[Note: Numbers in brackets refer to the printed pages of Understanding Evidence by Paul C. Giannelli where the topic is discussed.]

LexisNexis Area of Law Summary
Evidence

Chapter 1
OVERVIEW

§ 1.01 Introduction [1]

The rules of evidence govern how we go about the task of attempting to determine at trial what occurred in the past, often under circumstances of uncertainty.

§ 1.02 Proof at Trial [1-4]

In the common law system, proof typically comes in the form of witness testimony – *testimonial proof*. Proof may also consist of documentary evidence (e.g., written contract) or "real" evidence (e.g., murder weapon). Photographs, models, blackboards, and charts may be used to illustrate testimony – *demonstrative evidence*. In some cases, a witness may exhibit a scar or amputated arm to show the jury the result of an accident (*in-court exhibition*), or, perhaps show how she can no longer walk without a limp (*in-court demonstration*).

§ 1.03 Law of Evidence [4-8]

Evidence law may be divided into three major categories: (1) rules governing the substantive content of evidence, (2) rules governing witnesses, and (3) substitutes for evidence.

[A] Rules Governing the Content of Evidence
- **[1] Relevance Rules**
  - Character evidence
  - Other acts evidence
  - Habit evidence
  - Insurance evidence
- **[2] Competence Rules**
  - **[a] Rules Based on Reliability Concerns**
    - Hearsay rule
    - "Best evidence" rule
  - **[b] Rules Based on External Policies**
    - Privileges (e.g., attorney-client)
    - Quasi privileges (e.g., subsequent remedial measures)

[B] Rules Governing Witnesses
- **[1] Competency of Witnesses**

[2] Examination of Witnesses
[3] Types of Witnesses
[a] Lay Witnesses
[b] Expert Witnesses
[4] Credibility of Witnesses
[C] Substitutes For Evidence
Judicial notice of fact
Stipulations of fact

§ 1.04 Federal Rules of Evidence [8-10]

The Federal Rules of Evidence were enacted in 1975. As a federal statute not intended to preempt state law, the Federal Rules are not binding on the states.

§ 1.05 State Adoptions of the Federal Rules [10]

Over forty jurisdictions, including the military, have rules patterned on the Federal Rules.

§ 1.06 Interpreting the Federal Rules: The "Plain Meaning" Debate [11-13]

The Supreme Court has often, but not always, espoused an almost mechanical "plain meaning" approach in construing the Rules of Evidence, treating the Federal Rules as any other statute. In one case, the Court wrote: "We interpret the legislatively enacted Federal Rules of Evidence as we would any statute." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 587 (1993).

§ 1.07 Themes in the Federal Rules [13-14]

The paramount goal of a trial is truth-seeking, but that is not the only goal. The law of privileges, for example, precludes the admissibility of evidence that may be both relevant and reliable. Moreover, even when the ascertainment of truth is the goal, how to achieve that goal is often a matter about which reasonable people may disagree. Here, the federal drafters adopted several guiding principles. First, the Federal Rules are *biased in favor of admissibility*, which implicitly endorses jury competence. Another theme is *judicial discretion*. Although many trial lawyers prefer fixed rules, which they argue are predictable, the drafters believed that too many issues arise that cannot be anticipated, and therefore the trial judge must be given some leeway to shape the rules of evidence to deal with such contingencies.

§ 1.08 Criminal & Civil Trials [14-15]

The Rules of Evidence apply to both criminal and civil cases. Nevertheless, a number of rules recognize a distinction between civil and criminal trials – explicitly or by implication. Similarly, a number of rules, due to their subject matter, apply only in civil cases – for example, Rule 407

(subsequent remedial measures) and Rule 411 (liability insurance). Further differences in applicability in criminal and civil proceedings arise because the Rules of Evidence generally do not codify constitutional principles.

Chapter 2
ROLES OF JUDGE & JURY: FRE 614

§ 2.01 Introduction [17]

The allocation of responsibilities between judge and jury is a central part of the law of evidence. The judge decides the admissibility of evidence, the jury decides its "weight," which includes the credibility of witnesses.

§ 2.02 Role of the Judge [17-18]

"In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial." *Quercia v. United States*, 289 U.S. 466, 469 (1933).

§ 2.03 Court-called Witnesses [18-19]

Rule 614(a) recognizes the authority of the trial court to call witnesses on its own motion or at the behest of one of the parties. The authority to call witnesses includes the authority to appoint expert witnesses (Rule 706).

§ 2.04 Court Questioning of Witnesses [19-20]

Rule 614(b) recognizes the trial court's authority to question witnesses. It permits the judge to examine witnesses in order to develop facts germane to the issues and to clear up doubts that may arise from the testimony. An impartiality requirement is implicit in the federal rule. Rule 614(c) provides that objections to the questioning of witnesses by the court may be made at the time the witness is questioned or at the next available opportunity that the jury is absent.

§ 2.05 Commenting on Evidence [20-21]

Unlike most state judges, federal trial judges have long had the authority to comment on the evidence. The judge "may not assume the role of a witness. He may analyze and dissect the evidence, but he may not either distort it or add to it. ... This court has accordingly emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence 'should be so given as not to mislead, and especially that it should not be one-sided'; that 'deductions and theories not warranted by the evidence should be studiously avoided.'" *Quercia v. United States*, 289 U.S. 466, 470 (1933) (citations omitted).

§ 2.06 Jury Questioning of Witnesses [21-22]

There is no Federal Rule on questioning by jurors, but the cases recognize the trial court's discretion on this issue. There are a number of dangers in the practice. If jury questioning is permitted, jurors should be required to submit written questions so that the judge has the

opportunity to review the propriety of questions. If a question is unobjectionable, the judge puts it to the witness.

PART A: PROCEDURAL FRAMEWORK OF TRIAL

Chapter 3
STAGES OF TRIAL

§ 3.01 Introduction [23]

Most students have taken a course in civil procedure before they take the evidence course. The same cannot be said for criminal procedure. Thus, this chapter briefly summarizes some of the initial steps before trial, with more background information provided for criminal litigation.

§ 3.02 Pretrial Stages in Civil Cases [23-29]

A civil suit commences with the filing of a complaint. A summons along with the complaint is then served on the defendant, who is required to respond with an answer. The party must either admit or deny the averments in the complaint, unless unsure. Failure to deny may result in an admission. Affirmative defenses must also be set forth in the answer. Once the pleadings are closed, a party may move for a judgment on the pleadings.

§ 3.03 Pretrial Stages in Criminal Cases [29-34]

[A] Charging Instruments

Criminal cases may commence with the filing of a complaint or an arrest, which then is followed by a complaint. The process may also start with a grand jury indictment or in some jurisdictions, with the filing of a prosecutor's information.

[B] Preliminary Hearing

The preliminary hearing is a screening device, much the same as the grand jury is a screening device, designed to insure that persons are not made to stand trial for a felony in the absence of "substantial credible evidence." Unlike a grand jury, a preliminary hearing is an adversarial proceeding.

[C] Grand Jury Proceedings

State law generally governs indictment issues. Indeed, approximately two-thirds of the states do not require grand jury indictments for felonies. The rules of evidence, constitutional or otherwise, are generally inapplicable to grand jury proceedings.

§ 3.04 Jury Selection & Voir Dire [34-35]

The examination of prospective jurors (voir dire) is conducted to determine whether challenges are warranted. There are two types of challenges: (1) for cause and (2) peremptory. Challenges for cause are typically based on statutory provisions that contain age, citizenship, and other disqualifications such as a felony conviction or some relationship with one of the parties. The impartiality of jurors, of course, is required. Thus, evidence of personal bias is grounds for challenge. A peremptory challenge can be exercised for any reason except peremptory strikes may not be based on race or gender, a rule that also applies in civil cases.

§ 3.05 Order of Proceedings at Trial [35-41]

The trial begins with opening statements. Evidence is first presented in the plaintiff's (prosecution's) case-in-chief, which is followed by the defense case-in-chief, plaintiff rebuttal, and defense surrebutal. The trial ends with closing arguments by counsel and jury instructions. The judge has the discretionary authority to alter this scheme.

§ 3.06 Jury Deliberations, Verdicts & Posttrial Motions [41-42]

[A] Exhibits in the Jury Room

Real and documentary evidence admitted at trial usually goes with the jury to the deliberation room. In contrast, pedagogic devices, such as models, do not go to the deliberation room.

[B] Post-Verdict Hearings & Motions

When the jury returns its verdict and it is read in open court, losing counsel may ask for the jury to be polled. If there is a conviction in a criminal case, a sentencing hearing is scheduled after a presentence investigation and report is completed. A motion for a directed verdict may also be made at this time, as well as a motion for a new trial.

Chapter 4
BURDENS OF PROOF

§ 4.01 Introduction [43]

The term "burden of proof" is often confusing because there are two distinct burdens of proof: (1) the "burden of persuasion" and (2) the "burden of production."

§ 4.02 Allocation of Burdens [43-44]

In every case these two burdens are allocated, at least initially, to one of the parties on *every* issue in the case. These two burdens, however, do not have to be allocated to the same party, even on the same issue. For example, in some jurisdictions the burden of production on self-defense in a criminal case is allocated to the accused, but once that burden is satisfied, the burden of persuasion rests with the prosecution to disprove self-defense.

§ 4.03 Burden of Persuasion [44-49]

The burden of persuasion refers to the *convincing force* of the evidence. Technically, it is the "risk of nonpersuasion." Three common standards of proof are used to define the legally required persuasive force of the evidence: (1) "proof beyond a reasonable doubt" (the highest standard); (2) "clear and convincing evidence" (an intermediate standard); and (3) "preponderance of evidence" (more probable than not).

§ 4.04 Burden of Production [49-52]

The burden of production, sometimes called the "burden of going forward with evidence," refers to a party's responsibility to introduce evidence at trial. Technically, it is the risk of nonproduction. The judge (never the jury) determines whether this burden has been satisfied. There are two possible adverse consequences if a party fails to satisfy its burden of production: (1) the party may suffer a directed verdict, or (2) in the case of an affirmative defense, the jury may not be instructed on the defense. Both consequences take the issue away from the jury.

Chapter 5
PRESUMPTIONS & INFERENCES: FRE 301

§ 5.01 Introduction [53]

Rule 301 covers *rebuttable* presumptions in *civil* cases. There is no rule dealing with criminal presumptions in the Rules of Evidence. Rule 301 does not create any presumptions; it merely governs their effect. The rule further limits its own reach by explicitly recognizing legislative authority over the effect of presumptions.

§ 5.02 Definitions of Presumptions & Inferences [53-54]

Conclusive presumptions. Rule 301 governs only rebuttable presumptions. Conclusive or irrebuttable presumptions are actually substantive rules of law and are therefore beyond the scope of the Rules of Evidence.

Rebuttable presumptions. A presumption, as that term is used in Rule 301, is a procedural rule that defines the relationship between two facts – a basic fact and a presumed fact. If the basic fact is proved, the presumed fact must be accepted as established unless and until rebutted.

Inferences. A presumption is mandatory. In contrast, an inference, which also involves a relationship between two facts, is permissive. For example, the doctrine of res ipsa loquitur involves an inference of negligence. Establishment of the basic facts permits, but does not compel, a conclusion of negligence.

§ 5.03 Rationale for Presumptions [54-55]

Presumptions are created for a number of reasons: (1) policy, (2) fairness (possession of evidence), and (3) probability.

§ 5.04 Effect of Presumptions [55-57]

There are two principal views on the effect of presumptions in civil cases: (1) Professor Thayer's theory, and (2) Professor Morgan's theory. The difference concerns the quantum of proof necessary to rebut. Under the Morgan approach, a presumption shifts the burden of persuasion as well as the burden of production.

§ 5.05 Federal Rule 301 [57-58]

Rule 301 follows the Thayer approach.

§ 5.06 Conflicting Presumptions [58]

Under a pure Thayerian view, the presumptions would disappear if rebutted, and the evidence would be considered for its worth by the jury; often the basic fact would be circumstantial proof of the presumed fact. Another approach would look to the underlying rationale for the two presumptions, and the presumption with the stronger policy basis would trump the other presumption.

§ 5.07 State Presumptions in Federal Civil Cases [58-59]

Federal Rule 302 provides: "In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State law."

§ 5.08 Selected Presumptions [59-60]

§ 5.09 Criminal Presumptions [60-65]

Neither Rule 301 nor any other rule of evidence governs presumptions in criminal cases. As with presumptions in civil cases, confusing terminology is responsible for many of the problems in this context. For example, the presumption of innocence is not a true presumption; the accused is not required to prove any basic fact in order to trigger the presumption of innocence. Rather, the "presumption of innocence" is the traditional way of stating that the burden of persuasion is on the prosecution.

Civil-criminal distinction. Although the term "presumption" is used in both criminal and civil cases, a presumption operates differently in the criminal context than in a civil case. The difference arises from constitutional limitations. In a criminal case, an accused cannot constitutionally suffer a directed verdict. Thus, although the term presumption is often used in criminal cases, the effect of such a presumption generally is only that of an inference.

Chapter 6
OBJECTIONS & OFFERS OF PROOF: FRE 103

§ 6.01 Introduction [67]

An *objection* or *motion to strike* is used to exclude evidence an attorney believes is inadmissible. In contrast, when an attorney's proffer of evidence has been excluded by a trial judge's ruling, an *offer of proof* is required to preserve the issue for appeal.

§ 6.02 Objections: FRE 103(a)(1) [67-72]

Failure to make a *timely* and *specific* objection forfeits the right to raise the issue on appeal. Another consequence of failing to object is that the admitted evidence becomes part of the trial record and may be considered by the jury in its deliberations, by the trial court in ruling on motions (i.e., directed verdicts), and by a reviewing court determining the sufficiency of the evidence.

[A] Specificity: Grounds

Rule 103 requires *specific* objections – i.e., a statement of the grounds upon which the objection is based must accompany the objection unless the grounds are apparent from the context. For instance, "objection, hearsay" is a specific objection. An objection that is not sufficiently specific is called a *general objection.*

[B] Specificity: Parts of Documents

Although not explicitly stated in Rule 103, the specificity requirement further demands that counsel indicate which particular portion of evidence is objectionable.

[C] "Continuing" or "Running" Objections

Many jurisdictions recognize "continuing objections," which remove the need to object repeatedly to a line of testimony after an adverse ruling on an earlier objection based on the same issue.

[D] Timeliness of Objections

[1] Motions to Strike

In some instances, a witness may answer before counsel can object, or a question's tendency to elicit an objectionable response will not become apparent until the response is given. If a motion to strike is granted, the court should *instruct* the jury to disregard the evidence. Even though the jury has heard the answer, it is nevertheless important to ask the trial judge to strike the response

because such a ruling precludes opposing counsel from referring to the stricken material in closing argument.

§ 6.03 Offers of Proof: FRE 103(a)(2) [72-74]

When evidence has been *excluded* by a trial court ruling, Rule 103(a)(2) requires an offer of proof to preserve the issue for appeal. Without an offer of proof in the trial record, an appellate court cannot review the trial court's ruling to determine whether or not the action of the trial court is harmless error.

[A] Form of Offer of Proof

An offer of proof may take several forms. First, an offer of *testimonial* evidence often takes the form of a statement by counsel as to the expected content of the excluded testimony. Second, the trial court may require or be asked to take the "offer" by an examination of the witness, including cross-examination. Third, an affidavit (which requires an oath) summarizing the witness's expected testimony and signed by the witness is another way to make offer of proof. Finally, excluded *documentary* evidence should be "marked for identification" and appended to the record of trial

§ 6.04 Motions in Limine [74-76]

The term *motion in limine* means "at the threshold." It is a *pretrial* request for a preliminary decision on an objection or offer of proof. Although the Federal Rules do not explicitly mention motions in limine, their use is now common.

[A] Definitive Rulings

Rule 103(a) provides: "Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal."

§ 6.05 Required Testimony: *Luce v. United States* [76-77]

In *Luce v. United States*, 469 U.S. 38 (1984), the Supreme Court ruled that an accused who had failed to testify could not appeal a pretrial (*in limine*) decision to permit impeachment under Rule 609 (prior convictions). Other courts have extended *Luce* to other evidentiary contexts.

§ 6.06 "Drawing the sting": *Ohler v. United States* [77-78]

In *Ohler v. United States*, 529 U.S. 753 (2000), the Supreme Court held that an accused who brought out her prior conviction on direct examination ("drawing the sting") could not challenge the admissibility of that conviction on appeal.

§ 6.07 Invited Error Rule [78]

The "invited error" doctrine is another waiver rule. This rule prohibits a party who induces error in the trial court from taking advantage of the error on appeal

§ 6.08 Meeting "Fire with fire" [79]

If one party introduces irrelevant or incompetent evidence, in some circumstances the other party may respond "in kind."

§ 6.09 Record of Offer & Ruling: FRE 103(b) [79-80]

"Making the record" is one of trial counsel's most important responsibilities. If the court does not make a decision, it is assumed that the court overruled the objection. It is counsel's responsibility to ensure that all objections and offers of proof are recorded. Off-the-record objections are typically insufficient.

§ 6.10 Hearings Out of the Jury's Presence: FRE 103(c) [80]

Rule 103(c) requires that discussions involving the admissibility of evidence be held outside the hearing of the jury whenever practicable.

§ 6.11 Plain Error Rule: FRE 103(d) [80-81]

Rule 103(d) recognizes the plain error doctrine, under which an appellate court may consider an evidentiary error despite a party's failure to make an objection, motion to strike, or offer of proof at trial. The purpose of this doctrine is to safeguard the right to a fair trial, notwithstanding counsel's failure to object.

§ 6.12 Harmless Error [81-82]

In determining whether to reverse a trial court judgment, appellate courts must decide whether an evidentiary error is harmless or prejudicial (reversible). Rule 103(a) provides that a case will not be reversed on appeal because of an erroneous evidentiary ruling unless the ruling involves a "substantial right" and the other procedural requirements of Rule 103, such as timely objection, have been satisfied. The term "substantial right" is not defined in the rule, but it refers to the harmless error doctrine.

§ 6.13 Appellate Review of Admissibility Decisions [82]

Questions concerning the interpretation of an evidence rule, rather than its application in a particular case, are treated differently. Generally, the former involves de novo review, while the latter is reviewed under an abuse-of-discretion standard.

Chapter 7
PRELIMINARY QUESTIONS OF ADMISSIBILITY: FRE 104

§ 7.01 Introduction [87]

Federal Rule 104(a) follows the traditional practice of allocating to the trial judge the responsibility for determining the admissibility of evidence. Rule 104(b), however, modifies this principle somewhat with respect to preliminary questions involving issues of "conditional relevancy."

§ 7.02 Preliminary Questions: General Rule: FRE 104(a) [87-89]

[A] Application of Evidence Rules

Under Rule 104(a), the trial court is "not bound by the rules of evidence except those with respect to privileges" when ruling on the admissibility of evidence. Accordingly, the judge may consider affidavits and other hearsay information.

[B] Burden of Proof on Preliminary Issues

As a general rule, the party offering evidence has the burden of persuasion on preliminary issues once an objection has been raised. Also as a general rule, the "preponderance of evidence" standard applies.

§ 7.03 Conditional Relevancy: FRE 104(b) [89-91]

Under Rule 104(b), the court does not decide questions of conditional relevancy using the preponderance-of-evidence standard, as under Rule 104(a). Rather, the trial court determines only if sufficient evidence has been introduced "to support a finding of the fulfillment of the condition." In effect, this is a *prima facie* standard. The difference is between a preponderance of evidence and *evidence sufficient for a jury to find a fact by a preponderance of evidence*, a rather subtle difference.

§ 7.04 Hearing of Jury: FRE 104(c) [92]

Rule 104(c) requires the trial judge to hold a hearing out of the presence of the jury when ruling on the admissibility of a confession. Rule 104(c) provides that hearings "on other preliminary matters shall also be conducted out of the hearing of the jury when the interests of justice require, or when an accused is a witness and so requests."

§ 7.05 Testimony by Accused: FRE 104(d) [92-93]

Rule 104(d) limits the scope of cross-examination when a criminal defendant testifies on a preliminary matter; such testimony does not subject the defendant "to cross-examination as to other issues in the case."

§ 7.06 Weight & Credibility: FRE 104(e) [93-94]

A basic axiom of trial practice is that the trial judge decides issues of admissibility and the jury decides questions of weight and credibility. Rule 104(e) makes clear that a court's admissibility ruling does not curtail the right of a party to dispute the reliability of admitted evidence before the jury.

Chapter 8
LIMITED ADMISSIBILITY: FRE 105

§ 8.01 Introduction [97]

Multiple admissibility. Sometimes an item of evidence may properly be used for multiple purposes. In some cases this is proper. For example, a party's prior inconsistent statement may be admitted for impeachment as a prior inconsistent statement (Rule 613) and as substantive evidence as a party admission (Rule 801(d)(2)(A)[nllrz]).

Limited admissibility. Frequently, however, evidence may be admissible for one purpose but inadmissible for another purpose. Evidence also may be admissible against one party but not against another party. In other words, the evidence is admissible for a limited purpose. In such cases, Rule 105 applies, and the court must, upon request, instruct the jury as to the limited purpose of the evidence.

§ 8.02 Evidence Admissible for One Purpose [97-98]

Numerous examples of limited admissibility occur throughout the law of evidence. Sometimes a rule explicitly recognizes this principle. *See* Rule 404(b) (other-acts evidence); Rule 407 (subsequent remedial measures); Rule 408 (compromises & offers to compromise); and Rule 411 (liability insurance). However, sometimes the Rules are silent – e.g., hearsay context. For example, prior inconsistent statements are generally admissible only for the purpose of impeachment (and not for their truth). But see Rule 801(d)(1)(A).

§ 8.03 Evidence Admissible Against One Party [98-101]

Under Rule 105, when evidence is admissible against one party, but not another party, a limiting instruction must be given upon request, directing the jury to use the evidence only against the proper party. This issue most often arises in joint trials in criminal cases when a confession implicates the codefendant. This may raise a confrontation issue under *Bruton v. United States*, 391 U.S. 123 (1968). The *Bruton* issue can be obviated if separate trials are ordered, the defendant's name is redacted, or the codefendant testifies. There is no *Bruton* issue if the statement falls within a recognized hearsay exception.

PART B: RELEVANCY

Chapter 9
RELEVANCY & ITS COUNTERPARTS: FRE 401-03

§ 9.01 Overview of Relevancy Rules [105]

Relevancy is the most pervasive concept in evidence law. It is the threshold issue for all evidence. If the evidence is not relevant, it is excluded.

Federal Rule 401 defines relevant evidence (probative value). The rule must be read in conjunction with Rules 402 and 403. Rule 402 makes relevant evidence admissible in the absence of a rule of exclusion, and Rule 403 specifies the circumstances under which a trial court is permitted to exclude relevant evidence.

Special relevance rules. In some situations an issue recurs so frequently that the courts developed categorical rules. For instance, character evidence is generally prohibited, although there are important exceptions. Rules 404, 405, 412-15 deal explicitly with character. Similarly, evidence of liability insurance is generally inadmissible; Rule 411 covers that issue.

Ancillary rules based on policy. Rules 407-410 are relevance rules of a different kind. They involve the exclusion of relevant evidence based on external policy reasons – i.e., external to the truth-seeking function of the trial. For example, subsequent remedial measures (Rule 407) are excluded in order to encourage people to make repairs after accidents.

§ 9.02 Consequential ("material") Facts Defined [106-07]

Rule 401 embraces two concepts: *relevancy and materiality*. To be admissible, evidence must be both relevant and material. However, instead of the term "material fact," Rule 401 uses the phrase "fact that is of consequence to the determination of the action," which can be shortened to *consequential* fact. "Relevancy" describes the relationship between an item of evidence and the proposition it is offered to prove. In contrast, "materiality" describes the *relationship* between that proposition and the issues in the case – i.e., the consequential or material facts.

With the exception of the credibility of witnesses, the "consequential facts" in a particular case are a matter of substantive law – (1) the elements of the charged crime, (2) the elements of a cause of action, (3) the elements of an affirmative defense, and (4) damages in civil cases.

§ 9.03 "Relevancy" Defined [108-14]

Rule 401 defines "relevant evidence" as evidence having any tendency to make the existence of a material or consequential fact "more probable or less probable than it would be without the evidence." Rule 401's standard does not require that the evidence make a consequential

(material) fact "more probable than not" (preponderance of evidence), but only that the material fact be more or less probable with the evidence *than without the evidence*.

[A] Admissibility vs. Sufficiency

There is a difference between relevancy (admissibility) and sufficiency. Although the evidence as a whole must be sufficient to satisfy a party's burden of production and thus send an issue to the trier of fact, each item of evidence need only advance the inquiry.

[B] Basis for Relevancy Determination

In determining relevancy, the trial judge must rely on logic as informed by experience or science.

[C] Direct & Circumstantial Evidence

Problems of relevancy typically involve circumstantial rather than direct evidence. The distinction turns on the manner in which an item of evidence relates to the material issues in the case. Circumstantial evidence requires a *further inference* to reach the proposition that the evidence is offered to prove. Direct evidence is not necessarily better than circumstantial evidence.

[D] "Inference upon Inference" Rule

Some cases state that an inference cannot be stacked upon another inference. This rule makes no sense; reasoning requires inferences upon inferences.

[E] "Background" Evidence

All evidence need not involve a disputed issue. The federal drafters specifically approved of the admission of "background" evidence. As examples, the drafters cited charts, photographs, views of real estate, and murder weapons.

§ 9.04 Admissibility of Relevant Evidence: FRE 402 [114-17]

Rule 402 is the general provision governing the admissibility of evidence: relevant evidence is admissible, in the absence of a rule of exclusion, and irrelevant evidence is inadmissible. For present purposes, the most important part of Rule 402 is the phrase "by these rules." This language allows relevant evidence to be excluded by operation of some other rule of evidence. A number of exclusionary rules are found elsewhere in the Rules of Evidence. Rule 403 is an illustration. Examples in other Articles include rules on privilege, competency, firsthand knowledge, hearsay, authentication, and best evidence. In sum, evidence may meet the relevancy standard of Rule 401 but nevertheless be inadmissible because it fails to satisfy the requirements of some other provision of the Rules of Evidence.

Relevant evidence may also be excluded due to the Constitution, federal statutes, or the Civil and Criminal Rules of Procedure.

§ 9.05 Rule 403 "Balancing"

Rule 403 is the *most important* rule in evidence law because every item of evidence raises a Rule 403 problem – at least in theory. It confers no authority to admit irrelevant evidence; Rule 402 mandates the exclusion of irrelevant evidence.

[A] Estimating Probative Value

The application of Rule 403 requires a three-step process. First, the judge must determine the probative value of the proffered evidence. Second, the court must identify the presence of any of the enumerated dangers (unfair prejudice, confusion of issues, or misleading the jury) or considerations (undue delay, waste of time, or needless presentation of cumulative evidence). Finally, the court must balance the probative value of the evidence; exclusion is discretionary. The word "substantially" is significant; it makes Rule 403 biased in favor of admissibility.

[B] Rue 403 "Dangers"

Unfair prejudice. Rule 403 requires exclusion only in the case of *unfair* prejudice. Most evidence introduced by one party is "prejudicial" to the other side in the sense that it damages that party's position at trial. This is not the concern of Rule 403. Otherwise, the most probative evidence (e.g., a confession) would be excluded as the most "prejudicial." In other words, there is a difference between being unfavorable and being unfairly prejudicial.

Other dangers include confusion of issues and misleading the jury.

[C] Rule 403 "Considerations"

Rule 403 permits the trial court to exclude evidence if its probative value is substantially outweighed by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. In contrast to the "dangers" enumerated in Rule 403, these factors are not intended to protect the integrity of the factfinding process. Instead, they are designed to conserve judicial resources.

[D] Probative Value vs. Dangers & Considerations

Although not explicitly stated in Rule 403, the judge should consider (1) the effect of cautionary jury instructions, (2) the availability of alternative proof, and (3) the possibility of stipulations to reduce unfair prejudice in making the balancing determination. *See Old Chief v. United States*, 519 U.S. 172 (1997)[nlcitz].

[E] Appellate Review

Courts of appeals employ an abuse-of-discretion rule in reviewing a trial court's Rule 403 decisions.

§ 9.06 Similar Happenings; Other Accidents [125-27]

Frequently, similar events are offered in evidence. This usually presents a problem of circumstantial proof, and the issue becomes how probative are incidents that may differ as to parties, times, places, or circumstances from the event involved in the litigation. Rules 401 and 403 govern in this context, unless the evidence involves character. The test is often stated as whether there is *substantial similarity* between the other happening and the present litigation. Nevertheless, the issue involves a classic Rule 403 analysis.

Notice & dangerous conditions. Prior occurrences are sometimes admissible to show notice or a dangerous condition. Additional examples include other claims, misrepresentations, contracts, and business transactions, as well as sales of similar property as evidence of value.

Absence of other happenings. The lack of other accidents ("good" safety history) may be admissible to show the absence of a dangerous condition. Showing probative value, however, is far more difficult here.

§ 9.07 Adverse Inferences [127-30]

In some cases an adverse inference can be drawn from a party's conduct. This is sometimes characterized as an "implied admission."

[A] Admissions by Conduct – flight, alias, etc.

Conduct of a party, such as intimidating witnesses, may be used circumstantially to draw an adverse inference. Other examples include evidence of false statements, escape, offers to bribe witnesses, refusal to provide handwriting exemplars, and use of an alias.

[B] Destruction of Evidence (spoliation)

Spoliation involves the destruction of evidence. It is a type of circumstantial evidence, an implicit admission of the weakness of a party's case. Documents destroyed in good faith pursuant to a valid record retention policy should not be subject to this inference.

[C] Failure to Produce Evidence

Sometimes a party's failure to produce evidence may be used to draw an adverse inference. Perhaps the most familiar instance is an accused's failure to testify, which is prohibited on

constitutional, not evidentiary, grounds. *See Griffin v. California*, 380 U.S. 609, 614 (1965) (accused's failure to testify cannot be the subject of comment by the court or prosecutor).

[D] "Missing Witness" Rule

A party's failure to call a presumably favorable witness may give rise to an adverse inference. The inference is often troublesome, especially in criminal cases. The rule applies only when one party has superior "access" to a witness, and this is often not clear cut.

§ 9.09 Out-of-court Experiments [130-31]

Admissibility depends on whether the experiment was conducted under substantially similar circumstances as those involved in the case. Rule 403 governs. Courts often distinguish between experiments offered as a reconstruction of the accident and those that merely illustrate general scientific principles. The former generally must be conducted under circumstances closer to the conditions existing at the time of the event that is the subject of the litigation.

Chapter 10
CHARACTER EVIDENCE: FRE 404, 405, 412-15

§ 10.01 Introduction [137-38]

The saying, "Once a thief, always a thief,"captures the notion of *propensity* or *disposition* proof, better known as character evidence. Although character-as-proof-of-conduct may be probative, at least in some cases, it is generally inadmissible under Rule 404. However, recent amendments drastically change this rule in sex offense cases (*see* Rules 413-15).

Exceptions. Rule 404(a) recognizes exceptions for (1) a criminal *defendant's character* and (2) a *victim's character* in self-defense cases when offered by the accused. Rule 412, the rape shield law, is a special provision governing the victim's character in sex offense cases. A third exception in Rule 404(a) involves a *witness's character* and is limited to impeachment (i.e., character for truthfulness), a topic discussed in chapter 22.

§ 10.02 Rationale for Prohibiting Character Evidence [138]

Although character evidence may be probative, it is generally excluded because it is extremely prejudicial. There is a concern that the jury will overvalue the evidence and convict the accused for who he is rather for what he has done.

§ 10.03 Methods of Proof [138-40]

Rule 405(a) governs the methods of proof. Generally, only *opinion* and *reputation* evidence (not specific acts) are permitted to prove character when a Rule 404(a) exception applies. However, specific instances of conduct may be used during cross-examination of a character witness to test the witness's qualifications to testify on character.

§ 10.04 Accused's Character: FRE 404(a)(1) [140-44]

Under Rule 404(a)(1), the accused may offer evidence of a *pertinent* character trait (but only through reputation or opinion, Rule 405(a)), in which case the prosecution may respond by cross-examining the character witnesses on specific acts to test their qualifications or by introducing rebuttal character witnesses. Moreover, if the accused introduces evidence of a victim's violent character under Rule 404(a)(2), the prosecution may respond with evidence of the accused's violent character.

§ 10.05 Accused's Character in Sex Offense Cases: FRE 413-15 [145-48]

In sex offense cases, the prosecution (plaintiff) may offer evidence of the accused's character under Rule 413 (rape cases), Rule 413 (child molestation), and Rule 415 (civil cases).

§ 10.06 Victim's Character in Self-defense Cases: FRE 404(a)(2) [148-50]

The accused may offer evidence of a victim's violent character (but only through reputation or opinion evidence) on the first-aggressor issue, in which case the prosecutor may offer rebuttal character evidence. Note that there is a different use of character in self-defense cases – *communicated* character – on the issue of reasonable fear. Because this is not character-as-proof-of-conduct, Rules 404(a) and 405 do not apply. Instead, Rules 401-403 control.

§ 10.07 Rape Shield Law: FRE 412 [150-56]

Rule 412, the rape shield law, generally precludes evidence of a victim's character in sex offense cases. There are three exceptions: (1) to prove that the origin of semen, pregnancy, or other physical evidence was someone other than the accused, (2) to prove a victim's past sexual activity with the accused, and (3) when constitutionality required. In addition, notice and in-chamber procedures are mandated.

§ 10.08 Character Evidence in Civil Cases [156]

The first two exceptions in Rule 404(a) appear to apply only in criminal cases because the drafters used the term "accused" and the committee note supports this position. A small minority of federal courts, however, have carved out an exception in civil cases when a central issue is criminal in nature.

§ 10.09 Character as Element of a Cause of Action or Defense [156-57]

"Character in issue." There is a second use of character evidence. It involves those rare cases in which character is an element of a cause of action, a crime, or a defense. Rule 404(a) does not cover this use of character. Rule 405(b), however, specifies the methods of proof when character is "in issue."

Chapter 11
OTHER ACTS EVIDENCE: FRE 404(b)

§ 11.01 Introduction [156-60]

Rule 404(b) provides that evidence of other crimes, wrongs, or acts, although not admissible to prove character, may be admissible for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. The terms "similar act" or "prior crime" are frequently used to describe this subject matter; these terms are misleading. Although often used to admit criminal acts, by its own terms, Rule 404(b) is not limited to crimes; it embraces "wrongs" and "acts" as well. Moreover, the other-act need not be "similar" to the charged offense. The other-act need not have occurred prior to the charged offense; evidence of a *subsequent* act may be admissible. Finally, Rule 404(b) is not limited to criminal cases; it applies in civil litigation as well.

§ 11.02 Rule 404(b) Analysis [160-61]

The application of the rule requires three steps:

> (1) Rule 401 – identify a material issue (other than character) for which the evidence is being offered to prove (i.e., identity of perpetrator, mens rea, or corpus delicti);
>
> (2) Rule 403 – balance the probative of the evidence against the risk that the jury will ignore the limiting instruction (Rule 105) and make the prohibited character inference (unfair prejudice); and
>
> (3) Rule 104(b) – determine whether there is *prima facie* evidence of accused's involvement in the other act.

§ 11.03 Determining "Materiality" Under Rule 401 [161-65]

Typically, other-acts evidence is admitted as proof of one of three essential elements: (1) to show that the accused was the actor (identity issue); (2) to show that the accused possessed the requisite mental state (mens rea issue); or (3) to show that a crime has been committed (corpus delicti issue). In addition, it is sometimes impossible to separate the charged offense and the other-act. This is often referred to as "interrelated" acts or res gestae. Finally, the entrapment defense raises further issues in this context.

§ 11.04 Determining Admissibility Under Rule 403

Under Rule 403, relevant evidence may be excluded if its probative value is *substantially* outweighed by the dangers of unfair prejudice, confusion of issues, or misleading the jury.

Other-acts evidence presents all three of these dangers, especially the danger of unfair prejudice because the jury may use the evidence for the impermissible purpose of determining character.

[A] Disputed Issues

Even if "other acts" evidence is probative of an essential element of the charged offense, the evidence should not be admissible, according to some courts, unless that element is a disputed issue in the particular case.

[B] Stipulations

Frequently, a stipulation will eliminate a dispute and thus should obviate the need for other-acts evidence. However, in *Old Chief v. United States*, 519 U.S. 172, 190 (1997), the Supreme Court indicated that a stipulation need not be routinely accepted in this context.

[C] Jury Instructions

It may be possible to reduce the prejudicial effect of other-acts evidence through instructions informing the jury that such evidence may not be used to show the defendant's character (Rule 105).

§ 11.05 Defendant's Participation in Other Act: Rule 104(b)

For other-acts evidence to be relevant, the prosecution must offer some evidence tending to show that the defendant committed the other act. Many common law courts had required "a preponderance of evidence," "substantial proof", or "clear and convincing evidence" of the defendant's involvement. In *Huddleston v. United States*, 485 U.S. 681 (1988), the Supreme Court rejected all of these approaches. Instead, the Court, based on Rule 104(b), adopted a *prima facie* evidence standard.

§ 11.06 Other-act Evidence Offered by the Accused

The probative value of modus operandi to show identity is the same when offered by the defense, sometimes referred to as a "reverse 404(b)" issue. In this context, the defense is attempting to show that another person, using a distinctive modus operandi, committed the earlier robberies and, since the same modus operandi was used in the charged offense, that person also committed it.

§ 11.07 Entrapment Cases

A majority of jurisdictions follow the "origin of intent" test or subjective theory of entrapment. Under this test, entrapment occurs "when the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the *disposition* to commit the

alleged offense and induce its commission in order that they may prosecute." *Sorrells v. United States*, 287 U.S. 435, 442 (1932) (emphasis added). Under this view of entrapment, the defendant's predisposition (propensity) is a material issue, and the defendant's prior criminal conduct becomes relevant.

§ 11.08 Notice Requirement

In 1991 Federal Rule 404(b) was amended to include a notice provision.

§ 11.09 Double Jeopardy & Collateral Estoppel

In *Dowling v. United States*, 493 U.S. 342 (1990), the Supreme Court rejected double jeopardy and due process arguments against the prosecution's use of an other-act that was the subject of an acquittal.

Chapter 12
HABIT EVIDENCE: FRE 406

§ 12.01 Introduction [175]

Habit or routine-practice evidence may be admitted to prove that a person or organization acted in conformity with that habit or routine practice on a particular occasion.

§ 12.02 Habit & Character Distinguished [175-76]

Character distinguished. Evidence of habit must be distinguished from evidence of character because the former may be admissible under Rule 406, whereas the latter is generally inadmissible under Rule 404. The difference in treatment accorded habit and character evidence is based on the greater probative value of habit evidence

Definition. Habit is the regular response to a recurring particular circumstance – e.g., always stopping at a particular stop sign. The key elements in determining whether conduct is habit are (1) specificity, (2) repetition, (3) duration, and (4) the semi-automatic nature of the conduct.

§ 12.03 Routine Business Practices [177-78]

The phrase "routine practice of an organization" refers to the "habit" of an organization, commonly known as business practice, usage, or custom.

[A] Custom to Establish Standard of Care

Rule 406 does not govern the use of routine-practice evidence offered for some other purpose. For example, custom or routine practice is often used to establish the standard of care in negligence cases. Such evidence is not offered to prove conduct, and therefore Rule 406 does not apply.

§ 12.04 Determining Admissibility under Rule 403 [178-79]

Rule 406 provides only that evidence of habit or routine practice as proof of conduct is relevant, rather than admissible. Consequently, Rule 403 must be consulted to determine the admissibility of habit evidence. In making this determination, the trial court may consider the "compactness of proof."

§ 12.05 Methods of Proof [179]

In most instances, habit will be proved by opinion evidence or evidence of specific instances of conduct.

Chapter 13
SUBSEQUENT REMEDIAL MEASURES: FRE 407

§ 13.01 Introduction [181]

Rule 407 excludes evidence of subsequent remedial measures when offered to prove negligent or culpable conduct, including strict liability in federal courts.

§ 13.02 Rationale [181-82]

Rule 407 rests on two grounds. The most important is "a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety." Fed. R. Evid. 407 advisory committee's note. The second ground is relevance: Is the remedial measure really probative of negligence or are other motivations involved?

§ 13.03 "Remedial Measures" Defined [182]

Although known as the "repair rule" at common law, Rule 407 encompasses far more than subsequent repairs. It covers the installation of safety devices, changes in company rules, discharge of employees, disciplinary action against employees, changes in drug warnings, and modifications in product design.

§ 13.04 Timing of Repair [183]

The repair or remedial measure must take effect *after* the accident or incident being litigated. A repair or remedial measure that takes effect after purchase but before the accident being litigated is not a subsequent measure.

§ 13.05 Third-party Remedial Measures [183]

When a subsequent remedial measure is made by a third person, the policy of encouraging such measures is not implicated, and thus the rule does not apply. In these cases, however, the relevance of the subsequent measure becomes doubtful and is subject to exclusion under Rules 401 and 403.

§ 13.06 Required Remedial Measures [184]

When a subsequent remedial measure is required by governmental regulation, the policy of encouraging such measures is not be implicated. However, relevance issues remain.

§ 13.07 Strict Liability Cases [184-85]

Federal Rule 407 applies in strict liability cases, but the opposite is true in many states.

§ 13.08 Admissibility for Other Purposes [186-88]

If the evidence is offered for some other purpose, such as proof of ownership, control, feasibility of precautionary measures, or impeachment, Rule 407 does not apply. Rule 403 applies, however.

Chapter 14
COMPROMISES & OFFERS: FRE 408

§ 14.01 Introduction [189]

Rule 408 excludes evidence of compromises and offers of compromise when offered to prove liability for or the invalidity of a claim or its amount. A different provision, Rule 410, governs the admissibility of offers to plead guilty or no contest in criminal cases.

§ 14.02 Rationale [189]

Offers to settle lawsuits would quickly disappear if the other party could reject the offer but use it as evidence. Thus, such evidence is excluded to further the public policy favoring the settlement of lawsuits.

§ 14.03 Scope of Rule 408 [190-91]

Rule 408 extends to statements made during the course of settlement negotiations.

§ 14.04 "Dispute" Requirement [191-92]

Rule 408 applies only if the claim or its amount is *disputed*. Because statements made *prior to* the existence of a controversy are not covered by the rule (no dispute), it is critical to identify the time at which a dispute arose. Litigation is not required.

§ 14.05 Third-Party Compromises [192-93]

Settlements between a litigant and a third party are excluded if offered to prove liability for or the invalidity of a claim or its amount.

§ 14.06 Admissibility for Other Purposes [193-94]

If the evidence is offered for some other purpose, the exclusionary rule does not apply. The list of other purposes in Rule 408 – proving bias, negating a contention of undue delay, or proving obstruction of justice – is not exhaustive. Admissibility, however, is not automatic in this context; the trial court must still apply Rules 401 to 403. If evidence of settlement is introduced for another purpose, a limiting instruction is required upon request of a party (Rule 105).

Chapter 15
MEDICAL PAYMENTS: FRE 409

§ 15.01 Introduction [197]

Rule 409, sometimes known as the "Good Samaritan" rule, governs the admissibility of evidence of furnishing, offering, or promising to pay medical, hospital, or similar expenses. Such evidence is inadmissible if offered to prove liability for the injury. However, if offered for some other purpose, the rule does not apply.

Unlike Rule 408, which governs settlement offers, Rule 409 does not exclude statements that may accompany the payment of medical expenses. These rules also differ in another respect; there need not be a "dispute" for Rule 409 to apply.

§ 15.02 Rationale [197]

The policy underlying Rule 409 is straightforward – exclusion is based on the belief that "such payment or offer is usually made from humane impulses and not from an admission of liability, and that to hold otherwise would tend to discourage assistance to the injured person." Fed. R. Evid. 409 advisory committee's note.

Chapter 16
CRIMINAL PLEAS & OFFERS: FRE 410

§ 16.01 Introduction [199-205]

Rule 410 excludes evidence of (1) withdrawn pleas of guilty, (2) nolo contendere pleas, (3) statements concerning these pleas made during proceedings to determine their voluntariness under Criminal Rule 11, and (4) certain statements made during plea bargaining discussions. Virtually all of the evidence covered by Rule 410 would be admissible as an admission of a party opponent in the absence of Rule 410. *See* Rule 801(d)(2)(A) (individual admissions). There are two explicit exceptions: (1) for perjury and false statement prosecutions, and (2) the rule of completeness. Other exceptions have been read into the rule.

Chapter 17
INSURANCE: FRE 411

§ 17.01 Introduction [207-09]

Rule 411 excludes evidence of liability insurance if offered to prove that a person carrying *or failing to carry* liability insurance acted negligently or otherwise wrongfully. Evidence of liability insurance is simply irrelevant in this context. If the evidence is offered for another purpose, such as proof of agency, ownership or control, or bias of a witness, the rule does not apply but Rule 403 does.

PART C: WITNESSES

Chapter 18
WITNESS COMPETENCY: FRE 601, 603, 605, 606

§ 18.01 Introduction [211-12]

Witness competency concerns the witness's qualifications to testify. Mental competence (capacity) involves the witness's ability to observe, recall, and relate. Moral competence focuses on the witness's recognition of the duty to testify truthfully, which is fortified by the oath requirement. At one time, common law rules of incompetency or disqualification had immense impact on trials because there were so many categories, *including the parties*, whose testimony was deemed unreliable due to their interest in the case. These rules have generally evolved over time into impeachment rules.

Federal rule. Rule 601 provides that all witnesses are competent, and the drafters stated that there were no competency requirements. Nevertheless, some federal cases have suggested that the testimony of a witness who does not have the capacity to recall may be excluded under Rule 403.

§ 18.02 Oath Requirement: FRE 603 [212-13]

Rule 603 requires witnesses to swear or affirm to the truthfulness of their testimony. The purpose of the oath is merely to add a stimulus to truth-telling. Moreover, a perjury prosecution requires the taking of an oath. The form of the oath or affirmation is not important.

§ 18.03 Mental Competency [213-14]

Persons of "unsound mind" were automatically disqualified from testifying at common law. This is not true today. Even those adjudged insane are not necessarily disqualified because the test for insanity differs the standard for witness competency and focuses on a different point in time.

§ 18.04 Ability to Communicate [214]

On rare occasions, a witness's competency to testify has been challenged for the lack of ability to communicate. Except where the witness's disability precludes cross-examination, the courts have permitted witnesses to testify through a variety of devices such as hand signals, language interpreters, and computers.

§ 18.05 Child Competency & Testimony [214-17]

Child abuse cases have had a substantial impact on the law of evidence, and competency has received renewed attention. Some jurisdictions continue the older approach of making children of ten years of age or older presumptively competent. Children under 10 are often found competent, but generally a voir dire examination of the child by the trial court is required. More recent statutes, focusing on child sexual abuse cases, limit or abolish competency rules, including the oath requirement in one state. Rule 601 provides that every person is competent to be a witness, and a federal statute specifies that children are presumed to be competent. 18 U.S.C. § 3509(c)(2).

§ 18.06 Dead Man Statutes [217-18]

These statutes, which are still found in a number of states, are intended to protect the estates of deceased or incompetent persons against fraudulent claims. While this is a noble aim, it is how these statutes accomplish this goal that is troublesome. Typically, they disqualify a surviving party from testifying if the other party dies.

§ 18.07 Competency of Judge: FRE 605 [218-19]

Rule 605 disqualifies the presiding judge as a witness. No objection is required to preserve the issue for appeal.

§ 18.08 Competency of Jurors: FRE 606 [219-20]

[A] Juror as Witness

Rule 606(a) prohibits a juror from testifying in a case in which that juror is serving as a member of the jury. A party must object to a juror testifying but an opportunity to do so outside the presence of the jury is provided.

[B] Impeachment of Verdicts & Indictments

Under Rule 606(b), jurors are incompetent to testify about the validity of a verdict or an indictment if the subject of their testimony involves internal influences. This would encompass compromise verdicts, quotient verdicts, speculation about insurance coverage, misinterpretation of instructions, mistakes in returning a verdict, and interpretation of a guilty plea by one defendant as implicating codefendants.

However, a juror is competent to testify about extraneous prejudicial information that has come into the deliberation process – e.g., statements by the bailiff or the introduction of a prejudicial newspaper account into the jury room. In addition, a juror is competent to testify about outside influences that have been improperly brought to bear on the deliberation process.

§ 18.09 Competency of Attorneys [221]

Neither Rule 601 nor any other evidence rule makes an attorney incompetent to testify. Nevertheless, the rules of professional responsibility generally preclude an attorney from accepting employment or continuing to represent a client if the attorney will likely be a necessary witness in the case. *See* Model Rule 3.7(a).

§ 18.10 Choice of Law [221-22]

The second sentence of Rule 601 provides: "However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law." This phrase was added to the federal rule so that state Dead Man statutes would apply in federal trials where state law applies.

Chapter 19
SEQUESTRATION OF WITNESSES: FRE 615

§ 19.01 Introduction [225]

Often known simply as "the rule on witnesses," Rule 615 is intended to preclude the "tailoring" of testimony. The trial judge may exclude witnesses sua sponte. Upon request of a party, exclusion is mandatory. There are several exceptions.

§ 19.02 Exception: Parties [225-26]

A party who is a natural person may not be excluded from the trial even though that party may be called as a witness.

§ 19.03 Exception: Designated Officers & Employees [226-27]

A designated officer or employee of a party which is not a natural person (e.g., corporations, governmental entities) may not be excluded from the trial. In criminal cases, the "investigative agent" falls within this category.

§ 19.04 Exception: Essential Persons [227-28]

Witnesses whose presence is essential to the presentation of the case may remain in court. For example, trial counsel often need an expert's advice when cross-examining the opponent's expert.

§ 19.05 Exception: Crime Victims [228]

The Victim's Rights and Restitution Act of 1990 (42 U.S.C. § 10606(b)(4)) and the Victim's Rights Clarification Act of 1997 (18 U.S.C. § 3510) permit a victim-witness to attend the trial unless the testimony at trial would materially affect the victim-witness's testimony.

§ 19.06 Out-of-court Separation of Witnesses [228-29]

Because the policy underlying Rule 615 would be defeated if, after testifying, a witness discussed her testimony with other witnesses, courts often give an instruction "making it clear that witnesses are not only excluded from the courtroom but also that they are not to relate to other witnesses what their testimony has been and what occurred in the courtroom." *United States v. Johnston*, 578 F.2d 1352, 1355 (10th Cir. 1978).

§ 19.07 Out-of-court Separation of Attorney & Client [229]

In *Geders v. United States*, 425 U.S. 80 (1976), the Supreme Court held that an order precluding a defendant and his attorney from discussing evidence during an *overnight recess* violated the right to effective assistance of counsel. However, in *Perry v. Leeke*, 488 U.S. 272, 282 (1989), the Court upheld a trial judge order prohibiting the accused from talking with anyone, including his defense counsel, during a short break between direct examination and the beginning of cross-examination.

§ 19.08 Sanctions [229]

Rule 615 does not specify what sanctions may be imposed if a witness violates an exclusion order. There are several possible remedies: (1) excluding the witness's testimony, (2) holding the witness in contempt, and (3) permitting comment to the jury on the witness's failure to obey the order. Declaring a mistrial is a possible, but unlikely, sanction.

Chapter 20
EXAMINATION OF WITNESSES: FRE 611

§ 20.01 Introduction [233]

The examination of witnesses raises a host of issues: (1) judicial control of the proceedings, (2) direct examination, (3) cross-examination, (4) redirect and recross examination, (5) leading questions, and (6) "coaching of witnesses."

§ 20.02 Judicial Control of Trial [233-35]

Rule 611(a) is written in broad terms. Among other things, the trial judge has the authority to re-open the case, alter the order of proof, permit the recall of a witness, and grant continuances. In addition, the judge may authorize special methods to deal with child witnesses and set time limits for the presentation of evidence. The court's control also extends to jury issues, such as the use of exhibits in the jury room, jury questioning, and jury notetaking.

Narrative testimony. Testimony may be elicited by specific interrogation (question and answer) or by free narrative.

§ 20.03 Leading Questions [235-38]

Leading questions are prohibited on direct examination because it is thought that a witness is particularly susceptible to suggestion under questioning by the party calling the witness. A leading question is one that suggests the answer.

Exceptions. Rule 611(c) recognizes several exceptions to the prohibition against leading questions on direct examination. They are permitted (1) when necessary to develop a witness's testimony, (2) when the witness is "hostile," (3) when the witness is an adverse party, and (4) when the witness is identified with an adverse party.

§ 20.04 Scope of Cross-examination [238]

There are two principal rules on the scope of cross-examination: (1) the wide-open rule and (2) the restrictive rule. Federal Rule 611(b) adopts the restrictive rule. Under that rule, cross-examination is "limited to the subject matter of the direct examination and matters affecting the credibility of the witness."

§ 20.05 Redirect & Recross-examination [239]

In theory, redirect examination is limited to new matters raised on cross-examination, and recross is limited to new matters raised on redirect. Because trials are rarely this neat, the trial court has discretion to permit the elicitation of new matters on redirect and recross-examination.

§ 20.06 Other Common Objections [240]

There are numerous trial objections that are not specifically referenced in the Rules of Evidence. Some of the more common are: (1) argumentative questions, (2) asked and answered, (3) assuming facts not in evidence, (4) misleading questions, (5) compound questions, and (6) nonresponsive answers.

§ 20.07 Preparation ("Coaching") of Witnesses [240]

Under the adversary system as practice in this country, counsel is allowed to interview witnesses prior to trial. Nevertheless, an attorney cannot ethically assist in the fabrication of testimony. Model Rule 3.4(b) states that a lawyer shall not "falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law."

Chapter 21
REFRESHING RECOLLECTION: FRE 612

§ 21.01 Introduction [243]

Witnesses sometimes forget things. If this occurs at trial, we permit them to refresh their recollection.

§ 21.02 Rationale [243-44]

The witness's memory must be exhausted, or nearly exhausted, before a writing may be used to refresh recollection.

Admissibility. A writing does not become admissible solely because it is used to refresh a witness's recollection. The opposing party, however, not only has the right to inspect the writing but also the right "to cross-examine the witness" on the writing and to introduce into evidence the parts that relate to the witness's testimony. In this situation, the writing is used to impeach the witness's credibility and not as substantive evidence.

§ 21.03 Right of Inspection [245]

The right of inspection is mandatory for trial refreshment. The production of a writing used *prior to* trial to refresh a witness's recollection may be required "if the court in its discretion determines it is necessary in the interests of justice."

§ 21.04 Jencks Act [246-47]

Rule 612 does not apply to writings that are governed by the Jencks Act, 18 U.S.C. § 3500. Currently, Criminal Rule 26.2 governs this subject. Like the Jencks Act, it limits discovery of witnesses' prior statements until after direct examination has been completed. In effect, it a trial (rather than a pretrial) discovery provision.

§ 21.05 Privileged Material; Work Product [246]

Whether the use of a writing to refresh a witness's memory constitutes a waiver of privilege, including the qualified work product privilege, is unsettled.

§ 21.06 Sanctions [246]

In a criminal case in which the prosecution fails to produce a writing used to refresh memory, the court shall either strike the testimony or, if the interests of justice require, declare a mistrial. If a criminal defendant or a party in a civil case fails to produce a writing, the "court shall make any

order justice requires." This could include contempt, dismissal, or finding issues against the offender.

§ 21.07 Recorded Recollection Distinguished [247]

Refreshing recollection (Rule 612) must be distinguished from the hearsay exception for recorded recollection (Rule 803(5)).

Chapter 22
CREDIBILITY OF WITNESSES: FRE 607-609, 613

§ 22.01 Introduction [249-50]

[A] Stages of Credibility

Credibility may be viewed in three stages: (1) bolstering, (2) impeachment, and (3) rehabilitation. *Impeachment* involves attempts to diminish or attack a witness's credibility. There are also rules regulating attempts to support credibility. For example, as a general matter, a witness's credibility may not *bolstered* (supported) prior to impeachment. Moreover, under certain circumstances a witness's credibility may be *rehabilitated* (supported) after impeachment.

[B] Types of Impeachment

Numerous factors may be considered in evaluating credibility, including a witness's demeanor while testifying. There are, however, five principal methods of impeachment: (1) bias or interest, (2) sensory or mental defects, (3) character for untruthfulness, which includes impeachment by reputation, opinion, prior convictions, and prior untruthful acts; (3) specific contradiction, and (5) prior inconsistent statements (self-contradiction).

[C] Extrinsic Evidence ("collateral matters")

Depending on the method, the impeaching evidence may be elicited on cross-examination or through other witnesses – i.e., *extrinsic evidence*. The admissibility of extrinsic evidence depends on the type of impeachment – whether the method is considered "collateral." The word collateral can be confusing; in this context, it is a conclusory label.

§ 22.02 Prohibition on Bolstering [251-53]

Generally, a witness's credibility may not be bolstered or supported with evidence relevant *only* for that purpose, until after impeachment. There are two prominent examples: (1) a witness's good character for truthfulness is not admissible in the absence of an attack on character; and (2) prior consistent statements are inadmissible before a witness's credibility has been attacked.

§ 22.03 Impeachment of Own Witness: FRE 607 [253-54]

At common law, a party could not impeach its own witnesses. This was known as *the voucher rule*. Rule 607 abolishes the "voucher rule." The abolition of the voucher rule created one problem, which concerns impeachment with prior inconsistent statements: Rule 607 could be employed circumvent the hearsay rule.

§ 22.04 Bias Impeachment [254-58]

Although there is *no rule on bias* in the Federal Rules, in *United States v. Abel*, 469 U.S. 45, 51 (1984), the Supreme Court held that impeachment of a witness for bias was proper. Most jurisdictions require that a foundation be laid on cross-examination before extrinsic evidence of bias is admissible; some courts have indicated that this is the federal rule. At common law, bias was not considered a "collateral matter," and thus extrinsic evidence of bias was always admissible. However, a recent Advisory Committee Note (dealing with another type of impeachment) indicates that Rule 403 should control.

§ 22.05 Impeachment: Sensory & Mental Defects [258-59]

There is no federal rule on this type of impeachment but plenty of cases. Any sensory or mental defect that might affect a witness's capacity to observe, recall, or relate the events about which the witness has testified is admissible to impeach. Sensory and mental defects often can be effectively disclosed through cross-examination, in which case the admissibility of extrinsic evidence should be regulated by the trial court pursuant to Rule 403.

§ 22.06 Untruthful Character Impeachment: Overview [259]

Recall from Chapter 10 that character evidence is generally inadmissible under Rule 404(a). We saw, however, that there are exceptions concerning the accused and victims. A third exception deals with credibility.

Here again, there are three possible methods of proof: (1) reputation evidence, (2) opinion evidence, and (3) specific acts. Rule 608(a) sanctions the use of reputation and opinion, which is consistent with character on the merits under Rule 405(a). Specific acts are treated differently in this context. Rule 609 permits impeachment with prior convictions (specific acts) under some circumstances. Rule 608(b) allows impeachment by specific acts that have not resulted in a conviction – under limited circumstances.

§ 22.07 Untruthful Character – Reputation & Opinion: FRE 608(a) [259-60]

Rule 608(a) permits the use of opinion and reputation evidence to show a witness's untruthful character, including that of the accused. Before reputation evidence is permitted, a foundation must be laid showing that the character witness is acquainted with the principal witness's reputation in the community (i.e., where the principal (fact) witness lives, works, or goes to school). A similar foundation is required before a witness may express an opinion. This latter inquiry, however, focuses on the character witness's personal relationship with the principal witness rather than on community contacts.

§ 22.08 Untruthful Character – Prior Conviction: FRE 609 [260-69]

[A] Overview

Rule 609 governs the admissibility of evidence of prior convictions offered for impeachment *by showing untruthful character*. The rule applies in both civil and criminal cases, and it applies to the impeachment of any witness, including a criminal defendant.

Other theories of admissibility. If prior-conviction evidence is offered under an impeachment theory other than untruthful character or for reasons other than impeachment, Rule 609 does not apply. For example, evidence of a conviction may be admissible to show that a witness has received or expects to receive favorable treatment from the prosecution (i.e., bias). Similarly, evidence of "other crimes" may be admissible under Rule 404(b) as proof of motive, opportunity, intent, and so forth. (Note that Rule 404(b) does not require a conviction.) Also, if a witness testifies that he has "never committed a crime in my life," a prior conviction may be offered in rebuttal. Finally, sometimes a prior conviction is *an element* of a subsequently tried offense, in which case the prior conviction must be proved. (*See Old Chief v. United States*, 519 U.S. 172 (1997) (possession of a firearm by a felon). Here, it is substantive, not impeachment, evidence.

[B] Conviction defined; arrests; no-contest pleas

Rule 609 applies only to *convictions*. Arrests and indictments are not admissible under Rule 609.

[C] Rationale for Rule 609

The theory of admissibility underlying Rule 609 corresponds to the theory underlying Rule 608 (reputation, opinion and specific acts): a person with an untruthful character will likely act in conformity with that character while testifying.

[D] Prior "Felony" Convictions of the Accused

Under Rule 609(a)(2), prior convictions involving crimes punishable by death or imprisonment in excess of one year *may* be admissible against a criminal defendant. (Note that the label "felony" is technically not correct and is used here only as a convenient shorthand label.) Admissibility is not automatic. Only if the probative value of the prior conviction outweighs the unfair prejudice to the defendant is the evidence admissible.

[E] "Felony" convictions: Other witnesses

Under Rule 609(a)(1), prior "felony" convictions of witnesses other than an accused is permitted – witnesses in civil cases and prosecution and other defense witnesses in criminal cases. Admissibility is not automatic; it is subject to the trial court's discretion under Rule 403.

[F] Dishonesty & False Statement Crimes ("crimen falsi")

Under Rule 609(a)(2), prior convictions involving crimes of dishonesty or false statement are *automatically* admissible. The principal problem in applying this rule is determining what crimes involve "dishonesty" or "false statement."

[G] Ten-year Limit, FRE 609(b)

Evidence of a prior conviction that satisfies the criteria of Rule 609(a) is nevertheless inadmissible if more than ten years have elapsed since the date of (1) conviction or (2) release from confinement, "whichever is the later date."

[H] Pardons & Annulments, FRE 609(c)

If a pardon, annulment, or equivalent procedure is based on a finding of innocence, the impeachment value of the conviction is naught and Rule 609(c) so provides. The rule goes beyond this, however, and also excludes where a pardon, annulment, certificate of rehabilitation, or other equivalent procedure is based on a "finding of rehabilitation," provided the witness has not been convicted of a subsequent crime punishable by death or imprisonment in excess of one year.

[I] Juvenile Adjudications, FRE 609(d)

Juvenile delinquency adjudications are generally not admissible to impeach.

[J] Pendency of Appeal, FRE 609(e)

The pendency of an appeal does not affect the admissibility of evidence of a prior conviction. Evidence that an appeal is pending, however, is admissible and may affect the weight accorded to the prior conviction.

[K] Methods of Proof

Typically, the prior conviction is elicited on cross-examination. Generally, only the nature of the crime, time of conviction, and punishment are admissible – aggravating circumstances are not.

§ 22.09 Untruthful Character – Prior Acts: FRE 608(b) [269-71]

Under Rule 608(b), specific instances of conduct are admissible only if (1) the conduct reflects untruthful character, (2) its probative value outweighs the danger of unfair prejudice, (3) a good faith basis for the inquiry exists, and (4) the evidence is introduced on cross-examination (and not through extrinsic evidence – e.g., other witnesses).

§ 22.10 Prior Inconsistent Statements: FRE 613 [271-77]

[A] Hearsay Rule & Inconsistent Statements

At common law, prior inconsistent statements were admitted only for impeachment. The statement was offered to show the inconsistency between the witness's trial testimony and pretrial statements, rather than to show the truth of the assertions contained in the pretrial statement. The latter would violate the hearsay rule, which did not recognize an exception for such statements. In one important respect, the Federal Rules changed this. Under Rule 801(d)(1)(A), prior inconsistent statements taken under oath, subject to penalty of perjury, and made at certain proceedings are admitted as substantive evidence. In other words, there are two provisions on prior inconsistent statements: Rule 613 and Rule 801(d)(1)(A).

[B] Inconsistency Requirement

The federal courts have adopted a liberal view of the inconsistency requirement. A direct contradiction is not required.

[C] Foundational Requirements

Rule 613(b) does not require that the witness be afforded an opportunity to explain or deny the statement *before* extrinsic evidence is introduced, so long as the witness is afforded such an opportunity *at some time* during the trial. However, some federal courts recognize a trial court's authority under Rule 611 to require a foundation.

[D] Extrinsic Evidence; "collateral matters"

Even if a proper foundation had been laid on cross-examination, extrinsic evidence of a prior statement was admissible at common law *only* if it did not involve a "collateral matter." The exact definition of what constituted a collateral matter was unclear. Rule 403 should control.

[E] Statements in Opinion Form

Rule 701 governs the admissibility of lay opinion testimony. That provision adopts the modern view, which treats the opinion rule as a rule of preference as to the form of trial testimony. This view is inconsistent with the application of the opinion rule to extrajudicial statements.

[F] Prior Inconsistent Conduct

Rule 613 does not govern impeachment by prior inconsistent conduct. No federal rule prohibits this type of impeachment, however, and therefore such evidence is admissible if relevant.

[G] Impeachment by Silence

In *United States v. Hale*, 422 U.S. 171 (1975), a robbery defendant was arrested and advised of his *Miranda* rights. When asked where he had obtained the $158 in cash that was seized from him, Hale did not respond. At trial, he testified that the money came from his wife. On cross-examination, the prosecutor asked whether Hale had informed the police of this when questioned shortly after his arrest. The Supreme Court did not decide the issue on constitutional grounds. Instead, the Court held that silence in these circumstances was, as a matter of federal evidence law, not inconsistent with a defendant's trial testimony and excluded the evidence.

[H] Constitutional Issues

The Supreme Court has carved out an impeachment exception to the constitutionally derived exclusionary rule. *See Harris v. New York*, 401 U.S. 222 (1971) (statements obtained in violation of the *Miranda* admissible); *Michigan v. Harvey*, 494 U.S. 344 (1990) (right to counsel violations); *United States v. Havens*, 446 U.S. 620 (1980) (Fourth Amendment violations). However, in *Doyle v. Ohio*, 426 U.S. 610 (1976), the Court held that the impeachment use of a defendant's silence after receiving *Miranda* warnings violated due process.

§ 22.11 Specific Contradiction [277-78]

Although there is no rule on the subject, the Federal Rules permit impeachment by specific contradiction. A problem arises when the *only* purpose of witness B's testimony is to contradict witness A's testimony, especially if the contradiction is on a minor point. Because we all make mistakes, the impeachment value is minimal. This situation gave rise to the so-called "collateral matters" rule. The same issue arose with prior inconsistent statements (*see supra*), and the same result should apply here – leave the issue to the trial judge under Rule 403.

§ 22.12 Learned Treatise [278]

At common law, impeachment by means of a learned treatise was permitted under certain circumstances when an expert testified. Unlike the common law, Rule 803(18) recognizes a hearsay exception for this type of impeachment. *See* § 33.16 infra.

§ 22.13 Religious Belief: FRE 610 [278]

Rule 610 provides that the "nature" of a witness's religious beliefs or opinions is not admissible either to *impeach* or *support* the witness's credibility.

§ 22.14 Rehabilitation [278-79]

Rehabilitation evidence must directly answer the impeachment evidence.

[A] Untruthful Character: FRE 608(a)(2)

Once a witness's character for truthfulness has been attacked, opinion and reputation evidence showing that the witness has a good character for truthfulness is admissible.

[B] Prior Consistent Statements

Prior consistent statements do not rehabilitate impeachment by prior inconsistent statements because the inconsistency remains. However, in some circumstances a consistent statement may rehabilitate. Rule 801(d)(1)(B) permits the admission of consistent statements "to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." The rule makes these consistent statements substantive evidence, however, rather than evidence merely affecting credibility.

Chapter 23
LAY WITNESSES: FRE 602 & 701

§ 23.01 Introduction [285]

There are two rules relating to lay witnesses that do not apply to expert witnesses: (1) the firsthand knowledge rule and (2) the opinion rule.

§ 23.02 Firsthand Knowledge Rule: FRE 602 [285-87]

Rule 602 requires that a witness have personal knowledge of the subject about which the witness testifies. A witness's expression of uncertainty, such as "I think," "I believe," or "I'm not positive," is not ground for exclusion so long as the witness had an opportunity to observe.

[A] Standard of Proof: Prima facie

The trial judge does not decide whether or not a witness has firsthand knowledge by a preponderance of evidence (the usual standard), but only whether sufficient evidence to support a finding of firsthand knowledge has been introduced, i.e., a *prima facie* standard. In effect, Rule 602 is a specialized application of the conditional relevancy principle of Rule 104(b).

§ 23.03 Opinion Rule: FRE 701 [287-93]

[A] Overview

Frequently, the opinion rule is difficult to understand, at least initially, because the terms "opinion, inference, and conclusion" can be used in different ways in common parlance. In contrast, Rule 701 has a very narrow focus. As a policy matter, we want the witness's primary sensory impressions rather than opinions, conclusions, or inferences drawn from those opinions.

[B] Common Law "Fact-Opinion" Formulation

At common law, lay witnesses could testify to *facts* and not opinions, inferences, or conclusions. The courts, however, recognized an exception, sometimes known as the "short-hand rendition" rule or "collective facts" exception.

[C] Rule 701

Instead of codifying the common law fact-opinion dichotomy and an ill-defined exception, Rule 701 adopts a different formula. Rule 701 provides that the opinion of a nonexpert is admissible if (1) rationally based on the perception of the witness (firsthand knowledge), (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue and (3) not

based on scientific, technical or other specialized knowledge within the scope of Rule 702, which governs expert testimony.

Chapter 24
EXPERT TESTIMONY

§ 24.01 Introduction

The use of expert testimony raises two threshold issues. First, is the proffered testimony a proper *subject matter* for expert testimony? If the answer is "yes," the next question follows: Is this witness *qualified* in that subject matter? There is typically no requirement that an expert be called as a witness on a particular issue. Malpractice cases, however, frequently require expert testimony to establish the standard of care.

§ 24.02 Subject Matter Requirement: Overview

Expert testimony is bounded on one side by the unreliable and on the other side by the commonplace. Thus, courts developed one standard for instances where expertise is not needed – i.e., the commonplace, and another standard for judging when the testimony is too unreliable or uncertain.

§ 24.03 Subject Matter: Expertise Not Needed

The standard adopted by Rule 702 – whether expert testimony will "assist the trier of fact" – is a more liberal formulation of the subject matter requirement than that which is found in many common-law opinions. The common law often phrased the requirement as whether the subject was beyond the ken of lay persons.

§ 24.04 Subject Matter: Reliability of Evidence

Courts have used at least three different approaches to determine the reliability of expert testimony: (1) the general acceptance test, (2) the relevancy approach, and (3) the Supreme Court's reliability (*Daubert*) approach.

[A] *Frye* "General Acceptance" Test

For most of this century, *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), was the leading case on the admissibility of novel scientific evidence. In rejecting the results of a precursor of the modern polygraph, the D.C. Circuit held that novel scientific evidence must be have gained "general acceptance" in the relevant scientific community as a prerequisite to admissibility. Although *Frye* is no longer the majority rule, it is still followed in a dozen or so jurisdictions, including California, Florida, Illinois, Maryland, Michigan, Minnesota, New Jersey, New York, Pennsylvania, and Washington.

[B] Relevancy Approach

In his 1954 text, Professor McCormick argued that a special test, such as general acceptance, was not needed and that the traditional evidentiary rules on relevancy and expert testimony should be applied in this context. In effect, qualifying the expert presumptively qualifies the technique used by that expert. This is the most lax standard. Only a few states follow it.

[C] *Daubert* Reliability Test

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the Supreme Court rejected the *Frye* test and substituted a reliability approach.

[1] *Daubert* Factors

In performing the *Daubert* "gatekeeping function," the trial court may consider a number of factors. The Supreme Court specified five factors. First, a judge ought to determine whether the scientific theory or technique can be and has been tested. Second, whether a theory or technique has been subjected to peer review and publication is a relevant consideration. Third, a technique's known or potential rate of error is a pertinent factor. Fourth, the existence and maintenance of standards controlling the technique's operation are indicia of trustworthiness. Finally, "general acceptance" remains an important consideration. General acceptance is no longer the test; it has been demoted to the status of a mere relevant factor.

[2] Appellate Review

General Elec. Co. v. Joiner, 522 U.S. 136 (1997), was the second opinion in the *Daubert* trilogy. The Court ruled that the proper standard for reviewing a trial court's admissibility decision under *Daubert* was an abuse-of-discretion.

[3] Technical Expertise

In *Kumho Tire Co. v Carmichael*, 526 U.S. 137 (1999), the Court extended *Daubert's* reliability requirement to non-scientific testimony under Rule 702. In addition, the Court acknowledged the relevance of the *Daubert* factors in determining reliability in this context.

§ 24.05 Qualifications Requirement [310-11]

Rule 702 provides that a witness may be qualified as an expert "by specialized knowledge, skill, experience, training, or education." The expert need not be the best witness on the subject, nor an outstanding practitioner in the field. Nor must the expert's qualifications match those of the other side's expert. Experience alone may qualify a witness to express an opinion.

§ 24.06 Court-Appointed Experts: FRE 706 [311-12]

A trial court has inherent authority to appoint expert witnesses and technical advisors. Rule 706 recognizes this authority.

§ 24.07 Right to Defense Experts [312-13]

Due process may require the appointment of an expert for an indigent criminal defendant. In *Ake v. Oklahoma*, 470 U.S. 68 (1985), the Supreme Court held that "when a State brings its judicial power to bear on an indigent in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense."

§ 24.08 Polygraph Evidence [314-15]

§ 24.09 Hypnotic Evidence [316-19]

§ 24.10 Fingerprint Evidence [319-21]

§ 24.11 Questioned Documents; Handwriting [321-22]

§ 24.12 DNA Profiling [322-24]

§ 24.13 Eyewitness Identifications [324-26]

§ 24.14 Battered Woman Syndrome [326-28]

§ 24.15 Rape Trauma Syndrome [328-30]

§ 24.16 Child Sexual Abuse Accommodation Syndrome [331-32]

§ 24.17 Ultimate Issue Rule: FRE 704 [333-35]

Chapter 25
BASES OF EXPERT TESTIMONY: FRE 703 & 705

§ 25.01 Introduction [339-40]

To be relevant, an expert's opinion must be *based* on the facts in the particular case. If the jury rejects those facts (they may be disputed), the jury should also reject the opinion. Rule 703 recognizes three bases for expert testimony: (1) firsthand knowledge of the expert, (2) assumed facts that are in the record, typically in the form of a hypothetical question, (3) nonrecord facts if of a type reasonably relied upon by experts in the field.

§ 25.02 Opinion Based on Personal Knowledge [340]

Rule 703 provides that an expert may base an opinion on facts or data "perceived" by the expert (i.e., firsthand knowledge). Typical examples are the forensic chemist who analyzes and testifies about the nature of a controlled substance or the treating physician who testifies about the cause and extent of an injury.

§ 25.03 Opinion Based on Admitted Evidence ("record facts") [340-43]

[A] Hypothetical Questions

An attorney may ask an expert to *assume* certain facts as true and then ask the expert if she has an opinion based on those *assumed* facts. If the expert replies "yes", an opinion may be permitted. The assumed facts must be adduced through other evidence – i.e., they must be in the record.

[B] Modified Hypothetical Questions

An expert present during the testimony of other witnesses may base an opinion on that testimony. The expert is simply asked to *assume* that the overheard testimony is true. In general, this procedure is practicable only when the case is simple and the testimony concerning the underlying data is not disputed.

§ 25.04 Opinion Based on Nonrecord Facts: "Reasonable Reliance" Requirement [343-46]

In addition to personal knowledge and hypothetical questions, Rule 703 permits an expert to give an opinion based on information supplied to the expert outside the record (nonrecord facts), *if of a type reasonable relied upon by experts in the particular field.* Rule 705 provides that disclosure of the underlying basis of the opinion need not precede the answer. The drafters of the Federal Rules wanted to bring the courtroom use of expert testimony into conformity with how information is used in practice by experts.

[A] Determining Admissibility: Judge's Role

There are two different approaches to the judge's role in determining "reasonable reliance." One approach ("restrictive" approach) requires the trial court to make an *independent* assessment of the reasonableness of the expert's reliance. In contrast, other courts ("liberal" approach) limit the judge's role to determining what experts in the field consider reasonable.

[B] Hearsay Use

Although Rule 703 permits an expert to base an opinion on hearsay information, it does not recognize a hearsay exception for this information. In order to deal with this issue, a sentence was added to the rule in 2000: "Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect."

[C] Right of Confrontation

In criminal trials, the use of hearsay evidence as a basis for expert opinion testimony raises confrontation issues. Confrontation challenges have typically been rejected unless the testifying witness is a *mere conduit* for another expert's opinion – e.g., merely summarizes the views of others.

PART D: REAL & DEMONSTRATIVE EVIDENCE

Chapter 26
REAL & DEMONSTRATIVE EVIDENCE

§ 26.01 Introduction [351]

Real evidence (e.g., murder weapon) must be identified as a prerequisite to admissibility. The term "real evidence" is used to describe tangible evidence that is *historically connected* with a case, as distinguished from evidence, such as a model, which is merely illustrative. The latter is often called demonstrative evidence, although there is no agreed upon terminology in this area.

§ 26.02 Real Evidence [351-55]

[A] Condition of Object

Sometimes more than mere identification is involved; the condition of an object may also be important. Thus, before physical objects are admitted, the offering party must establish that they are in "substantially the same condition" as at the time of the crime or accident.

[B] Readily Identifiable Objects: FRE 901(b)(4)

There are two principal methods of identifying real evidence: (1) establishing that the evidence is *readily identifiable* or (2) establishing a *chain of custody*.

[C] Chain of Custody: FRE 901(b)(1)

The "links"in the chain of custody are those persons who have had physical custody of the object. Persons who have had access to, but not possession of, the evidence are not links. Most courts, however, hold that "the fact of a missing link does not prevent the admission of real evidence, so long as there is sufficient proof that the evidence is what it purports to be." *United States v. Howard-Arias*, 679 F.2d 363, 366 (4th Cir. 1982). Rule 901(a) requires only that the offering party introduce "evidence sufficient to support a finding that the matter in question is what its proponent claims" – i.e., a "prima facie" showing of authenticity.

§ 26.03 Charts, Models & Maps [356]

Diagrams, models, maps, blueprints, sketches, and other types of evidence may be used to illustrate and explain testimony if they are substantially accurate representations of what the witness is endeavoring to describe. Rule 403 controls.

§ 26.04 In-court Exhibitions [356-57]

Another type of "real" evidence involves an exhibition before the jury, often of a physical abnormality in a personal injury action. For example, a personal injury plaintiff might show scars or amputated limps to the jury. Rule 403 controls.

§ 26.05 In-court Demonstrations [357]

In-court demonstrations that go beyond mere physical exhibition involve other considerations. For example, demonstrations of pain can easily be faked. Rule 403 controls.

§ 26.06 Jury Views [357-58]

Jury views are a well-established trial procedure. In some jurisdictions, a jury view is not considered evidence, apparently because it cannot be recorded. The trial court has discretion whether to permit a jury view.

Chapter 27
PHOTOGRAPHS, TAPES & VOICE IDENTIFICATIONS

§ 27.01 Introduction [361]

Photographic evidence raises different issues depending how it is used. Sometimes photographs play a pivotal role at trial; at other times they are used merely as background evidence. The use of digital photographs and videotapes is now quite common.

Speaker identification presents different issues. However, because it often involves sound recordings (which require a foundation similar to videotapes), it is included in this chapter.

§ 27.02 Photographs [361-64]

[A] "Pictorial Communication" Theory

A foundation for the admissibility of photographs is generally laid by establishing that the photograph is an "accurate and faithful representation" of the scene or object depicted.

[B] "Silent Witness" Theory

The problem with the "pictorial testimony" theory is that it does not work with X-rays, surveillance tapes, and ATM photographs. In such cases, the process that produced the photo is authenticated. This "silent witness" theory is consistent with Rule 901(b)(9), which recognizes the authentication of a result produced by an accurate process.

§ 27.03 Videotapes & Movies [364-65]

Like photographs, videotapes are authenticated upon a showing that they accurately depict the scene which they purport to portray. What are known as "day-in-the-life" tapes are offered to show the daily struggles of an injured party, typically offered on the issue of damages.

§ 27.04 Computer Animations & Simulations [366-68]

[A] Computer Animations

An animation is merely a moving series of drawings. Some computer-generated animations fall into this category. Here, the fair-and-adequate portrayal requirement applies. There is a difference between computer-generated animations used as *illustrative* evidence and computer-generated animations used as *recreations* of the event at issue. A higher burden must be met for recreations.

[B] Computer Simulations

Computer simulations differ from animations. They are a type of scientific evidence. In simulations, mathematical models are used to predict and reconstruct an event for the trier of fact.

§ 27.05 Voice Identification: FRE 901(b)(5) [368-69]

Rule 901(b)(5) provides for the identification of a person's voice by someone familiar with that voice.

§ 27.06 Telephone Conversations: FRE 901(b)(6) [370]

Rule 901(b)(6) provides for the authentication of telephone conversations. A difference between outgoing and incoming calls must be heeded. The rule applies only to telephone calls made by the witness to the person or number in question (i.e., outgoing calls). Incoming calls are not covered by this rule. However, caller identification systems may alter this result.

§ 27.07 Sound Recordings [371]

Audiotapes may be admissible under several theories. Rule 901(b)(5) specifies voice recognition by a witness familiar with a person's voice as a method of authentication. A sound recording may also be authenticated under Rule 901(b)(9), if the process or system used to produce the recording is shown to be reliable.

Chapter 28
AUTHENTICATION OF WRITINGS: FRE 901-903

§ 28.01 Introduction [375]

Documents are generally not self-authenticating – i.e., a confession purportedly signed by the accused may not be admitted simply based on the signature. An authenticating witness (e.g., the detective who took the confession) must testify that she saw the accused sign the document. Rule 901 governs authentication generally and Rule 902 provides for the *self-authentication* of certain types of documents.

Rule 901 deals only with authentication. A document properly authenticated under Rule 901 may nevertheless be inadmissible because it fails to satisfy the requirements of the hearsay rule or the best evidence rule, or because its probative value is substantially outweighed by its prejudicial effect under Rule 403.

§ 28.02 General Rule [375-76]

Rule 901(a) imposes on the offering party the burden of proving that an item of evidence is genuine – i.e., what the proponent says it is. Rule 901(b) presents examples of traditional methods of authentication. These examples are merely illustrative. Different methods of authentication may be used by themselves or in combination.

[A] Standard of Proof: Prima Facie

Only a prima facie showing is required.

[B] Relationship with Civil Rules

Because of the availability of pretrial discovery procedures, authentication is rarely a significant problem in civil cases. For example, Civil Rule 36(a) provides for requests for admissions as to the genuineness of documents.

§ 28.02 Witness with Knowledge: FRE 901(b)(1) [376]

A witness with personal knowledge may authenticate a document. The authenticating witness need not be the author of the document, nor in most cases a subscribing witness.

§ 28.03 Nonexpert Opinion on Handwriting: FRE 901(b)(2) [376-77]

In some cases, a lay witness may testify to the genuineness of handwriting. The offering party must establish that the witness is *sufficiently familiar* with the handwriting of the purported author to offer a valid opinion concerning authenticity.

§ 28.04 Comparison by Trier or Expert Witness: FRE 901(b)(3) [377]

A document may be authenticated by comparison with known specimens of writing – by either (1) the trier of fact or (2) an expert witness.

§ 28.05 Distinctive Characteristics: FRE 901(b)(4) [378]

The "appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances" may satisfy the authentication requirement. In short, any circumstantial method of proof may be used to authenticate – e.g., postmark, letterhead, contents, and circumstances of discovery.

[A] Reply Rule

The federal drafters specifically mentioned the *reply rule* as a method of authentication under Rule 901(b)(4). Assume that I properly address and mail a letter to a person or company. My letter is not returned though I included my return address. Then, in due course, I receive a letter back purportedly from the person to whom I wrote, responding to the content of my letter. The return letter is authenticated circumstantially by the reply rule.

§ 28.06 Public Records & Reports: FRE 901(b)(7) [379]

Public (government) records may be authenticated by showing they were retrieved from the correct place of custody – i.e., the governmental repository for that type of record.

§ 28.07 Ancient Documents: FRE 901(b)(8) [379-80]

Under Rule 901(b)(8), a document may be authenticated by showing that the document "(A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence twenty years or more at the time it is offered." Another provision, Rule 803(16), recognizes a hearsay exception for ancient documents.

§ 28.08 Process or System: FRE 901(b)(9) [380]

Evidence describing a process or system used to produce an accurate result may suffice to authenticate evidence derived from that process or system – e.g., computer-generated documents.

Since Rule 901 is not limited to writings, it may also be used to authenticate sound recordings, X-rays, and surveillance camera photographs.

§ 28.09 Methods Provided by Statute or Rule: FRE 901(b)(10) [380]

Any method of authentication provided by statute or rule is permissible. Numerous statutes have provisions on public records and sometimes on hospital records. For example, both the Civil and Criminal Rules contain authentication provisions.

§ 28.10 Self-Authenticating Documents: FRE 902 [380-85]

Certain types of documents are self-authenticating. These documents are presumed to be genuine and therefore require no extrinsic evidence of authenticity – e.g., an authenticating witness. The most important rules concern *certified copies* of public records (Rule 902(4)) and business records (Rule 902(11)). Other provisions cover newspapers, trademarks, notarized documents, and commercial documents under the U.C.C.

§ 28.11 Subscribing Witnesses: FRE 903 [385]

Rule 903 makes the testimony of scribing witnesses unnecessary unless required by the law of the appropriate jurisdiction. Some states require that witnesses to a will testify, if available, when a will is contested.

PART E: WRITINGS

Chapter 29
RULE OF COMPLETENESS: FRE 106

§ 29.01 Introduction [387]

Under Rule 106, which codifies the rule of completeness, the opposing party has the right to introduce other documents or part of a document immediately. It is the "immediately" requirement that makes Rule 106 important; the other party does not have to wait either for cross-examination or until it can introduce evidence.

§ 29.02 Rationale [387]

Rule 106 is based on two considerations. "The first is the misleading impression created by taking matters out of context. The second is the inadequacy of repair work when delayed to a point later in the trial." Fed. R. Evid. 106 advisory committee's note.

§ 29.03 Oral Conversations [387-88]

Rule 106 does not apply to oral conversations unless they are taped. The trial court, however, has the authority under Rule 611(a) to apply the rule of completeness to conversations.

§ 29.04 "Ought in fairness" Standard [388-89]

A second document or recording may be required to (1) explain the admitted portion, (2) place the admitted portion in context, (3) avoid misleading the trier of fact, or (4) insure a fair and impartial understanding. The party invoking in the rule must specify which parts of the document are needed to place the writing in context.

§ 29.05 "Inadmissible Evidence" Problem [389-90]

Whether Rule 106 authorizes the admission of otherwise inadmissible evidence (e.g., hearsay) is an issue that has divided the courts.

Chapter 30
"BEST EVIDENCE RULE: FRE 1001-1008

§ 30.01 Introduction [391]

The term "best evidence rule" is misleading. The rule applies *only* to writings, recordings, and photographs – and only when proving their *contents*. There is no general rule requiring the "best evidence." A party generally is not required to introduce real evidence in order to prove its case.

§ 30.02 Rationale [391-92]

The nature of writings gives rise to their being singled out for special treatment. The copying of a writing by hand is especially susceptible to the introduction of inaccuracies, and even a minor inaccuracy may have significant legal consequences – for example, in wills, deeds, and contracts.

§ 30.03 Proving Contents [392-94]

The rule applies *only* when a party attempts to prove the contents of a writing or recording. Typically, this occurs when (1) the event to be proved is a written transaction or (2) a party chooses a written method of proof.

[A] Written Events; Independent Events

Some events and transactions, such as those involving deeds, contracts, and judgments, are written transactions, and the rule requires production of the original writing when the contents are sought to be proved. In contrast, Rule 1002 does not apply when the event sought to be proved existed independently of a writing, even if that event has been recorded.

[B] Written Method of Proof

If a party chooses to introduce a writing to prove a fact, the original must be produced.

§ 30.04 Definition of "Writing" & "Original" [394-96]

[A] Writings

Rule 1001(1) defines writings and recordings broadly. This definition is intended to include writings produced from modern photographic and computer systems. The term writing also encompasses artwork, engineering drawings, and architectural designs.

[B] "Originals" Defined

Rule 1001(3) defines an original as the writing or recording itself or any "counterpart intended to have the same effect by a person executing or issuing it." Thus, the rule employs an *intent* test to determine whether a writing is an original, thereby changing the common law.

§ 30.05 Exception: Duplicates. FRE 1003 ("Xerox" Rule) [396-97]

Rule 1003 says duplicates are generally admissible. This represents a major change from the common law. Duplicates are admissible unless (1) a genuine question of the authenticity of the original is raised, or (2) fairness requires production of the original.

§ 30.06 Exception: Original Lost or Destroyed: FRE 1004(1) [397-98]

Secondary evidence is admissible if all the originals are lost or destroyed, provided that the offering party has not lost or destroyed the originals in bad faith.

§ 30.07 Exception: Original Not Obtainable: FRE 1004(2) [398]

If an original cannot be obtained by any available judicial process, secondary evidence is admissible. The territorial limitation of a subpoena duces tecum in civil cases is 100 miles, while it is nationwide in criminal cases.

§ 30.08 Exception: Original in Opponent's Possession: FRE 1004(3) [398]

Secondary evidence is admissible if the opposing party fails to produce the original at trial, despite having been put on notice while the original was under his control that it would be subject to proof at trial. Notice may be by the pleadings or otherwise.

§ 30.09 Exception: Collateral Matters: FRE 1004(4) [399]

If the document is not important in the case, the rule does not apply.

§ 30.10 Exception: Public Records: FRE 1005 [399]

Rule 1005 provides for the admissibility of copies of official records and recorded documents, thus recognizing an automatic dispensation from the requirements of the original writing rule.

§ 30.11 Exception: Summaries: FRE 1006 [400-01]

In lieu of voluminous writings, Rule 1006 permits the use of summaries in the form of a chart or calculation. Although not explicitly stated in the rule, a summary is not admissible if the

originals upon which it is based are inadmissible. The use of summaries as evidence must be distinguished from the use of summaries and charts as pedagogical devices.

§ 30.12 Exception: Opponent Admission: FRE 1007 [401]

Where the party against whom the contents of a writing is offered admits the contents, the original need not be produced. The rule is limited to written or transcribed admissions; oral admissions do not qualify.

§ 30.13 Function of Judge & Jury: FRE 1008 [402]

Under most circumstances, the trial judge decides preliminary questions concerning the applicability of the original writing rule pursuant to Rule 104(a). However, there are three circumstances where jury should play an expanded role: (1) when there is a question whether a writing ever existed, and (2) when another writing is claimed to be the original. Whether other evidence of contents correctly reflects the contents of the original should also be a jury issue.

§ 30.14 Degrees of Secondary Evidence [402-03]

Some of the exceptions to the best evidence rule specify what type of secondary evidence is admissible. Under Rule 1003, "duplicates" have a precise meaning. Under Rule 1005, only *certified copies* of public records are admissible. By its own terms, Rule 1006 is limited to summaries. Other exceptions differ. If any of the conditions specified in Rule 1004 are satisfied, the rule does not prescribe the type of secondary evidence that must be produced. For example, if an original is lost, secondary evidence in the form of a copy or in the form of the testimony of a witness is permitted. The copy is not preferred.

PART F: HEARSAY

Chapter 31
HEARSAY RULE: FRE 801(a)-(c); 805, 806

§ 31.01 Overview of Article VIII [405-06]

In the absence of an exception or exemption, Rule 802 bars hearsay evidence. Rule 802 must be read in conjunction with Rule 801, which defines hearsay.

Exceptions. The exceptions are found in three rules. Rule 803 specifies twenty-three exceptions that apply whether or not the declarant is available. Rule 804 specifies five exceptions that apply *only* if the declarant is unavailable. Rule 807 recognizes a residual or "catch all" exception, under which some hearsay statements may be admitted on an ad hoc basis.

Exemptions. In addition to the exceptions, there were two categories of hearsay statements that the drafters wanted to admit into evidence. However, for theoretical reasons, the drafters choose not to classify them as exceptions. Instead, these statements were simply defined out of the definition of hearsay in Rule 801(d). The first category of exemptions (Rule 801(d)(1)) involves prior statements of a witness: It provides that certain prior inconsistent statements, prior consistent statements, and statements of identification are not hearsay. The second category (Rule 801(d)(2)) covers admissions of a party-opponent, of which there are five.

§ 31.02 Rationale for Hearsay Rule [406-07]

Cross-examination is the key to understanding the hearsay rule. If an out-of-court statement is offered for its truth, there is generally no cross-examination of the *real* witness (the declarant) to test that person's perception, memory, narration, and sincerity. (The oath and observation of demeanor are ancillary safeguards to cross-examination.)

§ 31.03 Hearsay Definitions [407-08]

Hearsay can be defined as an out-of-court statement whose probative value depends on the credibility of the declarant. Such a "declarant-focused" definition highlights the underlying policy of the hearsay rule. There is, however, a competing definition, an "assertion-focused" definition: Hearsay is an out-of-court statement offered for the truth of its assertion. In most cases, the same result is reached under either definition but not always. The Federal Rules adopt the latter definition.

§ 31.04 Declarant Defined: FRE 801(b) [408]

Rule 801(b) defines "declarant" as a "person who makes a statement." This definition makes clear that the hearsay rule does not apply to devices, such as radar, or to tracking dogs.

§ 31.05 "Out-of-Court" (extrajudicial) Requirement [408]

Rule 801(c) defines hearsay as a "statement, other than one made by the declarant while testifying at the trial or hearing." Hence, an out-of-court (extrajudicial) statement does not lose its hearsay character simply because the declarant later becomes a witness at trial and testifies about the statement.

§ 31.06 Statements Offered for Their Truth [409-15]

If the statement is offered for *any* purpose other than for its truth, it is not hearsay. This means that the hearsay character of the statement cannot be examined until we know why the proponent is offering the evidence – i.e., its relevancy. In other words, Rule 801 must be read along with Rule 401 (defining relevancy). In addition to Rule 401, Rule 403 plays an important role here.

Courts and commentators have recognized a number of recurring situations where statements are *not* offered for their truth. These are discussed below. Note, however, this is not an exhaustive list.

[A] To Show Effect on Listener

A statement offered to show its effect on the person who heard the statement is *not* hearsay – e.g., where the statement is offered to show only knowledge, good faith, or reasonableness.

[B] Verbal Acts

Statements that constitute verbal acts or operative acts are not hearsay because they are not offered for their truth. In other words, the uttering of certain words has independent legal significance under the substantive law – e.g., words of a contract, libel, slander, threats, and the like. Thus, we only care that these words were *said*, not that they are *true*.

[C] Verbal Parts of Acts

Verbal parts of acts are closely related to verbal acts. Such statements are offered in evidence only to show that they were made and to explain an otherwise ambiguous act. Most importantly, they must have independent legal significance.

[D] Prior Inconsistent Statements

The common law practice admitted prior inconsistent statements *only* for impeachment. Under this approach, the prior statement is offered to show the inconsistency between the witness's trial testimony and pretrial statements, rather than to show the truth of the assertions contained in the

pretrial statement. In general, the Rules of Evidence maintain this distinction. There is, however, an important exception. See Rule 801(d)(1)(A).

[E] To Circumstantially Prove Declarant's State of Mind

A person's mental state is often a material issue. If that person makes a statement that manifests her state of mind, the statement is relevant. Frequently, such statements are hearsay, but fall within the exception for presently existing state of mind. Rule 803(3). In other cases, the statement shows the declarant's state of mind only circumstantially. Under an assertion-oriented definition, the statement is not hearsay.

§ 31.07 Statement Defined; Implied Assertions: FRE 801(a) [415-20]

Rule 801(a) defines a "statement" as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." Conduct is problematic. The critical distinction under the Federal Rules is between assertive and nonassertive conduct.

[A] Assertive Conduct

Sometimes people use conduct to communicate – e.g., nodding the head and pointing a finger. Rule 801(a) treats conduct intended as an assertion (assertive conduct) as hearsay.

[B] Nonassertive Conduct

Conduct that is not intended by the declarant to be an assertion ("implied assertions") has divided courts and commentators. In *Wright v. Doe D' Tatham*, 112 Eng. Rep. 488 (1837), the House of Lords declared such conduct hearsay, a position rejected by the Federal Rules.

§ 31.08 Constitutional Issues [420]

The Due Process Clause may require the admissibility of hearsay in limited circumstances. The leading case is *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973), in which the Supreme Court held that state evidentiary rules that precluded the admission of critical and reliable evidence denied the defendant due process. One of the rules in *Chambers* that made defense evidence inadmissible was the hearsay rule. According to the Court, "In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice."

§ 31.09 Procedural Issues [420]

The trial judge decides the admissibility of hearsay evidence under Rule 104(a). *Bourjaily v. United States*, 483 U.S. 171, 175 (1987). Failure to raise the hearsay objection in a timely

manner is a waiver of the objection (Rule 103), and the evidence may be considered by the jury for whatever probative value the jury wishes to give it.

§ 31.10 Double Hearsay: FRE 805 [421]

Rule 805 governs the admissibility of multiple hearsay – i.e., hearsay within hearsay. If both parts of a double hearsay statement fall within an exception, the statement is admissible.

§ 31.11 Calling Hearsay Declarants: FRE 806 [421-22]

Rule 806 provides that, if a party against whom a hearsay statement is admitted calls the declarant as a witness, that party may examine the declarant "as if under cross-examination."

§ 31.12 Impeachment & Rehabilitation of Declarants: FRE 806 [422-23]

Rule 806 also governs the impeachment and rehabilitation of hearsay declarants. In effect, a hearsay declarant is a witness and generally may be impeached in the same manner as trial witnesses.

§ 31.13 "Res Gestae" [424]

The Rules of Evidence avoid the use of the term "res gestae," a confusing phrase which encompasses both evidence that is not hearsay and evidence that is hearsay but may fall within several exceptions to the hearsay rule.

Chapter 32
HEARSAY EXEMPTIONS: FRE 801(d)

§ 32.01 Introduction [429]

Rule 801(d) defines two types of statements as nonhearsay. They are: (1) certain prior statements and (2) admissions of a party-opponent.

§ 32.02 Prior Inconsistent Statements: FRE 801(d)(1)(A) [429-30]

There are two types of prior inconsistent statements in the Federal Rules. Prior inconsistent statements that do not satisfy the requirements of Rule 801 are still admissible but only for impeachment; Rule 613 governs the admissibility of these statements. Four conditions must be satisfied for admissibility under Rule 801(d)(1)(A): (1) the declarant must testify, subject to cross-examination, at the current trial; (2) the prior statement must be inconsistent with the witness's trial testimony; (3) the prior statement must have been given under oath subject to penalty of perjury; and (4) the prior statement must have been made "at a trial, hearing, or other proceeding, or in a deposition."

§ 32.03 Prior Consistent Statements: FRE 801(d)(1)(B) [430-32]

Prior consistent statements are admissible as *substantive* evidence if "offered to rebut an express or implied charge of recent fabrication or improper influence or motive." As with all exempted prior statements, the witness must be subject to cross-examination at trial. In *Tome v. United States*, 513 U.S. 150, 167 (1995), the Supreme Court held that the rule applies only when the statements "were made before the charged recent fabrication or improper influence or motive" – i.e., premotive.

§ 32.04 Statements of Identification: FRE 801(d)(1)(C) [432-33]

A witness's prior statement of identification of a person after perceiving that person is admissible as substantive evidence. An identification made at a lineup, show-up, photographic display, or prior hearing falls within the rule. Because prior identifications are admissible as substantive evidence, the rule applies whether or not the witness makes an identification at trial.

§ 32.05 Admissions of Party-Opponents: Overview [433-35]

[A] Rationale

Rule 801(d)(2) exempts admissions of a party-opponent from the scope of the hearsay rule by defining admissions as nonhearsay. Under the common law, an admission was characterized as an exception to the hearsay rule. The Federal Rules do not change this result; admissions are admissible, although under a different theory. The rule recognizes five types of party

admissions: (1) individual admissions, (2) adoptive admissions, (3) authorized admissions, (4) agent admissions, and (5) coconspirator admissions.

[B] Evidential & Judicial Admissions Distinguished

Rule 801(d)(2) does not govern the use of judicial admissions, such as admissions in pleadings or in stipulations. Unlike evidential admissions which can be rebutted at trial, a party is bound by its judicial admissions.

[C] Firsthand Knowledge & Opinion Rules

Generally, neither the firsthand knowledge rule nor the opinion rule applies to admissions of a party-opponent.

§ 32.06 Individual Admissions: FRE 801(d)(2)(A) [435-37]

Statements, oral or written, of a party, in either an individual or representative capacity, are admissible as substantive evidence if offered *against* that party. An individual admission is *any* statement made by a party at *any* time that is (1) relevant and (2) offered by the opposing party – e.g., guilty pleas, confessions, deposition testimony, or statements to friends.

"Declarations Against Interest" Distinguished. Party admissions are often confused with the hearsay exception relating to declarations against interest, Rule 804(b)(3).

§ 32.07 Adoptive Admissions: FRE 801(d)(2)(B) [437-39]

A statement that a party "adopts" is admissible as substantive evidence if offered against that party –e.g., adoption by use.

Adoption by Silence. A party may adopt the statement of a third person by failing to deny or correct under circumstances in which it would be *natural to deny or correct the truth* of the statement. It is not sufficient that the statement was merely made in the presence of a party.

§ 32.08 Authorized Admissions: FRE 801(d)(2)(C) [439]

Statements made by a person who was authorized by a party to make a statement are admissible as substantive evidence if offered against that party. The rule governs only statements by agents who have *speaking authority* – e.g., attorneys, partners, and corporate officers. In-house statements are included.

§ 32.09 Agent Admissions: FRE 801(d)(2)(D) [440-43]

Statements by agents or servants (1) concerning a matter within the scope of their agency or employment and (2) made during the existence of the agency or employment relationship are admissible as substantive evidence if offered against the party. In-house statements are included. Court have held that statements by law enforcement officers are generally not admissible against the prosecution under the rule. However, statements of an attorney may be admissible against the client as either an authorized admission, because the attorney usually has "speaking authority," or as an agent admission.

§ 32.10 Coconspirator Admissions: FRE 801(d)(2)(E) [443-47]

A conspirator's statement made during and in furtherance of the conspiracy is admissible as substantive evidence if offered against another conspirator. Three conditions must be satisfied: (1) the existence of a conspiracy, including the defendant's and declarant's participation, must be shown; (2) the statement must have been made *during the course* of the conspiracy; and (3) the statement must have been *in furtherance* of the conspiracy.

Chapter 33
HEARSAY EXCEPTIONS: FRE 803

§ 33.01 Introduction [451]

Exceptions to the hearsay rule are found in Rules 803, 804, and 807. This chapter discusses Rule 803, which specifies twenty-three exceptions that apply whether or not the declarant is available. Rule 804 specifies five exceptions that apply only if the declarant is unavailable; it is examined in the next chapter. Rule 807, the residual exception, is considered in chapter 35. In addition, exemptions to the hearsay rule, which function like exceptions, are explored in chapter 32.

§ 33.02 Rationale for Hearsay Exceptions [451-52]

Hearsay exceptions are based on some circumstantial guarantee of trustworthiness that is thought to warrant admissibility notwithstanding the lack of cross-examination, oath, and personal appearance of the declarant. Recall the hearsay dangers: perception, memory, narration, and sincerity risks. Each exception will reduce one or more of these risks. Most exceptions are also supported by a necessity or practical convenience argument. The necessity rationale is clearly present in the exceptions specified in Rule 804, because the unavailability of the declarant is required as a condition of admissibility.

§ 33.03 Firsthand Knowledge & Opinion Rules [452]

Several of the exceptions recognized in Rule 803 specifically require firsthand knowledge on the part of the declarant. For other exceptions, firsthand knowledge is not explicitly required. Nevertheless, firsthand knowledge is generally a requirement for all exceptions. The application of the opinion rule to hearsay statements is discussed with Rule 701. In a nutshell, it makes no sense to apply the opinion rule to out-of-court statements.

§ 33.04 Present Sense Impressions: FRE 803(1) [452-54]

Rule 803(1) requires: (1) a statement describing or explaining an event or condition, (2) about which the declarant had firsthand knowledge, and (3) made at the time the declarant was perceiving the event or immediately thereafter.

§ 33.05 Excited Utterances: FRE 803(2) [454-59]

Rule 803(2) requires: (1) a startling event; (2) a statement relating to that event; (3) made by a declarant with firsthand knowledge; and (4) made while the declarant was under the stress of the excitement caused by the event.

§ 33.06 Present Mental Condition: FRE 803(3) [459-64]

Rule 803(3) can be divided into three categories: (1) statements of present state of mind offered to prove that state of mind, (2) statements of present state of mind offered to prove future conduct, and (3) statements reflecting belief about past events.

[A] Proof of State of Mind that is a Material Fact

Statements made by an accused may be offered under this exception to show that the accused did not have the requisite mens rea. In some cases, statements concerning a victim's fear of the defendant have been admitted. These decisions are problematic. The statements do reflect the victims' state of mind, and thus satisfied Rule 803(3). However, the victim's state of mind is rarely a material issue.

[B] To Prove Future Conduct: *Hillmon* Doctrine

Statements of present state of mind are also admissible to prove that the declarant subsequently acted in accordance with that state of mind. *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285 (1892). For example, a declarant's statement, "I will revoke my will," is admissible to prove that the declarant subsequently revoked that will. A controversial issue is whether the *Hillmon* rule should extend to joint conduct.

[C] To Prove Past Conduct, *Shepard v. United States*

Rule 803(3) excludes statements of memory or belief to prove the fact remembered or believed except in cases involving the declarant's will. In contrast to statements that look forward as in *Hillmon*, statements that look backwards raise all the hearsay dangers: perception, memory, narration, and sincerity. *See Shepard v. United States*, 290 U.S. 96 (1933).

§ 33.07 Present Physical Condition: FRE 803(3) [464]

Rule 803(3) also covers statements of present *physical* condition in addition to mental condition. The critical requirement is that the statement relate to a present condition and not to past conditions, pains, or symptoms.

§ 33.08 Medical Treatment-Diagnosis: FRE 803(4) [464-67]

The reliability of statements made for the purpose of medical treatment rests on the belief that the declarant will not fabricate under these circumstances because the effectiveness of the treatment depends on the accuracy of the statement. However, Rule 803(4) is not limited to statements made for the purpose of medical treatment. It also covers statements made for the *purpose of diagnosis*, i.e., statements made to a physician solely for the purpose of presenting expert testimony at trial.

§ 33.09 Recorded Recollection: FRE 803(5) [467-69]

The rule requires that the witness (1) made or adopted a record, (2) based on firsthand knowledge, (3) when the matter recorded was fresh in the witness's memory, and (4) the record correctly reflects the witness's knowledge. Finally, (5) the witness at trial must have insufficient recollection to testify "fully and accurately" about the matter recorded. Joint (cooperative) records are admissible. The exception for recorded recollection should be distinguished from the practice of refreshing recollection, which does not involve hearsay evidence and is governed by Rule 612.

§ 33.10 Business Records Exception: FRE 803(6) [469-75]

Rule 803(6) requires: (1) a record of an act, event, condition, opinion, or diagnoses, (2) made at or near that time, (3) by, or from information transmitted by, a person with knowledge, (4) which was kept in the course of a regularly conducted business activity, (5) if it was the regular practice to make such record, (6) as shown by the testimony of the custodian or other qualified witness or as provided by Rules 902(11), 902(12), or statute, (7) unless the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

[A] Regular Activity; "Routine" Records

The rule requires that the record be the product of "the regular practice of that business activity." *See Shelton v. Consumer Products Safety Comm'n*, 277 F.3d 999, 1010 (8th Cir. 2002). This typically means that the record is the product of a routine practice.

[B] Events, Opinions & Diagnoses

Including "opinions and diagnoses" expanded upon the rule's statutory predecessors. Inevitably, the federal courts have had to draw a line between diagnosis and speculation. An opinion that would not be admissible at trial under Rule 702, which governs expert testimony, should not be admitted only because it was written in a medical record.

[C] Time Requirement

Under Rule 803(6), the record must have been "made at or near the time" of the matter recorded. The time requirement is one of the conditions that ensures the reliability of business records.

[D] Firsthand Knowledge

The record must have been made (1) by a person with knowledge of the matter recorded or (2) from information transmitted by a person with such knowledge. This provision does not require that the "person with knowledge" be produced at trial or even identified.

[E] Business Duty Requirement

If both the supplier of information and recorder are part of the business, the record is admissible; the supplier is under a business duty to transmit the information and the recorder is under a duty to make the record. However, if the supplier is *not* under a duty to transmit the information, the record is inadmissible as a business record. This situation presents a double hearsay problem, and admissibility is governed by Rule 805.

[F] Lack of Trustworthiness Clause

A record that satisfies the requirements of Rule 803(6) may nevertheless be excluded if "the source of information or the method or circumstances of preparation indicate lack of trustworthiness." Litigation records are an example.

[G] Foundational Requirement for Business Records

The foundation for the admissibility of business records may be shown by the testimony of the custodian or other qualified witness or as provided by Rules 902(10) and (11), which make business records self-authenticating. The foundational witness must be sufficiently acquainted with the records management system to establish that the requirements of the exception have been satisfied, but the witness is not required to have firsthand knowledge of the particular entry.

§ 33.11 Absence of Business Records: FRE 803(7) [475]

Rule 803(7) recognizes a hearsay exception for absence of a business record.

§ 33.12 Public Records: FRE 803(8) [475-80]

Rule 803(8) recognizes three types of public records: (1) those setting forth the activities of the office or agency, (2) those recording matters observed pursuant to a duty imposed by law, and (3) investigative reports. (Other rules also deal with different aspects of public records. Rule 1005, by permitting the use of certified copies, recognizes an exception to the best evidence rule for public records. Authentication of public records is governed by Rules 901(b) and 902. Under the latter rule, many public records are self-authenticating and thus admissible without the need to produce an authenticating witness. All these provisions combine to make admissibility quite easy to achieve.)

[A] Activities of Agency

Rule 803(8)(A) provides for the admission of records setting forth the "activities of the office or agency." Although division (A) contains no explicit firsthand knowledge requirement, that

requirement is applicable. As with business records, the person making the record need not have firsthand knowledge so long as the official transmitting the information had such knowledge.

[B] Matters Observed Per Legal Duty

Rule 803(8)(B) governs records setting forth "matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel." The rule specifically excludes police reports in criminal cases. Most federal courts have adopted a flexible approach, holding that the police records exclusion does not apply to all police records – i.e., routine, nonadversarial matters.

[C] Investigative Reports

Rule 803(8)(C) governs investigative or evaluative reports, which are admissible in civil actions and against the prosecution in criminal cases. The underlying theory is that reports, for example, dealing with the causes of mine disasters issued by the Bureau of Mines or airplane crashes issued by the FAA are sufficiently reliable.

[D] Lack of Trustworthiness Clause

Public records otherwise admissible under Rule 803(8) may be excluded if the "sources of information or other circumstances indicate lack of trustworthiness." This provision is identical to the one found in the business records exception and serves the same purpose.

[E] Business Records Compared

Many public records also satisfy the requirements of the business records exception; the opposite, however, is not true.

§ 33.13 Absence of Public Records: FRE 803(10) [480]

Rule 803(10) recognizes a hearsay exception for absence of a public record.

§ 33.14 Ancient Documents: FRE 803(16) [480]

Rule 803(16) recognizes a hearsay exception for "statements in a document in existence twenty years or more the authenticity of which is established." The rule must be read in conjunction with Rule 901(b)(8), which governs the authentication of ancient documents.

§ 33.15 Market Reports; Commercial Publications: FRE 803(17) [481]

The rule recognizes a hearsay exception for "market quotations, tabulations, lists, directories, or other published compilations" if they are "generally used and relied upon by the public or by persons in particular occupations." The rule goes beyond compilations prepared for professions and trades to include newspaper market reports, telephone directories, and city directories.

§ 33.16 Learned Treatises: FRE 803(18) [481-82]

Learned treatises were admissible at common law but only for the impeachment of experts. Rule 803(18) changes this result, making the treatise admissible as substantive evidence. Rule 803(18) permits the authoritativeness of the treatise to be established by another expert or by judicial notice.

§ 33.17 Judgment of Previous Conviction: FRE 803(22) [482-83]

Rule 803(22) recognizes a hearsay exception for judgments of previous criminal convictions when offered "to prove any fact essential to sustain the judgment."

§ 33.18 Other Exceptions [483-484]

There are numerous other exceptions in Rule 803. Many are codifications of the common law that are not as important today. For example, a number of exceptions deal with pedigree, i.e., births, deaths, legitimacy, marriage, and family relationships. While these issues are still important today, better recording systems make resort to the family Bible and community reputation rare. Indeed, Rule 803(9) recognizes a hearsay exception for records vital statistics. Another group of exceptions deal with real property.

Chapter 34
HEARSAY EXCEPTIONS, UNAVAILABLE DECLARANT: FRE 804

§ 34.01 Introduction [491]

Rule 804 specifies five hearsay exceptions that require a showing that the declarant is unavailable to testify at trial. In contrast, the exceptions enumerated in Rule 803 do not depend on the unavailability of the declarant.

§ 34.02 Unavailability [491-94]

Rule 804(a) contains five conditions of unavailability. The list is illustrative, not exclusive. By adopting a uniform rule of unavailability for all the Rule 804(b) exceptions, the rule changes the common law, under which each exception had developed its own conditions of unavailability.

[A] Claim of Privilege: FRE 804(a)(1)

The most common example is a witness who claims the privilege against self-incrimination under the Fifth Amendment.

[B] Refusal to Testify: FRE 804(a)(2)

If the court decides a claim of privilege is invalid but the witness persists in refusing to testify, Rule 804(a)(2) applies and the unavailability requirement is met. A ruling by the trial judge on the claim of privilege is required.

[C] Lack of Memory: FRE 804(a)(3)

The rule was somewhat controversial because of a concern about fabricated claims of lack of memory. The judge, however, can eye-ball the witness and may choose to disbelieve the declarant's testimony as to the lack of memory.

[D] Death or Illness: FRE 804(a)(4)

A continuance may resolve problems associated with a temporary infirmity.

[E] Unable to Procure Testimony: FRE 804(a)(5)

The rule governs situations in which the declarant's present whereabouts are unknown or the declarant is beyond the subpoena power of the court. In the case of most of the Rule 804 exceptions, the rule requires that the *testimony* as well as the attendance of the witness be

unavailable, which refers to the deposition of the declarant. This provision does not apply to former testimony because a deposition is a type of former testimony.

§ 34.03 Former Testimony: FRE 804(b)(1) [494-500]

Unlike other hearsay exceptions, former testimony is not based on any trustworthiness guarantee that is considered an adequate substitute for cross-examination. The rule requires only an "opportunity" to examine, not actual examination. Moreover, an opportunity for "direct" or "redirect" examination suffices.

[A] Type of Proceeding

Former testimony includes testimony given at a deposition, prior trial, preliminary hearing, or administrative proceeding.

[B] "Against whom" Requirement

The rule does not require "identity of parties," as had some common law cases. As long as the party against whom the former testimony is offered (or a predecessor in interest) had an opportunity to examine the witness at the former hearing, the rule is satisfied.

[C] "Predecessor in Interest"

Although Congress did not define the term "predecessor in interest," the most plausible reading would suggest privity or some of sort of legal relationship. The federal courts, however, have interpreted the phrase "predecessor in interest" expansively – "party having like motive to develop the testimony about the same material facts is . . . a predecessor in interest to the present party." *Lloyd v. American Export Lines, Inc.*, 580 F.2d 1179, 1187 (3d Cir. 1978).

[D] Similar Motive Requirement

There is no explicit requirement for "identity of issues." Nevertheless, this is an aspect of the similar motive requirement if modified to require only a substantial identity of issues.

[E] Method of Proof

A transcript of the former proceeding is the typical and preferable method of proof, but neither Rule 804 nor the best evidence rule requires a transcript's use. Nevertheless, the trial court has the authority pursuant to Rule 611(a) to require the use of a transcript if available. Former testimony also may be proved by the testimony of a witness who was present at the time the testimony was given.

§ 34.04 Dying Declarations: FRE 804(b)(2) [500-02]

The exception for dying declarations is based (1) on necessity (i.e., the unavailability of the declarant), and (2) on a circumstantial guarantee of trustworthiness. The theory being that people would not want to die with a lie upon their lips. In contrast to the common law, admissibility is not conditioned on the declarant's death; any of the conditions of unavailability specified in Rule 804(a) is sufficient.

[A] "Imminent Expectation of Death" Requirement

This requirement follows from the theory underlying the exception; a declarant who does not believe that death is near may not feel compelled to speak truthfully.

[B] Subject Matter Requirement

Only statements concerning the cause or circumstances of what the declarant believed to be his or her impending death are admissible. This requirement follows from the theory underlying the exception – statements beyond cause and circumstances indicate that the declarant may no longer be acting under an expectation of imminent death.

[C] Type of Case

At common law, dying declarations were admissible only in homicide cases. Under Rule 804, dying declarations are admissible in civil actions as well. They remain inadmissible in criminal trials other than homicide cases.

§ 34.05 Statements Against Interest: FRE 804(b)(3) [502-07]

Declarations against interest are based (1) on necessity (i.e., the unavailability of the declarant), and (2) a circumstantial guarantee of trustworthiness that eliminates the risk of insincerity.

[A] "Against Interest" Requirement

The "against interest" requirement focuses on the declarant's situation and motives *at the time the statement was made*. This is the critical requirement, which follows from the underlying theory of the rule.

[B] Declarations Against Penal Interests

At common law, declarations against penal interest were not admissible. This position rested upon a concern about collusive arrangements between defendants and declarants to fabricate confessions exonerating the defendant. Nevertheless, the federal drafters rejected the common

law position but then added a corroboration requirement as a safeguard against fabricated confessions.

[1] Corroboration Requirement

Rule 804(b)(3) imposes a corroboration rule when declarations of penal interest are offered in criminal cases to exculpate the accused. The federal cases, however, have applied the corroboration requirement to inculpatory statements. A proposed amendment would make clear that the corroboration requirement applied to the prosecution, as well as in civil cases.

[C] Collateral Statements

The admissibility of collateral statements – those that are not directly against the declarant's interest – have often proved controversial. In *Williamson v. United States*, 512 U.S. 594 (1994), the Supreme Court adopted a strict interpretation of the federal rule: the non-self-inculpatory portions are not against interest.

§ 34.06 Forfeiture by Wrongdoing: FRE 804(b)(6) [507-09]

In 1997, a new subsection was added to Rule 804(b) for statements offered against a party when the unavailability of the declarant is due to the wrongdoing of the party – e.g., killing a witness. The rule applies when the party against whom the statement is offered has "engaged or acquiesced in wrongdoing" that procured the unavailability of the declarant as a witness.

Chapter 35
RESIDUAL EXCEPTION: FRE 807

§ 35.01 Introduction [513]

There are reliable hearsay statements that do not fall within any of the exceptions specified in Rules 803 and 804. The residual exception is a way to recognize this by giving the trial judge ad hoc authority to admit hearsay in a particular case. The residual exception requires: (1) the statement have "equivalent circumstantial guarantees of trustworthiness" as the exceptions in Rules 803 and 804; (2) the statement be offered as evidence of a material fact; (3) the statement be more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; (4) the general purposes of the Federal Rules and the interests of justice be served by admission; and (5) notice be given to the other party. (Two of these requirements are redundant. Rule 401 requires materiality, and Rule 102, the purpose and construction clause, requires the doing of justice, among other things.)

The courts have rejected the "near miss" theory and have also frequently admitted grand jury testimony. Numerous factors are relevant to determining reliability. Consider first the hearsay dangers – perception, memory, narration, or sincerity problems.

Chapter 36
RIGHT OF CONFRONTATION

§ 36.01 Introduction [519]

The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him." The Confrontation Clause was held binding upon the states in *Pointer v. Texas*, 380 U.S. 400 (1965). There are several aspects to the Confrontation Clause. First, the right of confrontation includes the right of the accused to be present at trial. Second, it guarantees the accused the right to face adverse witnesses ("face-to-face" confrontation). Third, the defendant also has the right to cross-examine these witnesses. Finally, the hearsay rule by permitting the admission of evidence without the cross-examination of the declarant raises confrontation issues.

§ 36.02 Right to be Present at Trial [519-21]

The right of confrontation guarantees an accused the right to be present during trial, a right that may be forfeited by disruptive behavior (*Illinois v. Allen*, 397 U.S. 337 (1970)) or the accused's voluntary absence after the trial has commenced (*Taylor v. United States*, 414 U.S. 17 (1973)).

§ 36.03 Right to "Face-to-Face" Confrontation [521-22]

The Supreme Court has held that the right of confrontation requires "face-to-face" confrontation. However, this right is not absolute. In *Maryland v. Craig*, 497 U.S. 836 (1990), the Court upheld a statutory procedure that allowed the use of one-way closed circuit television for the testimony of a child witness in a sexual abuse case. Significantly, the trial court made a fact-specific inquiry to determine whether the child would be traumatized by testifying in the presence of the accused.

§ 36.04 Right to Cross-Examination [522-25]

On more than one occasion, the Supreme Court has stated that the primary interest secured by the Confrontation Clause is the right of cross-examination. *Douglas v. Alabama*, 380 U.S. 415, 418 (1965). Many of the Court's cases have involved limitations on the elicitation of bias impeachment on cross-examination. These limitations have invariably been struck down. *See Olden v. Kentucky*, 488 U.S. 227 (1988); *Delaware v. Van Arsdall*, 475 U.S. 673 (1986); *Davis v. Alaska*, 415 U.S. 308 (1974).

§ 36.05 Confrontation & Hearsay [525-34] [**Note:** After this section was written, the Supreme Court decided *Crawford v. Washington*, 541 U.S. 36 (2004), differentiating between "testimonial" and "nontestimonial" hearsay and holding that the Confrontation Clause bars the

admission of testimonial hearsay unless the declarant is unavailable and the accused has had a prior opportunity to cross-examine the declarant.]

Since a hearsay declarant is, in effect, a witness, a literal application of the Confrontation Clause would preclude the prosecution from introducing any hearsay statement, notwithstanding the applicability of a recognized hearsay exception. The Supreme Court has never adopted such an extreme view. The Clause also could be interpreted as requiring only the right to cross-examine in-court witnesses and not out-of-court declarants. Under this view, all hearsay exceptions would satisfy constitutional requirements. The Supreme Court also has rejected this view. Instead of either of these two approaches, the Court has attempted to steer a middle course. The cases can be divided into two categories – those in which the declarant testifies at trial and those in which the declarant does not testify.

[A] Available Declarants: Cross-examination at Trial

An opportunity to cross-examine the hearsay declarant at trial usually satisfies the Confrontation Clause. *California v. Green*, 399 U.S. 149 (1970).

[B] Unavailable Declarants: *Ohio v. Roberts'* Two-pronged Test

In *Ohio v. Roberts*, 448 U.S. 56 (1980), the Court set-forth a two-pronged analysis that focused on (1) the unavailability of the declarant and (2) the reliability of the hearsay statement.

[1] Reliability Requirement

The reliability requirement may be satisfied in either of two ways: (1) showing that the statement falls within a "firmly rooted hearsay exception," which makes it presumptively reliable; or (2) demonstrating that the statement possesses particularized guarantees of trustworthiness.

[a] "Firmly Rooted" Exceptions

"Firmly rooted" exceptions include the coconspirator exception, *Bourjaily v. United States*, 483 U.S. 171 (1987), as well as the excited utterance and medical diagnosis exceptions. *White v. Illinois*, 502 U.S. 346 (1992). The Court took a closer look at this requirement in *Lilly v. Virginia*, 527 U.S. 116 (1999), ruling that the exception for declarations against penal interest, as interpreted by the Virginia Supreme Court, was not a firmly rooted exception.

[b] Particularized Guarantees of Trustworthiness

If a statement does not fall within a "firmly rooted" hearsay exception, it may nevertheless satisfy Confrontation Clause demands if it possesses particularized guarantees of trustworthiness. In *Idaho v. Wright*, 497 U.S. 805, 806 (1990), a case involving the admissibility of a child's statement under a residual hearsay exception, the Court held that the trustworthiness requirement

involves a case-by-case approach that considers the "totality of the circumstances" *at the time* the statement was made. The relevant factors include spontaneity, consistency of repetition, the mental state of the declarant, use of terminology unexpected of a child of similar age, and lack of motivation to lie.

[2] Unavailability Requirement

The second prong of *Ohio v. Roberts* focuses on the unavailability of the declarant. At the time *Roberts* was decided, this requirement suggested a demanding standard. In *Barber v. Page*, 390 U.S. 719, 725 (1968), the Court had held that this requirement is satisfied only if "the prosecutorial authorities have made a good-faith effort to obtain" the presence of the declarant at trial. However, later cases demonstrate that the *Roberts'* unavailability requirement will not be strictly applied. In *United States v. Inadi*, 475 U.S. 387, 394 (1986), which involved the admissibility of coconspirator admissions, the Court limited *Roberts* to cases involving former testimony, explaining that *Roberts* cannot be read "to stand for the radical proposition that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable." The Court reaffirmed this position in *White v. Illinois*, 502 U.S. 346, 354 (1992), which involved the excited utterance and medical diagnosis exceptions in a child sex abuse prosecution. Again, the Court ruled that "*Roberts* stands for the proposition that unavailability analysis is a necessary part of the Confrontation Clause inquiry only when the challenged out-of-court statements were made in the course of a prior judicial proceeding."

PART G: PRIVILEGES

Chapter 37
PRIVILEGES: FRE 501

§ 37.01 Introduction [537]

Privileges differ from most other rules of evidence. They are intended to promote some policy that is external to the goals of a trial. Most other evidence rules are designed to enhance the search for truth and thus the fact-finding process. Privileges hinder that goal by excluding relevant and reliable evidence.

§ 37.02 Federal Rule 501 [537-40]

Rule 501 is the only provision in the Rules of Evidence that governs the law of privilege. The Supreme Court originally proposed thirteen rules of privilege – a general rule, nine specific privileges, and three procedural rules. Congress rejected these rules, substituting Rule 501, which left the law of privilege unchanged. Unless specified by statute or court rule, "the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of common law as they may be interpreted by the courts of the United States in the light of reason and experience."

§ 37.03 Rationale for Privileges [540-44]

There are two main theories underlying the law of privilege. The first is the utilitarian or instrumental justification: If you want clients to speak to lawyers, patients to therapists, or penitents to the clergy, provide them encouragement by recognizing a privilege for such communications. The second theory is based on the notion of privacy.

§ 37.04 Source of Privileges [544]

Some privileges, such as Fifth Amendment privilege against compulsory self-incrimination, are constitutional. Other are based on federal statutes. In addition, the Civil and Criminal Rules recognize a qualified work product privilege. Much of the federal law of privilege rests on common law developments. In the states, however, privileges are often statutory.

§ 37.05 Procedural Issues [544-46]

Only the *holder* may waive a privilege. Generally, the burden of persuasion is on the person claiming a privilege. In *United States v. Zolin*, 491 U.S. 554, 568 (1989), the Supreme Court held, as a matter of federal common law, that the trial judge could review in camera allegedly privileged communications to determine whether they fell within the crime-fraud exception to the attorney-client privilege.

§ 37.06 Choice of Law [546-47]

Rule 501 provides that "in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law."

Chapter 38
ATTORNEY-CLIENT PRIVILEGE

§ 38.01 Introduction [549-50]

The attorney-client privilege is intended to permit clients to receive informed legal advice and effective representation, which depends on "full and frank communication between attorneys and their clients." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

§ 38.02 Professional Responsibility Distinguish [550]

The attorney-client privilege should be distinguished from an attorney's obligations under the rules governing professional responsibility. Model Rule 1.6(a) states that lawyers "shall not reveal information relating to representation of a client," with only two narrow exceptions. While the privilege is limited to *communications*, the ethical rule covers all information obtain as a result of the representation. Moreover, an evidentiary privilege applies only in *legal* proceedings; the ethical rule applies outside legal proceedings.

§ 38.03 Holder [551]

The holder of the privilege is the client and not the attorney. Accordingly, only the client has the right to invoke and waive the privilege. The attorney may, however, claim the privilege on behalf of the client.

§ 38.04 Professional Relationship Requirement [551-52]

The attorney-client privilege applies only where the communication is made for the purpose of receiving legal advice. If an attorney is consulted for reasons unrelated to legal services (e.g., as a friend or business advisor), the privilege does not apply.

§ 38.05 Communications Defined [552-55]

Generally, only the communication is covered and not the facts that are the subject of the communication. Stated another way, the communication, but not the client's knowledge, is protected by the privilege.

[A] Documents

The privilege may encompass written communications between attorney and client – e.g., letter containing legal opinion about a proposed course of conduct. However, pre-existing documents do not become privileged merely because they are transmitted to an attorney. *Fisher v. United States*, 425 U.S. 391, 403-04 (1976).

[B] Client Identity; Fee Arrangements

Generally, a client's identity, the fact of consultation with or employment of an attorney, and fee arrangements do not fall within the protection of the attorney-client privilege. However, some courts extend the privilege's protection to the name and address of the client under certain circumstances – e.g., where the revelation of the identity of the client would reveal a confidential communication.

[C] Physical Evidence

A difficult problem arises when a client delivers tangible evidence to the attorney or provides the attorney with information necessary to retrieve the evidence. Here, the privilege applies to the communication itself. The attorney may not, however, take possession and hide the evidence; this would amount to an obstruction of justice. Nor, for the same reason, may the attorney tell the client to destroy the evidence.

§ 38.06 Confidentiality Requirement [555-56]

Where the information communicated is intended to become public, the privilege does not apply.

[A] Presence of Third-Parties

The privilege does not apply when the client's actions are inconsistent with an intention of confidentiality – for example, if the communication is made in the presence of a third person. Confidentiality will be considered preserved, however, where the third person is necessary to the legal consultation such as the case with legal secretaries, investigators, and paralegal assistants.

[B] Eavesdroppers

As long as the client did not know of the presence of an eavesdropper when the communication took place, and the client took reasonable steps to preserve confidentiality, the privilege is preserved and the eavesdropper may be prohibited from testifying about what was overheard.

§ 38.07 Attorneys & Their Agents Defined [556-59]

Agents who assist in providing legal services, such as associates and secretaries, are included.

[A] Insurance Companies

Some courts hold that communications from an insured to a representative of her insurance company come within the privilege. Other courts take a more restrictive view, requiring that "the dominant purpose of the communication" be for the insured's defense and that the insured

have a "reasonable expectation of confidentiality." *Cutchin v. State*, 792 A.2d 359, 366 (Md. App. 2002).

[B] Experts

Two different uses of experts must be distinguished. First, an expert may be retained for the purpose of testifying at trial. In this situation, the privilege is waived. Second, an expert may be retained for the purpose of consultation; that is, to provide the attorney with information needed to determine whether a scientific defense is feasible. Numerous courts have held that the attorney-client privilege covers communications made to an attorney by an expert retained for the purpose of providing information necessary for proper representation. Other courts have rejected the extension of the attorney-client privilege in this context, although their reasons vary.

§ 38.08 Clients & Their Agents Defined [559-60]

The definition of client includes governmental bodies and corporations. There is often a problem in determining whether the attorney represents only the corporation or also the corporate officers.

Control group test. In *Upjohn Co. v. United States*, 449 U.S. 383 (1981), the Supreme Court rejected the "control group" test as a matter of federal common law. The Court adopted a different test, the critical factors of which include: (1) whether the employee communicated with the attorney in her capacity as corporate counsel, (2) whether both were acting at the behest of their corporate superiors, (3) whether the communication was made to enable the corporation to obtain legal advice and the employee was aware of this, (4) whether the communication concerned matters within the employee's duties, and (5) whether the communications were considered confidential when made.

§ 38.09 Joint Defense Agreements [561]

The privilege may apply in "joint defense" situations, those in which attorneys for two or more different clients confer for the purpose of advancing the same defense.

§ 38.10 Duration of the Privilege [561-62]

In *Swidler & Berlin v. United States*, 524 U.S. 399 (1998), the Supreme Court held that the federal attorney-client privilege survives the death of the client.

§ 38.11 Exceptions [562-64]

There are several well-recognized exceptions to the attorney-client privilege: (1) crime-fraud, (2) joint clients (distinguished from "joint defense" situations), (3) breach of duty by attorney or client, (4) claimant through same deceased client, and (5) document attested by lawyer.

§ 38.12 Waiver [564-67]

The privilege may be waived in several ways: (1) client testifies about communication or attorney testifies about communication at client's behest, (2) client puts the communication in issue, (3) voluntary disclosure, and (4) inadvertent waiver (sometimes).

§ 38.13 Procedural Issues [567]

[A] Burden of Proof

Burden of persuasion rests with the person asserting the privilege.

[B] In Camera Hearings

In *United States v. Zolin*, 491 U.S. 554 (1989), the Supreme Court held that the applicability of the crime-fraud exception can be resolved by an in camera inspection of the allegedly privileged material.

§ 38.14 Work Product Privilege [567-68]

The attorney-client privilege should be distinguished from the work-product doctrine, a *qualified* privilege recognized in both the Civil and Criminal Rules. Fed. R. Civ. P. 26(b)(3); Fed. R. Crim. P.16(a)(2) (prosecution); Fed. R. Crim. P. 16(b)(2) (defense counsel). The work-product doctrine generally protects a broader range of materials than does the attorney-client privilege. The former protects materials prepared in anticipation of trial, while the latter is limited to communications. However, the protection for work product is not absolute; it may be overcome if the party seeking discovery shows that it has a "substantial need" for the materials and is unable without "undue hardship" to obtain the substantial equivalent of the materials sought by other means.

Chapter 39
SPOUSAL & FAMILY PRIVILEGES

§ 39.01 Introduction [573]

There are two spousal privileges. The spousal *testimonial* privilege provides that a spouse may not be compelled to testify against a defendant-spouse in a *criminal* prosecution. A second privilege involves *confidential communications* between spouses and applies in both civil and criminal cases. Some jurisdictions have both privileges, while others have one or the other.

§ 39.02 Spousal Testimonial Privilege [573-77]

The spousal testimonial privilege is sometimes known as the anti-marital fact privilege. "The modern justification for this privilege against adverse spousal testimony is its perceived role in fostering the harmony and sanctity of the marriage relationship." *Trammel v. United States*, 445 U.S. 40, 44 (1980).

[A] Type of Case

Unlike the confidential communication privilege, the testimonial privilege applies only in criminal cases.

[B] Scope & Duration of Privilege

The testimonial privilege is determined as of the time of trial. If there is a valid marriage, the privilege applies and all testimony, including testimony concerning events that predated the marriage, is excluded.

[C] Holder

In some jurisdictions, both spouses may assert the privilege. In others, only the witness-spouse holds the privilege.

[D] Exceptions

If the charged offense involves a crime against the other spouse or their children, the privilege typically does not apply. Moreover, some federal courts have engrafted a "joint participant" in crime exception onto the common law privilege.

[E] Waiver

Failure to object to a spouse's testimony at trial waives the privilege, as does voluntary disclosure to a third party. The privilege may also be waived by the holder or spouse testifying.

§ 39.03 Spousal Communication Privilege [577-81]

The second spousal privilege concerns confidential communications. The purpose of this rule is to promote marital discourse, an instrumental rationale.

[A] Type of Case

Unlike the testimonial privilege which applies only in criminal prosecutions, the confidential communication privilege applies in both civil and criminal cases.

[B] Scope & Duration of Privilege

The privilege applies only to communications made during coverture.

[C] Holder

It could be argued that only the communicating spouse should be able to assert the privilege. Nevertheless, the privilege often is held to extend to both spouses

[D] Communications

The privilege applies to confidential communications and includes acts intended as communications. Whether the privilege extends to conduct in addition to communications depends on the jurisdiction

[E] Confidentiality

The spousal privilege applies *only* to communications that are intended to be confidential.

[F] Exceptions

As with the testimonial privilege, the communication privilege does not apply in prosecutions for crimes against the spouse or their children. Like the testimonial privilege, a joint crime exception has been carved out by the federal courts.

[G] Waiver

Failure to object at trial to disclosure of a privileged communication waives the privilege. It may also be waived by offering the testimony of a witness concerning the privileged communication. In addition, voluntary communication to a third party is a waiver.

§ 39.04 Parent-Child Privilege [581-82]

Although some courts and legislatures have recognized a parent-child privilege, most have not.

Chapter 40
DOCTOR & PSYCHOTHERAPIST PRIVILEGES

§ 40.01 Introduction [583]

Although the doctor-patient privilege is the older of the two, the psychotherapist-patient privilege has been more extensively adopted today.

§ 40.02 Physician-Patient Privilege [583-87]

Although most states recognize a doctor-patient privilege, the federal courts do not. The holder of the privilege is the patient, not the physician; only the patient has the right to invoke and waive the privilege.

In those jurisdictions that have adopted the privilege, there is tremendous variation in the type of exceptions recognized and the conditions for waiver. The privilege, for example, may not apply to (1) required reports of gunshot, stab, or other wounds, (2) required reports of suspected child abuse and neglect, (3) required reports of abuse of mentally retarded persons, and (4) test results showing the presence of alcohol or drugs in a criminal suspect's body.

§ 40.05 Psychotherapist-patient Privilege [587-92]

The Supreme Court recognized the psychotherapist-patient privilege in *Jaffee v. Redmond*, 518 U.S. 1, 10 (1996): "Effective psychotherapy . . . depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears." The holder of the privilege is the patient, not the therapist; only the patient has the right to invoke and waive the privilege. In *Jaffee*, the Court extended the federal privilege not only to psychiatrists and psychologists, but also to clinical social workers.

The communication to the therapist must be made while seeking psychological treatment. Court-ordered psychological examinations or those required for worker's compensation are not covered. Matters other than communications and advice also do not fall within the privilege.

Exceptions to the privilege must be determined under the law of the jurisdiction in which the issue arises. There is significant variation in the state statutes, and the federal privilege is only beginning to be fleshed out. Common exceptions include: (1) civil commitment proceedings, (2) court-ordered examinations, and (3) the patient-litigant rule.

Chapter 41
OTHER PRIVATE PRIVILEGES

§ 41.01 Introduction [595]

There are numerous other privileges. Two of the most important are the clergy-penitent and journalist privileges.

§ 41.02 Clergy-Penitent Privilege [595-98]

Every jurisdiction recognizes a clergyman-penitent privilege. The proposed federal rule made the communicant the holder of the privilege. Some state statutes permit the clergy member to refuse to testify even when the penitent has expressly consented, if "the disclosure of the information is in violation of his sacred trust." First Amendment Free Exercise issues obviously are implicated in this context.

The communication must be made for the purpose of obtaining spiritual guidance; consultations for other reasons do not fall within the privilege. The modern privilege is not limited to "confessions" in the doctrinal religious sense. Like other communication privileges, the privilege requires confidentiality, and the presence of a third party cuts against an intent of confidentiality.

§ 41.02 Journalist's Privilege [598-99]

Numerous states recognize a journalist's privilege, which is intended to encourage the flow of information to newspapers and the electronic media. The privilege is limited to the identity of the source. In *Branzburg v. Hayes*, 408 U.S. 665 (1972), the Supreme Court held that the First Amendment guarantee of freedom of the press did not require the recognition of a journalist's privilege. However, a number of federal courts, focusing on Justice Powell's concurring opinion in *Branzburg*, have recognized a qualified journalist's privilege. This qualified privilege requires a balancing of interests, which in criminal cases may implicate the defendant's right to a fair trial. Other courts have rejected even this qualified privilege.

§ 41.03 Miscellaneous Privileges [600]

New privileges are always being proposed. Federal courts have rejected an academic peer-review privilege and an accountant's privilege. Some have recognized a privilege for critical self-analysis, at least under limited circumstances.

Chapter 42
GOVERNMENTAL PRIVILEGES

§ 42.01 Introduction [601]

The privileges discussed in the preceding chapters were private privileges. In some circumstances, they may apply to the government, such as the attorney-client privilege. This chapter examines privileges that *only* the government may assert.

§ 42.02 Informant's Privilege [601-06]

All jurisdictions recognize a qualified privilege that permits the prosecution to withhold the identity of an informer. This common law privilege is intended to protect the public interest in effective law enforcement by protecting the identity of informants. *Roviaro v. United States,* 353 U.S. 53 (1957).

[A] Holder

The holder is the government, not the informant.

[B] Scope of Privilege

The privilege covers only the identity of the informant and not the content of the communication. Thus, if revealing the informant's communication will not reveal the informant's identity, that communication is not privileged.

[C] Exceptions

There are two exceptions to the privilege. First, once the identity of the informant becomes known, the privilege ceases. Second, if the identity of the informant would provide substantial assistance to the defense at trial, the state is required to reveal the identity of the informant or dismiss the prosecution.

[D] In Camera Inspection

The trial court may use an in camera proceeding to determine the privilege's application.

[E] Burden of Proof

The burden of persuasion rests with the defendant.

[F] Suppression Hearings

Disclosure of an informant's identity is rarely required during a suppression hearing, based on an alleged Fourth Amendment violation, because, unlike a trial, guilt or innocence is not the issue. *McCray v. Illinois*, 386 U.S. 300 (1967).

§ 42.03 Surveillance Location Privilege [606]

In *United States v. Green*, 670 F.2d 1148 (D.C. Cir. 1981), the D.C. Circuit, reasoning by analogy to the informer's privilege, recognized a privilege for a surveillance location. Some state courts have recognized this privilege, while others have rejected it

§ 42.04 State Secrets & Executive Privilege [607-08]

United States v. Reynolds, 345 U.S. 1 (1953), a federal Tort Claims Act case against the Government, involved the deaths of civilians in the crash of a B-29 airplane. The plane was testing secret electronic equipment. The Court recognized a state secrets privilege. In *United States v. Nixon*, 418 US. 683 (1974), the Supreme Court recognized a limited executive privilege, although it also found that the privilege had to give way in that case.

§ 42.05 Miscellaneous Governmental Privileges [608]

Proposed Federal Rule 509 recognized an official information privilege, which covered several different categories of governmental information. In addition, sometimes disclosure of information in the government's control is governed by the Freedom of Information Act. 5 U.S. C. § 552(b)(7). The secrecy of grand jury proceedings is also frequently litigated. *See Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 219 (1979); *United States v. Sells Engineering, Inc.*, 463 U.S. 418 (1983) (court must always be reluctant to conclude that breach of secrecy has been authorized).

Chapter 43
PRIVILEGE AGAINST SELF-INCRIMINATION

§ 43.01 Introduction [611]

The Fifth Amendment to the Constitution prohibits compulsory self-incrimination: "No person ... shall be compelled in any criminal case to be a witness against himself." In *Malloy v. Hogan*, 378 U.S. 1 (1964), the Supreme Court held the privilege applicable in state trials. Many state constitutions also guarantee the right against self-incrimination. There are several components to the Self-Incrimination Clause: (1) *compulsion* to provide (2) the *testimonial* evidence (3) that would subject the person to the *criminal liability*.

§ 43.02 "Compulsion" Requirement [611]

A subpoena requiring a person to testify at trial is the classic example of compulsion within the meaning of the Fifth Amendment. The compulsion issue was critical in the *Miranda* decision, where the Court determined that custodial interrogation amounted to "compulsion" within the meaning of the privilege.

§ 43.03 "Criminal Liability" Requirement [611-14]

It is the exposure to possible criminal liability, rather than the forum in which the privilege is asserted, that is determinative. Thus, a witness can assert the privilege in a civil trial, congressional hearing, or administrative proceeding. *Lefkowitz v. Turley*, 414 U.S. 70 (1973). Immunity is used to elicit testimony from witnesses who assert the privilege against self-incrimination. In effect, immunity takes away the Fifth Amendment privilege because persons receiving immunity can no longer "incriminate" themselves. *Kastigar v. United States*, 406 U.S. 441 (1972).

§ 43.04 "Testimonial-Real Evidence" Distinction [614-16]

The Supreme Court has held that the privilege applies only to testimonial or communicative evidence, not real or physical evidence. *Schmerber v. California*, 384 U.S. 757 (1966). Thus, a person may be compelled to provide specimens of blood, handwriting, fingerprints, voice, dental impressions, and urine without violating the privilege.

§ 43.05 Accused's Privilege at Trial [616-18]

A defendant in a criminal case cannot be compelled to be a witness. If the defendant voluntarily takes the witness stand in the defense case-in-chief, the privilege against self-incrimination is waived.

[A] Comment Upon Failure to Testify

In *Griffin v. California*, 380 U.S. 609 (1965), the Supreme Court held that the Fifth Amendment prohibits the use of an accused's failure to testify as evidence of guilt.

[B] Jury Instructions

A defendant has the right, upon request, to an instruction explaining this constitutional right and admonishing the jury not to speculate on the defendant's reasons for not testifying. *Carter v. Kentucky*, 450 U.S. 288 (1981).

§ 43.06 Other Witness's Privilege [618-19]

In contrast to the accused, other witnesses may be subpoenaed and compelled to testify at trial. These witnesses must assert the privilege to each question that would subject them to criminal prosecution. The test is whether there is an appreciable risk that the answer could subject the witness to criminal prosecution, state or federal.

PART H: SUBSTITUTES FOR EVIDENCE

Chapter 44
JUDICIAL NOTICE: FRE 201

§ 44.01 Introduction [621]

Judicial notice is a short-cut. The party with the burden of proving an adjudicative fact typically must introduce evidence to establish that fact. If, however, a fact is indisputable, the court may, and in some instances must, accept the fact as established (judicially noticed) and thereby dispense with the requirement of evidentiary proof.

§ 44.02 Adjudicative & Legislative Facts [621-22]

Rule 201 applies only to judicial notice of adjudicative facts. The term "adjudicative fact" is used in contradistinction to the term "legislative fact." Adjudicative facts are what we normally think of when we talk about the "facts of a case."

§ 44.03 Types of Facts Subject to Judicial Notice [623-28]

Two kinds of adjudicative facts are subject to judicial notice: (1) facts generally known within the territorial jurisdiction of the trial court; and (2) facts capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned. Facts that fit these two categories, however, are proper subjects for judicial notice *only* if they are "not subject to reasonable dispute."

[A] Indisputability Requirement

By limiting judicial notice to indisputable facts, Rule 201 adopts Professor Morgan's view of judicial notice, which is based on the judicial function of resolving disputes. Two consequences follow from Morgan's theory. First, once a fact is judicially noticed by the court, evidence tending to establish or rebut that fact is inadmissible. Second, in civil cases the jury must accept the judicially noticed fact and is so instructed. The rule deviates from the Morgan theory in one respect. Division (g) of the rule provides that in criminal cases the jury shall be instructed that it is are not bound to accept a judicially noticed fact.

[B] "Generally Known Facts"

Facts in this category need only to be generally known within the "territorial jurisdiction" of the court. "Generally known facts," for purposes of Rule 201(b), must be distinguished from facts that a judge personally knows; only the former are properly the subject of judicial notice.

[C] "Accurately & Readily Determinable" Facts

Historical, geographic, physical, political, statistical, and scientific facts have all been noticed as verifiably certain. In deciding whether a fact is capable of ready and accurate determination, a court may rely only upon sources "whose accuracy cannot reasonably be questioned." The source itself need not be admissible in evidence.

§ 44.04 Procedural Issues [628-31]

[A] Discretionary & Mandatory Judicial Notice

Rule 201(c) permits a court to take judicial notice sua sponte. Rule 201(d) requires the court to take judicial notice if one of the parties so requests.

[B] Opportunity to be Heard

Rule 201(e) entitles a party, upon timely request, to an opportunity to be heard concerning both the propriety of taking judicial notice and the tenor of the matter to be noticed.

[C] Time of Taking Judicial Notice

Judicial notice may be taken at any time, including appeals.

[D] Jury Instructions

In civil cases, the court must instruct the jury "to accept as conclusive any fact judicially noticed." In contrast, Rule 201(g) directs the court to instruct the jury in a criminal case that it "may, but is not required to, accept as conclusive any fact judicially noticed."

§ 44.05 Criminal Cases [631-32]

Several special issues concerning judicial notice arise in criminal cases. As noted in the previous section, the jury instructions in criminal and civil cases are different. The rule, however, specifically resolves this issue. Two other issues are not explicitly addressed: (1) whether a trial court may take judicial notice of an ultimate fact or element of a crime, and (2) whether a defendant in a criminal prosecution may introduce evidence to rebut a judicially noticed fact.

§ 44.06 Judicial Notice of Law [632-33]

There is no provision in the Rules of Evidence that governs judicial notice of law. Judicial notice of law is covered in the rules of procedure. *See* Fed. R. Civ. P. 44.1(a); Fed. R. Crim. P. 26.1.

Chapter 45
STIPULATIONS

§ 45.01 Introduction [635-40]

A stipulation is a voluntary agreement between the opposing parties concerning the disposition of some matter before the court. Stipulations range from informal, impromptu oral concessions made during trial to complicated written agreements developed in the pretrial process. There are three types of stipulations: (1) stipulations of fact, (2) stipulations of expected testimony, and (3) stipulations concerning procedural and evidentiary rules. Generally, an offer to stipulate is just that – an offer. The other side does not have to accept the offer.