

# WASHINGTON MOCK TRIAL RULES OF EVIDENCE

## Introduction

In American trials, complex rules are used to govern the admission of proof (i.e. oral or physical evidence). These rules are designed to ensure that all parties receive a fair hearing and to exclude evidence deemed incompetent, irrelevant, untrustworthy, unfairly prejudicial, or otherwise improper.

If it appears that a rule of evidence is being violated, an attorney may raise an objection to the judge. The judge then decides whether the rule has been violated and whether the evidence must be excluded from the record of the trial. In the absence of a properly made objection, however, the judge will probably admit the evidence.

The burden is on the mock trial team to know the Rules of Evidence and to be able to use them to protect or advance their cases and fairly limit the actions of opposing counsel and their witnesses.

For purposes of mock trial competition, the Rules of Evidence have been modified and simplified. These evidence rules are based on the National High School Mock Trial Rules of Evidence, which in turn are based on the Federal Rules of Evidence, and its numbering system. Where Federal rule numbers or letters are skipped, those rules were deemed not applicable to mock trial procedure.

Not all judges will interpret the Rules of Evidence (or procedure) the same way, and mock trial attorneys should be prepared to point out specific rules (quoting them, if necessary) and to argue persuasively for the interpretation and application of the rule they think appropriate.

The Mock Trial Competition Rules and these Rules of Evidence govern high school mock trial competitions in Washington State.

The commentary sections are primarily based on commentary that has long been part of the Washington mock trial kit. The commentary was revised in the summer of 2004 to reflect Washington's adoption of the National rules. These comments are not comprehensive, authoritative, or intended to address all applications of the evidence rules to mock trial fact patterns.

Sources for additional commentary include the Advisory Committee's Notes for the Federal Rules of Evidence, the Emanuel's *Evidence* Outline, and Lubet's *Modern Trial Advocacy* (2d ed., NITA, 1997).

## Objections and Proper Question Form

During the course of a trial, it is the right and the duty of an attorney to make objections to regulate the procedure for, and the admissibility of, evidence in accordance with the rules of evidence. Upon receiving an objection, the judge will immediately decide whether the objection is accepted or rejected. If the judge agrees with the objection, he or she will "sustain" it. If the judge disagrees with the objection, he or she will "overrule" it. An attorney may ask to be heard on the point. Some judges then allow brief argument for and against the admissibility of the challenged evidence. The attorneys are bound by the trial court's rulings on objections. (In actual legal practice, evidentiary rulings may form the basis for a later appeal.)

Trial judges expect lawyers in their courtrooms to follow both the evidence rules and the customs of the trial courts. Attorneys must know how to phrase questions on direct examination and cross-examination. They must also know both when to object and how to object. Improperly phrased questions are objectionable.

(A) Leading Questions Forbidden on Direct Examination. Leading questions are not permitted during the direct examination of a witness except as may be permitted by the court to develop the witness's testimony. Ordinarily, leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

Comment: A leading question is one that suggests to the witness the answer desired by the examiner, and often suggests a "yes" or "no" answer. On direct examination, questions should be open ended and phrased to elicit facts from the witness. Courts will allow leading questions on direct examination of children, the elderly, and handicapped persons. Leading questions may be permitted to elicit background information which is not objectionable or to which no objection is made. Such questions save time and seek to elicit information that is not objectionable in most cases.

A proper direct question might be phrased, "Describe the defendant's physical appearance just before midnight the night of the party." An improper leading question might be phrased: "Did the defendant appear glassy-eyed and unsteady just before midnight the night of the party?"

(B) Compound Questions Forbidden. A question which is composed of two or more separate questions within the question is not permitted.

Comment: A compound question asks two or more questions at once. For example, "What time did you arrive at the party, whom did you go with and what did you do there?" is a compound question. Such questions are not permitted, primarily because they do not

permit opposing counsel to interpose appropriate objections before the witness launches into what could be an improper response to one or more parts of the question. Another difficulty with compound questions is that if the witness says "yes" (or "no") in response, it is not clear if the witness is responding to all of the question or only part of it. Questions should be phrased to elicit one fact at a time, unless the subject matter under examination is not objectionable for any reason, such as very general background information.

(C) Narrative Responses Forbidden. Questions which call for long narrative responses are not permitted if they prevent opposing counsel from interposing timely objections.

Comment: While the purpose of direct examination is to get the witness to tell a story, the questions must not be so broadly framed that the witness is allowed to ramble or "narrate" a whole story. Narrative questions are objectionable. Opposing counsel must be permitted to interpose objections to improper questions and responses. Timely objections are prevented by the use of narrative questions and responses.

An example of a question which calls for a narrative response is: "Start at the beginning and tell me what happened the night of the party." A proper objection to this question might be phrased: "Objection, the question calls for a narrative response."

When a witness launches into a long narrative answer to an otherwise proper question, a proper objection should be made quickly and might be phrased as follows: "Objection, the response is beyond the scope of the question."

(D) Argumentative Questions Forbidden. An attorney shall not ask argumentative questions.

Comment: An argumentative question typically occurs on cross-examination when the attorney asks the witness to agree to a particular interpretation or characterization of the evidence, as opposed to a particular fact. Attorneys learn the difference between proper aggressive cross-examination and improper argumentative questions.

(E) Questions Assuming Facts Not in Evidence Forbidden. Attorneys may not ask a question that assumes unproved facts. However, an expert witness may be asked a question based upon stated assumptions, the truth of which is reasonably supported by evidence (sometimes called a "hypothetical question").

Comment: The hackneyed example of the question that assumes facts not in evidence is, "Are you still beating your wife?" The question is improper because the questioner has not established that the witness ever beat his wife.

(F) Proper Foundation Required. Attorneys shall lay a proper foundation for testimony and prior to offering exhibits into evidence. After the exhibit has been offered into evidence, the exhibit may still be objected to on other grounds.

Comment: The "foundation" requirement for evidence provides the jury the basis for the evidence being offered. Evidence that is premature or not adequately supported by prior testimony is said to "lack foundation."

In mock trial, the parties usually stipulate to the authenticity of exhibits before trial, and the court's ruling on the pretrial motion determines the admissibility of contested exhibits. Nevertheless, the attorney should establish that the witness has previously seen the item and can identify it before offering it into evidence. (See Introduction of Exhibits below.)

When an attorney objects for lack of foundation, he or she is using legal "shorthand" to complain to the judge that the question asks for testimony which is premature, i.e., which is not admissible yet because some other fact or facts must be elicited before this question can be asked. For example, before a witness can be asked to identify the defendant as the perpetrator of a crime, the witness must first testify that he was at the scene of the crime or has some other first-hand basis for identifying the defendant as the perpetrator. Similarly, before a witness to an intersection accident can testify to the collision itself, the attorney should ask questions establishing her presence at the scene and her opportunity to observe events as they occurred.

Before an expert witness can render professional opinions, he must first testify as to his qualifications and be accepted by the court as an expert in the field or specialty area in question. Thus, before a ballistics expert can offer an opinion as to whether a particular gun fired a particular bullet, the attorney should ask questions establishing the witness's expertise, training, examination of the items, etc.

In either case, an opposing attorney would simply object to the lack of foundation as a way of saying the evidence might be admissible later but it surely is not admissible now. This objection may be overcome by asking more questions and eliciting more information about the bases for the witness's testimony.

(G) Non-responsive Answers Objectionable. A witness's answer is objectionable if it fails to respond to the question asked.

Comment: An attorney faced with an evasive hostile witness may move to strike the witness's answer as "non-responsive." Precise, narrowly phrased cross-examination questions reduce the witness's opportunity to be evasive. Skilled attorneys develop various "witness control" techniques to keep a witness in line during cross-examination. In closing argument, some attorneys will draw attention to a witness's evasiveness to attack the witness's credibility.

(H) Repetitive Questions Objectionable. Questions designed to elicit the same testimony or evidence previously presented in its entirety are improper if merely offered as a repetition of the same testimony or evidence from the same or similar source.

Comment: This objection is often phrased, "Asked and answered." Note also that Rule 403 may be invoked to block the presentation of cumulative evidence.

(I) Timeliness Required. Objections must be made in a timely manner or they are deemed to be waived.

Comment: Attorneys should strive to make their objections after the opposing attorney asks the objectionable question but before the witness gives an answer. This way, the judge will have an opportunity to rule on the objection before the jury hears or sees the objectionable evidence. If an attorney is slow in making an objection, a favorable ruling made after the jury has already been exposed to the tainted evidence could be useless. It does little good to close the gate after the cows have escaped.

Sometimes, the basis for an objection does not become clear until after the witness starts to respond. For example, a witness may give an answer which is not responsive to an otherwise proper question. In those cases, the attorney should make the objection as soon as it becomes evident that a basis for objection exists, regardless of whether the jury has been exposed to the evidence. If the objection is sustained, the attorney who made the objection should follow up with a motion to strike the non-responsive testimony from the record of the trial. If no objection is made, the evidence will be deemed admissible and will be treated as any other evidence admitted at trial.

(J) "Opening the Door" to Inadmissible Evidence. By voluntarily raising a subject on direct examination, a party may waive any objection to cross-examination or rebuttal on that subject even though such cross-examination would not otherwise be permitted under the rules of evidence.

Comment: If an attorney examines a witness during direct examination on a subject that would be forbidden if the subject were first raised on cross-examination, the attorney is said to have "opened the door" to the subject and will not be permitted to object when the

opposing party delves into the subject deeper on cross-examination. For example, the rules of evidence provide that in a criminal case only certain prior convictions may be introduced by the prosecution during cross-examination of the defendant to attack his or her character. However, if during direct examination the defendant testifies that he or she has led an exemplary life and would never think of shoplifting a leather jacket, the defense

has opened the door to permit the prosecution to explore the defendant's criminal history far beyond the scope that would have been permitted if the defendant had not reported his exemplary record for good citizenship. It should be noted, however, that the court will always exercise its discretion to limit the scope of examination in such collateral matters so that the trial does not stray from its principal issues.

(K) Scope of Direct, Redirect and Cross-Examination. Direct and cross-examination may cover all facts relevant to the case of which the witness has first hand knowledge or has special training and knowledge sufficient to permit the witness to offer an opinion, and any other matter permitted by these Rules of Evidence. Cross-examination is not limited to the scope of direct examination. Re-direct examination is limited to the scope of the cross-examination. Recross examination is limited to the scope of redirect examination.

(L) Specificity Required. An objection must be specific.

Comment: Whenever possible, an attorney making an objection must state the specific basis for the objection by citing the rule of evidence or law which supports the objection, or by stating the basis in the form of a word or phrase which informs the judge of the basis. (See examples listed below.)

If a party's objection does not include a statement of the legal reason supporting it, e.g., when an attorney simply says, "Objection," without telling the court why the objection was made, it is termed a "general objection." General objections are not prohibited per se, but the court may, in its discretion, refuse to sustain an objection which is not specific. On the other hand, when general objections are made to questions which are obviously objectionable, the court will usually rule on them even without a statement of the specific basis. For example, the judge may not need to be informed of the specific basis to rule on a question which is obviously leading ("Would you say the car was going around 50 miles per hour?") or one which obviously calls for a hearsay response ("What did Ms. Jones say to the police officer?").

Objections to the "form of the question" and "lack of foundation" are acceptable specific objections. When an attorney objects to the form of the question, he or she may be complaining that the question calls for a narrative response, is compound, is too broad, is too complex, is argumentative, or is defective in some other general way. The purpose of

the objection is to ask the court to require the examining attorney to ask a better, i.e. less objectionable, question.

## Sample Objections

Following are examples of acceptable ways to make common objections. Objections are not precise formulas or magic words. Objections should be clear, succinct, and well-founded. They should state the legal basis for the objection. They should not be used as a ploy to bring impermissible material to the attention of the jury.

Irrelevant Evidence. "Objection, relevance." Or, "I object, Your Honor. This testimony is irrelevant to the facts [issues] of this case."

Leading Questions. "Objection. Counsel is leading the witness." (Remember, this is only objectionable when done on direct examination.)

Narrative Question and/or Response. "Objection. Counsel's question calls for a narrative." Or, "Objection. The witness is giving a narrative response."

Improper Character Testimony. "Objection. The witness's character or reputation has not been put in issue." Or, "Improper character evidence under rule 404."

Beyond the Scope of Cross-examination. "Objection. Counsel's question goes beyond the scope of the cross-examination."

Hearsay. "Objection. Counsel's question calls for a hearsay response" (witness is about to testify to an objectionable out-of-court statement). Or, "Objection. The witness's answer is based on hearsay" (for example, witness is about to testify to facts in a newspaper article as if she had personal knowledge of them). (If the witness makes a hearsay statement, the attorney should also say, "and I ask that the statement be stricken from the record.")

Improper opinion. "Objection, a lay witness may not testify as an expert." Or, "Improper lay opinion." (This objection is appropriate when the question calls for a response in the form of an opinion which the witness is not qualified to give.)

Lack of Personal Knowledge. "Objection. The witness has no personal knowledge that would enable him/her to answer this question." Or, "Objection. Lack of foundation." (This latter objection presupposes that the subject matter of the testimony could be admissible if the examiner first establishes through proper questioning that the witness has the requisite personal knowledge.)

Badgering/Argumentative. "Objection. Counsel is badgering the witness." Or, "Objection. Counsel is arguing with the witness."

Motion to Strike. If inadmissible evidence has been introduced before an objection can be timely made and the court sustains the objection, a follow-up motion should always be made to purge the record of the tainted evidence. "Your Honor, I move to strike the

[nonresponsive] [inadmissible] portion of the witness's testimony from the record," or, "Your Honor, I ask that the jury be instructed to disregard the witness's last statement."

Note: Teams are not precluded from raising additional objections which are available under the Washington Mock Trial Rules of Evidence.

## **Introduction of Exhibits**

There is a formal procedure for introducing exhibits, e.g., documents, pictures, guns, etc., during an actual trial. The exhibit must be relevant to the case, and the attorney must be prepared to defend its use on that basis.

In mock trial, exhibits are usually pre-marked for identification, and the parties stipulate to their authenticity. In State competition, teams often use enlarged copies of the exhibits, but enlargements are normally not allowed under the National rules.

Below are the basic steps to use in mock trial when introducing a physical object or document for identification and/or use as evidence.

- Take the item, without showing it to the jury, and show it to opposing counsel. Then ask the court for permission to approach the witness.
- Hand the marked exhibit to the witness while stating, "I am now handing you [a document] [an item] previously marked for identification as Exhibit 1." Ask the witness whether he or she knows or recognizes the exhibit, and then ask the witness what it is in order to identify it and establish its relevance.
- After laying this foundation, offer the exhibit into evidence. "Your Honor, I offer Exhibit 1."

Opposing counsel will either object to the offering of the exhibit or say, "No objection." If opposing counsel makes a specific objection as to why the exhibit is not admissible, the attorney offering the exhibit will be given an opportunity to respond. In many cases opposing counsel will simply object for lack of foundation, meaning that the attorney

offering the exhibit has not asked enough questions to establish the witness's personal knowledge of the exhibit, its identity, and its relevance.

If the court overrules the objection and permits the exhibit to be admitted, counsel may now hand it back to the witness and commence examination of the witness on matters related to the exhibit. If the court sustains an objection for lack of foundation, additional questions should be asked of the witness to identify the exhibit or establish its relevance.

The exhibit should not be displayed to the jury until it has been admitted into evidence.

National Mock Trial Competition Rule 4.20 offers a similar series of steps by way of example.

# RULES OF EVIDENCE

Note -- All of following articles of the Federal rules have been omitted as inapplicable: Article II (Judicial Notice), Article III (Presumptions Civil Actions and Proceedings), Article IX (Authentication and Identification), and Article X (Contents of Writing, Recordings and Photographs).

## Article I. General Provisions

### Rule 101. Scope

These Rules of Evidence govern the trial proceedings of high school mock trial competitions in Washington State.

### RULE 102. Purpose and Construction

These Rules are intended to secure fairness in administration of the trials, eliminate unjust delay, and promote the laws of evidence so that the truth may be ascertained.

## Article IV. Relevancy and its Limits

### Rule 401. DEFINITION OF "RELEVANT EVIDENCE"

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

### Rule 402. RELEVANT EVIDENCE GENERALLY ADMISSIBLE; IRRELEVANT EVIDENCE INADMISSIBLE

All relevant evidence is admissible, except as otherwise provided in these Rules. Irrelevant evidence is not admissible.

Comment: The rule creates a very minimal threshold of admissibility. "Any evidence which has a *tendency*" to establish a fact is relevant and therefore admissible. In a case based primarily on circumstantial evidence, the relevance of a particularly small circumstance may not be readily apparent when viewed in isolation, but if it is "of consequence" to the outcome of the action it will be admissible. It is the duty of an attorney to persuade the court of the relevance of evidence.

### Rule 403. EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, if it confuses the issues, if it is misleading,

or if it causes undue delay, wastes time, or is a needless presentation of cumulative evidence.

Comment: This rule applies with equal force to direct examination and cross-examination and is to be applied in an evenhanded manner by the court to ensure fairness. The rule is intended to exclude only evidence which creates "unfair" prejudice. After all, all evidence is prejudicial in the sense that it is offered to persuade the jury to believe more strongly in the case of the party offering it.

However, since it is considered to be an extraordinary remedy when the court excludes relevant evidence, the party seeking to have the evidence excluded bears a heavy burden of persuasion to convince the court that the probative value of the relevant evidence "is substantially outweighed by the danger of unfair prejudice." Judges will rule very cautiously on such motions to exclude relevant evidence. (Note: the National rules do not include the word *substantially*, but most judges will apply that standard because *substantially outweighed* is the phrase in the Federal rules.)

**Rule 404. CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES**

(a) Character Evidence. -- Evidence of a person's character or character trait, is not admissible to prove action regarding a particular occasion, except:

- (1) Character of accused. -- Evidence of a pertinent character trait offered by an accused, or by the prosecution to rebut same;
- (2) Character of victim. -- Evidence of a pertinent character trait of the victim of the crime offered by an accused, or by the prosecution to rebut same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the aggressor;
- (3) Character of witness. -- Evidence of the character of a witness as provided in Rules 607, 608 and 609.

(b) Other crimes, wrongs, or acts. -- Evidence of other crimes, wrongs, or acts is not admissible to prove character of a person in order to show an action conforms to character. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Comment: The term "character" as used in the rules of evidence refers to a person's general tendencies with respect to honesty, peacefulness, temperance, truthfulness, and similar traits. This rule is concerned only with preventing a party from attempting to introduce a character trait as substantive evidence. For example, this rule would exclude evidence that a person was an alcoholic if it were being offered as substantive evidence to prove that the

person was intoxicated when he was involved in an accident on a particular date. This rule should not be confused with the rules pertaining to impeachment.

The 404(a)(1) exception permits an accused in a criminal case to offer evidence in his defense pertaining to his character if the character trait is relevant to his defense. For example, an accused may offer testimony concerning his good record for honesty at work where he handles large sums of money in a case where he is accused of theft. On the other hand, his record for honesty would not be relevant in a case where he was charged with assault or indecent exposure.

If the defendant opens up the subject of his character, the prosecution will be permitted to cross-examine him on the subject and introduce independent evidence which rebuts the defendant's testimony concerning his good character. For example, if a businessman defendant testifies about his wealth in an effort to persuade the jury that he has no need to steal money from his clients, the prosecution will be permitted to inquire about the defendant's income tax returns. However, just because a criminal defendant chooses to testify does not open up the issue of his or her character. The subject is opened up only when the accused voluntarily puts his or her character at issue by claiming to be a person of exemplary behavior.

The 404(a)(2) exception permits the accused to offer evidence of the victim's violent character in murder and assault cases in order to show that the victim was the first aggressor and the accused acted in self defense.

Rule 404(b) is based on the concept that the defendant is being tried for crimes alleged to have been committed in the present, not crimes or wrongdoing committed in the past. It is intended to prevent the prosecution from arguing that since the defendant has committed offenses in the past, he or she is more likely to have committed the offense with which he or she is currently charged, i.e., that the defendant is obviously a criminal or a "bad person." The danger of unfair prejudice from the admission of such evidence far outweighs its relevance.

However, this evidence may be admissible for some other purpose. For example, evidence that the defendant and the deceased engaged in physical combat on several occasions in the past could prove that the defendant was hostile toward the deceased and, therefore, had a motive to commit murder.

Evidence which is admissible under this rule will often be ruled inadmissible under Rule 403 because the danger of unfair prejudice far outweighs its probative value. When the decision to admit or exclude evidence concerning prior wrongdoing is in doubt, judges usually rule in favor of excluding the evidence.

Rule 405. METHODS OF PROVING CHARACTER

(a) Reputation or opinion. -- In all cases where evidence of character or a character trait is admissible, proof may be made by testimony as to reputation or in the form of an opinion. On cross-examination, questions may be asked regarding relevant, specific conduct.

(b) Specific instances of conduct. -- In cases where character or a character trait is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

Comment: Rule 405(a) allows a defendant to offer reputation or opinion evidence of his good character, but character witnesses for the defendant cannot testify as to specific incidents demonstrating the defendant's good character. If the defendant opens the door to his character, the prosecution may rebut the defendant's claim of good character through reputation or opinion evidence from other witnesses.

In addition, the prosecution may cross-examine the defendant's character witnesses about "relevant, specific conduct," if the prosecution has a good faith basis for believing that such conduct occurred. For example, if defendant is a bank teller accused of embezzlement and puts a neighbor on the stand to testify that the defendant has a reputation in the community as an honest person, the prosecution may cross-examine by asking, "Would defendant's reputation be different if it were known that the IRS is investigating him for tax fraud?"

Rule 405(b) governs situations where character is an "essential element" of the claim or defense. For instance, in a defamation suit, the plaintiff puts his character and good reputation at issue by claiming that defendant damaged his reputation. The defendant may offer prior "specific instances" of the plaintiff's bad conduct to show that plaintiff previously had a bad reputation.

Rule 406. HABIT; ROUTINE PRACTICE

Evidence of the habit of a person or the routine practice of an organization, whether corroborated or not and regardless of the presence of eye-witnesses, is relevant to prove that the conduct of the person or organization, on a particular occasion, was in conformity with the habit or routine practice.

Comment: "Habit" refers to a person's regular response to a repeated situation. It is distinct from "character," which is a general description of a person's disposition. For instance, assume an apartment building burns down and the cause of the fire is in dispute. Landlord claims tenant caused the fire by leaving a coffeepot on. Tenant can testify that it is his habit to always turn off and unplug the coffeepot before leaving the apartment. This testimony would be admissible to support tenant's claim that he did not cause the fire.

Rule 407. *SUBSEQUENT REMEDIAL MEASURES*

When measures are taken after an event which, if taken before, would have made the event less likely to occur; evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose; such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

Comment: This rule serves public policy by encouraging property owners and manufacturers to take corrective action after an accident occurs, without fear that plaintiff will unfairly exploit that corrective action by claiming that the correction shows that the defendant was at fault. For instance, if tenant slips on landlord's staircase, the landlord should then be able to install a safety tread on the staircase (a "subsequent remedial measure") without tenant being able to point to the absence of a tread to support tenant's claim that landlord had negligently maintained the stairs when tenant slipped on them.

The second sentence of the rule allows introduction of subsequent remedial measures for other purposes. In the example above, if defendant-landlord denied owning the apartment building, tenant could offer evidence that landlord installed the safety tread after the accident to support tenant's claim that landlord owned or controlled the building.

Rule 408. *COMPROMISE AND OFFERS TO COMPROMISE*

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct investigation or prosecution.

Comment: This rule serves public policy by encouraging parties to attempt to settle disputes and to be candid in settlement discussions. Statements made in settlement negotiations cannot be used to prove the weakness of an opposing party's claim or defense. But the rule allows admission of such statements "for another purpose," such as proving a witness's bias or prejudice.

Rule 409. *PAYMENT OF MEDICAL OR SIMILAR EXPENSES*

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

Comment: Rule 409 is similar to Rule 408. It prevents the injured party from using payment of his medical expenses as a basis for showing that the defendant was at fault. For instance, a motorist who injures a pedestrian might offer to pay the pedestrian's medical expenses, but the pedestrian cannot use the offer to argue that the motorist is liable for his injuries.

**Rule 410. INADMISSIBILITY OF PLEAS, PLEA DISCUSSIONS, AND RELATED STATEMENTS**

Except as otherwise provided in this Rule, evidence of the following is not, in any civil or criminal proceeding, admissible against a defendant who made the plea or was a participant in the plea discussions:

- (1) a plea of guilty which was later withdrawn;
- (2) a plea of *nolo contendere*;
- (3) any statement made in the course of any proceeding under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or
- (4) any statement made in the course of plea discussions made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty which is later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought, in fairness, be considered with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

Comment: Rule 410 applies the rationale of Rule 408 to plea negotiations. For instance, in plea negotiations with the prosecutor, a criminal defendant might admit to pulling the trigger and offer to plead guilty to manslaughter. If the prosecutor rejects the offer and tries defendant for murder, the prosecution cannot use defendant's admission in plea negotiations against him. (A *nolo contendere* plea is a plea of "no contest." Rule 11 of the Federal Rules of Criminal Procedure deals with types of pleas and the manner in which they may be made.)

**Rule 411. LIABILITY INSURANCE**

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

Comment: This rule is designed to prevent a plaintiff from arguing that because defendant was insured, defendant had less reason to be careful. It is usually improper to refer to defendant's insurance (or lack of it) in a personal injury case, as the jury might be affected by the argument that a "deep pocket" is available to compensate plaintiff for her injuries.

As in Rule 407, however, evidence of insurance may be admitted for another purpose, such as showing defendant's control of a premises or vehicle.

## **Article V. Privileges**

### **Rule 501. GENERAL RULE**

There are certain admissions and communications excluded from evidence on grounds of public policy. Among these are confidential communications between:

- (1) husband and wife;
- (2) attorney and client;
- (3) physician and patient; and
- (4) priest and penitent.

Comment: Privileges exempt a witness from testifying about certain types of subject matter. Maintaining candor and privacy in certain types of relationships (spouses, doctor-patient, attorney-client, etc.) or situations (among grand jurors, state secrets, self-incrimination, etc.) is deemed to be so important that the courts will forgo testimony concerning statements made in a privileged context. The holder of the privilege may choose to waive it. Testimonial privileges, because contrary to the judicial power to compel production of evidence, are strictly construed. (The wording of National Mock Trial Rule 501 differs slightly.)

## **Article VI. Witnesses**

### **Rule 601. GENERAL RULE OF COMPETENCY**

Every person is competent to be a witness.

### **Rule 602. LACK OF PERSONAL KNOWLEDGE**

A witness may not testify to a matter unless the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness's own testimony. This rule is subject to the provisions of Rule 703, related to opinion testimony by expert witnesses.

Comment: A witness must testify only on the basis of facts which the witness has seen, heard or otherwise perceived through his or her senses unless the witness is qualified as an expert witness. (See also Rule 701.) For example, a witness could testify from personal knowledge that she saw the defendant drink 12 bottles of beer at the party, but she would not be permitted to testify, "Everyone at the party knew Joey was drunk." Without laying a foundation to establish the basis for her knowledge about the thoughts of others, the witness has no first-hand knowledge about what all the other partygoers knew. Laypersons may give testimony in the form of opinions if the matters on which the testimony is based are matters of common experience and if the witness has first-hand

knowledge of such matters. For example, a witness is entitled to give an opinion as to whether or not the defendant was intoxicated based on the witness's experience observing intoxicated persons.

In the mock trial context, this rule should be read in conjunction with Competition Rule 2.

**Rule 607. WHO MAY IMPEACH**

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

Comment: If a mock trial problem includes an adverse witness who must be called in a party's case-in-chief, that party could attack the witness's credibility. Furthermore, that party could conduct the direct examination as a cross-examination, if the court makes a finding that the witness is a hostile witness.

**Rule 608. EVIDENCE OF CHARACTER AND CONDUCT OF WITNESS**

(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence, or otherwise.

(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the Court, if probative of truthfulness or untruthfulness, be asked on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

Testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination with respect to matters related only to credibility.

Comment: Rule 608 allows opinion or reputation evidence of a witness's character for truthfulness or untruthfulness, with certain restrictions. For example, if Ms. X observes an accident and testifies for plaintiff that the stoplight was red, the defense could offer testimony under 608(a)(1) from Ms. Y, her neighbor, that Ms. X is known to be a liar. Rule 608(a)(2) would then allow the plaintiff to call Ms. Z, another neighbor, to testify as to Ms. X's truthful character.

Rule 608(b) is designed to avoid mini-trials on specific instances of a witness's truthfulness or untruthfulness. Thus, the details of a prior dispute between Ms. X and Ms. Y, in which Ms. X allegedly lied, are inadmissible "extrinsic" evidence. Similarly, if Mr. Q witnessed the accident, testified for plaintiff, and falsely claimed he was walking home from church at the time, defendant could not call the card dealer at the casino to testify that Mr. Q had actually been at the casino, not at church. Such attacks on the credibility of nonparty witnesses are of marginal relevance and consume too much time. Note, however, that on cross-examination of Mr. Q, the defense attorney could ask, "Isn't it true that you were walking home from the casino?"

**Rule 609. IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME; TIME LIMITS**

(a) For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness had been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and the court determines that the probative value of admitting the evidence outweighs the prejudice to the party against whom the evidence is offered, or (2) involved dishonesty or false statement, regardless of the punishment.

(b) Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of pardon, annulment, or certificate of rehabilitation -- Evidence of a conviction is not admissible if (1) the conviction has been the subject of a pardon or other equivalent procedure based on a finding of the rehabilitation of the person convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications -- Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

Comment: This rule governs the admissibility of prior convictions to attack a witness's credibility. Some convictions are considered relevant to whether the witness's testimony is believable. Felonies and all crimes of dishonesty are admissible, subject to the time limits in 609(b). For felonies, the judge must balance the conviction's probative value against its prejudicial effect. But any crime involving "dishonesty or false statement" is admissible to attack credibility, even if it is a misdemeanor. Crimes of dishonesty or false statement include perjury, criminal fraud, embezzlement, counterfeiting, forgery, and filing false tax returns. Most crimes of violence (murder, assault, etc.) and many nonviolent crimes (drug offenses, prostitution) do not fall into this category. Courts disagree on whether theft, shoplifting, and the like are crimes of dishonesty. For instance, one federal decision calls bank robbery "a crime of violent, not deceitful, taking," and therefore not covered by 609(a)(2).

Rule 609(b) reflects the view that the older a conviction is, the less probative value it has. The ten year period usually begins running when the individual is released from prison. The party seeking to attack the witness's credibility must convince the judge that the relevance of the prior crime's "specific facts and circumstances" substantially outweighs the conviction's prejudicial effect. The party must also provide advance written notice to the other side.

#### Rule 610. RELIGIOUS BELIEFS OR OPINIONS

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.

Comment: This rule bars inquiry into the religious beliefs or opinions of a witness to show that the witness is (or is not) credible. It is impermissible to elicit testimony that the witness is an atheist in order to argue that the witness is not credible. Similarly, it is impermissible to argue that if the nun, the minister, and the rabbi all claim the light was green, it must have been green because people in the religious life are more credible than others.

#### Rule 611. MODE AND ORDER OF INTERROGATION AND PRESENTATION

(a) Control by Court -- The Court shall exercise reasonable control over questioning of witnesses and presenting evidence so as to (1) make the questioning and presentation effective for ascertaining the truth, (2) to avoid needless use of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of cross examination -- The scope of cross examination shall not be limited to the scope of the direct examination, but may inquire into any relevant facts or matters contained in the witness' statement, including all reasonable inferences that can be drawn \

from those facts and matters, and may inquire into any omissions from the witness statement that are otherwise material and admissible.

(c) Leading questions -- Leading questions should not be used on direct examination of a witness (except as may be necessary to develop the witness' testimony). Ordinarily, leading questions are permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, leading questions may be used.

(d) Redirect/Recross -- After cross examination, additional questions may be asked by the direct examining attorney, but questions must be limited to matters raised by the attorney on cross examination. Likewise, additional questions may be asked by the cross examining attorney on recross, but such questions must be limited to matters raised on redirect examination and should avoid repetition.

Comment: This rule gives the judge broad authority to control the manner in which testimony comes into evidence. See the "General Comment – Objections and Proper Form of Questions" for guidance on this rule in a mock trial setting.

#### Rule 612. WRITING USED TO REFRESH MEMORY

If a written statement is used to refresh the memory of a witness either while or before testifying, the Court shall determine that the adverse party is entitled to have the writing produced for inspection. The adverse party may cross-examine the witness on the material and introduce into evidence those portions which relate to the testimony of the witness.

Comment: This basic rule of fairness ensures that if the examining attorney shows the witness a document to refresh the witness's recollection, the other side is entitled to see the document and cross-examine the witness on it. When the witness's memory is refreshed with a document on direct examination, the proponent of the witness's testimony cannot offer statements in the document for their truth. The document is not received into evidence. But the rule allows the adverse party to cross-examine the witness about the document and introduce portions into evidence. (Compare Rule 803(5), the hearsay exception dealing with past recollection recorded.)

#### Rule 613. PRIOR STATEMENTS OF WITNESSES

In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same, and the opposite party is afforded an opportunity to interrogate.

Comment: This rule allows a cross-examining attorney to question a witness about the witness's prior statement without showing the statement to the witness. The cross-examiner must show the statement to opposing counsel on request. Usually the cross-examiner seeks to attack the witness's credibility by showing an inconsistency between the trial testimony and the prior statement. If "extrinsic evidence" of the prior statement is relevant and admissible (e.g. another witness's testimony that the first witness made the prior inconsistent statement), the first witness must be provided an opportunity to "explain or deny" the statement. If the inconsistent statement concerns a "collateral matter," the cross-examiner must take the witness's answer; the cross-examiner may not introduce "extrinsic evidence" to discredit the witness. (See comment to 608(b) for an example of extrinsic evidence on a collateral matter.)

## **Article VII. Opinions and Expert Testimony**

### **Rule 701. OPINION TESTIMONY BY LAY WITNESS**

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Comment: As a general rule, the testimony of lay witnesses is restricted to a recitation of facts, and their opinions are not permitted. However, there is no clear demarcation between fact and opinion in some instances. Sometimes a fact sounds like an opinion and an opinion sounds like a fact. For example, when a lay witness testifies to prior experience observing intoxicated persons, then testifies that the defendant was "drunk" at the time of the accident, is this a statement of fact or an opinion? It is both. Therefore, this rule of evidence does not prohibit per se opinions offered by lay witnesses but simply expresses a preference for factual testimony. Lay witnesses are permitted to offer certain opinions concerning matters which are based on their own common experience, provided adequate foundation is laid. For example, a witness is generally permitted to offer an opinion about the value of his home or about the average miles per gallon achieved by his car.

### **Rule 702. TESTIMONY BY EXPERTS**

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 in the form of an opinion or otherwise.

Comment: No expert opinion is permitted to be introduced in evidence until it is shown that the expert possesses the requisite skill, knowledge, experience, or education to be qualified to offer the opinion. Before any expert opinion is elicited from a witness, a foundation is laid by asking the expert witness questions that are intended to establish his

or her expert qualifications. Expert witnesses come from all trades and professions, and there is no qualitative distinction between an expert who is a journeyman carpenter with 25 years of practical experience and an aerospace engineer who has had 19 years of formal education. Both are experts in their own areas of specialty.

In addition to the requirement that a proper foundation be laid to establish the qualifications of the expert witness, an expert opinion still may not be admissible unless the judge rules that the subject matter of the opinion is beyond the common knowledge and experience of the jurors, that the opinion "will assist the trier of fact" to understand the evidence or determine a fact at issue, and that the opinion does not exceed the recognized limits of the science or art involved. The trier of fact does not need the assistance of an expert to draw inferences and conclusions from facts that are of common knowledge and experience.

The current mock trial rule reflects the law before the U.S. Supreme Court's decision *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). In response to *Daubert*, Federal Rule 702 was amended in 2000 to affirm the trial court's role of gatekeeper and provide some general standards that the trial court must use to assess the reliability and helpfulness of the proffered expert testimony. The 2000 amendment added three factors to guide the judge's decision: An expert "may" offer an opinion "if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."

Proponents of expert testimony should be prepared to demonstrate the reliability of scientific expert testimony, to the extent possible in a mock trial format. Rejection of expert testimony is the exception, not the rule. Vigorous cross-examination and presentation of contrary evidence are traditional and appropriate means of attacking shaky but admissible expert evidence.

#### Rule 703. BASES OF OPINION TESTIMONY BY EXPERTS

The facts or data upon which an expert bases an opinion may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the field in forming opinions or inferences, the facts or data need not be admissible in evidence.

Comment: This rule simply clarifies that the underlying facts and data used by the expert witness to form an expert opinion need not be admissible as evidence. If the expert customarily relies on such information, the information itself need not be admissible. The key to admissibility is the customary reliance by the expert on the information, not its independent admissibility. For example, to form an opinion concerning the weather on a certain date in March 2000, a meteorologist may rely on weather service maps which might

be objectionable hearsay evidence if admitted at trial by themselves. Yet the information may form the basis for the expert's opinion.

**Rule 704. OPINION ON ULTIMATE ISSUE**

(a) Opinion or inference testimony otherwise admissible is not objectionable because it embraces an issue to be decided by the trier of fact.

(b) In a criminal case, an expert witness shall not express an opinion as to the guilt or innocence of the accused.

Comment: Rule 704(a) allows lay and expert witnesses to offer opinions on issues to be decided by the jury. For example, in a medical malpractice case, an expert physician testifying for the plaintiff can opine that the treating physician's conduct fell below professional standard of care. However, witnesses cannot offer opinions on how the case should be decided, nor can they offer opinions on questions of law. Rule 704(b) specifically bars opinion testimony on the mental state of criminal defendants.

**Rule 705. DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT OPINION**

The expert may testify in terms of opinion or inference and give reasons therefore without prior disclosure of the underlying facts or data, unless the Court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Comment: Because Rule 703 allows the expert to base her opinion on otherwise inadmissible facts (if of the type reasonably relied on by other experts in the field), Rule 705 allows the expert to offer an opinion without disclosing the underlying facts or data. But the court has discretion to require disclosure on direct examination, and the opposing party can compel disclosure on cross-examination.

**Article VIII. Hearsay**

General comment: Rule 801 defines a "hearsay" statement as (1) an out-of-court statement, (2) made by someone other than the witness who is testifying to the contents of the statement, and (3) which is offered to prove the truth of the matters asserted in the statement. The easiest way to explain the rule is by example. If a witness testifies that he heard a man say, "I am Alexander the Great," the testimony concerning the statement would be hearsay if it was being offered to prove the truth of matters contained in the statement, i.e., that the person making the statement was in fact Alexander the Great. On the other hand, if the statement was being offered in evidence to prove that the person making the statement suffered from delusions, the statement would not be hearsay because it was not offered to prove the truth of matters contained in the statement.

A key to understanding hearsay is to focus on the purpose for which an out-of-court statement is being offered. The same statement can be hearsay or nonhearsay, depending on its purpose. For instance, assume X observes a traffic accident. Y comes to the scene a few minutes later. X tells Y, "The light was red." Y's testimony, "X said that the light was red" is hearsay, if offered to show the light was red. Suppose, however, that the issue was (1) whether X was blind, or (2) whether the traffic light was functioning at all. In those two situations, Y's testimony, "X said the light was red" is not hearsay. The statement is offered to show (1) that X could see, or (2) that the traffic light was working. Therefore "the truth of the statement" (whether the light was indeed red) is not at issue, and the statement is not hearsay.

Hearsay is inadmissible because it relies on the credibility of the person who made the statement, and that person is not on the witness stand. Such evidence is deemed to be less credible and less reliable than evidence elicited through first-hand testimony from the person who actually made the statement.

Keep in mind that a nonparty witness's own out-of-court statement can be hearsay, even when the witness testifies. Thus, in the traffic light example above, if X testifies, "I told Y that the light was red," the statement is hearsay if offered to show the light was red. Of course, X can testify, "I was there and I saw that the light was red," because X is testifying as to her own observations. Furthermore, out-of-court statements by witnesses *who are parties to the case* (or "speaking agents" of parties) are normally admissible under the 801(d)(2) exceptions.

Conduct can be a "statement" under the hearsay rule if it is intended to be an assertion. For example, if a person is asked, "Did Joe kill the bartender?" and the person nods his head in an affirmative response to the question, the nod is an assertion, and it would be hearsay for a witness to testify that he saw the person nod his head in response to the question just as it would be hearsay for the witness to testify that he heard the person say, "Yes, Joe killed the bartender." Another example of conduct as hearsay is when one person points at another person as a means of identifying that other person when asked, "Who killed the bartender?" An example of conduct which is not hearsay is when a person shakes with fright when confronted by a police officer. The involuntary shaking is not intended to be a statement.

Unless the statement being testified to meets the definition of hearsay, the statement is not hearsay and is not inadmissible on that basis. The rules of evidence also contain many exceptions to the rule that hearsay is inadmissible. The exceptions to the hearsay rule which apply in mock trial are set forth below. Attorneys in mock trial should learn the differences between statements which are inadmissible as hearsay, statements which are admissible because they are not hearsay, and statements which are hearsay but which are nevertheless admissible because they are recognized exceptions to the hearsay rule.

Rule 801. DEFINITIONS

The following definitions apply under this article:

(a) Statement -- A "statement" is an oral or written assertion or nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant -- A "declarant" is a person who makes a statement.

(c) Hearsay. -- "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay -- A statement is not hearsay if:

(1) Prior statement by witness -- The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement and the statement is:

(A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or

(B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or

(C) one of identification of a person made after perceiving the person; or

(2) Admission by a party-opponent -- The statement is offered against a party and is:

(A) the party's own statement in either an individual or a representative capacity, or

(B) a statement of which the party has manifested an adoption or belief in its truth, or

(C) a statement by a person authorized by the party to make a statement concerning the subject, or

(D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or

(E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

Comment: Technically all of the 801(d) statements are "nonhearsay," as a matter of definition; they are not hearsay "exceptions" (see 803 and 804). Conceptually, the 801(d) statements function much like hearsay exceptions. Note also that the 801(d)(2) statements must be offered "against a party," not by a party on his own behalf.

Example, 801(d)(1)(A), (prior inconsistent statement under oath): In a declaration (sworn statement) given to the insurance investigator after an automobile accident, the driver said the light was green. At trial, the driver testifies that the light was yellow. Under this rule, the driver's prior statement is admissible.

Example, 801(d)(1)(B), (prior consistent statement offered to rebut a charge of recent fabrication): Three men are charged with theft. One of them makes a deal with the prosecutor and pleads guilty to a minor offense in exchange for his testimony against the other two defendants. During the trial, the defense attorneys for the other two men make allegations against the witness that the prosecution "bought his testimony." In this situation, the prosecution would be entitled to use the witness's prior consistent statement to prove that he did not change his story after making the plea bargain deal.

Example, 801(d)(1)(C), (prior statement of identification): Just after a bank robbery the police put the suspect in a lineup and ask a witness if she can identify the robber. The witness identifies the suspect. At trial, the witness's out-of-court statement identifying the suspect is admissible.

Comment and example, 801(d)(2)(A), (admission by a party-opponent): Admissions made out-of-court by a party to the lawsuit are admissible. During a telephone conversation with the police, the defendant admitted being at the scene of a burglary. The statement is admissible. Similarly, the driver's statement, "I didn't see you in the crosswalk" is an admission in the pedestrian's suit against the driver.

Comment 801(d)(2)(B), (adoptive admission): This rule most commonly deals with situations where X (the party) is present when Y makes a statement. If X agrees or acquiesces in Y's statement, X may be deemed to have adopted Y's statement. In that situation, Y's statement is admissible as an admission against X.

Comment, 801(d)(2)(C), (authorized statement): Admissions made by a spokesperson are admissible. Admissions by a lawyer on the client's behalf can be admissible against the lawyer's client.

Comment and example, 801(d)(2)(D), (statement by a speaking agent): Assume a gas station pump explodes while plaintiff is filling her car. If the cashier tells injured plaintiff, "We've been meaning to get that pump fixed, but the corporate headquarters told stations across the country not to waste money on maintenance," is that statement about the corporate policy admissible against the corporate defendant as an admission by a "speaking agent"? On those facts, probably not, because broad corporate policies are not "a matter within the scope of [the cashier's] agency or employment."

Comment, 801(d)(2)(E), (statement by a co-conspirator): Statements made by one co-conspirator are admissible against other co-conspirators, as long as the statement was made during the course of the conspiracy and in furtherance of it. The threshold question of the existence of the conspiracy is decided by the judge, based on a preponderance of the evidence. The judge may admit a statement provisionally, based on a representation that the prosecution will "connect it up" later by laying further foundation that a conspiracy existed.

Rule 802. HEARSAY RULE

Hearsay is not admissible, except as provided by these rules.

Rule 803. HEARSAY EXCEPTIONS, AVAILABILITY OF DECLARANT IMMATERIAL

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

(1) Present sense impression -- A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) Excited utterance -- 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.

(3) Then existing mental, emotional, or physical conditions -- A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for purposes of medical diagnosis or treatment

(5) Recorded Recollection -- A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly.

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business,

institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(18) Learned treatises -- To the extent called to the attention of an expert witness upon cross examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice.

(21) Reputation as to character -- Reputation of a person's character among associates or in the community.

(22) Judgment of previous conviction -- Evidence of a judgment finding a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused.

Comment and example, 803(1), (present sense impression): This exception is commonly called the "present sense impression" exception. The rule presumes that a spontaneous statement, i.e. one made before the declarant has had a chance to think about the event he or she describes, reduces some of the risk of misrepresentation. When the person who was just involved in a car accident says to a witness, "Why didn't I put on my seat belt?" the statement is undoubtedly a spontaneous utterance and is not objectionable as hearsay.

Comment and example, 803(2), (excited utterance): This exception is called the "excited utterance" exception. A victim's telephone call to the police describing how the defendant raped her and left her along the road several hours before the call would probably be admissible as an "excited utterance." The key to admissibility is whether the declarant was still under the influence of the event (i.e., emotionally charged from the effects of the event) at the time the statement was made. The belief is that a statement made while the declarant is still under the influence of or affected by the event is more reliable and less likely to be fabricated than one made after the declarant has calmed down and taken the opportunity to think about the event.

Comment and example, 803(3), (state of mind): Statements which describe the declarant's then-existing state of mind fall within this exception. A statement of the declarant's intent or plan also falls within this exception when offered to prove that the intent or plan was later carried out by the declarant. However, the exception does not apply to statements that describe *past* states of mind. A witness will be permitted to testify that the victim of a spousal assault told her, "I fear my husband" because it was a statement of the victim's state of mind at the time the statement was made. On the other hand, the witness will not

be allowed to testify that the victim told her a week before the assault, "My husband threatened me and I thought he was going to hurt me" because that is a statement concerning a state of mind which existed in the past when the threat was made. In other words, the "state of mind" exception to the hearsay rule does not apply to statements of memory or belief about past actions or events. But the state of mind exception does apply to statements concerning the present status of a person's health or physical condition. In a prosecution for murder by poison, the victim's statement, "My stomach hurts a lot" would be admissible.

Comment and example, 803(4), (medical diagnosis): A doctor will be permitted to testify that his patient complained of a sore knee during an office visit. One issue that arises frequently is whether the patient's description of the cause of the injury is admissible through the testimony of the physician or through the physician's chart note. Under this exception, a patient's statement that he was struck by a car might be admissible, but probably not his statement, "The other guy hit me when he ran the red light."

Comment and example, 803(5), (past recollection recorded): A witness may make notes or a record of an observation, but then have forgotten it when called to testify months or years later. Rule 803(5) allows the witness's statements of "recorded recollection" to be admitted for their truth, if the proponent lays proper foundation. A typical line of foundation questions will establish (1) that the witness once had personal knowledge of the event; (2) the witness has forgotten the event to some extent; (3) the witness previously made an accurate record of the event; and (4) the event was fresh in the witness's memory when the witness made the record. In many situations, the past recollection recorded exception is similar to the business records exception (803(6)). But the past recollection recorded exception normally requires the maker of the actual record to testify, whereas the business record exception simply requires a "qualified witness" with knowledge of the enterprise's general practices.

The past recollection recorded hearsay exception is sometimes confused with the practice of refreshing a witness's "present recollection" under Rule 612. Rule 612 applies when a document, object, or picture will trigger a memory that had been forgotten; the item itself is an aid to memory and is not received into evidence. The witness testifies from her "refreshed recollection." In contrast, Rule 803(5) applies when the witness cannot trigger a memory of the event, but did "record" the event when it occurred.

Comment and example, 803(6), (business records): Most records kept in the ordinary course of business are hearsay if offered to prove that their contents are true. For instance, entries in a bank's loan register would be hearsay if offered to show the loan was not repaid on time. Records of any "regularly conducted activity" fall within this hearsay exception if proper foundation is laid. A typical line of foundation questions will establish that the record (1) was made at or near the time of the event; (2) was made by a person

with knowledge; (3) was kept in the regular course of business; (4) was made as a part of the business's regular practice. Note that the opposing party may be able to challenge admissibility of the business record on the grounds of "lack of trustworthiness."

Comment and example, 803(18), (learned treatises): Statements in a treatise or other scholarly publication are admissible for their truth, if the proponent lays foundation that the publication is a reliable authority in the field. For instance, in a medical malpractice case, either side's expert may read portions of a standard textbook in the field to establish that the treating doctor did (or did not) meet the applicable standard of care.

Comment and example, 803(21), (reputation in the community): Statements concerning a person's reputation in the community are not objectionable hearsay, so long as the statements do not exceed the scope of permissible character testimony and are elicited in the manner prescribed by Rule 405.

Comment and example, 803(22), (prior judgments): This rule allows admission of prior felony convictions in certain situations, even though the prior conviction would technically be hearsay. For instance, if D is convicted of murder, then Victim's family brings a wrongful death civil suit on the same set of facts, D's conviction is admissible for its truth, i.e. to show that D did indeed kill Victim. Victim's family does not need to re-litigate the issue of whether D really did it.

#### Rule 804. HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE

(a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant:

- (1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
- (2) Persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
- (3) Testifies to a lack of memory of the subject matter of the declarant's statement; or
- (4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
- (5) Is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b) (2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

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

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) Statement under belief of impending death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant, while believing that the declarant's death was imminent, and concerning the cause or circumstances of what the declarant believed to be impending death.

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statement of personal or family history. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(6) Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

Comment: All the hearsay exceptions under Rule 803 apply whether or not the declarant is "available" to testify in person. But another group of hearsay exceptions set forth under Rule 804 require that the declarant must be "unavailable" before the hearsay statement is admitted. Rule 804(a) defines situations in which a declarant is considered "unavailable." Physical unavailability such as death or absence from the jurisdiction is not required. The unavailability requirement is also satisfied if the witness invokes a privilege, or refuses to testify in contempt of court.

Comment, 804(b)(1). Rule 804(b)(1) creates a hearsay exception for an unavailable person's prior sworn statements.

Comment, 804(b)(2). Rule 804(b)(2) is the "dying declaration" hearsay exception. It creates a hearsay exception when the victim of a homicide says, "D shot me," before victim expires.

Comment, 804(b)(3). This rule sets forth the "declaration against interest" hearsay exception. It rests on the notion that a person is unlikely to make a statement that would get the person in trouble, unless the statement is true. The last sentence of the rule places a "corroboration" requirement on statements by an unavailable declarant that are offered to prove the innocence of a criminal defendant. For instance, if D is charged with murder, and D's brother Q is dying of cancer, Q might make a false deathbed "confession" to exonerate D. If D wants to admit Q's "confession" into evidence through a nurse who heard it, the corroboration requirement would have to be met.

Comment, 804(b)(4). Since one typically does not truly have "personal knowledge" of his or her birth, parents' marriage, ages of older siblings, etc., this rule creates a hearsay exception to allow witnesses to testify facts of family history.

Comment, 804(b)(6). The "forfeiture by wrongdoing" exception would include situations where a witness by a criminal case is unavailable because the defendant made arrangements for the witness to "sleep with the fishes." Because defendant's wrongdoing brought about the witness's unavailability, hearsay testimony from other witnesses about the unavailable witness's statements are admissible against the defendant.

#### Rule 805. HEARSAY WITHIN HEARSAY

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statement conforms with an exception to the hearsay rule provided in these rules.

Comment: This rule governs so-called double hearsay and multiple hearsay situations. These situations pose challenging analytical problems. Generally the proponent must show that every link in the chain of statements is admissible. Arguments for admissibility may

include the fact that one or more of the statements is not offered for its truth, or comes in under a hearsay exception, or is defined as non- hearsay, etc.

## **ARTICLE XI – Miscellaneous Rules**

### **Rule 1103. *TITLE***

These rules may be known and cited as the Washington Mock Trial Rules of Evidence