Admissibility Field Guide

Litigation Field Guides

AILA Doc. No. 17020132. (Posted 2/1/17)

ARPHURB

AUTHENTICITY: Before exhibit is admitted into evidence, it must be authenticated or identified.
- Satisfied by evidence supporting a finding that the object is what its proponent claims. FRE 901(a).
- Documents can be authenticated based upon origin or use. FRE 901(a).
- Unique items can be authenticated by anyone familiar with those items. FRE 901(a).
- Generic items/commodities need custody chain from use to court. *Abreu*, 952 F.2d 1458 (1st Cir. 92).

Self Authenticating: Some documents do not require external sources of authentication. FRE 902.
- Domestic public documents FRE 902(1/2)
- Foreign public documents FRE 902(3)
- Certified documents of public record FRE 902(4)
- Official publications FRE 902(5)
- Newspapers and periodicals FRE 902(6)
- Trade inscriptions FRE 902(7)
- Acknowledged documents FRE 902(8)
- Commercial paper and documents FRE 902(9)
- Presumptions in Congressional acts FRE902(10)
- Certified record, regular activity FRE902(12)

RELEVANCE: Relevant evidence is generally admissible. FRE 402.
- Evidence is relevant if it tends to make any "consequential" fact more or less probable. FRE 401.
- Court can admit evidence conditionally, subject to further evidence fulfilling condition. FRE 104(b).

PRIVILEGE: In "federal question" suits, evidentiary privileges come from the Constitution, acts of Congress, and Federal common law. FRE 501.
- Where a civil action or defense is based upon state law, state's privilege rules apply. FRE 501.

Attorney/Client Privilege: protects confidential communications by clients to their lawyers to obtain legal advice. The advice from counsel to client is privileged to the extent it discloses what the client told the lawyer. Facts are not privileged.

Work Product Doctrine: protects (1) documents and tangible things, (2) prepared in anticipation of litigation or trial, (3) prepared by party or representative (attorney, consultant, agent). FRCP 26(b).
- Work product doctrine can be defeated by sufficient need. *Hickman v. Taylor*, 329 U.S. 495 (1947).

Waiver: Voluntary disclosure of privileged materials waives privilege on relevant subject matter that "ought in fairness to be considered together." FRE 502.
- Clawback: Inadvertent disclosure does not waive privilege if reasonable efforts are taken to protect and promptly retrieve materials. FRE 502. Only applies to disclosure in federal and some state proceedings.

Executive Privileges: Executive privileges permit withholding documents: (1) Deliberative process privilege protects agency deliberation, (2) Investigative files privilege protects law enforcement files, (3) Informer's privilege protects the identity of informers, (4) Military and state secrets privilege protects national security, and (5) Presidential privilege protects presidential communications.

Common Law Privileges: Federal courts recognize (1) priest/penitent privilege, (2) therapist/patient privilege, (3) adverse spousal privilege, and (4) the Confidential Marital Communications Privilege.

Burden: Asserting party must establish privilege. *Marathon Oil*, 71 F.3d 1547 (10th Cir. 1995).

UNDUE PREJUDICE: Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion, delay, or waste of time. FRE403.
- Evidence is unfair if "it tends to have some adverse effect upon a defendant beyond tending to prove the fact or issue that justified its admission into evidence." *Quattrone*, 441 F.3d at 186 (2d Cir.).

HEARSAY: is (1) an oral, written, or nonverbal assertion, (2) other than one made while testifying at the trial or hearing, (3) offered in evidence to prove the truth of the matter asserted. FRE 801(c).
- Hearsay is generally not admissible, unless made admissible by the Federal Rules or statute. FRE 802.
- Double hearsay: hearsay that contains hearsay requires an exception for each hearsay level. FRE 805.

Not Hearsay: (801(d))
- **Party:** Out-of-court statements by a party are not hearsay, when offered by opposing party.
- Out-of-court statement can be attributed to a party if adopted, authorized, or by agent.
- **Prior Statement:** Witness's prior statements not hearsay if (1) witness adopts while testifying, (2) made under oath and statement contradicts witness's trial testimony, or (3) rebuts fabrication claim.

Exceptions (Witness Availability Irrelevant): (1) Present sense impression; (2) Excited utterance; (3) Existing mental, emotional, or physical condition; (4) Statements for purposes of medical diagnosis or treatment; (5) Recorded recollection; (6) Business Records; (8) Public records and reports; (9) Records of vital statistics; (11) Records of religious organizations; (12) Marriage, baptismal, and family certificates; (13) Family records; (14) Records affecting property interest; (15) Statements in documents affecting an interest in property; (16) Statements in ancient documents; (17) Market reports, commercial publications; (18) Learned treatises; (19) Reputation concerning personal or family history; (20) Reputation concerning boundaries or general history; (21) Reputation as to character; (22) Judgment of previous conviction; (23) Judgment on family, or general history or boundaries. FRE 803.

Exceptions (Witness Is Unavailable): (1) Former testimony; (2) Dying declaration; (3) Statement against penal interest; (4) Statement of personal or family history, (6) statement against party procuring witness's absence. FRE 804

Exceptions (Residual Exception): Hearsay may be admissible under the residual hearsay exception if (1) it evidences a material fact, (2) is more probative on the issues than any other evidence, (3) has circumstantial guarantees of trustworthiness, (4) admitting the evidence furthers the FRE's objectives and the interests of justice, and (5) the proponent notifies the adverse party in advance of trial. FRE 807.

RULES LIMITING ADMISSIBILITY

Character: Character evidence is not admissible to prove conformity with the character on a specific occasion. FRE 404(a). Evidence as to habit and routine practice is admitted to establish action. FRE 406.

Impeachment: Most evidence may be used to impeach credibility, including bias, impairment, illness.
- FRE limit how four types of impeachment evidence (1) character evidence, (2) specific instances of conduct, (3) prior convictions, and (4) prior inconsistent statements. FRE 607, 608.

Settlement Discussions: Evidence of offers, conduct, or statements made in compromise negotiations is not admissible to prove liability, validity, or claim amount, or to impeach. FRE 408. To qualify, the evidence must be: (1) created after a claim exists, (2) offered to prove liability, invalidity, or the claim's value, (3) part of effort to compromise the claim, and (4) from the same or a related claim or transaction.

BEST EVIDENCE RULE: When a document's contents are at issue, witness may not testify about the contents, unless there is a showing that the document does not exist or is unavailable. FRE 1002, 1004.

Copies: Parties may use copies (duplicates) in court unless there is doubt as to the copy's quality or the original's authenticity, then the original must be brought. FRE 1003.

Compilations: Voluminous contents of various documents can be presented in the form of a chart, summary, or calculation, as exception to best evidence rule. FRE 1006.
- The underlying documents must be admissible and made available for examination by the other side.
- The summary must be accurate, non prejudicial, and authenticated at trial by the creator.

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[A1] FOUNDATION ELEMENTS

QUICK RULE: *Seven elements must be considered to determine whether evidence is admissible into evidence: (1) Authenticity, (2) Relevance, (3) Privileges, (4) Hearsay rule, (5) Undue prejudice, (6) Rules limiting admissibility and use, and (7) Best Evidence Rule. These elements form the acronym "ARPHURB." The court is the proper fact finder for facts necessary to establish admissibility. FRE 104.*

DISCUSSION

I. **Elements Of Admissibility**: To establish a foundation, the proponent of evidence identifies or authenticates the evidence, usually with the testimony of a witness. *Sheets v. Salt Lake County,* 45 F.3d 1383, 1390 (10th Cir. 1995) (*citing McCormick on Evidence* § 51, at 123 (3d ed.)). An exhibit is admissible if it is (1) authentic, and (2) relevant to the facts at issue in the case. After the proponent of an exhibit establishes these two elements, the court may admit the exhibit into evidence, unless an objection is raised regarding (1) privilege, (2) hearsay, (3) undue prejudice, (4) rules limiting admissibility, or (5) the best evidence rule. Each of these steps is addressed under separate sets of rules and caselaw. The acronym "ARPHURB" identifies these seven elements.

A. **Authenticity Does Not Equal Admissibility**: Perhaps because the words sound similar, it is not uncommon for litigants and judges to confuse the idea of "admissibility" and "authenticity." *See e.g., United States v. Dickerson,* 248 F.3d 1036, 1049 (11th Cir. 2001) (court uses admissibility and authenticity interchangeably when discussing a hearsay objection). Authenticity is a necessary, but not sufficient, step toward establishing that an item is admissible into evidence. Authenticity is dealt with in FRE at 901 and 902; admissibility involves all possible objections that might arise under the rules.

II. **Evidentiary Record**: Evidence is any species of proof, or probative matter, presented at the trial, by the act of the parties and "through the medium of witnesses, records, documents, concrete objects, etc., for the purpose of inducing belief in the minds of the court or jury as to their contention." *Black's Law Dictionary* 656 (4th ed. 1951). See also *United States v. Cimera,* 459 F.3d 452, 460 (3rd Cir. 2006). An exhibit is entered into evidence, and becomes part of the evidentiary record, when it is admissible and deemed admitted by the court.

A. **Admissibility**: "Evidence is placed before the jury when it satisfies the technical requirements of the evidentiary Rules, which embody certain legal and policy determinations. The inquiry made by a court concerned with these matters is not whether the proponent of the evidence wins or loses his case on the merits, but whether the evidentiary Rules have been satisfied." *United States v. Brackett*, 113 F.3d 1396, 1401 (5th Cir. 1997).

1. **Admissibility Separate From Persuasiveness**: "[Q]uestions respecting the admissibility of evidence are entirely distinct from those which respect its sufficiency or effect." *Gentile v. County of Suffolk*, 926 F.2d 142, 159 (2nd Cir. 1991) (quoting *Columbian Ins. Co. v. Lawrence*, 27 U.S. (2 Pet.) 25, 44 (1829)).

III. **Court Responsible For Foundational Facts**: Foundational facts are those facts upon which the admissibility of evidence rests. *See United States v. Piper*, 298 F.3d 47, 52 (1st Cir. 2002). Those facts include matters such as the genuineness of a document or statement, the maker's personal knowledge, and the like. *See, e.g., Newton v. Ryder Transp. Servs*, 206 F.3d 772, 775 (8th Cir. 2000); *Ricketts v. City of Hartford*, 74 F.3d 1397, 1410 (2d Cir. 1996).

A. **Court Initial Fact Finder For Admissibility**: The court determines preliminary questions concerning admissibility. FRE 104(a). "If the court discerns enough support in the record to warrant a reasonable person in determining that the evidence [could support that which it sets out to support, then] the weight to be given to the evidence is left to the jury." *Blake v. Pellegrino*, 329 F.3d 43, 48 (1st Cir. 2003) (quoting *United States v. Paulino*, 13 F.3d 20, 23 (1st Cir. 1994)). *Example*: The trial court may make necessary findings that a document is 20-years old, and thus "ancient" under the hearsay exception.

B. **Foundational Fact Finding Not Subject To Evidentiary Rules**: In addressing foundational facts, the trial court is not bound by the rules of evidence except those with respect to privileges. FRE 104(a). *See also Almaz v. Temple-Inland Forest Products Corp.*, 243 F.3d 57, 69 (1st Cir. 2001); FRE 1101(d)(1). A district court can consider "any evidence whatsoever, bound only by the rules of privilege," to make foundational factual determinations. *United States v. Pierce*, 62 F.3d 818, 827 (6th Cir. 1995).

C. **Deference**: The trial court "act[s] as a gatekeeper" in resolving foundational facts. *United States v. Holmquist*, 36 F.3d 154, 167 (1st Cir. 1994). An appellate court will reverse a trial court's evidentiary ruling only if the ruling is "'manifestly erroneous,' such that the admission constitutes an abuse of discretion." *United States v. SKW Metals & Alloys, Inc.*, 195 F.3d 83, 87 (2d Cir. 1999).

D. **Burden Of Proof**: When resolving preliminary factual questions that form the bases of admissibility, these matters must be established by a preponderance of proof. *Bourjaily v. United States*, 483 U.S. 171, 175 (1987). The evidentiary standard is unrelated to the burden of proof on the substantive issues, be it a criminal or civil. *Id.* The preponderance standard ensures that before admitting evidence, the court will have found it more likely than not that the technical issues and policy concerns addressed by the FRE have been afforded due consideration. *Id.*

E. **Limit Of Court's Authority**: Once foundational facts are resolved (e.g., a document's authenticity), the trial court may not consider the evidence's ultimate persuasiveness. *Blake v. Pellegrino*, 329 F.3d 43, 48 (1st Cir. 2003). A trial court sitting with a jury may not exclude evidence based on the judge's determination that the evidence lacks persuasive force. *Id.*

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III. **Admissibility Finding Does Not End Enquiry**: The fact that an exhibit is admitted into evidence is not the final word as to its evidentiary value. FRE 104(a) permits adverse parties to introduce evidence relevant to the admitted exhibit's weight or credibility. *See Crane v. Kentucky*, 476 U.S. 683, 689 (1986). "[T]he objecting party is not precluded from attacking the additional evidence by any permissible means." *A Modern Approach to Evidence* 1065 (2d ed.).

A. **Authenticity v. Weight**: Once the evidence is admitted, the trier of fact makes its own determination of the evidence's authenticity and weight. *Orr v. Bank of America, NT & SA,* 285 F.3d 764, 773 (9th Cir. 2002) *(citing Alexander Dawson, Inc. v. NLRB,* 586 F.2d 1300, 1302 (9th Cir. 1978) (per curiam)).

B. **Example**: Public reports found to be trustworthy are excepted from the hearsay exclusionary rule. FRE 803(8)(C). Nevertheless, "the weight and credibility extended to government reports admitted as exceptions to the hearsay rule are to be determined by the trier of fact." *Bradford Trust Co. v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 805 F.2d 49, 54 (2d Cir. 1986). In *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 168 (1988), the Court described as the "ultimate safeguard" the opponent's right to present evidence tending to contradict or diminish the weight of an admitted report.

IV. **Admissibility Hearing Conducted Outside Of Jury's Hearing**: Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. *Hughes v. International Diving and Consulting Services. Inc.*, 68 F.3d 90 (5th Cir. 1995) (quoting FRE 104(c)). Hearings on other preliminary matters shall be conducted when the interests of justice require. *Id.*

V. **Limited Admissibility**: Sometimes, evidence which is admissible as to one party or for one purpose is not admissible as to another party or for another purpose. FRE 105. Under such circumstances, the court, *upon request,* shall restrict the evidence to its proper scope and instruct the jury accordingly. *Id.* (emphasis added). The failure to request a limiting instruction waives the argument on appeal. *United States v. Mateos-Sanchez,* 864 F.2d 232, 238 (1st Cir. 1988).

A. **Doctrine Of Completeness**: Occasionally, portions of a document, photograph, or recording are admissible, when other parts are inadmissible. The otherwise non-admissible portions may be presented to the fact finder "if it is necessary 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." *United States v. Soures,* 736 F.2d 87, 91 (3d Cir. 1984) (citing *United States v. Marin,* 669 F.2d 73, 84 (2d Cir. 1982)). "The Rule does not require introduction of portions of a statement that are neither explanatory of nor relevant to the passages that have been admitted." *Id. See also United States v. Hoffecker*, 530 F.3d 137, 192 (3rd Cir. 2008).

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Practice Point

Standard Joint Stipulations To Authenticity

- All documents produced are presumed authentic other than handwritten notes, which will be deemed authentic if supported by appropriate testimony. Documents produced are all documents produced by the parties and third parties in discovery and documents identified on a party's trial exhibit list. The presumption of authenticity may be rebutted by appropriate evidence.
- Handwritten notes include documents that are entirely handwritten and handwritten marginalia on typed or printed documents. Handwritten notes may be authenticated in any manner permitted by the Federal Rules of Evidence.
- Nothing in this stipulation shall be construed as an agreement concerning the admissibility of any document at trial, or an agreement concerning the applicability of any Rule of Evidence other than the Rules governing authenticity of documents.
- All outstanding objections not expressly waived herein are reserved for trial.

[A2] OBJECTIONS

QUICK RULE: *To preserve a challenge to the trial court's admitting evidence into the record, a party must make a timely objection or motion to strike stating the specific ground of objection, if the specific ground was not apparent from the context. FRE 103(a)(1).*
To preserve a challenge to the trial court's excluding evidence, the court must know the contents of the excluded evidence, the purpose for which it would be entered, and the basis for its admission. If the excluded evidence is testimony, the proffering party should make an offer of proof as to the contents of the excluded testimony, unless the contents are clear from the context. FRE 103(a)(2).
Objections made in motions in limine properly preserve an objection if, and only if, the court rules definitively upon the motion in limine.

DISCUSSION

I. **General**: A party wishing to preserve an error for appeal must put the court on notice regarding the existence and the nature of the error. *United States v. Wynn*, 845 F.2d 1439, 1442 (7th Cir. 1988). This allows the judge to avoid error. *United States v. O'Brien*, 435 F.3d 36, 39 (1st Cir. 2006). The manner in which an error is preserved depends upon whether the court is admitting or excluding challenged evidence.

A. **Error Admitting Evidence**: The rules "require a timely and specific objection to evidence erroneously admitted." FRE 103(a)(1); *United States v. Iglesias*, 535 F.3d 150, 158 (3rd Cir. 2008). To preserve an error admitting evidence, a party must object and state the specific ground of the objection. *United States v. Swan*, 486 F.3d 260, 264 (7th Cir. 2007); FRE 103(a)(1). Failure to specify the bases for the objection normally constitutes a waiver of the argument. *United States*, 510 F.3d 188, 191 (3rd Cir. 2007).

1. **General Objections Not Sufficient**: A general objection to the evidence will not preserve an issue for review. *United States v. Hickerson*, 732 F.2d 611, 613 (7th Cir. 1984) (general objection to all unrelated evidence did not preserve issue of admissibility of certain photographs on relevancy grounds); *United States v. Sandini*, 803 F.2d 123, 126 (3d Cir. 1986). An attorney need not typically cite the rule number upon which the objection is based. *United States v. Joseph*, 310 F.3d 975, 977 (7th Cir. 2002).

2. **Appeal Limited To Error Specified**: The specific ground for reversal of an evidentiary ruling on appeal must be the same as that raised at trial. *United States v. Taylor*, 800 F.2d 1012, 1017 (10th Cir. 1986). A party fails to preserve an evidentiary issue for appeal not only by failing to make a specific objection, but also

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by making the *wrong* specific objection. *United States v. Iglesias*, 535 F.3d 150, 158 (3rd Cir. 2008); *United States v. Gomez-Norena*, 908 F.2d 497, 500 (9th Cir. 1990); *United States v. Gracia*, 522 F.3d 597, 599 n. 1 (5th Cir. 2008); *United States v. Schalk*, 515 F.3d 768, 776 (7th Cir. 2008).

B. Error Excluding Evidence: If a party wishes to challenge the trial court's exclusion of evidence, the "attorney must preserve the issue for appeal by making an offer of proof." *Holst v. Countryside Enters., Inc.*, 14 F.3d 1319, 1323 (8th Cir. 1994). An offer of proof should describe: (1) the precise contents of the evidence being proffered; (2) the purpose for which it is proffered; and (3) the grounds under which it should be admitted. *See United States v. Crockett*, 435 F.3d 1305, 1311-12 (10th Cir. 2006); *United States v. Moore*, 425 F.3d 1061, 1068 (7th Cir. 2005); *United States v. Jimenez*, 256 F.3d 330, 343 (5th Cir. 2001); *United States v. Quinn*, 123 F.3d 1415, 1420 (11th Cir. 1997).

1. **Contents Of The Evidence Being Proffered**: The offer must express "precisely the substance of the excluded evidence." *Strong v. Mercantile Trust Co.*, 816 F.2d 429, 432 & n. 4 (8th Cir. 1987). If the excluded evidence is a document, presenting the document to the court is sufficient. If the excluded evidence is testimony, counsel must state "with specificity what he or she anticipates will be the witness' testimony" or put the witness on the stand out of the jury's hearing. *Id.* An offer of proof is inadequate if "[t]here is nothing in the offer that would apprise the district court that the proffered testimony was anything but cumulative." *Id.* at 431.

   a. **Context**: A proffer need not be made if the contents of the proposed testimony may be discerned by context. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153 (1988) (proposed testimony "abundantly apparent" from the question put to the witness). In considering whether a sufficient proffer has been made, the entire context is relevant, including information already known by the court and other parties when the issue arises. *See United States v. Sheffield*, 992 F.2d 1164, 1170 (11th Cir. 1993) ("[B]ecause the trial court and prosecutor were well aware of the substance of the evidence, and the record reflects the substance of the evidence, we find that the defense counsel made an adequate proffer").

2. **Purpose Of The Evidence Being Proffered**: A party may not claim error on appeal in the exclusion of evidence unless the district court was told not only what the party intended to prove but also for what purpose. *Tate v. Robbins & Myers, Inc.*, 790 F.2d 10, 12 (1st Cir. 1986)(*citing* 1 *Weinstein Evidence*, § 103(03), at 103-33 (1985) ("In making an offer of proof counsel must be careful to articulate every purpose for which the evidence is admissible; a purpose not identified at the trial level will not provide a basis for reversal on appeal.")).

3. **Offer Of Proof Must Be In The Record**: The courts of appeal will only consider an offer of proof contained in the record. *Dupre v. Fru-Con Engineering Inc.*, 112 F.3d 329, 336 -337 (8th Cir. 1997). *See also Potts v. Benjamin*, 882 F.2d 1320, 1323 (8th Cir. 1989) (determining that it was incumbent upon party challenging exclusion of evidence to place such evidence into the trial record by offer of proof).

4. **Timing Of The Offer Of Proof**: There is some dispute as to when the offer of proof should be made. To be safe, an offer of proof should either precede or immediately follow the ruling excluding the evidence so that the trial judge can reconsider.

   a. **Contemporaneous With Exclusion**: The offer of proof requirement "contemplates some contemporaneity between the trial judge's knowledge about the proposed evidence and the evidentiary ruling to allow a proper decision *at the time* the evidence is offered." *Polys v. Trans-Colo. Airlines, Inc.*, 941 F.2d 1404, 1407-1409 (10th Cir. 1991). *See United States v. Russo*, 527 F.2d 1051, 1058 (10th Cir. 1975) (concluding that offer of proof made "a day or two" after trial court denied motion to admit polygraph test was untimely); Wright & Graham *Federal Prac. & Proc.* § 5040 at 212 (West 1997) ("[T]he appropriate time for making the offer of proof is at the time of the objection.").

   b. **Timely Manner**: Although an offer of proof need not be made at the precise time the evidence is excluded, it must be made in a reasonably timely manner. 12 Federal Procedure L.Ed. § 33:27 (1988). *See also Murphy v. City of Flagler Beach*, 761 F.2d 622, 626 (11th Cir. 1985) (upholding offer of proof made at evidentiary hearing after trial court had already excluded the evidence).

5. **Informal Proffer**: It is not necessary that the proffering party state upon the record its intent to make a proffer. The party must at least inform the trial court "what counsel intends to show by the evidence and why it should be admitted." *United States v. Ballis*, 28 F.3d 1399, 1406 (5th Cir. 1994). In *United States v. Kay*, 513 F.3d 432, 455 -456 (5th Cir. 2007), by explaining to the court the substance of the proffered evidence (receipts indicating tax payments) and why the court should admit these documents (describing how the documents had been "subscribed and sworn-and certified by the United States vice counsel"), defendants made a sufficient "informal" offer of proof.

II. **Motions In Limine**: A party may preserve an error for appeal in a motion in limine, provided that the court rules definitively upon the motion. "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." FRE 103(a). "When the ruling is definitive, a renewed objection or offer of proof at the time the evidence is to be offered is more a formalism than a necessity." FRE 103, Advisory Committee Notes, 2000 Amendment; *see also Fuesting v. Zimmer, Inc.*, 448 F.3d 936, 940 (7th Cir. 2006); *Olson v. Ford Motor Co.*, 481 F.3d 619, 629 n. 7 (8th Cir. 2007). If the ruling, however, is anything other than clearly definitive, the party must renew the issue at trial to preserve it for appeal.

III. **Non Evidentiary Objections**: Throughout the trial, a party seeking to preserve an objection to the court's ruling must "mak[e] known to the court the action which the party desires the court to take or the party's objection to the action of the court and the grounds therefore." *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 174 (1988) (*quoting FRCP* 46).

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A. **Objection Must Be Timely**: Counsel must timely object to any action by the trial court so as to provide the court an opportunity to take corrective action. *S.E.C. v. Diversified Corporate Consulting Group*, 378 F.3d 1219, 1226 (11th Cir. 2004) (Failure to object as to the adequacy of a jury instruction waived challenge on appeal). Where a party foregoes an opportunity to object, the court of appeals generally will do not entertain the objection on appeal. *Id.; Daikin Miami Overseas, Inc. v. Lee, Schulte, Murphy & Coe, P.A.*, 868 F.2d 1201, 1206 (11th Cir. 1989) ("If a party has an objection, the party must make the objection. Failure to interpose an objection in a timely manner means that the party foregoes raising the issue.").

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Practice Point

Making Objections During Trial	Fielding Objections During Trial
• Stand when addressing the court. • If there's a jury and counsel's question is prejudicial, interrupt opposing counsel. • If there's no jury or if the question isn't prejudicial, let counsel complete the question. • State : "Objection" loud enough to stop the witness from answering. • Follow "Objection" by identifying the objection in 3 words or less. ("leading", "calls for hearsay"). • Don't bother with rule numbers. • Don't give detailed/speaking objections unless asked by the court. •Remain standing until the objection is resolved. •Win or lose, thank the court for hearing the objection ("Thank you your honor").	• If the objection is correct: concede the point without making the court rule. ("The question was vague, I withdraw it."). • If you disagree with the objection: after opposing counsel has finished speaking: freeze. Courts reject many objections without needing to hear the questioner - don't mess with this. • If the court rules against you on the objection without giving you a chance to speak, ask for permission to be heard. •For excluded testimony, make a proffer. • Never address opposing counsel: all comments are made to the court. •If you win, reask the question; even if witness remembers it, judge and jury might not. (Don't ask reporter to repeat it).

Authenticity | B1 - 1

[B1] AUTHENTICITY

QUICK RULE: *Before an exhibit can be admitted into evidence, it must be authenticated or identified. FRE 901. The requirement is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. Establishing authenticity is not enough to establish admissibility.*

DISCUSSION

I. **Authenticity**: Establishing foundation is the process whereby a proponent of a piece of evidence identifies or authenticates the evidence, usually with the testimony of a witness. *Sheets v. Salt Lake County,* 45 F.3d 1383, 1390 (10th Cir. 1995) (*citing McCormick on Evidence,* § 51, at 123 (3d ed)). Authentication or identification are conditions precedent to admissibility, and these conditions are satisfied by "evidence sufficient to support a finding that the matter in question is what its proponent claims." *Orr v. Bank of America, NT & SA,* 285 F.3d 764, 773 (9th Cir. 2002)(citing FRE 901(a)).

A. **Burden Of Establishing Foundation**: The proponent must establish authenticity. *Link v. Mercedes-Benz of N. Am., Inc.,* 788 F.2d 918, 928 (3d Cir. 1986). Rule 901(a) sets the standard: authentication need only be established to a degree "sufficient to support a finding," - that is if sufficient proof has been introduced so that a reasonable juror could find in favor of authenticity or identification. *United States v. Tank,* 200 F.3d 627, 630 (9th Cir. 2000); 1 *Weinstein's Evidence* ¶ 901(a) [01], at 901-16 to -17 (1983). This is a minimal standard. *Federal Practice and Procedure,* at 7110 (2d ed).

1. **Low Threshold**: "The rule does not erect a particularly high hurdle." *United States v. Ortiz,* 966 F.2d 707, 716 (1st Cir. 1992). The burden of authentication does not require the proponent of the evidence to rule out all possibilities inconsistent with authenticity, or to prove beyond doubt that the evidence is what it purports to be. *United States v. Pluta,* 176 F.3d 43, 49 (2d Cir. 1999). Rather, the standard for authentication, and hence for admissibility, is one of reasonable likelihood. *United States v. Holmquist,* 36 F.3d 154, 168 (1st Cir. 1994).

B. **Authentication v. Identification**: Authentication and identification both refer to the process of proving that an item of evidence is what the proponent claims. *Federal Practice and Procedure,* at 7103 (2d ed). The rules do not define the two terms and the distinction is unclear. The FRE's use of the terms suggests that "identification" answers the question "who" - such as "who placed the telephone call." *Id.* "Authentication" answers the question "what" - such as "what is the connection between the proffered document and the alleged breach of contract." The difference is not significant, as lawyers and judges tend to use the words interchangeably. *Id.*

C. **Establishing Authenticity**: The essential requirement to establish authenticity is testimony vouching for the thing. Authenticity may also be established by admissions in the pleadings, stipulation, discovery, or a request to admit. "The authenticity inquiry, then, turns on 'whether the document is what it purports to be,' not its veracity." *United States v. Mandycz*, 447 F.3d 951, 966 (6th Cir. 2006).

1. **Circumstantial Evidence**: Circumstantial evidence, either alone or in conjunction with direct evidence, is admissible for authentication purposes. *United States v. Carrasco*, 887 F.2d 794, 804 (7th Cir. 1989). *See United States v. Echeverri*, 982 F.2d 675, 679 -680 (1st Cir. 1993).

2. **Stipulations**: Stipulations as to authenticity eliminate any requirement that the parties supply independent foundational evidence to show that the documents are what they appear to be. *Sheets v. Salt Lake County*, 45 F.3d 1383, 1390 (10th Cir. 1995) ("the authenticity of the books and articles had been stipulated in the pretrial order. The evidentiary foundation for these documents was thus established.").

D. **Authentication v. Relevancy**: Authentication and identification represent special aspects of relevancy. FRE 901 Advisory Committee Notes. Failing to identify the speaker on a telephone call may render the call irrelevant, but it is better cast as a failure to authenticate. Establishing authenticity does not mean the proffered exhibit is relevant - authenticity only goes to one part of relevance. *Federal Practice and Procedure* at 7103 (2d ed).

E. **Authenticity Does Not Establish Admissibility**: Even an authentic document must satisfy other applicable criteria for admissibility. *See United States v. Southard*, 700 F.2d 1, 23 (1st Cir. 1983) (authentication and admissibility "are two separate matters").

F. **Establishing Authenticity Against Multiple Parties**: When an exhibit has been authenticated by a party, the requirement of authenticity is satisfied as to that exhibit with regards to all parties, subject to the right of any party to present evidence to the ultimate fact-finder disputing its authenticity. *Orr v. Bank of America, NT & SA*, 285 F.3d 764, 776 (9th Cir. 2002)(citing *In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238, 285-86 (3d Cir. 1983).

II. **Documents v. Physical Evidence**: The method of authenticating exhibits differs depending upon whether the proffered exhibit is a "document" or "physical evidence." Documents are defined broadly to include any recording, video or audio, or writing, where the contents are of primary import, and the original may or may not actually be brought into the courtroom (e.g., a copy of the video surveillance footage may be brought into evidence, but the original is not required). Physical evidence is an actual item that may be entered into evidence (the gun, the stolen painting, the car door). Occasionally, a document will become physical evidence, if its pedigree is under scrutiny (the original audio tape is entered into evidence by a party to show it was actually a compilation of two tapes).

A. **Documents**: The method by which a document is to be authenticated depends upon the type of document proffered. [Document specific authentication outlines are provided below.]

1. **Document Created By A Person**: Generally, if a person created the document (letter, e-mail, memo), then either a fact or expert witness must link the author with the writing.

2. **Document Created By Technology**: If a document is created by a machine (video tape, digital voice recording), authenticity can be established by either (1) a witness to the underlying event (someone who saw the dance as it was video tapped or heard the conversation recorded), who can confirm the accuracy of the recording, or (2) someone who can reliably confirm that the technology was working properly.

B. **Physical Evidence**: Physical evidence is properly divided into two groups: the unique and the mundane.

1. **Authenticating Unique Items**: Items with unique features or clear identifying marks are easily authenticated. This category would include a one-of-a-kind painting, a baseball with a unique number and signature, or a handgun, into which a detective has scratched his initials. These items are easily authenticated by anyone familiar with the item or the identifying mark, or an expert who can testify as to the object's pedigree.

2. **Authenticating Non-Unique Items And Commodities**: Non-unique items are more difficult to authenticate. This category includes anything mass produced (a Nike sneaker, a Coke can), and anything without a unique identifying mark (a bag of white powder, a shell casing). For such items, tracking the chain of custody is necessary to render it improbable that original item either has been exchanged with another or has been tampered with or contaminated. *United States v. Abreu*, 952 F.2d 1458 (1st Cir. 1992).

a. **Chain Of Custody**: A chain of custody is testimony from each witness that has handled or controlled the proffered exhibit from the time it was involved in the facts at issue, until the time it is presented in court. Wright and Gold, *Federal Practice and Procedure* at 7106. Each witness testifies as to the condition and manner in which they received the item, how they maintained the item, and to whom they consigned the item when it left their control. *Id.*

b. **Legal Standard**: A sufficient chain of custody is established if a reasonable juror could conclude that the proffered evidence is what it is purported to be. *United States v. Pluta*, 176 F.3d 43, 49 (2d Cir. 1999). "The standard for the admission of exhibits into evidence is that there must be a showing that the physical exhibit being offered is in substantially the same condition as when the crime was committed." *Moore,* 425 F.3d at 1071 *(quoting United States v. Lott,* 854 F.2d 244, 250 (7th Cir. 1988)).

c. **Possibility Of Tampering Not Enough To Exclude**: "Merely raising the possibility of tampering or misidentification is insufficient to render evidence inadmissible." *United States v. Combs,* 369 F.3d 925, 938 (6th Cir. 2004) (quoting *United States v. Kelly,* 14 F.3d 1169, 1175 (7th Cir. 1994)).

d. **Imperfect Chain**: Some courts have concluded that "gaps in the chain of custody affect only the weight of the evidence and not its admissibility." *United States v. Roberson,* 897 F.2d 1092, 1096 (11th Cir. 1990). For a chain of custody to be adequate, it need not be perfect. *United States v. Humphrey,* 208 F.3d 1190, 1205 (10th Cir. 2000).

e. **Presumption Of Government Care**: When chain of custody is questioned without any evidence of tampering, and if the property was in official custody at all times, a presumption arises that the property was handled properly. *United States v. Scott*, 19 F.3d 1238, 1245 (7th Cir. 1994).

f. **Reasonable Precautions**: The government need only show that it took reasonable precautions to preserve the evidence in its original condition. The government does not have to exclude all possibilities of tampering with the evidence. *United States v. Moore,* 425 F.3d 1061, 1071 (7th Cir. 2005).

Notes: _____

[B2] SELF-AUTHENTICATING

QUICK RULE: *Some exhibits are facially reliable enough that they do not typically require external evidence of authenticity - thus these exhibits can "self authenticate" absent a challenge. FRE 902. The following 12 categories of exhibits may self authenticate:*

- *Domestic public documents*
- *Foreign public documents*
- *Certified documents of public records*
- *Official publications*
- *Newspapers and periodicals*
- *Trade inscriptions and the like*
- *Acknowledged documents*
- *Commercial paper and related documents*
- *Presumptions under act of congress*
- *Certified domestic records of regularly conducted activity*
- *Certified foreign records of regularly conducted activity*

DISCUSSION

I. **Self Authenticating**: Self authenticating means that a document is admissible in evidence without testimony that it is authentic. *United States v. Mateo-Mendez,* 215 F.3d 1039, 1041, 1043-44 (9th Cir. 2000); *United States v. Hampton,* 464 F.3d 687, 689 -690 (7th Cir. 2006). Case law and statutes have identified instances in which authenticity is taken as established for purposes of admissibility without extrinsic evidence. Rule 902 Advisory Committee Notes. Sometimes this is for policy reasons, but more often because practical considerations reduce the possibility of fabrication to a "very small dimension." *Id.*

A. **Presumption Of Authenticity Subject To Challenge**: Presumptive authenticity does not preclude a challenge to the document's genuineness; it merely eliminates the need for the offering party to make a preliminary showing of authenticity. Ultimately, the trier of fact retains the power to determine authenticity, even for self-authenticating items. *Federal Practice and Procedure* at 7133 (2d ed).

B. **Court Applies FRE 902**: Whether FRE 902 applies to a proffered exhibit, making it self authenticating, is left to the trial court. FRE 104(a).

C. **Alternative To Self Authentication**: If a party offering the evidence is unable to self-authenticate it pursuant to FRE 902, the party may authenticate it under the general provision of Rule 901 that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." *Vatyan v. Mukasey,* 508 F.3d

1179, 1184 (9th Cir. 2007). In *United States v. Childs*, 5 F.3d 1328, 1336 (9th Cir. 1993), the court held that the district court did not abuse its discretion by permitting Canadian public documents to be authenticated under FRE 901.

II. **Categories Of Self-Authenticating Materials**: FRE 902 identifies 12 categories of materials that are self authenticating. Unlike FRE 901, which provides a non-exclusive list, the court cannot expand the list in FRE 902.

A. **Domestic Public Documents Under Seal**: A document is self authenticating if it (1) bears the seal of the United States, or any state, district or commonwealth, and (2) a signature purporting to be an attestation or execution. FRE 902(1). *See Hughes v. United States*, 953 F.2d 531, 540 (9th Cir. 1991); *United States v. Frauendorfer*, 2008 WL 3539272, 4 (D.Neb. 2008) (Document is self authenticating because it contains a seal from the Federal Deposit Insurance Corporation, and a signature which is an attestation to the validly of the certificate).

1. **Seal Requirement**: The seal must be one from a domestic public agency. "Under the approach of Rule 902(1), the seal of any executing officer or custodian will generally suffice." 5 *Weinstein's Federal Evidence* § 902.03[1], at 902-11 (3d ed.) (footnote omitted). The Navy, a political subdivision of United States, satisfies the rule. *United States v. Ventura-Melendez*, 275 F.3d 9, 14 (1st Cir. 2001).

a. **Photocopies Of Seals Not Sufficient**: A photocopy of a document, wherein the original but not the photocopy bears the seal, does not satisfy the rule. *United States v. Hampton*, 464 F.3d 687 (7th Cir. 2006)(The copies were copies of sealed documents rather than sealed documents themselves.). The rule's rationale is that a seal is difficult to forge. *Id. (citing United States v. Wexler*, 657 F.Supp. 966, 971 (E.D.Pa. 1987)). That is not true of a copy of a seal. *Id.*

i. Photocopies require further support before they are self authenticating. Specifically, there must be a certificate of correctness under FRE 902(4).

2. **Attestation Requirement**: "Attestation in this context means that the signer has examined the document and found it to be a genuine public document." *United States v. Martinez-Corona*, 189 F.3d 476 (9th Cir. 1999). "'Attestation' refers to the signature of a public official who has custody of the writing and 'attests' that the writing is held in his custody." *Federal Practice and Procedure* at § 7135. "Rule 902(1) does not specify any particular form of attestation or execution." 5 *Weinstein's Federal Evidence* § 902.03[1], at 902-12.

3. **Meaning Of "Public" Not Relevant**: The term "public document" is best understood to mean any document in the custody of a public office, regardless of private or public authorship. *See Federal Practice and Procedure* at § 7135. The official duty to record and maintain the document, rather than the duty to prepare it, which constitutes the document a public record for the purpose of authentication. *McCormick on Evidence*, § 224 (4th ed.).

B. **Domestic Public Documents Not Under Seal**: A public document may be self authenticating, even without a seal, if it (1) bears the signature of a governmental officer or employee, and (2) a public officer who has a seal, certifies under seal (a) that the original signer's signature is genuine, and (b) that the original signature was placed in the signer's official capacity.

1. **Example**: In *United States v. Combs,* 762 F.2d 1343, 1347 -1348 (9th Cir. 1985), the district court admitted into evidence a certified report signed by Colleen Davis, in which she stated that she had custody and control of the National Firearms Registration and Transfer Record concerning the registration of firearms. The Davis Report was not under seal, so the government attached to the report a document under seal executed by Gary Schaible, Chief of the National Firearms Act Branch of the Bureau of Alcohol, Tobacco, and Firearms. In that document, Schaible stated that Davis had proper custody and control of the Firearms Registration and Transfer Record, that he was familiar with her signature, and that the signature on the report appeared to be true.

2. **Delegation Of Authority Not Necessary**: Certification under seal need not state that the original signer was acting in her "official capacity." *United States v. Beason,* 690 F.2d 439, 444 (5th Cir. 1982). The signed certification by the public officer having actual legal custody was sufficient to satisfy the rule. *Id.* at n. 5.

C. **Foreign Public Documents**: Foreign documents may self authenticate variously:

1. **Certified Documents**: To self authenticate, properly executed or attested foreign public documents must be accompanied by a final certification of genuineness from an authorized government official. *Raphaely Intern., Inc. v. Waterman S.S. Corp.*, 972 F.2d 498, 502 (2nd Cir. 1992). The requirement that the document be "certified as correct" means only that the authenticating official certify that the copy delivered to the court is an accurate copy of the government record. *United States v. Doyle*,130 F.3d 523, 545 (2nd Cir. 1994). *See Agredano v. United States,* 82 Fed.Cl. 416, 426 (2008) (The opinion issued by the Mexican criminal court is a foreign public document; accordingly, no further proof of authenticity other than the document itself was required.)

2. **Document Not Certified**: Where a foreign public document is not certified, the court may treat the document as presumptively authentic if two conditions are satisfied: (1) the parties have been "given reasonable opportunity . . . to investigate the authenticity and accuracy" of the document; and (2) there is a showing of "good cause." *Raphaely Intern., Inc. v. Waterman S.S. Corp.*, 972 F.2d 498, 502 (2nd Cir. 1992); *see also* FRE 902(3).

a. **Effect Of Delay**: An opponent's delay in challenging the authenticity of a foreign document may provide a basis for finding "good cause" to presume the document is authentic. *United States v. De. Jongh*, 937 F.2d 1, 5 (1st Cir. 1991) ("Where the adversary, despite a fair chance to examine into the document's bona fides, casts no serious doubt on its authenticity, a finding of good cause can much

more readily eventuate."); *Black Sea & Baltic Gen. Ins. Co. v. S.S. Hellenic Destiny*, 575 F.Supp. 685, 692 (S.D.N.Y. 1983) (finding good cause where litigation proceeded for nine years and no evidence cast doubt upon validity of proffered public documents).

3. **Alternative Approach Under FRCP**: Both the FRCP and the FRE acknowledge that certification is not the exclusive means of authenticating a foreign public document. *Vatyan v. Mukasey*, 508 F.3d 1179, 1184 (9th Cir. 2007). FRCP 44(a)(2) provides that "[i]f reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the[foreign official record], the court may, for good cause shown . . . admit an attested copy without final certification." This exception exists because "it is recognized that in some situations it may be difficult or even impossible to satisfy the basic requirements of the rule" and is intended to apply "only when it is shown that the party has been unable to satisfy the basic requirements of the amended rule despite his reasonable efforts." FRCP 44, 1966 Advisory Committee Note.

D. **Certified Copies Of Public Records**: A copy of, or an entry from, an official record is self-authenticating if the document bears a seal and an attesting signature. FRE 902(4). The rule only applies to public records, reports, and recorded documents; it does not apply to "public documents" generally (setting it apart from the public document exceptions in 902(1 - 3)). FRE 902 Advisory Committee Notes. Trial transcripts, which contain the court reporters' certifications, are admissible as prima facie evidence of what was said therein; certified copies of public records of convictions are also self-authenticating. FRE 902(2), (4); *United States v. Weiland,* 420 F.3d 1062, 1072-73 (9th Cir. 2005); *see United States v. Huffhines,* 967 F.2d 314, 320 (9th Cir. 1992) (certified judgments are admissible under FRE 902(4)). A notarized document does not constitute "[a] copy of an official record or report" under FRE 902(4). *Acosta-Mestre v. Hilton Intern. of Puerto Rico, Inc.*, 156 F.3d 49 (1st Cir. 1998).

E. **Official Publications**: Extrinsic evidence is not necessary to authenticate official publications. The rule extends broadly to books, pamphlets, and anything else that may be loosely deemed a "publication." *Cf. United States v. Williams,* 946 F.2d 888 (4th Cir. 1991) (United States Army Pay Tables self-authenticate pursuant to FRE 902(5)); *United States v. Cecil,* 836 F.2d 1431, 1452 (4th Cir. 1988) (official government statistics are self-authenticating); *Cherry Hill Vineyards, LLC v. Hudgins,* 488 F.Supp.2d 601 (W.D.Ky. 2006) (FTC Staff Report is self-authenticating).

1. **Issuing Entity**: Although the rule is silent regarding the level of government that must authorize the publication, commentators suggest that the list includes the United States, any State, district, commonwealth, territory or insular possession of the United States, or a political subdivision, department, officer, or agency of any of the foregoing. *Lorraine v. Markel American Ins. Co.*, 241 F.R.D. 534 (D.Md. 2007).

2. **Publications On The Internet**: Information "retrieved from government websites . . . has been treated as self-authenticating, subject only to proof that the webpage does exist at the governmental web location." 2 *McCormick On Evidence* § 227 (6th ed.

2006). "Given the frequency with which official publications from government agencies are relevant to litigation and the increasing tendency for such agencies to have their own websites, Rule 902(5) provides a very useful method for authenticating these publications. When combined with the public records exception to the hearsay rule, Rule 803(8), these official publications posted on government agency websites should be admitted into evidence easily." *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 551 (D.Md. 2007). FTC press releases, printed from the FTC's web page, are self-authenticating official publications. *Sannes v. Jeff Wyler Chevrolet, Inc.*, 1999 WL 33313134, 3 (S.D.Ohio).

F. **Newspapers And Periodicals**: Printed materials purporting to be newspapers or magazines are self authenticating. *In re Unumprovident Corp. Securities Litigation*, 396 F.Supp.2d 858, 877 (E.D.Tenn. 2005). "The likelihood of forgery of newspapers or periodicals is slight indeed. Hence no danger is apparent in receiving them." FRE 902(6) Advisory Committee Notes.

1. **Meaning Of "Periodical"**: Periodicals include magazines, trade publications, and scientific and academic journals with weekly, monthly, or quarterly circulation. *Goguen ex rel. Estate of Goguen v. Textron, Inc.*, 234 F.R.D. 13, 17 -19 (D.Mass. 2006) (citing *Snyder v. Whittaker Corp.*, 839 F.2d 1085, 1089 (5th Cir. 1988) (magazine articles); *Stahl v. Novartis Pharmaceuticals Corp.*, 283 F.3d 254, 271 (5th Cir. 2002) (medical journals)). "The Court has been unable to locate a single case addressing the question whether a publication that does not take the form of a newspaper, magazine, or journal can be a self-authenticating 'periodical' within the meaning of Rule 902(6)." *Id.* *Contra* *Woolsey v. Nat'l Transp. Safety Bd.*, 993 F.2d 516, 520-21 (5th Cir. 1993) (holding magazine articles and self-promoting statements issued through press-kit and advertisements were self-authenticating under Rule 902).

   a. **Definition**: The *Oxford English Dictionary Online* defines periodical as "a magazine or journal issued at regular or stated intervals (usually weekly, monthly, or quarterly)." Such publications typically include "news or deal [ ] with matters of current interest in any particular sphere." *Oxford English Dictionary Online*. The United States Postal Service uses a similar definition of "periodical" to determine mailing rates. USPS Domestic Mail Manual (39 C.F.R. § 111.1).

2. **Excerpts From Newspapers Or Periodicals**: Although newspapers and periodicals self-authenticate, FRE 902 does not extend to personally-typed excerpts, which lose the aura of authenticity. *See United States ex rel. Pogue v. American Healthcorp, Inc.*, 977 F.Supp. 1329, 1335 (M.D.Tenn. 1997).

G. **Trade Inscriptions**: Any inscription, tag, or label indicating ownership, origin or control is self authenticating. FRE 902(7). This includes brand names, manufacturer and dealer designations, slogans, product names or symbols, and corporate logos. *Federal Practice and Procedure* at § 7141. The item to which the inscription is affixed is also authenticated under this provision. *Id.*

1. **Applying The Rule To Documents**: The self authentication of trade inscriptions does not normally apply to documents, the origins of which are established by signatures and seals. *Federal Practice and Procedure* at § 7141. *See Whitted v. General Motors Corp.*, 58 F.3d 1200, 1204 (7th Cir. 1995) ("the Nova Owner's Manual would not be admissible in trial as self-authenticating. . . The owner's manual is not a trade inscription and admitting the manual because it had a trade inscription on its cover does not comport with the rule."). ***Contra*** *Milton H. Greene Archives, Inc. v. BPI Communications, Inc.*, 378 F.Supp.2d 1189, 1195 (C.D.Cal. 2005) ("campaign books are also self-authenticating as items bearing trade inscriptions"); *United States v. Hing Shair Chan*, 680 F.Supp. 521, 526 (E.D.N.Y. 1988) ("because the hotel records bear printed and embossed trade inscriptions indicating their origin in the Hotel Regal Meridien under Rule 902(7).").

H. **Acknowledged Documents**: Any document signed before a notary, such as an affidavit, deed, or security, may be self authenticating as "acknowledged." FRE 902(8). An acknowledged document is one supported by a formal declaration to an authorized official from the person executing the document that it bears his signature. *Federal Practice and Procedure* at § 7142. The declaration is an "acknowledgment." Under the rule, the document must carry a "certificate of acknowledgment," which is a certificate of a notary or other authorized officer, stating that the person signing the underlying document appeared before the officer on a certain date and voluntarily signed the document. *Id.*

I. **Commercial Paper**: FRE 902(9) provides for the self-authentication of "[c]ommercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law." *United States v. Hawkins*, 905 F.2d 1489, 1493 (11th Cir. 1990); *In re Cook*, 457 F.3d 561, 566 (6th Cir. 2006). Accordingly, checks do not require extrinsic evidence of authenticity. As a negotiable instrument, a check is a species of commercial paper, and therefore self-authenticating. *United States v. Pang*, 362 F.3d 1187, 1192 (9th Cir. 2004). *See also United States v. Carriger*, 592 F.2d 312, 316 (6th Cir. 1979) (promissory notes).

1. **Breadth Of Rule**: The rule encompasses a broader range of self-authenticating documents than does the UCC's Article 3. *United States v. Varner*, 13 F.3d 1503, 1510 (11th Cir. 1994). Although an assumption agreement may not qualify as an "instrument" under Article 3, such agreements are self-authenticating pursuant to FRE 902(9) as "documents relating thereto." *Id.*

J. **Presumptions Under Acts Of Congress**: If you have read this far, you must really be desperate to authenticate something. This rule is not likely to help you. It only states that the FRE do not remove presumptions of authenticity provided by Congress. If you had that, you would not be reading this.

K. **Certified Domestic Records Of Regularly Conducted Activity**: In a rule adopted in 2000, FRE 902(11) provides a method for authenticating business records that mirrors FRE 803(6), the hearsay rule's business records exception. Specifically, the FRE 902(11) permits authentication of "certified domestic records of regularly conducted activity"

without "[e]xtrinsic evidence of authenticity," provided (1) that the records are admissible under FRE 803(6), and (2) are accompanied by a certificate meeting the rule's standards. *United States v. Adefehinti*, 510 F.3d 319, 324-328 (D.C. Cir. 2007). A party intending to offer a record into evidence under this rule must provide written notice to all adverse parties, and must make the record and declaration available for inspection in advance of their offer into evidence.

1. **Overview:** This is not really self authentication because this rule requires an authenticating declaration, but it does avoid the need to call the custodian as a witness. This rule can create confusion with Rule 802(6), which creates a hearsay exception for the same records. By providing the proper showing under this rule, however, the proponent is addressing authentication and hearsay without the need to call a sponsoring witness to authenticate the document and establish the elements of the hearsay exception. *Lorraine v. Markel American Ins. Co.*, 241 F.R.D. 534, 571 - 572 (D.Md. 2007).

2. **Certificate Requirement**: An authenticating certificate must contain "a written declaration of [the record's] custodian or other qualified person" that the record (A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters; (B) was kept in the course of the regularly conducted activity; and (C) was made by the regularly conducted activity as a regular practice. FRE 902(11). The required assertions are, almost exactly, the propositions needed for admission of a business record under Rule 803(6) [see Business Record Exception for greater detail as to what qualifies under that rule].

3. **Custodian's Personal Knowledge**: To lay a foundation under this exception the custodian need not have personal knowledge of the document's actual creation. *United States v. Williams*, 205 F.3d 23, 34 (2d Cir. 2000) (*quoting Phoenix Assocs. III v. Stone*, 60 F.3d 95, 101 (2d Cir. 1995)); *see also United States v. Jakobetz*, 955 F.2d 786, 800 (2d Cir. 1992) (a toll receipt incorporated into a business's records qualified as a business record, despite the fact that its custodian had no knowledge of the toll receipt's preparation, because the receipt had been so embedded in the company's business records to allow such an inference of authenticity).

4. **Advanced Notice Required**: The notice requirement is intended to give the opposing party the opportunity to verify the authenticity of either the records or any foundational testimony or affidavits. *United States v. Weiland*, 420 F.3d 1062, 1072 -1073 (9th Cir. 2005) (records not authenticated when proponent failed to give advanced notice).

5. **May Not Be Available For Public Records**: At least one court has held that a party may not circumvent the requirements for the authentication of public records outlined in Rule 902(4) by invoking Rule 902(11). *United States v. Weiland*, 420 F.3d 1062, 1072 -1073 (9th Cir. 2005) ("Rule 902(4), not Rule 902(11), describes the manner for establishing the authenticity of public records."). This holding seems troublesome, and may be anomalous.

Authenticity | B2 - 8

Notes: _____

Authenticity | B3 - 1

[B3] AUTHENTICITY OUTLINES

I. **General Approach**: Generally, most evidence can be authenticated by direct fact testimony that an object is what it is purported to be. Such testimony may only be offered by a "witness with knowledge" of the exhibit's authenticity. FRE 901(b)(1). The rules provide examples of how authentications may be performed, but they are not intended to be exclusive. 901(b) Advisory Committee Notes. Authenticity may be established by combining elements from more than one subdivision of FRE 901(b). *United States v. Reilly*, 33 F.3d 1396, 1404 (3rd Cir. 1994).

A. **Practice Point**: Because the nature of authentication turns on establishing that the item is what it is purported to be, the first, fundamental question is: what is the item purported to be? For example, "The knowledge required to authenticate a photograph depends upon what the offering party claims it to be." Write and Gold, *Federal Practice and Procedure* § 7106. If a letter is purportedly written by Joe, then there must be some means of establishing Joe wrote it. If the same letter is introduced merely because it was received by Emily, then the authentication must be changed.

I. **Accounting Ledger**: Testimony regarding the origin of the information in an accounting ledger, and the manner in which ledger was kept, is sufficient to authenticate ledger, even in absence of the bookkeeper. *See United States v. Kail*, 804 F.2d 441, 449 (8th Cir. 1986)(witness could authenticate ledger because she prepared the invoices which contained the data recorded in the ledger, and routinely observed bookkeeper record information from the invoices into the ledger. Second witness testified that the figures recorded in the ledger appeared accurate.). It may be enough to simply demonstrate the origin of the information contained in the ledger. *See Black v. Federal Deposit Ins. Corp.*, 640 F.2d 699, 702 (11th Cir. 1981) (Ledger properly authenticated under 901(a) when government employee testified that information in proffered ledger was taken from a bank's books by another government employee.).

A. **Gestalt**: Ledgers may be authenticated by the overall evidence of their authenticity. *United States v. Arce*, 997 F.2d 1123, 1128 (5th Cir. 1993) (Drug ledgers authenticated by witness who testified that he worked for defendant, that the proffered ledgers resembled drug ledgers that defendant maintained, and that the handwriting on the ledgers was similar to defendant's handwriting. Officers found the ledgers at defendant's home.).

II. **Audio Recordings**: Before a recording may be admitted at trial, the proponent must offer evidence sufficient to support a finding that the recording is what its proponent claims. *United States v. Emerson*, 501 F.3d 804, 813 -814 (7th Cir. 2007) *(quoting United States v. Eberhart,* 467 F.3d 659, 667 (7th Cir. 2006); *see* FRE 901(a). Court's have proscribed two methods of establishing authenticity, either based upon the recording's contents, or the manner in which it was created and preserved.

A. **Authenticity Based Upon Contents**: Most courts favor a flexible approach, holding that a sound recording may be authenticated where the evidence, taken as a whole, suggests that the recording is authentic. Wright and Gold, *Federal Practice and Procedure* § 7110. The proponent may offer (1) testimony that the recording accurately reflects the conversation that he or she witnessed, or (2) evidence establishing the tape's chain of custody. *United States v. Emerson*, 501 F.3d 804, 813 -814 (7th Cir. 2007); *United States v. Patterson,* 277 F.3d 709, 713 (4th Cir. 2002).

B. **Formal Foundation Based Upon Methodology**: Several courts, most notably the 8th Circuit, require a foundation based upon the equipment's reliability and the care with which the recording was preserved. This approach will also work in any court when there is no witness to testify regarding the contents on the conversation:
(1) The recording device could record the conversation now offered in evidence;
(2) The device's operator was competent to operate the device;
(3) The recording is authentic and correct;
(4) The recording has not been changed, added to, or deleted;
(5) The recording has been preserved in a manner that is shown to the court;
(6) The speakers are identified; and
(7) The conversation elicited was made voluntarily and in good faith, without any kind of inducement.
United States v. Johnson, 362 F.Supp.2d 1043, 1065 -1067 (N.D.Iowa 2005); *United States v. McMillan,* 508 F.2d 101, 103 (8th Cir. 1974).

C. **Inaudible Tape**: The admissibility of recordings that are partially inaudible lies within the trial court's discretion. *United States v. Devous*, 764 F.2d 1349, 1353 (10th Cir. 1985).

D. **Enhanced Recordings**: An "enhanced" copy of an audio recording can be authenticated in the same manner as an original - either by a witness testifying as to the recording's accuracy, or by establishing how the recording was made using the seven factors. *See United States v. Calderin-Rodriguez,* 244 F.3d 977 (8th Cir. 2001).

III. **Books**: Books are generally not self authenticating, nor can they be authenticated by referring to their cover. *Cruise v. Monington,* 558 F.Supp.2d 707, 708 (E.D.Tex. 2007).

A. **Self Authenticating**: A book is self authenticating only if it is purported to have been issued by a public authority. FRE 902(5). *See Sherman v. Sunsong America, Inc.*, 485 F.Supp.2d 1070, 1074 (D.Neb. 2007).

B. **Testimony**: A book may be authenticated by testimony from the publisher or writer. *See Goguen v. Textron Inc.*, 476 F.Supp.2d 5, 10 (D.Mass. 2007).

IV. **Checks**: As a negotiable instrument, a check is a species of commercial paper, and therefore self-authenticating. *United States v. Pang,* 362 F.3d 1187, 1192 (9th Cir. 2004).

V. **Computer Printouts**: A computer printout is, effectively a document, and may be authenticated like any other document. *See United States v. Meienberg*, 263 F.3d 1177,

1181 (10th Cir. 2001). A computer printout of an existing file is not the result of a "process or system used to produce a result" and not subject to authentication under Rule 901(b)(9). *Id.* "Any question as to the accuracy of the printouts, whether resulting from incorrect data entry or the operation of the computer program, as with inaccuracies in any other type of business records, would have affected only the weight of the printouts, not their admissibility." *United States v. Catabran,* 836 F.2d 453, 458 (9th Cir. 1988).

VI. **Computer Simulations**: Computer simulations are treated as a form of scientific evidence, offered for a substantive, rather than demonstrative purpose. *Lorraine v. Markel American Ins. Co.*, 241 F.R.D. 534, 560 -561 (D.Md. 2007) (*citing Weinstein Evidence* at § 900.03[1], at 900-21 (*citing* Imwinkelried, *Evidentiary Foundations* at § 4.09[4][a], [c])). *Commercial Union v. Boston Edison,* 412 Mass. 545, 591 N.E.2d 165, 168 (1992) established the foundational requirements for a computer simulation. The court explained that the function of computer programs "is to perform rapidly and accurately an extensive series of computations not readily accomplished without use of a computer. We permit experts to base their testimony on calculations performed by hand. There is no reason to prevent them from performing the same calculations, with far greater rapidity and accuracy, on a computer." The *Commercial Union* test has been followed by numerous courts in determining the foundation needed to authenticate computer simulations. *Lorraine v. Markel American Ins. Co.*, 241 F.R.D. 534, 560 -561 (D.Md. 2007).

VII. **Documents**:

A. **Writer, Signer, User, Viewer**: "[D]ocuments can be authenticated by a witness who wrote it, signed it, used it, or saw others do so." *Flowers v. Carville,* 310 F.Supp.2d 1157, 1162 (D.Nev. 2004) (*quoting* 31 *Federal Practice and Procedure: Evidence* § 7106 (2000)). Typically, to authenticate a document, parties call the author or a witness to the document's creation. *See Diaz v. Pima County,* 34 Fed.Appx. 309, 311, 2002 WL 598201, 1 (9th Cir. 2002). The simple fact that a person received a document or was named in it does not make them a witness with knowledge. *Id. (citing United States v. Dibble,* 429 F.2d 598, 602 (9th Cir. 1970)).

B. **Authentication Based On Document's Contents**: A document may be shown to have come from a person by virtue of the document's disclosing knowledge known only by that person. *United States v. Jones*, 107 F.3d 1147, 1150 (6th Cir. 1997) (*citing* FRE 901(b)(4) Advisory Committee's Note). If, for example, the writing "deal[s] with a matter sufficiently obscure or particularly within the knowledge of the persons corresponding so that the contents of the [writing] were not a matter of common knowledge[.]" 5 *Weinstein's Evidence,* ¶ 901(b)(4)[01], at 901-49 (1990).

C. **Handwriting**: A handwritten document can be authenticated by establishing who authored the document, based upon authentication of the handwriting (see below).

D. **Gestalt**: A court may review a document's contents together with the circumstances of its discovery and make its own determination regarding the evidence's authenticity. *Prime Ins. Syndicate, Inc. v. Damaso,* 471 F.Supp.2d 1087, 1093 (D.Nev. 2007) (citing *Alexander Dawson, Inc. v. N.L.R.B.*, 586 F.2d 1300, 1302 (9th Cir. 1978)); *United States*

v. McGlory, 968 F.2d 309, 328 (3rd Cir. 1992); *see also* FRE 901(b)(4) (permitting authentication based upon the exhibit's "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances").

E. **Age**: A document is "ancient," and thus authenticated, if it is (A) in such condition as to create no suspicion concerning its authenticity; (B) in a place where it, if authentic, would likely be; and (C) in existence twenty years or more at the time it is offered. *United States v. Firishchak*, 468 F.3d 1015, 1021 (7th Cir. 2006) (citing FRE. 901(b)(8)). This foundation may be provided by an expert, *id.*, or fact witness. *Kleenit, Inc. v. Sentry Ins. Co.,* 486 F.Supp.2d 121, 129 (D.Mass. 2007).

1. **Requires Testimony As To Origin**: To satisfy the ancient document rule, the proffering party must offer evidence as to where the document was found, and how it got there. *Kalamazoo River Study Group v. Menasha Corp.*, 228 F.3d 648, 662 (6th Cir. 2000). The court may deny authenticity if the document was not where one would expect to find an authentic copy. *Chemetall GMBH v. ZR Energy, Inc.,* 320 F.3d 714, 722 (7th Cir. 2003). *See also Dartez v. Fibreboard Corp.,* 765 F.2d 456, 464 (5th Cir. 1985) (court did not abuse discretion in excluding corporation's correspondence not found in the corporation's files).

VIII. **Demonstratives**: Although the term "Demonstrative" is often misused, it properly means anything not actually connected with the underlying facts of the case, generated later to demonstrate a fact or testimony. It can include models, photographs, video tapes, and diagrams. Demonstrative exhibits may be used, at the trial court's discretion, as "educational tool[s] for the jury." *Wipf v. Kowalski,* 519 F.3d 380, 387 (7th Cir. 2008); *United States v. Two Elk*, 536 F.3d 890, 905 (8th Cir. 2008). *See* FRE 611(a). Because demonstratives are not evidence they need not be "authenticated" - instead a proper foundation will "verify" what is depicted in the demonstrative. *See* **Demonstratives**.

IX. **Emails**: Emails are just a specific form of document. "The most frequent ways to authenticate e-mail evidence are 901(b)(1) (person with personal knowledge), 901(b)(3) (expert testimony or comparison with authenticated exemplar), 901(b)(4) (distinctive characteristics, including circumstantial evidence), 902(7) (trade inscriptions), and 902(11) (certified copies of business record)." *Lorraine v. Markel American Ins. Co.,* 241 F.R.D. 534, 555 (D.Md. 2007).

A. **Comparison**: Email messages "that are not clearly identifiable on their own can be authenticated . . . by comparison by the trier of fact (the jury) with 'specimens which have been [otherwise] authenticated' - in this case, those emails that already have been independently authenticated under Rule 901(b)(4)." *United States v. Safavian*, 435 F.Supp.2d 36, 40 -41 (D.D.C. 2006). If certain emails contain a cryptic email address, with no further indication of who uses that email address either through the contents or in the email heading itself, the document on its own does not clearly demonstrate who was the sender or receiver. *Id.* When these emails are examined alongside others, separately authenticated, which demonstrate who used the email address, the comparison of those emails can provide a sufficient basis to find that the unauthenticated emails are what they purport to be. *Id.*

X. **Handwriting**: The rules provide three ways of authenticating or identifying through the testimony of a witness the handwriting on a document as being written by a particular person. FRE 901(b); *United States v. Scott*, 270 F.3d 30, 49 (1st Cir. 2001). The handwriting may be identified through a lay witness, an expert, or the fact finder.

A. **Lay Testimony**: FRE 701 and 901 govern the admission of non-expert opinion on handwriting. FRE 901 allows handwriting identification by non-expert opinion "based upon familiarity not acquired for purposes of the litigation." FRE 901(b)(2); *United States v. Tipton*, 964 F.2d 650, 655 (7th Cir. 1992). FRE 701 permits lay opinion testimony when the opinion is "(a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." FRE 701.

1. **Previous Personal Knowledge Required**: Lay witness testimony without prior familiarity with the handwriting would not be helpful to the jury and would be prohibited by FRE 701 even if FRE 901 did not exist. *United States v. Scott*, 270 F.3d 30, 49 (1st Cir. 2001). A lay witness may not enter court, and compare unfamiliar handwriting samples; the result is the same, if the witness compared the two samples before entering the courtroom. *Id.; See also United States v. Pitts*, 569 F.2d 343, 348 (5th Cir. 1978).

B. **Expert Testimony**: Handwriting may be authenticated by one who lacks familiarity with the author's writing provided she has the requisite expertise. She then compares the sample with specimens which have been authenticated. FRE 901(b)(3). "Testimony based upon familiarity acquired for purposes of the litigation is reserved to the expert." FRE 901(b)(2) Advisory Committee's Note. "Rule 702 and Rule 901 must be read together." *United States v. Saelee*, 162 F.Supp.2d 1097, 1106 (D.Alaska 2001). "Rule 901(b)(3) contemplates testimony by an expert - but before an expert's testimony can be admitted," the testifier must but qualified as an expert under Rule 702. *Id.*

C. **Fact Finder**: The rules expressly permit the fact finder to compare the original, previously authenticated document with the proffered exhibit, to determine the authenticity of the handwriting. *Lorraine v. Markel American Ins. Co.*, 241 F.R.D. 534, 546 (D.Md. 2007) (citing FRE 901(b)(3)). Although the rule's common law origin involved its use for authenticating handwriting or signatures, FRE 901(b)(3) Advisory Committee's Note, it now is commonly used to authenticate documents. Weinstein at § 901.03[7][b].

XI. **Machine Generated Data**: When information provided by machines is mainly a product of "mechanical measurement or manipulation of data by well-accepted scientific or mathematical techniques," 4 *Federal Evidence*, § 380, at 65 (2d ed.), reliability concerns are addressed by requiring the proponent to show that (1) the machine and its functions are reliable, (2) the machine was correctly adjusted or calibrated, and (3) that the data or material put into the machine was accurate. *United States v. Washington* 498 F.3d 225, 231 (4th Cir. 2007); *see* also FRE 901(b)(9).

XII. **Magazines**: **See "Periodicals."**

XIII. **Newspapers**: Newspaper articles are generally self-authenticating under 902(6). *See Price v. Rochford,* 947 F.2d 829, 833 (7th Cir. 1991).

XIV. **Periodicals**: Printed materials purporting to be periodicals are self-authenticating under Rule 902(6). *See Sherman v. Sunsong America, Inc.,* 485 F.Supp.2d 1070, 1074 (D.Neb. 2007). Periodicals typically comprise magazines, trade publications, and scientific and academic journals with weekly, monthly, or quarterly circulation. *Goguen ex rel. Estate of Goguen v. Textron, Inc.,* 234 F.R.D. 13, 17 (D.Mass. 2006).

XV. **Photographs**: Like other evidence, photographs must be authenticated before being admitted into evidence. *See* FRE 901; *United States v. Blackwell,* 694 F.2d 1325, 1330 (D.C.Cir. 1982). A distinction must be made as to whether the photograph is offered as a demonstrative or as real evidence. A demonstrative is not created or used during the underlying events at issue in a case, but is created or adopted later to aide in a witnesses testimony. Demonstratives are dealt with under a separate heading (see Demonstrative). A non-demonstrative photograph may be authenticated in two ways: based upon its contents or upon the method by which it was taken. *See United States v. Rembert,* 863 F.2d 1023, 1026 (D.C.Cir. 1988).

A. **Authenticity Based Upon Photo's Contents**: One test of authenticity for a photograph is whether it accurately depicted the scene at the time the photograph was taken. *Shahid v. City of Detroit,* 889 F.2d 1543, 1546 (6th Cir. 1989). The photograph can only be offered and received into evidence for the purpose of indicating to the jury what it depicted. *Id.* A witness qualifying a photograph need not be the photographer or see the picture taken; it is sufficient if he recognizes and identifies the object depicted and testifies that the photograph fairly and correctly represents it. *United States v. Clayton,* 643 F.2d 1071, 1074 (11th Cir. 1981). *See also McCormick on Evidence,* § 214, at 394 (4th ed.) ("the witness who lays the foundation need not be the photographer nor need he know anything of the time, conditions, or mechanisms of the taking").

B. **Authenticity Based Upon Method**: Testimony by someone familiar with the operation of the camera, and the time and date imprints on the photographs themselves, can be sufficient "to permit a reasonable juror to find that the evidence is what its proponent claims." *United States v. Fadayini,* 28 F.3d 1236, 1241 (D.C. Cir. 1994) (concluding ATM photographs properly authenticated). *See also United States v. Rembert,* 863 F.2d 1023, 1027 (D.C.Cir. 1988).

XVI. **Tapes**: See "Audio recordings."

XVII. **Telephone Call**: "A telephone conversation is admissible in evidence if the identity of the speaker is satisfactorily established." *United States v. Dhinsa,* 243 F.3d 635, 658 -659 (2d Cir. 2001). A statement of identity by a person on the telephone is not sufficient to authenticate that person's identity; some additional evidence, which 'need not fall in[to] any set pattern,' may provide the necessary foundation. *United States v. Khan,* 53 F.3d 507, 516 (2d Cir. 1995) (quoting FRE 901(b)(6) Advisory Committee Notes).

A. **Authentication By Caller**: To authenticate a telephone call, there must be testimony that a call was made to an assigned number and circumstantial evidence identifying the person who answered the call as the one who was intended to be called. Rule 901(b)(6). ***If the recipient was a person***: this evidence can be self identification by the person. Rule 901(b)(6)(A). ***If the call was placed to a business***: this evidence can be the fact that the call resulted in business reasonably transacted over the phone. *Cook v. Babbitt,* 819 F.Supp. 1, 26 (D.D.C. 1993) (citing Rule 901(b)(6)(B)).

B. **Voice Identification**: A call can be authenticated by caller or recipient if they can identify the voice on the other end of the line based upon previous contact. *United States v. Pool,* 660 F.2d 547, 560 (5th Cir. 1981) ("a telephone call out of the blue from one who identifies himself as X may not be, in itself, sufficient authentication of the call as in fact coming from X.")

C. **Gestalt**: "The authentication may be established by circumstantial evidence such as the similarity between what was discussed by the speakers and what each subsequently did." *United States v. Puerta Restrepo,* 814 F.2d 1236, 1239 (7th Cir. 1987). A telephone call may be shown to have emanated from a particular person by virtue of its disclosing facts known peculiarly to him. *United States v. Garrison,* 168 F.3d 1089, 1093 (8th Cir. 1999); *See also United States v. Dhinsa,* 243 F.3d 635, 659 (2d Cir. 2001) (Threatening calls were authenticated based upon (1) the caller identified himself as the defendant; and (2) the defendant needed to identify himself to "benefit" from the threat).

XVIII. **Transcripts**: Transcripts are almost always created after the events that give rise to the litigation, and are thus a special kind of demonstrative. The court may, in its discretion, admit transcripts to assist the factfinder. *United States v. Watson,* 594 F.2d at 1336; *United States v. Slade,* 627 F.2d 293, 302 (D.C.Cir. 1980). A transcript may be self authenticating. If not, it may be authenticated based upon its contents or the method by which it was created.

A. **Self Authenticating**: Trial transcripts containing a court reporters' certification are self-authenticating as Certified Copies of Public Records. FRE 902(4). The transcript is admissible as prima facie evidence of what was said therein. *See United States v. Lumumba,* 794 F.2d 806, 815 (2d Cir. 1986).

B. **Conversation Participant**: When a transcript is offered, the authentication question is usually whether the transcript is an accurate rendition of a recorded conversation. *United States v. Devous*, 764 F.2d 1349, 1355 (10th Cir. 1985). A participant to the conversation can authenticate the transcript by testifying that the transcript is correct. *Id.* (citing *United States v. Rochan,* 563 F.2d 1246, 1251 (5th Cir. 1977).

C. **Method Of Transcription**: A transcript may be authenticated by the stenographer (transcriber). Testimony describing how the transcript was created can be sufficient to authenticate the resulting transcript. *United States v. Puentes,* 50 F.3d 1567, 1577 (11th Cir. 1995) ("The inspector testified that he heard every conversation that was contained in the transcripts; that the conversations were then written out in longhand; that the longhand transcription was then compared to the recorded conversation; and, finally, that

the longhand transcription was then dictated to a secretary and the typewritten product compared to the longhand transcription.").

D. **Transcript Separate From Conversation**: Even after a transcript is authenticated, it may be necessary to authenticate the underlying conversation, if the person authenticating the transcript cannot do so. ***Compare**: Logan v. City of Pullman,* 392 F.Supp.2d 1246, 1252 (E.D.Wash. 2005) (testimony of stenographer authenticated transcript made from recording of telephone call, but no one authenticated the recording to establish who was talking on the call), with *United States v. Puentes,* 50 F.3d 1567, 1577 (11th Cir. 1995) (Inspector who made the transcript was familiar with people taking part in conversation and able to authenticate tape and transcript).

XIX. **Voice Identification**: A voice can be identified through opinion testimony by anyone familiar with the individual's voice. FRE 901(5). "Once a witness establishes familiarity with an identified voice, it is up to the jury to determine the weight to place on the witness's voice identification." *Brown v. City of Hialeah,* 30 F.3d 1433, 1437 (11th Cir. 1994). A single telephone call, combined with hearing a voice in court, is sufficient for voice identification testimony to go to the jury. *United States v. Axselle*, 604 F.2d 1330, 1338 (10th Cir. 1979). The witness need only have "minimal familiarity" with the speaker's voice. *See United States v. Bush,* 405 F.3d 909, 919 (10th Cir. 2005).

A. **Identification By Factfinder**: If the fact finder hears (1) the recorded voice, and (2) the testimony of the purported speaker, the fact finder can itself make the comparison and identification . *United States v. Sliker,* 751 F.2d 477, 500 (2d Cir. 1984)(citing *United States v. Rizzo,* 492 F.2d 443, 448 (2d Cir. 1974).

XX. **Web Pages**: Information from the internet must be properly authenticated to be admitted. *United States v. Jackson,* 208 F.3d 633, 638 (7th Cir. 2000); *In re Homestore.com, Inc. Sec. Litig.,* 347 F.Supp.2d 769, 782-83 (C.D.Cal. 2004) ("Printouts from a web site do not bear the indicia of reliability demanded for other self-authenticating documents"). The proper foundation for authenticity depends upon the page's contents, which can contain video, photographs, sounds, and text. *See Lorraine v. Markel American Ins. Co.,* 241 F.R.D. 534, 542 (D.Md. 2007).

Notes: _____

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[B4] DEMONSTRATIVES

QUICK RULE: *Demonstratives are pedagogical tools used to explain evidence. In contrast to summary exhibits, which are analyzed under FRE 1006, demonstratives are properly considered under FRE 611(a). The court has discretion regarding the use of demonstratives, depending upon their usefulness, and whether they are fair and accurate. Most courts do not permit demonstratives to be entered into evidence, but some circuits permit this. When used with a jury, demonstratives should typically be accompanied by a limiting instruction.*

DISCUSSION

I. **General:** Demonstratives (a.k.a. "pedagogical devices") are widely used in trials to help illustrate for the fact finder matters that might otherwise be less than fully understood. *United States v. Salerno*, 108 F.3d 730, 744 (7th Cir. 1997); *Verizon Directories Corp. v. Yellow Book USA, Inc.*, 331 F.Supp.2d 136, 139 -144 (E.D.N.Y. 2004). These aids can take various forms, including diagrams, maps, computer animations, or mock-ups. *Colgan Air, Inc. v. Raytheon Aircraft Co.*, 535 F.Supp.2d 580, 583 -584 (E.D.Va. 2008).

A. **Purpose Of Demonstratives**: Regardless of the form, demonstratives generally explain or clarify complex principles or concepts, or aid in understanding complicated testimony. *United States v. McElroy*, 587 F.3d 73, 81 (1st Cir. 2009) (citing *United States v. Milkiewicz*, 470 F.3d 390, 397 (1st Cir. 2006)). A demonstrative's primary purpose is "to illustrate other admitted evidence and thus to render it more comprehensible to the trier of fact." *McCormick on Evidence*, § 214 (6th ed.).

B. **Court's Discretion On Demonstratives**: The court has "discretion to control the presentation of evidence" at trial. FRE 611(a). This discretion generally encompasses the authority to allow the use of demonstratives, including the display of charts or tables accurately summarizing the content of primary evidence. *See United States v. Pinto*, 850 F.2d 927, 935 (2d Cir. 1988); *United States v. Petty*, 132 F.3d 373, 379 (7th Cir. 1997); *Rogers v. Raymark Indus., Inc.*, 922 F.2d 1426, 1429 (9th Cir. 1991); *United States v. Hernandez*, 109 F.3d 1450, 1452 (9th Cir. 1997).

1. **Foundation For Using A Demonstrative**: A demonstrative may be used at trial if it would be "effective for the ascertainment of the truth." FRE 611(a)(1). The party seeking to use a demonstrative must usually demonstrate that it is fair and accurate. *See United States v. Myers*, 972 F.2d 1566, 1579 (11th Cir. 1992). In *Keller v. United States*, 38 F.3d 13, 32 n. 10 (1st Cir. 1994), the court concluded that a mock-up of a ladder was excludable due to the failure to lay a foundation. *See also Sanchez v. Denver & Rio Grande Western Railroad Co.*, 538 F.2d 304, 306 n. 1 (10th Cir. 1976) (noting that party must lay foundation of accuracy and fairness for motion picture exhibit).

2. **FRE 611 Unique**: Unlike most evidentiary rules, FRE 611(a) does not provide an independent ground for excluding or admitting evidence. *United States v. Colomb*, 419 F.3d 292, 297 (5th Cir. 2005). FRE 611 affects admissibility only as an incident to regulating mode and order; the provision itself creates no standards for admissibility. *Id.* Where a court excludes evidence to advance the policies described in FRE 611, it is FRE 403 that supplies the power for that action. *Id.*

II. **Demonstratives v. Compilations**: There are oceans of confusion and inconsistency regarding what qualifies as a demonstrative, and what can be done with demonstratives. It helps to begin with what demonstratives are **not**: demonstratives are not summaries or compilations. Compilations are admitted under FRE 1006, an exception to the best evidence rule. Compilations are proxies for voluminous records "which cannot be examined in court." FRE 1006. Demonstratives – which are not real evidence – organize and explain other evidence in the record. *United States v. Bray,* 139 F.3d 1104, 1110-12 (6th Cir. 1998). ***Courts often ignore the distinction between Rule 1006 summaries and Rule 611(a) demonstratives.***

A. **Lines Are Blurred**: The lines between these two types of summary documents are easily blurred. *United States v. Milkiewicz*, 470 F.3d 390, 397 (1st Cir. 2006). A summary admissible under FRE 1006 - and thus most appropriately introduced under that rule - could properly be offered under FRE 611(a) if the supporting material had been admitted into evidence. *Id.* A chart originally offered as a jury aid to assist with review of voluminous underlying documents already in evidence - and which accurately summarizes those documents - alternatively could be admitted under FRE 1006 if the court concluded that the supporting documents could not be examined conveniently in court. *Id.* In a case where voluminous underlying records are involved, the key difference between these various approaches appears to be the purpose for which the summaries are offered. *Id.* Charts admitted under FRE 1006 are explicitly intended to reflect the contents of the documents they summarize and typically are substitutes in evidence for the voluminous originals. Consequently, they must fairly represent the underlying documents and be "accurate and nonprejudicial." *United States v. Bray,* 139 F.3d 1104, 1111 (6th Cir. 1998); *United States v. Janati,* 374 F.3d 263, 272 (4th Cir. 2004).

III. **Circuit Split On Admissibility**: Demonstratives by definition, are not independently capable of establishing the existence or non existence of a fact. Demonstratives typically "do not have *independent* probative value for determining the substantive issues in the case." *Colgan Air, Inc. v. Raytheon Aircraft Co.*, 535 F.Supp.2d 580, 584 -586 (E.D.Va. 2008)(quoting 2 *McCormick on Evidence* § 214 (6th ed. 2006)). The demonstrative is created in preparation for litigation to explain the facts or one side's arguments about the facts. The circuits are split as to whether demonstratives can be admitted into evidence.

A. **Demonstratives Not Evidence**: Most courts have concluded that demonstratives "are not evidence themselves, but are used merely to aid the jury in its understanding of the evidence that has already been admitted." *United States v. Janati,* 374 F.3d 263, 273 (4th Cir. 2004) (citations omitted); *see also United States v. Bray,* 139 F.3d 1104, 1110-12 (6th Cir. 1998); *United States v. Sawyer,* 85 F.3d 713, 740 (1st Cir. 1996); *United States v. Bradley,* 869 F.2d 121, 123 (2d Cir. 1989); *United States v. Pelullo,* 964 F.2d 193, 205 (3d Cir. 1992); *United States v. Wood,* 943 F.2d 1048, 1053 (9th Cir. 1991). Under this view,

demonstratives are not admitted as evidence because, unlike real evidence and exhibits admitted under FRE 1006, demonstratives only summarize evidence that has actually been presented. *United States v. Buck*, 324 F.3d 786, 790 -791 (5th Cir. 2003) (It is an error of law (and thus an abuse of discretion) to admit a demonstrative into evidence.).

B. **Demonstratives Admitted Into Evidence**: Some courts have held that demonstratives are admissible into evidence, either citing district courts' broad discretion to regulate presentation of evidence under FRE 611(a), *see United States v. Poschwatta,* 829 F.2d 1477, 1481 (9th Cir. 1987) (overruled on other grounds); *United States v. Gardner,* 611 F.2d 770, 776 (9th Cir. 1980), or because "such pedagogical devices may be sufficiently accurate and reliable that they, too, are admissible in evidence, even though they do not meet the specific requirements of Rule 1006." *United States v. McElroy*, 587 F.3d 73, 81 (1st Cir. 2009) (quoting *United States v. Milkiewicz,* 470 F.3d 390, 397 (1st Cir. 2006)). *See, e.g., Roland v. Langlois,* 945 F.2d 956, 963 (7th Cir. 1991) (admitting life-sized replica of amusement park ride into evidence). One court explained that "Whether or not the chart is technically admitted into evidence, we are more concerned that the district court ensure the jury is not relying on that chart as "independent" evidence but rather is taking a close look at the evidence upon which that chart is based." *United States v. Johnson*, 54 F.3d 1150, 1159 (4th Cir. 1995).

C. **Jury Directions**: Whenever demonstratives are used, courts should explain to the jury that the charts, graphs, etc are not evidence themselves, but are displayed to assist the jury's understanding. *United States v. Janati*, 374 F.3d 263, 273 (4th Cir. 2004). "Where a chart or summary is introduced solely as a pedagogical device, the jury should be instructed that it is not to be considered as evidence but only as an aid in evaluating the evidence." *United States v. Buck*, 324 F.3d 786, 791 (5th Cir. 2003). Demonstrative summaries should be accompanied by a limiting instruction which informs the jury of the summary's purpose and that it does not itself constitute evidence. *United States v. Bray*, 139 F.3d 1104, 1111 (6th Cir. 1998).

1. **Demonstratives In The Jury Room**: The submission of purely demonstrative charts to the jury is disfavored. *United States v. Possick*, 849 F.2d 332, 339 -340 (8th Cir. 1988); *United States v. Gardner,* 611 F.2d 770, 776 n. 3 (9th Cir. 1980). Some courts do not allow demonstratives to go to the jury room absent the paties' consent. *United States v. Milkiewicz*, 470 F.3d 390, 397 (1st Cir. 2006); *United States v. Buck*, 324 F.3d 786, 791 (5th Cir. 2003); *United States v. Ollison,* 555 F.3d 152, 162 (5th Cir. 2009); *see also* 31 *Federal Practice and Procedure* § 8043, at 524 n. 9 ("[C]ourts often do not permit demonstrative evidence in the jury room."); 6 *Weinstein's Federal Evidence* § 1006.08[4] ("While a court retains discretion to permit the jury to take such aids into their deliberation, most courts do not allow it."). ***Contra*** *United States v. Salerno*, 108 F.3d 730, 744 -745 (7th Cir. 1997) (allowing scale model into jury room within court's discretion); *United States v. Downen*, 496 F.2d 314, 321 (10th Cir. 1974) (same).

IV. Specific Examples

A. Expert Demonstratives: Expert opinions may be summarized on charts and used as demonstrative road map. *United States v. Janati*, 374 F.3d 263, 273 (4th Cir. 2004); *Minebea Co., Ltd. v. Papst*, 231 F.R.D. 3, 12 (D.D.C. 2005). These charts may draw on authority granted under FRE 703 and 705, summarizing data on which experts in the case have relied or summarizing the expert's opinions. The side proffering expert demonstratives may have had an obligation under FRCP 26(a)(2)(B) to provide the demonstratives at the time the expert report was submitted. *Minebea Co., Ltd. v. Papst*, 231 F.R.D. 3, 12 (D.D.C. 2005). "Under amended FRCP 26" "all parties and the court should possess full information well in advance of trial on any proposed expert testimony or demonstrative evidence." *Robinson v. Missouri Pac. R.R.*, 16 F.3d 1083, 1089 n. 6 (10th Cir. 1994).

B. Chart Summarizing Testimony: Several courts have looked to FRE 611(a) as the means of reviewing whether a district court has properly admitted a summary chart into evidence. *United States v. Johnson*, 54 F.3d 1150, 1158 (4th Cir. 1995); *United States v. Pinto*, 850 F.2d 927, 935-36 (2d Cir. 1988). A summary chart "prepared by a witness from personal knowledge to assist the jury in understanding or remembering a mass of details . . . is admissible, not under Rule 1006, but under such general principles of good sense as are embodied in Rule 611(a)." *Weinstein's Evidence*, ¶ 1006[03] (1992). The decision whether to admit summary evidence pursuant to Rule 611(a) is left to the district court's discretion. *Pinto*, 850 F.2d 927, 935-36. "For complex cases, we have allowed summary witnesses in a limited capacity." *United States v. Fullwood*, 342 F.3d 409, 413 (5th Cir. 2003); *United States v. Ollison*, 555 F.3d 152, 162 (5th Cir. 2009).

1. **Relevant Factors For Summary Charts**: Guiding principles for when trial courts permit the use of testimony summaries: First, courts consider whether the summary chart aids the jury in ascertaining the truth. *United States v. Johnson*, 54 F.3d 1150, 1158 (4th Cir. 1995). In making this determination, courts look to the length of the trial, the complexity of the case, and the accompanying confusion that a large number of witnesses and exhibits may generate for the jury. *Id.* Second, applying what is essentially an analysis under FRE 403, courts consider the possible prejudice by allowing the summary chart into evidence. *Id.*

2. **Safeguards On Summary Charts**: Courts considering summary charts have developed safeguards to minimize possible prejudice by (1) ensuring that the individual who prepared the chart - as well as the evidence upon which the preparer relied - was available for cross-examination to test the competence of the evidence as presented in the summary, and (2) ensuring that the district court properly instructed the jury concerning the manner in which they were to consider the charts. *Johnson*, 54 F.3d at 1158; *Pinto*, 850 F.2d at 935.

C. Transcripts: Transcripts are almost always created after the events that give rise to the litigation, and are thus, effectively, forms of demonstratives. The admission of transcripts to assist the factfinder understand a recording lies within the trial court's discretion. *United States v. Watson*, 594 F.2d at 1336; *United States v. Slade*, 627 F.2d 293, 302

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(D.C.Cir. 1980). A transcript may be self authenticating. If not, it may be authenticated based upon its contents or the method by which it was created.

V. **Technology Not Overwhelming**: Jurors are not easily confused by the use of technology to create or show demonstratives. *Datskow v. Teledyne Continental Motors,* 826 F.Supp. 677, 685 (W.D.N.Y. 1993) ("Jurors, exposed as they are to television, the movies, and picture magazines, are fairly sophisticated. With proper instruction, the danger of their overvaluing such proof is slight.") (*quoting Federal Evidence,* ¶ 403[5] at 403-88 (1992) (footnotes omitted)).

VI. **Practice Point**: Some demonstratives can be created in court, summarizing or organizing testimony as it is presented. For example, if a witness is describing the management hierarchy in her office, an organization chart can be created using a paper flip chart or electronic presentation software. These demonstratives are highly effective – they should be stickered and identified by an exhibit number for the record.

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[C1] RELEVANT EVIDENCE

QUICK RULE: *Relevant evidence is generally admissible. FRE402. Evidence is relevant if it would tend to make any fact "of consequence" more or less probable. FRE 401. If the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit the evidence conditionally, subject to further evidence to support the condition. Rule 104(b).*

DISCUSSION

I. **Admissibility Of Relevant Evidence**: Relevant evidence is generally admissible, but may be excluded under specific parts of the rules FRE 402 or, generally, if its probative value is "substantially outweighed" by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. FRE 403. Such a determination is within the trial court's discretion. *Young Dental Mfg. Co., Inc. v. Q3 Special Products, Inc.*, 112 F.3d 1137, 1145 - 46 (Fed. Cir. 1997).

A. **Authentication v. Relevancy**: Authentication and identification represent special aspects of relevancy. FRE 901 Advisory Committee Notes. The failure to identify the speaker on a telephone call or the provenance of a document may render the call or document irrelevant, but it is better cast as a failure to authenticate. *Id.*

B. **Relevance v. Hearsay**: Hearsay typically meets the Rule 401 standards of relevance - it may "make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *United States v. Martinez de Ortiz*, 907 F.2d 629, 633 (7th Cir. 1990). The customary problem with hearsay is not irrelevance but excessive persuasive force; jurors may think the evidence more reliable than it is and so rely too heavily on it. *Id.*

II. **Defining Relevant Evidence**: "Relevant evidence" is defined as that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 587 (1993) (*quoting* FRE 401). The Rule's basic standard of relevance is a liberal one. *Id.*

A. **Standard Explained**: The standard is aimed at each "brick" of evidence potentially making a wall and not every witness "mak[ing] a home run." FRE 401 Advisory Committee Notes. To be "relevant," evidence need not be conclusive proof of a fact sought to be proved, or even strong evidence of the same. *United States v. Curtin*, 489 F.3d 935, 943 (9th Cir. 2007)(en banc). All that is required is a "tendency" to establish the fact at issue. *Id.* In that relation, "[t]he fact to be proved may be ultimate, intermediate, or evidentiary; it matters not, so long as it is of consequence in the determination of the action." FRE 401 Advisory Committee Notes.

B. **No Blanket Rule**: Courts determine relevance in the context of the facts and arguments in a particular case; relevancy is generally not amenable to broad *per se* rules. *Sprint/United Management Co. v. Mendelsohn*, 128 S.Ct. 1140, 1147 (2008). "Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case." *Id.* (*quoting* Advisory Committee Notes).

C. **Dispute Over Fact Not Necessary**: The fact to which evidence is directed need not be in dispute for the evidence to be relevant. *Old Chief v. United States*, 519 U.S. 172, 179 (1997) (citing FRE 401 Advisory Committee Notes). "While situations will arise which call for the exclusion of evidence offered to prove a point conceded by the opponent, the ruling should be made on the basis of such considerations as waste of time and undue prejudice (see FRE 403), rather than under any general requirement that evidence is admissible only if directed to matters in dispute." *Id.*

D. **Fact Relevant Even If It May Be Proven By Alternative Method**: The evidentiary relevance of a fact under Rule 401 is not affected by the availability of alternative proofs. "If, then, relevant evidence is inadmissible in the presence of other evidence related to it, its exclusion must rest not on the ground that the other evidence has rendered it 'irrelevant.'" *Old Chief v. United States*, 519 U.S. 172, 179 (1997).

E. **Fact Is Relevant Even If Contrary To Party's Position**: Evidence that is otherwise relevant does not become irrelevant simply because it appears to undermine the party's position. *United States v. Lawson*, 535 F.3d 434, 442 (6th Cir. 2008). "Although one would normally expect the Government to introduce only evidence of guilt, a piece of exculpatory evidence is not rendered irrelevant or inadmissible simply because it is offered by the Government." *Id.*

III. **Conditional Relevance**: The entry of some evidence may make other evidence relevant. It constantly happens that an evidential fact is relevant, not with direct reference to an allegation in the pleadings, but only through its connection with other subordinate facts. 6 *Wigmore on Evidence*, § 1871. Without them it is irrelevant, or immaterial, and therefore inadmissible. *Id.* So far, then, as concerns the time of its introduction in evidence, one might expect a rule requiring such a fact not to be given in evidence until the connecting facts, by reason of which it becomes relevant, have first been put in evidence. *Id.* No such rule, however, would be practicable; for those same connecting facts would themselves often be irrelevant apart from the fact in question; in other words, the relevancy appears only when all are considered together. *Id.*

A. **"Connecting Up"**: "When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition." FRE 104(b). In determining whether a party has introduced sufficient evidence to meet FRE 104(b), the trial court neither weighs credibility nor makes a finding that the party has proved the conditional fact by a preponderance of the evidence. *Huddleston v. United States*, 485 U.S. 681, 689-90 (1988). The court examines the evidence and decides whether the fact finder could reasonably find the conditional fact by a preponderance of the evidence. *Id.*

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The proof of connection "affects the weight of the evidence rather than its ultimate admissibility once the preliminary issue of admissibility is determined." *United States v. Brewer,* 630 F.2d 795, 802 (10th Cir. 1980).

B. **Doctrine Of Completeness**: "[W]hen one party has made use of a portion of a document, such that misunderstanding or distortion can be averted only through presentation of another portion, the material required for completeness is *ipso facto* relevant and therefore admissible under FRE 401 and 402. *Beech Aircraft Corp. v. Rainey,* 488 U.S. 153, 172 (1988) (*citing Weinstein's Evidence,* ¶ 106[02], p. 106-20 (1986)). The rule of completeness requires that a statement's redacted version not distort the statement's meaning. FRE 106.

IV. **Practice Point**: Relevance for admissibility is quite different from the relevance standard applied in discovery. This can be confusing. In discovery, information is relevant – and thus discoverable – if reasonably calculated to lead to the discovery of admissible evidence. FRCP 26(b)(1).

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[D1] ATTORNEY / CLIENT PRIVILEGE

QUICK RULE: *The attorney/client privilege protects communications made in confidence by clients to their lawyers for the purpose of obtaining legal advice. The advice provided from counsel to client is privileged to the extent it discloses, directly or indirectly, what the client told the lawyer. Facts are not privileged. Voluntary disclosure of privileged materials acts as waiver of relevant subject matter that "ought in fairness to be considered together." FRE 502. Inadvertent disclosure does not result in waiver if reasonable efforts were taken to protect and retrieve privileged materials. FRE 502.*

DISCUSSION

I. **General**: The attorney/client privilege encourages full and frank communication between attorneys and their clients and thereby promotes the public's interest in the observance of law and the administration of justice. *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998). The privilege protects communications made in confidence by clients to their lawyers for the purpose of obtaining legal advice. *American Standard Inc. v. Pfizer Inc.*, 828 F.2d 734, 745 (Fed. Cir. 1987). The attorney's advice to the client is privileged to the extent it discloses, directly or indirectly, what the client told the lawyer. *Id.*

A. **The Test**: Some circuits apply an eight-part test; communications are protected when: (1) legal advice is sought, (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence, (5) by the client, (6) are at his insistence permanently protected, (7) from disclosure by himself or by the legal advisor, (8) except upon waiver. *In re Impounded*, 241 F.3d 308, 316 (3rd Cir. 2001); *State of Maine v. U.S. Dept. of Interior*, 298 F.3d 60, 71 (1st Cir. 2002).

B. **Narrowly Construed**: Courts construe the attorney-client privilege narrowly because it comes with substantial costs and may interfere with the search for truth. *In re Keeper of Records (Grand Jury Subpoena)*, 348 F.3d 16, 22 (1st Cir. 2003).

C. **Burden Of Proof**: The party asserting attorney/client privilege must prove that the privilege applies; the communications were protected; and the privilege was not waived. *United States v. Aramony*, 88 F.3d 1369, 1389 (4th Cir. 1996).

II. **Who Is Covered**

A. **Prospective Client**: Privilege extends to consultations between attorneys and prospective clients, even if the attorney decides not to take the case. *Montgomery v. Leftwich, Moore & Douglas*, 161 F.R.D. 224, 225-6 (D.C.C. 1995).

B. **In-House Counsel**: (see below) The attorney/client privilege cloaks in-house counsel communications in same manner as counsel retained from outside. *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

C. **Government Counsel**: A government entity can assert attorney-client privilege in the civil context. *Ross v. City of Memphis*, 423 F.3d 596, 601 (6th Cir. 2005)(*citing In re Grand Jury Investigation,* 399 F.3d 527, 532 (2d Cir. 2005). *See also In re Grand Jury Subpoena Duces Tecum,* 112 F.3d 910, 917 & n. 7 (8th Cir. 1997) (acknowledging government entities' successful assertions of the privilege in civil cases where "the party seeking information was a private litigant adversarial to the government"). "[T]he attorney-client privilege extends to a communication of a governmental organization." Restatement (Third) of Law Governing Lawyers § 74 (2000).

D. **Former Employees**: "An argument could be made that the attorney-client privilege does not protect statements made in conversations with former employees, although every circuit to address this question has concluded that the distinction between present and former employees is irrelevant for purposes of the attorney-client privilege." *Sandra T.E. v. South Berwyn School Dist.*, 600 F.3d 612, 622 (7th Cir. 2010) (citing *In re Allen,* 106 F.3d 582, 605-07 (4th Cir. 1997); *City of Long Beach v. Standard Oil Co. of Cal. (In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.),* 658 F.2d 1355, 1361 n. 7 (9th Cir. 1981).

III. Communications Covered

A. **Confidential Communications**: The attorney-client privilege protects only confidential communications. *United States v. Bollin*, 264 F.3d 391, 412 (4th Cir. 2001). Someone claiming the privilege must have a reasonable expectation of confidentiality, either because the information disclosed is intrinsically confidential, or by showing that she had a subjective intent of confidentiality. *United States v. Robinson*, 121 F.3d 971, 976 (5th Cir. 2002). It is not enough for the meeting to be between a lawyer and would-be client, or that the meeting take place away from public view. *United States v. Melvin*, 650 F.2d 641, 646-47 (5th Cir. 1981).

B. **Facts Not Privileged**: The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts communicated to the attorney. "The client cannot be compelled to answer the question, 'What did you say or write to the attorney?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney." *Upjohn v. United States*, 449 U.S. 383, 396 (1981).

C. **Facts Concerning Attorney/Client Relationship**: The attorney/ client relationship itself is not privileged, but only the underlying communications. *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976, 982 (6th Cir. 2003). Privilege does not protect identify of client or attorney, when the relationship began, or how much is being paid for representation. *Diversified Ind. v. Meredith*, 572 F.2d 596, 602 (8th Cir. 1978)(en banc).

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IV. **Waiver**: FRE 502, recently adopted, governs both the scope of intentional privilege waiver and when unintentional disclosure results in a waiver. Under the rule, disclosure "does not operate as a waiver" if: "(1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B)." *See Eden Isle Marina, Inc. v. United States*, 89 Fed.Cl. 480, 501 - 502 (2009).

A. **Background**: Congress enacted FRE 502(d) in 2008. *See* Pub.L. No. 110-332, § 1(a), 122 Stat. 3537. Congress adopted the rule to resolve "longstanding disputes in the courts about the effect of certain disclosures of communications or information protected by the attorney-client privilege" and to avoid the notion that issues regarding the application of the privilege had to be litigated to the hilt in order to avoid inadvertent waivers of the privilege. *Jicarilla Apache Nation v. United States*, 91 Fed.Cl. 489, 494 (Fed.Cl. 2010) (citing 154 Cong. Rec. S1317-19 (Feb. 27, 2008) (statement of Sen. Leahy); *see also* 154 Cong. Rec. H7818-19 (Sept. 8, 2008) (statement of Rep. Jackson-Lee)).

B. **Inadvertent Disclosure**: Various courts apply "a multi-factor test for determining whether inadvertent disclosure is a waiver." FRE 502 Advisory Committee Notes (citing *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 332 (N.D.Cal. 1985)). The advisory committee explained that FRE 502(b) did not "explicitly codify that test, because it is really a set of non-determinative guidelines that vary from case to case." *Id.* The advisory committee described factors that might bear on the inadvertence analysis: (1) "the reasonableness of precautions taken;" (2) "the time taken to rectify the error;" (3) "the scope of discovery;" (4) "the extent of disclosure;" (5) "the overriding issue of fairness;" (6) "the number of documents to be reviewed;" (7) "the time constraints for production;" (8) the use of "advanced analytical software applications and linguistic tools;" and (9) "[t]he implementation of an efficient system of records management before litigation." *Id.*

1. **Must Be Actual Inadvertence**: Intentionally giving privileged documents to the other side, with the expectation they may be clawed back, is a flawed strategy. *Society of Professional Engineering Employees in Aerospace v. Boeing Co.*, 2010 WL 1141269, 5 (D.Kan.) (D.Kan. 2010) ("Boeing's decision to allow Spirit access to the e-mail messages from June 2005 to June 2006 was most assuredly *not* 'inadvertent.' Rather it was intentionally done for reasons of business continuity and economic convenience.").

2. **Time Taken To Rectify**: Delay in correcting a disclosure may result in loss of protection under FRE 502. *See Clarke v. J.P. Morgan Chase & Co.*, No. 08 Civ. 02400(CM)(DF), 2009 WL 970940, at *6 (S.D.N.Y. Apr. 10, 2009) (defendant's two-month delay in asserting privilege weighed in favor of finding a waiver; describes cases in which a waiver was found after a delay ranging from six days to one month); *Preferred Care Partners Holding Corp. v. Humana, Inc.*, 258 F.R.D. 684, 699-700 (S.D.Fla. 2009) (three-week delay in asserting privilege weighed in favor in finding a waiver of privilege).

C. **Disclosure Must Be Made In "Proceedings"**: The rule only protects documents disclosed (1) in Federal proceedings, (2) to a Federal office or agency, (3) in some state proceedings, or (4) pursuant to a court order. FRE 502. The new rule does not address disclosures to state agencies, *Bickler v. Senior Lifestyle Corp.*, 2010 WL 749924, 6 (D.Ariz. 2010), or disclosures to private parties outside of litigation.

D. **Documents Clawed Back**: (example) "Given that only four pages out of a more than 2000 page production were privileged, the documents were checked by three different attorneys prior to production, and counsel immediately sought the return of the documents once they discovered their mistake, return of the documents is required." *Edelen v. Campbell Soup Co.*, 2010 WL 774186, 23 (N.D.Ga. 2010).

V. **In-House Counsel**: A corporation can protect material as privileged only upon a "clear showing" that an in-house lawyer acted "in a professional legal capacity." *In re Sealed Case*, 737 F.2d 94, 99 (D.C.Cir. 1984). Communications made by and to in-house lawyers with respect to business matters, management decisions, or business advice are not privileged. *United States v. Rowe*, 96 F.3d 1294, 1297 (9th Cir. 1996). "A corporation cannot be permitted to insulate its files from discovery simply by sending a 'cc' to in-house counsel." *USPS v. Phelps Dodge Refining Corp.*, 852 F.Supp. 156, 163-64 (E.D.N.Y. 1994). Because an in-house lawyer often has other functions in addition to providing legal advice, the lawyer's role on a particular occasion will not be self-evident as it usually is in the case of outside counsel. *Minebea Co., Ltd. v. Papst*, 228 F.R.D. 13, 21 (D.D.C. 2005).

A. **Waiver**: Current management can waive a corporation's attorney/client privilege. *CFTC v. Weintraub*, 471 U.S. 343, 349 (1985).

B. **Personal Privilege**: Courts assume that the attorney only represents the corporate entity, not the individuals within the corporate sphere. *United States v. Bay State Ambul. & Hosp. Rental Serv., Inc.*, 874 F.2d 20, 28 (1st Cir. 1989). To override this presumption, an employee asserting privilege must demonstrate: (1) she approached counsel to seek legal advice; (2) she made it clear that she was seeking legal advice in her individual rather than in her representative capacities; (3) counsel advised her in her individual capacity, knowing that a possible conflict could arise; (4) conversations were confidential; and (5) substance of the conversations did not concern matters within the company's general affairs. *In re Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120 (3d Cir. 1986).

VI. **Crime Fraud Exception**: When a client seeks legal advice in furtherance of a crime or fraud, the communication is not privileged. *Clark v. United States*, 289 U.S. 1 (1933). To dispel the privilege, the opposing party must present a *prima facie* case that the communications furthered a crime or a fraud. *Id.*

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Privilege | D2 - 1

[D2] WORK PRODUCT DOCTRINE

QUICK RULE: *The Work Product Doctrine protects (1) documents and tangible things, (2) prepared in anticipation of litigation or for trial, (3) prepared by a party or that party's representative (attorney, consultant, surety, or agent). Hickman v. Taylor, 329 U.S. 495 (1947); codified at FRCP Rule 26(b)(3).*
A party can overcome the work product doctrine by sufficient need. Voluntary disclosure of privileged materials acts as waiver of relevant subject matter that "ought in fairness to be considered together." FRE 502. Inadvertent disclosure does not result in waiver if reasonable efforts were taken to protect and promptly retrieve privileged materials. FRE 502.

DISCUSSION

I. **Work Product Doctrine**: In *Hickman v. Taylor*, 329 U.S. 495 (1947), the Supreme Court extended protection to all inquiries and requests seeking "counsel's mental impressions, conclusions, or opinions." The work product doctrine protects the adversary trial process itself, rather than the attorneys' interests. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 864 (D.C.Cir. 1980).

A. **Purpose**: The work product doctrine serve dual purposes: (1) to protect an attorney's thought processes and mental impressions against disclosure; and (2) to limit the circumstances in which attorneys may piggyback on the fact-finding investigation of their more diligent counterparts. *Sandra T.E. v. South Berwyn School Dist.*, 600 F.3d 612, 622 (7th Cir. 2010).

B. **Not A True Privilege**: Unlike the attorney-client privilege, the work-product doctrine is distinguishable from the testimonial "true" privileges. *United States v. Ary*, 518 F.3d 775, 783 n.4 (10th Cir. 2008). This generally has no bearing on the doctrine's application. *Id.*

II. **Documents And Tangible Things**: FRCP 26(b)(3) codified the work product doctrine, providing protection for *documents and tangible things* prepared in anticipation of litigation. The language in *Hickman* is broader than FRCP 26(b)(3); the doctrine is interpreted under both the FRCP and *Hickman*. *In re Qwest Communications Intern. Inc.*, 450 F.3d 1179, 1186 (10th Cir. 2006).

A. **Facts Not Covered**: The work product doctrine does not protect facts concerning the creation of work product or facts contained within the work product. *See RTC v. Dabney*, 73 F.3d 262, 266 (10th Cir. 1995)). The protection extends to underlying facts only when they "inherently reveal the attorney's mental impression." *Onwuka v. Federal Express Corp.*, 178 F.R.D. 508, 512 (D.Minn. 1997); *Federal Practice and Procedure*, § 2024.

B. **Prepared In Anticipation Of Litigation**: The work product doctrine protects materials prepared for any litigation or trial as long as they were prepared by or for a party to the subsequent litigation. FRCP 26(b)(3); *F.T.C. v. Grolier Incorporated.*, 462 U.S. 19, 25 (1983). The test is whether "'in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.'" *United States v. Adlman*, 134 F.3d 1194, 1196 (2d Cir. 1998).

1. **Procedure**: To determine whether a document has been prepared "in anticipation of litigation," the court asks: (1) whether that document was prepared "because of" a party's subjective anticipation of litigation, as contrasted with ordinary business purpose; and (2) whether that subjective anticipation was objectively reasonable. *In re Professionals Direct Ins. Co.*, 578 F.3d 432, 439 (6th Cir. 2009). If a document is prepared in anticipation of litigation, the fact that it also serves an ordinary business purpose does not deprive it of protection. *Id.*

   a. **Difference Between "For" And "About"**: It is not enough to trigger work product protection that the *subject matter* of a document relates to a subject that might conceivably be litigated. *United States v. Textron Inc. and Subsidiaries*, 577 F.3d 21, 29 -30 (1st Cir. 2009). The literal language of FRCP 26(b)(3) protects materials *prepared for* any litigation or trial as long as they were prepared by or for a party to the subsequent litigation. *Id.*

   b. **Preparation By Lawyers Not Enough**: It is not enough that the materials were prepared by lawyers or represent legal thinking. *United States v. Textron Inc. and Subsidiaries*, 577 F.3d 21, 29 -30 (1st Cir. 2009). Even if prepared by lawyers and reflecting legal thinking, materials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes are not under the qualified immunity provided by this subdivision. FRCP 26 Advisory Committee Notes.

2. **Eventual Litigation**: The fact that litigation eventually ensues does not cloak materials prepared by an attorney with the protection of the work product doctrine. *Binks Mfg. Co. v. National Presto Indus., Inc.*, 709 F.2d 1109, 1119 (7th Cir. 1983). Conversely, even though litigation may have been contemplated, FRCP 26(b)(3) provides no protection for materials prepared in the regular course of business. *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 402 (8th Cir. 1987).

3. **Nonparties**: The rule, on its face, limits its protection to one who is a party (or a party's representative) to the litigation in which discovery is sought. *In re California Public Utilities Com'n*, 892 F.2d 778, 781 (9th Cir. 1989). "[D]ocuments prepared for one who is not a party to the present suit are wholly unprotected even though the person may be a party to a closely related lawsuit in which he will be disadvantaged if he must disclose in the present suit." Wright & Miller, *Federal Practice and Procedure* § 2024, at 201-02.

C. **Prepared By The Party**: The doctrine covers documents or tangible things prepared by a party's attorney, consultant, surety, indemnitor, insurer, or agent. *United States v. Nobles*, 422 U.S. 225, 238-39 (1975) (attorneys often must rely on investigators and the work product doctrine applies to materials prepared by such agents).

D. **Procedure**: A party seeking to withhold discoverable materials under the work product doctrine must expressly assert the claim, and, without revealing protected information, describe the documents or things not produced to enable other parties to assess the privilege's applicability. FRCP 26(b)(5); *Garcia v. City of El Centro*, 214 F.R.D. 587, 591 (S.D. Calif. 2003).

1. **Burden Of Proof**: The party resisting disclosure must establish the documents' eligibility for protection. *Binks*, 709 F.2d 1109, 1120 (7th Cir. 1983). The party claiming protection must show that anticipated litigation was the "driving force behind the preparation of each requested document." *In re Professionals Direct Ins. Co.*, 578 F.3d 432, 439 (6th Cir. 2009); *Nat'l Union Fire Ins. Co. of Pittsburgh v. Murray Sheet Metal Co.*, 967 F.2d 980, 984 (4th Cir. 1992).

E. **Attorney's Interest In Work Product**: Unlike the attorney-client privilege, the attorney has an independent privacy interest in his work product and may assert the work-product doctrine on his own behalf. *Sandra T.E. v. South Berwyn School Dist.*, 600 F.3d 612, 618 (7th Cir. 2010). The doctrine's protection is not waived simply because the attorney shared the information with his client. *Id.*

III. **Opinion v. Fact**: The work product doctrine shields both opinion and factual work product from discovery. *Pacific Fisheries, Inc. v. United States*, 539 F.3d 1143, 1148 (9th Cir. 2008). Courts distinguish between "opinion" and "fact" work product when considering the breadth of coverage.

A. **Opinion Work Product**: Opinion (or "core") work product describes documents containing "the mental impressions, conclusions, opinions, or legal theories of an attorney." *In re Murphy*, 560 F.2d 326, 336 (8th Cir. 1977). To be entitled to protection for opinion work product, the party asserting the privilege must show "a real, rather than speculative, concern" that the work product will reveal counsel's thought processes "in relation to pending or anticipated litigation." *In re Grand Jury Subpoena Dated July 6, 2005*, 510 F.3d 180, 183 -184 (2d Cir. 2007).

1. **Scope Of Protection**: Opinion work product has *near* absolute immunity. *In re Cendant Corp. Securities Litigation*, 343 F.3d 658, 663 (3rd Cir. 2003). In *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730, 735 (4th Cir. 1974), the court held that opinion work product is *absolutely* protected, but this is not the majority view.

2. **Examples**: Notes and memoranda of an attorney, or an attorney's agent, from a witness interview are opinion work product. *Baker v. General Motors Corp.*, 209 F.3d 1051, 1054 (8th Cir. 2000). Legal research details the mental impressions,

conclusions, and legal theories of attorneys and is opinion work product. *Chaudhry v. Gallerizzo*, 174 F.3d 394, 403 (4th Cir. 1999).

B. **Fact Work Product**: Fact (or "ordinary") work product describes materials prepared in anticipation of litigation but which do not contain the attorney's mental impressions. FRCP 26(b)(3) provides qualified immunity to fact work product. *Nat'l Union Fire Ins. Co. v. Murray Sheet Metal Co.*, 967 F.2d 980, 984 (4th Cir. 1992).

IV. Overcoming The Work Product Doctrine

A. **Obtaining Opinion Work Product**: Opinion work product may be discovered when mental impressions are at issue and the need for the material is compelling. *Holmgren v. State Farm Mut. Auto. Ins. Co.*, 976 F.2d 573, 577 (9th Cir. 1992); 4 *Federal Practice*, ¶ 26.64 (2d ed). The crime-fraud exception presents a rare and extraordinary circumstance in which opinion work product is discoverable. *Cox v. Administrator United States Steel & Carnegie*, 17 F.3d 1386, 1422 (11th Cir. 1994).

B. **Obtaining Ordinary Work Product**: To obtain ordinary work product a party must show both a substantial need for the information and that seeking the information through other means would cause undue hardship. *United Kingdom v. United States*, 238 F.3d 1312, 1322 (11th Cir. 2001)(*citing* FRCP 26(b)(3)). *See also Hickman*, 329 U.S. at 512-13 (production of the material is not merely relevant, but also necessary). Courts will generally not permit discovery of a witness's statement to opposing counsel if that witness is available to all parties. *Baker v. General Motors Corp.*, 209 F.3d 1051, 1054 (8th Cir. 2000).

V. **Waiver**: FRE 502, recently adopted, governs both the scope of intentional waiver and when unintentional disclosure results in a waiver. Under the rule, disclosure "does not operate as a waiver" if: "(1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B)." *See Eden Isle Marina, Inc. v. United States,* 89 Fed.Cl. 480, 501 -502 (2009).

A. **Inadvertent Disclosure**: Various courts apply "a multi-factor test for determining whether inadvertent disclosure is a waiver." FRE 502 Advisory Committee Notes (citing *Hartford Fire Ins. Co. v. Garvey,* 109 F.R.D. 323, 332 (N.D.Cal. 1985)). The advisory committee explained that FRE 502(b) did not "explicitly codify that test, because it is really a set of non-determinative guidelines that vary from case to case." *Id.* The advisory committee described factors that might bear on the inadvertence analysis: (1) "the reasonableness of precautions taken;" (2) "the time taken to rectify the error;" (3) "the scope of discovery;" (4) "the extent of disclosure;" (5) "the overriding issue of fairness;" (6) "the number of documents to be reviewed;" (7) "the time constraints for production;" (8) the use of "advanced analytical software applications and linguistic tools;" and (9) "[t]he implementation of an efficient system of records management before litigation." *Id.*

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1. **Must Be Actual Inadvertence**: Intentionally giving privileged documents to the other side, with the expectation they may be clawed back, is a flawed strategy. *Society of Professional Engineering Employees in Aerospace v. Boeing Co.*, 2010 WL 1141269, 5 (D.Kan.) (D.Kan. 2010) ("Boeing's decision to allow Spirit access to the e-mail messages from June 2005 to June 2006 was most assuredly *not* 'inadvertent.' Rather it was intentionally done for reasons of business continuity and economic convenience.").

2. **Time Taken To Rectify**: Delay in correcting a disclosure may result in loss of protection under FRE 502. *See Clarke v. J.P. Morgan Chase & Co.*, No. 08 Civ. 02400(CM)(DF), 2009 WL 970940, at *6 (S.D.N.Y. Apr. 10, 2009) (defendant's two-month delay in asserting privilege weighed in favor of finding a waiver; describes cases in which a waiver was found after a delay ranging from six days to one month); *Preferred Care Partners Holding Corp. v. Humana, Inc.*, 258 F.R.D. 684, 699-700 (S.D.Fla. 2009) (three-week delay in asserting privilege weighed in favor in finding a waiver of privilege).

B. **Disclosure Must Be Made In "Proceedings"**: The claw-back rule only protects documents disclosed (1) in Federal proceedings, (2) to a Federal office or agency, (3) in some state proceedings, or (4) pursuant to a court order. FRE 502. The new rule does not address disclosures to state agencies, *Bickler v. Senior Lifestyle Corp.*, 2010 WL 749924, 6 (D.Ariz. 2010), or disclosures to private parties outside of litigation.

C. **Documents Clawed Back**: (example) "Given that only four pages out of a more than 2000 page production were privileged, the documents were checked by three different attorneys prior to production, and counsel immediately sought the return of the documents once they discovered their mistake, return of the documents is required." *Edelen v. Campbell Soup Co.*, 2010 WL 774186, 23 (N.D.Ga. 2010).

VI. Specific Applications

A. **Testifying Experts**: In a significant rule change, many communications with experts are now protected under the work product doctrine. FRCP 26, as amended in 2010, now protects drafts and certain communications between a party's attorney and a testifying expert from disclosure. *PACT XPP v. Xilinx*, 2012 WL 1205855 (E.D. Tex.)(citing FRCP 26(b)(4)(B) & (C)). It is no longer true that all privileges and protections are waived as to confidential information disclosed to a testifying expert. *Id.*

1. **Non-Reporting Experts**: Although the amended rule explicitly provides these protections for expert witnesses who submit a written expert report under FRCP 26(a)(2)(B), the rules contemplate that privileges and protections may be available to protect communications with other types of expert witnesses. *PACT XPP Technologies, AG v. Xilinx, Inc.*, 2012 WL 1205855 (E.D. Tex.). "The rule does not itself protect communications between counsel and other expert witnesses, such as those for whom disclosure is required under Rule 26(a)(2)(C). The rule does not exclude protection under other doctrines, such as privilege or independent development of the work-product doctrine." FRCP 26 Advisory Note (2010).

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B. **Consultants**: "A party has the right to consult with experts without designating them as expert witnesses and without calling them at trial. The opposing party may discover the opinions of that expert only in two situations: 1) as provided in Rule 35, and 2) only "upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means." *Lehan v. Ambassador Programs, Inc.*, 190 F.R.D. 670, 671 (E.D. Wash. 2000)(FRCP 26(b)(4)(B)). Communications between consultants and testifying witness are discoverable and not privileged. *Trigon Insurance v. United States*, 204 F.R.D. 277, 282 (E.D. Va. 2001).

1. **Exceptions**: "A number of cases hold that 'exceptional circumstances' allowing for discovery of a non-testifying expert's opinion exist where the object or condition observed is not observable by an expert of the party seeking discovery." *Hartford Fire Ins. Co. v. Pure Air on the Lake Ltd. Partnership*, 154 F.R.D. 202, 208 (N.D.Ind. 1993)(*quoting Delcastor, Inc. v. Vail Assoc., Inc.*, 108 F.R.D. 405 (D.Colo. 1985); *see also, Dixon v. Cappellini*, 88 F.R.D. 1 (M.D.Pa. 1980). Likewise, "exceptional circumstances" can be shown where a non-testifying expert's report will be used by a testifying expert as the basis for an expert opinion. *Id.* (*citing Heitmann v. Concrete Pipe Machinery*, 98 F.R.D. 740 (E.D.Missouri 1983)).

C. **Attorney As Witness**: An attorney may testify as a fact witness without waiving work product privileges. *In re Pioneer Hi-bred International, Inc*, 238 F.3rd 1370, 1374 (Fed. Cir. 2001); *Motley v. Marathon Oil Co.*, 71 F.3d 1547, 1552 (10th Cir. 1995).

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[D3] EXECUTIVE PRIVILEGES

QUICK RULE: *Five executive privileges can serve as the basis for withholding documents in litigation: (1) Deliberative process privilege protects agency deliberation, (2) Investigative files privilege protects law enforcement files, (3) Informer's privilege protects the identity of informers, (4) Military and state secrets privilege protects national security, and (5) Presidential privilege protects presidential communications.*

DISCUSSION

I. **Deliberative Process Privilege**: The deliberative process privilege is a qualified privilege that is based "on the policy of protecting the decision making processes of government agencies." *Brennan Center for Justice at New York University School of Law v. U.S. Dept. of Justice*, 697 F.3d 184, 194 -195 (2d Cir. 2012)(citing *NLRB v. Sears, Roebuck, & Co.*, 421 U.S. 132, 150, (1975). The deliberative process privilege aims to protect documents that are both "predecisional" and "deliberative." *U.S. ex rel. Williams v. Renal Care Group, Inc.*, 696 F.3d 518, 527 (6th Cir. 2012)(citing *Norwood v. FAA*, 993 F.2d 570, 576 (6th Cir. 1993)). The privilege covers documents reflecting advisory opinions, recommendations, and deliberations that are part of a process by which government decisions and policies are formulated. *Department of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 2 (2001). The privilege also "seeks to protect the executive branch from judicial interference." *CACI Field Services, Inc. v. United States*, 12 Cl. Ct. 680, 687 (1987).

A. **Deliberative Process Test**: An inter- or intra-agency document may be withheld pursuant to the deliberative process privilege if it is: (1) 'predecisional,' i.e., 'prepared in order to assist an agency decisionmaker in arriving at his decision,' and (2) 'deliberative,' i.e., 'actually ... related to the process by which policies are formulated.' *Brennan Center for Justice at New York University School of Law v. U.S. Dept. of Justice*, 697 F.3d 184, 194 - 195 (2d Cir. 2012)(*quoting Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 482 (2d Cir. 1999)). The key question is whether disclosure of materials would expose an agency's decisionmaking process in such a way as to discourage discussion within the agency and thereby undermine the agency's ability to perform its functions. *Schell v. U.S. Dept. of Health & Human Services*, 843 F.2d 933, 940 (6th Cir. 1988).

B. **Procedure For Invoking Privilege**: First, agency head (or delegate) with control over the requested document must assert the privilege after personal consideration. *Marriott Intern. Resorts, L.P. v. United States*, 437 F.3d 1302, 1308 (Fed. Cir. 2006). Second, agency head or delegate must state with particularity what information is subject to the privilege. *Mobil Oil Corp. v. Department of Energy*, 102 F.R.D. 1, 5-6 (N.D.N.Y. 1983). Third, the agency must supply precise and certain reasons for maintaining the confidentiality of the requested document. *Id.* at 6; *Walsky Construction Co. v. United States*, 20 Cl.CT. 317 (1990).

C. **Breadth**: The privilege covers recommendations, draft documents, proposals, suggestions, and other subjective documents that reflect the writer's opinions rather than the agency's policy. *Dudman Communications Corp. v. Dep't of the Air Force*, 815 F.2d 1565, 1568 (D.C.Cir. 1987). Factual material is not protected. The privilege encompasses both documents and testimony concerning those documents. *KFC Nat'l Mgmt. Corp. v. NLRB*, 497 F.2d 298, 305 (2d Cir. 1974).

D. **Overcoming Privilege**: If a party challenges the deliberative process privilege, the court balances the relevance of the sought evidence, the availability of other evidence, the seriousness of the litigation, the government's role, and the possibility of future timidity by government employees. *In re Subpoena Served Upon the Comptroller of the Currency*, 967 F.2d 630, 634 (D.C.Cir. 1992).

II. **Investigative Files Privilege**: Federal common law recognizes a qualified privilege protecting investigative files in an ongoing criminal investigation. *In re U.S. Dept. of Homeland Sec.*, 459 F.3d 565, 569 (5th Cir. 2006)(*citing Coughlin v. Lee*, 946 F.2d 1152, 1159 (5th Cir. 1991)). "The law enforcement privilege plays a critical role in litigation involving the government." *In re The City of New York*, 607 F.3d 923, 940 -941 (2d Cir. 2010). The purpose of the privilege "to prevent disclosure of law enforcement techniques and procedures, to preserve the confidentiality of sources, to protect witness and law enforcement personnel, to safeguard the privacy of individuals involved in an investigation, and otherwise to prevent interference with an investigation." *Id.*; *Forest Products Northwest, Inc. v. United States*, 62 Fed. Cl. 109, 112-13 (2004).

III. **Informer's Privilege**: "What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law." *R.C.O. Reforesting v. United States*, 42 Fed.Cl. 405, 409 (1998)(*citing Roviaro v. United States*, 353 U.S. 53, 59 (1957)). There is generally a strong presumption against disclosure if the confidential informant is a mere "tipster." *See United States v. Sykes*, 977 F.2d 1242, 1245–46 (8th Cir. 1992). To overcome the government's privilege of nondisclosure, defendants must establish beyond mere speculation that the informant's testimony will be material to the determination of the case. *United States v. Lindsey* 284 F.3d 874, 877 (8th Cir. 2002)(*citing United States v. Harrington*, 951 F.2d 876, 877 (8th Cir. 1991)).

IV. **Military And State Secrets Privilege**: This privilege applies when "there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged." *United States v. Reynolds*, 345 U.S. 1, 10 (1953). *See also Guong v. United States*, 860 F.2d 1063, 1066 (Fed. Cir. 1988).

V. **Presidential Privilege**: The presidential privilege protects from disclosure confidential presidential communications between the President and his or her senior advisors. *United States v. Nixon*, 418 U.S. 683, 706, 708 (1974).

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[D4] OTHER PRIVILEGES

QUICK RULE: *In "federal question" suits, the only sources of evidentiary privileges come from the Constitution, Acts of Congress, and Federal common law. FRE 501. In civil actions, where an element of the action or defense is based upon state law, then that state's rules of privileges will apply. Id.*
The party seeking to assert an evidentiary privilege has the burden of establishing its applicability. Motley v. Marathon Oil Co., 71 F.3d 1547, 1550 (10th Cir. 1995).

DISCUSSION

I. **Fifth Amendment**: The Fifth Amendment guarantees that no person shall be compelled to be a witness against himself. This privilege applies in a civil context. *Pillsbury Co. v. Conboy*, 459 U.S. 248, 256-7 (1983). The party invoking the privilege need only demonstrate a possibility of criminal prosecution, even if the possibility is remote. *Andover Data Servs. v. Statistical Tabulating*, 876 F.2d 1080, 1082 (2d Cir. 1989). The privilege only protects individuals, and may not be invoked by a corporation, association, partnership, labor union, or other collective entity. *Braswell v. United States*, 487 U.S. 99, 108-114 (1988). Absent a formal statutory grant of immunity, a court may not constitutionally compel a witness to testify over a valid assertion of his privilege. *Taylor v. Singletary*, 148 F.3d 1276, 1283 n.7 (11th Cir. 1998).

A. **Witness Is Party**: Even if the witness is a party, the witness does not forfeit his right to refuse to answer a question. "It is inconceivable that by exercising the constitutional right to bring or defend an action a person waives his or her constitutional right not to be a witness against himself or herself, and no case has so held." 8 *Federal Practice and Procedure*, § 2018 (2d ed.).

1. **Test**: There are exceptions to this principle. If a party refuses to answer incriminating questions, courts considering sanctions evaluate: (1) the validity of the privilege assertion, (2) the costs to the witness of compelling him to answer the deposition questions, (3) whether upholding his assertion thwarts discovery of issues at the heart of the lawsuit, and (4) whether and how easily the party seeking discovery could obtain the information from other sources. *Swann v. City of Richmond*, 462 F.Supp.2d 709, 712 -713 (E.D.Va. 2006) (*citing Wehling v. Columbia Broadcasting Sys.*, 608 F.2d 1084, 1086 (5th Cir. 1979). *Mount Vernon Sav. and Loan v. Partridge Assocs.*, 679 F.Supp. 522, 529 (D.Md. 1987)).

B. **Specific Questions**: A claim of privilege against self incrimination must be directed to specific questions. *North River Ins. Co. v. Stefanou*, 831 F.2d 484, 487 (4th Cir. 1987). By objecting to particular questions, a record is made by which the court may determine whether the privilege claim is valid.

II. **Accountant/Client Privilege**: Neither federal statute nor federal common law recognize an accountant/client privilege. *Couch v. United States*, 409 U.S. 322, 335 (1973).

III. **Banker/Client Privilege**: Neither federal statute nor federal common law recognize a banker/ client privilege. *Young v. U.S. Dept. of Justice*, 882 F.2d 633, 642 (2nd Cir. 1989).

IV. **Physician/Patient Privilege**: Neither federal statute nor federal common law recognize a physician/ patient (or hospital-patient) privilege. *Northwestern Memorial Hosp. v. Ashcroft*, 362 F.3d 923, 926 (7th Cir. 2004); *Whalen v. Roe*, 429 U.S. 589, 602 (1977).

V. **Priest/Penitent Privilege**: Federal courts recognize the priest-penitent privilege, protecting confidential communications, confessions, and advice from discovery. *Trammel v. United States*, 445 U.S. 40, 51 (1980); *United States v. Gordon*, 655 F.2d 478, 486 (2d Cir. 1981).

VI. **Therapist/Patient Privilege**: Federal courts recognize a privilege protecting confidential communications between a licensed psychiatrist/ therapist made in the course of treatment. *Jaffee v. Redmond*, 518 U.S. 1, 116 (1996). A witness can waive this privilege by putting their metal state at issue by: seeking to recover for emotional distress, *see Doe v. Dairy*, 456 F.3d 704 (7th Cir. 2006); basing her claim upon the psychotherapist's communications with her; or selectively disclosing part of a privileged communication to gain an advantage in litigation. *Koch v. Cox*, 489 F.3d 384, 389 -391 (D.C. Cir. 2007). A plaintiff does not put his mental state in issue merely by acknowledging he suffers from depression, for which he is not seeking recompense; nor may a defendant overcome the privilege by putting the plaintiff's mental state in issue. *Id.*

VII. **Adverse Spousal Privilege**: An individual "may be neither compelled to testify nor foreclosed from testifying" against the person to whom he or she is married at the time of trial. *United States v. Espino*, 317 F.3d 788, 796 (8th Cir. 2003). The testifying spouse may waive the privilege without consent of the defendant spouse. *Id.* This privilege may not be asserted after a marriage has ended. *Pereira v. United States*, 347 U.S. 1, 6 (1954).

A. **Civil Proceedings**: It is an open question as to whether this privilege applies in civil proceedings, and if it applies when the witness's spouse is not a party, even if the testimony is adverse. *See Knepp v. United Stone Veneer, LLC.*, 2007 WL 2597936, 3 (M.D.Pa. 2007).

VIII. **Confidential Marital Communications Privilege**: Federal courts protect confidential communications made by one spouse to the other during the marriage. *Trammel v. United States*, 445 U.S. 40, 51 (1980). Either spouse may assert this privilege. The privilege has three prerequisites: (1) at the time of communication there must have been a legally recognized marriage; (2) the privilege applies only to "utterances or expressions intended by one spouse to convey a message to the other," *United States v. Lustig*, 555 F.2d 737, 748 (9th Cir. 1977); and (3) the communication must be made in confidence. 2 Weinstein and Berger, *Weinstein's Evidence* § 505[4] (1992).

A. **Exceptions**: Courts recognize exceptions to the privilege: (1) communications pertaining to the spouses' joint criminal activity, and (2) where the communications were made after

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the spouses have permanently separated, even though not legally divorced. *In Re Witness Before Grand Jury*, 791 F.2d 234, 238 (2d Cir. 1986).

B. Breadth: The marital communications privilege probably applies to civil matters and even applies if the witness or witness's spouse is not a party to the proceeding. *See Caplan v. Fellheimer Eichen Braverman & Kaskey,* 162 F.R.D. 490, 492 (E.D.Pa. 1995)(implying that the marital communications privilege applies in a civil context). The rationale behind the privilege of encouraging open and honest communications is only furthered if the spouses are able to keep the communication confidential, regardless of the type of case.

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Hearsay | E1 - 1

[E1] HEARSAY (GENERAL)

QUICK RULE: *Hearsay is (1) an oral, written, or nonverbal assertion, (2) other than one made while testifying at the trial or hearing, (3) offered in evidence to prove the truth of the matter asserted. FRE 801(c). Hearsay is generally not admissible, unless made admissible by the Federal Rules or statute. FRE 802.*

DISCUSSION

I. **Overview:** The hearsay rule limits out-of-court statements from being admitted into evidence to establish the truth of the facts contained in those out-of-court statements. Courts exclude hearsay because it denies any opportunity for the adversary to cross-examine the absent declarant whose out-of-court statement is introduced into evidence. *Anderson v. United States*, 417 U.S. 211, 219-221 (1974). Two types of statements (certain prior statements of a testifying witness and statements by the opposing party) are deemed not hearsay because of the opportunity to examine the out-of-court declarant during the trial. Exceptions to the hearsay exist where circumstances offer indicia that the out-of-court statements were truthful.

II. **Hearsay Elements**: Hearsay is (1) a "statement," including oral, written, or nonverbal assertion, (2) other than one made while testifying at the trial or hearing, (3) offered in evidence to prove the truth of the matter asserted. FRE 801(c). *Superior Fireplace Co. v. Majestic Products Co.*, 270 F.3d 1358, 1366 (Fed. Cir. 2001).

A. **Statements**: The hearsay rule encompasses any statements whether oral, written, or nonverbal, intended to convey information. The FRE define "statement" to exclude from the operation of the hearsay rule all evidence of conduct, verbal or nonverbal, not intended as an assertion. FRE 801 Advisory Committee Notes.

1. **Non-Verbal Assertion**: Under FRE 801(a), a "statement" is defined as nonverbal conduct "intended by the person as an assertion." *See United States v. Hensel,* 699 F.2d 18, 31 (1st Cir. 1983). Pointing to or pointing out something can, in some circumstances, be nonverbal hearsay. *See United States v. Caro,* 569 F.2d 411, 417 n. 9 (5th Cir. 1978) (pointing out a vehicle containing the defendant's source was assertive conduct).

a. **Silence Can Be Hearsay**: In some circumstances, silence can be a nonverbal assertion. *United States v. Kenyon,* 481 F.3d 1054, 1065 (8th Cir. 2007). "[A] statement is attributable to a person when he or she stands silent in the face of its utterance if the natural response would be to deny it if untrue." *Rahn v. Hawkins,* 464 F.3d 813, 821 (8th Cir. 2006).

2. **Judgments And Factfindings**: A court judgment is hearsay "to the extent that it is offered to prove the truth of the matters asserted in the judgment." *United States v. Boulware,* 384 F.3d 794, 806 (9th Cir. 2004); *see also* 2 *McCormick on Evidence*, §

298, at 337 (historically, prior judgments have been treated as hearsay). Similarly, courts find hearsay in prior judicial factfindings and analysis underlying a judgment, when the factfindings and analysis are offered to prove their truth. *United States v. Sine*, 493 F.3d 1021, 1036 (9th Cir. 2007).

a. **Rationale**: Judgments are generally not usable in subsequent proceedings as evidence of the facts underlying the judgment because of the difficulty of weighing a judgment, considered as evidence, against whatever contrary evidence a party to the current suit might want to present. *Greycas, Inc. v. Proud*, 826 F.2d 1560, 1567 (7th Cir. 1987).

3. **Medium Is Irrelevant**: It makes no difference under the hearsay rule whether the out-of-court statement is recalled by a witness at trial, contained in a document, or recorded in some device. Any statement in any document offered to prove the truth of the matter asserted in that document is hearsay, unless the author is a party. *Brooks v. Tri-Systems, Inc.*, 425 F.3d 1109, 1111 (8th Cir. 2005). A tape recording of an out-of-court conversation, offered for the truth of the matter asserted, is also hearsay. *See United States v. Hoffecker*, 530 F.3d 137, 192 (3rd Cir. 2008).

4. **Implied Assertions Not Hearsay**: FRE 801 removes implied assertions from the coverage of the hearsay rule. *United States v. Lewis*, 902 F.2d 1176, 1179 (5th Cir. 1990) (holding that the question "Did you get the stuff?" was not a statement and therefore not hearsay).

5. **Confirming Conversation Not Hearsay**: Asking a witness about the existence of an out-of-court conversation does not call for hearsay, provided that neither the question nor the answer indicates the contents of the conversation. *United States v. Two Elk*, 536 F.3d 890, 900 (8th Cir. 2008)("Did Francine Murphy advise you" deemed not hearsay).

6. **Testifying From Personal Knowledge**: When a witness testifies from his own experience, rather than recounting prior oral or written assertions, his testimony is not hearsay. *United States v. Aviles-Colon*, 536 F.3d 1, 15 (1st Cir. 2008) (citing *United States v. Flemmi*, 402 F.3d 79, 93 n. 21 (1st Cir. 2005)).

B. **Declarant Must Be Human**: The hearsay rule only encompasses statements made by a human declarant. *United States v. Washington*, 498 F.3d 225, 231 (4th Cir. 2007). Raw data generated by a machine is not a statement under the hearsay rules. *Id.* Accordingly, "nothing 'said' by a machine . . . is hearsay." 4 *Federal Evidence*, § 380, at 65 (2d ed). *See United States v. Hamilton*, 413 F.3d 1138, 1142-43 (10th Cir. 2005) (computer-generated information accompanying pornographic images on the Internet was not a hearsay statement because there was no "person" acting as a declarant); *United States v. Khorozian*, 333 F.3d 498, 506 (3d Cir. 2003) (automatically generated time stamp on a fax was not a hearsay statement). Concerns about the reliability of machine-generated information are addressed through authentication not by hearsay.

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1. **Distinction Between Testimony And Data**: "A physician may order a blood test for a patient and infer from the levels of sugar and insulin that the patient has diabetes. The physician's diagnosis is testimonial, but the lab's raw results are not, because data are not 'statements' in any useful sense." *United States v. Lamons*, 532 F.3d 1251, 1263 (11th Cir. 2008).

C. **Statement Offered In Evidence To Prove The Truth Of The Matter Asserted**: Out-of-court statements constitute hearsay only when offered in evidence to prove the truth of the matter asserted. FRE 801(c). *See also Anderson v. United States*, 417 U.S. 211, 219-221 (1974) (citing 5 Wigmore, *Evidence* § 1361 (3d ed); McCormick, *Law of Evidence* 460 (1954)). If the statement is not offered to establish the facts asserted, there is no missed opportunity for cross examination as to their veracity. *Id.* (*citing Dutton v. Evans*, 400 U.S. 74, 88 (1970)). Many categories of statements are not "assertions" and thus not barred by the hearsay rules.

1. **Verbal Acts**: The hearsay rule excludes 'verbal acts' and 'verbal parts of an act,' in which the statement itself affects the legal rights of the parties or is a circumstance bearing on conduct affecting their rights. FRE 801 Advisory Committee Notes. A witness who testifies at trial that someone solicited them to commit a crime is testifying to a verbal act of which the witness has direct knowledge: the extension of the invitation. *United States v. Childs*, 539 F.3d 552, 559 (6th Cir. 2008). The words allegedly spoken by the solicitor are not a "statement" because they do not constitute an "assertion." *Id.*

2. **Conveying Information**: An out-of-court statement is not hearsay if it is used only to show that the statement was made and that the listener heard the words uttered. *United States v. Munoz*, 36 F.3d 1229, 1233 (1st Cir. 1994).

3. **Motivation**: An out of court statement offered to show a person's motivation is not offered for the truth of the matter asserted in that statement. *Wilson v. Sirmons*, 536 F.3d 1064, 1111 (10th Cir. 2008).

4. **Possession**: Documents offered to establish that they were in the defendant's possession, and not for the truth asserted within the documents, do not raise hearsay concerns. *United States v. Fowler*, 535 F.3d 408, 422 (6th Cir. 2008).

5. **Effect On Listener**: Out of court statements may be admitted to show the effect of hearing that information upon the testifying witness. *United States v. Caver*, 470 F.3d 220, 239 (6th Cir. 2006). Background information that explains how law enforcement came to be involved with a particular defendant is not hearsay, because it is not being offered for the truth of the matter asserted. *United States v. Aguwa*, 123 F.3d 418, 421 (6th Cir. 1997).

6. **Comparing Past Testimony**: A request that the witness draw a comparison between his prior testimony and his trial testimony and describe whether the former was truthful did not call for hearsay. *United States v. Martinez*, 76 F.3d 1145, 1150 - 1151 (10 Cir. 1996).

7. **Impeachment**: Statements offered to impeach trial testimony, and not for the truth of the matter asserted, are not hearsay. FRE 801(c); *United States v. Causey*, 834 F.2d 1277, 1282-83 (6th Cir. 1987).

8. **Basis Of Expert's Opinion**: Rule 703 permits experts to rely on hearsay so long as that hearsay is of the kind normally employed by experts in the field. *In re TMI Litigation,* 193 F.3d 613, 697 (3rd Cir. 1999). This does not make the hearsay admissible for the truth of the matter contained within. *United States v. W.R. Grace*, 504 F.3d 745, 759 (9th Cir. 2007). To the extent that inadmissible evidence is reasonably relied upon by an expert, a limiting instruction typically is needed - *i.e.*, the evidence is admitted only to help the jury evaluate the expert's evidence. *E.g., United States v. 0.59 Acres of Land,* 109 F.3d 1493, 1496 (9th Cir. 1997) (error to admit hearsay offered as the basis of an expert opinion without a limiting instruction).

9. **Interpreters**: Except in unusual circumstances, an interpreter is no more than a language conduit and therefore his translation does not create an additional level of hearsay. *United States v. Martinez-Gayton,* 213 F.3d 890, 892 (5th Cir. 2000).

   a. **Exceptions**: From the general rule regarding interpreters, some courts have carved out a narrow exception that is applied where the particular facts of a case cast significant doubt upon the accuracy of a translated confession. *United States v. Martinez-Gayton,* 213 F.3d 890, 892 (5th Cir. 2000). Courts have identified four factors to determine whether this exception applies: "1) which party supplied the interpreter; 2) whether the interpreter had a motive to mislead or distort; 3) the interpreter's qualifications and language skills; and 4) whether actions taken subsequent to the conversation were consistent with the statements translated." *Id.* (citing *United States v. Nazemian,* 948 F.2d 522, 525-27 (9th Cir. 1991)).

10. **Names**: Evidence as to names is commonly regarded as either not hearsay because it is not introduced to prove the truth of the matter asserted or so imbued with reliability because of the name's common usage as to make any objection frivolous. *United States v. Allen*, 960 F.2d 1055, 1059 (D.C. Cir. 1992) (*citing Wigmore, Evidence* § 667a, at 928).

IV. **Double Hearsay**: "Double hearsay" is hearsay that contains hearsay. *See Shell v. Parrish,* 448 F.2d 528, 533 (6th Cir. 1971). Double hearsay arises when one out-of-court statement contains a second out-of-court statement. "Double hearsay" is inadmissible unless an exception exists for each separate level of hearsay. *See* FRE 805; *Miller v. Field,* 35 F.3d 1088, 1090 (6th Cir. 1994).

A. **Example**: If a document contains information told to the author, the document contains double hearsay. The statements made to the author, and the author's statements on the paper. Both layers of hearsay must be accounted for. *TK-7 Corp. v. Estate of Barbouti,* 993 F.2d 722, 729 (10th Cir. 1993).

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B. **Triple Play**: Courts have found triple hearsay as well. In *United States v. Santisteban*, 501 F.3d 873, 878 -879 (8th Cir. 2007), the court found three layers: (1) the author's out-of-court statement recorded in the memorandum, (2) the investigator's statement to the author (*i.e.,* that Cruz made a particular statement to the investigator), and (3) Cruz's statement to the investigator (*i.e.,* regarding Fernandez's actions). Because there were not exceptions available for each level, Cruz's out of court statement, lodged in the memorandum, was not admissible.

V. **Admission For Limited Purpose**: Some evidence has two bases for admissibility, only one of which would be limited by the hearsay rule. The evidence raises a hearsay concern if offered for the truth of the matter asserted, but has evidentiary value for some other purpose. In such circumstances, the court may admit the statements for the limited purpose regarding their non-hearsay value. *See e.g. United States v. Missouri*, (8th Cir. 2008).

VI. **Hearsay Myths**: Given the complexity of the hearsay rules, some myths have grown up around its application.

A. **Witness On The Stand**: Perhaps the grandest hearsay myth is that if the witness is on the stand, he or she may recount their own out of court statements (or read from documents that recount those statements). There is some logic to this, because the witness is available for cross, but the rule is mythical. *See United States v. Levine*, 378 F.Supp.2d 872, 875 (E.D.Ark. 2005). Unless an exception is to be found, or the out-of-court statement is not offered for its truth, the witness cannot testify as to his or her own out of court statement.

B. **Background**: There is no "background" exception to the hearsay rule. As one judge noted "Over the years, I have carefully reviewed the rules of evidence in an attempt to find the "background" exception to the hearsay rule. Thus far, I haven't been able to locate the rule; but it is firmly established in courthouse lore." *United States v. Levine*, 378 F.Supp.2d 872, 875 (E.D.Ark. 2005).

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Hearsay | E2 - 1

[E2] HEARSAY: PARTY ADMISSIONS

QUICK RULE: *A party's out of court statements are not hearsay, when offered into evidence by the opposing party. FRE 801(d)(2).*

DISCUSSION

I. **An Admission By A Party Opponent**: Pursuant to FRE 801(d)(2), an out-of-court statement offered against a party is not hearsay if it falls into one of five groups:

(1) it was the party's own statement,
(2) the party has adopted the statement,
(3) the statement was made by an authorized declarant,
(4) the statement was by the party's agent or servant concerning a matter within the scope of the agency or employment, or
(5) the statement is made by a co-conspirator in furtherance of the conspiracy.

These are not bright line categories and many statements have been found to fall within more than one.

A. **Overview**: Admissions are excluded from the hearsay rule as a result of the adversary system. 2 *McCormick on Evidence,* § 254, at 137. Admissions "pass the gauntlet of the hearsay rule," because the declarant, in the circumstance of making an admission, is "the only one to invoke the hearsay rule and because he does not need to cross-examine himself." 4 *Evidence in Trials at Common Law,* § 1048, at 4. In other words, the hearsay rule is satisfied; the party/declarant can put himself on the stand and explain his former assertion. *Id.* at 5.

1. **Effect Of Exception**: A party's admissions are received as substantive evidence of the facts admitted and not merely to contradict the party. As a result, no foundation by first examining the party, as required for impeaching a witness with a prior inconsistent statement, is mandated for admissions. 2 *McCormick on Evidence,* § 254, at 135-37.

2. **Burden Of Proof**: The proponent of the evidence must prove by a preponderance of the evidence the preliminary facts that bring the statement within FRE 801(d)(2). *United States v. Richards*, 204 F.3d 177, 202 (5th Cir. 2000). Under FRE 104, courts must consider all evidence when determining admissibility; thus the court may consider the hearsay statement itself when making the determination as to whether the proffered statement is an admission. *See Bourjaily v. United States,* 483 U.S. 171, 177-81 (1987); *DCS Sanitation Management, Inc. v. Occupational Safety and Health Review Com'n,* 82 F.3d 812, 815 (8th Cir. 1996).

B. **Nature Of Statement Irrelevant**: The statement need only be made by the party against whom it is offered. *United States v. McGee*, 189 F.3d 626, 631 (7th Cir. 1999). "On its face, Rule 801(d)(2) does not limit an admission to a statement against interest.

Furthermore, this court has refused to place such a limited construction on the scope of an admission." *United States v. Turner*, 995 F.2d 1357, 1363 (6th Cir. 1993).

1. **Not Only Statements Against Interest**: "A type of evidence with which admissions may be confused is evidence of declarations against interest. The latter, treated under a separate exception to the hearsay rule, must have been against the declarant's interest when made. No such requirement applies to admissions." *McCormick on Evidence* § 254, at 143.

II. **Party's Own Statement**: A party admission will include any statement by the party in either an individual or representative capacity. Statements made by executives or managers are admissions by corporate parties because they were made while the speaker represented the company. *Embrico v. U.S. Steel Corp.*, 404 F.Supp.2d 802, 806 (E.D.Pa. 2005).

III. **Adopted Statements**: If a party adopts the statements of another, the adoptive-admission doctrine permits the fact finder to treat those statements as the party's statements - as if the party made the statement. *United States v. Williams*, 445 F.3d 724, 735 (4th Cir. 2006)

A. **Method Of Adoption**: "A party may manifest adoption of a statement in any number of ways, including through words, conduct, or silence." *United States v. Robinson*, 275 F.3d 371, 383 (4th Cir. 2001); *Carr v. Deeds*, 453 F.3d 593, 607 (4th Cir. 2006).

1. **Examples**: Reviewing, categorizing, and evaluating documents with hearsay does not demonstrate that a party has adopted the information within. *Brown v. Crown Equipment Corp.*, 445 F.Supp.2d 59, 66 (D.Me. 2006). Receiving and forwarding emails manifests an adoption or belief in the truth of the statements therein. *United States v. Safavian*, 435 F.Supp.2d 36, 43 -44 (D.D.C. 2006).

B. **Adoption Through Silence**: A statement may be adopted through silence. *Vazquez v. Lopez-Rosario*, 134 F.3d 28, 35 (1st Cir. 1998). When a party claims silent-adoption, the primary inquiry is (1) whether the statement and circumstances were such that the person claimed to have adopted the statement would normally be induced to respond, and (2) whether there are sufficient foundational facts from which the factfinder could infer that the alleged adopter heard, understood, and acquiesced in the statement. *United States v. Williams*, 445 F.3d 724, 735 (4th Cir. 2006).

IV. **Statement In Authorized Capacity**: A statement offered against a party is not hearsay if the statement is made by a person authorized by the party to make a statement concerning the subject. *See Skillsky v. Lucky Stores, Inc.*, 893 F.2d 1088, 1091-92 (9th Cir. 1990) ("no evidence that [the person who related the alleged statement] had any authority to make [such] admissions"); FRE 801(d)(2)(C).

V. **Statement By A Party's Agent**: Statements by an agent or servant within the scope of the agency or employment are considered party admissions by the principal. *Fischer v. Avanade, Inc.*, 519 F.3d 393, 405 (7th Cir. 2008); FRE 801(d)(2)(D). In order to show that a statement falls within this rule and is therefore not hearsay, the party must show "(1) the existence of the agency relationship, (2) that the statement was made during the course of the relationship, and

(3) that it relates to a matter within the scope of the agency." *Pappas v. Middle Earth Condo. Ass'n,* 963 F.2d 534, 537 (2d Cir. 1992).

A. **Establishing Agency**: An agency relationship between an employee declarant and a defendant employer may be established by a variety of evidence, *United States v. Agne*, 214 F.3d 47, 55 (1st Cir. 2000), such as evidence that the declarant is directly responsible to the defendant, *see Zaken v. Boerer,* 964 F.2d 1319, 1322-23 (2d Cir. 1992); that the declarant reports directly to the defendant who owns an overwhelming majority of stock in the company, *see United States v. Paxson,* 861 F.2d 730, 734 (D.C.Cir. 1988); that the declarant was hired by the defendant and worked on matters in which the defendant was actively involved, *see United States v. Draiman,* 784 F.2d 248, 256-57 (7th Cir. 1986); or that the defendant directed the declarant's work on a continuing basis. *Boren v. Sable,* 887 F.2d 1032, 1041 (10th Cir. 1989).

1. **Hearsay Statement May Be Considered**: When a court is evaluating whether an agency foundation has been established, '[t]he contents of the statement shall be considered but are not alone sufficient to establish . . . the agency or employment relationship and scope thereof.'" *Sea-Land Service, Inc. v. Lozen Int'l, LLC,* 285 F.3d 808, 821 (9th Cir. 2002).

2. **Agency**: Because the rule does not define the term "agent," courts assume that Congress intended to refer to general common law principles of agency. *City of Tuscaloosa v. Harcros Chemicals,* Inc., 158 F.3d 548, 558 (11th Cir. 1999).

3. **Agency Relationship With Corporate Executive**: The statements of a corporate employee may be admitted against a corporate officer, as well as against the corporation, if the factors which normally make up an agency relationship are present. *United States v. Agne*, 214 F.3d 47, 54 -55 (1st Cir. 2000).

B. **Statements Made During Relationship**: To be admissible, the statement must be made during the agency relationship. A statement made after the agency relationship has ended is not a party admission and thus is not excluded from hearsay under 801(d)(2)(D). *Quintanilla v. AK Tube LLC,* 477 F.Supp.2d 828, 836 -837 (N.D.Ohio 2007) (citing *NLRB v. Sherwood Trucking Co.,* 775 F.2d 744, 750 (6th Cir. 1985).

C. **Matters Within Scope Of Agency**: The employee's station within the organization is not relevant to the Rule 801(d)(2) analysis. *McDonough v. City of Quincy,* 452 F.3d 8, 21 (1st Cir. 2006). The relevant inquiry is whether the employee's statement was made within the scope of employment. *Id.*

1. **Responsibility Need Not Include Making The Statement**: A corporation's agent need not have authority to make the statement at issue, but rather the subject of the statement must relate to the employee's area of authority. *United States v. Brothers Const. Co. of Ohio*, 219 F.3d 300, 311 (4th Cir. 2002). "The authority granted in the agency relationship need not include authority to make damaging statements, but simply the authority to take action about which the statements relate." *Pappas v. Middle Earth Condominium Ass'n,* 963 F.2d 534, 539 (2d Cir. 1992). The statement

need not be within the scope of the declarant's agency. *United States v. Petraia Maritime Ltd.*, 489 F.Supp.2d 90, 96 (D.Me. 2007). It need only be shown that the statement be related to a matter within the agency's scope. *Larch v. Mansfield Mun. Elec. Dep't,* 272 F.3d 63, 72 (1st Cir. 2001).

2. **Declarant Need Not Be Final Authority**: The declarant need not be the 'final decisionmaker' on a matter for his statements on that matter to be deemed within the scope of his agency. Rather, he need only be an advisor or other significant participant in the decision-making process that is the subject matter of the statement. *Nyack v. Southern Conn. State University,* 424 F.Supp.2d 370, 375 (D.Conn. 2006) (quoting *United States v. Rioux,* 97 F.3d 648, 661 (2d Cir. 1996).

3. **Examples Of Statements Within Agency**:

• Statements of a deputy police chief regarding promotion eligibility were admissible nonhearsay because deputy chief was "charged with managing the promotional process." *Grizzell v. City of Columbus Div. of Police,* 461 F.3d 711, 722 (6th Cir. 2006).

• Statements of university's vice provost regarding potential racial prejudice at the university were admissible nonhearsay because of the vice provost's "oversight of the affirmative action process at the University." *Carter v. Univ. of Toledo,* 349 F.3d 269, 276 (6th Cir. 2003).

• Admission found where declarant was an "advisor or other significant participant in the decisionmaking process that is the subject matter of the statement." *United States v. Rioux*, 97 F.3d 648, 661 (2d Cir. 1996)

4. **Examples Of Statements Not Within Agency**:

• Supervisor's statement not within scope of her employment and therefore was inadmissible hearsay because supervisor "was not involved in the actions that plaintiff claims led to her constructive discharge." *Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp.,* 176 F.3d 921, 928 (6th Cir. 1999).

• Executives' statements that another executive had problems with women were not made in the declarants' official capacity and thus not within the scope of their agency powers. *Henderson v. General Elec. Co.,* 469 F.Supp.2d 2, 11 (D.Conn. 2006); *see also E.E.O.C. v. Con Way Freight, Inc.*, 622 F.3d 933, 937 (8th Cir. 2010) (Statement not within scope of employment, and thus not party admission.).

• Evidence was not admissible under Rule 801(d)(2)(D) where "there was no evidence that [the declarants] had any involvement in the decision to discharge [the plaintiff]"). *Hill v. Spiegel*, 708 F.2d 233, 237 (6th Cir. 1983).

VI. Examples And Special Cases Regarding Party Admissions:

A. **Attorney Statements**: Attorneys are acting in an "authorized capacity" when they make statements in briefs on behalf of their clients; such statements may be admissible. *Purgess v. Sharrock,* 33 F.3d 134, 144 (2nd Cir. 1994) (*citing* FRE 801(d)(2)(c) (authorized

capacity)). An admission by an attorney in filed pleadings is not hearsay, and is admissible evidence, as it is a statement of party's agent concerning a matter within the scope of the agency made during existence of "the relationship." *Automobile Ins. Co. of Hartford Connecticut v. Murray, Inc.*, 571 F.Supp.2d 408, 425 (W.D.N.Y. 2008). ***Less conclusive:*** An attorney *may be* the agent of his client for purposes of FRE 801(d)(2)(D). *United States v. Swan,* 486 F.3d 260, 265 (7th Cir. 2007); *United States v. Harris,* 914 F.2d 927, 931 (7th Cir. 1990).

B. **Corporate Executives**: Because a corporation can act only through its employees, a corporate official's statement is an admission by a corporate defendant. *United States v. Brothers Constr. Co.*, 219 F.3d 300, 310-11 (4th Cir. 2000). Statements made by a company's president can be attributed to the party as an admission and, thus, are not hearsay under FRE 801(d)(2)(A). *King v. Auto, Truck, Indus. Parts and Supply, Inc.*, 21 F.Supp.2d 1370, 1381 (N.D.Fla. 1998); *Fischer v. Forestwood Co., Inc.*, 525 F.3d 972, 984 (10th Cir. 2008). Similarly, statements by a corporate executive are admissible under FRE 801(d)(2)(D) (agency) because executives are agents or servants. *City of Tuscaloosa v. Harcros Chemicals, Inc.*, 158 F.3d 548, 557 -558 (11th Cir. 1998).

1. **Managers**: "Rule 801(d)(2)(D) is designed to bind the employer where one of its managerial employees makes a statement within the scope of the employee's duties as a manager." *Barner v. Pilkington N. Am., Inc.*, 399 F.3d 745, 750 (6th Cir. 2005). "Scope of employment criterion extends beyond direct decision-makers." *Carter v. Univ. of Toledo,* 349 F.3d 269, 275 (6th Cir. 2003); *see also Grizzell v. City of Columbus Div. of Police,* 461 F.3d 711, 722 (6th Cir. 2006).

C. **Government Agents And Employees**: When the Government is a litigant in a case, statements from employees of any agency may be taken as admissions by the government and thus are not subject to the hearsay rule. *United States v. AT&T*, 498 F.Supp. 353 (D.D.C. 1980). *See also Rodriguez v. United States,* 69 Fed. Cl. 487, 493 n. 8 (Fed.Cl. 2006) (finding testimony to qualify as admission by party-opponent under FRE 801(d)(2)(D) because all "all five deponents are current employees of the United States and they limited the subject matter of their statements to the scope of their employment"); *Hurd v. United States,* 134 F.Supp.2d 745, 749 (D.S.C. 2001)(testimony regarding boating accident, given by Coast Guard personnel before National Transportation Safety Board, was admission of party opponent, and thus not hearsay, when offered in FTCA action against United States); *Gess v. United States,* 952 F.Supp. 1529, 1534 n. 7 (M.D.Ala. 1996) (finding report prepared by Air Force Office of Special Investigations admissible against government under FRE 801(d)(2) in FTCA action by Air Force hospital patients because report was conducted consistent with Air Force policy, reviewed for trustworthiness, and never contradicted).
- Contra: statements by government informants not admissions. *United States v. Zizzo*, 120 F.3d 1338 (7th Cir. 1997).

D. **Government Publications**: Every United States publication is admissible as a party admission. *United States v. Van Griffin*, 874 F.2d 634 (9th Cir. 1989).

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[E3] HEARSAY: PRIOR STATEMENTS

QUICK RULE: *Some prior statements by a testifying witness are not hearsay.*

- *An out-of-court statement adopted by the witness while testifying is converted to an admissible in-court statement.*
- *An out-of-court statement, made under oath at a hearing, trial, or deposition, is admissible if it contradicts a witness's in court testimony. FRE 801(d)(1)(A)*
- *A prior consistent statement is admissible to rebut claim that testimony is recently fabricated. FRE 801(d)(1)(B)*
- *A declarant's out-of court identification of another person is admissible if that declarant testifies at the trial and is subject to cross examination. FRE 801(d)(1)(C)*

DISCUSSION

I. **Prior Statements By The Witness (Overview)**: Generally, a prior out of court statement by a testifying witness has two possible uses at trial. The statement may be used to undermine or strengthen the witness's credibility (pursuant to FRE 613). The statement may also be used as substantive evidence to establish the truth of the matter asserted in that out of court statement, but only if the statement satisfies certain exemptions or exceptions to the hearsay rule.

A. **Availability For Cross Examination**: A prerequisite for the admission of all prior statements as non-hearsay is that the witness be available for cross examination concerning the prior statement. FRE 801(d)(1). Ordinarily a witness is regarded as "subject to cross-examination" when he is placed on the stand, under oath, and responds willingly to questions. *United States v. Owens*, 484 U.S. 554, 561-564 (1988). The trial court's limitations on the scope of examination or the witness's assertion of privilege may undermine the process to such a degree that meaningful cross-examination no longer exists, but that effect is not produced by the witness's assertion of memory loss. *Id.*

B. **Rules Are Consistent**: There is no inconsistency between the forgetful witness who is deemed "subject to cross-examination" under 801(d)(1)(C), but is simultaneously deemed "unavailable" under 804(a)(3). *United States v. Owens*, 484 U.S. 554, 561-564 (1988). This semantic oddity results from the fact that FRE 804 has chosen to describe the circumstances necessary in order to admit certain categories of hearsay testimony under the rubric "Unavailability as a witness." *Id.* These circumstances include not only absence from the hearing, but also claims of privilege, refusals to obey a court's order to testify, and inability to testify based on physical or mental illness or memory loss. The characterizations in FRE 801 and 804 are for two entirely different purposes and there is no requirement or expectation that they should coincide. *Id.*

II. **Incorporation**: When a witness, on the stand and under oath, acknowledges that a prior statement is his own statement and is truthful, then the witness adopts the prior statement as his present testimony and there is no hearsay problem. *Amarin Plastics, Inc. v. Maryland Cup Corp.*, 946 F.2d 147, 153 (1st Cir. 1991). The prior statement becomes one "made by the declarant while testifying," *BCCI Holdings (Luxembourg), Societe Anonyme v. Khalil,* 184 F.R.D. 3, 6 -8 (D.D.C. 1999), and the adopted prior statement becomes present testimony. 4 *Weinstein's Evidence* ¶ 801(d)(1)(A) [02]. The hearsay problem arises when the witness on the stand denies having made the statement or admits having made it but denies its truth. *Id.*

A. **Method Of Incorporation**: A witness's reference to the prior statement need not be so specific as to require each and every question of a prior deposition or every sentence of a prior statement to be reiterated by the witness during testimony. *Amarin Plastics, Inc. v. Maryland Cup Corp.*, 946 F.2d 147, 153 (1st Cir. 1991); *Federal Deposit Ins. Corp. v. Gravee,* 966 F.Supp. 622, 635 (N.D.Ill. 1997). A more general incorporation is permitted. *See Amarin Plastics,* 946 F.2d at 153 (witness adopted contents of letters); *Gravee,* 966 F.Supp. at 635 (witness adopted answers in prior deposition).

B. **Boundaries On The Rule Of Incorporation**: When a witness cannot recall making a prior statement, has no present recollection of its contents, and is not sure the events referred to in the prior statement occurred, the witness has not incorporated the prior statement into present testimony. *BCCI Holdings (Luxembourg), Societe Anonyme v. Khalil,* 184 F.R.D. 3, 6 -8 (D.D.C. 1999) (*citing United States v. Livingston*, 661 F.2d 239, 243 (D.C. Cir. 1981)); *see also United States v. Micke,* 859 F.2d 473, 476 (7th Cir. 1988).

III. **Prior Inconsistent Statement**: Prior testimony from a testifying witness is not hearsay if (1) it is inconsistent with their in-court testimony, and (2) the prior testimony was given *under oath* at a ***trial, hearing, or deposition***. FRE 801(d)(1).

A. **Purpose**: The rule regarding prior inconsistent statements protects a party against the 'turncoat witness' who changes his story on the stand and deprives the party calling him of evidence essential to his case. *United States v. Williams,* 737 F.2d 594, 609 (7th Cir. 1984) (*quoting* FRE 801(d)(1)(A) Advisory Committee Notes). Under this rule, the prior inconsistent statement is read into the record and becomes substantive evidence (see Advisory Committee Notes 1972 at (A)).

B. **Identifying Inconsistent Statements**: For two statements to be inconsistent, they "need not be diametrically opposed." *United States v. Agajanian*, 852 F.2d 56, 58 (2d Cir. 1988). Statements are inconsistent if there is "[a]ny variance between the statement and the testimony that has a reasonable bearing on credibility." 28 *Federal Practice and Procedure* § 6203, at 514 (1993). "[T]he test should be, could the jury reasonably find that a witness who believed the truth of the facts testified to would have been unlikely to make a . . . statement of this tenor?" 1 *McCormick on Evidence*, § 34, at 115 (4th ed)

1. **Expanded Testimony**: "To testify later in greater detail in response to detailed questions is not inconsistent, especially when the added detail was not crucial to the earlier conversation." *United States v. Jacoby*, 955 F.2d 1527, 1539 (11th Cir.

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1992)(*citing United States v. Leach*, 613 F.2d 1295, 1305 (5th Cir. 1980)).

2. **Memory Loss**: Where a declarant's memory loss is contrived it will be taken as inconsistent with a prior statement for purposes of applying FRE 801(d)(1)(A). *See United States v. Bigham*, 812 F.2d 943, 946-47 (5th Cir. 1987) (witness's "selective memory loss was more convenient than actual" and prior statements therefore admissible under 801(d)(1)(A)). "[T]he unwilling witness often takes refuge in a failure to remember, and the astute liar is sometimes impregnable unless his flank can be exposed to an attack of this sort." 3A Wigmore, *Evidence* § 1043, at 1061.

3. **Difficult Witness**: Inconsistency is not limited to diametrically opposed answers but may be found in evasive answers, inability to recall, silence, or changes of position. *United States v. Matlock,* 109 F.3d 1313, 1319 (8th Cir. 1997); *accord United States v. Williams,* 737 F.2d 594, 608 (7th Cir. 1984). Specifically, where a witness demonstrates a "manifest reluctance to testify" and "forgets" certain facts at trial, this testimony can be inconsistent under FRE 801(d)(1)(A). *United States v. Iglesias*, 535 F.3d 150, 159 (3rd Cir. 2008).

C. **Statements Must Be Under Oath In Hearing, Trial, Or Deposition**: A declaration or affidavit does not satisfy FRE 801(d)(1) because it was not generated at a trial, hearing, or deposition. Declarations and affidavits may not be admitted for the truth of the matter asserted unless an exception to the hearsay problem can be found elsewhere. *United States v. Micke*, 859 F.2d 473, 477 (7th Cir. 1988); *United States v. Livingston*, 661 F.2d 239, 242 (D.C.Cir. 1981).

D. **Timing**: Although it may be the better practice to proffer the inconsistent statement while the witness is still on the witness stand, the rules do not require this. *Alexander v. Conveyors & Dumpers, Inc.*, 731 F.2d 1221, 1231 (5th Cir. 1984). Where opposing counsel has had full opportunity to cross-examine the witness regarding the prior inconsistent statements, no error exists in admitting the statements after the witness has been discharged. *Id.*

IV. **Prior Consistent Statement**: A statement is not hearsay, and admissible for the truth of the matter asserted, if it meets the following four requirements: 1) the declarant testifies at trial and is subject to cross-examination; 2) the prior statement is consistent with the declarant's trial testimony; 3) the prior statement is offered to rebut an express or implied charge of recent fabrication or improper motive; and, 4) the statement was made before the declarant had a motive to fabricate. *United States v. Stoecker*, 215 F.3d 788, 791 (7th Cir. 2000) (*quoting United States v. Fulford*, 980 F.2d 1110, 1114 (7th Cir. 1992)).

A. **Not Permitted To Rebut All Forms Of Impeachment:** Admissibility is confined to those statements offered to rebut a charge of "recent fabrication or improper influence or motive." *Tome v. United States*, 513 U.S. 150, 156-163 (1995). Prior consistent statements may not be admitted to counter all forms of impeachment or to bolster the witness merely because she has been discredited. *Id.*

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1. **Recent Fabrication**: There need be only a suggestion that the witness consciously altered his testimony to permit the use of earlier statements that are generally consistent with the trial testimony. *United States v. Frazier*, 469 F.3d 85, 88 (3rd Cir. 2006). The line between challenging credibility or memory and alleging conscious alteration can be drawn when the cross-examiner's questions reasonably imply intent on the part of the witness to fabricate. *United States v. Frazier*, 469 F.3d 85, 88 (3rd Cir. 2006); *see also United States v. Ruiz*, 249 F.3d 643, 648 (7th Cir. 2001).

2. **Limits**: "Rule 801(d)(1)(B) cannot be construed to allow the admission of what would otherwise be hearsay every time a [witness's] credibility or memory is challenged; otherwise, cross-examination would always transform [the prior consistent statement] into admissible evidence." *United States v. Bishop*, 264 F.3d 535, 548 (5th Cir. 2001). In some cases, an attorney may be implying only that the witness has a faulty memory, not that he has willfully altered his account of events. *Gaines v. Walker*, 986 F.2d 1438, 1445 (D.C.Cir. 1993).

B. **Timing Of Statement Determinative**: The rule regarding prior consistent statements includes a temporal element: To be admissible as non-hearsay, a prior consistent statement must have been made "*before* the charged recent fabrication." *United States v. Bercier*, 506 F.3d 625, 629 (8th Cir. 2007). "The statement must have been made before the declarant developed [an] alleged motive to fabricate." *United States v. Forrester*, 60 F.3d 52, 64 (2d Cir. 1995). A prior consistent statement made after an improper motive is not within the scope of FRE 801(d)(1)(B). Only a consistent statement predating the motive rebuts the charge that the testimony was contrived as a consequence of that motive. *Tome v. United States*, 513 U.S. 150, 156, (1995).

C. **Prior Statement Need Not Be Sworn**: Unlike inconsistent statements, consistent statements need not be given in a hearing or trial, or even be sworn; an affidavit or declaration may be used. *United States v. Chang Da Liu*, 538 F.3d 1078, 1086 (9th Cir. 2008)(FBI Agent permitted to recount previous witness's prior consistent statements).

D. **Declarant Must Have Taken The Stand**: To admit prior consistent statements, it is essential that the consistent statement be admitted to *rebut* a charge of improper motive. The prior consistent statement cannot be admitted *before* the witness making it has a chance to take the stand. *United States v. Smith*, 746 F.2d 1183, 1185 (10th Cir. 1984).

V. **Identification Of A Person**: An out-of-court identification of a person made after perceiving the person is not hearsay, but *only* if the declarant testifies at trial and is subject to cross examination concerning the statement. FRE 801(d)(1)(C); *United States v. Brewer*, 36 F.3d 266, 271 (2d. Cir. 1994). If the out-of-court declarant never testifies at trial, the identification is hearsay and thus inadmissible. *United States v. Baker*, 432 F.3d 1189, 1218 (11th Cir. 2005). For example: an officer could properly testify regarding a witness's identification, which occurred after the crime, even when the witness failed to make a positive in-court identification. *United States v. Blackman*, 66 F.3d 1572, 1578 n. 6 (11th Cir. 1995).

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A. **Basis Of Exemption**: Because of fading memories, and given adequate safeguards against suggestiveness, courts generally prefer out-of-court identifications over courtroom identifications. *United States v. Paredes-Rodriguez,* 160 F.3d 49, 58 (1st Cir. 1998).

[E4] HEARSAY EXCEPTIONS – OVERVIEW

QUICK RULE: *FRE 803, 804, AND 807 address the hearsay exceptions. FRE 803 lists the exceptions that are available even if the witness is available; FRE804 lists the exceptions that only apply if the witness is unavailable. FRE 807 presents the residual hearsay exception.*

The hearsay exceptions are premised on the idea that the particular circumstances surrounding the making of certain utterances guarantee their reliability. Chambers v. Mississippi, 410 U.S. 284, 298-99 (1973).

DISCUSSION

I. **Court Cannot Create Additional Exceptions**: "When Congress enacted the prohibition against admission of hearsay in FRE 802, it placed 24 exceptions in FRE 803 and 5 additional exceptions in FRE 804. Congress thus presumably made a careful judgment as to what hearsay may come into evidence and what may not." *United States v. Salerno*, 505 U.S. 317, 322 (1992).

II. **Exemption v. Exception**: There is a difference between items that are exempt from the hearsay rule (such as a party admission) and exceptions to the rule. *Bourjaily v. United States*, 483 U.S. 171, 192 (1987). The Advisory Committee explained that the exclusion of admissions from the hearsay category is justified by the traditional "adversary system" rationale, not by any specific "guarantee of trustworthiness" used to justify hearsay exceptions. *See* Advisory Committee's Notes on FRE 801.

III. **Conditional Admittance**: Courts routinely admit hearsay statements subject to proof necessary to demonstrate the existence of a hearsay exception. *United States v. White*, 116 F.3d 903, 915 (D.C. Cir. 1997) (citing *United States v. Perholtz*, 842 F.2d 343, 356 (D.C. Cir. 1988). If the connection is not proven, the court must either strike the testimony and instruct the jury to disregard it, or, if that is not enough protection, must grant a mistrial. *United States v. Jackson*, 627 F.2d 1198, 1218 (D.C.Cir. 1980).

Hearsay Exceptions

FRE 803 exceptions:

☐ (1) Present sense impression
☐ (2) Excited utterance
☐ (3) Existing mental, emotional, or physical condition
☐ (4) Statements for purposes of medical diagnosis or treatment
☐ (5) Recorded recollection
☐ (6) Records of regularly conducted activity (i.e., business records)
☐ (8) Public records and reports
☐ (9) Records of vital statistics
☐ (11) Records of religious organizations
☐ (12) Marriage, baptismal, and similar certificates
☐ (13) Family records
☐ (14) Records of documents affecting interest in property
☐ (15) Statements in documents affecting an interest in property
☐ (16) Statements in ancient documents
☐ (17) Market reports, commercial publications
☐ (18) Learned treatises
☐ (19) Reputation concerning personal or family history
☐ (20) Reputation concerning boundaries or general history
☐ (21) Reputation as to character
☐ (22) Judgment of previous conviction
☐ (23) Judgment as to personal, family, or general history or boundaries

FRE 804 exceptions:

☐ (1) Former testimony
☐ (2) Statement under belief of impending death
☐ (3) Statement against interest
☐ (4) Statement of personal or family history
☐ (6) Forfeiture by wrong doing

FRE 807 exception:

☐ Residual Hearsay Exception

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[E5] HEARSAY EXCEPTIONS – WITNESS AVAILABLE

QUICK RULE: *FRE 803 lists the exceptions that are available even if the witness is available*

DISCUSSION

I. **Present Sense Impression**: An out-of-court statement is admissible if it is "a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." FRE 803(1). The exception has three requirements: (1) the declarant must personally perceive the event; (2) the declaration must be an explanation or description rather than a narration; and (3) the declaration and the event must be contemporaneous. *United States v. Mitchell*, 145 F.3d 572, 576 (3d Cir. 1998).

A. **Personal Observation**: A statement does not qualify as a present sense impression if it merely reports opinions held by others. *Brown v. Keane*, 355 F.3d 82, 88-90 (2d Cir. 2004) (anonymous 911 call was not admissible where caller's statements indicated that he had not personally witnessed shooting in question).

B. **Description**: The rule requires statements that are either explanations or descriptions of the declarant's present impression. A narrative about an event does not meet this requirement.

C. **Contemporaneous**: The fundamental premise underlying the present sense impression exception "is that substantial contemporaneity of event and statement minimizes unreliability due to [the declarant's] defective recollection or conscious fabrication." *See United States v. Green*, 541 F.3d 176, 180 (3d Cir. 2008) (citations omitted). The time requirement underlying the exception is strict because it is the factor that assures trustworthiness. *Id.* (citing 4*Federal Evidence* § 8:67, 559, 562 (3d ed).

1. **Passage Of Time**: The rule recognizes that, often, precise contemporaneity is not possible and hence a slight lapse is allowable. FRE 803(1) Advisory Committee Notes. *See United States v. Shoup*, 476 F.3d 38, 42 (1st Cir. 2007) (although two minutes may have elapsed between alleged threat by defendant and 911 call, FRE 803(1) does not require that the statement occur contemporaneously with the event); *United States v. Thomas*, 453 F.3d 838, 843-44 (7th Cir. 2006) (where anonymous caller stated to the 911 operator that "'[t]here's a dude that just got shot . . .,' and that 'the guy who shot him is still out there,' " district court did not err" in admitting recording of call under Rules 803(1)).

II. **Excited Utterance**: An excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." FRE 803(2). Excited utterances or spontaneous declarations are excepted from the hearsay rule because they are "given under circumstances that eliminate the possibility of

fabrication, coaching, or confabulation," so that "the circumstances surrounding the making of the statement provide sufficient assurance that the statement is trustworthy and that cross-examination would be superfluous." *Idaho v. Wright,* 497 U.S. 805, 820 (1990).

A. **Elements**: To determine whether a statement is an excited utterance, courts consider (1) the event's characteristics, (2) the lapse of time between the startling event and the statement, (3) whether the statement was made in response to an inquiry, (4) the declarant's age, (5) the declarant's physical and mental condition, and (6) the statement's subject matter. *United States v. Wilcox,* 487 F.3d 1163, 1170 (8th Cir. 2007).

B. **Stress Needs To Be Recent**: An excited utterance or spontaneous declaration is a "statement that has been offered in a moment of excitement - without the opportunity to reflect on the consequences of one's exclamation." *White v. Illinois,* 502 U.S. 346, 356 (1992). On the other hand, a statement made "after the declarant has had an opportunity to reflect or discuss the matter with others" is not considered a spontaneous declaration. *Wright,* 497 U.S. at 820.

1. **Not Necessarily Contemporaneous Statement**: An excited utterance need not be contemporaneous with the startling event to be admissible. *United States v. Jones,* 299 F.3d 103, 112 (2d Cir. 2002). The key question is whether the declarant was under the stress of excitement caused by the event or condition. *United States v. Fell,* 531 F.3d 197, 231 (2d Cir. 2008).

2. **Examples**: Witness's statements about a sexual assault within 30 minutes of that assault were properly deemed excited utterances, especially when coupled with information that witness was still upset. *United States v. Bercier*, 506 F.3d 625, 630 (8th Cir. 2007).

III. **Existing Mental, Emotional, Or Physical State**: A declarant's "state of mind, if relevant, may be proved by contemporaneous declarations of feeling or intent." *Shepard v. United States,* 290 U.S. 96, 104 (1933); *Catalan v. GMAC Mortg. Corp.,* 629 F.3d 676, 694 (7th Cir. 2011)(Statements as to bank's collective intentions not hearsay under FRE 803(3)). To be admissible under FRE 803(3), a statement must occur contemporaneously "with the state of mind sought to be proved," and the party "must not have had time to reflect and possibly fabricate or misrepresent his thoughts." *United States v. Reyes*, 239 F.3d 722, 743 (5th Cir. 2001) (citing *United States v. Jackson*, 780 F.2d 1305, 1315 (7th Cir. 1986)).

A. **Limit On State Of Mind**: The purpose for the proffered statement becomes controlling. *Sanft v. Winnebago Industries, Inc.,* 216 F.R.D. 453, 457 -459 (N.D.Iowa 2003). The state-of-mind exception does not include "a statement of memory or belief to prove the fact remembered or believed." *PRD Washington-DC v. PRD Maryland*, 311 F.Supp.2d 14, 16 -17 (D.D.C. 2004). A declarant's out of court statement that he had been or was going to be laid off from his employment did not fall under the exception because it was offered to prove the fact remembered or believed (i.e., the lay off), not to show the declarant's emotion or intent. *Firemen's Fund Ins. Co. v. Thien*, 8 F.3d 1307, 1312 (8th Cir. 1993).

1. **Explanation For Limit**: "The exclusion of 'statements of memory or belief to prove the fact remembered or believed' is necessary to avoid the virtual destruction of the hearsay rule which would otherwise result from allowing state of mind, provable by a hearsay statement, to serve as the basis for an inference of the happening of the event which produced the state of mind." FRE 803 Advisory Committee Notes. A defendant's "attempt to introduce statements of her belief (that she was not violating the law) to prove the fact believed (that she was acting in good-faith) is improper." *United States v. Sayakhom*, 186 F.3d 928, 937 (9th Cir. 1999).

B. **Past Remembrance**: To fall within the state-of-mind exception, a statement must relate to a then existing state of mind. FRE 803(3). Statements about past remembrances do not fall within the exception because, in the words of Justice Cardozo, "the testimony now questioned face[s] backward and not forward." *Shepard v. United States*, 290 U.S. 96, 106 (1933).

C. **Future Intent**: A declarant's out-of-court statement of intention is admissible to prove that the declarant subsequently acted in conformity with that intention, if the doing of that act is a disputed material fact. *See United States v. Honken*, 378 F.Supp.2d 970, 990 -991 (N.D.Iowa 2004)(citing *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285, 295 (1892) (holding that statements of a declarant's future intent are admissible to show that the declarant acted in conformity with his intention)). *See also United States v. Best*, 219 F.3d 192, 198 (2d Cir. 2000).

D. **Motive**: Statements of customers as to why they stopped purchasing from plaintiff is admissible as statements of motive. *ERBE Electromedizin GmbH v. Canady Technology LLC*, 529 F.Supp.2d 577, 585 (W.D.Pa. 2007). *See Callahan v. A.E.V. Inc.*, 182 F.3d 237, 252 (3d Cir. 1999) (customers' statements that they no longer came to plaintiffs' business because defendants' stores offered lower prices were admissible as evidence of customers' states of mind, i.e., their reasons for no longer shopping at plaintiffs' stores).

E. **Fear**: Declarant's statement that he thought defendant wanted to kill him admissible under FRE 803(3) because the statement expressed declarant's then-existing mental, emotional, or physical state. *United States v. Baker*, 432 F.3d 1189, 1214 (11th Cir. 2005).

1. **Limits**: Although a declarant's statement that something caused him fear is admissible to show state of mind, it is not admissible to establish the legitimacy of his fear. An employee's statement that he feared employer retaliation is admissible to prove that he in fact feared retaliation, *Lightner v. Dauman Pallet, Inc.*, 823 F.Supp. 249, 252 n. 2 (D.N.J. 1992) (citing *United States v. Kelly*, 722 F.2d 873 (1st Cir. 1983), but not to prove that there was, in fact, retaliation. *See United States v. Cohen*, 631 F.2d 1223 (5th Cir. 1980).

F. **Compared To Present Sense Exception**: The "state of mind" exception "is essentially a specialized application" of the present sense impression exception in FRE 803(1). FRE 803(3) Advisory Committee Notes. The exception assumes "that substantial contemporaneity of event and statement negate the likelihood of deliberate or conscious misrepresentation." *Id.*

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IV. **Statements For Medical Diagnosis Or Treatment**: Statements made for medical diagnosis or treatment are excepted from the hearsay rule. FRE 803(4). This includes statements describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source. *Id.*

A. **Declarant Must Be Seeking Treatment**: The declarant's motive to promote treatment or diagnosis is the factor crucial to the statement's reliability. *Bucci v. Essex Ins. Co.*, 393 F.3d 285, 298 (1st Cir. 2005) (*citing Danaipour v. McLarey*, 386 F.3d 289, 297 (1st Cir. 2004)). The exception generally "applies only to statements made by the one actually seeking or receiving medical treatment." *Field v. Trigg County Hosp., Inc.*, 386 F.3d 729, 736 (6th Cir. 2004). If medical records are unclear as to who was the declarant, the records may not be subject to the hearsay exception. *See Stull v. Fuqua Industries, Inc.*, 906 F.2d 1271, 1274 (8th Cir. 1990) (holding that "[i]n the absence of any evidence attributing the statement to [plaintiff], the district court acted well within its discretion in excluding the hospital record.").

B. **Causation**: Statements relating to the cause of an injury are admissible hearsay if "reasonably pertinent to a physician in providing treatment." *Cook v. Hoppin*, 783 F.2d 684, 690 (7th Cir. 1986). This may be true even if the information is provided both for medical treatment and the collection of evidence. *See United States v. Gonzalez*, 533 F.3d 1057, 1062 (9th Cir. 2008) (statements to registered nurse and sexual examiner properly admitted under FRE 803(4) even though nurse was collecting evidence at the time). This exception will not cover disclosure of a perpetrator's identity. *United States v. Bercier*, 506 F.3d 625, 630 -631 (8th Cir. 2007).

V. **Recorded Recollection**: For a document to be admissible as recorded recollection, the party seeking to admit it must show (1) the record concerns a matter about which the witness once had knowledge, (2) the witness now has insufficient recollection to testify fully and accurately, (3) the witness made or adopted the record when the matter was fresh in the witness' memory, and (4) the record reflects that knowledge correctly. FRE 803(5); *Collins v. Kilbort*, 143 F.3d 331, 338 (7th Cir. 1998). If a record satisfies these predicates, it may be read into evidence, but the record is not received as an exhibit. *See Greger v. International Jensen, Inc.*, 820 F.2d 937, 943 (8th Cir. 1987).

A. **Declarant's Knowledge**: The rule does not specify any particular method of establishing the declarant's knowledge nor the statement's accuracy. *United States v. Porter*, 986 F.2d 1014 (6th Cir. 1993); *Parker v. Reda*, 327 F.3d 211 (2d Cir. 2003).

B. **Witness's Memory**: The record's advocate must show that the witness cannot remember his past statement. *United States v. Reyes*, 239 F.R.D. 591, 600 (N.D.Cal. 2006). "The mere passage of time does not make a statement admissible as a past recollection; to hold otherwise would swallow the rule entirely." *Id.* It is error to admit evidence as recorded recollection without a showing that the witness lacks sufficient memory to testify fully. *United States v. Dazey*, 403 F.3d 1147, 1166 -1167 (10th Cir. 2005); *Collins v. Kibort*, 143 F.3d 331, 338 (7th Cir. 1998).

C. **Made Or Adopted When Recorded**: The witness must have either made the record herself, or to have reviewed and adopted the statement, at a time when the matter concerned was fresh in her memory. *United States v. Mornan*, 413 F.3d 372, 377 -378 (3rd Cir. 2005). "A memorandum written by another is admissible as the witness's recorded recollection if the witness can testify (1) that the witness checked the memorandum when the matter it concerned was fresh in his or her memory, and (2) that the witness then knew it to be correct." *Weinstein's Federal Evidence* § 803.07[d]. Where the statement was recorded by someone other than the declarant, accuracy may be established through the testimony of the person who recorded the statement. *United States v. Booz*, 451 F.2d 719, 725 (3d Cir. 1971).

D. **Matter Must Be Fresh When Recorded**: The rule requires that the memory be fresh, like good fish. *United States v. Hawley*, 562 F.Supp.2d 1017, 1050 (N.D.Iowa 2008) (statements taken years after the events about which the statements were made, cannot be shown to have been made by the witness when the matter was fresh in the witness' memory).

E. **Method Of Proof**: The rule does not spell out a precise method that courts should use for establishing the witness's initial knowledge or the contemporaneity and accuracy of the record in question, but rather leaves these matters to be "dealt with as the circumstances of the particular case might indicate." *Newton v. Ryder Transp. Services*, 206 F.3d 772, 774 -775 (8th Cir. 2000) (*quoting* FRE 803(5) Advisory Committee Notes).

G. **Examples**:

- **Diary**: Diary entries may be admissible under FRE 803(5). *Emerson v. Zanke*, 522 F.Supp.2d 281, 282 -283 (D.Me. 2007).
- **Medical Records**: A doctor's written record may be admissible by deeming a patient's statement to be evidence of what the patient said to the doctor. *Forbis v. McGinty*, 292 F.Supp.2d 160, 161-62 (D.Me. 2003) (admitting, via FRE 803(5), when the statement was not admissible as a medical record).
- **Transcripts**: Transcripts of telephone calls may be deemed recorded recollection as a record of the words a listener heard when she listened to an intercepted conversation. *United States v. Rommy*, 506 F.3d 108, 138 -139 (2d Cir. 2007).
- **Periodical**: Magazine articles can be recorded recollection where the author testified that (1) he had no independent recollection of the matters discussed; (2) the article was written while the subject matter was fresh in his mind; (3) he had no incentive to misrepresent what was said; and (4) his usual reporting practice was to check all quotations against tape recordings. *Tracinda Corp. v. DaimlerChrysler AG*, 362 F.Supp.2d 487, 496-97 (D.Del. 2005).
- **Newspaper**: Newspaper articles can be admissible as recorded recollection where reporter testified he had little recollection of his interviews but affirmed that he had accurately transcribed the notes on which the article was based in accord with his usual

practices while the subject matter was still fresh in his mind. *Sadrud-Din v. City of Chicago*, 883 F.Supp. 270 (N.D.Ill. 1995); *but see Jacobson v. Deutsche Bank, A.G.*, 206 F.Supp.2d 590 (S.D.N.Y. 2002) (declining to apply FRE 803(5) where reporter did not testify that he had an "insufficient recollection" but rather declined to testify and invoked the journalist privilege).

VI. **Business Record Exception**: Records of regularly conducted activity are excepted from the hearsay exclusion. FRE 803(6); *Air Land Forwarders, Inc. v. United States*, 172 F.3d 1338, 1342 (Fed. Cir. 1999). This exception, known as the business record exception, exists because (1) regularly kept records are generally trustworthy, and (2) the need for business records in many cases. *Conoco Inc. v. Department of Energy*, 99 F.3d 387, 391 (Fed. Cir. 1997).

A. **The Rule's Purpose**: The business record exception reflects the inherent reliability "supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation." *United States v. Wells*, 262 F.3d 455, 462 (5th Cir. 2001) (*quoting* FRE 803(6) Advisory Committee Notes). The key concepts in this exception are "routineness and repetitiveness." FRE 803(6) Advisory Committee Notes.

1. **Solid Chain**: "The essential component of the business records exception is that each actor in the chain of information is under a business duty or compulsion to provide accurate information." *United States v. McIntyre*, 997 F.2d 687, 699 (10th Cir. 1993). "If any person in the process is not acting in the regular course of business, then an essential link in the trustworthiness chain fails." *2 McCormick on Evidence* § 290 (6th ed. 2006).

2. **Breadth**: The business records exception is construed generously in favor of admissibility. *Conoco Inc. v. Department of Energy*, 99 F.3d 387, 391 (Fed. Cir. 1997). Courts apply the rule to admit evidence if it has any probative value at all. *United States v. Freidin*, 849 F.2d 716, 722 (2d Cir. 1988).

B. **Requirements**: The business record exception applies when:
(1) The record is based upon (a) the entrant's personal knowledge, or (b) the personal knowledge of someone who had a business duty to transmit the information to the entrant;
(2) The record was made at or near the time of the events recorded;
(3) The record was made in the regular course of a business activity;
(4) The record was regularly kept by the business.
United States v. Pelullo, 964 F.2d 193, 200 (3d Cir. 1992); *United States v. Ary*, 518 F.3d 775, 786 -787 (10th Cir. 2008).

1. **Record Created By A Person With Knowledge**: The record's creation must contain indicia of reliability.

   a. **Personal Knowledge**: A document qualifies as a business record if it was created by person with personal knowledge of the information. FRE 803(6);

Handbook of Federal Evidence § 803:6 (6th ed). If an insurance appraiser examines a car and puts the information into a report, the rule is satisfied.

b. **Information Received From Person With Knowledge**: The knowledge requirement can be met if the person with knowledge gave the information to the entrant, who created the record. Under these circumstances, the person providing the information ultimately stored in the record must have had a business obligation to provide the information. *United States v. McIntyre,* 997 F.2d 687, 698-99 (10th Cir. 1993) (motel registration cards should not have been admitted, as guests were not under business obligation to provide the information).

c. **Record Need Not Have Been Generated By Storing Business**: Several courts have found that a record of which a firm takes custody is thereby "made" by the receiving firm within the meaning of the rule (and thus is admissible if all the other requirements are satisfied). *United States v. Adefehinti*, 510 F.3d 319, 326 (D.C. Cir. 2007). Under this approach, the firm receiving the records must (1) rely upon the received records, and (2) have a substantial interest in the record's accuracy. *MRT Constr. v. Hardrives, Inc.*, 158 F.3d 478, 483 (9th Cir. 1998). *See also Air Land Forwarders, Inc. v. United States*, 172 F.3d 1338, 1342 (Fed. Cir. 1999).

i. **Integration**: Generally, "business records are admissible if witnesses testify that the records are integrated into a company's records and relied upon in its day-to-day operations." *Matter of Ollag Construction Equipment Corporation,* 665 F.2d 43, 46 (2d Cir. 1981) (noting that relevant financial statements were completed at bank's request and were of a type that the bank regularly used to decide whether to extend credit). In *United States v. Duncan,* 919 F.2d 981, 986 (5th Cir. 1990), the court found that there was "no requirement that the [business] records be created by the business having custody of them," so that insurance company custodians could lay an adequate foundation for admitting records compiled by those companies from the business records of hospitals.

2. **Made At Or Near The Time**: Testimony must establish that the records were made at or near the time of the event recorded. *United States v. Ary,* 518 F.3d 775, 786 (10th Cir. 2008) (inventory records were created as soon as the museum received a new artifact).

3. **Created In The Regular Course Of A Business Activity**: Neither a paper document, such as a letter, memo, or note, nor an email, falls within the business-records exception simply because it concerns a business matter. *United States v. Robinson*, 700 F.2d 205, 209-10 (5th Cir. 1983) (must be records of regularly conducted activity). FRE 803(6) requires that it be "the regular practice of that business activity to make" the record. *Lust v. Sealy, Inc.*, 383 F.3d 580, 588 -589 (7th Cir. 2004) (A memo of employee conversations not part of regularly kept personnel records and thus not admissible). The phrase "course of a regularly conducted activity" is intended to capture the "essential basis" of the business records

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exception. *United States v. Cervantes-Flores*, 421 F.3d 825, 833 (9th Cir. 2005) (*quoting FRE* 803(6) Advisory Committee Notes).

a. **Regularly Conducted Activity**: The business records exception rests on the assumption that business records are reliable because they are created on a day-to-day basis and "[t]he very regularity and continuity of the records are calculated to train the recordkeeper in habits of precision." *McCormick on Evidence*, § 286 (5th ed). This assumption of reliability, accuracy and trustworthiness, however, collapses when any person in the process is not acting in the regular course of the business.

b. **Unique Items**: "Memoranda that are . . . unique do not qualify as business records." 3 *Federal Evidence* § 803.08[2].

c. **Must Be Created As Part Of Official Duty**: Documents are only admissible under the business record exception if an employee regularly compiled them as part of her official duties. *United States v. Bueno-Sierra*, 99 F.3d 375, 379 (11th Cir. 1996). The item must be in furtherance of the employer's needs and not for the personal purposes of the employee who made them. *See Broadcast Music, Inc. v. Xanthas, Inc.*, 855 F.2d 233, 238 (5th Cir. 1988) (finding that letters did not fall within the business records exception). *United States v. Vigneau*, 187 F.3d 70, 75 (1st Cir. 1999) (information in business record provided by someone other than person with duty to gather such information in ordinary course of business is hearsay and must be redacted prior to record's admission).

4. **Kept In the Regular Course Of Business**: The records must have been kept in the regular course of the keeping company's business. *See United States v. Turner*, 189 F.3d 712, 721 (8th Cir. 1999). For a document to be admitted as a business record, there must be some evidence of a business duty to regularly maintain records of that type. *United States v. Ferber*, 966 F.Supp. 90, 98 (D.Mass. 1997) (Although it may have been an employee's routine business practice to make such records, there was no sufficient evidence that the employer required such records to be maintained.).

C. **Exception To The Rule**: Even if a business record meets FRE 803(6)'s criteria, the court may exclude it if "the source of information or the method or circumstances of preparation indicate lack of trustworthiness." *United States v. Jenkins*, 345 F.3d 928, 935 (6th Cir. 2003). *See also United States v. Freidin*, 849 F.2d 716, 722 (2d Cir. 1988).

D. **Foundational Witness**: The proponent of the document must lay this foundation for its admission. *United States v. Ary*, 518 F.3d 775, 786 (10th Cir. 2008). The person who testifies to the business record must be (1) the document's custodian, (2) the person who compiled the documents, or (3) "have knowledge of the procedure under which the records were created." *United States v. LeShore*, 543 F.3d 935, 942 (7th Cir. 2008)(*quoting United States v. Wables*, 731 F.2d 440, 449 (7th Cir. 1984). To be considered to be an "otherwise qualified witness" under FRE 803(6), the witness need only be familiar with the organization's record keeping procedures. *United States v. Jenkins*, 345 F.3d 928, 936 (6th Cir. 2003); *see also United States v. Christ*, 513 F.3d 762, 770 (7th Cir. 2008).

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1. **Non Employee**: A business-record foundation may be laid, in whole or in part, "by the testimony of a government agent or other person outside the organization whose records are sought to be admitted." *United States v. Hathaway,* 798 F.2d 902, 906 (6th Cir. 1986). The only requirement is that the "witness be familiar with the record keeping system." *Id. See Zayre Corp. v. S.M. & R. Co.,* 882 F.2d 1145, 1150 (7th Cir. 1989).

2. **Written Foundation Permitted**: FRE 902(11) extends FRE 803(6) by allowing a written foundation in lieu of an oral one. *United States v. Adefehinti*, 510 F.3d 319, 325 (D.C. Cir. 2007).

3. **No Personal Knowledge**: The person laying the foundation for the introduction of the business record need not have personal knowledge of the record's preparation. *Dyno Const. Co. v. McWane, Inc.,* 198 F.3d 567, 576 (6th Cir. 1999). *See also United States v. Franks,* 939 F.2d 600, 602-03 (8th Cir. 1991) (rejecting defendant's contention that the FRE 803(6) witness needed to know who prepared delivery records and airbills).

   a. **Need Not Have Seen Records**: A sponsoring witness need not possess or even see the records in question before trial. *United States v. Turner,* 189 F.3d 712, 720 (8th Cir. 1999) (citing *United States v. Coohey,* 11 F.3d 97, 99-100 (8th Cir. 1993) (a sponsoring witness could authenticate phone records even though she had not seen or possessed the records before trial).

4. **Certification**: Foundational witness need not testify if proffering party produces written declaration affirming each foundational element. FRE 803(6).

E. **Double Hearsay In Records**: "Business records are potentially fraught with double hearsay." *United States v. Gwathney*, 465 F.3d 1133, 1141 (10th Cir. 2006)(*citing TK-7 Corp. v. Estate of Barbouti,* 993 F.2d 722, 729 (10th Cir. 1993). "Double hearsay in the context of a business record exists when the record is prepared by an employee with information supplied by another person." *Wilson v. Zapata Off-Shore Co.,* 939 F.2d 260, 271 (10th Cir. 1991). Any information provided by another person, if an outsider to the business preparing the record, must fall within a hearsay exception to be admissible. *Id.*

F. **Specific Examples**:

1. **Litigation Materials**: Records prepared in anticipation of litigation are not made in the ordinary course of business. *Palmer v. Hoffman,* 318 U.S. 109, 114 (1943). Reports prepared for the purpose of litigation do not fall within business records exception because they are not kept in the course of regularly conducted business. *Timberlake Const. Co. v. U.S. Fidelity and Guar. Co.,* 71 F.3d 335, 342 (10th Cir. 1995) ("It is well-established that one who prepares a document in anticipation of litigation is not acting in the regular course of business."). Same result for materials prepared in response to a subpoena. *United States v. Kim,* 595 F.2d 755, 761-62 (D.C.Cir. 1979). Such records lose the assumption of trustworthiness.

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2. **Financial Statement**: "Although a financial statement audit is based in part on hearsay, it is generally admissible as a business record of the audited entity under FRE 803(6)." *See Paddack v. Dave Christensen, Inc.*, 745 F.2d 1254, 1257 n. 3 (9th Cir. 1984).

3. **Email**: A party seeking to introduce an employee's email under the business record exception must show that the employer imposed a business duty to make and maintain the record. *Schaghticoke Tribal Nation v. Kempthorne*, 587 F.Supp.2d 389 (D.Conn. 2008). *See also DirecTV, Inc. v. Murray,* 307 F.Supp.2d 764, 772-73 (D.S.C. 2004) (admitting sales records in emails under as business records when the sale orders were regularly received by email and the emails were retained as records of each order); *Stevens Shipping and Terminal Co. v. Japan Rainbow*, 334 F.3d 439, 439, 444 (5th Cir. 2003)(trial court's ruling that e-mail correspondence was inadmissible hearsay was not clear error);

4. **Memos**: Interoffice memos may not be admissible if not part of a business's formal activity. *Zenith Radio Corp. v. Matsushita Elec. Indus. Corp.*, 505 F. Supp. 1190, 1232 (E.D. Pa. 1980)(interoffice memos inadmissible because they were not formal, required to render or required to keep items, but were merely "casual and informal in nature").

5. **Correspondence**: Correspondence is admissible as a business record where the preserving company received the correspondence in the ordinary course of its business and the correspondence became part of the files. *Deland v. Old Republic Life Insurance Co.*, 758 F.2d 1331, 1338 (9th Cir. 1985).

6. **Sales Invoice**: One who provides a sales invoice is under a business duty to provide accurate information. *United States v. Ary*, 518 F.3d 775, 786 -787 (10th Cir. 2008) *(citing United States v. Hines,* 564 F.2d 925, 928 (10th Cir. 1977) (vehicle invoice admissible under business records exception).

7. **Transcripts**: An interview may be a business record, but at most that means the fact finder can rely on the accuracy of the transcript or interview notes - it says nothing about the reliability of the information contained in the interview. If the proponent wants to use the transcript as substantive evidence for the truth of the matters asserted by the speaker, another hearsay exception must be found to cover the hearsay within hearsay. *See United States v. De Peri*, 778 F.2d 963, 976-77 (3d Cir. 1985) (proffered interview reports posed "a classic 'hearsay within hearsay' problem;" to be admissible the interviewees' "out-of-court statements . . . require[d] a separate hearsay exception"); *cf. Bondie v. Bic Corp.*, 947 F.2d 1531, 1534 (6th Cir. 1991) (a report containing a party's statements was admissible because of "the combined effect of" two separate exceptions).

8. **Telephone Records**: These are business records. *United States v. Yeley-Davis,* 632 F.3d 673, 678 (10th Cir. 2010).

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9. **911 Call**: Because citizens who call 911 are not under any 'duty to report,' a recorded statement by a citizen must satisfy a separate hearsay exception. *Bemas v. Edwards,* 45 F.3d 1369, 1372 (9th Cir. 1995).

G. **Public Records As Business Records**: At least one court has held that public records and convictions are not properly admitted as business records. *United States v. Weiland*, 420 F.3d 1062, 1074 (9th Cir. 2005). The Ninth Circuit has concluded that public records, including records of conviction, must be admitted, if at all, under FRE 803(8), or, in some cases, under a specific hearsay rule, such as FRE 803(22), governing the admission of prior convictions. *United States v. Orellana-Blanco,* 294 F.3d 1143, 1149 (9th Cir. 2002); *United States v. Pena-Gutierrez,* 222 F.3d 1080, 1086-87 (9th Cir. 2000). The court reached this conclusion to prevent the government from circumventing FRE 803(8) by admitting public records as business records under FRE 803(6). *Weiland*, 420 F.3d at 1074.

1. **Analysis**: This conclusion has appeal, although the rules are typically not read as being mutually exclusive regarding the admissibility of any given evidence, but rather to establish various threshold of reliability upon which materials that are otherwise hearsay may be entered into evidence. *See United States v. Adedoyin*, 369 F.3d 337, 344 -345 (3rd Cir. 2004) (Permitting certified copy of conviction pursuant to FRE 803(8) as a public record, rather than under FRE 803(22) as a conviction).

VII. **Record's Absence**: If a record set accords with the business record exception (FRE 803(6)), evidence that a matter is not included in the records may prove the event's nonoccurrence or nonexistence, provided the event was the kind that regularly lead to a record's creation. *United States v. Munoz-Franco*, 487 F.3d 25, 39 -40 (1st Cir. 2007) (*citing* FRE 803(7)).

A. **Alternative Method**: It may be argued that the absence of a record is not hearsay at all. *United States v. Cervantes-Flores,* 421 F.3d 825, 832 n. 4 (9th Cir. 2005) ("evidence that a record does not exist arguably is not hearsay at all."). Although not necessarily consistent with FRE 803(7), this position actually makes more sense given the hearsay rule's purpose. The Advisory Committee acknowledges that the absence of evidence from a record may not be hearsay. They state: "While probably not hearsay as defined in Rule 801, decisions may be found which class the evidence not only as hearsay but also as not within any exception. In order to set the question at rest in favor of admissibility, it is specifically treated here."

B. **Requirements Of Record Keeping System**: The "absence of entry" rule may only be invoked where the record from which the entry is absent is one "kept in accordance with the provisions of paragraph (6)" of FRE 803. *Brodersen v. Sioux Valley Memorial Hosp.*, 902 F.Supp. 931, 953 -954 (N.D.Iowa 1995).

C. **Absence Of Information In Individual Record**: Courts may also apply the negative inference to individual business records. The "[f]ailure of a record to mention a matter which would ordinarily be mentioned is satisfactory evidence of its nonexistence." FRE 803(7) Advisory Committee.

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VIII. Public Records: Public records are generally excepted from hearsay restrictions. FRE 803(8). Records, reports, statements, or data compilations, in any form, of public offices or agencies, are admissible when these materials (A) set forth the activities of the office or agency, (B) incorporate matters observed pursuant to duty imposed by law, or (C) contain factual findings resulting from a legally authorized investigation.

A. **Overview**: The common law excepted public records from hearsay restrictions; the rules continue this exception. The public records exception is justified on "the assumption that a public official will perform his duty properly and the unlikelihood that he will remember details independently of the record." FRE 803(8) Advisory Committee (*citing Wong Wing Foo v. McGrath,* 196 F.2d 120 (9th Cir. 1952); *Chesapeake & Delaware Canal Co. v. United States,* 250 U.S. 123 (1919)). Accordingly, the rule's language "focuses on reports of the activities *of the office,* and on observations and investigations *made under the authority of law*." *United States v. De La Cruz*, 469 F.3d 1064, 1069 (7th Cir. 2006) (emphasis in original) (holding that a city's legal opinion was not exempted from hearsay rule under FRE 803(8)).

1. **No Sponsoring Witness**: No foundational testimony is required to admit public records. *United States v. Vidacak*, 553 F.3d 344, 351 (4th Cir. 2009). FRE 803(8)'s exception does not require a sponsoring witness. *United States v. Doyle,* 130 F.3d 523, 546 (2d Cir. 1997); *United States v. Loyola-Dominguez,* 125 F.3d 1315, 1318 (9th Cir. 1997).

2. **Foreign Records**: Courts regularly admit foreign records pursuant to the public records exception. *See, e.g., United States v. Demjanjuk,* 367 F.3d 623, 631 (6th Cir. 2004) (Nazi German Service Identity Card); *United States v. Garland,* 991 F.2d 328, 334-35 (6th Cir. 1993) (Ghanian judgment); *United States v. Grady,* 544 F.2d 598, 604 (2d Cir. 1976) (Northern Ireland constabulary firearms report). Because passports are public records, "a foreign passport may be admissible in a United States court to prove foreign citizenship." *United States v. Pluta,* 176 F.3d 43, 50-51 (2d Cir. 1999).

3. **Double Hearsay**: Public records may contain hearsay statements by someone other than the document's author(s). If so, those statements are double hearsay and need their own exception to be admissible. *United States v. Pagan-Santini*, 451 F.3d 258, 264 (1st Cir. 2006). "[H]earsay statements by third persons . . . are not admissible under [Rule 803(8)(C)] merely because they appear within public records." *United States v. Mackey,* 117 F.3d 24, 28-29 (1st Cir. 1997).

B. **Activities Of The Office Or Agency**: The public record exception excepts from the hearsay rule public-agency statements "in any form" setting forth "the activities of the office or agency." *United States v. Romero,* 32 F.3d 641, 650 (1st Cir. 1994) (accepting under FRE 803(8)(A) the Secretary of State's certification that a vessel was stateless because it "was a statement by a public agency setting forth a routine activity of that agency"). *See also United States v. Lechuga,* 975 F.2d 397, 399 (7th Cir. 1992); *United States v. Vidaure,* 861 F.2d 1337, 1341 (5th Cir. 1988).

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1. **Examples**: Given the breadth of public agency action, the types of materials made admissible are countless. It includes an Applicant Register ranking applicants for employment. *Alexander v. Estepp,* 95 F.3d 312, 314 (4th Cir. 1996). It includes complaints filed in state courts, *Blue Tree Hotels v. Starwood Hotels & Resorts,* 369 F.3d 212, 218 (2d Cir. 2004), as well as warrants of deportation. *United States v. Loyola-Dominguez,* 125 F.3d 1315 (9th Cir. 1997). When offered to show the fact of conviction rather than underlying guilt "a judgment readily fits the public records exception." *Olsen v. Correiro,* 189 F.3d 52, 63 (1st Cir. 1999). An assessment can also be admitted under the agency records exception. *Christopher Phelps & Associates, LLC v. Galloway*, 492 F.3d 532, 542 (4th Cir. 2007).

C. **Matters Observed Pursuant To Legal Duty**: For civil matters, the public records exception applies to matters observed pursuant to a duty imposed by law as to which there was a duty to report. Fingerprinting and photographing a suspect, and cataloguing a judgment and sentence are the types of routine and unambiguous matters to which the public records hearsay exception in FRE 803(8)(B) is designed to apply. *United States v. Weiland*, 420 F.3d 1062, 1075 (9th Cir. 2005). The rule permits the admission of an F.B.I. agent's testimony that certain motor vehicles appeared on a law enforcement agency's computer report of vehicles reported as stolen, and the admission of police department computer printouts reflecting reported robberies. *United States v. Brown,* 315 F.3d 929, 931 (8th Cir. 2003).

1. **Limits**: The definition of "public record" excludes records created with an eye toward litigation and criminal prosecution. *United States v. Mendez*, 514 F.3d 1035, 1044 (10th Cir. 2008) (*citing United States v. Bohrer*, 807 F.2d 159, 162 (10th Cir. 1986)).

D. **Fact Findings Pursuant To Legal Authority**: The public records exception allows a court to admit public records and reports, in any form, of public agencies setting forth factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate a lack of trustworthiness. *Davignon v. Hodgson,* 524 F.3d 91, 113 (1st Cir. 2008). The rules presume the evidentiary admissibility of public records and reports because of the reliability of the public agencies usually conducting the investigation, and their lack of motive for conducting the studies other than to inform the public fairly and adequately. *Ellis v. Int'l Playtex, Inc.*, 745 F.2d 292, 300 (4th Cir. 1984).

1. **Exception**: FRE 803(8)(C) contains an exception: the record need not be excepted from the hearsay rule if the sources of information or other circumstances indicate a lack of trustworthiness. When the trustworthiness of such an investigative report has been challenged, the court assesses and weighs factors such as: (1) the investigation's timeliness; (2) the investigator's special skill or experience; and (3) any possible motivation problems. *Ellis,* 745 F.2d at 300-01. Other factors that may, in the proper circumstances, be appropriate to such an evidentiary assessment, include "unreliability, inadequate investigation, inadequate foundation for conclusions, [and] invasion of the jury's province." *Distaff, Inc. v. Springfield Contracting Corp.*, 984 F.2d 108, 111 (4th Cir. 1993).

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a. **Burden**: The party challenging admissibility has the burden of proving untrustworthiness under FRE 803(8)(C). *Freitag v. Ayers*, 468 F.3d 528, 541 (9th Cir. 2006); *Johnson v. City of Pleasanton*, 982 F.2d 350, 352 (9th Cir. 1992) (reports of public agencies shall be admitted where the challenging party fails to meet its burden to show untrustworthiness). To exclude evidence which technically falls under FRE 803(8)(C) there must be "an affirmative showing of untrustworthiness, beyond the obvious fact that the declarant is not in court to testify." *Kehm v. Proctor & Gamble Manufacturing Co.*, 724 F.2d 613, 618 (8th Cir. 1983).

b. **Weight**: The weight and credibility extended to government reports admitted as exceptions to the hearsay rule are to be determined by the fact finder. *Bradford Trust Co. of Boston v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 805 F.2d 49, 54 (2d Cir. 1986) (*citing Rosario v. Amalgamated Ladies Garment Cutters' Union*, 605 F.2d 1228, 1251 (2d Cir. 1979)).

2. **Breadth**: Portions "of investigatory reports otherwise admissible under Rule 803(8)(C) are not inadmissible merely because they state a conclusion or opinion." *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 170 (1988).

3. **Interim Findings**: The public records exception does not make admissible interim findings. *City of New York v. Pullman Inc.*, 662 F.2d 910, 915 (2d Cir. 1981) (interim staff report of the Urban Mass Transit Administration, which was ultimately rejected by the UMTA administrator, "did not embody the findings of an agency").

4. **Examples**:

- **EEOC Records**: EEOC determinations are generally admissible under the public records and reports exception to the hearsay rule (FRE 803(8)(C)), unless "the sources of information or other circumstances indicate lack of trustworthiness" sufficient to justify exclusion from evidence. *Barfield v. Orange County*, 911 F.2d 644, 650-51 (11th Cir. 1990). These are subject to 803(7)(C)'s exception for trustworthiness. *McClure v. Mexia Ind. Sch. Dist.*, 750 F.2d 396, 400 (5th Cir. 1985) (finding EEOC determinations are not an exception to hearsay when "the sources of information or other circumstances indicate the lack of trustworthiness").

- **Judicial Findings And Judgments**: Judicial findings of fact in a previous case are inadmissible under FRE 803(8)(C), because the jury is likely to give them disproportionate weight. *Herrick v. Garvey*, 298 F.3d 1184, 1192 (10th Cir. 2002); *Milan Express v. Averitt Express*, 254 F.3d 966, 983, n. 25 (11th Cir. 2001). A court judgment is also hearsay "to the extent that it is offered to prove the truth of the matters asserted in the judgment." *United States v. Sine*, 493 F.3d 1021, 1036 (9th Cir. 2007); *see also* 2 *McCormick on Evidence*, *supra*, § 298, at 337 (noting the historic treatment of prior judgments as hearsay).

- **State Commissions**: A state commission's findings are not stamped with a judicial imprimatur, and are less likely than those of a court to be given disproportionate weight by a jury. *Davignon v. Hodgson,* 524 F.3d 91, 113 (1st Cir. 2008). They are exempt from hearsay under the rule. *Id.*

- **Police Reports**: Police reports do not fit within the FRE 803(8)(C) exception because they do not contain what FRE 803(8)(C) makes admissible - "factual findings resulting from an investigation." *United States v. Taylor*, 462 F.3d 1023, 1026 (8th Cir. 2006). *See* FRE 803, Advisory Committee Notes ("Police reports have generally been excluded except to the extent to which they incorporate firsthand observations of the officer.").

IX. **Vital Statistics**: Records or data compilations, in any form, of births, deaths, or marriages, are excluded from hearsay limits if the report was made to a public office pursuant to requirements of law. FRE 803(9). This exception only applies when the responses were legally mandated. *Gibson v. County of Riverside,* 181 F.Supp.2d 1057, 1066 (C.D.Cal. 2002) (response to questionnaire not excepted as vital statistic because responses were voluntary and not legal obligation).

X. **Absence Of A Public Record**: ***There is no way to explain this rule without double and triple negatives.*** Under FRE 803(10), when confronted with a public database or record set, testimony as to the absence of an expected record may be used to demonstrate that the event that would have been memorialized in the record did not happen. *United States v. Mendez,* 514 F.3d 1035, 1044 (10th Cir. 2008). The rule "includes situations in which the absence of a record may itself be the ultimate focal point of the inquiry." *Id.* (*Citing* FRE 803(10) Advisory Committee Note).

A. **Database Requirements**: The rule mandates only that the underlying records "be regularly made and preserved by a public office or agency." *United States v. Ventura-Melendez*, 275 F.3d 9, 14 (1st Cir. 2001). The rule does not have the more arduous foundational requirements of the business record exception regarding the types or maintenance of the database. *Id.* ("Had the drafters of the Rules of Evidence intended such a requirement, they were well aware of how it could be imposed.")

B. **Diligent Search**: The rule requires that someone diligently search for the contemplated record before the hearsay exception attaches. It is not necessary, however, that the foundational witness actually state that they have searched "diligently" provided that the testimony and the relevant circumstances reflected an adequate search. *See United States v. Valdez-Maltos*, 443 F.3d 910, 911 (5th Cir. 2006).

C. **Foundation Requirement**: A party may demonstrate the non-existence of a public record with an affidavit from someone familiar with the records stating that a diligent search had failed to turn up the contemplated record. *United States v. Hale*, 978 F.2d 1016, 1021 (8th Cir. 1992). Evidence may be provided in the form of a certification in accordance with FRE 902 that a diligent search failed to disclose the record, report, statement, or data compilation. *United States v. Robinson*, 389 F.3d 582, 593 (6th Cir. 2004). Such affidavits are known as Certificates of Nonexistence of Record (CNR). *United States v. Urqhart*,

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469 F.3d 745, 746 (8th Cir. 2006). Generally, a certificate stating a diligent search has taken place is sufficient proof of the diligent quality of the search. *See e.g., United States v. Combs,* 762 F.2d 1343, 1348 (9th Cir. 1985) (certificate with cursory language that search was diligent admitted into evidence).

XI. **Records Of Religious Organizations**: The rules except from hearsay statements of births, marriages, divorces, or other similar facts of personal or family history, contained in a religious organization's regularly kept records. FRE 803(11). Statements of contributions to a church do not constitute such personal information. *Hall v. C.I.R.*, 729 F.2d 632, 635 (9th Cir. 1984).

XII. **Marriage And Baptismal Certificates**: The rules exclude from hearsay any statements of fact contained in a certificate that the maker performed a ceremony or administered a sacrament. FRE 803(12). The rule requires (1) that the statements in the certificate be made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and (2) the certificate must state that it was issued at the time of the act or within a reasonable time thereafter. The rule is anticipated to apply to marriages, baptisms, and confirmations. FRE 803(12) Advisory Committee Notes.

XIII. **Family Records**: The rules exclude from hearsay factual statements concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones. FRE 803(13). If you ever use this rule, send me the transcript and I'll send you a prize. If you use the urn, crypt, or tombstone exceptions, I'll double the prize.

XIV. **Records Of Documents Affecting A Property Interest**: The rules except from hearsay the record of a document purporting to establish or affect an interest in property. FRE 803(14). The record may be used to prove the content of the original recorded document, its execution, and its delivery for each person by whom it purports to have been executed. To qualify, the record must be a record of a public office, and a statute must authorize the recording of documents of that kind in that office. A mortgage would satisfy FRE 803(14) and its contents would not be hearsay. *United States v. Ruffin*, 575 F.2d 346, 357 -358 (2d Cir. 1978).

A. **Judgments**: A judgment may be offered to show the true owner of certain properties. *United States v. Boulware*, 384 F.3d 794, 806 (9th Cir. 2004) (citing *United States v. Perry*, 857 F.2d 1346 (9th Cir. 1988)). "[A] judgment, insofar as it fixes property rights, should be admissible as the official record of such rights, just like other documents of title." *Greycas, Inc. v. Proud,* 826 F.2d 1560, 1567 (7th Cir. 1987).

XV. **Statements In Documents Affecting a Property Interest**: The rules exclude from hearsay any statement contained in a document purporting to establish or affect a property interest, if the matter stated was relevant to the purpose of the document. FRE 803(15). This rule does not apply if dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document. *See Silverstein v. Chase,* 260 F.3d 142, 149 (2d Cir. 2001).

A. **Types Of Property**: The rule applies to real and personal property. *United States v. Weinstock*, 863 F.Supp. 1529, 1534 n.4 (D.Utah 1994)(citing 4 *Weinstein's Evidence* § 803(15)).

B. **Types Of Documents**: The courts have read this broadly. An affidavit used to obtain a replacement stock certificate was admissible under FRE 803(15). *United States v. Weinstock*, 863 F.Supp. 1529, 1534 n.4 (D.Utah 1994). A judgment that establishes the ownership of disputed property is a dispositive document, and the judgment's recital of facts is not exempt from the hearsay rule. *United States v. Boulware*, 384 F.3d 794, 806 (9th Cir. 2004) (holding that a state court judgment was admissible under FRE 803(15) as a document that affected an interest in property).

XVI. **Ancient Documents:** Statements in authenticated ancient documents are not hearsay. FRE 803(16); *Martha Graham School and Dance Foundation, Inc. v. Martha Graham Center of Contemporary Dance, Inc.*, 380 F.3d 624, 643 (2d Cir. 2004). Ancient documents are those in existence 20 years or more. *United States v. Hajda*, 135 F.3d 439, 443 -444 (7th Cir. 1998).

A. **Types Of Documents**: The rule does not contemplate any limit as to the types of documents which can be exempted from hearsay exceptions under this rule. *See George v. Celotex Corp.*, 914 F.2d 26, 30 (2d Cir. 1990) (report admissible as ancient document without any testimony regarding the reliability of the report's conclusions.).

B. **Authenticity Of Ancient Documents**: The FRE contain separate rules for the authentication of ancient documents and the hearsay exception for ancient documents. FRE 803(16) only carries the ancient document hearsay exception. Authenticity may be established in any manner permitted under the rules. FRE 901(b)(8) provides a simple means for authenticating ancient documents. Authenticity is a function of whether 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 20 years or more at the time it is offered." FRE 901(b)(8).

C. **Double Hearsay**: The rule's language contains some ambiguity as to whether ancient documents can suffer from double hearsay. The rule exempts from hearsay "statements in a document" and could thus, arguably be read to make all statements in the document hearsay exempted. The more likely reading is that ancient documents, like many other kinds of evidence, can contain double hearsay. FRE 803(16) only cures the statements of the document's author that are recorded in the document. "If the document contains more than one level of hearsay, an appropriate exception must be found for each level." *United States v. Hajda*, 135 F.3d 439, 443 -444 (7th Cir. 1998) (*citing* FRE 805).

XVII. **Market Publications:** The rules provide a hearsay exception for market quotations, tabulations, lists, directories, or other published compilations. FRE 803(17). *See United States v. Woods,* 321 F.3d 361, 364 -365 (3rd Cir. 2003) (admitting information from database based upon its necessity and reliability). "The Rule does not apply unless the proponent establishes that the reports are relied upon by the public or by people in a relevant field." 4 *Federal Rules of Evidence Manual* § 803-74 (8th ed. 2002).

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A. **Types Of Publications**: The rule applies to a wide range of publications:

• **Bank directories:** *United States v. Goudy*, 792 F.2d 664, 674 (7th Cir. 1986) (admitting a bank directory showing the "routing number" prefix for Los Angeles).

• **Monthly real estate sale data:** *United States v. Pezzullo*, 4 F.3d 1006 (1st Cir. 1993) (admitting the publication "County Comps," which contained data regarding the monthly listings of properties sold, the sales prices, and the dates the sales were closed).

• **Electronic database:** *United States v. Masferrer*, 514 F.3d 1158, 1162 (11th Cir. 2008) (admitting stock quotes based upon conclusion that "Bloomberg financial information is universally relied upon by individuals and institutions involved in financial markets").

• **Compilations**: *United States v. Mount*, 896 F.2d 612, 625 (1st Cir. 1990) (The two volumes of The Collected Works of Abraham Lincoln were subject to FRE 803(17) because manuscript dealers rely upon the work to locate original Lincoln documents)

B. **Types Of Information**: Once a publication or database has been qualified as being relied upon by the public or those in a specific field, the rule does not limit the information that may be gleaned from qualified publications. Even if the publication or database contains information that requires a subjective analysis of other facts, or if individuals might differ in the conclusions they draw from the data, the information is exempt from hearsay. *United States v. Cassiere*, 4 F.3d 1006, 1019 (1st Cir. 1993).

C. **Basis For Exception**: As with other hearsay exceptions, the admissibility of market reports and commercial publications under FRE 803(17) is predicated on the two factors of necessity and reliability. Necessity lies in the fact that if this evidence is to be obtained, it must come from the compilation, as the task of finding every person who had a hand in making the report would be impossible. Reliability is assured because the compilers know that their work will be consulted; if it is inaccurate, the public or the trade will cease consulting their product. 5 *Weinstein's Federal Evidence* § 803.19[1] (2002).

XVIII. **Learned Treatises**: The rules exempt from hearsay statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art. FRE 803(18). To qualify for this exception, the treatise must be established as a reliable authority by (1) and expert witness, or (2) judicial notice. The treatise may only be used while an expert is on the witness stand and the statements may be read into evidence but may not be received as exhibits.

A. **Establishing Treatise As Reliable**: The treatise can be established as reliable by expert testimony, by admission of an expert on cross-exam, or by judicial notice. *United States v. Norman*, 415 F.3d 466, 474 (5th Cir. 2005). The foundational witness must have expertise in the subject matter covered by the treatise. *Id.*

1. **Judge As Gatekeepers**: The rule explicitly requires trial judges to act as gatekeepers, ensuring that any treatise admitted is "authoritative." *Schneider v. Revici*, 817 F.2d 987, 991 (2d Cir. 1987); FRE 803(18). Trial judges must determine that the proffered treatise is trustworthy as viewed by professionals in

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the relevant field." *Id.*; *see* FRE 803(18) Advisory Committee Notes. In making this evaluation, trial judges need not be draconian. The object of the rule is to make valuable information available to the trier of fact; trial judges should not insist on a quantum of proof that the proponent cannot meet. *See Weinstein's Federal Evidence* § 803.23[4] (2d ed. 1997).

2. **Example**: It was not enough that the trade magazine in which an article appeared was reputable; the author of the particular article must also to be shown to be an authority before the article could be used as a learned treatise. *Meschino v. North American Drager, Inc.*, 841 F.2d 429, 433 (1st Cir. 1988); *see also Twin City Fire Ins. Co. v. Country Mut. Ins. Co.*, 23 F.3d 1175, 1184 (7th Cir. 1994) (same). The court reasoned that in "these days of quantified research, and pressure to publish, an article does not reach the dignity of a 'reliable authority' merely because some editor, even a most reputable one, sees fit to circulate it." *Meschino*, 841 F.2d at 434.

B. **Rationale**: The exception's rationale is self-evident: if the authority of a treatise has been sufficiently established, the jury should benefit from expert learning on a subject, even if it is hearsay. *See* Mueller & Kirkpatrick, *Evidence* § 8.52, at 997 (1995).

C. **Type Of Publication**: Although the rule's language suggests it is limited to written publications, videotapes have been considered learned treatises under FRE 803(18). *Costantino v. Herzog,* 203 F.3d 164, 171 (2d Cir. 2000).

XIX. **Reputation Concerning Family History**: The rule excludes from hearsay reputation evidence in the community concerning birth, adoption, marriage, divorce, death, legitimacy, relationship, or similar fact of personal or family history. FRE 803(19).

A. **Two-Step Inquiry**: In applying FRE 803(19), the court considers (1) what "community" falls within the breadth of coverage, and (2) what foundation is required. *Blackburn v. United Parcel Service, Inc.*, 179 F.3d 81, 98 -103 (3rd Cir. 1999).

1. **Relevant "Community"**: The rule is flexible regarding the relevant community when considering reputation evidence. "The 'world' in which the reputation may exist . . . has proved capable of expanding with changing times from the single uncomplicated neighborhood, in which all activities take place, to the multiple and unrelated worlds of work, religious affiliation, and social activity, in each of which a reputation may be generated." FRE 803(19) Advisory Committee Notes.

a. **Reputation At Work**: FRE 803(19), in referring to "reputation ... among a person's associates, or in the community," encompasses one's reputation at a place of work. *Blackburn v. United Parcel Service, Inc.*, 179 F.3d 81, 98 -103 (3rd Cir. 1999). "Allowing such proof [under Rule 803(19)] to come from 'associates' reflects the fact that nowadays a person's reputation may no longer exclusively be found in the place where the person lives, but frequently can only be ascertained from coparticipants in the varied activities that make up a modern person's world." 5 *Weinstein's Federal Evidence* § 803.24[2] (1999).

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b. **Witness Must Be From The Community**: Before a witness can testify to reputation, the witness must be qualified by showing membership in a group familiar with the personal or family history of the person in question. *Blackburn v. United Parcel Service, Inc.*, 179 F.3d 81, 98 -103 (3rd Cir. 1999).

2. **Foundation Of The Information**: Trustworthiness in reputation evidence is found when the topic is such that the facts are likely to have been inquired about and that persons having personal knowledge have disclosed facts which have thus been discussed in the community; and thus the community's conclusion, if any has been formed and is likely to be trustworthy. *United States v. Brodie*, 326 F.Supp.2d 83, 97 -98 (D.D.C. 2004). A proponent of reputation testimony must establish that it "arises from sufficient inquiry and discussion among persons with personal knowledge of the matter to constitute a trustworthy 'reputation.'" *Blackburn*, 179 F.3d at 100. The judge should consider not only the foundation that has been laid for the reception of this reputation evidence, but also such factors as the significance and nature of the fact towards which the proof is directed, the availability of other evidence, and the nature of the litigation. *Id.*

B. **Purpose**: The matters of personal and family history that are within the ambit of FRE 803(19) are often difficult to prove through personal knowledge. *Blackburn v. United Parcel Service, Inc.*, 179 F.3d 81, 98 -103 (3rd Cir. 1999). For example, if a witness has not been present at someone's wedding, or has not personally seen that person's valid marriage license and executed marriage certificate, he or she presumably could only testify regarding the marriage on the basis of hearsay. *Id.* However, "[m]arriage is universally conceded to be a proper subject of proof by evidence of reputation in the community." FRE 803(19) Advisory Committee Notes. Other matters of personal and family history also "seem to be susceptible to being the subject of well founded repute." *Id.*

C. **Examples**: A witness's testimony regarding her own age "can be considered reputation concerning personal or family history, for which an exception has been made to the hearsay rule." *Government of V.I. v. Joseph*, 765 F.2d 394, 397 n. 5 (3d Cir. 1985). Family members' statements that a particular person lived with the plaintiff, supported her financially, and held her out as his child, were admissible under FRE 803(19). *McBride v. Heckler*, 619 F.Supp. 1554, 1561-62 (D.N.J. 1985). Testimony by a criminal defendant's father regarding his belief as to where the defendant was born was also admissible. *United States v. Jean-Baptiste*, 166 F.3d 102, 110 (2d Cir. 1999).

XX. **Reputation Regarding Land**: The rules provide a hearsay exception for evidence regarding "[r]eputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located." FRE 803(20).

A. **Nature Of Opinion**: Community opinion, not individual personal observations, triggers FRE 803(20). *See The Nature Conservancy v. Nakila*, 671 P.2d 1025, 1034 (Haw.Ct.App. 1983). In addition to land boundaries, the rule extends to community opinion on the ownership of land. *See Guerrero v. Guerrero*, 2 N.M.I. 61, 69 (1991).

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1. **Age Of Information**: The reputation must predate the dispute. There is some support for the idea that the matter must be ancient "or one as to which it would be unlikely that living witnesses could be obtained." *People of State of N.Y. by Abrams v. Ocean Club, Inc.*, 602 F.Supp. 489, 491 (D.C.N.Y. 1984).

2. **Customs**: The exception may allow a witness to testify as to historical background as "events of general history." *United States v. Belfast*, 611 F.3d 783, 821 (11th Cir, 2010).

B. **Foundational Requirements**: The Advisory Committee Notes to the rule point out that trustworthiness in reputation evidence is found "when the topic is such that the facts are likely to have been inquired about and that persons having personal knowledge have disclosed facts which have thus been discussed in the community; and thus the community's conclusions if any has been found, is likely to be a trustworthy one." (*Citing* 5 Wigmore, *Evidence* § 1580, p. 444 (1974)).

XXI. **Reputation Of Character**: Statements regarding the "reputation of a person's character among associates or in the community" are excluded from hearsay. FRE 803(21); *see United States v. Penson*, 896 F.2d 1087, 1093 (7th Cir. 1990) (Evidence showing "good" reputation in the drug-trafficking community fell within FRE 803(21) hearsay exception.).

A. **Rule Only Hearsay Exception**: Although FRE 803(21) allows hearsay to prove character, it does so only where character evidence is admissible. *L'Etoile v. New England Finish Systems, Inc.*, 575 F.Supp.2d 331, 338 (D.N.H. 2008). Proponents of character evidence must show its relevance to permit admissibility. *Schweitzer-Reschke v. Avnet, Inc.*, 881 F.Supp. 530, 532 (D.Kan. 1995). The Advisory Committee observed that the exception "deals only with the hearsay aspect" of character reputation evidence, and explains that limitations "upon admissibility based on other grounds will be found in Rules 404, relevancy of character evidence generally, and 608, character of witness." *United States v. Harris*, 1992 WL 373473, 1 (S.D.N.Y. 1992).

B. **Limits On the Rule**: The rule is limited to statements concerning the reputation of a person's character. *Dick v. Phone Directories Co., Inc.*, 397 F.3d 1256, 1266 (10th Cir. 2005) (general statements regarding sexual orientation of people in a workplace not exempt under the rule). Statements about specific prior acts and intentions do not establish the reputation "character among associates or in the community." *United States v. Arroyo*, 406 F.3d 881, 888 (7th Cir. 2005); FRE 803(21).

1. **Difference Between Reputation And Opinion**: There is a difference between opinion and reputation evidence. Hearsay evidence of a person's reputation can be rebutted without cross-examining the declarant, merely by introducing reputation witnesses in rebuttal. A statement of opinion can be challenged or rebutted only by cross-examination.

C. **General Interest**: To have significant probative value, the matter in question "must be one of general interest, so that it can accurately be said that there is a high probability that the matter underwent general scrutiny as the community reputation was formed."

McCormick on Evidence § 324, at 750 (2d ed.) (footnote omitted). Wigmore states this "general interest" requirement more emphatically: "the facts for which such an opinion or reputation can be taken as trustworthy must . . . be such facts as have been of interest to all members of the community as such, and therefore have been so likely to receive general and intelligent discussion and examination by competent persons, so that the community's received opinion on the subject cannot be supposed to have reached the condition of definite decision until the matter had gone, in public belief, beyond the stage of controversy and had become settled with fair finality." 5 *Evidence* § 1598, at 564-565.

XXII. Judgment Of Previous Conviction: The rules provide a hearsay exception for certain criminal judgments of conviction. FRE 803(22) allows judgments of felony convictions resulting after trial or from guilty pleas to be admitted into evidence to establish any fact essential to sustain the judgment.

A. *Nolo Contendere* Plea: The hearsay exception does not apply to *nolo contendere* pleas. *United States v. Nguyen*, 465 F.3d 1128, 1131 -1132 (9th Cir. 2006). *Nolo contendere* convictions are inadmissible "consistent with the treatment of *nolo* pleas in Rule 410." FRE 803(22) Advisory Committee Notes.

1. **Rule Not A Bar**: FRE 803(22) does not bar any evidence. *See Olsen v. Correiro,* 189 F.3d 52, 62 -63 (1st Cir. 1999). The rule explains that certain evidence of judgments is not barred by the hearsay rule and that this exception does not apply to judgments entered upon a nolo plea. *Id.* Evidence of a final judgment that does not fall within this hearsay exception may still be admissible, either because it is not being offered for the truth of the matter asserted or because it falls within another hearsay exception. *See Hinshaw v. Keith,* 645 F.Supp. 180, 182 (D.Me. 1986) ("Rule 803(22) is not a rule of exclusion, but rather an exception to the broad exclusionary rule known as the hearsay rule.").

2. **Alternative Basis For Admission**: Although FRE 803(22) does not from hearsay pleas of *nolo contendere,* and convictions based upon such pleas, for purposes of proving that the defendant is guilty of the crime in question, the rule is silent to - and therefore does not prevent the admission of – such convictions being admitted solely for the purpose of showing a prior felony conviction. *United States v. Adedoyin*, 369 F.3d 337, 344 -345 (3rd Cir. 2004).

B. Misdemeanors: FRE 803(22) does not waive hearsay restrictions for misdemeanor convictions because "motivation to defend at this level is often minimal or nonexistent." *United States v. Nguyen*, 465 F.3d 1128, 1131 -1132 (9th Cir. 2006).

C. Special Cases

1. **Foreign Courts**: Foreign court records, including the indictments, are admissible under FRE 803(22), which excepts judgments of previous convictions from the general ban against hearsay. *Mike's Train House, Inc. v. Lionel, L.L.C.*, 472 F.3d 398, 412 (6th Cir. 2006).

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2. **Indictments**: Several courts have held that an indictment from a previous conviction is properly included within the scope of FRE 803(22) and is thus admissible despite being hearsay. *See Maynard v. Dixon,* 943 F.2d 407, 414 (4th Cir. 1991) (an indictment relating to a previous conviction is admissible).

3. **Acquittals**: No hearsay exception exists for acquittals. *United States v. Bailey*, 319 F.3d 514, 518 (D.C. Cir. 2003). Evidence of prior acquittals are inadmissible. *United States v. Gricco*, 277 F.3d 339, 352 -353 (3rd Cir. 2002) (*citing United States v. De La Rosa*, 171 F.3d 215 (5th Cir. 1999); *United States v. Marrero-Ortiz*, 160 F.3d 768 (1st Cir. 1998)). "A judgment of acquittal is relevant to the legal question of whether the prosecution is barred by the constitutional doctrine of double jeopardy or of collateral estoppel. But once it is determined that these pleas in bar have been rejected, a judgment of acquittal is not usually admissible to rebut inferences that may be drawn from the evidence that was admitted." *United States v. Viserto*, 596 F.2d 531, 537 (2d Cir. 1979). Judgments of acquittal are hearsay. *Id. See* 2 *McCormick on Evidence*, § 298 (1999).

XXIII. Civil Judgments As To Family Or Land: Judgments as proof of matters of personal, family, or general history; or boundaries, essential to the judgment, are excepted from hearsay limits if the same would be provable by evidence of reputation. FRE 803(23).

A. **Other Civil Judgments Not Excluded From Hearsay**: Although FRE 803 contains exceptions for certain kinds of judgments, such as judgments of previous felony convictions, civil judgments do not fit comfortably into any hearsay exception. *United States v. Boulware*, 384 F.3d 794, 806 (9th Cir. 2004).

Notes _____

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Notes

[E6] HEARSAY EXCEPTION (WITNESS UNAVAILABLE)

QUICK RULE: *FRE 804 lists the hearsay exceptions that may apply only if the witness is "unavailable." The witness's "unavailability" can arise from a privilege claim, the witness's absence, bad memory, or a refusal to testify*

DISCUSSION

I. **Unavailability**: If a declarant is unavailable as a witness, additional hearsay exceptions may apply to that declarant's statements. FRE 804. These include his former testimony, statements made under belief of impending death, statements made against interest, and statements made regarding personal or family history. *Id.* The party seeking to introduce hearsay statements bears the burden of showing that the declarant is unavailable. *United States v. Ochoa*, 229 F.3d 631, 637 (7th Cir. 2000).

A. **Valid Privilege Claim**: A witness is unavailable if a court's ruling exempts the witness from testifying based upon an asserted privilege concerning the declarant's statement. FRE 804(a)(1). *United States v. James*, 128 F.Supp.2d 291, 297 (D.Md. 2001)(By asserting her spousal testimony privilege, Mrs. James was "unavailable" as a witness.). If the privilege has been waived, or if the Court concludes the assertion of privilege is inappropriate, the witness is "available" under this rule. *United States v. Basciano*, 430 F.Supp.2d 87, 95 (E.D.N.Y. 2006).

1. **Fifth Amendment Claims**: When a witness invokes the Fifth Amendment right against testifying, the witness is "unavailable." *See United States v. Matthews*, 20 F.3d 538, 545 (2d Cir. 1994); *United States v. Bakhtiar*, 994 F.2d 970, 977 (2d Cir. 1993). With the Court's permission, a witness need not be physically brought into court to assert the privilege. *United States v. Chan*, 184 F.Supp.2d 337, 341 (S.D.N.Y. 2002). The government's representation that the pleading defendants' lawyers had been contacted and that each attorney stated that his client would assert the Fifth Amendment privilege is sufficient. *Id. (Citing United States v. Williams*, 927 F.2d 95, 98-99 (2d Cir. 1991)).

a. **Defendant**: A defendant in a criminal trial is presumed to be unavailable. *United States v. Robbins*, 197 F.3d 829, 838 (7th Cir. 1999). A party asserting the privilege against self incrimination, cannot then seek to deem himself unavailable so to permit the admission of his own out-of-court statement. *United States v Kimball*, 15 F.3d 54, 55 -56 (5th Cir. 1994). "When the defendant invokes his Fifth Amendment privilege, he has made himself unavailable to any other party, but he is not unavailable to himself." *United States v. Hughes*, 535 F.3d 880, 882 (8th Cir. 2008)(*quoting United States v. Peterson*, 100 F.3d 7, 13 (2d Cir. 1996)).

B. **Refusal To Testify**: A witness is rendered unavailable if he simply refuses to testify concerning the subject matter of his statement despite judicial pressures. FRE 804(a)(2) Advisory Committee Notes. The record must reflect that the witness "persist[ed] in

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refusing to testify concerning the subject matter of his statement despite an order of the court to do so." *Gregory v. Shelby County, Tenn.*, 220 F.3d 433, 448 -449 (6th Cir. 2000) (finding that judicial pressure would have been unavailaing for witness serving life sentence). The trial judge may not need to threaten contempt to determine if the witnesses' persistence was adequately tested before the witness is deemed unavailable. *United States v. Boulahanis*, 677 F.2d 586, 588 (7th Cir. 1982).

C. **Lack Of Memory**: A declarant is unavailable if he or she "testifies to a lack of memory of the subject matter of the declarant's statement." FRE 804(a)(3); *Schindler v. Seiler*, 474 F.3d 1008, 1012 (7th Cir. 2007). This exception is not available if the declarant can recall the statement or lack thereof. *Id.*

D. **Illness Or Incapacity**: A witness is unavailable if she is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity. *Mutuelles Unies v. Kroll & Linstrom*, 957 F.2d 707, 713 (9th Cir. 1992) (citing FRE 804(a)(4)). In determining whether a witness is unavailable, courts consider factors such as the nature of the infirmity, the expected time of recovery, the reliability of the evidence concerning the infirmity, and other special circumstances. *See Ecker v. Scott*, 69 F.3d 69, 72 (5th Cir. 1995).

1. **Doctor's Opinion**: Court may credit a doctor's written opinion that a witness is unable to undergo the stress of testifying. *United States v. McGuire*, 307 F.3d 1192, 1205 (9th Cir. 2002)(Late term pregnancy made witness unavailable based upon Doctor's note).

E. **Absent From The Hearing**: A witness is unavailable if the proponent of the witness's statement cannot "procure" the witness's attendance by process or other means. FRE 804(a)(5).

1. **Necessary To Satisfy**: To satisfy the rule's reasonable means mandate, a good-faith effort must be made to obtain the declarant's presence at trial. FRE 804(a)(5). *See United States v. Kehm*, 799 F.2d 354, 360 (7th Cir. 1986); *Barber v. Page*, 390 U.S. 719, 724-25 (1968). These reasonable means must be "genuine and bona fide." *United States v. Yida*, 498 F.3d 945, 952 (9th Cir. 2007).

   a. **Timing Of Search For Witness**: The effort to bring the witness to trial must begin well before trial and include pursuit of compulsory process. *United States v. Hite*, 364 F.3d 874, 882 -883 (7th Cir. 2004), *rev'd on other grounds*. Courts are sensitive to how close to the beginning of trial a party began searching for the witness they hope to deem "unavailable." *United States v. Quinn*, 901 F.2d 522, 527-28 (6th Cir. 1990) (the government's subpoena of a declarant on a Thursday before a Monday trial was not justifiable as a good-faith effort because the trial date had been set for a month.).

   b. **Effort Must Be Made**: Courts may insist that an effort made to obtain the witnesses attendance, even if it is unlikely to be successful. *United States v. James*, 128 F.Supp.2d 291, 297 (D.Md. 2001) ("Although appellant stated that

his son Ruben was in the Dominican Republic, there was no evidence that he had made any efforts or taken any steps to procure his son's attendance or testimony at trial.").

c. **Examples**: A fugitive from justice is reasonably deemed unavailable for trial. *United States v. Chapman*, 345 F.3d 630, 632 (8th Cir. 2003). *Cf. United States v. Flenoid*, 949 F.2d 970, 973 (8th Cir. 1991) (defense showed unavailability of witness through numerous attempts at service, other attempts to reach the witness at her last known address, and by exhausting all other leads concerning her whereabouts). *See United States v. Mann*, 590 F.2d 361, 367 (1st Cir. 1978) ("other reasonable means" is a relatively high good-faith standard that cannot be satisfied by perfunctory efforts).

F. **Absence Cannot Be Procured**: "A declarant is not unavailable as a witness if . . . absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying." FRE 804(a). *United States v. Hazelett*, 32 F.3d 1313, 1317 (8th Cir. 1994).

II. **Exceptions When Declarant Is Unavailable**: If the party proffering the hearsay establishes the witness's unavailability, the rules provide hearsay exceptions for former testimony, dying declarations, statements against interest, statement about family history, and statements against a party who has procured the witness's absence.

A. **Former Testimony**: If the declarant is unavailable, a court may admit testimony given as a witness at (1) another hearing, or (2) a deposition, if the party against whom the testimony is now offered had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. *United States v. Yida,* 498 F.3d 945, 949 -950 (9th Cir. 2007) (*citing* FRE 804(b)(1)). "If important witnesses [from a first trial] have become, for one reason or another, unavailable, their former testimony may be introduced at the second trial." *See United States v. Mohawk*, 20 F.3d 1480, 1488 (9th Cir. 1994); *United States v. Vargas*, 933 F.2d 701, 705 (9th Cir. 1991).

2. **Similar Motive**: The "similar motive" requirement is a fact-intensive investigation, dependent on the case's particular circumstances. FRE 804(b)(1); *United States v. Salerno*, 505 U.S. 317, 325 (1992). "The 'similar motive' requirement is inherently factual and depends, at least in part, on the operative facts and legal issues and on the context of the proceeding." *United States v. Geiger*, 263 F.3d 1034, 1038 (9th Cir. 2001).

a. **Specificity Of Consideration**: The court must determine at what level of generality a party's respective motives should be compared, an issue that has divided the circuits. *See* 2 Mccormick On Evidence § 304 (6th ed. 2006) (noting that the circuits appear to be in disagreement over "whether in typical grand jury situations exculpatory testimony meets" FRE 804(b)(1)'s similar motive requirement).

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i. **High Level**: In *United States v. Miller*, 904 F.2d 65, 68 (D.C.Cir. 1990), the court compared the government's respective motives at a high level of generality. The Miller Court concluded that "[b]efore the grand jury and at trial" the testimony of an unavailable co-conspirator "was to be directed to the same issue-the guilt or innocence" of the defendants, and thus, the government's motives were sufficiently similar. *Id.*; *accord United States v. Foster*, 128 F.3d 949, 957 (6th Cir. 1997).

ii. **Granular**: In *United States v. DiNapoli*, 8 F.3d 909 (2d Cir.1993) (*en banc*), the court compared motives at a fine-grained level of particularity. "[W]e do not accept the proposition . . . that the test of similar motive is simply whether at the two proceedings the questioner takes the same side of the same issue." *Id.* The proper test for similarity at this level is whether the questioner had "a substantially similar degree of interest in prevailing" on the related issues at both proceedings); *accord United States v. Omar*, 104 F.3d 519, 522-24 (1st Cir. 1997) (the government will rarely have a similar motive in questioning a witness before a grand jury as it would have at trial).

B. **Dying Declaration**: A "statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death," may be admitted when the declarant is unavailable to testify. FRE 804(b)(2); *United States v. Shields*, 497 F.3d 789, 793 (8th Cir. 2007).

1. **Hopelessness A Must**: To qualify as a dying declaration, "the declarant must have spoken without hope of recovery and in the shadow of impending death." *Shepard v. United States*, 290 U.S. 96, 99-100 (1933). "Fear or even belief that illness will end in death will not avail itself to a make a dying declaration. There must be 'a settled hopeless expectation' that death is near at hand, and what is said must have been spoken in the hush of its impending presence." *Id.*

2. **Inferring Declarant Believed Death Was Near**: A declarant's serious injuries can support an inference that he believed death was imminent, *see United States v. Peppers*, 302 F.3d 120, 137 (3d Cir. 2002), but the nature and extent of the injuries must be so severe that the declarant "must have felt or known that he could not survive." *Mattox v. United States*, 146 U.S. 140, 151 (1892). An injury, though severe, cannot support a dying declaration if they are obviously not life-threatening in nature. *United States v. Shields*, 497 F.3d 789, 793 (8th Cir. 2007).

a. **Factors**: Courts will consider if (1) a doctor diagnosed the injuries as life threatening, (2) whether others expected the declarant to survive, and (3) whether the declarant believed he would die. *Id. See United States v. Lawrence*, 349 F.3d 109, 117 (3d Cir. 2003) (attacker's identification was not a dying declaration because there was no evidence declarant believed death was imminent, everyone expected him to survive, and no one told him he would die).

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C. **Statement Against Interest**: A statement against penal interest is exempted from hearsay exclusion if it meets three elements: (1) the declarant must be unavailable; (2) the statement must be against the declarant's penal interest; and (3) corroborating circumstances must exist indicating the trustworthiness of the statement. *United States v. MacDonald,* 688 F.2d 224, 232-233 (4th Cir. 1982), *United States v. Robbins*, 197 F.3d 829, 838 (7th Cir. 1999). This rule applies to all witnesses and **must not be confused with the rule exempting all** admissions by a party opponent from hearsay. FRE 801(d)(2).

1. **Statements Against Penal Interest**: Self-incriminatory statements made by individuals involved in a criminal action fall "within the definition of a statement against penal interest excepted from the exclusions of the hearsay rule." *United States v. Pratt,* 553 F.3d 1165, 1171 (8th Cir. 2009); FRE 804(b)(3). A statement that may forfeit declarant's favorable plea agreement and result in prosecution is against penal interest. *United v. Jackson*, 540 F.3d 578, 588 -589 (7th Cir. 2008).

   a. **Immigration Status**: A declarant's statement to immigration officers regarding his citizenship and alienage is admissible under the hearsay exceptions for statements against interest. *United States v. Pena-Gutierrez*, 222 F.3d 1080, 1088 (9th Cir. 2000).

2. **Corroborating Circumstances**: There must be "corroborating circumstances that 'clearly indicate' the trustworthiness of the statement." *United States v. Hall*, 165 F.3d 1095, 1112 (7th Cir. 1999); FRE 804(b)(3). Such circumstances are lacking when the declarant was willing to subject herself to criminal liability to shield others. *United States v. Cole*, 525 F.3d 656, 661 (8th Cir. 2008).

   a. **Factors**: The trial court should consider three factors when determining whether corroborating circumstances exist to qualify a statement for this hearsay exception: (1) the relationship between the declarant and the exculpated party; (2) whether the statement was voluntary and given after *Miranda* warnings; and (3) whether there is any evidence the statement was made to curry favor with authorities. *United States v. Nagib*, 56 F.3d 798, 805 (7th Cir. 1995). It "is the statement rather than the declarant which must be trustworthy." *United States v. Brainard,* 690 F.2d 1117, 1124 (4th Cir. 1982).

D. **Statement Of Personal Or Family History**: Statements "concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history" are not excluded by the hearsay rule if the declarant is unavailable. *United States v. Pluta,* 176 F.3d 43, 47 (2d Cir. 1999)(*quoting* FRE. 804(b)(4)(A)). *See United States v. Hernandez*, 105 F.3d 1330, 1332 (9th Cir. 1997).

1. **Breadth Of Exception**: The rule only excepts from hearsay those facts related to family history that are likely to be uncontroversial. The rule is not intended to address "highly debatable or controversial matters." *United States v. Carvalho*, 742 F.2d 146, 151 (4th Cir. 1984). "[T]the rule rests on the assumption that the type of declarant specified by the rule will not make a statement about the type of fact

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covered by the rule unless it is trustworthy." 4 *Weinstein's Evidence* § 804(b)(4)[01] (1981). The assumption exists where the facts at issue concern, for example, the date of a marriage or existence of a ceremony. *Id. See United States v. Medina-Gasca*, 739 F.2d 1451, 1454 (9th Cir. 1984) ("Since some of this testimony went to a critical element of the crimes charged . . . we think the trial judge would have been better advised" no to allow it in under 804(b)(4)).

E. **Statement Offered against Party That Procured Witness's Absence:** The "forfeiture by wrongdoing" rule applies when a party "engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." FRE 804(b)(6). This rule codified the common law forfeiture doctrine. *Davis v. Washington*, 547 U.S. 813, 833 (2006). The requirement of intent "means that the exception applies only if the defendant has in mind the particular purpose of making the witness unavailable." *Giles v. California*, 128 S.Ct. 2678, 2687 -2688 (2008).

1. **Bad Act Not Enough**: It is not enough that a defendant murdered a victim with the *effect* of preventing her testimony; rather, the defendant must have murdered the victim with the *intent* of preventing her testimony. *Davis*, 547 U.S. at 833.

Notes: _____