Themis
Bar Review
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LAW SCHOOL ESSENTIALS:

EVIDENCE

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EVIDENCE

I. PRESENTATION OF EVIDENCE

With some exceptions, the Federal Rules apply to all civil and criminal proceedings before United States district courts, courts of appeal, Bankruptcy Court, and Claims Court, and in proceedings before United States magistrates. Fed. R. Evid. 1101(a).

The Federal Rules, except for the rules on privilege, do not apply to:

i) The court's determination of a preliminary question of fact governing admissibility (*see* § I.A.1.a. Judge, *infra*);

ii) Grand jury proceedings; and

iii) Criminal proceedings for the following purposes:

a) The issuance of a search or arrest warrant or a criminal summons;

b) A preliminary examination in a criminal case;

c) Extradition or rendition;

d) Consideration of bail or other release;

e) Sentencing; and

f) Granting or revoking probation or supervised release.

Fed. R. Evid. 1101(c), (d).

A. INTRODUCTION OF EVIDENCE

1. Role of Judge and Jury

In a jury trial, the jury is traditionally the trier of fact and the judge the trier of law.

a. Judge

The trial judge generally decides **preliminary questions** regarding the admissibility of evidence, whether privilege exists, and whether a person is qualified to be a witness. The court is not bound by the Federal Rules in deciding these questions, except with respect to privileges, and it may consider otherwise inadmissible evidence. Fed. R. Evid. 104(a). With respect to preliminary questions, the party offering the evidence ordinarily bears the burden to persuade the trial judge by a preponderance of the evidence. *Bourjaily v. United States*, 483 U.S. 171 (1987) (confession of co-conspirator as admission of party opponent); *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993) (expert opinion); Rule 702, Notes of Advisory Committee (2000).

Hearings on preliminary matters must be conducted outside the presence of the jury when the hearing involves the admissibility of confessions, when a defendant in a criminal case is a witness and so requests, or when justice requires it. Fed. R. Evid. 104(c).

b. Jury

A party has the right to present evidence (e.g., bias) that is relevant to the weight and credibility of other evidence (e.g., the testimony of a witness). Once evidence

has been admitted, it is the role of the jury to determine the **weight and credibility** of the evidence. Fed. R. Evid. 104(e).

2. Challenge to Evidence Ruling

A party may challenge an evidentiary ruling as erroneous only if the ruling affects a substantial right of a party, and the party notifies the judge of the error. There are two ways to call the court's attention to the error—objection and offer of proof. Fed. R. Evid. 103(a). (Note: While the judge in a jury trial must permit a party to challenge the court's ruling, the judge must also conduct the trial to the extent practicable so that inadmissible evidence is not suggested to the jury. Fed. R. Evid. 103(d).)

a. Objection to admission of evidence

If the ruling **admits** evidence, a party must make a timely **objection** or motion to strike and must usually state the specific ground for the objection or motion in order to preserve the admissibility issue for appeal. A party is not required to state the ground if it is apparent from the context. Fed. R. Evid. 103(a)(1).

b. Offer of proof for exclusion of evidence

If the ruling **excludes** evidence, a party must make an **offer of proof** in order to preserve the evidence for appellate review of the ruling. An offer of proof is an oral or written explanation of the relevance and admissibility of the evidence made on the record. The court may direct that an offer of proof be made in question-and-answer form. An offer of proof is not necessary if the substance of the evidence is apparent from the context. Fed. R. Evid. 103(a)(2),(c).

c. Consequence of a definitive ruling

Once a judge has made a definitive ruling on the admissibility of evidence, a party need not renew an objection or offer of proof, even if the ruling was made before the trial began. Fed. R. Evid. 103(b).

d. Plain error rule

A plain error is one that is obvious to a reviewing court. A plain error that affects a substantial right is grounds for reversal, even if no objection or offer of proof was made. Fed. R. Evid. 103(e). A court may take notice of a plain error to prevent a miscarriage of justice or to preserve the integrity and the reputation of the judicial process.

3. Limited Admissibility

Evidence may be admissible for one purpose but not for another (e.g., for impeachment but not substantive purposes), or against one party but not against another. In these cases, if a party makes a timely request, the court must restrict the evidence to its proper scope and instruct the jury accordingly. Fed. R. Evid. 105.

4. Completeness Rule

Under the rule of completeness, when a party introduces part of a writing or recorded statement, an adverse party may compel the introduction of an omitted portion of the writing or statement if, in fairness, it should be considered at the same time, such as when the omitted portion explains or clarifies the admitted portion. This rule also applies to a separate writing or recorded statement that relates to the introduced writing or recorded statement, such as the original letter when the reply letter has been introduced. Fed. R. Evid. 106. The rule of completeness does not require the admission of irrelevant portions of a statement. *United States v. Kopp*, 562 F.3d 141 (2d Cir. 2009).

Timing of introduction of omitted evidence: While the rule of completeness permits an adverse party to compel the immediate introduction of evidence during the presentation of related evidence, the rule does not ***require*** the adverse party to do so. The adverse party may instead choose to present the omitted evidence subsequently, such as during cross-examination.

5. Judicial Notice

Judicial notice is the court's acceptance of a fact as true without requiring formal proof. The Federal Rules only address judicial notice of adjudicative facts, which are the facts of the case at hand—those that relate to the parties and their activities, and that typically are decided by the jury. The Federal Rules do not apply to judicial notice of legislative facts, which are policy facts related to legal reasoning and the lawmaking process. Fed. R. Evid. 201.

Example (adjudicative fact): A witness testifies that an accident happened on a Saturday. The accident report indicates that the accident happened on July 21, 2007. Whether July 21, 2007, was indeed a Saturday is an adjudicative fact.

Example (legislative fact): A judge must decide whether to recognize an exception to the common-law marital privilege. The fact that allowing the exception would undermine the sanctity of marriage is a legislative fact.

a. Facts subject to judicial notice

Not all adjudicative facts are subject to judicial notice. Judicial notice may be taken of an adjudicative fact only if it is **not subject to reasonable dispute** because (i) it is **generally known** within the territorial jurisdiction of the trial court, or (ii) it can be **accurately and readily determined** from sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b).

1) Generally known facts within jurisdiction

A fact does not need to be known by everyone to be "generally known"; it must only be well known within the community. Fed. R. Evid. 201(b).

Example: A judge could take judicial notice that a bank provides a checking account customer with a monthly account statement. *Kaggen v. IRS*, 71 F.3d 1018 (2d Cir. 1995).

Despite being termed "judicial notice," a judge may not take notice of a fact based solely on his own personal knowledge.

Example: A judge could not take judicial notice of informal judicial procedures for the issuance of court orders within a jurisdiction. *Switzer v. Coan*, 261 F.3d 985 (10th Cir. 2001).

2) Accurately and readily determined facts

A fact that can be accurately and readily determined need not be generally known as long as it can be determined from a source whose accuracy cannot be reasonably questioned, such as a geographic and historical fact obtained from a respected reference source.

Example: A judge could take judicial notice of the state's statutory rate for post-judgment interest in determining the appropriate interest rate for pre-judgment interest. *Fox v. Kane-Miller Corp.*, 398 F. Supp. 609 (D. Md. 1975).

Contrast: A judge could not take judicial notice of information about a company found on the company's website, because such information is often

self-serving and subject to puffery. *Victaulic Co. v. Tieman*, 499 F.3d 227 (3d Cir. 2007).

b. Procedure

A court may take judicial notice at any time during a proceeding, including on appeal, whether upon request of a party or by the court's own initiative. Note, however, that a court may not take judicial notice against a criminal defendant for the first time on appeal. *U.S. v. Jones*, 580 F.2d 219 (6th Cir. 1978). If a party makes a request and the court is supplied with the necessary information, then the court must take notice of the fact. Fed. R. Evid. 201(c), (d).

1) Party's opportunity to be heard

When a party makes a timely request, the judge must give the party an opportunity to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. This right to be heard exists even if the court has taken judicial notice of a fact before notifying the party. Fed. R. Evid. 201(e).

2) Instructing the jury

a) Civil case

In a civil case, the jury must be instructed to accept the noticed fact as **conclusive**. Fed. R. Evid. 201(f).

b) Criminal case

In a criminal case, the jury must be instructed that it **may or may not accept** any judicially noticed fact as conclusive. Fed. R. Evid. 201(f).

B. MODE AND ORDER OF PRESENTATION OF EVIDENCE

1. Trial Process

A trial traditionally begins with the plaintiff's/prosecutor's case-in-chief, followed by the defendant's case, followed by the plaintiff's/prosecutor's rebuttal.

a. Judicial control of process

Subject to the evidentiary rules, a party is generally free to present evidence in the manner and order that the party feels is most effective. The order of the witnesses and presentation of the case, however, are within the discretion of the court, in order to effectively determine the truth, avoid wasting time, and protect witnesses from harassment. Fed. R. Evid. 611(a).

b. Judicial presentation of evidence

A judge may question, or even call, a witness. If the judge calls a witness, all parties may cross-examine that witness. A party objecting to the judge's calling or interrogation of a witness may wait to object until the next opportunity when the jury is not present. Fed. R. Evid. 614.

2. Examination of Witness

A party who calls a witness may examine the witness subject to the evidentiary rules. Another party may then cross-examine that witness.

a. Scope of cross-examination

The scope of cross-examination generally is limited to the subject matter of the direct examination and the credibility of the witness; however, the court may allow inquiry into additional matters. Fed. R. Evid. 611(b).

b. Additional examination

After cross-examination, the party who called the witness may engage in redirect examination, ordinarily to reply to any significant new matter raised on cross-examination. Recross-examination is also generally permissible with respect to significant new matters brought up during redirect examination. For both redirect and recross, the court has discretion to permit inquiry into other matters.

c. Examination of a defendant

The Fifth Amendment privilege against self-incrimination protects a defendant in a criminal case from being compelled to testify. A defendant in a criminal case who testifies as to a preliminary question, such as the voluntariness of the defendant's confession, has not opened himself up to cross-examination on other issues in the case. Fed. R. Evid. 104(d).

d. Motions to strike

During trial testimony, objections should be made after an improper question is asked but before the witness responds. If it is the witness's answer that makes the testimony improper (i.e., unresponsive to the question, hearsay, etc.), counsel should move to strike the answer as inadmissible.

EXAM NOTE: Unresponsive answers are only subject to motions to strike by the examining counsel.

3. Form of Questions

a. Leading questions

1) Direct examination

On direct examination of a witness, a leading question—that is, a question that suggests the answer within the question—generally is not permitted. Fed. R. Evid. 611(c).

Example: The question "Didn't you start the fire at 10:00?" suggests when the person being questioned started the fire. In contrast, the question "When did you start the fire?" does not suggest the answer.

a) Exceptions

A leading question is permitted on direct examination when it is necessary to develop the witness's testimony. For example, a leading question is usually permitted to elicit preliminary background information that is not in dispute. In addition, a leading question is typically permitted on direct examination of a witness who has difficulty communicating due to age or a physical or mental condition. Finally, when a party calls a witness who is likely to be antagonistic, such as an adverse party or a person associated with an adverse party, or a witness who presents adverse testimony (i.e., a hostile witness), even if such testimony is unanticipated, then the party ordinarily is permitted to use leading questions.

2) Cross-examination

There is generally no restriction on the use of leading questions during cross-examination. Fed. R. Evid. 611(c). If questions concerning matters beyond the subject matter of the direct examination are permitted, however, those inquiries must be made as if on direct examination. Fed. R. Evid. 611(b). The use of leading questions may also be restricted when the cross-examination is one of form rather than fact, such as when a party is cross-examined by his own lawyer after having been called as a witness by an opposing party. Fed. R. Evid. 611, Notes of Advisory Committee on Rules.

b. Improper questions

1) Compound question

A question that requires answers to multiple questions is compound and is not permitted.

Example: "Didn't you leave the house at 7:00, lock the door behind you, get in your car, and drive away?" (A "no" answer could mean that the witness did not leave at all, left at a time other than 7:00, did not lock the door, etc.)

2) Assumes facts not in evidence

A question that assumes as true facts that have not been established is not permitted.

Example: "When did you stop beating your wife?" (The question assumes that the witness is married and used to beat his wife. If neither fact has been established, this question is objectionable.)

3) Argumentative

A question that is intended to present an argument, rather than elicit a factual response, is not permitted.

Example: "It sounds like you are just not the kind of person that the jury should trust, doesn't it?"

4) Calls for a conclusion or opinion

A question that requires the witness to draw a conclusion or state an opinion that he is not qualified to make is not permitted.

Example: "How did your mother feel after you told her the news?" (The witness cannot know how her mother felt and would have to give an opinion to answer the question.)

5) Repetitive

The repetition of a question that has been asked and answered is generally not permitted, although judges may allow some repetition, particularly on cross-examination.

4. Exclusion of Witnesses

At a party's request or upon the court's own initiative, the court must exclude witnesses from the courtroom so that they do not hear the testimony of other witnesses.

Some witnesses, however, may not be excluded under this rule, including:

i) A party who is a natural person;

ii) An officer or employee of a party that is not a natural person, after the individual has been designated as the party's representative by its attorney, including a police officer in charge of the investigation in a criminal case;

iii) A person whose presence is essential to a party's presentation of its case; or

iv) A person, such as a victim, whose presence is permitted by statute.

Fed. R. Evid. 615. Note that a victim may be excluded if the court determines, by clear and convincing evidence, that the victim's testimony would be materially altered by the victim hearing other testimony. 18 U.S.C. § 3771.

C. BURDENS AND PRESUMPTIONS

1. Burden of Proof

The burden of proof comprises two distinct burdens: the burden of production and the burden of persuasion.

a. Burden of production

The party with the burden of production (or burden of going forward) must produce legally sufficient evidence as to each element of a claim or defense, so that a reasonable trier of fact could infer that the alleged fact has been proved. In meeting this burden, a plaintiff or prosecutor has made a **prima facie** case. Failure to meet this burden can result in a directed verdict against the party bearing the burden. The determination of whether it has been met rests with the court. The burden of production may shift during trial.

Example: In a negligence action in which the plaintiff produces uncontroverted evidence of the defendant's negligence, the defendant who does not have an affirmative defense bears the burden of producing evidence that challenges the case made by the plaintiff.

b. Burden of persuasion

The burden of persuasion (or standard of proof) is the degree to which legally sufficient evidence must be presented to the trier of fact. For example, in a civil case, this burden usually lies with the plaintiff to prove the allegations in the complaint and with the defendant to prove any affirmative defenses. This burden does not shift. Typically, determination of whether it has been met rests with the trier of fact.

1) Civil standards

The standard in most civil cases is a **preponderance of the evidence.** A fact is proven by a preponderance of the evidence if it is more likely to exist than not.

A higher standard used in some civil cases (such as fraud) is **clear and convincing evidence.** Under this standard, the existence of a fact must be highly probable or reasonably certain.

2) Criminal standard

In criminal cases, the prosecution must prove each element of a crime **beyond a reasonable doubt** to overcome the defendant's presumption of innocence. *In re Winship*, 397 U.S. 358 (1970).

2. Presumptions

A presumption is a conclusion that the trier of fact is required to draw upon a party's proof of an underlying fact or set of facts (i.e., basic facts). A rebuttable presumption may be overcome by evidence to the contrary; a conclusive presumption may not.

Example: A presumption arises that a person is dead when a party establishes that the person has been missing and not heard from for more than seven years.

Example: A presumption arises that a letter has been received by the intended recipient when the sender places a properly addressed, stamped envelope into an outgoing mailbox.

a. Rebuttable

A rebuttable presumption shifts the burden of production, but not the burden of persuasion, to the opposing party. Under the "bursting bubble" approach followed by the Federal Rules in a civil case, a presumption "bursts" (i.e., no longer has a preclusive effect) after the introduction of sufficient evidence by the opposing party to sustain a contrary finding. If no contrary evidence is introduced, the judge must instruct the jury to accept the presumption. If contrary evidence is introduced, the burden of persuasion remains on the party who had it originally. While the presumption no longer has preclusive effect after the introduction of contrary evidence, a judge may instruct the jury that it may, but is not required to, draw the conclusion (e.g., a person is dead) from the basic facts (e.g., the person has been missing for seven years). Fed. R. Evid. 301.

Limitation: The "bursting bubble" approach does not apply when a federal statute or another Federal Rule of Evidence, such as Federal Rule 302 (*see* § c. Diversity cases, *below*), provides otherwise.

b. Conclusive

Conclusive (or irrebuttable) presumptions are treated as rules of substantive law and may not be challenged by contrary evidence, no matter how strong the proof. One example is the presumption in some states that a child under the age of four lacks the ability to form the intent necessary to commit an intentional tort; no evidence to the contrary is permitted to disprove this assumption.

c. Diversity cases

In a federal diversity action, the federal court generally applies the Federal Rules to determine the resolution of evidentiary issues. However, when state substantive law is determinative of the existence of claim or defense under the *Erie* doctrine, then state law, rather than the Federal Rules, also governs the effect of a presumption related to the claim or defense. Fed. R. Evid. 302.

3. Destruction of Evidence

In general, the intentional destruction of evidence relevant to a case raises a presumption or inference that such evidence would have been unfavorable to the party that destroyed the evidence. To be entitled to such an inference, the alleged victim of the destruction of the evidence must establish that (i) the destruction was intentional, (ii) the destroyed evidence was relevant to the issue about which the party seeks such inference, and (iii) the alleged victim acted with due diligence as to the destroyed evidence. The presumption that arises from the destruction of evidence is rebuttable.

II. RELEVANCE

A. GENERAL CONSIDERATIONS

As a rule, evidence must be relevant to be admissible, and all relevant evidence is admissible unless excluded by a specific rule, law, or constitutional provision. Fed. R. Evid. 402. Evidence is relevant if:

i) It has any tendency to make a fact more or less probable than it would be without the evidence (i.e., **probative**); and

ii) The fact is of consequence in determining the action (i.e., **material**).

Irrelevant evidence is generally inadmissible. Fed. R. Evid. 401.

Sufficiency Distinguished: To be relevant, evidence need not, by itself, establish an element that a party must prove (e.g., the death of an individual in a homicide prosecution) or serve to refute such an element (e.g., a defendant's lack of a duty in a negligence action). The test of sufficiency of a party's evidence focuses on all evidence submitted by a party and admitted by the court. By contrast, under the test of relevancy, evidence is admissible even if it is only a single brick that is part of a wall of evidence establishing a party's position. Fed. R. Evid. 401, Notes of Advisory Committee, referring to Professor McCormick's famous statement, "A brick is not a wall."

1. Direct and Circumstantial Evidence

a. Direct evidence

Direct evidence is identical to the factual proposition that it is offered to prove. An eyewitness who testifies that she saw the defendant kill the victim is an example of direct evidence that the defendant committed a homicide.

Conviction without direct evidence: There is no rule that requires the presentation of direct evidence in order to convict a defendant. In other words, a defendant can be convicted solely upon circumstantial evidence.

b. Circumstantial evidence

Evidence that tends to indirectly prove a factual proposition through inference from collateral facts is circumstantial. An eyewitness who testifies that, moments before entering a room, she heard a shot, and upon entering the room saw the defendant standing over the body of the victim holding a smoking gun is circumstantial evidence that the defendant committed a homicide.

Compare direct evidence: While it is sometimes said that direct evidence is better than circumstantial evidence, circumstantial evidence may have greater probative value. For example, testimony as to the identity of a thief based on a fleeting glimpse by an eyewitness with poor vision may not be as persuasive as testimony that the stolen item was found in the defendant's home.

2. Exclusion of Relevant Evidence

Relevant evidence may be excluded if its probative value is **substantially outweighed** by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence. This exclusion is often denominated by the applicable rule; that is, it is referred to as a "Rule 403" exclusion. Fed. R. Evid. 403. In determining the probative value of evidence, the court should consider the availability of other evidence to establish the same fact. *Old Chief v. United States*, 519 U.S. 172 (1997) (court abused discretion in permitting prosecution to introduce record of judgment of a prior conviction, which

identified the specific offense and the punishment imposed on the defendant when defendant offered to stipulate to the fact of that conviction).

Matter of degree: Evidence may be admissible even if the danger of prejudice or other factors outweigh the probative value, so long as the danger does not do so **substantially.**

3. Relevance Dependent on Existence of Fact

When the relevance of evidence depends upon whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof is introduced later. Fed. R. Evid. 104(b). In making its determination that sufficient evidence has been introduced, the court must examine all of the evidence and decide whether the jury could reasonably find the conditional fact by a preponderance of the evidence; the court itself is not required to find that the conditional fact exists by a preponderance of the evidence. *Huddleston v. United States*, 485 U.S. 681 (1988).

4. Admission of Inadmissible Evidence—Curative Admission

When a court erroneously admits evidence, the court may permit the introduction of additional inadmissible evidence to rebut the previously admitted evidence. Known as a curative admission, such evidence can be admitted at the court's discretion when necessary to remove unfair prejudice. The failure of a party to object to the admission of the initial inadmissible evidence is one factor to be considered in determining whether the party was unfairly prejudiced by it. Curative admissions are generally used when a motion to strike or curative jury instruction would not suffice. *Nguyen v. Sw. Leasing & Rental, Inc.*, 282 F.3d 1061 (9th Cir. 2002); *United States v. Hall*, 653 F.2d 1002 (5th Cir. 1981); *Crawford v. United States*, 198 F.2d 976 (D.C. Cir. 1952).

5. Laying a Foundation

Various types of evidence are admissible subject to the existence of a necessary predicate (i.e., a foundation), such as the authentication of tangible evidence. The failure of the proponent of the evidence to establish that foundation may be challenged by an objection for lack of proper foundation.

B. CHARACTER EVIDENCE

Character evidence, which is generalized information about a person's behavior—such as information that the defendant is a criminal, a bad parent, or an inattentive driver—is generally inadmissible.

1. Civil Cases

a. Inadmissible to prove conforming conduct

In a civil case, evidence of a person's character (or character trait) generally is inadmissible to prove that the person acted in accordance with that character (or character trait) on a particular occasion. Fed. R. Evid. 404(a)(1).

Example: A plaintiff cannot introduce evidence that the defendant is a reckless driver to prove that the defendant drove recklessly on the day in question.

Evidence concerning past sexual assault or child molestation by a *defendant* in a case in which the claim for relief is based on the defendant's sexual misconduct is admissible. This includes evidence of specific acts. Fed. R. Evid. 415. Evidence concerning the past sexual behavior of a victim of sexual misconduct (e.g., rape) is admissible in limited circumstances (*see* § V.B.6. Sexual Conduct, *infra*).

b. Character at issue

Character evidence is admissible, however, when character is an **essential element** of a claim or defense, rather than a means of proving a person's conduct. Character is most commonly an essential element in defamation (character of the plaintiff), negligent hiring or negligent entrustment (character of the person hired or entrusted), and child-custody cases (character of the parent or guardian). Fed. R. Evid. 404(b); 405.

2. Criminal Cases

a. Defendant's character

1) By prosecution—defendant's bad character

In general, the same rule that applies in a civil action applies to the prosecution in a criminal case. The prosecution is not permitted to introduce evidence of a defendant's **bad character** to prove that the defendant has a **propensity** to commit crimes and therefore is likely to have committed the crime in question. Fed. R. Evid. 404(a)(1).

Example: A defendant is charged with brutally murdering his wife. The prosecution may not present evidence of the defendant's violent nature.

2) By defendant—defendant's good character

A defendant is **permitted** to introduce evidence of his **good character** as being inconsistent with the type of crime charged.

Example 1: A defendant is charged with brutally murdering his wife. The defendant may present evidence of his peaceable nature.

The defendant's character evidence must be pertinent to the crime charged.

Example 2: A defendant is charged with embezzling money from her employer. The defendant may not present evidence of her peaceable nature.

3) Defendant "opens the door"

Although the prosecution cannot introduce evidence of the defendant's bad character, the defendant makes his character an issue in the case if he offers evidence of his good character. When the defendant **"opens the door,"** the prosecution is free to rebut the defendant's claims by attacking the defendant's character. Fed. R. Evid. 404(a)(2)(A).

Defendant as witness: The defendant does not "open the door" to character evidence merely by taking the stand, but as a witness, the defendant is subject to impeachment.

In addition, the defendant "opens the door" for the prosecution to introduce evidence of his bad character by introducing evidence of the victim's bad character. The prosecution's evidence regarding the defendant must relate to the same character trait (e.g., violence) that the defendant's evidence about the victim did. Fed. R. Evid. 404(a)(2)(A).

b. Victim's character

1) By defendant—victim's bad character

A criminal defendant may introduce reputation or opinion evidence of the alleged victim's character when it is relevant to the defense asserted. Fed. R.

Evid. 404(a)(2)(B). (Note: The introduction of evidence of the character of an alleged victim of sexual misconduct in a criminal case, however, is subject to significant limitations (*see* § V.B.6. Sexual Conduct, *infra*).)

Example: A defendant is charged with assault. The defendant may offer evidence of the alleged victim's character trait of violence to support a claim of self-defense by showing that the alleged victim was the aggressor.

2) By prosecution—victim's good character

Generally, the prosecution may offer rebuttal evidence of the alleged victim's good character only after the defendant has introduced evidence of the alleged victim's bad character. Fed. R. Evid. 404(a)(2)(B).

Example: A defendant is charged with assault. The defendant presents evidence of the alleged victim's character trait of violence to support a claim of self-defense. The prosecution may then rebut the defendant's evidence with evidence of the alleged victim's character trait of peacefulness. Note: The prosecution may also offer evidence of the defendant's character trait of violence.

In a homicide case, the prosecution may also offer evidence of the alleged victim's trait for peacefulness to rebut evidence that the alleged victim was the first aggressor. Fed. R. Evid. 404(a)(2)(C).

3. Methods of Proving Character

Proof of character, whether good or bad, offered by any party generally must be in the form of **reputation** testimony or **opinion** testimony. Reputation evidence is defined as a defendant's reputation in the community. "Community" includes people with whom the defendant engages on a regular basis. Fed. R. Evid. 405(a). For use of specific instances of conduct, *see* § II.C.2. Introduction of Specific Acts as Character Evidence, *infra*.

4. Impeachment

Character evidence is admissible for impeachment purposes. Character evidence about the witness may be introduced to show that the witness is not a person whose testimony should be believed. In such instances, the witness's character for untruthfulness is relevant. When permitted, the witness's testimony may be supported by testimony as to the witness's character for truthfulness. Fed. R. Evid. 404(a)(3). *See* § III.B. Impeachment, *infra*.

C. SPECIFIC (BAD) ACTS

In addition to general evidence of a person's character (or character trait), evidence of a specific act is not admissible to prove a person's character in order to show that the person acted in accordance with that character on a particular occasion. Fed. R. Evid. 404(b)(1).

Example 1: A driver is sued to recover for injuries inflicted on the plaintiff allegedly due to the driver's negligent failure to stop at a stop sign. The plaintiff cannot introduce testimony by a witness that the driver failed to stop at the same stop sign the day before the accident in question for the purpose of proving that the driver failed to stop at the stop sign on the day of the accident.

However, evidence of a person's conduct (e.g., other crime, wrongdoing, or act) is admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. Fed. R. Evid. 404(b)(2).

Example 2: A defendant is charged with murder. Evidence that the defendant was previously convicted of robbery is likely admissible if the murder victim was the prosecutor on the robbery case against the defendant. Such evidence establishes the defendant's motive for killing the victim.

MIMIC evidence: This type of evidence is sometimes referred to as "MIMIC" evidence (**M**otive, **I**ntent, absence of **M**istake, **I**dentity, or **C**ommon plan), but it is important not to treat this list as all-inclusive. Subject to the other restrictions on the admissibility of evidence (e.g., relevancy, Rule 403 exclusion), a defendant's bad act may be introduced for any purpose so long as that purpose is not to prove that, because the defendant had a propensity to commit crimes, the defendant committed the charged crime.

EXAM NOTE: While Rule 404(b) refers to the "accused," the "prosecution," and a "criminal case," it does so only in the context of a notice requirement. The admissibility standards of Rule 404(b) remain fully applicable to both civil and criminal cases.

1. Advance Notice

When a criminal defendant requests, the prosecution must provide reasonable notice of the general nature of such evidence that the prosecution intends to offer at trial. Such notice must generally be given before trial, but it can be given during trial when the court, for good cause, excuses the lack of pretrial notice. Fed. R. Evid. 404(b)(2).

2. Introduction of Specific Acts as Character Evidence

a. Civil cases

When character evidence is admissible as evidence in a civil case (e.g., evidence that is an essential element of a claim or defense), it may be proved by specific instances of a person's conduct as well as either by testimony about the person's reputation or by testimony in the form of an opinion. Fed. R. Evid. 405(b).

b. Criminal cases

Generally, when character evidence is admissible as evidence in a criminal case (e.g., evidence of good character introduced by the defendant), specific instances of a person's conduct are not admissible. Character must be proved by either reputation or opinion testimony. Fed. R. Evid. 405(a).

Non-propensity use: When a defendant's bad act is not used to show the defendant's criminal propensity but for another purpose (e.g., motive, identity), such instance of conduct may be admissible for that purpose.

Essential element of the crime charged: When character or a character trait is an essential element of the crime charged, the defendant may introduce relevant specific acts inconsistent with the crime. Fed. R. Evid. 405(b).

c. Cross-examination of character witness

When a character witness is cross-examined, the court may allow a party to inquire into specific acts committed by the person about whom the witness is testifying. Fed. R. Evid. 405(a).

Rule 403: Keep in mind that evidence of a bad act that is otherwise admissible is especially subject to challenge under Federal Rule 403, which permits the court to exclude evidence when its probative value is substantially outweighed by the danger of unfair prejudice, etc. (*see* § II.A.2. Exclusion of Relevant Evidence, *supra*).

D. HABIT EVIDENCE

Evidence of a **person's habit** or an **organization's routine** is admissible to prove that the person or organization acted in accordance with the habit or routine on a particular occasion. Unlike character evidence, which is a general description of a person's disposition, habit evidence indicates a person's particular routine reaction to a specific set of circumstances to the point of being **semi-automatic** in nature. *See Weil v. Seltzer*, 873 F.2d 1453, 1460–61 (D.C. Cir. 1989). The proponent has the burden of establishing that the evidence is inflexibly regular and proven by an adequate and representative sample. *Id.*

Example: A person drives the same route to work and parks in the same spot every day.

Habit evidence may be admitted without corroboration and without an eyewitness. Fed. R. Evid. 406.

III. WITNESSES

A. COMPETENCE

1. In General

Every person—except for the presiding judge and (in most instances) a juror in the case—is competent to be a witness if the person gives an oath or affirmation to testify truthfully, subject to the personal knowledge requirement for non-expert witnesses. Fed. R. Evid. 601. Issues raised regarding a witness' mental abilities, including the effect of drugs and alcohol on the witness' ability to perceive, recall, or recount a matter, as well the degree of certainty expressed by the witness about the matter, affect the credibility of the witness' testimony rather than the witness' competency to testify.

Common-law prohibitions on a witness's ability to testify (e.g., lack of religious belief, conviction of a crime) are inapplicable in proceedings governed by the Federal Rules. However, in a case in federal court, a witness' competency is determined by state law regarding a claim or defense for which state law supplies the rule of decision. Fed. R. Evid. 601.

a. Mental incapacity and immaturity

The Federal Rules of Evidence do not subject a witness who lacks mental capacity or maturity (e.g., a young child) to a special test of competency. However, a court may conduct an examination as to whether such a person has the ability to differentiate between truth and falsehood and understands the importance of the telling the truth. A person who is unable to understand the requirement to tell the truth is incompetent to be a witness. There is, however, no specific age at which a child possesses this understanding. *Wheeler v. United States*, 159 U.S. 523 (1895) (finding a five-year-old child competent to testify at a capital murder trial).

1) Abused child as a witness

Under federal law, a child, including a child who has suffered abuse or witnessed a crime, is rebuttably presumed to be competent to testify. If a court determines that a child in unable to testify in open court in the presence of the defendant in a proceeding involving an alleged offense against that child, the court may order that the child's testimony be taken by closed-circuit television. 18 U.S.C.S. § 3509.

2. Personal Knowledge

A non-expert witness must have personal knowledge of a matter to testify about that matter. Personal knowledge may be established by the witness' own testimony as well as through other means. Fed. R. Evid. 602.

a. Role of judge

In a jury trial, the judge must decide whether, based on the evidence, the jury could reasonably find that the witness possesses personal knowledge, i.e., the witness could and did perceive the matter about which the witness is testifying and can now recall and recount the matter. The judge is not required to find that the witness possessed personal knowledge. If the judge finds that sufficient evidence exists, the decision as to whether the witness had personal knowledge rests with the jury. Fed. R. Evid. 602, Notes of Advisory Committee (1972); 1 McCormick On Evid. § 62 Mental incapacity and immaturity: Oath or affirmation (8th ed.)

b. Hearsay evidence

A witness testifying as to hearsay (*see* VI.A. What is Hearsay, *infra*) must have personal knowledge as to the making of the statement but need not have personal knowledge of the matter asserted in the statement. Fed. R. Evid. 602, Notes of Advisory Committee (1972).

3. Oath or Affirmation

A witness must give an oath or affirmation to testify truthfully. The oath or affirmation must be in a form designed to impress that duty on the witness's conscience. Fed. R. Evid. 603. An interpreter must give an oath or affirmation to make a true translation. Fed. R. Evid. 604.

4. Judge as Witness

The presiding judge is absolutely barred from testifying as a witness in the trial. A party is not required to object in order to preserve the issue. Fed. R. Evid. 605.

5. Juror as Witness

a. At trial

A juror may not testify as a witness at trial in front of the members of the jury. If a juror is called to testify, the opposing party must be given the opportunity to object outside the presence of the jury. A juror may be called to testify outside the presence of the other jurors as to matters that occur during the trial, such as the bribery of a juror or a juror's failure to follow the court's instruction (e.g., discussing the case with family members). Fed. R. Evid. 606(a).

b. After trial—"no impeachment" rule

During an inquiry into the validity of a verdict, a juror generally may not testify about:

i) Any statement made or incident that occurred during the jury's deliberations (e.g., refusal to apply the court's instructions);

ii) The effect of anything upon that juror's, or any other juror's, vote; or

iii) Any juror's mental processes concerning the verdict.

Fed. R. Evid. 606(b).

1) Exceptions

A juror may testify about whether:

i) Extraneous prejudicial information was brought to the jury's attention (e.g., the circulation of a newspaper article not introduced into evidence about the trial and the defendant's guilt);

ii) An outside influence was improperly brought to bear on a juror (e.g., a threat on the life of a juror's spouse); or

iii) A mistake was made in entering the verdict onto the verdict form.

The mistake exception, item iii above, does not extend to mistakes about the consequences of the agreed-upon verdict. Fed. R. Evid. 606(b).

Grand jury: The same rule applies regarding a challenge to the validity of an indictment by a grand jury.

2) Right to an impartial jury

There is a constitutional right to an impartial jury in civil as well as criminal cases. U.S. Const. amend. VI; *Warger v. Shauers*, 574 U.S. 40 (2014). This right overrides the "no impeachment" rule when a juror makes a clear post-verdict statement that he relied on racial stereotypes or animus to convict a criminal defendant, and that the animus was a significant motivating factor in the juror's vote to convict. *Pena-Rodriguez v. Colorado*, 580 U.S. ___, 137 S. Ct. 855 (2017). However, this right does not override the "no impeachment" rule when a juror's post-verdict statement reveals that some jurors were under the influence of alcohol and drugs during the trial, *Tanner v. United States*, 483 U.S. 107 (1987), or that a juror failed to disclose a pro-defendant bias during voir dire. *Warger, supra.*

6. Dead Man's Statutes

At common law, a party with a financial interest in the outcome could not testify in a civil case about a communication or transaction with a person whose estate was party to the case and the testimony was adverse to the estate, unless there was a waiver. Dead Man's Statutes do not apply in criminal cases.

The Federal Rules do not include such a restriction, but most jurisdictions have adopted such "Dead Man's Statutes," which may be applicable in federal cases when state law applies (i.e., diversity cases).

a. Protected parties

The rationale of a Dead Man's Statute is to protect a decedent's estate from parties with a financial interest in the estate. Therefore, protected parties generally include an heir, a legatee, a devisee, an executor, or an administrator of an estate.

b. Disqualified witnesses

Any person directly affected financially by the outcome of the case may be disqualified as a witness under a Dead Man's Statute. A predecessor in interest to the party may be disqualified in order to prevent circumvention of the statute by transference of property to a relative or friend.

c. Interested person

A personal representative of the decedent or a successor in interest may also be protected under a Dead Man's Statute as an interested person.

d. Waiver

An interested person or protected party may waive the protection afforded by a Dead Man's Statute in several ways, including (i) failing to object to the introduction of testimony by a disqualified witness or (ii) introducing evidence of a conversation or transaction to which the statute applies.

B. IMPEACHMENT

A witness may be impeached by calling into question her credibility. Typically, a witness's testimony is challenged based on her character for untruthfulness, bias, ability to perceive or testify accurately, or prior statement that contradicts the witness's testimony at trial. Impeachment evidence may be presented through the witness's own testimony, by the testimony or another witness, or by other extrinsic evidence that contradicts the witness's testimony.

1. Who May Impeach a Witness

Any party, including the party that called the witness to testify, may attack the credibility of a witness. Fed. R. Evid. 607.

2. Witness's Character for Truthfulness

a. Reputation and opinion testimony

A witness's credibility may be attacked by testimony regarding the witness's character for untruthfulness. Generally, this testimony must be about the witness's **reputation** for having a character for untruthfulness or in the form of an **opinion** of the witness's character for untruthfulness. Fed. R. Evid. 608(a).

b. Truthful character evidence

The credibility of a witness may not be bolstered. Evidence of the truthful character of the witness is admissible only after the witness's character for truthfulness has been attacked. Evidence that impeaches the witness but does not specifically attack the witness's character for truthfulness, such as testimony that the witness is biased, does not constitute an attack. As with evidence regarding a witness's character for untruthfulness, evidence as to a witness's character for truthfulness is generally admissible only in the form of reputation or opinion testimony. Fed. R. Evid. 608(a).

c. Specific instances of conduct

Generally, a specific instance of conduct (e.g., lying on a job application) is not admissible to attack or support the witness's character for truthfulness. However, on cross-examination, a witness may be asked about specific instances of conduct if it is probative of the truthfulness or untruthfulness of (i) the witness or (ii) another witness about whose character the witness being cross-examined has testified. Fed. R. Evid. 608(b).

1) Limitations

The judge may refuse to allow such questioning of a witness under either Federal Rule 403 (the probative value is substantially outweighed by the danger of unfair prejudice) or Federal Rule 611 (protection of the witness from harassment or undue embarrassment). In addition, the lawyer who examines the witness must have a good-faith basis for believing that the misconduct occurred before asking the witness about it. *United States v. Davenport*, 753 F.2d 1460 (9th Cir. 1985).

2) Arrest

Because an arrest for misconduct is not itself misconduct, a witness may not be cross-examined about having been arrested solely for the purpose of impeaching the witness's character for truthfulness; however, the witness may be cross-examined about the underlying conduct that lead to the arrest. *See Michelson v. United States*, 335 U.S. 469 (1948).

3) Use of extrinsic evidence

When, on cross-examination, the witness denies a specific instance of conduct, extrinsic evidence is not admissible to prove that instance in order to attack or support the witness's character for truthfulness. This prohibition also bars references to any consequences that a witness may have suffered because of the conduct (e.g., suspension from a governmental job for improper personal use of governmental property). (An exception exists for criminal convictions, *see* § 3. Criminal Conviction, *below*.)

Note, however, that extrinsic evidence of specific conduct can be admissible to impeach the witness on other grounds, such as bias. Fed. R. Evid. 608(b), Notes of Advisory Committee (2003).

While a document is generally considered to be extrinsic evidence, *United States v. Elliott*, 89 F.3d 1360, 1368 (8th Cir. 1996), when the foundation for the document is established through the witness being impeached, it is possible that the document might be admissible to impeach the witness's character for truthfulness. Kevin C. McMunigal & Calvin W. Sharpe, *Reforming Extrinsic Impeachment*, 33 Conn. L. Rev. 363, 372–73 (2001).

4) Privilege against self-incrimination

By testifying on another matter, a witness does not waive the privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness. Fed. R. Evid. 608(b).

3. Criminal Conviction

A witness's character for truthfulness may be impeached with evidence that the witness has been convicted of a crime, subject to the limitations discussed below. It does not matter whether the conviction is for a state or federal crime. Fed. R. Evid. 609.

a. Crimes involving dishonesty or false statement

Subject to the 10-year restriction (*see below*), **any witness** may be impeached with evidence that he has been convicted of **any crime**—felony or misdemeanor—**involving dishonesty or false statement,** regardless of the punishment imposed or the prejudicial effect of the evidence. A crime involves dishonesty or false statement if establishing the elements of the crime requires proof (or admission) of an act of dishonesty or false statement, such as perjury, fraud, embezzlement, or false pretense. Crimes of violence, such as murder, assault, and rape, are not crimes involving dishonesty or false statement, even though the perpetrator acted deceitfully in committing the crime of violence. Fed. R . Evid. 609(a)(2).

b. Crimes not involving dishonesty or false statement

Subject to the 10-year restriction (*see below*), a conviction for a crime not involving fraud or dishonesty is admissible to impeach a witness only if the crime is

punishable by death or imprisonment for more than one year (typically, a felony). Fed. R. Evid. 609(a)(1).

1) Criminal defendant

When the witness is a criminal defendant, evidence of a felony conviction for a crime not involving dishonesty or false statement is admissible **only if** its probative value outweighs the prejudicial effect to that defendant. This stricter-than-usual balancing test gives extra protection to a criminal defendant who takes the stand in his own defense.

2) Other witnesses

For witnesses other than a criminal defendant, such evidence generally must be admitted. The court does have the discretion, however, to exclude the evidence when the party objecting to the impeachment shows that its probative value is **substantially outweighed** by its prejudicial effect (i.e., the Rule 403 standard).

c. Convictions more than 10 years old

If more than 10 years have elapsed since the conviction (or release from confinement, whichever is later), then evidence of the conviction is admissible only if:

i) The probative value of the conviction, supported by specific facts and circumstances, **substantially outweighs** its prejudicial effect; and

ii) The proponent gives an adverse party reasonable written notice of the intent to use such evidence so that the adverse party has a fair opportunity to contest the use of such evidence.

Fed. R. Evid. 609(b).

d. Effect of pardon

Evidence of a witness's conviction is not admissible if the conviction has been the subject of a pardon, annulment, or other action based on a finding of innocence. This rule also applies to an action based on a finding that the witness has been rehabilitated, provided that the witness has not been convicted of a later crime punishable by death or imprisonment in excess of one year (typically, a felony). Fed. R. Evid. 609(c).

e. Juvenile adjudications

Evidence of a juvenile adjudication is not admissible to impeach a defendant. When the witness is not the defendant, evidence of a juvenile adjudication can be used to impeach the witness's character for truthfulness only if:

i) It is offered in a criminal case;

ii) An adult's conviction for that offense would be admissible to attack the adult's credibility; and

iii) Admitting the evidence is necessary to fairly determine guilt or innocence.

Fed. R. Evid. 609(d).

Used to show bias: Under the Sixth Amendment Confrontation Clause, evidence of a witness's juvenile adjudication can also be used by a criminal defendant to impeach a witness's credibility by showing bias, such as when the witness's

juvenile adjudication could provide a motive for the witness to lie. *Davis v. Alaska*, 415 U.S. 308 (1974).

f. Manner of proof

Evidence of a prior conviction may be produced by way of an admission by the witness, whether during direct testimony or on cross-examination, as well as by extrinsic evidence (e.g., a record of the conviction). Fed. R. Evid. 609, Notes of Advisory Committee (1990).

g. Pendency of appeal

A witness's conviction may be used for impeachment purposes even if an appeal is pending. Evidence of the pendency is also admissible. Fed. R. Evid. 609(e).

4. Prior Inconsistent Statements

A witness's prior statement that is inconsistent with the witness's testimony at trial may be used to impeach the witness.

a. Disclosing the statement to the witness

A party who is examining a witness about the witness's prior statement is not required to show it or disclose its contents to the witness, but the statement must be shown, or its contents disclosed, to an adverse party's attorney upon request. Fed. R. Evid. 613(a).

b. Extrinsic evidence

Extrinsic evidence (i.e., evidence other than the witness's own testimony) of a witness's prior inconsistent statement may be introduced only if the witness is given the opportunity to **explain or deny** the statement, and the opposing party is given the opportunity to **examine the witness** about it. The witness's opportunity to explain or deny the statement need not take place before the statement is admitted into evidence.

1) Exceptions to the opportunity to explain

The opportunity to explain or deny a prior inconsistent statement does not apply when the statement (i) impeaches a hearsay declarant (*see* § 7. Impeachment of a Hearsay Declarant, *below*) or (ii) qualifies as an opposing party's statement under Rule 801(d)(2) (*see* § VI.B.2., Opposing Party's Statement, *infra*). In addition, this opportunity is not mandated if justice so requires it (e.g., statement discovered after witness becomes unavailable). Fed. R. Evid. 806, 613(b), incl Notes of Advisory Committee.

2) Collateral matter

At common law, extrinsic evidence of a prior inconsistent statement could not be used to impeach a witness regarding a collateral (i.e., irrelevant) matter; the questioning party was bound by the witness's answer. The federal rule does not specifically recognize this limitation, but the court may prevent the introduction of extrinsic evidence under Rule 403 (*see* II.A.2. Exclusion of relevant evidence, *supra*).

5. Bias or Interest

Because a witness may be influenced by his relationship to a party (e.g., employment), his interest in testifying (e.g., avoidance of prosecution), or his interest in the outcome of the case (e.g., receipt of an inheritance), a witness's bias or interest is always

relevant to the credibility of his testimony, and consequently, a witness may be impeached on that ground.

Although the Federal Rules do not expressly require that a party ask the witness about an alleged bias before introducing extrinsic evidence of that bias, many courts require that such a foundation be laid before extrinsic evidence of bias can be introduced.

6. Sensory Competence

A witness may be impeached by showing a deficiency in her testimonial capacities to perceive, recall, or relate information. This can be achieved by demonstrating that the witness is physically or mentally impaired, or through evidence of outside interference with the witness's abilities, such as thunder impeding the ability to hear or darkness impeding the ability to see.

7. Impeachment of a Hearsay Declarant

When a hearsay statement is admitted into evidence, the credibility of the declarant may be attacked (and, if attacked, supported) by any evidence that would be admissible if the declarant had testified as a witness. The declarant need not be given the opportunity to explain or deny any inconsistent statement or conduct, whether such statement or conduct occurred before or after the hearsay statement. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, then the party is entitled to examine the declarant on the statement as if under cross-examination. Fed. R. Evid. 806.

Similar impeachment treatment is accorded a nonhearsay statement made by a co-conspirator, agent, or authorized spokesperson for an opposing party that has been admitted into evidence.

8. Rehabilitation of a Witness

A witness who has been impeached may be "rehabilitated" by the introduction of rebuttal evidence by either party to support the witness's credibility. Rehabilitation may be accomplished by:

i) **Explanation** or clarification on redirect examination;

ii) Reputation or opinion evidence of his **character for truthfulness,** if the witness's character was attacked on that ground under Fed. R. Evid. 608(a); or

iii) A **prior consistent statement** offered to rebut an express or implied charge that the witness lied due to improper motive or influence.

Fed. R. Evid. 801(d)(1)(B).

9. Religious Opinions and Beliefs

Evidence of a witness's religious opinions or beliefs is not admissible to attack or support a witness's credibility. Fed. R. Evid. 610. However, such evidence may be admissible to show bias or interest, such as when the witness is affiliated with a church that is a party to a lawsuit.

10. Impeachment by Contradictory Evidence

A witness may be impeached by evidence that contradicts the witness's testimony. Impeachment may be by extrinsic evidence as well as by cross-examination.

Example: The plaintiff in a negligence action based on a car accident testifies that, due to the defendant's reckless driving, the plaintiff's car was damaged. The defense may introduce a record of an insurance claim filed by the plaintiff prior to the accident

for such damage due to another incident. Alternatively, the defense attorney may cross-examine the plaintiff about that claim.

11. Collateral Issues

While the Federal Rules do not explicitly prohibit impeachment on collateral issues, a court may refuse to admit evidence related to a collateral issue under the Rule 403 balancing test. Generally, a party may not impeach the credibility of a witness by introducing extrinsic evidence of a collateral matter. Instead, the party must accept the witness's testimony.

Example: A defendant is charged with assault. A prosecution witness testifies that the defendant assaulted the victim, who was wearing a plaid shirt. The defense may not call another witness to testify that the victim was wearing a striped shirt in order to establish the type of shirt that the victim was wearing.

C. RECOLLECTION REFRESHED

1. Present Recollection Refreshed

A witness may examine any item (e.g., writing, photograph) to refresh the witness's present recollection. The witness's testimony must be based on the witness's refreshed recollection, not on the item itself (e.g., the witness cannot read from the refreshing document).

a. Adverse party's options

When the item used to refresh a witness's recollection is a writing, the adverse party is entitled to have the document produced, to inspect the document, to cross-examine the witness about it, and to introduce any relevant portion into evidence. If the producing party claims that the document contains unrelated matter, the court may examine the document in camera and delete any unrelated portion before ordering that the rest be delivered to the adverse party. The adverse party may object to the deletion, in which case the deleted portion must be preserved in the record. Fed. R. Evid. 612(b).

Evidentiary purpose: When an adverse party seeks to introduce a writing used to refresh a witness's memory, the writing typically will be admissible for only the purpose of impeaching the witness's credibility. It will be admissible for substantive purposes only if it satisfies the other restrictions on admissibility, such as the hearsay rule.

When the refreshing of a witness's memory with a writing takes place before the witness testifies, the court may permit an adverse party to utilize these options, if justice so requires. Fed. R. Evid. 612(a).

b. Failure to produce or deliver the writing

In a criminal case, if the prosecution refuses to comply with a court order to produce or deliver a writing, the court must strike the witness's testimony, or may, when justice requires, declare a mistrial. In other circumstances, the court is free to issue any appropriate order. Fed. R. Evid. 612(c).

2. Past Recollection Recorded

A memorandum or record about a matter that a witness once had knowledge of but now has insufficient recollection of to testify to it may be admissible under a hearsay exception (*see* § VII.B.5. Recorded Recollection, *infra*). Although the record may be read into evidence, it is received as an exhibit only if offered by an adverse party.

Refreshed and recorded recollections distinguished: The item used to refresh a witness's present recollection is generally not admitted into evidence, but a document introduced under the recorded recollection hearsay exception may be.

D. OPINION TESTIMONY

1. Lay Witness

A lay (non-expert) witness is permitted to testify as to the witness's opinion if the opinion is:

i) Rationally **based on the perception** of the witness;

ii) Helpful to a **clear understanding** of the witness's testimony or the determination of a fact in issue; and

iii) **Not** based on scientific, technical, or specialized knowledge.

Fed. R. Evid. 701. Typically, a lay witness may state an opinion as to matters such as appearance, emotion, intoxication, and speed of a vehicle.

If the opinion is based on scientific, technical, or specialized knowledge, then the witness must be qualified as an expert before giving that opinion. By contrast, if a lay witness has gained familiarity with a matter that the general public does not have but could acquire without a specialist's training, then a lay witness may state an opinion. Fed. R. Evid. 701, Notes of Advisory Committee on 2000 amendments.

Example: A frequent user of heroin can identify a substance as heroin, but cannot testify as to the process for manufacturing heroin without qualifying as an expert.

2. Expert Witness

a. Subject matter of testimony

Before an expert witness may testify, the court must first determine that the subject matter of the witness's testimony:

i) **Is scientific, technical, or other specialized knowledge,** which focuses on the *reliability* of the testimony; and

ii) Will **help the trier of fact** understand the evidence or determine a fact in issue, which focuses on the *relevance* of the testimony.

Some courts have held that expert testimony that goes to the credibility of a witness improperly invades the province of the jury to determine whether the witness is telling the truth. *Compare Nimely v. City of N.Y.*, 414 F.3d 381, 397 (2d Cir. 2005) (expert testimony that defendant witnesses had not lied inadmissible) *with United States v. Shay*, 57 F.3d 126 (1st Cir. 1995) (expert testimony that defendant witness suffered from pseudologia fantastica, a mental disorder that caused him to lie pathologically admissible).

b. Qualified expert

Once the testimony is determined to be reliable and relevant, an expert witness may testify as to her opinion, provided:

i) The witness is **qualified as an expert** by knowledge, skill, experience, training, or education;

ii) The testimony is based on **sufficient facts or data**;

iii) The testimony is the product of **reliable principles and methods** (i.e., the factual data, principles, and methods used as a basis for the testimony

are of the type reasonably relied on by experts in the field, although the data need not be admissible itself); and

iv) The witness **applied the principles and methods reliably to the facts** of the case.

Fed. R. Evid. 702. The expert must also possess a reasonable degree of certainty in her opinion, which may be expressed using language such as "probably." *United States v. Mornan*, 413 F.3d 372 (3d Cir. 2005); *see also*, *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999); *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993).

c. Ultimate issue

Generally, an opinion of a witness, whether lay or expert, may be admissible even though the opinion embraces an ultimate issue in the case (including the defendant's state of mind). However, an expert **may not** state an opinion about whether a criminal defendant had the **requisite mental state** of any element of the crime charged or of a defense. That determination lies in the province of the trier of fact. Fed. R. Evid. 704.

d. Basis of opinion

The expert's opinion may be based on facts and data that the expert has personally observed or about which the expert has been made aware. When such facts and data are not admissible, the opinion itself may nevertheless be admissible if experts in the particular field would reasonably rely on those kinds of facts and data in forming an opinion on the subject. If such facts are inadmissible, the proponent nevertheless may disclose them to the jury if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect. Fed. R. Evid. 703.

1) Disclosure of underlying facts and data

An expert may state an opinion and give the reasons for it without first testifying as to the underlying facts or data, unless the court orders otherwise. Another party, when cross-examining the expert, may, of course, require the expert to disclose those facts or data. Fed. R. Evid. 705.

2) Use of hypothetical

In making facts known to the expert at trial, use of a hypothetical question is not required.

3) Lack of knowledge

A party can challenge the credibility of an expert witness on cross-examination by attacking the adequacy of the expert's knowledge, both their general knowledge in their field of expertise and their specific knowledge of the facts underlying their testimony.

e. Court-appointed expert

The court may appoint an expert witness and must inform the expert, either orally or in writing, of the expert's duties. Such a witness must advise each party of any findings. Each party may depose the witness, call the witness to testify, and cross-examine the witness. The court may authorize disclosure to the jury that the court appointed the expert. In a criminal case, the expert is paid by funds provided by law; in most civil cases, the expert's compensation is paid by the parties. Fed. R. Evid. 706.

f. Interpreter

An interpreter is subject to the rules for expert witnesses. Fed. R. Evid. 604.

E. PAYMENT OF WITNESS

A lawyer may not offer or pay a witness any consideration:

i) In excess of the reasonable expenses of the witness incurred and the reasonable value of the witness's time spent in providing evidence, except that an expert witness may be offered and paid a noncontingent fee;

ii) Contingent on the content of the witness's testimony or the outcome of the litigation; or

iii) Otherwise prohibited by law.

Restatement (Third) of the Law Governing Lawyers, § 117. The prohibition against contingent compensation does not apply to an expert retained only to consult and not to testify or otherwise provide evidence. Id., at § 117, cmt c. Any witness in attendance in federal court or a deposition pursuant to federal rule or court order is entitled to an appearance fee as well as a travel allowance. 28 U.S.C. § 1821.

IV. TANGIBLE EVIDENCE

Tangible evidence is evidence that is not presented in the form of testimony by a witness; it includes both documentary evidence (e.g., a written contract, a letter) and physical objects (e.g., a gun, torn clothing, an injured foot, a sound recording).

A. AUTHENTICATION

All tangible evidence must be authenticated. To authenticate an item, the proponent must produce sufficient evidence to support a finding that the thing is what its proponent claims it is. This is a lesser standard than a preponderance of the evidence. Fed. R. Evid. 901(a).

Satisfaction of the standard for authentication by a proponent of an item does not conclusively establish that the item is what the proponent claims. Admission of the item into evidence does not preclude the opponent from presenting evidence challenging the proponent's claim. For example, a party may introduce evidence that contradicts the other party's authentication of a signature on an instrument.

1. Physical Objects

a. Personal knowledge

A physical object may be authenticated by testimony of **personal knowledge** of the object. Fed. R. Evid. 901(b)(1).

Example: The owner of a stolen pocket watch may authenticate the watch by simply identifying it, "Yes, that is my pocket watch that was stolen."

b. Distinctive characteristics

A physical object may be authenticated by testimony of its **distinctive** characteristics. Fed. R. Evid. 901(b)(4).

Example: An electronically stored document may be authenticated by its metadata (e.g., filename, file type, creation date, permissions).

c. Chain of custody

Authentication by chain of custody must be used with respect to a physical object that could easily be tampered with or confused with a similar item, such as a blood

sample. The witness testifying must account for the whereabouts of the item from the time it was obtained up until its introduction at the trial.

d. Reproductions and explanatory evidence

When reproductions (e.g., photographs, diagrams, maps, movies) are introduced into evidence, they may be authenticated by the testimony of a witness with personal knowledge that the object accurately depicts what its proponent claims it does. It is generally not necessary to call the person who created the reproduction to authenticate it. However, the creator may be called to authenticate the reproduction and may do so by testifying that the reproduction method produces an accurate result. Fed. R. Evid. 901(b)(9).

e. X-ray images and electrocardiograms

X-ray images, electrocardiograms, and similar items are physical representations of things that cannot otherwise be seen (i.e., the inner workings and functionality of a human body), and, as such, unlike other reproductions, they cannot be authenticated merely by the testimony of a witness that they are accurate reproductions of the facts. To authenticate such an item, it must be shown that an accurate process was used, that the machine used was working properly, and that the operator of the machine was qualified to operate it. The chain of custody must also be established.

2. Documentary Evidence

Documentary evidence is commonly authenticated by stipulation, testimony of an eyewitness, or handwriting verification.

a. Ancient documents and data compilations

A document or data compilation, including data stored electronically, is considered authentic if it is (i) at least **20 years old,** (ii) in a **condition unlikely to create suspicion** as to its authenticity, and (iii) **found in a place where it would likely be** if it were authentic. Fed. R. Evid. 901(b)(8).

b. Public records

A public record may be authenticated by evidence that the document was recorded or filed in a public office as authorized by law or that the document is from the office where items of that kind are kept. Fed. R. Evid. 901(b)(7).

c. Reply letter doctrine

A document may be authenticated by evidence that it was written in response to a communication, so long as it is unlikely, based on the contents, that it was written by someone other than the recipient of the first communication.

d. Handwriting verification

There are two methods by which handwriting verification may be used to authenticate a writing.

1) Comparison

An expert witness or the trier of fact may compare the writing in question with another writing that has been proven to be genuine in order to determine the authenticity of the writing in question. Fed. R. Evid. 901(b)(3). This method may also be used for authenticating other items, such as fingerprints, cloth fibers, and hair.

2) Non-expert opinion

A lay witness with personal knowledge of the claimed author's handwriting may testify as to whether the document is in that person's handwriting. The lay witness must not have become familiar with the handwriting for the purposes of the current litigation. Fed. R. Evid. 901(b)(2).

e. Self-authenticating documents

The following items are self-authenticating—they do not require extrinsic evidence (i.e., evidence outside the document) of authenticity to be admitted:

i) Public documents bearing a governmental seal and a signature of an authorized governmental official or that are not sealed but are signed by an authorized governmental official and certified by another authorized governmental official;

ii) Certified copies of public records;

iii) Official publications issued by a public authority;

iv) Newspapers and periodicals;

v) Trade inscriptions (e.g., labels affixed in the course of business that indicate origin, ownership, or control);

vi) Notarized (acknowledged) documents;

vii) Commercial paper (including the signature thereon, and related documents);

viii) Any document, signature, or other item declared by federal statute to be authentic; and

ix) Records of a regularly conducted activity (e.g., a business) certified by a custodian of the records.

Although a proponent of a self-authenticating document generally is not required to give an adverse party advance notice of the intent to introduce the document, the proponent of business records (item ix, *above*) must give an adverse party reasonable written notice prior to the trial or hearing of the intent to offer the record and must make the record available for inspection so that the party has a fair opportunity to challenge them. Fed. R. Evid. 902.

f. Attesting witness

The testimony of a witness who attests or subscribes to a document generally is not required to authenticate a document. However, such testimony may be required by state law, such as to authenticate a will. Fed. R. Evid. 903.

3. Oral Statements

Oral statements may need to be authenticated as to the identity of the speaker in cases in which that identity is important (e.g., an opposing party's statement).

a. Voice identification

A voice can be identified by **any person** who has heard the voice **at any time** (including one made familiar solely for the purposes of litigation, in contrast to the rule for handwriting verification). It makes no difference whether the voice was heard firsthand or through mechanical or electronic transmission or recording. Fed. R. Evid. 901(b)(5).

b. Telephone conversations

A party to a telephone conversation may authenticate statements made during that conversation as having been made by a particular individual by testifying that:

i) The caller recognized the speaker's voice;

ii) The speaker knew facts that only a particular person would know;

iii) The caller dialed a number believed to be the speaker's, and the speaker identified himself upon answering; or

iv) The caller dialed a business and spoke to the person who answered about business regularly conducted over the phone.

Fed. R. Evid. 901(b)(4)–(6).

B. BEST EVIDENCE RULE

The best evidence rule (also known as the original document rule) requires that the original document (or a reliable duplicate) be produced to prove the contents of a writing, recording, or photograph, including electronic documents, x-rays, and videos. A "writing" is defined as "letters, words, numbers or their equivalent set down in any form." A "recording" and "photograph" are similarly broadly defined. Fed. R. Evid. 1001(a)–(c).

This rule applies only when the **contents of the document are at issue** or a witness is **relying on the contents of the document** when testifying. Fed. R. Evid. 1001–08.

Caution: Despite its name, the best evidence rule does not require a party to present the most persuasive evidence, nor does it require the presentation of documentary evidence instead of a witness's testimony simply because a document is available.

Example: A witness writes down her observations of an accident immediately after it happens. The best evidence rule does not prevent the witness from testifying about the event simply because a writing of her observations exists.

1. Contents at Issue

The contents of a document are at issue when:

i) The document is used as proof of the happening of an event, such as with a photograph of a bank robbery;

ii) The document has a legal effect, such as with a contract or a will; or

iii) The witness is testifying based on facts learned from the writing (as opposed to personal knowledge), such as with an x-ray image.

Fed. R. Evid. 1002, Notes of Advisory Committee.

2. "Original"

An original of a writing or recording includes any counterpart intended to have the same effect as the original by the person who executed or issued it. If the information is stored electronically, any legible printout (or other output readable by sight) that reflects the information accurately is an original. An original of a photograph includes the negative and any print made from it. Fed. R. Evid. 1001(d).

3. Exceptions

a. Duplicates

A duplicate is a counterpart produced by any process or technique that accurately reproduces the original. Fed. R. Evid. 1001(e). A duplicate is admissible to the same extent as an original unless:

i) There is a genuine question as to the authenticity of the original; or

ii) The circumstances make it unfair to admit the duplicate, such as may be the case when only part of the original is duplicated.

Fed. R. Evid. 1003.

Handwritten copies: Handwritten copies of an original are not duplicates and are admissible only when the original or duplicate is lost, destroyed, or in the possession of an adversary who fails to produce it.

b. Original unavailable

The original is not required, and other evidence of its contents is admissible if:

i) All of the originals are lost or destroyed, and not by the proponent acting in bad faith;

ii) The original cannot be obtained by any available judicial process;

iii) The party against whom the original would be offered (a) had control of the original, (b) was at that time put on notice that the original would be the subject of proof at the trial or hearing, and (c) failed to produce it at the trial or hearing; or

iv) The writing, recording, or photograph is not closely related to a controlling issue (i.e., it is a collateral matter).

In such cases, once the party has accounted for the absence of an original, the party may prove the contents of the writing, recording, or photograph by other means. Fed. R. Evid. 1004.

c. Public records

The contents of a public record (i.e., an official record or a document recorded or filed in a public office as authorized by law) may be, and generally are, proved by a certified copy rather than by the original record. Alternatively, a public record may be proved by a copy of the record plus the testimony of a person who has compared the copy with the original. If a certified or compared copy cannot be obtained by reasonable diligence, the contents may be proved by other evidence. Fed. R. Evid. 1005.

d. Summaries

The contents of voluminous writings, recordings, or photographs may be presented in the form of a chart, summary, or calculation, if such contents cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination and copying by other parties at a reasonable time and place. The court may order the proponent to produce the originals or duplicates in court. Fed. R. Evid. 1006.

e. Admission by party

The proponent may prove the contents of a writing, recording, or photograph by the testimony, deposition, or written statement of the party against whom the evidence is offered. In such a case, the proponent does not need to account for the original. Fed. R. Evid. 1007.

Oral out-of-court statement: If a party against whom a document is offered admits to the contents of the document in an oral statement made out of court (other than during a deposition), the best evidence rule applies. The proponent must account for the original before using the adverse party's oral statement to prove the contents of the document.

4. Role of Court and Jury

Ordinarily, the court determines whether the proponent has fulfilled the conditions for admitting other evidence of the content of a document. In a jury trial, however, the jury determines any issue as to whether:

i) An asserted writing, recording, or photograph ever existed;

ii) Another writing, recording, or photograph produced at trial is the original; or

iii) Other evidence of content correctly reflects the content.

Fed. R. Evid. 1008.

C. PAROL EVIDENCE RULE

1. General Rule

The parol evidence rule operates to exclude evidence that, if introduced, would change the terms of a written agreement. The rule is based on the assumption that a written contract represents the complete agreement between the parties.

a. Complete integration

If a written agreement is a complete integration (i.e., contains all of the terms to which the parties agreed), then the parol evidence rule is in effect, and no extrinsic evidence may be introduced.

b. Partial integration

A contract that contains some, but not all, of the terms to which the parties agreed is a partial integration. In this case, extrinsic evidence that **adds to** the writing may be admitted. Evidence that **contradicts** the writing may not be admitted.

2. Exceptions

Extrinsic evidence can always be admitted for the following purposes:

i) To clarify an ambiguity in the terms of the writing;

ii) To prove trade custom or course of dealings;

iii) To show fraud, duress, mistake, or illegal purpose on the part of one or both parties; or

iv) To show that consideration has (or has not) been paid.

3. Applicable Evidence

Only evidence of **prior or contemporaneous negotiations** is subject to the parol evidence rule. In other words, evidence of negotiations conducted **after** the execution

of the written contract is not prohibited by the parol evidence rule and may be offered to prove subsequent modifications of the agreement.

D. DEMONSTRATIVE AND EXPERIMENTAL EVIDENCE

A court may allow demonstrations and experiments to be performed in the courtroom. This may include exhibition of injuries in a personal injury or criminal case. A court has discretion to exclude evidence of personal injuries if the demonstration of such severe injuries would result in unfair prejudice. A court may also exclude a demonstration that cannot be effectively cross-examined. Science experiments are permitted but may be excluded if they will result in undue waste of time or confusion of the issues.

V. PRIVILEGES AND OTHER POLICY EXCLUSIONS

A. PRIVILEGES

The Federal Rules have no specific privilege provisions but instead defer to common-law privileges, except in diversity cases, when state rules generally apply. Fed. R. Evid. 501. A claim of privilege applies at all stages of a case or proceedings. Fed. R. Evid. 1101(c).

1. Confidential Communication

For a privilege to apply, there must be a confidential communication.

a. Presence of third party

Generally, if the communication is overheard by a third party, the privilege is destroyed. However, the presence of the third party does not destroy the privilege if:

i) The first two parties do not know that the third party is present (e.g., an unknown eavesdropper); or

ii) The third party is necessary to assist in the communication (e.g., a translator).

b. Waiver

A privilege may be waived if the person who holds the privilege:

i) Fails to assert the privilege in a timely manner (i.e., when the testimony is offered);

ii) Voluntarily discloses, or allows another to disclose, a substantial portion of the communication to a third party, unless the disclosure is privileged; or

iii) Contractually waives the privilege in advance.

A wrongful disclosure without the privilege holder's consent does not constitute a waiver. For limitations on waiver of the attorney-client privilege due to inadvertent disclosure, *see* § 3.c. Effect of disclosure on waiver, *below*.

2. Spousal Privilege

"Spousal privilege" comprises two distinct privileges: spousal immunity and confidential marital communications.

a. Spousal immunity

The general rule is that the spouse of a **criminal defendant** may not be called as a witness by the prosecution. Nor may a married person be **compelled** to testify against his spouse in any criminal proceeding, including a grand jury proceeding, regardless of who is the defendant.

1) Holder of the privilege

a) Federal courts

In federal courts (and a majority of states), the **witness spouse** holds the privilege and may choose to testify but cannot be compelled to do so.

b) State courts

In a minority of jurisdictions, the **party spouse** (as opposed to the witness spouse) holds the privilege and may prevent the witness spouse from testifying, even if the witness spouse wants to testify.

2) Period to which the privilege applies

The spousal immunity privilege applies to testimony about events that occurred **before and during the marriage.**

3) Time limit on assertion of the privilege

The spousal immunity privilege can be asserted **only during a valid marriage.** The right to assert the privilege expires upon divorce or annulment.

b. Confidential marital communications

Communication made between spouses **while they were married** is privileged if the communication was made **in reliance on the sanctity of marriage.**

1) Holder of the privilege

The majority view, which is followed by most federal courts, is that the privilege is held by **both** spouses. E.g., *United States v. Porter*, 986 F.2d 1014, 1018 (6th Cir. 1993). Under the majority view, **either spouse** may assert the privilege and refuse to testify about the communication or prevent the other spouse from testifying. Waiver of the privilege by one spouse does not affect the other spouse's right to claim the privilege. Some courts, however, have taken the position that only the communicating spouse can assert the privilege. *See* 1 Kenneth S. Broun et al., McCormick on Evidence § 83 (6th ed. 2006).

2) Scope of the privilege

This privilege applies only to communications made **during marriage.** This privilege applies to both **civil and criminal cases.**

3) Lack of time limit on assertion of the privilege

The time for asserting this privilege extends **beyond the termination of the marriage.** Thus, either party may assert the privilege—by refusing to testify or by preventing the other party from doing so—at any time, even after divorce or the death of one spouse.

Comparison of timing: Spousal immunity applies to events occurring before marriage but ends when the marriage does, whereas the confidential communication privilege begins with marriage but continues after the marriage has ended.

c. Exceptions

Spousal privileges are subject to limitations in cases in which one spouse is suing the other, or when one spouse is charged with a crime against the other spouse

or the children of either. For example, a defendant-spouse accused of battery of a witness-spouse would not be able to prevent the witness-spouse from testifying as to confidential marital communications.

3. Attorney-Client Privilege

A confidential communication between a client and an attorney for the purpose of obtaining or providing legal assistance for the client is privileged.

a. Elements

1) Confidential

The communication must be intended to be confidential in order to be privileged. A communication made in the presence of a third party generally is not privileged, but the presence of, or communication by or through, a representative of the client or the attorney does not destroy the attorney-client privilege.

2) Communication

The communication must be **for the purpose of obtaining or providing legal assistance for the client,** but the attorney does not need to give advice or agree to the representation for the privilege to exist.

a) Non-privileged statements

A statement made to an attorney that is not about legal advice or services sought by the client is not privileged. This includes statements regarding the fact of employment, the identity of the client, and the fee arrangements for the representation. If providing such information would divulge a confidential communication or incriminate the client, then it may be protected.

Furthermore, the attorney-client privilege does not protect disclosure of the underlying facts. A client cannot be compelled to answer the question "What did you say to your attorney?" but cannot refuse to reveal a fact within her knowledge merely because she told that fact to her attorney. *Upjohn Co. v. United States*, 449 U.S. 383 (1981) (quoting *Philadelphia v. Westinghouse Electric Corp.*, 205 F.Supp. 830, 831 (E.D. Pa. 1962)).

Finally, communications are not privileged when they are made to an attorney who is acting in a capacity other than as an attorney, such as a business partner or a witness to a will.

b) Corporate client

When an attorney represents a corporation, some states limit the privilege to communications received by the attorney from a member of the "control group" of the corporation (employees in a position to control or take a substantial part in a decision). *See, e.g.*, *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 432 N.E.2d 250 (Ill. 1982). However, in cases in which federal law controls, the privilege extends to communications by a non-control-group employee about matters within the employee's corporate duties made for the purpose of securing legal advice for the corporation. *Upjohn Co. v. United States*, 449 U.S. 383 (1981) (protecting communications by lower-level employees who were directed by their superiors to communicate with the corporation's attorney).

3) Client holds the privilege

The client holds the privilege. The attorney, however, must assert the privilege on the client's behalf to protect the client's interests. The privilege exists until it is waived, and it can survive termination of the attorney-client relationship, and even the client's death.

b. Exceptions

The attorney-client privilege does not protect these confidential communications:

i) Communications made to enable or aid the commission of what the client **knew or should have known** was a crime or fraud;

ii) Communications relevant to a dispute between attorney and client or former client (e.g., client's malpractice allegation, lawyer's compensation or reimbursement claim);

iii) Communications relevant to a dispute between parties who claim through the same deceased client; and

iv) Communications between former co-clients who are now adverse to each other.

Work product documents: Documents prepared by an attorney for his own use in connection with the client's case are not covered by the attorney-client privilege because **they are not communications.** However, such documents are protected under the "work product" doctrine and are not subject to discovery unless the party seeking disclosure (i) demonstrates a substantial need for the information, and (ii) cannot obtain the information by any other means without undue hardship. The mental impressions, conclusions, and trial tactics of an attorney are always protected from discovery. Fed. R. Civ. P. 26(b)(3).

c. Waiver

The client, guardian, or successor-in-interest (e.g., the personal representative of a deceased client's estate) may waive the privilege. In addition, the attorney, when acting on behalf of the client, may also waive the privilege.

1) Disclosure of protected information

Although the Federal Rules generally do not address the existence or scope of common-law privileges, there is one exception. Federal Rule 502 addresses the effect that a litigation-related disclosure of protected information has on the waiver of the attorney-client privilege, drawing a distinction between an intentional disclosure and an unintentional disclosure. The rule applies to the disclosure of material protected by the work-product doctrine as well as confidential communications. Fed. R. Evid. 502.

a) Inadvertent disclosure—no waiver

When made during a federal proceeding, the inadvertent disclosure of privileged communication or information does not waive the privilege if the holder of the privilege:

i) Took reasonable steps to prevent disclosure; and

ii) Promptly took reasonable steps to rectify the error.

Fed. R. Evid. 502(b). In determining whether the holder took reasonable steps to prevent disclosure, factors such as the number of documents to

be reviewed, the time constraints for production, or the existence of an efficient records-management system may be relevant.

b) Intentional disclosure—limitation on the scope of waiver

When made during a federal proceeding, the intentional disclosure of privileged material operates as a waiver of the attorney-client privilege. The waiver extends to undisclosed information only in those unusual situations in which (i) the disclosed and undisclosed material concern the same subject matter and (ii) fairness requires the disclosure of related information because a party has disclosed information in a selective, misleading, and unfair manner. Fed. R. Evid. 502(a).

c) Effect of disclosure made in a state proceeding

When privileged material is disclosed in a state proceeding and the state and federal laws are in conflict as to the effect of the disclosure, the disclosure does not operate as a waiver in a subsequent federal proceeding if the disclosure (i) would not be a waiver had it been made in a federal proceeding or (ii) is not a disclosure under the law of the state where it was made. In other words, the federal court must apply the law that is most protective of the privilege. This rule does not apply if the state court has issued an order concerning the effect of the disclosure; in such a case, the state-court order would be controlling. Fed. R. Evid. 502(c).

d) Controlling effect of a federal confidentiality order

A federal court may order that the privilege or protection is not waived by disclosure connected with the pending litigation (i.e., a confidentiality order). In such a case, the disclosure does not constitute a waiver in any other federal or state proceeding. Fed. R. Evid. 502(d).

e) Parties' agreement

An agreement between the parties regarding the effect of a disclosure binds only the parties unless the agreement is incorporated into a court order. Fed. R. Evid. 502(e).

4. Physician-Patient Privilege

Although there is no common-law privilege covering statements made by a patient to a physician, most states protect such communications by statute, so long as the communications were made for the purpose of obtaining medical treatment. The patient holds the privilege; thus, only the patient may decide whether to waive it.

The privilege does not exist if:

i) The information was acquired for **reasons other than treatment**;

ii) The patient's **physical condition is at issue**;

iii) The communication was made as part of the **commission of a crime or tort**;

iv) A **dispute exists** between the physician and the patient;

v) The patient contractually **agreed to waive** the privilege; or

vi) A **case is brought in federal court** and state law does not apply (e.g., most cases that involve a federal question).

If an attorney requests that a physician consult with his client, then the physician-patient privilege applies only if treatment is contemplated during the consult.

5. Psychotherapist-Patient Privilege

The federal courts and all states recognize some form of privilege for confidential communications between a psychiatrist, psychologist, or licensed social worker and a patient in the course of diagnosis or treatment. The patient holds the privilege, but the psychotherapist must assert the privilege in the patient's absence. *Jaffee v. Redmond*, 518 U.S. 1 (1996).

The privilege does not exist if (i) the patient's mental condition is at issue, (ii) the communication was a result of a court-ordered exam, or (iii) the case is a commitment proceeding against the patient.

6. Self-Incrimination

a. In general

The Fifth Amendment protection against self-incrimination allows a witness in any proceeding to refuse to give testimony that may tend to incriminate the witness. The protection covers only current (not prior) statements and the fruits derived therefrom, and it does not apply to physical characteristics or mannerisms. The privilege belongs only to human beings. A corporation or other organization is not able to assert the privilege. *Bellis v. United States*, 417 U.S. 85 (1974). The Fifth Amendment only protects against domestic prosecutions; it cannot be invoked out of a fear of foreign prosecution. *United States v. Balsys*, 524 U.S. 666 (1998).

b. Comment and inference

In a criminal case, a prosecutor may not comment on the defendant's failure to take the stand and may not argue that the jury should draw a negative inference from the assertion of the privilege. *Griffin v. California*, 380 U.S. 609 (1965).

In a civil case, however, it is proper for the opposing party to ask the jury to draw an adverse inference from a witness's claim of privilege.

c. Immunity

A witness may be compelled to provide incriminating testimony if the government grants him immunity from prosecution. The witness is not entitled to "transactional" immunity, i.e., protection against prosecution for the entire transaction about which he was testifying; instead, the government is constitutionally required to offer mere "use" immunity, which prohibits only the use of the compelled testimony against the witness. *Kastigar v. United States*, 406 U.S. 441 (1972). If the government does prosecute the witness in such a case, the government has the burden to show that the compelled testimony did not provide an investigatory lead that was helpful to the prosecution.

A witness may lose the right to invoke the privilege if the danger of incrimination has been removed through acquittal or conviction of the underlying charge. If the questioning about the adjudicated crime can lead to prosecution for other crimes, however, the privilege can be invoked.

7. Other Privileges

a. Clergy-penitent

In some jurisdictions, a confidential communication made by a penitent to a member of the clergy is privileged. The penitent holds the privilege, but the clergy member must assert the privilege on the penitent's behalf.

b. Accountant-client

Although not available at common law, many jurisdictions recognize a privilege for confidential communications made by a client to his accountant. The privilege operates similarly to the attorney-client privilege.

c. Professional journalist

There is no federal privilege protecting a journalist's source of information, but some states have enacted statutes extending some protection to journalists.

d. Governmental privileges

The government, at all levels, is privileged against disclosing:

i) The identity of an informant in a criminal case; and

ii) The communication of **official information** (i.e., information that relates to the internal affairs of the government and is not open to the public) by or to public officials.

B. PUBLIC POLICY EXCLUSIONS

1. Subsequent Remedial Measures

When measures are taken that would have made an earlier injury or harm less likely to occur (e.g., repairing an area where a customer slipped), evidence of the subsequent measures is **not admissible to prove negligence, culpable conduct, a defective product or design, or the need for a warning or instruction.** However, evidence of subsequent remedial measures may be admissible for other purposes, such as impeachment or—if disputed—ownership or control of the cause of the harm (e.g., a car) or the feasibility of precautionary measures. Fed. R. Evid. 407.

Product liability: The exclusion of evidence of a subsequent remedial measure applies to product liability actions based on negligence and those based on strict liability.

a. Timing of remedial measure

To be excluded, the remedial measure must be undertaken **after** the plaintiff is injured; a remedial measure made after a product was manufactured but **before** the plaintiff was injured is not subject to exclusion under this rule. Fed. R. Evid. 407, Notes of Advisory Committee (1997).

b. Third-party remedial measure

This exclusion does not apply to a remedial measure undertaken by a third party, rather than a defendant. *E.g., Diehl v. Blaw-Knox*, 360 F.3d 426, 430 (3d Cir. 2004).

2. Compromise Offers and Negotiations

Compromise offers made by any party, as well as any conduct or statements made during compromise negotiations, are not admissible to prove or disprove the **validity**

or amount of a disputed claim, nor may they be admitted for impeachment by prior inconsistent statement or contradiction. Fed. R. Evid. 408.

Lack of dispute: If the claim is not disputed as to its validity or amount (e.g., a party admits to both), then a statement made in connection with an offer to settle for a lesser amount is admissible. Fed. R. Evid. 408, Notes of Advisory Committee.

a. Exceptions

1) Negotiation with a governmental agency

A person's conduct or statements made during compromise negotiations with a governmental agency (e.g., the IRS) during the exercise of its regulatory, investigative, or enforcement authority may be introduced in a subsequent criminal case against the person.

2) Admissibility for other reasons

Evidence of settlement offers and negotiations is admissible to prove bias or prejudice of a witness, to negate a claim of undue delay, or to prove obstruction of a criminal investigation or prosecution.

b. No immunization of evidence

Evidence may be admissible through means other than as an admission made during compromise negotiations. A party does not immunize (i.e., protect from admission) evidence simply by discussing it during compromise negotiations. Fed. R. Evid. 408, Notes of Advisory Committee (2006).

c. Prohibition on all parties

Compromise evidence is not admissible on behalf of **any party** who participated in the compromise negotiations, even the party who made the settlement offer or statement. The protection of this rule cannot be waived unilaterally. Moreover, when there are more than two parties, a settlement agreement entered into by a party with an adverse party cannot be used by a remaining adverse party to prove or disprove the validity or amount of an unsettled claim. Fed. R. Evid. 408, Notes of Advisory Committee (2006); *Branch v. Fid. & Cas. Co.*, 783 F.2d 1289 (5th Cir. 1986).

d. Use of settlement by third person

A party's furnishing or accepting valuable consideration in compromising a claim may not be used by a third person to prove or disprove the validity or amount of a disputed claim that the third person has asserted against the party. Fed. R. Evid. 408(a)(1), Notes of Advisory Committee.

Example: In an accident involving a truck and an automobile, a truck driver is sued by both the automobile driver and the passenger in the automobile. The truck driver pays the passenger an amount in settlement of the passenger claim against the truck driver. The automobile driver cannot introduce this settlement as evidence of the truck's liability for the accident.

3. Offers to Pay Medical Expenses

Evidence of the payment, offer to pay, or promise to pay medical, hospital, or similar expenses resulting from an injury is **not admissible to prove liability for the injury.** Fed. R. Evid. 409.

Compare compromise: Unlike a compromise negotiation, any conduct or statement that accompanies the payment, offer to pay, or promise to pay medical expenses is admissible.

4. Plea Negotiation

In a civil or criminal case, evidence of the following is generally not admissible against the defendant who made the plea or participated in the plea discussions:

i) Withdrawn guilty pleas;

ii) Pleas of no contest (i.e., a *nolo contendere* plea);

iii) Statements made while negotiating a plea with a prosecutor (e.g., an offer to plead guilty); and

iv) Statements made during a plea proceeding (e.g., a Rule 11 proceeding under the Federal Rules of Criminal Procedure). Fed. R. Evid. 410(a).

a. Exceptions

Statements made during pleas or negotiations are admissible, however, if another statement made during the same plea or negotiation has already been admitted, and fairness requires that the statement in question also be admitted. Such statements also are admissible in a subsequent perjury prosecution if they were false statements made under oath, on the record, and with counsel present. Fed. R. Evid. 410(b).

b. Waiver

A defendant may waive the protection of Rule 410 if the waiver is knowing and voluntary. *United States v. Mezzanatto*, 513 U.S. 196 (1995).

5. Liability Insurance

Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully. However, such evidence may be admissible for another purpose, such as to prove agency, ownership, or control, or to prove a witness's bias or prejudice. Fed. R. Evid. 411.

6. Sexual Conduct

a. Victim's conduct

Under the "rape shield" rule, evidence offered to prove the sexual behavior or sexual predisposition of a victim (or alleged victim) generally is not admissible in any civil or criminal proceeding involving sexual misconduct. The exclusion applies to the use of such evidence for impeachment as well as substantive purposes.

Sexual behavior includes not only sexual intercourse or contact but also activities that imply such sexual intercourse or contact, such as the use of contraceptives or the existence of a sexually transmitted disease. Sexual predisposition can include the victim's mode of dress, speech, or lifestyle. Fed. R. Evid. 412(a), Notes of Advisory Committee (1994).

1) Exceptions

a) Criminal cases

In a criminal case involving sexual misconduct, evidence of specific instances of a victim's sexual behavior is admissible to prove that someone other than the defendant was the source of semen, injury, or other

physical evidence. In addition, evidence of sexual behavior with the person accused of sexual misconduct is admissible if offered by the defendant to prove consent or if offered by the prosecution. Fed. R. Evid. 412(b)(1).

Note that, in contrast with the general preference under the Federal Rules for reputation or opinion testimony over evidence of specific acts, in criminal cases involving sexual misconduct, reputation or opinion evidence of a victim's sexual behavior or predisposition is not admissible.

Finally, any evidence whose exclusion would violate the defendant's constitutional rights is admissible under Rule 412. For example, under the Sixth Amendment Confrontation Clause, a defendant in a rape case may be able to cross-examine an alleged victim who testified that she lived with her mother about her cohabitation with another man in order to show that the alleged victim denied having consensual sex with the defendant in order to protect her relationship with the other man. *Olden v. Kentucky*, 488 U.S. 227 (1988).

b) Civil cases

In a civil case, evidence offered to prove a victim's sexual behavior or predisposition is admissible if its probative value **substantially outweighs** the danger of harm to any victim and of unfair prejudice to any party. Evidence of a victim's reputation is admissible only when it has been placed in controversy by the victim. Fed. R. Evid. 412(b)(2).

The restriction on evidence of a victim's sexual behavior or predisposition applies only when the party against whom the evidence is offered can be characterized as a victim of sexual misconduct. For example, a plaintiff in a defamation action based on a statement about the plaintiff's sexual behavior is not a victim of sexual misconduct. By contrast, a plaintiff who brings a Title VII sexual harassment action can be characterized as a victim of sexual misconduct. Fed. R. Evid. 412, Notes of Advisory Committee (1994).

c) Procedure for admission

In a criminal or civil case, the party intending to offer evidence of the victim's sexual behavior or predisposition must file a motion describing the evidence and stating the purpose for its introduction. The motion must be filed at least 14 days before trial unless the court sets a different time. The motion must be served on all parties, and the victim (or the victim's guardian or representative) must be notified. The court must conduct an *in camera* hearing and give the victim and the parties the right to attend and to be heard. Unless the court orders otherwise, the record of the hearing is sealed. Fed. R. Evid. 412(c).

b. Defendant's conduct

In a criminal case in which a defendant is accused of sexual assault, attempted sexual assault, or conspiracy to commit sexual assault, evidence that the defendant committed any other sexual assault is admissible to prove any relevant matter. Similarly, in a criminal case in which a defendant is accused of child molestation, evidence that the defendant committed any other child molestation is admissible to prove any relevant matter. A similar rule applies in civil cases alleging sexual assault or child molestation. Fed. R. Evid. 413–15.

Propensity evidence: Unlike Federal Rule 404(b), which applies to other crimes or bad acts committed by a defendant, these rules permit the use of a defendant's previous commission of a sexual assault or child molestation as evidence of the defendant's propensity to commit the charged sexual assault or child molestation. Consequently, for example, a defendant's prior conviction for rape can be used as evidence of the defendant's propensity to commit the charged rape, but a defendant's prior conviction for robbery cannot be used as evidence of the defendant's propensity to commit the charged robbery.

The court does have discretion to exclude such evidence under Rule 403 when the probative value is substantially outweighed by the danger of unfair prejudice. *United States v. Kelly*, 510 F.3d 433 (4th Cir. 2007); *Johnson v. Elk Lake Sch. Dist.*, 283 F.3d 138 (3d Cir. 2002).

1) Not limited to convictions

An arrest or even testimony of an incident that was unreported to the authorities may be admitted as evidence that a defendant has committed sexual assault or child molestation. Moreover, unlike Rule 609 regarding the use of a conviction to impeach a witness, there is no specific time restriction on the use of such evidence. *See, e.g.*, *United States v. Horn*, 523 F.3d 882 (2008).

2) Pretrial disclosure

The prosecutor or plaintiff who intends to introduce such evidence must disclose it to the defendant at least 15 days before trial unless the court, for good cause, allows a later disclosure. Fed. R. Evid. 413(b), 414(b), 415(b).

VI. HEARSAY

A. WHAT IS HEARSAY

Hearsay is a statement that the declarant makes at a time other than while testifying at the current trial or hearing (i.e., an out-of-court statement) that is offered to prove the truth of the matter asserted. Fed. R. Evid. 801(c). Hearsay evidence generally is inadmissible unless it falls within an exception or exclusion set out in the Federal Rules, a federal statute, or a Supreme Court rule. Fed. R. Evid. 802.

1. Declarant—Person

The declarant (i.e., the maker of the statement) must be a person. Evidence generated by a machine or an animal is not hearsay. Fed. R. Evid. 801(b). Examples of such nonhearsay evidence include:

i) A dog's bark;

ii) An automatically generated time stamp on a fax;

iii) A printout of results of computerized telephone tracing equipment; and

iv) Raw data (such as blood-alcohol level) generated by a forensic lab's diagnostic machine.

Witness as declarant: A witness's own prior statement may be hearsay, and if hearsay, the witness may be prohibited from testifying as to her own statement unless an exception or exclusion applies.

2. Statement—Assertion

A statement is a person's oral or written assertion, or it may be nonverbal conduct intended as an assertion. Fed. R. Evid. 801(a). An example of assertive conduct is a defendant nodding his head up and down to indicate a "yes" answer to a question.

Contrast nonassertive conduct: Nonassertive conduct is not hearsay. An example of nonassertive conduct is a pilot's act of flying an airplane, when such evidence is offered as evidence of the plane's safety.

3. Offered to Prove the Truth of the Matter Asserted

Statements offered to prove something other than the truth of the matter asserted are not hearsay.

EXAM NOTE: A statement that is not hearsay is not automatically admissible. For exam purposes, it is important to keep in mind that the statement must be admissible under the other rules restricting admission, such as the rules on privileges.

a. Legally operative facts

A statement offered to prove that the statement was made, regardless of its truth, is not hearsay.

Example: In a slander action, the defendant's statement that the plaintiff is a murderer may be admissible to prove that the defendant made the statement but not to prove that the plaintiff is a murderer.

b. Effect on recipient

A statement offered to show the effect on the person who heard it is not hearsay.

Example: In a negligence action, the defendant's statement to the plaintiff that the sidewalk in front of the defendant's house was icy may be admissible to show that the plaintiff had notice of the danger but not to show that the sidewalk was actually icy.

c. State of mind

A statement offered as circumstantial evidence of the declarant's mental state is not hearsay.

Example: A testator's statement, "I am the queen of England," is not admissible to show its truth, but it is admissible to prove that the testator is not of sound mind.

d. Identification

A statement that is used as circumstantial evidence linking a person with an event, place, or object is not being introduced for its truth and therefore is not hearsay.

Example: A hotel receipt found on defendant's person is circumstantial evidence that the defendant had been to the hotel and therefore is not hearsay. *United States v. Mejias*, 552 F.2d 435, 446 (2d Cir. 1977).

e. Impeachment and Rehabilitation

A statement offered solely to impeach or rehabilitate a witness is not being introduced for its truth and therefore is not hearsay (*see* III.B.4. Prior Inconsistent Statement, *supra*).

4. Multiple Hearsay

A statement that contains hearsay within hearsay may be admissible as long as each part of the combined statement conforms to a hearsay exception. Fed. R. Evid. 805.

Example: A plaintiff sues a defendant for battery, claiming that the defendant struck the plaintiff's kneecaps with a baseball bat. At trial, the plaintiff seeks to introduce as evidence a hospital record, which consists of a note from a physician that the plaintiff told the physician that the plaintiff's injury was caused by being struck with a baseball bat. Both the plaintiff's statement to the physician and the note are hearsay; they are out-of-court statements being offered to prove the truth of the matter asserted—the cause of the plaintiff's injury. However, because each part of the statement falls within a hearsay exception (the plaintiff's statement is a statement made for the purpose of obtaining medical treatment, and the doctor's note is a business record), the hospital record may be admissible.

B. WHAT IS NOT HEARSAY

The following types of statements, which otherwise would qualify as hearsay, are expressly defined as nonhearsay. Fed. R. Evid. 801(d).

1. Declarant-Witness's Prior Statements

The Federal Rules identify three types of prior statements that are not hearsay. In all three cases, the witness who made the statement (declarant witness) must testify at the present trial or hearing and be subject to cross-examination concerning the statement in order for it to be admissible. Fed. R. Evid. 801(d)(1).

a. Prior inconsistent statements

A prior inconsistent statement **made under penalty of perjury** at a trial, hearing, or other proceeding, or in a deposition may be admissible to **impeach** the declarant's credibility and as **substantive evidence.** Statements made in a prior legal action that is unrelated to the current action may be admitted under this rule. Fed. R. Evid. 801(d)(1)(A).

Statement not made at a former proceeding: An inconsistent statement that was not made under penalty of perjury may be admissible to impeach a witness but is not admissible under this provision as substantive evidence.

b. Prior consistent statements

A prior consistent statement, whether made under oath or not, may be admissible (i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in testifying, only if it was made **before the declarant had reason to fabricate or the improper influence or motive arose;** or (ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground. Fed. R. Evid. 801(d)(1)(B).

c. Prior statement of identification

A previous out-of-court identification of a person after perceiving that person (e.g., lineup) is not hearsay and may be admissible as substantive evidence. Fed. R. Evid. 801(d)(1)(C). Even if the witness has no memory of the prior identification, it will be admissible because the witness is subject to cross-examination about the prior identification. *United States v. Owens*, 484 U.S. 554 (1988).

EXAM NOTE: Beware of fact patterns involving prior out-of-court identifications by a witness who is not testifying at the current trial and therefore is not subject to cross-

examination. This rule cannot apply, for instance, if the witness is dead or otherwise unavailable to testify.

2. Opposing Party's Statement

A statement made by a **party to the current litigation** is not hearsay if it is offered by an opposing party. The statement may have been made by the party in his individual or representative capacity (e.g., trustee). Fed. R. Evid. 801(d)(2)(A). This type of statement traditionally was known as an admission of a party-opponent.

Contrast statement against interest exception: Unlike with the statement against interest hearsay exception (*see* § VII.A.4. Statement Against Interest, *infra*), an opposing party's statement need not have been against the party's interest at the time that it was made.

Unlike most testimony by a lay witness, an opposing party's statement may be admitted even if it is not based on personal knowledge. In addition, an opposing party's statement in the form of an opinion may be admitted, even if the statement is about a matter that normally would be beyond the scope of lay witness opinion testimony. Fed. R. Evid. 801(d)(2), Notes of Advisory Committee.

a. Judicial admission

An admission made during the discovery process or a stipulation otherwise made during a proceeding is conclusive evidence, as is a statement made in a pleading, unless amended. Otherwise, although a statement in a pleading or an admission or stipulation made in another proceeding is usually admissible, it may generally be rebutted.

Note: A *withdrawn* guilty plea is generally not admissible in a subsequent civil or criminal proceeding (*see* § V.B.4. Plea Negotiation, *supra*.)

b. Adoptive admission

An adoptive admission is a statement of another person that a party expressly or impliedly adopts as his own. Fed. R. Evid. 801(d)(2)(B). Silence in response to a statement is considered an adoptive admission if:

i) The person was present and heard and understood the statement;

ii) The person had the ability and opportunity to deny the statement; and

iii) A reasonable person similarly situated would have denied the statement.

Post-arrest silence by a defendant who has received *Miranda* warnings may not be used as an adoptive admission of a statement made by another person (e.g., a police officer). *Doyle v. Ohio*, 426 U.S. 610 (1976).

c. Vicarious statements

A statement made by one person may be imputed to another based on the relationship between them. In determining whether a statement constitutes an opposing party's statement, the statement is considered, but the statement itself cannot establish the necessary relationship between the parties.

1) Employee or agent

A statement made by a party's agent or employee constitutes an opposing party's statement if it was made concerning a matter **within the scope of and during the course of the relationship.** Fed. R. Evid. 801(d)(2)(D).

2) Authorized speaker

A statement about a subject that is made by a person who is **authorized** by a party to make a statement on the subject constitutes an opposing party's statement. Fed. R. Evid. 801(d)(2)(C).

3) Co-conspirators

Although a statement made by one co-party is not admissible against another co-party based solely on their status as co-parties, a statement made by a co-conspirator **during and in furtherance of** the conspiracy is admissible as an opposing party's statement against other co-conspirators. Fed. R. Evid. 801(d)(2)(E). A statement made by a co-conspirator after being arrested generally is not admissible, since it was not made during the conspiracy.

VII. HEARSAY EXCEPTIONS

Although hearsay generally is inadmissible, the Federal Rules identify some situations in which hearsay is allowed, either because of necessity (i.e., the declarant is unavailable) or because the statements are inherently trustworthy, in which case the declarant's availability is immaterial.

A. DECLARANT UNAVAILABLE AS A WITNESS

There are five exceptions to the hearsay rule that apply only if the declarant is unavailable as a witness: former testimony, dying declaration, statement against interest, statement of personal or family history, and statement offered against a party that wrongfully caused the declarant's unavailability.

1. Unavailable Declarant

An unavailable declarant is a person who:

i) Is exempt on the grounds of privilege;

ii) Refuses to testify despite a court order to do so;

iii) Lacks memory of the subject matter of the statement;

iv) Is unable to testify due to death, infirmity, or physical or mental disability; or

v) Is absent and cannot be subpoenaed or otherwise made to be present.

A declarant is not deemed unavailable if the unavailability is due to the procurement or wrongdoing of the proponent of the statement in order to prevent the declarant from testifying at or attending the trial. Fed. R. Evid. 804(a).

2. Former Testimony

Testimony that was given **as a witness** at a trial, hearing, or lawful deposition is not excluded as hearsay if the party against whom the testimony is being offered (or, in a civil case, a party's predecessor-in-interest) had an **opportunity and similar motive** to develop the testimony by direct examination, redirect examination, or cross-examination. This exception applies whether the testimony was given during the current proceeding or during a different one, but the witness who gave the testimony must now be unavailable. Fed. R. Evid. 804(b)(1).

Grand jury testimony generally does not fall within the former testimony exception, but it may be admissible nonhearsay evidence as a prior inconsistent statement.

3. Dying Declaration

A statement qualifies as a "dying declaration" if:

i) The declarant **believes that her death is imminent**; and

ii) The statement pertains to the **cause or circumstances** of the death she believes to be imminent.

Under this exception to the hearsay rule, although the declarant must be unavailable, the declarant need not have actually died in order for the statement to avoid exclusion as hearsay. The dying-declaration exception applies **only in homicide prosecutions and civil cases.** Fed. R. Evid. 804(b)(2).

4. Statement Against Interest

A statement made by a declarant who is unavailable to testify is not excluded as hearsay if the statement:

i) Was against the declarant's interest at the time it was made; and

ii) Would not have been made by a reasonable person unless he believed it to be true.

Under this exception to the hearsay rule, the statement must have been against the declarant's proprietary or pecuniary interest, have invalidated the declarant's claim against someone, or have exposed the declarant to civil or criminal liability. A statement that would subject the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. Fed. R. Evid. 804(b)(3).

Opposing party's statement distinguished: A **statement against interest** may be made by a non-party, the declarant must be unavailable, and the statement must have been against the declarant's interest at the time it was made. An **opposing party's statement,** on the other hand, must have been made by a party, and the statement need not have been against the party's interest when it was made (*see* § VI.B.2. Opposing Party's Statement, *supra*).

5. Statement of Personal or Family History

A statement concerning the unavailable declarant's own birth, adoption, marriage, divorce, legitimacy, familial relationship, or other similar fact of personal or family history is not excluded as hearsay. Fed. R. Evid. 804(b)(4).

6. Statement Against Party That Caused Declarant's Unavailability

Formerly known as the "forfeiture against wrongdoing" exception, a statement offered against a party that wrongfully caused the declarant's unavailability is not excluded as hearsay. Under this exception, the wrongful party forfeits the right to object to the admission of the declarant's statement as hearsay. The wrongdoing, which need not be criminal, may be accomplished by a deliberate act or by acquiescing to another's act, but must be done with the intent of preventing the witness from testifying. This exception applies to all parties, including the government. Fed. R. Evid. 804(b)(6).

Note: For the effect of the Confrontation Clause on this exception, *see* § VIII.A.1.b. Unavailability of the declarant, *infra*.

B. DECLARANT'S AVAILABILITY AS A WITNESS IMMATERIAL

The following hearsay exceptions do not require that the declarant be unavailable because the circumstances under which the statements were made suggest that the statements are inherently trustworthy. Fed. R. Evid. 803.

1. Present Sense Impression

A statement describing or explaining an event or condition that is made **while or immediately after the declarant perceived it** is not excluded as hearsay. Fed. R. Evid. 803(1).

a. Res gestae

A common-law hearsay exception labeled "res gestae" (meaning "things done") existed for a statement that was precipitated by an event or was about a contemporaneous condition. The Federal Rules do not contain a general res gestae exception but instead recognize several distinct, related exceptions, including exceptions for a present sense impression; an excited utterance; a dying declaration; a statement of mental, emotional, and physical condition; and a statement made for purposes of medical treatment or diagnosis.

2. Excited Utterance

A statement made about a startling event or condition **while the declarant is under the stress of excitement that it caused** is not excluded as hearsay. Under this exception to the hearsay rule, the event must shock or excite the declarant, and the statement must relate to the event, but the declarant need not be a participant in the event (i.e., the declarant can be a bystander). Fed. R. Evid. 803(2).

Present sense impression distinguished: A present sense impression must be a **description** of the event, whereas an **excited utterance** need only **relate to** the exciting event.

Example 1: Adele looks out the window and states, "It sure is raining hard tonight." She has made a statement of present sense impression, which is admissible to prove that it rained on the night in question.

Example 2: Bob discovers that he has a winning lottery ticket and shouts, "I just won a million dollars!" He has made an excited utterance, which is admissible to prove that he won the money.

Note: There is some overlap between these exceptions, and a statement, such as one describing a murder made immediately after the murder took place, could fall into both categories.

3. Statement of Mental, Emotional, or Physical Condition

A statement of the declarant's **then-existing** state of mind or emotional, sensory, or physical condition is not excluded as hearsay. Fed. R. Evid. 803(3).

a. State of mind

A statement of **present intent, motive, or plan** can be used to prove **conduct in conformity** with that state of mind. A statement of a memory or past belief is inadmissible hearsay when used to prove the fact remembered or believed, unless the statement relates to the validity or terms of the declarant's will.

EXAM NOTE: Do not confuse this "state of mind" hearsay exception with circumstantial evidence of the declarant's state of mind, which is not hearsay. (*See* § VI.A.3.c. State of mind, *supra*.) To fall under the hearsay exception, the statement must be offered to prove that the declarant acted in accordance with his stated intent.

b. Physical condition

When a declarant's physical condition at a particular time is in question, a statement of the declarant's mental feeling, pain, or bodily health made **at that time** can be used to prove the **existence** of that condition but not its cause.

In most states, a statement made by a patient to a doctor relating to a **past** condition is not admissible under this exception. Under the Federal Rules, such a statement is admissible under the hearsay exception for statements for purposes of medical diagnosis or treatment (*see* 4. Statement Made for Medical Diagnosis or Treatment, *below*).

4. Statement Made for Medical Diagnosis or Treatment

A statement describing medical history or past or present symptoms is not excluded as hearsay if it is made for medical **diagnosis or treatment.** A statement of the cause or source of the condition is admissible as an exception to the rule against hearsay if it is reasonably pertinent to diagnosis or treatment. Fed. R. Evid. 803(4).

Effect of physician-patient privilege: A statement that falls within this hearsay exception still may be inadmissible if it is protected by the physician-patient privilege.

a. Statement made to a person other than a physician

The statement need not be made to a physician to fall under this exception. Statements to other medical personnel, including hospital attendants and ambulance drivers, or even to family members, may be included. Fed. R. Evid. 803(4), Notes of Advisory Committee.

b. Statement made to nontreating physician

Statements made to a physician consulted only for the purpose of enabling the physician to testify at trial are admissible. Fed. R. Evid. 803(4), Notes of Advisory Committee on Proposed Rules, Exception (4); Fed. R. Evid. 703.

c. Statement made by a person other than the patient

Under this hearsay exception, the statement need not necessarily be made by the patient, so long as it is made for the purpose of medical diagnosis or treatment. The relationship between the declarant and the patient usually determines admissibility—the closer the relationship, the stronger the motive to tell the truth, and, as such, the more presumably reliable the statement. The court must assess the probative value of the statement pursuant to Rule 403, weighing that value against the risk of prejudice, confusion, or waste of time. *See Weinstein's Evidence*, Vol. 4 (1993), p. 803-145.

5. Recorded Recollection

If a witness is unable to testify about a matter for which a record exists, that record is not excluded as hearsay if the following foundation is established:

i) The record is on a matter that the witness once knew about;

ii) The record was made or adopted by the witness when the matter was fresh in the witness's memory;

iii) The record accurately reflects the witness's knowledge; and

iv) The witness states that she cannot recall the event well enough to testify fully and accurately, even after consulting the record on the stand.

Under this exception, the record, if admitted, may be read into evidence, but it may be received as an exhibit only if offered by an adverse party. Fed. R. Evid. 803(5).

Present recollection refreshed distinguished: Any item—which need not be a writing—may be used to refresh a witness's recollection (*see* § III.C.1. Present Recollection Refreshed, *supra*).

6. Records of Regularly Conducted Activity (Business Records)

A record (e.g., memorandum, report, data compilation) of an act, event, condition, opinion, or diagnosis is not excluded as hearsay if:

d) The record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling;

ii) The making of the record was a regular practice of that activity; and

iii) The record was made at or near the time by (or from information transmitted by) someone with knowledge.

Although this exception is commonly referred to as the "business records" exception, it extends to any regularly conducted activity of an organization, including a nonprofit organization. Fed. R. Evid. 101(b)(4); 803(6)(A)–(C).

Recorded recollection exception distinguished: Unlike the recorded recollection exception, the business records exception does not require the inability to remember, but it does require that the record be kept in the course of a regularly conducted activity.

d. Authentication

For the record to be admissible under the business records hearsay exception, the custodian of the record or other qualified witness may testify that the above requirements have been met. Alternatively, a record may be self-authenticated if properly certified (*see* § IV.A.2.e. Self-authenticating documents, *supra*). Fed. R. Evid. 803(6)(D).

b. Lack of trustworthiness

A business record that otherwise qualifies under this hearsay exception is nevertheless inadmissible if the opponent shows that the source of information for the record or the method or circumstances of its preparation indicate a lack of trustworthiness. Fed. R. Evid. 803(6)(E).

Anticipation of litigation: Records prepared in anticipation of litigation, such as an employee's accident report, may not qualify under this exception due to a lack of trustworthiness. *Palmer v. Hoffman*, 318 U.S. 109 (1943).

c. Medical records

Medical records are considered business records to the extent that the entries relate to diagnosis or treatment. Statements related to fault associated with the cause of injury generally do not qualify under the business records exception.

d. Police reports

A police report is a public record (see below), but it might qualify under the business records exception as well. However, a statement made by a witness that is contained in the report does not generally qualify because the witness is not acting on behalf of the police in making the statement. The statement may, however, qualify under another hearsay exception, such as an opposing party's statement.

e. Absence of a record

Evidence that a **matter is not included in a record** of a regularly conducted activity may be admissible to prove that the matter did not occur or exist, provided that a record was regularly kept for a matter of that kind. The opponent may prevent admission by showing circumstances, including the possible source of the information, that indicate a lack of trustworthiness. Fed. R. Evid. 803(7).

7. Public Records

A hearsay exception applies to a record or statement of a public office or agency that sets out:

i) The **activities** of the office or agency;

ii) An **observation** of a person under a duty to report the observation (except for an observation of a law enforcement officer offered in a criminal case); or

iii) **Factual findings of a legal investigation,** when offered in a civil case or against the government in a criminal case.

Fed. R. Evid. 803(8).

Investigative reports: Opinions, evaluations, and conclusions contained in an investigative report that are based on factual findings are included in the public records exception. *Beech Craft Corp. v. Rainey*, 488 U.S. 153 (1988).

a. Lack of trustworthiness

As with the business records exception, the court may exclude any evidence offered under this exception if the opponent shows that the source of the information or other circumstances indicate a lack of trustworthiness. Fed. R. Evid. 803(8)(B).

b. Absence of a record

Similarly, testimony or a certification by a public official that a diligent search failed to disclose a public record or statement may be admitted to prove that the record or statement does not exist, or that a matter did not occur or exist, if the public office regularly kept a record of statements for a matter of that kind. In a criminal case, a prosecutor must provide the defense with written notice of the intent to offer such evidence at least 14 days before trial, and the defendant has seven days from receipt of notice to object in writing. Fed. R. Evid. 803(10), *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009).

c. Public records of vital statistics

A record of a birth, death, or marriage is not excluded as hearsay if the event is reported to a public office in accordance with a legal duty. Fed. R. Evid. 803(9).

8. Learned Treatises

A statement contained in a treatise, periodical, or pamphlet is not excluded hearsay if:

i) An expert witness **relied on the statement during direct examination** or it was **called to the expert's attention on cross-examination**; and

ii) The publication is established as a **reliable authority** by admission or testimony of the expert witness, by another expert's testimony, or by judicial notice.

If admitted, the statement is read into evidence, but the publication itself may not be received as an exhibit. Fed. R. Evid. 803(18).

9. Judgment of Previous Conviction

Evidence of a final judgment of conviction is not excluded as hearsay if:

i) The judgment was entered after a trial or guilty plea, but not a plea of no contest (i.e., *nolo contendere*);

ii) The conviction was for a crime punishable by death or imprisonment for more than one year; and

iii) The evidence is offered to prove any fact essential to sustain the judgment.

If the prosecutor in a criminal case offers evidence of a final judgment of conviction for a purpose other than impeachment, the judgment must have been against the defendant. The pendency of an appeal may be shown but does not affect admissibility. Fed. R. Evid. 803(22).

Traffic offense: A driver's guilty plea to a traffic offense that is punishable by a fine or imprisonment for one year or less cannot be used as evidence of the driver's negligence under this hearsay exception.

10. Other Exceptions

Other hearsay exceptions for which the declarant's availability is immaterial include:

i) A statement concerning personal or family history, such as a birth, death, marriage, or divorce contained in a regularly kept record of a religious organization (Fed. R. Evid. 803(11));

ii) A statement of fact in a marriage or baptismal certificate (Fed. R. Evid. 803(12));

iii) A statement of fact about personal or family history contained in a family record, such as a Bible or an engraving on a ring (Fed. R. Evid. 803(13));

iv) Records of, and statements in, documents affecting an interest in property (Fed. R. Evid. 803(14), (15));

v) Statements in ancient documents (i.e., authenticated documents prepared before January 1, 1998) (Fed. R. Evid. 803(16));

vi) Market reports and similar commercial publications generally relied upon by the public (Fed. R. Evid. 803(17));

vii) Reputation concerning personal or family history, boundaries or general history, or character (Fed. R. Evid. 803(19)–(21)); and

viii) A judgment admitted to prove a matter of personal, family, or general history or a boundary, if the matter was essential to the judgment and could be proved by evidence of reputation. Fed. R. Evid. 803(23).

C. RESIDUAL EXCEPTION

There is a "catch-all" exception for a statement that is not otherwise covered by the Federal Rules. A hearsay statement may be admissible under this exception if:

i) 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

ii) 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 proponent must give an adverse party reasonable notice of the intent to offer the statement, as well as its substance and the declarant's name. Notice should be given in writing before the trial or hearing, or in any form during the trial or hearing, if the court excuses earlier notice for good cause. Fed. R. Evid. 807.

VIII. CONSTITUTIONAL LIMITATIONS

A. HEARSAY EVIDENCE RESTRICTIONS

Hearsay evidence has successfully been challenged on two constitutional grounds.

1. Sixth Amendment—Confrontation Clause and Hearsay Evidence

In a criminal trial, to admit an out-of-court testimonial statement of a declarant (i.e., hearsay) against a defendant, the Confrontation Clause of the Sixth Amendment requires that:

i) The declarant must be unavailable; and

ii) The defendant must have had a prior opportunity to cross-examine the declarant.

Crawford v. Washington, 541 U.S. 36 (2004).

Note: The Supreme Court suggested in dicta in *Crawford* that the Confrontation Clause does not preclude the admission of a dying declaration as hearsay, even if the statement is testimonial, since this common-law exception predates the Confrontation Clause. *Crawford v. Washington*, 541 U.S. 36, 56, n.6 (2004).

a. Testimonial statements

In determining whether a statement is testimonial, an objective analysis of the circumstances, rather than the subjective purpose of the participants, is key. A statement made during a police interrogation that had the primary purpose of ascertaining past criminal conduct is testimonial, as is a certificate of a governmental laboratory analyst that a substance was an illegal drug. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009).

By contrast, a statement made to police during the course of questioning with the primary purpose of enabling police to provide assistance to meet an ongoing emergency (e.g., a 911 call) is not testimonial, *Davis v. Washington*, 547 U.S. 813 (2006), nor is a statement made by a fatally wounded victim as to the identity of his assailant in response to police questioning, because the statement was made to assist the police in addressing an on-going emergency, *Michigan v. Bryant*, 562 U.S. 344 (2011).

Generally, a statement made to an individual who is not a law enforcement officer, such as a teacher, is much less likely to be testimonial than a statement made to a law enforcement officer, even when the individual is under a duty to report such statements to police (e.g., school personnel's statutory obligation to report

suspected child abuse to police). In addition, a statement made by a very young child (e.g., a three-year old) will seldom, if ever, be testimonial.

Example: Statements made by a young child to his teachers in response to questions about physical evidence of abuse that identified the defendant as the child's abuser were not testimonial. *Ohio v. Clark*, 576 U.S. ___, 135 S. Ct. 2173 (2015).

b. Unavailability of the declarant

The Confrontation Clause mandates that the use of hearsay evidence based on the forfeiture-by-wrongdoing exception requires the defendant to have acted with the particular purpose of making the witness unavailable. The mere fact that the declarant is unavailable due to the defendant's act (e.g., murder of the witness) is not sufficient to establish such a purpose when the defendant is on trial for the act that made the witness unavailable. *Giles v. California*, 554 U.S. 353 (2008).

2. Fourteenth Amendment—Due Process Clause

The Due Process Clause of the Fourteenth Amendment may prevent application of a hearsay rule when such rule unduly restricts a defendant's ability to mount a defense.

Example: Application of a state evidentiary rule that prevents a defendant from using a witness's hearsay statements to impeach the witness's in-court testimony operated to deny the defendant the ability to present witnesses in the defendant's own defense. *Chamber v. Mississippi*, 410 U.S. 284 (1973).

B. FACE-TO-FACE CONFRONTATION

The Confrontation Clause reflects a preference for face-to-face confrontation of a defendant and a witness in court.

Example: A defendant who is charged with committing a sex crime against a child can force the child victim to testify in open court rather than from behind a screen that blocks the witness's view of the defendant. *Coy v. Iowa*, 487 U.S. 1012 (1988).

This type of confrontation may be denied, however, if there is an important public interest at stake, such as protecting a child.

Example: A child victim of a sex crime could testify via a one-way closed circuit television when there was a specific finding that the child witness would suffer serious emotional distress if the witness was required to testify in open court. *Maryland v. Craig*, 497 U.S. 836 (1990). The Court in *Coy*, above, refused to recognize a *presumption* of trauma to witnesses who were victims of sexual abuse.