TAXPAYERS ASSISTANCE CENTER

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Tax Evidence, Part II: The Federal Rules of Evidence As Applied by the U.S. Tax Court

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

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
Tuesday, October 9, 2018 Registration/Pizza @ 5:30 PM **Seminar: 6:00 PM – 9:00 PM**	**Bergen Community College** **Ciarco Learning Center** 355 Main Street Room 102/103 Hackensack, NJ 07601

Learning Objective

In Tax Evidence, Part 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.

Rule 701 - Opinion Testimony by Lay Witnesses **Rule 702 - Testimony by Expert Witnesses** **Rule 801 - Hearsay & Exclusions from Hearsay** **Rule 803 - Exceptions to the Rule Against Hearsay** **Rule 806 - Attacking 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**

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TIMED AGENDA

Tax Evidence, Part II: The Federal Rules of Evidence As Applied by the U.S. Tax Court
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Frank Agostino, Esq., Agostino & Associates, PC

6:05 – 6:30 **Rule 701 Opinion Testimony by Lay Witnesses**
Rule 702 Opinion Testimony by Expert Witnesses
Valerie Vlasenko, Esq., Agostino & Associates, PC

6:30 - 7:00 **Rule 801 Hearsay and Exclusions from Hearsay**
Rule 802 The Rule against Hearsay
Frank Agostino, Esq., Agostino & Associates, PC

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

7:10 – 7:50 **Rule 803 Exceptions to the Rule against Hearsay**
Rule 804 Hearsay Exceptions: Declarant Unavailable
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Rule 807 Hearsay Exceptions: Residual Exception
Frank Agostino, Esq., Agostino & Associates, PC

7:50 – 8:00 **Break**

8:00 – 8:30 **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
Malinda Sederquist, Esq., Agostino & Associates, PC

8:30 – 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

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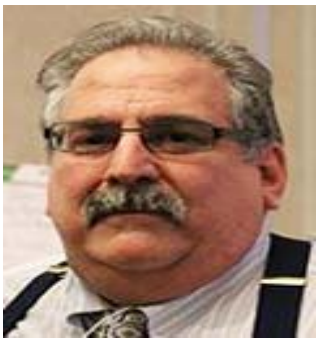

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Profile

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)

Practice Areas

- Civil Tax
- Criminal Tax
- White Collar Defense

Education

- LL.M., Taxation, New York University School of Law
- J.D., New York Law School
- B.A., City College of New York

Awards & Recognition

- Recipient, ABA's 2012 Janet Spragens Pro Bono Award
- Recipient, NJ State Bar Association's 2015 Pro Bono Award

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Malinda Sederquist, Esq., CPA, is a tax controversy and litigation associate at Agostino & Associates, P.C. who specializes in criminal tax investigations. She has six years of experience working as a Tax Auditor for New York State Department of Taxation and Finance and six years of experience working as an Investigative Auditor for the Suffolk County District Attorney's Criminal Tax Unit. Ms. Sederquist earned her Bachelor of Science Degree and Master's of Science Degree in Accounting at Long Island University, Southampton, N.Y. She received her Juris Doctor Degree from Touro College Jacob D. Fuchsberg Law Center, Islip, N.Y. She is licensed to practice law in New York and New Jersey.

Valerie Vlasenko is a tax controversy and litigation associate at Agostino & Associates, P.C. She is a recent graduate of Seton Hall University School of Law, where she was a Director of the Volunteer Income Tax Assistance program. Prior to joining Agostino & Associates, P.C., Mrs. Vlasenko completed a clerkship with the Honorable Joseph M. Andresini of the New Jersey Tax Court.

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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.

EVIDENCE – PART II

VI. The Hearsay Rule

A. Statement of the rule

1. Hearsay is an out of court statement offered in evidence to prove the truth of the matter asserted in the statement. FRE 801(c)

2. Hearsay is not admissible. FRE 802

B. Reasons for excluding hearsay

1. Suggested reasons

a. Inaccurate reporting

b. Declarant not under oath

c. Unable to observe demeanor

2. The most important reason:

a. Inability to cross-examine declarant (person who made the out-of-court statement)

b. Cross-examination at time statement made

3. Consider these reasons in conjunction with the exceptions

C. Three elements of hearsay

1. Definition of "statement"

a. An oral or written assertion

b. Non-verbal conduct only if it is intended as an assertion

2. Out of court - "other than one made by the declarant while testifying at the trial" - examples of potential hearsay:

a. W is asked, "What did X say about…

b. W is asked, "Then, what did you say?"

c. Y identifies a letter written to her by Z which P then offers into evidence

3. Offered to prove the truth of the matter asserted

a. What issue is the evidence being directed?

b. Possible - admissible for one purpose, not for another. [FRE 104]

D. Examples

1. In an estate tax case, TP offers a written appraisal of the property in question. Hearsay objection: sustained, but it would be overruled if TP argues that it's admissible to show TP's good faith.

2. Issue: Whether TP timely filed a request for automatic extension. TP testifies "My EA told me he filed the extension request." Hearsay objection: is sustained.

E. Out-of-court statements offered for a purpose other than the truth of the matter asserted

1. Legally operative facts

a. Example: The executed written contract may be offered to prove the terms of the contract. It's offered to show the words used, not the truth of the words

b. Example: The original tax return is generally offered in evidence to show what the TP reported, not to show the truth of the matters asserted

2. Statements offered to show effect on hearer or reader - go to his/her “knowledge or state of mind”

a. Example: EA testifies at the trial as an IRS witness. He says "TP asked me if X is includible in income, and I told him it most certainly is." TP's statement is a party - opponent admission; EA's response is not hearsay, offered to show IM's knowledge, not whether X is in fact includible in income

3. Statements offered as circumstantial evidence of declarant's state of mind

a. General rule - not hearsay

(1) Evidence of insanity

(2) Evidence of knowledge

b. Compare - state of mind exception

F. Prior statements which are non-hearsay under Federal rules. [FRE 801(d)]

1. Prior inconsistent statements

a. Declarant testifies and is subject to cross

b. The statement is inconsistent with the testimony and was under oath

2. Prior consistent statements - allowed only to rebut a suggestion of recent fabrication, improper influence or motive

a. Example - TP suggests, in cross-examining W, an IRS witness, that W testified against TP only because of a recent fight between TP and W. The IRS is allowed to introduce evidence of a prior consistent statement, made before the fight

3. Above can be used as substantive proof

4. Impeachment

G. Hearsay within hearsay – each part must conform. [FRE 805]

H. Party-opponent admissions - not hearsay. [FRE 801(d)(2)]

1. Four kinds

a. Own statement (individual or representative)

b. Adopted

c. Authorized

d. Agent's

2. Substantive evidence, not just impeachment

I. The hearsay exceptions - availability of declarant immaterial

1. Declarations of physical or mental condition - excited and contemporaneous utterances

a. Declaration of then existing state of mind, mental, emotional or physical condition [FRE 803(3)]

b. Excited utterances - [FRE 803(2)]

(1) Rationale

(2) Requirements for admissibility

(a) Startling event or condition

(b) Declaration must be made contemporaneously - "while ... under the stress of excitement."

c. Present sense impression: - [FRE 803(1)]

d. Statements for the purpose of (and pertinent to) medical diagnosis or treatment [FRE 803(4)]

2. Business records - [FRE 803(6)]

a. Rationale

b. Elements RACK-BPCU

(1) Record - a memorandum, report, record or data compilation in any form

(2) Acts - of acts, events, conditions, opinions or diagnoses

(3) Contemporaneous – made at or near the time

(4) Knowledge - by, or from info transmitted by, a person with knowledge

(5) Business - if kept in the course of a regularly conducted business activity

(6) Practice - if it was regular practice of that business activity to make to record

(7) Custodian - all as shown by the custodian or other qualified witness

(8) Untrustworthy - unless the source of information or the method or circumstances of preparation indicate lack of untrustworthiness

c. Absence of entry in business records as evidence of no transaction. [FRE 803(7)]

3. Past recollection recorded - [FRE 803(5)]

a. Requirements for admissibility

(1) Insufficient recollection

(2) Recording made when events fresh in mind, and correctly reflects the past knowledge

(3) Authentication

b. Writing is read into evidence but is not admissible

4. Official records and other official writings

a. Public records and reports - [FRE 803(8)]

(1) Elements

(a) Records… of a public office or agency

(b) Setting forth:

(1) the activities

(2) matters observed pursuant to legal duty as to which there was a duty to

report OR

(i) E.g., cause of death

(3) factual findings from a legally authorized investigation

(c) Unless sources of information circumstances indicate lack of trustworthiness

b. Records of vital statistics, if reported to a public office - [FRE 803(9)]

c. Statement of absence of a public record - certification; diligent search, failed to disclose [FRE 803(10)]

5. Ancient documents - 20 years or more, authenticity established. [FRE 803(16)]

6. Learned treatises - [FRE 803(10)]

a. Elements of exception:

(1) Statement contained in a treatise, periodical or pamphlet

(2) Subject of history, medicine, other science or art

(3) Established as a reliable authority

(4) Called to expert's attention on cross, or relied upon by him in direct

b. Read into evidence, not received as exhibit

7. Market reports - directories, other published compilation generally used and relied upon by the public or by persons in particular occupations - [FRE 803(17)]

8. Catch-all exception of federal rules. [FRE 807]

a. Requirements

(1) Circumstantial guarantees of trustworthiness

(2) Evidence of a material fact

(3) More probative than any other…

(a) 2 and 3 = necessity

(4) Interests of justice

b. Notice to adversary - intent to offer, particulars, name and address of declarant

c. Example: In [Petzoldt vs. Cmr, 92 TC 661 (1989)], certain drug ledgers were admitted under the catchall exception to the hearsay rule. Circumstantial evidence authenticated the ledgers and linked them to petitioner; moreover, they were the most probative information available, given TP's lack of cooperation.

J. Hearsay exceptions - declarant unavailable. [FRE 804]

1. Unavailability defined - [FRE 804(a)]:

   a. Exempted by court privilege

   b. Refuses to testify

   c. Lack of memory

   d. Death or physical/mental disability

   e. Absent, unable to find by reasonable means

2. Former testimony exception, [FRE 804(b)(1)]

   a. Testimony under oath

   b. Offered against a party

   c. Party had an opportunity and similar motive to develop the testimony

   d. Declarant is unavailable

3. Statement against interest – [FRE 804(b)(3)]

   a. Declaration against pecuniary or proprietary interests or exposing declarant to civil or criminal liability

   b. Declarant unavailable

4. Dying declaration – [FRE 804(b)(2)]

   a. Declarant believes death is imminent

   b. Concerning cause or circumstances of death

   c. Declarant unavailable

5. Catchall [FRE 807]

Exam Tips

The Hearsay Rule

Hearsay typically accounts for 30-40% of a typical Evidence exam, so you need to be on the lookout for it in every fact pattern, whether essay or multiple choice.

Memorize every word of the classic definition: ***"Hearsay is a statement or assertive conduct which was made or occurred out of court, and is offered in court to prove the truth of the facts asserted."*** In an essay, begin your answer by quoting this verbatim, then show how it does or doesn't apply to the facts of the question.

Here's what to look for in analyzing a hearsay question (exceptions to the hearsay rule are covered in the next chapter):

Look for a ***statement.***

A statement may be ***oral or written.***

Even things that don't sound at all "testimonial" may be statements, and thus hearsay. (***Example:*** P tells the court that a bottle's label bore the words, "Contains sodium chloride." The label has since been destroyed. The label's contents are probably a "statement," so if P is offering those words in order to prove that that's what the bottle contained, this is probably hearsay.)

Where what happened out-of-court is ***non-verbal conduct,*** consider whether the person who did it intended it as an ***assertion*** — if it was, it can be hearsay; if it wasn't, it can't be hearsay.

> ***Example:*** D is on trial for burglarizing W and W's wife Helen. W testifies that a week after the crime, W and Helen were in a park, when Helen saw D and shouted, "You're the one who burglarized my house!" W further testifies that D immediately ran away. If D's flight is found to be the equivalent of saying "I did it and don't want to be caught," W's statement about the flight would be hearsay. Probably, however, the court will find that D's flight was not intended by D as an assertion of any factual matter: in that case. W's testimony about the flight would not be hearsay.
>
> > ***Animals and machines*** don't make statements. (***Example:*** W, a DEA agent, testifies for the prosecution that a dog sniffed D's luggage and then started barking in a way he was trained to do if he found drugs. The barking isn't a statement, and therefore can't be hearsay. Same result if W testifies that a drug-testing machine beeped in a way that signifies "I've found drugs.")

Check whether the statement is being offered to prove the ***truth of the matters asserted*** therein. If not, the statement isn't hearsay. Most frequently-tested aspects:

Verbal acts: The statement may be an operative fact that gives rise to ***legal consequences.*** If so. check whether the statement is being offered because of these consequences, not to prove the truth of the matter asserted. Some examples:

Defamation suits. (***Example:*** P sues D for defamation, claiming that D said, "P is a crook," during a TV interview. P puts on W, a video engineer who taped the interview. who testifies, "I heard D say 'P is a crook' during the interview." Since D's making of the statement has legal significance aside from its truth — P can't recover unless he shows D made the statement — D's statement is a "verbal act" that's not hearsay.)

Breach of contract suits. (***Example:*** W testifies that he heard P say to D, "I'11 paint your portrait for $5,000," and that he heard D respond, "OK, I'll come to your studio tomorrow." Neither of these out-of-court statements - P's and D's - is hearsay, because the statements are being offered to show their independent legal significance, as offer and acceptance, respectively, not to show the truth of any matter asserted therein.)

Suit where giving of a gift is at issue. (***Example:*** The administrator of X's estate sues D, an orderly in the hospital where X died, seeking the return of a watch which the orderly allegedly took. D testifies, "X said to me, 'This watch is a gift to you.' "D's testimony is not hearsay, because X's statement, coupled with the delivery of the watch, had the independent legal effect of completing the gift of the watch.)

State of mind: Statements which are not offered for their truth, but to show the ***state of mind*** either of the ***declarant*** or of a ***listener***. Look for patterns where ***knowledge, belief or intent*** is at issue. Some contexts:

To show the intent of a party to ***contract*** negotiations. (***Example:*** P, a Japanese exporter, contracts to deliver china dishes to D, an American importer. The writing does not specify the material to be used in the dishes. D refuses the goods, on the grounds that they are plastic, and the parties intended porcelain. At trial on the suit for breach, D offers the testimony of a translator, W, who says, "I translated during the negotiations between P and D. In response to a question by D, P told me in Japanese, 'The dishes will be genuine porcelain,' and that's what I told D in English." W's testimony is not hearsay, because P's statement went to D's understanding of what the contract called for — it's not being offered for the purpose of establishing the truth of P's statement.)

To show the state of mind of a ***criminal defendant***.

Example 1: D, a labor union president, is charged with violating a state law making it a felony for a union official to knowingly misappropriate union funds. The charge is that D authorized a large raise for himself. D offers testimony by his predecessor as president, W, who says, "Before the raise, D asked me if he could lawfully take a raise and I told him he could

if he honestly believed it was reasonable and necessary." W's testimony isn't hearsay because it's being offered to prove that D believed the union rules permitted him to act as he did. not to prove that he was in fact allowed to raise his own salary.

Example 2: D, a policeman, is accused of attempting to kill his wife by shooting her with a Sureshot 202 pistol from a distance of 1/4 mile. D maintains that the shot was an accident, and that the Sureshot is not accurate at more than 1/8 mile. The prosecution calls D's former classmate from the police academy, who testifies, "In pistol class, attended by D and myself at the academy, the instructor said the Sureshot 202 is accurate up to 1/2 a mile." Admissible, because it's offered to show that D believed the pistol would be accurate, not to prove that the pistol really was accurate at that range.

To show a witness' ***bias***. (***Example:*** W1 says that D drove through a red light before hitting P. D puts on W2, who says, "Before trial, W1 told me, 'D blackballed me from becoming a member of the club he belongs to.' "Admissible, because it shows bias by W1 against D, and is not being offered to show that D really blackballed W1.)

Witness repeats own out-of-court statement: Remember that there can be hearsay even where the witness is testifying to his or her own out-of-court statement. As long as the out-of-court statement is being offered for the truth of the matter asserted, the fact that the in-court witness and the out-of-court declarant are the same is irrelevant. (***Example:*** In a civil car-crash suit, D says on the stand, "After the accident, I told the police officer who came to the scene that the light was green when I drove through the intersection." This is hearsay, if as seems probable it's being offered to show that the light really was green.)

Once you've determined that a particular bit of evidence is hearsay, of course consider whether it's admissible as an exception. But ***don't skip the first step*** — the fact that something would fall within an exception even if it were hearsay should never prevent you from first carefully analyzing whether it really is hearsay.

Exam Tips

Exceptions to the Hearsay Rule

Once you've concluded that something is hearsay, you'll of course need to determine whether it falls within one of the many exceptions to the hearsay rule. The substantial majority of test items that are hearsay will turn out to fall within an exception, and of those that don't, most will raise an issue about whether they fall within an exception.

The "Declarant's Availability Irrelevant" Exceptions

Admissions by a Party-Opponent

The "admissions" exception is probably the most frequently-tested of all hearsay exceptions. Here's what to look for:

Party: Most obviously, remember that the exception only applies where the out-of-court statement is made by a party to the present proceeding.

Common trap: The statement is made by a bystander witness or a non-party passenger in a car. Even if this person is closely linked to a party, her statement regarding the accident is still not an admission as long as there's no principal-agent relationship between the declarant and the party against whom the statement is now sought to be used.

Example: A car driven by Driver, and in which Passenger, Driver's friend, is riding, hits Pedestrian. Shortly after, Passenger tells Officer, "We were returning from a party, at which Driver was drinking." In Pedestrian's suit against Driver, Passenger's statement to Officer is not admissible against Driver as an admission, because Passenger isn't a party, and there's no relationship (e.g., principal and agent) by which Passenger's statement could be attributed to Driver. In fact, the statement doesn't fall within any exception, and is thus inadmissible hearsay. (But if the statement had been made by Driver, not Passenger, it would be admissible against him as an admission.)

Similar issue: Often, the declarant will be so closely aligned in interest with a party that you might be duped into thinking the declarant is a party — but the requirement that declarant be a party is very tightly construed. (**Example:** The administrator of X's estate sues Orderly, an orderly in the hospital where X died, seeking the return of a watch which Orderly allegedly took. Orderly wants to testify that X told him, "Take this watch; it's a gift from me to you." This statement is not an admission, because it was made by X, and X is not a party, only his estate is.)

Against party: Also, make sure the statement is being offered against, not for, the party who made it.

Remember that for admissions, there is no requirement that the party who made the

statement be unavailable to testify.

Combinations: Heavily-tested area: admissions ***combined*** with statements containing facts about insurance, offers to settle, or offers to pay medical bills. (Here, you just have to memorize the rules. For instance, factual admissions made while offering to pay medical bills are admissible under the FRE, but factual admissions made in the course of settlement negotiations aren't.)

Representative admissions: Look for a situation where there's an attempt to bind one party with an admission ***made by another person***.

> **Vicarious admission:** Commonly, a party tries to use an ***employee's*** statement ***against the employer***, arguing that the employer is vicariously responsible for the statement. Two main tricks to watch out for (especially under FRE 801(d)(2)(D)):
>
> > **Timing:** First, make sure the statement was made at a time ***when the employment relationship existed***. (***Example:*** P is injured when a plane he's flying in, owned and operated by D airline, crashes. P offers the testimony of Investigator, who says, "I interviewed Walter after the crash. Walter was a mechanic for D at the time of the crash. Walter told me that before the crash, he told the president of D that the plane had cracks, but the president ignored him. Immediately after the crash, Walter was fired; he told me that this had happened as part of a cover-up by D." Walter's entire out-of-court statement is not admissible against D as a vicarious admission, because when it was made, Walter was no longer an employee of D.)
>
> > **Scope:** Second, make sure that that statement concerns a matter within the scope of the employment relationship. **Commonly-tested:** An employee is involved in a car accident, and statements made by him are sought to be attributed to the employer.
> >
> > > ***Example (within relationship):*** An accident occurs when a delivery van driver is en route making a delivery for his employer; the driver's statement about the accident to a witness is admissible against the employer.
> > >
> > > ***Example (not within relationship):*** In a drug case against D, Officer testifies that D tried to buy drugs from Officer. W, D's girlfriend, testifies for D, "Once Officer arrested me for prostitution, and told me he'd let me off if I bribed him. I said I wouldn't, and he said he'd get me and my friends." This isn't admissible against the government as a vicarious admission, because Officer's solicitation of bribes, and threat of revenge, probably weren't within the scope of his employment relationship. [However, it would be admissible to impeach Officer by showing bias, subject perhaps to the need to lay a foundation by first

questioning Officer about the episode.]

Note that the statement of the employee may not be used to establish the employer-employee relationship. This must be proven ***independently.***

Also, note that at common-law, the employee must be shown to have been ***authorized*** by the employer to ***make the statement*** (it's not enough that the statement was about a matter falling within the scope of employment). But under FRE 801(d)(2)(D), this requirement is ***dropped*** — as long as the matter is within the scope of employment, the employee ***doesn't need to have been authorized to speak about it***.

Adoptive admission: If a party hears or sees another person's statement, and by her words or actions indicates that she "accepts" or "adopts" that statement, the statement is binding on the party as an admission.

Most frequently-tested: an ***implied*** admission. Here, A claims that B's ***silence*** in the face of a statement made by someone other than B amounts to an adoption by B of the statement. The test is, would a reasonable person in B's position have denied the statement had it not been true?

Examples where silence is unreasonable (so adoption applies):

A is accused of murder or some other heinous crime;

A is accused of mislabelling his products;

A is told, "You know that's your signature" while being shown a contract.

In all 3 of the above examples, the statement will be admissible against A as an adoptive admission.

Co-conspirator's statement: Where an out-of-court statement is made by one conspirator implicating another, the statement can often be introduced against the latter. Check that the statement was made: (1) while the conspiracy was ***still in force***, and (2) in ***furtherance*** of that conspiracy. [FRE 801(d)(2)(E)]

Most frequently-tested: the "in furtherance" requirement, when applied to ***confessions, narratives of past events, and finger-pointing*** by the declarant against one who ends up being the defendant. If the court applies the "in furtherance" requirement strictly, to mean "in an attempt to advance the conspiracy's objectives," all of these kinds of statements ***won't*** be admissible. (But a lot of courts don't apply the requirement very strictly). (***Example:*** After a burglary, the police catch X in a chase. X says, "You never would have caught me if D hadn't been so slow in finishing the job." This statement would probably be found not to have been made in furtherance of the conspiracy, and would thus not be usable

as an admission against D at D's criminal trial for the burglary.)

Keep in mind that the same out-of-court statement may sometimes be admissible both as a prior inconsistent statement for impeachment purposes, and as an admission for substantive purposes. This is likely to be true wherever a party makes an out-of-court statement that contradicts his trial testimony. (***Example:*** P and D have a car accident. P hires an undercover investigator, W, who engages D in what seems to be a random conversation in a bar. D tells W, "l had a six-pack before the accident, but the police never tested me." At trial, D testifies on direct that he drove carefully and in full possession of his faculties, and on cross denies having ever said otherwise in any conversation in a bar. As part of P's case, W's testimony about what D to]d him in the bar will be admissible both as a prior inconsistent statement to impeach D, and substantively as an admission against a party-opponent.)

Distinction: Keep straight the differences between an admission and a declaration against interest: a declaration against interest must be against the declarant's interest at the time it was made (an admission doesn't have to be); applies only when the declarant is unavailable (no such rule applies to admissions); and may be offered into evidence by the party who made it (whereas the admission may be used only against the party who made it.)

> **Quick rule of thumb:** If used against the party who made it, always treat the statement as an admission. If used by the party who made it, or if made by a non-party, the statement can't be an admission, and will have to be a declaration against interest (if anything).

When you're writing about the FRE, note in your answer that the admission is nonhearsay (not "hearsay subject to an exception," as at common law). This makes no practical difference, but it tends to show your grasp of fine distinctions.

Statements about a Person's Physical Condition

Look for a person's statement about her ***physical condition***.

Treatment or diagnosis: If the statement is made for purposes of obtaining ***medical diagnosis or treatment***, then it's admissible if told to a physician, nurse, ambulance driver, hospital check-in clerk, etc. [FRE 803(4)] (***Example:*** P is injured in a car crash with D, taken to the hospital, and then complains of severe pain. P dies from the injuries. The statement is admissible at trial against D to prove damages.)

> Remember that in this "diagnosis or treatment" situation, the statement can be about ***either past or present*** physical sensation. (***Example:*** P says to Doctor, "Before the accident, I had no pain, and was able to hold a full-time job doing heavy lifting." As long as this statement related to P's attempt to get treatment or diagnosis, Doctor can repeat the statement at P's trial, even though the statement, when made, related to P's past rather than present physical condition.)
>
> Even if the doctor is consulted only in ***anticipation of litigation*** (e.g., to get the

doctor to testify as an expert witness for the plaintiff), the person's statements can come in, as long as they're relevant to "diagnosis."

Commonly-tested: the cause of the injury is included in the statement. If (and only if) it's ***pertinent to the diagnosis***, then it's admissible. (***Examples:*** (1) Patient tells Doctor, "When I was hit by the car, my elbow hit the ground hard and I heard a sharp crack"; statement admissible. (2) Hospital record reads, "Patient says ladder collapsed and Patient fell." Record probably admissible to prove cause of accident. (3) Patient tells Doctor, "I was on my bicycle and D ran a stop light and knocked me to the ground." Part about the stop light inadmissible, because not reasonably pertinent to the diagnosis; rest of statement probably admissible.)

Check to make sure the statement is made to the doctor, not ***by*** the doctor. (***Example:*** Civil suit involving injuries from car crash. P is examined by MD. MD signs an affidavit saying that P is suffering from back spasms. The affidavit will not be admissible under the "statement of physical condition" exception, because it's MD's statement about what he found, not a repeating of P's statement about his physical condition.)

Statement can be made by ***one other than the patient*** (e.g., a friend or relative assisting the patient), if it concerns the patient's physical condition and is reasonably pertinent to treatment or diagnosis. (Example: P is unconscious after car accident; H, P's husband, brings her to hospital and says to ER doctor, "She was hit from the rear while on her bike." Admissible.)

Statements not in connection with treatment or diagnosis: But where the statement about the speaker's physical condition is not made for the purpose of getting treatment or diagnosis, different (and more limiting) rules apply.

Most important (and most often tested): The statement must be about the speaker's present (not past) physical condition. (***Example:*** P says to W, his wife (a layperson), "Honey, I fell on the ice in front of D's house yesterday and it really hurt when it happened." Not admissible, because not a statement about P's present physical condition.)

On the other hand, the statement can be made to a layperson, i.e., one not connected with the giving of medical care or diagnosis. (***Example:*** Same facts as prior example, but P says to wife W, "My back is still hurting from the fall yesterday." W can repeat the statement at trial.)

Note that a statement about one's present physical condition may also come in as a statement of ***present sense impression***. (***Example:*** P says over telephone, "Ouch, I just cut myself slicing bread.")

For the two categories of "statement about physical condition" (for treatment/diagnosis or not), note that the declarant ***need not be unavailable***.

Statements about Declarant's Mental State

Statements about the declarant's ***present state of mind*** are sometimes admissible, sometimes not.

When a declarant expresses an ***intention or desire to do something***, the "present state of mind" exception usually applies, and the statement is admissible to prove that the declarant ***in fact did that something***.

Example 1: Declarant's statement, "I'm going to call P and tell him to go ahead with the portrait" is admissible to prove that Declarant probably later accepted P's offer to paint Declarant's portrait.

Example 2: Declarant tells W, "I'm going to use my friend Ed's cabin this weekend." Admissible to prove that Declarant went to the cabin that weekend.

Common scenario: Declarant's desire to commit suicide. (***Example:*** "I have nothing to live for," admissible to prove that declarant probably committed suicide.)

Watch out for cases where declarant mentions says that he or she plans to take an act ***in conjunction with another person***. The statement will only be admissible to prove that the ***other person*** participated in the act, if there is ***independent corroboration*** that that participation occurred (and some courts won't let it in even in that event). (***Example:*** Bonnie tells W, "Clyde and I plan to hold up the post office tomorrow." This will clearly be admissible to show that Bonnie held up the post office, but will be admissible to show that Clyde held up the post office only if there's some independent corroborative evidence that he did. Furthermore, some courts Won't allow it against Clyde even with corroboration.)

Common application of this rule: Murder victim says, "I'm going to meet with D." Not admissible to show D met with or murdered victim, unless there's corroboration that they met.

Past state of mind: Statements about declarant's ***past state of mind*** are generally ***inadmissible***. In other words, the declarant's statement must be about her ***then-existing state of mind***, not her state of mind at some materially earlier moment. (***Example:*** Defamation action. D newspaper offers testimony by W that Reporter told W, "When I wrote that piece on P two days ago, I believed every word of it." Not admissible, because Reporter's statement relates to his state of mind on a prior, not the present, occasion.)

Memory or belief: Similarly, statements about declarant's ***present memory or belief about past events*** are generally ***inadmissible to show the fact remembered or believed***. (***Example:*** Victim says, "I believe that Dr. Shepard has poisoned me." Inadmissible, because although it's a statement about declarant's present belief, that belief relates to a past event.)

But remember that there's an exception for will contests. [FRE 803(3), last clause] (***Example:*** Decedent tells W, "In the will I wrote last year, I left $10,000 to my son Mark." Admissible to show that at the time the will was written, Decedent

intended to leave Mark the money.)

Excited Utterances

Whenever the declarant ***blurts something out*** at the ***scene of an accident or crime***, the statement is probably admissible as an ***"excited utterance."***

Memorize the FRE test 803(2): the exception applies to "a statement relating to a ***startling event or condition*** made while the declarant was under the stress ***of excitement caused by*** the event or condition." Check for both elements: (1) ***startling event*** or condition; and (2) stress ***caused by*** the event or condition.

Most frequently-tested: Make sure that the ***amount of time*** that has passed since the event is ***short enough*** that the declarant is ***still under the stress***. Be skeptical of anything more than 1/2 hour or so, unless declarant was in shock, unconscious, or otherwise unable to reflect about the matter. (***Example:*** A statement made by an accident victim the day after the accident, where the victim never went into shock or lost consciousness, will clearly not qualify.)

But ***some*** time may pass between event and utterance — it's the ***present sense impression*** exception (see below), not the excited utterance exception, that requires true contemporaneity between event and statement.

Frequently-tested: Even if the ***identity of the declarant is unknown***, the statement is still admissible. (***Example:*** P falls on steps. At the civil trial, W testifies for defense, "Just after P fell, I heard someone in the crowd say, 'She was taking the steps three at a time and tripped.' "Admissible even if the declarant's identity is not shown.)

Present Sense Impression

If you have a declarant ***describing or explaining an event that's occurring at that very moment***, or that has just occurred, think of the ***"present sense impression"*** exception. A present sense impression must be ***contemporaneous*** with, or ***immediately*** following, the observation.

Distinguish present sense impression from excited utterance:

Present sense impression is narrower, in the sense that very little time must elapse between event and statement. But it's broader, in the sense that present sense impression may relate to a ***non-startling*** and ***non-stressful*** event. So look for present sense impression especially where the event appears routine and non-startling at the time.

Example: A witness to a car accident reports to a police officer, "A few minutes ago I saw… " Not a present sense impression, because not contemporaneous. (Might be excited utterance, depending on how "shook up" the witness still was.)

Example: Witness watches a car accident, and within 5 seconds after

impact, says, "The red car didn't have its headlights on." Present sense impression (and probably also excited utterance).

Where declarant is making a statement about his ***current physical condition***, especially about pain he's feeling, note that this is likely to be ***both*** present sense impression and "statement of physical condition."

Past Recollection Recorded

If a witness on the stand ***cannot remember***, and there exists a writing written by the witness regarding the subject matter of the questioning, consider whether the past recollection recorded exception applies.

Check for the following requirements: (1) the writer (or the source of the information) ***had personal knowledge*** of what he was writing; (2) the writing was made ***shortly after the event***, so that it was fresh in the writer's or source's memory; (3) the writer or source can testify as to the accuracy of the writing; and (4) the writer/witness' recollection is ***presently impaired***.

Most-often tested: Did the writer have the required ***first-hand knowledge*** of the subject matter of the writing? If the writer is recording another person's declaration, the required knowledge will usually be missing if only the writer testifies.

Common scenario: A police officer writes an accident report at the scene of an accident, and includes in it a statement by W, a witness. At trial, the officer cannot by himself read W's statement from his report, because the officer has no first-hand knowledge of the matters recited in the W's statement. (But the statement can be introduced if W testifies to having made it when his own memory was fresh, and the officer also testifies to writing it down accurately.)

Business Records

Whenever there's an attempt to admit a ***writing*** into evidence to prove that an event mentioned in the writing occurred, consider whether the document may be admitted as a business record.

Test for business record: A writing is admissible as a business record if: (1) the writing was made ***at or near the time*** of an event, (2) by, or from information supplied by, a ***person with knowledge***; (3) the writing was kept in the course of a ***regularly conducted business activity***; and (4) it was the business' ***regular practice to make the record*** (i.e., the record was "regularly kept"), (5) all as shown by the testimony of a ***qualified witness***. [FRE 803(6)]

Examples of business records: An answering service's telephone message log; a patient's chart in a hospital; a business' invoice showing that a shipment was made.

Many times the same document may be considered both a business and a public record. Don't forget to mention both options. (***Example:*** A police report made at the scene of an accident, in a jurisdiction that defines "business" broadly to

include "institutions" and non-profit organizations, as the FRE do.)

Document must be offered in evidence: Do a threshold check to see if the business records exception is even plausible to apply in the circumstances. The fact that the substance of a witness' trial testimony has previously been recorded in a business record is irrelevant — unless the file or record itself is being admitted into evidence, the business records exception doesn't apply. (***Example:*** Supervisor testifies at trial to details about a construction job, including the number of workers used and the number of hours spent. The facts indicate that Supervisor had previously recorded these facts in a notebook, as part of his office routine. The notebook is not sought to be introduced. Because the notebook isn't coming in, the fact that the matters on which Supervisor is testifying were recorded in a business record is irrelevant — Supervisor's testimony is admissible as his first-hand nonhearsay knowledge, without reference to the business records exception.)

Look for a record that was made in the ***regular course of business*** and in conjunction with the company's primary business.

> Commonly tested: ***Accident or investigative reports*** made by a business in anticipation of litigation. If the report is not related to a business activity of the entity, then it is not a business record, even though it is done routinely. In other words, if the sole purpose of the accident report is to ***prepare for litigation***, it's probably not a business record; but if it's done for "regular" business reasons (e.g., to prevent similar occurrences by changing the way the business operates), it may be a business record. (***Example:*** After an on-campus rape, Prexy, President of the College, interviews the victim in order to help the police arrest the rapist. Prexy takes notes of the victim's statements, and puts the notes in a file. This is probably not a business record, because it's probably not sufficiently related to the college's regular business.)

Confirm that the source of the material had ***personal knowledge*** of the items reported. By "source of the material," we don't necessarily mean the person who wrote the entries. A may recite matters to B, who enters them in the record; in that case, all that's required is that A, not B, have personal knowledge. (Example: A and B both work for Company. A inspects the contents of each shipment, and orally says to B, "The computer-generated invoice for this shipment is correct." B then writes on the invoice, "Shipment of these items confirmed." If B testifies at trial that the invoices were routinely marked this way based on oral statements by a person with knowledge, then a particular such invoice is admissible to show that the goods noted on it were in fact shipped; no testimony by A is needed.)

Foundation: Check to see that there was a ***foundation*** laid for each business record. However, this foundation can be laid by anyone with personal knowledge of the routine (i.e., that the records were routinely kept in the ordinary course of the business, based on input from someone with personal knowledge, etc.), ***not necessarily someone with personal knowledge of how the routine was applied in this particular instance***. Thus in the above example, even C — let's say, an office manager who did not personally make

the entries could lay the foundation by saying in essence "It was our company practice to have each shipment checked by someone, and then the checker or someone working with the checker noted the confirmation on the invoice." In fact, it wouldn't matter that C didn't know the identity of the person who had the knowledge, or the person who made the notation, in this particular invoice — it's enough that C has knowledge of how the routine ***generally*** worked.

Business duty: Check that the source of the knowledge had a ***business duty*** to make the report. If not. many (though not all) courts will keep the evidence out, perhaps on grounds of untrustworthiness.

> **Typical application:** ***Accident report***, in which declarant is a witness who does not work for the business that is preparing the report. (***Example:*** P slips and falls in Store. W, another shopper, says to Manager, "P was running when she fell." Manager quotes this statement in an "accident report" routinely kept by Store. Most courts won't allow this report to come in as a business record, because W was not an employee of the business, and thus had no business duty to supply the information; the fact that W is not under the business' control also may make it less likely that W's information is trustworthy.)
>
> However, even if the source did not have a business duty to make the report, the source's statement as recorded in the business record will be admissible if it independently falls within ***some other hearsay exception***. (***Example:*** Same facts as above, but it's P, not L, who says to Manager, "I was running when I fell." Manager's report will be admissible against P, because the report was kept as a business record [assuming that it was kept for regular business reasons and not in anticipation of litigation], and P's own statement contained within the report is an admission when used against P.)

Remember that ***"business"*** is defined very broadly in FRE 803(6) to include non-profits, institutions and "callings of any kind."

Trustworthiness: In any business records issue, always check (and in an essay, discuss) the additional requirement of ***trustworthiness***. Quote FRE 803(6): the exception fails if "the source of information or the method or circumstances of preparation indicate lack of trustworthiness."

> Pay special attention to trustworthiness where an accident report is involved — if the business making the report is likely to be a defendant in litigation, the desire to avoid liability probably makes the report untrustworthy.
>
> Lack of trustworthiness can also be indicated by a lack of ***detail*** about ***where the information came*** from. (***Example:*** On a death certificate, the cause of death reads. "Rung of ladder broke, and victim fell on head." If there's no indication on the certificate of where the information came from, the certificate is probably too untrustworthy to be admitted as a business record.)
>
> Pay special attention to trustworthiness where a ***computer printout*** is involved.

Include in your answer (if essay) the special requirements that testimony include a description of: the equipment, how the computer was programmed and how errors in programming are detected and corrected, how data is entered, how errors in data are caught and corrected, and how unauthorized access to program or data files is prevented.

Nonoccurrence: Remember that ***nonoccurrence of an event*** may be proven by ***lack of a record***, if it was the regular practice of the business to record all such matters. (***Example:*** Libel suit against D newspaper, in a state which requires P to show he first asked for a retraction. D's office manager testifies that it's the routine practice of the paper to carefully keep in a single file all demands for retraction, and that he has searched the file for any demand by P, and found none. Admissible as a business record to show no retraction demand was made by P.)

Multiple hearsay: Be alert to ***multiple hearsay*** problems, which must be analyzed layer by layer. If the business record ***quotes a statement made by someone outside of the business***, and the record is offered to show the truth of that statement, the statement must itself fall within a hearsay exception. (***Example:*** An operator of an answering service keeps a "Telephone Log" of all messages received. An entry in it reads, "May 3, Mr. D called P, said he accepted P's offer to paint D's portrait for $4,000." In P's contract suit against D, the log can be offered by P, but only after a multiple-hearsay analysis. The log comes in as a business record, to show that D's statement was made. D's statement itself comes in as an admission.)

But where the business record quotes a statement by one working in the business, no multiple hearsay problem exists — the business records exception covers everything. (***Example:*** A and B both work for Company. A tells B, "The shipment on order 256 was complete; I checked." B writes on the invoice, "Shipment complete." Because A worked in the business, the invoice can come in as a business record to prove the shipment was complete, and no independent hearsay analysis of A's oral statement is needed.)

Public Records

Whenever a document is prepared by a ***governmental body***, be alert to the possibility that the document may be admissible as a ***public record***. [FRE 803(8)]

Look for the public records exception in three main contexts:

A government agency makes a report about its ***own activities***. (***Example:*** To prove a police department tapped his phone, D could introduce an internal report prepared by the department saying, "We tapped D's phone.")

A government official makes a written record of ***observations he made in the line of duty***, if his job required him to make those observations. (***Example:*** In P's civil suit against D for a car crash, P could introduce a police report in which Officer says, "I saw the accident; D ran a red light.")

No criminal use. This "observations made in the line of duty" exception does not allow the ***government*** to use the report ***against D in a criminal case***. (***Example:*** Officer spots someone running away after a burglary, and writes in his report. "The burglar was a 6'2" hispanic male." In a criminal case against D for the burglary, this report can't be introduced against D. But it can be used by D to show that D doesn't fit the description.)

Government ***conducts an investigation***, and makes ***factual findings*** in that investigation. The factual findings can be introduced. (***Example:*** The National Transportation Safety Board investigates the crash of an airplane, and finds pilot error. In a civil suit against the airline, this report is admissible as a public record to show airline negligence.)

No criminal use. Again, this exception ***can't be used by the government against D*** in a criminal case. (***Example:*** The FBI investigates a bank robbery, and concludes in a report. "Devon did it." This report can't be introduced against Devon at his criminal trial, though it could introduced by Devon as a public record, if he so desired.)

Be alert to the possibility that the document is a non-qualifying public record yet falls within ***some other hearsay exception***. Courts are split about what to do where the document satisfies a non-public-records hearsay exception (e.g., business records, or past recollection recorded) and is also a public record that's inadmissible under the public-records provision.

In the most common case raising this issue, a ***police report*** about a crime might be an investigative report (a type of public record) and a business record. Here, the rule preventing the public record from being introduced against a criminal defendant will prevail, preventing the business-records use.

Learned Treatises

Where a published reference work is sought to be admitted for the truth of matters stated in it, think of the "learned treatise" exception [FRE 803(18)] Most frequently tested issues:

The treatise can't be "free-standing" — it must come in as an ***adjunct*** to testimony by an ***expert*** witness. (It can only come in if it's ***"called to the attention"*** of an expert witness on cross, or ***relied on*** by an expert ***on direct***.)

Make sure that the treatise is not entered into evidence ***as an exhibit*** — all that may happen is that the publication's ***contents are read*** into the record.

Make sure that the treatise is shown to be a ***reliable authority***. There are three ways to do this: by the witness herself, by another expert, or by judicial notice.

When the treatise is used on cross, don't be sidetracked by the fact that the witness didn't ***rely*** on the treatise — as long as some other expert says that it's a reliable authority, or the judge takes judicial notice that it is, that's enough to allow it to be read. (***Example:*** On direct, Expert 1 states that "Causes of Cancer" is a reliable

authority. Now, Expert 2 may be cross-examined with passages from the book, even if Expert 2 says the book isn't authoritative, and/or denies having relied on it; these passages can be substantive as well as impeaching evidence.)

The exception applies only to scholarly works. Thus it typically doesn't apply to articles in popular magazines or in general newspapers.

Commercial publications

"Published compilations" can be used, if relied upon by the public for the type of information in question. [FRE 803(17)] "Lists," "directories" and "market quotations" are examples. (***Example:*** D is charged with burglary. He asserts the alibi defense that he was watching a particular movie on cable TV at the time. The TV listings page from the local cable guide may be introduced to prove that the movie wasn't playing on any channel at the time in question.)

Ancient documents

Under the FRE, a document in existence for ***20 years*** or more can be admitted as a hearsay exception (the "ancient documents" exception), if its authenticity is established. (***Example:*** The issue is whether a deed issued 15 years ago was made while the grantor, Bill, was of sound mind. An affidavit by Bill's brother Dave, signed at about the same time, states that Dave thinks Bill is insane for enumerated reasons. The affidavit is not admissible as an ancient document, because it's too new; but if it were 22 years old, it could be introduced as an ancient document, to prove that at that time Bill was insane.)

The "Declarant Unavailable" Exceptions

The remaining exceptions require that the declarant be ***"unavailable."***

Here are examples of fact patterns where the witness will be considered to be unavailable:

W is ***dead***;

W deliberately ***avoids service***;

W does not respond to a ***subpoena***;

W takes the stand, but ***refuses to testify***. (Most often, W takes the 5th Amendment.) It doesn't matter whether W's refusal is lawful (i.e., a privilege in fact applies) or wrongful (i.e., W can be held in contempt).

W claims a ***lack of memory*** as to the declarant's statement.

Former Testimony

Where there is past testimony that one party wishes to offer at the present trial, but the testifier is unavailable, consider the hearsay exception for ***former testimony***.

Remember that the former testimony must have been given at a ***"hearing."*** [FRE

804(b)(1))] A "hearing" is in essence a proceeding in which the testifier testifies ***under oath***, and is subject to ***cross-examination***.

Examples that qualify:

A ***preliminary examination*** in a criminal case.

A ***deposition***.

A ***previous trial*** concerning a related or similar charge.

Examples that don't qualify:

A sworn ***affidavit***. (This is not a "hearing" and isn't subject to cross-examination).

A signed ***transcript*** of a ***confession or interrogation*** in front of the police or the prosecutor. (Same shortcomings as affidavit.)

Also remember that the party against whom the former testimony is being offered must have had the ***"opportunity and similar motive"*** to "develop the testimony" (usually by ***cross-examining the witness***) at the time it was given. [FRE 804(b)(1)]

Common "distractor": Professors. will often try to fool you by saying in the fact pattern that no cross-examination took place in the earlier proceeding. That's irrelevant — as long as the party against whom the testimony is now sought to be introduced had an ***opportunity and incentive*** to cross-examine, the fact he didn't ***take*** that opportunity doesn't block the former testimony exception from applying. (***Example:*** Peter is injured when a Twig-model car he owns, made by Carco, explodes. Peter brings a civil suit against Carco in Alaska state court. In that suit, Peter calls Expert to testify that the Twig was defectively designed. Carco doesn't cross-examine Expert. Later, Paula sues Carco when her Twig explodes. Expert is now unavailable. Paula may put Expert's testimony at the Peter-vs-Carco trial into evidence as substantive proof that the Twig is defectively designed. Since Carco had a similar motive to cross-examine Expert in the Peter trial as it would have today if Expert were giving live testimony, it doesn't matter that Carco didn't in fact conduct any cross.)

Dying Declarations

When the declarant is ***badly injured or very sick*** at the time of the declaration, consider whether her statement may be admitted as a dying declaration.

Most important element to look for: that the statement concerned the ***cause or circumstances of declarant's impending death***.

Example where this element is not satisfied: Duane is charged with murdering Victor. Duane wants to put into evidence a statement made by Edward to Walter,

in which Edward said "Now that I'm about to die of AIDS, I wanted to get something off my chest — it was me. not Duane, who killed Victor." (Edward in fact died soon thereafter.) Not admissible as a dying declaration, because the point for which the statement is sought to be admitted relates to who killed Victor, not to the cause or circumstances of Edward's death.

Example where this element is satisfied: Valerie, believing she will soon die of gunshot wounds, says, "Dexter shot me." If Valerie dies (or is otherwise unavailable at Dexter's trial), admissible against Dexter to show that Dexter shot her.

There is no requirement that the declarant actually die (let alone that she die from the thing she thought she would die of.) But she must be unavailable.

The declarant must believe that she will die ***imminently***. Thus if declarant believes that she has successfully escaped, say. a murder attempt, the exception doesn't apply.

Remember that the FRE allow for the exception in ***criminal homicide*** prosecutions (but no other kinds of criminal cases) as well as in civil cases. [FRE 804(b)(2)]

Declarations Against Interest

Whenever the declarant makes a statement that, at the time made, seems ***damaging to the declarant***, consider whether it's a declaration against interest.

Look for the declarant to be either a ***non-party***, or a party who wants to ***use his own statement***. (If the declarant is the party ***against whom*** the statement is to be used, you can avoid fulfilling the requirements of a declaration against interest — unavailability, against interest when made, and personal knowledge — by treating the statement as an admission.)

Make sure that the statement was against the declarant's ***pecuniary or penal interest*** when made. (But remember that at common law, only statements against pecuniary interest, not those exposing the declarant to criminal liability, count.)

Common fact pattern: A passenger in a car makes a statement to a police officer at the scene of a crime or accident, and the statement is incriminating to (or against the financial interest of) the driver but not the passenger.

Examples: (1) Car accident; Passenger tells police, "We should have had our lights on." (2) Car accident; Passenger tells bystander, "We were coming back from a wedding at which we had both been drinking." In each case, Passenger's statement is against the driver's pecuniary and penal interest, but not against Passenger's own interest, because a passenger isn't responsible for putting the car's lights on or not being drunk in the vehicle. Therefore, neither statement qualifies as a declaration against interest.

Make sure that the declarant knew, at the time of the statement, that it was against

her interest. ***(Hindsight doesn't count.)***

Confirm that the ***declarant is unavailable***. This is an easy one to forget, because unlike many of the other "declarant unavailable" exceptions (e.g., dying declaration), there's nothing in the core declaration-against-interest scenario to jog your mind into focusing on this requirement.

In an essay, mention whether it's a declaration against pecuniary interest or against penal interest (or both).

Most frequently-tested: A statement that would subject the declarant to ***criminal liability***. (Note in your answer that at common-law, exposure to criminal liability doesn't suffice, but that under FRE 804(b)(3) it does.)

Example 1: P sues Insurance Co. for failing to pay off on insurance claim; Insurance Co. defends on grounds that it cancelled policy for non-payment, and sent P the statutorily-required notice doing so. P offers testimony by Neighbor that Mailman, who delivered all mail to P's neighborhood during the time in question (and who is now in prison in another state) told Neighbor shortly after the time of alleged cancellation, "I just threw away a lot of the mail recently instead of delivering it, because my back hurt." Admissible, because the statement could have led to Mailman's prosecution for destruction of U.S. mail.

Example 2: Suit against a ladder manufacturer for personal injuries suffered by P when P fell from a ladder. The manufacturer may present testimony by W, who says, "X [now unavailable] told me that the fall happened because he, X, kicked the ladder out from under P." Admissible, because it was against X's pecuniary interest when made (since it exposed X to a civil suit by P), as well as against X's penal interest (prosecution for battery.)

Use by defendant: In criminal prosecutions where the ***defendant*** wants to introduce the out-of-court statement, beware the special rule that kicks in when the declarant ***inculpates himself*** by the same statement that ***exculpates the defendant*** — here, the declaration-against-interest exception applies only if there are ***"corroborating circumstances"*** that ***"clearly indicate the trustworthiness of the statement."*** [FRE 804(b)(3)] (***Example:*** Murder trial of Dexter, for killing Valerie. Dexter produces testimony of Officer, a police officer, who says, "Zeke [now dead] confessed to me that he killed Valerie." Unless there's some independent evidence indicating that Zeke in fact killed Valerie, Officer's testimony is not admissible as a declaration-against-interest.).

Use by prosecution: In criminal prosecutions where the ***prosecution*** wants to use the statement, check to see if the declarant had a ***self-serving motive*** that conflicted with the supposedly against-interest aspects. If so, the statement ***won't*** be admissible.

Key scenario: Declarant ***"confesses"*** after being caught red-handed. During the course of the confession, he ***implicates D***, against whom the confession is now

sought to be used. (In this fact pattern, Declarant is "unavailable" at D's trial, usually because Declarant pleads the Fifth.) If Declarant was trying to ***minimize his own culpability*** (e.g., "D was the ringleader, and I was just the errand boy"), or was trying to ***"curry favor"*** with the authorities by implicating D, you should conclude that the declaration wasn't really against Declarant's interest when made, and should therefore not be admitted under the against-interest rule.

Collateral statements: Also, remember that the ***precise statement itself*** must be "against interest" — it's not enough that the statement is ***"collateral to"*** an against-interest statement. So even if parts of Declarant's confession are clearly against his interest, other parts that aren't against his interest (e.g., parts where he implicates someone else) can't come in as being collateral to the against-interest parts. Cite: **Williamson v. U.S.** on this point.

Near death: If the declarant is ***near death*** at the time of the declaration, question whether the statement is truly against his interests. (***Example:*** Same facts as earlier example [Zeke confesses to crime for which Dexter is now charged.] Now, assume that Zeke, at the time of his confession, knew he was dying of a bullet wound. He probably wasn't very worried about criminal liability, so the court may well refuse to admit the statement, on the grounds that it doesn't have the special guarantee of truthfulness that serves as the basis for the against-interest exception.)

Where the statement is against pecuniary interest, however, consider the possibility that the declarant, though dying, had an interest in ***preserving his estate*** for inheritance by his next-of-kin. In that case. the impending death would not be enough to remove the declarant's pecuniary interest.

Prior Statements by Testifying Witnesses

Prior Inconsistent Statements

Remember that under the FRE (but not at common law), a prior inconsistent statement by a trial witness is sometimes admissible as substantive evidence.

Remember the requirements for a prior inconsistent statement to be substantively admissible: (1) the declarant must ***testify*** and be available for cross; (2) the prior statement must have been made ***under oath*** at a ***trial, hearing, "other proceeding" or deposition.***

Example: In a multiple-car collision case, W testifies for P that D went through a red light. D may contradict W's testimony by reading into the record W's statement at a deposition taken in the case, in which W said that the light was yellow when D went through it. This statement is admissible substantively, to prove that the light was yellow (as well as admissible to impeach W).

Note in your answer that the FRE classify admissible prior statements as ***nonhearsay***, not as hearsay admissible because of an exception.

Don't confuse this exception with the "former testimony" exception. Here, the statement must be in conflict with the current testimony. On the other hand, there's no requirement that the prior statement have been subject to cross examination.

> ***Example:*** A prior inconsistent statement from a witness' testimony at a grand jury hearing is admissible against the defendant, even though that defendant had no lawyer present to cross-examine the witness. In contrast, the statement would not be admissible under the "former testimony" exception because no cross was possible.

Make sure the ***declarant is presently testifying***. If the prior inconsistent statement is offered to contradict a prior out-of-court declaration rather than the declarant's live testimony, the exception doesn't apply.

> ***Example:*** Murder prosecution of D for shooting V. The prosecution puts on W1, who says, "One day before V died of his gunshot wounds, he was pretty sure he'd die, and he said to me D did this to me.'" *This is admitted as a dying declaration.] Now, the defense offers W2, V's friend, who says, "After the shooting, when V thought he'd recover, he said to me in his hospital room, 'X did this to me.' "W2's testimony is not admissible as a prior inconsistent statement because it's not being offered to contradict V's live at-trial testimony. (Also, it doesn't qualify because V wasn't under oath at a proceeding when he made the statement to W2.) However, W2's testimony is admissible to impeach W1.

Distinguish between use of a prior inconsistent statement for ***impeachment*** purposes and use for substantive purposes. What we're talking about here is substantive use. (But don't forget that if you determine that the statement is substantively admissible, then it's automatically also available for impeachment.)

If the statement was not given under oath at a formal proceeding, but was made by (and is sought to be used against) a party, consider whether it's admissible as an admission.

Prior Consistent Statement

Prior consistent statements are rarely tested. When they are, remember the FRE approach: the consistent statement is admissible only to rebut an express or implied charge that the witness has been improperly influenced, or has recently fabricated his story. Note that the prior consistent statement must have been made before the influence or fabrication came into existence.

Prior Identification

Remember that prior statements of identification are fairly easy to admit. Under FRE 801(d)(1)(C), a statement of "identification of a person after perceiving him" is nonhearsay if the declarant testifies at trial and is available for cross.

So the typical scenario involves a trial witness who testifies that ***at some earlier point in time***, she identified D as the perpetrator. (***Example:*** W testifies at trial, "After the rape, I picked D out at a lineup as the person who raped me." Admissible.)

Common scenario: W is asked at trial to identify the defendant as the perpetrator of the crime charged. She says she can't, because his appearance is now different. The prosecution then asks W to repeat the previous identification that took place after the crime. (***Example:*** W says at trial, "I can't now ID the defendant as the man who raped me, because the — defendant has a beard covering his face, and the man who raped me didn't, and I can't tell if the two are the same." The prosecution then shows that W picked a person out of a lineup conducted after the rape, and that the person picked was in fact D. Admissible.)

Residual ("Catchall") Exception

In any hearsay problem where you don't find any exception that applies, consider whether the residual ("catchall") exception [FRE 807] applies.

Most important: The two most important things to watch for in analyzing the catch all are:

The statement must have ***"circumstantial guarantees of trustworthiness."***

The statement must be ***"more probative"*** on the point for which it is offered than any other reasonably available evidence. Therefore, be most on the look-out for the catch-all when the ***declarant is unavailable*** (though unavailability is not a strict requirement.)

Grand jury testimony against D: Most likely scenario for use of the catchall: The prosecution wants to use a person's ***grand jury testimony*** against a criminal ***defendant.*** (This can't come in under the former testimony exception, because the defendant wasn't present during the grand jury testimony.) Usually this happens where the testimony is from someone who refuses to testify at trial (perhaps because he's afraid of D). Say that this is a close situation; if there's evidence that D intentionally ***intimidated*** Declarant into not testifying, the court should allow the grand jury transcript.

Near miss: Also, allude to the "near miss" problem, if the facts just miss qualifying for one of the traditional hearsay exceptions. Say that most courts don't hold the "near miss" against the proponent, and allow the catchall to be used despite the near-miss if the required "circumstantial guarantees of trustworthiness," etc., are present.

VII. Privilege

A. Testimonial privileges - Federal rules contain no specific privilege provisions

B. The attorney-client privilege - statements made in confidence, between attorney and client, for the purpose of seeking/rendering legal advice are privileged

C. The Fifth Amendment prohibits compelling a witness to testify against himself. It applies, not just to answers which in themselves are incriminating, but to any testimony which could "furnish a link in the chain of evidence needed to prosecute". The witness must show that there is a real danger of self-incrimination, not remote or speculative.

D. Example - A nonparty accountant voluntarily executed an affidavit for IRS CID. Later, he was made a target of the CID investigation. Petitioner attempted to subpoena the affidavit, and the witness refused to produce it, claiming Fifth Amendment privilege. Held: the witness waived his Fifth Amendment privilege when he executed the affidavit. [Jones vs. Cmr, 97 TC 7 (1991)]

Exam Tips

Privilege

Usually, it's not hard to spot whether a fact pattern poses an issue of privilege - the pattern will probably tell you that the witness refuses to testify, and often it will tell you the asserted grounds. The problem thus is almost entirely one of determining whether the particular privilege applies.

Here's what to look for:

General

When a fact pattern contains an issue regarding a privilege:

> ***Know the controlling rule of law.*** Each state, of course, sets up its own rules of privilege. In the federal courts, the ***FRE do not contain specific privilege rules***; therefore: (1) for civil diversity cases, the federal court uses the state law on privilege; and (2) in ***criminal*** cases, and in ***"federal question"*** civil cases, the court uses its ***own judgment***, i.e., "federal common law."
>
> Watch for ***eavesdroppers***, a commonly-tested scenario. The ***modern rule*** is that the presence of an easvesdropper ***does not destroy*** the privilege of a confidential communication, if and only if the eavesdropping ***wasn't reasonably to be anticipated***. (***Example:*** During a recess of a criminal trial, D tells his wife, "I should have known that X would spill his guts." A reporter who is sitting behind D hears the statement and testifies to it. D should probably have anticipated the possible presence of a reporter; if so, he'll lose the spousal privilege and the reporter's testimony will be allowed.)

Attorney-Client

When an attorney is being asked to divulge information about a party to a lawsuit, consider whether the attorney-client privilege applies.

> **First**, look for an ***attorney-client relationship***. The client must have been ***seeking professional legal advice*** when communicating with the attorney. (***Example:*** Suit by P against D for breach of an oral contract in which P is to paint D's portrait. P produces testimony that D said to his attorney-wife W, "Since oral agreements are valid, I'm going to call P and tell him to go ahead with my portrait." Since P wasn't attempting to procure legal advice from W when he made the statement, the attorney-client privilege doesn't apply.)
>
> > Remember that the attorney ***doesn't have to be paid or retained*** in order for the privilege to apply, as long as an attorney-client relationship (i.e., an attempt to get professional legal advice) existed at the time of the communication. (***Example:*** P wants to bring a product liability action against D, a drug manufacturer, for liver damage he says D's pills caused. P initially consults attorney X about his claim, and tells X that his liver was malfunctioning even before he took the pills. X

declines to represent P. The privilege still applies.)

Make sure the evidence is a ***"confidential communication."*** Look for a disclosure by the client and an intent that the disclosure remain secret.

> **Trick question:** A communication may be protected even though it is nonverbal. However, a lawyer's ***observation of a client's physical appearance*** that third parties could also have made is not covered. (***Example:*** D is the driver of a car in which his attorney, L, is a passenger. The car crashes, injuring P, a pedestrian. In a civil suit by P against D, D is not represented by L. P calls L to testify, and asks, "Didn't D appear to be drunk just before the accident?" L's answer can't be blocked by the attorney-client privilege, because the answer doesn't involve any communication between L and D, merely L's observations of D's physical appearance.)
>
> ***Previously-prepared documents*** that a client gives to an attorney are not a communication. (***Example:*** P sues D, a car manufacturer, for defective design of the Thunderwheel. P subpoenas from D records of tests that D performed on the Thunderwheel before the accident occurred. D objects on the grounds that D has given these records to its lawyer, thereby subjecting them to attorney-client privilege. D will lose — only materials prepared for the purpose of communicating with a lawyer can be protected under the attorney-client privilege. [Nor are the documents protected by attorney work-product, since they weren't prepared in anticipation of litigation.])

Confirm that the privilege hasn't been ***waived***. Look for the presence of third parties — if a third party is present whose presence wasn't reasonably necessary, the privilege will be lost. (***Example:*** D makes the communication to L, his lawyer, in front of a cab driver who has nothing to do with the litigation or the conference. The privilege is lost.)

> But if the third party's presence is ***reasonably necessary*** to the conference, then the privilege isn't waived. (Examples: Employees of Client; guardian of Client; investigators joint clients.)
>
> > ***Example:*** Pedestrian is injured by a truck driven by Driver and owned by Driver's boss Employer. Driver and Employer attend a conference with Lawyer, who represents Employer, and Investigator, who has been retained by Lawyer to help defend the anticipated suit. In the civil trial of Pedestrian's suit against Driver and Employer, Pedestrian attempts to compel Driver to testify about admissions Driver made at this meeting. Driver won't have to testify — all communications at the meeting are privileged even though Employer and Investigator were present, since their presence was reasonably necessary.)
> >
> > But if the meeting involves ***joint clients*** who later are asserting ***claims against each other***, the privilege doesn't apply to evidence about those claims. (***Example:*** Same facts as prior example. Now, Owner makes a

cross-claim against Driver as part of Pedestrian's suit. Owner can testify to admissions made by Driver in the meeting with Lawyer — this testimony will be admissible only as to the Owner-vs.-Driver claim. Same result if Owner sued Driver in a later suit separate from Pedestrian's suit.)

Other instances where the privilege doesn't apply:

Claim by ***lawyer against client***, or vice versa. (***Example:*** If Client sues Lawyer for malpractice, either may put on evidence about communications between them.)

Furtherance of ***crime or fraud***. (***Example:*** Product liability suit by P against D for making pills that damaged P's left main coronary artery. D subpoenas Lawyer, whom P originally consulted but who would not take the suit, and asks, "Didn't P tell you he had a defective left main coronary artery before he began taking our pills?" D cannot block the question, because any such admission by P would have indicated that P was hoping to persuade Lawyer to participate in a fraud, by bringing a fraudulent claim.)

Physician-Patient

When a doctor is being asked to divulge information about a party to a lawsuit, consider whether the ***physician-patient*** privilege applies.

Remember that the communication must be related to treatment of a condition, or to diagnosis that is expected to lead to treatment. (***Example:*** D is on trial for drug possession. The prosecution calls W, an M.D., who testifies that he gave D a physical exam, and that during the exam D stated that he, D, was a drug addict and asked W if W would like to buy drugs. These statements by D will not be privileged, because they don't relate to the diagnosis or treatment of a condition.)

If the communication is done solely to permit the M.D. to serve as an ***expert witness*** in litigation (i.e., no treatment is contemplated), most states hold that the privilege does not apply.

Also, the privilege doesn't apply where the patient has placed ***her physical condition in issue***. Common scenario: A personal injury suit.

Example: P sues D, a cosmetics company, for injuries she claims she suffered where her leg became infected as a result of using a hair remover made by D. D calls Doc, who testifies that when he examined P's leg injury, P told him she had infected it by falling on a rusty pitchfork. Not privileged, because P's suit has placed her physical condition in issue.

Remember that the majority rule is that the privilege ***can't be used in criminal proceedings***.

Remember that the privilege is ***held*** exclusively by the ***patient***. So the doctor can't assert

the privilege if the patient doesn't want to, and if the patient is a litigant the other party can't assert the privilege either.

> Common scenario: The defendant objects to testimony by the plaintiff's doctor. (***Example:*** Personal injury suit. W, an MD, testifies for P that she examined P, and that P described pain she was feeling in her lower back. D objects on grounds of patient-physician privilege. Objection overruled: only the patient can assert the privilege. [Also, observe that there's no hearsay problem, because there's a hearsay except for statements of physical condition made to a doctor for treatment or diagnosis.])

Remember that the privilege also applies, in virtually every state, to confidential communications between a patient and a ***psychotherapist*** (including non-M.D, ***psychologist***).

Self-Incrimination

Whenever someone refuses to answer a question, consider whether the Fifth Amendment privilege against ***self-incrimination*** may be invoked.

If the witness is ***someone other than a criminal defendant***, make sure that the witness has ***taken the stand and been asked a question***. (A criminal defendant may, in his own case, refuse to take the stand at all, but anyone else must take the stand before claiming the privilege.) (***Example:*** Murder trial of D. The prosecution subpoenas W, who the prosecution thinks was present at the scene of the crime. W may not refuse to appear in court, or to take the stand, on Fifth Amendment grounds. She must take the stand and be asked questions; only then may she plead the Fifth.)

> The privilege may be invoked at a ***civil proceeding***, if the witness reasonably believes that the answer might tend to incriminate her for purposes of some later theoretically-possible prosecution. (***Example:*** W, a witness in a civil case involving a car crash, testifies to witnessing the crash. D's lawyer asks her, "Weren't you actually robbing a store in Carson City on the day this accident occurred?" W may plead the Fifth, even though she has never been charged with the robbery — it's enough that W's answer might possibly be used against her in a later prosecution for the robbery.)
>
> If W does plead the Fifth, the trial judge has discretion to order any earlier testimony by W in the matter ***stricken from the record***, on the grounds that W's plea has deprived the party opposing W from ***meaningfully cross-examining W***.

Also, point out in your answer that ***no comment*** may be made upon a criminal defendant's ***refusal to testify*** on his own behalf.

Make sure the evidence is ***testimonial and compulsory***.

> ***Common traps (where the evidence does not violate the Fifth Amendment):***

The evidence consists of testimony of a witness regarding an ***admission*** made by the defendant. The privilege never applies to A's repetition in court of an out-of-court statement made by B. (***Example:*** D's trial for murdering V. The prosecution puts on W, who testifies, "D said to me, 'I killed V.' "D cannot raise any Fifth Amendment claim against this testimony.)

The evidence consists of testimony of a witness based on her ***observations of the defendant.***

The evidence consists of an ***audiotape or videotape*** of the defendant, that was recorded without his knowledge, while he talked to a non-law-enforcement person; since the defendant isn't "compelled" to give the evidence, the Fifth Amendment doesn't apply. (Example: The police secretly videotape D telling his friend, "Sure I did it, but they'll never catch me." There's no Fifth Amendment privilege, because D's statement wasn't compulsory.)

Remember that it's unnecessary for the person invoking the privilege to ***show how*** he statement might be incriminating. In a criminal case, D has the absolute right to claim the privilege without any showing at all. A witness who is not a criminal defendant may invoke the privilege unless it's virtually impossible to conceive of circumstances in which the answer called for would be incriminating.

Determine what kind of immunity, if any, has been granted. Be sure to distinguish between ***use*** immunity and ***transactional*** immunity. Typically, you'll be told which of the types has been granted, and you'll have to figure out the consequences of that grant.

When a witness is given immunity (either type), she is ***no longer entitled to claim*** the Fifth Amendment, and must give the testimony or be held in contempt.

Use immunity: Use immunity prevents the use of a person's testimony or its fruits in a subsequent criminal proceeding against that person.

Use immunity prevents even the ***indirect use*** of the testimony. Thus any kind of ***"fruit"*** that is ***in any way derived*** from the testimony is blocked. (***Example:*** Mayor, the Mayor of Gotham, is subpoenaed by a grand jury investigating municipal bribery. After being given use immunity, she testifies that Commish, Gotham's Building Commissioner, has frequently taken bribes and shared them with her. Both Mayor and Commish are indicted for taking bribes. The only evidence against Commish is Mayor's grand jury testimony. Commish pleads guilty in return for promising to testify against Mayor. This testimony will be barred by the grant of use immunity to Mayor — because Mayor's testimony was the only evidence against Commish, his plea bargain and testimony against Mayor are the indirect fruits of Mayor's immunized testimony, and therefore may not be used against Mayor.)

Remember that use immunity ***doesn't protect against prosecution***, just against use of the immunized testimony. So if the government can go forward without any direct or indirect use of that testimony, the prosecution is allowed. (***Example:*** Based on descriptions obtained from bank employees, D is arrested for robbing X Bank. D is subsequently picked out of a line-up by a bank employee, and is charged with armed robbery in state court. He is then subpoenaed by a federal grand jury investigating robberies of certain federal banks. After being granted use immunity, D admits his participation in robbing X Bank. D may still be tried in state court if the only evidence presented is the testimony of the bank employees who picked him out of the lineup, because that testimony did not derive in any way from D's immunized testimony.)

Watch for instances where use immunity ***doesn't*** render evidence inadmissible:

For instance, the prosecution is not barred from using the immunized testimony against ***someone other than the witness***. (***Example:*** Sidekick is given use immunity, then asked in a grand jury proceeding about crimes that he carried out for his employer, Boss. Sidekick implicates Boss in various crimes. Boss is now prosecuted for those crimes. The grant of use immunity to Sidekick doesn't prevent Sidekick's grand jury testimony from being used against Boss, because the grand of use immunity only protects the witness (Sidekick), not anyone else.)

Transactional immunity: Transactional immunity ***prevents criminal prosecution for the entire transaction(s)*** about which the person has testified, even if the prosecution doesn't make use of the immunized testimony. So it's broader (better for the witness) than use immunity.

Common trap: Look for a subsequent ***civil suit*** — the immunized testimony ***can*** be used in the civil suit (since the immunity only applies to ***criminal prosecutions***). (***Example***: D, a member of a professional crime organization, is offered transactional immunity in return for testifying against other members of the organization. He so testifies, and during the course of his testimony admits having killed V. V's wife then brings an action for damages resulting from the wrongful death of V. This action may proceed, and may in fact make use of D's immunized testimony. [Same result if the immunity was use rather than transactional.])

Marital Communications / Spousal Immunity

When a spouse is asked to testify, consider whether the privilege for ***confidential marital communications*** and/or the ***adverse testimony privilege*** (spousal immunity) applies.

Distinguish: The privilege for confidential marital communications only prevents

disclosure of confidential ***communications*** made by one spouse to the other during the marriage. The adverse-testimony privilege (or principle of "spousal immunity") gives a criminal complete protection from adverse testimony — whether it relates to a communication or not — by his or her spouse.

> Sometimes both privileges will apply, but often only one will. (***Example:*** Suppose Wife sees Husband kill V. If the jurisdiction recognizes the adverse testimony privilege, that privilege will apply, so that Wife can't be forced by the prosecution to testify to what she saw. But the confidential communications privilege won't apply on these facts, since there's no communication, merely observation.)

Confidential communications: For the privilege for confidential marital communications:

> Look for a communication. Gestures are usually covered; a few courts also cover acts that are not intended to communicate, but that take place in private.
>
> > The spouse's physical appearance generally isn't a communication, so it can't be covered. (***Example:*** In a rape prosecution, D's wife testifies that D returned home on the night in question with scratches on his arm. The testimony doesn't violate the confidential communication privilege, because there was no "communication," merely an observation of something physical. [But if the testimony was that D intentionally pulled up his sleeve to show his wife his scratches, this gesture might be found to be communicative and thus covered.])
>
> Make sure that the communication was intended to be ***confidential***. This is the most frequently-tested aspect.
>
> > Thus, look out for the presence of third persons. If a third person's presence is known to the speaking spouse, there's no intent to keep the communication confidential, and thus no privilege. (***Example:*** H makes the disclosure to W at dinner, with the butler present. No privilege.)
>
> Where the defendant spouse objects, but the testifying spouse seems willing to testify (even if it's because she's being threatened with being prosecuted herself), flag the issue of, ***"Whose privilege is it?"*** Courts are split; some say it can be asserted by either, but others that it can be asserted only by the spouse ***who made the communication*** (who will usually, but not always, be the defendant if it's a criminal trial.)
>
> Remember that the communication must have been made during the marriage. But the parties' ***present marital status doesn't matter***. (***Example***: Even if H and W are now divorced, H can prevent the prosecution from using W's testimony against H about something H said when they were married.)
>
> The privilege applies to both ***criminal and civil suits*** (but not to a suit between

the spouses, e.g. a divorce suit.)

Adverse testimony/spousal immunity: In analyzing whether the adverse testimony privilege (spousal immunity) applies, look to these factors:

The ***nature of the proceeding***. Most states limit the spousal immunity to ***criminal cases***.

Who holds the privilege. In ***federal cases***, the privilege belongs to the testifying spouse, not the party spouse. [***Trammel v. US***] (***Example:*** Prosecution of H. W cuts a deal to testify against H in return for not being prosecuted herself. H can't block W's testimony, because the privilege belongs to the testifying spouse, not the litigant spouse.)

The parties' ***marital status***. It doesn't matter whether they were married when the act or communication occurred; all that's required is that they be married now. (***Example:*** W can refuse to testify against H as to something H told her before they were married.)

Remember that this privilege covers ***all testimony*** by the spouse, even testimony ***not involving any communication***. (***Example:*** In a jurisdiction where the privilege exists, W may refuse to testify about whether she saw scratch marks on H after he allegedly raped V.)

Remember that all federal courts recognize the privilege (though as noted only the testifying spouse may assert it), but only a slight majority of states recognize it.

Other Privileges

Be alert to the possibility that a non-standard privilege exists under local state law. (***Examples:*** accountant-client; psychotherapist-patient; journalist-source.) If your fact pattern involves one of these, you typically won't be expected to know whether the state in question recognizes the privilege — you should merely mention that a privilege may exist, and perhaps describe how that privilege is usually defined when it exists.

Exam Tips

Confrontation & Compulsory Process

Whenever your question involves a criminal prosecution, and evidence is being introduced against the defendant, check for the possibility of a Confrontation Clause problem.

If ***hearsay*** is being used, check to see whether the hearsay falls within a ***"firmly rooted exception"*** to the hearsay rule.

If there is a firmly-rooted exception, say that there's no Confrontation Clause problem, regardless of the reliability of the particular out-of-court declaration at issue.

If ***no*** firmly-rooted exception is being used (e.g., some non-standard state-specific hearsay exception is being used, or the federal ***catch-all*** is being used, or the ***"against-interest"*** exception is used), check whether the ***particular declaration*** seems ***factually reliable***, based on the surrounding circumstances. If it isn't reliable, then there's a serious Confrontation Clause problem.

Confession implicating someone else: Most likely to pose Confrontation clause problems: A's ***confession*** (taken when A was in custody, and implicating B) is used against B at B's trial, and A won't take the stand because he pleads the 5th (or he takes the stand and then pleads the 5th during cross). Here, the use of A's confession almost certainly ***violates*** B's rights.

Variation: A and B are ***tried together***. If the same jury hears A's confession implicating B (and A doesn't take the stand), then B's Confront clause rights are violated even if the prosecution only purports to be offering the confession against A.

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

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Lay Opinion Testimony – FRE 701

- Non-experts (laypersons) generally may only testify as to the facts of which they have personal knowledge. FRE 602.
- Lay opinion testimony is generally prohibited.
- Lay opinion testimony is permitted only when:
  - The testimony is rationally based on witness's own perception; and
  - The testimony is helpful to gain a clear understanding of the witness's testimony or the determination of a fact in issue; and
  - The testimony is NOT based on scientific, technical, or other specialized knowledge within the scope of the rule on expert witnesses.

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Expert Opinion Testimony – FRE 702 and T.C. Rule 143(g)

Expert testimony is allowed where "scientific, technical, or other specialized knowledge" will help the trier of fact either:

- understand the evidence; or
- determine a fact in issue.

Qualified Expert

- Demonstrate adequate knowledge, skill, experience, training, or education.
- At trial, qualification of an expert is accomplished on direct examination by the proponent of the expert.

Expert Testimony

- the expert's testimony must:
  - Be based on sufficient facts or data
  - Be the product of reliable principles and methods, and
  - Reliably apply the principals and methods to the facts of the case.

Tax Court Procedure for Expert Witness Testimony

- Under T.C. Rule 143(g) expert witness must prepare and sign a written report containing:
  - a complete statement of all opinions and the bases and reasons for the opinions;
  - facts and data considered in forming the opinions;
  - any exhibits used to summarize or support opinions (e.g. charts, graphs, etc.)
  - witness qualifications, including a list of all publications in the last 10 years (generally a CV will be attached to the report);
  - a list of all other cases in which the witness testified as an expert at trial or by deposition for the previous 4 years (again most experts who do this type of work have that as part of their CV package);
  - a statement regarding the amount of compensation received by the expert.

Tax Court Procedure for Expert Witness Testimony

- Report must be lodged with Tax Court and served on opposing counsel 30 days before the call of the trial calendar on which the case is scheduled (which is not necessarily the trial date).
  - May be excused for good cause if there is no prejudice to opposing party

Tax Court Procedure for Expert Witness Testimony

- Proponent of witness qualifies her as an expert.
- Report marked as an exhibit, identified by witness, and received into evidence (unless the witness is not qualified as an expert).
- Report is the witness's direct testimony.
- Additional direct testimony may be allowed to clarify or emphasize, or address matters arising after preparation of report, or at the discretion of the Court.

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Bases of Expert Opinion – FRE 703

- 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).
- 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.

Daubert/Kumho Tire

- Trial judges charged with responsibility as "gatekeeper" to keep out unreliable expert testimony.
- Arbitrary assertions not backed by reasonable science should be kept out, but weak claims should be allowed in. Remember: refuting the arbitrary can be lengthy and expensive, in violation of goal of "just, speedy, and inexpensive" resolution of tax disputes.
- Factors to be considered by Court are:
  - Whether technique or theory has been tested
  - Whether technique or theory has been subject to peer review
  - The known or potential rate of error
  - Whether the technique or theory has been generally accepted in the relevant scientific community

Opinion on Ultimate Issue – FRE 704

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

Hearsay – FRE 801-807

- Hearsay is defined as a statement, whether verbal, written, or non-verbal conduct, that the declarant made outside of the Court and which is being offered to prove the truth of the matter asserted in the statement.
- Classic example is where the witness testifies as to what someone else told him.
- Statement made by party opponent is not hearsay. It is considered an “admission.”

FRE 802: The Rule Against Hearsay

- Hearsay is not admissible, unless authorized by a federal statute or rule to the contrary.

FRE 803: Exceptions to the Hearsay Rule

- There are 23 exceptions to the hearsay rule. These 23 exceptions are items that would be hearsay, if not for being listed as an exception.
- All of these exceptions apply regardless of the availability of the declarant.
- All of the exceptions are important, but pay careful attention to the elements for the business records exception, which is Number 6 below.
- Note that some of these exceptions reflect other evidence rules discussed elsewhere. For example, the business records exception (6) also reflects the rule regarding habit evidence in FRE 406; exception (21) relating to character also reflects the rules set forth in FRE 404 and 608; exception (22) relating to prior convictions also reflects the rules for the use of convictions set forth in FRE 609.

Exceptions to the Hearsay Rule – (1) *Present Sense Impression*

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

Exceptions to the Hearsay Rule - (2) *Excited Utterance*

- **(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.

Exceptions to the Hearsay Rule - (3) *Then-Existing Mental, Emotional, or Physical Condition*

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

Exceptions to the Hearsay Rule - (4) *Statement Made for Medical Diagnosis or Treatment*

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

Exceptions to the Hearsay Rule – (5) *Recorded Recollection*

- **(5) *Recorded Recollection.*** A record that:
  - **(A)** is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;
  - **(B)** was made or adopted by the witness when the matter was fresh in the witness's memory; and
  - **(C)** accurately reflects the witness's knowledge.

- If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

Exceptions to the Hearsay Rule – (6) *Records of a Regularly Conducted Activity*

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

Exceptions to the Hearsay Rule – (7) *Absence of a Record of a Regularly Conducted Activity*

- **(7) *Absence of a Record of a Regularly Conducted Activity*.** Evidence that a matter is not included in a record described in paragraph (6) if:
- **(A)** the evidence is admitted to prove that the matter did not occur or exist;
- **(B)** a record was regularly kept for a matter of that kind; and
- **(C)** the opponent does not show that the possible source of the information or other circumstances indicate a lack of trustworthiness.

Exceptions to the Hearsay Rule - (8) *Public Records*

- **(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.

Exceptions to the Hearsay Rule - (9) *Public Records of Vital Statistics*

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

Exceptions to the Hearsay Rule - (10) *Absence of a Public Record*

- **(10) *Absence of a Public Record*.** Testimony — or a certification under Rule 902 — that a diligent search failed to disclose a public record or statement if:
- **(A)** the testimony or certification is admitted to prove that
- **(i)** the record or statement does not exist; or
- **(ii)** a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind; and
- **(B)** in a criminal case, a prosecutor who intends to offer a certification provides written notice of that intent at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the notice — unless the court sets a different time for the notice or the objection.

Exceptions to the Hearsay Rule - (11) *Records of Religious Organizations Concerning Personal or Family History*

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

Exceptions to the Hearsay Rule - (12) *Certificates of Marriage, Baptism, and Similar Ceremonies*

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

Exceptions to the Hearsay Rule - (13) *Family Records*

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

Exceptions to the Hearsay Rule - (14) *Records of Documents That Affect an Interest in Property*

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

Exceptions to the Hearsay Rule - (15) *Statements in Documents That Affect an Interest in Property*

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

Exceptions to the Hearsay Rule - (16) *Statements in Ancient Documents*

- **(16) *Statements in Ancient Documents*.** A statement in a document that was prepared before January 1, 1998, and whose authenticity is established.

Exceptions to the Hearsay Rule - (17) *Market Reports and Similar Commercial Publications*

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

Exceptions to the Hearsay Rule - (18) *Statements in Learned Treatises, Periodicals, or Pamphlets*

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

Exceptions to the Hearsay Rule - (19) *Reputation Concerning Personal or Family History*

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

Exceptions to the Hearsay Rule - (20) *Reputation Concerning Boundaries or General History*

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

Exceptions to the Hearsay Rule - (21) *Reputation Concerning Character*

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

Exceptions to the Hearsay Rule - (22) *Judgment of a Previous Conviction*

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

Exceptions to the Hearsay Rule - (23) *Judgments Involving Personal, Family, or General History, or a Boundary*

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

FRE 804: Hearsay Exceptions – Declarant Unavailable

- The witness must be unavailable. Unavailable means:
- **(a) Criteria for Being Unavailable.** A declarant is considered to be unavailable as a witness if the declarant:
- **(1)** is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;
- **(2)** refuses to testify about the subject matter despite a court order to do so;
- **(3)** testifies to not remembering the subject matter;
- **(4)** cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or
- **(5)** is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:
- **(A)** the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or
- **(B)** the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).
- But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.
- Exceptions are listed on next slide.

FRE 804: Hearsay Exceptions – Declarant Unavailable, Continued

- **(b) The Exceptions.** The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:
- **(1) *Former Testimony*.** Testimony that:
- **(A)** was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and
- **(B)** is now offered against a party who had — or, in a civil case, whose predecessor in interest had — an opportunity and similar motive to develop it by direct, cross-, or redirect examination.
- **(2) *Statement Under the Belief of Imminent Death*.** In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.
- **(3) *Statement Against Interest*.** A statement that:
- **(A)** a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and
- **(B)** is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.
- **Continued on next slide**

FRE 804: Hearsay Exceptions – Declarant Unavailable, Continued

- **(4) *Statement of Personal or Family History*.** A statement about:
- **(A)** the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption, or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or
- **(B)** another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.
- **(5) [*Other Exceptions* .]** [Transferred to Rule 807.]
- **(6) *Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability*.** A statement offered against a party that wrongfully caused — or acquiesced in wrongfully causing — the declarant's unavailability as a witness, and did so intending that result.

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FRE 806: Attacking and Supporting the Declarant

- The declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

FRE 807: Exceptions to the Hearsay Rule Residual Exception

- There is a catch-all residual exception for "trustworthy" hearsay. Remember: reliability and trustworthiness are the touchstones of evidence.
- FRE 807 provides:
- **(a) In General.** Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:
- **(1)** the statement has equivalent circumstantial guarantees of trustworthiness;
- **(2)** it is offered as evidence of a material fact;
- **(3)** it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and
- **(4)** admitting it will best serve the purposes of these rules and the interests of justice.
- **(b) Notice.** The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

Documentary Evidence

FRE 901: Authentication

- 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).
- In Tax Court, documents are often authenticated in the Stipulation of Facts.

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Authentication, cont.

- Do not confuse authentication with admissibility.
- A document may be authenticated but still not admissible (e.g. as hearsay).
- Conversely, a document may be admissible (e.g. not hearsay), but it still must be authenticated properly.

Evidence of Authenticity – FRE 901(b)

- 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.”
- Handwriting verifications
  - Nonexpert opinion - based on familiarity.
  - Comparison of writings - by Court or by expert witness.
- Voice identification.

Evidence of Authenticity – FRE 901(b)

- 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.
- Ancient documents
  - Condition creates no suspicion concerning authenticity
  - Found in a place where, if authentic, it would likely be
  - 20 years old or more

Evidence of Authenticity, cont.

- Telephone conversations FRE 901(b)(6) - evidence that a call was made to a number assigned at the time to:
  - A particular person, if circumstances show the person answering was the one called; or
  - A particular business, if the call was made to a business and the call related to business reasonable transacted over the telephone

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Evidence of Authenticity, cont.

- Public Records – evidence that
  - 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
  - A purported public record or statement is from the public office where items of its kind are maintained.
  - Note that in many cases, public records can be self-authenticating (see below)

Evidence of Authenticity, cont.

- Process or System – evidence describing a process or system and showing that it produces an accurate result
- Catchall – any other method of authentication allowed by federal statute or rule of the Supreme Court

Self-Authenticating Documents – FRE 902

- Some documents are considered self-authenticating – i.e. - no extrinsic evidence of authenticity is required in order to be admitted.
- The documents must be otherwise admissible.
- Self-authentication is related to, but not exactly the same as, judicial notice under FRE 201.

Self-Authenticating Documents FRE 902

- The most common self-authenticating documents are:
  - Public Documents Sealed or Signed:
    - Must bear governmental seal and signature purporting to be an attestation of authenticity
  - Public Documents Not Sealed but Signed and Certified
    - Signed by an officer of the public entity
    - certified by another public officer in same entity that document is signed by someone with official capacity and signature is genuine

Self-Authenticating Documents FRE 902

- Certified copies of public records
  - Certified as correct by custodian or other authorized person; or
  - Other certification that complies with FRE 902(1), (2), or (3), a federal statute, or rule prescribed by Supreme Court
- Documents acknowledged by a notary public or other officer authorized to take acknowledgements.

Self-Authenticating Documents, cont.

- Certified domestic records of a regularly conducted activity. Requirements:
  - Must qualify for business records exception to hearsay rule (FRE 803(6)), and
  - Be certified as such by custodian or other authorized person that complies with federal statute or Supreme Court rule, and
  - Proponent must give advance notice of use and make available to adverse parties for inspection, and
  - Adverse party must have fair opportunity to challenge

Best Evidence Rule

- 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

Best Evidence Rule - Continued

- FRE 1003 – Duplicates are admissible to the same extent as originals unless there is a genuine question as to the authenticity of the original or other circumstances make it unfair to admit the duplicate. Again, the touchstone is trustworthiness and reliability.
  - Example: exact copy of tax return where there is no concern that it is identical to an authentic original

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:
  - Proponent makes the documents (originals or duplicates) available for inspection and/or copying by other parties at a reasonable time and place, and
  - Court may order them produced in court

Admissibility of Other Evidence of Contents – FRE 1004

- Writing is not required, and other evidence of contents is admissible if:
  - Originals lost or destroyed (unless proponent lost or destroyed them in bad faith); or
  - Original outside jurisdiction of court and not obtainable (e.g. cannot be subpoenaed); or
  - Original in possession of adversary who, after notice, fails to produce; or
  - Writing is collateral, not closely related to a controlling issue

Admissibility of Other Evidence of Contents, cont.

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

Doctrine of Completeness – FRE 106

- 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.

2008 Question E-6

- **(5 minute/s)** At the trial before the Tax Court, the value of certain real property is in controversy. T calls A, a real estate appraiser with excellent credentials and extensive experience appraising property in the area of the real property the value of which is in controversy. T offers into evidence A's written report, dated January 15, 2008, which contains A's opinion as to the value of the property. T offers A's report as evidence of the value of the property. The report was submitted to the Tax Court 60 days prior to the call of the trial calendar on which T's case appears. C objects to the admission of A's report on the grounds that A did not furnish C with a copy of the report until 29 days prior to the call of the trial calendar on which T's case appears.
- What would be the proper ruling of the Tax Court, and why?

2008 Question E-6

- Issues Presented
  - Tax Court Rule 143(g)
    - Is report timely? No. Tax Court procedure requires that the report be furnished 30 days before the call of the trial calendar. However, the late production may be excused for good cause when it will not prejudice the opposing party.

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2012 Question E-3

- a. (6 minutes) During the I.R.S. case, the government calls X as a witness. X testifies that X is a professional tax return preparer and that X and A (the same A identified in Question 2.b.) work together in the same capacity at a local tax return preparation center. X further testifies that, on April 1, 2007, X observed TP walk into the business suite shared by X and A and place TP's tax return (face up) on a table before leaving the area for a few minutes. Shortly after TP's departure, X testified that X walked over to the table and picked up TP's tax return. When TP returned to the area, X testified that "TP looked in my direction and suddenly acted extremely nervous and anxious. He was behaving quite strange. TP started to sweat profusely and was acting as if TP wanted to quickly leave the building." If TP objects on the basis that the testimony contains improper opinions, what is the best response of the I.R.S., and explain how the Tax Court should rule.

2012 Question E-3

- Issues Presented
  - Admissibility of Opinion Testimony (FRE 701 and 702)
    - Is it expert opinion? No
      - Not based on specialized knowledge
      - Does not comply with TC Rule 143(g)
    - Is it permissible lay opinion? Yes
      - Rationally based on witness's perception? Yes
      - Helpful to determination of a fact at issue (relevant?)
      - Based on specialized knowledge? No

2016 Question E-2

- (6 minutes) Assume that C, the President of Charity Inc., is still on the witness stand. During the direct examination, 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?

2016 Question E-2

- Hearsay is a statement made outside of court that is offered to prove the truth of what is asserted.
- This statement of TP’s is clearly an out of court statement.
- Is it offered for the truth of the matters asserted in the statement? Unless there is a question as to whether TP in fact made the donation, this statement does not appear to be offered to prove the truth of the matters asserted.
- Could qualify as an exception to hearsay under 803 (1) (present sense impression) or (2) (excited utterance) or (3) (then existing mental, emotional, or physical condition).

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2016 Question E-4

- (6 minutes) 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?

2016 Question E-4

- C’s testimony about what his secretary told him is about an out of court statement, and it is being offered for the truth of the matters asserted. Therefore it fits within the definition of hearsay.
- Does an exception to hearsay apply? No.
- Could be habit testimony under FRE 406.

2016 Question E-5

- (6 minutes) 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?

2016 Question E-5

- This is an out of court statement made by TP that is being offered for the truth of the matters asserted. This is the definition of hearsay.
- No hearsay exception applies.
- The Tax Court should sustain the IRS's objection.

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2008 Question E-1

- T claims that she was in Chicago for a business meeting on July 24-26, 2008, for which she claimed business expense deductions. C's position is that the trip was for personal reasons.
- T offers into evidence a letter purporting to be from X, dated June 15, 2008, asking to meet with her in Chicago on July 25, 2008, to discuss employing T to design X's web site. Can T authenticate this letter by testifying that she recognizes X's signature from prior business correspondence she had with X? Discuss.

2008 Question E-1

Yes. Opinion testimony by lay witnesses can be used to authenticate handwriting.

- Authentication (FRE 901)
- Methods of Authentication
  - Testimony
  - Lay Opinion on handwriting (FRE 901(2))
- Authentication vs. Hearsay – just because the document may be authentic does not mean it is admissible as non-hearsay.

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2016 Question E-3

- (6 minutes) 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 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?

2016 Question E-3

- Best evidence rule requires original documents. FRE 1002.
- Duplicates are admissible if there is no genuine question as to the authenticity of the original. FRE 1003.
- Is there any serious question of authenticity? Not on these facts.
- Is this hearsay? Yes – it is an out of court statement offered for the truth of what the writing contains (tax exempt status).
- Does it fall within any of the hearsay exceptions? Public records exception (803(8)).
- Is this a business record under 803(6)? No, because it is not made in the regular course of the IRS's business, nor is it made in the regular course of Charity, Inc.'s business.

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2010 Question E4 Facts

- **For purposes of Evidence Questions 1 and 4, assume the following facts.**
- **Taxpayer (T), a self-employed web-site designer, has filed a petition with the Tax Court to re-determine a deficiency as set forth in a notice of deficiency. The alleged deficiency arises from the disallowance of certain claimed business expense deductions. T works out of her home office. The Commissioner (C) has answered, both parties have followed all proper pre-trial procedures, and the case is now at trial. Unless otherwise stated, *assume that each question calls for relevant evidence,* that is, evidence that is material and probative as to some issue in the case.**

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.)

2010 Question E-4

- Issues Presented
  - Admissibility of Summaries (FRE 1006)
    - Elements
      - Summarizes voluminous documents not convenient for examination by Court
      - Proponent makes documents reasonably available (i.e., the receipts) for inspection and copying to adversary
      - Must be produced in Court if so ordered
  - Practically speaking, the TC should rule in favor of T. She could alternatively admit each and every receipt, which would be inconvenient for the Court to examine at trial.
  - Just because chart was offered in connection with a settlement negotiation does not make the chart inadmissible at trial. However, if C attempted to introduce the chart rather than T, T would have a valid objection under FRE 408.

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

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Questions?

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- November 5, 2018
- November 26, 2018
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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.	