Tax Evidence Part I: The Federal Rules of Evidence As Applied By The U.S. Tax Court

Three (3) Free NY & NJ CLE, CPE, and EA CE Credits

Bergen Community College *Ciarco Learning Center* **355 Main Street, Room 102/103Hackensack, NJ 07601**	**Tuesday, September 4, 2018** **6:00 PM to 9:00 PM**

TOPICS, INCLUDE:

Rule 103- Rulings on Evidence
Rule 201- Judicial Notice of Adjudicative Facts
Rule 401- Relevance
Rule 404- Character Evidence; Crimes or Other Acts
Rule 405- Methods of Proving Character
Rule 408- Compromise Offers and Negotiations
Rule 608- A Witness's Character for Truthfulness or Untruthfulness
Rule 609- Impeachment by Evidence of a Criminal Conviction
Rule 611- Mode and Order of Examining Witnesses and Presenting Evidence
Rule 612- Writing Used to Refresh a Witness's Memory
Rule 613- Witness's Prior Statement

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TIMED AGENDA

Tax Evidence, Part I: The Federal Rules of Evidence As Applied By The U.S. Tax Court
September 4, 2018 (6 pm – 9 pm)

6:00 - 6:05 **Introduction & Opening Remarks**
Frank Agostino, *Esq., Agostino & Associates, PC*

6:05 – 6:20 **Underpinnings and Purpose of the Rules of Evidence**
Edward N. Mazlish, Esq., Agostino & Associates, PC

6:20 - 6:30 **Judicial Notice and Presumptions**
Frank Agostino, *Esq., Agostino & Associates, PC*

6:30 - 6:50 **Direct Examination and Relevance**
Frank Agostino, Esq., Agostino & Associates, PC

6:50 – 7:00 **Privilege**
Frank Agostino, *Esq., Agostino & Associates, PC*

7:00 - 7:10 **Break**

7:10 – 7:15 **Cross Examination of Witnesses - Introduction**
Edward N. Mazlish, Esq., Agostino & Associates, PC

7:15 – 7:25 **Impeachment of Witnesses; Character and Habit Evidence**
Edward N. Mazlish, Esq., Agostino & Associates, PC

7:25 – 7:35 **Impeachment by Bad Acts That are Not Crimes**
Edward N. Mazlish, Esq., Agostino & Associates, PC

7:35 – 7:45 **Impeachment by Prior Criminal Conviction**
Edward N. Mazlish, Esq., Agostino & Associates, PC

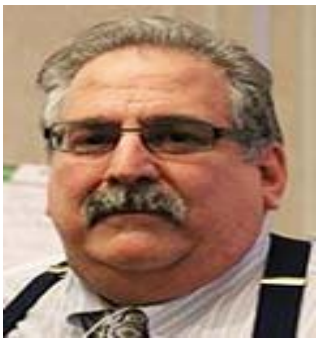
7:45 – 7:50 **Impeachment by Prior Statement**
Edward N. Mazlish, Esq., Agostino & Associates, PC

7:50 – 8:00 **Break**

8:00 – 8:55 **Review of Prior Exam Questions and Answers**
Frank Agostino, Esq., Agostino & Associates, PC

8:55 - 9:00 **Closing Remarks and Questions and Answers**
Frank Agostino, *Esq., Agostino & Associates, PC*

AGOSTINO & ASSOCIATES



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Profile

Frank Agostino is the president of Agostino & Associates, P.C., a law firm in Hackensack, New Jersey specializing in civil and white collar criminal litigation, tax controversies and tax planning.

Prior to entering private practice, Mr. Agostino was an attorney with the Internal Revenue Service's District Counsel in Springfield, Illinois and Newark, New Jersey. He also served as a Special Assistant United States Attorney, where he prosecuted primarily criminal tax cases.

As an adjunct professor, Mr. Agostino taught tax controversy at Rutgers School of Law and served as the co-director of the Rutgers Federal Tax Law Clinic.

Mr. Agostino is a frequent speaker and author on tax controversy and litigation matters. He serves on the Advisory Board of the Journal of Tax Practice and Procedure. Mr. Agostino is actively involved with the American Bar Association and the New York County Lawyers' Association.

Mr. Agostino is also the President of the Taxpayers Assistance Corp., which provides tax and legal advice to low income taxpayers in the NY/NJ area.

Recent Publications

- *Tax Practitioner's Guide to Identity Theft* (CCH Inc., 2017, ISBN 978-0-8080-4556-4
- *Recent Developments in FATCA Compliance*, 93 TAXES 51 (July 2015)
- *A 21st-Century Approach to Litigating Valuation Issues*, 17 J. TAX PRAC. & PROC. 47 (Apr.-May 2015)
- *Reviving Disallowed Charitable Conservation Easement Deductions*, 146 TAX NOTES 449 (Apr. 27, 2015)
- *Be Prepared: The IRS's Duty to Foster Voluntary Compliance Through Code Secs. 6014(a) and 6020(a)*, 17 J. TAX PRAC. & PROC. 5 (Feb.-Mar. 2014)

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- Civil Tax
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- LL.M., Taxation, New York University School of Law
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Awards & Recognition

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Edward N. Mazlish, Esq. is an experienced litigation attorney who has been licensed in NY since 1994 and NJ since 2000. After receiving his LLM in Taxation from NYU in 1995, he began litigating constitutional law cases against charity regulators throughout the United States. At his subsequent positions, he represented businesses in complex commercial litigation matters while also integrating his tax expertise as that knowledge could benefit his clients. He has been an associate with Agostino & Associates, P.C. since 2017, where he continues to practice litigation while expanding his practice to protect business clients from the IRS and state taxing authorities. He can be reached via email at EMazlish@Agostinolaw.com.

EVIDENCE PART I

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   B. Evidence classifications
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   B. Recurring relevance questions
   C. Other bad acts
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   B. Judicial notice of law
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   C. Basic testimonial qualifications
   D. Federal rules of competency
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   H. Creditability – impeachment
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V. Documentary Evidence
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EVIDENCE – PART I

I. General Considerations

A. Sources of rules of evidence

1. Pursuant to Tax Court Rule 143, the Federal Rules of Evidence are applicable to trials in the Tax Court.

B. Evidence classifications, and some evidence substitutes

1. Direct Evidence: evidence that tends to show the existence of a fact in question, without the intervention of the proof of any other fact.

2. Circumstantial (or Indirect) Evidence: evidence of facts or circumstances from which the existence or non-existence of a fact at issue may be *inferred* or *deduced* by the process of reasoning.

3. Testimonial Evidence: evidence adduced by oral testimony in court or under oath.

4. Documentary Evidence: evidence adduced by written instruments.

5. Real Evidence: objects relating to the issues in the case (e.g., the murder weapon). Real evidence is not likely to be used in Tax Court trials.

6. Demonstrative Evidence: visual aids, models, charts, enlargements. Demonstrative evidence is likely to be used especially by expert witnesses. (Other examples in tax court could include the use of maps to show the extent of a conservation easement donation for open land, and how the land could have otherwise been used, as in a subdivision plan.)

7. Presumptions. Generally, where a presumption exists, the party in whose favor the presumption acts establishes that fact or claim *prima facie*. The opponent has the duty of rebutting the presumption by producing evidence that the presumption is incorrect. FRE 301. The act of rebutting a presumption does not generally change who bears the burden of proof, HOWEVER

a. The most important presumption in Tax Court is that IRS is entitled to the ***presumption of correctness***, i.e., the IRS's deficiency determination is presumed correct. Thus, the Taxpayer generally bears the burden of proof at trial to show why the IRS is not correct.

b. Pursuant to IRC §7491, the Taxpayer may shift the burden of proof to the IRS where the Taxpayer introduces credible evidence with respect to any relevant factual issue, and where the Taxpayer has cooperated with the IRS and maintained all necessary records. **Practice Tip:** always move to shift the burden of proof to the IRS at the close of the Taxpayer's case in chief. It also pays to try and get a stipulation from the IRS that the Taxpayer has cooperated with the IRS

and kept all necessary records.

8. Judicial Notice. Facts accepted as true without formal proof. FRE 201 governs judicial notice. A court may judicially notice a fact that is not subject to reasonable dispute because it (1) is generally known within the court's territorial jurisdiction, or (2) can be accurately and readily determined from sources whose accuracy cannot be reasonable questioned.

   Procedurally, a Court may take judicial notice on its own, or upon motion/request by a party. In either case, if requested, the Court must provide a party with the opportunity to be heard on the propriety of taking judicial notice.

   Judicial notice may be taken at any stage of the proceeding. In Tax Court cases, facts for which judicial notice would be appropriate should be covered in the Stipulation of Facts.

9. Admissions. Tax Court Rule 90 provides:

> A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters which are not privileged and are relevant to the subject matter involved in the pending action, but only if such matters are set forth in the request and relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. However, the Court expects the parties to attempt to attain the objectives of such a request through informal consultation or communication before utilizing the procedures provided in this Rule.

The effect of admission is that the admitted matter is conclusively established without the need for additional evidence or testimony. Note that failure to respond timely to a request for admissions may result in matters being deemed admitted. *See* Rule 90(c).

10. Stipulations of Fact - especially important in the Tax Court. Tax Court Rule 91:

> (a) Stipulations Required: (1) General:
> The parties are required to stipulate, to the fullest extent to which complete or qualified agreement can or fairly should be reached, all matters not privileged which are relevant to the pending case, regardless of whether such matters involve fact or opinion or the application of law to fact. Included in matters required to be stipulated are all facts, all documents and papers or contents or aspects thereof, and all evidence ***which fairly should not be in dispute***. Where the truth or authenticity of facts or evidence claimed to be relevant by one party is not disputed, an objection on the ground of materiality or relevance may be noted by any other party but is not to be regarded as just cause for refusal to stipulate. The requirement of stipulation applies under this Rule

without regard to where the burden of proof may lie with respect to the matters involved. Documents or papers or other exhibits annexed to or filed with the stipulation shall be considered to be part of the stipulation.

Note: Tax Court Rule Rule 91(f) covers situations in which a party refuses to stipulate.

11. Res judicata (claim preclusion). Literally "a thing decided." Rule that a judgment on the merits is conclusive of all rights as among the parties in any later suit on issues determined in the prior suit. Requires identity of claims and parties.

12. Collateral estoppel (issue preclusion). Issue must have been actually litigated and decided on the merits. Requires identity of issues, not identity of claims.

II. Relevance

A. An introduction to relevance

1. Relevant evidence means any evidence having a tendency to make the existence of a material fact more or less probable than it would be otherwise. A material fact is one that has some consequence to the determination to be made in the action. FRE 401.

2. Relevant evidence is admissible; evidence not relevant is not admissible. FRE 402. (The most important rule.)

3. To determine what evidence is relevant, start with the issues raised in the deficiency notice and the pleadings, then determine the elements required to prove or disprove the issue. Keep in mind that where the parties have stipulated to a fact or a fact has been admitted, additional evidence on that fact is not technically relevant (it is cumulative).

4. Example: IRS disallows a business expense. The elements of a business expense are (1) must be ordinary and necessary, and (2) actually paid or incurred. Thus evidence showing that an expense satisfies these elements is relevant. Elements can be further sub-divided, e.g., "paid or incurred" requires consideration of Taxpayer's accounting method.

5. Exclusion of relevant evidence. Pursuant to FRE 403, relevant evidence may be excluded where its probative value is substantially outweighed by the danger of:

(1) Unfair prejudice

(2) Confusion of issues

(3) Misleading the jury

The use of this rule is not common in Tax Court because there is no jury, the Tax Court judge is not likely to be confused by the issues, and the Tax Court

discovery and stipulation process largely avoids the opportunity for a party to introduce potentially prejudicial evidence.

Relevant evidence may also be excluded based on considerations of undue delay, waste of time, and needless presentation of cumulative evidence.

6. Miscellaneous exclusion provisions:

   a. Foreign based documents. Pursuant to IRC §982

   (a) **General rule.** If the taxpayer fails to substantially comply with any formal document request arising out of the examination of the tax treatment of any item (hereinafter in this section referred to as the "examined item") before the 90th day after the date of the mailing of such request on motion by the Secretary, any court having jurisdiction of a civil proceeding in which the tax treatment of the examined item is an issue shall prohibit the introduction by the taxpayer of any foreign-based documentation covered by such request.

   Note: there is a reasonable cause exception.

   See Flying Tigers Oil Co. vs. Commissioner, 92 TC 1261 (1989)(during the audit, IRS sought documents through a written request which advised TP that, pursuant to IRC §982, the requested documents would be excluded from evidence in any later litigation if they were not produced within 90 days. IRS moved to preclude the admission any foreign-based documentation covered by the request. The court granted the motion, since TP had failed to show reasonable cause for its failure and had not initially moved to quash the request, as it was entitled to do.)

   b. Summons served after petition is filed:

      (1) After a case was docketed in the Tax Court, CID served summonses on several witnesses. TP filed a motion for protective order, arguing that the government's use of summonses would allow it to circumvent the Tax Court discovery rules and give it an unfair advantage. The court granted the motion and held that the government would be prohibited from using any testimony, documents or other information obtained pursuant to the use of administrative summonses. Universal Manufacturing Co. vs. Commissioner, 93 TC 589 (1989).

      (2) In Ash vs. Commissioner, 96 TC 459 (1991), the Tax Court refined its holding in Universal. As to summonses issued before the petition is filed, the court will not issue a protective order. As to summonses issued after the petition is filed, the court established two rules. First, if a summons is issued regarding the same taxpayer and same taxable year, the court will ordinarily issue a protective order unless respondent can show that the summons was issued for a valid reason, independent of the Tax Court litigation. Second, where a

petition has been filed and a summons has been served other than for the same taxpayer and same taxable year (i.e., for a different taxpayer or for a different taxable year), normally the court will not exercise its protective powers, unless the petitioner can show lack of an independent and sufficient reason for issuance of the summons.

c. Violation of constitutional rights or IRM:

(1) A Revenue Agent's violation of Internal Revenue Manual provisions (e.g., by continuing to seek evidence from the TP even after there are "firm indications of fraud") does not give rise to unconstitutional conduct requiring suppression of evidence. Vallone vs. Commissioner, 88 TC 794 (1987), Jones vs. Commissioner, 97 TC 7 (1991), involved more egregious facts, but no affirmative misrepresentation. The Court held that, even though had there been a constitutional violation, it would not apply the exclusionary rule.

(2) Evidence obtained by federal agencies in violation of a TP's constitutional rights is not admissible in Tax Court, but IRS can use evidence seized by state authorities in an unconstitutional search. Berkery vs. Commissioner, 91 TC 179 (1988).

B. Recurring relevance questions

1. Liability insurance - not admissible to show negligence, FRE 411

a. To prove ownership or control

b. For purposes of impeachment (bias or prejudice)

c. As part of an admission

2. Subsequent remedial measures - FRE 407

a. General rule - inadmissible to prove negligence

b. When admissible

(1) To prove ownership or control

(2) To rebut a claim that precaution was impossible

3. Settlement offers - FRE 408

a. General rule - Offers to compromise, and statements made in compromise negotiations are not admissible

b. Rationale - open dialogue without fear of potential admissions being used later helps to settle cases

4. Habit Evidence - FRE 406

a. FRE 406 provides:

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

Note: Do not confuse "habit" with "character." While there is no definition of "habit" in the FRE, this rule should not be relied on to try to introduce evidence of a person's character (e.g. truthfulness). In other words, a person does not have a "habit" of telling the truth, that falls under the rules for character evidence (see below).

Habit evidence should be "defined" as a person's regular response to a repeated specific situation or the routine practice of an organization (parallels habit of an individual).

Examples:

Habit evidence is commonly used to show timely mailing, but is not always admissible:

James v. Commissioner, T.C. Memo. 1999-160 (TP introduced evidence of his habit of picking up his tax return from the preparer and mailing it the same day; Court actually found that TP actually had a habit of late filing).

Coleman v. Commissioner, 94 T.C. 82 (1990)(habit evidence admitted as part of proof of date of mailing)

Mary O. Magazine v. Commissioner, 89 T.C. 321 (Court would not admit habit evidence, without more, to demonstrate IRS had mailed notice of deficiency, because date of mailing was of critical importance to determining Court's jurisdiction)

Habit evidence is also used to show routine business practices:

Karme v. Commissioner, 73 T.C. 1163 (1980)(operational practices of business relevant to determination of whether stock sale was a sham).

Finnegan v. Commissioner, T.C. Memo 2016-118 (2016)(associate of return preparer who pled guilty to fraud could testify that the preparer routinely, i.e., habitually, used certain entries and methods which appeared on taxpayer's returns).

Note that routine practice is what one company does. Compare with industry custom (i.e., what everybody does), which would be relevant to showing the standard of care, perhaps in response to a penalty assertion

b. Specific types of similar acts

(1) Previous similar acts admissible to prove intent

(a) Example. A pattern of tax fraud or non-filing shows intent to defraud, or a lack of seriousness as to one's tax responsibilities

(2) Sales of similar property

(a) Admissible to show value

(b) Usually shown through an expert

(3) Prior contracts and course of conduct

5. Character Evidence - FRE 404(a), 607, 608.

a. Character evidence is evidence as to person's disposition, or his or her disposition pertaining to a particular trait such as truthfulness or violence

b. Unlike habit evidence, character evidence may NOT be used to prove that on a particular occasion the person acted in accordance with the character or trait (there are exceptions for criminal cases).

c. For Tax Court purposes, character evidence will only be used with respect to the credibility of witnesses:

(1) Credibility of a witness is always relevant. Pursuant to FRE 607, any party may attack the credibility of a witness.

(2) Pursuant to FRE 608, a witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. Evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

(3) Means of proving character

(a) Opinion about W's character for truthfulness

(b) Testimony as to W's general reputation for truth and veracity in the community

6. Prior Bad Acts - FRE 404(b)

a. General rule - evidence of a crime, wrong, or other so-called bad acts is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with that "bad" character.

b. Exception - Prior bad acts may be admissible to show motive, opportunity, intent, preparation, plan knowledge, identity, absence of mistake, or lack of accident.

c. Examples:

(1) Evidence of mistakes on prior year returns may rebut the TP's claim that an error on the return in question is an isolated instance

(2) A TP's involvement in an illegal activity, perhaps narcotics sales, could prove the source, i.e., "opportunity" of unreported income

Exam Tips

Relevance

No matter what the item of evidence being presented, the first question to ask yourself is whether the evidence is relevant.

Makes more or less probable: Remember that an item of evidence is relevant if it tends to "make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FRE 401

Brick is not a wall: In analyzing relevance, remember that "a brick is not a wall" (and feel free to quote this "rule"). Relevant evidence may also be though of as one cigarette in a pack. In other words, if an item of evidence (call it A) is offered as tending to prove fact X, the fact that X is still less likely to be true than not true after proof of A does not block A from being relevant, as long as X is more likely to be true with A than without A. (Example: Decedent's Estate is issued a deficiency notice claiming that Decedent owned a significant asset (a business) at the time of his death that was includable in his gross estate for estate tax purposes. The Estate contends the business was owned by Decedent's brother. The IRS offers a letter written by Decedent, which he signed as "CEO." The letter is relevant and admissible (assume it is not hearsay), because it shows that Decedent wielded significant influence in the company, and this fact makes it more likely that he had some ownership interest than would be the case if the letter were not in evidence — it doesn't matter that the letter is not by itself enough to make it more likely than not that Decedent was the owner.)

Relatively rare: Instances of evidence that is really ***irrelevant*** are relatively ***rare.*** On multiple choice questions, an answer like "The testimony is relevant, and thus admissible" is more likely to be correct than an answer like "The testimony is inadmissible because it's irrelevant."

Legal irrelevance: The most common situation where the evidence is irrelevant ***involves legal*** irrelevance — if the item in question simply doesn't tie in with the ***legal elements*** for a claim or defense, it will be irrelevant.

Examples:

> TP receives a deficiency notice disallowing certain claimed business expenses. TP seeks to introduce evidence that he made other payments that were personal in nature that were not claimed as business expenses. That evidence is irrelevant to whether the challenged payments were actually made and whether the challenged payments were actually business expenses.

Probative value outweighed: This is very unlikely in a Tax Court case, however it may be argued where the IRS seeks to introduce evidence of prior bad acts or crimes to show a TP has a history of deceit. FRE 403. Where this comes in to play most commonly is with graphic**,** visually shocking material. (Example: In a murder case, photos of V's body taken after autopsy, when V looked gorier than after the murder itself, might be excluded

as likely to cause prejudice greater than the probative value, especially if pre-autopsy photos are available.) Remember that the prejudice/probative value balancing is largely within the judge's ***discretion.***

Exam Tips

Circumstantial Proof: Special Problems

Character evidence

Here's what to focus on in connection with character evidence:

> **General rule:** The general rule, of course, is that a person's character is inadmissible to prove "action in conformity therewith," i.e., to prove that the person acted a certain way in accordance with his character on a particular occasion. FRE 404(a) (***Example:*** TP receives a deficiency notice for income tax. The IRS will not be allowed to show that TP was generally a cheap person who didn't like to pay bills and TP won't be allowed to show that he had a reputation for paying his bills on time.)
>
> **Character in issue:** Remember that the general rule applies only to ***"circumstantial"*** use of character evidence, i.e.. X's character is used to prove that on a particular occasion he probably acted in conformity with that character. In other words, if a person's character is itself directly ***"in issue"*** (i.e., his character is an element of a crime, claim or defense), the general "no character evidence" rule simply doesn't apply, and the evidence is admissible. However, there aren't many true instances of "character in issue," especially in Tax Court.
>
> **Other crimes or bad acts by D:** ***other crimes or his unconvicted bad acts.***
>
> > **Generally inadmissible:** Remember that the general rule is that such evidence is not admissible to show that TP's other "bad acts" make it more likely that he committed the particular act at issue. (***Example:*** TP challenges the assessment of a TFRP. Respondent contends that TP was a responsible person and acted willfully. As evidence of willfulness, the IRS seeks to introduce evidence that TP was involved in civil litigation for refusing to pay his landscaper. Not admissible)
> >
> > > **Exceptions:** However, most questions in this "other crimes and bad acts" area involve one of the many exceptions to the general rule. So before you conclude that the evidence is inadmissible because of the general rule, look hard to see if the fact pattern falls into one of the exceptions. Using the prior example, if the IRS sought to introduce evidence that TP was previously assessed a TFRP for another company, and was found to have acted willfully, the exceptions for intent, and absence of mistake might apply.

<u>Habit – Routine Business Practice</u>

Remember that a person's ***habit*** can generally be used to show he acted in conformity with that habit on the particular occasion in question.

The essence of a "habit" is that it is a ***regular response to a repeated situation.*** (***Example:*** TP cannot find this postal receipt for the year at issue, but can demonstrate with postal receipts that he regularly mailed his tax return on April 1 for each of the past 10 years.)

Before concluding that something is a "habit," check for 3 factors (if even one is absent, the evidence is probably not of a true "habit"):

> **Specificity:** The more specific the action, the more likely it is to be a habit rather than mere proof of a character trait. So beware of general descriptions of behavior (e.g., something that sounds like reputation evidence) — these are likely to flunk the specificity test, and be inadmissible character evidence. (***Example:*** TP has a reputation for being on time is not admissible as habit evidence to show a return was timely mailed.)
>
> **Regularity:** The habit must be regular. This has two sub-aspects.
>
> > **First,** there must be a ***fair*** number of specific instances where the person adhered to the habit proved. (***Example:*** As above, postal receipts showing 10 years of returns mailed on April 1 of each year. While one or two years may not be enough, it is still worth making the argument)
> >
> > **Second,** there must be sufficient ***"uniformity of response,"*** i.e., not very many instances where the situation arose and the habit was not followed. (***Example:*** As above, TP is missing only one year's postal receipt.)

Make sure the proof of the habit is in the proper form. Proof of ***specific instances*** of the person's adherence to the habit is the best. (***Example:*** As above, postal receipts.) Courts sometimes — but not generally — allow the witness' ***opinion*** that a person has a particular habit. Testimony that the person has a reputation for having a certain habit is virtually never allowed.

Remember that evidence of the routine practice of an organization or institution is admissible to show that some event occurred. (***Example:*** To prove that a document was mailed on a particular day, a company secretary testifies that she, the secretary, personally enclosed the document in a properly addressed envelope, sealed it, and placed it in the basket marked "Outgoing Mail" on that day at 2 p.m. She further testifies that, as a matter of office routine, the office mail clerk empties the basket every day at 4 p.m. and immediately, takes the contents to the post office. This is sufficient to meet the requirements for proving the business's "routine practice," and thus to establish that the document was probably mailed on the day in question.)

> Make sure the witness describes the routine business practice with sufficient specificity, and that the witness has personal knowledge of that practice. (***Example:*** If in the above example, the testimony were merely that "We always mail documents out the day they're prepared, and I prepared this on May 1, so it must have gone out that day," the lack of detail about where the mail is put, who takes it to the post office and when, etc., may cause the court to deny

admissibility.)

The testimony need not be given by the person who carries out the business practice, as long as the witness has personal knowledge of the practice. (***Example:*** In the first, detailed example about mailing the notice, the fact that the secretary didn't personally empty the Outgoing box every day and take the contents to the post office didn't block admission, because she had first-hand knowledge of how this was done and who routinely did it.)

Remember that a business custom can be used to prove the ***non-occurrence*** of an act. (***Example:*** Company claims that it never received a certain notice from the IRS. The company's mailroom clerk testifies that it was the invariable procedure of the company to have all correspondence from the IRS immediately hand delivered to the CFO, and for him to wait while the CFO immediately opened and reviewed the IRS correspondence, and that no such notice was ever delivered to or reviewed by the CFO. This should be admissible to demonstrate that the company never received the notice.)

Subsequent Remedial Measures

Evidence that the defendant has taken subsequent remedial measures is ***inadmissible*** to prove D's ***negligence.*** While this rule is more applicable to personal injury cases, one could envision that if a business negligently failed to report and item of income, and then implemented a new procedure to avoid the problem again, this should not be admissible in connection with of the assertion a negligence penalty. However, where ownership of an asset is at issue, which can often be the case in Tax Court, the fact that the TP fixed a loose step after a trip and fall would certainly be admissible to prove ownership or control of the building.

Insurance

Evidence that a party has liability insurance is inadmissible to show that he acted negligently or otherwise wrongfully. FRE 411. This is highly unlikely to come up in Tax Court, but as with subsequent remedial measures, could be offered as proof of ownership or control.

Settlements and Compromises

Settlements: Evidence of an offer to settle a claim is inadmissible on the issue of the claim's validity.

Collateral admissions of fact: Most frequently-tested: admissions ***of fact*** made in conjunction with settlement offers. Here, remember that such collateral admissions are not admissible under the FRE. (***Example:*** TP says to IRS, "Your calculations seem high, but since I may have underreported my income by a little bit, I'll offer you $1,000." Both the fact of the offer and the statement made in connection with the offer must be excluded.

Abraham Lincoln Infamous Cross-Examination

As Defense Counsel on a Murder Case
Adjudicated May 07, 1858
SUMMARY OF EVENTS

Abraham Lincoln (1809 - 1865) had always shown great intellectual promise. After he returned from the Black Hawk War (1832) he began taking odd jobs, and although he had little formal education, he began to study law. After his admission to the bar (1836), Lincoln quickly became known as an unusually skilled litigator who was effective and resourceful, and who was able to present complicated issues simply and persuasively. He argued 243 cases before the Illinois Supreme Court. Lincoln went on to became the 16th president of the United States (1861 - 1865), leading the Union to victory in the American Civil War.

In 1858, William "Duff" Armstrong was tried in the Circuit Court of Illinois for the murder of James Metzker on the night of August 29, 1857. The State's star witness was Charles Allen, who testified on direct examination that he had seen Armstrong strike Metzker in the eye with a slingshot. According to one young lawyer present in the courtroom, Lincoln "sat with his head thrown back, his steady gaze apparently fixed upon one spot of the blank ceiling, entirely oblivious to what was happening around him, and without a single variation of feature or noticeable movement of any muscle of his face." Finally, Lincoln stood and began his cross-examination of Mr. Allen.

Lincoln's Cross-Examination

Selected Excerpts of Testimony:

Q: Did you actually see the fight?
A: Yes.
Q: And you stood very near to them?
A: No, it was one-hundred fifty feet or more.
Q: In the open field?
A: No, in the timber.
Q: What kind of timber?
A: Beech timber.
Q: Leaves on it are rather thick in August?
A: It looks like it.
Q: What time did all this take place?
A: Eleven o'clock at night.
Q: Did you have a candle there?
A: No, what would I want a candle for?
Q: How could you see from a distance of one-hundred fifty feet or more, without a candle, at eleven o'clock at night?
A: The moon was shining real bright.
Q: Full moon?
A: Yes, a full moon.

At this point, Lincoln withdrew from his back pocket a blue-covered almanac, opened it slowly to the astronomy table for the night in question, and placed it before the witness. Lincoln continued his cross-examination,

Q: Does not the almanac say that on August 29th the moon was barely past the first quarter instead of being full?
A: (No audible answer from the witness)
Q: Does not the almanac also say that the moon had disappeared by eleven o'clock?
A: (No audible answer from the witness)
Q: Is it not a fact that it was too dark to see anything from so far away, let alone one-hundred fifty feet?
A: (No audible answer from the witness)

Defendant Armstrong was found <u>not guilty</u> of the murder as charged.

The acquittal represented a personal and professional triumph for Lincoln, who once rocked the cradle of the defendant in New Salem. Lincoln took over the defense after a change of venue (the case moved from Mason to Cass County).

The trial resulted from a nighttime brawl, and the resourceful Lincoln produced an 1857 almanac (the year the incident occurred) to show that the state's witness could not have seen Armstrong kill the victim because there was no moonlight at the time (he would have seen Armstrong from a long distance - impossible without full moonlight). Lincoln also produced a witness who helped achieve the acquittal.

III. Testimonial Evidence

A. Competence. Pursuant to FRE 601:

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

While no mental or moral qualifications for testifying as a witness are supplied by the rule, mental capacity is an element of competence, but difficult to actually apply. Since there is no jury in Tax Court, testimony will likely be allowed even if a party claims the witness is incompetent. The Judge can give the appropriate weight to the testimonial evidence, even if he thinks the witness is nutters.

B. Personal Knowledge - FRE 602

1. A witness may only testify of he has personal knowledge of the matters on which the testimony is offered. (This does not apply to experts). The evidence or the witness's own testimony must demonstrate that he has the requisite knowledge. If the witness does not have personal knowledge, the testimony is hearsay (which is not admissible and discussed at length below).

C. Oath or Affirmation - FRE 603

1. A witness must provide an oath or affirmation to testify truthfully and must appreciate what the oath means.

2. Under the FRE, all witnesses, even young children, are presumed competent to testify. The test for competency requires that the witnesses have sufficient intelligence, understanding, and ability to observe in order to recall and communicate information, comprehend the seriousness of taking an oath, and appreciate the necessity of telling the truth. When the witness is a child, the judge or attorneys may question the child in what is known as a voir dire process. The purpose of this process is to ascertain that the child:

   a. Knows the difference between truth and lies

   b. Is prepared to testify truthfully

   c. is capable of observing, remembering, and verbally describing events

   d. If the judge is satisfied, the child may testify

D. Form of examination of witness

1. Direct Examination of Witness

a. Leading questions are generally not permissible – FRE 611(c)

b. The rule continues the traditional view that the suggestive powers of the leading question are as a general proposition undesirable.

c. A leading question is a question that suggests the answer in the question itself. A question that starts with who, what, when, where, why, or how is generally NOT a leading question.

(1) Example of improper leading question: Isn't it true you called TP that day to tell him you received a notice from the IRS?

(2) Example of proper direct examination: Did you ever talk to TP on the telephone? When did you call to TP? Why did you call TP? (Note that it may take more than one question to get you to the same place as one leading question)

d. Exceptions to general rule against leading questions. Permissive use of leading questions on direct examination clearly falls within the area of control by the judge over the mode and order of interrogation and presentation and accordingly is phrased in words of suggestion rather than command. However, it is generally accepted that leading questions are permitted on direct examination as follows:

(1) Questions regarding preliminary, background or inconsequential matters (e.g. a witness's educational and professional background)

(2) To assist in developing a witness' testimony, especially where the witness has communication problems, the witness's recollection is exhausted, and where the witness is a child

(3) Hostile witness, adverse party, or a witness identified with adverse party (note that if the witness is not an adverse party or someone identified with an adverse party, the witness must be demonstrated to be hostile in fact, such as by an unwillingness to answer questions or a demonstrated bias. Once demonstrated, the Court should be asked for permission to treat the witness as "hostile," which is basically asking permission to ask leading questions.

2. Cross Examination of Witness

a. Leading questions are permitted

b. Purpose is to test the accuracy and credibility of the direct examination

c. The scope of the cross-examination should not exceed the scope of the direct examination. In other words, no new topics of testimony should be permitted on cross-examination. If the cross examiner wants to explore different topics, the witness should be recalled when it is that party's turn to present its case in chief. It is, however, at the Court's discretion. FRE 611(b). Practically speaking, where

both the TP and the IRS intend to examine the same witness at trial, the convenience of the witness will prevail, and both parties will normally be allowed to question the witness on whatever topics are relevant. If the IRS questions the witness on new topics, the TP's counsel would do well to ask the Court for permission to use leading questions on re-direct examination with respect to those new topics. FRE 611(b) states that new topics may be permitted on cross-examination "as if on direct examination." The argument is that had the cross-examination been limited and the witness recalled on the IRS's case in chief, the TP's counsel would have been entitled to ask leading questions.

3. Vague, Ambiguous, and Misleading Questions

   a. Generally objectionable

   b. As a rule of thumb, if you don't understand what is being asked, neither does the witness, so make an objection

   c. Watch for questions that misstate dates, times, places, people involved, etc.

   d. Watch for questions that assume facts that are not in evidence (classic example: when did you stop beating your wife?)

4. Present Recollection Refreshed – FRE 612

   a. A witness's present recollection can be refreshed by showing the witness a document or by asking a leading question. The idea is that the document or question will spark the witness's present memory, not that the witness is just reading the document. If the witness is shown a document, the document does not generally come in as evidence.

      (1) Procedure. The examiner asks for permission to show the witness a document, then asks the witness to review the document, and then ask if the document "refreshes" the witness's recollection on the matter being questioned. If the answer is yes, the witness should be asked what the witness's recollection is. The examiner might also ask a leading question such as "would it refresh your recollection if I told you it was on a Saturday?" Again, the witness will answer yes or no, and if yes, can supply his newly refreshed recollection to the court.

      (2) While documents

   b. if a witness uses a writing while testifying to refresh memory, the adverse party may have the writing produced, inspect it, to cross examine thereon, and to introduce into evidence those portions which relate to the testimony. If the writing is used to refresh recollection prior to testifying, the court has discretion to order its production, to allow inspection, etc.

   c. Do not confuse this rule with the hearsay exception for past recollection recorded

(discussed below). A past recollection recorded is something that the witness does not presently remember, and the recorded item does not refresh his present memory.

E. Opinion testimony

1. Lay opinion testimony (not expert witness) – FRE 701

   a. Lay opinion testimony generally prohibited

   b. Lay opinion testimony is permitted only when:

      (1) The testimony is rationally based on witness's own perception; and

      (2) The testimony is helpful to clear understanding of the witness's testimony or the determination of a fact in issue; and

      (3) The testimony is NOT based on scientific, technical, or other specialized knowledge within the scope of the rule on expert witnesses (FRE 702).

      (4) Examples of lay opinion testimony that may be permitted:

         (a) General appearance or condition of a person

         (b) State of emotion of a person

         (c) Matters involving sense recognition

         (d) Identity and likeness of appearance, voice, or handwriting (must be based on the witness' personal knowledge of the subject's voice or writing).

         (e) Speed of a moving vehicle

         (f) Value of own services or property

         (g) Rational or irrational nature of another's conduct (sanity)

         (h) Intoxication

2. Expert Opinion Testimony – FRE 702-703, Tax Court Rule 143(g)

   a. Expert testimony is common in tax court cases because experts are often used on issues of valuation (e.g. appraisers). In connection with valuation, especially of real property, other experts may also be used, such as architects, engineers, and land use consultants, and builders.

   b. Expert testimony is allowed where "scientific, technical, or other specialized knowledge" will help the trier of fact either: (1) understand the evidence; or (2) determine a fact in issue. FRE 702.

c. An expert witness must first be qualified as an "expert," by demonstrating adequate knowledge, skill, experience, training, or education. At trial, qualification of an expert is accomplished on direct examination by the proponent of the expert. Once the witness's qualifications have been established trough testimony, the proponent offers the witness to the Court as an expert. Often, the parties do not challenge the qualifications of each other's experts. However, adverse parties may object and voir dire the witness to demonstrate he is not an expert. The Court will then rule on whether the witness will be permitted to testify as an expert.

d. In addition to the foregoing, the expert's testimony must:

(1) Be based on sufficient facts or data

(2) Be the product of reliable principles and methods, and

(3) Reliably apply the principals and methods to the facts of the case.

e. Bases of Expert Opinion – FRE 703

(1) May be based on facts or date of which the expert has been made aware OR personally observed (i.e., personal knowledge of the facts is not necessary).

(2) Facts or data relied on by expert need not be admissible as long as they are the type of facts or data reasonably relied on by experts in the field in forming an opinion.

f. Daubert/Kumho Tire[1] – trial judges charged with responsibility as "gatekeeper" to keep out unreliable expert testimony. Factors to be considered by Court are:

(1) Whether technique or theory has been tested

(2) Whether technique or theory has been subject to peer review

(3) The known or potential rate of error

(4) Whether the technique or theory has been generally accepted in the relevant scientific community

g. Tax Court Rule 143(g) – Expert Report is Direct Testimony

3. Opinion on Ultimate Issue – FRE 704

a. an opinion is NOT objectionable just because it embraces an ultimate issue of fact (e.g. the value of a charitable contribution)

[1] Daubert v. Merrrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993); Kumho Tire Co. v. Carmichael, 119 S. Ct. 1167 (1999).

F. Impeachment of Witnesses

1. What is "impeachment"? - to discredit a witness' testimony or credibility

2. To reiterate:

(1) Credibility of a witness is always relevant. Pursuant to FRE 607, any party may attack the credibility of a witness, including a party's own witness.

(2) Pursuant to FRE 608(a), a witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. Evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked (this is sometimes referred to as the "no bolstering" rule)

3. Other Methods of Impeachment:

a. Prior inconsistent statements - FRE 613 and FRE 801(d)(1)

(1) The prior statement need not be shown or disclosed to witness. In other words, the witness can simply be questioned about the statement. FRE 613(a). The statement must be disclosed to an adverse party's attorney upon request.

(2) Before extrinsic evidence of a prior inconsistent statement is admissible, the witness must be given the opportunity to explain or deny the statement and the adverse party must be given the opportunity to question the witness about it. This does not mean the witness cannot be questioned about the statement, only that any additional evidence about the statement will not be admitted until the witness has explained or denied the statement. FRE 613(b). (Note that FRE 613(b) does not apply to the prior statements of an opposing party.)

(3) Evidentiary effect of prior inconsistent statement: Limited to impeachment (showing a capacity to be mistaken) because the statement is technically hearsay. EXCEPTION: a prior inconsistent statement made under oath at a trial, hearing, other proceeding, or deposition is NOT hearsay and is admissible for any purpose, including the truth of the matter asserted. (Hearsay is discussed at length below)

(4) Prior consistent statements – not hearsay when offered to rebut an express or implied charge that the witness recently fabricated the statement of acted from a recent improper influence or motive – FRE 801(d)(1)(B)

b. Bias, interest, or motive – always relevant to credibility – may be shown by extrinsic evidence.

c. Impeachment by Evidence of Criminal Conviction - FRE 609

(1) Evidence of a criminal conviction is admissible to impeach a witness's character for truthfulness only if:

(a) It is any crime an element of which is dishonesty or false statement OR

(b) the crime was punishable by imprisonment for more than one year (i.e. a felony)

(c) Additional elements for admission for either (a) or (b):

(1) there was a conviction (arrest or indictment is not enough)(the fact that a conviction is on appeal does not make it inadmissible); and

(2) the conviction is not more than 10 years old; and

(3) there has been no pardon, annulment, or certificate of rehabilitation (or other equivalent procedure)

Note: there is an exception to the 10 year requirement. The proponent must (1) show that the probative value of an older conviction outweighs its prejudicial effect and (2) have given the opposing party reasonable written notice of intent to use such evidence to provide a fair opportunity for that party to contest its use.

Practice Tip: To attempt to keep admissible evidence of a criminal conviction out, you should always argue that its probative value is outweighed by its prejudicial effect under FRE 403. This only applies to crimes punishable for more than a year. For crimes involving dishonesty or false statement, that evidence must be admitted and is not subject to FRE 403.

d. Impeachment by specific instances of misconduct – prior "bad acts." FRE 608(b)

(1) General rule – except for evidence of a criminal conviction (see above) extrinsic evidence is NOT admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. The Court may, however, allow examination of the witness about prior bad acts if probative on the issue of credibility.

(2) For example, a witness may be asked on cross-examination "isn't it true you were arrested for shoplifting." The examiner must live with the witness's answer however. Thus, if the witness responds "no," no extrinsic evidence is admissible to show that the witness was, in fact, arrested for shoplifting. The same is true if the witness is testifying about the credibility of another witness. Thus, if the witness properly testifies that the TP has a reputation for honesty (under FRE 608(a)), and is then asked " are you aware TP was arrested for shoplifting," if the answer is no, no extrinsic evidence is admissible to show that TP was, in fact, arrested for shoplifting

(a) Subject to court's control

(b) Counsel must inquire in good faith – e.g. must have good faith belief that the bad act inquired about was actually committed

(3) Evidence of truthful character is admissible only after character has been attacked

e. Contradiction

(1) Proof of contrary facts

(a) Wrong on one fact suggests wrong on others

(b) Evidence of contrary facts on collateral issues generally not allowed

(1) Example: X is called as a witness by IRS and testifies "TP called me about his tax concerns, either the first or second Sunday in April. He called me right after I got home from church."

(2) X's statement that he received the call right after arriving home from church is collateral, not directly relevant to the issues in the case not relevant to bias, interest, or lack of capacity; and

(3) A witness may not be impeached through extrinsic evidence (i.e., testimony of another witness) of "collateral" facts to contradict the first witness's testimony

(4) Defects of capacity

(a) Perceptive disabilities

(b) Lack of memory

(c) Mental disorders

(d) For an excellent example of this type of impeachment (and the use of judicial notice), see Abraham Lincoln cross-examination above

(5) Lack of knowledge

(a) Expert witnesses - lack of expertise, of lack of sufficient data or information regarding the facts of the case; this should be done first during voir dire of the expert in an effort to have him disqualified. If the proposed expert truly lacks knowledge or information, he should not be qualified as an expert witness by the Court (Daubert). If the witness is qualified as an expert witness by the Court, this goes to the credibility of his testimony.

(b) Lay Opinion witnesses - contradictory facts

(c) Character witnesses - "Have you heard?" (Note: remember that pursuant to FRE 608(b) you must live with whatever answer the witness gives, no extrinsic evidence will be allowed in this regard)

4. Impeachment of hearsay declarant - FRE 806

   a. When a hearsay statement has been admitted (pursuant to some exception) OR when the statement of someone authorized by an opposing party, or the statement of an opposing party's agent, employee, or co-conspirator is admitted (as non-hearsay), the credibility of the declarant may be attacked (or supported) in the same way as if the declarant testified as a witness at trial.

   b. Evidence of the declarant's inconsistent statements and conduct is admissible even if the declarant did not have the opportunity to explain or deny. (Note that this differs from the rule for live witnesses, see above)

   c. If the opposing party calls the declarant as a witness, the declarant may be cross-examined on the statement even though it is a direct examination (i.e., leading questions are permitted)

5. Rehabilitation

   a. Explanation on redirect

   b. Good reputation for truth, only after character for truthfulness is attacked (FRE 608(a))

G. Objections, exceptions, offers of proof

1. Objections

   a. Objections to trial testimony - should be made after the question, but before the answer.

   b. Motion to strike - essentially an objection to evidence after it has already come in. Examples where proper:

      (1) Witness answers before objection can be made.

      (2) Question is permissible but the answer is objectionable (e.g. blatant hearsay, answer is not responsive to the question asked).

2. Preserving claims of error - FRE 103(a)

   a. Timely objection to admission of evidence must be made on the record:

      (1) For testimonial evidence, this means objecting before the question is answered (i.e. "calls for hearsay" or "calls for speculation"), or moving to strike after the answer is given.

(2) For documentary or real evidence, objection to its admission must be made at the time it is offered into evidence by the opposing party

(3) Objections should be made with specificity – i.e., the specific ground for exclusion should be stated unless it is readily apparent from the context. Better practice is to articulate the specific ground whether or not apparent from context (e.g. hearsay is the most common objection)

(4) Evidence Excluded

(a) If the Court's ruling excludes evidence you are trying to admit, to preserve a claim of error you must make an "offer of proof," which means you must tell the Court what the substance of the evidence was.

(b) No offer of proof is necessary if obvious from context, but again, better safe than sorry in actual practice

(5) No Need to Renew Objection

(a) Once the Court definitively rules on the record, a party need not renew an objection or offer of proof to preserve a claim of error

(b) Example: TP makes a motion before trial to have evidence admitted, and in the motion makes an offer of proof. Before or during trial the Court rules the evidence is not admissible. TP does not have to make another offer of proof.

(6) Court's statement – the Court may make any statement on the record regarding the evidence, the objection, and its ruling. The Court may direct a party to make an offer of proof in question and answer form (i.e. of the witness)

(7) Plain Error – a Court may take notice of plain error affecting a substantial right of a party even where no claim of error was properly preserved.

3. Doctrine of Completeness – FRE 106

a. Where a party seeks to introduce all or part of a writing, the adverse party may request that any other part of the writing, or any other writing or recorded statement also be admitted so the Court has the "complete" context.

b. Example: this may occur when a party seeks to introduce deposition testimony. Often only the questions and answers that the offering party thinks support its case are offered. The opposing party can request that other questions and answers also be offered to put the entire issue in context.

Exam Tips

Opinions, Experts, and Scientific Evidence

Lay Opinions

When a non-expert witness is testifying to what appears to be an opinion, examine two threshold issues before you apply the rules on opinions:

> **First,** make sure it really is an opinion, not some other form of evidence, such as reputation. (***Example:*** If the examiner asks, "Isn't it correct that your dog is generally known to be gentle?" this question is really asking for reputation evidence, not opinion evidence.)
>
> **Second,** check that the statement is being ***offered as testimony in court***. The rules on lay opinions apply only to in-court testimony, not to things said out-of-court (which may pose hearsay problems, but usually don't pose opinion problems.) (***Example:*** TP wants to introduce a letter to TP from W, in which W says, "In my opinion, your CPA was intoxicated when he prepared your tax return." This letter poses hearsay problems, but you don't need to worry about the opinion rules.)

Two requirements: Remember that a non-expert witness may testify to an opinion if the opinion is both: (1) ***rationally based on the perception*** of the witness; and (2) ***helpful*** to a clear ***understanding*** of the witness' ***testimony*** or the ***determination of a fact*** in issue. [FRE 701] Commonly-tested:

> Look for W's ***sense impressions***, or W's perceptions of someone's or something's ***appearance***, stated in terms of an opinion but based on ***common everyday knowledge***. These are admissible when it ***isn't reasonably practical*** for W to state the detailed underlying facts that caused her to form her opinion. **Example:**
>
> > In a case where TP's mental competence is in issue, W states that TP's appearance changed over time from one of neatness and alertness to one of disorder and absentmindedness. That's admissible.
>
> **Common trap:** W didn't have had a ***sufficient opportunity to perceive*** the elements on which her opinion is based. **Example:**
>
> > If W testifies that TP's CPA was intoxicated at the time TP's return was prepared, that opinion would not be admissible unless W actually observed the CPA drinking alcohol or acting in an intoxicated manner at that time. W could not testify that the CPA was drunk at the time the return was prepared based on W's knowledge that CPA liked to drink at work.

Expert Opinions

Technical issue: Look for a fact pattern where W is talking about some ***technical issue*** about which the ordinary person wouldn't have knowledge. That's your tip-off that you have to decide whether the requirements for expert testimony are met.

Foundation: Make sure that a foundation has been laid, demonstrating the witness' expert ***credentials***. The witness must be shown to possess some special technical expertise. This expertise may have been acquired by education, formal training, ***informal work experience*** ("on the job training"), or even amateur pursuit (a ***hobby***).

Stipulation: Even though one party offers to ***stipulate*** that the other's expert witness is qualified, the party offering the expert testimony is still permitted to ***continue questioning*** the witness about her qualifications. This is often done to show the Court how qualified the expert is so the Court will place adequate weight on her testimony. Offering to stipulate can be advantageous if the other party (and the Court) accept the stipulation and do not examine the witness on her credentials.

Similarly, an expert may be ***impeached*** on cross by challenging her credentials, because this calls into question how much weight the jury should give to her testimony. As noted above, this should also be done on voir dire if you are trying to exclude the expert in the first instance. (***Example:*** The court permits W, an appraiser, to testify as an expert witness. On cross, opposing counsel may ask W, "Isn't it true that you are not certified as an appraiser in the State of New Jersey?")

Trap: Just because a highly-trained or highly-educated witness is testifying, don't assume that she's giving an opinion or that her opinion constitutes expert testimony. If she's testifying about matters she ***personally observed***, and her testimony ***doesn't*** include opinions requiring ***specialized knowledge***, the rules on expert testimony ***don't apply***. (***Example:*** IRS calls W, an antiques dealer, who testifies that he once bought a similar item for $X. This isn't expert testimony, because it's a statement of W's personal knowledge of facts, and doesn't involve any opinion or inference requiring expertise.

Examples of ***appropriate*** expert testimony:

> After TP's makes a charitable contribution of a motorcycle, its value at the time of the gift is in dispute. W, a motorcycle dealer, who never saw the bike but reviewed a picture of it and was told its make, model and year, testifies that in his opinion, such a motorcycle is customarily bought and sold on the used market for between $4,000 and $5,000. Admissible.
>
> After TP makes a charitable contribution of open land, its value at the time of the gift is in dispute. W, a land use expert and engineer, testifies that a subdivision of 25 residential lots could have been developed from the property pursuant to applicable zoning regulations and engineering concerns. Admissible.

Example of ***inappropriate*** expert testimony:

W, an appraiser, testifies as to the value of a piece of real property based only on a statement made by a real estate agent. This should not be admissible because it is not based on adequate data or in facts of the type reasonably relied on by expert real estate appraisers.

Bases for expert opinion:

Opinion may be based on: (1) W's ***personal knowledge*** of the facts; (2) facts presented in the courtroom in the form of a ***hypothetical***; or (3) facts told to W outside the courtroom, and not in evidence, as long as they are of a ***type reasonably relied upon*** by experts in the particular field. FRE 703

An opinion based on ***material not in evidence***. ***Trap:*** The material relied on is ***inadmissible*** (usually hearsay); this ***doesn't matter***. (***Example:*** W, a land use expert, testifies on behalf of TP, "Based in part on the town zoning officer's statement to me that there are no wetlands on the property, I conclude that there will be no impact from wetland regulations on the number of lots that could be subdivided from the property. The fact that W's statement is based on inadmissible hearsay, the zoning officer's out-of-court statement doesn't prevent W's testimony from being admissible. TP would have to show that land use experts customarily rely on such oral information.)

Ultimate issue:

Look for an opinion on an ***ultimate issue of fact***. Mention that FRE 704(a) says that an otherwise-admissible opinion isn't deemed objectionable just because it embraces an ultimate issue of fact.

But W's opinion can't be posed in ***conclusory legal terms***, because then W is treading on an area reserved to the judge and jury. ***Example:***

TP's real estate attorney testifies, "in my opinion, TP owned the property at the time of his death." That is a legal conclusion for the Court based on the evidence.

Scientific Tests and Principles

When an expert's testimony concerns a scientific test or principle, check that the Daubert/Kumho Tire test for reliability is satisfied.

> Briefly cite some of the factors going to scientific validity: (i) whether the test/principle can be reliably tested; (ii) whether it's been subject to peer review and publication; (iii) its error rate; and especially (iv) whether it's "generally accepted" in the field.

The Daubert Standard in More Detail

A. Special rule for scientific evidence: As we have seen, an expert's testimony must be helpful — and in some courts, necessary — to the jury's understanding of the case. This is basically a requirement of relevance. But where the expert's testimony concerns a ***scientific*** test or principle, the federal courts impose an additional requirement: the proponent must show that the scientific test or principle is ***"scientifically valid."*** This requirement derives from the 1993 Supreme Court case, **Daubert v. Merrell Dow Pharmaceuticals, Inc.**

1. **Frye** case: Before we get to **Daubert**, we need to take a brief look at the doctrine it replaced, the so-called "Frye standard." The Frye standard, which derives from **Frye v. US**, 293 E 1013 (D.C. Cir. 1923), held that only scientific evidence that was ***"generally accepted"*** could be admitted.

   a. **Application in Frye itself:** The court in Frye upheld a lower court's refusal to admit the results of a lie detector test offered by the defendant in a murder case. The appeals court reasoned, "[W]hile courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be ***sufficiently established to have gained general acceptance*** in the particular field in which it belongs." The polygraph was simply too new a technique to have attained such acceptance "among physiological and psychological authorities."

   b. **Generally prevailed:** Until the 1993 decision in Daubert, all federal courts, and most state courts, paid at least lip service to the Frye standard. When courts wanted to reject a particular type of evidence, Frye furnished a convenient "hook" on which to justify the result — the court didn't need to independently assess the scientific reliability of the evidence, it could merely take a "head count" of scientists to determine whether the particular scientific test or principle was "generally accepted." Frye has thus been used to keep out not only polygraph evidence, but also ***hypnotically-induced*** testimony, ***psychological stress evaluations, voice prints***, and other techniques that the courts have mistrusted.

   c. **Criticisms:** There have been many criticisms of the Frye standard. Among them have been these: (1) Every scientific technique must at some point be comparatively new (and thus not yet "generally accepted" in its field), yet

newness alone doesn't equal unreliability; (2) The rule is ***hard to apply***, since it requires the court to define how "general" the general acceptance must be, exactly what principle it is that must be accepted, and what the "particular field" is to which the evidence belongs and in which it must be accepted; and (3) The dangers cited by proponents can be combatted by a less exclusionary rule, such as by focusing on the technique's ***reliability***, of which general acceptance is just one indicator.

2. ***Daubert*** rejects ***Frye***: Finally, in 1993, the Supreme Court rejected the Frye standard and substituted a new "***reliability***" standard, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1993).

   a. **Facts:** The P's in Daubert were minors born with serious birth defects, who claimed that these were caused by Bendectin, a drug manufactured by D that their mothers took during pregnancy. The Ps tried to establish their case by using the testimony of 8 experts, who would have offered two main types of evidence that Bendectin had caused the Ps' injuries: (1) analyses of test-tube and animal studies finding a link between Bendectin and malformations; and (2) unpublished "reanalyses" of previously published epidemiological (human statistical) studies, with the reanalysis finding a link between Bendectin and birth defects even though each published study had not found such a link. The lower courts refused to allow the expert testimony, holding mainly that the only "generally accepted" method of showing a link between a substance and a human birth defect was the use of epidemiological studies, and that unpublished "reanalyses" of prior studies did not qualify.

   b. Holding by Supreme Court: The Supreme Court threw out the Frye "generally accepted" test entirely. Instead, the Court held, in an opinion by Justice Blackmun, that scientific evidence must now meet two requirements before it can be admitted in federal courts:

      (1) the evidence must be shown to be ***"scientifically valid"***; and

      (2) the evidence must ***"fit"*** at least one issue in the case, i.e., be ***relevant*** to the task at hand.

   c. **Superseded by FRE:** The Court began by concluding that the Frye test had been superseded by the enactment of the FRE. FRE 702 sets forth the grounds for admitting scientific evidence ("If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise"), and does not impose any requirement of "general acceptance." Because the FRE are generally liberal on questions of admissibility, and because the "generally accepted" rule of Frye is conspicuously absent from the text of the Rule governing scientific evidence, the Court concluded that the FRE superseded the Frye test.

d. **New "scientific knowledge" test:** Instead, the Court concluded that FRE 702 itself imposes the requirement that scientific evidence be shown to constitute "scientific knowledge." To constitute "scientific knowledge," the Court said (at various points in its opinion), the evidence must be ***"scientifically valid,"*** must be ***"derived by the scientific method,"*** must be ***"good science,"*** and must "rest on a ***reliable*** foundation." (This is all one "prong" — which we'll call here the ***"reliability" prong*** — of the Court's analysis.)

e. **"Relevancy" prong:** The Court added a ***second prong*** to the analysis: in addition to the reliability prong, the evidence must be ***"relevant,"*** i.e., ***"sufficiently tied to the facts of the case*** that it will aid the jury in resolving a factual dispute." This is an issue of ***"fit"*** the Court said. Evidence might be scientifically valid, but be sought by the proponent to be used for a purpose for which the evidence does not fit; in that case, the evidence must be rejected.

(1) **Illustration:** The Court gave the following illustration of what it meant by this "relevancy" prong. Suppose an expert has studied the phases of the moon. That expert may then have "scientific knowledge" about whether a certain night was dark. If an issue in the case is whether there was moonlight on a certain night, the scientific knowledge is relevant to that issue (and thus is admissible under Daubert because it satisfies both the "reliability and "relevancy" prongs.) But use of the same knowledge on the issue of whether an individual was unusually likely to have behaved irrationally on that night would not be allowed, because it does not "fit" the issue (unless there were independent scientific grounds to support a link between phase-of-moon and human behavior).

f. **Determining scientific reliability:** Since the new test for scientific evidence is that the evidence constitute "scientific knowledge" or be "scientifically valid" (as well be tied to the facts), most of the Supreme Court's opinion in Daubert was devoted to ***how courts can determine whether proffered evidence is indeed "scientific knowledge."*** The Court listed these factors as ones that lower courts should consider:

(1) whether the theory or technique has been or can be ***reliably tested***. (If so, it's more likely to be found to be "scientific knowledge.")

(2) whether the theory or technique has been subjected to ***peer review and publication***. (If so, it's more likely to pass muster, because "submission to the scrutiny of the scientific community is a component of 'good science,' in part because it increases the likelihood that substantive flaws in methodology will be detected.")

(3) the technique's "known or potential ***rate of error***." Obviously, the more errors in individual applications of a technique or test (e.g., false matches in DNA testing), the less likely the test is to be "scientific knowledge."

(4) whether there are standards controlling the technique's operations, and whether those standards are well-maintained. For instance, if there is a ***professional organization*** that maintains standards for how the test should be performed, that's a plus.

(5) whether the technique or test has become ***"generally accepted."*** Under Frye, this was the sole factor. Under Daubert, it remains an important, though no longer dispositive, factor.

(6) whether the technique grows naturally out of work that the testifying expert was conducting ***independently of the litigation***, or was instead developed specifically for the present litigation. (This factor was not articulated by the Supreme Court, but was relied on by the Ninth Circuit on remand in Daubert; it's likely that other courts will agree). Clearly, techniques developed independently of litigation are more likely to be found to be "scientifically valid," if only because the technique and its proponents are less likely to be biased than where the technique is developed solely for use in the particular lawsuit.

(7) **Note:** The Court made it clear that these are "non-exclusive" factors. So the lower courts remain free to consider other factors that go to whether particular scientific evidence is "reliable." The last factor listed above — independence from the litigation — is one such factor.

(8) **Note:** None of the listed factors is ***necessary*** to a finding of reliability. So evidence satisfying some but not all factors (e.g., a technique that hasn't yet been subjected to peer review or general acceptance, but that is shown to be testable and to have a low error rate) may nonetheless be found "reliable."

g. **Partial dissent:** In a partial dissent, Justice Rehnquist criticized the majority for placing an undue burden on federal judges: "I do not doubt that Rule 702 confides to the judge some gatekeeping responsibility in deciding questions of the admissibility of proffered expert testimony. But I do not think it imposes on them either the obligation or the authority to become ***amateur scientists*** in order to perform that role."

h. **Result on remand:** The Supreme Court did not decide whether the expert testimony proffered in Daubert met the new standard. Instead, it remanded to the Ninth Circuit on that issue. The Ninth Circuit then concluded that the evidence did ***not meet*** the Daubert standard. Daubert v. Merrell Dow Phamaceuticals, 43 F. 3d 1311 (9th Cir. 1995). The Court of Appeals reasoned that research that is performed ***specifically for purposes of the litigation*** (which was the case here) will not be found to be "scientifically valid" (and thus admissible under Daubert) unless either: (1) the research is "subjected to normal scientific scrutiny through ***peer review and publication***"; or (2) the experts "explain precisely how they went about reaching their conclusions and ***point to some objective source*** — a learned treatise, the policy statement of a professional association, a published article in a

reputable scientific journal or the like —- to show that they have ***followed the scientific method***, as it is practiced by (at least) a ***recognized minority*** of scientists in their field."

(1) **Application of standard:** Under this fairly tough standard, the evidence was inadmissible — it was unpublished, it was developed specially for the present litigation, and the methodology behind it was not supported by published articles or other objective sources.

3. **Questions raised by Daubert:** Daubert raises many questions. Here are some:

a. **Scope:** What's the **scope** of Daubert, i.e., to what types of evidence does it apply? It clearly applies to traditional "hard" scientific evidence (e.g., DNA testing, spectrographic voice analysis, epidemiology, and the like). But does it apply to evidence from the ***social sciences*** (e.g., the reliability of hypnotically-induced testimony)? The answer is probably "yes" — the Court's opinion says that all "science" must meet the new standard, and the social sciences are nonetheless sciences.

(1) **Technical and other specialized knowledge:** A related question is, does Daubert apply to the other types of expert testimony listed in FRE 702, ***"technical"*** knowledge and ***"other specialized"*** knowledge? A literal reading of Daubert — especially the Court's emphasis on the phrase "scientific knowledge" — suggests that the Court was only talking about "science," not technology or other specialized knowledge. If so, experts in these non-scientific fields (e.g., an expert car mechanic) would not have to show that their testimony and underlying techniques were particularly reliable or accurate — a showing that the witness was an "expert" who possessed the required technique or other specialized knowledge would suffice.

b. **Preference for "independent" research:** Will ***"independent"*** research (i.e., research not done in connection with the litigation) be easier to introduce? The Ninth Circuit's opinion on remand expressed a very strong ***preference*** for such research — essentially, independent research is ***presumed*** to be "scientifically valid," whereas research done expressly for the purpose of producing evidence for the present litigation must be made to jump through additional hoops (publication/peer review, or objective support in the literature). There's a good chance other courts will agree that litigation-specific research is to be scrutinized more harshly, but the Ninth Circuit's view will probably turn out to be stricter than most courts will impose. (For instance, under the Ninth Circuit's view, no matter how eminent the scientist, and now matter how clearly the scientist sets out the steps by which he did the research and says how it followed the scientific method, the evidence will be inadmissible if not peer-reviewed and not supported by published sources. So careful, well-credentialed new techniques developed for a particular case will rarely be admissible under the Ninth Circuit view.)

4. **What difference Daubert makes:**

   a. **No "head count":** The trial judge's job is probably harder than under Frye. It's no longer enough for the judge to conduct a ***"head count,"*** and to allow the evidence if and only if a majority or substantial minority of experts in the field have accepted the technique or test. Instead, the judge must attempt to make her own assessment of the reliability of the test or technique; "general acceptance" is now merely one factor to be considered (with testability, error rate, controls, peer review, etc. also needing to be taken into account).

      (1) **"General acceptance" still counts:** General acceptance remains a major — probably the single most important — factor. Techniques that are generally accepted within the relevant field will rarely be excluded under Daubert. Techniques that have not yet been generally accepted may sometimes pass muster (e.g., if they're ***very new***, have recently been published, and the expert has excellent credentials), but often will not. Certainly if the technique has been around a long time, and has been dismissed as unreliable by the vast majority of experts in the field, the technique is unlikely to be found "reliable" even if it meets some of the other factors (e.g., it's been published and peer-reviewed, but negatively.)

   b. **New techniques:** ***New or "novel" techniques*** clearly have a ***better chance*** of getting into evidence than under Frye. If the new technique has a good scientific pedigree, the fact that it hasn't yet had a chance to get "generally accepted" is no longer fatal.

   c. **Significant gatekeeper role:** Daubert doesn't really allow materially more scientific material into evidence than Frye. The judge remains very much a "gatekeeper" under FRE 702; "junk science" can and should still be kept out. It's just that the trial judge has more factors to use in deciding whether something is really true science rather than "junk science."

   d. **Role of judge:** The judge's role under Daubert is ***not*** to determine whether the ***results*** of the test or technique are reliable (i.e., accurate), in the particular case at hand. Instead, the judge's job is merely to determine whether the ***methodology used*** is reliable.

      (1) **Actual finding:** However, on this issue of whether the method was reliable, the judge makes the ***actual finding***. In other words, she must conclude that the method actually is or is not reliable (probably by a preponderance of the evidence). Since the Judge in a Tax Court case is also the finder of fact, if the evidence is allowed in, it's also up to the Judge to determine whether the ***results*** of the test or technique are accurate.

Exam Tips

Examination & Impeachment of Witnesses

Of the topics in this chapter, two make up the overwhelming majority of test questions: cross-examination generally, and impeachment (with its counterpart, rehabilitation).

Direct Examination

Where your exam question involves direct examination, there's really only one rule that gets tested with any frequency: the examiner may not ask leading questions. Remember that a leading question is one that suggests to the witness the answer desired by the questioner. (One common example: any question starting with "Didn't," "Weren't," or "Isn't it True"). Questions that begin with who, what, when, where, why, and how are generally not leading.

Remember the exceptions. Leading questions are allowed on direct for:

1. Questions regarding preliminary, background or inconsequential matters (e.g. a witness's educational and professional background)

2. To assist in developing a witness' testimony, especially where the witness has communication problems, the witness's recollection is exhausted, and where the witness is a child

3. Hostile witness, adverse party, or a witness identified with adverse party

Cross-Examination

Here's what to look for when the exam question involves cross-examination:

Scope: Look out for issues involving the proper scope of cross.

Limited to scope of direct: The majority rule - FRE 611(b) - is the "scope of direct" rule, i.e., cross is limited to the scope of the matters the witness testified to on her direct exam.

Controlled By Court: also keep in mind that the examination of witnesses is largely at the discretion of the Court. As noted above, for considerations of witness convenience, judges will often allow the witness to testify once on all topics, rather than being called separately to testify for TP and IRS. For issues on cross that exceed the scope of direct, the .adverse party should be allowed to question the witness on re-direct as if it were a cross-examination

Credibility: Questions relevant to credibility are always within the scope of cross.

Leading: Leading questions are permissible on cross.

Self-incrimination: Also, look out for situations in which the witness under cross invokes the Fifth Amendment privilege against ***self-incrimination***. When W properly invokes the privilege, what should the trial judge do? Usual answer: strike W's direct testimony. The reasoning is that W's invocation of the privilege prevents the parties from fully enquiring into the facts. Invocation of the privilege does occur in Tax Court. Example: IRS calls TP's CPA as witness and asks "isn't it true you knew TP's return was fraudulent at the time you signed it?" If CPA invokes the privilege, no testimony should be allowed by CPA regarding the return and its preparation.

Present Recollection Refreshed

Whenever a witness can't remember something, consider the possibility that the doctrine of "present recollection refreshed" may apply. Here are the aspects most often tested:

Remember that the doctrine applies only when the witness cannot remember the answer, but there is something that will refresh that memory (as opposed to something the W cannot remember at all, but which was recorded at the time).

Generally, ***any item*** (a writing or thing) may be used. Most fact patterns involve a writing (e.g., a newspaper article; a letter written by or to W; company files.)

The item itself need not be admissible. That's because the item is never being admitted into evidence, only the refreshed testimony becomes evidence. The witness must have an actual, present recollection after the "refresh," it cannot be testimony based simply on what the document or item says. If the witness's recollection is NOT refreshed, check to see whether the item itself is admissible instead. (In some cases you may want to admit the item even if the witness's recollection is refreshed.) Most common ways: ***past recollection recorded and business record***.

Frequently-tested: Does opposing counsel have the right to see the item and use it for cross-examination of the witness?

If the item is shown to the witness ***at trial***, FRE 612 gives the opposing party the right to inspect the item and use it for cross.

If the item is merely consulted by the witness ***before*** trial, FRE 612 leaves it up to the court's ***discretion*** whether to allow the opposing counsel to see the item and cross-examine W with reference to it.

Impeachment — Generally

When you conclude that a particular piece of evidence is inadmissible substantively, always check to see if it's admissible for ***impeachment***. Evidence is being used for impeachment when it's used to ***attack a witness's credibility*** (rather than to directly establish a fact at issue in the case).

Types of evidence or questions likely to be impeaching: (1) attacks on W's ***character***,

especially ***truthfulness***; (2) W's ***prior inconsistent statement***; (3) W's ***bias***; (4) W's ***sensory or mental defect***; and (5) ***contradiction*** of W's testimony (e.g., by testimony of a different witness).

Most commonly-tested: May a lawyer ***impeach his own witness*** (i.e., may impeachment be done on direct?)

YES, pursuant to FRE 607.

Impeachment By Prior Criminal Conviction or Prior Bad Acts

Impeachment by prior criminal convictions or prior bad acts are probably the most commonly-tested types of impeachment. The rules are detailed and non-obvious, so spend some time memorizing them. Here are the main things to watch for:

Prior convictions: Where the impeachment is by showing W's prior ***criminal conviction***:

Dishonesty or false statement: If the crime involved dishonesty or false statement ***("crimen falsi")***, the evidence is always admissible. FRE 609. And it's true even if the conviction was a misdemeanor. (***Example:*** Lawyer asks W, "Isn't it true that two years ago, you were convicted on misdemeanor charges of perjury?" Admissible.)

Examples of *crimen falsi*: perjury, criminal fraud, embezzlement, false pretenses, forgery, tax fraud (probably). Not covered: most crimes of violence; drug offenses. Questionable (but probably not covered): larceny (including shoplifting), robbery, burglary.

There's ***no discretion*** — the court can't conclude that the probative value is outweighed by the danger of unfair prejudice. In other words FRE 403 does not apply.

Felony Crimes (punishable by > 1 year in prison). Remember that what counts is the maximum sentence possible in the state or federal system where the conviction occurred, not the punishment W actually received. (So even a sentence of probation would not make the conviction inadmissible if a 1-year sentence could have been given for the crime.)

Non-dishonesty misdemeanor: If the crime is a misdemeanor not involving dishonesty, it's not admissible.

Limits: Don't forget some limits:

10-years: Most important, the conviction is not admissible (whether it's a felony or a crimen falsi misdemeanor) if ***more than 10 years*** has elapsed since the conviction or release from confinement (whichever is later), unless the judge finds specific facts making the probative value substantially outweigh the prejudicial effect. Most often, this special showing won't be made (and the conviction will be excluded).

Rehabilitation: Also, the conviction is not admissible if it's reversed on appeal, or, in most instances, if W was pardoned.

Procedures: Usually, the impeachment will be by ***questioning*** of the witness ("Weren't you convicted") But it may also be by extrinsic evidence, i.e., by introducing a certified ***copy of the judgment*** of conviction.

Prior bad acts: Unconvicted bad acts that are probative of truthfulness may be questioned at the discretion of the judge. FRE 608(b). Here's what to watch for:

Truthfulness: The bad act must be of a sort that bears on truthfulness. (The definition is basically the same as for ***crimen falsi*** under FRE 609. So these probably don't qualify: violent crimes; status crimes like drug-addiction; and theft crimes containing no clement of false statement, like shoplifting and burglary.

Bad acts that ***do*** meet the "bears on truthfulness" test: lying on an insurance policy: defrauding customers; committing perjury.

Good-faith basis: The questioner must have a ***"good-faith basis"*** for believing that the witness committed the bad act.

No extrinsic evidence: The bad acts must be proved only by questioning the witness, not by introducing ***"extrinsic evidence."*** In other words, you are stuck with the answers you get. This means that:

A ***second witness*** can't be called to testify that the first witness committed the bad act; and

Documents can't be introduced to show W's bad act, even during the cross-examination of W. But a document can be referred to, as long as it's not introduced.) (***Example:*** W can be asked, "Didn't you once file an insurance claim, in which you falsely said your car radio was stolen?" But the false claim form itself can't be introduced even if the W answers “no”)

Note: The only way extrinsic evidence can be used to show W's character for truthfulness is by reputation or opinion testimony, not by "specific acts" testimony, which is what is being discussed here.

Bad act led to conviction: If the bad act resulted in a conviction, the limits of the conviction rule probably must be adhered to even if only the bad act is inquired about. (***Example:*** W probably can't be asked, "Did you commit perjury 12 years ago?" if W was in fact convicted and released from prison more than 10 years ago, making the conviction itself too old to introduce.)

<u>Impeachment by Opinion and Reputation Testimony</u>

Remember that the principal witness (W1) can be impeached by the testimony of a second, or "character" witness (W2), subject to these rules:

Reputation or opinion: W2 must testify to W1's poor ***reputation*** for truthfulness, or testify that in W2's ***opinion***, W1 is of untruthful character. FRE 608(a). In other words, W2 can't testify to specific ***instances*** in which W1 was untruthful. (***Example:*** W2 can say, "I think, based on my past experience with him, that W1 often lies." But W2 can't continue on by saying, "For instance, I saw him lie about his income on a welfare application.")

Rehabilitation by specific instances: But once W2 gives the reputation or opinion testimony about W1's poor reputation for truthfulness, the party who called W1 may at the court's discretion ***rehabilitate*** W1 by asking about specific instances of W1's truthfulness. (***Example:*** To W2, "Didn't W1 tell you he'd been in jail, even though you had no other way to find this out?")

Rehabilitation by character testimony: once a W's character fro truthfulness has been attacked, he can be rehabilitated by another W's testimony as to his truthful character. FRE 608(a).

Impeachment by W's Prior Inconsistent Statement

Look for a witness testifying on the stand who is making a statement that is inconsistent with some prior statement made by that same witness. In general, the cross-examiner may impeach this witness by using the prior inconsistent statement.

Types of proof allowed: Proof of the prior inconsistent statement may be by either testimonial or extrinsic evidence.

Example of testimonial proof: TP testifies that money deposited in his bank account was a loan from a relative. IRS asks on cross. "When you were first questioned by the Revenue Agent, didn't you tell her the money was rental income?" Proper.

Example of extrinsic proof: Same fact pattern. TP denies the statement. IRS calls Revenue Agent as a witness who testifies that TP told her the money was rental income. The extrinsic evidence need ***not*** be shown to the witness, or summarized, before the inconsistency is revealed. FRE 613(a). But remember that extrinsic evidence of the prior inconsistent statement is not admissible unless the witness is given a chance to "explain or deny" the statement, and the party who called that witness is given a chance to rehabilitate. FRE 613(b). This rule can be dispensed with if "the interests of justice otherwise require", and does not apply at all where the statement is made by a party-opponent.

Extrinsic evidence: Most test questions focus on the special rules for showing a prior inconsistent statement by extrinsic evidence:

Collateral matters rule: Extrinsic evidence of prior inconsistent statement on a ***collateral issue***, i.e., one that is not directly in issue in the case; is generally not admissible. (***Example:*** Same basic facts as prior example. In the course of his testimony, TP testifies that on the day he met with the Revenue Agent, he bought

a gallon of milk from the 7-11. IRS calls W2, who testifies "TP told me he never shops at 7-11 because it's a rip-off." Inadmissible, because it's extrinsic evidence of prior inconsistent statement not relating to an issue in the case — whether TP did or didn't shop at the 7-11 that day isn't a direct issue in the case.)

Hearsay: Don't get confused by a prior statement that seems to be (or is) ***hearsay***. It's still admissible as a prior inconsistent statement if it's being used to impeach, not to prove its truth. Also, examine the possibility that a prior inconsistent statement may be admissible ***both substantively and as impeachment***. To be admissible substantively, the statement must not be considered hearsay or must quliafy for an exception to the hearsay rule. Two common situations where the statement will be admissible for both purposes: (1) A party's ***own prior statement*** is being introduced by the other party (thus qualifying substantively as an ***admission***); and (2) a person's prior statement was given ***under oath*** at a proceeding or deposition (thus qualifying substantively under FRE 801(d)(1)(A)'s "prior inconsistent statement" exception to the hearsay rule.)

Impeachment by Showing Bias

Examples:

An expert is asked, "How much are you getting paid to testify?";

A witness for the TP is asked, "Isn't it true that the TP in this case is your employer?";

W testifies on TP's behalf. IRS asks, "Isn't it true that you also received a deficiency notice for the same reason as TP, and you're awaiting trial, so you have an incentive to help TP?"

Foundation: Where the attacking party wants to use extrinsic evidence to show bias, focus on the possible need for a ***"foundation,"*** i.e., the need to give the witness who's being attacked the chance to explain before the extrinsic evidence is introduced.

Federal courts: Federal courts often require a foundation before the witness' own prior statement is introduced to show his bias, but not where some other kind of extrinsic evidence is used to show bias.

Impeachment by Showing W's Impairment

Remember that W can be impeached by showing an impairment of her capacity to observe, recall or narrate. (***Example:*** Abraham Lincoln cross-examination above)

Impeachment by Contradiction

Impeachment of W by ***contradiction*** occurs where evidence is offered that contradicts W's testimony in the case.

Keep in mind the rule against impeachment on a ***"collateral matter"*** (see above with respect to prior inconsistent statements). In other words, if the evidence doesn't bear on some independently relevant item like the witness's bias or general untruthfulness, it should be excluded as collateral.

But where W2's testimony contradicting W1 does relate to a substantive issue in the case, or to some fact provable even if it didn't directly contradict W1 (e.g., it proves that W1 is biased, or habitually lies, or lacks capacity to observe or remember accurately), then it won't be excluded as collateral. (***Example:*** W1, after giving testimony favorable to TP, is asked, "Aren't you a personal friend of TP?" W1 denies this. IRS may put on W2 to testify that W1 and TP are in fact friends — this would be admissible to prove W1 's bias (which is not a collateral matter) even if W1 hadn't denied being TP's friend.)

Rehabilitation

Once a witness' credibility has been attacked, it may be ***rehabilitated*** by the non-attacking party. Be on the lookout for two issues:

First, the rehabilitating evidence must be sufficiently ***directly related*** to the impeaching evidence. (***Example:*** P's expert witness, W1, is asked by D's lawyer on cross, "Doctor, how much are you being paid for testifying in this case?" W1 answers, "$500." P's lawyer then calls W2, who testifies solely that W1 has a good reputation for truth and veracity. This rehabilitating evidence is inadmissible because (1) it doesn't relate to W1's bias, and thus doesn't refute the impeaching evidence, and (2) character evidence for truthfulness is only admissible once a witness's truthful character has been attacked.

Second, a ***prior consistent statement*** can't be used to bolster a witness' credibility, unless the other side has first claimed that the testimony was a recent fabrication or the result of improper influence or motive.

> ***Example (admissible):*** TP testifies that money deposited in his account was a loan from a relative. IRS asks TP on cross, "Isn't it true that you made up this loan story only after the IRS audit?" Now, since IRS has claimed that TP's testimony is a recent fabrication, evidence as to TP's prior consistent statement (e.g. TP told Revenue Agent during the exam that the money was a loan) is admissible to rehabilitate TP's credibility.

V. Documentary Evidence

A. General Procedure

1. Ask the Court to mark Exhibit for identification

2. Authenticate document: e.g. ask witness "I show you Exhibit 1, mark it for identification. Are you familiar with it? How are you familiar with it? What is it?

    a. Must cover all the elements for admissibility depending on the document. Many documentary exhibits will potentially be hearsay. Most common foundation for admissibility in Tax Court will be business records exception to hearsay rule (discussed below). Also common is that a document is not being offered to prove its contents, but to demonstrate someone's state of mind.

3. Offer Exhibit into Evidence

4. Example objection by IRS counsel: "Respondent objects on the following grounds this witness has not properly authenticated the document. Also the document is hearsay."

5. Example response by Petitioner's counsel: "The witness has personal knowledge of the document and she has testified as to what the document is; the document isn't hearsay because it's offered to show the TP's knowledge." When dealing with Exhibits that are not stipulated to, you must know the foundation for admissibility of each one and have a witness or other plan (e.g. judicial notice) to get them into evidence.

6. Judge rules.

7. Remember that if the Judge excludes your exhibit and you wish to preserve the issue for appeal, you should make an offer of proof :

    a. Judge, may I make an offer of proof?

    b. State the substance of the evidence that was excluded.

B. Authentication

1. General requirement for authentication: need evidence sufficient to support a finding that the item in question is what its proponent claims it is. FRE 901(a).

2. In Tax Court, documents are often authenticated in the Stipulation of Facts (although objections to the documents on other grounds may be reserved).

3. Do not be confused by hearsay, a document may be authenticated but still not admissible as hearsay. Conversely, a document may be non-hearsay, but it still must be authenticated in some way. For example, just because a document appears to be

an admission of a party, it must still be authenticated as actually being authored or authorized by that party.

4. Evidence of authenticity

   a. MOST COMMON - Testimony of a witness with knowledge that an item is what it is claimed to be. Examples: "That is a letter I wrote," or "that is an e-mail I sent." FRE 901(b)(2).

   b. Handwriting verifications

      (a) Nonexpert opinion - based on familiarity. FRE 901(b)(2), FRE 701

      (b) Comparison of writings - by Court or by expert witness. FRE 901(b)(3), FRE 702-703

   c. Voice identification. FRE 901(b)(5), FRE 701

   d. Distinctive Characteristics. The appearance, contents, substance, and other unique characteristics, taken together with the circumstances. FRE 901(b)(4). E.g. reply letter doctrine - once a letter is mailed, another letter shown by contents to be in reply is authenticated.

   e. Ancient documents - FRE 901(b)(8)

      (a) Condition creates no suspicion concerning authenticity

      (b) Found in a place where, if authentic, it would likely be

      (c) 20 years old or more

   f. Telephone conversations FRE 901(b)(6) - evidence that a call was made to a number assigned at the time to:

      (1) A particular person, if circumstances show the person answering was the one called; or

      (2) A particular business, if the call was made to a business and the call related to business reasonable transacted over the telephone

   g. Public Records – FRE 901(b)(7) – evidence that

      (1) Document was recorded of filed in a public office as required by law (such as be a certified copy from the office where recorded or filed); or

      (2) A purported public record or statement is from the public office where items of its kind are maintained.

      (3) Note that in many cases, public records can be self-authenticating (see below)

h. Process or System – FRE 901(b)(9) – evidence describing a process or system and showing that it produces an accurate result

i. Catchall – FRE 901(b)(10) – any other method of authentication allowed by federal statute or rule of the Supreme Court

5. Self-authenticating documents - FRE 902

a. Public Documents Sealed or Signed:

(1) Must bear seal purporting to be that of the US, any state (including territories or insular possessions of the US), political subdivision of a state, department, agency, or officer of any such entity; and

(2) Signature purporting to be an attestation of authenticity

b. Public Documents Not Sealed but Signed and Certified

(1) Signed by an officer of the public entity

(2) Sealed or certified by another public officer in same entity that document is signed by someone with official capacity and signature is genuine

c. Foreign Public Documents

(1) Purports to be signed by person authorized

(2) Accompanied by certificate of genuineness by appropriate US or foreign diplomatic official

d. Certified copies of public records

(1) Certified as correct by custodian or other authorized person; or

(2) Certificate that complies with FRE 902(1), (2), or (3), a federal statute, io rule prescribed by Supreme Court.

e. Official publications of a public authority

f. Newspapers and periodicals

g. Trade inscriptions

(1) an inscription, sign, tag, or label purporting to have been affixed in the course of business, and

(2) indicating origin, ownership, or control

h. Documents acknowledged by a notary public or other officer authorized to take

acknowledgements.

i. Commercial paper and related documents (as allowed by general commercial law)

j. Presumptions under federal statute – anything that a federal statute declares to be presumptively authentic (this is rebuttable)

k. Certified domestic records of a regularly conducted activity. Requirements:

(1) Must qualify for business records exception to hearsay rule (FRE 803(6)), and

(2) Be certified as such by custodian or other authorized person that complies with federal statute or Supreme Court rule, and

(3) Proponent must give advance notice of use and make available to adverse parties for inspection, and

(4) Adverse party must have fair opportunity to challenge

l. Certified foreign records of a regularly conducted activity. Requirements:

(1) Must meet requirements for domestic records EXCEPT

(2) Certification must be signed under penalty of perjury rather than by custodian or other person authorized by federal statute or Supreme Court rule

C. Best Evidence Rule – FRE 1002, 1003, 1004

1. FRE 1002 - To prove the content of a writing, recording or photograph, the original is required, except as otherwise provided in the FRE or by statute, HOWEVER

2. FRE 1003 – Duplicates admissible to the same extent as original unless there is a genuine question as to the authenticity of the original or other circumstances make it unfair to admit the duplicate.

a. Example of admissible – exact copy of tax return where there is no concern that it is identical to the original and the original is authentic.

b. Example of (likely) inadmissible – copy of promissory note where one party challenges the authenticity of the borrower's signature

3. FRE 1005 – Copies of public records are admissible to prove content provided:

a. Otherwise admissible (authentic, non-hearsay)

b. Copy is certified as correct pursuant to FRE 902(4) or a witness testifies it is correct

c. If no copy can be obtained with due diligence, other evidence may be used

4. Best Evidence Rule does NOT apply:

    a. Application of the Best Evidence Rule requires an answer to the question of whether the contents of a writing are sought to be proved. Where evidence of the fact or event to be proved exists independently of the writing, the Best Evidence Rule does not apply. Examples: payment may be proved without a receipt (testimony), or the amount of earnings may be proved without the books and records (testimony).

    b. The Best Evidence Rule also does not apply to testimony that books anre records have been reviewed and found not to contain any reference to a designated matter.

    c. Writing is collateral to litigated issue (FRE 1004(d))

5. Summaries – FRE 1006 – a summary, chart, or calculation may be used to prove the contents of voluminous writings that cannot be examined conveniently in Court if:

    a. Proponent makes the documents (originals or duplicates) available for inspection and/or copying by other parties at a reasonable time and place, and

    b. Court may order them produced in court

6. Admissibility of Other Evidence of Contents – FRE 1004, 1007

    a. Writing is not required, and other evidence of contents is admissible if:

        (1) Originals lost or destroyed (unless proponent lost or destroyed them in bad faith); or

        (2) Original outside jurisdiction of court and not obtainable (e.g. cannot be subpoenaed); or

        (3) Original in possession of adversary who, after notice, fails to produce; or

        (4) Writing is collateral, not closely related to a controlling issue

    b. Proponent may prove the content of a writing or written statement of the party against whom the evidence is offered by testimony, without accounting for the original (FRE 1007).

    c. If secondary evidence is admissible, contents may be proven by testimony or by a non-original writing

D. Parol Evidence Rule

1. General Rule - When the parties have agreed on a writing as the final embodiment of their agreement (i.e., they have an "integrated agreement"), extrinsic evidence of the parties' negotiations, representations or promises is inadmissible to vary the terms of the written agreement

a. Note not in FRE because it is a rule of construction arising in contract law

b. But has effect on what is material, what facts are "of consequence to determination of the action."

2. Effect is to protect integrated agreements.

3. Exceptions to the Parol Evidence Rule

a. Completion of incomplete or ambiguous contract

b. Collateral agreements (not "part and parcel" of the main agreement)

c. Oral agreements

d. Mistake in reducing the agreement to writing (e.g. scrivenor's error)

e. Where a party contests validity of contract:

(1) Fraud, duress, or undue influence.

(2) Lack of consideration

(3) Illegality of subject matter

4. Subsequent modifications of written contract – Parol Evidence rule only bars prior or contemporaneous negotiations or agreements; would apply if subsequent modification is independently an integrated writing)

Exam Tips

Real and Demonstrative Evidence; Writings

Whenever a piece of evidence (a tangible "thing" as opposed to the testimony of a witness) is offered into evidence, here's what to look for:

Authentication

Confirm that the item has been properly ***authenticated***.

> Look for self-authenticating documents —- these don't need any sponsoring witness. Most common examples in Tax Court are certified copies of public records (e.g. certified transcripts).
>
> Most types of documents are NOT self-authenticating. (***Examples:*** Business Records (need custodian to testify as to authenticity and lay foundation for hearsay exception); personal or business letterhead (litigant can't simply introduce, unsponsored, a letter on letterhead for the purpose of establishing that the letter was written by the person or business whose letterhead it is.)

If the item does not fall into one of the categories of self-authenticating items, make sure there is a ***sponsoring witness***, who testifies that the item is what its proponent claims it to be. Make sure that the sponsoring witness's testimony falls into one of the two following categories:

> Either the sponsoring witness has personal knowledge that the item is what the witness claims it is (e.g., "this is the general ledger for XYZ Corp.") or
>
> The sponsoring witness(es) testifies as to the chain of custody for the object. (Example: Corporate Officer testifies he obtained the documents from CFO, who obtained them from the accounting department where they are normally maintained.)

Handwriting on a document. Most common sub-issue: can a ***nonexpert*** make the identification? Remember the rule on lay opinion (FRE 901(b)(2)): lay opinion on the genuineness of handwriting may be given if based upon "familiarity ***not acquired for purposes of the litigation***." (***Example:*** TP denies signing a return. IRS calls W, who testifies that W and TP were married for 10 years, during which time W became familiar with TP's signature, and that the signature on the disputed return appears to be TP's. Admissible.

> Conversely, if W acquired her familiarity with the writing in preparation for the litigation (e.g., by comparing known samples of TP's writing with the disputed samples), W must be a handwriting expert.
>
> Also, remember two other methods of authenticating handwriting: an ***admission*** by the writing (e.g. acknowledgment by a notary), and a ***comparison performed by the Court*** between the disputed sample and a known sample.
>
> Remember the special rule for ***wills:*** Under FRE 903, no attesting witness needs to

testify, unless local state law so requires. May states allow use of “self-proving affidavit,” but some states still require at least one attesting witness to testify to the will's execution.

When the item is a ***photograph or film:***

There is no requirement that a chain of custody be proven, only that a witness testify that the photo is a fair and accurate representation of what it purports to illustrate.

Trap: A question mentions that a photo or videotape was ***mislaid*** for a period of time, or that ***possession was transferred*** from person to person (with no clear chain of custody proven). Not relevant.

The ***photographer does not have to testify***. Only need supporting witness who can lay foundation by testifying that the photo is an accurate representation of what it purports to represent.

The photograph ***doesn't*** have to be an ***exact depiction*** of the entire scene as it was. It just has to fairly and accurately represent the thing(s) in issue.

A physical ***drawing, chart or illustration*** of a witness' testimony is admissible, if the witness testifies from personal knowledge that the drawing is a fair representation of what it purports to illustrate. (***Example:*** W is asked about certain payments made by XYZ Corp. Proponent offers into evidence a chart W prepared after examining at books and records. He states that the chart reflects his personal knowledge. The chart should be admissible as a summary.

Where what's being offered is a ***computer print-out***, the authentication must be by evidence: (1) ***"describing a process or system"*** used to produce the result, plus (2) evidence showing that the "process or system produces an ***accurate result***." (***Example:*** If a computer print-out of account balances is offered by P to show that D owes P money, P must first: (1) describe how customer-balance information gets entered into the system; and (2) show that the system for data entry, and the computer program that manipulates the data, are accurate.)(FRE 910(b)(9))

Where what's at issue is the ***parties to a telephone conversation***, authentication is vital and often tricky. Distinguish between outgoing and incoming calls:

For ***outgoing calls*** (calls made ***by*** the witness), authentication usually requires a showing that: (1) W made a call to the ***number assigned by the phone company*** to a particular person, and (2) the circumstances show that the person who talked ***was in fact*** the person the caller was trying to reach. FRE 901(b)(6)

For requirement (2), the most common "circumstances" are: (1) ***Self-identification*** by the person on the other end. (***Example:*** W wants to testify that he called TP, and that TP said something. W can do this by showing that: (1) he called the number listed in the phone book for TP; and (2) when someone answered, he identified himself as TP); or (2) ***Voice identification*** by W. (***Example:*** As above, but W can testify "I dialed TP's number, and I recognized TP's voice from prior conversations.")

For ***incoming calls*** (calls made to the witness), there must be a showing that the caller ***was in fact*** the one who she seemed to be. Most common ways to do this:

W testifies that he recognized the voice of the caller from having spoken to her previously; or

The caller is shown to have had knowledge that only the caller had. (***Example:*** TP wants to show that the person who left a message on TP's answering machine was W. If TP testifies that the caller said, "I received your signed return and put it in the mail to the IRS today, April 10," and TP also testifies that the only person who knew that TP wanted signed his return was W, the required authentication is made.)

Trap: To prove that the caller was X, it's ***not enough for*** W to testify that the caller said he was X — there must be ***some additional evidence*** that the caller really was X (e.g., that W recognized the voice, that the caller had special knowledge, etc.)

Best Evidence Rule

The Best Evidence Rule requires that the original writing or a true and accurate duplicate must be produced when the contents of the writing (or other document) are sought to be proved.

So the "best evidence" is not required when something other than a writing's contents is being proven. In other words, there's no general rule requiring that every fact be proven by the "best evidence" of that fact.

Example: The authenticity of TP's signature on a letter is at issue. TP's witness, W, testifies, "I knew TP's signature 10 years ago, and this letter contains TP's signature." IRS can't object that testimony by someone who's seen D's signature more recently is the "best evidence" of that signature's validity and must be offered instead.

Common situation: a writing has a ***legally operative effect***. Here, the Best Evidence Rule is very likely to apply. Examples: terms of a contract, contents of a tax return

Look for situations where W's testimony relies almost entirely on ***what a document says***. (Distinguish these situations — covered by the Best Evidence Rule — from those in which W relies in significant part on W's own personal knowledge — not covered.)

Very common trap: The Best Evidence Rule isn't triggered merely because a writing ***happens to contain the same info*** as that sought to be proved. If W ***independently*** has the same personal knowledge of a fact that happens to be separately is reflected in a document, W's testimony can be used instead of the document. (***Example:*** The issue is what costs TP sustained in performing a contract. TP may testify based on his own memory of those costs — even if the memory was "refreshed" by consulting business records. The fact that the records contain the same cost figures doesn't mean that the records must be introduced, because TP is testifying to his own knowledge of the costs

themselves, and the fact that those same costs are recorded somewhere is coincidental.)

Remember that under the FRE, the Best Evidence Rule applies not only to writings, but also to ***photographs and recordings (video and audio)***. FRE 1002

Always check whether the ***collateral writings exception*** to the Best Evidence Rule applies: If W's testimony relates to a minor issue in the case, then even if W is testifying about what a writing said, the Best Evidence Rule ***does not*** apply. (***Example:*** W is asked how he remembers the date of a meeting. He says, "I remember it was May 3rd, because the day of the meeting the newspaper announced my daughter's engagement, and I know that story ran on May 3rd." Even though W is testifying as to the contents of a writing (the newspaper story), the Best Evidence Rule won't apply, because the issue is collateral: it relates only to W's credibility as to the date. Thus the article doesn't have to be introduced.)

> When the contents of a writing are being used for ***impeaching a witness' credibility***, it is usually collateral (and thus need not be produced under the Best Evidence Rule.) (***Example:*** W testifies on behalf of TP. The IRS, to attack W's credibility, asks W, "Didn't you once file a false insurance claim?" Even though this question is arguably an attempt to prove the contents of a document, the Best Evidence Rule does not apply and the claim form doesn't have to be produced (and actually is not admissible as extrinsic evidence of a prior "bad act" under FRE 608(b)). The only issue to which the question relates is W's truthfulness, a collateral issue.

Remember that the Best Evidence Rule only applies where the original is ***available*** (or its unavailability is due to the proponent's ***bad faith***). In many exam questions, you're told that the original is lost or destroyed without fault, so you automatically avoid a Best Evidence Rule problem (though you should mention the Best Evidence Rule in your answer anyway). Common scenario: the original is burned in a fire that's not the proponent's fault.

If the Best Evidence does apply, remember that it's normally satisfied by the introduction of either the original or a true and accurate ***"duplicate"*** of the writing. ***Photocopies*** are admissible unless there's a "genuine question" about the original's authenticity, or admitting the copy would be unfair.

Exam Tips

Burdens of Proof, Presumptions

What effect does a presumption have once the opposing party produces some substantial evidence of the non-existence of the presumed fact (i.e., rebuts the presumption) Under FRE 301, the answer is: the presumption ***no longer has any effect***; it's a "bubble" that has "burst" (for instance, it doesn't shift the burden of persuasion).

> ***Example:*** D in a contract case claims she notified P by letter that she was withdrawing from the contract (as she was permitted to do). D testifies that she put the letter in an envelope, with proper postage, addressed to P at his place of business (a P.O. box), and that she placed it in a U.S. mailbox. (This is enough to trigger the presumption that a properly-mailed letter was received by the addressee.) P testifies that he got his mail each day from a locked post office box, and that he never received any such letter. Because P has come forward with enough evidence of non-receipt of the letter to rebut the existence of the presumed fact (i.e., to allow a reasonable jury to conclude that P didn't get the letter): (1) there is no presumption that P got the letter; (2) the burden of persuasion remains with P (so if the jury thinks there's a 50-50 chance that P got the letter, D wins); and (3) trier of fact may still infer from the evidence that P received the notice.

The Federal Rules of Evidence – Part I
Tax Court Non-Attorney Admission Exam

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Underpinnings and Purpose of the Rules of Evidence

Introduction

- Why do we need Rules of Evidence?
- Why not let litigants decide how to best make their case, and let the fact finder (in Tax Court, the judge) sort out the truth and decide what the truth is?

Purpose of the Rules of Evidence

- To facilitate the just, speedy, and inexpensive resolution of tax controversies
- To keep out ARBITRARY claims (not LOSING claims, but arbitrary claims not tied to fact) - even losing claims are heard
- Disproving an arbitrary claim can be lengthy and expensive, even impossible
- No “filibusters” allowed
- Touchstone of evidence is the RELIABILITY of the evidence offered

FRE 102: Purpose

- These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.
- Compare to Tax Court Rule 1(d): The Court's Rules shall be construed to secure the just, speedy, and inexpensive determination of every case.

Tax Court Rule 143

- Rule 143 (a) General: Trials before the Court will be conducted in accordance with the Federal Rules of Evidence.

Evidence Excluded – FRE 103

- You must preserve objections in order to be able to appeal adverse rulings.
- If the Court's ruling excludes evidence you are trying to admit, to preserve a claim of error you must make an "offer of proof," which means you must tell the Court what the substance of the evidence or testimony would have been if it had been admitted.
- Promotes the goals of speedy and inexpensive, by giving judge the chance to correct error immediately.

Preserving Claims of Error – FRE 103

- Timely objection to admission of evidence must be made on the record:
  - For testimonial evidence, this means objecting before the question is answered, or moving to strike after the answer is given.
  - For documentary or real evidence, objection to its admission must be made at the time it is offered into evidence by the opposing party
  - Objections should be made with specificity – i.e., the specific ground for exclusion should be stated unless it is readily apparent from the context.
    - Better practice is to articulate the specific ground whether or not apparent from context. (e.g. hearsay is the most common objection)

No Need to Renew Objection – FRE 103(b)

- Once the Court definitively rules on the record, a party need not renew an objection or offer of proof to preserve a claim of error
- Example: TP makes a motion before trial to have evidence admitted, and in the motion makes an offer of proof. Before or during trial the Court rules the evidence is not admissible. TP does not have to make another offer of proof.

Court's Statement – FRE 103(c)

- The Court may make any statement on the record regarding the evidence, the objection, and its ruling.
- The Court may direct a party to make an offer of proof in question and answer form (i.e. of the witness)

Plain Error – FRE 103(e)

- A Court may take notice of plain error affecting a substantial right of a party even where no claim of error was properly preserved.

Judicial Notice and Presumptions

Judicial Notice – FRE 201

- Facts accepted as true without formal proof.
  - A court may judicially notice a fact that is not subject to reasonable dispute because it
    - (1) is generally known within the court's territorial jurisdiction, or
    - (2) can be accurately and readily determined from sources whose accuracy cannot be reasonable questioned.
- Court may take judicial notice on its own, or upon motion/request by a party. In either case, if requested, the Court must provide a party with the opportunity to be heard on the propriety of taking judicial notice.
- Judicial notice may be taken at any stage of the proceeding.

Presumptions – FRE 301

- A presumption is where the Court will assume something true unless proven otherwise.
- Generally, where a presumption exists, the party in whose favor the presumption acts establishes that fact or claim *prima facie* – without proof.
- The opponent then has the duty of rebutting the presumption by producing evidence showing that the presumption is incorrect.
- The act of rebutting a presumption does not generally change who bears the burden of proof, HOWEVER

Presumption of Correctness

- The most important presumption in Tax Court is that IRS is entitled to the ***presumption of correctness***.
  - The Taxpayer generally bears the burden of proof at trial to show why the IRS is not correct.
- The Taxpayer may shift the burden of proof to the IRS where the Taxpayer introduces credible evidence with respect to any relevant factual issue, and where the Taxpayer has cooperated with the IRS and maintained all necessary records.

Direct Examination and Relevance

Testimonial Evidence

Basic Prerequisites for Testimonial Evidence

- Competence (FRE 601)
  - Every person is competent to be a witness unless these rules provide otherwise.
  - In civil cases, state law governs the witness's competency regarding a claim or defense for which state law supplies the rule of decision.
  - Never been tested.

Basic Prerequisites for Testimonial Evidence

- Personal Knowledge (FRE 602)
  - A witness may only testify if he has personal knowledge of the matters on which the testimony is offered.
  - Never been tested.

Basic Prerequisites for Testimonial Evidence

- Oath or Affirmation (FRE 603)
  - A witness must provide an oath or affirmation to testify truthfully and must appreciate what the oath means.
  - Never been tested.

Direct Examination of Witnesses

- Direct Examination of Witness
  - Leading questions are generally not permissible. FRE 611.
  - A leading question is a question that suggests the answer in the question itself.
  - Leading questions allowed if:
    - Background only (developing witness's testimony)
    - Hostile witness
    - Adverse party

2016 Question E-1

- (6 minutes) In the case in chief, TP calls C as the first witness. C testifies that C is the President of Charity, Inc., a nonprofit organization. C testified that, in November 2012, C approached TP's residence and rang the doorbell. C then testified that TP answered the door and that C and TP engaged in a conversation about Charity, Inc. After this testimony, TP asked C the following question: "Is it true that you, C, told TP that your organization, Charity, Inc., had been in existence since 2000, that the organization sought to improve the lives of the less affluent members of American society, that you were seeking donations to assist in that endeavor, and that all contributions were tax deductible?" The IRS objects, arguing that the form of the question (the phraseology of the question) is improper. TP disputes this contention. How should the Tax Court rule?

2016 Question E-1

- FRE 611 - Leading questions.
- Is this background information? Does not appear to be.
- Is C a hostile witness? No.
- Court should probably sustain the objection.

Relevance – FRE 401, 402

- Evidence is relevant if:
- **(a)** it has any tendency to make a fact more or less probable than it would be without the evidence; and
- **(b)** the fact is of consequence in determining the action.
- FRE 402: Relevant evidence is admissible; evidence not relevant is not admissible.

Relevance, cont.

- To determine what evidence is relevant, start with the issues raised in the deficiency notice and the pleadings, then determine the elements required to prove or disprove the issue.
  - where the parties have stipulated to a fact or a fact has been admitted, additional evidence on that fact is not technically relevant (cumulative).
  - Tax Court exam questions often contain assumption that evidence is relevant.

Relevance Example

- IRS disallows a business expense.
- The elements of a business expense are
  - (1) must be ordinary and necessary, and
  - (2) actually paid or incurred.
- Thus evidence showing that an expense satisfies these elements is relevant.
- Elements can be further sub-divided, e.g., "paid or incurred" requires consideration of Taxpayer's accounting method.

2016 Question E-6

- (6 minutes) Assume that TP is on the witness stand and assume the facts in Question 5. TP's attorney asks TP "What did you do after you talked with your brother on the telephone?" TP responded, "Well before I answer your question, I must say this. I think the IRS should be abolished because it is a crooked agency." The IRS objects to TP's testimony arguing that the statement is not pertinent to the case at bar. TP contests this claim. How should the Tax Court rule?

2016 Question E-6

- Without more, the statement is not relevant. TP would need to offer evidence of crookedness in this particular case, with particular facts. Standing alone, this statement is not relevant.
- This statement is also lay opinion that is prohibited by FRE 701 (discussed below).
- Even insofar as there is any probative value in TP's statement, its prejudice almost certainly far outweighs that probative value, making the statement inadmissible under FRE 403 (discussed below).

Exclusion of Relevant Evidence – Prejudice, Confusion, Delay

- Pursuant to FRE 403, relevant evidence may be excluded where its probative value is substantially outweighed by the danger of:
  - Unfair prejudice
  - Confusion of issues
  - Misleading the jury (trier of fact)
- Relevant evidence may also be excluded based on considerations of undue delay, waste of time, and needless presentation of cumulative evidence.

FRE 612: Writing Used to Refresh Witness's Recollection

- If the witness forgets something, the questioner can show the witness a writing to refresh the recollection.
- Adverse party is entitled to see the writing, cross examine the witness about the writing, and to introduce into evidence any portion of the writing related to the witness' testimony.
- Reliability: is the testimony really the witness', or is the witness really just reading the writing?

2016 Question E-8

- (6 minutes) Assume that TP calls TP's brother, B, to the witness stand. During direct examination, B testifies that B recalls having a telephone conversation with TP in early April 2013 regarding the filing of TP's 2012 tax return [the conversation in Question 5]. When asked by TP to testify to the precise contents of this conversation with TP, B testified that B could not remember the precise contents. TP wants to refresh B's memory by showing B an IRS document that summarizes an earlier interview that an IRS agent had with TP that includes details regarding TP's April 2013 conversation with B. The IRS objects that this is an improper means to refresh B's memory. TP counters that this method of refreshing B's recollection is proper. How should the Tax Court rule?

2016 Question E-8

- FRE 612 allows TP to use any writing to refresh B's recollection, so long as the IRS is given the opportunity to inspect the document and cross examine B about it.
- FRE 612 also allows the IRS to introduce the document into evidence either in whole or in part.

Settlement Offers- FRE 408

- General rule - Offers to compromise, and statements made in compromise negotiations are not admissible.
- Purpose of rule is to allow for free communication in settlement negotiations.
- Underlying facts do not become inadmissible just because they were discussed during settlement negotiations.

2016 Question E-7

- (6 minutes) Assume that TP is on the witness stand. On cross-examination, the IRS asks TP "Isn't it true that just last year in a letter you sent to the IRS you offered to concede that you underpaid your federal income tax and were subject to a Section 6662(b)(1) penalty in exchange for a negotiated resolution of this matter?" TP objects to this question arguing that his tax liability cannot be proved with such evidence. The IRS submits that the TP's objection is without merit. How should the Tax Court rule?

2016 Question E-7

- FRE 408 prohibits the use of settlement offers to prove underlying liability.
- Although the letter is and admission of TP and therefore not hearsay, it is not admissible because of FRE 408.

Privilege

Privilege – FRE 501

- There are no specific claims of privilege in the Federal Rules of Evidence
- Privilege is governed by:
  - Federal Common Law
  - The United States Constitution
  - Federal Statutes
  - Rule prescribed by the US Supreme Court

Privilege – FRE 501

- The most likely privilege that will appear on the test is the attorney-client privilege.
- Elements of attorney-client privilege under federal common law:
  - (1) where legal advice of any kind is sought;
  - (2) from a professional legal advisor in his capacity as such;
  - (3) the communications relate to the legal advice;
  - (4) the communications are made in confidence by the client

Privilege – FRE 501 Continued

- Client holds the privilege (only client can waive the privilege)
- Only the communications pertaining to advice, and not the underlying facts, are protected by the privilege.
- Attorney-Client privilege extends to federally authorized tax practitioners. IRC 7525.

Cross Examination of Witnesses - Introduction

Cross Examination of Witnesses

- Leading questions are permitted.
- Purpose is to test the accuracy and credibility of the direct examination.
- The scope of the cross-examination should not exceed the scope of the direct examination.

Cross Examination - Continued

- There are 2 purposes to a good cross examination:
- Show that what the other side says happened, did not actually happen.
- Show that the witness testifying today is not trustworthy (i.e., is lying)

Cross Examination - Continued

- There is a difference between “witness committed tax fraud in the past, therefore he committed tax fraud in this case” and “witness committed tax fraud in the past, which involved dishonesty, therefore he is lying today.”

Cross Examination – Continued

- Credibility of the witness is always relevant

FRE 607

- Any party, including the party that called the witness, may attack the witness's credibility.
- Attacking credibility differs from proving a substantive element of your case.
- Attacking credibility means showing witness is lying TODAY. Does not prove that the underlying event happened.

Impeachment of Witnesses; Character and Habit Evidence

Impeachment of Witnesses

- Character for Untruthfulness (FRE 608(a))
- Specific instances of misconduct (FRE 608(b))
- Evidence of Criminal Conviction (FRE 609)
- Prior statements (FRE 613 and 801(d)(1))
- Bias, interest, or motive
- Contradiction

FRE 404 – Character Evidence; Crimes or Other Bad Acts

- General Rule for Character: Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.
- General Rule for Crimes and Bad Acts: Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
- BEWARE: Impeachment rules in FRE 608 and 609 may allow prior crimes and bad acts into evidence – but only for the limited purpose of attacking the witness' credibility.

Character Evidence - Generally

- Character evidence is evidence as to person's disposition, or his or her disposition pertaining to a particular trait such as truthfulness or violence
- Unlike habit evidence, character evidence may NOT be used to prove that on a particular occasion the person acted in accordance with the character or trait (there are exceptions for criminal cases)(FRE 404).

Character Evidence - Generally

- For Tax Court purposes, character evidence will only be used with respect to the credibility of witnesses.
- Credibility of a witness is always relevant.
- Any party may impeach the credibility of a witness (FRE 607), including one's own witness.

Character Evidence – Compare to Attacking Credibility

- Evidence of a crime, wrong, or other so-called "bad act" is not admissible to show that on a particular occasion the person acted in accordance with that prior act.
- Prior bad acts may be admissible to show motive, opportunity, intent, preparation, plan knowledge, identity, absence of mistake, or lack of accident.
- Examples:
  - The fact that a TP took unsubstantiated deductions on a prior is not admissible to show that the TP did the same thing again.
  - Evidence of mistakes on prior year returns may rebut the TP's claim that an error on the return in question is an isolated instance (absence of mistake).

Habit Evidence – FRE 406

- Habit is distinct from character. It is based on specific actions, not reputation.
- Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice.
- The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.

Habit Evidence – FRE 406

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

Impeachment by Bad Acts That are Not Crimes

Impeachment of Witnesses FRE 608(a)

- To discredit a witness's testimony or credibility.
  - Credibility of a witness is always relevant.
  - A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. FRE 608(a).
  - Evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked. Remember as "no bolstering."

FRE 608 – Impeachment of Truthfulness of Witness

- A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character.
- But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

FRE 608 Continued

- Reputation as a liar – admissible, but only as to credibility.
- Reputation for truth telling – only admissible after credibility has been attacked.
- Is there really a practical difference? Cannot un-ring the bell. But for purposes of the Tax Court Bar Exam, there is a difference.

Impeachment of Witnesses FRE 608(b)

- Witnesses may also be impeached by demonstrating specific instances of misconduct a/k/a prior "bad acts." FRE 608(b).
- Criminal convictions are covered by a separate rule.
- General rule is that extrinsic evidence of prior bad acts is not admissible to attack credibility.

Specific Instances of Misconduct FRE 608(b)

- Notwithstanding the general rule, the Court may allow you to cross-examine a witness on prior "bad acts" if they are probative of truthfulness or untruthfulness of:
  - The witness who is testifying OR
  - Another witness who the testifying witness is being asked about

FRE 608 Continued – Extrinsic Evidence

- No extrinsic evidence of prior "bad acts" is allowed.
- What does this mean?
  - You must live with the witness's answer.
  - If a witness denies the prior act, you may not offer other evidence showing that the witness actually committed the act.

FRE 608 Continued – Extrinsic Evidence

- Except for criminal convictions under FRE 609, extrinsic evidence is NOT allowed to attack credibility. --> Must live with the witness' answer.
- Bad acts that are not crimes are admissible, but you cannot prove them with extrinsic evidence. E.g., if the witness lied on a job application but was never prosecuted, you can ask about the lie but if he lies again on the stand, you cannot refute the lie.

Impeachment by Prior Criminal Conviction

FRE 609 – Impeachment by Evidence of Criminal Conviction

- Impeachment is an attack on the **credibility** of a witness.
- Impeachment does not seek to establish an element of your case – it seeks to discredit the witness. Compare FRE 404.
- Difference between elements of case and credibility.

FRE 609 Continued

- FRE 404 says character evidence cannot be used to prove that the witness acted in a particular way at the time of the relevant events.
- FRE 609 says that certain past acts can be used to challenge whether the witness is lying TODAY.

Impeachment by Prior Conviction FRE 609

- Evidence of a criminal conviction is admissible to impeach a witness's credibility.
- There are restrictions to using evidence of criminal convictions as impeachment.

Impeachment by Prior Conviction FRE 609

- Only two types of criminal convictions may be used as evidence:
  - Felonies
    - These are crimes that are punishable be imprisonment for more than one year in the relevant jurisdiction.
    - Do not confuse with *misdemeanors*, which are crimes punishable by up to one year in prison.

Impeachment by Prior Conviction FRE 609

- Crimes involving a dishonest act or false statement
  - Admissible regardless of the length of punishment; in other words can be a felony or a misdemeanor.
  - Examples include any type of fraud, including larceny (theft) by deception or fraud, perjury, tax evasion.

Impeachment by Prior Conviction FRE 609

- Convictions must be less than 10 years old to be admissible, except
  - If the probative value substantially outweighs the prejudicial effect, and
  - The adverse party is given reasonable written notice of the intent to use such evidence and the fair opportunity to contest its use
  - This exception has never been tested

FRE 609 continued

- If witness has been convicted of a crime punishable by MORE THAN 1 year in prison, the crime MUST be admitted, subject to FRE 403 (probative value substantially outweighed by prejudice).
- Crime punishable by MORE THAN 1 year in prison is a FELONY. Crime punishable by 1 year OR LESS in prison is a MISDEMEANOR.

FRE 609 Continued

- For any crime of DISHONESTY (e.g., fraud), the prior conviction is admissible regardless of the prison time.
- After 10 years from conviction/release from prison, FRE 403 test must be applied (whether the probative value substantially outweighs the prejudicial effect of admitting the conviction into evidence).

Impeachment by Prior Conviction FRE 609

- Evidence of a Prior Conviction is NOT admissible if:
  - Witness has been pardoned
  - Conviction has been annulled
  - Witness received a certificate of rehabilitation
- This exception has never been tested

2016 Question E-9

- (6 minutes) Assume that TP's brother, B, is on the witness stand and that during direct examination B provides testimony favorable to TP. On cross examination, the IRS seeks to admit into evidence a properly authenticated "Judgment and Conviction" order that reflects B's misdemeanor conviction for "bank fraud" in 2010. TP objects claiming that such evidence is inadmissible impeachment evidence. The IRS submits that such evidence is admissible. How should the Tax Court rule?

2016 Question E-9

- Impeachment by prior criminal conviction – FRE 609.
- Prior conviction is a misdemeanor, not a felony. Therefore, it does not automatically get admitted into evidence.
- However, it is a crime of dishonesty. Misdemeanors involving dishonesty can be admissible.
- Conviction is less than 10 years old.
- Should be admissible, unless the judge makes a finding under FRE 403 that the prejudice substantially outweighs the probative value of the evidence of conviction.

2016 Question E-10

- (6 minutes) Assume that TP's brother, B, is on the witness stand and that during direct examination B provides testimony favorable to TP. On cross examination, the IRS asks B whether B disclosed on an employment application to X Corporation two years ago that B had a prior felony conviction. B responds "Yes, I did." B had not disclosed this information, and the IRS seeks to admit extrinsic evidence to prove that B did not make this disclosure. TP objects to the introduction of this extrinsic evidence. The IRS submits that the introduction of such extrinsic evidence is proper. How should the Tax Court rule?

2016 Question E-10

- Impeachment of witness based on prior bad acts (FRE 608 and 609).
- The bad act is the non-disclosure, not the felony conviction.
- IRS is allowed to cross examine B on the non-disclosure, but FRE 608 prohibits introduction of extrinsic evidence to prove the non-disclosure.
- IRS has to live with B's lie.
- IRS could introduce evidence of the felony conviction as long as it is less than 10 years old. If more than 10 years old, FRE 403 balancing test of whether the probative value substantially outweighs the prejudicial effect determines whether the conviction would be admissible.

Impeachment by Prior Statement

Prior Statements
FRE 613

- A witness may also be impeached by testimonial evidence of a prior (inconsistent) statement.
- The prior statement need not be shown or disclosed to the witness.
- Upon request, the prior statement must be shown or disclosed to an adverse party's attorney

Prior Statements
FRE 613

- No extrinsic evidence of the prior statement is admissible UNLESS
  - The witness is give the opportunity to explain or deny the prior statement, AND
  - Adverse party has the opportunity to examine the witness about it
- This does not apply to statements made by a PARTY (statements made by a party are considered admissions, covered later)

Past Exam Questions

- Prior Exam Questions and Answers appear on the following slides.

2008 Question E-3

- Assume that T's state of mind is relevant to an issue, such as avoidance of certain penalties. T offers to read into evidence three paragraphs of an authoritative accounting textbook. Assume she offers it to support her argument that she had a good-faith belief in the deductibility of a particular business expense, having testified that she read and relied on the text.

2008 Question E-3

- **(b) (6 minute/s)** Assume the Court overrules C's hearsay objection and the proffered text is admitted and read to the Court. C then requests that T be required to read the next five paragraphs in the text. What additional showing, if any, does C have to make to cause the Tax Court to order T to admit and read the additional five paragraphs?

Question E-3

- Issue Presented
  - Doctrine of Completeness (FRE 106)
    - context

2010 Question E-2

- **(6 minutes)**
- Suppose T calls her secretary, S, to testify to certain conversations. Before S can answer, the Tax Court sustains C's objection to the question. T disagrees with that ruling. At the conclusion of the trial, the Tax Court decides the case in favor of C, and T appeals. To preserve for appeal the Tax Court's alleged error in rejecting T's evidence, what must T have done at the time the objection was sustained? Describe specifically what T must have done.

Question E-2

- Issues Presented
  - Preservation of Claim of Error (FRE 103(a))
    - Was evidence admitted or precluded?
    - What needs to be done if admitted?
      - Timely objection with specific grounds therefore
    - What needs to be done if precluded?
      - Offer of proof

2014 Question E-3

- Question E-3. Assume the same facts as in Question E2. Assume further that the Tax Court overruled the objection, and that W denied having such a conversation with S. In the midst of W's response to TP's question, W added the following: "Moreover, it was impossible for me to have had such a conversation with S as your question suggested, because in 2009 the City Local Library was open Mondays through Saturdays, but it was closed on Sundays. And December 9th fell on a Sunday. I know that because December 9th was my birthday." December 9,2009, actually was a Monday, and TP then asks the Court to take judicial notice that December 9, 2009, fell on a Monday. The IRS objects, arguing that TP is required to prove this fact. How should the Tax Court rule?

Question E-3

- Issue Presented
  - Judicial Notice (FRE 201)
    - Not subject to reasonable dispute
    - Can accurately and readily be determined from trustworthy sources
    - Court must take judicial notice if requested by a party and appropriate
    - May take judicial notice at any time

2010 Question E-4

- **(6 minutes)**
- T asked her accountant, A, to prepare a report in which A summarized and categorized the expenses claimed by T associated with the meeting. T submitted the report during settlement negotiations with the IRS. When no settlement could be reached, T stated that she would use the report during trial of the case. C indicated that he would object to the introduction of the report on the grounds that the report was submitted to C during settlement negotiations and, accordingly, was evidence of conduct or statements made in compromise of negotiations and barred under Federal Rule of Evidence 408. T filed a motion in limine, requesting a ruling on the admissibility of the report. What would be the proper ruling of the Tax Court, and why? (Assume that, if necessary, the requirements of Tax Court Rule 143(g) have been satisfied.)

Question E-4

- Statements made in settlement negotiations (FRE 408)
  - What evidence is covered by the rule?
    - Evidence as to validity or amount of claim that is:
      - » Evidence of furnishing, promising, offering, accepting, promising to accept, or offering to accept consideration to settle claim
      - » Evidence of conduct or statements made during negotiations regarding the claim
  - What is the purpose behind the rule
  - Is the summary the type of conduct or statement sought to be precluded?

2006 Question E-5

- (8 minutes) Assume that, in T's case, one of the issues is whether T's 2005 income tax return was timely filed. As some evidence that it was, T offers to testify and to introduce other evidence that T invariably filed every federal income tax return from 1980 through 2004 on time. Is this evidence relevant and admissible as some evidence that T'S 2005 return was timely filed?
- Discuss.

2006 Question E-5

- Issue Presented
  - Relevance (FRE 401)
  - Habit Evidence (FRE 406)
    - What is habit evidence?
    - Is habit evidence relevant (FRE 406)?
    - Is it admissible to demonstrate acts in conformity therewith?
    - No corroboration or witnesses are necessary.

2014 Question E-4

- TP's petition to the Tax Court asserts that no § 6662(b)(1) penalty is warranted according to § 6664(c)(1) because TP believed TP had reasonable cause for, and acted in good faith with respect to, not reporting the $100,000 as gross income. TP elects to take the witness stand. TP testifies that, prior to filing TP's 2009 tax return, TP (1) consulted with a tax attorney (who prepared and delivered to TP a written memorandum explaining the tax attorney's conclusions), (2) obtained advice from two online tax preparation programs, and (3) read at the City Local Library several books and materials on federal income taxation. TP further testified that all of these sources either stated directly (or, at the very least, strongly suggested) that the $100,000 need not be reported as gross income on TP's tax return. On cross-examination, the IRS asks TP, the following: "You testified on direct that your tax attorney prepared and delivered a written memorandum which detailed the attorney's conclusions regarding whether the $100,000 should be reported on your individual return as gross income. Can you please produce that memorandum for our review?" TP objects, arguing that the memorandum prepared by TP's attorney is privileged matter. How should the Tax Court rule?

2014 Question E-4

- Issue Presented
  - Attorney-Client Privilege (FRE 501)
  - Elements
  - Who holds the privilege?
  - Privilege is waived
    - TP already testified as to the memorandum's contents

2014 Question E-1

- In TP's case-in-chief, TP calls Witness (W) to the witness stand. First, TP asks W to state W's name. After W stated W's name, TP then asks W the following question: "And you are employed as the 'Chief Reference Librarian' at the City Local Library, is that correct?" The IRS objects to the form of the question. Explain how the Tax Court should rule.

2014 Question E-1

- Issue Presented
  - Witness Testimony (FRE 611)
    - No leading questions on direct
    - Exceptions
      - Background material (i.e. develop testimony of witness)

2008 Question E-2

- **(6 minute/s)** T calls her brother-in-law, B, as a character witness. She proffers B to testify that, in his opinion, T is a truthful, honest person. Assume that T has already testified. C objects to B's testimony. What would be the proper ruling of the Tax Court, and why?

2008 Question E-2

- Character Testimony – FRE 608
  - T already testified
  - Was her credibility attacked?
    - If yes - admissible
    - If no – inadmissible – no bolstering

2014 Question E-9

- Assume that W3 is still on the witness stand. On direct examination, W3 testified that W3 was a student at City University. On cross-examination of W3, the IRS asks W3 whether two years ago W3 had been suspended for one academic semester from City University for submitting a plagiarized term paper. TP objects to this question. How should the Tax Court rule?

2014 Question E-9

- Issue Presented
  - Prior Bad Acts (FRE 608(b))
    - Testimony allowed if
    - Probative of credibility of witness or another witness

2014 Question E-10

- Assume that W3 is still on the witness stand. Assume further that W3 denies having submitted a plagiarized paper and having been suspended from the university. The IRS then seeks to admit a certified document from City University which is addressed to W3 and informs W3 of W3's suspension from the University for W3's submission of a plagiarized term paper. TP objects, arguing that this type of impeachment is improper. How should the Tax Court rule?

2014 Question E-10

- Issue Presented
  - Prior Bad Acts (FRE 608(b))
  - Extrinsic evidence prohibited (i.e. you have to live with answer)

2014 Question E-5

- On cross-examination of TP, the IRS asks TP whether, in 2007, TP had been convicted of bank fraud. TP denies having been convicted of this offense, but TP had been convicted to this offense in 2007. In the state where TP was convicted, the crime of bank fraud is a misdemeanor (punishable by less than one year in prison). The IRS seeks to admit a certified copy of TP's bank fraud conviction. TP objects, arguing that this is improper impeachment. How should the Tax Court rule?

2014 Question E-5

- Issue Presented
  - Impeachment by Prior Conviction (FRE 609)
    - Is it a felony?
      - No, not punishable by >1 year in prison
    - Is it another crime involving dishonest act or false statement?
      - Yes, fraud
    - Is it more than 10 years old?
      - No.

2008 Question E-5

- Assume that T has testified. C offers into evidence the original of T's Day-Timer diary for the month of July 2008, which contains entries made by T that are in some respects apparently inconsistent with her testimony as to her activities when she was in Chicago that month. Assume that the parties have stipulated that the diary is authentic and the entries are in T's handwriting.
- T objects that the entries are hearsay and improper impeachment. C responds that C is only offering it to impeach T. What would be the proper ruling of the Tax Court, and why?

2008 Question E-5

- Is use for impeachment proper?
  - Is extrinsic evidence being offered?
    - Yes
  - When is extrinsic evidence of prior statement admissible?
    - Witness must be give opportunity to deny or explain statement

Questions?

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Question #	Question	Rules Implicated by Question	Suggested Answer
E-1	In the case in chief, TP calls C as the first witness. C testifies that C is the President of Charity, Inc., a nonprofit organization. C testified that, in November 2012, C approached TP's residence and rang the doorbell. C then testified that TP answered the door and that C and TP engaged in a conversation about Charity, Inc. After this testimony, TP asked C the following question: "Is it true that you, C, told TO that your organization, Charity, Inc., had been in existence since 2000, that the organization sought to improve the lives of the less affluent members of American society, that you were seeking donations to assist in that endeavor, and that all contributions were tax deductible?" The IRS objects, arguing that the form of the question (the phraseology of the question) is improper. TP disputes this contention. How should the Tax Court rule?	FRE 611(c) **(c) Leading Questions.** Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. Ordinarily, the court should allow leading questions: **(1)** on cross-examination; and **(2)** when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.	The Court should sustain the objection. This is a leading question asked on direct examination. The question does not appear to be background in nature, nor is there any reason to believe that C is a hostile witness.
E-2	Assume that C, the President of Charity Inc., is still on the witness stand. During the direct examination,	FRE 801(c) **(c) Hearsay.**"Hearsay" means a statement	The Court should overrule the objection. While the statements to which C is testifying are out

	TP asks C the following question: "After you requested a donation from TP, what, if anything, did TP say?" C then responded, "TP then started to cry hysterically and then rather loudly exclaimed 'Yes! I would love to help you out! I have so many close family members who are destitute and in desperate situations. This is such a great cause, and I am beyond thrilled to be a part of such a fantastic charitable effort!" The IRS objects to C's testimony on hearsay grounds. How should the Tax Court rule?	that: **(1)** the declarant does not make while testifying at the current trial or hearing; and **(2)** a party offers in evidence to prove the truth of the matter asserted in the statement. FRE 802: Hearsay is not admissible unless any of the following provides otherwise: • a federal statute; • these rules; or • other rules prescribed by the Supreme Court. FRE 803(1),(2) The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness: **(1)** ***Present Sense Impression*****.** A statement describing or explaining an event or condition, made while or immediately after the declarant perceived	of court statements, they do not appear to be offered for the truth of the matters asserted. There is no suggestion in the question that there is an issue as to whether the donation was, in fact, made. Additionally, these statements qualify as exceptions to the hearsay rule under FRE 803(1) and (2). C is testifying to his then present sense impression of TP's reaction. C is also testifying as to an excited utterance made by TP.

		it. **(2)** ***Excited Utterance*****.** A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.	
E-3	Assume that C, the President of Charity, Inc., is still on the witness stand. During the direct examination of C, TP shows C a two page document comprised of (1) a photocopy of an IRS determination letter and (2) a cover letter. The photocopy is of a document on IRS letterhead that is signed by an appropriate official of the IRS and which states that Charity, Inc., is a tax-exempt charitable organization under Section 501(c)(3). The cover letter was signed by an appropriate person at the IRS and certifies that the attached photocopy of the determination letter is a true and accurate representation of the original determination letter (dated January 15, 1990) on file at the IRS. C testifies that C recognizes the determination letter, that it is the document that C, on behalf of Charity, Inc., received in the mail from the IRS in 2000 and that	FRE 1002 Requirement of Original An original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise. FRE 1003 Admissibility of Duplicate A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate. FRE 801(c) **(c) Hearsay.**"Hearsay" means a statement that: **(1)** the declarant does not make while testifying at the current trial or hearing; and **(2)** a party offers in evidence to prove	The Court should overrule the objection. Although the document is not an original as required by FRE 1002, it is admissible as a duplicate under FRE 1003. Furthermore, although a written document is often hearsay, this document falls within the public records exception to the hearsay rule under FRE 803(8). Note: The document does NOT fall within the business records exception to the hearsay rule under FRE 803(6). Even though Charity, Inc. kept the document as though it were a business record, the document was not made in the regular course of Charity, Inc.'s business, nor was it made in the regular course of the IRS's business.

	C has kept it in a secured file cabinet on the third floor of the organization's office complex. The IRS objects to the admission of the document. TP contests this contention. How should the Tax Court Rule?	the truth of the matter asserted in the statement. FRE 802: Hearsay is not admissible unless any of the following provides otherwise: • a federal statute; • these rules; or • other rules prescribed by the Supreme Court. FRE 803 (8) **(8)** ***Public Records*****.** A record or statement of a public office if: **(A)** it sets out: **(i)** the office's activities; **(ii)** a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or **(iii)** in a civil case or against the government in a criminal case, factual findings from a legally	

		authorized investigation; and **(B)** the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness.	
E-4	Assume that C, the President of Charity, Inc., is still on the witness stand. Assume further that the document referenced in question 3 was admitted into evidence. During direct examination, TP asks C the following question: "After you received the document in the mail from the IRS, which recognized your entity as a tax-exempt organization, what did you do next?" C responded, "I asked my secretary, 'Can you tell me where in our office we file our important correspondence?'" The IRS objects, arguing that C's question to the secretary is hearsay. TP responds that the IRS's objection is without merit. How should the Tax Court rule?	FRE 801(c) **(c) Hearsay.**"Hearsay" means a statement that: **(1)** the declarant does not make while testifying at the current trial or hearing; and **(2)** a party offers in evidence to prove the truth of the matter asserted in the statement. FRE 802: Hearsay is not admissible unless any of the following provides otherwise: • a federal statute; • these rules; or • other rules prescribed by the Supreme Court.	The Court should sustain the objection unless Charity, Inc.'s habit or routine practices have been called into issue, which they do not appear to have been on the face of this question. C's testimony about what his secretary told him is an out of court statement being offered for the truth of the matters asserted within it. It fits within the definition of hearsay and there are no exceptions that appear to make the statement admissible.

		FRE 406 Habit; Routine Practice Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.	
E-5	Assume that TP takes the witness stand. On direct examination, TP's attorney asks TP the following: "You testified that, after you submitted your return, you called your brother. What did you say to him during that conversation?" TP responded, "I told him 'I just filed my tax return, which included a $250,000 gift to that wonderful charitable organization, Charity, Inc." The IRS objects to TP's response arguing that it is hearsay. TP's counsel responds that the IRS's objection is without merit and that TP's response should be admissible for the truth of the matters asserted therein. How should the Tax Court rule?	FRE 801(c) **(c) Hearsay.**"Hearsay" means a statement that: **(1)** the declarant does not make while testifying at the current trial or hearing; and **(2)** a party offers in evidence to prove the truth of the matter asserted in the statement. FRE 802: Hearsay is not admissible unless any of the following provides otherwise: • a federal statute; • these rules; or • other rules prescribed by the	The Court should sustain the objection. TP's statement to his brother is an out of court statement and it is being offered for the truth of the matters asserted within it. The statement fits within the definition of hearsay and no exception applies to make it admissible.

		Supreme Court.	
E-6	Assume that TP is on the witness stand and assume the facts in Question 5. TP's attorney asks TP "What did you do after you talked with your brother on the telephone?" TP responded, "Well before I answer your question, I must say this. I think the IRS should be abolished because it is a crooked agency." The IRS objects to TP's testimony arguying that the statement is not pertinent to the case at bar. TP contests this claim. How should the Tax Court rule?	FRE 401 Relevance Evidence is relevant if: **(a)** it has any tendency to make a fact more or less probable than it would be without the evidence; and **(b)** the fact is of consequence in determining the action. FRE 402 Test for Relevance Relevant evidence is admissible unless any of the following provides otherwise: • the United States Constitution; • a federal statute; • these rules; or • other rules prescribed by the Supreme Court. Irrelevant evidence is not admissible. FRE 403 Exclusion of Relevant Evidence	The Court sustain the objection. The testimony by itself is not relevant, and would only potentially be relevant if TP offered specific facts of which he had personal knowledge of crookedness in this particular case. The testimony is also lay opinion testimony that is not admissible pursuant to FRE 701. FRE 403 would also bar this testimony because it is highly prejudicial and even if TP could point to some abstract, theoretical basis to support his belief, the probative value of the testimony is far outweighed by the prejudice.

		The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence. FRE 701 Lay Opinion Testimony If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: **(a)** rationally based on the witness's perception; **(b)** helpful to clearly understanding the witness's testimony or to determining a fact in issue; and **(c)** not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.	
E-7	Assume that TP is on the witness stand. On cross-examination, the IRS asks TP "Isn't it true that just last year in a letter you sent to the IRS you offered to concede that you underpaid your federal income tax and were subject to a Section 6662(b)(1) penalty	FRE 408 Compromise Offers and Negotiations **(a) Prohibited Uses.** Evidence of the following is not admissible — on behalf of any party — either to prove or disprove the validity or amount of a disputed claim or to	The Court should sustain the objection. While the letter is an admission made by TP that would otherwise be admissible under FRE 801(d)(2), it was made in the course of settlement negotiations of a

	in exchange for a negotiated resolution of this matter?" TP objects to this question arguing that his tax liability cannot be proved with such evidence. The IRS submits that the TP's objection is without merit. How should the Tax Court rule?	impeach by a prior inconsistent statement or a contradiction: **(1)** furnishing, promising, or offering — or accepting, promising to accept, or offering to accept — a valuable consideration in compromising or attempting to compromise the claim; and **(2)** conduct or a statement made during compromise negotiations about the claim — except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority. **(b) Exceptions.** The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.	disputed claim. The opposing party is not allowed to use admissions made in that situation to prove the underlying liability.
E-8	Assume that TP calls TP's brother, B, to the witness stand. During direct examination, B testifies that B recalls having a telephone conversation with TP in early April 2013 regarding the filing of TP's 2012 tax return [the conversation in Question 5]. When asked by TP to testify to the precise	FRE 612 Writing Used to Refresh a Witness **(a) Scope.** This rule gives an adverse party certain options when a witness uses a writing to refresh memory: **(1)** while testifying; or	The Court should overrule the objection. FRE 612 allows TP to use any writing to refresh B's recollection, so long as the IRS is given the opportunity to inspect the document and cross examine B about it. FRE 612 also allows the IRS to

	contents of this conversation with TP, B testified that B could not remember the precise contents. TP wants to refresh B's memory bu showing B an IRS document that summarizes an earlier interview that an IRS agent had with TP that includes details regarding TP's April 2013 conversation with B. The IRS objects that this is an improper means to refresh B's memory. TP counters that this method of refreshing B's recollection is proper. How should the Tax Court rule?	**(2)** before testifying, if the court decides that justice requires the party to have those options. **(b) Adverse Party's Options; Deleting Unrelated Matter.** Unless 18 U.S.C. §3500 provides otherwise in a criminal case, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record. **(c) Failure to Produce or Deliver the Writing.** If a writing is not produced or is not delivered as ordered, the court may issue any appropriate order. But if the prosecution does not comply in a criminal case, the court must strike the witness's testimony or — if justice so requires — declare a mistrial.	introduce the document into evidence either in whole or in part.
E-9	Assume that TP's brother, B, is on the witness stand and that during direct	FRE 609(a),(b) Impeachment by Evidence of Prior Criminal Conviction	The Court should overrule the objection. Although the prior

	examination B provides testimony favorable to TP. On cross examination, the IRS seeks to admit into evidence a properly authenticated "Judgment and Conviction" order that reflects B's misdemeanor conviction for "bank fraud" in 2010. TP objects claiming that such evidence is inadmissible impeachment evidence. The IRS submits that such evidence is admissible. How should the Tax Court rule?	**(a) In General.** The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction: **(1)** for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence: **(A)** must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and **(B)** must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and **(2)** for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving — or the witness's admitting — a dishonest act or false statement. **(b) Limit on Using the Evidence After 10 Years.** This subdivision (b) applies if more than 10 years have passed since the	conviction was for a misdemeanor not a felony, the crime involved dishonesty. Also, the conviction was less than 10 years prior to the testimony, so unless its probative value is substantially outweighed by prejudice, the conviction should be admissible evidence.

		witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if: **(1)** its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and **(2)** the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.	
E-10	Assume that TP's brother, B, is on the witness stand and that during direct examination B provides testimony favorable to TP. On cross examination, the IRS asks B whether B disclosed on an employment application to X Corporation two years ago that B had a prior felony conviction. B responds "Yes, I did." B had not disclosed this information, and the IRS seeks to admit extrinsic evidence to prove that B did not make this disclosure. TP objects to the introduction of this extrinsic evidence.	FRE 608 Character Evidence **(a) Reputation or Opinion Evidence.** A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked. **(b) Specific Instances of Conduct.** Except for a criminal conviction under Rule 609,	The Court should sustain the objection. The IRS is allowed to question B about his bad act of lying on the job application to challenge his credibility, but it is not allowed to introduce extrinsic evidence to establish the prior bad act. The prior bad act is not the criminal conviction, which could be proved through extrinsic evidence, but rather the act of lying on the job application.

	The IRS submits that the introduction of such extrinsic evidence is proper. How should the Tax Court rule?	extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of: **(1)** the witness; or **(2)** another witness whose character the witness being cross-examined has testified about. By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness. FRE 609(a),(b) Impeachment by Evidence of Prior Criminal Conviction **(a) In General.** The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction: **(1)** for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year,	

		the evidence: **(A)** must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and **(B)** must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and **(2)** for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving — or the witness's admitting — a dishonest act or false statement. **(b) Limit on Using the Evidence After 10 Years.** This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if: **(1)** its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial	

		effect; and **(2)** the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.	

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featuring

Nina E. Olson, the National Taxpayer Advocate

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Tax Professionals that attend the seminar are encouraged to accept a pro bono tax controversy case assignment from NYCLA, an ABA-sponsored Tax Court Pro Bono program or a NY or NJ Low-Income Tax Clinic

WHEN	WHERE
Thursday, September 27, 2018 Registration & Sign-In @ 8:30AM Seminar 9:00 AM to 12:00 PM	**JONES DAY** **250 Vesey Street** **New York, NY 10281-1047**

This seminar introduces the volunteers to nontraditional advocacy in tax controversy case, including

1. when & how to request assistance from the Taxpayer Advocate Service (TAS),
2. when & how to involve the Taxpayer Inspector General for Tax Administration (TIGTA),
3. when & how to involve the traditional media and/or social media in tax cases, and
4. when & how to involve elected officials (i.e., how and when constituent services offices can help).

Moderators	
Frank Agostino, Esq., Agostino & Associates	Kathryn Keneally, Esq., Jones Day
RSVP @ https://conta.cc/2NgcqRN Feel free to contact Jeff Dirmann at Jdirmann@AgostinoLaw.com with questions.	IRS APPROVED CONTINUING EDUCATION PROVIDER

* This program has been approved by the Board on Continuing Legal Education of the Supreme Court of New Jersey for 3 hours of total CLE credit. Of these, 0 qualify as hours of credit for ethics/professionalism, and 0 qualify as hours of credit toward certification in civil trial law, criminal trial law, workers compensation law and/or matrimonial law. This course or program has been approved in accordance with the requirements of the New York State Continuing Legal Education Board for a maximum of 3 credit hours.

† Based upon our interpretation of the regulations by the New York and New Jersey State Boards of Accountancy, this event will qualify for CPE credit. Our New Jersey CPE Sponsorship number is 20CE00213700. Our New York CPE Sponsorship number is 002405. Our Office of Professional Responsibility Sponsor Number is QVGWD.

TAX EVIDENCE, PART II: THE FEDERAL RULES OF EVIDENCE AS APPLIED BY THE U.S. TAX COURT

THREE FREE NY & NJ CLE[1], CPE[2], and EA CE CREDITS

WHERE:
Bergen Community College
Ciarco Learning Center
355 Main Street
Room 102/103
Hackensack, NJ 07601

WHEN:
Tuesday, October 9, 2018
6:00 PM – 9:00 PM

DESCRIPTION:

In Tax Evidence, Part I & II, we will review the Federal Rules of Evidence and Tax Court Rules applied by the Tax Court judge to determine what testimony and documents will be admissible at trial.

TOPICS INCLUDE:

Rule 701 - Opinion Testimony by Lay Witnesses
Rule 702 - Testimony by Expert Witnesses
Rule 801 - Definitions That Apply to This Article; Exclusions from Hearsay
Rule 803 - Exceptions to the Rule Against Hearsay - Regardless of Whether the Declarant Is Available as a Witness
Rule 806 - Attacking and Supporting the Declarant's Credibility
Rule 901 - Authenticating or Identifying Evidence
Rule 902 - Evidence That Is Self-Authenticating
Rule 1002 - Requirement of the Original
Rule 1006 - Summaries to Prove Content

REGISTER @
http://conta.cc/2BbXvCz

APPROVED CONTINUING EDUCATION PROVIDER

Please note that this seminar is available via Live Stream- (There are no continuing education credits offered for watching the stream.)

[1] This program has been approved by the Board on Continuing Legal Education of the Supreme Court of New Jersey for 3 hours of total CLE credit. Of these, 0 qualify as hours of credit for ethics/professionalism, and 0 qualify as hours of credit toward certification in civil trial law, criminal trial law, workers compensation law and/or matrimonial law. This course or program has been approved in accordance with the requirements of the New York State Continuing Legal Education Board for a maximum of 3 credit hours.

[2] Based upon our interpretation of the regulations by the New York and New Jersey State Boards of Accountancy, this event will qualify for CPE credit. Our New Jersey CPE Sponsorship number is 20CE00213700. Our New York CPE Sponsorship number is 002405. Our Office of Professional Responsibility Sponsor Number is QVGWD. ‡CFP CE Credit will be provided..

TAXPAYERS ASSISTANCE CENTER

AGOSTINO & ASSOCIATES COUNSELLORS AT LAW

TAXPAYERS ASSISTANCE CORPORATION

PRACTICE BEFORE THE US TAX COURT - ETHICS & PROFESSIONAL CONDUCT

THREE FREE NY & NJ CLE*, CPE†, and EA CE CREDITS

WHERE:
Bergen Community College
Ciarco Learning Center
355 Main Street
Room 102/103
Hackensack, NJ 07601

WHEN:
Tuesday, November 6, 2018
6:00 PM – 9:00 PM

DESCRIPTION:

This is the last class before the US Tax Court's November 2018 Non-attorney Admission Examination. This class will focus on the rules of Ethics and Professionals Conduct applicable to Tax Controversy Professional.

TOPICS INCLUDE:

Rule 1.2 – Scope of Representation and Allocation of Authority Between Client and Lawyer
Rule 1.4 – Communications
Rule 1.6 – Confidentiality of Information
Rule 1.7 – Conflict of Interest: Current Clients
Rule 1.8 – Conflict of Interest: Current Clients: Specific Rules
Rule 1.9 – Duties to Former Clients
Rule 1.10 – Imputation of Conflicts of Interest: General Rule
Rule 1.16 – Declining or Terminating Representation
Rule 3.1 – Meritorious Claims and Contentions
Rule 3.3 – Candor toward the Tribunal
Rule 3.7 – Lawyer as Witness
Rule 4.2 – Communication with Person Represented by Counsel
Tax Court Rule 24(c) – Withdrawal of Counsel
Tax Court Rule 24(g) – Conflict of Interest
Tax Court Rule 33(b) – Effect of Signature

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* This program has been approved by the Board on Continuing Legal Education of the Supreme Court of New Jersey for 3 hours of total CLE credit. Of these, 3 qualify as hours of credit for ethics/professionalism, and 0 qualify as hours of credit toward certification in civil trial law, criminal trial law, workers compensation law and/or matrimonial law.
This course or program has been approved in accordance with the requirements of the New York State Continuing Legal Education Board for a maximum of 3 credit hours.
† Based upon our interpretation of the regulations by the New York and New Jersey State Boards of Accountancy, this event will qualify for CPE credit. Our New Jersey CPE Sponsorship number is 20CE00213700. Our New York CPE Sponsorship number is 002405. Our Office of Professional Responsibility Sponsor Number is QVGWD.