TEXAS YOUTH AND GOVERNMENT

TRIAL COURT

RULES OF EVIDENCE

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INTRODUCTION

Rules marked with an asterisk (*) have been created or altered for the purpose streamlining the trials for the Texas Youth and Government judicial competition. Also, some Rules that are not relevant to the competition have been excluded from this document. As such you will see lists that leave out numbers or letters and lists that begin with a number or letter other than "1" or "A."

Some rules are immediately followed by a supplemental "comment" designed to help explain how the rule operates in a trial setting. In making or responding to an objection, an attorney may reference a "comment" to a rule of evidence. Example: "Your honor, the comments to Rule 602 states that a lay witness may not testify as to subjects that they learned from another person. This constitutes both a lack of personal knowledge and hearsay."

TEXAS PENAL CODE

Sec. 2.01 PROOF BEYOND A REASONABLE DOUBT. All persons are presumed to be innocent, and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that he has been arrested, confined, or indicted for, or otherwise charged with, the offense gives rise to no inference of guilt at his trial.

TEXAS RULES OF EVIDENCE

ARTICLE I: GENERAL PROVISIONS

RULE 101. TITLE, SCOPE, AND APPLICABILITY OF THE RULES; DEFINITIONS.

(a) **Title.** These rules may be cited as the Texas Rules of Evidence.
(b) **Scope.** These rules apply to proceedings in Texas courts.

RULE 102. PURPOSE.

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

RULE 103. RULING ON EVIDENCE.

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

Comment 1: An objection to a question is considered timely if made before the witness begins answering the question. Example: "Objection, the question calls for hearsay." An objection to the content of a witness' answer is considered timely if made immediately after the objectionable content is given by the witness. Example: "Objection, the answer contains hearsay."

Comment 2: An objection to evidence must be specific as to both the grounds for the objection and the specific part of the testimony that is objectionable. Saying "I Object" is not sufficient to draw the Judge's attention to the specific rule (i.e. grounds) you believe would be violated if the testimony were admitted into evidence. Also, if evidence such as a document contains multiple parts, the objecting attorney must specifically state which parts of the document are subject to the objection.

RULE 104. PRELIMINARY QUESTIONS.

(a) **In General.** The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.
(b) **Witness *Voir Dire*.** An attorney may not *voir dire* a witness called by an opposing attorney for the purpose of challenging evidence offered by that attorney.*

Comment: Occasionally a judge may admit testimony over a party's objection to relevancy because the offering attorney promises that the relevancy of the line of questioning will soon be revealed. If the offering attorney fails to provide these connecting pieces of evidence within a few questions, then the opposing party should renew their objection. If the Judge sustains the objection, the objecting party may request that the previously admitted, irrelevant testimony be "stricken from the record."

RULE 105. EVIDENCE THAT IS NOT ADMISSIBLE AGAINST OTHER PARTIES OR FOR OTHER PURPOSES.

(a) **Limiting Admitted Evidence.** If the court admits evidence that is admissible against a party or for a purpose—but not against another party or for another purpose—the court, on request, must restrict the evidence to its proper scope and instruct the jury accordingly.

Comment: One example of this rule is when a party offers an otherwise hearsay statement not for "the truth of the matter asserted" but for the purpose the purpose of showing that the defendant heard the statement. If the opposing attorney objects to the statement, the offering attorney would inform the judge that the statement is only being offered for the limited purpose. If the judge agrees, the judge would say, "the objection is overruled, the statement will be admitted for the limited purpose stated." The objecting attorney bears the responsibility of ensuring that this "limiting instruction" has been given by the Judge.

RULE 106. REMAINDER OF OR RELATED WRITINGS OR RECORDED STATEMENTS.

(a) If a party introduces all or part of a writing or recorded statement, an adverse party may introduce, at that time, any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time. "Writing or recorded statement" includes depositions and affidavits.
(b) If invoked this rule only requires the immediate introduction of a complete sentence and the sentences immediately before and immediately after the previously introduced statement. This additional evidence is still subject to the other rules of evidence.*

Comment: This is not a rule of exclusion but rather a rule of admission. If invoked and allowed by the trial court judge, the opposing party will be allowed to immediately read or present the left out part of the statement. The judge is tasked with ensuring that this process takes only minimal time out of the original attorney's presentation time.

RULE 107. RULE OF OPTIONAL COMPLETENESS.

If a party introduces part of an act, declaration, conversation, writing, or recorded statement, an adverse party may inquire into any other part on the same subject. An adverse party may also introduce any other act, declaration, conversation, writing, or recorded statement that is necessary to explain or allow the trier of fact to fully understand the part offered by the opponent. "Writing or recorded statement" includes a deposition.

Comment: This does not require or allow for immediate action like Rule 106. When invoking this rule a party often will say something like, "opposing council opened the door on this subject." For example, if the prosecution solicits a prior statement of the defendant, which for them falls within a hearsay exception, the defense can then discuss that statement with witnesses or during arguments for the rest of the trial, even though the statement would have been inadmissible if originally offered by the defense. If the prosecution objects to the defense attorney referencing the statement, then the defense attorney would say, "Your Honor, this statement was already admitted into evidence; the door has been opened by the State." Also, even if the subject testimony is inadmissible to all parties, once the specific testimony is admitted into evidence the other party may also discuss this testimony. Only parts of the topic that are "on the same subject" are covered by this rule.

ARTICLE IV: RELEVANCY AND ITS LIMITS

RULE 401. TESTS FOR RELEVANT EVIDENCE.

Evidence is relevant if:

(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and

(b) the fact is of consequence in determining the action.

Comment: Evidence is relevant if it is of any consequence to the elements of the case in light of the actual law that the plaintiff/prosecution is claiming that the defendant violated. The evidence must "tip the scales of justice" regarding one of the main facts of the case. The evidence is relevant even if it has very little "weight" and barely moves the scales. Evidence of witness credibility, such as education background or bias, bolsters the weight that is given to the testimony of the witness and thus is relevant.

RULE 402. GENERAL ADMISSIBILITY OF RELEVANT EVIDENCE.

Relevant evidence is admissible unless any of the following provides otherwise:

- the United States or Texas Constitution;
- a statute;
- these rules; or
- other rules prescribed under statutory authority.

Irrelevant evidence is not admissible.

Comment: An attorney objecting under Rule 402 would say, "Objection, this evidence is not relevant." Practice tip: When responding to a relevancy objection, you can take advantage of the moment to give a mini-closing argument about why this fact proves or disproves a specific element of the case. Make the objecting attorney regret having made the objection in the first place.

RULE 403. EXCLUDING RELEVANT EVIDENCE FOR PREJUDICE, CONFUSION OR OTHER REASONS.

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, or needlessly presenting cumulative evidence.

Comment: An attorney objecting under Rule 403 would say, "Objection, the prejudicial effect of this evidence outweighs any probative value." This type of testimony is analogous to an attorney throwing a skunk into the jury box. This type of evidence only slightly moves the scales but would highly inflame the emotions of the jury against one party. Example: If an issue in the case is whether the plaintiff was permanently injured in an on-the-job accident and thus in unable to walk, evidence that the defendant marched in a "KKK: White Power" rally would be relevant because it shows that he can walk but would be properly excluded under Rule 403 as unnecessarily prejudicial especially if other activities show that the defendant can walk. Also, evidence of other "bad acts," although possibly admissible under Rule 404(b), could be excluded under Rule 403 if it is more prejudicial than probative.

RULE 404. CHARACTER EVIDENCE; CRIMES OR OTHER ACTS.

(a) Character Evidence.

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

(2) Exceptions for an Accused.

(A) In a criminal case, a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it.

(B) In a civil case, a party accused of conduct involving moral turpitude may offer evidence of the party's pertinent trait, and if the evidence is admitted, the accusing party may offer evidence to rebut it.

(3) Exceptions for a Victim.

(A) In a criminal case, subject to the limitations in Rule 412, a defendant may offer evidence of a victim's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it.

(B) In a homicide case, the prosecutor may offer evidence of the victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

(C) In a civil case, a party accused of assaultive conduct may offer evidence of the victim's trait of violence to prove self-defense, and if the evidence is admitted, the accusing party may offer evidence of the victim's trait of peacefulness.

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

(5) Definition of "Victim." In this rule, "victim" includes an alleged victim.

(b) Crimes, Wrongs, or Other Acts.

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

(2) Permitted Uses; Notice in Criminal Case. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On timely request by a defendant in a criminal case, the prosecutor must provide reasonable notice before trial that the prosecution intends to introduce such evidence—other than that arising in the same transaction—in its case-in-chief.

Comment to (a): A party wishing to offer character evidence must comply with both Rule 404 and 405. Rule 404 dictates when character evidence is admissible. Rule 405 contains the methods of proving admissible character evidence. Character is a generalized description of a person's disposition, or of the disposition in respect to a general trait, such as honesty, temperance or peacefulness. Each case should stand on whether the facts of the case can be proven by the accuser, not on which party is has the best character traits. There are three modes of proving character: reputation in the community, a witness's opinion of the person, and specific instances of conduct. Each type has their own rules of exclusion. An objecting party would say, "Objection, the question calls for inadmissible evidence of character."

Comment to (b): The permissible uses in Rule 404(b)(2) generally come into play after an opposing party presents some excuse for the actions in question at the current trial and the prior bad act can be used to cast doubt on the excuse. Example: If a defendant on trial for murder claims self-defense, then, to show state of mind, the prosecution may offer evidence of other violent acts by the defendant. Example: If a defendant on trial for robbery claims that he is not the person who robbed the store wearing white gloves, then, to prove identity, the prosecution may show other offenses where this defendant wore white gloves while robbing other stores.

RULE 405. METHODS OF PROVING CHARACTER.

(a) By Reputation or Opinion

(1) In General. When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination of the character witness, inquiry may be made into relevant specific instances of the person's conduct.

(2) Accused's Character in a Criminal Case. In the guilt stage of a criminal case, a witness may testify to the defendant's character or character trait only if, before the day of the offense, the

witness was familiar with the defendant's reputation or the facts or information that form the basis of the witness's opinion.

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

Comment: The character witness must first state that they are familiar with person's reputation in the community. Under Rule 405(a)(1), the cross examination of a character witness is typically done with "have you heard" or "did you know" questions. Example: Did you know that the defendant has failed to pay his child support for the last 5 years? Have you heard that the defendant had an affair with a beet farmer? If a witness denies knowledge of the specific act, the attorney's questioning regarding that act must end. Under this section, the attorney may not at that point attempt to prove that the specific act actually happened.

RULE 406. HABIT; ROUTINE PRACTICE.

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

Comment: A habit is a person or an organizations regular response to a certain situation. As opposed to character evidence, evidence of a habit is admissible to show conforming conduct (i.e. they probably took a certain action on the day in question because they always take that action). Just a few occurrences of an action does not prove the formation of a habit. Examples including driving the same route to work every day, a nurse performing a procedure the exact same way for every patient, and an organization regularly mailing out documents after a purchase has been made.

RULE 407. SUBSEQUENT REMEDIAL MEASURES; NOTIFICATION OF DEFECT.

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

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

(b) Notification of Defect. A manufacturer's written notification to a purchaser of a defect in one of its products is admissible against the manufacturer to prove the defect.

RULE 409. OFFER TO PAY MEDICAL AND SIMILAR EXPENSES.

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

RULE 412. EVIDENCE OF PREVIOUS SEXUAL CONDUCT IN CRIMINAL CASES.

(c) Exceptions for Specific Instances. Evidence of specific instances of a victim's past sexual behavior is admissible if:

(1) [not applicable]

(2) the evidence:

(A) is necessary to rebut or explain scientific or medical evidence offered by the prosecutor;

(B) concerns past sexual behavior with the defendant and is offered by the defendant to prove consent;
(C) relates to the victim's motive or bias;
(D) is admissible under Rule 609; or
(E) is constitutionally required to be admitted; and

(3) the probative value of the evidence outweighs the danger of unfair prejudice.

ARTICLE VI: WITNESSES

RULE 601. COMPETENCY TO TESTIFY IN GENERAL.

All persons listed in the Mock Trial Case packet is competent to be a witness.*

RULE 602. NEED FOR PERSONAL KNOWLEDGE.

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

(b) A witness may make reasonable inferences from the information provided in the case packet. However, the witness may not testify to matters that are not reasonably within that witness' experiences.

Comment to (a): A lay witness (non-expert) must have personal knowledge of the testimony they are providing. They may not adopt the opinions of another (Rule 802: hearsay) or offer mere speculation (Rule 703: opinion). The objecting attorney would say, "Objection, lack of personal knowledge and hearsay, this witness is only providing testimony that she heard from someone else" or "Objection, lack of personal knowledge, the witness did not personally observe the action/behavior about which she is testifying."

Comment to (b): If the case packets say: "I went to college" then it would not be a reasonable inference to say "I was valedictorian at Harvard with a degree in astrophysics." It is bad form to make up facts that bolster your arguments. You cannot make up a star witness that wins your case or some new fact that isn't in the case packet. You should never try to win a round on a trick, but rather on the strength of your team's preparation and performance. The objecting attorney would say, "Objection this question/answer is outside the scope of the case problem." The attorney should not make this objection lightly and must be ready to provide evidence of the "reasonable inference" violation.

RULE 603. OATH OR AFFIRMATION TO TESTIFY TRUTHFULLY.

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

Comment: The trial court judge will swear in all witnesses before trial.

RULE 607. WHO MAY IMPEACH A WITNESS.

Any party, including the party that called the witness, may attack the witness's credibility.

Comment: The purpose of impeaching a witness is not to force the witness off the stand, but rather to challenge the testimony provided by the witness or the actual witness themselves. If "impeached" the witness remains on the stand and the questioning attorney need not make any formal declaration of impeachment. A witness can be impeached by showing: (1) the witness has untruthful character, (2) the witness has some reason to fabricate

their testimony, (3) the witness has made a prior inconsistent statement, (4) some issue affects the witness' ability to perceive or recall an event, or (5) other evidence contradicts the witness's testimony. Impeachment may open the door to otherwise inadmissible character evidence and prior consistent statements.

RULE 608 A WITNESS'S CHARACTER FOR TRUTHFULNESS OR UNTRUTHFULLNESS.

(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, a party may not inquire into or offer extrinsic evidence to prove specific instances of the witness's conduct in order to attack or support the witness's character for truthfulness.

Comment: Rules 404 and 405 relate to all types of character evidence. Rule 608 only relates to the character of truthfulness of a witness. An attorney objecting under Rule 608 would say, "Objection, the opposing attorney is attempting to bolster the witness's character for truthfulness in violation of Rule 608."

RULE 609. IMPEACHMENT BY EVIDENCE OF A CRIMINAL CONVICTION.

(a) In General. Evidence of a criminal conviction offered to attack a witness's character for truthfulness must be admitted if:
  (1) the crime was a felony or involved moral turpitude, regardless of punishment;
  (2) the probative value of the evidence outweighs its prejudicial effect to a party; and
  (3) it is elicited from the witness or established by public record.

RULE 611. MODE AND ORDER OF EXAMINING WITNESSES AND PRESENTING EVIDENCE.

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

(b) Scope of Examination. On direct and cross-examination a witness may be questioned on any relevant matter, including credibility. During redirect-examination, a witness may only be questioned on matters discussed during cross-examination. During recross-examiniation, a witness may only be questioned on matters discussed during redirect-examination.*

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

Comment 1: Leading Questions are questions that suggest the desired answer. Questions are leading if a reasonable person gets the impression that the questioning attorney desires one answer over another. Questions that make a statement and seek agreement from the witness are leading such as "isn't is true that…" Some questions that call for a "yes" or "no" answer could be considered leading. Leading on cross is typically allowed if the question relates to a preliminary question or undisputed matters. Also if a witness is struggling to recall a specific event or piece of information the attorney may be permitted to use a leading question. Not leading – "Did you see the body?" Leading – "You saw the body, didn't you?" Not leading – "Did you call 911?" Leading – "You

then called 911, right?" The objecting attorney will say, "Object, leading." Practice tip: Watch for impermissible leading on redirect examination. Redirect is generally unscripted and lends itself to impermissible use of leading questions.

Comment 2: Rule 611 encapsulates several standard objections related to the form of questions and method of questioning.

(a) Narrative. An open-ended question that is too broad in scope and allows the witness to add additional information not asked in the question. Example: "What happened on July 1st?" or "Tell me about the accident." Also, an answer can become narrative if the witness begins to ramble. The objecting attorney would say, "Objection, the question calls for a narrative answer" or "Objection, the answer has become narrative."

(b) Nonresponsive Answer. When the witness does not answer the question asked or and answer goes beyond the scope of the question and includes subject matter not called for by the question. The questioning attorney is normally the one objecting, saying,
"Objection, nonresponsive. I would ask the court to instruct the witness to answer the question." Practice tip: Be careful using this objection. You are signaling to everyone in the room that you have lost control and need help. Instead try say, "Mr. Jones, I'm not sure you understood my question so I'm going to ask it one more time." If they fail to answer the question again, this signals to everyone that the witness is being uncooperative and will lower their credibility.

(c) Compound Question. A question that contains two or more questions and each require a different answer. Example: "Did you or anyone else see the accident?" The objecting attorney would say, "Objection, compound."

(d) Ambiguous Question. A question that either cannot reasonably be understood or one that is capable of being understood in two or more possible senses. Example: "After the cat caught the mouse, did it die?" The objecting attorney would say, "Objection, ambiguous. I don't believe the witness understood the question" or "Objection, ambiguous. The question could be interpreted in multiple ways."

(e) Asked and Answered. When an attorney repeats a question that has already been asked of and answered by this witness. The trial court judge has full discretion to allow the question to be repeated. The objecting attorney would say, "Objection, asked and answered."

(f) Argumentative. Questions that attempt to elicit an argument, to summarize, or comment on the evidence and do not seek new information. This objection is not to be used just because an attorney raises her voice when asking a question. Example: "How can you remember what happened on October 10th when you can't remember anything on the 11th or 12th?" or "Can you tell this court what you mean so that we will know what you are talking about?" or "You are guilty, aren't you?" The objecting attorney would say, "Objection, argumentative."

(g) Assumes Facts not in Evidence. This is another attempt at an attorney to testify in their questions. The question contains statements of fact that have not been presented by a witness or document.

(h) Badgering/Harassing. An attorney is not allowed to raise their voice or express improper emotions when questioning a witness. The trial court judge will decide if the conduct is permissible.

Comment 3: A trial court judge should not allow argument on an objection regarding a leading questions, narrative questions or answers, and nonresponsive answers. The judge should rule immediately after the objection is made.

RULE 613. WITNESS'S PRIOR STATEMENT AND BIAS OR INTEREST.

(a) Witness's Prior Inconsistent Statement.

(1) Foundation Requirement. When examining a witness about the witness's prior inconsistent statement—whether oral or written—a party must first tell the witness:

(A) the contents of the statement;

(B) the time and place of the statement; and
(C) the person to whom the witness made the statement.

(2) Need Not Show Written Statement. If the witness's prior inconsistent statement is written, a party need not show it to the witness before inquiring about it, but must, upon request, show it to opposing counsel.

(3) Opportunity to Explain or Deny. A witness must be given the opportunity to explain or deny the prior inconsistent statement.

(5) Opposing Party's Statement. This subdivision (a) does not apply to an opposing party's statement under Rule 801(e)(2).

(b) Witness's Bias or Interest.

(1) Foundation Requirement. When examining a witness about the witness's bias or interest, a party must first tell the witness the circumstances or statements that tend to show the witness's bias or interest. If examining a witness about a statement—whether oral or written — to prove the witness's bias or interest, a party must tell the witness:
(A) the contents of the statement;
(B) the time and place of the statement; and
(C) the person to whom the witness made the statement.

(2) Need Not Show Written Statement. If a party uses a written statement to prove the witness's bias or interest, a party need not show the statement to the witness before inquiring about it, but must, upon request, show it to opposing counsel.

(3) Opportunity to Explain or Deny. A witness must be given the opportunity to explain or deny the circumstances or statements that tend to show the witness's bias or interest. And the witness's proponent may present evidence to rebut the charge of bias or interest.

RULE 614. EXCLUDING WITNESSES.

At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding a party to the case.*

ARTICLE VII: OPINIONS AND EXPERT TESTIMONY

RULE 701. OPINION TESTIMONY BY LAY WITNESSES.

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:
(a) rationally based on the witness's perception; and
(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue.

RULE 702. TESTIMONY BY EXPERT WITNESSES.

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

Comment 1: Before an expert witness begins discussing their opinions in a case, the questioning attorney must "lay a foundation" for why this witness should be qualified as an expert witness. The attorney should ask the witness about their knowledge, skill, experience, training, and education in whatever area of expertise the witness has been called to testify. After the foundation has been laid the attorney will say, "Your honor, we offer Mr. Jones as an expert in the field of aerospace engineering." The opposing attorney may say, "We object because opposing counsel has not laid sufficient foundation to show that Mr. Jones is an expert in this field." If the judge disagrees they will say, "Objection overruled, Mr. Jones is now considered an expert in the field of aerospace engineering.

You may continue your questioning." Practice tip: Memorize the five areas of qualification and recite the applicable areas back to the judge in response to an objection regarding the qualification of your expert witness.

Comment 2: An expert's testimony is limited to their specific filed of qualification. An expert may only be qualified to give expert testimony in a certain field. For example, an expert qualified as a medical doctor in the field of psychiatry would not be able to give testimony regarding the operation of a firearm. The objecting attorney would say, "Objection, this testimony is an improper lay opinion as it is outside the scope of the witness' area of expertise."

RULE 703. BASES OF AN EXPERT'S OPINION TESTIMONY.

An expert may base an opinion on facts or data in the case that the expert has been made aware of, reviewed, or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.

RULE 704. OPINION ON AN ULTIMATE ISSUE.

An opinion is not objectionable just because it embraces an ultimate issue.

ARTICLE VIII: HEARSAY

RULE 801. DEFINITIONS THAT APPLY TO THIS ARTICLE; EXCLUSIONS FROM HEARSAY.

(a) **Statement.** "Statement" means a person's oral or written verbal expression, or nonverbal conduct that a person intended as a substitute for verbal expression.

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

(c) **Matter Asserted.** "Matter asserted" means:

(1) any matter a declarant explicitly asserts; and

(2) any matter implied by a statement, if the probative value of the statement as offered flows from the declarant's belief about the matter.

(d) **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.

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

(1) **A Declarant-Witness's Prior Statement.** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is inconsistent with the declarant's testimony and:

(i) when offered in a civil case, was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition; or

(ii) when offered in a criminal case, was given under penalty of perjury at a trial, hearing, or other proceeding—except a grand jury proceeding—or in a deposition;

(B) is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(C) identifies a person as someone the declarant perceived earlier.

(2) **An Opposing Party's Statement.** The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

Comment to (c): A statement may still be admissible if it has relevancy apart from the truth of the matter asserted or implied by the statement. When the very making of the statement or the effect of the statement on the hearer is relevant, then the statement will not be considered hearsay. Example: Basic information related to why an officer was dispatched to a crime scene and why the officer made an arrest would not be offered for the truth of the matters asserted but rather for the purpose of providing context to the officer's actions. Also, if a defendant in a murder case was told by his neighbors that the victim intended to kill the defendant, the statement is not hearsay because its probative value is that the defendant reasonably believed that his life was in danger and thus it is more likely that he acted in self-defense. The attorney responding to a hearsay objection would say, "Your honor, the statement is not offered for the truth of the matter asserted but rather to show …"

RULE 802. THE RULE AGAINST HEARSAY.

Hearsay is not admissible unless any of the following provides otherwise:

- a statute;
- these rules; or
- other rules prescribed under statutory authority.

Inadmissible hearsay admitted without objection may not be denied probative value merely because it is hearsay.

Comment: During the Inquisition anyone could testify as to what they heard someone else say. The accused was unable to challenge the truth of these out-of-court statements because the declarant was not present during the inquest. The 6th Amendment to the US Constitution contains a confrontation clause – "in all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him." Rule 803 and 804 provide exceptions to the hearsay rule because the content of the statement has a higher degree of reliability of the truth of the statements. For example, most people don't lie to their doctor when the doctor is attempting to make a diagnosis and thus these statements fall within an exception to the hearsay rule.

RULE 803. EXCEPTIONS TO THE RULE AGAINST HEARSAY – REGARDLESS OF WHETHER THE DECLARANT IS AVAILABLE AS A WITNESS.

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

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

Comment: The time between the event perceived and the statement must be provided by the witness or implied in the testimony. A few minutes is fine but 10 minutes is probably too much time. If there has been an opportunity for reflection then the statement should not fall within this exception. The statement must describe or explain the event. Statements of the declarants own opinions regarding the event are not admissible under this exception.

(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.

Comment: The subject matter of an excited utterance is permissibly broader than under the present sense impression exception. Also, the elapsed time for excited utterance is based on the intensity of the stress

caused by the event. If the event was a death of a loved one, the stress would remain with the declarant for possibly a few hours. An attorney wishing to rely on this exception should "lay a foundation" of the event and the stress caused by the event before eliciting the declarant's statement.

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

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

Comment: "Statements as to fault would not ordinarily qualify under this latter language. Thus a patient's statement that he was struck by an automobile would qualify but not his statement that the car was driven though a red light." Also, this rule does not pertain to statements by a medical professional made to a patient.

(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, unless the circumstances of the record's preparation cast doubt on its trustworthiness.

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

(6) **Records of a Regularly Conducted Activity.** A record of an act, event, condition, opinion, or diagnosis if:
(A) the record was made at or near the time by—or from information transmitted by—someone with knowledge;
(B) the record was kept in the course of a regularly conducted business activity;
(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 an affidavit or unsworn declaration that complies with Rule 902(10); and
(E) the opponent fails to demonstrate that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

"Business" as used in this paragraph includes every kind of regular organized activity whether conducted for profit or not.

Comment: An attorney must lay a foundation before invoking this exception. Ask these questions to someone who is a custodian or keeper of the records: "Do you recognize this document? What is it? Was this document made at or near the time of the event that it records? Was this document kept in the regular course of business? What is the regular practice of your business to make documents such as this one?" Practice tip:

Memorize and use the four elements of the business records exception once. This will show an experienced evaluator that you are highly competent. A business record must still comply with Rule 805.

(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 fails to show that the possible source of the information or other circumstances indicate a lack of trustworthiness.

(8) **Public Record.** 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 fails to demonstrate that the source of information or other circumstances indicate a lack of trustworthiness.

(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.

(24) **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 or to make the declarant an object of hatred, ridicule, or disgrace; 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.

RULE 804. EXCEPTIONS TO THE RULE AGAINST HEARSAY – WHEN THE DECLARANT IS UNAVAILABLE AS A WITNESS.

(a) **Criteria for Being Unavailable.** A declarant is considered to be unavailable as a witness if the declarant:
(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

(b) **The Exceptions.** The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(2) **Statement Under the Belief of Imminent Death.** A statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

RULE 805. HEARSAY WITHIN HEARSAY.

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

ARTICLE IX: AUTHENTICATION AND IDENTIFICATION

RULE 901. AUTHENTICATING OR IDENTIFYING EVIDENCE.

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

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

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

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

(6) Evidence About a Telephone Conversation. For a telephone conversation, evidence that a call was made to the number assigned at the time to:

(A) a particular person, if circumstances, including self-identification, show that the person answering was the one called; or

(B) a particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone.

RULE 902. EVIDENCE THAT IS SELF-AUTHENTICATING.

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

(4) **Death Certificates.** Copies of a death certificate.

(10) **Business Records Accompanied by Affidavit.** The original or a copy of a record that meets the requirements of Rule 803(6) or (7), if the record is accompanied by an affidavit of the person who would otherwise provide the prerequisites of Rule 803(6) or (7).*

ARTICLE X: CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

RULE 1001. DEFINITIONS THAT APPLY TO THIS ARTICLE.

In this article:

(a) A "writing" consists of letters, words, numbers, or their equivalent set down in any form.

(b) A "recording" consists of letters, words, numbers, or their equivalent recorded in any manner.

(c) A "photograph" means a photographic image or its equivalent stored in any form.

(d) An "original" of a writing or recording means the writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it. For electronically stored information, "original" means any printout—or other output readable by sight—if it accurately reflects the information. An "original" of a photograph includes the negative or a print from it.

(e) A "duplicate" means a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.

RULE 1002. REQUIREMENT OF THE ORIGINAL.

An original writing, recording, or photograph is required in order to prove its content unless these rules or other law provides otherwise.

RULE 1003. ADMISSIBILITY OF DUPLICATES.

(a) A duplicate is admissible to the same extent as the original unless a question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate.

(b) Stray pen marks, copier ink marks, and hole punches do not render an original writing or duplicate writing inadmissible unless such alterations change the meaning or subject matter conveyed by the document.*