6 Morgan's Evidence Handbook
(For State of Major Trial Lawyers)

By Judge D. Morgan (Ret.)
Prof. University of Major Law School

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CHAPTER 1. OBJECTIONS—GENERAL RULES

I. RULE

To have an objection sustained or to preserve error on appeal if there is an adverse ruling, an objection should meet the following requirements:

1. A substantial right of a party must be affected—not harmless error, and
2. the objection should be made so that:
    a. if the objection is to the admission of evidence, it should be timely made or accompanied by a motion to strike in State a specific ground, or
    b. if the objection is to the exclusion of evidence, it should be accompanied by an offer of proof unless the nature of the evidence is apparent from the question asked. Rule 103(a).

II. APPLICATION OF THE RULE

A. Criminal Case

In a criminal case, the defense's failure to object or move to exclude the evidence from this trial will not bar the appellate court from considering

fundamental error that denied the defendant a fair trial and errors that affect fundamental constitutional rights. *State v. McHenry*, 190 Maj.2d 313, 320 (20XX-4).

B. Timeliness of Objection

An objection is not timely if made after the answer unless there was no opportunity to object or it was not apparent from the question that the answer would be inadmissible. To preserve the error for appeal, a late objection should be coupled with a motion to strike. *State v. Galileo*, 192 Maj.2d 105 (20XX-4).

C. Limiting Instruction

If evidence is admissible for one purpose but inadmissible for another purpose, a request for the court to instruct the jury concerning the proper scope of the evidence should be granted. Rule 105.

> Instruction Form: "Evidence has been introduced in this case on the subject of_____. You must not consider this evidence (for any other purpose) (for the purpose of _____)."

D. Motion in Limine

Rather than risk that the jury might hear inadmissible evidence and rely upon an objection and motion to strike at the time of the offering of the evidence, it is good practice to anticipate the offer and move to have the court prohibit counsel and his witnesses from mentioning the expected evidence. Rule 103(c) and *State v. Brookings*, 881 Maj.2d 13, 15 (20XX-7). Example: defense motion in limine to prevent the prosecutor and witnesses from mentioning the defendant's inadmissible prior convictions.

E. Hearing by the Jury

Rule: To the extent practicable, the jury should be protected from hearing inadmissible evidence. This includes: offers of proof; statements, and questions. Rule 103(c).

Practice: Depending upon the court's preference, you may request a bench conference with the judge or ask that the jury be excused in order to prevent the jury hearing potentially inadmissible evidence.

F. Just Result

In making or meeting objections, counsel should keep in mind Rule 102, dealing with the purpose and construction of Major Rules of Evidence. Rule 102 grants the trial judge discretion to construe the rules in such a way as to reach a just result. The rules are not to be applied mechanically.

CHAPTER 2. RELEVANCE AND ITS BOUNDARIES

I. RELEVANT EVIDENCE—RULES 401, 402, AND 403

A. Another Person Committed the Crime

State v. O'Neill, 199 Maj.2d 32, 66-77 (20XX-2), examined the question of the admissibility of other suspect evidence and quoted *State v. Mak*, 718 P.2d 407 (1986), as follows:

> Before a defendant can introduce evidence connecting another person with the crime charged, a proper foundation must be laid. The rule stated in *State v. Downs*, 168 Wash. 664, 667, 13 P. 2d 1 (1932):
>
> > Before such testimony can be received, there must be such proof of connection with the crime, such a train of facts or circumstances as tend clearly to point out someone besides the accused as the guilty party.
>
> The rationale for this rule is perhaps best explained in a California case, *People v. Mendez*, 193 Cal. 39, 52, 223 P. 65 (1924), . . .
>
> > It seems to us that there is a sound basis for this rule and that it rests fundamentally upon the same consideration which led to the early adoption of the elementary rules that evidence to be admissible must be both relevant and material. It rests upon the necessity that trials of cases must be both orderly and expeditious, that they must come to an end, and that it should be a logical end. To this end it is necessary that the scope of inquiry into collateral and unimportant issues must be strictly limited. It is quite apparent that if evidence of motive alone upon the part

> of other persons were admissible, that in a case involving the killing of a man who had led an active and aggressive life it might easily be possible for the defendant to produce evidence tending to show that hundreds of other persons had some motive or animus against the deceased; that a great many trial days might be consumed in the pursuit of inquiries which could not be expected to lead to any satisfactory conclusion.

II. EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF UNFAIR PREJUDICE, CONFUSION, OR WASTE OF TIME—RULE 403

A. "Unfair Prejudice"

Rule 403 requires the trial judge to conduct a balancing test. In the end, for evidence to be admissible the probative value of that evidence must be substantially outweighed by unfair prejudice. *Scales v. Wait*, 109 Maj.2d 212, 245 (20XX-35), defined the term "unfair prejudice" as follows:

> "Unfair prejudice" is that prejudice that is caused by evidence that is more likely to bring about an emotional rather than a reasoned decision by the fact finder.

B. Gruesome Photographs

In *State v. Gapping*, 180 Maj.2d 345, 354 (20XX-8), the Major Supreme Court observed, "We have stated that photographs are not inadmissible simply because they are gruesome or depict the brutality and viciousness of the crime." The Court upheld the trial court's ruling admitting gruesome photographs of the victim's wounds because they were probative on the self-defense issue and on whether the State had proven the "serious bodily injury" element of aggravated assault. Also, in the decision, the Major Supreme Court cautioned prosecutors as follows:

> We do not approve of prosecutors using cumulative and inflammatory photographs. Both the court and the prosecutor should use judgment and not introduce unnecessary and inciting evidence.

C. Character Evidence—Rule 404 and 405

1. Criminal Defendant's Character Trait

While Rule 404(a) prohibits the introduction of evidence of a person's character or character trait to prove that the person acted in conformity with that trait, 404(a)(1) provides an exception for criminal defendants. An accused in a criminal case may introduce evidence of "pertinent trait of character." The prosecution may then rebut that evidence. To be pertinent, the character trait must disprove the charged crime, such as an opinion that the defendant is a peaceful person would refute an assault charge. For instance, *United States v. Hewitt*, 634 F.2d 277 (5th Cir. 1981), held:

> To the extent, however, that the evidence proffered by Hewitt would establish his character as law-abiding citizen, it stands on a different footing. Such evidence is always relevant, see 1 Wigmore, Evidence § 55 (3d ed. 1940), and may be introduced whether or not the defendant takes the stand. See *Darland v. United States*, 5 Cir. 1980, 626 F.2d 235, 1238. The leading case on character evidence in criminal trials, *Michelson v. United States*, 1948, 335 U.S. 469, 69 S. Ct. 213, 93 L. Ed. 168, as well as our recent decision in *Darland*, controlling here, both held that the defendant had a right to establish the character trait of being a "law abiding citizen".

On the other hand, if the trait is not pertinent, the evidence is inadmissible as the Major Supreme Court held in *State v. Yuk*, 172 Maj.2d 10, 13 (20XX-10), "Defendant's character trait of honesty is not pertinent to the charge of assault whereas peacefulness is."

2. Specific Acts

Under Rule 405(b) if character is "an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct." Application of the essential element rule is rare and an exception to the general rule. In *Menda v. Prevarac*, 194 Maj.2d 114, 121 (20XX-3), plaintiff sued for libel alleging that Prevarac falsely accused her of being a "two-bit liar." The Major Supreme Court held:

> While specific acts of conduct may not be introduced into evidence to prove a person's character, the trial court here correctly allowed the defendant to respond with specific acts proving her truthfulness under the "essential element rule."

3. Opinion or Reputation

Testimony about a person's character may take the form of opinion or reputation. If the testimony is to reputation, the Major Supreme Court long ago established the formulaic foundation in *Rout v. Tine*, 15 Maj. 78, 85 (20XX-95), as follows:

> The correct manner of interrogating a character witness must follow this format:
>
> Q. Do you know the general reputation of the defendant in the community in which he lives for [fill in the specific trait, such as morality]?
> A. Yes. [If no, questioning is concluded.]
> Q. What is it—good or bad? [Nothing more may be added.]

Since the time of the *Rout* decision, our state Supreme Court has clarified what it meant by "the community." In *State v. Roomor*, 180 Maj.2d 225, 234 (20XX-8), it stated, "The community in which he lives is not to be taken literally. Rather, it should be a group of persons in general and neutral. For example, the person's reputation within the person's own family would not be admissible."

4. Cross-Examination

a. Cross on Specific Instances

On cross-examination of a defendant's character witness, inquiry is allowed into specific instances of misconduct under Rule 405(a). The purpose of this line of cross is to impeach the witness by showing lack of knowledge or to call into question the standard the witness is employing. The vilification of the person whose character is in issue under the guise of testing the character witness's testimony against community reports is error. *State v. Snypes*, 156 Maj.2d 173, 184 (20XX-18). *Snypes* held, "The specific incident of the defendant's misconduct must relate to the character trait about which the witness testified." And in *United States v. Williams*, 738 F.2d 172 (7th Cir. 1984), the prosecutor asked character witnesses for the accused about the facts of the case on which the accused was on trial, and the U.S. Court of Appeals held:

> The cross-examination of appellant's character witnesses was neither an inquiry into specific instances testing the witnesses' knowledge nor exposure of the witnesses' bias as contemplated by the Federal Rules. See supra notes 6 & 7. The questioning allowed the prosecution to foist its theory of the case repeatedly on the jury and to force an unsuspecting witness to speculate on the effect of a possible conviction. Other courts have held that this line of questioning is error because it assumes away the presumption of innocence.

b. Good-Faith Basis

In *State v. Yuk*, 172 Maj.2d 10, 15 (20XX-10), the State of Major Supreme Court held:

> A cross-examiner who seeks to impeach by asking the character witness whether he/she has heard of the specific act of misconduct by the defendant must have a good-faith basis for asking the question. If objection is raised, the examiner must make an offer of proof of the factual basis.

5. Rebuttal

The prosecution may call a character witness to testify to the defendant's bad reputation in rebuttal. However, if a character witness called by the accused has on cross denied hearing of the accused misconduct, the prosecution may not introduce extrinsic evidence to the contrary in rebuttal, but instead must "take the witness's answer."

D. Evidence Not for Propensity—Rule 404(b)

State v. Ward, 161 Maj.2d 333 (20XX-16), laid out the foundational requirements that must be met before misconduct evidence may be introduced under Rule 404(b) as follows:

> The trial court must make three preliminary findings. First, the trial court must find by a preponderance of evidence that the bad acts, other than the crime charged, occurred. On this issue we agree with the appellant and impose a higher burden of proof than *Huddleston v. United States*, 485 U.S. 681 (1988), which calls only for evidence sufficient for the jury to conclude the act occurred and that the defendant committed the act. Second, the trial court must find the evidence materially relevant to an identifiable, legitimate purpose. Third, under MER 403, the trial court must balance the unfair prejudicial effect of the evidence against its probative value.

E. Habit Evidence, Routine Practice—Rule 406

Reo v. Cur, 197 Maj.2d 57, 63 (20XX-2), held:

> It is important to distinguish character evidence, which is inadmissible unless an exception under our evidence rules is satisfied, from routine practice evidence, which is admissible under Rule 406. Character evidence tends to describe a person's disposition, such

as honesty. By contrast, the following factors indicate routine practice: (1) specific conduct frequently engaged in by the person or organization, and (2) the number of instances in which the practice is followed is large enough that it is unlikely to have been varied from on a single occasion.

CHAPTER 3. HEARSAY

FORM: "Objection. Hearsay."

I. RULE

Hearsay and hearsay within hearsay are inadmissible unless within an exception provided by evidence, other court rules, or statute. Rules 802 and 805.

A. Reason for Rule

Because the person who made the statement was not subject to cross-examination when he or she made the statement, hearsay is inadmissible.

B. Definition—What Is Hearsay?

Two-pronged test:

1. An out-of-court (a) oral or written statement, or (b) nonverbal conduct if it is intended by the declarant (person who made the statement or act) as an assertion, and
2. Offered to prove the truth of the matter stated (offered to prove what the statement says). Rule 801(a)-(c).

C. Self-Serving Hearsay

EXAMPLE: In a criminal case, the defense tries to avoid subjecting the defendant to cross-examination by introducing the defendant's out-of-court exculpatory statements to a police.

ANOTHER EXAMPLE OF HEARSAY: A witness testifies that another person pointed a finger if the finger-pointing conduct was intended as an assertion.

II. APPLICATION OF THE RULE

A. Failure to Object

The trier of fact or appellate court may consider hearsay for its probative value if it is admitted without objection. J. Mitchell, 5 Major Prac. Section 53. An objection made at trial must be specific to preserve the error for appeal. For instance, the Major Supreme Court would not consider a complaint that an offer of evidence was not within the admission exception to the hearsay rule where this hearsay objection was not made at trial. *State v. Brag*, 183 Maj.2d 345 (20XX-7).

B. Bench Trial

When the trial has been to a judge, the appellate court will assume that hearsay was disregarded in reaching a decision. *In re Olson*, 180 Maj.2d 46 (20XX-8).

C. Proceedings Where Hearsay Is Admissible

The evidence rules provide that there are several types of proceedings where the court need not apply the hearsay rule. Rule 1101(d), such as a preliminary fact determination under Rule 104 and various administrative hearings.

III. NON-HEARSAY

A. Rule

The definition of hearsay in Rule 801(a)-(d) establishes what is non-hearsay. Non-hearsay is admissible as substantive evidence, as opposed to, for instance, prior inconsistent statements, which are admissible only to affect the witness's credibility.

B. State of Mind

Some out-of-court statements are admissible to show circumstantially the state of mind of the declarant (person who made the statement) or of the person who heard the statement when the state of mind is at issue. The

out-of-court statement is offered to prove the state of mind in issue, and not to prove the truth of the matter stated. Rule 801(a)-(d) and J. Mitchell, 5 Major Prac. Section 383.

1. Limiting Instruction

The party adversely affected may request an instruction to limit the use of the evidence, such as evidence to proof of mental state. J. Mitchell, 5 Major Prac. Section 383.

2. Examples of Statements Offered to Prove Declarant's State of Mind

- Threats of defendant to show motive for assault, and
- When insanity is the defense, the defendant's out-of-court statements may be admissible to show his mental state.

C. Operative Fact

An out-of-court statement or assertive act that must be proved to establish a case or defense is an operative fact, also referred to as having "independent legal effect," and non-hearsay. It is offered to prove that something was said or done and not to prove the truth of the statement. Rule 801(a)-(c).

Examples

- Proof that a defamatory statement was made is admissible in a defamation case.
- Statements establishing a contract in a contract case.

D. Prior Inconsistent Statement Under Oath

1. Rule

A prior inconsistent statement or assertive conduct is non-hearsay and admissible as substantive evidence if

a. the declarant (person who made the statement) testifies at the hearing and is subject to cross-examination;
b. the prior statement is inconsistent with his testimony;

c. the prior statement was made at a trial, hearing, deposition, or other proceedings; and
d. it was made subject to a perjury penalty. Rule 801(d)(1)(A).

2. Reason for the Rule

The prior statement was made under such circumstances as to be reliable.

E. Prior Consistent Statement

Rule

A prior consistent statements or assertive conduct is not hearsay and is admissible as substantive evidence if

a. the declarant testifies and is subject to cross-examination;
b. the prior statement or act is consistent with the witness's testimony; and
c. is offered to rebut an express or implied allegation of recent fabrication or improper influence or motive. Rule 801(d)(1)(B).

F. Prior Statement of Identification

1. Rule

A prior statement or assertive conduct indicating identification is non-hearsay and admissible as substantive evidence if the declarant testifies and is subject to cross-examination. Rule 801(d)(1)(C).

2. Examples

- A witness testifies that prior to trial she picked the defendant out of the lineup.
- A witness testifies that prior to trial he identified the defendant's clothing. *State v. Orgon*, 163 Maj.2d 290 (20XX-16).

G. Admissions of Party-Opponent

1. By a Party Rule

A statement or assertive conduct by a party in his or her individual or representative capacity and offered against him or her is non-hearsay and admissible as substantive evidence. Rule 801(d)(2)(A).

2. Adoptive Admission Rule

A statement or assertive conduct of which a party has manifested his adoption or belief in its truth and that is offered against him is non-hearsay and admissible as substantive evidence. Rule 801(d)(2)(B).

3. Admission by Authorized Person Rule

A statement or assertive conduct of a person authorized by party to make the statement on the subject and that is offered against the party is non-hearsay and admissible as substantive evidence. Rule 801(d)(2)(C).

Impeachment of a Person Authorized: Under Rule 806, the credibility of the authorized speaker may be impeached as though she had testified, except there is no requirement that she be afforded a chance to explain or deny inconsistent statements.

a. Admission by Agent

A statement or assertive conduct of a person by an agent or servant is non-hearsay and admissible as substantive evidence if (1) it is offered against the party, and (2) the agent or servant was acting within the scope of his or her authority to make this statement for the party. Rule 801(d)(2)(D).

Impeachment of the Agent or Servant: Under Rule 806, the agent may be impeached as though he had testified except that he need not be afforded the opportunity to explain or deny inconsistent statements.

b. Coconspirator

A statement or assertive conduct by a coconspirator of a party is non-hearsay and admissible as substantive evidence if it (1) is offered against the party, (2) was made during the course of the conspiracy, and (3) was made in furtherance of the conspiracy. Rule 801(d)(2)(E).

Impeaching the Coconspirator: Under Rule 806, when a hearsay statement of a coconspirator is admitted into evidence, that coconspirator's credibility may be impeached as though the coconspirator had testified, except that there is no requirement that the coconspirator be afforded the opportunity to explain or deny the inconsistent statement.

IV. HEARSAY EXCEPTIONS—AVAILABILITY OF DECLARANT IMMATERIAL

Rule 803 sets forth 23 exceptions to the hearsay rule where the statement or assertive conduct in question is not excluded by the hearsay rule and there is no requirement that the declarant be proven to be unavailable.

A. Present Sense Impression

1. Rule

A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter is not excluded by the hearsay rule, and there is no requirement that the declarant be proven unavailable. Rule 803(1).

2. Example

A witness testifies that an unidentified person standing next to the witness at the time of the accident said, "That car ran the red light."

B. Excited Utterances

1. Rule

A statement relating to a startling event or condition made while the declarant was under stress of excitement caused by the event or condition is not excluded by the first hearsay rule, though the declarant cannot be shown to be unavailable. Rule 803(2).

2. Model Evidentiary Foundation—Excited Utterance

PROSECUTOR:

Q: [The prosecutor begins by laying the foundation that establishes the startling event—the collision and that the officer spoke to the witness within a short time after the collision.] Officer Dramas, what did you see when you arrived at the intersection of Eastlake Avenue and University Way?

A: An Acura was in the middle of the intersection with its front fender embedded in the passenger door of a Prius. Two other patrol cars were already there. Officers were directing traffic. EMTs were tending to a person I later learned was the passenger in the Prius.

Q: Did you speak to a Ms. Whitt?

A: Yes, I did.

Q: Where was she when you spoke to her?

A: On the northwest corner of the intersection.

Q: [Establishing that she was startled or excited.] Could you describe how she appeared to you?

A: She was upset and her voice was shaky.

Q: Can you tell us whether or not you spoke to her about what happened?

DEFENSE COUNSEL: Objection. Hearsay.

PROSECUTOR: Excited utterance, Your Honor.

JUDGE: Overruled. Officer, you may answer.

A: Ms. Whitt said she saw the light was red and the Prius was making a left turn when the Acura ran the light and hit the Prius on the passenger-side door.

C. Then-Existing Mental, Emotional, Physical Condition

1. Rule

The declarant's statement explaining or describing the then existing state of mind, emotion, sensation, or physical condition, such as intent, plan, motive, design, mental feeling, pain, and bodily health, are not excluded by

the hearsay rule, and it is not necessary to prove the declarant unavailable. But such statements may not include a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant will. Rule 803(3).

2. Distinction from Non-Hearsay

This exception can easily be confused with the state-of-mind and non-hearsay rule. While this exception covers statements offered for truth, the non-hearsay rule covers statements not offered for the truth, such as to circumstantially prove state of mind. J. Mitchell, 5 Major Prac. Section 472.

3. Types of Statements Governed by the Rule

a. **Declaration of symptoms and other statements to physicians:** Statements of the declarant's present pain and suffering (not memory of past suffering) is admissible. J. Mitchell, 5 Major Prac. Section 472.
b. **Declaration of present mental state at issue:** A statement of intent at the time of an act is admissible to prove intent when intent is at issue. J. Mitchell, 5 Major Prac. Section 463.
c. **Declaration of present mental state to prove act:** The declarant's statement of a plan to do an act is admissible to prove she probably did the act. J. Mitchell, 5 Major Prac. Section 474.

D. Statement for Medical Treatment or Diagnosis

Rule

Statements made for the purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as "reasonably pertinent" to diagnosis or treatment are not excluded by the hearsay rule and are admissible as substantive evidence, and it is not necessary to prove the declarant is unavailable. Rule 803(4). Generally, identification of a person who was at fault for an injury, such as the name of the driver who hit a party in a cross-walk, is not considered "reasonably pertinent" to satisfy Rule 803(4).

E. Past Recollection Recorded

1. Form of Objection

"Objection. Insufficient foundation to read the document."

2. Rule

A memorandum or record may be read into evidence (it may not be received as an exhibit unless offered by an adverse party) and is not excluded by the hearsay rule if

a. the memorandum or record concerned a matter about which the witness once had knowledge;
b. the witness now has insufficient recollection to enable the witness to testify fully and accurately;
c. the item was made or adopted by the witness when the matter was fresh in the witness's memory; and
d. the item reflects the witness's knowledge accurately. Rule 803(5).

3. Related Rule—Refreshed Recollection

a. Form of Objection

"Objection. Insufficient foundation in that there is no showing that the witness needs to refresh her memory."

b. Rule

A witness may use a writing to refresh the witness's memory if a foundation is laid that the witness needs to refresh her recollection. If after the witness refers to the writing, she has an independent recollection, then she may testify. The writing is inadmissible if offered by the party that called the witness. Rule 612 and J. Mitchell, 5 Major Prac. Section 262.

c. Next Step—Recollection Recorded

If the witness, who has referred to the writing, still does not have an independent recollection or cannot testify fully and accurately, the party who called the witness may be able to introduce the writing into evidence under the recollection recorded exception to the hearsay rule. Rule 803(5).

d. Rights of Adverse Party

When a witness has refreshed memory for the purpose of testifying, either before or during testimony, the adverse party has the following rights:

a. to inspect the writing;
b. to cross-examine concerning the writing; and
c. to read the writing into evidence.

Under Rule 612, the adverse party may only use the writing to attack credibility.

e. Model Evidentiary Foundation—Past Recollection Recorded

PLAINTIFF'S COUNSEL IN A NEGLIGENCE CASE:

Q: [Defense counsel elicits testimony to show that the witness had knowledge of the event.] Ms. Whitt, have you ever witnessed a collision?

A: Yes, I once saw a car run a red light and crash into the passenger door of another car.

Q: Where did that happen?

A: Intersection of Eastlake Avenue and University Way.

Q: When did this happen?

A: I'm sorry. It was a couple years ago now. I don't recall the date.

Q: Can you describe the makes of the cars?

A: I really can't help you there. I can't remember the types of cars.

Q: Do you recall giving a written statement to the police about what happened?

A: Yes.

Q: Would it refresh your memory if you looked at that statement?

A: It might.

[After having the clerk mark a document as an exhibit and give it a number for identification, showing the exhibit to opposing counsel, and gaining the judge's permission to approach the witness, the counsel shows the

witness the exhibit. Counsel at this point is attempting to refresh the witness's recollection.]

Q: Handing you Plaintiff's Exhibit 11. Do you recognize it?

A: Yes, it's the statement that I wrote for the police that day.

Q: Will you read the statement to yourself and let me know when you are done?

A: I'm finished.

Q: Could you hand me the exhibit. [Witness does.] Thank you. Did reading the statement refresh your memory so that you can tell us the date and the makes of the cars independent from the statement?

A: Can't say I can. I can only tell you what I just read.

Q: [Counsel now knows that the witness lacks current personal knowledge of the date of the collision and the makes of the cars, and begins laying a foundation to introduce the statement as a past recollection recorded by establishing the statement was accurate when made.] Can you tell us whether or not the statement correctly states what you knew of the collision?

A: Oh, it's correct. I wrote it.

PLAINTIFF'S COUNSEL: Offer Plaintiff's Exhibit 11.

DEFENSE COUNSEL: Your Honor, may I voir dire the witness regarding her recollection?

JUDGE: You may.

DEFENSE COUNSEL:

Q: Ms. Whitt, besides not being able to recall the date and makes of the cars, do you remember the rest of what happened?

A: Oh, yes. I remember what happened.

DEFENSE COUNSEL: Your Honor, no objection to reading the date and makes of the cars from the statement. But the witness has an independent recall of the rest of what happened and we object to the rest of the statement as hearsay.

JUDGE: What's the state's position?

PROSECUTOR: We agree.

JUDGE: Very well. The witness may read out loud those portions of the statement indicating the date and makes of the vehicles, and only those parts.

F. Record of Regularly Conducted Activity

Rule

"A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method of circumstances or preparation indicate a lack of trustworthiness. The term 'business' as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether not conducted for profit." Rule 803(6).

G. Business Records

1. Form of Objection

"Objection. The exhibit is not qualified as a business record."

2. Rule

Business records are not excluded by the hearsay rule. Rule 803(6). Major Rule of Evidence 803(6), to ensure reliability of such business records, imposes the following requirements for admissibility:

a. The evidence must be in the form of a report, record, or data compilation;
b. Evidence must be of an act, condition, event, opinion, or diagnosis;
c. The record must be made in the regular course of business;
d. The record must be made at or near the time of the act, condition, or event;
e. The information must be by or from a transmission of a person with knowledge;

f. It must be kept in the course of a regularly conducted business activity;
g. The business includes business, institution, association, profession, occupation, and calling of any kind, whether for money or not; and
h. These things must be shown by the testimony of the custodian or other qualified witness or with certification complying with Rule 902(11), 902(12) or a statute permitting certification, unless the source or method or circumstances of preparation show a lack of trustworthiness. *Strat v. Various, Inc.*, 280 Maj.3d 14 (20XX-4).

3. Qualified Witness

It is unnecessary to call as a witness the person who prepared the record or to show that the preparer is unavailable, so long as the record is produced by a custodian or other witness qualified to testify about the manner of the preparation of the record (be able to lay the foundation required under MRE 807. *State v. Harp*, 194 Maj.2d 900 (20XX-3).

4. Hospital Business Records

Hospital records are admissible under Rule 803(6) subject to these conditions:

a. Diagnostic Opinions

A doctor's opinion, recited in the business record, is not admissible if:

1) It is not based on observations and not supported by the record, or
2) The opinion is controversial. J. Mitchell, 5 Major Prac. Section 513.

b. Statements of Patient

Statements made for the purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, or sensations or the inception of general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment are not excluded by the hearsay rule. MRE 803(4). Because patients do not work for the hospital, they are not covered by this Rule 803(6) hearsay exception. The patient's statement raises a second-level hearsay issue, MRE 805, which is satisfied by being a statement for the purposes of medical diagnosis. MRE 803(4).

5. Business Records

Model Evidentiary Foundation—Jewelry Store Business Records

PLAINTIFF'S COUNSEL:

Q: Mr. Cratchit, are you employed?

A: Yes, I am the office manager for Carroll's Jewelry Store here in Ruston.

Q: In general, what are your duties as the office manager?

A: I report to and do what the store owner wishes done. I keep the books, maintain the files and records of the business, and on occasion help out with customers in the store.

Q: You said that you maintain the files and records of Carroll's Jewelry store. In that capacity, is it correct or not that you are thoroughly familiar with the records and files of the store?

A: I've been with Carroll's for 15 years, and when I was hired, I redid the store's record-keeping system, and I have updated it since then, obviously. I know it backwards and forwards.

[After having the clerk mark a document as an exhibit and give it a number for identification, showing the exhibit to opposing counsel, and gaining the judge's permission to approach the witness, the counsel shows the witness the exhibit.]

Q: Please, could you tell us, Mr. Cratchit, whether you recognize what the clerk has marked for identification as Plaintiff's Exhibit 18?

A: Yes, I recognize it.

Q: Can you tell us what it is?

A: It is our copy of a receipt.

Q: How do you recognize it?

A: Well, I took this from our files. It bears the name of our business across the top—"Carroll's Jewelry." It has the signature of Bob Tim, one of the store's salespeople, at the bottom. I know his handwriting.

Q: So, this receipt was created by or from someone with knowledge of this transaction?

A: Yes, Bob Tim.

Q: To your knowledge, do you know when this receipt was prepared?

A: The way it works is that a receipt is prepared when the sale is made and the jewelry is given to the customer.

Q: Can you tell us whether this receipt was made in the regular course of Carroll's Jewelry Store's business?

A: It was.

Q: Your Honor, we offer Plaintiff's Exhibit 18.

JUDGE: Any objections?

OPPOSING COUNSEL: No.

JUDGE: Plaintiff's Exhibit 18 will be admitted into evidence.

Q: What does this receipt record show?

A: It shows that Lucile Benton received a diamond broach from Carroll's in exchange for $25,000 on May 19, two years ago.

6. Absence of Entry

Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of MRE 803(6) to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness is not excluded by the hearsay rule. Rule 803(7).

7. Other Exceptions

Rule 803 states that the following are not excluded by the hearsay rule, even though the declarant is available as a witness.

a. Public records and reports and absence thereof: public records, and the absence of public records, are not excluded as hearsay. Rule 803(8) and (9).

b. Records of vital statistics: records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was

made to a public office pursuant to the requirements of law. Rule 803(9).

c. Record of documents affecting an interest in property: The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of public office and an applicable statute authorized the recording of documents of that kind at that office. Rule 803(14).

d. Statement of documents affecting an interest in property: A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document. Rule 803(15).

e. Statements in ancient documents: Statements in a document in existence 20 years or more whose authenticity is established. Rule 803(16).

f. Market report, commercial publications: Market quotations, tabulations, lists, directories, other published compilations generally used and relied upon by the public or by persons in particular occupations. Rule 803(17).

g. Learned treatises: To the extent called to the attention of an expert witness on cross-examination or relied upon by her in direct examination, statements contained in published treatises, periodicals, pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority or by testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits. Rule 803(18).

h. Reputation concerning boundaries or general history: Reputation in the community, arising before the controversy, as to boundaries or of customs affecting lands in the community, and reputation as to advance of general history important to the community or state or nation in which located. Rule 803(20).

i. Reputation as to character: Reputation of a person's character among his or her associates in the community. Rule 803(21).

j. Judgment of previous conviction: Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), judging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered for the

prosecution in a criminal case for purposes other than impeachment, judgments against persons, other than the accused. The tendency of an appeal may be shown but does not affect admissibility. Rule 803(22).

k. Judgment as to personal, family, or general history, or boundaries: Judgments as proof of matters of personal, family, or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation. Rule 803(23).

V. HEARSAY EXCEPTIONS—DECLARANT UNAVAILABLE

Rule 804 establishes for exceptions to the hearsay rule that require proof that the declarant is unavailable before the hearsay statement is admissible.

A. "Unavailability as a Witness" Defined

1. Definition

Rule 804(a) indicates that a witness will be considered unavailable under the following five different situations:

a. **Exempted by privilege:** The declarant is exempted by ruling of the court on the grounds of privilege from testifying concerning the subject matter of the statement. Rule 804(a)(1).

   Example: A declarant claims an attorney-client privilege as to all testimony being sought. The court then finds the witness is unavailable, and the court admits the witness's former testimony.

b. **Refusal to testify:** The declarant persists in refusing to testify concerning the subject matter in her statement despite an order of the court to do so. Rule 804(a)(2).

c. **Lack of memory:** The declarant testifies to a lack of memory of the subject matter of his statement. Rule 804(a)(3).

   Voir dire of witness: If the witness claims she does not recall, the opposing party may request to inquire of the witness before the hearsay is admitted. The adverse party may attempt to discredit the witness's claim of memory failure. The court has discretion to refuse the hearsay if the judge does not accept the witness's claimed lack of memory. J. Mitchell, 5 Major Prac. Section 305.

d. **Death, physical, or mental illness:** The declarant is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity. Rule 804(a)(4).

e. **Absent from hearing:** The declarant is absent from the hearing and the proponent of her statement has been unable to procure her attendance or in the case of a hearsay exception under Rule 804(b)(2), (3), or (4), her attendance or testimony by process or other reasonable means. Rule 804(a)(5).

2. Forfeiture Wrongdoing

If the unavailability of the witness is the product of the wrongdoing by the party who offers the hearsay, the hearsay statement of the witness will be admissible. Rule 804(6).

3. Necessary Efforts to Make Witness Available

A prosecutor must make stringent efforts to make the testimony of the prosecution's witness available because the defendant has a constitutional right to confront his accusers under the Sixth Amendment. *Page v. Barber*, 166 Maj.2d 132 (20XX-15).

The defendant in a criminal case and parties to a civil suit need not make such a strong showing of an effort to obtain the witness's testimony.

B. Former Testimony

Rule

Under Rule 804(b)(1) prior testimony of the declarant given as witness is not excluded by the hearsay rule if the following conditions are met:

1. The declarant is unavailable as a witness;
2. The testimony was given at another hearing of the same or different proceedings or in a deposition taken in compliance with law in the course of the same as another proceedings;
3. The party against whom the testimony is offered, or in a civil action or proceedings, predecessor in interest, has an opportunity similar and similar motive to develop the testimony by direct, cross or redirect examination;
4. In criminal cases only, the defendant was present and had an opportunity for cross-examination, and

5. The person who is to reproduce the evidence of the former testimony will state, under oath, that he heard, remembers, and can relate the substance of all of the testimony of the absent witness. Generally, the evidence is brought in through a certified copy of the transcript.

C. Dying Declaration

Rule

Dying declarations both of the fact and opinion will not be excluded by the hearsay rule if the following conditions are met:

1. The declarant is unavailable as witness (in a civil case, the declarant may be unavailable for reasons other than death);
2. The statements are offered either in a homicide case or a civil action or proceeding;
3. A statement concerned that cause or circumstances of what the declarant believed to be impending death, and
4. When the declarant made the statement, the declarant believed death was imminent. Rule 804(b)(2).

D. Declaration Against Interest

Rule

Under Rule 804(b)(3), a declaration against interest is not excluded by the hearsay rule if the following conditions are met:

1. The declarant is unavailable as a witness;
2. A reasonable person in the declarant's position would not have made the statement unless the person believed it to be true, and
3. The statement was against one of the following interests:
   a. pecuniary;
   b. proprietary;
   c. against subjecting that person to civil liability or render it an invalid claim by the person against another; or
   d. penal—would tend to subject the declarant to criminal liability.

Additional conditions for admissibility: If the defendant or prosecution offers a statement against penal interest, the statement is only admissible if cor-

roborating circumstances clearly indicate the trustworthiness of the statement. *State v. Bosch*, 193 Maj.2d 55 (20XX-3).

CHAPTER 4. SIXTH AMENDMENT CONFRONTATION CLAUSE

I. SIXTH AMENDMENT AND HEARSAY

The Sixth Amendment's Confrontation Clause states, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." Like the hearsay rule, the Confrontation Clause is aimed at keeping certain out-of-court statements out of evidence and affording a party the opportunity to challenge the witness face to face. However, the protections of the Confrontation Clause are only available to a defendant in a criminal case.

If the out-of-court statement is non-hearsay or falls under one of the hearsay exceptions, it may still be admissible under the Confrontation Clause. And vice versa—if the statement is admissible under the Confrontation Clause, it may still be inadmissible because it is hearsay and does not fall under one of the hearsay exceptions.

In recent years, the U.S. Supreme Court has expanded jurisprudence regarding the Confrontation Clause in a series of cases—*Crawford*, *Davis*, *Giles*, and *Bryant*—discussed below.

II. TESTIMONIAL VS. NONTESTIMONIAL

In *Crawford v. Washington*, 124 S. Ct. 1354 (2004), Michael Crawford was charged with assault and attempted murder for stabbing a man who allegedly tried to rape his wife. At Crawford's trial, his wife's tape-recorded statement was played for the jury in an effort to prove that the stabbing was not in self-defense. The wife was barred from testifying by the marital privilege in the State of Washington.

The U.S. Supreme Court in *Crawford* held that an out-of-court testimonial statement by a defendant is inadmissible against the defendant in a criminal trial if the witness to the statement is unavailable because to admit it would violate the defendant's Sixth Amendment right to confront witnesses against him. The testimonial statement would only be admissible if the defendant had a prior opportunity to cross-examine the witness. The Court found that

the wife's statement was testimonial because it was taken by police officers in the course of an interrogation. *Id.* at 1365.

The *Crawford* decision relied on an historical analysis and left the more comprehensive definition of "testimonial" for later, as follows:

> Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does Roberts, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of "testimonial." Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.

Id. at 1374.

Crawford was followed by *Davis v. Washington*, 126 S. Ct. 2266 (2006), which involved a nontestimonial 911 call. The Supreme Court held:

> Without attempting to produce an exhaustive classification of all conceivable statements—or even all conceivable statements in response to police interrogation—as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Id. at 2273-74.

In *Michigan v. Bryant*, 131 S.Ct. 1143 (2011), the Supreme Court expanded the scope of what constitutes an "ongoing emergency" to where a gun was involved. The Court saw police questioning of a gunshot victim concerning the identity of the assailant as nontestimonial because an at-large assailant with a gun is a threat to police and other victims. In general, the determination as to whether or not a particular statement is testimonial is to be resolved by looking at all the circumstances and the perspectives of all participants, the police and the declarant alike.

III. FORFEITURE BY WRONGDOING

A. Intent to Prevent the Witness from Testifying

If the criminal defendant wrongfully caused the witness to be unavailable for trial, can the defendant successfully assert his right to confrontation to exclude an out-of-court statement by that witness? In *Giles v. California*, 128 S. Ct. 2678 (2008), the defendant was convicted of first degree murder for shooting his ex-girlfriend. At trial, a three-week-old domestic-violence report by the ex-girlfriend against Davis was admitted into evidence. The California Supreme Court held that the defendant forfeited his right to confrontation by his wrongful act that made the ex-girlfriend unavailable to testify. The Supreme Court overturned the California Supreme Court, holding as follows regarding the forfeiture by wrongdoing rule:

> The manner in which the rule was applied makes plain that unconfronted testimony would not be admitted without a showing that the defendant intended to prevent a witness from testifying. In cases where the evidence suggested that the defendant had caused a person to be absent, but had not done so to prevent the person from testifying—as in the typical murder case involving accusatorial statements by the victim—the testimony was excluded unless it was confronted or fell within the dying-declaration exception. Prosecutors do not appear to have even argued that the judge could admit the unconfronted statements because the defendant committed the murder for which he was on trial.

Id. at 2684.

B. Demonstrating Forfeiture

While the *Davis* case did not decide what was required to demonstrate that the defendant forfeited by wrongful acts, the Supreme Court did review the law on this issue:

> We take no position on the standards necessary to demonstrate such forfeiture, but federal courts using Federal Rule of Evidence 804(b)(6), which codifies the forfeiture doctrine, have generally held the Government to the preponderance-of-the-evidence standard, see, e.g., United States v. Scott, 284 F.3d 758, 762 (C.A.7 2002). State courts tend to follow the same practice, see, e.g., Commonwealth v. Edwards, 444 Mass. 526, 542, 830 N.E.2d 158, 172

> (2005). Moreover, if a hearing on forfeiture is required, Edwards, for instance, observed that "hearsay evidence, including the unavailable witness's out-of-court statements, may be considered." Id., at 545, 830 N.E.2d, at 174. The Roberts approach to the Confrontation Clause undoubtedly made recourse to this doctrine less necessary, because prosecutors could show the "reliability" of ex parte statements more easily than they could show the defendant's procurement of the witness's absence. Crawford, in overruling Roberts, did not destroy the ability of courts to protect the integrity of their proceedings.

Davis v. Washington, 126 S. Ct. 2280 (2006).

CHAPTER 5. ORIGINAL EVIDENCE RULE

FORM: "Objection. The exhibit is not the best evidence of the contents of . . ."

I. RULE

Rule 1: The original of a writing, recording, or photograph is required to prove the contents of the writing, recording, or photograph unless it falls within an exception provided by the evidence of another State of Major Supreme Court rule or by statute. MRE 1002.

Rule 2: A duplicate is admissible to the same extent as an original unless the opposing party EITHER:

1. raises a genuine question as to the authenticity of the original, OR
2. raises an objection showing that under the circumstances it would be unfair to admit the duplicate in lieu of the original. MRE 1003.

Summary: A duplicate may be used instead of the original unless the opposing party can raise a legitimate objection.

II. DEFINITIONS

1. "Writings" or "recordings" consist of letters, words, sounds, or numbers or equivalents set down by handwriting, typing, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation. MRE 1001(1).
2. "Photographs" include stills, x-rays, and movies. MRE 1001(2).

3. "Original":
   a. The original of a writing or recording is either the writing or recording itself or a counterpart that was intended by the person issuing it to have the same effect as the original.

      Example: A photocopied copy of a contract bearing the original signatures of the parties.
   b. The original of a photograph includes the negative of any part of it.
   c. The original of a computer printout or similar output is that printout if it is readable by sight and shown to reflect the data accurately. MRE 1001(3).
4. "Duplicate" is a counterpart produced by: the same impression or matrix as the original, or by photograph (enlargement or miniature) or by mechanical or electronic recording or by chemical reproduction or equivalent techniques to accurately reproduce the original. MRE 1001(4).

III. APPLICATION

A. Distinction

This rule does not prevent a party from proving a fact other than through the writing, recording, or photograph. It is not the better evidence rule.

Example

A party could prove that a couple was married by calling the best man as a witness. The party need not produce the marriage license. It is only if a witness attempts to discuss the contents of the license or the party attempts to produce a copy of the marriage license that the original evidence rule comes into play.

B. Function of Judge and Jury

1. Rule

When the admissibility of evidence (other than the original) of the contents of writings, recordings, or photos depends upon fulfillment of a conditions precedent, such as whether the original was destroyed, ordinarily the judge will decide this question as a preliminary fact determination under MRE 104(b).

2. Exception

The trier of fact (jury or in a nonjury case the judge) shall decide the following questions as with other issues in the case:

a. whether an asserted writing ever existed;
b. whether a writing, recording, or photo is the original; and
c. whether the evidence of the contents accurately reflects the contents. MRE 1008.

3. Model Evidentiary Foundation—Duplicate of a Document

[After having the clerk mark the exhibit and give it a number for identification, showing the exhibit to opposing counsel, and gaining the judge's permission to approach the witness, the plaintiff's lawyer hands the exhibit to the witness.]

PLAINTIFF'S COUNSEL:

Q: Mr. Marks, do you recognize what has been marked for identification as Plaintiff's Exhibit 21?

A: I do. It's the bill from Snyder Corporation, the bill that I just described.

Q: Is this the original bill or a copy?

A: It's a copy.

Q: Please tell us whether it is a true and accurate copy of the original bill.

A: It's an accurate copy. I made it myself from the original. It's the same.

PLAINTIFF'S COUNSEL: Offer Plaintiff's Exhibit 21.

DEFENSE COUNSEL: Objection. Not the best evidence.

JUDGE: Counsel?

PLAINTIFF'S COUNSEL: Your Honor, while not the original, it has been authenticated and as to the original evidence rule, the duplicate is admissible unless a question has been raised as to the exhibit's authenticity.

JUDGE: Objection overruled. Plaintiff's Exhibit 21 will be received into evidence.

IV. ORIGINAL NOT AVAILABLE TO PROPONENT

A. Lost or Destroyed

1. Rule

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if all originals are lost or destroyed, unless the proponent lost or destroyed them in bad faith. MRE 1004(1). Wills that have been lost or destroyed are governed by RCM (Revised Code of Major) 11.20.070, which is not superseded by the rule.

2. Foundation

Whether the original has been lost or destroyed is a preliminary question to be decided by the judge. If the original is claimed lost, the proponent must show a reasonable and diligent search to find the original. J. Mitchell, 5 Major Prac. Section 95.

B. Original Not Obtainable

Rule

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if the original cannot be obtained by any available judicial process or procedure. MRE 1004(2).

C. Original in Possession of Opponent

Rule

The original is not required and other evidence of the contents of a writing, recording, or photograph is admissible if:

a. The original is in the possession of the party against whom it would be offered;
b. That party was given notice (by pleading or otherwise) that the contents of the original would be proved at the hearing; and
c. The party does not produce the original. MRE 1004(3).

V. COLLATERAL MATTERS

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if it is not closely related to a controlling issue. MRE 1004(4). The reason for the rule is that the court should not waste time on collateral issues. Whether the writing, recording, or photograph is offered on a collateral matter or a controlling issue depends upon the issues in the case. J. Mitchell, 5 Major Prac. Section 93.

VI. PUBLIC RECORDS

Rule

Certified copies or copies testified to as accurate copies by a person who has compared the copy with the original of official records or of documents that are authorized to have been recorded and filed are admissible. If a certified copy cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents should be admissible. MRE 1005.

VII. SUMMARIES

Rule

A summary, chart or other calculation may be substituted for the originals if

1. The contents of voluminous writings, recordings, or photographs cannot be conveniently examined in court; and
2. The originals or duplicates are made available for examination or copying or both by the parties at a reasonable time and place. MRE 1006.

VIII. TESTIMONY OR WRITTEN ADMISSION OF PARTY

1. Rule

Without accounting for the non-production of the original, the contents of writings, recordings, or photographs may be proved by testimony or deposition of the party against who offered or by his or her written admission. MRE 1007.

2. Examples

If the adverse party has discussed the content of a writing in trial testimony, deposition, or written responses to requests for admissions, the originals rule will not bar opposing counsel from presenting secondary evidence, such as testimony based on recollection, regarding the content of the writing.

CHAPTER 6. PRIVILEGE

I. PHYSICIAN-PATIENT

A. Statutes

1. Civil Statute RCM (Revised Code of Major) 5.60.060(4)

Subject to the limitations under 71.05.250 (mental commitment proceedings), a physician or surgeon or podiatric physician or surgeon or osteopathic physician or surgeon shall not, without the consent of his or her patient, be examined in a civil action as to any information acquired in attending such patient, which was necessary to enable him or her to prescribe or act for the patient, except as follows:

(a) In any judicial proceedings regarding a child's injury, neglect, or sexual abuse or the cause thereof, and

(b) Ninety days after the filing of an action for personal injuries or wrongful death, the claimant shall be deemed to have waived the physician patient privilege. Waiver of the physician-patient privilege for any one physician or condition constitutes a waiver of the privilege as to all physicians or conditions, subject to such limitations as a court may impose pursuant to court rules.

Criminal Statute RCM 10.50.010:

The rules of evidence in civil actions, so far as practicable, shall be applied to criminal prosecutions.

B. Rule

The privilege applies if:

1. A doctor-patient relationship exists, and
2. The patient consulted a doctor for medical treatment or advice.

C. Scope of Privilege

1. The Privilege Covers

Not only the patient's statements, but also all information gathered to treat the patient (x-rays and hospital staff).

2. The Privilege Does Not Cover

a. Forensic examinations that were not for the purpose of attending the patient;
b. Involuntary commitment;
c. Communication in the presence of a third person if this and other circumstances indicate that the patient's intent was not to have that communication confidential;
d. Where a patient unlawfully attempts to obtain controlled substances; and
e. Child abuse cases.

D. Objection and Waiver

1. Who Can Object

The patient is the holder of the privilege (only she can waive it), and either the patient may claim it or the doctor witness may assert it for the patient.

2. Who Cannot Object

The privilege may not be asserted by someone other than the physician or patient. A defendant in a criminal case may not object to the testimony of the physician who treated the crime victim. *State v. Boyle*, 182 Maj.2d 75 (20XX-7).

3. Waiver

The patient *waives* the privilege if the patient is present when the doctor testifies and fails to object or if the patient calls the doctor as a witness.

The patient *waives* the privilege if the patient commences a personal injury suit, *supra*.

E. Termination of the Privilege

"When a patient dies, the lips of her physician are sealed forever," according to the Major Supreme Court. *In re Interd*, 180 Maj.2d 245, 156 (20XX-8). Other jurisdictions have held that the privilege is not terminated upon the death of the patient. Major's Supreme Court in *In re Interd* reasoned that by analogy to the attorney-client privilege and quoted *In re Thomas' Estate*, 165 Maj. 42 (20XX-79), as follows:

> That the privilege, as relating to attorney and client, is a common law privilege, independent of statute, though in some states expressed by statute, seems plain. . . . That the privilege, as relating to physician and patient is not a common law privilege, but one existing in a number of states, as in this state, solely by virtue of statute, seem equally plain. . . . The common law privilege, as relating to attorney and client, we think, is well and tersely stated in the text of 28 R.C.L. 5548 as follows:
>
> > An attorney, counselor or solicitor is not permitted, and cannot be compelled, to testify as to communications made to him in his professional character by his client unless the client consents.
>
> Thus, it seems plain that this common law rule, as relating to attorney and client, is, in substance, the same as our above quoted statutory rule as relating to physician and patient.

CHAPTER 7. AUTHENTICATION AND IDENTIFICATION

FORM OF OBJECTION:

"Objection. The exhibit has not been identified."

"Objection. The exhibit has not been authenticated."

I. EXHIBIT NOT SELF-AUTHENTICATING

A. Rule

Under Rule 901(a), before a matter (usually an exhibit) is admissible it must be proven to be properly identified or authenticated by "evidence sufficient to support a finding that the matter in question is what its proponent claims"

(the court should admit the matter if a reasonable juror would find it authenticated or identified). J. Mitchell, 5 Major Prac. Section 71.

B. Inadmissible for Other Reasons

An authentic or identified exhibit may still be inadmissible for other reasons. For example, an authentic letter may still be inadmissible hearsay.

C. Preliminary Fact Determination

Whether a matter is authentic or identified is a condition precedent to admissibility and should be decided by the judge in accordance with MRE 104(b) as a preliminary fact determination.

Hammon v. Organization Pro. Co., 187 Maj.2d 98 (20XX-5), holds that all evidence having reasonable connection with issues as well as all evidence tending to establish or disestablish a material fact should be admitted. Courts must be most circumspect and motivated by the most compelling of reasons before depriving a jury of material and relevant evidence having a bearing on the truth.

D. Examples of How to Satisfy Rule 901(a)

The following are examples only and any matter may be found authentic or identified if it satisfies the general rule. MRE 901(b).

1. Testimony by Witness with Knowledge

a. Rule

If a lay witness testifies that a matter is what it is claimed to be, it should be found authentic or identified. MRE 901(b)(1). An exhibit is sufficiently identified when it is identified as the same object and in the same condition as it was at a relevant time or in a different condition if the change in condition is explained. *Baldwin v. Stein*, 192 Maj.2d 10 (20XX-4).

b. Degree of Certainty

An identification of an exhibit may be qualified and need not be made with complete certainty. Varying degrees of uncertainty do not affect admissibility. A qualified identification of an exhibit affects only the weight of the

evidence. In *State v. Uke*, 197 Maj.2d 313 (20XX-2), the witness testified the exhibit "looks like" the object in question.

c. Model Evidentiary Foundation

See Real Evidence at pages 258-260.

2. Lay Opinion on Handwriting

a. Rule

If a lay witness testifies that handwriting is genuine and has familiarity with the handwriting that was not acquired for purposes of litigation, it should be found to be authentic. MRE 901(b)(2). *Workentine v. Erich*, 191 Maj.2d 26 (20XX-4)

b. Example

A witness testifies a letter was written by his wife.

3. Comparison by Court or Expert

Rule

If an expert witness or the trier of fact compares an exhibit with the specimen that has been found authentic and finds the exhibit authentic, it should be deemed authentic. MRE 901(b)(3).

4. Distinctive Characteristics and the Like

a. Rule

The appearance, contents, substance, internal patterns, or distinctive characteristics taken in conjunction with circumstances may demonstrate the exhibit's authenticity.

b. Example

Reply doctrine where a note sent specifically answering a question that the person was asked earlier in the day, or a letter that recites facts that could only be known by the purported author. J. Mitchell, 5 Major Prac. Section 64.

5. Voice Identification

a. Rule

If a witness testifies that a voice, whether heard firsthand or through mechanical transmission or recording, is identical with that of a person based upon the witness's hearing the voice at any time under circumstances connecting it with the speaker, it should be found identified. MRE 901(b)(5). *Gibson v. Strings*, 196 Maj.2d 111 (20XX-2).

b. Example

A witness familiar with the person's voice testifies that she recognizes a person's voice on a tape recording.

6. Telephone Conversation

a. Rule

A telephone conversation should be found identified if

1) The call was made to a telephone number assigned by the telephone company; and
2) There is identification on the other end that is either:
   a) self-identification and other circumstances show it was the person called, or
   b) in the case of a business, the call was to a business and the conversation related to business reasonably conducted over the phone. MRE 901(b)(6). *See also Workentine v. Erich*, 190 Maj.2d 26 (20XX-4).

b. Model Evidentiary Foundation—Telephone Call

DEFENSE ATTORNEY:

Q: Ms. Bell, when you discovered the engine noise in your new car, what did you do?

A: I decided to call the sales manager at Ruston Motor Cars.

Q: Did you call?

A: Yes, I did.

Q: How, if at all, did you get the phone number?

A: I had the salesman's business card, and it had the number for Ruston Motors on the card. So I called that number.

Q: Whom did you speak with when you called?

A: First, I spoke to the operator and told her that I wanted to speak with the manager, and she transferred me through to Ms. Anthrop, the manager.

Q: How do you know that it was the manager, Ms. Anthrop?

A: When I first spoke to the operator, I asked for the sales manager's name and was given it, and then, when I got through to her, she said she was Ms. Anthrop.

Q: Tell us about what was said.

7. Process or System

a. Rule

An exhibit should be found authentic if there is evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result. MRE 901(b)(9).

b. Examples

Photographs and x-rays.

II. SELF-AUTHENTICATION

A. Public Records and Reports

1. Rule

Public documents and records are self-authenticated under MRE 902, and no extrinsic evidence is required provided they satisfy one or more of the applicable statutes or court rules. Direct testimony by the custodian of records is another method of authentication. J. Mitchell, 5 Major Prac. Section 33. Under MRE 902, the following are self-authenticating public documents:

a. Domestic Public Document Under Seal

A document bearing a seal purporting to be that of the United States, or any state, district, commonwealth, territory, or insular possession thereof, or a

political subdivision, department, officer, or agency thereof and a signature purporting to be an attestation or execution. Rule 902(1).

b. Domestic Public Document Not Under Seal

A document purporting to bear the signature in his or her official capacity of an officer or employee of any entity included in section (a), having no seal if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine. Rule 902(2).

. . .

c. Certified Copies of Public Records

A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office including data compilation in any form certified as correct by the custodian or other person authorized to make the certification, by certificate complying with any law of the United States or of this state. Rule 902(4).

Model Evidentiary Foundation—Certified Copy

[After having the clerk mark a properly certified copy of a judgment and sentence as exhibit and give it a number for identification (State's Exhibit 19), and showing the exhibit to opposing counsel, the prosecutor hands the exhibit to the judge for inspection so the judge can determine whether it is properly certified. Then, because the document is self-authenticating under MRE 902(4), the prosecutor need only offer the exhibit and need not provide any foundational testimony.]

PLAINTIFF'S COUNSEL: Offer State's Exhibit 19, Your Honor.

2. Official Publications

a. Rule

Books, pamphlets, or other publications purporting to be issued by public authority are admissible, and no extrinsic evidence or authenticity is required. MRE 902(5).

b. Note

If statutes, court rules, and decisions are not published by the government, they are not deemed authentic under this rule. Comment to MRE 902(5).

3. Newspapers and Periodicals

Rule

Printed materials purporting to be newspapers or periodicals should be found to be authentic, and no extrinsic evidence of authenticity is required. MRE 902(6).

CHAPTER 8. FOUNDATIONS FOR EXHIBITS

I. PROCEDURE FOR INTRODUCING EXHIBITS

A. Have Clerk Mark the Exhibit

Hand the exhibit to the clerk and ask that it be marked. The clerk will mark the exhibit with a number, and will record the number and description of the exhibit. For convenience, consider having the exhibits marked pretrial.

B. Hand the Exhibit to Opposing Counsel

So that counsel has an opportunity to examine it.

C. Have Witness Identify the Exhibit and Establish Admissibility

Hand the witness the exhibit and ask (1) if the exhibit has been seen before, and if so, when and where; (2) if the witness recognizes it and what it is; and, if so, (3) the witness should be asked to identify the exhibit without discussing its contents. Do not allow the jury to view the exhibit until it has been admitted into evidence.

D. Offer the Exhibit

Once the witness has identified the exhibit, the attorney states, "Offer Plaintiff's Exhibit 1, Your Honor." Opposing counsel may now state any objection and grounds or request to voir dire the witness regarding the identification of the exhibit. Thereafter, the court either admits or refuses the exhibit. Counsel should ascertain the basis for refusal. If the objection to the exhibit can be overcome, the exhibit can be reoffered at a later time.

II. REAL EVIDENCE

A. Definition and Overview

Real evidence is the actual evidence in a case. Some practitioners and commentators designate real evidence as original or physical evidence. When discussing real evidence, we are referring to an actual object that played a direct role in the incident that is the subject of the trial.

Witness testimony is the common manner of proof and requires that the witness testify that the exhibit is what it is claimed to be. There are two categories of real evidence with which you will be dealing:

- Readily identifiable real evidence (the thing is unique, singular), and
- Fungible real evidence (lacks unique characteristics, not readily identifiable).

B. Readily Identifiable Real Evidence

1. Foundation Points

To introduce an exhibit of real evidence counsel needs to lay a foundation sufficient to establish (1) that the exhibit is relevant (Rules 401-402) see pages 217-218; (2) it is what the witness claims (Rule 901(a)); (3) any changes to the exhibit are explained; and (4) it passes the Rule 403 test, see page 218.

2. Model Evidentiary Foundation—Readily Identifiable Evidence

[After having the clerk mark the exhibit and give it a number for identification, showing the exhibit to opposing counsel, and gaining the judge's

permission to approach the witness, the prosecutor hands the exhibit to the witness.]

PROSECUTOR:

Q: Officer Glock, handing you what has been marked for identification as Plaintiff's Exhibit 11. Can you identify it?

A: Yes, this is a bag that I placed into evidence; it bears my initials and the case number that I wrote on it.

Q: Officer, could you cut open the bag? Look at what is in the bag, but do not show the contents of the bag to the jury. Can you tell us whether you recognize what is in the bag?

A. Yes, I recognize it.

Q: What is it?

A: It is the handgun that I just said that I took from the defendant's bag after I arrested him.

Q: How do you know it is the same gun that you took from the defendant?

A: This is a Smith and Wesson revolver—the same kind that was in defendant's bag. It bears the serial number 67432, which is the number that I saw on the weapon and noted in the case file. Also, I placed the weapon in an evidence bag, sealed the bag, wrote my initials on the seal, and logged it into the evidence room when I got back to the station.

Q: Looking at the handgun, Exhibit 11 now, is it in the same condition that it was when you took it from the defendant, bagged it, and logged it into the evidence room, or is it different?

A: It does have a white powder on the handle and barrel that was not on the gun when I took it from the defendant's bag. Also, it has a trigger guard that I put on it this morning when I checked it to see whether it was safe.

Q: Is it loaded? Is it safe?

A: It is unloaded and safe.

Q: Was it unloaded when you recovered it from the defendant's bag?

A: No. It had five live rounds in it. I unloaded the weapon and bagged the ammunition separately.

Q: Officer, other than the fact that it's now unloaded, has powder on it, and now has a trigger guard on it, can you please tell us whether Exhibit 11 is in the same condition now as it was when you took it from the defendant's bag?

A: It is in the same condition.

Q: Officer Glock, do you know how what is now marked as Plaintiff's Exhibit 11 got to this courtroom?

A: Yes, this morning I picked it up from the evidence room.

PROSECUTOR: Your Honor, I offer Plaintiff's Exhibit 11.

JUDGE: Any objection?

DEFENSE COUNSEL: No, Your Honor.

JUDGE: Plaintiff's Exhibit 11 will be admitted.

PROSECUTOR: Officer Glock, will you come down here in front of the jury and show the jurors Exhibit 11?

C. Fungible Evidence—Not Readily Identifiable

1. Chain of Custody

To lay a foundation for evidence that is not readily identifiable (fungible evidence), generally counsel will need to call more than one witness to establish the chain of custody from when the exhibit was first obtained until it reaches the courtroom, as well as show that it has neither been tampered with nor had something substituted for it. The testimony of each witness is similar to that reflected in the transcript for readily identifiable evidence in the prior section.

State v. Sure, 200 Maj.2d 3 (20XX-1), described what is and what is not required to lay a sufficient chain of custody for admissibility:

> It is not necessary to negate every possibility of an opportunity for tampering with an exhibit nor to trace its custody by placing each custodian upon the witness stand. The statement that the exhibit is the identical object and that it is in the same condition as of the time of occurrence does not preclude the right to rebut these statements while making the exhibit admissible.

However, counsel might nevertheless chose to put on a more extensive showing of chain of custody, being mindful that the persuasiveness of the exhibit is enhanced by using the testimony of witnesses to show that there

are no significant breaks in the links of the custody chain. This is particularly important when chain of custody is really at issue. In that case, the testimony should convince the jury that the real evidence is that which was involved in the case—there has been no tampering, no mix-up, no unexplained change.

2. Model Evidentiary Foundation—Fungible Evidence

For example, if the exhibit were a powdery substance that a police officer seized from the defendant in a possession of controlled substances case, in a model foundation the prosecutor would call the officer to testify about seizing the drugs, packaging them in State's Exhibit 20, a sealed envelope, which at trial is marked as State's Exhibit 20 for identification. The officer would testify that he placed his initials on the envelope, sealed it, and delivered it to the evidence room. The officer would testify about how evidence is stored and that the envelope has been opened and that someone else's initials are on the envelope. So far, only a partial chain of custody has been laid. The prosecutor would call a forensic scientist from the crime laboratory to testify to taking Exhibit 20 from the evidence room to the lab, opening the envelope, testing the powdery substance, determining it to be cocaine, resealing the envelope, initialing it, and returning it to the evidence room. The expert would also testify about lab procedures used to ensure that the contents of the envelope are not contaminated or exchanged. This is one model of how a chain of custody for fungible evidence can be laid. Then the exhibit can be offered into evidence.

III. DOCUMENTARY EVIDENCE

A. Definition and Overview

Documentary evidence refers to things in writing or things recorded that are offered to prove their content. Examples of documentary evidence include e-mails, letters, memoranda, contracts, leases, recordings such as videos, a written statement, or a will.

B. Foundation Points

The first three essential evidentiary questions applicable to documentary evidence are the same as those for real evidence:

1. Is it relevant?
2. Does it pass the Fed. R. Evid. 403 test (probative vs. unfairly prejudicial)?
3. Is it authentic or identified? See below and pages 251-257.

Added to these are the following three:

4. Is it admissible under the original writing rule—Fed. R. Evid. 1001-1004? See pages 244-248.
5. Will it survive a hearsay objection? See pages 222-241.
6. Is it otherwise admissible?

Because meeting objections that the document is irrelevant or unfairly prejudicial depends upon the facts of the individual case and not that the exhibit is a document, the focus here is on laying foundations to establish that the document is authentic, satisfies the original evidence rule, and is not inadmissible hearsay.

C. Authentication

The evidentiary foundation for a document must establish that it is authentic. Formulating a foundation for authenticity, like any other foundation, begins with applicable court rules and case law, which outline the evidentiary predicates. Rule 901(a) states the rule regarding the quantity of evidence needed to lay the foundation:

> The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

Now, we examine and provide model foundations for e-mails, text messages, website printouts, and traditional documents, such as letters, contracts, or memoranda.

1. E-Mails

E-mails are commonplace trial exhibits. The foundation may be laid either by testimony that the e-mail is what the party claims (Fed. R. Evid. 901(b)(1)); by comparison (Fed. R. Evid 901(b)(3)), or by its distinctive characteristics (Fed. R. Evid. 901(b)(4)).

a. Testimony by the Sender

The foundation for an e-mail may be laid by calling a witness who sent the e-mail to testify, in accordance with Fed. R. Evid. 901(b), "that the matter (e-mail) is what it is claimed to be." For example:

Model Evidentiary Foundation: E-Mail—Sender's Testimony

Q. Handing you what has been marked as Plaintiff's Exhibit 45 for identification. *Do you recognize it?*

A. Yes.

Q. *What is it?*

A. It is a printout of an e-mail that I sent Barbara Schwab.

Q. *How do you recognize it?*

A. It is what I wrote, and it is addressed to Barbara Schwab's e-mail address. We frequently exchanged e-mails.

b. Circumstantial Evidence

A foundation for introduction of an e-mail can be laid with circumstantial evidence. For example, when defendant David Safavian was prosecuted for making false statements and concealing facts during an investigation into his golfing trip with lobbyist Jack Abramoff while Safavian was chief of staff of the General Services, the government sought to introduce 260 e-mails between Safavian, Abramoff, and others. *U.S. v. Safavian*, 435 F. Supp. 2d 36 (2006). The defense challenged the authenticity of the e-mails, and the court decided there was sufficient circumstantial evidence for the jury to determine that they were authentic. The district judge noted that the "threshold for the Court's determination of authenticity is not high," and that it is not incumbent upon the Court to "find that the evidence is necessarily what the proponent claims, but only that there is sufficient evidence that the jury ultimately might do so." *Safavian* at 38.

Based upon circumstantial evidence, the district judge found that the e-mails in the *Safavian* case met the authentication requirements of 901. *Safavin* at 39-41. For many of the e-mails, the court relied upon 901(b)(4), stating:

> One method of authentication identified under Rule 901 is to examine the evidence's "distinctive characteristics and the like," including "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." Fed. R. Evid. 901(b)(4). Most of the proffered exhibits can be

> authenticated in this manner. The e-mails in question have many distinctive characteristics, including the actual e-mail addresses containing the "@" symbol, widely known to be part of an e-mail address, and certainly a distinctive mark that identifies the document in question as an e-mail. See *United States v. Siddiqui*, 235 F.3d 1318, 1322 (11th Cir. 2000). In addition, most of the e-mail addresses themselves contain the name of the person connected to the address, such as "abramoffj@gtlaw.com," "David.Safavian@mail.house.gov," or "david.safavian @gsa.gov." *See, e.g.,* Exhibits 101, 105, 106. Frequently these e-mails contain the name of the sender or recipient in the bodies of the e-mail, in the signature blocks at the end of the e-mail, in the "To:" and "From:" headings, and by signature of the sender. The contents of the e-mails also authenticate them as being from the purported sender and to the purported recipient, containing as they do discussions of various identifiable matters, such as Mr. Safavian's work at the General Services Administration ("GSA"), Mr. Abramoff's work as a lobbyist, Mr. Abramoff's restaurant, signatures, and various other personal and professional matters.
>
> The court then decided that the other e-mails that were "not clearly identifiable on their own" were also admissible, relying on 901(b)(3):
>
> Those e-mails that are not clearly identifiable on their own can be authenticated under Rule 901(b)(3), which states that such evidence may be authenticated by comparison by the trier of fact (the jury) with "specimens which have been [otherwise] authenticated"—in this case, those e-mails that already have been independently authenticated under Rule 901(b)(4). For instance, certain e-mails contain the address "MerrittDC@aol.com" with no further indication of what person uses that e-mail address either through the contents or in the e-mail heading itself. *See, e.g.,* Exhibit 134. This e-mail address on its own does not clearly demonstrate who was the sender or receiver using that address. When these e-mails are examined alongside Exhibit 100 (which the Court finds is authenticated under Rule 901(b)(4) by its distinctive characteristics), however, it becomes clear that MerrittDC@aol.com was an address used by the defendant. Exhibit 100 is also an e-mail sent from that address, but the signature within the e-mail gives the defendant's name and the name of his business, Janus-Merritt Strategies, L.L.C., located in Washington, D.C. (as well as other information, such as the business' address, telephone and fax numbers), thereby connecting the defendant to that e-mail address and clarifying the meaning of both "Merritt" and "DC" in it. The comparison of those e-mails containing MerrittDC@aol.com with Exhibit 100 thereby can provide the jury with a sufficient basis to find that these two exhibits are what they purport to be—that is, e-mails to or from Mr. Safavian.

This is an example of how to lay the foundation for the admissibility of an e-mail with circumstantial evidence:

Model Evidentiary Foundation—Circumstantial Evidence

Q. Handing you what has been marked for identification as Plaintiff's Exhibit 46. *Do you recognize it?*

A. Yes.

Q. *What is it?*

A. It is a printout of an e-mail that I received from Barbara Schwab.

Q. Is there anything about Exhibit 46's *appearance, contents, substance, or anything else* that causes you to recognize it as an e-mail from Barbara Schwab to you?

A. Yes. It is addressed to me and it has her e-mail address, Bschwab@comayak.net, in the "From" line.

Q. How do you know that's Barbara Schwab's e-mail address?

A. I have carried on a regular exchange of e-mails for the past three years with her using that address.

Q. Is there anything else about *contents* of the e-mail that indicates that it is from Barbara Schwab?

A. Yes. We had been discussing her homeowner's insurance around the date on which this e-mail was sent, and she discusses that insurance in this e-mail. Besides, it has her name, the name of her business, address, and phone number at the bottom of the e-mail.

2. Other Electronic Messages

When the Supreme Court of North Dakota was faced for the first time with the issue of the foundational requirements for admissibility of text messages, it turned to case law around the country holding that other electronic messages, including e-mails, chat room printouts, instant messages, and text messages were authenticated by "circumstantial evidence establishing the evidence was what the proponent claimed it to be." *State v. Thompson*, 777 N.W.2d 617, 624-25 (2010). Upholding the trial court's ruling that a text message had been properly admitted into evidence, the North Dakota Supreme Court observed the low threshold of proof required to authenticate an electronic message—"the proponent must provide proof sufficient for a reasonable juror to find the evidence to be what it purports to be"—and that an argument that electronic messages are inherently unreliable because of their "relative anonymity" should be rejected. The Court held that the witness's testimony about his "knowledge of Thompson's cell phone number and signature on the text messages" was sufficient to authenticate the text message under North Dakota's Rules of Evidence 901(b)(1) and (4), which are the same as the Federal Evidence Rules. *Id.* at 624-26.

If you are looking for case law on the authentication of e-mails, text messages, websites, Web pages, and other electronically stored evidence and an analysis of those cases, see Jay M. Zitter, *Authentication of Electronically Stored Evidence, Including Text Messages and E-mail*, 34 A.L.R. 6th 253 (originally published 2008).

The template of predicate questions for other electronic messages, such as faxes, text messages, and chat room printouts mirrors that for e-mails. For example, this is an illustration of how to lay a foundation for a text message:

Model Evidentiary Foundation—Text Message

Q. Handing you what has been marked as Exhibit 48 for identification. *Do you recognize it?*

A. Yes.

Q. *What is it?*

A. It is a printout of a cell phone text message that I received from Barbara Schwab.

Q. Is there anything about Plaintiff's Exhibit 48's *appearance, contents, substance, or anything else* that causes you to recognize it as a text message from Barbara Schwab to you?

A. Yes. It says "Fr: Barb" at the beginning, and I have her cell phone number stored in my cell phone under "Barb." And at the end of the message, it has her cell phone number and her signature, "Bschwab."

Q. How do you know that Bschwab is Barbara Schwab's signature?

A. I've seen it over and over again when she texted me in the past.

3. Websites and Web Pages

Websites and printouts from websites can be circumstantially authenticated in the same way as has been shown for e-mails and other electronic communications. For instance, in *Griffin v. State*, 995 A.2d 791 (2008), the Maryland Court of Special Appeals found that a MySpace profile printout was circumstantially authenticated based upon the context and content of the communication. The court relied upon Md. Rule 5-901(b)(4), the state's counterpart to the Fed. R. Evid. 901(b)(4), which is the rule most commonly relied upon to authenticate e-mails and other electronic communications. *Id.* at 803. In *Griffin*, among the circumstances laid out in the foundation for authentication of the MySpace profile as belonging to Ms. Barber were the following: a photograph of a Ms. Barber on the profile, testimony by Ms. Barber that her boyfriend's nickname was "Boozy," references in the profile to "Boozy," and Ms. Barber's birth date matching the birth date on the profile.

4. Traditional Documents and Signatures

Authentication of handwriting on traditional documents, such as letters, contracts, wills, and the like may be proven by calling as a witness either a person who saw the person sign the document (Fed. R. Evid. 901(b)(1)), a nonexpert who is familiar with the handwriting of the person whose signature is on the document (Fed. R. Evid. 901(b)(2)), or by having the trier of fact or a handwriting expert compare the exhibit with authenticated specimens (Fed. R. Evid. 901(b)(3)).

This is how to lay a foundation with a nonexpert witness who is familiar with the signature on the document:

a. Model Evidentiary Foundation—Traditional Document: Lay Testimony

Q. Handing you Defense Exhibit 12. *Do you recognize it?*

A. It's a letter.

Q. Tell us whether you recognize the signature on the letter.

A. It is my brother's signature.

Q. *How do you know that he signed it?*

A. Pretty easy. It's signed Terry Dunham, my brother's name. I've seen him sign his name over the years, and he sends me signed holiday and birthday cards—when he remembers to send one.

The foundation for an expert's authentication of handwriting commences with qualifying the witness as a handwriting expert, and you can consult Chapter 12 on how to accomplish that. Then, the foundation may be laid as follows:

b. Model Evidentiary Foundation—Traditional Document: Expert Testimony

Q. Handing you Defense Exhibit 15. *Do you recognize it?*

A. Yes. They are samples of Terry Dunham's handwriting.

Q. *How do you recognize them as samples of his handwriting?*

A. He came to my office, and I had him provide these samples of his handwriting in my presence.

Q. Now I'm handing you Defense Exhibit 4. Do you recognize it?

A. It is a letter—a questioned document—that defense counsel provided to me for examination.

Q. *Did you ever compare the handwriting on Defense Exhibit 15 with the handwriting on Exhibit 4?*

A. Yes.

Q. Could you describe how you *compared* the known handwriting on Exhibit 15 with the handwriting on the questioned document, Exhibit 4?

A. I used a microscope to examine and compare the distinctive characteristics of the handwriting on each, including how the letters were formed, misspellings, and so on. (Note that a complete direct examination of the expert would have first discussed the theory and methodology of handwriting comparisons.)

Q. Were you able to reach an opinion as to whether or not the Gary Clark whose handwriting is on Exhibit 15 is the author of Defense Exhibit 4 for identification?

A. Yes, I was. The author of both Defense Exhibits 4 and 15 are the same person—Terry Dunham.

Having laid the foundation for the admissibility of the two defense exhibits, defense counsel offers them into evidence. Then, counsel has the expert testify that they were enlarged and placed side by side, and counsel offers this demonstrative exhibit. Once admitted, the expert uses this visual aid to show the jury how points of comparison on Exhibits 4 and 15 match and establish that the handwriting on Exhibit 4 is Terry Dunham's.

5. Self-Authentication

Fed. R. Evid. 902 lists self-authenticated documents that do not require extrinsic evidence of authentication. For a discussion of self-authentication, see pages 255-257.

IV. DEMONSTRATIVE EVIDENCE

A. Definition and Overview

Demonstrative evidence refers to evidence that demonstrates, or illustrates, a fact or condition to be proved in a case. Demonstrative evidence is created evidence used in trial to assist a witness in testifying, to make the testimony more persuasive, and to aid the jury in understanding the case. Examples of demonstrative evidence are a computer-generated slideshow (PowerPoint), photographs, charts, graphs, models, diagrams, timelines, anatomical drawings, computer animations, videos, and in-courtroom demonstrations. In civil cases and for the criminal defense, an attorney or attorney-agent creates demonstrative evidence. In criminal cases, generally a law enforcement

agency or the prosecutor's office creates the government's demonstrative evidence. Demonstrative evidence is often admitted into evidence; however, some judges do not permit demonstrative evidence in a jury room because it isn't real evidence in the case.

B. Foundation Points

Just as with real and documentary evidence, the essential evidentiary questions applicable to demonstrative evidence include:

1. Is it relevant? See pages 217-218.
2. Does it pass the Fed. R. Evid. 403 test (probative vs. unfairly prejudicial)? See page 218.
3. Is it authentic or identified? See pages 251-257.
4. Is it otherwise admissible?

This section covers how to lay foundations for most of the common and some uncommon demonstrative exhibits. Because relevancy is case specific, the focus here is on authentication of the exhibit under Fed. R. Evid. 901(a) (is the evidence sufficient to support a finding that the exhibit is what the proponent claims it is?) and whether it passes the Rule 403 test.

C. Discretion of the Court

The admissibility of demonstrative evidence, such as a diagram or courtroom demonstration, rests within the sound discretion of the trial court, and such evidence should be based upon conditions and circumstances substantially like the facts that are sought to be proved. *State v. Marshell*, 192 Maj.2d 7 (20XX-4).

D. Model Evidentiary Foundations

1. Diagram

Model Evidentiary Foundation—Diagram

See *State v. Carma*, 181 Maj.2d 7 (20XX-7).

[After having the clerk mark the diagram as an exhibit and give it a number for identification, showing the exhibit to opposing counsel, and gaining the judge's permission to approach the witness, counsel shows the witness the diagram without showing it to the jury.]

PLAINTIFF'S COUNSEL:

Q: Ms. Ocular, showing you what has been marked for identification as Plaintiff's Exhibit 13. *Do you recognize this?*

A: That's a chart of my patio and backyard before it was damaged, as I've already told you.

Q: Does Exhibit 13 fairly and accurately show what your patio and backyard looked like on the day before it was damaged on August 20, two years ago?

A: It does.

Q: Do you know whether or not the diagram is drawn to scale?

A: No. I don't.

Q: Other than that, does it *appear accurate* to you or not?

A: Yes, it seems accurate to me.

Q: Would this diagram *help the jury understand* your testimony today?

A: Yes. I think it would help.

Q: Your Honor, I offer Plaintiff's Exhibit 13.

DEFENSE COUNSEL: Your Honor, we'd ask for a limiting instruction regarding it not being to scale. Otherwise, no objection.

JUDGE: Counsel: Ms. Ocular testified that she does not know whether or not this diagram is drawn to scale, and that is sufficient. No instruction is necessary. Plaintiff's Exhibit 13 is admitted.

[In another jurisdiction where the law requires a limiting instruction, the judge would grant defense counsel's request. However, here plaintiff's counsel proceeds and places the diagram on an easel situated near the witness chair. Then, he has Ms. Ocular join counsel there so that Ms. Ocular can continue her testimony with the aid of the diagram.]

2. Courtroom Demonstration

Model Evidentiary Foundation—Courtroom Demonstration

In a domestic violence assault case, the prosecutor is conducting direct examination of Officer Show concerning statements and actions by the defendant, Mr. Tell, at the time he was arrested for assaulting his wife. See *State v. Anderson*, 183 Maj.2d 26 (20XX-7).

PROSECUTOR: Officer Show, please come over here in front of the jury. I'm handing you a ruler, and I ask that you assume that this is State's Exhibit 15, the knife you found in the defendant's living room on the 19th of May. Will you show the jury, using the ruler as a substitute for the knife, how the defendant showed you how his wife cut herself three times?

DEFENSE COUNSEL: Objection. 403. Waste of time and cumulative.

PROSECUTOR: Your Honor, the jury should have an opportunity to see how the defendant claims his wife cut herself in three places.

JUDGE: Objection is overruled. You may proceed.

3. Model

Model Evidentiary Foundation—Model

DEFENSE COUNSEL: Mr. Casey, as the engineer who was involved in designing the crane that was used by Condo Construction Company, have you created something that would aid the jury's understanding of what caused the crane to buckle?

PLAINTIFF'S COUNSEL: Leading.

DEFENSE COUNSEL: It's preliminary, Your Honor.

JUDGE: Overruled. You may answer.

A: I have.

Q: What is it?

A: I created a model of the crane that was used by Condo Construction.

Q: Is it or is it not a fair and accurate model of the crane?

A. While it is reduced in size, obviously, it looks just like the crane that I have been talking about.

Q: Do you have the model with you?

A: It's in that box by the door.

[After having the clerk mark the exhibit and give it a number for identification, showing the exhibit to opposing counsel, and gaining the judge's permission to approach the witness, defense hands the exhibit to the witness.]

Q: Mr. Casey, could you examine what has been marked as Defense Exhibit 16 for identification

and tell us whether or not that is the model crane that you just told us about?

A: It is.

Q: How helpful would this model be in explaining what caused the crane to collapse?

A: Extremely helpful, because I can show how the crane was positioned and how it was operated.

DEFENSE COUNSEL: Your Honor, we offer Defense Exhibit 16.

JUDGE: Any objection counsel?

PLAINTIFF'S COUNSEL: None at all.

JUDGE: Defense Exhibit 16 is admitted.

DEFENSE COUNSEL: Mr. Casey, will you remove the model from the box? Your Honor, may the witness bring the model down and place it on counsel table so the jury can see it better and so Mr. Casey can use it to describe what happened?

JUDGE: Mr. Casey, will you kindly take the model to counsel table, where counsel is standing? Thank you.

4. Photographs

a. Foundation Points

To introduce a photograph, video, diagram, and the like, counsel needs to lay a foundation sufficient to establish that the photograph is relevant (Rules 401-402), shows what the witness claims (Rule 901(a)), and is not misleading (Rule 403). Elements of the foundation are (1) the subject matter in the exhibit is relevant, (2) the witness has *seen* the subject matter in the exhibit, (3) the exhibit fairly and accurately shows what is in it at a relevant time, and (4) changes to what is shown are explained.

Model Evidentiary Foundation—Photograph

[After having the clerk mark the photograph exhibit and give it a number for identification, showing the exhibit to opposing counsel, and gaining the judge's permission to approach the witness, defense counsel hands the exhibit to the witness.]

DEFENSE COUNSEL:

Q: Mr. Lebowitz, I'm handing you what has been marked as Defense Exhibit 14 for identification. Do you recognize what that is?

A: Yes.

Q: What is that?

A: It's a photograph showing the view looking out from my living room.

Q: You've just told us about how you looked out your front window and saw Mr. Steigliz approaching your home on May 23rd. Can you tell us whether this is a fair and accurate photograph of the view that you had on the 23rd?

A: It is.

Q: Are there any differences from the way it looked on May 23rd?

A: Not that I can tell.

DEFENSE COUNSEL: Your Honor, I offer Defense Exhibit 14.

PLAINTIFF'S COUNSEL: No objection.

JUDGE: Defense Exhibit 14 is admitted into evidence.

[Next, defense counsel places the photograph on the document camera, which projects the image onto a screen. Then, counsel has Mr. Lebowiz continue his testimony with the aid of the photograph.]

b. Aerial Photographs

Aerial photographs are admissible if shown to be a fair and accurate depiction of what they are intended to show and changes are explained. *State v. Birdseye*, 198 Maj.2d 34, 44 (20XX-2) held:

> Appellant contends that an aerial photograph of the crime scene and surrounding area were erroneously admitted into evidence. Witnesses testified that the aerial photograph of the scene of the robbery of the coffee shop took place in the winter, whereas the robbery occurred in August, and they also testified that road construction was underway on a nearby street at the time of the robbery. Appellant argues that these differences keep the photographs from being true and accurate depictions of the scene, and therefore they were admitted into evidence in error.
>
> The admission of photographic evidence is within the discretion of the trial court, and the trial court's ruling will only be overturned upon a showing of an abuse of discretion. To be admissible, the photograph must be relevant and authenticated. A photograph will be admitted if it can be established that it fairly and accurately shows what it is intended to depict. Photographs of a crime scene are generally admissible because they are competent and relevant aids by which a jury can orient itself to best understand the evidence presented. Here the aerial photograph showed the coffee shop and the roads that the perpetrators of the robbery used in flight, and

> thus they were relevant. Police officers testified that the photograph accurately showed the scene and the streets near the shop. These witnesses fully explained the differences between the scene at the time of the robbery and those shown in the aerial photograph. The trial court correctly concluded that these differences did not render the photograph inadmissible, but rather went to the weight the jury could give to the exhibit.

Sample Evidentiary Foundation—Aerial Photograph

[In a burglary case in which the victim came home and discovered two men leaving her home and driving off toward the freeway, the prosecutor wants to introduce an aerial photograph. After having the clerk mark the photograph exhibit and give it a number for identification, showing the exhibit to opposing counsel, and gaining the judge's permission to approach the witness, defense counsel hands the exhibit to the witness.]

DEFENSE COUNSEL:

Q: Ms. Thompson, I'm handing you what has been marked as Plaintiff's Exhibit 33 for identification. Do you recognize what that is?
A: Yes.
Q: What is that?
A: It's an aerial photograph showing my neighborhood and the freeway near it.
Q: How do you recognize it as being a photograph of your neighborhood?
A: I've lived in that neighborhood for the past 20 years, and it looks just like it.
Q: As you look at the photograph, is that the way it looked on May 19 a year ago, or are there differences?
A: Well, a new house has been built in what had been a vacant lot three years ago.
Q: Is there any difference in where your home was and is located?
A: No.
Q: Any differences in the streets leading from your home to the freeway?
A: None.

PROSECUTOR: Your Honor, offer Plaintiff's Exhibit 14.

DEFENSE COUNSEL: Objection. The witness has indicated that the photograph does not accurately depict what the neighborhood looked like at the time of the incident.

PROSECUTOR: The exhibit is offered to show the location of Ms. Thompson's home and the route to the freeway.

JUDGE: State's Exhibit 33 is admitted into evidence.

[Next, prosecutor places the photograph on the document camera, which projects the image onto a screen. Then, counsel has Ms. Thompson continue her testimony with the aid of the aerial photograph.]

5. Videos

a. Rule

To lay a foundation for the use of a video, the proponent must satisfy MRE 901(b)(1) and elicit testimony "that a matter is what it is claimed to be." In other words, call a witness who witnessed the event and/or situation and who can testify that the video fairly and accurately depicts that event and/or situation. *State v. Maurices*, 199 Maj.2d 7 (20XX-1)

b. Model Evidentiary Foundation—Video

[After having the clerk mark the exhibit (a DVD) and give it a number for identification, showing the exhibit to opposing counsel, and gaining the judge's permission to approach the witness, defense counsel hands the exhibit to the witness.]

DEFENSE COUNSEL:

Q: Ms. Flicks, handing you what has been marked as Defense Exhibit 17 for identification. Do you recognize what that is?

A: It is a DVD with my initials on it.

Q: Have you viewed the DVD?

A: I watched it in your office.

Q: What is on this DVD?

A: It shows the plaintiff, Mr. Able, playing tennis in Magnolia Park on April 11 of last year.

Q: Did you video Mr. Able playing tennis?

A: No, but I was there when the investigator, Mr. Ireland, did.

Q: Where is Mr. Ireland today?

A: Well, he moved to Australia in December of last year.

Q: Please tell us whether the DVD fairly and accurately shows what you saw happen when you saw Mr. Able playing tennis last April 11.

A: It does.

Q: Are there any sounds on the DVD?

A: Oh, yes, you can hear Mr. Able and the other man he was playing with cheering and talking.

Q: Do they or do they not sound the way they did on April 11?

A: They are the same.

DEFENSE COUNSEL: Offer Defense Exhibit 17, Your Honor.

PLAINTIFF'S COUNSEL: Objection. Ms. Flick didn't video this, the investigator did. No foundation.

JUDGE: Overruled. It is unnecessary that the videographer testify. Defense Exhibit 17 is received into evidence.

DEFENSE COUNSEL: Judge, may we show the DVD at this time?

JUDGE: You may.

6. Computer Animations

Computers can generate animations that illustrate what happened during the event that is the subject of the lawsuit. The animations are drawings created by the computer and then assembled so that when the animation is run it looks like a movie. With an animation, the jury can see a re-creation of events, such as an automobile collision, a plane crash, or a product failure. You can watch animations by visiting the links on this book's website at *http://www.aspenadvocacybooks.com,* which is a website for Wolters Kluwer advocacy books.

A valuable resource that both pulls together and analyzes cases involving computer animations is Kurtis A. Kemper, *Admissibility of Computer-Generated Animation,* 111 A.L.R. 5th 529 (originally published 2003).

The South Carolina Supreme Court listed the usual essential evidence rules that must be complied with to lay a foundation for a computer animation, which is another form of demonstrative evidence, as follows:

> Despite the dangers, computer animations can serve worthwhile purposes if screened carefully and admitted cautiously. We hold that a computer-generated video animation is admissible as demonstrative evidence when the proponent shows that the animation is (1) authentic under Rule 901, SCRE; (2) relevant under Rules 401 and 402, SCRE; (3) a fair and accurate representation of the evidence to which it relates, and (4) its probative value substantially outweighs the danger of unfair prejudice, confusing the issues, or misleading the jury under Rule 403, SCRE. (Note; the fourth requirement here is an apparently mistaken reversal of the standard under Rule 403.)

Clark v. Cantrell, 529 S.E.2d 528, 536 (2000).

Because an animation is demonstrative evidence, like a chart or diagram, and unlike a scientific device, the party offering it need not lay a foundation showing the validity of its underlying principles and data. *People v. McHugh*, 476 N.Y.S.2d 721, 760 (Supp. 1984); *People v. Hood*, 53 Cal. App. 4th 965, 969 (4th Dist. 1997).

a. A Witnessed Event

If the event was witnessed, the proponent of showing the animation need only call the eyewitness to lay the evidentiary foundation for admissibility, because the foundation for authenticating the animation is similar to the foundation required for a video at pages 275-276. The witness testifies that the animation is a fair and accurate portrayal of what the witness saw. For example, a motorist who witnessed a collision could testify to seeing what happened and that the animation fairly and accurately shows what happened, and the animation would be admissible.

b. Animation to Assist an Expert

Computer animations are admissible as demonstrative evidence to assist an expert in explaining a witness's findings and opinions to the jury; for example, in *State v. Farner*, 66 S.W.3d 188 (Tenn. 2002), a negligent homicide case in which the Supreme Court of Tennessee admitted a computer animation to illustrate and explain the accident reconstructionist's expert testimony. Again, the foundation for admissibility of an animation to assist an expert would resemble that used for a video at pages 275-276.

When an animation is admitted into evidence, the court should give a limiting jury instruction along the lines of this one given in *Hinkle v. Clarksburg*, 81 F.3d 416, 425 (1998), in accordance with Fed. R. Evid. 105 or its state rule counterpart:

> This animation is not meant to be a recreation of the events, but rather it consists of a computer picture to help you understand Mr. Jason's opinion which he will, I understand, be giving later in the trial. And to reenforce the point, the video is not meant to be an exact recreation of what happened during the shooting, but rather it represents Mr. Jason's evaluation of the evidence presented.

7. Computer Simulation

State v. Farner, 66 S.W.3d 188, 208 (Tenn. 2002), explains the difference between a computer animation and a computer simulation. The case discusses the additional foundational requirements for a simulation, which

would reconstruct the event and be admissible as substantive evidence, as opposed to a computer animation that only illustrates testimony, as follows:

> Computer generated evidence is an increasingly common form of demonstrative evidence. . . . If the purpose of the computer evidence is to illustrate and explain a witness's testimony, courts usually refer to the evidence as an animation. . . . In contrast, a simulation is based on scientific or physical principles and data entered into a computer, which is programmed to analyze the data and draw a conclusion from it and courts generally require proof to show the validity of the science.

Commercial Union Ins. Co. v. Boston Edison Co., 591 N.E.2d 165, 168 (1992), involved an actual computer simulation. *Commercial Union* concerned a dispute over whether the plaintiff was overcharged for steam supplied by the defendant. Plaintiff offered a computer simulation, generated by a computer program called TRACE, to prove the calculation of actual steam provided was less than what they were charged for. The defendant objected to the simulation. The Massachusetts Supreme Court found that the simulation was properly considered by the trial court and outlined the foundational requirements for the admission of a simulation as follows:

> The function of computer programs like TRACE "is to perform rapidly and accurately an extensive series of computations not readily accomplished without use of a computer." *Schaeffer v. General Motors Corp.*, 372 Mass. 171, 177, 360 N.E.2d 1062 (1977). We permit experts to base their testimony on calculations performed by hand, cf., e.g., *Anthony's Pier Four, Inc. v. HBC Assocs.*, 411 Mass. 451, 478, 583 N.E.2d 806 (1991); *Kroeger v. Stop & Shop Cos.*, Inc., 13 Mass.App.Ct. 310, 323, 432 N.E.2d 566 (1982). There is no reason to prevent them from performing the same calculations, with far greater rapidity and accuracy, on a computer. Therefore, as we indicated in *Schaeffer*, *supra,* 372 Mass. at 177-178, 360 N.E.2d 1062, we treat computer-generated models or simulations like other scientific tests, and condition admissibility on a sufficient showing that: (1) the computer is functioning properly; (2) the input and underlying equations are sufficiently complete and accurate (and disclosed to the opposing party, so that they may challenge them); and (3) the program is generally accepted by the appropriate community of scientists. *See Commonwealth v. Fatalo*, 346 Mass. 266, 269, 191 N.E.2d 479 (1963).

8. Summary Charts

Two types of summary charts are the Fed. R. Evid. 1006 chart and the Rule 611(a) chart. The 1006 chart is substantive evidence, not demonstra-

tive, and it is admitted into evidence and may go to the jury room during deliberation.

By contrast, a 611(a) chart is merely a teaching or illustrative device; it is inadmissible, and as such, many courts will not permit it to go to the jury room. If the summary chart does not qualify under 1006 because, for instance, the volume of the documents is insufficient, it may still be admissible under 611(a). A 611(a) chart summarizes the testimonial or documentary evidence that has been presented in the trial. For example, in *United States v. Baker*, 10 F.3d 1374 (9th Cir. 1993), an FBI agent testified to the values of drug transactions with the aid of summary charts that were based on her notes of the trial testimony. The summary charts were admitted for illustrative purposes to aid the agent's testimony.

Summary charts are nowhere mentioned in Rule 611(a); rather, they are permitted under Rule 611(a), which authorizes the judge to "exercise reasonable control over the mode . . . of . . . presenting evidence so as to (1) make the . . . presentation effective for the ascertainment of the truth, (and) (2) avoid needless consumption of time."

When the court allows the use of a summary chart, it may instruct the jury along these lines:

> Certain charts and summaries have been shown to you solely to help explain the facts disclosed by the books, records and documents which are evidence in this case. These charts and summaries are not evidence or proof of any facts. You should therefore determine the facts from the evidence.

United States v. Ogba, 526 F.3d 214, 225 (5th Cir. 2008).

State v. Yates, 168 P.3d 359 (2007) outlines the foundation necessary to introduce a summary chart into evidence. In *Yates*, the prosecution offered a chart with the list of the 13 murder victims listed horizontally across the top and 15 categories of evidence listed vertically down the left side. Information was added to the chart once the evidence was admitted. To be admissible, the court must be satisfied that (1) the chart is based on competent evidence already before the jury, (2) the chart fairly represents that evidence, and (3) the opposing party has a full opportunity to object before the jury sees it. Also, Yates requires that the jury be instructed that the "chart is not itself evidence, but is only an aid in evaluating the evidence." Id. at 391.

CHAPTER 9. WITNESS TESTIMONY

I. FORM OF THE QUESTION

Major Rule of Evidence (MRE) 611 gives the trial court the authority to control the form of the question put to a witness as follows:

> **(a) Control by Court**
>
> The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.
>
> **(b) Scope of Cross-Examination**
>
> Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.
>
> **(c) Leading Questions**
>
> Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness's testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

A. Argumentative Question—MRE 611

FORM OF OBJECTION: "Objection. The question is argumentative."

Con Frond v. D. Backel, 194 Maj.2d 269 (20XX-6) observed:

> Counsel's question "Do you expect the jury to believe that?" was argumentative. An argumentative question does not seek to elicit facts; it is one designed to prompt the witness to argue.

B. Assumes Facts Not in Evidence—MRE 103, 611

FORM OF OBJECTION: "Objection. Assumes facts not in evidence."

Through his questions, counsel may not testify to facts not before the jury. *Eden v. Beck*, 187 Maj.2d 111 (20XX-5).

C. Compound Questions—MRE 403, 611

FORM OF OBJECTION: "Objection. It is a compound question."

Blodgett v. Blinkin, 195 Maj.2d 34 (20XX-3) held:

> "Do you think that there is a market for the boat and that it will sell?" was a compound question touching on two issues but permitting only one answer. It would have been misleading and violates Rule 403. The trial court properly sustained the objection to the question.

D. Confusing the Witness—MRE 611

FORM OF OBJECTION: "Objection. The question is confusing."

Rule 611(a) states:

> The court shall exercise reasonable control over the mode and order of interrogating witnesses . . . so as to (1) make the interrogation and presentation effective for the ascertainment of the truth,

E. Harassing the Witness—MRE 611

FORM OF OBJECTION: "Objection. Counsel is harassing the witness."

Rule 611(a) states:

> The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to . . . (3) protect witnesses from harassment or undue embarrassment.

F. Leading Question—MRE 611

FORM OF OBJECTION: "Objection. Counsel is leading the witness."

Rule 611(c) states:

> Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness's testimony.

A leading question is one that suggests the answer. *State v. Shoan*, 195 Maj.2d 455 (20XX-3).

G. Narrative—MRE 611

FORM OF OBJECTION: "Objection. Question calls for a narrative response."

Downing v. Lasnik, 192 Maj.2d 123 (20XX-4) held:

> Except when restricted to background information, direct examination should be conducted in a question-and-answer format, rather than though a witness's narrative, which does not afford opposing counsel and opportunity to object.

II. PERSONAL KNOWLEDGE

FORM OF OBJECTION: "Objection. This witness has not been shown to have personal knowledge about this."

Rule

A witness may not testify about a matter unless sufficient evidence is introduced that the witness has personal knowledge of that matter. Proof that the witness had personal knowledge may come from that witness or it may be in the form of circumstantial evidence. This rule is subject to Rule 703 relating to experts. Rule 602.

For example, a witness was not allowed to testify to what occurred during a bar fight because he was not present and only learned about it from others, which was hearsay. *Bliss v. Gignorant*, 190 Maj.2d 99 (20XX-4).

III. LAY WITNESS OPINION

FORM: "Objection. The question calls for an opinion, which is . . . [not rationally based on perception of the witness; not helpful; misleading]."

Rule

A lay witness may testify factually or in the form of an opinion or inference including opinion touching on the ultimate issue to be decided by the trier of fact (not an opinion on law) only if

1. It is "rationally based on the perception of the witness";
2. It is "helpful to a clearer understanding of the testimony or the determination of a fact in issue"; and
3. "Not based on scientific, technical, or other specialized knowledge within the scope of rule 702" (expert testimony). Rule 701.

Examples of admissible lay opinions include:

- Speed of the motor vehicle. *Fit v. Prios*, 189 Maj.2d 388 (20XX-5).
- Intoxication of a person. *Dram v. Flaggon*, 186 Maj.2d 10 (20XX-6).
- Defendant was "calm" at a murder scene and the witness was surprised to find out that the victim was his wife. *Holz v. Spurrier*, 198 Maj.2d 144 (20XX-2).

IV. IMPEACHMENT—WHO MAY IMPEACH

Rule

Rule 607 states, "The credibility of a witness may be attacked by any party, including the party calling the witness."

A. Bias

In *Davis v. Alaska*, 415 U.S. 308, 316-317 (1974), the Supreme Court stated, "We have recognized that the exposure of a witness's motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *See also Delaware v. Van Arsdall*, 475 U.S. 673 (1986). Although cross-examination as to bias is a matter of right and the defendant in a criminal case is given wide latitude, the trial court determines what is relevant to show bias on an individual case basis. J. Mitchell, 5 Major Prac. Section 79.

V. IMPEACHMENT—SPECIFIC INSTANCES PROBATIVE OF UNTRUTHFULNESS

Rule

Rule 608(b), relating to specific instances of conduct, provides in part:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness's character for truthfulness or untruthfulness, or

> (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified. . . .

Examples of admissible specific instances include:

- Witness lied in a declaration signed under oath. *Prevare v. Cashun*, 199 Maj.2d 23 (20XX-1).
- Witness had previously used several false names. *Mendacy v. Reliable Parts*, 194 Maj.2d 333 (20XX-3).

Example of inadmissible specific incidents include:

- Witness previously used drugs. *State v. Dose*, 181 Maj.2d 213 (20XX-7).

VI. IMPEACHMENT—PRIOR CONVICTION

A. Rule

A prior conviction is admissible for the purpose of attacking the credibility of a witness under Rule 609 if these conditions are met:

1. THE TYPE OF CRIME is either:
   a. a *FELONY* (punishable by death or imprisonment over one year), and
      (i) in the case of the *witness,* the judge decides that the probative value of the evidence is not substantially outweighed by unfair prejudice (Rule 403), or
      (ii) in the case of an *accused,* the judge decides that the probative value of admitting the evidence outweighs its prejudicial effect to the accused.

      FACTORS TO CONSIDER: The State of Major Supreme Court in *State v. Berner*, 194 Maj. 2d 17, 25 (20XX-3), outlined several factors that the trial court should consider when making the determination whether or not to permit the prosecution to impeach the defendant with her prior conviction as follows:
      1. The type of crime—crimes of violence are not normally probative of the witness's propensity to lie;
      2. Length of the witness's criminal record—unnecessarily cumulative prior convictions are more prejudicial;
      3. Remoteness of the prior conviction—the older the conviction, the less probative of the witness's credibility;

4. Age and circumstances of the defendant presently or at the time of the prior conviction—was the defendant very young, were there extenuating circumstances?
5. The similarity of the prior crime—the greater similarity, the greater the possible prejudice.

OR

b. a *CRIME OF DISHONESTY OR FALSE STATEMENT* (felony or misdemeanor).

DEFINITION: "This phrase is restrictive and includes only acts in the nature of *crimin falsi,* the commission of which involves some element of untruthfulness, deceit, or falsification bearing on the witness's propensity to testify truthfully." *State v. Phibber*, 197 Maj. 2d 210 (20XX-2).

- Examples of *crimes qualifying* are theft, forgery, perjury, and embezzlement, and they are per se admissible for impeachment.
- Examples of *crimes not qualifying* are assault, manslaughter, and use or sale of drugs.
- Example of *crime where it is necessary to look beyond the face of the judgment and sentence* of conviction to determine its nature is second degree burglary, which requires an unlawful entry with intent to commit a crime. "Because theft is a crime of dishonesty, second degree burglary committed with intent to commit theft is also a crime of dishonesty." State v. Moore, 180 Maj.2d 175 (20XX-8). The State of Major differs from other jurisdictions, including federal court where crimes of deception qualify as crimes of dishonesty, but crimes of stealth, such as theft, do not.

2. TIME LIMIT: Fewer than ten years have elapsed since the conviction or release from confinement, whichever is later.

   EXCEPTION: A conviction more than ten years old is admissible if (1) the judge finds that the probative value together with the specific facts substantially outweighs the prejudicial effect, and (2) the proponent gives the adverse party sufficient advance written notice of intent to use the conviction.

3. CONVICTION STILL ACTIVE: The conviction has not been voided by either

   a. a pardon, amendment certificate of rehabilitation, or equivalent (exception: The conviction will be admissible if there has been a subsequent conviction of a felony); or

b. any of the actions mentioned in 3.a. if the basis was the defendant's innocence.

4. NOT A JUVENILE CONVICTION: Juvenile convictions are not admissible, except that the court may in the interest of justice admit juvenile convictions to impeach witnesses other than the accused.

B. Facts of the Conviction

In *State v. Demarco*, 196 Maj.2d 190 (20XX-2), the prosecutor on cross-examination of the defendant sought to elicit facts underlying the defendant's prior conviction, which the prosecutor introduced for impeachment purposes, and the Major Supreme Court held:

> Under MRE 609(a), cross-examination is restricted to the facts contained on the face of the judgment and sentence of conviction, including: the fact of conviction, the type of crime, and the punishment imposed. Cross-examination exceeding these bounds is irrelevant, unduly prejudicial, and therefore inadmissible.

C. What Is Admissible

The cross-examiner can (a) introduce the self-authenticated judgment and sentence document, or (b) elicit an admission to the conviction on cross.

D. Limiting Instruction

Normally, the trial judge will instruct the jury at the end of the case that the prior conviction may be considered only in deciding what weight or credibility should be given to the testimony of the defendant and for no other purpose.

VII. IMPEACHMENT—PRIOR INCONSISTENT STATEMENT

A. Rule

Under Rule 613, a witness may be examined about prior inconsistent statements, either oral or written, to impeach the credibility of the witness, not as substantive evidence, if

1. the prior statement is inconsistent with that made as a witness (inconsistency is determined by the "whole impression or effect of what has been said," *Dunham v. Dunham*, 165 Maj.2d 87 (20XX-15)); and

2. the statement or contents need not be disclosed to the witness at that time, but on request it shall be disclosed to opposing counsel.

B. Extrinsic Evidence

Evidence of the prior statement (either the writing containing the statement or testimony of a witness to the oral statement) is admissible, provided:

1. It is called to the attention of the witness and the witness is given an opportunity to explain or deny it, and the opposing attorney is given an opportunity to ask about the statement. This opportunity is satisfied so long as the witness has not been excused from subpoena and thus is still subject to being recalled. The court has the discretion to admit extrinsic evidence in the interest of justice even if the statement is not brought to the witness's attention. Rule 613(b);
2. The witness denies making the statement (if the witness admits making the statement, the court may in its discretion exclude extrinsic evidence as being cumulative under Rule 403). If the witness states that he cannot recall making the prior statement, the court may admit the extrinsic evidence. *State v. Float*, 194 Maj.2d 111 (20XX-3); and
3. The inconsistent statement does not concern a collateral matter (extrinsic evidences is inadmissible on a collateral matter even though the witness denies making the statement). *Stuck v. Withy*, 181 Maj.2d 251 (20XX-7)).

"The cross-examiner must prove up the prior inconsistent statement if the witness denies making it. An accused can be convicted only on the evidence and not by insinuations about prior statements." *State v. Level*, 129 Maj.2d 353 (20XX-27).

C. Substantive Evidence

The above-described restrictions do not apply to admissions by a party opponent for such statements are non-hearsay and are admissible as substantive evidence. Rules 613 and 801(d)(2). Also, a prior inconsistent statement will be admissible as substantive evidence if the declarant testifies and is subject to cross-examination, and the prior statement was given under oath and subject penalty of perjury at trial, hearing, or other proceedings, or in a deposition. Rule 801(d)(1)(A).

D. Limiting Instruction

The party harmed by the prior inconsistent statement may request an instruction limiting the use of the inconsistent statement to impeachment purposes only (unless it also qualifies as substantive evidence).

CHAPTER 10. EXPERT TESTIMONY

FORM: "Objection. The question calls for an opinion that is [of no assistance to the jury, outside the witness's area of expertise, misleading, and so on]."

I. RULE

Under Rules 702 and 704, an expert witness may testify factually or in the form of opinion, including an opinion on an ultimate issue to be decided by the trier of fact, if

1. scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or determining a fact in issue; and
2. the expert is qualified by knowledge, skill, experience, training, or education.

II. TRIAL COURT'S DISCRETION

The admission of expert opinion is within the trial court's discretion, and the court's ruling will not be overturned on appeal absent an abuse of discretion. *Cheng v. Edwards*, 191 Maj.2d 76 (20XX-4). Whether an expert is qualified is a matter within the trial court's discretion. *Lininger v. Protech, Inc.*, 198 Maj.2d 45 (20XX-2).

III. SCIENTIFIC RELIABILITY

A. *Frye* Test

Frye v. U.S., 293 F. 1013 (CA DA 1923), enunciated the classic tests for a novel science: Has it gained general acceptance in the particular scientific field to which it belongs? Is there a reliable method for applying that theory? When offering such evidence, ask the expert this question about the scientific theory, protocol, or technology:

Q: Has or has not . . . been generally accepted in the scientific field of . . . ?

Example: *Trustworthy Tile v. Niles*, 161 Maj.2d 333, 338 (20XX-16), holding "under the *Frye* test that bloodstain pattern interpretation had gained general acceptance." Other jurisdictions hold that bloodstain pattern analysis is an accepted scientific method of proof. *See State v. Daughtry*, 340 N.C. 488, 459 S.E.2d 747 (1995). *See also* Danny R. Villeux, *Admissibility, in Criminal Prosecution, of Expert Opinion as to "Blood Spatter" Interpretation,* 9 ALR 5th 369 (originally published in 1993).

B. *Daubert* Test

The U.S. Supreme Court, in *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 113 S. Ct. 2786 (1993), dropped *Frye*, holding that Rule 702 replaced it. The *Frye* test becomes one of the "general observations" to consider in the court's preliminary screening.

Under *Daubert*, the trial court makes a Rule 104 preliminary inquiry whether the expert has scientific knowledge that will help the fact finder decide or understand a fact in issue. Rule 403 comes into play to exclude scientific evidence when its probative value is substantially outweighed by danger of unfair prejudice. Judicially relevant factors under *Daubert* are:

a. Whether the theory or technique can be and has been tested;
b. Whether the theory or technique has been subjected to peer review and publication;
c. The known or potential rate of error and the existence and maintenance of standards controlling the technique's operation; and
d. The level of acceptance in the scientific community.

Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 23 (1999), held that the court applied the gatekeeper concept to all expert evidence offered under Rule 702.

Daubert controls in the federal system. In the State of Major, *Daubert* has been in effect since it was adopted by the Major Supreme Court in *Dilbert v. Monroe*, 188 Maj.2d 471 (20XX-5).

C. Determining Reliability

Deciding that the trial court did not abuse its discretion in taking judicial notice of the reliability of footprint identification, the Major Supreme Court in *State v. Tharp*, 195 Maj.2d 325 (20XX-3), quoted *State v. Goode*, 461 S.E.2d 631 (1995), for what it found to be an analogous issue to the one it was currently considering:

> A new scientific method of proof is admissible at trial if the method is sufficiently reliable. . . . As stated above, in determining reliability, a court may look to testimony by an expert specifically relating to the reliability, may take judicial notice, or may use a combination of the two. . . . In the present case, Agent Deaver, a forensic serologist, testified extensively on voir dire concerning the reliability of blood stain pattern interpretation. . . .
>
> Our review of Agent Deaver's testimony leads us to conclude that it is sufficient to show that bloodstain pattern interpretation is an appropriate area for expert testimony.

IV. BASIS FOR OPINION

According to Rule 705, the types of data or facts upon which an expert may base an opinion include:

1. Those perceived by the witness or made known to the witness at or before the hearing.

   Example: A doctor performs a physical examination of a patient, or at trial a hypothetical question is posed containing a description of a person's physical condition.
2. Those otherwise inadmissible into evidence if reasonably relied upon by experts in a particular field in forming opinions.

   Example: A mechanical engineer renders an opinion based in part on discussions with workers who were at the scene when a crane collapsed.

It is an open issue in the State of Major under what circumstances, if any, the jury may be told about the content of the inadmissible evidence relied upon by the expert.

V. QUALIFICATION OF EXPERT

Model of Foundation Questions for Qualifying an Expert Witness

1. INTRODUCTION:
   - Q: Please state your name.
   - Q: What is your business address?
   - Q: What is your title?
   - Q: By whom are you employed?
2. EXPERTISE:
   - Q: What is your particular field?

Q: As [e.g., a latent fingerprint expert, firearms examiner], what are your primary responsibilities?

3. EDUCATION:
   Q: Where did you obtain your education in the field of . . . ?
   Q: Please describe your educational background in this area.
   Q: What degree did you receive after completing . . . ?
   Q: After receiving your degree in . . ., were you in a further educational program [e.g., for a doctor, intern and residency]?
4. CERTIFICATION:
   Q: What is board certification [e.g., in a particular field of medicine]?
   Q: What are the requirements to become board certified?
   Q: Are you board certified in . . . ?
5. Licensing:
   Q: Are you or are you not licensed in this state to practice [e.g., medicine, law]?
6. TRAINING:
   Q: Could you describe for the jury the other training you received in . . . ?
7. EXPERIENCE:
   Q: Have you received any on-the-job training as a . . . ?
   Q: How long have you worked as a . . . expert?
   Q: Over the years that you have worked as an expert in this field, roughly how often have you [e.g., compared known fingerprints with latent fingerprints, performed autopsies]?
8. PROFESSIONAL ORGANIZATIONS
   Q: Do you belong to professional organizations in the field of . . . ?
   Q: How are members of that organization selected?
   Q: Have you held any office in the organization?
9. TEACHING
   Q: Have you had any teaching experience in your area of expertise?
   Q: What was your academic title, if any?
   Q: Do you still hold the title and appointment of [e.g., associate professor]?
   Q: What subjects have you taught?
   Q: Please explain to the jury, the process of how you achieved the position of . . . .
10. PUBLICATIONS
    Q: Have you or have you not written on this subject?
    Q: What written works of yours have been published?

11. HONORS
    Q: Have you received any honors in the field of . . . ?
12. PRIOR EXPERIENCE TESTIFYING
    Q: Have you testified before as an expert in the area of . . . in [e.g., superior court, district court]?
    Q: How often have you testified in those courts?
    Q: Have you testified as a . . . expert in other states?
    Q: Have you been called to testify for the defense and the prosecution?
    Q: How often would you estimate that you have been called by each party?

VI. HYPOTHETICAL QUESTION

Before an expert testifies to an opinion and supporting reasons, it is not required that the facts or data underlying the opinion be disclosed—hypothetical questions are unnecessary. However, the court in its discretion may require such disclosure by hypothetical question. Rule 705.

VII. CROSS-EXAMINATION

A. Discovery

Because the facts or data supporting the expert's opinion need not be disclosed at trial and may include inadmissible information, it is important that opposing counsel obtain full discovery.

B. Underlying Facts

The expert may in any event be required to disclose the underlying facts or data on cross-examination. Rule 705.

CHAPTER 11. JUDICIAL NOTICE

I. RULE

Rule 201 provides in part:

(a) Scope of rule.

This rule governs only judicial notice of adjudicative facts.

(b) Kinds of facts.

A judicially noticed fact must be one not subject to reasonable dispute in that it is either

(1) generally known within the territorial jurisdiction of the trial court, or

(2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When discretionary.

A court may take judicial notice, whether requested or not.

(d) When mandatory.

A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity to be heard.

A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) Time of taking notice.

Judicial notice may be taken at any stage of the proceeding.

(g) Instructing jury.

In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

II. EXAMPLES

Examples of matters subject to judicial notice:

- Regarding the reliability of DNA testing, *State v. Phifer*, 197 Maj.2d 356 (20XX-2), held:

> In light of Agent Coen's testimony concerning the reliability and the decisions of other courts validating the reliability of DNA testing, we hold that the trial court did not abuse its discretion by taking judicial notice of the validity and reliability of DNA testing and allowing Patton to testify at trial.

- The City of Ruston is in Jamner County. *Pierce v. Snahomish*, 162 Maj.2d 98 (20XX-16).