EVIDENCE

EVIDENCE STUDY HINTS

Evidence became a separate Tax Court exam section in 1996; prior to that time Evidence questions were found in Practice and Procedure and commonly were posed as "explain" or "describe." More recent exam emphasis is on recognizing evidentiary or examination issues in a courtroom scenario and being able to quickly apply those concepts, which makes these questions more difficult for most non-attorneys to answer. There are usually only 10 questions, which also makes this section challenging. But it can be passed, and in recent years our students are passing Evidence with higher scores.

No resource material is provided during the exam. The exam tests the Federal Rules of Evidence (FRE), which is the law of evidence utilized in federal courts. Study aids may help in preparation for this section, and you can find a variety of resources available at amazon.com or other online vendors. Work with a version of the FRE that contains commentary to help explain the meaning. You can find audio Evidence lectures by professors such as Faust Rossi and Steven J Goode which may assist in understanding topics better than just reading about them. Youtube offers other lectures, but be careful that the content you choose focuses on the federal rules of evidence. A law dictionary may also be helpful to study in this area to define unfamiliar terms, although many of these terms can now easily be Googled.

Attorneys spend a significant amount of time studying this information in law school, and it will require solid effort on your part to learn this section. If you know an attorney willing to answer your questions, take advantage of that opportunity. If you have some law school in your background, be grateful as your study of Evidence may come more naturally to you than for others. Working through sample questions in study guides to understand the concepts may assist your understanding as well.

Beginning with the 2020 text we added a section for Sample Evidence answers, provided by a law professor, to provide you with even more guidance on how to answer these questions.

Be sure you read the question and answer the actual question asked. If the question asks that you answer whether an objection will be sustained or overruled, begin your answer with that response. Full point exam answers in the past few cycles also included the FRE number, so we now suggest that you also try to at least reference part of that in an answer.

> For example, this answer received 11 out of a possible 12 points on the 2016 exam. It was a great answer, but never addressed the question of "How should the Tax Court rule?"
>
> **2016 E-3 (6 minutes) Assume that C, the President of Charity, Inc., is still on the witness stand. During direct examination of C, TP shows C a two-page document comprised of (1) a photocopy of an IRS determination letter and (2) a cover letter. The photocopy is of a document on IRS letterhead that is signed by an appropriate official of the IRS and which states that Charity, Inc., is a tax-exempt charitable organization under §501(c)(3). The cover**

letter was signed by an appropriate person at the IRS and certifies that the attached photocopy of the determination letter is a true and accurate representation of the original determination letter (dated January 15, 1990) on file at the IRS. C testifies that C recognizes the determination letter, and that it is the document that C, on behalf of Charity, Inc., received in the mail from the IRS in 2000 and that C has kept in a secured file cabinet on the third floor of the organization's office complex. The IRS objects to the admission of the document. TP contests this contention. How should the Tax Court rule?

PARTIAL POINTS AWARDED: The record is hearsay but the business record exception applies under FRE 803. It was produced in the normal course of business by the IRS as a record of a record of a regularly conducted activity. Also, it was produced by a "person with knowledge" in a contemporaneous way. It also would likely qualify as a "public record" under that applicable hearsay exception. The document has been authenticated under FRE 902 as a self-authenticating document since it has been properly certified by an authorized person at the IRS. (11/12)

EVIDENCE BASICS

Evidence, as defined by Gilbert Law Dictionary, is "… all the means legally presented at trial to persuade the court or jury as to the truth of a matter in question." Evidence includes testimony by witnesses, records, photographs, and exhibits. Although "evidence" and "proof" are often used interchangeably, there is a distinction between the terms: **Evidence** is the ***means*** by which the truth or falsity of a matter is established, and **proof** is the ***result of evidence***, although not all evidence establishes proof.

CIRCUMSTANTIAL EVIDENCE

Evidence that is 'inferred' from another set of facts is circumstantial. Also called indirect evidence, circumstantial evidence is based upon the presumption from certain facts that leads to a particular conclusion.

> Example: I see Joe running from building just moments before the building bursts into flame. This may be circumstantial evidence Joe was involved in setting the fire.

DEMONSTRATIVE EVIDENCE

Demonstrative evidence is relevant if it explains, clarifies or illustrates the material facts in the case; maps, charts or aids are common examples of visual aids in this category. Demonstrative evidence has no probative value itself but acts as a visual aid to assist the judge.

DIRECT EVIDENCE

Direct evidence is that which is seen, heard, or felt directly by a witness; in other words, the witness experiences the event with one or more of his senses.

Example: I saw Joe throw gasoline in the doorway, then light a match and throw it on the gasoline only moments before the building burst into flames. This is direct evidence that Joe is involved in setting the fire.

EXTRINSIC EVIDENCE

Extrinsic refers to facts outside the body of a document and can include oral statements. Extrinsic evidence is usually not admissible to define the boundaries of an agreement (see the parol evidence below) but is always admissible for the purpose of interpreting an agreement.

Extrinsic evidence comes from outside a document or testimony.

ILLEGALLY-SEIZED EVIDENCE

Evidence seized by state police officers in violation of a petitioner's Fourth Amendment rights (which generally excludes evidence obtained in violation of an individual's constitutional rights) is admissible in federal civil tax proceedings (*Guzzetta v Comm'r* (78 TC 173, (1982)) and *US v Janis (*428 US 433 (1976))). The key is that federal tax authorities did not participate or collaborate in the illegal search and seizure (*Houser v Comm'r*, 96 T.C. 184 (1991)).

INTRINSIC EVIDENCE

Intrinsic refers to evidence or information that is learned from a document without any outside testimony to either explain the document or for what purpose it was written or used.

PAROL EVIDENCE

Parol evidence is oral or verbal rather than written. Evidence given by a witness in court is an example of parol evidence.

The parol evidence rule states that once an agreement is written and both parties acknowledge that writing as the final expression of their agreement, then any parol (oral) evidence of any prior or present understanding about the terms of the agreement is inadmissible if it alters or contradicts the meaning of the written document. Clear and unambiguous writing is considered the best measure of the parties' intent. The rule does not cover agreements that are made subsequent to the writing. This is also known as the "four corners" rule – what is contained within the 4 corners of this document is sufficient to explain the document.

REAL EVIDENCE

Real evidence includes writings, voice samples, or physical objects.

SCIENTIFIC EVIDENCE

Scientific evidence includes evidence such as psychiatric testing, chemical analyses, blood tests, radar, voiceprints and so forth. Polygraph tests are generally inadmissible in all courts (although in some courts they may be admitted if both parties agree to its use). Scientific tests require a minimum safeguard of reliability before being admitted into evidence; the

experiments and theories must be recognized and accepted in a given field, the test conditions must be substantially similar to the conditions in issue, and the person performing the experiment must be qualified and be able to attest to the proper working order of any equipment used.

SELF-INCRIMINATING EVIDENCE

The Fifth Amendment to the U.S. Constitution against self-incriminating testimony applies to **individuals in criminal cases**. Unless criminal prosecution is likely, the 5th Amendment may not be claimed in Tax Court proceedings, which are civil in nature. Remember also that this amendment does not apply to corporations or other entities.

In *Leggett* (TC Memo 2006-253 (11/21/06)) the petitioner made numerous 5th amendment privilege claims; these were deemed meritless because he was not the subject of any current or previous criminal tax or other criminal investigation by respondent and there was no indication the respondent ever even considered imposition of civil fraud penalties. The 5th amendment protects "against real dangers, not remote and speculative possibilities." Taxpayer was fined $6,000 under §6673.

EVIDENCE IN TAX COURT

The Tax Court can issue rules of practice and procedure for its own proceedings, but under the Internal Revenue Code (IRC) §7453 and Tax Court Rule (Rule) 143(a), trials before the Tax Court (the court) must use the Federal Rules of Evidence.

The FRE establish guidelines used by the judges to determine what testimony and documents are admissible into evidence. The FRE does not govern the Tax Court's pretrial discovery procedures.

The court has authority to issue subpoenas to force the appearance and testimony of witnesses, and to force production of documents or things. The court can also punish as contempt any misbehavior or disobedience to its orders. The court can order foreign petitioners to produce relevant documents and it can request assistance from the U.S. marshals in carrying out its orders.

Under Tax Court Rule 143(c), depositions are not evidence until offered and received into evidence. Rule 143(d) permits a copy of a document in lieu of the original when there is no objection, or where the court authorizes it.

Parties must correct errors in transcripts. The court has the power to correct clerical errors, which enables its decisions to conform to earlier determinations to prevent someone from being misled by the error.

Subpoenas are all issued under seal of the court. They are available from the Clerk of the Tax Court, and on the court's website (ustaxcourt.gov). Subpoenas can command the appearance

of a person or the production of documents or things. Service must be made by a U.S. marshal, or deputy marshal, or by any other person who is not a party and is not less than 18 years old. Unless the subpoena is used on behalf of the Commissioner, the party must also render one day's fee for attendance and mileage as allowed by law.

As the petitioner normally bears the burden of proof, the taxpayer presents his or her case first. Petitioner and respondent each begins with an opening statement. All stipulations are filed with the court. Witnesses for each party are presented in direct examination, with the opposing party given an opportunity to cross-examine the witness. Before being admitted, evidence must be authenticated, or shown to be genuine.

Briefs are filed after trial or submission of the case. Gilbert Law Dictionary defines a brief as "a concise statement of the facts of a case, relevant laws, and an argument which cites the reasons and authorities counsel will use to support his case." A party who fails to file an opening brief cannot file an answering or reply brief, except by leave granted by the court. The presiding judge can permit or direct that oral argument be made in lieu of briefs. Briefs may be filed simultaneously or seriatim:

- **simultaneous** requires that briefs for each party must be filed within 75 days after conclusion of trial, with answering briefs 45 days thereafter.
- **seriatim** requires that an opening brief be filed within 75 days after conclusion of trial, the answering brief within 45 days, and the reply brief within 30 days after the due date of the answering brief.

A decision is the court's final determination in a proceeding. In a deficiency action, the decision is usually a statement of the amount the petitioner owes in taxes and which penalties apply and to what extent. A Tax Court decision may be stated orally if it is recorded in the transcript of the trial. The Tax Court can enter a decision:

- for the petitioner (the taxpayer wins),
- for the respondent (the government wins), **or**
- by Rule 155, which indicates a split between the parties. Note the court itself does not recompute the tax deficiency or liability but instructs the parties to do so.

The date of the court's decision is the date the order is entered into the Tax Court records. The 90-day appeals period begins to run from the date entered. A decision becomes final when the time for filing a notice of appeal expires.

Each opinion is considered to be the decision of the entire Tax Court, rather than that of the issuing judge. In this way the Tax Court acts like an appellate court. A draft opinion is prepared after the final reply brief is filed. Usually, the judge or Special Trial Judge who heard the case also prepares the draft opinion, but any other judge can prepare it. Draft opinions do not become opinions of the Tax Court until after the Chief Judge reviews them. The Chief Judge may choose within 30 days to have the entire court consider the opinion, making it a 'reviewed'

opinion. All opinions reviewed by the entire court are published in the Tax Court Reporter. The Chief Judge decides what other cases will be published.

Review by the full court is likely to happen if the draft opinion invalidates a regular opinion or overrules court precedent. Reviewed decisions may also occur if the issue is likely to come up in another pending case or if the Tax Court was reversed by a court of Appeals. The Chief Judge selects a judge to write the reviewed opinion and the concurring or dissenting opinions follow the court opinion.

The Chief Judge determines which designation an opinion will have. Regular opinions are published in the Reports of the Tax Court; the court regards regular opinions as binding precedent. Memorandum opinions are published commercially. A memorandum opinion usually applies settled law to the facts and circumstances before the court; they are not precedential, but the court does not lightly ignore them. Summary opinions are those issued but not officially published, such as those rendered in small tax cases.

A presiding judge may issue a bench opinion under Rule 152 and §7459(b); these are not published or precedent for other cases, but could be used for res judicata, collateral estoppel, and law of the case. Bench opinions cannot be issued in actions for declaratory judgment or disclosure actions.

AFFIRMATIVE DEFENSES

An affirmative defense is more than a denial of a charge or an answer to a complaint. An affirmative defense also presents evidence or argument in favor of the one who offers it. In the Tax Court this could be either the respondent (who argues that the petition was received out of time) or the petitioner (who argues the notice of deficiency was issued out of time).

An affirmative defense is more than a denial of a charge.
It must be pled expressly and with proof offered in the pleading.
The party raising an affirmative defense has burden of proof on this matter.
Res judicata, collateral estoppel, and statutes of limitations are examples.

A party must expressly plead affirmative defenses. Whether raised by the petitioner or the respondent, affirmative defenses must be pleaded with particularity; in other words, specific allegations are pled with proof offered in the pleading. The party raising these defenses has the burden of proof for the issues, even if the burden normally rests with the other party.

Res judicata means "a thing already judged." This doctrine promotes "finality of court decisions" in *Hemmings v Comm'r* (104 TC 221 (1995)). A court's final judgment is conclusive against the same parties in any further, identical cause of action between the parties. The

intention is to prevent repetitious lawsuits on the same causes of action; parties are bound on all issues that were tried and all that could have been tried.

Three things must be satisfied for res judicata to apply:

1. the parties in the second case are the same, or in privity, with parties in the first case,
2. the cause of action in the second case is substantially the same as in the first case, **and**
3. the first case resulted in a final judgment on its merits by a court of competent jurisdiction. Res judicata also applies to a stipulated decision even when there is no adjudication.

   Example: a taxpayer with a large sum of cash receives a termination assessment (later reduced to summary judgment) in the district court for the part of the year up to the discovery of the cash. Later the IRS issues a deficiency notice for the entire taxable year that included the discovery date of the cash. The taxpayer timely files a petition with the Tax Court and the IRS moves to claim that the summary judgment received in district court is res judicata in Tax Court. The claim is denied because the termination assessment only covered a partial tax year, and the Notice of Deficiency covered the entire tax year – these are not identical causes of action, so the trial moves forward.

If a petition is timely filed but fails to state a claim, the court can dismiss the petition and enter a decision that sustains the deficiency under §7459(d). That decision is res judicata.

Collateral estoppel focuses on the identity of the issues, and not the identity of legal proceedings. It may apply to issues of fact or law that were previously litigated even though the current claims differ. It prevents lesser offenses from being tried.

For collateral estoppel to apply, the following must be satisfied:

- the issues in the 2nd suit must be identical in all respects to the one decided in the first suit,
- there must be a final judgment rendered by a court of competent jurisdiction,
- the party against whom collateral estoppel is invoked must be a party (or privity) in the prior judgment,
- the parties must have litigated the issue and its resolution must be essential to the prior decision,
- the controlling facts/rules must remain unchanged from prior litigation, **and**
- no special circumstances exist that warrant the trial court in the later case to exercise its discretion to find an exception to the normal rules of preclusion.

  Example: *Michael Cantrell* (TC Memo 2017-170 (8/30/17)) conceded the underlying tax but argued that he didn't owe the fraud penalties. Between 2001 through 2005 he received over $959,000 in bribes that he failed to report on his federal income tax returns – he also didn't inform his then wife that he was receiving bribes (she thought

he was a good investor). He prepared his own tax returns using Turbo Tax and received refunds for claimed overpayments.

By way of a redacted plea agreement, petitioner pled guilty to all 5 counts of his criminal case, including one count of tax evasion and agreed that the total tax loss for his failure to report the bribe income was $323,145. There was no mention of civil tax liabilities or civil penalties and no IRS representative was involved in executing the redacted plea agreement, and petitioner argues that the fraud penalties only apply to 2002, the year he pled guilty

Under §6663(a) if any part of any underpayment of tax required to be shown on a return is due to fraud, a penalty equal to 75% of the portion of the underpayment of tax attributable to fraud is imposed. The Commissioner must show by clear and convincing evidence that (1) an underpayment of tax exists, and (2) some portion of that underpayment is due to fraud. If the Commissioner establishes that any portion of an underpayment is attributable to fraud, the entire underpayment is attributable to fraud, except with respect to any portion of the underpayment that the taxpayer establishes is not attributable to fraud. The civil tax liability and penalties are independent of any amount of restitution ordered in the earlier criminal case IRS closing agreements are final, conclusive and binding on the parties, but without a closing agreement, the IRS can assert the fraud penalty.

Respondent raised collateral estoppel as an affirmative allegation in his answer for the 2002 civil fraud penalty and petitioner conceded the issues in the pretrial memorandum.

GENERAL PROVISIONS – FRE ARTICLE I

The FRE applies to proceedings in United States trial courts. They were adopted in 1975 and govern the admission of facts by which parties in the federal courts may prove their cases. Judges are provided a broad and nearly limitless grant of power to control the admission of evidence in their courtrooms. The rules require that the judge as the Trier of Fact be given reliable evidence that matters, that aids in resolving the dispute, but does not unfairly harm the rights of the parties.

PURPOSE – RULE 102

These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination. In other words, the court can manage the trial by construing the FRE in a way that enables it to control the proceedings.

Documents can be admitted into evidence when they serve the purpose of the FRE and the interest of justice and are to be construed to eliminate unjustified expense and delay. In *Sundstrad Corp v Comm'r* (89 TC 810 (1987)) the petitioner filed a motion to exclude financial

data and income tax returns for years subsequent to those before the court; the court agreed that the undue delay and waste of time in providing the information outweighed its probative value.

RULINGS ON EVIDENCE – RULE 103

FRE 103 establishes a roadblock from the Court of Appeals reversing a decision solely on evidentiary grounds. First, there must be an erroneous ruling that affects a "substantial" right of the party plus a timely objection or movement to strike with the appropriate objection. The court may also take notice of a plain error even if the claim was not properly preserved. Reversible or non-harmless errors affecting a substantial right are most commonly found in criminal, not civil, proceedings.

Plain error refers to error that affects the fairness, integrity or public reputation of judicial proceedings; in other words, the fundamental fairness of the trial concluded. Plain error is seldom found in civil cases.

Timely objections mean that if the question is objectionable, the objection must be raised before the answer is given. If an exhibit is objectionable, the objection must be made before the judge rules. If the answer is objectionable, because it contains hearsay for example, the objection must come when the answer is given, and must be accompanied by a motion to strike the offending answer; without the motion to strike, the error is waived.

One issue in *Brock v Comm'r* (44 TCM 128) related to the deductibility of certain expenses. The parties' stipulation said the Commissioner did not stipulate that the expenses were contemporaneous or that they were prepared by the person whose name was on the documents. When the documents were offered into evidence the Commissioner did not state any objection, but argued on brief that the documents were inadmissible hearsay. The court held that the respondent waived any objection by not objecting when the documents were entered into evidence.

OBJECTIONS

A proper objection must be made timely and must state the specific legal basis for the objection. "Objection, hearsay" is more appropriate than simply offering, "I object." The judge may accept the objection ("sustained") or deny it ("overruled").

EXAM ALERT!

Use the language of the court when answering Evidence questions that call for a ruling on an objection. In other words, first respond "objection overruled" (or "overruled") or "objection sustained" (or "sustained") before providing your explanation for the action requested. Be certain the grader knows what your answer is or you may not receive full points.

Use the language of the court when answering Tax Court exam questions:

"Overruled" means the Court disagrees with the objection, opening the door for the testimony to come in.

"Sustained" means the Court agrees with the objection, stopping the testimony from coming in.

PRELIMINARY QUESTIONS – FRE 104

Preliminary questions are used to ascertain the qualifications of the person to be a witness, the existence of privilege, or the admissibility of evidence, as determined by the court. In making the determination the court is not bound by the FRE except those rules that deal with privilege. If the relevance of evidence depends on whether or not a fact exists, sufficient proof must be introduced to support the finding the fact does exist.

LIMITING EVIDENCE … NOT ADMISSIBLE – FRE 105

The court, upon request, can restrict evidence to its proper scope when it is admitted for one purpose but not admissible to another party or for another purpose. If a party intends to limit the evidence, that party must request the limitation when the evidence is offered.

REMAINDER OF OR RELATED WRITINGS OR RECORDED STATEMENTS – RULE 106

Also known as the "rule of completeness" it is based on two considerations:

- a misleading impression is created by taking matters out of context
- it is difficult to fix this when the repair is delayed to a later point in the trial

As soon as a writing or recorded statement, in full or in part, is introduced by a party, the adverse party may require the introduction of any other part of any writing or recorded statement that should be considered with the first item. The purpose is to avoid misleading impressions that could be created by taking matters out of context, and because waiting to clear a misimpression may be inadequate when that is delayed to another time in the trial.

The request to introduce any other part of the writing must be made when the other party seeks to introduce part of the writing. In *Fellrath v Comm'r* (42 TCM 939) the taxpayer introduced two pages from an appointment book to establish deductibility of travel expenses. Four months after the trial the respondent argued on brief that the entire book was admissible.

The court held that the respondent should have requested the entire book be introduced when the taxpayer introduced the two pages.

As a practice note, there is a split in the circuits on whether Rule 106 authorizes the admission of otherwise inadmissible evidence when that evidence is necessary to explain the portion already introduced.

JUDICIAL NOTICE – FRE ARTICLE II

Judicial notice is a shortcut that allows trial and appellate courts to accept certain facts as true without requiring formal proof. This saves time and the expense of proving facts that are not reasonably in dispute. Courts may take judicial notice of natural phenomena (sunrise, tides), chronology (April 15, 2021 was a Thursday), history (Abraham Lincoln was assassinated), geography (the Ohio River is navigable), demography (population of a city), scientific theories, facts, and conclusion (including scientific basis for tests like DNA).

Under Rule 201, judicial notice may be taken at any stage of the proceedings and can be taken on adjudicative facts – those that relate to the immediate parties or event. In *Petzoldt v Comm'r* (92 TC 661 (1989)) the court took judicial notice of the fact that in a third party's criminal proceeding drug ledgers were admitted as evidence of that party's drug dealing, and that a handwriting expert testified that the writings were made by the third party. That action was taken before determining whether those drug ledgers were admissible at this trial, which can only occur if this is indisputable.

With a timely request a party is entitled to be heard whether it is appropriate to take judicial notice, whether or not the court takes judicial notice before notifying the party.

Universal knowledge is not required for judicial notice if it is generally known and accepted by well-informed people in a community. Even if a fact is not generally known, if it is capable of verification by sources whose accuracy cannot reasonably be questioned, the fact may still be judicially noticed. Such reliable sources may include the court's own acts and records, geographic facts, or matters appearing in the Federal Register or the Code of Federal Regulation, public records, and historical facts.

A judge may **not** take judicial notice of certain facts that he or she has private knowledge of; a party seeking judicial notice must show that the facts are generally known within the community.

Judicial notice allows the Court to accept generally known facts.
It must be taken when requested by the party who provides the necessary information.
The judge cannot judicially notice privately known facts.

The Tax Court may also take judicial notice of facts not subject to reasonable dispute and may do so without a party's request. In *Denson v Comm'r* (44 TCM 275) the respondent reconstructed the petitioner's income using the source and application of funds method with Bureau of Labor Statistics data. The parties stipulated to the cover page and one additional page that provided average expenses for families having a higher standard of living; the court took judicial notice of the pages reflecting the cost of living for lower-budget and intermediate families.

The court must take judicial notice when requested by a party who furnishes the court with the necessary information, but the judge determines if the facts fit the requirements of Rule 201(b). In *Snyder v Comm'r* (44 TCM 276) the court refused to take judicial notice of technical books and articles on corporate finance the respondent referred to. The court had no basis in which to evaluate the accuracy or reliability of the sources, and because the opinions were generally not known, the court declined to take judicial notice.

If a court takes judicial notice in a civil case, that fact is accepted as true and evidence to disprove its truth is not admissible.
To illustrate, the Tax Court has taken judicial notice of:

- information contained in the Federal Reserve Bulletin;
- the prime lending rate;
- the value of the British pound;
- prices of crude oil;
- portions of the Internal Revenue Manual;
- the cost of filing a petition in the Tax Court;
- length of a pending tax bill;
- the day of the week on which a particular date fell.

Neither Rule 201 or any other rule restricts a judge's discretion to take judicial notice of legislative facts. Under the FRE judges may **always** take judicial notice of legislative facts and can do so without following any prescribed procedure. Similarly, judges are always able to do their own research as to the appropriate law to follow when making decisions on cases.

MEMORY TOOL: LA LAW

Areas where judicial notice can be taken:

L - Legislative Facts
A - Adjudicative Facts (specifically granted in Rule 201, these are the facts of the particular case before the court)
LAW – just that, Law (of foreign countries)

EXAM ALERT!

A note about mnemonics – these are useful study tools for some, but not all, students. If they don't work for you, don't worry it and don't try to memorize them. We provide a number of them in the various texts. You can also create your own so if they are helpful to your studies.

PRESUMPTIONS IN CIVIL ACTIONS AND CASES – FRE ARTICLE III

A trial before the court is not based upon the administrative record developed by the respondent. The court will not look behind the notice of deficiency to determine whether the respondent's motives or procedures were appropriate (*Greensberg Express, Inc.* 62 TC 324 (1974). Since the notice is presumed to be correct, the taxpayer has burden of proof which must be met by a preponderance of the evidence.

Burden of proof refers to the obligation to prove one's assertion, or the amount of evidence necessary to establish a disputed fact or a degree of belief in the mind of the court. There are two elements of burden of proof:

- the burden of coming forward with sufficient evidence to support a particular proposition of fact, **and**
- the burden of persuading the court that the alleged fact is true.

Burden of proof has two components:
1) burden of production (producing evidence) and
2) the burden of persuasion

The party that has burden of production and fails to meet it will lose by a directed verdict against the party. In other words, the party bearing the burden of proof must produce some evidence on the matter or they lose.

Failure to meet the burden of persuasion results in a trial decision against the party responsible for the burden of proof. If the Judge believes the evidence is evenly balanced on the issue, it must find for the opposing party. A preponderance of the evidence is required to win in Tax Court, which means the evidence must show the disputed item is more likely true than not.

WHO HAS BURDEN OF PROOF?

The burden of production, or going forward, refers to the party that is legally obligated to initiate the production of evidence on a claim or defense. For Tax Court, the petitioner (who petitions for review of the matter) has the burden of going forward with its claims and must meet that burden on any affirmative defenses to the respondent's counterclaims. The respondent has burden of going forward as to its affirmative defenses and counterclaims.

Generally, the burden of proof in Tax Court is on the petitioner to a preponderance of evidence, except as by statute or where the taxpayer introduces credible evidence. As previously discussed in the Practice and Procedure text, the 1998 IRS Restructuring Act under §7491 shifted the burden of proof to IRS with respect to a factual issue once the taxpayer presents credible evidence and demonstrates he or she met these conditions:

- compliance with substantiation and recordkeeping requirements of the Internal Revenue Code,

- cooperation with IRS – timely response to reasonable requests and assisting the IRS in obtaining information not within the taxpayer's possession or control, **and**
- net worth limitations (does not apply to an individual) – a corporation, trust, or partnership cannot exceed $7,000,000 net worth.

The taxpayer need not extend the statute of limitations in order to meet the cooperation provision.

Credible evidence is that the court, after critical analysis, finds sufficient on which to base a decision if no contrary evidence were submitted. The taxpayer does not present credible evidence if she merely makes implausible factual assertions, frivolous claims, or tax protestor arguments. Introducing evidence will not meet the credible evidence standard if the court is not convinced the evidence is worthy of belief. If the court believes the evidence is equally balanced, it will find that the respondent has not met the burden of proof.

The IRS bears the burden of proof in other situations as well, discussed in Practice and Procedure text.

In Tax Court proceedings, the IRS must initially come forward with evidence to establish it is appropriate to apply a penalty, addition to tax, or any additional amount before the court can impose that amount. The taxpayer then can introduce evidence of reasonable cause or substantial authority to mitigate the penalty. It is not the respondent's responsibility to introduce defenses to the penalty.

> Example: If the respondent must prove proper mailing of the notice of deficiency and can establish that the IRS complied exactly with Postal Service Form 3877, a presumption of official regularity arises. The presumption then shifts the burden of going forward to the petitioner.

If the respondent determines the taxpayer has unreported income, substantive evidence must be introduced to link the taxpayer to that income. If the IRS cannot establish the taxpayer has unreported income, the notice of deficiency is not presumed correct, and the burden shifts to the IRS. This does not invalidate the notice of deficiency, but it establishes which party is responsible for meeting the burden of proof.

The burden is always on the petitioner to establish a right to claimed deductions.

STANDARDS OF PROOF

Depending upon the type of case at trial, one of three standards of proof must be met by the evidence presented at a case. The lowest standard is **preponderance** of the evidence, which is the burden most often to be met in the Tax Court. According to Gilbert Law Dictionary, preponderance is "all evidence more clearly and more probably favors one side than the other." Effectively this is a 50.1% (or 51%) test as the odds are better than 50-50; enough evidence was produced so a reasonable person can determine the evidence makes it 'more

likely than not.' In the Tax Court the petitioner must prove that it is more likely than not that the determination of the tax deficiency proposed by the IRS is erroneous.

The next higher standard is **clear and convincing**, which is the standard that must be met in civil fraud tax cases. It is a more exacting standard than preponderance but is more difficult to define and establish than either preponderance or 'beyond a reasonable doubt.' Gilbert Law Dictionary defines it as the "degree of proof required to produce a firm belief concerning the truth of facts" and indicates that it is a higher standard than preponderance but lower than beyond a reasonable doubt. The courts make no effort to quantify this standard but noted in *Avenell* (TC Memo 2012-32 (2/2/12)) that it is a high standard that cannot be presumed and must be affirmatively established. Clear and convincing can be proven by circumstantial evidence.

The highest standard, **beyond a reasonable doubt**, does not apply in Tax Court or civil litigation. Applied in criminal cases, this standard does not require absolute certainty, but a high enough level of certainty that leads an honest, conscientious juror to convict a person of a crime.

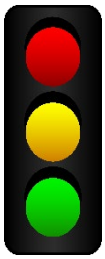
Standard of proof in the Tax Court must generally be met at the preponderance of the evidence level.
Clear and convincing is the standard that must be met in civil fraud tax cases.

Consider this traffic light explanation for the elements associated with burden of proof:

RED LIGHT- evidence is produced only that the cars collided, and no evidence of A's fault is produced. Result is a directed verdict (red light) as B failed the burden of production.

YELLOW LIGHT – some weak evidence of fault is introduced. No directed verdict is possible as some evidence was presented (burden of going forward or production was met), but it may not be sufficient evidence to meet the burden of persuasion.

GREEN LIGHT – strong evidence of fault is introduced. B meets both the burden of production and the burden of persuasion.



RELEVANCE AND ITS LIMITS – FRE ARTICLE IV

Relevant evidence is generally admissible; irrelevant evidence is inadmissible. To be admissible evidence must tend to show that a **fact** is more or less probable. In *Armco Inc v Comm'r* (87 TC 865 (1986)) the taxpayer requested a ruling on admitting an affidavit made by a former IRS employee who died before the trial; the affidavit purported to explain the intent of drafters on a particular regulation. Because the affidavit addressed a legal, not factual, issue it was deemed inadmissible.

Relevant evidence is generally admissible;
Irrelevant evidence is inadmissible;
but not all relevant evidence is admitted.

The relevance rule restricts the court to consider only material that relates closely to facts that matter in the case. Relevant evidence is defined under FRE 401 as "evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence." Such evidence may be direct or circumstantial.

The relevancy concept saves time and narrows the topics the parties must prepare for trial by removing extraneous evidence that may be of interest on some level, but have nothing to do with the issues at trial.

TEST FOR RELEVANT EVIDENCE – FRE 401

Rule 401 favors a finding that the evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence, and the fact is of consequence in determining the action. The judge decides if evidence is relevant by determining whether the evidence might influence a rational judge in deciding the existence of a fact. It is not necessary that the court be strongly influenced, only that the evidence can assist in making the determination of the fact more or less probable.

The following evidence was found to not be relevant:

- documents related to the taxpayer's attempt to obtain a private letter ruling and the IRS's internal communications used to prepare the notice of deficiency;
- Generally Accepted Accounting Principles (GAAP) to resolve a transfer-pricing issue;
- an English teacher's written analysis of the grammatical structure of the Sixteenth Amendment and a letter from a senator to the Chief Counsel stating that wages are not income to determine whether taxpayer had a fraudulent intent when filing his returns.

GENERAL ADMISSIBILITY OF RELEVANT EVIDENCE – FRE 402

Relevant evidence is generally admissible unless the US Constitution, a federal statute, the Federal Rules of evidence, or other prescribed by the Supreme court render it inadmissible.

EXCLUDING RELEVANT EVIDENCE FOR … – FRE 403

Relevant evidence may be excluded under FRE 403 if the relevance is marginal and is outweighed by the danger of unfair prejudice, confusion of the issues, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Otherwise, relevant testimony may not be allowed if the judge feels its probative value for truth is substantially outweighed by potential prejudice to the witness. The court possesses discretion to protect witnesses from harassment or undue embarrassment under FRE 611. Probative value' refers to what the evidence can add to establish or prove the truth. 'Prejudice' refers to a bias or preconceived opinion without justification, and may invoke emotions such as sympathy, hatred, contempt, or horror.

Generally, all evidence a party introduces is intended to prejudice the opponent; if a party has evidence that is helpful to the opponent it is rarely offered in court. Unfair prejudice can occur when the court may respond to evidence in a way that should not be part of the evaluation process.

In *Roman V, Inc v Comm'r* (52 TCM 1278), to determine wages paid by the taxpayer the IRS presented evidence of 2 massage parlor attendants the taxpayer employed. The court refused to accept other offers of proof from 2 additional attendants because it was cumulative and a waste of time. In *Davies v Comm'r* (42 TCM 768) a diary of tips received, maintained by an individual with a poor reputation for truth and veracity, was not excluded under this rule to determine whether a taxpayer underreported tip income. The court determined the danger of unfair prejudice outweighed the probative value of the evidence in *Houser v Comm'r* (70 TCM 131) when, in determining whether a taxpayer was liable for the addition to tax for fraud, when excluding evidence the taxpayer was prosecuted for theft of electricity and tampering with an electric meter.

CHARACTER EVIDENCE – FRE 404 AND METHODS OF PROVING CHARACTER – FRE 405

Character is a generalized description of a person's nature or disposition, and it includes personal traits such as 'peacefulness' or 'truthfulness'. Evidence of a person's character is not admissible to prove that a person acted in conformity with that character trait on a specific occasion. Evidence of a crime, wrong or other act is not admissible to prove a person's character to show that on a particular occasion the person acted in accordance with that character.

There are three ways in which a person's character may be proven:

- **reputation** – the witness must have knowledge of the person's reputation, even if they do not know the person. The witness may only acknowledge whether the reputation is 'good' or 'bad' for example, and not give reasons why the reputation exists. On cross-examination inquiry is permitted into relevant specific instances of conduct.
- **opinion** – the witness is only permitted to state an opinion of the person's character and may not give reasons for that opinion. On cross-examination inquiry is permitted into relevant specific instances of conduct.

- **specific instances of conduct** – evidence that a person has engaged in specific acts may tend to establish a person's character. Specific instances can be used when character is itself an element of a claim or defense but may not be used when character is offered to prove conduct.

Character evidence is generally inadmissible in **civil** cases to prove any action but it may be used to impeach the witness, or to support the character of a witness for truthfulness. It may be offered when the witness's character is questioned, or when character is an essential element of a cause of action or claim (as in negligent hiring claims or in libel or slander cases where truth is an absolute defense).

> Example: A woman says a man did something to harm her. The man denies it, and claims defamation of character when he sues her. Each side can legitimately introduce character evidence because the character evidence is not intended to support an inference that a party acted on a specific occasion in conformity with his or her character, but whether or not the allegations are indeed true.

To the extent a party's business reputation is pertinent to the determination of character, evidence as to the party's reputation among his associates or in the community at large is admissible. In *Johnson Ford, Inc v Comm'r* (54 TCM 881) reputation testimony (elicited by the IRS special agent's conversations with business and personal acquaintances) that the officer had a reputation of being very frugal was admissible; the court found that testimony might be pertinent to determining the taxpayer's character, which could establish fraudulent intent.

HABIT; ROUTINE PRACTICE – FRE 406

Habit usually refers to regular responses to a repeated and specific situation where actions become semi-automatic and invariably regular; for example, always buckling a seat belt before starting the car or always coming to a complete and full stop at stop signs or stop lights. Those driver habits cannot be introduced to support an inference that the driver is cautious and law-abiding, which relates to her character; they can be admitted to indicate that on a specific occasion she was wearing a seatbelt and came to a complete stop at a certain intersection. The court may admit that evidence regardless of whether it is corroborated or whether there is an eyewitness.

Evidence of an individual's habit, rather than his or her character, or the routine practice of an organization, may be admitted when relevant to prove that such conduct on a particular occasion was in conformity with habit or routine practice.

Habit of an individual or the routine practice of an organization may be admitted to show conduct was in conformity with habit or routine practice

Why the difference for how the same evidence can be offered? Little ambiguity exists when proving someone invariably locks his car door when he parks the car but much ambiguity exists when trying to prove the same person has the character traits of being cautious or honest.

Evidence of a habit is not enough to establish that something did in fact occur at a later or earlier date. In *Magazine v Comm'r* (89 TC 321 (1987)) the notice of deficiency was dated 3/29/83; taxpayer filed her petition on 10/2/86. Form 3877, *Postal Service Application for Registration or Certification*, had been destroyed. While the IRS ninety-day clerk could not remember mailing the specific notice of deficiency, she testified to her practice of recording certified mail numbers and verifying them to Form 3877 before taking them to the post office and obtaining the postal stamp on Form 3877. She followed the same procedure on each occasion she mailed notices of deficiency. The court found that the evidence would have been enough to satisfy the court that Form 3877 was reliable evidence of mailing, but the testimony was not sufficient by itself to prove the notices were mailed. The case was dismissed for lack of jurisdiction because the respondent could not prove a timely notice of deficiency had been mailed.

The court will not consider something a habit if facts indicate otherwise. A taxpayer attempted to prove with evidence of habit that he mailed his tax return before a certain date (*James v Comm'r*, 77 TCM 1995). The taxpayer did not have good tax return filing habits, habitually filed his returns late, and the court did not find that the return had been filed.

SUBSEQUENT REMEDIAL MEASURES – FRE 407

Evidence that a party took remedial measures after an injury or accident occurred is not admissible to prove that party is negligent or at fault. The evidence may be admitted to prove something other than negligence; for example, for impeachment purposes or to prove the party is the property owner.

The reason for this rule is to encourage parties to take safety measures, which can be easily seen in personal injury situations:

> Example: After a guest trips on torn rug in a hotel lobby, the hotel management repairs the rug. Management's action may suggest a belief it was risky to leave the rug as it was, which could influence a trial decision awarding punitive damages to the guest who tripped.

COMPROMISE OFFERS AND NEGOTIATIONS – FRE 408

Offers to compromise, settle, or reduce disputed claims are inadmissible to prove liability for the claim. Pleas or plea discussions are also inadmissible. The purpose of these rules is to encourage settlements. Parties are more willing to speak openly about their cases strengths and weaknesses if the admission of weaknesses cannot be used against them at trial. Material submitted during settlement negotiations cannot be used against the party who offered the material but may be used by that offering party.

Terms of a settlement reached in appeals or during the examination are not admissible in evidence during trial.

> Example: A petitioner's offer to an IRS Appeals Officer to pay $15,000 to settle his 2021 income tax liability is not admissible in the petitioner's Tax Court trial.

Evidence of an offer in compromise (not the OIC we are accustomed to thinking of!) is not admissible if it is:

- made in settlement negotiations;
- intended to prove liability for or invalidity of a claim or its amount; **and**
- not otherwise discoverable.

Terms of a settlement can be offered for other purposes or to prove a witness's bias or prejudice, or used to negate a contention of undue delay. For example, in *Galalde v Comm'r* (106 TC 355 (1996)) the fact that the parties met to discuss the tax liability was admitted to establish the taxpayer requested the IRS to waive the substantial underpayment penalty.

PLEAS, PLEA DISCUSSIONS, AND RELATED STATEMENTS – FRE 410

In a civil or criminal case evidence of the following is not admissible against the defendant who made the plea (guilty plea later withdrawn, a nolo contendere plea, or a statement made during plea discussions with an attorney if they did not result in a guilty plea). The court may admit such a statement in a proceeding in which another statement made during the same plea discussions is introduced, if in fairness the statements ought to be considered together.

EXCLUDED AREAS – FRE 409, 411-415

As these areas do not relate to Tax Court practice, FRE rules relating to payment of medical expenses, liability, and evidence in rape, sexual assault cases, child molestation or similar cases are excluded from the present discussion.

PRIVILEGES – FRE ARTICLE V

The effect of privilege is to keep the truth secret. The law recognizes that there are times when it is socially beneficial to protect an interest or a relationship even at the risk of not learning the truth. Privilege is recognized only when denying it would undoubtedly create harm in an interest or relationship. Most of the privileges related to Tax Court representation are confidential communication privileges. The holder of the privilege can refuse to disclose information protected by these privileges and can prevent others from disclosing the information as well.

PRIVILEGE IN GENERAL – FRE 501

FRE 501 simply says that "the common law – as interpreted by United States courts in the light of reason and experience – governs a claim of privilege unless the following provides otherwise:

- the United States Constitution

- a federal statute, or
- rules prescribed by the Supreme Court.

The courts have the flexibility to develop the rules of privilege under a case-by-case basis.

Most states recognize lawyer-client, physician-patient, husband-wife and psychotherapist-patient privileges along with those related to clergy communications. Only those privileges recognized in civil proceedings can be used by Tax Court parties.

To claim a privilege the practitioner should prepare a privilege log or offer to produce the documents for an *in camera* inspection by the court (in private). A privilege log should contain a brief description of the document contents, date of document, who prepared it, person to whom the document is prepared, purpose for preparing the document, privilege asserted, and how that document satisfies the asserted privilege.

ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT – FRE 502

This privilege encourages clients to tell everything to their attorney. This privilege protects oral or written communication between legal advisors, their clients or prospective clients, and their respective agents. The government cannot compel testimony about matters protected by privilege. Generally, privilege cannot protect the client's identify or the fee arrangement between the parties, unless disclosing those facts necessarily reveals a substantive confidential communication.

Attorney-client privilege applies even if the parties had no prior relationship, the lawyer is never formally retained by the client, the lawyer is never paid, or the lawyer eventually refuses to represent the client.

Privileged communication must take place without strangers and be for the purpose of obtaining legal advice. For these purposes, the practitioner's employees, including experts hired to assist the attorney with trial preparation, or a client's agent are not considered strangers. However, an expert hired to testify at trial is not covered by lawyer-client privilege.

Attorney client privilege applies even if the client never formally retains the attorney, never pays the attorney, and the attorney refuses to represent the client.

Not Covered by Attorney-Client Privilege

Not all communications with an attorney are privileged. For example, privilege does not protect:

- the underlying facts,
- business or other non-legal legal advice given by the attorney,
- information received from third parties,

- information given to an attorney that the attorney is expected to disclose to a third party (for tax preparation purposes, for example – once it goes on a return it is disclosed to the IRS, who is a third party), OR
- the identity of a client or the fact that an individual has become a client.

  Example: Taxpayer's business partner is an attorney. Communications between taxpayer and the business partner are not protected by privilege unless they occur specifically for the purpose of obtaining legal advice. Claims of privilege cannot be used to stop an audit.

Holder of the Privilege

The client holds the privilege, and unless waived by the client, the attorney must claim privilege when an inquiry is made into a privileged matter in the client's absence. Waiving privilege means the client fails to claim privilege when there is an opportunity to do so, or when the client reveals a significant part of the privileged communication. A client may intentionally waive privilege by disclosing it to others. The client may also inadvertently waive privilege by disclosing protected information in the presence of third parties.

In a federal proceeding if the attorney reveals confidential information without the client's consent, privilege is not waived. If the attorney discloses information the client intended that he or she disclose, privilege is waived.
If another party eavesdrops on the confidential conversation they can be stopped from testifying about the privileged communication as long as the client intended the conversation to be confidential.

What is Protected

Communications themselves are protected by privilege, but the underlying information is not. Relevant information cannot be hidden merely by telling it to an attorney.

> Example: "Did you tell your lawyer that you ran the red light?" is not a permissible question during a deposition, but the question "Did you run the red light?" is.

Privilege does not protect physical evidence, which must be turned over to the appropriate authorities. Communication about that evidence is protected by privilege.

> Example: "Did you tell your lawyer that you bought a knife?" is a protected communication. The attorney's action of having a bloody knife in his or her possession is not protected by privilege.

Attorney Work Product

Documents prepared in anticipation of litigation are protected if they are prepared by, or at the direction of, the party's attorney or the party. "Work product protection" means protection of tangible material, or its intangible equivalent (personal beliefs, mental impressions) prepared

by the attorney in anticipation of a trial. This protection is broader than that under the attorney-client privilege.

The party must show the document was created with reference to a specific claim that would likely lead to litigation. The privilege does not protect purely factual materials, but does protect the portion of the document that contains opinions, judgments, and thought processes.

Giving an attorney documents that exist before the client-attorney relationship is established does not make those documents privileged. If the document is subject to discovery while in the client's hands, it can be discovered while in the attorney's possession.

> Example: Pre-existing business files or letters turned over to an attorney are not covered by privilege. Writing a synopsis of an event for the attorney at his or her request permits the document to fall under attorney-client privilege.

Work product privilege does not apply to documents prepared in the ordinary course of business or for other non-trial purposes. Reports prepared by a revenue agent or appeals officer during the investigation are not privileged; they are prepared in the ordinary course of business. Work product privilege may be waived.

> Example: In *Ratke* (129 TC 6 (9/5/07)) the petitioner won a case and then sought an award of costs under §7430 and sanctions under §6673. In that case he sought discovery of a 1) memorandum sent by the respondent's initial trial counsel requesting advice from their national office at the time the answer was filed and 2) the unredacted version of the responding memorandum sent a few months later by the national office. The respondent resisted discovery, claiming work product doctrine privilege. The court ruled that both memoranda were work product when prepared for the case in chief and continue to be work product in the current stage of litigation. The court also found that respondent's brief reference in the motion papers to the memoranda, but not to contents, did not amount to a "testimonial" use of either memorandum that would constitute an implied waiver of the privilege. The court performed an *in camera* inspection of the documents and found there was no exception to the privilege and the privilege had not been waived. Work product doctrine extends to subsequent litigation.

Privilege with a Corporate Client

If the client is a corporation, privilege covers communications between the practitioner and a high-ranking corporate official. It also covers communications between the attorney and other current or former corporate employees if these conditions are met:

- the employee is directed by his/her supervisor to communicate with the attorney,
- the employee knows the purpose of the communication is to obtain legal advice for the corporation, **and**
- the communication concerns a subject within the employee's scope of duties for the corporation.

Privilege survives the client's death and can be asserted by the client's successor or personal representative.

If an attorney acts for two or more clients who share a common interest, neither party can claim privilege in a subsequent controversy with the other party. Such clients can be business partners or a husband and wife. Privilege still applies to the jointly retained attorney and his or her clients against non-clients.

Privilege Does Not Apply
Lawyer-Client privilege does not apply in these situations:

- the client seeks the attorney's services to aid or enable anyone to commit a future crime or fraud,
- the communication is relevant to an issue of breach of duties arising out of the attorney-client relationship,
- civil litigation arises between two parties who were formerly joint clients of the attorney, **and**
- the attorney is asked for evidence about either a client's competency or his intent relating to property disposition through a will or inter vivos transfer (unlikely to occur in Tax Court or to be tested on the admission exam).

Attorney client privilege does not apply
if the client seeks to commit a future crime or fraud

Waiver of Limitation
When privilege information is disclosed in a federal proceeding or to a federal office or agency, the waiver extends to undisclosed communication or information in a federal proceeding only if:

- the waiver is intentional,
- the disclosed and undisclosed information or communication concerns the same subject matter, **and**
- in fairness they ought to be considered together.

The wavier does **not** operate as a waiver in a federal proceeding if:

- the waiver is inadvertent,
- the holder of the privilege or protection took reasonable steps to prevent disclosure, **and**
- the holder promptly took reasonable steps to rectify the error, including following Federal Rule of Civil Procedure 26(b)(5)(B).

A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court – in which case the disclosure is also not a waiver in any other federal or state proceeding.

Under this rule these definitions apply:

- "Attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications, **and**
- "Work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

The following areas are not listed as separate areas in the FRE, but prior Tax Court exam questions posed questions on them.

MARITAL (SPOUSAL) PRIVILEGE

Communications made privately between spouses are assumed generally to be confidential. The privilege vests with the witness-spouse, but the taxpayer retains the privilege to stop testimony regarding confidential martial communications.

There are two types of privileges involving spouses. One protects confidential communications made during marriage (marital communications privilege) and the other permits a person to refuse to testify against a spouse in a criminal case (spousal testimonial privilege). The communications must be made privately for either privilege to apply. If not intended to be confidential, the communication is not privileged.

The spousal testimonial privilege belongs to the testifying/witness spouse and allows that spouse the right to refuse to answer questions that may incriminate the non-testifying spouse. The witness spouse may choose to testify. This privilege does not exist if the marriage is a sham or otherwise invalid. It protects communications made before and during the marriage, but does not survive its dissolution.

The marital communication privilege is applicable to civil cases where federal law provides the rule of decision, and to criminal cases. It protects confidential communications made during a legal marriage and bars testimony about those communications unless the spouses are permanently separated. This privilege does not protect communication before marriage, but does survive death, divorce or annulment. Both spouses control this privilege, so neither may waive privilege without the other's consent.

RELIGIOUS PRIVILEGE

Clergy has privilege, if the discussions are intended to be confidential.

PHYSICIAN/PSYCHOTHERAPIST – PATIENT PRIVILEGE

The patient has the right to refuse to disclose, or to prevent another party from disclosing, confidential information gathered for the purpose of diagnosis or treatment of any physical, mental or emotional condition.

MISCELLANEOUS PRIVILEGES

Along with the privileges that protect communications, there are some designed to protect other information. For example, a person, agent or employee may refuse to disclose trade

secrets owned if they are not concealing fraud or otherwise working an injustice. If the courts direct disclosure, it takes protective measures to protect interests of the holder of the privilege, the parties, and those required in the interests of justice.

Accountant-client privilege applies with respect to federally authorized tax practitioners as if the practitioner is an attorney. As we know, the privilege does not apply to tax return preparation.

FIFTH AMENDMENT PRIVILEGE

Taxpayers have the right not to testify against themselves or provide evidence needed to prosecute the taxpayer for a crime. The protection can be invoked whenever a taxpayer reasonably believes his testimony will "furnish a link in the chain of evidence" needed to prosecute him or her for a crime. The 5th Amendment privilege protection keeps a taxpayer from responding to discovery or from testifying in the Tax Court, **only** if the taxpayer faces possible criminal prosecution.

This privilege cannot be claimed on a selective basis in response to particular questions or requests for documents or records. Taxpayers must show a "real and appreciable danger of self-incrimination", which cannot be remote or speculative. A blanket refusal to answer is insufficient when material is not incriminating. The burden of establishing the danger is on the taxpayer who wants to claim the protection. The court makes the appropriate determination, not the taxpayer who must provide sufficient information for the judge to evaluate the claim.

The taxpayer has no 5th amendment privilege to prohibit testimony on civil fraud unless he can demonstrate that the testimony might subject him to criminal charges (*Brod v Comm'r*, 65 TC (1976)). Taxpayers who write "Fifth Amendment" notations on their tax returns, rather than providing numbers necessary to compute their income tax liability are not protected by that privilege. Entities, such as corporations and partnerships, have no right against self-incrimination.

STUDY HINT – PRIVILEGE

Ask the **following questions to determine if privilege applies** to the particular set of circumstances the question poses:

RELATIONSHIP – is there a privileged relationship?
COMMUNICATION – was there a germane communication?
CONFIDENTIALITY – was the communication confidential?
HOLDER – is the holder asserting the privilege?
WAIVER – did the holder waive the privilege?
EXCEPTIONS – is there an exception to the privilege?

WITNESSES – FRE ARTICLE VI

COMPETENCY TO TESTIFY IN GENERAL – FRE 601

Nearly anyone can be a witness in a federal court. Except as provided in Article VI of the FRE, witnesses are deemed to be competent, unless the rules provide otherwise. A witness may not testify unless sufficient evidence is introduced indicating he or she has personal knowledge of the matter. Expert witnesses may give opinion testimony as provided by FRE 703. A witness is also required to declare by an oath or affirmation that he or she will testify truthfully.

Only a minimal ability to observe, record, recollect and recount events is required to be a witness. It requires personal knowledge through any of the senses and the understanding of the duty to tell the truth. No mental qualification is required; questions related to mental competence are used to determine the weight given the testimony rather than the admissibility of the evidence. Children are presumed to be competent as there is no minimum age to testify.

NEED FOR PERSONAL KNOWLEDGE – FRE 602

Witnesses cannot testify to a matter unless sufficient evidence is introduced to indicate the witness has personal knowledge of the matter. Expert witnesses do not rely upon personal knowledge but their expertise, and so are able to testify. Even if a witness does not have personal knowledge their testimony may be given some weight if the facts warrant.

OATH OR AFFIRMATION TO TESTIFY TRUTHFULLY – FRE 603

Before testifying a witness must be given an oath or affirmation to testify truthfully. This must be in a form designed to "impress that duty on the witness's conscience."

Gilbert Law Dictionary equates 'oath' with a 'pledge.' An oath generally includes the words "so help me, God." An affirmation does not contain words relating to God. Since a belief in God is not required to testify, the witness may make either an oath or an affirmation. The form and administration of the oath or affirmation is designed to impress the witness with the duty to testify truthfully. The witness acknowledges that the testimony is true and is given under penalties of perjury.

If the hostile or uncooperative witness flatly refuses to take any oath, he or she is barred from testifying. A witness who refused to testify because of religious beliefs that prohibited swearing before God (and who would not acknowledge its truth under penalty of perjury) was denied deductions for lack of substantiation in *DiCarlo v Comm'r* (63 TCM 3019 (1992)).

INTERPRETER – FRE 604

Interpreters are also administered an oath or affirmation to make a 'true translation.' They are subject to the same qualifications rules as are expert witnesses.

JUDGE'S COMPETENCY AS A WITNESS – FRE 605

The presiding judge may not testify as a witness at the trial; a party need not object to preserve the issue.

EXCLUDED (JUROR) – FRE 606

WHO MAY IMPEACH A WITNESS – FRE 607

A witness's credibility goes to the weight the court will give the testimony and does not affect whether the testimony is admissible. There is a general right to impeach every witness. Any party may attack the credibility of any witness, including the party who calls the witness to testify. Counsel is allowed every permissible type of impeachment during cross-examination, but must do so in good faith. Innuendos and insinuations of inadmissible or nonexistent matters are improper.

Any party can impeach a witness, including the calling party

A witness may not be impeached prior to testifying. On direct examination (the first questioning of a witness) it is not proper to elicit the witness's testimony that he or she "always tells the truth." No one has yet raised the issue. However, evidence that a witness "always tells the truth" may be used to rehabilitate a witness after cross-examination.

According to Gilbert Law Dictionary to 'impeach' a witness is to "call into question the testimony of a witness or the truthfulness of a document." Impeaching a witness is usually an attack upon the witness's credibility to show the witness is mistaken, lying, or both. Impeaching can be directed at one or more components of credibility including the witness's:

- memory,
- reputation for veracity,
- prior acts of misconduct,
- prior conviction of a felony or a crime involving dishonesty (whether a felony or not), OR
- bias.

Impeaching a witness can be accomplished by introducing contradicting evidence. It can also be accomplished by introducing evidence of the witness's self-contradiction with a prior inconsistent statement.

The standing pre-trial order requires that all documentary and written evidence be stipulated, unless the document or evidence is to be used solely for the purpose of impeachment. All documents or materials that a party expects to utilize at trial must be identified and exchanged by the parties at least 14 days prior to the first day of the trial session. Documents intended for the purpose of impeachment do not need to be identified or exchanged. If a document impeaches a witness, it is admitted only for purpose of contradicting the proffered testimony.

MEMORY TOOL: BICCC

Methods of Impeachment:

B – Bias – personal relationship, animosity, financial interest
I – Inconsistent prior statement – under FRE witness may be asked about a prior inconsistent statement without telling the witness the identity, time, place or contents of the statement
C - Capacity – witness has defect in ability to see, hear, remember or recount facts
C - Character – poor character for truthfulness by opinion/reputation, acts not resulting in conviction, or convictions
C - Contradiction – witness contradicts previous testimony

A Witness's Character for Truthfulness or Untruthfulness – FRE 608
Testimony cannot be considered separate from the individual who provides it. The character of the witness is relevant and a proper area for examination. Under FRE 404(a), character evidence is generally not admissible for the purpose of proving a person acted in conformity with their character. A person's character for truthfulness or untruthfulness makes it more or less likely that the individual will testify truthfully.

Under FRE 608, a witness's credibility may be attacked or supported by opinion or reputation evidence, but only about the witness's character for truthfulness or untruthfulness and only after the witness's character for truthfulness is attacked by opinion, reputation evidence or other evidence. The character evidence that is then permitted can only pertain to the witness's character for truthfulness or untruthfulness.

A witness may be cross-examined about specific instances of conduct, if the court finds that the specific instance is probative of untruthfulness. If the cross-examiner has a good faith basis for the inquiry, he or she can ask about the commission of offenses that did not lead to a conviction along with acts of misconduct that do not constitute a crime.

Other than for criminal convictions as provided below in FRE 609, extrinsic evidence cannot be offered as proof of specific instances of conduct. In other words, the cross-examiner can ask a witness questions about prior acts, but must then accept the witness's answer. The practitioner cannot bring in other evidence if the witness denies the allegation.

Note that inquiries into past acts can occur only during cross-examination under FRE 608(b). Specific instances of conduct related to truthfulness or untruthfulness of the witness on the stand cannot be developed during direct or redirect examination.

Extrinsic evidence cannot be offered to prove a specific instance of conduct; the cross-examiner must take the witness's answer.

Reputation testimony must relate to the person's general reputation in the neighborhood where he or she works, attends school, or lives. The testimony must relate to the witness's reputation at or near the time of trial and must be based on the witness discussing the reputations with others, or hearing others discuss it. The witness testifying about the

reputation of truthfulness of another may be asked if he or she would believe the individual under oath. Reputation testimony may be elicited using questions that begin, "Have you heard?"

Opinion testimony must be rationally based on the personal knowledge of the character witness. The character witness must have sufficient personal knowledge based upon contacts with the principal witness in some aspect of their life. Again, only the opinion held at or near the time of trial is relevant. A character witness testifying as to an opinion may also be queried as to whether he or she would believe the individual under oath. Opinion testimony may be elicited using questions that begin, "Do you know?" or "Are you aware?"

Impeachment by Evidence of a Criminal Conviction – FRE 609

Impeachment about a prior criminal conviction is admissible if the probative value of the conviction outweighs any prejudicial effect. Prior criminal acts can only be used to impeach the witness's character for truthfulness and cannot be offered as evidence bearing on the witness's character for being law-abiding. Impeachment on prior criminal acts is admissible if the crime was punishable by death or imprisonment in excess of one year (considered to be a felony) EVEN if this level of punishment was not imposed.

Prior criminal convictions are **not** admissible if more than 10 years elapsed since date of the conviction, or release of the witness from the confinement imposed for the conviction, whichever is the later date, **unless**

- the probative value outweighs any prejudicial effects, at the court's discretion, **and**
- the proponent gives the adverse party sufficient advance written notice of intent to use the evidence that allows the adverse party an opportunity to contest the use of the conviction. In other words, counsel cannot surprise a witness at trial.

Prior criminal convictions are not admissible if more than 10 years elapsed since date of the conviction <u>unless</u> the probative value outweighs prejudicial effect, and the proponent gives the adverse party sufficient advance written notice of intent to use the conviction so the party has a fair opportunity to contest its use.

Extrinsic evidence can be offered to establish a conviction.

Prior convictions are not admissible if the conviction was subject to a pardon, annulment, or other equivalent proceeding, as long as the person was not convicted of a subsequent felony. Juvenile adjudications are generally not admissible. Evidence that an appeal is pending is admissible because a conviction occurred even if the appeal status is unknown. However, a conviction reversed on appeal cannot be used to impeach.

Since it generally is accepted that a conviction for a crime involving 'dishonesty or false statement' is probative on the issue of a witness's truthfulness, these convictions can be used

to impeach every witness regardless of the punishment imposed. In other words, it does not need to be a felony and there is no required minimum punishment to use the conviction.

Crimes including perjury, subordination of perjury, false statement, criminal fraud, embezzlement or false pretense, and other crimes involving deceit, untruthfulness or falsification fall into this category. Assault and battery, drunkenness and prostitution do not.

The conviction may be elicited from a witness on direct or cross-examination, or can be established by a certified copy of a public record. The witness may be questioned about public record matters, including the court, date and nature of the offense. If the witness fails to admit the conviction when questioned, the impeaching party must also introduce evidence supporting the conviction. Preferably this is the public record of conviction along with proof that the witness is the same individual who was convicted.

RELIGIOUS BELIEFS OR OPINIONS – FRE 610

Evidence of the witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility.

MODE AND ORDER OF EXAMINING WITNESSES AND PRESENTING EVIDENCE – FRE 611

Control by the Court

The court must exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence:

- to make the procedures effective for determining the truth,
- to avoid wasting time, **and**
- to protect witnesses from harassment or undue embarrassment.

Leading Questions

Witnesses are more likely to testify truthfully if they do not know what answer the questioner wishes to hear. Leading questions are ones that either direct a witness to a certain response or suggest the answer. Although not always true, a leading question often results in a 'yes' or 'no' response. When leading questions are used it may be unclear whether the witness or the attorney is the one actually testifying.

> Example: "Is it true you locked the car door after you got out of it?" is a leading question. "What, if anything, did you do after you turned off the ignition?" does not lead the witness.

Leading questions are generally not acceptable during direct examination but may be used during direct when calling an adverse party, or one who is closely identified with an adverse witness, or a hostile witness. When permitted, counsel usually first requests permission from the court to lead the witness.

Leading questions tend to suggest the answers and are generally improper on direct exam; they may be used with certain witnesses and testimony.
They are generally permissible on cross-examination.

Leading questions may be allowed as necessary to develop a witness's direct testimony to:

- establish preliminary background information about a witness or other issues that are not in dispute,
- jog or refresh a witness's memory,
- facilitate the testimony of a young or timid witness, **or**
- question a hostile witness, an adverse party, or a witness identified with an adverse party.

Leading questions are generally permitted during cross-examination.

MEMORY TOOL: BART
When leading questions are permitted:

B – Preliminary **background** info
A – **Adverse** party/hostile witness
R – **Refresh** witness memory
T – **Timid** or young witness

Other Form Objections
In addition to questions that lead, other questions may be objectionable on one or more grounds. Although not specifically set out in FRE 611, which addresses only leading questions, objections can also be made to the form of other questions. Some common examples include:

Argumentative questions are those that contain arguments or comments on the evidence. "You wouldn't know the truth if it smacked you in the nose, would you?" is argumentative.

Asked and answered questions are repetitive and intended to emphasize the answer.

Compound questions have many parts. A 'yes' or 'no' answer may be confusing as it is not clear which question or part of a question is answered. Each question should be asked separately.

Harassing, embarrassing, or personally attacking a witness questions are improper. Under FRE 611(a) the court is to protect witnesses from harassment or undue embarrassment. Badgering or attacking the witness by name-calling or using pejorative terms is impermissible.

Speculation and conjecture questions call for the witness to speculate or guess about some event.

ORDER OF TRIAL

Opening Statements

An opening statement informs the court what each party expects to prove during the trial from witness testimony and exhibits. The FRE does not specifically govern the approved content of an opening statement but gives the trial judge latitude in deciding their proper scope. The ABA Model Rules of Professional Conduct prohibits an attorney from making a false statement about a material fact or the law or offering evidence the lawyer knows to be false (Rule 3.3).

Petitioner's Case in Chief

The petitioner, who generally has the burden of production, initially presents his or her case in chief, which is also known as a prima facie case. The petitioner must introduce facts sufficient to establish the claim asserted in the petition.

Direct Examination

During direct examination a party asks its own witness questions about relevant issues. A party has control over the direct examination process, including the order in which the Trier of Fact learns relevant information. Under the "scope-of-direct rule" opposing counsel is limited during cross-examination to issues raised during direct examination; this permits counsel to select which topics are developed during witness examination. The rule, however, is flexible; FRE 611(b) grants the court discretion to permit inquiry during cross-examination into new matters as if they occurred during direct examination.

Cross-Examination

Once direct examination concludes, the opposing attorney cross-examines the witness. The purpose of cross is to weaken the effect of direct testimony, and/or to damage the witness's credibility or veracity. Cross-examination is often considered an essential safeguard of the testimony's accuracy and completeness.

Under FRE 611(b), cross-examination is limited by the scope-of-direct rule, and to topics concerning the witness's credibility. Questions that impeach are not limited to the topics raised during direct examination but may be limited by other FRE provisions.

Leading questions often are used in cross-examination, but the judge may limit their use while counsel questions a friendly witness. Opposing counsel can also ask questions more than once, or rephrase them, in order to get at a single idea in more than one way. Cross-examination is limited by FRE 611(a), which protects witnesses from undue harassment or embarrassment, and the judge may halt improper questioning.

Cross examination is limited to the scope of direct examination and impeachment. Leading questions are generally permissible on cross examination; the purpose to weaken direct exam testimony.

If new matters are raised during cross-examination, leading questions into those areas are not permitted. Examination into new matters more closely resembles direct examination rather than cross.

Cross-examination, leading questions, and impeachment are separate components.

- Cross examination is a stage of questioning;
- Leading questions are a type or form of question, **and**
- Impeachment is the attempt to attack a witness's credibility.

Redirect Examination

This stage of examination is the opportunity for the calling party's counsel to expand or bolster their witness's testimony. Usually, a mere restatement of assertions made previously during direct or cross-examination is not permitted at this stage of questioning. The answer may explain or qualify new substantive facts or impeachment matters elicited by the cross-examiner. Under FRE 611(a) the judge has discretion over the scope of redirect examination. Not every witness is subject to redirect.

Recross-Examination

This stage is the final opportunity for opposing counsel to question the witness. Generally, this stage is confined to questions on topics discussed during redirect examination, or to explain new matters raised during redirect.

WRITING USED TO REFRESH A WITNESS'S MEMORY – FRE 612

A witness may use writing to refresh memory for purpose of testifying either before or during their testimony. The writing does not have to be made by the witness to refresh his or her memory, and it does not need to be a formal writing (it may be a handwritten note on a napkin). The writing itself is not evidence and does not need to comply with the best evidence rule or be authenticated (both of these will be discussed in a later section).

Typically, the witness reads the writing silently before it is removed from his or her sight. If the writing refreshes the witness's recollection, the witness testifies from memory. Further, if during testimony any writing refreshes the witness's memory, the adverse party is entitled to have the entire writing produced at the hearing, to inspect it, and to cross-examine the witness on it. If a writing is used before testimony the court has discretion to order that the writing be produced to opposing counsel for inspection, cross-examination and introduction of relevant matters.

A writing may be used to refresh the witness's memory before or during their testimony. The writing itself is not evidence and is not admitted, but opposing counsel can see the entire writing. The witness reads the writing silently, then it is removed from sight before the witness testifies.

If the writing contains unrelated matters, the court may excise them after examining it in camera (frequently in chambers and out-of-court). When privileged material is used to refresh a witness's recollection, most courts hold that privilege was waived and permit the adverse party to inspect the writing. The court may impose appropriate sanctions if a party refuses to produce or deliver the writing as ordered for this rule.

If the attempt to refresh recollection fails, the hearsay exception of past recollection recorded applies. This exception permits the witness to read actual parts of the document into evidence under FRE 803(5), which will be discussed later in this text.

WITNESS'S PRIOR STATEMENT – FRE 613

The most commonly used impeachment technique is proof that the witness made a pretrial statement inconsistent with trial testimony. The fact that a prior inconsistent statement exists is relevant to the witness's credibility and can demonstrate the witness is either uncertain or untruthful; both circumstances question the witness's believability. The degree of the prior inconsistency is important to evaluate whether or not there is a sufficient difference between the trial testimony and prior statements to indicate the witness's credibility is impaired. The fact that a witness no longer remembers an event does not make a prior statement describing that event an inconsistent statement.

Prior inconsistent statement is the most common impeachment technique. The statement doesn't need to be shown to the witness but opposing counsel is entitled to see the statement upon request.

To examine a witness concerning a prior statement made, the statement does not need to be shown to the witness nor do its contents need to be disclosed at that time. However, upon request the opposing counsel is entitled to have the statement shown or disclosed.

Extrinsic evidence of a prior inconsistent statement is not admissible unless the witness is given an opportunity to explain or deny the statement (extrinsic evidence is any evidence other than testimony from the witness currently on the stand). The opposing party must have an opportunity to interrogate the witness on the prior statement. This provision does not apply to opposing party admissions as defined in FRE 801(d)(2).

Prior statements used to impeach a witness are not considered hearsay. They are not offered to prove the truth of either statement, but only to show inconsistencies between them. See the Hearsay section for more discussion on those rules.

COURT'S CALLING OR EXAMINING A WITNESS – FRE 614

The court may call witnesses at the suggestion of a party or upon its own motion. All parties are entitled to cross-examine any witnesses called by the court. Whether called by the court or not, the court may question any witness at its discretion. The judge's motive for questioning a witness should be to increase the clarity of testimony.

Any objections to calling of witness or interrogation by the court must be made at the earliest available opportunity.

EXCLUDING WITNESSES – FRE 615

At the request of a party, or upon its own motion, the court can order witnesses excluded from trial so they cannot hear the testimony of other witnesses. These exclusion rules do not apply to:

- a party who is a natural person (an individual, in other words),
- an officer or employee of a party that is not a natural person (a corporation or trust, for example) designated as its representative by its attorney, **or**
- a person whose presence is shown by a party to be essential to the presentation of his case (such as an expert witness), **or**
- a person authorized by statute to be present.

Note the last item in this list has not been required for a full point exam answer in past exams.

> Example: *Richard Canatella* TC Memo 2017-124 (6/26/17), an attorney, timely filed a petition for redetermination of more than $468,000 in deficiencies on late filed returns. The returns were pulled for audit both because they were untimely filed, and there were information returns indicating nearly $71,000 in unreported interest and more than $39,000 in unreported social security income. A bank deposit analysis was prepared and given to the petitioner to contest the results, which he did not do. The notice of deficiency both increased income for unreported business income and disallowed business expenses plus other unreported income.

At the beginning of trial, the petitioner requested that all witnesses be excluded from the courtroom under Rule 145 – the court ordered all excluded except for the revenue agent (RA), who was designated the IRS's representative by the trial attorneys from the IRS Office of Chief Counsel. As such, the RA was properly permitted to remain in the courtroom under the exception in Rule 145 (a) for "an officer or employee of a party which is not a natural person designated as its representative by its attorney." Petitioner contended that the designated representative of the IRS was the trial attorney's supervising attorney, who also was in the courtroom, and that therefore the revenue agent could not also be the designated representative – but, the supervising attorney was not the IRS's designated representative under TCR 145(a), so the Court was correct in allowing the RA to stay.

In the bank account analysis, the IRS incorrectly concluded that some bank deposits were income, but the court recognized that some errors are unavoidable when an indirect method is used to reconstruct income, especially where the taxpayer fails to maintain adequate records. Since petitioner only used QuickBooks to track only one of his business accounts, and didn't produce the QuickBooks records at trial, the court was unable to conclude the IRS was unreasonable in engaging in its own method of determining his income was unreasonable. Petitioner was able to challenge that particular deposits were not taxable.

MEMORY TOOL: POE
Witnesses that cannot be excluded:

P – natural **person**
O – **officer** or employee designated as a representative
E – **essential** witness

At its discretion, the court may impose sanctions for noncompliance with an exclusion order. For example, a witness may be prevented from testifying for violating the order.

OPINIONS AND EXPERT TESTIMONY - FRE ARTICLE VII

OPINION TESTIMONY BY LAY WITNESSES – FRE 701

A lay witness is any witness who is not testifying as an expert, so an expert who is testifying about something outside their area of expertise is also considered a lay witness. Testimony in the form of an opinion is limited to one that is:

- rationally based (not requiring specialized knowledge) on the witness's perception
- helpful to clearly understanding the witness's testimony or to determining a fact in issue; **and**
- not based on scientific, technical or other specialized knowledge within the scope of FRE 702.

A lay person may not testify as to the ultimate legal conclusions, which includes terms such as 'schizophrenic' or 'alcoholic.' The judge makes those decisions.

TESTIMONY BY EXPERT WITNESSES – FRE 702-706

A witness who is qualified as an expert by knowledge, skill, experience, training or education may testify in the form of an opinion or otherwise if

a) the expert's scientific, technical or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
b) the testimony is based on sufficient facts or data;
c) the testimony is the product or reliable principles and methods; and
d) the expert has reliably applied the principles and methods to the facts of the case.

Expert witness testimony is permitted for areas requiring specialized knowledge if it will assist the judge in understanding the evidence or determining a fact in issue. Expert witness testimony must be both reliable and relevant before it is admitted, and the court has broad discretion in allowing expert witness testimony.

Before being allowed to testify, the expert must demonstrate that he or she possess the requisite specialized knowledge. Experts testify based on their own general information and knowledge and apply that expertise to the case facts. An expert qualifies as such by his or her knowledge, skill, experience, training or education. The court has discretion in deciding how specifically the prospective expert's experience and training must relate to the topic at issue.

Unless the Court orders otherwise, an expert may state an opinion – and give the reasons for it – without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination under FRE 705.

The expert bases his or her opinions upon facts or data either perceived by the expert or made known to him or her before or at the hearing. Experts need not have personal knowledge about the specific case. The underlying facts or data does not need to be admissible if they are a type reasonably relied upon by experts in the particular field to form opinions or inferences. For example, an expert opinion can be based upon hearsay, which would be inadmissible under other circumstances.

> Example: A real estate assessor can testify about the value of a home even if the testimony is in part based on hearsay statements by neighbors, if relying on those statements is reasonable in real estate appraising.

The expert's basis for the opinion does not need to be stated when the expert testifies, unless ordered by the court. If asked, the expert must reveal the underlying facts or data during cross-examination.

The Tax Court will decide how much weight to give to the expert's opinion. The Tax Court doesn't use a middle-of-the-road compromise when determining value; instead, they may find the evidence of value presented by one side is "sufficiently more convincing than that of the other party," and may choose to accept only those portions of expert opinions they find reliable (*Champions Retreat Golf Founders, LLC, Riverwood Land, LLC, Tax Matters Partner* (TC Memo 2022-106 (10/17/22)).

On a party's motion or on 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. The Court may appoint any expert the parties agree on and any of its own choosing, but only if that expert consents to act. The expert is entitled to reasonable compensation set by the Court.

The court must inform the expert of the expert's duties. The expert must 1) advise the parties of any findings the expert makes, 2) may be deposed by any party, 3) may be called to testify by the court or any party, and 4) may be cross-examined by any party, including the calling party.

An expert witness may be properly cross-examined as to:

- his or her qualifications,
- the subject matter and basis of the opinion,
- compensation received for the testimony, **and**
- discrepancies between opinions expressed by the expert and those contained in treatises and articles.

As with any other witness, experts can be impeached by their:

- prior inconsistent statement,
- bad reputation for truthfulness, **or**
- bias.

Bias is a commonly employed impeachment technique. The cross-examiner may prove that the expert is receiving a large fee in exchange for his or her testimony or may show that the witness always aligns with a particular point of view or a particular side. The inference is that the expert is motivated by money or other reasons to slant his or her testimony.

The expert must actually be available for cross examination, and the expert's report cannot be admitted on its own. The court can also exclude an expert witness's report as unreliable and irrelevant.

> Example: *Neil Feinberg and Andrea Feinberg, Kellie McDonald* (TC Memo 2017-211 (10/23/17)) were shareholders in an LLC (THC), treated as an S corporation, organized under the laws of Colorado, and licensed to grow and sell medical marijuana. THC held 2 medical marijuana dispensaries and leased a separate warehouse facility (for cultivation). For the years at issue (2009, 2010 and 2011) THC calculated its total income by subtracting COGS from gross receipts and reported ordinary business losses.

THC also claimed deductions for ordinary and necessary business expenses including wages, repairs, rents, depreciations, and other. During the trial petitioners produced no contemporaneous records or other business records, relying instead exclusively on an expert witness report of a CPA who was an expert in cost accounting with an emphasis in the marijuana industry.

The case contains a good discussion of the use of expert witnesses. The Court found the CPA's report to be brief and its content unreliable. For example, the report stated a price per pound of medical marijuana and COGS at 55% of sales without providing the basis for those assumptions. Expert witness about what the law is or that directs the finder of fact on how to apply the law does not assist the trier of fact, and expert opinions on law are inadmissible. The CPA report was found not admissible under Rule 702 because it was not helpful in understanding evidence or in determining a fact and it included legal conclusions.

To determine the correct COGS substantiation of THC's expenses is necessary – a reconstructed return based on industry averages does not take the place of substantiation and does not help determine a fact in issue. COGS is not a deduction but an offset to income for the purpose of calculating gross income and it is subtracted from gross income to arrive at taxable income. The Court didn't even address whether 280E applied because petitioners failed to substantiate any expenses – they did not produce any business records or other supporting documents.

HEARSAY – FRE ARTICLE VIII

For some, this will be the most difficult part of your Evidence study but remember that while the concept of hearsay is difficult, it is not impossible to comprehend and learn. Stay focused on the policies underlying the rule and the exceptions will be easier to understand and apply during the Tax Court exam.

Hearsay stems from the simple idea that first hand reports are more reliable than second hand ones; hearsay bars testimony if it is unreliable. The exceptions and exclusions allow into evidence what would otherwise be considered as hearsay because some is more reliable.

Testimony's value depends upon the witness's perception, memory, narration, and sincerity. Did the witness accurately perceive what is described? Is the witness's memory accurate? Is the testimony language sufficiently clear to convey what was perceived? Is the witness testifying truthfully? If the person is on the witness stand, more testimony can be elicited to

Hearsay is a barrier to admissibility that keeps testimony out.
Exceptions and exclusions to the hearsay rule allow the testimony to be heard.
The judge decides how reliable that testimony is.

fully understand those issues. It is when the person's testimony is recounted by another that hearsay becomes an issue.

Invariably information received directly from an individual is more likely to be accurate than that which is filtered through an intermediary. Evidence law determined that a witness's reliability is enhanced when:

- the witness takes an oath to testify truthfully,
- the witness is present at trial and has first-hand knowledge, **and**
- the witness is subject to cross-examination on his or her testimony.

In hearsay there are two witnesses: one who is present at trial and subject to the above conditions, and the other who is not.

Hearsay is generally not admissible as evidence in trials, except as provided by the FRE or other rules prescribed by the Supreme Court pursuant to statutory authority or by an act of Congress. The key reason is that the person making the statement was not in court (not under oath or subject to cross-examination) at the time the assertion was made.

Unless an exception exists, a party cannot either have a witness quote what anyone said out-of-court or introduce a document containing words written out-of-court.

Some believe that even self-quotation can be hearsay under the FRE. A witness cannot testify "I said" or "I told her" if the following statement is intended to prove the truth of the matter. However, that same witness is permitted to testify about what he saw or heard.

HEARSAY DEFINITIONS THAT APPLY; EXCLUSIONS FROM HEARSAY

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.
Or this variation: Hearsay is an out of court statement offered to prove truth of the matter asserted.

Hearsay is an out of court statement offered to prove the truth of the matter asserted.

Seems simple enough? Once again, this undoubtedly will be the area of study that proves the most difficult to learn and to apply during the exam. Expect to spend time going over it more than once and understand you won't 'get it' necessarily the first time.

Statement – FRE 801(a)

A '**statement'** can be an **oral or written assertion** or the **nonverbal conduct of a person, if it is intended to be an assertion**. Because they are by definition assertive in form, it is assumed that oral and written statements are assertions.

Generally, when someone says or writes something, the purpose is communication. In other words, he or she intends to make an assertion. A person saying "It is raining" makes an oral assertion. If a person writes the same words on a piece of paper, they are a written assertion.

Examples of written hearsay include:

- a hospital record showing that a patient was administered morphine;
- a note left on a car that indicates the recent damage was done by a vehicle as described in the note;
- a written estimate of damages made by an estimator who did not appear at trial;
- written invoices from third parties as independent evidence the repairs were made;
- a written appraisal of a stolen trailer, prepared by an appraiser who did not testify.

Nonverbal conduct may be as assertive as words, if they are intended as an assertion. If in response to the question, "Who did it?" a person raises his hand, that gesture is as meaningful as words spoken or written. Similarly, pointing to a person in a line-up in response to the question, "Do you see the person who hurt you?" is the same as indicating, "That person did it."

Before classifying nonverbal conduct as hearsay, one must first determine whether there was the requisite intention to make an assertion.

> Example: After inspecting a ship for seaworthiness, a deceased captain boarded the ship with his family. Was the captain's nonverbal conduct (the inspection followed by boarding the ship with his family) the intention to say the ship was seaworthy? Was the captain's conduct intended to support a belief that the ship was seaworthy, therefore leading to the conclusion that ship was seaworthy?
>
> No, this action is not a statement as the captain was merely taking a trip. Sailing on a ship is non-assertive conduct. It is not hearsay under the FRE, and thus admissible in court. Keep in mind that a witness's statement that the captain said, "This is a fine ship" is hearsay, and thus inadmissible.

Most nonverbal conduct is intended to accomplish something, but not to convey information. As such, it does not fall under the hearsay rules. Opening an umbrella is not intended to say, "It is raining." Since the act is not a "statement," it is not hearsay. The fact that someone held an open umbrella can be used to establish it was raining.

Declarant – FRE 801(b)

A '**declarant**' is the person **who makes the statement** and not the person presently testifying as to what was said.

> Example: Witness W testifies on the stand that declarant D stated that X did not report all his income on his tax return. D's statement was not made in court. D's statement is offered to prove the truth that X did not report all his income, which makes D's

statement hearsay. As such it is inadmissible as hearsay (for now, such statement may be admissible as indicated soon).

W has no personal knowledge on whether X reported all of his income on his tax return; W only has information about what D said.

The declarant is the one who made the statement, not the witness on the stand. The declarant's credibility can be impeached.

Any party is permitted to impeach the declarant's credibility under FRE 806. Keep in mind the declarant is not on the witness stand, so effectively there are limits to what impeachment types are allowed. Impeachment evidence can be offered to establish the declarant:

- committed a crime, with similar restrictions as when a witness testifies live,
- has a bad character for truthfulness, **or**
- is biased.

Unless the declarant is available as a witness, his or her past acts that did not result in a conviction cannot be raised to impeach him or her.

While Testifying …
All this signifies is that the statement was made out of court. Specifically, it refers to testimony out of THIS court, even if it was made at a previous court hearing. Clearly most of our lives are lived out of court, so hearsay opportunities abound.

Offered in Evidence for the Truth of the Matter
The final key element in the hearsay definition is the reason the statement is offered at trial. **If the out-of-court statement is offered to prove truth, it is hearsay**. If the offered statement is relevant regardless of whether it conveys accurate information, it is not hearsay.

> Example: The IRS wants to establish that George was at work at a certain time and day. Sally, another employee, can testify about the conversation she and George had that natural grass is better for playing football than Astroturf. The statement is not offered to prove the truth that real grass is better but is offered to establish that George was present at a certain time. As such it is not hearsay and it is admissible.
>
> Example: The IRS wants to establish that George overstated the value of the car he gave to charity. Sally cannot testify that she overheard George telling someone else that he valued his 1975 Volkswagen as if it was a 1992 BMW. The statement is offered to prove the truth that George overstated the value of his donation; it is hearsay and inadmissible.

Example: To prove there was a puddle of juice in the juice aisle of a grocery store Witness is to testify "I heard Declarant say a juice bottle was dropped." This is hearsay – it is offered to prove the truth that there was a bottle of juice dropped – and is inadmissible.

Example: To prove that management had prior notice of the danger of a puddle of juice in the grocery store aisle, Witness is to testify "I heard Declarant tell the store manager that she nearly slipped in a puddle in the juice aisle." This is not hearsay – it is offered to demonstrate that management knew the juice bottle had broken, not to prove there was a puddle.

NON-HEARSAY WORDS

Some words are significant because they were said. If the statement is offered because it was said, and not because it is true, it is not hearsay. Such words are admissible.

Legal Significance of Words

Words that have independent legal significance because they were said cannot be hearsay. Common examples are words of defamation, false representation and/or fraud, extortion threats, gifts, contracts, and consent.

Contract law requires an offer and an acceptance. Regardless of whether they are oral or written, the actual words of a contract cannot be hearsay because they are offered to prove the elements of a contract. The words "I will sell you my car for $5,000" and "I accept" indicate an offer and an acceptance and are not hearsay. A gift of personal property requires physical delivery of property along with words of donative intent. The words "I give you my car" indicate donative intent and are not hearsay.

Words offered to prove their falsity are not hearsay. Remember, hearsay is offered to prove the truth of the matter asserted.

Example: Sarah claims that Rachel said, "There is oil under this land not more than 50 feet down" during negotiations for the purchase of the land. In a fraudulent representation case Sarah wants to offer those words to prove their falsity. In other words, Rachel knew there was no oil and made that claim anyway. The words are not hearsay because they are not offered to prove the truth that there is oil under the land.

Prior out-of-court statements that are not consistent with the witness's in-court testimony are not hearsay if they are offered only to prove the witness said something different at an earlier time. To admit the prior inconsistent statement for purposes of impeachment it is not necessary to prove that either statement is actually true, just that the statements are different. The statement must have been given under penalty of perjury at a hearing, deposition or other proceeding.

Example: Ray tells the officer at an accident scene, "The light was green when the black car went through the intersection." In court, Ray testifies the light was red. The prior statement is admissible for the purpose of impeaching Ray's testimony. It is not offered to prove the light was green, so it is not hearsay.

An out-of-court statement can be non-hearsay if it is introduced to show the effect the statement had on the listener's state of mind. In this category are words that establish the listener's relevant mental state, such as notice, knowledge, intent, motive, fear, and reasons for acting or not acting in a certain way.

Example: A defendant can testify, "My tax preparer told me it was legal to deduct cash given to my sister as a charitable contribution" to prove his lack of criminal intent. Evidence of intent is not hearsay.

NON-HEARSAY

Some types of statements are defined as not hearsay under FRE 801(d); as such they are admissible in court.

Declarant-Witness Prior Statement

A witness's own out-of-court words are technically hearsay, even when quoted at trial by the witness (declarant and witness are the same individuals), if their relevance depends on the truth of the assertion. There are three types of out-of-court statements:

- prior inconsistent statements,
- prior consistent statements, **and**
- statements identifying a person.

In order to meet the hearsay exclusion, the declarant must be now available for cross-examination about the prior out-of-court statement. In *United States v Owens* (494 US 554, (1988)), the witness was considered "available for cross-examination" even though the witness remembered making a statement but could not remember the events that he described in his statement and did not remember any circumstances involved in making the statement, which effectively limited cross-examination.

A Declarant-Witness's Prior (Inconsistent) Statement - FRE 801(d)(1)(A)

A prior sworn inconsistent statement is not hearsay and is always admissible as substantive evidence. These occur when a declarant testified, subject to cross-examination about the prior statement, and the statement is now inconsistent, or is consistent and is offered to rebut an express or implied charge that the declarant recently fabricated it. Sworn statements are those subject to penalty of perjury, including depositions and grand jury testimony, but not affidavits.

A prior sworn inconsistent statement is any statement:

- sworn, subject to penalties,
- made out of this court,

- before the witness now testifies,
- that conflicts with something the witness currently says in testimony.

Prior inconsistent statements are not hearsay when they are offered to impeach a witness – they are then not offered to prove the truth of the matter, so they are admissible.

A Declarant-Witness's Prior (Consistent) Statement - FRE 801(d)(1)(B)
Prior consistent statements are those made out-of-court before the witness's testimony that reinforce or support the testimony. Under the FRE, a prior consistent statement need not be made under oath.

Prior consistent statements are admissible **only** when offered in rebuttal to rehabilitate and bolster the credibility of a witness whose credibility was attacked. For example, a prior consistent statement is offered to rebut an implied or express charge that the statement was recently fabricated.

FRE 801(d)(1)(B) does not explicitly state that the prior consistent statement need be made before the witness had a motive to falsify his testimony, but in *Tome v United States* (513 US 150 (1995)), the Supreme Ccourt interpreted it to include this requirement. A statement made after the speaker had reason to lie, but before her testimony, is thus not excluded as non-hearsay.

PRIOR IDENTIFICATIONS - FRE 801(d)(1)(C)
A prior identification is admissible as non-hearsay only where the declarant-eyewitness is presently testifying at the trial.

AN OPPOSING PARTY'S STATEMENT - FRE 801(d)(2)(A)
Generally anything a party says can and will be used against the party. Admissions by a party are commonly introduced at trial by the opponent (opposing party's statement is also known as admission by party opponent). While guilty pleas fall within this description, admissions are not 'confessions.' They are anything a party ever communicated (whether in speech, writing or any other form) sought to be introduced against that party at trial.

Admissions are considered substantive evidence, not mere impeaching statements. An opposing party's statement is not hearsay if the statement is offered against a party and it is:
- the party's own statement,
- a statement the party manifests that it adopted or believed to be true,
- a statement by a person whom the party authorized to make a statement on the subject,
- one made by a person whom the party authorized to make a statement on the subject, **or**

- a statement by the party's coconspirator during and in furtherance of the conspiracy.

KEY: It is the party's OWN statement offered by their OPPONENT.
Read the question to see <u>who is offering</u> the statement.
If it is offered by the party, it is NOT opposing party statement.

Under the FRE, admissions are specifically exempted from the definition of hearsay. Because admissions involve a party to the trial, many of the hearsay dangers are diminished. The party is available to explain what the statement meant when it was said.

Any relevant admission by a party is admissible when offered by an opponent. It does not matter whether the declarant is available or if the declarant has personal knowledge about the statement. When the party made the statement it could have been favorable, unfavorable, or neutral; it does not need to be against the party's interests when it was made.

Admissions are the party's own past words, relevant at the time of trial to an issue in the trial.

> Example: Cars driven by A and B collide at an intersection. When the drivers get out of their vehicles, B says, "I didn't see the red light." That statement is an admission, one that A can introduce at trial.

ADOPTIVE ADMISSION - FRE 801(d) (2) (B)
Also known as Admission by Silence, an adoptive admission is a party's reaction to another person's statement or action, when it is reasonable to treat the party's reaction as an admission of something stated or implied by the other person. In other words, the circumstances must be such that a reasonable person would deny the assertion. It must be reasonable to assume that the party's silence does constitute truth; if there are plausible reasons for the silence it does not amount to a tacit admission.

> Example: Immediately following the collision of A and B's vehicles, someone says to B, "You didn't stop for the red light" and B replies, "I'm sorry I didn't." The question and B's answer are an adoptive admission.

> Example: If someone said to B, "We all saw the light was against you," and B makes no reply, it is an admission by silence.

> Example: If someone on B's left side said, "We all saw the light was against you," and B makes no reply because B is deaf in the left ear, B's answer is not an admission by silence.

AUTHORIZED ADMISSION - FRE 801(d)(2)(C)
Statements made by a person other than a party can be treated as admissions when offered against the party. Statements by a person authorized to speak on behalf of someone who becomes a party to a lawsuit are admissible as admissions when offered against the party.

The person authorized to speak on behalf of the party can be an employee or an agent. A property manager hired by an owner is his agent, as is an attorney. The authority to speak may be express or implied, and must be established at trial. Authorization to speak about the subject may be established by the acts or conduct of the principal or his or her statements to the agent or a third party. Independent proof may be required to show the extent of an agent's authority in partnership situations.

Statements by the authorized person to the principal himself are included in this rule. A party's books or records are usable against him without regard of the intent to disclose them to third persons.

VICARIOUS ADMISSION OF AN AGENT OR EMPLOYEE - FRE 801(d)(2)(D)
Statements of an agent or employee are allowed if they were made during the employment and concern a matter within the scope of employment. It is not required that the employee actually have the authority to speak.

> Example: A truck's brakes fail on a hill, and the resulting crash claims one life. Following the accident M, the trucking company's chief mechanic, says, "I told my boss that the brakes were going on this thing." Although M is probably not authorized by his employer to make such statements, they were made during his employment about his job, and are admissible as a vicarious admission.

CO-CONSPIRATOR'S ADMISSION - FRE 801(d)(2)(E)
A co-conspirator's admission must be made by a party's co-conspirator during the course of and in furtherance of the conspiracy.

Statements made after the co-conspirator's arrest are not admissible because they were not made during the conspiracy. Proof of the underlying conspiracy must be established by a preponderance of independent evidence. The scope of the conspiracy must be ascertained to determine whether the statement is "in furtherance of" the conspiracy.

HEARSAY EXCEPTIONS

THE RULE AGAINST HEARSAY – FRE 802
Hearsay is not admissible unless it is allowed by federal statute, these rules, or other rules prescribed by the Supreme Court.

Hearsay exceptions are usually based on these concepts:

- some out-of-court statements are deemed inherently reliable because of the conditions under which they are made, **and**
- sometimes the only choice is between evidence that bears some risk of unreliability and no evidence at all.

When the statements are inherently reliable, and it is necessary to admit evidence that has some risk attached, the Trier of Fact can properly hear evidence that is hearsay. Exceptions exist that allow a decision to allow evidence in if there is sufficient reliability in the evidence even if the witness with first-hand knowledge is not under oath and subject to cross-examination.

The FRE organizes the exceptions into two groups: exceptions for which the declarant's availability is immaterial, and exceptions that can only be used if the declarant is not available (see the discussion below for FRE 804(a) for what makes a witness unavailable).

EXCEPTION … REGARDLESS OF DECLARANT AVAILABILITY – FRE 803

There are twenty-three instances of hearsay admissible under the FRE regardless of whether the declarant is now available, plus a 'catch-all' provision in Rule 807. Declarant availability is not important, the FRE drafters apparently felt the risks inherent in this type of hearsay were less than with other hearsay.

Present Sense Impression – FRE 803(1)

A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it. Since the statement must be made during or immediately following the event, the problems associated with memory are slight.

> Example: While on the telephone the declarant says, "I must hang up now. I don't know who it is, but somebody just walked into my office with a toaster oven." The statement is admissible as a present sense impression.

Excited Utterance – FRE 803(2)

A statement relating to a startling event or condition made while the declarant was under the stress of the excitement or under the startling events. The court determines how much time can lapse between the event and the utterance to fall within this hearsay exception. Determining factors include the event, the age and condition of the declarant, whether the statement was volunteered or in response to a question, and whether self-interest was present in the utterance. Memory is not a problem because the statement must be made close in time to the startling event.

> Example: Someone screams "Oh, no" or "Look at that!" Such statements are likely to be excited utterances. Notice that the statement must only 'relate' to the startling event and does not need to describe it.

An excited utterance is admissible even if the witness denies making the statement at trial. The excited utterance may be made by a bystander or by a participant.

Then-Existing Mental, Emotional, or Physical Condition – FRE 803(3)
A statement of the declarant's then existing state of mind (such as motive, intent, or plan), or emotional, sensory or physical condition (such as mental feeling, pain or bodily health), but not including a statement of memory or belief to prove the fact remember or believed unless it relates to the validity or terms of the declarant's will. When people make statements about what they think or how they feel emotionally or physically, there are no perception or memory problems that are likely to diminish the accuracy of what they say.

The exception covers statements about what a person feels at the time he or she speaks. "I feel sick" is admissible for its truth that the speaker felt sick at the time he or she spoke.
A statement as to a plan or intent is admissible as to whether the declarant had a plan, and whether the declarant carried out the plan.

> Example: Gina makes a statement on Thursday that "I plan to have dinner with Cathy tomorrow" is an admissible statement relevant to the issue of whether Gina actually had dinner with Cathy on Friday.

To come within the state of mind exception:

- the statement must be contemporaneous with the mental state sought to be proven;
- there must not be suspicious circumstances suggesting a motive for the declarant to fabricate or misrepresent his thoughts; **and**
- the declarant's state of mind must be relevant to an issue before the court.

In determining whether a withdrawal from a corporate taxpayer was a loan or an unauthorized withdrawal, a check from the corporate taxpayer to the taxpayer's president reflected the president's intent and was admissible in *Pan Am Acceptance Corp v Comm'r*, 57 TCM 1360 (CCH)). Statements made to the taxpayer that amounts paid to her were intended to be gifts were statements of the declarant's then-existing state of mind and were made close enough to the event to provide reasonable assurance the statements were not contrived in *Gaw v Comm'r* 70 TCM 1996 (CCH)).

Statements Made for Medical Diagnosis or Treatment – FRE 803(4)
Statements made for, and is reasonably pertinent to, medical diagnosis or treatment, and describes medical history (past or present symptoms or sensations, their inception, or their general cause). This doesn't have to be made to a doctor. The hearsay exception likely exists because people have compelling self-interest to speak truthfully to those who provide medical services. The exception also allows a description of what caused the problem as long as the description is reasonably pertinent to diagnosis or treatment.

> Example: Declarant's statement to a paramedic that his leg was run over by a car is admissible under this hearsay exception.

Recorded Recollection – FRE 803(5)
This is a record that:

a) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;
b) was made or adopted by the witness when the matter was fresh in the witness's memory; and
c) accurately reflects the witness's knowledge.

The memorandum or record may be read into evidence but is not itself admitted as an exhibit unless offered by an adverse party. However, ordinarily the requirements that the document be read into the record or offered by the adverse party are waived by the Tax Court judge and the document is admitted into evidence.

The witness must be on the witness stand and attempts to refresh the witness's recollection must first fail. Since the witness cannot effectively be cross-examined due to a lack of memory, recorded recollection is a method that can be used to elicit testimony. The document itself is the evidence. The writing, which is read into evidence, must be authenticated and must also satisfy the best evidence rule.

If writing to refresh fails and the witness cannot testify from memory, using recorded recollection allows the memo or record to be read into the evidence. That writing must be authenticated and satisfy the best evidence rule.

An affidavit can be a recorded recollection and thus admissible. Also, a written statement prepared for use at the taxpayer's trial on criminal drug charges was admitted as recorded recollection in *Herberg v Comm'r*, 53 TCM 755 (CCH)).

Recorded recollection is not the same as using a writing to refresh current memory. With present recollection refreshed, the writing is used to refresh memory while the witness is testifying. The writing is then put aside and the witness testifies; it is not read into evidence so there is no hearsay problem. The witness can be cross-examined as to what he or she remembers once memory is refreshed. The adverse party is the only one who may introduce the evidence that was used to refresh memory.

Records of a Regularly Conducted Activity – FRE 803(6)
Records of regularly conducted activity, whether in a profit or nonprofit organization or business, are exceptions to hearsay. Such records are likely to be accurate since they are made for the purpose of running a business or activity rather than for a purpose relating to litigation.

This includes a record of an act, event, condition, opinion or diagnosis if:

a) the record was made at or near the time by – or from information transmitted by – someone with knowledge;

b) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
c) making the record was a regular practice of that activity;
d) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 901(11) or (12) or with a statute permitting certification; and
e) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

The document be made at or near the time of the event. Financial statements prepared after the close of the year in which the transactions reflected occurred meet this requirement. A financial statement dated 5/31/80 was sufficiently near the 12/31/80 sale of stock to qualify in *DeMann v Comm'r*, 65 TCM 2614 (CCH), but documents prepared shortly before trial and for purpose of trial were not.

The document must be created in the course of a regularly conducted activity by a business, organization, occupation, or calling, whether or not for profit. Compilation of data based on records of tokes reported by other casino dealers was data kept in the course of an audit. Since examination activity is part of the regularly conducted IRS business the compilation was allowed within this exception.

If the document lacks trustworthiness it does not come under the business records exception. In *Shriver v Comm'r* 85 TC 1 (1985) statements contained within a report made by a drug enforcement agent in his official capacity were made by a government informant. The informant was not called to testify because he had no recollection of the events in the report. The report was found to lack trustworthiness and was not admissible.

A proper foundation must be laid before an item comes under this exception. The person making the entry does not need to testify, but a custodian or reliable, qualified witness with personal knowledge must introduce the record. Foundation can be established through a certification of a custodian or other qualified person (this person must comply with Rule 902).

A witness who kept books and records for a gambling business and worked there 6 days a week was sufficiently familiar with the business and the records to testify about them in *Williams v Comm'r* 74 TCM 295 (CCH). On the other hand, a witness who examined the records on a quarterly basis but did not witness or assist the taxpayer in preparing the business records lacked direct personal knowledge in the business affairs in *Hofstetter v Comm'r* 47 TCM 295 (CCH).

A party who intends to establish foundation through certification must provide written notice of that intention to all adverse parties and must make the record and declaration available for inspection sufficiently in advance of offering the item into evidence to allow the adverse party to challenge the record. In *Spurlock v Comm'r* 85 TCM 1236 (CCH)) petitioner claimed that receiving documents and affidavits 3 days before trial was not proper notification. However,

the court noted that the respondent's trial memorandum identified the declarants, payors and underlying records he intended to rely upon to support the government's position that the taxpayer had unreported income. That document was provided more than 2 weeks before trial, giving the taxpayer sufficient time to call the witnesses at trial or to contact them before trial.

Documents admitted as part of the business records exception include:

- an appointment book used for business purposes and kept contemporaneously;
- an escrow statement;
- index cards containing tenant names and rental history;
- financial statements prepared by an accounting firm (prepared in the regular course of business)
- calendars reflecting appointments and seminars when entries were kept contemporaneously;
- hospital records;
- ledger sheets kept by a bookkeeper for a bookie;
- taxpayer's income tax return, taxpayer's audited financial statements, a page from the taxpayer's cash disbursement journal, and a page from the taxpayer's general ledger; **and**
- bank records.

MEMORY TOOL: KRAP RULE
Business records exception:

K = Kept – regular practice of the business (organization/calling) to keep such records
R = Regular course – type of record regularly kept by the business (organization/calling) and recorded in a routine fashion, making the record a regular practice of the activity
A = At or near the time – contemporaneous records are more likely to be reliable than those made after the fact
P - Personal knowledge – either the maker has personal knowledge of the recorded facts or is someone with a business duty to report the information (several employees may be between the employee who has the personal knowledge and the one who records the event and still satisfy this test).

Absence of Record of a Regularly Conducted Activity – FRE 803(7)
Evidence that a matter is not included in a record described in FRE 803(6) if:

a) the evidence is admitted to prove that the matter did not occur or exist;
b) a record was regularly kept for a matter of that kind; and
c) the opponent does not show that the possible source of the information or other circumstances indicate a lack of trustworthiness.

Public Records – FRE 803(8)
Public records can be self-authenticated under Rule 902(4) with a certified copy.

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

Police reports do not fall under this hearsay exception in criminal cases as they may be inadmissible for lack of trustworthiness. However, they are admissible in civil cases.

Documents that came within this exception include:
- Memorandum and Order denying the taxpayer's motion for release pending appeal of conviction for criminal tax evasion;
- employment card maintained by the city's Parks Department;
- an excerpt from a balance sheet prepared by a foreign corporation that was published annually as required by law;
- a certificate of assessments and payments;
- portions of the administrative IRS file.

Testimony by an employee of the public agency does not come within this exception.

Public Records of Vital Statistics Records – 803(9)
A record of a birth, death, or marriage, if reported to a public office in accordance with a legal duty.

Absence of Public Record – FRE 803(10)
Testimony – or a certification under FRE 902 – that a diligent search failed to disclose a public record or statement if:
A) the testimony or certification is admitted to prove that
   (i) the record or statement does not exist; or
   (ii) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind; and

B) in a criminal case, a prosecutor who intends to offer a certification provides written notice of that intent at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the notice – unless the Court sets a different time for the notice or the objection.

The fact that IRS records did not reflect any return being filed for a taxpayer was evidence of the nonoccurrence of an event ordinarily recorded in *Espinoza v Comm'r*, 78 TC 412.

Records of Religious Organization – FRE 803(11)
Statements of birth, marriage, divorce, death, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization. Such records are usually highly reliable.

Certificates of Marriage, Baptism and Similar Ceremonies – FRE 803(12)
A statement of fact that the maker performed a ceremony contained in a certificate made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified. The certificate must be issued at the time of the act or a reasonable time afterwards.

Family Records – FRE 803(13)
A statement of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engraving on urns, crypts, or tombstones, or the like.

Records of Documents Affecting an Interest in Property – FRE 803(14)
The record of a document affecting or establishing an interest in property, as proof of the content of the original recorded document, if the record is one of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

Statements in Documents Affecting an Interest in Property – FRE 803(15)
A statement contained in a document affecting or establishing an interest in property, if the matter stated is relevant to the purpose of the documents unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

To come within this exception, the proponent must establish:

- the document purports to establish or affect an interest in property;
- the statement is relevant to the purpose of the document; **and**
- subsequent dealings with the property are not inconsistent with the truth of the statement.

In *Tsakopoulos v Comm'r*, 83 TCM 1064 (CCH) the taxpayer objected to a preliminary change of ownership report filed with the county Assessor's office that was prepared by an escrow assistant (taxpayer had claimed an abandonment loss upon the transfer of an interest in property to his brother). Taxpayer argued that the report did not affect an interest in property. After applying the three-prong test above, the court found that the report met the tests and came within the exception.

Statements in Ancient Documents – FRE 803(16)
Ancient documents must be in existence 20 years or more and their authenticity must be established before they are admissible as a hearsay exception.

Market Reports and Similar Commercial Publications – FRE 803(17)
Market quotations, tabulations, lists, directories or other published compilations, generally used and relied upon by the public or by persons in particular occupations are included in this category. A newspaper article is not the type of compilation covered by this exception.

Statements in Learned Treatises, Periodicals or Pamphlets – FRE 803(18)
A statement contained in a treatise, periodical or pamphlet if:

a) The statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination, and
b) The publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit.

In *Snyder v Comm'r*, 93 TC 529 (1989) quotations from books and articles were inadmissible because the books and articles were neither relied upon nor referred to by an expert, and they were not established as reliable authority by any expert.

Reputation Concerning Personal or Family History – FRE 803(19)
Reputation among members of his or her family by blood, adoption or marriage, or among his or her associates, or in the community concerning a person's birth, adoption, marriage, divorce, death legitimacy, or similar facts about his or her family or personal history is a hearsay exception.

Reputation Concerning Boundaries or General History – FRE 803(20)
Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located is a hearsay exception.

Reputation as to Character – FRE 803(21)
Reputation of a person's character among his or her associates or in the community is a hearsay exception. The reputation or character evidence must otherwise be admissible for this exception to apply.

In *Johnson Ford, Inc v Comm'r*, 54 TCM 881 (CCH) the court admitted testimony of the special agent who spoke with business and personal acquaintances of an officer who indicated the officer had a reputation for being extremely frugal. It found that "evidence as to the reputation of an individual among his associates or in the community at large is excepted from the hearsay rule."

Judgment of Previous Conviction – FRE 803(22)
Evidence of a final judgment if

a) The judgment was entered after a trial or upon a guilty plea (but not a plea of nolo contendere);

b) The conviction was for a crime punishable by death or by imprisonment for more than a year;
c) The evidence is admitted to prove any fact essential to the judgment; and
d) When offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.

The pendency of an appeal may be shown, but does not affect admissibility.

This must be a final judgment to be usable. In *Burgo v Comm'r* (69 TC 729) the taxpayer was convicted in a Municipal court for receiving support from the earnings of a prostitute. The taxpayer appealed the conviction, which was vacated by the Superior court. The respondent was unable to use the conviction in the Tax Court trial.

Judgment as to Personal, Family, or General Boundary – FRE 803(23)
Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation is admissible. Prior judgments are thought to be at least as trustworthy as reputation evidence. This matter does not arise frequently in practice.

EXCEPTIONS TO THE RULE AGAINST HEARSAY – WHEN THE DECLARANT IS UNAVAILABLE – FRE 804
Some hearsay exceptions can only apply when the declarant is unavailable. This suggests that these statements may have a higher degree of unreliability than those that can be used regardless of whether the declarant is available to testify.

'Unavailable' Defined – FRE 804(a)
A declarant is considered to be unavailable if the declarant is;
1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;
2) refuses to testify about the subject matter despite a court order to do so;
3) testifies to not remembering the subject matter;
4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness or mental illness; **or**
5) is absent from the trial or hearing and statement's proponent has not been able, by process or other reasonable means, to procure:
   A) the declarant's attendance, in the case of a hearsay exception under FRE 804(b)(1) or (6); or
   B) the declarant's attendance or testimony, in the case of a hearsay exception under FRE 804(b)(2),(3) or (4).

But NOT if the statement's proponent procedure or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

The following instances meet the unavailable test:
- Declarant refused to testify on constitutional grounds;

- Declarant is beyond the powers of the court;
- Declarant is of advanced age, bad health, or at a distance from the place of trial;
- Declarant fails to remember facts; **and**
- good faith efforts were made to locate the declarant, but the whereabouts remained unknown at the time of trial.

MEMORY TOOL: PRIMA
What makes a witness unavailable:

P - Privilege – exempted due to privilege
R - Refusal to testify – even when ordered by the court
I - Ill or dead – too sick to testify or is dead
M - Memory – testifies to a lack of memory
A - Absent – and the proponent cannot procure attendance

Remember, the proponent cannot do anything to make the witness unavailable.

Former Testimony – FRE 804(b)(1)
Testimony that:

A. Was given as a witness at a trial, hearing or lawful deposition, whether given during the current proceeding or a different one; and
B. Is now offered against a party who had – or in a civil case, whose predecessor in interest had – an opportunity and similar motive to develop it by direct, cross, or redirect examination.

Former testimony is admissible if the party against whom it is offered had an opportunity and similar motive to develop the declarant's testimony. This exception does not apply if the declarant is available as a witness.

In *Foster v Comm'r*, 80 TC 34, an accountant's deposition taken at a state court proceeding was filed with the Tax Court. The accountant was dead (surely "unavailable" under any definition). The taxpayer argued there was no similar motive to develop the accountant's testimony; the court ruled there was similar motive because the tax consequences of the accountant's services were an issue in both the state court and the Tax Court proceeding.

Admissibility of evidence is not based on the quality of the evidence, such as whether the witness is credible or whether the answers are specific. In *Haeri v Comm'r* 56 TCM 1061 (CCH) a witness's deposition was admissible even though the witness failed to bring certain financial records to the deposition and gave only vague answers.

Statement Made under Belief of Imminent Death – FRE 804(b)(2)
Regardless of whether death actually occurs, a statement made while believing death was imminent, concerning the cause or circumstances of what he or she believed to be impending death, is a hearsay exception.

Statement Against Interest – FRE 804(b)(3)
A statement that:

A) A reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary 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; and
B) Is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

The statement must only satisfy one of the conditions to be admissible. In *Petti v Comm'r,* 59 TCM 1062 (CCH) the respondent determined that the taxpayer had income from a gambling operation. The respondent called another participant in the gambling operation, who was not able to testify successfully. The respondent offered into the evidence the witness's grand jury testimony; petitioner objected because the witness was granted immunity, and so the testimony did not subject him to criminal liability. The court allowed the evidence in because it was both contrary to the witness's pecuniary interests and would also subject him to civil liability, which rendered the testimony admissible. If the statement does not meet one of the conditions, it is inadmissible.

These statements were admissible:

- statement at a criminal trial that the declarant attempted to induce another to pay a bribe and an admission that he did not report profit from the scheme for tax purposes;
- two sworn statements executed during the criminal investigation of the taxpayer wherein the declarant admitted to lying to the Service about loaning funds to the taxpayer;
- statement that the declarant converted another's funds to his own use;
- statement that the declarant assisted in the preparation of a false Form 1099;
- testimony of special agent as to payments made to him by declarant regarding allegedly illegal kickback payments.

A **statement against interest** seems similar to an admission, but there are important differences:

- Declaration against interest requires the declarant to be unavailable. An Admission does not require the declarant be unavailable.
- Declaration against interest is a statement of a non-party that is against his or her interest when made. An Admission is a statement of a party in the current case, and need not be against interest when made.

Statement of Personal or Family History – FRE 804(b)(4)
A statement concerning the declarant's own birth, adoption, marriage or similar fact of personal or family history is not hearsay, even if the declarant has no way to acquire personal knowledge of the matter stated.

Statement … Against a Party That Wrongfully Caused … Unavailability – FRE 804(b)(6)
A statement offered against a party that wrongfully caused, or acquiesced in wrongfully causing, the declarant's unavailability as a witness, and did so intending that result.

MEMORY TOOL: DAFT
The four primary hearsay exceptions that apply only if the declarant is unavailable include:

D- Dying Declarations – made while believing death is imminent, even if it does not occur
A - Against interest declarations – at the time the statement is made
F – Family and Personal history statements – own birth, marriage, etc.
T – Testimony, former – in a former hearing or deposition, under oath, opportunity and motive to develop the testimony when it was given

MEMORY TOOL: BAD SPLITS PEPPI
All the important hearsay exceptions can be remembered by this mnemonic. Although the Tax Court exams won't ask you to create this list, perhaps it will assist you in remembering the hearsay exceptions. Use it if you find that helpful in your studies:

B – **Business** records
A – **Admission** (opposing party)
D – Dying declaration

S – **Spontaneous** statements (excited utterance/present sense impression)
P – **Past** recollection recorded
L – **Learned** treatise
I – **Interest**, declaration against
T – **Testimony**, former
S – **State** of mind or condition

P – **Public** records
E – **Equivalency** (catch-all)
P – **Prior** inconsistent statement
P – **Prior** consistent statement
I – **Identification**

Technically the last three are defined in the FRE as non-hearsay.

HEARSAY WITHIN HEARSAY – FRE 805
For hearsay within hearsay to be admissible, each statement, or part of the statement, must come within an exception to the hearsay rule. If one out-of-court statement offered for its truth contains another such out-of-court statement, each layer must be separately examined. Justification for admissibility of each statement is required or the entire statement is not admissible.

Example: the custodian of a business record can introduce an entry made by his or her employer who recorded a statement made by the defendant that "the goods I sold were not up to our usual quality." The entry is a business record and the statement is an admission; both parts are admissible so the entire statement is admissible.

In *Shriver v Comm'r* (85 TC 1) the respondent made a determination based on a DEA report that contained statements made by a government informant and a statement allegedly made by the taxpayer to the informant. Because the report was inadmissible, the taxpayer's alleged statements to the informant were also inadmissible.

Other multiple hearsay examples:

- letters which contained a statement based on statements made by another person;
- a newspaper article that contained a statement attributed to another party;
- a paragraph in a memorandum relating to notes from a conversation with another individual.

ATTACKING AND SUPPORTING THE DECLARANT – FRE 806

A declarant, of either a hearsay statement or a statement defined by the FRE as non-hearsay, may have his or her credibility attacked by any evidence that is admissible for that purpose if the declarant testified as a witness. The declarant's bias, prejudice, interest, prior conviction of a crime, evidence of character and conduct, or inconsistent statements may be shown. Similarly, once the declarant's credibility is attacked, he or she may be rehabilitated to the same extent as if he or she were a witness.

Evidence of the declarant's prior inconsistent statement or conduct may be introduced regardless of whether the witness was given an opportunity to explain or deny the prior statement or conduct.

If a declarant is called as a witness, the party against whom the hearsay statement was admitted can treat the declarant as if he or she is under cross-examination. This permits the use of leading questions under FRE 611(c).

RESIDUAL EXCEPTION - FRE 807

Under the following conditions, a hearsay statement is not excluded by the rule against hearsay even if the statement is not admissible under a hearsay exception in FRE 803 or 804:

1) the statement is supported by sufficient guarantees of trustworthiness – after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement; and
2) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.

The statement is admissible only if the proponent gives an adverse party reasonable notice of the intent to offer the statement – including its substance and the declarant's name – so that the party has a fair opportunity to meet it. The notice must be provided in writing before the

trial or hearing – or in any form during the trial or hearing if the court, for good cause, excuses a lack of earlier notice.

In these situations, the court found the proposed statement had equivalent circumstantial guarantees of trustworthiness:

- grand jury testimony allowed into evidence during the taxpayer's criminal trial;
- affidavit by a declarant who was a disinterested person under no pressure to sign the affidavit when the signing was witnessed by an independent third person and corroborated by other evidence;
- private offering memorandum.

The court found no equivalent circumstantial guarantees of trustworthiness in these instances:

- affidavit supporting the taxpayers' position and a directly contradictory affidavit supporting the respondent's position, both given by the accountant who prepared the taxpayers' income tax returns, who was 88 years old, frail, and in failing health;
- affidavit taken without the opportunity for confrontation or cross-examination;
- affidavits are not admissible if the affiants are available to testify;
- transcript of an interview of the taxpayer's accountant taken by respondent's investigators or agents without presence of the taxpayer's attorney, when the declarant was not cross-examined;
- special agent's report of his interview with a contractor from whom the taxpayer was extorting payments;
- letters written at the taxpayer's behest when the taxpayer failed to establish that the authors of the letters had personal knowledge of the facts contained within the letters;
- testimony by special agents of the FBI;
- testimony by taxpayer-husband as to statements made to him by taxpayer-wife.

The general purpose of the rules of evidence and the interest of justice must be served by admitting the statement into evidence.

ANALYZING HEARSAY

Many statements are hearsay and still admissible under the FRE. The problem of analyzing hearsay is determining first whether a statement is hearsay, and then whether any of the exclusions or exceptions apply. To determine if a statement is inadmissible hearsay or not, it must be analyzed on several levels:

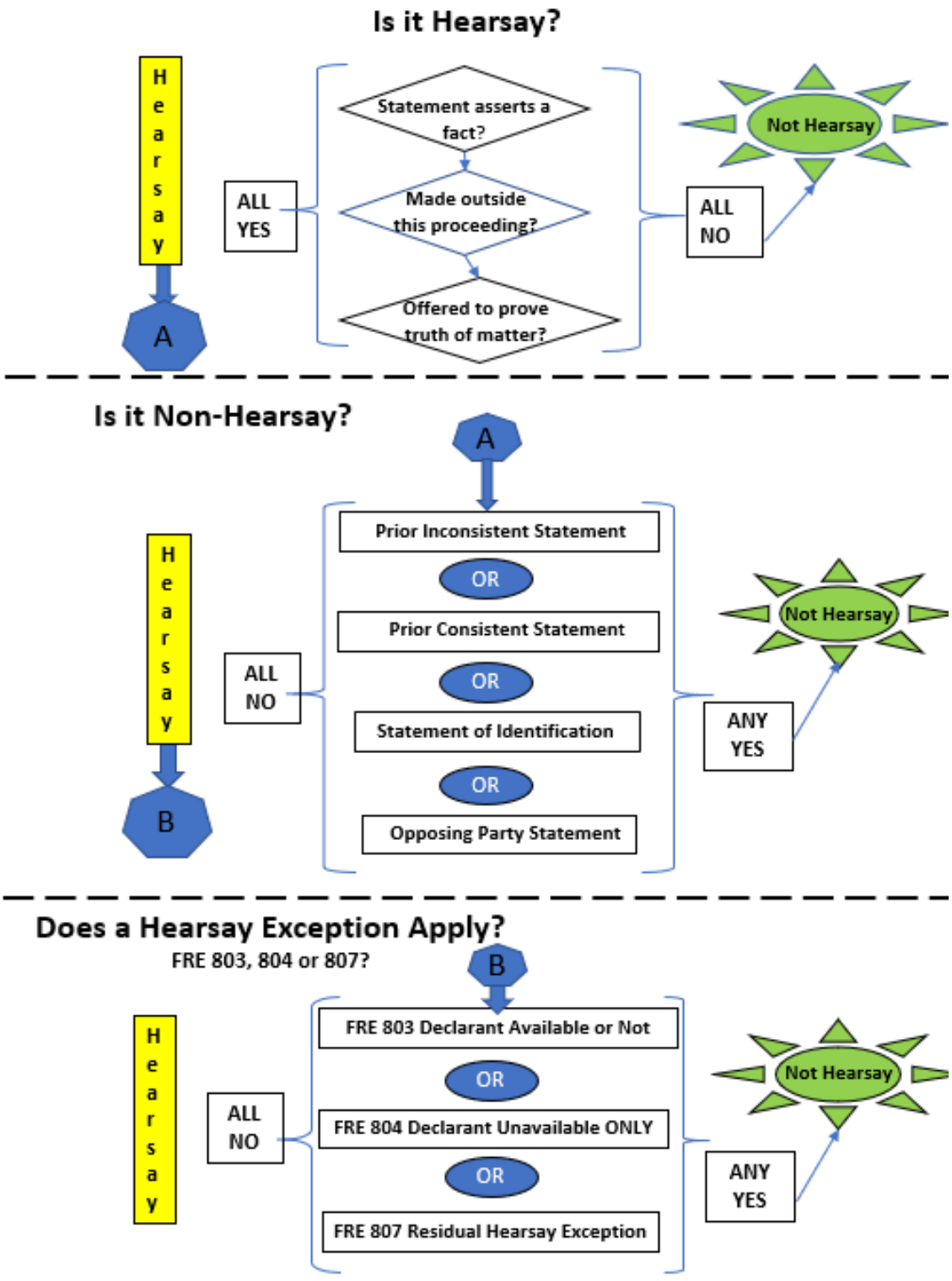
- Is it an **out-of-court statement** under FRE 801(a)? - if not, it's not hearsay
  - either a written or oral assertion, **or**
  - nonverbal conduct, but intended to be an assertion?

- Who is the **declarant**? Remember the declarant is the person **making** the statement, not the witness presently testifying.
  - Is the declarant a party to the case?
    - The statement of a **party** offered against him by his **opponent** is admissible as an admission.
    - The statement of a **non-party** is inadmissible, unless covered by a hearsay exception.

- Why is the statement offered?
  - Is it **offered to prove the truth of the matter**? If so, it is hearsay.
  - If it is not offered to prove truth, it is non-hearsay.
    - Words with legal significance apart from their truth, including:
      - tortious words – the actual words of slander or libel in defamation actions.
      - transactional words – the actual words of offer and acceptance in a contract, or the words of intent in a donative transfer, sale, will or deed.
      - verbal facts – words that accompany ambiguous physical actions. Their legal significance is independent of their truth. Examples include statements intended to show notice, knowledge, motive or good faith that bear on present or subsequent conduct.
    - Prior statements to impeach or rehabilitate – statements of witnesses offered merely to challenge credibility or to show perjury, regardless of their truth, are non-hearsay.
    - Effect on listener's state of mind – statements offered to prove a relevant attitude, belief, or intent of either the declarant or the listener are admissible circumstantially as non-hearsay.

- Apply the hearsay exclusions and exceptions, if possible, to determine whether the statement is admissible hearsay, inadmissible hearsay, or non-hearsay.

IS IT HEARSAY? CHART



IS IT HEARSAY? CHART EXPLANATION

Remember that hearsay relates to admissibility of evidence – if it is hearsay, the statement is not allowed in as evidence. If it is either not hearsay or falls under an exemption or exemption, it will be allowed into evidence. The chart may help you see that relationship more quickly.

Is it Hearsay?

YES: If it is hearsay, all these conditions must apply: it must be a statement that asserts a fact, that was made outside this proceeding, and offered to prove truth of the matter. If so, it is hearsay, and not admissible (at least not yet). Move to A to see if it is defined as non-hearsay.

NO: If these do not all apply it is **not hearsay, and it is admissible**.

A: Is Non-Hearsay?

Is it a prior inconsistent statement?

If it is the declarant-witness prior statement, given under penalty of perjury at a trial, hearing or other proceeding or in a deposition, and it is inconsistent with what is now being said, it is not hearsay.

Is it a prior consistent statement?

If it is the declarant-witness's prior statement and it is consistent with testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or a motive in so testifying, it is not hearsay.

If it is used to rehabilitate the declarant's credibility as witness when attacked on another ground, it is not hearsay.

Is it a statement of identification?

If it is the declarant-witness's prior statement and identifies a person as someone the declarant perceived earlier, it is not hearsay.

Is it an opposing party statement?

If it is the party's statement and is offered by the opponent, it is not hearsay.

This may be a statement made by the party or an agent or representative, or one adopted by the party, or one made by a co-conspirator during and in furtherance of the conspiracy.

YES: if any of these apply, it is **defined as not hearsay and it is admissible.**

NO: If these do not apply it is **still hearsay and move to B (exceptions) to see if it will be admissible**.

B: Does a Hearsay Exception Apply under FRE 803, FRE 804 or 807?

FRE 803 doesn't matter if Declarant is Available or Unavailable

Including … present sense impression, excited utterance, then existing mental/emotional/physical condition, statement made for medical diagnosis or treatment, recorded recollection, record of a regularly conducted activity, absence of a regularly conducted activity, public records, absence of a public record, vital statistics, records of religious organizations, certificates of marriage/baptism and similar ceremonies, family records, records of documents that affect an interest in property, statements in documents that affect an interest in property, statements in ancient documents, market reports and similar commercial publications, statements in learned treatises, periodicals or pamphlets, reputation concerning personal or family history, reputation concerning boundaries or general history, reputation concerning character, judgment of a previous conviction, judgments involving personal/family or general history or a boundary

FRE 804 requires the Declarant is Unavailable (because of privilege, refuses to testify, ill, memory issues, absent from trial and can't procure their attendance)

Including … Former testimony, statement under belief of imminent death, statement against interest, statement of personal or family history, statement offered against a party that wrongfully caused the declarant's unavailability

FRE 807 residual exception may allow it

Even if the statement is not covered under FRE 803 or 804 if it has equivalent circumstantial guarantees of trustworthiness, it is offered as evidence of a material fact, it is more probative on point for which it is offered than other evidence that the proponent can obtain through reasonable efforts, and admitted it will best serve the purposes of these rules and the interests of justice.

YES: if any of these apply, it is **hearsay, but admissible under an exemption.**

NO: If these do not apply it is **still hearsay and is not admissible evidence**.

HEARSAY EXCEPTIONS SYNOPSIS

SOURCE OF THIS SYNOPSIS: "Hearsay Exceptions: Thirty-One Flavors" chart in Learning Evidence by Deborah Jones Merritt and Ric Simmons, page 464

Rule 801(d): Exemptions (not hearsay)
Prior statement by witness
Statement of opposing party

Rule 803: Availability of Declarant Varies
Present sense impression
Excited utterance
Then-existing mental, emotional or physical condition
Statement made for medical diagnosis/treatment
Recorded recollection
Records of a regularly conducted activity
Absence of a record of a regularly conducted activity
Public records
Public records of vital statistics
Absence of a public record
Records of religious organizations concerning personal or family history
Certificates of marriage, baptism, etc.
Family records
Records of documents that affect an interest in property
Statements in documents that affect an interest in property
Statements in ancient documents
Market reports and similar commercial publications
Statements in learned treatises, periodicals or pamphlets
Reputation concerning personal or family history
Reputation concerning boundaries or general history
Reputation concerning character
Judgment of a previous conviction
Judgments involving personal, family or general history or a boundary

Rule 804: Declarant Unavailable
Former testimony
Dying declaration
Statement against interest
Statement of personal or family history
Statement offered against a party that wrongfully caused the declarant's unavailability

Rule 807: Residual Exception
Other statements having equivalent circumstantial guarantees of trustworthiness

AUTHENTICATION AND IDENTIFICATION – FRE ARTICLE IX

To be admitted, evidence must be authenticated with proper foundation.

AUTHENTICATING OR IDENTIFYING EVIDENCE – FRE 901

To authenticate or identify an item of evidence the proponent must produce sufficient evidence to support a finding that the item is what the proponent claims it is. Authentication helps to establish the relevance and genuineness of evidence, but it doesn't mean there can't or won't be challenges to either of those items. The threshold for establishing authenticity is very low – the proponent must just introduce evidence to suggest a finding that the item is what the proponent says it is. Some evidence may require some type of extrinsic information to be authenticated while other evidence is self-authenticating.

The rule applies to documents, records, or other physical things described in testimony and/or offered into evidence. A document is not admissible simply because it has been authenticated; all potential objections to admissibility, such as hearsay and relevance, also must be met satisfactorily.

Even after it is authenticated,
the evidence must still be relevant and not be hearsay before it is admitted.

TESTIMONY OF A WITNESS WITH KNOWLEDGE

Physical objects can be authenticated by a witness with personal knowledge showing familiarity with the item, by distinctive markings or characteristics, or by chain of custody evidence.

NONEXPERT OPINION ABOUT HANDWRITING

An expert on handwriting can testify whether the handwriting belongs to an individual, as long as someone other than the expert first authenticates the samples used. However, expert witnesses are not the only ones who can authenticate handwriting. A lay witness may testify to the genuineness of handwriting, as long as the familiarity with the handwriting was not acquired for purpose of the litigation. The judge can also make a comparison, as long as authenticated writing specimens are used.

It is not necessary to have an expert authenticate handwriting.
It can be authenticated by anyone familiar with the person's handwriting,
or even by the judge who is using authenticated writing samples.

COMPARISON BY AN EXPERT WITNESS OR THE TRIER OF FACT

A comparison with an authenticated specimen by an expert witness or the trier of fact.

DISTINCTIVE CHARACTERISTICS AND THE LIKE

Authentication can offer with the appearance, contents, substance and other distinctive characteristics of the item when taken together with all the circumstances.

OPINION ABOUT A VOICE

Voice identification, whether heard first hand or through mechanical or electronic transmission or recorded, can be authenticated by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

A witness may authenticate a voice by testifying about personal familiarity with the voice, if the witness has a reasonable basis for recognizing and identifying the speaker. Personal familiarity with a voice can be used to authenticate voices heard in telephone calls as well as in other instances.

EVIDENCE ABOUT A TELEPHONE CONVERSATION

Telephone conversations can be authenticated by evidence that a call was made to the number then assigned by the telephone company to a particular person or business, if:

- in the case of a person, circumstances, including self-identification, show that the person answering is the one who was called.
- in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

  Example: W testifies that she looked up the phone number for XY's Tax Service, dialed it, and that the person who answered said "This is XY." That is sufficient to identify the speaker on the telephone as being XY.

EVIDENCE ABOUT A PUBLIC RECORD

Authentication can occur with evidence the document was recorded or filed in a public office as authorized by law, or the purported public record or statement is from the office where items of this kind are kept.

EVIDENCE ABOUT ANCIENT DOCUMENTS OR DATA COMPILATIONS

Evidence must be provided that it is in a condition without suspicion about its authenticity, it was in a place where it would be if authentic, and it is at least 20 years old when offered.

EVIDENCE ABOUT A PROCESS OR SYSTEM

Authentication occurs when evidence describes the process and shows that it produces an accurate result.

METHODS PROVIDED BY A STATUTE OR RULE

Any method of authentication or identification allowed by a federal statute or a rule prescribed by the Supreme Court.

EVIDENCE THAT IS SELF-AUTHENTICATING – FRE 902

Some documents are self-authenticating and do not require extrinsic evidence of their authenticity. A document is not admissible simply because it has been self-authenticated; the objections to admissibility, such as hearsay and relevance, must also be satisfied.

Documents that are self-authenticating include:

- domestic public documents under seal – documents bear a seal and a signature that is an attestation or execution, and domestic public documents not under seal – documents purport to bear a signature in the official capacity of an officer or employee, if the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine,
- certified copies of public records and official publications issued by public authority.
- newspapers and periodicals,
- trade inscriptions and the like – inscriptions, signs, tags or labels purported to be affixed during the course of business and indicating ownership, control or origin
- acknowledged or notarized documents (testimony by the subscribing witness is not necessary to authenticate a writing unless so required by the laws of the jurisdiction that governs validity of the writing),
- commercial paper and related documents,
- Certified domestic records of a regularly conducted activity (shown by certification of the custodian or another qualified person). The proponent must give an adverse party reasonable written notice of the intent to offer the record before the trial or hearing, and must make the record and certification available for inspection so the party has a fair opportunity to challenge them, **and**
- Certified foreign records of a regularly conducted activity for which the certification must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty. The same advance notice requirements as for the domestic records must also be met.

In *Cualfield v Comm'r* (66 TCM 710 (CCH)) the taxpayer objected to introducing a document that was filed in his divorce proceeding. The document bore the official seal of a circuit court and a stamped certificate of true copy that was purported to be signed by a deputy clerk of the circuit court. Because the document contained the official seal and the signature, it was self-authenticating as a certified copy of a public record; there was no requirement to also certify the deputy clerk's authority.

Similarly, a certified copy of an opinion rendered by the Michigan court of appeals, an employment card certified by the city that maintained the card, a foreign letter, and a check were all self-authenticating. An unsigned promissory note is not self-authenticated.

SUBSCRIBING WITNESS'S TESTIMONY – FRE 903
A subscribing witness's testimony is necessary to authenticate a writing only if required by the law of the jurisdiction that governs its validity.

CONTENTS OF WRITINGS, RECORDINGS AND PHOTOGRAPHS – FRE ARTICLE X

DEFINITIONS – FRE 1001
Writings and Recordings – FRE 1001(A) and (B)
Writings and recordings include letters, words, numbers or their equivalent set down in any form.

If the parties to a contract prepare two copies of the agreement and sign each copy, both are considered an original.

A "recording" consists of letters, words, numbers, or their equivalent recorded in any manner.

Photographs – FRE 1001(C)
This category includes a photographic image or its equivalent stored in any form.

Originals – FRE 1001(D)
An original of a writing or recording means the writing or recording itself or any counterpart intended to have the same effect by the person who executed it. For electronically stored information "original" means any printout, or other output readable by sight, if it accurately reflects the information. An "original" of a photograph includes the negative or a print from it.

Duplicates – FRE 1001(E)
A duplicate means a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.

REQUIREMENT OF THE ORIGINAL – FRE 1002
Generally, an original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise.

The notion that to prove the content of a writing, recording or photograph, the original item must be produced is known as the '**best evidence rule**.' The rule only applies when the contents of a writing are at issue:

- if a witness without personal knowledge introduces contents of a document into evidence as proof of what it says.

  Example: the witness introduces a receipt to provide proof of payment.

- where the content of the writing itself has legal effect.

Example: defamatory writings and recordings, a contract, will or deed where the document is the subject of the lawsuit all have legal effect.

- when the **witness's testimony relies upon the writing** rather than personal knowledge.

Example: testimony based on the findings of an x-ray, letter, recording or other document. The underlying writing usually is hearsay and is itself inadmissible unless it falls within an exception.

The best evidence rule does **not** apply when the contents are not an issue because no original is required:

- personal knowledge is used to prove an event, such as when first hand testimony rather than the record of the event is used to prove the content of the record.

  Example: a buyer of goods may testify she paid for them without showing a receipt.

- If there is no writing, there is no requirement for an original and no best evidence rule.
- where the contents of a physical object are an issue; physical objects, including the inscription on a tombstone (hearsay exception for family records) are not within the best evidence rule, unless the item can easily be brought into court and the exact wording is necessary to the case.
- where the writing is collateral to a controlling issue; under FRE 1004 secondary evidence is allowed where the fact in issue is not material to the litigation.

Admissibility of Duplicates – FRE 1003
A duplicate is admissible to the same extent as the original unless a genuine question is raised as to the authenticity or continuing effectiveness of the original, **or** under the circumstances it is unfair to admit the duplicate in lieu of the original.

Photocopies are considered duplicates but documents that are hand-copied from an original are not.

In *Petito v Comm'r* (80 TCM 771 (CCH)) the taxpayer offered into evidence an unsigned copy of the tax return and a timely election. The respondent objected because neither was the original or an exact duplicate. The court held the documents were admissible because the taxpayer testified he copied the return and election prior to signing them, and since the original were filed with the IRS it made no sense to expect the taxpayer to have the original return.

ADMISSIBILITY OF OTHER EVIDENCE OF CONTENT – FRE 1004
The original is not required and other evidence of the content of a writing, recording, or photograph is admissible if:

1) all the originals are lost or destroyed, and not by the proponent acting in bad faith;

2) the original cannot be obtained by any available judicial process;
3) the party against whom the original would be offered had control of the original, was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or
4) the writing, recording or photograph is not closely related to a controlling issue.

In *Brodsky v Comm'r* (82 TC Memo 505 (CCH)) the taxpayer offered into evidence worksheets prepared by an IRS employee from the taxpayer's various bank accounts from information summonsed by the IRS. The respondent objected on the basis of the best evidence rule, but the taxpayer argued that since IRS was in control of the original documents he should be able to use secondary evidence. The court blocked admission under Rule 1004(c) but permitted them under Rule 1007, which allows an adverse party's writings into evidence in lieu of the originals.

Secondary evidence has been admitted in these situations:

- to determine if stock is §1244 stock, when the bankruptcy court destroyed the original official corporate records, and a diligent search was made for copies of the destroyed records, and there was no bad faith on the taxpayer's part;
- to determine whether the taxpayer had unreported income, and copies of the bank statements had been lost, the revenue agent's testimony and work papers were allowed;
- to determine when the taxpayer was entitled to a loss, reconstructed receipts of expenses incurred by taxpayer with respect to his business when the taxpayer established the records loss was not due to his bad faith;
- to determine whether taxpayer executed Form 872, Consent to Extend the Time to Assess Tax, when the IRS could not provide the original and the taxpayer could not produce a copy the IRS was permitted to rely on secondary evidence.

MEMORY TOOL: LOUC
When the original is not required:

L = lost or destroyed, not due to proponent's action in bad faith
O = opponent's possession, who does not produce them
U = unobtainable, by any available judicial process
C = collateral matters

COPIES OF PUBLIC RECORDS TO PROVE CONTENT – FRE 1005
Contents of an official record, including documents authorized to be recorded, may be proved by certified copy or testimony of witness who compared it with the original. If no such copy can be obtained by reasonable diligence the proponent may use other evidence to prove the content.

SUMMARIES TO PROVE CONTENT – FRE 1006
Summaries of voluminous writings, records, or photographs may be presented if the originals cannot be conveniently examined in court. However, the originals or duplicates must be

available for examination or copying by other parties at a reasonable time and place before the trial. The Court may order the proponent to produce them in court.

The purpose of this rule is to make presentation of facts more convenient and meaningful to the court. To be admissible however, the summary must be based on documents that are admissible in evidence and that were made available to the opposing party for inspection. If the summary goes beyond the scope of a chart, summary or calculation, it will not be admitted into evidence.

To lay the foundation for introduction of summary evidence the proponent must establish:

- the originals exist;
- the originals would be admissible in evidence;
- the originals are so voluminous it would be inconvenient to bring them into court for examination,
- the witness reviewed the originals;
- the witness was qualified to review the originals and prepare the summary;
- the witness prepared the chart, summary or calculation to be offered into evidence, **and**
- the exhibit is a fair and accurate summary of the underlying information.

Voluminous materials may be summarized,
but originals must be available for examination and copying.
Proper foundation must be laid for the summary to be admitted.

In *Brodsky* (82 TCM 505 (CCH)) worksheets prepared by an employee of the IRS were not admissible by the taxpayer as a summary. Only 25 entries were at issue, and the taxpayer failed to establish that 25 entries were voluminous and could not be conveniently examined in court.

The following items have been admissible as summaries:

- calendar compiled from notes taken contemporaneously with the events that listed 75 sales appointments or seminars and numerous payments allegedly made in the course of the taxpayer's activities;
- summary of 3 years of checking activity;
- schedules and summary of the taxpayer's income and cost of goods sold relating to real estate sold that were derived from bank collection records, warranty deeds, and copies of agreements-for-deed;
- schedule estimating the value of inventory that was based on papers pertaining to the business.

TESTIMONY OR STATEMENT OF A PARTY TO PROVE CONTENT – FRE 1007

Contents of writing, records or photographs can be proved by the testimony or deposition of the party against whom offered, or by his written admission, without accounting for the

original. This rule provides an exception to the best evidence rule by allowing an adverse party's testimony, deposition or written admission to prove the contents of the document in lieu of the document.

FUNCTIONS OF THE COURT AND JURY – FRE 1008

The Trier of Fact, the judge at a Tax Court proceeding, must determine whether the proponent has fulfilled the factual conditions for admitting other evidence of the writing, recording or photograph under FRE 1004 or 1005, including:

a) whether an asserted writing, recording or photograph ever existed,
b) whether another one produced at the trial is the original, **or**
c) whether other evidence of contents accurately reflects the contents.

MISCELLANEOUS RULES – FRE ARTICLE XI

The rules apply to the courts and proceedings as shown. A federal statute or rule prescribed by the Supreme Court may provide for admitting or excluding evidence independently from these rules.

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102 – Purpose
103 – Rulings on Evidence
104 – Preliminary Questions
105 – Limiting Evidence that is Not Admissible Against Other Parties or for Other Purposes
106 – Remainder of or Related Writings or Recorded Statements

JUDICIAL NOTICE – ARTICLE II
201 – Judicial Notice of Adjudicative Facts

PRESUMPTIONS – ARTICLE III
301 – Presumptions in Civil Cases Generally
302 – Applying State Law to Presumptions in Civil Cases

RELEVANCY AND ITS LIMITS – ARTICLE IV
401 – Test for Relevant Evidence
402 – General Admissibility of Relevant Evidence
403 – Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time or Other Reasons
404 – Character Evidence; Other Crimes, Wrongs or Acts
405 – Methods of Proving Character
406 – Habit; Routine Practice
407 – Subsequent Remedial Measures
408 – Compromise Offers and Negotiations
409 – Offers to Pay Medical and Similar Expenses
410 – Pleas, Plea Discussions, and Related Statements
411 – Liability Insurance
412 – Sex Offense Cases; Relevance of Victim's Sexual Behavior or Predisposition
413 – Similar Crimes in Sexual Assault Cases
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415 – Similar Acts in Civil Cases Involving Sexual Assault or Child Molestation

PRIVILEGES – ARTICLE V
501 – Privileges in General
502 – Attorney-Client Privilege and Work Product; Limitations on Waiver

WITNESSES – ARTICLE VI
601 – Competency to Testify in General
602 – Need for Personal Knowledge
603 – Oath or Affirmation to Testify Truthfully
604 – Interpreter
605 – Judge's Competency as a Witness
606 – Juror's Competency as a Witness
607 – Who May Impeach a Witness
608 – A Witness's Character for Truthfulness or Untruthfulness

609 – Impeachment by Evidence of a Criminal Conviction
610 – Religious Beliefs or Opinions
611 – Mode and Order of Examining Witnesses and Presenting Evidence
612 – Writing Used to Refresh a Witness's Memory
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701 – Opinion Testimony by Lay Witnesses
702 – Testimony by Expert Witnesses
703 – Basis of an Expert's Opinion Testimony
704 – Opinion on an Ultimate Issue
705 – Disclosing the Facts or Data Underlying an Expert Opinion
706 – Court-Appointed Expert Witnesses

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801 – Definition that Apply to This Article; Exclusions from Hearsay
802 – The Rule Against Hearsay
803 – Exceptions to the Rule Against Hearsay – Regardless of Whether the Declarant is Available as a Witness
804 – Exceptions to the Rule Against Hearsay – Regardless of Whether the Declarant is Unavailable as a Witness
805 – Hearsay Within Hearsay
806 – Attacking and Supporting the Declarant's Credibility
807 – Residual Exception

AUTHENTICATION AND IDENTIFICATION – ARTICLE IX
901 – Authenticating or Identifying Evidence
902 – Evidence that is Self-Authenticating
903 – Subscribing Witness' Testimony

CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS – ARTICLE X
1001 – Definitions that Apply to this Article
1002 – Requirement of the Original
1003 – Admissibility of Duplicates
1004 – Admissibility of Other Evidence of Content
1005 – Copies of Public Records to Prove Content
1006 – Summaries to Prove Content
1007 – Testimony or Statement of a Party to Prove Content
1008 – Functions of the Court and Jury

MISCELLANEOUS RULES – ARTICLE XI
1101 – Applicability of the Rules
1102 – Amendments
1103 - Title

APPENDIX B – SUMMARY MOST COMMONLY USED FRE IN TAX COURT

Source also: Appendix, Summary of Most Commonly Used Rules of Evidence, page 273, Larson, Joni, A Practitioner's Guide to Tax Evidence

Source: Appendix B, Tax Lawyer, Vol 57, No 2, page 531 (article by Joni Larson, displayed in the Bibliography)

Introduction of document at trial:

- offer document to the trial clerk to mark for purpose of identification
- authenticate document
- allow opposing party to examine document
- offer document into evidence
- obtain ruling from judge on admissibility

Offer of proof (Rule 103(a)(1):

- state what the evidence would be
- state the purpose that would be served by admitting the evidence
- if the court has stated the evidence is inadmissible, state why it is admissible
- attach document (or excluded portion) as part of the trial record

Judicial notice (Rule 201): Fact must be either:

- generally known in the community; or
- capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned

Relevancy (Rule 401, 402):
Evidence must tend to show the existence of any *fact* is more or less probable

Offer in compromise (Rule 408): Evidence of an offer in compromise is in admissible if

- made in settlement negotiations;
- intended to prove liability for or invalidity of a claim or amount; and
- not otherwise discoverable

Refreshing recollection of witness (Rule 612):

- mark document (even if document will not be offered into evidence)
- show document to the witness
- ask witness to read the document silently
- have the witness set the document aside
- ask the witness if the document refreshes his memory
- have the witness testify from refreshed memory

Requirement of original (Rule 1002) (Best Evidence Rule):
When a writing's terms are in issue, the proponent must either:

- produce an original or duplicate; or
- both excuse the non-production of the original and present an admissible type of secondary evidence

Hearsay (Rule 801(c)):
Hearsay is

- an oral or written assertion;
- made out of court; and
- offered to prove the truth of the matter asserted

Exceptions to Hearsay – availability of declarant immaterial (Rule 803)

- present sense impression
- then existing mental, emotional or physical condition
- recorded recollection – establish:
  - the witness had personal knowledge of the fact or event;
  - the witness prepared or adopted a record of the event;
  - the record of the event was made while the event was fresh in the witness's memory;
  - the witness can assure that the record prepared was accurate; and
  - at trial the witness cannot completely and accurately testify even after reviewing the record
- business records – establish through affidavit or testimony of custodian or other qualified witness the record was:
  - made at or near the time of the transaction or event;
  - made by, or based on, information transmitted from a person with knowledge;
  - kept in the course of a regularly conducted business activity, and
  - made as part of the regular practice of that business activity
- public records and reports

Exception to hearsay – declarant unavailable (Rule 804):

- former testimony,
- statement against interest

Residual exception to hearsay (Rule 807):
Establish that

- the statement is not covered by any of the other hearsay exceptions;
- the statement has circumstantial guarantees of trustworthiness equivalent to that of the enumerated exceptions;
- the statement is offered as evidence of a material fact;
- the statement is more probative on the point for which it is offered than any other that can be procured through reasonable efforts;
- the general purposes of the rules and the interests of justice will be served by the admission of the statement into evidence; and
- the adverse party has been given notice in advance of trial of the intent to offer the statement

APPENDIX C – COMMON TERMS DEFINED

Adverse party: party against whom the evidence is offered.

Best evidence rule: when proving the terms of a writing where the terms are material, the original writing must be produced unless it can be shown to be unavailable for some reason other than the serious fault of the proponent.

Burden of proof: two distinct burdens of proof, that of product and of persuasion. Burden of production must come forward with evidence – of persuasion, must actually persuade the judge based on that evidence that the fact or evidence is true. In Tax Court burden of proof is met to the **preponderance** of the evidence.

Crimen falsi: element of dishonesty or false statement (perjury, false statement, criminal fraud, embezzlement, filing false tax returns, etc.).

Declarant: person who made the statement, including one who testified at a prior trial or proceeding, whose testimony is now being offered at the current trial.

Examination: process of questioning witnesses

> **Direct**: the party who calls the witness does direct examination.
> **Cross examination**: the adverse/opposing party then examines the witness, including impeachment. The scope is considered to be of direct plus impeachment.
> **Re-direct**: calling party has the opportunity to examine the witness again, but usually limited to rebutting points made on cross (what is brought out on cross exam).
> **Re-cross**: cross examining side has a brief opportunity to re-cross, limited to rebutting the effect of re-direct.

Expert witness: must have specialized knowledge that will help the trier of fact understand the evidence or determine a fact in issue – the witness must be qualified, the testimony must be based on sufficient facts or data, on the basis or reliable principles and methods, and the expert must reasonably apply the methods and principles to the facts of the case. Expert's opinion may be based on evidence that would otherwise be inadmissible if the expert can reasonably rely on these kinds of facts or data.

Habit: regular response to a repeated situation.

Hearsay: out of court statement offered in evidence to prove the truth of the matter asserted.

Inconsistent statement: must be inconsistent with current testimony now offered.

Impeachment: calls into question the testimony offered by attacking credibility of the witness (bias, prior inconsistent statement, bad character, capacity).

Judicial notice: saves time and allows the judge to recognize adjudicative facts that are generally known and capable of immediate and accurate verification.

Lay witness: an ordinary (non expert) witness must have firsthand knowledge to testify.

Leading question: the question suggests the answer, generally not permitted except on cross examination and in certain other situations.

Offer in compromise: an offer to settle (not the typically OIC we think of in collection representation)

Recorded recollection: witness memory is not refreshed. Witness once knew and cannot now testify fully and accurately. The writing was made or adopted by the witness when it was fresh. The record is read into evidence and may be offered as an exhibit ONLY if offered by an adverse party.

Refresh recollection: if witness can't testify from memory, any document or written memo may be used to refresh memory. Witness must be able to continue testimony after document is put away. The document is not admitted as an exhibit and it does not need to be admissible. Opposing counsel has the ability to see the item and use it for cross examination if it is shown at trial.

Relevant evidence: has any tendency to make a fact more or less probable. All relevant evidence is admissible, but not all relevant evidence is admitted.

Statement: words or conduct intended to be an assertion.

Testimony: what a witness says under oath.

Vicarious: transaction within agent's authority.

Witness: person who is currently testifying.

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