[E7] HEARSAY (RESIDUAL EXCEPTION)

QUICK RULE: *If an out-of-court statement constitutes hearsay, it may be admissible under the residual hearsay exception. The statement must meet a five-part-test:*
(1) the statement must evidence a material fact,
(2) the evidence must be more probative on these issues than any other evidence,
(3) admitting the evidence must further the FRE's objectives and the interests of justice,
(4) the evidence must have circumstantial guarantees of trustworthiness, and
(5) the proponent has served prior notice to the adverse party in advance of trial. FRE 807.

DISCUSSION

I. **Residual Hearsay Exception**: The hearsay ban contains a residual, "catch-all," exception. FRE 807; *United States v. Smith*, 591 F.3d 974, 980 (N.D. Cal. 2010). Out-of-court statements, otherwise inadmissible hearsay, may be admitted under the residual hearsay exception. *United States v. Darwich*, 337 F.3d 645, 658 -659 (6th Cir. 2003). The exception requires certain guarantees of trustworthiness and high degrees of probativeness and necessity. *United Technologies Corp. v. Mazer*, 556 F.3d 1260, 1279 (11th Cir. 2009) *(quoting United States v. Wright*, 363 F.3d 237, 245 (3d Cir. 2004)).

A. **Rule To Be Used Rarely**: "Congress intended the residual hearsay exception to be used very rarely, and only in exceptional circumstances." *United States v. Ingram*, 501 F.3d 963, 967 (8th Cir. 2007). "The proponent of the statement bears a heavy burden," *United States v. Washington*, 106 F.3d 983, 1001-02 (D.C.Cir. 1997), and the rule's invocation demands some degree of rigor. *Trustees of the University of Pennsylvania v. Lexington Ins. Co.*, 815 F.2d 890, 906 (3d Cir. 1987).

1. **Discretion**: In deciding when a hearsay statement fits the residual hearsay exception, trial courts have considerable discretion. *United States v. Dumeisi*, 424 F.3d 566, 574 (7th Cir. 2005). The Seventh Circuit, however, has directed courts to construe the residual exception narrowly. *See Keri v. Board of Trustees of Purdue University*, 458 F.3d 620, 631 (7th Cir. 2006).

2. **Citation**: In 1997, the residual hearsay exceptions in FRE 803(24) and 804(b)(5) were combined into the new FRE 807, with no intended substantive changes.

Hearsay | E7 - 2

B. Five-Part Test: The rules provides a five-part test to determine whether an out-of-court statement should be exempted from hearsay restrictions:
(1) the statement must evidence a material fact,
(2) the evidence must be more probative on these issues than any other evidence,
(3) admitting the evidence must further the FRE's objectives and the interests of justice,
(4) the evidence must have circumstantial guarantees of trustworthiness, and
(5) the proponent must notify the other party before trial. *United States v. Banks,* 514 F.3d 769, 777 (8th Cir. 2008); *In re Slatkin,* 525 F.3d 805, 812 (9th Cir. 2008); FRE 807.

1. **Materiality**: To overcome the hearsay exclusion, the proffered evidence must bear significantly on the case's outcome. Marginal evidence is properly excluded. *United States v. Gaines,* 969 F.2d 692, 697-698 (8th Cir. 1992) (out-of-court statement properly excluded because it "did not add much" to other testimony); *see also United States v. Sparkman,* 235 F.R.D. 454, 461 (E.D.Mo. 2006) (hearsay statement regarding prior acts is not material pursuant to FRE 807).

2. **Probativeness**: To qualify for the hearsay exception, the proffered evidence must be more probative than any other evidence the party could obtain through reasonable efforts. *United Technologies Corp. v. Mazer,* 556 F.3d 1260, 1279 (11th Cir. 2009). This essentially creates a "best evidence" requirement. *Larez v. City of Los Angeles,* 946 F.2d 630, 644 (9th Cir. 1991). The proffering party must demonstrate a reasonable effort to locate any more probative witness or real evidence, before seeking the admission of hearsay under FRE 807. *AAMCO Transmissions, Inc. v. Baker*, 591 F.Supp.2d 788, 799 (E.D.Pa. 2008).

   a. **Cumulative Evidence**: Cumulative evidence is not properly admitted under the residual hearsay exception. *See United States v. Hughes*, 535 F.3d 880, 882 -883 (8th Cir. 2008).

   b. **Declarant's Availability Dispositive**: If the declarant is available to testify, the hearsay should not be admitted under FRE 807. *Green v. Baca*, 226 F.R.D. 624, 639 (C.D.Cal. 2005). If a witness is able to testify, the declarant's prior, out-of-court statement cannot be "more probative" than the evidence and testimony properly presented at trial. *See United States v. Laster,* 258 F.3d 525, 530 (6th Cir. 2001).

3. **Interests Of Justice**: Use of the out-of-court statement must comport with the FRE's general purpose and be consistent with the interests of justice. *United States v. Hawley*, 562 F.Supp.2d 1017, 1053 (N.D.Iowa 2008). The courts have shown little consistency as to what this prong means. Generally, the courts seem focused on the extent to which the other elements of the 807 test are met.

   a. **Usefulness**: The court may consider how helpful the hearsay is, in evaluating whether admitting it is in the interests of justice. Admitting testimony of adults, describing a child's out-of-court statements regarding sexual abuse, was found to be in the interests of justice because it aided the jury in its fact finding. *See United States v. Peneaux,* 432 F.3d 882, 893 (8th Cir. 2005).

b. **Failure Of Other Factors**: If the other four factors in the test are met by thin evidence, the court may use this alone to conclude that admitting the evidence is not in the interest of justice. *See Applied Medical Resources Corp. v. Steuer,* 527 F.Supp.2d 489, 492 (E.D.Va. 2007). One court concluded that, because the hearsay statement was vague, allowing it in would not meet the interests of justice. *See United States v. Sparkman,* 235 F.R.D. 454, 461 (E.D.Mo. 2006). Vagueness would better go to probity or materiality. This seems a circular or at best double counting, and is not the best practice.

4. **Circumstantial Guarantee Of Trustworthiness**: "Critical to the admission of a hearsay statement under [807] is a finding by the district court that the statement is trustworthy." *Keri v. Board of Trustees of Purdue University,* 458 F.3d 620, 631 (7th Cir. 2006). Without circumstantial guarantees of trustworthiness, courts need not even consider the other FRE 807 factors. *Elnashar v. Speedway SuperAmerica, LLC,* 484 F.3d 1046, 1057 (8th Cir. 2007). Generally, "out of court statements are inadmissible because they are presumed to be unreliable." *United States v. Hall,* 165 F.3d 1095, 1110 (7th Cir. 1999); *United States v. Hooks,* 848 F.2d 785, 796 (7th Cir. 1988). A party "wishing to introduce hearsay evidence must rebut the presumption of unreliability by appropriate proof of 'trustworthiness.'" *Hall,* 165 F.3d at 1110.

   a. **Sliding Scale Regarding Presumption**: "[A]s the trustworthiness of a statement increases, the justification for excluding it decreases." *United States v. Peneaux,* 432 F.3d 882, 892 (8th Cir. 2005) (citations omitted).

   b. **Circumstances Provide Reliability**: To determine whether testimony exhibits a guarantee of trustworthiness, courts look to the circumstances surrounding the testimony itself, rather than at corroborating testimony. *United States v. Castelan,* 219 F.3d 690, 695 (7th Cir. 2000)(citing *Lilly v. Virginia,* 527 U.S. 116, 138 (1999)). If the declarant's truthfulness is clear from the circumstances, cross-examination is of little use and the hearsay rule does not bar the statement. *Idaho v. Wright,* 497 U.S. 805, 820 (1990).

   c. **Totality Of The Circumstances**: In determining whether there are guarantees of trustworthiness, courts apply a "totality of the circumstances test." *United States v. Hawley,* 562 F.Supp.2d 1017, 1053 (N.D.Iowa 2008) *(quoting United States v. Shields,* 497 F.3d 789, 794 (8th Cir. 2007)). The court will consider:
   (1) whether the declarant was known and named;
   (2) whether the statement was made under oath;
   (3) whether the declarant knew assertions were subject to cross-examination;
   (4) whether the statement was based upon personal knowledge;
   (5) whether the declarant had motivation to lie;
   (6) whether the statement was corroborated;
   (7) whether the declarant was qualified to make the assertion;
   (8) whether the declarant made a prior inconsistent statement;
   (9) whether the statement was videotaped;
   (10) the proximity of time between the events described and the statement;
   (11) whether the statement is prepared in anticipation of litigation; and

Hearsay | E7 - 4

(12) the statement's spontaneity.
Bohler-Uddeholm Am., Inc. v. Ellwood Group, Inc., 247 F.3d 79, 113 (3d Cir. 2001) (first seven factors); *AAMCO Transmissions, Inc. v. Baker*, 591 F.Supp.2d 788, 799 (E.D.Pa. 2008) (remaining factors).

i. **Motivation**: Most courts give strong emphasis to the declarant's motivation to be honest/dishonest at the time the statement was made. *See United States v. Lawrence*, 405 F.3d 888, 903 (10th Cir. 2005) (Statement properly excluded because declarant "had a strong motivation to minimize any evidence of wrongdoing at the time he made the statements.").

d. **Comparison Approach**: In some courts, evidence can only qualify for the residual hearsay exception if it has "equivalent circumstantial guarantees of trustworthiness" as compared to evidence admitted under the other hearsay exceptions. *United States v. Darwich*, 337 F.3d 645, 659 (6th Cir. 2003). One method of approaching this analysis is to "compare the circumstances surrounding the statement to the closest hearsay exception." 2 Broun, *McCormick on Evidence* § 324 (6th ed. 2006). *See also United States v. Earles*, 113 F.3d 796, 800 n. 3 (8th Cir. 1997); *United States v. Banks*, 514 F.3d 769, 777 -778 (8th Cir. 2008) (comparing ATF form to business record exception, which might have applied had a custodian been called).

e. **Examples Of Indicia Of Reliability**:

• A plea agreement had circumstantial guarantees of trustworthiness because the plea agreement, (1) was made under oath with the advice of counsel, (2) subjected declarant to severe criminal penalties, (3) was made after declarant was advised of his constitutional rights, and (4) was accepted by the court in the criminal matter only after the court determined that declarant's plea was knowing and voluntary. *In re Slatkin*, 525 F.3d 805, 812 (9th Cir. 2008). *See also United States v. Hawley*, 562 F.Supp.2d 1017, 1053 (N.D.Iowa 2008).

• An interview taken under a proffer agreement did not contain circumstantial guarantees of trustworthiness because declarant's "position as a target in a criminal investigation provided him ample motivation to implicate others (even falsely)." *United Technologies Corp. v. Mazer*, 556 F.3d 1260, 1279 (11th Cir. 2009).

• Letters to one party did not contain indicia of reliability because they were not made under oath and the author would not be subject to cross examination. *Schoolcraft Memorial Hosp. v. Michigan Dept. of Community Health*, 570 F.Supp.2d 949, 963 n. 10 (W.D.Mich. 2008).

• A defendant's self-serving, out-of-court statement to a friend lacked indicia of reliability. *United States v. Hughes*, 535 F.3d 880, 882 (8th Cir. 2008). "[A] denial of guilt made by a criminal defendant to a friend contains no indicia whatsoever of reliability." *Sweet v. Delo*, 125 F.3d 1144, 1158 (8th Cir. 1997).

Hearsay | E7-5

• If the declarant lacked personal knowledge of the event described in the out-of-court statement, the statement is not trustworthy under FRE 807. *Keri v. Board of Trustees of Purdue University,* 458 F.3d 620, 631 (7th Cir. 2006).

• Declarant's physical and mental health may undermine the reliability of the out-of-court statement, and make it excludable under FRE 807. *United States v. Two Shields*, 435 F.Supp.2d 973, 978 -979 (D.N.D. 2006).

• In the "extraordinary circumstances" where police chief's statement appeared in three independent newspapers, and the declarant testified at trial, the newspaper quotes had "circumstantial guarantees of trustworthiness" at least equivalent to those of many of the other hearsay exceptions. *Larez v. City of Los Angeles,* 946 F.2d 630, 643 (9th Cir. 1991).

5. **Notice Requirement**: Before seeking to admit hearsay under FRE 807, the proponent must give other parties adequate notice; this notice should (a) be sufficiently in advance of trial so as to obviate the dangers of prejudice and unfair surprise, (b) include the out-of-court statement or where the statement could be found, (c) include the declarant's name, address, and phone number. *See United States v. Peneaux*, 432 F.3d 882, 892 (8th Cir. 2005); *Hicks v. Charles Pfizer & Co. Inc.*, 466 F.Supp.2d 799, 809 (E.D.Tex. 2005).

   a. **General Application**: "The notice requirements of the residual hearsay rule are strictly construed." *United States v. Musal*, 421 F.Supp.2d 1153, 1161 (S.D.Iowa 2006). Failure to provide the opposing party with the declarant's name and address can, alone, undermine an FRE 807 request. *See Lloyd v. Prof'l Realty Servs., Inc.,* 734 F.2d 1428, 1433-34 (11th Cir. 1984) ("a trial court following the strict language of the rule to exclude testimony is [not] guilty of an abuse of discretion").

   b. **When Notice Is Not Possible**: Courts have disagreed about whether FRE 807's notice provision should be strictly construed when circumstances render technical compliance impossible. *Hicks v. Charles Pfizer & Co. Inc.*, 466 F.Supp.2d 799, 809 (E.D.Tex. 2005).

      i. **Flexible Interpretation**: Some courts have interpreted the notice requirement "flexibly." *United States v. Evans,* 572 F.2d 455, 489 (5th Cir. 1978) (notice requirement satisfied so long as the opposing party has "sufficient opportunity to determine its trustworthiness"). The Fifth Circuit has upheld the admission of evidence under the residual hearsay exception despite the impossibility of the offering party's providing the declarant's name and address. *See Universal Elec. Co. v. United States Fid. & Guar. Co.,* 792 F.2d 1310, 1314-15 (5th Cir. 1986) (the trial court did not abuse its discretion in admitting the hearsay testimony of a deceased person under the residual hearsay exception); *see also United States v. West,* 574 F.2d 1131, 1134-36 (4th Cir. 1978) (district court did not abuse its discretion where deceased witness's grand jury testimony was admitted as evidence under

Hearsay | E7 - 6

residual exception); *United States v. Medico,* 557 F.2d 309, 313-16 (2d Cir. 1977) (upholding the admission of evidence under the residual exception where declarants were unidentified bystanders).

ii. **Strict Compliance Mandated**: Some courts have determined that strict, technical compliance with the notice provision's name and address requirement is essential to admit evidence under FRE 807. *See United States v. Mandel,* 591 F.2d 1347, 1368-69 (4th Cir.), *rev'd en banc,* 602 F.2d 653 (4th Cir. 1979) (declarants' unidentified status precluded compliance with the notice provision and consequently rendered the statements inadmissible); *Akzo Coatings, Inc. v. Aigner Corp.,* 881 F.Supp. 1202, 1212 (N.D.Ind. 1994), *aff'd in part, vacated in part,* 197 F.3d 302 (7th Cir. 1999) (failure to provide the names and addresses of the hearsay declarant's rendered statements inadmissible under FRE 807).

Notes:

Prejudice | F1 - 1

[F1] UNDUE PREJUDICE

QUICK RULE: *All evidence is inherently prejudicial; that's what makes it relevant. 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.*
This is a discretionary, case specific analysis. The result may turn upon the availability of other evidence to prove the point for which the challenged evidence is offered.
Rather than excluding the evidence, the court may give the jury a limiting instruction regarding how the evidence may be use. FRE 105. A limiting instruction is preferred over exclusion when the instruction reduces the risk of prejudice, delay, or confusion so that it no longer substantially outweighs the evidence's probative value.

DISCUSSION

I. **General**: Relevant evidence is not necessarily admissible. *United States v. Caraway*, 534 F.3d 1290, 1301 (10th Cir. 2008). The court may exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion, misleading jury, delay, or waste of time. FRE 403.

A. **Extraordinary Remedy**: Generally, exclusion under FRE 403 is an extraordinary remedy; the rules carry a strong presumption in favor of admissibility for authentic relevant evidence. *United States v. Grant*, 256 F.3d 1146, 1155 (11th Cir. 2001).

B. **Discretionary**: When considering whether to exclude relevant evidence under FRE 403, the court balances the evidence's probative value against its prejudicial harm. *United States v. Rubio*, 727 F.2d 786, 798 (9th Cir. 1983). This is a discretionary, case-specific analysis. *Id.* The court carries wide discretion in assessing the evidence's probative value, and weighing factors counseling against admissibility. *United States v. Abel*, 469 U.S. 45, 54 (1984); *Tome v. United States*, 513 U.S. 150, 174 (1995).

II. **Unfair Prejudice, Confusion, Misleading**: A trial court may exclude evidence where its tendency to mislead and confuse the jury *substantially* outweighs its probative value. *United States v. Ozuna*, 561 F.3d 728, 738 (7th Cir. 2009) (*citing United States v. Jackson*, 540 F.3d 578, 588 (7th Cir. 2008)).

A. **General**: All relevant evidence is inherently prejudicial. *Heimlicher v. Steele*, 615 F.Supp.2d 884, 927 (N.D.Iowa 2009). It is only when *unfair* prejudice substantially outweighs probative value that FRE 403 permits exclusion of relevant evidence. "Rule 403 does not exclude evidence because it is strongly persuasive or compellingly relevant - the rule only applies when it is likely that the jury will be moved by a piece of evidence in

a manner that is somehow unfair or inappropriate. The truth may hurt, but Rule 403 does not make it inadmissible on that account." *In re Air Crash Disaster,* 86 F.3d 498, 538 (6th Cir. 1996).

1. **Prejudice v. Confusion v. Misleading**: Although there may be some semantic distinction between "unfair prejudice," "confusion of issues," and "misleading the jury," courts almost always group these elements, ignoring any distinction. Any evidence that has one trait must have the others as well. Some courts, however, have carved out a separate meaning for confusion of the issues. The Eighth Circuit has explained, "Confusion of the issues warrants exclusion of relevant evidence if admission of the evidence would lead to litigation of collateral issues." *Firemen's Fund Ins. Co. v. Thien,* 63 F.3d 754, 758 (8th Cir. 1995) *(quoting United States v. Dennis,* 625 F.2d 782, 796-97 (8th Cir. 1980)).

2. **No *Per Se* Rule**: Applying FRE 403 to determine if evidence is prejudicial requires a fact-intensive, context-specific inquiry. *Sprint/United Management Co. v. Mendelsohn,* 128 S.Ct. 1140, 1147 (2008). Because prejudice under FRE 403 is determined in the context of the facts and arguments in a particular case, it is generally not amenable to broad *per se* rules. *Id.*

B. **Prejudice Defined**: Evidence is not unfairly prejudicial simply because it is damaging to an opponent's case. *United States v. Curtis,* 344 F.3d 1057, 1067 (10th Cir. 2003). The prejudice must be 'unfair.' " *Koloda v. General Motors Parts Div., General Motors Corp.,* 716 F.2d 373, 378 (6th Cir. 1983). Evidence presents a danger of unfair prejudice when "it tends to have some adverse effect upon a defendant beyond tending to prove the fact or issue that justified its admission into evidence," such as proving some adverse fact not properly in issue or unfairly exciting emotions against the defendant. *United States v. Quattrone,* 441 F.3d 153, 186 (2d Cir. 2006).

1. **Evidence May Tend To Prove Multiple Points**: One notion of "unfair prejudice" is when evidence may prove more than one proposition and could be considered for both a proper and an improper purpose. *Dresser v. Cradle of Hope Adoption Center, Inc.,* 421 F.Supp.2d 1024, 1030 (E.D.Mich. 2006). Unfair prejudice can result when the improper purpose overwhelms or overshadows any legitimate basis for receiving the evidence. *See United States v. Vandetti,* 623 F.2d 1144, 1149 (6th Cir. 1980). To be *unfairly* prejudicial, the evidence must have "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." FRE 403 Advisory Committee Notes. Unfair prejudice "speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." *United States v. Basham,* 561 F.3d 302, 326 -327 (4th Cir. 2009) *(quoting Old Chief v. United States,* 519 U.S. 172, 180 (1997)).

2. **Evidence May Divert The Fact Finder**: One notion of "unfair prejudice" is when evidence that is only marginally probative tends to be given preemptive weight by the jury substantially out of proportion to its logical force. *See Sutkiewicz v. Monroe Cnty. Sheriff,* 110 F.3d 352, 360 (6th Cir. 1997) ("relevant evidence may permissibly

be excluded if it serves to inflame the passions of the jury"). Unfairly prejudicial evidence is so inflammatory on its face, it may divert the jury's attention from the trial's material issues. *United States v. Adams*, 401 F.3d 886, 900 (8th Cir. 2005).

3. **Credibility Not Part Of Prejudice Analysis**: "Rule 403 is not to be used to exclude testimony that a trial judge does not find credible because credibility questions are the prerogative of a jury." *Gardner v. Galetka*, 568 F.3d 862, 876 (10th Cir. 2009).

C. **Probative Value Must Be Substantially Outweighed**: The trial court's consideration of the challenged evidence's probative value is a crucial element of the FRE 403 balancing test. *United States v. McFall*, 558 F.3d 951, 963 -964 (9th Cir. 2009). FRE 403 only requires suppression of evidence that results in unfair prejudice, and "only when that unfair prejudice *substantially* outweighs the probative value of the evidence." *United States v. Mohr*, 318 F.3d 613, 619-20 (4th Cir. 2003).

1. **Availability Of Alternative Evidence**: "The probative worth of any particular bit of evidence is obviously affected by the scarcity or abundance of other evidence on the same point." 22 *Federal Practice and Procedure* § 5250, pp. 546-547 (1978). A "conscientious assessment" under FRE 403 includes determining "whether there exists any alternative evidence with the same or greater probative value, but with a lesser threat of unfairly prejudicing the defendant, as the proffered evidence." *United States v. Ozsusamlar*, 428 F.Supp.2d 161, 170 (S.D.N.Y. 2006). When a court considers "whether to exclude on grounds of unfair prejudice," the "availability of other means of proof may be an appropriate factor." *Old Chief v. United States*, 519 U.S. 172, 184 (1997). In considering the "probative value" of evidence under FRE 403, the court must determine the "marginal probative value" of the evidence relative to the other evidence in the case. 1 *McCormick* 782, and n. 41.

2. **Limiting Instruction Preferred**: When considering an FRE 403 challenge, the court will review the possible effectiveness of a limiting instruction. *Mendenhall v. Cedarapids, Inc.*, 5 F.3d 1557, 1568 (Fed. Cir. 1993); *Kuiper v. Givaudan, Inc.*, 602 F.Supp.2d 1036, 1043 (N.D.Iowa 2009). The use of a limiting instruction as to the evidence's proper use may reduce the potential for prejudice such that it does not outweigh the evidence's probative value. See *United States v. Hawthorne*, 235 F.3d 400, 404 (8th Cir. 2000).

a. **Limiting Instruction**: A limiting instruction is an instruction to the jury that some evidence may only be used for a limited purpose. *FRE* 105 (limiting instruction required when evidence admitted for a limited purpose). A limiting instruction may diminish the danger of unfair prejudice arising from the admission of evidence. *United States v. Shellef*, 507 F.3d 82, 102 (2d Cir. 2007); *United States v. Walker*, 470 F.3d 1271, 1275 -1276 (8th Cir. 2006). A trial court may abuse its discretion by excluding evidence under FRE 403 without first considering whether a limiting instruction will reduce the risk of unfair prejudice. *See S.E. C. v. Peters*, 978 F.2d 1162, 1172 (10th Cir. 1992).

b. **Limiting Instruction Not Sufficient**: Courts assume that juries follow limiting instructions. *White v. Honeywell, Inc.*, 141 F.3d 1270, 1278 (8th Cir. 1998). A limiting instruction may not sufficiently reduce the effect of prejudicial evidence. *United States v. Nachamie*, 101 F.Supp.2d 134, 146 (S.D.N.Y. 2000). "The presumption that a jury will adhere to a limiting instruction evaporates where there is an overwhelming probability that the jury will be unable to follow the court's instructions and the evidence is devastating." *United States v. Jones*, 16 F.3d 487, 493 (2d Cir. 1994).

3. **Effect Of Stipulation**: A party's willingness to stipulate to a potentially prejudicial fact, may tip the balance under FRE 403 and provide the basis for excluding evidence to establish that fact. In *Old Chief v. United States*, 519 U.S. 172 (1997), the district court abused its discretion when it (1) rejected the defendant's proffered admission that he had been convicted of a felony (without indicating the felony's nature), and (2) then allowed the prosecution to introduce the judgment of conviction. Some courts, however, have refused to allow stipulations which would prevent a party from presenting the "gist" of its case. A defendant's willingness to stipulate that he had possessed child pornography could not avoid the introduction of the incriminating photos under FRE 403. *United States v. Schene*, 543 F.3d 627, 643 (10th Cir. 2008).

D. **Opening The Door**: Evidence, properly excluded under FRE 403 as prejudicial, may be permitted into evidence when the prejudiced party opens the door to the issue. *United States v. Elfgeeh*, 515 F.3d 100, 128 (2d Cir. 2008). "The rule of 'opening the door,' or 'curative admissibility,' gives the trial court discretion to permit a party to introduce otherwise inadmissible evidence on an issue (a) when the opposing party has introduced inadmissible evidence on the same issue," and (b) when the prejudicial evidence "is needed to rebut a false impression that may have resulted from the opposing party's evidence." *United States v. Rosa*, 11 F.3d 315, 335 (2d Cir. 1993).

E. **Expert Testimony**: The need for a thorough FRE 403 analysis of expert testimony is particularly important. *United States v. Frazier*, 387 F.3d 1244, 1263 (11th Cir. 2004); *United States v. Gallion*, 257 F.R.D. 141, 153 (E.D.Ky. 2009). Even appropriate expert testimony under FRE 702 may be excluded under FRE 403 if its probative value is substantially outweighed by the risk of unfair prejudice. *United States v. Lopez-Lopez*, 282 F.3d 1, 15 (1st Cir. 2002).

1. **Court Must Examine Expert Testimony**: "Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 595 (1993) (quoting Weinstein, *Rule 702 of the Federal Rules of Evidence is Sound; It Should Not Be Amended*, 138 F.R.D. 631, 632 (1991)). "Simply put, expert testimony may be assigned talismanic significance in the eyes of lay jurors, and, therefore, the district courts must take care to weigh the value of such evidence against its potential to mislead or confuse." *United States v. Frazier*, 387 F.3d 1244, 1263 (11th Cir. 2004).

Prejudice | FI - 5

F. **Bench Trials**: Regarding exclusion of evidence under Rule 403 in bench trials, the joint trier of law and fact can exclude improper inferences from his or her mind in rendering a decision." *See Gulf States Utilities Co. v. Ecodyne Corp.*, 635 F.2d 517 (5th Cir. 1981); *Schultz v. Butcher*, 635 F.2d 517 (4th Cir. 1994); *United States v. Zuber*, 118 F.3d 101 (2nd Cir. 1997)("We traditionally assume that judges, unlike juries, are not prejudiced by impermissible factors").

G. **Examples**:

1. **Fact/Expert Witness**: "Courts must be mindful when the same witness provides both lay and expert testimony," *United States v. Upton*, 512 F.3d 394, 401 (7th Cir. 2008), because of the heightened possibility of undue prejudice. *United States v. Flores-De-Jesus*, 569 F.3d 8, 20 -21 (1st Cir. 2009). Specifically, the risk of a jury conflating expert and fact testimony is increased when the opinion is given by the officers who were in charge of the investigation. *United States v. Brown*, 776 F.2d 397, 401 n. 6 (2d Cir. 1985). *See also United States v. Dukagjini*, 326 F.3d 45, 53 (2d Cir. 2003).

2. **Gruesome Photographs**: When photographs are probative of a relevant fact, even if not necessarily a disputed one, admission of gruesome photographs under FRE 403 is not reversible error. *Heimlicher v. Steele*, 615 F.Supp.2d 884, 928 (N.D.Iowa 2009) (Use of photos of still born child did not create unfair prejudice when child was the subject of the lawsuit). "Gruesomeness alone does not make photographs inadmissible." *United States v. Naranjo*, 710 F.2d 1465, 1468 (10th Cir. 1983). *See United States v. Ortiz*, 315 F.3d 873, 897 (8th Cir. 2002) (in capital case, admission of photos of bloody corpse was not abuse of discretion, as they corroborated testimony and established crime was heinous and depraved).

3. **Domestic Violence**: Domestic violence, when irrelevant to the charge at hand, has "great potential to incite unfair prejudice." *United States v. Covington*, 565 F.3d 1336, 1342 -1343 (11th Cir. 2009). Where the defendant faced narcotics charges, the court concluded that evidence of domestic abuse should have been excluded both for irrelevance and for unfair prejudice under FRE 403. *United States v. Hands*, 184 F.3d 1322, 1328-29 (11th Cir. 1999). If the domestic violence is a critical part of the case, evidence regarding the violence is not unfair. *United States v. Covington*, 565 F.3d 1336, 1342 -1343 (11th Cir. 2009).

4. **Possessing A Weapon**: The court may exclude evidence that a handgun was found in defendant's house when it was not part of the crime charged. *United States v. Malachowski*, 604 F.Supp.2d 512, 515 (N.D.N.Y. 2009).

5. **Expert Testimony**: Court refused to allow proposed expert to express legal opinions where the probative value was substantially outweighed by the danger of unfair prejudice. *United States v. Gallion*, 257 F.R.D. 141, 153 (E.D.Ky. 2009). A trial court properly excluded expert testimony that defendant believed "he is entitled to the 'sacramental consumption' of drugs," because the testimony had a significant

potential for confusing and misleading the jury and might invite jury nullification. *United States v. Ahrendt*, 560 F.3d 69, 73 (1st Cir. 2009).

6. **Post-Injury Cure**: Because the risk of jury confusion substantially outweighed the probative value, the trial court properly excluded drug-label warnings, added after patient's suicide. *Giles v. Wyeth, Inc.*, 556 F.3d 596, 600 (7th Cir. 2009).

7. **Patent Reexamination**: Evidence of incomplete patent reexamination proceedings is not admissible to prove patent invalidity, because whatever the evidence's probative value, it is outweighed by its potential for undue prejudice or jury confusion about the presumption of patent validity. *Transamerica Life Ins. Co. v. Lincoln Nat. Life Ins. Co.*, 597 F.Supp.2d 897, 907 (N.D.Iowa 2009).

III. **Cumulative Evidence**: A trial court can exclude otherwise relevant evidence if the evidence's probative value is substantially outweighed by the needless presentation of cumulative evidence. *United States v. Grant*,563 F.3d 385, 393 -394 (8th Cir. 2009) (*citing* FRE 403); *United States v. Oldbear*, 568 F.3d 814, 821 (10th Cir. 2009). A trial court was within its discretion to exclude cumulative evidence when the evidence did not provide new insight beyond the previously admitted evidence. *United States v. Willis*, 277 F.3d 1026, 1033 (8th Cir. 2002)).

A. **Cumulative v. Undue Delay v. Waste Of Time**: FRE 403 permits the exclusion of relevant evidence when it is cumulative, causes undue delay, or is a waste of time. Typically, the courts will use a mix of these, without explaining how they might be different. In *United States v. Stevens*, 935 F.2d 1380, 1399 (3d Cir. 1991), the court excluded expert testimony because its probative value was outweighed by concerns of "undue delay, waste of time, or needless presentation of cumulative evidence."

B. **Defining Cumulative Evidence**: Evidence is cumulative if its probative effect is already achieved by other evidence in the record; that is, if the small increment of probability it adds may not warrant the time spent in introducing it. *United States v. Davis*, 40 F.3d 1069, 1076 (10th Cir. 1994). Cumulative evidence is not "corroborating evidence," which buttresses weak or assailable evidence, often by "establishing data which refute possible discrediting circumstances." 2 Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* § 874, at 235 (1923). New evidence need not be identical to previous evidence to be cumulative, but only of the same general substance, related to the same fact or point, and of little additional probative value. *Jewell v. Life Ins. Co. of North America*, 508 F.3d 1303, 1314 (10th Cir. 2007).

1. **Cumulative Even If Form Differs**: Evidence may be cumulative even if its form differs from that already admitted. If testimony has already been offered regarding a point, the court may exclude business records containing the same information. *United State v. Arledge*, 553 F.3d 881, 894 (5th Cir. 2008); *See Winans v. Rockwell Int'l. Corp.*, 705 F.2d 1449, 1456 (5th Cir. 1983) (harmless to exclude documentary evidence that was cumulative to direct testimony).

C. **Judicial Discretion**: When considering whether to exclude cumulative evidence, the trial judge's discretion is wide, because cumulative evidence is excluded in the interests of trial efficiency, time management, and jury comprehension. *Jewell v. Life Ins. Co. of North America*, 508 F.3d 1303, 1314 (10th Cir. 2007); *International Minerals & Resources, S.A. v. Pappas*, 96 F.3d 586, 596 (2d Cir. 1996) ("A district judge has discretion to exclude evidence if it is cumulative of evidence already in the record.").

D. **Effect Of Stipulation**: A factual stipulation can fully support a trial court's finding that evidence of the same fact is properly excluded as cumulative and wasteful of the court's and the jury's time. *Madeira v. Affordable Housing Foundation, Inc.*, 469 F.3d 219, 251 (2d Cir. 2006). A concession will sometimes "call for the exclusion of evidence offered to prove [the] point conceded by the opponent." FRE 401 Advisory Committee Notes.

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Prejudice | F1 - 8

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[G1] STATEMENTS MADE IN SETTLEMENT

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

DISCUSSION

I. **Settlement Negotiations Not Admissible**: Conduct or statements made in settlement negotiations, or in efforts to compromise a claim are not admissible to prove or disprove liability, or to establish the validity or value of any claim. *Millenkamp v. Davisco Foods Intern., Inc.*, 562 F.3d 971, 980 (9th Cir. 2009); FRE 408. *See Fiberglass Insulators, Inc. v. Dupuy*, 856 F.2d 652, 653 (4th Cir. 1988) (trail court properly excluded "statements made by attorneys in the course of settling prior related litigation between the same parties").

A. **Rule Designed To Encourage Settlement**: The rule excluding settlement negotiations embraces a strong public policy favoring settlement. *Trout v. Milton S. Hershey Medical Center*, 572 F.Supp.2d 591, 599 (M.D.Pa. 2008). The rule is designed to foster open discussions, to encourage out-of-court settlements, and to guard against the admission of evidence that may not fairly represent the actual value or merits of a claim. *E.E.O.C. v. UMB Bank Financial Corp.*, 558 F.3d 784, 791 (8th Cir. 2009). The rule encompasses (1) offers, (2) evidence of conduct or statements made in compromise negotiations, and (3) the completed compromise itself. *Id. See* 2 *McCormick on Evidence*, § 266 (6th ed) (To promote settlement of disputes, courts bar offers to pay a sum in compromise; this would be discouraged if offers of compromise were admitted).

II. **Elements Of Exclusion Under The Rule**: For statements or conduct to be excludable under the rule, the evidence must (1) be created after a claim exists, (2) be offered to establish liability, invalidity, or the claim's value (3) be part of an effort to compromise the claim, and (4) arise from either the same claim, the same transaction, or a related claim.

A. **Claim Must Exist For Exclusion To Apply**: A claim must exist for the rule limiting admissibility to attach to a statement or action. The exclusionary rule is limited to actual disputes over existing claims and cannot apply when the parties merely suspect that they will one day be drawn into conflict. *Deere & Co. v. International Harvester Co.*, 710 F.2d 1551, 1556-57 (Fed. Cir. 1983). For purposes of FRE 408, "[a] dispute arises only when a claim is rejected at the initial or some subsequent level." *S.A. Healy Co. v. Milwaukee Metropolitan Sewerage District*, 50 F.3d 476, 480 (7th Cir. 1995).

1. **Complaint Need Not Be Filed**: The rule contains no "bright-line" requirement that a complaint be filed before statements made in compromise are excludable. *Kleen Laundry and Dry Cleaning Services Inc. v. Total Waste Management Corporation,* 817 F.Supp. 225, 228-229 (D.N.H. 1993). Whether or not settlement related discussions are deemed inadmissible depends upon the statement's purpose and the context in which the statement was made. *Davis v. Dawson, Inc.*, 15 F.Supp.2d 64, 98 (D.Mass. 1998).

B. **Evidence Only Excluded For Certain Reasons**: FRE 408 is not an absolute ban on all evidence regarding settlement negotiations. *Bankcard America, Inc. v. Universal Bancard Systems, Inc.*, 203 F.3d 477, 484 (7th Cir. 2000). Evidence coming out of settlement negotiations may be admissible for reasons other than establishing liability, validity, or claim value. *Zurich American Ins. Co. v. Watts Industries, Inc.*, 417 F.3d 682, 689 (7th Cir. 2005). When evidence of compromise is offered, a critical inquiry is what factual point does the proffering party seek to support with the evidence. *McInnis v. A.M.F., Inc.*, 765 F.2d 240, 247 -248 (1st Cir. 1985); *see Breuer Electric Mnf'g Company v. Tornado Systems of America,* 687 F.2d 182 (7th Cir. 1982).

1. **Exception When Showing Bias**: A trial court may properly allow in evidence regarding settlement to establish bias. *Croskey v. BMW of North America, Inc.*, 532 F.3d 511, 519 (6th Cir. 2008).

2. **Exception When Interpreting Settlement Agreement**: Compromise offers are admissible when issues arise regarding a settlement agreement; specifically, compromise offers may be admitted to demonstrate intent of the parties or to resolve a settlement agreement's ambiguity. *Catullo v. Metzner,* 834 F.2d 1075 (1st Cir. 1987). This rule only applies when the parties have reached a final settlement agreement. *Rein v. Socialist People's Libyan Arab Jamahiriya,* 568 F.3d 345, 352 - 353 (2d Cir. 2009). Provisional concessions, uttered in an unsuccessful attempt to reach a settlement agreement, cannot be used to support a finding on the merits of the dispute. *Id.*

3. **Exception When Settlement Talks Affected Litigating Positions**: If settlement discussions affect the parties' litigating positions, the content of those discussions may become admissible if the settlement discussions fail. If, during settlement discussions, one party lures the other into breaching the contract at issue, or in missing applicable time limits, the statements made in settlement are admissible to show the origins of those actions. *Bankcard America, Inc. v. Universal Bancard Systems, Inc.*, 203 F.3d 477, 484 (7th Cir. 2000) (citing Wright & Graham, *Federal Practice and Procedure: Evidence* § 5312, at 273 n. 5 (1980)).

4. **Exception For Waiver**: The courts will consider settlement negotiations when all parties to an action wish that it be done and effectively waive the rule barring admissibility. *McCown v. City of Fontana*, 565 F.3d 1097, 1105 (9th Cir. 2009); *United States v. One Star Class Sloop Sailboat*, 546 F.3d 26, 39 (1st Cir. 2008). Failure to object to the admission of settlement evidence is deemed a waiver and

cannot support an appeal. *United States v. One Star Class Sloop Sailboat built in 1930 with hull no. 721, named ""Flash II,"* 546 F.3d 26, 39 (1st Cir. 2008).

a. **No Waiver By Disclosure**: The rule barring the admission of settlement offers is not subject to inadvertent waiver based upon disclosure. *Rein v. Socialist People's Libyan Arab Jamahiriya*, 568 F.3d 345, 352 (2d Cir. 2009). Even a settlement offer presented in a letter to the court did not waive a party's right to exclude the offer from evidence. "Courts regularly receive information from the parties, including settlement positions, for use for specified purposes." *Id.*

5. **Exception When Settlement Part Of Claim**: Statements made in settlement of one claim are not excludable when the statements are the source and substance of a different and independent cause of action. *Scott v. Goodman*, 961 F.Supp. 424, 438 (E.D.N.Y. 1997); s*ee Cassino v. Reichhold Chem., Inc.*, 817 F.2d 1338, 1342-43 (9th Cir. 1987) (FRE 408 inapplicable where "coercive" settlement agreements are probative on the issue of retaliatory discrimination); *Resolution Trust Corp. v. Blasdell*, 154 F.R.D. 675, 680 (D.Ariz. 1993) (permitting evidence of settlement negotiations offered to reveal improper retaliatory motive for filing lawsuit).

6. **Exception When Measuring Fees**: The court may consider settlement discussions to determine if a party was "successful," as part of an effort to award attorneys fees. *Lohman v. Duryea Borough*, 574 F.3d 163, 168 (3rd Cir. 2009).

C. **Statement Must Pursue Compromise**: When deciding whether to exclude evidence under FRE 408, the court must determine whether the "statements or conduct were intended to be part of the negotiations for compromise." *Fiberglass Insulators, Inc. v. Dupuy*, 856 F.2d 652, 654 (4th Cir. 1988). A document or comment pursues "compromise," and is thus subject to the exclusionary rule, if it seeks to settle differences by mutual concessions. *Rodriguez-Garcia v. Municipality of Caguas*, 495 F.3d 1, 12 (1st Cir. 2007). Letters whose contents offer no concessions do not meet the definition of "compromise" and thus are outside FRE 408's scope. *Id; Ikossi-Anastasiou v. Board of Supervisors of Louisiana State University*, 579 F.3d 546, 551 (5th Cir. 2009) (Payment demand letter not an offer to settle under FRE 408); *Latorraca v. Centennial Technologies Inc.* 583 F.Supp.2d 208, 212 -213 (D.Mass. 2008) (Letters seeking and providing information without any discussion of concessions were not excludable).

D. **Rule Applies To Some Third-Party Settlements (Split)**: The rule limiting admissibility does not automatically attach to all settlement negotiations carried on by either party to the suit. FRE 408 generally excludes settlement discussions addressing the same complaint or claim as the one at issue. *See Quad/Graphics, Inc., v. Fass*, 724 F.2d 1230, 1235 (7th Cir. 1983) (evidence of plaintiff's settlement with two defendants in contract action not admissible at trial of remaining defendants). There is a split among courts as to how closely aligned the claim which is the subject of the settlement discussion must be to the claim at issue for FRE 408 to bar admission of evidence.

1. **Applying FRE 408 Only To Settlement On The Same Claim**: "By its terms, Rule 408 precludes the admission of evidence concerning an offer to compromise 'a claim' for the purpose of proving (or disproving) the fact or amount of 'the claim.'" *Armstrong v. HRB Royalty, Inc.* 392 F.Supp.2d 1302, 1304 (S.D.Ala. 2005). " Rule 408 excludes evidence of settlement offers only if such evidence is offered to prove liability for or invalidity [or amount] of the claim under negotiation." *Vulcan Hart Corp. v. National Labor Relations Board,* 718 F.2d 269, 277 (8th Cir. 1983). *Accord Uforma/Shelby Business Forms, Inc. v. National Labor Relations Board,* 111 F.3d 1284, 1293-94 (6th Cir. 1997)("'Rule 408 only bars the use of compromise evidence to prove the validity or invalidity of the claim that was the subject of the compromise, not some other claim.' ") (*quoting* 23 *Federal Practice and Procedure: Evidence* § 5314 (1st ed)); *Broadcort Capital Corp. v. Summa Medical Corp.*, 972 F.2d 1183, 1194 (10th Cir. 1992)(FRE 408 does not apply when the settlement discussions "involved a different claim than the one at issue in the current trial").

2. **Applying FRE 408 To Settlement On The Same Transaction**: Some courts limit admissibility for settlements on all claims arising from a single event or the "same transaction." *See Branch v. Fidelity & Casualty Co.,* 783 F.2d 1289, 1294 (5th Cir. 1986); *McInnis v. A.M.F., Inc.,* 765 F.2d 240, 246-48 (1st Cir. 1985); *United States v. Contra Costa County Water District,* 678 F.2d 90, 91-92 (9th Cir. 1982). "A more common situation involves the attempted use of a completed compromise of a claim arising out of the same transaction between a third person and a party to the suit being litigated. Rule 408 codifies the general practice of the federal courts in making compromise agreements inadmissible in such circumstances, as proof of liability for, or invalidity of, the claim." 2 *Weinstein's Evidence* ¶ 408[04] at 408-30 (1996).

3. **Reading Rule 408 Broadly**: Some Courts have read FRE 408's bar on admissibility more broadly to pursue the rule's goal of encouraging settlement. *See Hudspeth v. Commissioner,* 914 F.2d 1207, 1210, 1213 (9th Cir. 1990) (evidence of the Commissioner's timber valuation in settling a similar case could not be used to show the timber value in separate case). Some courts have read FRE 408 akin to a balancing test. *Zurich American Ins. Co. v. Watts Industries, Inc.,* 417 F.3d 682, 689 (7th Cir. 2005) ("balance is especially likely to tip in favor of admitting evidence when the settlement communications at issue arise out of a dispute distinct from the one for which the evidence is being offered").

   a. **Relatedness Test**: In *Bradbury v. Phillips Petroleum Co.,* 815 F.2d 1356 (10th Cir. 1987), the court acknowledged that plaintiffs' suits "arguably involved claims that arose out of different events and transactions," but it concluded that "the stronger argument is that these claims are related inasmuch as they arose in the course of the same large scale uranium exploration project" and "because they are similar enough to the claim sued upon in this case to be relevant." *Id.* at 1363. *Bradbury* thus adopted a "relatedness" test. *Orr v. City of Albuquerque,* 531 F.3d 1210, 1218 (10th Cir. 2008). *See Lo Bosco v. Kure Eng'g Ltd.,* 891 F.Supp. 1035, 1037-39 (D.N.J. 1995) (adopting same rule).

III. **Breadth Of Rule**: This exclusionary rule applies to all materials related to the settlement negotiations, settlement agreements, and applies throughout all parts of the case.

A. **Rule Covers Materials Created For Settlement, Even If Not Distributed**: The rule bars from admissibility certain work product, internal memos, and other materials created specifically for the purpose of conciliation, even if not communicated to the other party. *E.E.O.C. v. UMB Bank Financial Corp.*, 558 F.3d 784, 791 (8th Cir. 2009) *(citing* Advisory Committee Notes). Internal memoranda or reports regarding compromise negotiations are not admissible, even though not communicated to the opposing parties. *Affiliated Mfrs., Inc. v. Alum. Co. of Am.*, 56 F.3d 521, 528-30 (3d Cir. 1995); *Blu-J, Inc. v. Kemper C.P.A. Group*, 916 F.2d 637, 641-42 (11th Cir. 1990); *Ramada Dev. Co. v. Rauch*, 644 F.2d 1097, 1106-07, (5th Cir. 1981).

B. **Rule Applies Throughout Case**: The prohibition regarding the use of settlement information applies throughout all stages of the case, including the award of attorney fees. *See Rein v. Socialist People's Libyan Arab Jamahiriya*, 568 F.3d 345, 352 -353 (2d Cir. 2009) (*citing* 4 Wigmore, *Evidence in Trials at Common Law* § 1061 (1972).

C. **Rule Covers Completed Settlement Agreements**: The exclusionary rule applies equally with respect to completed compromises when offered against a party thereto. *McInnis v. A.M.F., Inc.*, 765 F.2d 240, 247 -248 (1st Cir. 1985) (*citing* Advisory Committee Notes). This situation ordinarily arises when a party to the present litigation has compromised with a third person. *Id. See Young v. Verson Allsteel Press Co.*, 539 F.Supp. 193, 196 (E.D.Pa. 1982) (refusing request to admit evidence of the plaintiff's settlement with a co-defendant to decrease the moving defendant's liability).

D. **Consent Decrees**: The exclusionary rule applies not only to settlements but to civil consent decrees with government agencies. *Bowers v. National Collegiate Athletic Ass'n*, 563 F.Supp.2d 508, 536 (D.N.J. 2008).

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Rules Of Exclusion | G1 - 6

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[G2] VIEW AND INSPECTION

QUICK RULE: *The decision to permit a view of a site outside the courtroom is within the Court's discretion. The circuits are split as to whether a view amounts to evidence.*

DISCUSSION

I. **General**: A federal court, exercising its inherent powers, may view places or objects outside the courtroom. *United States v. Passos-Paternina*, 918 F.2d 979, 986 (1st Cir. 1990). Whether to permit a view in a particular situation is a question committed to the trial court's informed discretion. *United States v. Pettiford*, 962 F.2d 74, 76 (1st Cir. 1992); *United States v. Culpepper*, 834 F.2d 879, 883 (10th Cir. 1987).

A. **Considerations**: In ruling upon requests for site inspections, the district court may weigh various factors involving the trial's fair and efficient conduct. *United States v. Williams*, 44 F.3d 614-9 (7th Cir. 1995). Relevant factors include concern over transport to the site, difficult logistics, and the risk of physical harm. *Id.*

1. **Alternatives**: Photographs or videotape films are preferable substitutes for physical inspection because they can be preserved in the record. *Hirsch v. Zavaras*, 920 F.Supp. 148, 151 (D. Co. 1996).

2. **Caution**: The Seventh Circuit warns that trial courts "should be extremely cautious in conducting a view in a bench trial, and such should be a rare rather than a common practice. In each instance, agreement of counsel should be sought, and if such is not forthcoming, the court should reconsider and not go forward unless conducting the view appears to be absolutely necessary. *E.E.O.C. v. Mercy Hospital and Medical Center*, 709 F.2d 1195, 1200 (7th Cir. 1983).

II. **Evidence**: The courts are split as to whether a site view constitutes evidence. Although the conclusion that a view does not itself constitute or generate evidence may represent the majority position, the momentum appears to be headed in the opposite direction. *United States v. Gray*, 199 F.3d 547 (1st Cir. 1999).

A. **Site View Constitutes Evidence**: Most commentators question the rationale for excluding views from evidentiary status, observe that position has lost favor, or both. *See McCormick on Evidence,* § 216, at 29 (the "preferable" position is that a view is "evidence like any other"); 22 *Federal Practice and Procedure* § 5176, at 141 (1978) ("The notion that a view is not 'evidence' has been discredited by the writers, and explicitly rejected by one modern code.") (citations omitted); *Weinstein's Federal Evidence* § 403.07[4] (2d ed) ("the modern position is that the view does provide independent evidence.").

B. **Site View Not Evidence**: The position that a view should not be considered evidence appears to derive from a concern that the "facts" gathered by the jury from an on-the-scene observation cannot be made part of the record for purposes of appeal. *See In re*

Application, 102 F.R.D. 521, 524 (E.D.N.Y. 1984); *McCormick on Evidence* § 216, at 29; 4 *Wigmore on Evidence* § 1168, at 381-82, 385.

C. **Alternative View**: "We acknowledge that jurisdictions vary as to whether a view is treated as evidence or simply as an aid to help the trier of fact understand the evidence. However, we believe such a distinction is only semantic, because any kind of presentation to the jury or the judge to help the fact finder determine what the truth is and assimilate and understand the evidence is itself evidence. The United States Supreme Court has stated that the "inevitable effect [of a view] is that of evidence no matter what label the judge may choose to give it." *Lillie v. United States*, 953 F.2d 1188, 1190 (10th Cir. 1992) (footnote omitted) (*quoting Snyder v. Massachusetts*, 291 U.S. 97, 121 (1934), overruled on other grounds).

III. **Procedural Safe Guards**: Though discretionary at the outset, a view, once authorized, should embody certain fundamental safeguards. These safeguards are aimed at achieving fairness and maximizing the trial's truth-seeking function. The courts have proposed steps that should be followed before and during a view. *Clemente v. Carnicon-Puerto Rico Management Associates, L.C.*, 52 F.3d 383, 385-7 (1st Cir. 1995), *rev'd* on other grounds.

1) Counsel should be alerted to a proposed view at the earliest practicable time and given an opportunity to be heard concerning it.

2) The court should instruct the jury, before embarking on the view, as to whether or not the view itself is evidence, or, rather, is simply to help them understand the evidence.

3) The court should permit counsel to attend the view, although the judge may, in her discretion, place limits on their interaction with the subject of the view and with the jurors. *See* 2 *McCormick on Evidence* § 216, at 26 (4th ed. 1992).

4) Because the judge's oversight is as necessary at a view as in the course of the trial proper, the judge ordinarily should attend the view.

5) The court should fully and accurately record the view, usually by enlisting a court reporter. *See Lillie v. United States,* 953 F.2d 1188, 1191 (10th Cir. 1992) (where "there is no record of the view, the litigants may effectively be denied any means of challenge on appeal").

6) The onus for implementing these safeguards does not rest exclusively upon the trial judge. When a judge orders a view but strays from the protections that should accompany it, an offended party must bring the omissions to the judge's attention in a timely fashion, and, if necessary, lodge a formal objection. A party's failure to take appropriate action will usually foreclose appeal predicated on the omission.

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Rules Of Exclusion | G3 - 1

[G3] CHARACTER, HABIT, ROUTINE PRACTICE

QUICK RULE: *Character evidence is typically not admissible to prove that, on one occasion, someone acted consistently with their character. FRE 404(a). Certain types of character evidence are admissible, including habit and routine practice. FRE 406. Other character evidence may be permitted to impeach a witness. FRE 608.*

DISCUSSION

I. **Use Of Character Evidence**: The manner in which character evidence is treated depends entirely upon why it is being proffered. If the evidence is proffered to prove a fact at issue in the case, the controlling rules are FRE 404(a) and FRE 406. The use of character evidence for this purpose is greatly limited, as discussed below. If the evidence is being offered to impeach a witness, the rules are more generous regarding admissibility (*see* **Impeachment**). FRE 608.

II. **General**: In a civil case, evidence of a person's character or a trait of character is generally not admissible to establish the person's actions conformed with that character. FRE 404. The rule "excludes character evidence as a general matter." *United States v. Holt*, 486 F.3d 997, 1001 (7th Cir. 2007). Evidence of a person's habit or an organization's routine practice can be used to prove that, on a particular occasion, the person's or organization's conduct conformed with the habit or routine practice. *United States v. Oldbear*, 568 F.3d 814, 822 (10th Cir. 2009) (*citing* FRE 406).

   A. **Habit Compared To Character Evidence**: Character and habit are closely related. Character is a generalized description of one's disposition, or of one's disposition in respect to a general trait, such as honesty, temperance, or peacefulness. Habit is more specific. It describes one's regular response to a repeated specific situation. *Becker v. ARCO Chemical Co.*, 207 F.3d 176, 203 -204 (3rd Cir. 2000) (*citing* Advisory Committee Notes). "Character may be thought of as the sum of one's habits." *United States v. Yazzie*, 188 F.3d 1178, 1190 (10th Cir. 1999)(*quoting* Advisory Committee).

III. **Evidence To Establish Habit Or Routine**: Evidence proffered to establish habit or routine practice must meet certain criteria; otherwise the court will exclude the evidence as irrelevant. *See Camfield v. City of Oklahoma City*, 248 F.3d 1214, 1232 -1233 (10th Cir. 2001). This requirement helps prevent attempts to sneak in inadmissible character evidence under FRE 404, *i.e.*, evidence used to establish a party's propensity to act in conformity with her general character, as habit or routine practice evidence. *Simplex, Inc. v. Diversified Energy Sys., Inc.*, 847 F.2d 1290, 1293 (7th Cir. 1988).

   A. **Habit v. Routine Practice**: FRE 404 relates "habit" to individuals and "routine practice" to organizations. *See also U.S. ex rel. El-Amin v. George Washington University*, 533 F.Supp.2d 12, 26 (D.D.C. 2008). The courts, however, often used the terms interchangeably, sewing confusion. *See Mobil Exploration and Producing U.S., Inc. v. Cajun Const. Services, Inc.*, 45 F.3d 96, 99 (5th Cir. 1995) ("Habit evidence is relevant to prove that a business acted in a certain way") and *United States v. Mulder*, 147 F.3d 703,

707-08 (8th Cir. 1998) (relating "routine practice" to an individual's conduct). This arises because businesses operate by the actions of individuals; an employee's "habit" of stamping papers in the corner may also be described as the business's "routine practice."

B. "Habit" Evidence: A habit is a semi-automatic act, "such as the habit of going down a particular stairway two stairs at a time, or of giving a hand-signal for a left turn." *United States v. Troutman,* 814 F.2d 1428, 1455 (10th Cir. 1987). The nature of habit evidence is that it is done reflexively. *Sims v. Great Am. Life Ins. Co.*, 469 F.3d 870, 887 (10th Cir. 2006). Habit "refers to the type of nonvolitional activity that occurs with invariable regularity." *Weil v. Seltzer,* 873 F.2d 1453, 1460 (D.C.Cir. 1989).

1. **Value Of Habit Evidence**: A habit is probative because it is nonvolitional; it has "a reflexive, almost instinctive quality." *U.S. ex rel. El-Amin v. George Washington University,* 533 F.Supp.2d 12, 26 -27 (D.D.C. 2008). Once admitted, habit evidence is highly persuasive as proof of conduct on a particular occasion. FRE 406 Advisory Committee Notes; *Williams v. Security Nat. Bank of Sioux City*, 358 F.Supp.2d 782, 812 (N.D.Iowa 2005); *Loughan v. Firestone Tire & Rubber Co.*, 749 F.2d 1519, 1524 (11th Cir. 1985).

   a. **Habit v. Character Evidence**: Habit evidence is considered to be probative and, therefore, superior to character evidence because "the uniformity of one's response to habit is far greater than the consistency with which one's conduct conforms to character or disposition." *McCormick on Evidence,* § 195 at 463.

2. **Establishing Habit**: Because habit evidence is an exception to the FRE's general exclusion of character evidence, courts are cautious in admitting this evidence. *United States v. Angwin*, 263 F.3d 979, 991 (9th Cir. 2001). In deciding whether certain conduct constitutes a habit, courts consider two factors: (1) the conduct's specific, semi-automatic nature; and (2) the regularity or numerosity of the examples of the conduct. *United States v. Newman,* 982 F.2d 665, 668 (1st Cir. 1992); *Weil v. Seltzer*, 873 F.2d 1453, 1460 (D.C.Cir. 1989).

   a. **Proving Habit (Specificity)**: Before a court admits habit evidence, the offering party must establish the degree of specificity that ensures more than a mere 'tendency' to act in a given manner, but rather, conduct that is 'semi-automatic' in nature." *Zubulake v. UBS Warburg LLC,* 382 F.Supp.2d 536, 542 (S.D.N.Y. 2005). Evidence proffered to support a general habit of violence, or even a habit of attacking people, is not specific enough. *See United States v. Yazzie*, 188 F.3d 1178, 1190 (10th Cir. 1999).

   b. **Proving Habit (Frequency)**: To prove an act was habitual, the proponent must offer evidence of numerous, consistent occurrences of the act. *Camfield v. City of Oklahoma City,* 248 F.3d 1214, 1232-33 (10th Cir. 2001) (five acts would not suffice); *Leonard v. Nationwide Mut. Ins. Co.,* 499 F.3d 419, 442 (5th Cir. 2007) (with fifteen hundred customers, comments made to five of them over the course of a decade does "not remotely qualify or quantify as a habit within the meaning the Rule 406.").

C. **"Routine Practice"**: A routine practice must be "reasonably regular and uniform." *United States v. Oldbear*, 568 F.3d 814, 822 (10th Cir. 2009) (*citing* 7 *McCormick on Evidence* § 195).

1. **Value Of Routine Practice Evidence**: Evidence of a routine practice is highly probative, and persuasive. *Loughan*, 749 F.2d at 1524. It is particularly persuasive in the business context because "the need for regularity in business and the organizational sanctions which may exist when employees deviate from the established procedures give extra guarantees that the questioned activity followed the usual custom." McCormick on Evidence § 195, at 351.

2. **Establishing Routine Practice**: "To obtain a Rule 406 inference of the routine practice of a business, a plaintiff must show a sufficient number of specific instances of conduct to support that inference." *Reyes v. Missouri Pac. R. Co*, 589 F.2d 791, 795 (5th Cir. 1979). Evidence of the defendant's actions on only a few occasions or only in relation to the plaintiff are not enough; "the plaintiff must show regularity over substantially all occasions or with substantially all other parties with whom the defendant has had similar business transactions." *Mobil Exploration and Producing U.S., Inc. v. Cajun Const. Services, Inc.*, 45 F.3d 96, 99 -100 (5th Cir. 1995).

a. **Required Showing**: The courts have not established a uniform gauge as to how many occurrences establish a routine business practice. *See United States Football League v. National Football League,* 842 F.2d 1335, 1372 (2d Cir. 1988) ("testimony as to three or four episodes over a 20-year period was hardly sufficient to conclude that a pattern of behavior exists with respect to the conduct at issue"). *But see S.E.C. v. Lyon*, 605 F.Supp.2d 531, 542 (S.D.N.Y. 2009) (Three instances may be used to show routine practice).

b. **Foundational Requirement**: Foundational requirements for admitting routine practice evidence are less stringent than those for habit. *U.S. ex rel. El-Amin v. George Washington University,* 533 F.Supp.2d 12, 27 (D.D.C. 2008)(*citing Wetherill v. University of Chicago,* 570 F.Supp. 1124, 1129 (D.Ill. 1983)).

D. **Burden Of Proof**: The burden of establishing that certain conduct qualifies as evidence of habit or routine practice falls upon the party wishing to introduce the evidence. *See Weil v. Seltzer,* 873 F.2d 1453, 1461 (D.C.Cir. 1989).

1. **Lay Opinion May Establish Foundation**: The foundation for habit and routine practice can be established by lay opinion if the opinion complies with FRE 701, which requires only that the witness's testimony be rationally based on perception and helpful to the determination of a fact at issue. *Maynard v. Sayles,* 817 F.2d 50, 52 (8th Cir.), *vacated on reh'g other grounds,* 831 F.2d 173 (8th Cir. 1987).

IV. **Use Of Habit And Routine Practice Evidence**: Habit evidence may be used "to prove that the conduct of the person . . . on a particular occasion was in conformity with the habit." FRE 406. The rule uses "habit" evidence to prove what someone *actually did. Williams v. Security Nat. Bank of Sioux City, Iowa,* 358 F.Supp.2d 782, 813 (N.D.Iowa 2005). At least one court

has found that habit evidence may be used to demonstrate what would have happened in a counter-factual (i.e., but-for) set of circumstances. *Williams v. Security Nat. Bank of Sioux City, Iowa,* 358 F.Supp.2d 782, 814 (N.D.Iowa 2005). This seems to be a stretch.

V. **Examples**:

A. **Seatbelts**: Evidence that decedent "always wore his seat belt, regardless of whether he was the driver or a passenger and regardless of the length of the trip" was properly admitted as habit evidence to prove the decedent was wearing a seatbelt at the time of the accident. *Babcock v. General Motors Corp.*, 299 F.3d 60, 66 (1st Cir. 2002)

B. **Waivers**: Evidence that insurance company agents had previously waived standard, written conditions when issuing an insurance policy was admissible as evidence of a routine business practice. *Rosenburg v. Lincoln American Life Ins. Co.*, 883 F.2d 1328, 1336 (7th Cir. 1989).

C. **Announcement**: Announcing the seizure of pornography upon walking into a video rental store is not semi-automatic and could not serve as a basis for habit evidence. *Camfield v. City of Oklahoma City,* 248 F.3d 1214, 1232 -1233 (10th Cir. 2001).

D. **Fabrication**: The fabrication of reasons to justify its employees' dismissals is not the sort of semi-automatic, situation-specific conduct admitted under the rule. *Becker v. ARCO Chemical Co.*, 207 F.3d 176, 203 -204 (3rd Cir. 2000).

E. **Violence**: The trial court properly (1) allowed habit evidence regarding an individual's reflexive action of placing a gun in his waistband or knife in his boot, and (2) rejected habit evidence that an individual routinely started fights, picked on weak people he met, and beat them up. *United States v. Yazzie*, 188 F.3d 1178, 1190 (10th Cir. 1999).

Notes: _____

[G4] IMPEACHMENT

QUICK RULE: *The FRE limit how four types of evidence may be used to support or impeach a witness's credibility (1) character evidence, (2) specific instances of conduct, (3) prior convictions, and (4) prior inconsistent statements. Other types of evidence may be used to impeach credibility, including evidence of bias, impairment, or mental illness.*

DISCUSSION

I. **General**: By testifying, a witness puts his or her veracity at issue. *United States v. Tedder*, 403 F.3d 836, 839 (7th Cir. 2005). The rules expressly limit the scope of impeachment when related to (1) character evidence [608(a)], (2) specific instances of conduct, [608(b)], (3) prior convictions, [609] and (4) prior inconsistent statements. [613(b)]. Other types of impeachment evidence are not so limited and may come in unless the probative value is "substantially outweighed" by concerns of prejudice, confusion, or wasting time. FRE 403.

II. **Evidence Of Character Allowed Through Opinion and Reputation Testimony**: Either party may attack a witness's character for truthfulness through opinion or reputation testimony. *United States v. Holt*, 486 F.3d 997, 1001 -1002 (7th Cir. 2007) (citing FRE 608(a)). Such an attack may be made through the testimony of any witness.

A. **Reputation v. Opinion**: Reputation evidence is that of the witness's reputation in the community for the character trait at issue; opinion character evidence is elicited when a witness provides his or her own personal opinion as to a facet of the witness's character. *United States v. Kellogg*, 510 F.3d 188, 193 -194 (3rd Cir. 2007).

B. **Limits On Opinion And Reputation Evidence**: Opinion and reputation testimony may refer only to character for truthfulness or untruthfulness; witnesses may not testify about specific instances of deceit. *United States v. Tedder*, 403 F.3d 836, 839 (7th Cir. 2005). A proper question as to opinion for truthfulness should not ask fact questions about conduct, but should be "What is your opinion as to his character for truthfulness?" *United States v. Marshall*, 173 F.3d 1312, 1315 -1316 (11th Cir. 1999); *United States v. Lollar*, 606 F.2d 587, 589 (5th Cir. 1979).

1. **Must Go To Truthfulness**: Reputation and opinion evidence is only admissible in civil cases as it goes to the character trait of truthfulness. All other opinion and reputation evidence regarding character is inadmissible. FRE 404(a); *see United States v. Meserve*, 271 F.3d 314, 328 (1st Cir. 2001) (questions regarding witness's reputation as a violent "tough guy" held improper).

C. **Opinion Evidence For Truthfulness/Untruthfulness**: One party may offer testimony that, in the witness's opinion, another, adverse witness is not a truthful person. *See United States v. Holt*, 486 F.3d 997, 1001-02 (7th Cir. 2007).

1. **Foundation For Opinion Evidence**: The rules do not require a long acquaintanceship before opining as to truthfulness/untruthfulness. *United States v. Garza*, 448 F.3d 294, 297 -298 (5th Cir. 2006). The rule, however, "does not abandon all limits on the reliability and relevance of opinion evidence." *United States v. Dotson*, 799 F.2d 189, 192 (5th Cir. 1986). Before a witness may opine regarding truthfulness, the proponent must show "that the opinions were more than bare assertions." *United States v. McMurray*, 20 F.3d 831, 834 (8th Cir. 1994). If the court finds the witness lacks sufficient information to have formed a reliable opinion, the judge can exclude the opinions under FRE 403 (undue prejudice) and FRE 602 (personal knowledge). *Id.; see United States v. Whitmore*, 359 F.3d 609, 616-618 (D.C. Cir. 2004).

2. **Opinion Must Be Based Upon First-Hand Knowledge**: The opinion witness's testimony must comply with Rule 701, which requires that the opinion be rationally based on the perception of the witness, and helpful to the fact finder. Thus, a lay witness offering opinion for truthfulness must testify from first-hand knowledge. *See United States v. Ruiz-Castro,* 92 F.3d 1519, 1530 (10th Cir. 1996); *United States v. Cortez,* 935 F.2d 135, 139-40 (8th Cir. 1991) (rejecting opinion testimony by police officers because they had minimal, post-arrest contacts with witness and their testimony "merely expresses their belief in the story he told them").

D. **Foundation For Reputation Evidence**: To offer reputation evidence regarding truthfulness or untruthfulness, a party must establish that the character witness is qualified by having an (1) acquaintance with the witness, (2) his community, and (3) the circles in which the witness has moved, so as to speak with authority regarding the witness's reputation. *United States v. Whitmore*, 359 F.3d 609, 616-618 (D.C. Cir. 2004) (*citing Michelson v. United States,* 335 U.S. 469, 478 (1948)). *Compare United States v. Bedonie,* 913 F.2d 782, 802 (10th Cir. 1990) (witness qualified to give reputation testimony because he lived in community, regularly used local facilities, and personally knew and had frequent contact with witnesses), *with United States v. Ruiz-Castro,* 92 F.3d 1519, 1530 (10th Cir. 1996) (Defendants did not establish requisite foundation to testify about reputation because sole connection was that character witnesses and principal witness were from Mexico).

1. **Community Defined**: When establishing reputation evidence, "The community must not be so parochial that there is a risk that each member of that community forms opinions as to character based on the same set of biases." *United States v. Whitmore*, 359 F.3d 609, 616-618 (D.C. Cir. 2004) *(quoting* 28 Wright & Gold, *Federal Practice and Procedure* § 6114, at 63 (1993)). *See Williams v. United States,* 168 U.S. 382, 397 (1897) (reputation evidence inadmissible because foundation was few individuals in one building and Court noted community cannot be so narrowly drawn as to ignore "general reputation in the community"); *United States v. Nedza,* 880 F.2d 896, 904 (7th Cir. 1989) (rejecting reputation testimony because only foundation was two former high school classmates' conversations).

E. **No Time Limit**: FRE 608(a) does not contain a time limit. *United States v. Tedder*, 403 F.3d 836, 839 (7th Cir. 2005). "[H]onesty is more like climate than like weather: it is a

stable attribute even though subject to daily variability." *Id.* The fact that an opinion or reputation witness has not spoken with the witness for an extended time is proper subject for cross examination, but not proper basis to exclude the testimony. *United States v. Pacione,* 950 F.2d 1348, 1354 (7th Cir. 1991) (permitting 10-year old opinion testimony). The reputation may be so outdated as to make it inadmissible. *See United States v. Nedza,* 880 F.2d 896, 904 (7th Cir. 1989) (disallowing year-old reputation evidence).

F. Limits On Opinion And Reputation Evidence: The FRE limit the admission of character evidence of a witness's truthfulness to those situations where the witness's character has been attacked. *United States v. Yarbrough*, 527 F.3d 1092, 1101 (10th Cir. 2008) (*citing* FRE 608(a)(2)); *United States v. Harris*, 491 F.3d 440, 448 (DC Cir. 2007). Under FRE 608(a), whether a witness's credibility has been attacked depends on the nature of the opponent's impeaching evidence. *See United States v. Dring,* 930 F.2d 687, 690-91 (9th Cir. 1991).

1. **Direct Attacks On Veracity Not Enough**: Direct attacks on a witness's veracity in the particular case do not open the door for evidence of the witness's good character. *Renda v. King*, 347 F.3d 550, 554 -555 (3rd Cir. 2003). It must be an attack on the witness's general character for truthfulness. *Id.*

2. **Bias Evidence Does Not Open the Door**: Evidence of bias generally does not open the door for evidence of good character for truthfulness because bias only relates to a motive to lie in the particular case, not a general predisposition to lie. *See United States v. Dring,* 930 F.2d 687, 690-91 (9th Cir. 1991); *United States v. Medical Therapy Sciences, Inc.*, 583 F.2d 36, 41 (2d Cir. 1978).

3. **Prior Inconsistent Statements**: Prior inconsistent statements do not open the door for evidence of good character for truthfulness because there can be a number of reasons for the error, such as memory defects, bias, or interest to lie in this particular instance, or a general character trait for untruthfulness. *See Dring,* 930 F.2d at 691; 3 Mueller and Kirkpatrick § 270. Although the inconsistency may be due to a dishonest character, it is not necessarily, or even probably, due to this cause. *Renda v. King*, 347 F.3d 550, 554 -555 (3rd Cir. 2003).

4. **Indirect Attacks On Truthfulness**: Opinion or reputation that the witness is untruthful specifically qualifies as an attack under the rule, and evidence of misconduct, including conviction of crime, and of corruption also fall within this category. *Renda v. King*, 347 F.3d 550, 554 -555 (3rd Cir. 2003) (citing Advisory Committee Notes). The reason that an indirect attack on a witness's character for truthfulness opens the door for testimony about the witness's good character for truthfulness is because such attacks directly call into question the witness's moral character for truthfulness. *Id.*

5. **Counsel's Comments And Attack On Cross**: Courts are split as to whether the comments and questions of counsel during opening and cross create an opening for testimony as to truthfulness. *Compare United States v. Drury*, 396 F.3d 1303, 1315 (11th Cir. 2005)(Counsel pointing out inconsistencies and arguing that testimony is

not credible does not constitute an attack on the witness's reputation for truthfulness within the meaning of FRE 608) with *United States v. Marshall*, 173 F.3d 1312, 1315 (11th Cir. 1999) (attack on witness's credibility during opening statement and on cross satisfied "condition precedent" for evidence of truthful character).

III. **Specific Instances Of Conduct**: Specific instances may be inquired into on cross examination in the discretion of the trial court, but only if the conduct is probative of truthfulness or untruthfulness. FRE 608(b). Generally, extrinsic evidence of a witness's specific acts is not permitted to attack or support a witness's character for truthfulness. *United States v. Thomas*, 467 F.3d 49, 55-56 (1st Cir. 2006).

A. **Trial Judge's Discretion**: The rule states only that prior instances of conduct "may" be inquired of "in the discretion of the court, if probative of truthfulness or untruthfulness." *United States v. Holt*, 486 F.3d 997, 1001 -1002 (7th Cir. 2007). The trial judge has broad discretion to limit the scope and extent of cross-examination. *See United States v. Matthews*, 168 F.3d 1234, 1244 (11th Cir. 1999).

1. **Role Of FRE 403**: The rule against unfair prejudice (FRE 403) modifies the rule permitting testimony as to specific conduct (608(b)) by providing that otherwise admissible and relevant evidence may be excluded if the court determines that its probative value is substantially outweighed by the danger of unfair prejudice. *United States v. Price*, 566 F.3d 900, 912 -913 (9th Cir. 2009).

B. **Must Take Answer**: If the witness denies the conduct, such acts may not be proved by extrinsic evidence and the questioning party must take the witness' answer, unless the evidence would be otherwise admissible as bearing on a material issue of the case. *United States v. Matthews*, 168 F.3d 1234, 1244 (11th Cir. 1999). This is the case even if the witness's answer is known to be untrue by the questioner. *United States v. DeSantis*, 134 F.3d 760, 766 (6th Cir. 1998).

C. **Extrinsic Evidence**: The rule's limit on the use of "extrinsic evidence," encompasses documentary evidence. *United States v. Elliott*, 89 F.3d 1360, 1368 (8th Cir. 1996) (trial court properly excluded documentary exhibits as extrinsic evidence under FRE 608(b)); *Deary v. City of Gloucester*, 9 F.3d 191, 197 (1st Cir. 1993) (documentary evidence of a disciplinary finding against a police officer was extrinsic evidence); *United States v. Jackson*, 882 F.2d 1444, 1448 (9th Cir. 1989) (Rule prohibits the admission into evidence of documents to prove prior misconduct)

1. **Consequences Of Misconduct**: Courts disagree as to whether the rule permits the questioner to question regarding the consequences of the specific conduct, or whether that is properly considered "extrinsic evidence."

a. **Barring References To Consequences**: "[T]he extrinsic evidence prohibition of Rule 608(b) bars any reference to the consequences that a witness might have suffered as a result of an alleged bad act. For example, Rule 608(b) prohibits counsel from mentioning that a witness was suspended or disciplined for the conduct that is the subject of impeachment, when that conduct is offered

Rules Of Exclusion | G4 - 5

only to prove the character of the witness." FRE 608(b) Advisory Committee Note (2003 Amendment). *See United States v. Whitmore*, 384 F.3d 836, 837 (D.C. Cir. 2004). Counsel is not permitted to circumvent the no-extrinsic-evidence provision by tucking a third person's opinion about prior acts into a question asked of the witness who has denied the act. *United States v. Davis*, 183 F.3d 231, 257 n. 12 (3d Cir. 1999).

b. **Permitting References To Consequences:** Some courts have held that 608(b) only prohibits the use of extrinsic evidence, not lines of questioning. *United States v. Dawson*, 434 F.3d 956, 958 (7th Cir. 2006); *see also United States v. Redditt*, 381 F.3d 597, 602 (7th Cir. 2004). ***It is unclear whether some caselaw permitting references to consequences is still valid after the 2003 advisory committee notes.*** *See United States v. Bagaric*, 706 F.2d 42, 65 (2d Cir. 1983); *United States v. Terry*, 702 F.2d 299, 316 (2d Cir. 1983).

2. **Other Bases**: If extrinsic evidence of misconduct has its own, legitimate basis for admissibility, then it is admissible and does not violate FRE 608(b). *Van Westrienen v. Americontinental Collection Corp.*, 94 F.Supp.2d 1087, 1110 (D. Ct. Ore. 2000). Even if evidence would be barred under Rule 608(b), it nonetheless may be admissible if it tends to show bias. *United States v. Abel*, 469 U.S. 45, 56 (1984); *see United States v. Martinez*, 962 F.2d 1161, 1165 (5th Cir. 1992) ("Extrinsic evidence may . . . be admissible for another purpose - for example, if it tends to show bias in favor of or against a party.").

D. **Rule's Breadth**: The rule does not address convictions or prior inconsistent statements, which are covered under other parts of the FRE.

1. **Specific Instances Other Than Convictions**: "Rule 608(b) permits impeachment. . . by specific acts that have not resulted in a criminal conviction." *United States v. Osazuwa*, 564 F.3d 1169, 1174 (9th Cir. 2009). Evidence relating to impeachment by way of criminal conviction is treated exclusively under FRE 609. *Id.*

2. **Rule Does Not Limit Use Of Prior Inconsistent Statements**: This rule does not limit extrinsic evidence to impeach a witness regarding a prior inconsistent statement. FRE 613(b) "applies when two statements, one made at trial and one made previously, are irreconcilably at odds. In such an event, the cross-examiner is permitted to show the discrepancy by extrinsic evidence if necessary - not to demonstrate which of the two is true but, rather, to show that the two do not jibe (thus calling the declarant's credibility into question)." *United States v. Winchenbach*, 197 F.3d 548 (1st Cir. 1999). Comparison and contradiction are the hallmarks of Rule 613(b); in contrast, FRE 608(b) addresses situations in which a witness's prior activity, whether exemplified by conduct or by a statement, in and of itself casts doubt upon his veracity. *Id.* FRE 608(b) "applies to a statement, as long as the statement in and of itself stands as an independent means of impeachment without any need to compare it to contradictory trial testimony." *Id.*

E. **Rule Applied To Hearsay Declarant:** The rules allow impeachment of a hearsay declarant, even if the declarant never takes the stand. FRE 806. Impeaching a hearsay declarant is limited to the means that would be available if the declarant had testified. *Id.* For specific instances of misconduct, this would be limited to cross-examination. FRE 608(b). If the hearsay declarant cannot be called to testify, there is no cross examination and under the plain wording of the rules, there would be no avenue to bring in specific instances of misconduct. *United States v. Saada*, 212 F.3d 210, 221 (3rd Cir. 2000). *See United States v. Finley*, 934 F.2d 837, 839 (7th Cir. 1991) ("Rule 806 extends the privilege of impeaching the declarant of a hearsay statement but does not obliterate the rules of evidence that govern how impeachment is to proceed"). This conclusion is neither dispositive nor particularly satisfying.

F. **Examples**:

1. **Violation Of Company Policy**: Questions about witness's violation of an anti-gratuity policy were improper because there was no showing as to the policy's contents or whether the violation bespoke of untruthfulness. *United States v. Simonelli*, 237 F.3d 19, 23 -24 (1st Cir. 2001).

2. **Prior False Statements**: Perjury is an act of dishonesty within the permissible scope of cross-examination under Rule 608(b), as a specific instance of conduct. *Varhol v. National R.R. Passenger Corp.*, 909 F.2d 1557, 1567 (7th Cir. 1990). When prior false testimony results from a mistaken belief, and did not evince the intent to mislead, the court properly excludes evidence of the false statement. *Gill v. Maciejewski,* 546 F.3d 557, 563 (8th Cir. 2008).

3. **Bribery**: Bribery is probative of a witness's character for truthfulness or untruthfulness and is a permissible area of inquiry under FRE 608(b). *United States v. Wilson*, 985 F.2d 348, 352 (7th Cir. 1993); *United States v. Hurst*, 951 F.2d 1490, 1500 (6th Cir. 1991). ***Contra*** *United States v. Rosa,* 891 F.2d 1063, 1069 (3d Cir. 1989) ("[b]ribery ... is not the kind of conduct which bears on truthfulness or untruthfulness.").

4. **Suspended Professional License**: Cross examination about the suspension of witness's chiropractor's license for false, deceptive, and misleading advertising and for misrepresentations to individuals, should have been permitted under FRE 608(b). *United States v. Fulk*, 816 F.2d 1202, 1206 (7th Cir. 1987).

5. **Receiving Stolen Property**: Receipt and use of stolen property is sufficiently probative of witness's credibility to permit cross-examination about such conduct pursuant to FRE 608(b). *Varhol v. Nat'l R.R. Passenger Corp.*, 909 F.2d 1557, 1567 (7th Cir. 1990) (en banc).

IV. **Convictions**: In civil cases, a witness's character may be impeached by evidence of prior convictions under two conditions (1) that the crime was punishable by more than one year of imprisonment, and the court determines that the evidence's probative value outweighs its possible prejudice, or (2) if it can readily be determined that proof of the crime required acts

of dishonesty or false statements. FRE 609(a). Admissibility under FRE 609(a)(1) is only "for the purpose of attacking the character for truthfulness of a witness." *United States v. Raplinger*, 555 F.3d 687, 691 (8th Cir. 2009).

A. **Permitted Use**: The rule limiting evidence of conviction only applies to its use in attacking character for truthfulness; the rule has no application when the conviction is used to contradict or undermine witness testimony. *United States v. Gilmore*, 553 F.3d 266, 272 (3rd Cir. 2009); *United States v. Bender*, 265 F.3d 464, 470-71 (6th Cir. 2001) (permitting the government to cross-examine the defendant about prior drug trafficking convictions after she testified on direct examination that she had never sold drugs and did not start using them until 1992); *United States v. Norton*, 26 F.3d 240, 243-45 (1st Cir. 1994) (the government properly permitted to cross-examine the defendant about prior firearm conviction after the defendant testified that "I never had a gun in my life in that car. Or on my possession or anywhere.").

B. **Crimes Not Involving Dishonesty**: When considering whether to admit evidence of prior crimes where there is no element of truthfulness, the court must balance the probative value and prejudicial effect. FRE 609(a)(1); *United States v. Kemp*, 546 F.3d 759, 764 (6th Cir. 2008).

C. **Crimes Involving Dishonesty**: When admitting evidence of prior convictions involving dishonesty to impeach, the trial court is not required to balance the prejudicial impact of the evidence against its probative value. FRE 609(a)(2); *United States v. Wilson*, 985 F.2d 348, 351 (7th Cir. 1993); *United States v. Noble*, 754 F.2d 1324, 1331 (7th Cir. 1985). Evidence of a conviction requiring proof or admission of an act of dishonesty or false statement is automatically admissible and not subject to FRE 403 balancing. *United States v. Collier*, 527 F.3d 695, 700 (8th Cir. 2008) *(citing Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 525-26 (1989)).

1. **Must Involve Deceit, Untruthfulness, Or Falsification**: To be admissible without balancing, a prior conviction must involve deceit, untruthfulness, or falsification. FRE 609(a)(2), *United States v. Meserve*, 271 F.3d 314, 328 (1st Cir. 2001). Convictions involving dishonesty or false statement encompass "crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of crimen falsi, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully." *United States v. Fowler*, 620 F.Supp.2d 229, 231 (D.N.H. 2009)(*quoting* FRE 609 Advisory Committee Note.

2. **Shoplifting**: There is a split as to whether petty larceny is a qualifying "bad heart" conviction. *Compare United States v. Galati*, 230 F.3d 254, 261 (7th Cir. 2000) (petty shoplifting is not a crime of dishonesty "unless it involves items of significant value") *and United States v. Grandmont*, 680 F.2d 867, 871 (1st Cir. 1982) (robbery *per se* does not involve dishonesty though it may if it was committed by "fraudulent or deceitful means") *with United States v. Del Toro Soto*, 676 F.2d 13, 18 (1st Cir. 1982) ("grand larceny conviction could certainly have been introduced under FRE 609(a)(2)" for impeachment).

3. **Fraud**: Bank fraud is an act of dishonesty, so the conviction is admissible under FRE 609(a)(2). *United States v. Osazuwa*, 564 F.3d 1169, 1175 (9th Cir. 2009). Theft-by-check convictions fall under FRE 609(a)(2) because they have as an element "an act of dishonesty or false statement by the witness." *United States v. Harper*, 527 F.3d 396, 408 (5th Cir. 2008).

4. **Taxes**: A conviction for filing false state tax returns is admissible to impeach the defendant under FRE 609(a)(2)). *United States v. Thompson*, 806 F.2d 1332, 1339 (7th Cir. 1986). A conviction for failure to file tax returns is also a crime involving dishonesty. *Dean v. TransWorld Airlines*, 924 F.2d 805, 811 (9th Cir. 1991).

D. **Time Limit**: Evidence of a conviction is generally not permitted if more than ten years have elapsed from either the conviction or the witness's release from confinement for the sentence, whichever is longer. FRE 609(b). Once a conviction is more than ten years old, it is presumptively inadmissible, absent a finding that its probative worth substantially outweighed its potential for prejudice so as to warrant its admission in the interest of justice. *United States v. Rogers*, 542 F.3d 197, 200 (7th Cir. 2008).

1. **Measuring Ten Years**: The ten-year limit runs from the end of "confinement," which "means release from actual imprisonment," and does not include non-incarceration restraints such as probation or parole. *Byrd v. Trombley*, 580 F.Supp.2d 542, 556 (E.D.Mich. 2008) (*citing Bizmark, Inc. v. Kroger Co.*, 994 F.Supp. 726, 728 (W.D.Va. 1998); *United States v. Rogers*, 542 F.3d 197, 200 (7th Cir. 2008).

   a. **End Date**: The end date of the time limit for impeaching convictions is the start of the trial at which the witness is testifying. *United States v. Thompson*, 806 F.2d 1332, 1339 (7th Cir. 1986).

   b. **Stopping The Clock**: Revocation of parole stops the running of the ten-year clock. *See United States v. Gray*, 852 F.2d 136, 139 (4th Cir. 1988) (stopping the time where the defendant had been re-incarcerated after a parole violation); *United States v. McClintock*, 748 F.2d 1278, 1288-89 (9th Cir. 1984) (same for probation violations that implicate the original offense conduct).

2. **Admitting Convictions Older Than Ten Years**: The Court should only admit evidence of convictions older than 10 years based upon an exceptional showing of the convictions importance and when the offering party has provided proper advanced notice.

   a. **Required Showing**: To admit evidence of a conviction older than ten years, the court must make "an on-the-record determination supported by specific facts and circumstances that the probative value of the evidence substantially outweigh[ed] its prejudicial effect." *United States v. Mahler*, 579 F.2d 730, 734 (2d Cir. 1978). This is an asymmetrical balancing test, requiring the conviction's probative value to *substantially* outweigh the prejudice. *United*

Rules Of Exclusion | G4 - 9

States v. Rogers, 542 F.3d 197, 201 (7th Cir. 2008). Convictions over ten-years old should be admitted very rarely and only in exceptional circumstances, as convictions over ten years old generally do not have much probative value. *Zinman v. Black & Decker (U.S.), Inc.*, 983 F.2d 431, 434 (2d Cir. 1993).

b. **Notice Required**: Evidence of older convictions may be brought into evidence only if the proponent gives the adverse party advance written notice. The notice prevents "unfair surprise" and gives the adverse party the opportunity to prepare for trial. *See United States v. Lopez*, 979 F.2d 1024, 1033 (5th Cir. 1992).

E. **Scope of Permitted Inquiry**: The scope of inquiry into prior convictions is limited. *United States v. Osazuwa*, 564 F.3d 1169, 1175 (9th Cir. 2009). Generally, "only the prior conviction, its general nature, and punishment of felony range [are] fair game for testing the defendant's credibility." *United States v. Albers*, 93 F.3d 1469, 1480 (10th Cir. 1996). *See United States v. Estrada*, 430 F.3d 606, 617 (2d Cir. 2005). Generally, evidence of a prior conviction admitted for impeachment purposes may not include collateral details and circumstances attendant upon the conviction. *United States v. Sine*, 493 F.3d 1021, 1036 n. 14 (9th Cir. 2007).

1. **Rationale for Limitation**: The scope of the inquiry is limited because of the unfair prejudice and confusion that could result from eliciting details of the prior crime. *See United States v. Robinson*, 8 F.3d 398, 410 (7th Cir. 1993).

2. **"Sanitization" Of The Evidence**: The cases permit the "sanitization" of prior-crimes evidence used to impeach, by concealing the nature or name of the crime. *Schmude v. Tricam Industries, Inc.*, 556 F.3d 624, 627 (7th Cir. 2009). Trial courts have the discretion to further reduce the scope of information as deemed necessary under FRE 403. *United States v. Brown*, 606 F.Supp.2d 306, 312 (E.D.N.Y. 2009).

F. **Appeal Pending**: Pendancy of an appeal does not render otherwise admissible conviction inadmissible. FRE 609(e). Neither a stayed mandate nor the pending certiorari petition affects the conviction's admissibility. *United States v. Jackson*, 549 F.3d 963, 980 (5th Cir. 2008). The appeal's existence is, itself, admissible. *Id.*

V. **Prior Statements**: One method of impeachment is through the use of a prior inconsistent statement. *United States v. Meserve*, 271 F.3d 314, 320 (1st Cir. 2001). To be admissible, (1) the statement must be inconsistent with testimony offered at trial, and (2) the witness being impeached with the inconsistent testimony must be given a chance to explain or deny the prior statement. *FRE* 613.

A. **General**: Impeachment by contradiction is a means of "policing the 'defendant's obligation to speak the truth in response to proper questions.'" *United States v. Greenidge*, 495 F.3d 85, 99 (3d Cir. 2007) (*quoting United States v. Havens*, 446 U.S. 620, 626 (1980)).

1. **Avoid Confusion With Hearsay Rules**: Even if a prior inconsistent statement would otherwise be inadmissible as hearsay, it may be admissible for the limited purpose of impeaching the witness. *United States v. Ince*, 21 F.3d 576, 579 (4th Cir. 1994). There is a wide world of prior inconsistent statements that may be admitted under FRE 613 to impeach; some sworn, some written by third parties; some oral. These are only admissible, generally, for impeachment and not to establish the underlying fact. A subset of these statements, when sworn and meeting FRE 803, are exempt from the hearsay rule; for these statements, the prior statement may come in for the truth of the matter asserted in the out-of-court statement. *See Fenske v. Thalacker*, 60 F.3d 478, 481 (8th Cir. 1995) (Witness's unsworn prior inconsistent statement was proper impeachment evidence under Rule 613, but it was not admissible as substantive evidence.).

2. **Third-Party Notes**: The notes of a third party regarding what a witness said are not admissible as prior statements of that witness in the absence of the witness's endorsement of those notes as his own statement. *S.E.C. v. Treadway*, 438 F.Supp.2d 218, 223 (S.D.N.Y. 2006)(citing *United States v. Almonte*, 956 F.2d 27, 29-30 (2d Cir. 1992). "The burden of proving that notes reflect the witness's own words rather than the note-taker's characterization falls on the party seeking to introduce the notes." *Almonte*, 956 F.2d at 29.

B. **Prior Statement Must Be Inconsistent**: For the prior statement to be admissible for impeachment purposes, the prior statement must be inconsistent with trial testimony. *United States v. Young*, 248 F.3d 260, 267 (4th Cir. 2001). FRE 613 "applies when two statements, one made at trial and one made previously, are irreconcilably at odds." *United States v. Winchenbach*, 197 F.3d 548, 558 (1st Cir. 1999).

1. **Trial Court To Make Finding**: For a prior inconsistent statement to be admissible for impeachment purposes, there must be a preliminary finding that statements are inconsistent. *United States v. Avants*, 367 F.3d 433, 447 -448 (5th Cir. 2004). "Preliminary questions" of admissibility are for the trial judge. FRE 104.

2. **Defining "Inconsistent"**: A prior statement is inconsistent if it, "taken as a whole, either by what it says or by what it omits to say affords some indication that the fact was different from the testimony of the witness whom it sought to contradict." *United States v. Gravely*, 840 F.2d 1156, 1163 (4th Cir. 1988) (citation omitted); *Weinstein's Federal Evidence* § 613.04[1] (2d ed. 2001) (Statement are inconsistent "if under any rational theory it might lead to any relevant conclusion different from any other relevant conclusion resulting from anything the witness said.").

   a. **Rule Read Broadly**: Statements need not be directly contradictory in order to be deemed inconsistent. *United States v. Richardson*, 515 F.3d 74, 84 (1st Cir. 2008); *Udemba v. Nicoli*, 237 F.3d 8, 18 (1st Cir. 2001); *United States v. Winter*, 663 F.2d 1120, 1154 (1st Cir. 1981) (admitting statement despite finding it "ambiguous at best"); *United States v. Barrett*, 539 F.2d 244, 254 (1st Cir. 1976) (contradiction need not be "in plain terms;" requires "some indication" that statement differed from trial testimony).

Rules Of Exclusion | G4 - 11

b. **Impeachment By Omission**: Prior statements that omit details included in a witness's trial testimony are inconsistent if it would have been "natural" for the witness to include the details in the earlier statement. *United States v. Meserve*, 271 F.3d 314, 320 -321 (1st Cir. 2001); *United States v. Stock*, 948 F.2d 1299, 1301 (D.C.Cir. 1991) (*citing Jenkins v. Anderson*, 447 U.S. 231, 239 (1980)). This test is an elastic one, because the "naturalness" of a witness's decision not to include certain information in an earlier statement may depend on the nuances of the prior statement's context, as well as the witness's own loquacity. *United States v. Meserve*, 271 F.3d 314, 320 -321 (1st Cir. 2001).

C. **Evidence Need Not Be Otherwise Admissible**: A party may use otherwise inadmissible evidence in order to impeach a testifying witness. *See United States v. Morla-Trinidad*, 100 F.3d 1, 4 (1st Cir. 1996); *Williams v. Poulos*, 11 F.3d 271, 287 (1st Cir. 1993); *Walder v. United States*, 347 U.S. 62, 64-65 (1954) (holding illegally obtained evidence admissible for impeachment purposes).

1. **Witness Called Solely To Impeach:** If a witness's prior statement is inadmissible, a party may not call the witness for the primary purpose of impeaching with that prior statement. *United States v. Cisneros-Gutierrez*, 517 F.3d 751, 761 (5th Cir. 2008) (citing *United States v. Hogan*, 763 F.2d 697, 701 (5th Cir. 1985)).

D. **Impeachment By Inconsistent Statements Limited By FRE 403**: Even if all the foundational elements of FRE 613 are met, a trial court is not bound to admit any or all extrinsic evidence of a prior inconsistent statement. *United States v. Barile*, 286 F.3d 749, 755 -756 (4th Cir. 2002). The court may still exercise its discretion to exclude such evidence under FRE 403 when its probative value is substantially outweighed by the danger of unfair prejudice, confusion, or by considerations of delay. *Id.*

E. **May Question Witness Without Revealing Prior Statement:** During cross examination based upon a prior inconsistent statement, the questioning counsel need not reveal the prior statement to the witness. *Rush v. Illinois Cent. R. Co.*, 399 F.3d 705, 720 (6th Cir. 2005). "The traditional insistence that the attention of the witness be directed to the statement on cross-examination is relaxed." *United States v. McCall*, 85 F.3d 1193, 1197 (6th Cir. 1996) (*quoting* Advisory Committee Notes).

F. **Extrinsic Evidence Not Necessary:** When impeaching a witness through alleged prior inconsistent statements, there is no requirement that the questioning attorney present extrinsic evidence to "support" the impeachment attempt. FRE 613; *United States v. Gholston*, 10 F.3d 384, 388 -389 (6th Cir. 1993). The attorney must have a good faith basis to ask the question. *Id.*

1. **Safeguards**: Safeguards reduce the risk that an impeaching party might, in bad faith, allude to non-existent statements: (1) the trial court can control the impeaching party's line of questioning, (2) the non-impeaching party may examine persons who allegedly heard the prior statement, (3) if extrinsic evidence of an allegedly inconsistent statement is not forthcoming, the non-impeaching party can highlight

Rules Of Exclusion | G4 - 12

this in closing argument, and (4), the court should instruct the jury that counsel's statements are not evidence. *United States v. Gholston*, 10 F.3d 384, 388 -389 (6th Cir. 1993).

VI. Other Impeachment Evidence: Other evidence not otherwise prohibited or limited by the rules is admissible to impeach a witness's testimony.

A. Bias: Bias is used in the "common law of evidence" to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party. *United States v. Figueroa*, 548 F.3d 222, 230 (2d Cir. 2008). Bias may be induced by a witness's like, dislike, or fear of a party, or by the witness's self-interest. *Id.* Proof of bias is almost always relevant. *United States v. Abel*, 469 U.S. 45, 52 (1984).

1. **Basis For Bias**: "A successful showing of bias on the part of a witness would have a tendency to make the facts to which he testified less probable in the eyes of the jury than it would be without such testimony." *United States v. Abel*, 469 U.S. 45, 51 (1984). This is confirmed by the references to bias in the Advisory Committee Notes to FRE 608 and 610, and by the provisions allowing any party to attack credibility in FRE 607, and allowing cross-examination on "matters affecting the credibility of the witness" in FRE 611(b).

2. **Relevance**: Bias evidence is governed by the relevance standard. FRE 402; *United States v. Green*, 258 F.3d 683 (7th Cir. 2001)(*citing*, *United States v. Smith*, 232 F.3d 236, 242-43 (D.C.Cir. 2000)).

B. Impeachment By Demonstration: "'Where a defendant testifies on direct examination regarding a specific fact, the prosecution may prove on cross-examination that the defendant lied as to that fact.'" *United States v. Gambino*, 951 F.2d 498, 503 (2d Cir. 1991)). FRE 607 authorizes impeachment by contradiction, and FRE 403 governs its application. *United States v. Gilmore*, 553 F.3d 266, 271 (3rd Cir. 2009). One party may impeach a witness's testimony with contradictory evidence unless the evidence's probative value is substantially outweighed by the danger of unfair prejudice, confusion or delay. *See* FRE 403.

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Method Of Impeachment

Form of Impeachment	Authority	Mode of Impeachment	Extrinsic Evidence Allowed	Foundation for Extrinsic Evidence
1. Bias, Interest, improper motive	FRE 401 - 403; 611(a) *US v. Abel*, 469 U.S. 45 (1984)	Cross-exam	Yes	Confront on cross and denial
2. Perception	FRE 401-403 *US v. Abel*	Cross- exam	Yes	None required
3. Memory	FRE 401-403 *US v. Abel*	Cross-exam	Yes	None required
4. Prior inconsistent statement	FRE 613	Cross-exam	Yes, if not collateral FRE 613(b)	Opportunity of witness to explain or deny
5. Specific instances of conduct to attack witness' credibility	FRE 608(b)	Cross-exam	No, except conviction FRE 608(b)	
6. Reputation or opinion testimony regarding dishonesty	FRE 608(a)	Third party testimony	Yes (the third party witness is extrinsic)	Witness has testified
7. Prior conviction	FRE 609	Cross-exam	Yes	Witness to be impeached has testified
8. Specific instances of conduct to attack character witness's testimony	FRE 405(a)	Cross-exam	No FRE 405(a) casenotes	

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Rules Of Exclusion | G5 - 1

[G5] ADMISSIONS

QUICK RULE: *The court will deem conclusive facts admitted in response to FRCP 36 discovery requests, if the admissions are deemed admissible. Unless the court permits their withdrawal, the admissions prevent the presentation of contrary facts at trial. Judicial admissions are factual statements made in court filings; these have the same preclusive effect as FRCP 36 admissions.*

DISCUSSION

I. **Party Admissions**: As a general rule, "admissions made in response to a Rule 36 request for admissions are binding on that party." *Bender v. Xcel Energy, Inc.*, 507 F.3d 1161, 1168 (8th Cir. 2007). "Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission." *Id.* Once a fact is formally admitted and thereby set aside in the discovery process, "the party requesting an admission is entitled to rely on the conclusiveness" of it. *Armour v. Knowles*, 512 F.3d 147, 154 (5th Cir. 2007) (*quoting* 7 MOORE'S FEDERAL PRACTICE, *supra*, § 36.03[5], at 36-21.) .

A. **Must Be Admissible**: FRCP 36 admissions are subject to all admissibility objections. "Admissions obtained under Rule 36 may be offered in evidence at the trial of the action, but they are subject to all pertinent objections to admissibility that may be interposed at the trial." *Walsh v. McCain Foods Ltd.*, 81 F.3d 722, 726 (7th Cir. 1996). Facially, all admissions are hearsay and require some exclusion or exception to be admitted. *See Id.* When the admission is offered against an admitting party, it is excepted from hearsay restrictions. *Id.* (*citing* 8A *Federal Practice and Procedure* § 2264, at 571-572 (1994).

B. **Court Cannot Disregard Admission**: Once a matter that is properly the subject of an admission under FRCP 36(b) has been admitted during discovery, the trial court cannot disregard that admission. *See Langer v. Monarch Life Ins. Co.*, 966 F.2d 786, 803 (3d Cir. 1992) ("Rule 36 admissions are *conclusive* for purposes of the litigation and are sufficient to support summary judgment."). "An admission that is not withdrawn or amended cannot be rebutted by contrary testimony or ignored by the district court simply because it finds the evidence presented by the party against whom the admission operates more credible." *Am. Auto. Ass'n v. AAA Legal Clinic*, 930 F.2d 1117, 1120 (5th Cir. 1991); *Cook v. Allstate Ins. Co.*, 337 F.Supp.2d 1206, 1210 (C.D.Cal. 2004).

1. **Contra (And Minority Opinion)**: According conclusive effect to an admission "may not be appropriate where requests for admissions or the responses to them are subject to more than one interpretation." *Rolscreen Co. v. Pella Prods. of St. Louis, Inc.*, 64 F.3d 1202, 1210 (8th Cir. 1995). Some courts have concluded that district courts are afforded discretion as to what scope and effect is to be accorded party admissions under Rule 36. *See Johnson v. DeSoto County Bd. of Comm'rs*, 204 F.3d 1335, 1341 (11th Cir. 2000).

C. **Withdrawing Admissions**: District courts apply a "two-part test" in deciding whether to grant or deny a motion to withdraw or amend admissions. *Smith v. First Nat'l Bank*, 837 F.2d 1575, 1577 (11th Cir. 1988). First, the court considers whether the withdrawal will serve the presentation of the merits. Second, the court determines whether the withdrawal will prejudice the party who obtained the admissions. *Perez v. Miami-Dade County*, 297 F.3d 1255, 1264 (11th Cir. 2002); *Hadley v. United States*, 45 F.3d 1345, 1348 (9th Cir. 1995); *FDIC v. Prusia*, 18 F.3d 637, 640 (8th Cir. 1994).

II. **Judicial Admissions**: Judicial admissions are facts, admitted by a party, that bind the party throughout the litigation. *Gibbs ex rel. Estate of Gibbs v. CIGNA Corp.*, 440 F.3d 571, 578 (2d Cir. 2006); *see Oscanyan v. Arms Co.*, 103 U.S. 261, 263 (1881) ("The power of the court to act in the disposition of a trial upon facts conceded by counsel is as plain as its power to act upon the evidence produced."). "Judicial admissions are not evidence at all. Rather, they are formal concessions in the pleadings in the case or stipulations by a party or counsel that have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact." *Hoodho v. Holder*, 558 F.3d 184, 191 (2d Cir. 2009) (*quoting* 2 *McCormick on Evidence*, § 254 (6th ed)).

A. **Limited To Statements Of Fact**: Judicial admissions are "statements of fact rather than legal arguments made to a court." *New York State National Organization for Women v. Terry*, 159 F.3d 86, 97 n. 7 (2d Cir. 1998). A legal argument cannot be taken as judicial admission. *Stichting Ter Behartiging v. Schreiber*, 407 F.3d 34, 45 (2d Cir. 2005); *McCaskill v. SCI Management Corp.*, 298 F.3d 677, 681 (7th Cir. 2001).

B. **Judicial Admission's Effect**: Generally, a party is bound by the admissions in his pleadings. *Best Canvas Prods. & Supplies, Inc. v. Ploof Truck Lines, Inc.*, 713 F.2d 618, 621 (11th Cir. 1983). A "judicial admission, unless allowed by the court to be withdrawn, is conclusive in the case." *Hoodho v. Holder*, 558 F.3d 184, 191 (2d Cir. 2009).

1. **Judicial Admissions Limit Proofs**: To the extent that a party has made factual statements in court filings, he is barred from taking any position inconsistent with those statements under the doctrine of judicial admissions. *Berckeley Inv. Group, Ltd. v. Colkitt*, 455 F.3d 195, 211 n. 20 (3d Cir. 2006).

2. **Beyond Evidence**: Judicial admissions trump evidence. *Murrey v. United States*, 73 F.3d 1448, 1455 (7th Cir. 1996). Facts "judicially admitted are facts established not only beyond the need of evidence to prove them, but beyond the power of evidence to controvert them." *Cooper v. Meridian Yachts, Ltd.*, 575 F.3d 1151, 1178 (11th Cir. 2009) (*quoting Hill v. Federal Trade Comm'n*, 124 F.2d 104, 106 (5th Cir. 1941)).

3. **Beyond Court Scrutiny**: Admissions by parties are not subject to judicial scrutiny to ensure that the admissions are fully supported by the underlying record. *Hoodho v. Holder*, 558 F.3d 184, 191 (2d Cir. 2009). This rule of non-inquiry promotes efficiency and judicial economy by facilitating the concession of specific issues, thereby providing notice to all litigants of the issues remaining in dispute, identifying those that can be eliminated from the case and those that cannot be, narrowing the

scope of discovery to disputed matters and thus reducing trial time. *Banks v. Yokemick,* 214 F.Supp.2d 401, 405-06 (S.D.N.Y. 2002).

C. **Withdrawing An Admission**: In rare cases, a court may disregard a stipulation if to accept it would be manifestly unjust or if the evidence contrary to the stipulation is substantial. *PPX Enters., Inc. v. Audiofidelity, Inc.*, 746 F.2d 120, 123 (2d Cir. 1984).

D. **Pleadings As Admissions**: Pleadings are judicial admissions and a party may use them to render facts indisputable. *Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, 272 F.3d 1335, 1353 (Fed. Cir. 2001)(*citing Help At Home Inc. v. Medical Capital, L.L.C.*, 260 F.3d 748 (7th Cir. 2001)). A statement in defendant's answer can constitute a binding judicial admission, withdrawing the issue from contention. *Crest Hill Land Development, LLC v. City of Joliet*, 396 F.3d 801, 805 (7th Cir. 2005).

E. **Compared With Evidentiary Admissions**: Statements not made in a pleading or in a response to a request for admissions are ordinary evidentiary admissions. *Keller v. United States*, 58 F.3d 1194, 1199 n. 8 (7th Cir. 1999). In contrast to judicial admissions, a party may controvert or explain evidentiary admissions. *Id.*

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Rules Of Exclusion | G5 - 4

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Best Evidence Rule | H1 - 1

[H1] BEST EVIDENCE RULE

QUICK RULE: *There are two parts of the best evidence rule.*

- *First, when a document's contents are at issue, the rule prevents testimony about the contents, unless there is a foundation showing that the document no longer exists or is unavailable. FRE 1002, 1004.*
- *Second, the rule requires the original of a document if there is any reason to suspect the quality of a copy or the authenticity of the original. FRE 1003.*

DISCUSSION

I. **Best Evidence Rules**: The "best evidence rule" encompasses two separate rules that are often confused or intermingled. The first limits evidence about the contents of a document, to the document itself, unless certain exceptions apply. The rule's second part permits duplicates of documents to be entered into evidence, unless certain exceptions apply.

A. **Overview**: "Best Evidence Rule" is a misleading title. *Lorraine v. Markel American Ins. Co.*, 241 F.R.D. 534, 577 (D.Md. 2007). The rule does not require the "best evidence" that a party could find to prove a fact. *See Travelers Ins. Co. v. United States*, 46 Fed.Cl. 458, 463 (2000). The rule is actually an "Original Writing Rule" because it does not mandate introduction of the "best" evidence to prove the contents of a writing, recording or photograph, but merely requires such proof by an "original," "duplicate," or, in certain instances, by "secondary evidence." *Lorraine*, 241 F.R.D. at 577.

II. **Best Evidence Regarding A Document's Contents**: To prove the contents of a writing, recording, or photograph, the original is required, unless (1) the original is lost, destroyed, or unavailable, or (2) the writing is not "closely related to a controlling issue." FRE 1002, 1004. The rules have special exceptions for public records and for compilations, which may be used in place of original documents.

A. **Rationale**: The best evidence rule rests on the fact that the document or recording is a more reliable, complete and accurate source of information as to its contents and meaning than anyone's description of it. *Gordon v. United States*, 344 U.S. 414, 420 (1953). The rule prevents inaccuracy and fraud when attempting to prove a document's contents, where often small changes in words may be of significance. *See U.S. ex rel. El-Amin v. George Washington University*, 522 F.Supp.2d 135, 148 (D.D.C. 2007); *United States v. Johnson,* 362 F.Supp.2d 1043, 1067 -1069 (N.D.Iowa 2005).

B. **"Proving The Contents"**: The best evidence rule requires the introduction of originals, if at all, only when the content of the document itself is a factual issue. *United States v. Howard,* 953 F.2d 610, 612 (11th Cir. 1992). The rule does not prevent the introduction in evidence of facts about the document, or facts that exist independently of the document that are not given legal consequence by the document's terms. *See United States v. Sliker,*

751 F.2d 477, 483 (2d Cir. 1984) (no need to introduce original bank insurance policy just because witness testified to the fact the bank was insured).

1. **Rule Does Not Apply To Underlying Facts**: The best evidence rule does not apply where "a witness's testimony is based on his first-hand knowledge of an event as opposed to his knowledge of the document." *Waterloo Furniture Components, Ltd. v. Haworth, Inc.*, 467 F.3d 641, 648-49 (7th Cir. 2006). There is a clear distinction between having someone testify about the contents of a conversation and having someone testify about the contents of a tape of the conversation. The former raises no best evidence rule issues, the later does. *United States v. Workinger*, 90 F.3d 1409, 1415 (9th Cir. 1996).

   a. **Rule May Not Apply To Facts Obtained From Document**: A fact may exist independently of the content of any book, document, recording, or writing; if so, obtaining the fact from a document and offering testimony about the fact does not mean that the testimony was offered "to prove the content" of the books and computer files. *United States v. Smith*, 566 F.3d 410, 414 (4th Cir. 2009). This may, of course, raise foundational problems.

   b. **Examples**: The witness to a wedding ceremony may testify that someone is married; the marriage license is not required, and the rule will not apply. If the only proof of the marriage is by the record itself, the rule does apply. Similarly, someone who heard a politician give a speech may testify to what was said, because the video recording of the speech is not at issue. In contrast, if the only way to prove the content of the speech is by the video, because there are no witnesses available to testify, the rule would apply to the video recording. (From *Lorraine v. Markel American Ins. Co.*, 241 F.R.D. 534, 578 -579 (D.Md. 2007))

2. **Contents v. Existence**: Difficulty applying the best evidence rule commonly arises where the party proffering secondary proof contends that it is not intended to "prove the content" of the document it discusses, but merely its "existence." *Railroad Management Co., L.L.C. v. CFS Louisiana Midstream Co.*, 428 F.3d 214, 217 -219 (5th Cir. 2005). The FRE do not define the difference, but in practice "[t]estimony about a document cannot go very far without referring to its terms." 4 *Wigmore on Evidence* § 1242 (1972). The distinction requires careful consideration of the facts of each case to avoid descent into mere logical subtlety and verbal quibbling. *Railroad Management Co., L.L.C. v. CFS Louisiana Midstream Co.*, 428 F.3d 214, 217 -219 (5th Cir. 2005).

3. **Corroboration**: Courts distinguish between testimony to prove the content of a recording or document (which may be barred by the best evidence rule) and testimony corroborating the document or recording. *United States v. Branham*, 97 F.3d 835, 853 (6th Cir. 1996). The rule does not apply to corroboration.

C. **Defining An "Original"**: An original is the writing or recording or any "counterpart" intended to have the same effect. FRE 1001(3). A carbon copy of a duplicate is an

original, as is any print made from an original negative. FRE 1001(3) Advisory Committee Notes. Any computer printout is an "original" under the rule. *Id.*

D. Exceptions: The best evidence rule is a "rule of preference, not a solid bar on secondary evidence." *U.S. ex rel. El-Amin v. George Washington University,* 522 F.Supp.2d 135, 145 -147 (D.D.C. 2007) (*citing* 5 *Weinstein's Federal Evidence* § 1004(1)[02] (1982)). The best evidence rule "contains a number of built-in exceptions to the requirement that the original be produced." 6 *Weinstein's Federal Evidence* § 1002.04. These exceptions are intended to "prevent over-technical application of the rule in light of its more limited rationale." *Id.* Exceptions to the best evidence rule arise (1) when the document is unavailable, and (2) when the matter addressed in the document is not significant.

1. **Document Unavailable**: When an original document or recording has been lost, destroyed, or is otherwise not producable, the original is not required and other evidence of its content is admissible, unless the proponent lost or destroyed the original in bad faith. FRE 1004(1). This rule allows admission of secondary evidence offered by a party who destroyed the original as long as the action was not taken in bad faith. *See Estate of Gryder v. Commissioner of Internal Revenue,* 705 F.2d 336 (8th Cir. 1983).

   a. **Search Not Required**: FRE 1004 "does not contain an independent requirement that a search be conducted; rather, the concept of a diligent search is an avenue by which the larger issue of the document's destruction may be proved." *United States v. McGaughey,* 977 F.2d 1067, 1071 (7th Cir. 1992).

2. **Insignificant Issues**: The best evidence rule does not apply for collateral issues, and other evidence of the document's contents are admissible. FRE 1004(4).

E. Secondary Evidence: Secondary evidence is any evidence other than an original, such as "testimony, or a draft of a writing to prove the final version, if no original or duplicate is available." FRE 1001 Advisory Committee Notes. When a document's original is not available, secondary evidence is admissible to prove the writing's contents. *Glew v. Cigna Group Ins.*, 590 F.Supp.2d 395, 412 -413 (E.D.N.Y. 2008).

1. **Types Of Secondary Evidence Allowed**: Once it is shown that an original is not available, the party seeking to prove the document's contents may do so by any secondary evidence. *United States v. Gerhart,* 538 F.2d 807, 809 (8th Cir.1976); 5 *Weinstein's Evidence,* § 1004[01], at 1004-4 (1993). The rule recognizes no 'degrees' of secondary evidence. FRE 1004 Advisory Committee Note. If the original document is lost or destroyed, without bad faith, the proponent may offer testimony describing the document's contents, by a witness who read the document. *Glew v. Cigna Group Ins.*, 590 F.Supp.2d 395, 412 -413 (E.D.N.Y. 2008).

   a. **Secondary Evidence Allowed Even If Copy Exists**: There is no requirement that a copy be introduced in preference to oral testimony. *United States v. Billingsley,* 160 F.3d 502, 505 n.2 (8th Cir. 1998). *See United States v. Gerhart,* 538 F.2d 807, 809 (8th Cir. 1976) ("once an enumerated condition of Rule 1004

is met, the proponent may prove the contents of a writing by any secondary evidence, subject to an attack by the opposing party not as to admissibility but to the weight to be given the evidence"). Of course, copies may be admitted under the rule. *United States v. Phillips*, 543 F.3d 1197, 1204 (10th Cir. 2008).

b. **Not A Means To Avoid Hearsay Rule**: The best evidence rule is not meant to eliminate other limits on admissibility. *McInnis v. Fairfield Communities, Inc.*, 458 F.3d 1129, 1144 (10th Cir. 2006) (*citing* 31 *Federal Practice and Procedure*, § 7183 (2000)). If hearsay rule barred the document's original contents, it is error to allow those contents in through secondary evidence of the document's contents. *United States v. Wells*, 262 F.3d 455, 460-463 (5th Cir. 2001).

F. **Burdens Of Proof**: The party asserting the best evidence rule to exclude evidence must make the threshold showing that a writing at some point existed. *C.P. Interests, Inc. v. California Pools, Inc.*, 238 F.3d 690, 699-700 (2001); FRE 1002. The party against whom the secondary evidence is being offered bears the burden of challenging its admissibility. *United States v. Garmany*, 762 F.2d 929, 938 (11th Cir. 1985).

G. **Examples**:

1. **Contracts**: Trial courts bar testimony as to a written contract's material elements, where the contract had not been shown to be unavailable. *See Acumed LLC v. Advanced Surgical Services, Inc.*, 561 F.3d 199, 222 (3rd Cir. 2009); *Lincoln General Ins. Co. v. Access Claims Adm'rs, Inc.*, 596 F.Supp.2d 1351, 1379 n. 19 (E.D.Cal. 2009) (best evidence rule barred testimony as to contents of re-insurance agreement). For oral promises there is no best evidence concern because there is no document. *S.E.C. v. Merrill Scott & Associates, Ltd.*, 505 F.Supp.2d 1193, 1200 (D.Utah 2007).

2. **Fraud**: The best evidence rule is implicated when plaintiff must show that defendant submitted a false claim, which requires plaintiff to "prove the content" of the claim. *U.S. ex rel. El-Amin v. George Washington University*, 522 F.Supp.2d 135, 147 (D.D.C. 2007).

3. **Transcripts**: Where an original recording is missing, a transcript may be used to prove the recording's contents. *See Wright v. Farmers Co-op*, 681 F.2d 549, 553 (8th Cir. 1982). A transcript may be secondary evidence where the recording from which the transcript derived had been accidentally erased and the transcript's drafter testified to transcript's accuracy. *United States v. Maxwell*, 383 F.2d 437, 442-43 (2d Cir. 1967). *See United States v. Ross*, 33 F.3d 1507, 1513-14 (11th Cir. 1994).

H. **Admission Of Public Records**: There is a specialized best evidence rule for official records and documents to be recorded or filed. The contents of these documents, if otherwise admissible, may be proven by copy, certified as correct in accordance with FRE 902 or testified to be correct by a witness who has compared it with the original. FRE 1005. If a copy which complies with this cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given. *United States v. Phillips*, 543 F.3d 1197, 1204 -1205 (10th Cir. 2008).

I. **Admission Of Compilation Or Voluminous Records**: The FRE provide an exception to the best evidence rule for the contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court. *Highland Capital Management, L.P. v. Schneider,* 551 F.Supp.2d 173, 190 (S.D.N.Y. 2008). Pursuant to FRE 1006, these materials may be presented in the form of a chart, summary, or calculation. (*See **Compilations***).

III. **Best Evidence - Admissibility Of Duplicates**: The best evidence rule generally permits the use of duplicates, rather than originals. FRE 1003. Duplicates are only disallowed when there is a genuine issue of authenticity. *See Tyson v. Jones & Laughlin Steel Corp.*, 958 F.2d 756, 761 (7th Cir. 1992). To raise such an issue, the opponent to the copy must expressly and specifically challenge the accuracy of the duplicates' contents. *Id.*

A. **Rationale**: The common law required production of the original of any document offered in evidence in order to ensure that the trier of fact had the "best evidence" of the content of the document, which of course is the document itself. *Carroll v. LeBoeuf, Lamb, Greene & MacRae, L.L.P.*, 614 F.Supp.2d 481, 485 (S.D.N.Y. 2009). In an age in which copying machines permit the routine production of exact copies, adherence to the common law rule usually is unwarranted because the nature of the modern copying process affords substantial protection against fraud, error, and mistake in consequence of the use of copies in place of originals. FRE 1003 Advisory Committee Notes. The rule generally permits the use of copies rather than originals. FRE 1003; *Murphy v. Metropolitan Transp. Authority,* 548 F.Supp.2d 29, 42 (S.D.N.Y. 2008) (Defendant's "best evidence" argument rule is without merit, as defendant possesses and vouches for the originals of the documents that plaintiff received from defendant during discovery).

B. **Exception When Genuine Dispute As To Authenticity**: The best evidence rule excludes copies where there is a genuine dispute as to the original's authenticity. FRE 1003. The rule recognizes that the original might provide evidence of forgery or fraud that cannot be discerned from a copy. "The original [of a document] may contain, and the copy may lack, such features as handwriting impressions, type of paper, and the like as may afford the opponent valuable means of objecting to admissibility. For example, the original may be a pasted-together version that gives an entirely different impression than a smooth photocopy." 6 *Weinstein's Federal Evidence,* § 103.03[4] (2008).

C. **Enhanced Copy**: Duplicates are copies made by methods that virtually eliminate the possibility of error. FRE 1001 Advisory Committee Notes. Handwritten copies are not duplicates. *Id.* The rules permit slight variation on duplicates, such as enlargement or clarifications. "Enhanced" recordings are "duplicates" if they are arise from "electronic re-recording." FRE 1001(4). Mere "changes" in volume in an "enhancement" are not legally significant. *Calderin-Rodriguez,* 244 F.3d 977, 986-87 (8th Cir. 2001).

IV. **Practice Points**: At trial, it is generally improper to read from a document until that document is admitted into evidence. Once the document is in evidence, a party may read a portion – or have the witness read the portion. Questioning on the document may include questions such as "Why did you write that?", "What did you understand this to mean when

Best Evidence Rule | H1 - 6

you received it?" or "What actions did you take in response to this?" On cross, the attorney will use leading versions of these questions. It is even valid to simply ask the witness "Did I read this correctly?" Some attorneys will, unfortunately, try and muddle the record by mixing questions such as "Did I read that correctly?" with "True?" or "Correct?" These later two questions go to the accuracy of the read statement rather than the accuracy of the attorney's reading ability. These sorts of parlor tricks are the hallmark of the desperate and untalented charlatan, but they must be watched for and objected to as confusing.

Notes:

[H2] COMPILATIONS

QUICK RULE: *The voluminous contents of documents can be presented in the form of a chart, summary, or calculation. Unless the compilation is relied upon by an expert, the underlying documents need to be admissible and made available for examination by the other side. FRE1006. The underlying documents do not need to be actually admitted; FRE1006 acts as an exception to the best evidence rule. The summary must be accurate and non prejudicial and authenticated at trial by the individual who created it.*

DISCUSSION

I. **Overview**: The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. FRE 1006. The compilation may be a document or chart, or may take the form of testimony. Wright and Gold, *Federal Practice and Procedure*, § 8044.

A. **Requirements**: The party proffering the compilation must satisfy six requirements to lay the foundation required for admissibility: (1) the underlying documents are so voluminous that they cannot be conveniently examined in court; (2) the summary's proponent must have made the documents available for examination or copying at a reasonable time and place; (3) the underlying documents must be admissible in evidence; (4) the summary must be accurate and nonprejudicial; (5) the summary must be properly introduced through the testimony of a witness who supervised its preparation. *See United States v. Jamieson*, 427 F.3d 394, 409 (6th Cir. 2005); *United States v. Moon*, 513 F.3d 527, 545 (6th Cir. 2008); *United States v. Bishop*, 264 F.3d 535, 547 (5th Cir. 2001).

B. **Materials Eligible For Summation**: All documents are eligible for summation. The rule does not require that the underlying documents contain complex calculations to be eligible. *United States v. Robinson*, 774 F.2d 261, 276 (8th Cir. 1985). Transcripts are not summaries but simply written copies of a conversation. *United States v. West*, 948 F.2d 1042, 1045 (6th Cir. 1991).

1. **Summaries Of Testimony Not Permitted**: The rule "does not specifically address summary witnesses or summarization of trial testimony." *United States v. Fullwood*, 342 F.3d 409, 413 (5th Cir. 2003). The rule does not authorize the presentation of a witness's recitation of facts in a written summary, in lieu of his or her sworn testimony. *United States v. Baker*, 10 F.3d 1374, 1411 (9th Cir. 1993) (citing *United States v. Winn*, 948 F.2d 145, 158 n. 32 (5th Cir. 1991)) (FRE 1006 does not authorize summarization of relevant *testimony*).

a. **Exception**: For complex cases, courts have allowed "summary witnesses in a limited capacity." *United States v. Nguyen*, 504 F.3d 561, 572 (5th Cir. 2007).

C. **Exception To Best Evidence Rule**: The rule permitting summaries and charts is an exception to the best evidence rule (FRE 1002 and 1003) which otherwise requires either original documents or duplicates to establish the contents of those documents.

II. **Documents Must Be Voluminous**: To be admissible, a chart must summarize documents so voluminous "as to make comprehension 'difficult and . . . inconvenient,' " although not necessarily "literally impossible." *United States v. Hemphill*, 514 F.3d 1350, 1358 (D.C. Cir. 2008) (*quoting United States v. Bray*, 139 F.3d 1104, 1109-10 (6th Cir. 1998). FRE 1006 requires only that in-court examination be inconvenient. *United States v. Osum*, 943 F.2d 1394, 1405 (5th Cir. 1991) (*citing United States v. Duncan*, 919 F.2d 981, 988 (5th Cir. 1990)).

A. **Examples**:

1. Eighteen one-page, pulmonary-function test results were deemed "not voluminous." *Daniel v. Ben E. Keith Co.*, 97 F.3d 1329, 1335 (10th Cir. 1996).

2. Contents of three tape recordings were not "voluminous," and thus could not be properly summarized under FRE 1006. *United States v. West*, 948 F.2d 1042, 1045 (6th Cir. 1991).

3. One-hundred-and-five applications, with eight documents each, "easily" satisfied FRE 1006's voluminous" requirement. *United States v. Robinson*, 774 F.2d 261, 276 (8th Cir. 1985).

4. Examining reports from three separate accidents would be burdensome for the jury and would be substantially facilitated by summary evidence. *United States v. Osum*, 943 F.2d 1394, 1405 (5th Cir. 1991). The fact that the reports were already in evidence does not mean that in-court examination would have been convenient. *Id.*

III. **Inspection Required**: A summary is inadmissible if its proponent failed to offer the underlying evidence for inspection. *Hackett v. Housing Auth.*, 750 F.2d 1308, 1312 (5th Cir. 1985); *United States v. Miller*, 771 F.2d 1219 (9th Cir. 1985). "When the underlying documents are not subject to examination by the opposing parties, the summary should not be admitted into evidence." *United States v. Kim*, 595 F.2d 755, 764 (D.C.Cir. 1979).

A. **Rule Does Not Address Summaries**: The plain language only requires that the summarized documents, and not the summaries themselves, be made available to the opposing party at a "reasonable time and place." *See Fid. Nat'l Title Ins. Co. of N.Y. v. Intercounty Nat'l Title Ins. Co.*, 412 F.3d 745, 753 (7th Cir. 2005)(FRE 1006 "does not say when the summaries must be made available to the party-for that matter, it nowhere states that the summaries must be made available to the opposing party."). Nevertheless, in civil cases, the FRCP require "an appropriate identification" of each document, including summaries, as part of the pre-trial process. FRCP 26(a)(3)(c). As a practical matter, courts conclude that identification of the summarized materials is essential to the purpose of making the source materials available. *Federal Practice and Procedure*, § 8045.

Best Evidence Rule | H2 - 3

IV. **Underlying Documents Must Be Admissible**: FRE 1006 is "not a back-door vehicle for the introduction of evidence which is otherwise inadmissible." *Eichorn v. AT&T Corp.*, 484 F.3d 644, 650 (3rd Cir. 2007). The voluminous evidence that is the subject of the summary must be independently admissible. *Peat, Inc. v. Vanguard Research, Inc.*, 378 F.3d 1154, 1160 (11th Cir. 2004).

A. **Underlying Documents Need Not Be Admitted**: Although the underlying documents must be admissible, courts generally do not require that the party offering the summary actually enter the underlying exhibits. *United States v. Hemphill*, 514 F.3d 1350, 1358 (D.C. Cir. 2008) (*quoting United States v. Bray*, 139 F.3d 1104, 1109-10 (6th Cir. 1998). The rule's purpose is to avoid entering the documents into evidence. ***Contra***: To be admissible, summaries must be "based on competent evidence already before the jury." *United States v. Bishop*, 264 F.3d 535, 547 (5th Cir. 2001). This case seems aberrational at best.

1. **Underlying Documents May Be Admitted**: Although the evidence underlying FRE 1006 summaries need not be introduced into evidence, *United States v. Janati*, 374 F.3d 263, 272-73 (4th Cir. 2004), nothing in the rule forecloses a party from doing so. *United States v. Milkiewicz*, 470 F.3d 390, 396 -398 (1st Cir. 2006). The fact that the underlying documents are already in evidence does not mean that they can be "conveniently examined in court." *United States v. Milkiewicz*, 470 F.3d 390, 396 -398 (1st Cir. 2006). The summary may be admitted in addition to the underlying documents to provide the jury with easier access to the relevant information. *United States v. Green*, 428 F.3d 1131, 1134-35 (8th Cir. 2005); *United States v. Petty*, 132 F.3d 373, 379 (7th Cir. 1997).

2. ***Contra***: Admitting both the underlying evidence and the Rule 1006 summary is inconsistent with the rule's purpose of providing an exception to the best evidence rule because, "[i]f the underlying evidence is already admitted, there is no concern that a summary is used in lieu of the 'best evidence." See *Federal Practice and Procedure*, § 8043, at 523-24 n. 8.

B. **Compare With Demonstratives**: Charts summarizing voluminous material under FRE 1006 are admitted as evidence themselves; pedagogical or demonstrative aids submitted under FRE 611(a) are not introduced into evidence, but merely shown to the jury to help them understand evidence that has already been admitted into the record. *United States v. Buck*, 324 F.3d 786, 790-91 (5th Cir. 2003).

1. **Summaries As Demonstratives**: A trial judge may allow use of a chart or other summary tool under FRE 611(a), which gives the trial court "control over the mode ... [of] presenting evidence." *United States v. Harms*, 442 F.3d 367, 375 (5th Cir. 2006). Such summaries most typically are used as "pedagogical devices" to "clarify and simplify complex testimony or other information and evidence or to assist counsel in the presentation of argument to the court or jury." *United States v. Bray*, 139 F.3d 1104, 1111 (6th Cir. 1998). A summary chart used as a pedagogical device must be linked to evidence previously admitted and usually is not itself admitted into evidence.

a. **Distinguishing Summaries From Demonstratives**: Charts admitted under Rule 1006 reflect the documents they summarize and typically substitute in evidence for the voluminous originals. *United States v. Milkiewicz*, 470 F.3d 390, 396 - 398 (1st Cir. 2006). 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) (*quoting Gomez v. Great Lakes Steel Div., Nat'l Steel Corp.*, 803 F.2d 250, 257 (6th Cir. 1986)). By contrast, a pedagogical aid allowed under Rule 611(a) to illustrate or clarify a party's position, or allowed under Rule 703 to assist expert testimony, may be less neutral in its presentation. Record support is necessary because such devices tend to be "more akin to argument than evidence." 6 *Weinstein's Federal Evidence* § 1006.08[4].

2. **Confusion In The Caselaw**: Courts often confuse FRE 1006 compilations with demonstratives, which are controlled by FRE 611(a). FRE 1006 compilations are evidence - they stand in the place of admissible materials too cumbersome to be brought into court. FRE 1006 compilations may support factual findings. Demonstratives are only pedagogical materials, used to illustrate admitted exhibits. Although courts must often give jury instructions regarding the proper use of demonstratives, no such warning is necessary for Rule 1006 compilations. The caselaw to the contrary is mistaken. *Daniel v. Ben E. Keith Co.*, 97 F.3d 1329, 1335 (10th Cir. 1996) (citing *Gomez v. Great Lakes Steel Div., Nat'l Steel Corp.*, 803 F.2d 250, 257 (6th Cir. 1986)).

C. **Exception For Chart Used By Experts**: Otherwise inadmissible evidence may be entered to support an expert's testimony if it is of the type reasonably relied upon by experts in the field. FRE 703. If an expert has created a chart of this type of evidence, then the chart may come in under FRE 1006, even if the underlying evidence is not otherwise admissible. *United States v. DeSimone*, 488 F.3d 561, 576 -577 (1st Cir. 2007); *Federal Practice and Procedure* § 8043 n. 5.

V. **Accuracy Touchstone**: The overriding concern for summary compilations is that they be fair, accurate, and not misleading. FRE 1006; *United States v. Dorta*, 783 F.2d 1179, 1183 (4th Cir. 1986).

A. **Calculations And Analysis**: It is not problematic for a witness to perform some simple calculations in preparing a summary chart. *United States v. Hemphill*, 514 F.3d 1350, 1359 (D.C. Cir. 2008). *See United States v. Evans*, 910 F.2d 790, 799-800 (11th Cir. 1990) (government witness added $100 per month to the defendant's accounts); *United States v. Jennings*, 724 F.2d 436, 442 (5th Cir. 1984) (exhibit extrapolated defendant's reimbursement by assuming a value for average daily expenditure).

B. **More Complex Analysis**: If a summary goes beyond the data summarized and includes assumptions, inferences, or projections about future events, the chart is not admissible under FRE 1006. *Eichorn v. AT&T Corp.*, 484 F.3d 644, 650 (3rd Cir. 2007). Instead, the chart represents opinion testimony and is thus subject to the rules governing opinion testimony. *See* FRE 701, 702; *Gomez v. Great Lakes Steel Div. Nat'l Steel Corp.*, 803 F.2d 250, 258 (6th Cir. 1986) (proposed exhibit was improperly admitted because, despite

Best Evidence Rule | H2 - 5

being labeled "Summary of Actual Damages," it "projected future events and economic losses, and was therefore not a simple compilation of voluminous records."); *State Office Sys., Inc. v. Olivetti Corp.*, 762 F.2d 843, 845-46 (10th Cir. 1985) (projections of future lost profits set forth in a summary "are not legitimately admissible as summaries under Rule 1006, since they are interpretations of past data and projections of future events, not a simple compilation of voluminous records."). *In re Bayshore Ford Trucks Sales, Inc.*, 471 F.3d 1233, 1260 (11th Cir. 2006) (Trial court properly excluded report under FRE 1006 because it was based upon assumptions, and was not a mere summary of data).

VI. **Foundation By Person Who Created The Chart**: As part of the foundation for a summary chart, the witness who prepared the chart should introduce it and explain how it was created. *United States v. Bray*, 139 F.3d 1104, 1109-10 (6th Cir. 1998); *United States v. Hemphill*, 514 F.3d 1350, 1359 (D.C. Cir. 2008).

A. **Personal Knowledge**: For summary compilations, the testifying witness need only have knowledge of the documents he or she reviewed to prepare the charts; they need not have personal knowledge of the underlying documents. *United States v. Hemphill*, 514 F.3d 1350, 1359 (D.C. Cir. 2008).

B. **Expert Not Necessary**: A non-expert witness can prepare a chart or testify about it without understanding the underlying materials. *See United States v. Scales*, 594 F.2d 558, 563 (6th Cir. 1979) (necessary only that the investigator "had properly catalogued the exhibits . . . and had knowledge of the analysis"). When "a chart does not contain complicated calculations requiring the need of an expert for accuracy no special expertise is required in presenting the chart." *United States v. Jennings*, 724 F.2d 436, 443 (5th Cir. 1984).

C. **Benchtrials**: Courts may reject attacks on compilations in bench trials, because the judge can be generally trusted to give evidence its proper weight without regard to the technical rules of evidence. *See Greycas, Inc. v. Proud*, 826 F.2d 1560, 1567-68 (7th Cir. 1987).

Notes: _____

Best Evidence Rule | H2 - 6

Notes:

[J1] JUDICIAL NOTICE

QUICK RULE: *The court can take judicial notice of adjudicative facts which are not subject to reasonable dispute because they are generally known or subject to subject to accurate and ready determination. FRE 201(a)-(b). The court must take judicial notice when requested by a party that has supplied the necessary information. FRE 201(d). The court may take notice on its own initiative, although the opposing party is entitled to be heard. FRE 201(e). Judicially noticed facts are conclusive.*

DISCUSSION

I. **General:** Judicial notice is a doctrine that authorizes the fact finder to waive proof of facts that cannot reasonably be contested. FRE 201; *Galina v. INS,* 213 F.3d 955, 958 (7th Cir. 2000); *Gen. Elec. Capital Corp. v. Lease Resolution Corp.,* 128 F.3d 1074, 1081 (7th Cir. 1997). Courts may take judicial notice of facts of universal notoriety, which need not be proved. *B.V.D. Licensing Corp. v. Body Action Design, Inc.*, 846 F.2d 727, 728 (Fed. Cir. 1988). Courts may also notice such scientific, historical, and geographical facts as a state's boundaries or the time of sunset. *Shahar v. Bowers,* 120 F.3d 211, 214 (11th Cir. 1997).

A. **Scope Of Judicial Notice:** The "traditional textbook treatment" has included two categories for judicial notice: "matters of common knowledge" and "facts capable of verification." *United States v. Bari*, 599 F.3d 176, 180 (2d Cir. 2010)(*citing* FRE 201, Advisory Committee Notes.). Judicial notice is only appropriate for matters generally known within the court's territorial jurisdiction or "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Jespersen v. Harrah's Operating Co., Inc.,* 444 F.3d 1104, 1110 (9th Cir. 2006) (en banc) (*quoting* FRE 201).

1. **Limits**: Taking judicial notice of facts is a "highly limited process" because it bypasses the usual procedural safeguards involved in proving facts through competent evidence. *Shahar v. Bowers,* 120 F.3d 211, 214 (11th Cir. 1997).

2. **Examples**: Information on the internet is not generally deemed reliable enough to serve as the basis for judicial notice. *Victaulic Co. v. Tieman*, 499 F.3d 227, 236 - 237 (3rd Cir. 2007). The status of disabled children could not be judicially noticed because this was not generally known throughout the Ninth Circuit. *N.D. ex rel v. Hawaii Dept. of Educ.*, 600 F.3d 1104, 1113 (9th Cir. 2010). The court took judicial notice as to the Federal Reserve discount rate. *First Nat. Mortg. Co. v. Federal Realty Inv. Trust*, 633 F.Supp.2d 985, 995 (N.D.Cal. 2009).

B. **Rule Only Applies To Adjudicative Facts**: FRE 201, which governs a district court's use of judicial notice, applies only to adjudicative facts, which are "simply the facts of the particular case" or, stated differently, "those to which the law is applied in the process of

adjudication." FRE 201 Advisory Committee Notes; *see Ind. Harbor Belt R.R. Co. v. Am. Cyanamid Co.*, 916 F.2d 1174, 1182 (7th Cir. 1990). "When a court or an agency finds facts concerning the immediate parties - who did what, where, when, how, and with what motive or intent - the court or agency is performing an adjudicative function, and the facts are conveniently called adjudicative facts." FRE 201 Advisory Committee notes (*quoting* 2 Administrative Law Treatise 353). "Stated in other terms, the adjudicative facts are those to which the law is applied in the process of adjudication. They are the facts that normally go to the jury in a jury case. They relate to the parties, their activities, their properties, their businesses." *Id.*

1. **Non-Evidence Facts**: Every case involves the use of hundreds or thousands of non-evidence facts. FRE 201 Advisory Committee Notes (*citing A System of Judicial Notice Based on Fairness and Convenience, in Perspectives of Law* 69, 73 (1964)). When a witness in an automobile accident case says "car," everyone, judge and jury included, furnishes, from non-evidence sources within himself, the supplementing information that the "car" is an automobile, not a railroad car, that it is self-propelled, probably by an internal combustion engine, that it may be assumed to have four wheels, and so on. *Id.* The judicial process cannot construct every case from scratch - these items could not possibly be introduced into evidence, and no one suggests that they be. *Id.*

2. **Judicial Notice Does Not Apply To Non-evidence Facts**: Non-evidence facts are not the appropriate subjects for any formalized treatment of judicial notice of facts. *In re Digby*, 47 B.R. 614, 620 (Bkrtcy.Ala. 1985). The use of non-evidence facts in evaluating the adjudicative facts is not an appropriate subject for a formalized judicial notice treatment. *Id.*

C. **Timing Of Judicial Notice:** A court may take judicial notice at any stage of the proceedings. FRE 201(f). Judicial notice should be done sparingly at the pleading stage. *Victaulic Co. v. Tieman*, 499 F.3d 227, 236 -237 (3rd Cir. 2007). Only in the clearest cases should a district court reach beyond the pleadings for facts to resolve a case. *Id.*

D. **Effect Of Judicial Notice:** In a civil case, judicially noticed facts are conclusive; the court must instruct juries accordingly. FRE 201. Judicially noticing a fact precludes the opposing party from introducing contrary evidence and essentially directs a verdict as to the noticed fact. *United States v. Jones*, 29 F.3d 1549, 1553 (11th Cir. 1994).

II. Application Of The Rule:

A. **Activities In Another Court**: A court may take notice of proceedings in other courts if those proceedings have a direct relation to the matters at issue. *Janowsky v. United States*, 133 F.3d 888, 889 (Fed. Cir. 1998). "Factual findings in one case ordinarily are not admissible for their truth in another case through judicial notice." *Wyatt v. Terhune*, 315 F.3d 1108, 1114 n. 5 (9th Cir. 2003). *See Lasar v. Ford Motor Co.*, 399 F.3d 1101, 1117 (9th Cir. 2005) (declining to take judicial notice of a Journal Entry by the Court of Common Pleas because the factual findings were offered for the purpose of proving the truth contained therein.).

1. **Rationale**: Judicial notice of factual findings is generally not allowed because (1) such findings do not constitute facts "not subject to reasonable dispute" within the meaning of FRE 201; and (2) "were [it] permissible for a court to take judicial notice of a fact merely because it had been found to be true in some other action, the doctrine of collateral estoppel would be superfluous." *Taylor v. Charter Medical Corp.*, 162 F.3d 827, 829-30 (5th Cir. 1998).

2. **Exceptions**:

   a. **Related Equitable Proceedings**: Courts may notice the contents of related published decisions when considering an equitable motion. *Motorola Credit Corp. v. Uzan*, 561 F.3d 123, 127 (2d Cir. 2009). A court properly took judicial notice of factual findings in a related contempt proceeding. *New York v. Operation Rescue Nat'l*, 273 F.3d 184, 198 (2d Cir. 2001).

   b. **Court's Own Prior Decisions**: A court may judicially notice its memorandum of order and judgment from a previous case involving the same parties, in which the court made factual findings. *Amphibious Partners, LLC v. Redman*, 534 F.3d 1357, 1362 (10th Cir. 2008). *See St. Louis Baptist Temple, Inc. v. FDIC*, 605 F.2d 1169, 1172 (10th Cir. 1979) (noting that "[j]udicial notice is particularly applicable to the court's own records of prior litigation closely related to the case before it").

B. **Dictionary Definitions/ Encyclopedia Entries**: The Court may notice dictionary definitions. *Cybor Corp. v. FAS Technologies, Inc.*, 138 F.3d 1448, 1462 (Fed. Cir. 1998). In *Nix v. Hedden*, 149 U.S. 304, 306-07 (1893), the Supreme Court used a dictionary to decide whether a tomato was a "fruit" or a "vegetable." The Supreme Court said, "Of that meaning the court is bound to take judicial notice, as it does in regard to all words in our own tongue." *See also United States v. Bari*, 599 F.3d 176, 180 (2d Cir. 2010) (where, rather circularly, the court took notice of the *Black's Law Dictionary* definition of judicial notice).

C. **Foreign Acts And Proclamations**: The public acts and proclamations of foreign governments, and those of their publicly recognized agents, in carrying into effect treaties, are historical and notorious facts, of which the court can take regular judicial notice. *Gross v. German Foundation Indus. Initiative*, 549 F.3d 605, 612 (3rd Cir. 2008) (citing *United States v. **Reynes***, 50 U.S. (9 How.) 127, 147-48, 13 L.Ed. 74 (1850); *and El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 167 (1999).

D. **Medical Facts**: The court may notice well-known medical facts. *Lolli v. County of Orange*, 351 F.3d 410, 419 (9th Cir. 2003); *Hines on Behalf of Sevier v. Secretary of Dept. of Health and Human Services*, 940 F.2d 1518, 1526 (Fed. Cir. 1991). The court may also take notice as to the effects of drugs, as described in the Physician's Desk Reference. *United States v. Howard*, 381 F.3d 873, 880 (9th Cir. 2004). The court may take judicial notice of a party's life expectancy. *Crane v. Crest Tankers, Inc.*, 47 F.3d 292, 295 (8th Cir. 1995).

1. **Moving Target**: The ability to judicially notice medical facts shifts as the common understanding of these facts changes over time. *Compare: Franklin Life Ins. Co. v. William J. Champion & Co.*, 350 F.2d 115, 130 (6th Cir. 1965) (taking judicial notice of the fact that cancer does not manifest itself quickly), with *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 347-48 (5th Cir. 1982) ("The proposition that asbestos causes cancer, because it is inextricably linked to a host of disputed issues . . . is not at present so self-evident a proposition as to be subject to judicial notice.").

E. Publications: Courts may take judicial notice of publications introduced to "indicate what was in the public realm at the time, not whether the contents of those articles were in fact true." *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010)(*quoting Premier Growth,Fund v. Alliance Capital Mgmt.*, 435 F.3d 396, 401 n. 15 (3d Cir. 2006). The court may take judicial notice "that the market was aware of the information contained in news articles submitted by the defendants." *Heliotrope Gen. Inc. v. Ford Motor Co.*, 189 F.3d 971, 981 n. 118 (9th Cir. 1999).

F. Legislative Facts: "Legislative facts" include facts "which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body." *Getty Petroleum Marketing, Inc. v. Capital Terminal Co.*, 391 F.3d 312, 322 -323 n. 14 (1st Cir. 2004). Legislative facts do not change from case to case, but are proffered to establish or understand relevant legal principles. *United States v. Coffman*, 638 F.2d 192, 194 (10th Cir. 1980). The court decides legislative facts, even if a jury acts is factfinder. *Id.*

1. **Examples Of Legislative Facts**: Statutes are considered legislative facts. *United States v. Williams*, 442 F.3d 1259, 1261 (10th Cir. 2006). Legislative facts may include presidential commission reports, military orders, and agency committee memoranda. *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010). Legislative facts may also include the "fact" that a drug was a Schedule I controlled substance, *United States v. Wisniewski*, 741 F.2d 138, 142 (7th Cir. 1984), or that that Indianapolis is located in Southern District of Indiana. *United States v. Rumell*, 642 F.2d 213, 216 (7th Cir. 1981). In some instances, whether a fact is adjudicative or legislative depends upon the manner in which it is used. *United States v. Bello*, 194 F.3d 18, 22-23 (1st Cir. 1999).

2. **Courts Split On "Noticing" Legislative Fact**: Courts are split as to whether it is necessary for a court to formally notice a legislative fact – importantly, for those that have concluded noticing is necessary, they have also concluded that court's ability to notice legislative fact is unquestioned.

   a. **Judicial Notice Not Necessary For Legislative Facts**: Judicial notice of legislative facts is unnecessary. FRE 201(a) Advisory Committee Notes. "[J]udicial notice is generally not the appropriate means to establish the legal principles governing the case." *Toth v. Grand Trunk R.R.*, 306 F.3d 335, 349 (6th Cir. 2002).

b. **Judicial Notice Of Legislative Facts**: Several courts routinely take judicial notice of legislative facts. *See, e.g., United States v. Williams*, 442 F.3d 1259, 1261 (10th Cir. 2006)("statutes are considered legislative facts" of which the authority of courts to take judicial notice is "unquestionable").

G. **Judicial Notice Of Law:** Judicial notice of law applies to the doctrine that the rules of evidence governing admissibility and proof of documents generally do not make sense to apply to statutes or judicial opinions - which are technically documents - because they are presented to the court as law, not to the jury as evidence. *Getty Petroleum Marketing, Inc. v. Capital Terminal Co.*, 391 F.3d 312, 322 -323 n. 14 (1st Cir. 2004) (citing Strong, *McCormick on Evidence* § 335 (5th ed. 1999). In the federal system, "[t]he law of any state of the Union, whether depending upon statutes or upon judicial opinions, is a matter of which the courts of the United States are bound to take judicial notice, without plea or proof." *Lamar v. Micou,* 114 U.S. 218, 223 (1885); *White v. Gittens,* 121 F.3d 803, 805 n. 1 (1st Cir. 1997).

1. **Federal Rules Do Not Apply To Judicial Notice Of Law**: Although judicial notice of fact and judicial notice of law share the phrase "judicial notice," they draw on different practice rules. The FRE govern "only judicial notice of adjudicative facts." FRE 201(a). Judicial notice of law is outside the scope of FRE 201, and derives from practical considerations and case law that do not rely upon principles of evidence. *Getty Petroleum Marketing, Inc. v. Capital Terminal Co.*, 391 F.3d 312, 322 -323 n. 14 (1st Cir. 2004).

H. **Administrative Regulations**: Administrative regulations fall within the category of facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Toth v. Grand Trunk R.R.*, 306 F.3d 335, 349 (6th Cir. 2002); FRE 201(b). *See Int'l Bhd. of Teamsters v. Zantop Air Transp. Corp.*, 394 F.2d 36, 40 (6th Cir. 1968) ("[A] Court may take judicial notice of the rules, regulations and orders of administrative agencies issued pursuant to their delegated authority.").

I. **Distances**: The Court may take judicial notice of the distance between two geographic places. *Rainey v. Wal-Mart Stores, Inc.,* 139 F.R.D. 94, 94 (W.D.La. 1991).

J. **Mathematics**: The court may take notice of the "immutable laws of mathematics." *Duckworth v. State Bd. of Elections*, 213 F.Supp.2d 543, 549 -550 (D.Md. 2002). The court may also notice applied mathematics, such as the fact that paying down a mortgage quicker will result in the payment of less interest over time. *Miller v. Federal Land Bank of Spokane*, 587 F.2d 415, 422 (9th Cir. 1978).

K. **Statistics**: The court may take notice of statistics, including the value of standard deviation analysis. *African-American Voting Rights Legal Defense Fund, Inc. v. State of Mo.*, 994 F.Supp. 1105, 1118 (E.D.Mo. 1997); *Hazelwood School Dist. v. United States,* 433 U.S. 299, 307-308 & n. 14 (1977). For example, one court noticed the principle that the precision and dependability of statistics is directly related to the size of the sample (i.e., the greater the sample size, the greater the reliability of the analysis). *See Id.*

Alternatives | J1 - 6

L. **Public Record**: The Eleventh Circuit has held that a district court may take judicial notice of matters of public record. *See Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1278 (11th Cir. 1999).

M. **Learned Treatise**: The learned treatise exception to the hearsay rule provides several methods for establishing that a treatise, periodical, or pamphlet is a "reliable authority," as required by the rule. FRE 803(18). One method is by the court taking judicial notice. *Id. See Trostel on Behalf of Murray v. Bowen*, 695 F.Supp. 1418, 1420 (E.D.N.Y. 1988).

Notes:

[J2] BASIS OF EXPERT'S OPINION

QUICK RULE: *An expert may base his testimony upon inadmissible evidence, so long as the information is of the type reasonably relied upon by experts in that field. FRE 703. Hearsay or other inadmissible evidence, upon which an expert properly relies, can be admitted to explain the basis of the expert's opinion, but not for the truth of the matter asserted within the evidence. Experts may also rely upon inadmissible work of other experts and disclosed consultants. FRE 703*

DISCUSSION

I. **General**: The FRE do not limit what type of information an expert may rely upon in reaching his opinion; even if that information is not otherwise admissible, an expert witness may rely upon it so long as it is the type of information on which others in the field reasonably rely. *Boim v. Holy Land Foundation for Relief and Development*, 549 F.3d 685, 703 (7th Cir. 2008). Facts not otherwise admissible in evidence may form the basis for an expert's assumptions and analysis. *Advent Systems Ltd. v. Unisys Corp.*, 925 F.2d 670, 682 (3rd Cir. 1991).

A. **Use Of Admitted Evidence**: FRE 703 does not provide for the general admissibility of evidence. The rule merely permits hearsay, or other inadmissible evidence, upon which an expert properly relies, to be admitted to explain the basis of the expert's opinion. An expert is permitted to disclose hearsay for the limited purpose of explaining the basis for his expert opinion, FRE 703, but not as general proof of the truth of the underlying matter. *Paddack v. Dave Christensen, Inc.*, 745 F.2d 1254, 1261-62 (9th Cir. 1984). *See Engebretsen v. Fairchild Aircraft Corp.*, 21 F.3d 721, 728-9 (6th Cir. 1994).

B. **Rationale**: "The rationale for this aspect of Rule 703 is that experts in the field can be presumed to know what evidence is sufficiently trustworthy and probative to merit reliance." 29 *Federal Practice and Procedure*, § 6273, at 311 (1997).

C. **Required Showing By Proffering Party**: The Rule's only requirement is that the data be "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." *Pineda v. Ford Motor Co.*, 520 F.3d 237, 247 (3rd Cir. 2008). In determining the preliminary question of whether reliance by the expert is reasonable, the party calling the witness must satisfy the court, both that such facts, data or opinions are of the type customarily relied upon by experts in the field and that such reliance is reasonable. *Christophersen v. Allied-Signal, Corp.*, 939 F.2d 1106, 1113-1114 (5th Cir. 1991) (en banc).

II. **Limiting FRE 703**: FRE 703 is not an open door to all inadmissible evidence disguised as expert opinion. *United States v. Steed*, 548 F.3d 961, 975 (11th Cir. 2008). An expert may not simply transmit inadmissible evidence to the jury. *United States v. Mejia*, 545 F.3d 179, 197 (2d Cir. 2008). The expert must form opinions by applying his experience and a reliable

methodology to the inadmissible materials. *Id.* Otherwise, the expert is simply repeating hearsay evidence without applying any expertise whatsoever, a practice that circumvents the FRE. *Id.*

A. **Interviews Provide Reliable Information**: Interviews with knowledgeable witnesses are often the type of evidence normally relied upon by experts. *Int'l Adhesive Coating Co. v. Bolton Emerson Int'l, Inc.*, 851 F.2d 540, 545 (1st Cir. 1988). The interviews must contain information and not self-serving opinion testimony from lay witnesses. *Maiz v. Virani*, 253 F.3d 641, 666 (11th Cir. 2001) ("most economists would not have interviewed individual Plaintiffs to evaluate what those parties would have done [in the but-for scenario] given the high risk that their responses would be distorted by hindsight").

B. **Improper Reliance On Fact Witnesses**: The expert's role is not to restate - or to give expert support - to fact testimony. Courts may dismiss expert testimony when the expert relies upon the subjective, self-interested claims of fact witnesses for a significant part of her conclusions. *Joy v. Bell Helicopter Textron, Inc.*, 999 F.2d 549, 568-70 (D.D.C. 1993); *see Genmoora Corp. v. Moore Business Forms, Inc.*, 939 F.2d 1149, 1163 (5th Cir. 1991) (rejecting opinion of expert who improperly relied upon a fact witness as the basis for his opinion); *Nichols Construction Corp. v. Cessna Aircraft Co.*, 808 F.2d 340, 352 (5th Cir. 1985) (rejecting expert testimony where based not on expert analysis, but opinions of others).

C. **Witness Summaries**: Rule 703 does not provide experts unlimited license to testify or present charts that simply summarize the testimony of others without first relating that testimony to some 'specialized knowledge' on the expert's part as required under FRE 702. *United States v. Flores-De-Jesus*, 569 F.3d 8, 20 (1st Cir. 2009) (*citing United States v. Johnson*, 54 F.3d 1150, 1157 (4th Cir. 1995).

III. **Reliance On Assistants**: An expert witness may use assistants to formulate his expert opinion; the assistants typically need not testify. *United States v. Bramlet*, 820 F.2d 851, 855-56 (7th Cir. 1987); *United States v. Lawson*, 653 F.2d 299, 301-02 (7th Cir. 1981). If the testifying expert supervised the assistants carefully, and if relying on assistance was standard practice in his field, then the assistants' work need not be introduced into evidence.

A. **Assistants Exercising Professional Judgment**: The analysis is more complicated if the assistants are not merely gofers or data gatherers but exercise professional judgment that is beyond the testifying expert's knowledge. *Dura Automotive Systems of Indiana, Inc. v. CTS Corp.*, 285 F.3d 609, 613 (7th Cir. 2002). In technical fields, experts often base an opinion in part on what a different expert believes; FRE 703 suggests that there is no general requirement that the second expert testify as well. The Committee Notes give the example of a physician who, though not an expert in radiology, relies on an x-ray for a diagnosis. The leader of a clinical medical team need not be qualified as an expert in every individual discipline encompassed by the team in order to testify as to the team's conclusions. *Walker v. Soo Line R.R.*, 208 F.3d 581, 589 (7th Cir. 2000); *Ferrara & DiMercurio v. St. Paul Mercury Ins. Co.*, 240 F.3d 1, 8-9 (1st Cir. 2001).

Alternatives | J2 - 3

B. Challenge To Assistant's Judgment: One expert may rely upon and discuss what another expert has told her, but if the second expert does not testify, the first may not vouch for the quality of the missing expert's testimony. *In re James Wilson Associates*, 965 F.2d 160, 172-73 (7th Cir. 1992). Where the issue is the state of repair of a building, the consulting engineer who had evaluated that state should have testified. *Id.* Pursuant to FRE 703, the architect who did testify could use what the engineer told him to offer an opinion within the architect's domain of expertise, but he could not testify for the purpose of vouching for the truth of what the engineer had told him - of becoming the engineer's spokesman. *Id. See TK-7 Corp. v. Estate of Barbouti*, 993 F.2d 722, 732 (10th Cir. 1993).

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Alternatives | J2 - 4

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[J3] REFRESHING RECOLLECTION

QUICK RULE: *A witness may use a writing to refresh her memory for the purpose of testifying. FRE 612. To use a writing to refresh, (1) the witness must demonstrate a need to have her memory refreshed, and (2) the writing must actually refresh her memory. United States v. Holden, 557 F.3d 698, 703 (6th Cir. 2009). The writing need not be admissible, and need not have been authored by the witness. The adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence the portions which relate to the testimony of the witness. FRE 612.*

DISCUSSION

I. **General**: A witness may use a writing to refresh his or her recollection only if (1) the witness requires refreshment, and (2) the writing actually refreshes the witness's memory. *See United States v. Horton,* 526 F.2d 884, 888-89 (5th Cir. 1976); *Thompson v. United States,* 342 F.2d 137, 139 (5th Cir. 1965). A witness may not, under the guise of Rule 612, testify directly from a writing. *See Horton,* 526 F.2d at 888-89; *Thompson,* 342 F.2d at 139.

A. **Proper Procedure**: Proper procedure varies from court to court, but generally involves the following steps:
1) The witness's recollection is exhausted;
2) The writing is described to the court;
3) The court is satisfied that the writing may help refresh the witness's memory;
4) Counsel offers the writing to the witness, and shows a copy to the opposing parties;
5) The court has the witness silently read the writing and then state whether the writing has refreshed his recollection.
6) The writing is then retrieved or turned over so that the witness may testify from his refreshed memory.

See Rush v. Illinois Cent. R. Co., 399 F.3d 705, 716 (6th Cir. 2005) (*citing* 4 Weinstein & Berger, *Federal Evidence*, § 612.03[4][a][i]).

1. **Formalism Not Necessary**: Courts may dispense with the formal nature of these steps. "[W]here there was an absence of the customary formalistic wording to show inability to recollect without aid and *the refreshing effect of the writing,* the context of the specific queries, the witness' spoken reaction and the trial judge's opportunity to observe the witness' demeanor" can provide the foundation necessary for FRE 612. *United States v. Carey*, 589 F.3d 187, 190 -191 (5th Cir. 2009). In such circumstances, however, the court must be careful that the document is actually used for refreshing and not for putting words in the witness's mouth. *Id.* (*citing Esperti v. United States,* 406 F.2d 148, 150 (5th Cir. 1969)).

2. **Document Used During Testimony**: Generally, the witness must put away the refreshing document before giving refreshed testimony. Some courts, however, allow exceptions to this rule. *Fendi Adele S.R.L. v. Burlington Coat Factory Warehouse Corp.*, 689 F.Supp.2d 585, 594 -595 (S.D.N.Y. 2010) (*citing McCormick on Evidence* § 9 (6th ed. 2009)). Courts may permit witnesses to rely on documents throughout their testimony if the witness demonstrates an independent recollection, and the testimony is of a detailed nature. *See United States v. Rinke,* 778 F.2d 581, 588 (10th Cir. 1985). Thus, the court allowed a witness to read a list because the items involved were so numerous that no one would be expected to recite them without having learned a list by rote memory. *See United States v. Riccardi,* 174 F.2d 883, 889 (3d Cir. 1949).

B. **Refreshing Must Be Necessary**: A party may not use a document to refresh a witness's recollection unless the witness exhibits a failure of memory. *United States v. Balthazard*, 360 F.3d 309, 318 (1st Cir. 2004).

C. **Anything May Be Used To Refresh A Witness's Memory**: Anything may be used to refresh a witness's memory, even a plate of spaghetti. *See 20th Century Wear, Inc. v. Sanmark-Stardust Inc. (20th Century),* 747 F.2d 81, 93 n. 17 (2d Cir.1984) (approving use by plaintiff of taped conversation between its lawyer and witness, stating that the canons of ethics do not determine what will jog a witness's memory); *United States v. Heath,* 580 F.2d 1011, 1020 (10th Cir. 1978) (permitting use of a hearsay statement to refresh witness's recollection). **Contra**: Before document can be used to refresh, court must be satisfied that the memorandum on its face reflects the witness's statement or one the witness acknowledges. *Rush v. Illinois Cent. R. Co.*, 399 F.3d 705, 716 (6th Cir. 2005).

1. **Writing Need Not Be Admissible**: Rule 612 has never been construed to require that a writing used to refresh a witness' recollection must be independently admissible into evidence. *United States v. Shinderman,* 515 F.3d 5, 18 (1st Cir. 2008); *United States v. Kusek,* 844 F.2d 942, 949 (2d Cir. 1988); *United States v. Scott,* 701 F.2d 1340, 1346 (11th Cir. 1983). Information that is used to refresh a witness's recollection does not need to be authenticated and does not require a hearsay exception, because the information is not itself being offered as evidence. *See* Mueller & Kirkpatrick, 3 *Federal Evidence* § 6:93 (3d ed. 2009).

   a. **Supervision Important**: "When there is careful supervision by the court, the testimony elicited through refreshing recollection may be proper, even though the document used to refresh the witnesses' memory is inadmissible." *United States v. Scott,* 701 F.2d 1340, 1346 (11th Cir. 1983) (citation omitted).

2. **Reliability Of The Refreshing Document Not At Issue**: The admissibility of testimony accompanied by a FRE 612 refreshment does not depend upon the source of the writing, the identity of the writing's author, or the truth of the writing's contents, for "[i]t is hornbook law that any writing may be used to refresh the recollection of a witness." *United States v. Carey*, 589 F.3d 187, 191 (5th Cir. 2009) (quoting *Thompson v. United States,* 342 F.2d 137, 139 (5th Cir. 1965)). "The

reliability or truthfulness of the statement was relevant only to the problem of the weight and credibility to be accorded the witness' testimony." *Id.*

D. **Rule Only Applies When Refreshing Memory**: "Rule 612 does not apply where a witness refers to documents for purposes other than refreshing recollection. In such a case, Rule 612 is inapplicable and the question becomes whether the writing is admissible under laws regulating the admissibility of documentary evidence." 28 Wright & Miller, *Federal Practice And Procedure* § 6183 (1993).

II. **Refreshing Does Not Make Document Admissible**: FRE 612 is not an independent source of admissibility for the party using the document to refresh, but merely a means to refresh a witness's memory on an admissible subject of testimony. *United States v. Holden*, 557 F.3d 698, 703 -704 (6th Cir. 2009). It is the witness's present refreshed recollection - as opposed to the contents of the writing used to refresh memory - that is the substantive evidence of the matter at issue. *See United States v. Humphrey*, 279 F.3d 372, 377 n. 3 (6th Cir. 2002). "The rule in cases of refreshed recollection is that the writing may not be admitted into evidence or its contents even seen by the jury." *United States v. Lmu*, 575 F.3d 298, 307 (3rd Cir. 2009) (quoting *United States v. Booz*, 451 F.2d 719, 725 (3d Cir. 1971).

A. **Example:** Counsel may use a prior statement to refresh the recollection of a witness who cannot remember a past event, but doing so does not render the document thereby admissible. *United States v. Caraway*, 534 F.3d 1290, 1295 (10th Cir. 2008).

III. **Admissibility Under FRE 612**: Typically, when a party uses a writing to refresh a witness's memory, the opposing party has the right to offer "those portions [of the writing] which relate to the testimony of the witness" into evidence. *Granfield v. CSX Transp., Inc.*, 597 F.3d 474, 488 (1st Cir. 2010)(*quoting* FRE 612). "If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto." *Id.*

IV. **Refreshing Before Testifying**: If a witness uses a writing to refresh his memory before testifying, the court may compel the document's production "if the court determines it is necessary in the interests of justice." *Burns v. Exxon Corp.*, 158 F.3d 336, 343 (5th Cir. 1998).

A. **Memory must be refreshed**: Even where a witness reviewed a writing before or while testifying, if the witness did not rely on the writing to refresh memory, FRE 612 confers no rights on the adverse party. *United States v. Sheffield*, 55 F.3d 341, 343 (8th Cir. 1995) (*quoting* 28 *Federal Practice and Procedure* § 6185).

B. **Must Be in interest of Justice**: Even if a witness uses a writing to refresh his memory before testifying, the court may order the statement produced only if the court determines the production is in the interest of justice. *BP Amoco Chemical Co. v. Flint Hills Resources, LLC*, 697 F.Supp.2d 1001, 1036 (N.D.Ill. 2010). For example, a witness took notes when meeting with counsel and used those notes to refresh his memory before testifying; the court, nevertheless, denied requests that the notes be produced. *Id.*

Alternatives | J3 - 4

C. **Refreshing May Waive Privilege**: If a witness uses a document to refresh recollection, the existence of a privilege may not protect against the disclosure required under FRE 612. *See Ehrlich v. Howe,* 848 F.Supp. 482, 493 (S.D.N.Y. 1994). When confronted with the conflict between the command of FRE 612 to disclose materials used to refresh recollection and the protection provided by the attorney-client privilege the weight of authority holds that the privilege is waived. *Id.* A party, however, is not precluded from asserting a privilege at that point. *See* Advisory Committee Notes. Courts must balance the tension between the disclosure needed for effective cross-examination and the protection against disclosure afforded by any relevant privilege. *Suss v. MSX Int'l Eng'g Servs., Inc.,* 212 F.R.D. 159, 163 (S.D.N.Y. 2002).

V. **Practice Point: *Recollection Refreshed v. Recollection Recorded***: The attempt to refresh a witness's memory (recollection refreshed) is often confused with the hearsay exception (recollection recorded). Recollection refreshed is a method to use an inadmissible document to refresh the witness's memory. Recollection recorded is a means by which the document itself may come into evidence. These rules are connected; the attempt to refresh the witness's memory is one foundational element for the recorded recollection hearsay exception. *See* FRE 803(5). For a statement to come in as recorded recollection, the proffering party must show (among other elements) that the witness now has insufficient memory to testify fully and accurately. *Id.* This is established if the document fails to refresh. *See E5-4.*

VI. **Practice Point: *Refreshing v. Impeaching***: Refreshing is for the examination of non adverse witnesses (generally on direct examination); impeachment is for adverse or hostile witnesses (generally on cross examination). Generally, if a friendly witness cannot recall a fact, counsel refreshes the witness's memory. This gets the presumably helpful testimony into evidence without unduly undermining the witness. If an adverse witness claims a failed memory, then refreshing is rarely a good idea. After reading the proposed refreshing document, the witness need merely state that her memory is not refreshed. Because the refreshing document is not read into the record, there's no cost to the witness for refusing to be refreshed. Impeachment, however, puts the document in front of the fact finder and demonstrates the inconsistencies with the current testimony.

Notes: _____

[K1] LAY WITNESS TESTIMONY

QUICK RULE: *A lay witness may only offer testimony regarding opinions, or inferences which are (a) rationally based on the witness's perception, (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue,* ***and*** *(c) not based on scientific, technical, or other specialized knowledge. FRE 701. If otherwise admissible, lay witnesses in a civil case may testify regarding ultimate issues of fact. FRE 704(a).*

DISCUSSION

I. **General**: Lay witnesses may offer opinion testimony if the opinions or inferences are (a) rationally based on the witness's own perception, and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue. FRE 701; *United States v. Sarras*, 575 F.3d 1191, 1217 (11th Cir. 2009). To ensure that the rule is not used to undermine FRE and FRCP expert disclosure requirements, lay witness opinions cannot be based upon scientific, technical, or other specialized knowledge. FRE 701(c).

A. **Rationale**: Courts admit lay-witness, opinion testimony not because of experience, training, or specialized knowledge within the realm of an expert, but because of the witness's particularized knowledge based upon personal experience. *See King v. Hartford Packing Co., Inc.*, 189 F.Supp.2d 917, 924-5 (N.D. Ind 2002).

B. **Opinion Must Be Rationally Based**: The rule reflects the general requirement that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." *United States v. Kaplan*, 490 F.3d 110, 119 (2d Cir. 2007) (*quoting* FRE 602). *See JGR, Inc. v. Thomasville Furniture Indus., Inc.*, 370 F.3d 519, 526 (6th Cir. 2004) (district court abused its discretion by admitting lay testimony of witness who lacked personal perception). Opinion testimony of lay witnesses must be predicated upon concrete facts within the witness's own observation. *United States v. Durham*, 464 F.3d 976, 982 (9th Cir. 2006).

1. **Personal Knowledge**: Lay opinion testimony regarding another's knowledge will only satisfy the rationally-based requirement if the witness has personal knowledge of one or more "objective factual bases from which it is possible to infer with some confidence that a person knows a given fact . . . includ[ing] what the person was told directly, what he was in a position to see or hear, what statements he himself made to others, conduct in which he engaged, and what his background and experience were." *United States v. Kaplan*, 490 F.3d 110, 119 (2d Cir. 2007)(*quoting United States v. Rea*, 958 F.2d 1206, 1215 (2d Cir. 1992)).

2. **Court Must Ensure Witness Can Offer Lay Opinion**: A trial judge must rigorously examine the reliability of a layperson's opinion by ensuring that the witness possesses sufficient specialized knowledge or experience which is germane

to the opinion offered. *Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190, 1200-01 (3d Cir. 1995).

B. **Opinion Testimony Must Be Helpful To Fact Finder**: The basic approach to opinions - lay and expert - is to admit them when helpful to the trier of fact. *United States v. Perez*, 280 F.3d 318, 341 (3rd Cir. 2002); FRE 704 Advisory Committee Notes. The evidence must be otherwise admissible as lay testimony under FRE 701, *United States v. Baskes*, 649 F.2d 471, 478-79 (7th Cir. 1980), or expert testimony under FRE 702, *United States v. Scavo*, 593 F.2d 837, 844 (8th Cir. 1979).

1. **Lay Witness Cannot Offer Legal Conclusion**: A lay witness cannot offer a legal conclusion because it is not helpful to the jury. *United States v. Noel*, 581 F.3d 490, 496 (7th Cir. 2009); FRE 701(b). A lay witness's purpose is to inform the jury what is in the evidence, not to tell it what inferences to draw from that evidence. *Id. See United States v. Grinage*, 390 F.3d 746, 750 (2d Cir. 2004); *United States v. Wantuch*, 525 F.3d 505, 514 (7th Cir. 2008) (whether the defendant knew his actions were legal demanded a conclusion as to the legality of the defendant's conduct, which was unhelpful to the jury under FRE701).

2. **Ultimate Issues Of Fact**: Under the FRE, testimony is not objectionable solely "because it embraces an ultimate issue to be decided by the trier of fact." FRE 704(a); *United States v. Wantuch*, 525 F.3d 505, 513 (7th Cir. 2008). A lay witness may offer opinion testimony that is otherwise admissible even if "it embraces an ultimate issue to be decided by the trier of fact." *United States v. Espino-Rangel*, 500 F.3d 398, 400 (5th Cir. 2007) (*quoting* FRE 704).

II. **Distinction Between Expert And Lay Testimony**: The rules distinguish between lay and expert *testimony*, not *witnesses*. *United States v. White*, 492 F.3d 380, 403 (6th Cir. 2007). The distinction is that lay testimony results from a process of reasoning familiar in everyday life, while expert testimony results from a process of reasoning which can be mastered only by specialists in the field. *United States v. Yanez Sosa*, 513 F.3d 194, 200 (5th Cir. 2008) (*quoting* FRE 701 Advisory Committee Notes). A "lay opinion must be the product of reasoning processes familiar to the average person in everyday life." *United States v. Garcia*, 413 F.3d 201, 215 (2d Cir. 2005). *Any* part of a witness's opinion that rests on scientific, technical, or specialized knowledge must be determined by reference to FRE 702, not FRE 701. *Id.* (*citing* FRE 701 Advisory Committee Notes).

A. **Distinction When Specialized Knowledge Is Applied**: The distinction between lay and expert testimony is far from clear in cases where a witness with specialized or technical knowledge was also personally involved in the factual underpinnings of the case. *United States v. White*, 492 F.3d 380, 401 (6th Cir. 2007) (*citing United States v. Ayala-Pizarro*, 407 F.3d 25, 28 (1st Cir. 2005)). Trial courts must be especially vigilant in evaluating the admissibility of expert testimony where a witness is called on to testify as a fact witness but also functions as an expert. *United States v. Cruz*, 363 F.3d 187, 194 (2d Cir. 2004) (DEA agent, called as fact witness, improperly permitted to testify to the meaning of the phrase "to watch someone's back" as used in a drug transaction); *United States v. Perkins*, 470 F.3d 150, 155 (4th Cir. 2006).

1. **When Specialized Testimony Is Allowed**: Courts have "allowed lay witnesses to express opinions that required specialized knowledge" where "No great leap of logic or expertise was necessary for one in [the witness's] position to move from his observation . . . to his opinion." *United States v. Riddle,* 103 F.3d 423, 428 (5th Cir. 1997); *United States v. Grote,* 632 F.2d 387, 390 (5th Cir. 1980) (allowing an IRS official to compare defendant's tax returns and characterize some as "acceptable").

2. **Fact v. Opinion Testimony**: The line between fact and opinion testimony is often illusory. "There is no conceivable statement however specific, detailed and 'factual,' that is not in some measure the product of inference and reflection as well as observation and memory." *Beech Aircraft Corp. v. Rainey,* 488 U.S. 153, 168-169 (1988) (*quoting McCormick on Evidence* 27 (1984)).

B. **2001 Amendment**: The 2001 version of FRE 701 added a clause to the end of the rule to clarify the distinction between lay and expert testimony. *See* FRE 701(c). The change added the requirement that opinion testimony by lay witnesses be limited to opinions "not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." This addition was not intended to substantively change FRE 701. *United States v. Garcia*, 291 F.3d 127, 139 (2nd Cir. 2002). The amendment prohibited the inappropriate admission of expert opinion under FRE 701 than to change the substantive requirements of the admissibility of lay opinion.

1. **Purpose Of Change**: "Rule 701 has been amended to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing." FRE 701 Advisory Committee Notes. "By channeling testimony that is actually expert testimony to Rule 702, the amendment also ensures that a party will not evade the expert witness disclosure requirements set forth in FRCP 26 and FRCP 16 by simply calling an expert witness in the guise of a layperson." *Id.*

III. **Examples**: The "prototypical examples" of lay opinion testimony relate to the appearance of persons or things, identity, the manner of conduct, competency of a person, degrees of light or darkness, sound, size, weight, distance, and numerous items that indescribable factually apart from inferences. *Tampa Bay Shipbuilding & Repair Co. v. Cedar Shipping Co., Ltd.,* 320 F.3d 1213, 1222 (11th Cir. 2003); FRE 701 Advisory Committee Notes).

A. **Business Value**: One of the most contentious issues regarding lay witness testimony is the extent to which a lay witness may testify to lost profits. The owner or officer of a business may usually testify to the business's value or projected profits, without qualifying the witness as an accountant, appraiser, or similar expert. FRE 701 Advisory Committee Notes. The complexity of the analysis controls the rule's breadth.

1. **Lost Profits**: In the realm of lost profits, lay opinion testimony may be allowed in limited circumstances where the witness bases his opinion on particularized knowledge he possesses due to his position within the company. FRE 701 Advisory Committee Notes. A lay witness "testifying about business operations may testify about 'inferences that he could draw from his perception' of a business's records, or 'facts or data perceived' by him in his corporate capacity." *United States v. Polishan,* 336 F.3d 234, 242 (3d Cir. 2003).

   a. ***Lightning Lube***: In *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153 (3d Cir. 1993), the court allowed a company's founder and owner to testify regarding his lost future profits and harm to the value of his business. *Id.* at 1175. Though the testimony concerned a "specialized" field and involved predictions about future business performance, the court found that the witness had adequate personal knowledge in light of his in-depth experience with the business's contracts, operating costs, and competition. *Id.* The testimony in *Lightning Lube*, which defines the outer boundary for lay opinion testimony, was allowed "only because that testimony is tied to [the witness'] personal knowledge." *Compania Administradora v. Titan Int'l, Inc.*, 533 F.3d 555, 560 (7th Cir. 2008).

   b. **Beyond *Lightning Lube***: In *Von der Ruhr v. Immtech Intern., Inc.*, 570 F.3d 858, 862 -866 (7th Cir. 2009), the court affirmed the rejection of plaintiff's effort "(1) to prove lost profits damages, (2) in a complex market, (3) from a product that has never been sold, (4) without any expert testimony."

2. **Lay Witness Testimony Permitted Regarding Damages**: The Third Circuit has also permitted a business's principal shareholder to testify concerning business projections where he was intimately involved with the investments and management of the business, *In re Merritt Logan, Inc.*, 901 F.2d 349, 360 (3d Cir. 1990), and a company's licensed public accountant to testify regarding lost profits based on his personal knowledge of company's balance sheets. *Teen-Ed, Inc. v. Kimball Int'l, Inc.*, 620 F.2d 399, 403 (3d Cir. 1980).

3. **More Complicated Calculations**: Lay witness testimony regarding business damages is probably incorrect when the proof requires more than a discussion regarding the inevitable results of the company's current plan. For more complicated businesses, such as banks, only experts are capable of creating the complex calculations necessary to evaluate the business's value. *See United States v. Cavin,* 39 F.3d 1299, 1309 (5th Cir. 1994) ("Expert testimony may be particularly appropriate" when discussing financial issues).

   a. **Discounting Analysis**: In *Donlin v. Philips Lighting North America Corp.*, 581 F.3d 73, 80 -84 n. 5 (3rd Cir. 2009), the court quoted the district court's observation that "Some disagreement exists even among experts as to the methodology used to discount an award to present value." The court of appeals then concluded that "The District Court's memorandum on damages suggests that discounting is best left to experts." *Id.*

B. **Police Testimony**: A police officer's testimony regarding modifications made to a shotgun was permissible lay opinion testimony, likely based upon common sense or first-hand experience; the officer's testimony regarding the use of the chemicals found in defendant's apartment was likely expert testimony. *United States v. Yanez Sosa*, 513 F.3d 194, 200 -201 (5th Cir. 2008).

C. **Repairs**: Trial court properly permitted fact witnesses to opine about the reasonableness of the costs and time required to repair a ship. *Tampa Bay Shipbuilding & Repair Co. v. Cedar Shipping Co., Ltd.*, 320 F.3d 1213, 1216 (11th Cir. 2003).

D. **Research**: Based upon many years living near the shore, a fact witness was permitted to testify that during her walks along the shoreline she found "fossils that we never found before." *Banks v. United States*, 78 Fed.Cl. 603, 648 (2007). The trial court, however, refused to accept the witness's research as to how the fossils came to be on the shore, as the witness had not been qualified as an expert and only possessed sufficient education to reach an intelligent layman's interpretation of the research. *Id.*

E. **Discrimination**: "Courts generally hold admissible under Rule 701 evidence in the form of lay opinion testimony in discrimination cases when given by a person whose position with the defendant entity provides the opportunity to personally observe and experience the defendant's policies and practices." *Gossett v. Oklahoma Bd. of Regents for Langston Univ.*, 245 F.3d 1172, 1179 (10th Cir. 2001).

F. **Computers**: The trial court properly excluded "lay testimony" from a computer specialist regarding running commercially-available software, obtaining results, and reciting them. *United States v. Ganier*, 468 F.3d 920, 925 (6th Cir. 2006). The proposed testimony required the witness to apply knowledge and familiarity with computers and the particular software well beyond that of the average layperson. *Id.*

G. **Lost Pay**: The Third Circuit has permitted lay witness testimony regarding lost pay in some employment discrimination cases. In *Maxfield v. Sinclair International*, 766 F.2d 788 (3d Cir. 1985), the court allowed a plaintiff alleging age discrimination to testify as to his projected earnings and to reduce those earnings to present value. *Id.* at 797. The court relied, in part, upon the fact that the plaintiff worked for the defendant for 40 years; given his significant employment history, the court recognized that plaintiff would be able to base his request for future pay upon his former earnings without making any projection in earnings "for which expert testimony was required." *Id.*

1. **Limits On Lay Testimony Regarding Lost Pay**: The courts have refused to award lost pay based upon unfounded assumptions that required expert testimony, and complex calculations that required expert analysis.

   a. **Lay Witness Cannot Make Unfounded Assumptions**: In *Eichorn v. AT & T Corp.*, 484 F.3d 644 (3d Cir. 2007), a group of employees sued claiming a violation of their pension rights after their employer merged with a larger company. *Id.* at 646-47. The plaintiffs failed to produce an expert witness on damages and instead relied on a report and testimony from plaintiffs' counsel's

son. *Id.* at 648. The witness made various assumptions including: when plaintiffs would have retired; how their salaries would have increased in the merged company; what choices the plaintiffs would have made with respect to pension benefits; and the life expectancy of each plaintiff. *Id.* at 648. The trial court properly barred the lay witness testimony because (1) the witness was testifying based on neither experience nor personal knowledge, and (2) the calculations required were "sufficiently complex." *Id.*

b. **Lay Witness Cannot Perform Complex Analysis**: In *Donlin v. Philips Lighting North America Corp.*, 581 F.3d 73, 80 -84 (3rd Cir. 2009), the court of appeals reversed the trial court, concluding that testimony "crossed the line into subject areas that demand expert testimony." These areas included calculating the pension component of her back-pay damages, and, on the issue of front pay, plaintiff's lay testimony was inappropriate with regard to her estimate of the annual pay raises, her estimated pension value, and the discounts she made for the probability of death and to find the present value of the award. *Id.* The court concluded "this testimony was of a specialized or technical nature and was not within [plaintiff's] personal knowledge."

H. **Motivation**: A witness may opine as to why an individual acted in a certain way, provided sufficient foundation as to the factual basis. *United States v. Tsekhanovich,* 507 F.3d 127, 130 (2d Cir. 2007). A witness could testify as to why the defendant was sending the witness cars to repair, based upon an extensive previous relationship. *Id.*

I. **Truthfulness**: Opinion testimony regarding a witness's truthfulness is admissible under the rules for impeachment. FRE 608(a). The opinion witness's testimony must comply with FRE 701; accordingly, a lay witness offering an opinion for truthfulness must testify from first-hand knowledge. *See United States v. Ruiz-Castro,* 92 F.3d 1519, 1530 (10th Cir. 1996); *United States v. Cortez,* 935 F.2d 135, 139-40 (8th Cir. 1991) (rejecting opinion testimony by police officers because they had minimal, post-arrest contacts with witness and they merely expressed their belief witness's story).

J. **Handwriting**: A lay witness may testify as to the author of handwriting provided the witness has prior, pre-litigation experience with the writing. Lay witness testimony without prior familiarity with the handwriting would not be helpful to the jury and is prohibited. *United States v. Scott*, 270 F.3d 30, 49 (1st Cir. 2001) (*citing* FRE 701). A lay witness may not enter court and compare unfamiliar handwriting samples; the result is the same if the witness compared the samples before entering the courtroom. *Id.; See United States v. Pitts,* 569 F.2d 343, 348 (5th Cir. 1978).

Notes: _____

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[K2] ADMISSIBILITY OF EXPERT TESTIMONY

QUICK RULE: *If scientific, technical, or other specialized knowledge will assist the fact finder to (1) understand the evidence, or (2) determine a fact in issue, a witness qualified as an expert may testify as to opinions and analysis. FRE 702. To be qualified as an expert, the witness must have specialized knowledge, skill, experience, training, or education. Expert testimony must (1) be based upon sufficient facts or data, (2) be the product of reliable principles and methods, and (3) apply the principles and methods reliably to the facts of the case. FRE 702.*

DISCUSSION:

I. **Admissibility Of Expert Opinion**: The rules create a four-part test for the admissibility of expert testimony:
- The testimony must be scientific, technical, or other specialized knowledge that will assist the fact finder to understand the evidence or determine a fact in issue;
- The witness must be qualified as an expert;
- The testimony must have indicia of reliability; and
- The proffered testimony must "fit" the facts of the case.

A. **Court Is Gatekeeper**: The rules impose a "special obligation" upon on trial courts to act as "gatekeepers" to ensure that expert testimony meets the requirements of qualification, reliability, and fit. *Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 147, (1999); *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 597 (1993). The court must consider the proposed expert's qualifications, the reliability of her methods, and whether her testimony "fits" the case at hand. *Schneider v. Fried,* 320 F.3d 396, 404 (3d Cir. 2003).

1. **Credibility For Factfinder**: Whether the expert is credible or whether the theories being applied by the expert are correct, is a "factual one that is left for the jury to determine after opposing counsel has been provided the opportunity to cross-examine the expert regarding his conclusions and the facts on which they are based." *Smith v. Ford Motor Co.,* 215 F.3d 713, 719 (7th Cir. 2005). Furthermore, "[i]t is not the trial court's role to decide whether an expert's opinion is correct. The trial court is limited to determining whether expert testimony is pertinent to an issue in the case and whether the methodology underlying that testimony is sound." *Id.*

   a. **Factfinder May Reject Qualified Expert Testimony**: After the court has found expert testimony admissible under FRE 702 and *Daubert*, the fact finder may choose to reject it as not credible or reliable. Juries are not bound to believe expert opinions. *See United States v. Oliver,* 278 F.3d 1035, 1043 (10th Cir. 2001). It is solely within the jury's province to weigh expert testimony. *Id.* In *United States v. Madrid,* 673 F.2d 1114 (10th Cir. 1982), the court of appeals affirmed a conviction for robbery even though "four of the five experts who

expressed opinions on the issue of sanity concluded that [the defendant] was not capable of conforming his conduct to the requirements of the law at the time of the robbery."

2. ***Daubert* Hearing Not Necessary**: The trial court possesses "latitude in deciding how to test an expert's reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability." *Kumho Tire*, 526 U.S. at 152. Although the rules do not mandate the process, *Daubert* hearings are the most common method for fulfilling the gatekeeper function. *United States v. Turner*, 285 F.3d 909, 913 (10th Cir. 2002). *Daubert* challenges, like other preliminary questions of admissibility, are governed by Rule 104(c), which provides that a hearing outside the presence of the jury shall be conducted "when the interests of justice require." *McCoy v. Whirlpool Corp.*, 214 F.R.D. 646, 653 (D.Kan. 2003)(*citing Summers v. Mo. Pac. R.R.*, 132 F.3d 599 (10th Cir. 1997).

B. **First Inquiry - Testimony Must Assist The Fact Finder**: To be admissible, expert testimony must be directed to the witness' scientific, technical, or specialized knowledge and not to lay matters which a jury is capable of understanding and deciding without the expert's help. *Andrews v. Metro North Commuter R. Co.*, 882 F.2d 705, 708 (2nd Cir. 1989); *McGowan v. Cooper Indus., Inc.*, 863 F.2d 1266, 1272 (6th Cir. 1988). If proffered analysis invades an area in which the jury does not need assistance, the subject is not proper for expert testimony. *United States v. Brodie*, 858 F.2d 492, 496 (9th Cir. 1988); *Brassette v. Burlington Northern, Inc.*, 687 F.2d 153, 158 (8th Cir. 1982).

1. **Subjective Opinions**: Opinions based on personal, subjective views do not meet the core requirement that expert testimony rest on "knowledge," a term that "connotes more than subjective belief or unsupported speculation." *In re Rezulin Products Liability Litigation*, 309 F.Supp.2d 531, 543 (S.D.N.Y. 2004); FRE 702. *See Grdinich v. Bradlees*, 187 F.R.D. 77, 81 (S.D.N.Y. 1999) (excluding as speculation expert opinion based on claimed industry standards, where only bases was general "common-sense" guidelines.)

2. **Testimony Cannot Encompass Legal Analysis**: It is legal error for a witness to testify regarding legal conclusions or legal principles, as those are the domain of the court. *Marx & Co. v. Diners' Club*, 550 F.2d 505 (2d Cir. 1977) (error to allow witness to testify about meaning of contract's "best efforts" provision); *Montgomery v. Aetna Cas. & Sur. Co.*, 898 F.2d 1537 (11th Cir. 1990) (in breach of contract case, court properly excluded expert's testimony that insurer was liable under "duty to defend" clause); *F.H. Krear & Co. v. Nineteen Named Trustees*, 810 F.2d 1250, 1258 (2d Cir. 1987) (attorney-expert's testimony that contracts lacked essential terms and therefore were unenforceable properly excluded in breach of contract case); *Energy Oils, Inc. v. Montana Power Co.*, 626 F.2d 731 (9th Cir. 1980) (expert witness improperly allowed to testify about agreement's legal effect in breach of contract case).

a. **Regulatory Interpretation**: Because regulatory interpretation is a legal issue, expert testimony relating to this question, such as the affidavit of a former government official, "should not be received, much less considered." *Mola v. United States*, 516 F.3d 1370, 1379 n. 6 (Fed. Cir. 2008) (*citing Rumsfeld v. United Techs. Corp.*, 315 F.3d 1361, 1369 (Fed. Cir. 2003)).

b. **Interpretation Of Legal Standard**: Experts cannot interpret legal standards. Opinions offered to "illuminate the applicable negligence standard" is inadmissible as it would encroach on the role of the trial judge in instructing the jury as to the applicable law. *United States v. Lumpkin*, 192 F.3d 280, 289 (2d Cir. 1999); *United States v. Duncan*, 42 F.3d 97, 101 (2d Cir. 1994).

3. **Behavior Of Organizations**: Expert testimony as to "the intent, motives or states of mind of corporations, regulatory agencies and others have no basis in any relevant body of knowledge or expertise." *In re Rezulin Products Liability Litigation*, 309 F.Supp.2d 531, 546 (S.D.N.Y. 2004). *See also DePaepe v. General Motors Corp.*, 141 F.3d 715, 720 (7th Cir. 1998) (trial court erroneously allowed expert to testify as to why General Motors had reduced the padding in its automobile; expert "lacked any scientific basis for an opinion about the motives of GM's designers.").

4. **Custom And Usage**: Custom and usage are relevant to contract interpretation, and may properly be the subject of expert testimony where foundational facts demonstrating relevancy or qualification are sufficiently established. *See A.J. Cunningham Packing Corp. v. Florence Beef Co.*, 785 F.2d 348, 351 (1st Cir. 1986); *LuMetta v. U.S. Robotics, Inc.*, 824 F.2d 768, 771 (9th Cir. 1987); *Nucor Corp. v. Nebraska Pub. Power Dist.*, 891 F.2d 1343, (8th Cir. 1989).

5. **Specific Causation**: An expert must hold a medical license to testify on specific causation in a toxic tort case. *Plourde v. Gladstone*, 190 F. Supp. 2d 708 (D. Vt. 2002), *aff'd*, 2003 WL 21511764 (2d Cir. 2003). *See Goewey v. United States*, 886 F. Supp. 1268 (D. S.C. 1995), *aff'd*, 106 F.3d 390 (4th Cir. 1997); *Conde v. Velsicol Chem. Corp.*, 804 F. Supp. 972 (S.D. Ohio 1992), *aff'd*, 24 F.3d 809 (6th Cir. 1994). To allow someone without a medical license to practice medicine in the legal arena is contrary to established statutory law in many states.

C. **Second Inquiry - Expert Qualifications**: Before a person may offer expert testimony, the court must qualify the witness as an expert in identified and articulated fields of knowledge. *LuMetta v. U.S. Robotics, Inc.*, 824 F.2d 768, 771 (9th Cir. 1987). To make this finding, the proffering party must demonstrate that the expert has sufficient background and possess "specialized knowledge that 'will assist the trier of fact to understand the evidence or to determine a fact in issue.'" *Crowe v. Marchand*, 506 F.3d 13, 17 (1st Cir. 2007).

1. **Basis Of Expertise**: The basis of "specialized knowledge" can be from "practical experience as well as academic training and credentials." *Waldorf v. Shuta*, 142 F.3d 601, 625 (3d Cir. 1998). Courts may consider factors such as experience, certification, education, and membership in certain organizations to determine

whether individual may qualify to testify. Examples: An elected sheriff did not have requisite experience to qualify as an expert on the effects of disciplining officer *Berry v. City of Detroit*, 25 F.3d 1342 (6th Cir. 1994). A witness's extensive experience as a firefighter and fire investigator qualified him as expert in fire scene investigation. *Hickerson v. Pride Mobility Products Corp.*, 470 F.3d 1252, 1257 (8th Cir. 2006).

2. **Scope Of Expertise**: The permissible scope of expert testimony is broad; trial courts have broad discretion in making admissibility determinations. *Hill v. Reederei F. Laeisz G.M.B.H. Rostock,* 435 F.3d 404, 423 (3d Cir. 2006). The witness's scope of expertise must encompass her proffered testimony. A district court properly disqualified an engineer who did not have the requisite experience to support his proffered theory. *Surace v. Caterpillar, Inc.*, 111 F.3d 1039, 1055 (3d Cir. 1997). *See also Aloe Coal Co. and Commercial Union Ins. Co. v. Clark Equip. Co.*, 816 F.2d 110, 114-15 (3d Cir. 1987) (the trial court abused its discretion by allowing a salesman to testify about the cause of an equipment fire).

3. **Standard For Finding Expertise**: The threshold question of whether a witness is competent as an expert is solely for the trial judge. *Fox v. Dannenberg,* 906 F.2d 1253, 1256 (8th Cir. 1990). The trial judge has considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable. *Kumho Tire,* 526 U.S. at 152. Generally, the rejection of expert testimony is the exception rather than the rule. FRE 702 Advisory Committee Notes. The trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system. *United States v. 14.38 Acres of Land Situated in Leflore County, Mississippi,* 80 F.3d 1074, 1078 (5th Cir. 1995).

   a. **Cross Examination Often Preferred Over Exclusion**: Minor challenges with an expert's experience on specific points of a case are properly explored on cross-examination, and tend to the proffered testimony's weight and credibility - not its admissibility. *McCullock v. H.B. Fuller Co.*, 61 F.3d 1038, 1043 (2d Cir. 1995). Put another way, "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert,* 509 U.S. at 595. "[W]here the opposing side has the opportunity to cross-examine an expert regarding his qualifications and where the jury is properly instructed to determine for itself the weight and credibility to be given to the expert's testimony, an argument opposing admissibility of the testimony on the grounds that it is outside the witness's area of expertise must fail." *Benton v. Ford Motor Co.* 492 F.Supp.2d 874, 877 (S.D.Ohio 2007).

4. **Expert Need Not Be The Most Qualified Person**: The fact that the proffered expert is not the "best qualified" or does not have the most appropriate specialization is not sufficient grounds for excluding an expert. *Lauria v. Natl. R.R. Passenger Corp.*, 145 F.3d 593, 598-99 (3d Cir. 1998).

D. Third Inquiry - Reliability of Testimony: "In *Daubert* the Court charged trial judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony, and the Court in *Kumho* clarified that this gatekeeper function applies to all expert testimony, not just testimony based in science." FRE 702 Advisory Committee Notes.

1. ***Daubert* Factors**: The Supreme Court identified a series of factors the trial court may consider when evaluating the reliability of the proffered expert testimony. The *Daubert* factors are:
   - Whether a theory or technique can be (and has been) tested;
   - Whether the theory or technique has been subjected to peer review and publication;
   - Whether there is a known or potential error rate and whether there are standards for controlling errors; and,
   - Whether the theory or technique enjoys general acceptance within a relevant scientific community. *See Terran v. Secretary of Health and Human Services*, 195 F.3d 1302, 1316 (Fed. Cir. 2000).

   a. **Testing**: The ability and feasibility of testing the theory or technique is case dependent. The expert need not perform the most elaborate and expensive tests possible. The failure to perform any testing at all, when some methods exist for testing, undermine the reliability of proffered testimony. *Johnson v. Manitowoc Boom Trucks, Inc.*, 484 F.3d 426, 433 (6th Cir. 2007) (Expert's "complete failure to test his proposed design cuts heavily against him.").

   b. **Flexibility**: The inquiry envisioned is a flexible one. Its overarching subject is the scientific validity - and thus the evidentiary relevance and reliability - of the principles that underlie a proposed submission. *Bonner v. ISP Technologies, Inc.*, 259 F.3d 924, 929 (8th Cir. 2001); *Daubert*, 509 U.S. at 594-95. The focus must be solely on principles and methodology, not on the conclusions that they generate. *Id.*

2. ***Kumho* Clarification**: Six years after issuing *Daubert*, the Court made clear in *Kumho* that the same factors apply in the context of "engineering" testimony as well as "scientific" testimony. The distinction between "scientific knowledge" (at issue in *Daubert*) and "technical or other specialized knowledge" (at issue in *Kumho*) is fuzzy. *Johnson v. Manitowoc Boom Trucks, Inc.*, 484 F.3d 426, 429 (6th Cir. 2007). Rather, "the gatekeeping inquiry must be tied to the facts of a particular case," depending on "the nature of the issue, the expert's particular expertise, and the subject of his testimony." *Id.*

3. **Other Factors**: The *Daubert* factors are neither mandatory nor exclusive; the trial court must decide which *Daubert* factors are appropriate, use them as a starting point, and then ascertain if other factors should be considered. *See Black v. Food Lion*, 171 F.3d 308, 311-12 (5th Cir. 1999).

   a. **Prepared Solely For litigation**: One significant fact is whether the experts are proposing to testify about matters growing naturally and directly out of research

they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying. *Johnson v. Manitowoc Boom Trucks*, 484 F.3d 426, 434 (6th Cir. 2007); *Daubert v. Merrell Dow Pharmaceuticals,* 43 F.3d 1311 (9th Cir. 1995) ("*Daubert II*")). That an expert testifies based on research he has conducted independent of the litigation provides important, objective proof that the research comports with the dictates of good science. *Id.*

b. **Improper Extrapolation**: The court may consider whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion. *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

c. **Alternatives**: The court should consider whether the expert has adequately accounted for alternative explanations (on matters of causation). *Claar v. Burlington N.R.R.*, 29 F.3d 499 (9th Cir. 1994); *contra Ambrosini v. Labarraque*, 101 F.3d 129 (D.C. Cir. 1996)(unconsidered alternative causes is an issue of weight, so long as expert has considered obvious causes).

d. **Care Taken**: The court should consider whether the expert was as careful as he would be in his regular professional work outside his litigation consulting. *Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940, 942 (7th Cir. 1997).

4. **Court's Role**: The trial court is "both authorized and obligated to scrutinize carefully the reasoning and methodology underlying" expert testimony. *Claar v. Burlington Northern R.R. Co.,* 29 F.3d 499, 501 (9th Cir. 1994). *See Greenwell v. Boatright*, 184 F.3d 492, 501 (6th Cir. 1999)("trial judges have an unequivocal duty to give careful scrutiny to the testimony of paid experts in order to avoid verdicts based on 'junk science'").

a. **Specific Findings**: When trial judges admit testimony under *Daubert,* the court must make "specific findings on the record" rather than rule "off-the-cuff." *United States v. Nacchio,* 519 F.3d 1140, 1153 -1154 (10th Cir. 2008); *Dodge v. Cotter Corp.*, 328 F.3d 1212, 1223 (10th Cir. 2003). The trial court must then create a sufficiently developed record to allow a determination on appeal of whether the trial court properly applied the relevant law. *Id.*

b. **Reliability Affects Weight**: The question of reliability goes both to admissibility and weight. Even if testimony is deemed sufficiently reliable to permit admissibility, the fact finder might find the testimony is due little if any weight. *Libas, Ltd. v. United States*, 193 F.3d 1361, 1365-1969 (Fed. Cir. 1999). The difference between weight and admissibility is often a close question. *Id.* When the issue of reliability is raised, it is a key consideration in determining the weight to be given to expert testimony. See *United States v. Velasquez*, 64 F.3d 844, 848 (3rd Cir. 1995). In general, criticisms touching on whether the expert made mistakes in arriving at her results are for the jury. *United States v. Bonds,* 12 F.3d 540, 563 (6th Cir.1993).

5. **Assumptions**: *Daubert* analysis does not preclude testimony merely because it may be based upon an assumption; however, "the supporting assumption must be sufficiently grounded in sound methodology, and reasoning to allow the conclusion it supports to clear the reliability hurdle." *In re TMI Litigation,* 193 F.3d 613, 677 (3d Cir. 1999).

E. Forth Inquiry: "Fit": It is not enough for the expert opinions to be reliable – they must be demonstrably related to the facts of the case. In *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997), the Supreme Court explained that the FRE do not require "a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert." The court may conclude that there is too great an analytical gap between the data and the opinion proffered. *Id.*

1. **Proper Inquiry**: Identified by the term "fit," the principles or methods underlying the testimony must be both (1) relevant to the facts of the case, *Kennedy v. Collagen Corp.*, 161 F.3d 1226, 1228 (9th Cir. 1998); and (2) properly applied to the facts of the case. *See General Elec,* 522 U.S. at 146. "[W]ithout more than credentials and a subjective opinion, an expert's testimony that 'it is so' is not admissible." *Viterbo v. Dow Chem. Co.,* 826 F.2d 420, 424 (5th Cir. 1987). "An expert's testimony will not support a verdict if it lacks an adequate foundation in the facts of the case." *Genmoora Corp. v. Moore Bus. Forms, Inc.*, 939 F.2d 1149, 1157 (5th Cir. 1991) (rejecting expert valuation estimate based on assumptions about financial status and financial report errors which lacked supporting record evidence).

II. Procedure Of *Daubert* Challenge: The rules do not state when a *Daubert* challenge may or must be raised. A challenge may be raised in a motion in limine, after voire dire, or after cross examination. Variables to consider are the likelihood of success on the challenge, when you will have sufficient information to make the best possible challenge, and the judge's general practice.

A. Burden Of Proof: The rules regarding the admissibility of expert testimony is consistent with other areas of evidence: when a challenge to the admissibility of expert testimony is raised, the proponent of that testimony must provide the necessary foundation for its admissibility. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1316 (9th Cir. 1995) (following remand from the Supreme Court)("*Daubert II*").

B. Standard Of Proof: Courts apply a preponderance of evidence standard to determine whether an expert is qualified to testify. FRE 104(a); *See Bourjaily v. United States,* 483 U.S. 171, 175-76 (1987). The party proffering an expert must prove the testimony's reliability by a preponderance of the evidence. *Moore v. Ashland Chemical, Inc.,* 151 F.3d 269, 276 (5th Cir. 1998) (en banc). An expert's blank assurances that he used generally accepted scientific methodology is insufficient. *Id.*

C. Summary Judgment: In response to a summary judgment motion, to show a genuine issue of material fact, the plaintiff must produce reliable expert opinions that meet the standards of FRE 702. *See Southland Sod Farms v. Stover Seed Co.,* 108 F.3d 1134, 1140 (9th Cir. 1997).

Opinion Testimony | K2 - 8

Notes:

FRE (2012) | M1-1

Rule 101. Scope; Definitions
(a) SCOPE. These rules apply to proceedings in United States courts. The specific courts and proceedings to which the rules apply, along with exceptions, are set out in Rule 1101.
(b) DEFINITIONS. In these rules:
(1) "civil case" means a civil action or proceeding;
(2) "criminal case" includes a criminal proceeding;
(3) "public office" includes a public agency;
(4) "record" includes a memorandum, report, or data compilation;
(5) a "rule prescribed by the Supreme Court" means a rule adopted by the Supreme Court under statutory authority; and (6) a reference to any kind of written material or any other medium includes electronically stored information.

Rule 102. Purpose. These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.

Rule 103. Rulings on Evidence
(a) PRESERVING A CLAIM OF ERROR. A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and: (1) if the ruling admits evidence, a party, on the record: (A) timely objects or moves to strike; and (B) states the specific ground, unless it was apparent from the context; or (2) if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.

(b) Not Needing To Renew An Objection Or Offer Of Proof. Once the court rules definitively on the record—either before or at trial—a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

(c) Court's Statement About The Ruling; Directing An Offer Of Proof. The court may make any statement about the character or form of the evidence, the objection made, and the ruling. The court may direct that an offer of proof be made in question and-answer form.

(d) Preventing The Jury From Hearing Inadmissible Evidence. To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.

(e) Taking Notice Of Plain Error. A court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved.

Rule 104. Preliminary Questions
(a) In General. The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.

(b) Relevance That Depends On A Fact. When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.

(c) Conducting A Hearing So That The Jury Cannot Hear It. The court must conduct any hearing on a preliminary question so that the jury cannot hear it if: (1) the hearing involves the admissibility of a confession; (2) a defendant in a criminal case is a witness and so requests; Or (3) justice so requires.

FRE (2012) | MI-2

Rule 104 (cont)

(d) Cross-Examining Criminal Defendant. By testifying on a preliminary question, a defendant in a criminal case does not become subject to cross-examination on other issues in the case.

(e) Evidence Relevant To Weight/Credibility. This rule does not limit a party's right to introduce before the jury evidence that is relevant to the weight or credibility of other evidence.

Rule 105. Limiting Evidence That Is Not Admissible. If the court admits evidence that is admissible against a party or for a purpose — but not against another party or for another purpose — the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly.

Rule 106. Remainder of or Related Writings. If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement - that in fairness ought to be considered at the same time.

Rule 201. Judicial Notice.
(a) SCOPE. This rule governs judicial notice of an adjudicative fact only, not a legislative fact.

(b) Kinds Of Facts That May Be Judicially Noticed. The court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

(c) Taking Notice. The court: (1) may take judicial notice on its own; or (2) must take judicial notice if a party requests it and the court is supplied with the necessary information.

(d) TIMING. The court may take judicial notice at any stage of the proceeding.

(e) OPPORTUNITY TO BE HEARD. On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

(f) Instructing The Jury. In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.

Rule 301. Presumptions in Civil Cases. In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.

Rule 302. State Law Presumptions, Civil Cases In a civil case, state law governs the effect of a presumption regarding a claim or defense for which state law supplies the rule of decision.

Rule 401. Test for Relevant Evidence. Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.

Rule 402. Admissibility, Relevant Evidence. Relevant evidence is admissible unless any of the following provides otherwise:
- the United States Constitution;
- a federal statute;
- these rules; or
- other rules prescribed by the Supreme Court.

Irrelevant evidence is not admissible.

Rule 403. Excluding Evidence for Prejudice. The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Rule 404. Character Evidence; Crimes Etc.
(a) Character Evidence.
(1) *Prohibited Uses.* Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

(2) *Exceptions for a Defendant or Victim in a Criminal Case.* The following exceptions apply in a criminal case: (A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it; (B) subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may: (i) offer evidence to rebut it; and (ii) offer evidence of the defendant's same trait; and (C) in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

(3) *Exceptions for a Witness.* Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

(b) Crimes, Wrongs, Or Other Acts.
(1) *Prohibited Uses.* Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) *Permitted Uses; Notice in a Criminal Case.* This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must: (A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and (B) do so before trial—or during trial if the court, for good cause, excuses lack of pretrial notice.

Rule 405. Methods of Proving Character
(a) By Reputation Or Opinion. When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct.

(b) By Specific Instances Of Conduct. When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct.

Rule 406. Habit; Routine Practice. Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.

FRE (2012) | MI-4

Rule 407. Subsequent Remedial Measures. When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:

- negligence;
- culpable conduct;
- a defect in a product or its design; or
- a need for a warning or instruction.

But the court may admit this evidence for another purpose, such as impeachment or—if disputed—proving ownership, control, or the feasibility of precautionary measures.

Rule 408. Compromise Offers, Negotiations

(a) Prohibited Uses. Evidence of the following is not admissible — on behalf of any party — either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction: (1) furnishing, promising, or offering—or accepting, promising to accept, or offering to accept—a valuable consideration in compromising or attempting to compromise the claim; and (2) conduct or a statement made during compromise negotiations about the claim—except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.

(b) Exceptions. The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Rule 409. Offers to Pay Medical Expenses. Evidence of furnishing, promising to pay, or offering to pay medical, hospital, or similar expenses resulting from an injury is not admissible to prove liability for the injury.

Rule 410. Pleas, Plea Discussions

(a) Prohibited Uses. In a civil or criminal case, evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions: (1) a guilty plea that was later withdrawn; (2) a nolo contendere plea; (3) a statement made during a proceeding on either of those pleas under Federal Rule of Criminal Procedure 11 or a comparable state procedure; or (4) a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea.

(b) Exceptions. The court may admit a statement described in Rule 410(a)(3) or (4): (1) in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if in fairness the statements ought to be considered together; or (2) in a criminal proceeding for perjury or false statement, if the defendant made the statement under oath, on the record, and with counsel present.

Rule 411. Liability Insurance: Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, such as proving a witness's bias or prejudice or proving agency, ownership, or control.

Rule 412. Sex-Offense Cases: The Victim's Sexual Behavior or Predisposition

(a) Prohibited Uses. The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct: (1) evidence offered to prove that a victim engaged in other sexual behavior; or (2) evidence offered to prove a victim's sexual predisposition.

FRE (2012) | M1-5

(b) EXCEPTIONS.
(1) *Criminal Cases.* The court may admit the following evidence in a criminal case: (A) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence; (B) evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and (C) evidence whose exclusion would violate the defendant's constitutional rights.

(2) *Civil Cases.* In a civil case, the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy.

(c) Procedure To Determine Admissibility.
(1) *Motion.* If a party intends to offer evidence under Rule 412(b), the party must: (A) file a motion that specifically describes the evidence and states the purpose for which it is to be offered; (B) do so at least 14 days before trial unless the court, for good cause, sets a different time; (C) serve the motion on all parties; and (D) notify the victim or, when appropriate, the victim's guardian or representative.

(2) *Hearing.* Before admitting evidence under this rule, the court must conduct an in camera hearing and give the victim and parties a right to attend and be heard. Unless the court orders otherwise, the motion, related materials, and the record of the hearing must be and remain sealed.

(d) Definition Of "Victim." In this rule, "victim" includes an alleged victim.

Rule 413. Similar Crimes in Sexual-Assault Cases

(a) Permitted Uses. In a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault. The evidence may be considered on any matter to which it is relevant.

(b) Disclosure To The Defendant. If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses' statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.

(c) Effect On Other Rules. This rule does not limit the admission or consideration of evidence under any other rule.

(d) Definition Of "Sexual Assault." In this rule and Rule 415, "sexual assault" means a crime under federal law or under statelaw (as "state" is defined in 18 U.S.C. § 513) involving: (1) any conduct prohibited by 18 U.S.C. chapter 109A; (2) contact, without consent, between any part of the defendant's body — or an object — and another person's genitals or anus; (3) contact, without consent, between the defendant's genitals or anus and any part of another person's body; (4) deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person; or (5) an attempt or conspiracy to engage in conduct described in subparagraphs (1)–(4).

FRE (2012) | M1-6

Rule 414. Similar Crimes in Child-Molestation Cases

(a) Permitted Uses. In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other child molestation. The evidence may be considered on any matter to which it is relevant.

(b) Disclosure To The Defendant. If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses' statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.

(c) Effect On Other Rules. This rule does not limit the admission or consideration of evidence under any other rule.

(d) Definition Of "Child" And "Child Molestation." In this rule and Rule 415: (1) "child" means a person below the age of 14; and (2) "child molestation" means a crime under federal law or under state law (as "state" is defined in 18 U.S.C. § 513) involving:
(A) any conduct prohibited by 18 U.S.C. chapter 109A and committed with a child; (B) any conduct prohibited by 18 U.S.C. chapter 110; (C) contact between any part of the defendant's body—or an object—and a child's genitals or anus; (D) contact between the defendant's genitals or anus and any part of a child's body; (E) deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on a child; or (F) an attempt or conspiracy to engage in conduct described in subparagraphs (A)–(E).

Rule 415. Similar Acts in Civil Cases Involving Sexual Assault

(a) Permitted Uses. In a civil case involving a claim for relief based on a party's alleged sexual assault or child molestation, the court may admit evidence that the party committed any other sexual assault or child molestation. The evidence may be considered as provided in Rules 413 and 414.

(b) Disclosure To The Opponent. If a party intends to offer this evidence, the party must disclose it to the party against whom it will be offered, including witnesses' statements or a summary of the expected testimony. The party must do so at least 15 days before trial or at a later time that the court allows for good cause.

(c) Effect On Other Rules. This rule does not limit the admission or consideration of evidence under any other rule.

Rule 501. Privilege in General. The common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege unless any of the following provides otherwise:
- the United States Constitution;
- a federal statute; or
- rules prescribed by the Supreme Court.

But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

Rule 502. Attorney-Client Privilege & Work Product; Limitations on Waiver. The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney- client privilege or work-product protection.

(a) Disclosure Made In A Federal Proceeding Or To A Federal Office Or Agency; scope of a waiver. When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding

FRE (2012) | M1-7

Rule 502 (cont)

only if: (1) the waiver is intentional; (2) the disclosed and undisclosed communications or information concern the same subject matter; and (3) they ought in fairness to be considered together.

(b) Inadvertent Disclosure. When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding 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).

(c) Disclosure Made In A State Proceeding. When the disclosure is made in a state proceeding and is not the subject of a state-court order concerning waiver, the disclosure does not operate as a waiver in a federal proceeding if the disclosure: (1) would not be a waiver under this rule if it had been made in a federal proceeding; or (2) is not a waiver under the law of the state where the disclosure occurred.

(d) Controlling Effect Of A Court Order. A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other federal or state proceeding.

(e) Controlling Effect Of A Party Agreement. An agreement on the effect of disclosure in a federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(f) Controlling Effect Of This Rule. Notwithstanding Rules 101 and 1101, this rule applies to state proceedings and to federal court-annexed and federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if state law provides the rule of decision.

(g) Definitions. In this rule: (1) "***attorney-client privilege***" means the protection that applicable law provides for confidential attorney-client communications; and (2) "***work-product protection***" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

Rule 601. Competency to Testify in General. Every person is competent to be a witness unless these rules provide otherwise. But in a civil case, state law governs the witness's competency regarding a claim or defense for which state law supplies the rule of decision.

Rule 602. Need for Personal Knowledge. A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703.

Rule 603. Oath or Affirmation to Testify Truthfully. Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience.

Rule 604. Interpreter. An interpreter must be qualified and must give an oath or affirmation to make a true translation.

Rule 605. Judge's Competency as a Witness. The presiding judge may not testify as a witness at the trial. A party need not object to preserve the issue.

Rule 606. Juror's Competency as a Witness.
(a) At The Trial. A juror may not testify as a witness before the other jurors at the trial. If a juror is called to testify, the court must give a party an opportunity to object outside the jury's presence.

(b) During An Inquiry Into The Validity Of A Verdict Or Indictment.
(1) *Prohibited Testimony or Other Evidence.* During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

(2) *Exceptions.* A juror may testify about whether: (A) extraneous prejudicial information was improperly brought to the jury's attention; (B) an outside influence was improperly brought to bear on any juror; or (C) a mistake was made in entering the verdict on the verdict form.

Rule 607. Who May Impeach a Witness. Any party, including the party that called the witness, may attack the witness's credibility.

Rule 608. A Witness's Character for Truthfulness or Untruthfulness
(a) Reputation Or Opinion Evidence. A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

(b) Specific Instances Of Conduct. Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of: (1) the witness; or (2) another witness whose character the witness being crossexamined has testified about.

By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.

Rule 609. Impeachment by Evidence of a Criminal Conviction
(a) IN GENERAL. The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction: (1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence: (A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; And (B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and (2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving — or the witness's admitting — a dishonest act or false statement.

Rule 609 (cont)

(b) Limit On Using The Evidence After 10 Years. This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if: (1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and (2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

(c) Effect Of A Pardon, Annulment, Or Certificate Of Rehabilitation. Evidence of a conviction is not admissible if: (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding that the person has been rehabilitated, and the person has not been convicted of a later crime punishable by death or by imprisonment for more than one year; or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile Adjudications. Evidence of a juvenile adjudication is admissible under this rule only if: (1) it is offered in a criminal case; (2) the adjudication was of a witness other than the defendant; (3) an adult's conviction for that offense would be admissible to attack the adult's credibility; and (4) admitting the evidence is necessary to fairly determine guilt or innocence.

(e) Pendency Of An Appeal. A conviction that satisfies this rule is admissible even if an appeal is pending. Evidence of the pendency is also admissible.

Rule 610. Religious Beliefs or Opinions.
Evidence of a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility.

Rule 611. Mode and Order of Examining Witnesses.
(a) Control By The Court; Purposes. The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:(1) make those procedures effective for determining the truth; (2) avoid wasting time; and (3) protect witnesses from harassment or undue embarrassment.

(b) Scope Of Cross-Examination. Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility. The court may allow inquiry into additional matters as if on direct examination.

(c) Leading Questions. Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. Ordinarily, the court should allow leading questions: (1) on cross-examination; and (2) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

Rule 612. Writing Used to Refresh a Witness's Memory
(a) Scope. This rule gives an adverse party certain options when a witness uses a writing to refresh memory: (1) while testifying; or (2) before testifying, if the court decides that justice requires the party to have those options.

(b) Adverse Party's Options; Deleting Unrelated Matter. Unless 18 U.S.C. § 3500 provides otherwise in a criminal case, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-

FRE (2012) | M1 - 10

Rule 612 (cont)

examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record.

(c) Failure To Produce Or Deliver The Writing. If a writing is not produced or is not delivered as ordered, the court may issue any appropriate order. But if the prosecution does not comply in a criminal case, the court must strike the witness's testimony or—if justice so requires—declare a mistrial.

Rule 613. Witness's Prior Statement

(a) Showing Or Disclosing The Statement During Examination. When examining a witness about the witness's prior statement, a party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party's attorney.

(b) Extrinsic Evidence Of A Prior Inconsistent Statement. Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).

Rule 614. Court's Calling or Examining a Witness

(a) Calling. The court may call a witness on its own or at a party's request. Each party is entitled to cross-examine the witness. **(b) Examining.** The court may examine a witness regardless of who calls the witness. **(c) Objections.** A party may object to the court's calling or examining a witness either at that time or at the next opportunity when the jury is not present.

Rule 615. Excluding Witnesses. At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding: (a) a party who is a natural person; (b) an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney; (c) a person whose presence a party shows to be essential to presenting the party's claim or defense; or (d) a person authorized by statute to be present.

Rule 701. Opinion Testimony by Lay Witnesses. If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Rule 702. Testimony by Expert Witnesses. A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

Rule 703. Bases of an Expert's Opinion Testimony. An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

Rule 704. Opinion on an Ultimate Issue. (a) **In General—Not Automatically Objectionable**. An opinion is not objectionable just because it embraces an ultimate issue. (b) **Exception.** In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.

Rule 705. Disclosing the Facts or Data Underlying an Expert's Opinion: Unless the court orders otherwise, an expert may state an opinion - and give the reasons for it - without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

Rule 706. Court-Appointed Expert Witnesses
(a) Appointment Process. On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.

(b) Expert's Role. The court must inform the expert of the expert's duties. The court may do so in writing and have a copy filed with the clerk or may do so orally at a conference in which the parties have an opportunity to participate. The expert: (1) must advise the parties of any findings the expert makes; (2) may be deposed by any party; (3) may be called to testify by the court or any party; and (4) may be cross-examined by any party, including the party that called the expert.

(c) Compensation. The expert is entitled to a reasonable compensation, as set by the court. The compensation is payable as follows: (1) in a criminal case or in a civil case involving just compensation under the Fifth Amendment, from any funds that are provided by law; and (2) in any other civil case, by the parties in the proportion and at the time that the court directs—and the compensation is then charged like other costs.

(d) Disclosing The Appointment To The Jury. The court may authorize disclosure to the jury that the court appointed the expert.

(e) Parties' Choice Of Their Own Experts. This rule does not limit a party in calling its own experts.

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay
(a) Statement. "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

(b) Declarant. "Declarant" means the person who made the statement.

(c) Hearsay. "Hearsay" means a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2)

a party offers in evidence to prove the truth of the matter asserted in the statement.

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(1) *A Declarant-Witness's Prior Statement.* The declarant testifies and is subject to cross-examination about a prior statement, and the statement: (A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition; (B) is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or (C) identifies a person as someone the declarant perceived earlier.

(2) *An Opposing Party's Statement.* The statement is offered against an opposing party and: (A) was made by the party in an individual or representative capacity; (B) is one the party manifested that it adopted or believed to be true; (C) was made by a person whom the party authorized to make a statement on the subject; (D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or (E) was made by the party's coconspirator during and in furtherance of the conspiracy.

The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

Rule 802. The Rule Against Hearsay. Hearsay is not admissible unless any of the following provides otherwise: • a federal statute; • these rules; or • other rules prescribed by the Supreme Court.

Rule 803. Exceptions to Hearsay Rule, Regardless of Declarant's Availability. The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(1) *Present Sense Impression.* A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.

(2) *Excited Utterance.* A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

(3) *Then-Existing Mental, Emotional, or Physical Condition.* A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

(4) *Statement Made for Medical Diagnosis or Treatment.* A statement that: (A) is made for—and is reasonably pertinent to—medical diagnosis or treatment; and (B) describes medical history; past or present symptoms or sensations; their inception; or their general cause.

(5) *Recorded Recollection.* A record that: (A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately; (B) was made or adopted by the witness when the matter was fresh in the witness's memory; and (C) accurately reflects the witness's knowledge. If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

(6) *Records of a Regularly Conducted Activity.* A record of an act, event, condition, opinion, or diagnosis if: (A) the record was made at or near the time by—or from information transmitted by—someone with knowledge; (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit; (C) making the record was a regular practice of that activity; (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and (E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

(7) *Absence of a Record of a Regularly Conducted Activity.* Evidence that a matter is not included in a record described in paragraph (6) if: (A) the evidence is admitted to prove that the matter did not occur or exist; (B) a record was regularly kept for a matter of that kind; and (C) neither the possible source of the information nor other circumstances indicate a lack of trustworthiness.

(8) *Public Records.* A record or statement of a public office if: (A) it sets out: (i) the office's activities; (ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or (iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and (B) neither the source of information nor other circumstances indicate a lack of trustworthiness.

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

(10) *Absence of a Public Record.* Testimony—or a certification under Rule 902—that a diligent search failed to disclose a public record or statement if the testimony or certification is admitted to prove that: (A) the record or statement does not exist; or (B) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind.

(11) *Records of Religious Organizations Concerning Personal or Family History.* A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) *Certificates of Marriage, Baptism, and Similar Ceremonies.* A statement of fact contained in a certificate: (A) made by a person who is authorized by a religious organization or by law to perform the act certified; (B) attesting that the person performed a marriage or similar ceremony or administered a sacrament; and (C) purporting to have been issued at the time of the act or within a reasonable time after it.

(13) *Family Records.* A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.

(14) *Records of Documents That Affect an Interest in Property.* The record of a document that purports to establish or affect an interest in property if: (A) the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it; (B) the record is kept in a public office; and (C) a statute authorizes recording documents of that kind in that office.

(15) *Statements in Documents That Affect an Interest in Property.* A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose—unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.

(16) *Statements in Ancient Documents.* A statement in a document that is at least 20 years old and whose authenticity is established.

(17) *Market Reports and Similar Commercial Publications.* Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.

(18) *Statements in Learned Treatises, Periodicals, or Pamphlets.* A statement contained in a treatise, periodical, or pamphlet if: (A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and (B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice. If admitted, the statement may be read into evidence but not received as an exhibit.

(19) *Reputation Concerning Personal or Family History.* A reputation among a person's family by blood, adoption, or marriage — or among a person's associates or in the community — concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.

(20) *Reputation Concerning Boundaries.* A reputation in a community — arising before the controversy — concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.

(21) *Reputation Concerning Character.* A reputation among a person's associates or in the community concerning the person's character.

(22) *Judgment of a Previous Conviction.* Evidence of a final judgment of conviction if: (A) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea; (B) the conviction was for a crime punishable by death or by imprisonment for more than a year; (C) the evidence is admitted to prove any fact essential to the judgment; and (D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant. The pendency of an appeal may be shown but does not affect admissibility.

(23) *Judgments Involving Personal, Family, or General History, or a Boundary.* A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter: (A) was essential to the judgment; and (B) could be proved by evidence of reputation.

Rule 804. Exceptions to the Rule Against Hearsay— Declarant Is Unavailable

(a) CRITERIA FOR BEING UNAVAILABLE. A declarant is considered to be unavailable as a witness if the declarant: (1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies; (2) refuses to testify about the subject matter despite a court order to do so; (3) testifies to not remembering the

Rule 804 (cont)

subject matter; (4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or (5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure: (A) the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or (B) the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4). But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant
from attending or testifying.

(b) THE EXCEPTIONS. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:
(1) *Former Testimony.* Testimony that: (A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and (B) is now offered against a party who had—or, in a civil case, whose predecessor in interest had—an opportunity and similar motive to develop it by direct, cross-, or redirect examination. 18 U.S.C. chapter 109A

(2) *Statement Under the Belief of Imminent Death.* In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

(3) *Statement Against Interest.* A statement that: (A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and (B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

(4) *Statement of Personal or Family History.* A statement about: (A) the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption, or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or (B) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

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

Rule 805. Hearsay Within Hearsay. Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule.

Rule 806. Attacking and Supporting the Declarant's Credibility. When a hearsay statement—or a statement described in Rule 801(d)(2)(C), (D), or (E)—has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's

FRE (2012) | M1- 16

Rule 806 (cont)

inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

Rule 807. Residual Exception

(a) IN GENERAL. Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804: (1) the statement has equivalent circumstantial guarantees of trustworthiness; (2) it is offered as evidence of a material fact; (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and (4) admitting it will best serve the purposes of these rules and the interests of justice.

(b) NOTICE. The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

Rule 901. Authenticating or Identifying Evidence

(a) IN GENERAL. To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

(b) EXAMPLES. The following are examples only — not a complete list — of evidence that satisfies the requirement:

(1) *Testimony of a Witness with Knowledge.* Testimony that an item is what it is claimed to be.

(2) *Nonexpert Opinion About Handwriting.* A nonexpert's opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation.

(3) *Comparison by an Expert Witness or the Trier of Fact.* A comparison with an authenticated specimen by an expert witness or the trier of fact.

(4) *Distinctive Characteristics and the Like.* The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.

(5) *Opinion About a Voice.* An opinion identifying a person's voice — whether heard firsthand or through mechanical or electronic transmission or recording—based on hearing the voice at any time under circumstances that connect it with the alleged speaker.

(6) *Evidence About a Phone Conversation.* For a telephone conversation, evidence that a call was made to the number assigned at the time to: (A) a particular person, if circumstances, including selfidentification, show that the person answering was the one called; or (B) a particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone.

(7) *Evidence About Public Records.* If selected for this program, I would enthusiastically commit myself to identifying effective and efficient ways to facilitate leadership skills throughout the FTC.

Evidence that: (A) a document was recorded or filed in a public office as authorized by law; or

Rule 901 (cont)

(B) a purported public record or statement is from the office where items of this kind are kept.

(8) *Evidence About Ancient Documents or Data Compilations.* For a document or data compilation, evidence that it: (A) is in a condition that creates no suspicion about its authenticity; (B) was in a place where, if authentic, it would likely be;
And (C) is at least 20 years old when offered.

(9) *Evidence About a Process or System.* Evidence describing a process or system and showing that it produces an accurate result.

(10) *Methods Provided by a Statute or Rule.* Any method of authentication or identification allowed by a federal statute or a rule prescribed by the Supreme Court.

Rule 902. Evidence That Self-Authenticates. The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:
(1) *Domestic Public Documents That Are Sealed and Signed.* A document that bears: (A) a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; and (B) a signature purporting to be an execution or attestation.

(2) *Domestic Public Documents That Are Not Sealed but Are Signed and Certified.* A document that bears no seal if: (A) it bears the signature of an officer or employee of an entity named in Rule 902(1)(A); and (B) another public officer who has a seal and official duties within that same entity certifies under seal — or its equivalent — that the signer has the official capacity and that the signature is genuine.

(3) *Foreign Public Documents.* A document that purports to be signed or attested by a person who is authorized by a foreign country's law to do so. The document must be accompanied by a final certification that certifies the genuineness of the signature and official position of the signer or attester—or of any foreign official whose certificate of genuineness relates to the signature or attestation or is in a chain of certificates of genuineness relating to the signature or attestation. The certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States. If all parties have been given a reasonable opportunity to investigate the document's authenticity and accuracy, the court may, for good cause, either: (A) order that it be treated as presumptively authentic without final certification; or (B) allow it to be evidenced by an attested summary with or without final certification.

(4) *Certified Copies of Public Records.* A copy of an official record—or a copy of a document that was recorded or filed in a public office as authorized by law—if the copy is certified as correct by: (A) the custodian or another person authorized to make the certification; or (B) a certificate that complies with Rule 902(1), (2), or (3), a federal statute, or a rule prescribed by the Supreme Court.

(5) *Official Publications.* A book, pamphlet, or other publication purporting to be issued by a public authority.

FRE (2012) | M1 - 18

(6) *Newspapers and Periodicals.* Printed material purporting to be a newspaper or periodical.

(7) *Trade Inscriptions and the Like.* An inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control.

(8) *Acknowledged Documents.* A document accompanied by a certificate of acknowledgment that is lawfully executed by a notary public or another officer who is authorized to take acknowledgments.

(9) *Commercial Paper and Related Documents.* Commercial paper, a signature on it, and related documents, to the extent allowed by general commercial law.

(10) *Presumptions Under a Federal Statute.* A signature, document, or anything else that a federal statute declares to be presumptively or prima facie genuine or authentic.

(11) *Certified Domestic Records of a Regularly Conducted Activity.* The original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)–(C), as shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record—and must make the record and certification available for inspection—so that the party has a fair opportunity to challenge them.

(12) *Certified Foreign Records of a Regularly Conducted Activity.* In a civil case, the original or a copy of a foreign record that meets the requirements of Rule 902(11), modified as follows: the certification, rather than complying with a federal statute or Supreme Court rule, must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the country where the certification is signed. The proponent must also meet the notice requirements of Rule 902(11).

Rule 903. Subscribing Witness's Testimony. A subscribing witness's testimony is necessary to authenticate a writing only if required by the law of the jurisdiction that governs its validity.

Rule 1001. Definitions For This Article. In this article: (a) A "***writing***" consists of letters, words, numbers, or their equivalent set down in any form. (b) A "***recording***" consists of letters, words, numbers, or their equivalent recorded in any manner. (c) A "***photograph***" means a photographic image or its equivalent stored in any form. (d) An "***original***" of a writing or recording means the writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it. For electronically stored information, "original" means any printout— or other output readable by sight—if it accurately reflects the information. An "original" of a photograph includes the negative or a print from it. (e) A "***duplicate***" means a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.

Rule 1002. Requirement of the Original. An original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise.

Rule 1003. Admissibility of Duplicates. A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate.

Rule 1004. Admissibility of Other Evidence of Content. An original is not required and other evidence of the content of a writing, recording, or photograph is admissible if: (a) all the originals are lost or destroyed, and not by the proponent acting in bad faith;
(b) an original cannot be obtained by any available judicial process; (c) the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or (d) the writing, recording, or photograph is not closely related to a controlling issue.

Rule 1005. Copies of Public Records to Prove Content. The proponent may use a copy to prove the content of an official record—or of a document that was recorded or filed in a public office as authorized by law—if these conditions are met: the record or document is otherwise admissible; and the copy is certified as correct in accordance with Rule 902(4) or is testified to be correct by a witness who has compared it with the original. If no such copy can be obtained by reasonable diligence, then the proponent may use other evidence to prove the content.

Rule 1006. Summaries to Prove Content. The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.

Rule 1007. Testimony or Statement of a Party to Prove Content. The proponent may prove the content of a writing, recording, or photograph by the testimony, deposition, or written statement of the party against whom the evidence is offered. The proponent need not account for the original.

Rule 1008. Functions of the Court and Jury. Ordinarily, the court determines whether the proponent has fulfilled the factual conditions for admitting other evidence of the content of a writing, recording, or photograph under Rule 1004 or 1005. But in a jury trial, the jury determines—in accordance with Rule 104(b)—any issue about whether:
(a) an asserted writing, recording, or photograph ever existed; (b) another one produced at the trial or hearing is the original; or (c) other evidence of content accurately reflects the content.

Rule 1101. Applicability of the Rules
(a) TO COURTS AND JUDGES. These rules apply to proceedings before:
- United States district courts;
- United States bankruptcy and magistrate judges;
- United States courts of appeals;
- the United States Court of Federal Claims; and
- the district courts of Guam, the Virgin Islands, and the Northern Mariana Islands.

(b) TO CASES AND PROCEEDINGS. These rules apply in:
- civil cases and proceedings, including bankruptcy, admiralty, and maritime cases;
- criminal cases and proceedings; and
- contempt proceedings, except those in which the court may act summarily.

(c) RULES ON PRIVILEGE. The rules on privilege apply to all stages of a case or proceeding.

(d) EXCEPTIONS. These rules—except for those on privilege—do not apply to the following: (1) the court's determination, under Rule 104(a), on a preliminary question of fact governing admissibility;

Rule 1102. Amendments
These rules may be amended as provided in 28 U.S.C. § 2072.

Rule 1103. Title
These rules may be cited as the Federal Rules of Evidence.

Notes:

Friends, Romans, countrymen, lend me your ears;/I come to bury Caesar, not to praise him./The evil that men do lives after them;/The good is oft interred with their bones;/So let it be with Caesar. The noble Brutus/Hath told you Caesar was ambitious:/If it were so, it was a grievous fault,/And grievously hath Caesar answer'd it./Here, under leave of Brutus and the rest -/For Brutus is an honourable man;/So are they all, all honourable men -/Come I to speak in Caesar's funeral./He was my friend, faithful and just to me:/But Brutus says he was ambitious;/And Brutus is an honourable man./He hath brought many captives home to Rome/Whose ransoms did the general coffers fill:/Did this in Caesar seem ambitious?/When that the poor have cried, Caesar hath wept:/Ambition should be made of sterner stuff:/Yet Brutus says he was ambitious;/And Brutus is an honourable man./You all did see that on the Lupercal/I thrice presented him a kingly crown,/Which he did thrice refuse: was this ambition?/Yet Brutus says he was ambitious;/And, sure, he is an honourable man./I speak not to disprove what Brutus spoke,/But here I am to speak what I do know./You all did love him once, not without cause:/What cause withholds you then, to mourn for him?/O judgment! thou art fled to brutish beasts,/And men have lost their reason. Bear with me;/My heart is in the coffin there with Caesar,/And I must pause till it come back to me.

Absence Of A Record:
- in business record set, as hearsay exception: E5-11
- Public record: E5-15

Accounting Ledger:
- Authenticating: B3-1

Accounting:
- Authenticating ledger: B3-1
- Accountant Privilege: D4-2

Acknowledged documents:
- Self-authentication: B2-6

Admissibility:
- Weight, compared to: A1-2
- Defined: A1-1
- Hearing for: A1-3
- Not end of enquiry: A1-3
- Limited: A1-3

Admissions:
- Generally: G5
- Judicial admissions: G5-2
- Party admissions: G5-1
- Requests for admissions, responses to: G5-1

Affidavit:
- as Prior Statement, hearsay exception: E3-3

Agent:
- Admission by: H2-2
- Privileged preparation: D2-3

Ancient document:
- Authenticity: B3-4
- Hearsay exception: E5-17

Attorney/Client Privilege: D1
- Generally: D1-1
- Crime fraud exception: D1-4
- Government counsel: D1-2
- In-house counsel: D1-2, D1-4
- Former employees: D1-2
- Facts not privileged: D1-2
- Waiver of: D1-3, D1-4

Audio Recordings:
- Authenticity of: B3-1
- Enhanced: B3-2
- Foundation: B3-2

Authenticity:
- Generally: B1, B2
- Burden of establishing: B1-1
- Admissibility, compared to: A1-1
- Documents, authenticating: B1-2
- Identification, compared to : B1-1
- Physical evidence, authenticating: B1-3
- Relevance, compare to: B1-2, C1-1
- Weight, compared to: A1-3
- Stipulations: B1-2, A1-4

Banker's Privilege: D4-2

Bench Trial:
- Compilation: H2-5
- Undue prejudice: F1-5

Best Evidence Rule:
- Generally: H1
- Compilations, exception to: H2

Bias:
- Character evidence, not permitted in response to: G4-3
- Impeachment by: G4-12
- proved by statements made in settlement: G1-2

Books:
- Authentication of: B3-2
- Judicial notice of: J1-4

Business Records:
- Absence of a record: E5-11
- Certification of: E5-9
- Foundational witness for: E5-8/9
- Hearsay exception: E5-6
- Public Records, compared to: E5-11
- Self-authenticating: B2-7

Business Value:
- and Lay witness: K1-3

Certification:
- Business record: E5-9
- Domestic record of regular activity: B2-7
- Foreign Record: B2-3

Chain Of Custody:
- Authenticating physical evidence: B1-3
- Imperfect chain: B1-4

Character Evidence:
- Actions consistent with, to establish: G3-1
- Habit, compared to: G3-1
- Impeachment by: G4-1
- Opinion testimony, to establish: G4-1
- Reputation testimony: G4-1

Checks:
- Authenticating: B3-2

Civil Judgments: *see **Judgments***

Compilation:
- General: H2
- Best Evidence Rule, as exception to: H2-2
- Demonstratives, compared to: H2-3/4, B4-2

Commercial Paper: B2-6

Completeness:
- Doctrine of: A1-3, C1-3

Computer Printouts:
- Authenticating: B3-2

Computers:
- Lay witness testimony: K1-5

Computer Simulations:
- Authenticating: B3-3
- Not demonstratives: B3-3

Conditional Admittance:
- for Relevance: C1-2
- for Hearsay exception: E4-1

Conduct:
- Specific instances showing truthfulness: G4-4

Confusion:
- Basis for excluding relevant evidence: F1

Congressional Act
- Creating presumption of authenticity: B2-6

Connecting Up: C1-2

Contract:
- Best Evidence Rule: H1-4

Index | M2- 2

Conviction:
- Hearsay exception: *see **Judgments***
- Impeachment by: G4-7/8

Copy: *see **Duplicate***

Correspondence:
- as Business Record: E5-10
- Residual hearsay exception: E7-4

Cumulative Evidence:
- Exclusion of: F1-6/7

Damages:
- Lay witness testimony: K1-4

Database:
- Generally
  *see **Machine Generated Data***
- Hearsay exception:
  *see **Market Publication***

Daubert:
- Generally: K2-1
- Factors: K2-5
- Procedure: K2-5

Declaration:
- not prior statement, hearsay exception: E3-3

Delay:
- Basis for excluding relevant evidence: F1

Deliberative Process Privilege: D3-1

Demonstratives:
- Generally: B4
- Admissibility of: B4-2/3
- Compilations, compared to: H2-3/4
- Defined: B3-4
- Expert created: B4-4
- Foundation for: B4-1
- Jury room: B4-3
- Purpose: B4-1
- Summaries, compared to: B4-2
- Summarizing testimony: B4-4
- Transcripts as: B4-4

Deposition:
- hearsay exceptions:
  + as prior statement: E3-3
  + when declarant is absent: E6-3

Diagnosis: see ***Medical Diagnosis***

Diary:
- Recorded recollection: E5-5

Dictionary Entry:
- by Judicial Notice: J1-3

Distance:
- Judicial Notice of: J1-5

Documents:
- Acknowledged, self-authenticating: B2-6
- Ancient: B3-4
- Authenticating: B1-2, B1-3, B3-3
- Emails: B3-4
- Physical evidence, compared to: B1-2
- Public documents: B2-2/3

Domestic Violence:
- Prejudice resulting from: F1-5

Double Hearsay:
- Generally: E1-4/5
- in Business records: E5-9, E5-11
- in Public records: E5-12
- in Ancient documents: E5-17

Duplicates:
- Best evidence Rule: H1-5
- Enhanced copy: H1-5

Dying Declaration:
- Hearsay exception: E6-4

EEOC Records:
- as Public record: E5-12

Email:
- Authenticity of: B3-4
- Business record: E5-10

Emotional State:
- Hearsay exception: E5-2

Evidence:
- Circumstantial: B1-2
- Defined: A1-1
- View and Inspection, as: G2-1/2

Evidentiary Admission:
- compare Judicial Admission: G5-3

Excited Utterance:
- Hearsay exception: E5-1/2

Executive Privilege:
- Deliberative process: D3-1
- Investigative files: D3-2
- Informers: D3-2
- Military and States secrets: D3-2
- Presidential Privilege: D3-2

Existing Mental, Emotional, or Physical State:
- Hearsay exception: E5-2

Experts:
- Admissibility of opinion: K2
- Basis of opinion: J2, E1-4
- Compilations: H2-5
- Consultants: D2-6
- as Fact witness, prejudice: F1-5
- Reports: D2-5
- Undue Prejudice: F1-4
- Work product privilege: D2-5

Facts:
- Adjudicative, judicial notice: J1-2
- Legislative, judicial notice: J1-4/5
- *see **Foundational Facts***

Family:
- Record, hearsay exception: E5-16
- History: hearsay exception: E6-5

Financial Statement:
- as Business records: E5-9/10
- *see **Accounting Ledger***

Fifth Amendment Privilege:
- Generally: D4-1
- Unavailability, hearsay exception: E6-1

Foreign Record:
- Public record, hearsay exception: E5-12

Foreign Acts:
- admissible, Judicial Notice: J1-3

Former Testimony:
- Hearsay exception: E6-3

Foundational Fact:
- Defined: A1-2
- Not subject to FRE: A1-2

Index | M2- 3

Habit:
- Evidence of: G3-1/2
- Routine practice, compared: G3-1

Handwriting:
- Generally: B3-5; B3-3
- Authenticated by lay witness: B3-5, K1-6
- Authenticated by expert: B3-5
- Authenticated by Factfinder: B3-5

Hearsay:
- Declarant unavailable: E6-1/3
- Double hearsay: E1-4/5, E5-17, E5-9, E5-17
- Elements of: E1-1
- Exceptions: E4, E5, E6; *see **Hearsay Exceptions***
- Identification: E3-4
- Party Admission: E2
- Prior Statement: E3
- Truth of the matter asserted: E1-3

Hearsay Exceptions:
- Absence of business record: E5-11
- Absence of public record: E5-15
- Ancient documents: E5-17
- Baptismal Certificate: E5-16
- Business Record: E5-6/11
- Business record, absence of: E5-11
- Civil Judgments, family or land: E5-23
- Dying Declaration: E6-4
- Excited Utterance: E5-1/2
- Existing State (Mental, Emotional, Physical): E5-2
- Family history, statement of: E6-5
- Family Record: E5-16
- Former testimony: E6-3
- Interest, statement against: E6-5
- Judgment of conviction: E5-22
- Learned Treatises: E5-19
- Market Publications: E5-18
- Marriage certificate: E5-1
- Medical Diagnosis or Treatment, statements made for: E5-4
- Present Sense Impression: E5-1
- Prior testimony: E6-3
- Property Interest, records affecting: E5-16
- Property Interests, statements in documents affecting: E5-16/7
- Public Records: E5-12
- Public record, absence of: E5-15

Hearsay Exceptions (cont):
- Recorded Recollection: E5-4
- Religious Organization, record of: E5-16
- Reputation regarding character: E5-21
- Reputation regarding Family History: E5-19
- Reputation regarding land: E5-21
- Residual exception: E7-1
- Statement against interest: E6-5
- Vital Statistics: E5-15
- Witness's absence, statement against procuring party: E6-6

Historical Background:
- Hearsay exception, for: E5-21

Identification:
- Authenticity, for: B1-1
- as Hearsay: E2-4

Impeachment:
- General: G4
- Chart of: G4-13
- v. refreshing recollection: J3-4

Indictment:
- Hearsay exception: E5-23

Informer's Privilege: D3-2

Investigative Files Privilege: D3-2

Invoice:
- as business record: E5-10

Inconsistent Statements: *see **Prior Statements***

In-House Counsel:
- When covered by privilege: D1-2, D1-4

Interpreters:
- and Hearsay: E1-4

Internet: *see* **Web Page**

Interview:
- Basis of expert opinion: J2-2
- Residual hearsay exception: E7-4

Judicial Admission: G5-2

Judicial Findings:
- Public record, hearsay exception: E5-14

Judicial Notice: J1

Judgments:
- Public records, hearsay exceptions: E5-13/14
- Affecting property interest, hearsay exception: E5-16/17
- Civil judgments, hearsay exception: E5-23
- Convictions, hearsay exception: E5-22

***Kumho*:** K2-5

Lay Opinion Testimony:
- General: K1
- Expert opinion, compared to: K1-2
- Habit, to establish: G3-3/4
- Handwriting, to authenticate: B3-5, K1-j
- Routine practice, to establish: G3-3/4

Learned Treatises:
- Hearsay exception: E5-18
- Judicial notice of: J1-6

Ledgers: *see **Accounting Ledger***

Legal Conclusions:
- and Lay Witness: K1-2
- and Expert Witness: K2-2

Legislative Facts:
- Judicial Notice of: J1-4

Letters: *see **Correspondence***

Limiting Instruction:
- for Demonstratives: B4-3
- for Prejudicial evidence: A1-3, F1-3/4

Litigation Materials:
- Business records: E5-9
- Privilege: *see **Work Product Doctrine***

Lost Profits:
- and Lay Witness: K1-4

Machine Generated Data:
- Authentication: B3-5
- Not hearsay: E1-2/3

Magazines: *see **periodicals***

Market publications:
- Hearsay exception: E5-17/8

Mathematics:
- Judicial Notice of: J1-5
- Subject of lay opinion: K1-3/4

Medical Diagnosis Or Treatment:
- statement made for, Hearsay exception: E5-4

Medical Records:
- Judicial Notice: J1-3
- Recorded recollection: E5-5

Memoranda:
- as business records: E5-10

Mental State
- Hearsay exception: E5-2/3

Military Secrets Privilege: D3-2

Misleading Evidence:
- as basis for excluding relevant evidence: F1

Motion In Limine: A2-3

Newspapers:
- Recorded recollection: E5-5/6
- Residual hearsay exception: E7-5
- Self-authentication: B2-5, B3-6

Notary:
- Notarized documents, self authenticating: B2-6

Objections:
- General: A2
- Non evidentiary: A2-3

Offer Of Proof:
- Requirement: A2-2
- Timing of: A2-3, A2-4

Official Publications:
- Self-authenticating: B2-4

Opinion:
- Character, established by: G4-1/2
- Work product:
  *see **Work Product Doctrine***
- Fact witness, by:
  *see **Lay Opinion Testimony***

Party Admissions:
- Attorney Statements: E2-4
- Corporate executives: E2-5
- Government agents: E2-5
- Government publications: E2-5
- Requests for admissions, response to: G5-1/2

Past Recollection:
*See **Recorded Recollection***
*See **Refreshing Recollection***

Periodicals:
- Defined: B2-5
- Published quotations, tabulations, lists, directories: *see **Market Publications***
- Recorded recollection: E5-5
- Self-authentication: B2-5, B3-6

Photographs:
- Authenticating: B3-6
- as Demonstrative: B4-4
- Gruesome, prejudice from: F1-5

Physical Evidence:
- Authenticating: B1-3
- Documentary evidence, compared to: B1-2
- Unique and mundane: B1-3

Physical state, existing:
- Hearsay exception: E5-2

Physician/Patient privilege: D4-2

Pictures: *see **Photographs***

Plea agreement:
- Residual hearsay exception: E7-4

Pleadings:
- as Admission: G5-3

Practice Points:
- Objections at trial: A2-4
- Refreshing v. Impeaching: J3-4
- Relevance standard: C1-3-
- Stipulations to authenticity: A1-4

Prejudice: *see **Undue Prejudice***

Present Sense Impression:
- Existing mental state, compared to: E5-3/4
- Hearsay exception: E5-1
- Recorded Recollection, compared to: E5-3

Presidential Privilege: D3-2

Priest/Penitent Privilege: D4-2

Print Out: *see **Computer Printout***

Prior Statement:
- Consistent statement, hearsay exclusion: E3-3
- Declarant unavailable, hearsay exception: E6-3
- Inconsistent statement, hearsay exclusion: E3-2/3
- Inconsistent statement, impeachment by: G4-9/10
- Character testimony: G4-3, 5

Privilege:
- Attorney/Client: D1
- Executive: D3
- Fifth Amendment: D4-1
- Work Product: D2

Proffer: *see **Offer of Proof***

Property Interest:
- Records affecting, hearsay exception: E5-16
- Documents affecting, hearsay exception: E5-17

Publication: *see **Books***

Public Documents:
- Admission: B2-5
- FRCP 44: B2-4
- Self-authenticating, seal: B2-3

Public Records:
- Best Evidence Rule, applied to: H1-4/5
- Business records, compared to: E5-11
- Certified: B2-4
- Hearsay exception: E5-12

Recorded Recollection:
- Hearsay exception: E5-4/5
- v. Refreshing recollection: J3-4

Recollection:
*See **Recorded Recollection***
*See **Refreshing Recollection***

Recordings: *see **Audio Recordings***

Record Of Regularly Conducted Activity: *see **Business Record***

Refreshing Recollection: J3-1

Regularly Conducted Activity: B2-6

Regulations:
- Judicial Notice of: J1-5

Relevance:
- Generally: C1
- Authenticity, compared to: B1-3
- Conditional relevance: C1-2
- Defined: C1-1

Reputation:
- Family history, hearsay exception: E5-19

Reputation (cont):
- Land, hearsay exception: E5-20
- Character, established by: G4-1/3
- Character, hearsay exception: E5-21

Reports:
- Expert reports: D2-5

Residual hearsay exception: E7

Routine Practice:
- to establish behavior: G3-3

Self-Authenticating:
- Categories of: B2-2
- Definition: B2-1

Settlement:
- settlement agreements: G1-2
- statements made during, exclusion: G1

Silence:
- Adopting a statement, by: E2-2
- as Hearsay: E1-1

Site visit: *see **View and Inspection***

Spousal Privileges: D4-2

Statement Against Interest:
- Compared to Party Admission: E2-2, E6-6
- Hearsay exception: E6-5

Statistics:
- Judicial Notice of: J1-5

Stipulations:
- Authenticity: A1-4
- Causing proof to be cumulative: F1-7
- Withdrawing: G5-3

Summary Exhibits:
- *see **Compilations***

Tape Recording: *see **Audio Recordings***

Telephone Call:
- Authenticating: B3-6, B3-7
- Telephone records, as business records: E5-11
- 911 call as business record: E5-11

Testimony:
- Summarized on Demonstrative: B4-4
- Summarized by expert: J2-2

Therapist/Patient Privilege: D4-2

Trade Inscriptions:
- Self-authentication: B2-5, 6

Transcript:
- Authenticity of: B3-7, 8
- Best evidence Rule, applied to: H1-4/5
- Business record: E5-10
- Demonstrative: B4-4
- Recorded recollection: E5-5

Truthfulness:
- analyzed by Lay Witness: K1-6
- Specific instances, establishing: G4-4

Unavailable Declarant:
*see **Hearsay Exceptions***

Undue Prejudice:
- Excluding relevant evidence: F1
- Bench trials: F1-5

Ultimate Issues:
- and Lay Witness: K1-2

View And Inspection: G2-1

Vital Statistics:
- Hearsay exception: E5-15

Voice Identification: B3-8

Web Page:
- Authenticity of: B3-8

Weight:
- Authenticity, compared to: A1-3

Work Product Doctrine:
- Generally: D2-1
- Anticipation of litigation: D2-2
- Expert reports: D2-5
- Expert testimony: D2-5
- Opinion v. Fact: D2-3/4

Common Hearsay Exceptions

Present Sense Impression: Statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately after. R803(1).
- o Declarant personally perceives the event;
- o Declaration is an explanation or description rather than narration; and
- o Declaration and event are contemporaneous or nearly so.

Excited Utterance: Statement relating to a startling event or condition made while declarant was under stress of excitement caused by the event or condition. R803(2). Court considers:
- o Event's characteristics;
- o Time lapse between the startling event and the statement;
- o Whether the statement responded to an inquiry;
- o Declarant's age;
- o Declarant's physical and mental condition; and
- o Statement's subject matter.

Existing Mental, Emotional, Or Physical Condition: Contemporaneous declarations of feeling or intent may prove a party's state of mind. R803(3). The exception does not cover statements of memory or belief to prove the fact remembered or believed. Elements:
- o Statement contemporaneous with the state of mind to be proved; and
- o Declarant did not have time to reflect and fabricate his thoughts.

Business Record Exception: Records of regularly conducted activity are hearsay exempt. R803(6). The record must be:
- o Based on entrant's knowledge, or knowledge of person with business duty to give information to entrant;
- o Made at or near the time of the events recorded;
- o Made in the regular course of a business activity; and
- o Regularly kept by the business.

Record's Absence: If a set of records accords with the business record exception (R803(6)), evidence that a matter is not in the records may prove the event's nonoccurrence or nonexistence.
- o The event must be the kind that regularly lead to a record's creation. R803(7)).

Statements For Medical Diagnosis Or Treatment: Statements made for medical diagnosis or treatment are hearsay exempt. R803(4).
- o Includes statements describing medical history; past or present symptoms, pain, or sensations; or the inception or general character of the cause or source.
- • Exception applies only to statements by person seeking or receiving treatment.

Recorded Recollection: For a document to be admissible as recorded recollection, the party seeking to admit it must show:
- o The record concerns a matter about which the witness once had knowledge,
- o Witness's recollection is now insufficient for full and accurate testimony;
- o Witness made or adopted the record when her memory was fresh; and
- o Record reflects that knowledge correctly. R803(5).
- • If predicate satisfied, record read into evidence, but not admitted as exhibit.

Public Records Exception: Public records are excepted from hearsay restrictions. R803(8). Records, reports, statements, or data compilations, in any form, of public offices or agencies, are admissible when:
- o They set forth the activities of the office or agency, or
- o Incorporate matters observed pursuant to duty imposed by law, or
- o Present factual findings resulting from a legally authorized investigation.

Vital Statistics: Records or data compilations of births, deaths, or marriages, are excluded from hearsay limits if the report was made to a public office pursuant to legal requirement. R 803(9).
- o Exception only applies when the responses were legally mandated.

Absence Of A Public Record: For a public database or record set, the absence of an expected record may prove the event didn't happen. R803(10).
- o Public office or agency must regularly make or preserve the records;
- o Someone must diligently search for the contemplated record; and
- o May be established with affidavit from someone familiar with the records.

Ancient Documents: Statements in ancient documents are not hearsay exempt. R 803(16).
- o Show document existed 20 years or more.

Market Publications: Market quotes, tabulations, lists, directories, or other published compilations are hearsay exempt. R803(17).
- o Must show the reports are relied on by the public or people in a relevant field.

Learned Treatises: Statements are hearsay exempt if in published treatises; periodicals; or pamphlets. R803(18).
- o Subject must be history, medicine, or other science or art; and
- o Must be established as a reliable by (1) expert witness, or (2) judicial notice.
- • The treatise may only be used while an expert is on the witness stand;
- • Statements may be read into evidence; treatise may not be received as exhibit.

Former Testimony: Testimony given as a witness at another hearing may be hearsay exempt. R804(b)(1).
- o Witness unavailable;
- o Prior testimony in same or different proceeding; and
- o Party now opposing admission had an opportunity and similar motive in prior hearing to develop testimony by direct, cross, or redirect examination.

Statement Against Interest: Statement against penal interest may be hearsay exempt. R804(b)(3).
- o Witness unavailable;
- o Statement against the declarant's penal interest; and
- o Circumstances support statement's trustworthiness.

Residual Hearsay Exception: Out-of-court statements, otherwise inadmissible hearsay, may be admitted under the residual hearsay exception. R807. Courts consider whether:
- o Statement evidences a material fact;
- o Evidence is more probative on these issues than any other evidence;
- o Admitting the evidence furthers the FRE's objectives and interests of justice;
- o Evidence has circumstantial guarantees of trustworthiness; and
- o Proponent gives notice to the other party before trial

"There are some things which cannot be learned quickly, and time, which is all we have, must be paid heavily for their acquiring. They are the very simplest things and because it takes a man's life to know them the little new that each man gets from life is very costly and the only heritage he has to leave." **Hemingway**

"In the long run, we are all dead." **Keynes**

"Be fearful when others are greedy, and be greedy when others are fearful." **Warren Buffet**

"I skate to where the puck is going to be, not to where it has been." **Wayne Gretzky**

"Have you ever noticed that anybody driving slower than you is an idiot, and anyone going faster than you is a maniac?" **George Carlin**

"For what do we live, but to make sport for our neighbors, and laugh at them in our turn?" **Jane Austen**

"In such cases as these, a good memory is unpardonable." **Jane Austen**

"Great people talk about ideas, average people talk about things, and small people talk about wine." **Fran Lebowitz**

"Only two things are infinite, the universe and human stupidity, and I'm not sure about the former." **Einstein**

"Insanity is doing the same thing over and over again, expecting different results." **Einstein**

"There are two types of people in baseball, those who are humble and those who are about to become humble." **Baseball adage**

Now this is the Law of the Jungle -- as old and as true as the sky/ And the Wolf that shall keep it may prosper, but the Wolf that shall break it must die. / As the creeper that girdles the tree-trunk the Law runneth forward and back -- / For the strength of the Pack is the Wolf, and the strength of the Wolf is the Pack. **Kipling**

"In war, all disasters can be explained by two words: 'too late.'" **Gen. Douglas MacArthur**

"Perhaps someday it will be pleasant to remember even this." **Virgil**

"In the particular is contained the universal." **Joyce**

"Life is lived forward but understood backwards." **Kierkegaard**

"There is no education in the second kick of a mule." **Sam Rayburn**

"Arrange what pieces come your way." **Woolf**

"All life is a preparation for something that probably will never happen." **Yeats**

"Be Quick But Don't Hurry." **John Wooden**

"You can do what you want to us. But we won't sit here and listen to you badmouth the United States of America." **Animal House**

"The government is us; we are the government. You and I." **Teddy Roosevelt**

"If I have made myself clear I have misspoken." **Greenspan**

"No man ever listened themself out of a job." **Coolidge**

"That which we obtain too easily, we esteem too lightly. " **Thomas Paine**

"A good plan executed today is better than a perfect plan executed at some indefinite point in the future." **General George Patton Jr**

"The moral arc of the universe is long, but it bends toward justice." **Martin Luther King Jr.**

"You can't step into the same river twice." **Heracleitus**

"Verbum sat sapient" -A hint is sufficient to any wise man

"Trust but verify." **Ronald Reagan**

"The harder I work, the luckier I get." **Lee Trevino**

"The difference between the right word and the almost right word is the difference between lightning and a lightning bug." **Mark Twain**

"Towards thee I roll, thou all-destroying but unconquering whale; to the last I grapple with thee; from hell's heart I stab at thee; for hate's sake I spit my last breath at thee." **Melville** (Ahab's last speech)

"If you call a tail a leg, how many legs has a dog? Five? No, calling a tail a leg don't make it a leg." **Lincoln**

TRIAL OBJECTIONS

Objections Regarding Witness:

- Competence: Witness not competent to testify (Lack of perception, memory, inability to understand oath, inability to communicate in language of the court). (F601)
- Improper Opinion: Lay witness improperly testifying based on scientific, technical, specialized knowledge. (F701, F702)
- Personal Knowledge: Fact witness lacks personal knowledge of subject. (F602)
- Unqualified Expert: Proffered expert not qualified by knowledge, skill, experience, or training. (F702)

Objections On Admissibility:

- Authenticity: Not sufficient evidence that item is what it is purported to be. (F901)
- Best Evidence: Evidence cannot be admitted to prove a document's contents (F1002, F1004)
- Cumulative: Evidence must be excluded as it duplicates evidence already received. (F403)
- Delay: Evidence must be excluded because it will cause unnecessary delay or waste time. (F403)
- Fairness: Evidence must be excluded, possible unfair prejudice or confusion outweighs probative value. (F403)
- Hearsay: Evidence contains out of court statements offered for the truth of the matter asserted. (F802)
- Relevance: Evidence not relevant because it doesn't make significant fact more or less probable. (F401)
- Summaries: Summary of documents not admissible when materials not voluminous. (F1006)

Objections As To The Form Of The Question:

- Ambiguous: Question is confusing; unfair to make witness answer unclear questions. (F611(a))
- Assumes Fact Not In Evidence: Question assumes some fact not yet placed in evidence; insufficient foundation for the question. (F611(a))
- Character: Improperly calls for character evidence to prove act in conformance (in civil trial). (FRE404)
- Confusing: Structure or contents of the question make it unclear or misleading. (FRE 611(a))
- Compound Question: Attorney asked two questions; unclear which witness is answering. (FRE 611(a))
- Cumulative: Question seeks evidence that duplicates evidence already received. (FRE 403)
- Hearsay: Question calls for hearsay (or answer contains hearsay). (FRE 801, 802)
- Leading: Leading questions (questions that suggest the answer) not permitted on direct. (FRE 611(c))
- Privilege: Question seeks information protected by common law or statutory privilege. (FRE 501, 502)
- Repetitious: Question has already been asked and answered. (FRE 611(a), 403)
- Scope: Question on cross exam exceeds scope of direct. (FRE 611(b))
- Speculation: Question calls for guessing; no foundation witness has personal knowledge. (FRE 602)
- Vague: Question is unclear; unfair to make witness answer unclear questions. (FRE 611(a))