

**104 – Preliminary Questions**

- (a) – Judge decides preliminary admissibility, court not bound by rules of evidence except for privilege
- (b) – Evidence conditioned on fulfillment of a condition of fact subject to introduction of supporting evidence
- (c) – Admissibility of confessions shall be determined without being heard by jury; same for other matters against accused witness
- (d) – Accused not subject to cross on non-preliminary issues
- (e) – May introduce to jury evidence relevant to weight and credibility

**401 – Definition of Relevant Evidence**

Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action *more probable or less probable than it would be without the evidence*

**402 – Relevant Evidence Generally Admissible; Irrelevant Information Evidence Inadmissible**

- All relevant evidence is admissible unless provided by Const., Cong., etc.
- Evidence which is not relevant is not admissible

**403 – Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time**

Although relevant, evidence may not be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence

**404 – Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes**

- (a) – Character evidence not admissible to prove action in conformity therewith, except:
  - Criminal defendant's character
  - Victim's character in self-defense cases when offered by the accused
  - Witness's character limited to impeachment
- (b) – Evidence of other crimes, acts, or wrongs not admissible to show character (need to be similar to that which is accused); may be used to show
  - Motive
  - Opportunity
  - Intent
  - Preparation
  - Plan
  - Knowledge
  - Identity
  - Absence of mistake

**405 – Methods of Proving Character**

- (a) – Reputation or opinion – on cross may ask about relevant specific incidences of conduct
- (b) – Specific instances of conduct – where trait of character is an essential element of a charge, claim, or defense

**406 – Habit; Routine Practice**

- Relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice

**407 – Subsequent Remedial Measures**

- Not admissible to prove negligence
- May be used to show other purpose such proving ownership, control or impeachment

**408 – Compromise and Offers to Compromise**

- Offers to settle and statements made during negotiations are not admissible
- Applies only if the claim or amount is disputed
- Evidence otherwise discoverable not excluded just because presented during negotiations
- Not excluded if offered for another purpose (bias, prejudice, undue delay)

**409 – Payment of Medical and Similar Expenses**

Offer to pay medical expenses not admissible to prove liability

**410 – Inadmissibility of Pleas, Plea Discussions, and Related Statements**

- The following are not admissible in civil or criminal proceedings
  - Guilty plea withdrawn
  - Nolo contendere
  - Statements made under Criminal Rule of Procedure 11
  - Certain statements made during plea bargaining discussions
- Exceptions
  - Perjury and false statement prosecution
  - The rule of completeness

**412 – Sex Offense Cases; Relevance of Alleged Victim’s Past Sexual Behavior or Alleged Sexual Predisposition**

- (a) – Not admissible for proceedings involving sexual misconduct
  - Evidence offered to prove that any alleged victim engaged in other sexual behavior
  - Evidence offered to prove any alleged victim’s sexual predisposition
- (b) – Exceptions
  - Criminal cases
    - Evidence of specific instances of sexual behavior by the alleged victim to prove that a person other than the accused was the source of injury
    - Evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution
    - Evidence the exclusion of which would violate the constitutional rights of the defendant
  - Civil (balancing test) – victim’s reputation is admissible only if it has been placed in controversy by the alleged victim
- (c) – Procedure to determine admissibility
  - Party intending to offer evidence under subdivision (b) must
    - File written motion describing evidence and purpose
    - Serve motion on all parties and notify the alleged victim
  - Conduct in camera hearing

**413 – Evidence of Similar Crimes in Sexual Assault Cases**

- May offer evidence of accused character (other sexual offense)

- Government shall disclose evidence to defendant

**414 – Evidence of Similar Crimes in Child Molestation Cases**

- May offer evidence of an accused character (other child molestation offense)
- Government shall disclose evidence to defendant

**415 – Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation**

- In a civil case, evidence may be considered under rules 413 and 414
- Party must disclose evidence to the party against whom it is being offered

**501 – Privileges – General Rule**

- Principles of privilege governed by the common law
- Civil actions use the state law to determine privilege

**607 – Who May Impeach**

The credibility of a witness may be attacked by any party, including the party calling the witness

**608 – Evidence of Character and Conduct of Witness**

- (a) – Opinion and reputation evidence may be used to show a witness' untruthful character
- (b) – Specific instances of conduct may be introduced only if:
  - Conduct reflects untruthful character
  - Probative value outweighs danger of unfair prejudice
  - Good faith basis for inquiry exists
  - Evidence is introduced on cross

**609 – Impeachment by Evidence of Conviction of Crime**

- Permits impeachment for prior *convictions* of a felony within 10 years by showing untruthful character
- Probative value must outweigh unfair prejudice (witness other than the accused)
- Crimes of dishonesty are automatically admissible (any witness)
- Excluded by pardon
- Juvenile adjudications generally are not admissible
- Appeal does not effect admissibility

**611 – Mode and Order of Interrogation and Presentation**

- Judge has control over the trial
- Leading questions prohibited on cross except when necessary to develop testimony, with a hostile witness, or witness is an adverse party
- Cross limited to subject matter of direct and credibility of witness
- Redirect limited to cross and recross limited to redirect

**612 – Writing Used to Refresh Memory**

- Witness unable to remember may refresh memory
- Opposing party may inspect writing, cross examine on the writing, and introduce certain parts into evidence relating to the testimony

**613 – Prior Statement of Witness**

- Inconsistent prior statements may be admitted
- Extrinsic evidence related to this statement is not admissible unless the witness is given an opportunity to explain or deny the statement and the opposing party is given an opportunity to interrogate the witness

**701 – Opinion Testimony by Lay Witness**

- Non expert witness testimony limited to opinions and inferences
- Rationally based on the perception of the witness
- Helpful to a clear understanding of the witness' testimony or determination of a fact in issue
- Not based on scientific or other specialized knowledge

**702 – Testimony by Experts**

- Testimony based on sufficient facts or data
- Testimony is the product of reliable principles and methods
- Witness has applied the principles and methods reliably to the facts of the case

**703 – Bases of Opinion Testimony by Experts**

- First hand knowledge of the expert
- Assumed facts that are in the record (typically a hypothetical question)
- Nonrecord facts if of a type reasonably relied upon by experts in the field
- May be based on data perceived by the expert
- Use of hearsay evidence raises confrontation issues in criminal proceedings

**704 – Opinion on Ultimate Issue**

- Testimony in the form of an opinion by an expert is admissible
- Cannot testify in respect to the mental state of a witness in a criminal case

**705 – Disclosure of Facts or Data Underlying Expert Opinion**

Disclosure of the underlying basis of the opinion need not precede the answer

**706 – Court Appointed Experts**

- (a) – Court or either party may ask for a show cause order regarding the expert witness, the court may appoint an expert witness that will be subject to cross by both parties
- (b) – Expert entitled to reasonable compensation
- (c) – Court has discretion to disclose to the jury the reason for the appointment
- (d) – This rule does not limit the parties in selecting their own expert

**801 – Hearsay – Definitions**

- (a) – A statement is an oral or written assertion or nonverbal conduct or a person if it is intended by the person as an assertion
- (b) – A declarant is a person who makes a statement
- (c) – Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted
- (d) – Hearsay exceptions
  - (1) – Prior statements – subject to cross
    - (A) – Inconsistent with testimony given under oath
    - (B) – Consistent statement used to rebut a charge of fabrication or improper influence or motive
    - (C) – One of identification of a person after perceiving the person
  - (2) – Admission by party opponent – statement offered against a party
    - (A) – A party's own statement in either an individual or representative capacity
    - (B) – A statement of which the party has manifested an adoption or belief in its truth

- (C) – A statement by a person authorized by the party to make a statement concerning the subject
- (D) – A statement by the party's agent concerning a matter within the scope of the employment, made during the existence of the relationship
- (E) – A statement by a coconspirator of a party during the course and in furtherance of the conspiracy

### **802 – Hearsay Rule**

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the S.Ct pursuant to statutory authority or by Cong.

### **803 – Hearsay Exceptions; Availability of Declarant Immaterial**

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

- (1) – Present sense impression – statement made describing event during or immediately after its occurrence
- (2) – Excited utterance – a statement relating to a startling event while the declarant was under the excitement of the event
- (3) – Then existing mental, emotional, or physical condition – may show intent, plan, motive, pain but cannot be a memory or belief (except with wills)
- (4) – Statements made for the purpose of medical diagnosis or treatment – medical history, past or present symptoms – pertinent to diagnosis or treatment
- (5) – Recorded recollection – record that shows witness once had knowledge – witness now has insufficient recollection – made when matter was fresh in witness's mind – may be read into evidence – received if offered by adverse party
- (6) – Records of regularly conducted activity – record made by person with knowledge if kept in the regular course of business and such records are a regular practice
- (7) – Absence of entry in records kept in accordance with (6)
- (8) – Public records and reports – activities of the office or agency, or matters observed where there was a duty to report (excluding criminal/police), or for civil actions – official investigation

### **804 – Hearsay Exceptions; Declarant Unavailable**

- (a) – Unavailability as a witness
  - Privilege
  - Refusal
  - Lack of memory
  - Physical or mental illness
  - Unable to procure testimony
- (b) – Not excluded by the hearsay rule if the declarant is unavailable as a witness
  - Former testimony – similar motive to develop testimony by direct, cross, or redirect
  - Statement under belief of impending death – homicide or civil action
  - Statement against interest – pecuniary or proprietary interests – criminal need corroborating circumstances

### **806 – Attacking and Supporting Credibility of Declarant**

If a party against whom a hearsay statement is admitted calls the declarant as a witness, that party may examine the declarant as if under cross-examination

### **807 – Residual Exception**

Judge has the authority to admit some evidence that does not fall under a hearsay exception if:

- The statement have “equivalent circumstantial guarantees of trustworthiness” as the exceptions in Rules 803 and 804
- The statement be offered as evidence of a material fact
- The statement be more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts
- The general purposes of the Federal Rules and the interests of justice be served by admission
- Notice be given to the other party

### **901 – Requirement of Authentication or Identification**

- (a) – Evidence must be authenticated
- (b) – Illustrations
  - Testimony of witness with knowledge
  - Nonexpert opinion on handwriting
  - Comparison by trier or expert witness
  - Distinctive characteristics and the like
  - Voice identification
  - Telephone conversations
  - Public records or reports
  - Ancient documents – condition seems authentic, place where it would seem authentic, 20+ years
  - Process or system
  - Methods provided by statute or rule

### **902 – Self-Authentication**

- Domestic public documents under seal
- Domestic public documents not under seal – official signature
- Foreign public documents – certification of genuineness
- Certified copies of public records
- Official publications
- Newspapers and periodicals
- Trade inscriptions
- Acknowledged documents
- Commercial paper
- Presumptions under acts of Cong.
- Certified domestic records of regularly conducted activity – See 803(6)
- Certified foreign records of regularly conducted activity

### **903 – Subscribing Witness’ Testimony Unnecessary**

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing

### **1001 – Contents of Writings, Recordings and Photographs – Definitions**

### **1002 – Requirement of Original**

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or act of Cong.

**1003 – Admissibility of Duplicates**

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original

**1004 – Admissibility of Other Evidence of Contents**

Original not required if:

- Originals lost or destroyed
- Original not obtainable
- Original in possession of opponent
- Collateral matters – not closely related to a controlling issue

**1005 – Public Records**

Admissible if certifiable under 902 – cannot be obtained otherwise by due diligence

**1006 – Summaries**

Large writings, recording or photos may be summarized and originals made available for examination

**1007 – Testimony or Written Admission of Party**

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party's written admission, without accounting for the nonproduction of the original

**1008 – Functions of Court and Jury**

Trier of fact must determine:

- Whether the asserted writing ever existed
- Whether the writing produced at trial is the original
- Whether other evidence of contents correctly reflects the contents

Otherwise the judge makes determinations

**Other hearsay exceptions**

- A statement offered to show its effect on the listener
- Statements that constitute verbal acts or operative acts because not offered for truth (contracts, liable, slander, threats)
- Verbal parts of acts – show statement was made

**Privileges**

**Physician/Patient**

**Marital**

**Reporter**