TRIALBOOM™

# EVIDENCE MANUAL

(Federal Rules of Evidence)

Version 1.3

Updated: July 1, 2018

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

**Copyright © 2018 by Trial Boom LLC**

**All rights reserved. This Evidence Manual or any portion thereof may not be reproduced, distributed, or transmitted in any form or by any means, including photocopying, recording, or other electronic or mechanical methods, without the prior written permission of the publisher, except in the case of brief quotations embodied in critical reviews and certain other noncommercial uses permitted by copyright law. For permission requests, write to Trial Boom LLC, addressed "Attention: Legal," at the address below.**

**Trial Boom LLC**
**2225 Buchtel Blvd.**
**Unit #801**
**Denver, CO 80210**
**www.trialboom.com**

**NOTE: All language from the Federal Rules of Evidence ("F.R.E.") is highlighted in Blue.**

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

## CLE Course ID List

### CLE Approved

- **Colorado**
    - Trial Boom: People v. Booth – #**764533**
    - 10 General CLE Credits (including 2 Ethics CLE Credits)
- **Florida**
    - Trial Boom: People v. Booth – **#1804825N**
    - 12 General CLE Credits (including 2.5 Ethics CLE credits)
- **Illinois**
    - Trial Boom: People v. Booth – **No Course #**
    - 10 General CLE Credits (including 2 Professional Responsibility CLE hours)
- **Texas (self-study only at this time)**
    - Trial Boom: People v. Booth – **No Course #**
    - 3 self-study CLE credits (including 1 legal ethics CLE credit)

### Pending CLE Approval

- **California**
- **Georgia**
- **New Jersey**
- **New York**
- **Ohio**
- **Pennsylvania**

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

# TABLE OF CONTENTS



**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

# ARGUMENTATIVE (A)

**FRE 611(a)**

**Questions that articulate the examining attorney's opinions, rather than seeking a statement or admission from the witness, are objectionable as argumentative. This is a good objection to make when the examining attorney is making an argument of law or application of law that should be argued in a closing statement. Any question which is actually an argument is improper.**

Examples

- "Please describe who was present with you at the theater on April 14th before the worst tragedy in American history took place."
- "What did you see the Defendant doing before he murdered the President?"
- "What was the second thing that the most famous murderer of our time told you?"
- "Please describe what the murderer looked like."
- "The night of April 14th of last year had to be horrifying. Can you please tell us about it?"

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

FRE 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 Cross-Examination.** Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility. The court may allow inquiry into additional matters as if on direct 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, an adverse party, or a witness identified with an adverse party.

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

Summary

Rule 611 deals generally with the scope of a trial judge's authority to exercise reasonable control over the trial proceedings, including the mode of interrogating witnesses and presenting evidence. The rule contemplates flexibility and discretion so that the truth will be ascertained and the interests of the public and the parties promoted. In short, the three main objectives of Rule 611 are to discover the truth in an efficient manner, avoid wasting time, and protect the witnesses from improper examination questions.

**Possible Objections under Rule 611:** Argumentative, Compound, Narrative, Leading, Mischaracterization, Nonresponsive, Asked & Answered, Vague, Facts not in Evidence

Case Law (Argumentative)

- **U.S. v. Abair, 746 F.3d 260 (7th Cir. 2014)** (prosecutor asked highly improper compound question with at least twelve distinct factual assertions built into it that was really just an accusatory and argumentative speech)
- **Smith v. Estelle, 602 F.2d 694 (5th Cir. 1979)** ("[Y]ou're kind of the hatchet man down here for the District Attorney's Office, aren't you?")
- **U.S. v. Micklus, 581 F.2d 612 (7th Cir. 1978)** ("It wouldn't bother you any, to come in here and lie from the time you started to the time you stopped, would it?")
- **U.S. v. Briscoe, 839 F. Supp. 36 (D.D.C. 1992)** ("Isn't what you told this jury on its face ridiculous?")

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

# BEST EVIDENCE RULE (B)

## FRE 1002

**When a witness is being asked about a document that is available to be entered into evidence, that document should be entered into evidence as proof of its contents. When the contents of a writing, recording, photograph, or other document are directly at issue, the original document must be produced. This is a good objection to raise when the evidence being solicited is not the best source of the information.**

Examples

- "Is this tunnel located on the blueprints for the theater?" (and the blueprints are available to be entered into evidence)
- "Can you please describe what you saw in the photograph?" (and the photograph is available to be entered into evidence)
- "How much did you pay for the house?" (and the closing statement for the house is available to be entered into evidence)
- "What were the terms of the contract?" (and the contract is available to be entered into evidence)

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

FRE 1002. Requirement of the Original

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

Summary

When the actual contents of a writing, recording, or photograph are considered indispensable to prove a case or establish a defense, Rule 1002 applies. Original documents occupy a central position in the law. When the contents of a document are at issue in a case, oral testimony as to the terms of the document is subject to a greater risk of error than if the original document was available and entered into evidence. The original document, or a true copy, provides reliable evidence.

For purposes of applying the Best Evidence Rule, courts often consider the following factors:

1. Relative importance of content in the case;
2. Simplicity or complexity of content and consequent risk of error in admitting testimonial account;
3. Strength of proffered evidence of content, taking into account corroborative witnesses or evidence and presence or absence of bias or self-interest on part of witnesses;

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

4. Breadth of margin for error within which mistake in testimonial account would not undermine point to be proved;
5. Presence or absence of actual dispute as to content;
6. Ease or difficulty of producing the document; and
7. Reasons why proponent of other proof of its content does not have or offer the document itself.

***Railroad Management Co., L.L.C. v. CFS Louisiana Midstream Co.*, 428 F.3d 214, 218–19 (5th Cir. 2005).**

Exceptions to Best Evidence Rule

**FRE 1003** creates an exception to the best evidence rule by allowing duplicates to be admissible, as long as no genuine question as to its authenticity exists and admitting the duplicate in lieu of the original is not deemed unfair.

**FRE 1004** creates an exception to the best evidence rule by excusing the production of the original document when it cannot be produced because it is lost, destroyed, or cannot be obtained through the legal process.

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

Case Law (Best Evidence Rule)

- **Amin v. Loyola University Chicago, 423 F. Supp. 2d 914 (W.D. Wis. 2006)** (witness's testimony regarding content of retirement plan was inadmissible where no copy of plan was submitted and there was no claim the document was lost, destroyed or unobtainable)
- **U.S. v. Hampton, 464 F.3d 687 (7th Cir. 2006)** (photocopies of certificates of insurance admissible as duplicates)
- **Boswell v. Jasperson, 266 F. Supp. 2d 1314 (D. Utah 2003)** (where original deed was never produced and authenticity was in issue, altered deed did not satisfy Best Evidence Rule)
- **U.S. v. Szehinskyj, 104 F. Supp. 2d 480 (E.D. Pa. 2000)** (no unfairness in admitting copies of Nazi concentration camp documents; originals were old, in delicate condition and held in various nations' archives)
- **Marshak v. Treadwell, 58 F. Supp. 2d 551 (D.N.J. 1999)** (written contract lost or destroyed in fire; photocopy admissible as duplicate under Rule 1003 or as "other evidence" under Rule 1004).
- **Ridgway v. Ford Dealer Computer Services, Inc., 114 F.3d 94 (6th Cir. 1997)**
- **U.S. v. Ross, 33 F.3d 1507 (11th Cir. 1994)**
- **U.S. v. Stockton, 968 F.2d 715 (8th Cir. 1992)** (best evidence rule applies to photographs of documents when photographs used to prove document's contents)

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

- **U.S. v. Yamin, 868 F.2d 130 (5th Cir. 1989)** (where defendants were convicted of trafficking in counterfeit watches, government not required under best evidence rule to produce original phony watches; even though writing on watches is what makes them counterfeit, trial court judge was within his discretion to consider them chattels)
- **U.S. v. Ratliff, 623 F.2d 1293 (8th Cir. 1980)** (defendant misrepresented value of pre-World War II German corporate bonds to get bank loans; not error to permit testimony of German examiner charged with duty of determining bonds' value despite fact that there was a master valuation list)

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

# COMPOUND (C)

## FRE 611(a)

**Compound questions are two questions posed as one. When a compound question is asked, the witness's answer will usually be ambiguous and misleading to the jury.**

Examples

- "Let's look back to April 14th of law year. Where did you and the President go, what did you see, and why did you go there?"
- "Tell us what you saw while watching the play, also what you heard, and what you smelled."
- "Did you go to the play that evening and sit next to Ms. Hale?"
- "Please tell us your relationship to this case and to the defendant."

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

FRE 611

**(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 Cross-Examination.** Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility. The court may allow inquiry into additional matters as if on direct 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, an adverse party, or a witness identified with an adverse party.

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

Summary

Rule 611 deals generally with the scope of a trial judge's authority to exercise reasonable control over the trial proceedings, including the mode of interrogating witnesses and presenting evidence. The rule contemplates flexibility and discretion so that the truth will be ascertained and the interests of the public and the parties promoted. In short, the three main objectives of Rule 611 are to discover the truth in an efficient manner, avoid wasting time, and protect the witnesses from improper examination questions.

**Possible Objections under Rule 611:** Argumentative, Compound, Narrative, Leading, Mischaracterization, Nonresponsive, Asked & Answered, Vague, Facts not in Evidence

Case Law (Compound)

- **U.S. v. Abair, 746 F.3d 260 (7th Cir. 2014)** (prosecutor used vague, confusing and highly improper compound questions)
- **U.S. v. Smith, 354 F.3d 390 (5th Cir. 2003)** (government's attorney asked: "Are you aware that two weeks ago, your wife called Keisha and Meredith [and] asked if they would testify today that Josh Booty was at Kristenwood on January 23rd, as late as 8:00 o'clock?" witness responded: "Yes"; court found question to be improper because it was impossible for jury to determine which part of the question witness was saying "Yes" to)
- **U.S. v. Matthews, 222 F.3d 305 (7th Cir. 2000)** (compound nature of questions made witness testimony unclear).

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

- **U.S. v. Watson, 171 F.3d 695 (D.C. Cir. 1999)** ("Mr. Thomas, you believe that you know Watson's girlfriend, Tyra Jackson, right?" was ruled as a compound question because attorney effectively asked whether witness knew Ms. Jackson and whether witness knew Ms. Jackson to be defendant's girlfriend)

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

# NARRATIVE (D)

**FRE 611(a)**

**This objection should be used when the examining attorney asks a question that prompts the witness to tell a long, uncontrolled story.**

Examples

- "Mrs. Lincoln, tell us everything you know."
- "In your own words, please tell us what happened that day."
- "Ms. Keene, tell us everything you know about this case."
- "Can you please tell the jury everything that happened, starting from the beginning?"

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

FRE 611

**(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 Cross-Examination.** Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility. The court may allow inquiry into additional matters as if on direct 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, an adverse party, or a witness identified with an adverse party.

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

Summary

Rule 611 deals generally with the scope of a trial judge's authority to exercise reasonable control over the trial proceedings, including the mode of interrogating witnesses and presenting evidence. The rule contemplates flexibility and discretion so that the truth will be ascertained and the interests of the public and the parties promoted. In short, the three main objectives of Rule 611 are to discover the truth in an efficient manner, avoid wasting time, and protect the witnesses from improper examination questions.

**Possible Objections under Rule 611:** Argumentative, Compound, Narrative, Leading, Mischaracterization, Nonresponsive, Asked & Answered, Vague, Assumes Facts not in Evidence

Case Law (Narrative)

- **U.S. v. Beckton, 740 F.3d 303 (4th Cir. 2014)** (defendant, as a pro se litigant, was not permitted to testify in narrative form)
- **U.S. v. Gallagher, 99 F.3d 329 (9th Cir. 1996)** (no abuse of discretion in restricting defendant's right to testify when defendant attempted to testify in narrative form)
- **U.S. v. Young, 745 F.2d 733 (2d Cir. 1984)** (trial judge has broad discretion in deciding whether or not to allow narrative testimony)

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

# IMPROPER EXPERT OPINION (E)

**FRE 702**

**When testimony requires some degree of skill or expertise in a certain area, the witness must first be tendered as an expert. A proffered expert must possess sufficient qualifications through knowledge, skill, training, or experience to assist the trier of fact to understand the evidence or to determine a fact at issue.**

Examples

- "Dr. Smith, can you please describe the caliber of the bullet hole you observed?" (Dr. Smith was tendered as an expert heart surgeon, but not an expert in guns and/or ammunition)
- "Ms. Beckshire, what type of medical treatment is normally used in this scenario?" (Ms. Beckshire was tendered as an expert in hospital administrative procedures, but not an expert in medical procedures)
- "Mr. Morris, please tell the jury about standard safety designs for this type of aircraft." (Mr. Morris was tendered as an expert in electrical engineering, generally, but not an expert specifically in aircraft safety design)

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.

FRE 702. Testimony by Expert Witness

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:

**(a)** 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;

**(b)** the testimony is based on sufficient facts or data;

**(c)** the testimony is the product of reliable principles and methods; and

**(d)** the expert has reliably applied the principles and methods to the facts of the case.

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

Summary

The law permits the testimony of experts because experts can draw inferences that require special skill or expertise beyond that of lay jurors. A witness can be tendered as an expert based on the witness's education, experience, or a combination of education and experience. Typically, an expert witness's background will consist of a combination of both theoretical education and practical experience.

There is no discrete formula for determining whether an expert is qualified to offer opinion evidence in a certain field, just that under the totality of the circumstances, the expert witness can be said to be a qualified expert in the particular field. Courts have typically been liberal in their assessments of expert qualifications. However, the Supreme Court ruled in ***Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)**, that the trial judge must find the witness is competent to perform the specific "task at hand." This language has caused courts in recent years to raise the standard for qualification as an expert. Among other elements, the foundation for an expert's qualifications usually include the following:

- Degrees from educational institutions;
- Other specialized training in this field of expertise;
- Licensed to practice in the field;
- Practiced in the field for a number of years;
- Taught in the field;

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

- Published in the field;
- Belongs to professional organizations in the field; and
- Previously has testified as an expert on this subject.

*See also* **Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999)**, holding that Daubert's "gatekeeping" function applies to all expert testimony under Rule 702 and that the trial court should make a "flexible" but diligent reliability inquiry in resolving the admissibility of such testimony. In making this determination, lower courts may look to the Daubert factors to the degree they are "reasonable measures of reliability," but these factors do not represent a "definitive checklist." This "flexibility" applies to both scientific and non-scientific experts.

Case Law (Improper Expert Opinion)

- **Qualified Experts:**
    - **U.S. v. Galloway, 749 F.3d 238 (4th Cir. 2014)** (agent qualified by experience as expert with respect to interpretation of coded language used in narcotics-related communications)
    - **U.S. v. Eiland, 738 F.3d 338 (D.C. Cir. 2013)** (operations of narcotics dealers repeatedly have been found to be suitable topic for expert testimony because they are not within common knowledge of average juror)

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

- **Bado-Santana v. Ford Motor Co., 482 F. Supp. 2d 192 (D.P.R. 2007)** (although not a physician, neuropsychologist qualified to testify as expert on mild traumatic brain injury)
- **Hadix v. Caruso, 461 F. Supp. 2d 574 (W.D. Mich. 2006)** (by nature of practice and experience, primary care physicians qualified to offer opinions on psychiatric and psychological care)

- **Unqualified Experts:**
  - **Smith v. Goodyear Tire & Rubber Co., 495 F.3d 224 (5th Cir. 2007)** (polymer scientist with no expertise in tire design, manufacture, or malfunction not permitted to testify on cause of tire failure)
  - **Botnick v. Zimmer, Inc., 484 F. Supp. 2d 715 (N.D. Ohio 2007)** (witness did not qualify as expert in defective medical device case; general mechanical engineering was not particular to the science bearing on design or causation issues of alleged product defects)
  - **McMillan v. Weeks Marine, Inc., 478 F. Supp. 2d 651 (D. Del. 2007)** (actuarial economist should not have testified about plaintiff's future employment prospects; subject was outside his discipline and prior experience)
  - **Pfizer Inc. v. Teva Pharmaceuticals USA, Inc., 461 F. Supp. 2d 271 (D.N.J. 2006)** (rheumatologist not qualified to testify in patent infringement case on subject of whether other doctors were influenced by advertising and promotion in deciding whether to prescribe drug)

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.

# FOUNDATION (LACK OF) (F)

**FRE 602**

**Before any evidence can be admitted, the proper foundation for that evidence must be laid. An objection based on Lack of Foundation indicates that it MIGHT be possible for the witness to potentially know the answer, but additional predicate questions must be asked first. All foundation must be established by the witness's own testimony, or, in the case of an out-of-court statement being offered in court, by inference from the nature of the statement and the surrounding circumstances (*See* U.S. v. McGrath, 613 F.2d 361 (2d Cir. 1979)).**

Examples

- "Ms. Hale, what is the weather like today in London?" (and evidence/testimony has not been introduced to prove that Ms. Hale was in London earlier that day)
- "Mrs. Lincoln, let's unpack that a little. How long was your husband comatose before he died?" (and evidence/testimony that Mr. Lincoln was in a coma had not yet been introduced)
- "Upon arrival, why did you proceed directly to the reserved viewing box?" (and evidence/testimony of the witness going to the reserved viewing box had not yet been introduced)

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

- "Why was the viewing box reserved for you?" (and no evidence/testimony of the viewing box being reserved had been introduced)
- "What did the person say in Latin?" (and no evidence/testimony of the person actually speaking in Latin had been introduced)

FRE 602. Need for Personal Knowledge

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.

Summary

A witness may not testify to any matter unless he/she has personal knowledge of the matter. If the witness does not have personal knowledge of the matter, then an objection for lack of foundation may be appropriate. An objection based on a lack of foundation is a general objection that applies to a variety of different evidentiary issues, such as failure to authenticate a document, failure to establish that a document qualifies as a business record, failure to

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

establish that a witness is qualified to give an opinion, lack of foundation to impeach a witness, and lack of first-hand knowledge.

The bar for admitting testimony under Rule 602 is low. Because most knowledge is inferential, personal knowledge includes opinions and inferences grounded in observations or other first-hand experiences. Absolute certainty of observation or of recollection is not required to establish personal knowledge.

Foundation is required for all pieces of evidence, including testimony, real evidence, and demonstrative evidence. For testimony, an attorney might ask a witness the following questions to lay foundation:

- "Hi, Mr. Smith. Can you please introduce yourself and spell your last name for the court?"
- "What do you do for a living?"
- "How do you know the defendant?"
- "What is your relationship like with the defendant?"

For an exhibit, an attorney might ask a witness the following questions to lay foundation for entering the exhibit into evidence:

- "Mrs. Smith, do you recognize this document?"

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

- “What is this document?”
- “How do you know the note was from the Defendant?”
- “Please take a look at the note and let the jury know, does this document fairly and accurately reflect the note and the condition it was in when you received it from the Defendant?”
- (To the Judge) “Your Honor, at this time, the Prosecution requests that the document be entered into evidence, as its authenticity and accuracy has been shown.”

Case Law (Lack of Foundation)

- **De La Torre v. Merck Enters., 540 F. Supp. 2d 1066, 1075 (D. Ariz. 2008)** (personal knowledge can be established through physical senses or when a witness testifies based on rational observations or experience)
- **Ege v. Yukins, 485 F.3d 364, 376 (6th Cir. 2007)** (“In this case there was no evidence offered to support the expert's conclusion regarding the probability that the defendant made the [bite] mark. In other words, the expert did not testify that he had identified particular features of the bite mark that had a known rate of occurrence. Neither did the expert did [sic] testify that he had multiplied these values to reach his conclusion.”)
- **Argo v. Blue Cross & Blue Shield of Kan., Inc., 452 F.3d 1193, 1200 (10th Cir. 2006)** (an affidavit attempting to be introduced into evidence cannot be admitted if no sufficient foundation can be laid to show that the witness actually perceived or observed that which he testified to in the affidavit)

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

- **Hilgraeve, Inc. v. Symantec Corp., 271 F. Supp. 2d 964 (E.D. Mich. 2003)** (personal knowledge may be proved by witness's own testimony but he must still set forth a factual basis for his claim of personal knowledge)
- **PAS Communications, Inc. v. Sprint Corp., 139 F. Supp. 2d 1149 (D. Kan. 2001)** (inferences and opinions must be grounded in observation or other first-hand personal experience; they must not be flights of fancy, speculations, hunches, intuitions, or rumors about matters remote from that experience)
- **U.S. v. Joy, 192 F.3d 761 (7th Cir. 1999)** (portion of 911 call referring to burglaries was supported by sufficient circumstantial evidence to make caller's inference reasonable)
- **U.S. v. Cantu, 167 F.3d 198 (5th Cir. 1999)** (witness could testify that defendant was boss of drug operation based on her personal observations of his interaction with others)
- **Bohannon v. Pegelow, 652 F.2d 729 (7th Cir. 1981)** (witness who observed arrest could testify she believed it was motivated by racial prejudice)

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

# ASSUMES FACTS NOT IN EVIDENCE (G)

**FRE 611(a)**

**An objection based on Assumes Facts Not in Evidence indicates that the attorney is asking a question, but some information contained in the question has not yet been established in the trial through a particular witness. The purpose of this type of question is to usher in facts before the jury that have yet to be proved or may never be proved during trial. The classic example of this type of question is "When did you stop beating your wife?" Regardless of how the witness answers that question, the implied assumption is that the witness beats his wife, when no evidence has been introduced to prove that assertion. Questions that assume facts not in evidence are objectionable on both direct and cross examination**

Examples

- "Mr. Booth, when did you stop kicking puppies for a hobby?" (when this witness has never admitted that he ever kicked puppies during his life)
- "In spite of your drinking that night, you claim you remember your husband was sitting to your left?" (and testimony regarding the witness drinking that night has not been introduced)

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

- “How much did your flu diminish your ability to observe events accurately on April 14th?” (and testimony about the witness suffering from the flu has not been introduced)
- “At the moment when you and the audience erupted into laughter, you were still oblivious to the murderous plot of George Atzerodt?” (and nothing has been established to show that the witness had any knowledge of an alleged “murderous plot of George Atzerodt”)
- “What is your response to the papers that reported you viewing President Lincoln as ‘the head of the Union Beast’?” (and no evidence has been introduced to show that the papers ever said that)

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

FRE 611

**(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 Cross-Examination.** Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility. The court may allow inquiry into additional matters as if on direct 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, an adverse party, or a witness identified with an adverse party.

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

Summary

Rule 611 deals generally with the scope of a trial judge's authority to exercise reasonable control over the trial proceedings, including the mode of interrogating witnesses and presenting evidence. The rule contemplates flexibility and discretion so that the truth will be ascertained and the interests of the public and the parties promoted. In short, the three main objectives of Rule 611 are to discover the truth in an efficient manner, avoid wasting time, and protect the witnesses from improper examination questions.

**Possible Objections under Rule 611:** Argumentative, Compound, Narrative, Leading, Mischaracterization, Nonresponsive, Asked & Answered, Vague, Assumes Facts not in Evidence

Although the phrase “Assumes Facts Not in Evidence” does not appear anywhere in the F.R.E., the court has discretion to sustain this objection under Rule 611. Furthermore, an objection under Rule 103(a) may also be permissible if the assumed facts would be inadmissible even if they were not “assumed.” Rule 103(a) states that inadmissible evidence should not be “suggested to the jury by any means.”

The ABA Standards for Criminal Justice provide that “[a] prosecutor should not ask a question which implies the existence of a factual predicate for which a good faith belief is lacking.” This objection is meant to prevent an attorney on cross-examination from sowing the seeds of a

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

fictitious accusation in the minds of jurors by framing questions in a certain way that inject information not yet introduced.

Case Law

- **U.S. v. Abair, 746 F.3d 260 (7th Cir. 2014)** (government lacked good faith basis for believing defendant lied on tax and school aid forms)
- **U.S. v. Taylor, 522 F.3d 731 (7th Cir. 2008)** (when sidebar revealed proposed questions were just shots in the dark without good faith basis, court properly barred them)
- **Friese v. Mallon, 940 S.W.2d. 37, 41 (Mo. App. 1997)** ("When an objection is made to a hypothetical question on the ground that it assumes facts not in evidence, counsel so objecting must point out what matters not in evidence are assumed in the hypothetical.")
- **U.S. v. Adames, 56 F.3d 737 (7th Cir. 1995)** (questions about alleged involvement in murder properly excluded when counsel failed to provide good faith basis for them)
- **U.S. v. Elizondo, 920 F.2d 1308 (7th Cir. 1990)** (when prosecution asks damning questions that go to central issue in case, those questions must be supported by evidence, available or inferable)
- **U.S. v. DeGeratto, 876 F.2d 576 (7th Cir. 1989)** (government lacked sufficient evidence to permit a good faith belief that defendant knowingly helped a prostitution operation)
- **Williams v. Mensey, 785 F.2d 631 (8th Cir. 1986)** (counsel should refrain from displaying a disputed document during trial to the jury in a way that suggests the content of the document is true when that document has not yet been introduced into evidence)

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

- **U.S. v. Davenport, 753 F.2d 1460 (9th Cir. 1985)** (new trial ordered where government failed to establish factual predicate for question about planning other bank robberies)

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

# HEARSAY (H)

## FRE 802

**Hearsay is an out-of-court statement offered in evidence to prove the truth of the matter asserted. For a statement to be considered hearsay, the evidence must be (1) an assertive statement (2) by a human being (3) still considered an out-of-court declarant at the time of trial and (4) offered at trial to prove the truth of the assertion.**

Examples

- "The official police report of the scene indicated that Abraham was about 5 feet away."
- "Tell us what you said in your statement regarding what happened when you heard this loud bang."
- "In the days after all of this, what did the doctors tell you?"
- "What did you tell the press?"
- "George told me that he shot the President, yesterday." (and George is not present at trial)

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

FRE 802. The Rule Against Hearsay

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

- a federal statute;
- these rules; or
- other rules prescribed by the Supreme Court.

Summary

The hearsay rule "is premised on the theory that out-of-court statements are subject to particular hazards. The declarant might be lying; he might have misperceived the events which he relates; he might have faulty memory; his words might be misunderstood or taken out of context by the listener. And the ways in which these dangers are minimized for in-court statements – the oath, the witness's awareness of the gravity of the proceedings, the jury's ability to observe the witness's demeanor, and, most importantly, the right of the opponent to cross-examine – are generally absent for things said out of court." ***Williamson v. United States*, 512 U.S. 594, 598 (1994); *U.S. v. Evans*, 216 F.3d 80, 85 (D.C. Cir. 2000)** (the problem with hearsay is that it deprives the opponent of the opportunity to cross-examine the person who uttered the statement at issue; "[C]ross-examination may be the greatest legal engine ever invented for the discovery of truth but it is not of much use if there is no one to whom it can be applied" (citation omitted)).

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

However, even if a statement falls within the definition of hearsay, the statement may still be admissible. The Federal Rules of Evidence provide numerous exceptions to the hearsay rule:

- Rule 801 sets out the exemption for statements or admissions by a party-opponent
- Rule 803 contains a list of 23 different exceptions to the rule.
- Rule 804 contains more exceptions if the declarant is unavailable as a witness.
- Rule 807 adds a final, "catch-all" exception.

Case Law (Generally)

- Definition of Hearsay Cases:
    - **U.S. v. Caira, 737 F.3d 455 (7th Cir. 2013)**
    - **U.S. v. Caraballo, 595 F.3d 1214 (11th Cir. 2010)**
    - **U.S. v. Martinez, 588 F.3d 301 (6th Cir. 2009)**
    - **U.S. v. DeCologero, 530 F.3d 36 (1st Cir. 2008)**
    - **U.S. v. Thomas, 453 F.3d 838 (7th Cir. 2006)**
    - **U.S. v. Wright, 343 F.3d 849 (6th Cir. 2003)**
    - **ACTONet, Ltd. v. Allou Health & Beauty Care, 219 F.3d 836 (8th Cir. 2000)**

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

- **In re C.R. Bard, Inc., MDL. No. 2187, Pelvic Repair System Products Liability Litigation, 810 F.3d 913 (4th Cir. 2016)** (product liability action for injury from medical mesh implant used to support internal organs; data safety sheet of the mesh material component manufacturer was introduced because it says the material is not suitable to be surgically implanted in humans; sheet was inadmissible to prove the truth of the matter asserted (i.e., that the material was unsuitable for human implantation), but was admissible to show defendant had notice that material might be unsuitable)
- **U.S. v. Lizarraga-Tirado, 789 F.3d 1107 (9th Cir. 2015)** (statements that are hearsay must be made by a human, not a machine; satellite Google Earth maps and automatically generated digital markers or labels with GPS coordinates are not hearsay because they are not human assertions; court itself typed in GPS coordinates and witnessed the automatic nature of the coordinates; court therefore took judicial notice that the markings were machine generated and thus not hearsay; maps likened to photographs, which are not hearsay; joins 3rd, 4th, 7th, 10th and 11th circuits that machine generated statements are not hearsay)
- **U.S. v. Picardi, 739 F.3d 1118 (8th Cir. 2014)** (effort to have witness testify about defendant's out-of-court statements properly excluded as inadmissible hearsay)
- **U.S. v. Wright, 739 F.3d 1160 (8th Cir. 2014)** (a statement offered to show its effect on the listener is not hearsay)
- **Kramer v. Wasatch County Sheriff's Office, 743 F.3d 726 (10th Cir. 2014)** (in Title VII action, coworker's statement about having to tolerate sexual harassment not offered for

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

truth but to show plaintiff heard what was said and that it contributed to her perception of workplace culture)

- **U.S. v. Yielding, 657 F.3d 688 (8th Cir. 2011), cert. denied, 132 S. Ct. 1777 (2012)** (Medicare fraud; defendant's wife during an FBI interview said, "we made a loan" to a nurse, who then improperly ordered products from defendant and his wife, were not offered to prove the truth of the matter asserted, but rather to prove that it was false – the "loan" was not a loan, but a kickback; therefore the statement was not hearsay)
- **U.S. v. Tann, 532 F.3d 868 (D.C. Cir. 2008), cert. denied, 129 S. Ct. 772 (2008)** (statements on eighteen forged checks instructing bank to pay money from employer's account "to the order of" defendant were not hearsay, since where the checks were offered only to prove that they had been created by defendant, not to prove the truth of any statement asserted on those checks)
- **U.S. v. Lamons, 532 F.3d 1251 (11th Cir. 2008), cert. denied, 129 S. Ct. 524 (2008)** (machine-generated compact disc (CD) of data collected from telephone calls made to airline's corporate toll-free number on the date that call concerning false bomb threat was made was not a testimonial "statement" within the meaning of the Confrontation Clause or the Federal Rules of Evidence; CD was the statement of a machine, not a person, as no human intervened at the time raw billing data was recorded onto telephone company's data reels)
- **U.S. v. Colon-Diaz, 521 F.3d 29 (1st Cir. 2008)** (directions from one person to another do not constitute hearsay and nonhearsay includes statements offered to supply a motive for the listener's action)

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

- **U.S. v. Quinones, 511 F.3d 289 (2d Cir. 2007)** (murder victim's out-of-court statements were not received for truth but as circumstantial evidence of his state of mind to explain his and defendants' future actions)
- **U.S. v. Serrano, 434 F.3d 1003 (7th Cir. 2006)** (insurance documents and related correspondence were not hearsay, since they were not introduced for truth of matters they asserted but simply as circumstantial evidence linking defendant to drug house)
- **U.S. v. Lewis, 436 F.3d 939 (8th Cir. 2006)** (the fact that past out-of-court statements were made by a witness now testifying at trial does not remove them from the scope of the hearsay rule if they are offered to prove the truth of the matters asserted)
- **Lust v. Sealy, Inc., 383 F.3d 580 (7th Cir. 2004)** (a memo normally is hearsay)
- Anderson v. United States, 417 U.S. 211, 94 S. Ct. 2253, 41 L. Ed. 2d 20 (1974)

Statements Which Are Not Hearsay

If an out-of-court statement is NOT offered to prove the truth of the matter it asserts, then the statement is not hearsay. For example, the following out-of-court statements can be admitted into evidence, as long as there is no issue as to truth:

- Greetings
- Pleasantries
- Expressions of gratitude
- Questions

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

- Verbal acts such as offers
- Instructions
- Warnings
- Demands
- Exclamations
- Expressions of emotion

News Media

Courts generally hold that newspaper articles are inadmissible hearsay when the article is offered as proof of facts stated in the article but was NOT written or acknowledged by the referenced party.

- **Southern Wine & Spirits v. Alcohol & Tobacco CTrL., 731 F.3d 799 (8th Cir. 2013)**
- **Boim v. Holy Land Foundation for Relief and Development, 511 F.3d 707 (7th Cir. 2007)**
- **Lyons Partnership, L.P. v. Morris Costumes, Inc., 243 F.3d 789 (4th Cir. 2001)** (evidence that children who saw costume at elementary school rally thought costume depicted popular children's television character (Barney), and of newspaper clippings in which reporters had erroneously identified costume as a depiction of Barney, was offered not to prove truth of matter asserted by children and newspaper articles, but merely to prove that children and newspaper reporters had expressed their belief that costume depicted Barney – the character was actually Duffy the Dragon)

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

- **Miles v. Ramsey, 31 F. Supp. 2d 869 (D. Colo. 1998)**

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

Police Investigations

If an out-of-court statement was made for the limited purpose of explaining why a police investigation was undertaken, then courts will generally allow such testimony.

- **U.S. v. Cass, 127 F.3d 1218, 1223 (10th Cir. 1997)** (quoting McCormick on Evidence (4th ed.) § 249 at 104) ("[A]n arresting or investigating officer should not be put in the false position of seeming just to have happened upon the scene and should be allowed some explanation of his or her presence and conduct. However, testimony that the officer acted 'upon information received,' or words to that effect should be sufficient.")
- **U.S. v. Reyes, 18 F.3d 65 (2d Cir. 1994)** (government may be permitted to offer out-of-court statement for purpose of showing investigating agent's state of mind to help jury understand agent's subsequent actions)

*Crawford v. Washington* – Criminal Cases

The Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him." **U.S. Const. amend. VI.** "The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." **Lilly v. Virginia, 527 U.S. 116, 124 (1999)**.

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

The *Crawford* case involved a tape-recorded statement given by the defendant's wife to police describing the stabbing with which the defendant was charged. Pursuant to the state marital privilege, the wife did not testify at trial, so the defendant had no opportunity to cross-examine her. The wife's statement was admitted at trial over objection because the trial court determined that the statement had "particularized guarantees of trustworthiness."

The Supreme Court overturned the trial court, holding that the Confrontation Clause bars the state from introducing out-of-court statements which are testimonial in nature, unless the declarant is unavailable as a witness and the defendant had a prior opportunity to cross-examine the declarant.

> **"[D]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with a jury because a defendant is obviously guilty. This is not what the Sixth Amendment proscribes."**

**Crawford v. Washington, 541 U.S. 36, 62 (2004).**

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

# F.R.E ARTICLE XIII (HEARSAY)

FRE 801. Definitions That Apply to this Article; Exclusions from Hearsay

The following definitions apply under this article:

**(a) Statement.** "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

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

**(c) Hearsay.** "Hearsay" means a statement that:

**(1)** the declarant does not make while testifying at the current trial or hearing; and

**(2)** a party offers in evidence to prove the truth of the matter asserted in the statement.

**(d) 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 was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

**(B)** is consistent with the declarant's testimony and is offered:

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

(i) 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

(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; 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.

The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

FRE 802. The Rule Against Hearsay

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

- a federal statute;
- these rules; or
- other rules prescribed by the Supreme Court.

FRE 803. Exceptions to the Rule Against Hearsay.

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.

**(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.

**(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,

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

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.

**(5)** ***Recorded Recollection.*** A record that:

**(A)** is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;

**(B)** was made or adopted by the witness when the matter was fresh in the witness's memory; and

**(C)** accurately reflects the witness's knowledge.

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

**(6)** ***Records of a Regularly Conducted Activity*****.** A record of an act, event, condition, opinion, or diagnosis if:

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

**(A)** the record was made at or near the time by — or from information transmitted by — someone with knowledge;

**(B)** the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

**(C)** making the record was a regular practice of that activity;

**(D)** all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

**(E)** the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

**(7)** ***Absence of a Record of a Regularly Conducted Activity*****.** Evidence that a matter is not included in a record described in paragraph (6) if:

**(A)** the evidence is admitted to prove that the matter did not occur or exist;

**(B)** a record was regularly kept for a matter of that kind; and

**(C)** the opponent does not show that the possible source of the information or other circumstances indicate a lack of trustworthiness.

**(8)** ***Public Records*****.** A record or statement of a public office if:

**(A)** it sets out:

**(i)** the office's activities;

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

**(ii)** a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

**(iii)** in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

**(B)** the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness.

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

**(10)** ***Absence of a Public Record*****.** Testimony — or a certification under Rule 902 — that a diligent search failed to disclose a public record or statement if:

**(A)** the testimony or certification is admitted to prove that

**(i)** the record or statement does not exist; or

**(ii)** a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind; and

**(B)** in a criminal case, a prosecutor who intends to offer a certification provides written notice of that intent at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the notice — unless the court sets a different time for the notice or the objection.

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

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

**(12)** ***Certificates of Marriage, Baptism, and Similar Ceremonies*****.** A statement of fact contained in a certificate:

**(A)** made by a person who is authorized by a religious organization or by law to perform the act certified;

**(B)** attesting that the person performed a marriage or similar ceremony or administered a sacrament; and

**(C)** purporting to have been issued at the time of the act or within a reasonable time after it.

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

**(14)** ***Records of Documents That Affect an Interest in Property*****.** The record of a document that purports to establish or affect an interest in property if:

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

**(A)** the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;

**(B)** the record is kept in a public office; and

**(C)** a statute authorizes recording documents of that kind in that office.

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

**(16)** ***Statements in Ancient Documents*****.** A statement in a document that is at least 20 years old and whose authenticity is established.

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

**(18)** ***Statements in Learned Treatises, Periodicals, or Pamphlets*****.** A statement contained in a treatise, periodical, or pamphlet if:

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

**(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.

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

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

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

**(22)** ***Judgment of a Previous Conviction*****.** Evidence of a final judgment of conviction if:

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

**(A)** the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;

**(B)** the conviction was for a crime punishable by death or by imprisonment for more than a year;

**(C)** the evidence is admitted to prove any fact essential to the judgment; and

**(D)** when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.

The pendency of an appeal may be shown but does not affect admissibility.

**(23) *Judgments Involving Personal, Family, or General History, or a Boundary*.** A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:

**(A)** was essential to the judgment; and

**(B)** could be proved by evidence of reputation.

**(24) [*Other Exceptions* .]** [Transferred to Rule 807.]

FRE 804. Hearsay Exceptions; Declarant Unavailable

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

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

**(1)** is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;

**(2)** refuses to testify about the subject matter despite a court order to do so;

**(3)** testifies to not remembering the subject matter;

**(4)** cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or

**(5)** is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:

**(A)** the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or

**(B)** the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

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

**(1)** ***Former Testimony*****.** Testimony that:

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

**(A)** was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

**(B)** is now offered against a party who had — or, in a civil case, whose predecessor in interest had — an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

**(2) *Statement Under the Belief of Imminent Death*.** In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

**(3) *Statement Against Interest*.** A statement that:

**(A)** a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

**(B)** is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

**(4) *Statement of Personal or Family History*.** A statement about:

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

**(A)** the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption, or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or

**(B)** another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

**(5) [*Other Exceptions*.]** [Transferred to Rule 807.]

**(6) *Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability*.** A statement offered against a party that wrongfully caused — or acquiesced in wrongfully causing — the declarant's unavailability as a witness, and did so intending that result.

FRE 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.

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

FRE 806. Attacking and Supporting the Declarant

When a hearsay statement — or a statement described in Rule 801(d)(2)(C), (D), or (E) — has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

FRE 807. Residual Exception

**(a) In General.** Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:

**(1)** the statement has equivalent circumstantial guarantees of trustworthiness;

**(2)** it is offered as evidence of a material fact;

**(3)** it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and

**(4)** admitting it will best serve the purposes of these rules and the interests of justice.

**(b) Notice.** The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

# HEARSAY 801 EXCLUSIONS

Case Law (Statements Not Hearsay under Rule 801)

- **U.S. v. Moon, 512 F.3d 359 (7th Cir. 2008)** (machine readouts are not "statements"; a machine is not a "witness against" anyone, since a machine cannot be cross-examined)
- **U.S. v. Carmichael, 379 F. Supp. 2d 1299 (M.D. Ala. 2005)** (statements introduced not for truth but to show they were false)
- **U.S. v. Moreno, 233 F.3d 937 (7th Cir. 2000)** (utterance of consent to search by police and subsequent retraction are verbal acts, and, as such, are admissible hearsay)
- **Quartararo v. Hanslmaier, 186 F.3d 91 (2d Cir. 1999)** (a question is not an assertion and cannot be a hearsay statement)
- **U.S. v. Bellomo, 176 F.3d 580 (2d Cir. 1999)** (statements offered as evidence of commands, threats or rules directed to witness are not hearsay)
- **Talley v. Bravo Pitino Restaurant, Ltd., 61 F.3d 1241 (6th Cir. 1995)** (racial slurs allegedly made by owners offered not for truth but demonstrate their racial attitudes)
- **Link v. Mercedes-Benz of North America, Inc., 788 F.2d 918 (3d Cir. 1986)** (publications offered for limited purpose of showing industry practice)
- **U.S. v. Pheaster, 544 F.2d 353 (9th Cir. 1976)** (hearsay evidence is admissible if it bears on the state of mind of the declarant and if that state of mind is an issue in the case)

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.

801(d)(1)(A) – Prior Inconsistent Statements

Rule 801(d)(1)(A) exempts witnesses' prior statements from hearsay if they are inconsistent with the present testimony and the prior statements were previously given under oath subject to the penalty of perjury in another trial, hearing, proceeding, or deposition.

- **U.S. v. Butterworth, 511 F.3d 71 (1st Cir. 2007), cert. denied, 129 S. Ct. 37 (2008)** (witness previously testified before grand jury, but current testimony was inconsistent with testimony she provided during the grand jury, and thus the grand jury testimony was admissible as prior inconsistent statements within meaning of hearsay exemption; at the grand jury, the witness testified that defendant sold weed and crack for a significant amount of money and that she met defendant's supplier ten or more times, but at trial, witness testified she only met defendant's supplier three or four times, that defendant did not make much money, and witness denied remembering what she told grand jury)

801(d)(1)(B) – Prior Consistent Statements

Rule 801(d)(1)(B) allows certain prior witness statements to be allowed into evidence if the following requirements are met:

- (1) Statement is consistent with prior testimony;

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

- (2) Prior testimony 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"; and
- (3) Prior testimony is offered "to rehabilitate the declarant's credibility as a witness when attacked on another ground."

- **U.S. v. Frazier, 469 F.3d 85 (3d Cir. 2006), cert. denied, 549 U.S. 1328 (2007)** (no abuse of discretion when trial court admitted officer's prior consistent statement as non-hearsay since counsel satisfied the recent fabrication element by suggesting the officer consciously altered his testimony)
- **U.S. v. Ruiz, 249 F.3d 643 (7th Cir. 2001)** (statements made at the time of the incident by the officer to another officer over a walkie-talkie that were consistent with the current testimony are admissible under 801(d)(1)(B) as well as the present sense impression rule)

<u>801(d)(1)(C) – Statements of Identification</u>

Rule 801(d)(1)(C) exempts a witness's prior identification of a person from the hearsay rule. This rule is most common when a witness is identifying a person for the second time after identifying that person in a police line-up the first time. Although a prior identification may overcome the hearsay rule, it still must overcome Constitutional hurdles, as well.

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

- **Kirby v. Illinois, 406 U.S. 682 (1972)** (right to counsel only applies to post-indictment lineups
- **Gilbert v. California, 388 U.S. 263 (1967)** (Sixth Amendment right to an attorney applies to lineup identifications)

801(d)(2)(A) – Admission by Party-Opponent

Under Rule 801(d)(2)(A), a party's own statement made in his own individual capacity is not hearsay when offered by an opposing party. Under this exception, basically anything the opposing party has ever said or done will be admissible as an exception to hearsay, as long as the admissions have something to do with the case.

- **U.S. v. Brinson, 772 F.3d 1314, 96 Fed. R. Evid. Serv. 148 (10th Cir. 2014)** (Facebook posting written by a "Twinchee Vanto" was sufficiently established to be by defendant because the phone number on the bill of sale for defendant's SUV matched the number that Twinchee Vanto gave Facebook as a contact number and witnesses said that was defendant's Facebook name and that he was known as "Twin"; therefore, party admission)
- **U.S. v. Monserrate-Valentin, 729 F.3d 31 (1st Cir. 2013)**
- **Jones v. National American University, 608 F.3d 1039 (8th Cir. 2010)** (job postings of a university were not inadmissible hearsay because they were party admissions under

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

Rule 801(d)(2)(A); one of the job postings was not hearsay at all because offered only to show that the university had a certain practice)

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

801(d)(2)(B) – Adoptive Admissions

Under Rule 801(d)(2)(B), evidence is not hearsay if the admission is adopted by a party-opponent. This evidence will only be admitted over hearsay upon a showing that the party-opponent heard, understood, and acquiesced in the statement. Adoption of an admission may manifest through language, conduct, and even silence.

- **F.T.C. v. Ross, 743 F.3d 886 (4th Cir. 2014)** (where defendant's own earlier affidavit adopted the contents of another's affidavit which had included a profit and loss summary; that summary was admissible in defendant's trial as an adoptive admission)
- **U.S. v. Duval, 496 F.3d 64 (1st Cir. 2007), cert. denied, 128 S. Ct. 2499 (2008) and cert. denied, 128 S. Ct. 952 (2008)** (statement that the defendant wanted to sell firearms, made in the presence of defendant in a small room, with defendant remaining silent, was properly admissible as adoptive admission by defendant because adequate foundation was laid from which it could reasonably be inferred that the defendant heard the statement in question)
- **U.S. v. Miller, 478 F.3d 48 (1st Cir. 2007), cert. denied, 551 U.S. 1158 (2007)** (transcript of defendant's change of plea hearing reporting judge's statement of the facts was properly admissible as adoptive admission since defendant remained silent during the hearing and failed to respond to judge's statement when given ample opportunity)

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

- **U.S. v. Magbaleta, 234 Fed. Appx. 718 (9th Cir. 2007)** (National Park Service medical screening form was admissible as adoptive admission in criminal prosecution because defendant signed the form, thereby manifesting an adoption or belief in its truth)
- **Schering Corp. v. Pfizer Inc., 189 F.3d 218 (2d Cir. 1999)** (Pfizer employee helped design physician's survey and later wrote report analyzing its results; survey was adoptive admission)
- **U.S. v. Jinadu, 98 F.3d 239 (6th Cir. 1996)** (defendant replied "yes" to agent's question "you know that's China White heroin" adopted the contents of the question)
- **U.S. v. Warren, 42 F.3d 647 (D.C. Cir. 1994)** (sworn affidavit submitted to magistrate to obtain search warrant was admissible as non-hearsay statement offered against the government which had "manifested an adoption or belief in its truth.")
- **Alvord-Polk, Inc. v. F. Schumacher & Co., 37 F.3d 996 (3d Cir. 1994)** (statements by trade association president and its chief executive in article written by association employee and appearing in its newsletter were adoptive admissions)

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

801(d)(2)(C) – Admission by Authorized Person

Under Rule 801(d)(2)(C), a statement is not hearsay if it "was made by a person whom the party authorized to make a statement on the subject."

- **U.S. v. Valencia, 826 F.2d 169 (2d Cir. 1987)** (defense attorney's statements to prosecutor during informal meeting to obtain defendant's release on bond were within the scope of Rule 801(d)(2)(C); however, court rejected them on policy grounds)
- **U.S. v. Iaconetti, 540 F.2d 574 (2d Cir. 1976)** (businessman solicited by government official for bribe who carries message back to his partners is speaking as agent for government official; not hearsay because of 801(d)(2)(C))

801(d)(2)(D) – Admission by Agent

Under Rule 801(d)(2)(D), a statement is not hearsay if it "is offered against an opposing party and . . . was made by the party's agent or employee on a matter within the scope of that relationship and while it existed." In order for the agent exception to apply, the party offering the statement must show that (1) an agency or employment relationship existed between the declarant and the party, (2) the statement was made during the agency or employment relationship, and (3) the statement concerned a matter within the declarant's scope of agency or employment.

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

- **Marra v. Philadelphia Housing Authority, 497 F.3d 286 (3d Cir. 2007)** (trial court properly admitted testimony against the company by employee regarding statements from supervisor, as non-hearsay statements under (d)(2)(D), since as his supervisor he was authorized to speak with his employee about his perception of the company's disciplinary practices; supervisor speaking as authorized agent of the company)
- **Marcic v. Reinauer Transp. Companies, 397 F.3d 120 (2nd Cir. 2005)**
- **Guzman v. Abbott Laboratories, 59 F. Supp. 2d 747 (N.D. Ill. 1999)** (the statement must have been made during the scope of employment of the declarant for it to be admissible)
- **Hilao v. Estate of Marcos, 103 F.3d 767 (9th Cir. 1996)** (statements made to torture victims by members of the Philippine military were vicarious admissions by then-President Ferdinand Marcos under Rule 801(d)(2)(D) and were admissible to show he ordered their abuse or knew of and failed to prevent it)
- **Boren v. Sable, 887 F.2d 1032 (10th Cir. 1989)**
- **Nekolny v. Painter, 653 F.2d 1164 (7th Cir. 1981)** (an agent "who speaks on any matter within the scope of his agency or employment during the existence of that relationship is unlikely to make statements damaging to his principal or employer unless those statements are true.")

<u>801(d)(2)(E) – Admission by Co-Conspirator</u>

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

Under Rule 801(d)(2)(E), "[a] statement is not hearsay if . . . [it] is offered against an opposing party and was made by the party's coconspirator during and in furtherance of the conspiracy." During the course of a conspiracy, an admission by one conspirator is considered an admission by all. For an admission by a co-conspirator to be admitted over hearsay, the proponent must establish that (1) there was a conspiracy, (2) its members included the declarant and the party against whom the statement is now being offered, and (3) the statement was made both (a) during the course of, and (b) in furtherance of the conspiracy.

- **Bourjaily v. United States, 483 U.S. 171 (1987)** (seminal case on admitting co-conspirator admissions)
- **U.S. v. Conrad, 507 F.3d 424, 429 (6th Cir. 2007)** (there must be some independent corroborating evidence of the defendant's participation in the conspiracy for the hearsay statement to come in)
- **U.S. v. SKW Metals & Alloys, Inc., 195 F.3d 83 (2d Cir. 1999)** (company president took notes to memorialize information supplied by co-conspirators, which were held to be statements of co-conspirators)
- **U.S. v. McGlory, 968 F.2d 309 (3d Cir. 1992)** ("owe sheets" found in defendant's trash showing sales of heroin were admissible under Rule 801(d)(2)(E) because there was sufficient evidence to show that the declarant was, more likely than not, a co-conspirator)
- **U.S. v. Broome, 732 F.2d 363 (4th Cir. 1984)** (conspiratorial statements were made during marital communication in which commission of a crime was discussed, to which

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

both spouses are alleged participants; held: marital privilege does not apply, thus applicability of 802(d)(2)(E) not limited)

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

# HEARSAY 803 EXCEPTIONS

803(1) – Present Sense Impression

Under Rule 803(1), a statement as a present sense impression can be admitted over the hearsay rule if (1) the statement describes an event or condition without calculated narration, (2) the speaker has personally perceived the event or condition described, and (3) the statement must have been made while the speaker was perceiving the event or condition, or immediately thereafter.

- **Greene v. B.F. Goodrich Avionics Systems, Inc., 409 F.3d 784 (6th Cir. 2005)** (pilot's statement "I think my gyro just quit" seconds before his fatal helicopter crash was admissible as present sense impression)
- **U.S. v. Blakey, 607 F.2d 779 (7th Cir. 1979)** (remarks made to a friend by the now-deceased extortion victim twenty-three minutes after the alleged extortion were sufficient to qualify as "immediately thereafter" for a present sense impression exception)
- **Hilyer v. Howat Concrete Co., Inc., 578 F.2d 422 (D.C. Cir. 1978)** (fifteen to forty-five minutes is too long a time between the perception and the statement to qualify as a present sense impression but not to qualify as an excited utterance, where the declarant was still under the excitement of witnessing a terrible accident)

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.

803(2) – Excited Utterance

Rule 803(2) allows any "statement relating to a startling event or condition made while the declarant was under the stress of excitement that it caused." For a statement to qualify as an excited utterance, (1) a startling event must have occurred, (2) the declarant observed the event and made the statement under the stress of excitement caused by the startling event, and (3) the statement must relate to the startling event.

- **U.S. v. Boyce, 742 F.3d 792 (7th Cir. 2014)** (911 call made after going upstairs and leaving the scene of the incident admissible as excited utterance; statement need not necessarily be contemporaneous with the exciting event reported, just with the excitement caused by it; Judge Posner's concurrence attacks the scheme of categorical hearsay exceptions in the Federal Rules of Evidence as a system of "folk psychology")
- **U.S. v. Wilcox, 487 F.3d 1163 (8th Cir. 2007)** (sexual abuse victim's call to police department qualified under the excited utterance exception where the call was made only a short time period after the act and it was made at the victim's first opportunity to call the police)
- **U.S. v. Clemmons, 461 F.3d 1057 (8th Cir. 2006)** (statement must be spontaneous, excited or impulsive rather than product of reflection and deliberation)
- **U.S. v. Tocco, 135 F.3d 116 (2d Cir. 1998)** (a statement made by a "hyped" and "nervous" defendant three hours after learning there were people in the building he had burned down earlier that evening was admissible as an excited utterance)

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

803(3) – Then-Existing Mental, Emotional, Physical Condition (State of Mind)

Rule 803(3) creates an exception to hearsay by admitting 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)." For the statement to be admissible, it must have been contemporaneous with the state of mind sought to be proved, and the declarant must not have had an opportunity to reflect and possibly fabricate or misrepresent his thoughts.

- **D.J.M. ex rel. D.M. v. Hannibal Public School Dist. No. 60, 647 F.3d 754 (8th Cir. 2011)** (emails about threats received from plaintiff to commit violent acts at school admitted under 803(3))
- **U.S. v. Hyles, 479 F.3d 958 (8th Cir. 2007)** (co-conspirator's statement that he planned to kill victim admissible as his "then-existing state of mind")
- **Citizens Financial Group, Inc. v. Citizens Nat. Bank of Evans City, 383 F.3d 110 (3d Cir. 2004)** (bank tellers' testimony about customer confusion about similarly named banks)
- **U.S. v. Reyes, 239 F.3d 722 (5th Cir. 2001)**
- **U.S. v. Hartmann, 958 F.2d 774 (7th Cir. 1992)** (evidence that the victim told others he feared his wife and her lover was admissible as his then-existing state of mind to show it was unlikely that the victim would name his wife as his beneficiary of a life insurance policy)

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

- **Nuttall v. Reading Co., 235 F.2d 546 (3d Cir. 1956)** (error not to admit decedent's statement to co-worker that he was not feeling well and had requested day off but was refused)

803(4) – Statements for Purposes of Medical Diagnosis or Treatment

Rule 803(4) provides that statements made for and reasonably pertinent to purposes of medical diagnosis and treatment and describing medical history, past or present symptoms, or sensations, their inception, or their general cause, are admissible over the hearsay rule.

The proponent must show that (1) the declarant's motive in making the statement must be consistent with the purposes of promoting treatment; and (2) the content of the statement must be such as is reasonably relied on by a physician in treatment or diagnosis.

- **Smith v. Pfizer Inc., 688 F.Supp.2d 735 (M.D. Tenn. 2010)** (statements to pharmacist admissible under medical diagnosis exception)
- **U.S. v. Gonzalez, 533 F.3d 1057 (9th Cir. 2008)** (victim's statement to nurse that she had been sexually assaulted admitted under medical diagnosis exception)
- **Willingham v. Crooke, 412 F.3d 553 (4th Cir. 2005)**

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

- **Danaipour v. McLarey, 386 F.3d 289 (1st Cir. 2004)** (mother's statements to doctor, recounting minor daughter's prior statements, were made for purposes of medical treatment)
- **Davignon v. Clemmey, 322 F.3d 1 (1st Cir. 2003)** (statements made by plaintiffs to a family therapist and social worker not licensed to practice medicine concerning their extreme emotional distress as a result of defendants' campaign of harassment were admissible)
- **Swinton v. Potomac Corp., 270 F.3d 794 (9th Cir. 2001)** (exhibits containing statements by the plaintiff relating acts of racial harassment to psychologists were admissible as a routine part of the psychologists' medical diagnosis procedures)

803(5) – Recorded Recollection

Rule 803(5) provides an exception to the hearsay rule when a witness cannot testify from refreshed memory and requires a memorandum or record of an event. The theory is that if a witness wrote something down during the event, then that record is presumed to be fairly reliable. In order for a writing under Rule 803(5) to be admissible, (1) the record must pertain to a matter about which the witness once had personal knowledge; (2) the witness must now demonstrate insufficient recollection about the matter to testify fully and accurately; (3) the record was made or adopted by the witness when the matter was fresh in the witness's memory; and (4) the record reflects the witness's prior knowledge accurately.

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

- **U.S. v. Kortright, 2011 WL 4406352 (S.D.N.Y. 2011)** (transcript of police officer's grand jury testimony qualified as recorded recollection, even though testimony occurred two months after the arrest)
- **U.S. v. Garcia, 282 Fed. Appx. 14 (2d Cir. 2008)** (police officers permitted to read from arrest reports and booking sheets under recorded recollection exception)

803(6) – Business Records

Rule 803(6) provides that business records are exempt from the hearsay rule. The theory of this exemption is that business records are fairly reliable due to their repetitive nature and the fact that profits and jobs are contingent on accurate business records. For a record to constitute a business record, it must be established that (1) the record was made at or near the time of the event or transaction described, (2) the record was made by a person with knowledge of the event or transaction described, (3) the record was made in the course of a regularly conducted business activity, (4) it was a part of that regularly conducted business activity to make and keep the record, and (5) the witness is able to identify the document from actual knowledge of its preparation, is the business custodian of the record, or is a qualified person to sponsor the records for some other reason.

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

- **U.S. v. Cone, 714 F.3d 197 (4th Cir. 2013)** (e-mails sent or received by a business are not necessarily business records, but may be if they comply with the rule)
- **U.S. v. Moon, 513 F.3d 527 (6th Cir. 2008)** (computer records of purchases from various drug companies were "data compilations" and thus business records under Rule 803(6))
- **U.S. v. Ary, 518 F.3d 775 (10th Cir. 2008)** (803(6) exists because business records have high degree of reliability because businesses have incentives to keep accurate records)
- **Haag v. U.S., 485 F.3d 1 (1st Cir. 2007)** (testimony from IRS employee that ordinary procedures were to mail letters such as the one at issue was sufficient under 803(6) absent affirmative evidence to the contrary)

803(7) – Absence of Business Records

In a similar vein as Rule 803(6), the *absence* of business records can also be admitted into evidence over the hearsay rule.

- **U.S. v. Munoz-Franco, 487 F.3d 25 (1st Cir. 2007)** (court properly admitted minutes from board meeting as evidence that lack of material information about transaction in minutes indicated that the information was not provided to the board)
- **U.S. v. Zeidman, 540 F.2d 314 (7th Cir. 1976)** (an oral report within a business that there was no record of a check being sent was held to be admissible)

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

803(8)-(10) – Public Records and Reports

Rules 803(8), 803(9), and 803(10) allow for public records to be admitted over the hearsay rule. Records, reports, statements or data compilations, in any form, of public offices or agencies which set forth: (a) the activities of the office or agency; (b) matters observed in the course of official duties; or (c) in civil actions, factual findings resulting from an investigation made pursuant to authority granted by law may be admitted unless the sources of information or other circumstances indicate lack of trustworthiness. The policy behind this exception is the assumption that a public official will perform his/her duty properly and honestly.

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

Subdivision (8)

- **U.S. v. Lopez-Moreno, 420 F.3d 420 (5th Cir. 2005)** (computer printouts from Bureau of Immigration and Customs Enforcement for van passengers were admissible as public records)
- **U.S. v. Midwest Fireworks Mfg. Co., Inc., 248 F.3d 563 (6th Cir. 2001)** ("[a]dmitting the records under the 803(8) exception is a practical necessity that must be afforded to government officers 'who have made in the course of their duties thousands of similar written hearsay statements concerning events coming within their jurisdiction'")
- **Bridgeway Corp. v. Citibank, 201 F.3d 134 (2d Cir. 2000)** (properly admitting U.S. State Department Country Report indicating that the Liberian judicial system was corrupt)
- **Paolitto v. John Brown E. & C., Inc., 151 F.3d 60 (2d Cir. 1998)** (trial courts have discretion to determine whether EEOC or equivalent state agency findings are admissible as a public record; 5th and 9th Circuits have adopted a per se rule of admissibility for agency probable cause determinations)

Subdivision (9) – vital statistics

- **Weiner v. Metropolitan Life Ins. Co., 416 F. Supp. 551 (E.D. Pa. 1976)** (death certificate; cause of death; prima facie evidence admitted)

Subdivision (10) – absence of public record or entry

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

- **U.S. v. Parker, 761 F.3d 986 (9th Cir. 2014)** (Forest Service officer's testimony he searched Forest Service records and found no permit, was accepted as evidence that defendant had no permit)
- **U.S. v. Bowers, 920 F.2d 220 (4th Cir. 1990)** (in order to prove taxpayers failed to pay income taxes, government allowed to use sponsoring IRS witness, who checked IRS nationwide computer records under Rule 803(8) and (10), as long as witness conducted diligent search and was subject to cross-examination at trial)
- **U.S. v. Robinson, 544 F.2d 110 (2d Cir. 1976)** (the trustworthiness of records is a threshold precondition to be decided by the judge and a confused, indefinite, less-than-diligent search is inadmissible to prove the absence of a record)

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

803(11) – Records of Religious Organizations

Typically, church and other religious organization records are admitted over the hearsay bar.

- However, … **Hall v. C.I.R., 729 F.2d 632 (9th Cir. 1984)** (Rule 803(11) does not cover church statements of contributions)

803(12)-(14) – Personal or Family History, Interest in Property

Rules 803(9), (11), (12), (13), (19) and 804(b)(4) all allow for statements concerning family history, such as the date and place of birth and death of members of the family and facts about marriage, descent, or relationship.

803(14) allows statements affecting interest in property to be admitted over hearsay.

- **Lewis v. Marshall, 30 U.S. 470 (1831)** (entry in family Bible admissible as evidence of date of landowner's death)

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

803(15) – Statements in Documents Affecting an Interest in Property

Rule 803(15) allows statements in a document to be admitted into evidence that affect an interest in property. The requirements for admissibility are (1) that the document has been authenticated and is trustworthy, (2) that it affects an interest in property, and (3) that the dealings with the property since the document was made have been consistent with the truth of the statement.

- **Kelly v. Enbridge (U.S.) Inc., 2008 WL 2123755 at *7 (C.D. Ill. 2008)** (assignment agreements showed name changes that affected the chain of title to easement in dispute)
- **Compton v. Davis Oil Co., 607 F. Supp. 1221 (D. Wyo. 1985)** (warranty deeds)

803(16) – Ancient Documents

Rule 803(16) provides that ancient documents are not hearsay. An "ancient document" is a (a) document that is at least 20 years old, (b) is free from suspicious alterations, and (c) has been in proper custody. Authenticity of the ancient document is subject to Rule 901.

- **U.S. v. Mandycz, 447 F.3d 951 (6th Cir. 2006**) (Soviet interrogation records)

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

- **U.S. v. Stelmokas, 100 F.3d 302 (3d Cir. 1996)** (documents from Lithuanian archives detailing defendant's Nazi service during World War II)
- **Dartez v. Fibreboard Corp., 765 F.2d 456 (5th Cir. 1985)** (1940s memos discussing dangers of asbestos)
- **Compton v. Davis Oil Co., 607 F. Supp. 1221 (D. Wyo. 1985)** (warranty deeds)
- **Bell v. Combined Registry Co., 397 F. Supp. 1241 (N.D. Ill. 1975)** (old newspaper articles)

803(17) – Market Reports, Commercial Publications

Rule 803(17) allows market quotations, tabulations, lists, directories, and other published compilations generally used and relied upon by the public or by persons in particular occupations to be admitted over the hearsay bar.

- **Level 3 Communications, LLC v. Floyd, 2011 WL 1106420 (M.D. Tenn. 2011)** (telecommunications tariff report and price guide)
- **Fond du Lac Bumper Exchange, Inc. v. Jui Li Enterprise Co., Ltd., 753 F.Supp.2d 792 (E.D.Wis. 2010)** (U.S. Customs records)
- **In re Young, 390 B.R. 480 (Bankr. D. Me. 2008)** (Kelley Blue Book values may be accepted as reliable market reports or compilations)

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

- **U.S. v. Masferrer, 514 F.3d 1158 (11th Cir. 2008)** (historical financial data derived from computerized records of Bloomberg Financial Service)
- **Elliott Associates, L.P. v. Banco de la Nacion, 194 F.R.D. 116 (S.D.N.Y. 2000)** (interest rates obtained from Federal Reserve Board website and Bloomberg reporting service)
- **U.S. v. Cassiere, 4 F.3d 1006 (1st Cir. 1993)** (court approved admission of publication called County Comps, generally used by appraisers to estimate value of properties)
- **U.S. v. Goudy, 792 F.2d 664 (7th Cir. 1986)** (Polk's Bank Directory)

803(18) – Learned Treatise

Rule 803(18) allows statements contained in published treatises, periodicals, or pamphlets to be admitted over the hearsay bar.

- **U.S. v. Norman, 415 F.3d 466 (5th Cir. 2005)**
- **Costantino v. David M. Herzog, M.D., P.C., 203 F.3d 164 (2d Cir. 2000)** (videotape produced by American College of Obstetricians and Gynecologists admissible as learned treatise; it is "overly artificial to say that information that is sufficiently trustworthy to overcome the hearsay bar when presented in a printed learned treatise loses the badge of trustworthiness when presented in a videotape")

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

# HEARSAY 804–807 EXCEPTIONS

804(a)(1)-(5) – Unavailable Witness

If a witness is present at trial, that witness may be exempted from testifying due to a judicially sustained claim of privilege (subsection (1)), or the witness may refuse to testify (subsection (2)). However, if no privilege claim is present, the judge may order the witness to testify. Again, however, the witness may assert his or her Fifth Amendment privilege. Under these circumstances, the witness is still considered "unavailable."

- **U.S. v. Peterson, 100 F.3d 7 (2d Cir. 1996)** (a criminal defendant cannot make himself unavailable by invoking the Fifth Amendment so as to introduce his own grand jury testimony under Rule 804(b)(1))

Under subsection (3), the witness may claim that he/she has a lack of memory.

- **U.S. v. Davis, 551 F.2d 233 (8th Cir. 1977)** (where a prosecution witness denied recalling a statement made by the defendant admitting to other robberies, the witness's testimony was "unavailable" within the meaning of Rule 804(a)(3), and the prosecutor was properly permitted to read the witness's testimony at another trial of defendant's)

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

Subsection (4) provides that death or physical illness constitutes "unavailability."

Subsection (5) states that absence may be considered "unavailable," but there must be a showing of a reasonably diligent attempt to find and procure the attendance of the witness.

- **Perricone v. Kansas City Southern Ry. Co., 630 F.2d 317 (5th Cir. 1980)** (when the plaintiff simply stated, "we have made a diligent effort to locate (the witness) and have been unable to do so. We don't know where the man is at all," it was reversible error to admit testimony given by that witness in another personal injury case, under the former testimony hearsay exception of Rule 804(b)(1); immediately after trial, a railroad claims agent found the witness within two hours at work within a mile of courthouse, the witness had established a residence nearby, and an old phone number played a recorded message stating a new phone number)

804(b)(1) – Former Testimony

Rule 804(b)(1) provides an exception for former testimony from an unavailable declarant. For such testimony to be admitted, (1) the declarant must be unavailable, (2) the testimony must have been taken at a hearing or deposition in the same or another proceeding, and (3) the party against whom the testimony is now offered must have had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

- **U.S. v. Loggins, 486 F.3d 977 (7th Cir. 2007)**
- **U.S. v. Fischl, 16 F.3d 927 (8th Cir. 1994)** (a co-defendant's testimony at a prior detention hearing was inadmissible against the prosecution under Rule 804(b)(1) because the prosecution did not have a similar motive to develop the testimony through cross-examination)
- **U.S. v. Salerno, 505 U.S. 317 (1992)** (when the statement at issue was made to a grand jury and is now being offered against government at trial, Rule 804(b)(1) does not contain an implicit limitation permitting the "similar motive" requirement to be waived in the interest of adversarial fairness)

804(b)(2) – Dying Declaration

Rule 804(b)(2) allows certain dying declarations to be admitted over the hearsay rule. In order for a dying declaration to be admitted, (1) the declarant must have believed his death was imminent (regardless if he/she actually died), (2) the statement was based on personal knowledge, and (3) the statement concerns the cause or circumstances of what the declarant believed to be his imminent death. It is important to recognize that NOT all dying declarations are admissible. Only those that meet the three criteria above are admissible.

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

- **U.S. v. Shields, 497 F.3d 789 (8th Cir. 2007)** (the nature and extent of the declarant's injuries must be so severe that he obviously must have felt or known that he could not survive)
- **Webb v. Lane, 922 F.2d 390 (7th Cir. 1991)** (reasonable to infer declarant knew seriousness of his condition because he was attached to life support with six gunshot wounds)
- **U.S. v. Mobley, 421 F.2d 345 (5th Cir. 1970)** (court looked at gravity of declarant's wounds in determining his awareness of death)

804(b)(3) – Statement Against Interest

Rule 804(b)(3) states that a statement of fact that goes against the declarant's interests is admissible over the hearsay bar, provided that the declarant had personal knowledge of the fact and is now unavailable to testify as a witness. The proponent of such evidence must establish that (1) the declarant is unavailable to testify and (2) the statement was against the declarant's interest.

- **U.S. v. Gupta, 747 F.3d 111 (2nd Cir. 2014)** (insider trading statements corroborated by events occurring shortly after exchange of information admitted under 804(b)(3))
- **U.S. v. Halk, 634 F.3d 482 (8th Cir. 2011)** (declarant's statement that the gun found by police belonged to his son was not a statement against declarant's own interest)

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

- **United Technologies Corp. v. Mazer, 556 F.3d 1260 (11th Cir. 2009)** (statement of officer and part owner of defendant corporation to government concerning a sale involving his company would tend to deplete the financial interests of the company, and hence his wealth, and was therefore to some extent against his pecuniary interest; but he would have been more concerned with the government investigation into him, and the statement helped him in that regard, so on balance the statement was not against his interest)

805 – Multiple Hearsay (Hearsay Within Hearsay)

Rule 805 allows hearsay within hearsay, but only if each portion of the hearsay meets an exception to the hearsay rule.

Often times, hearsay within hearsay involves business records. Where the source of the information in a business record and the recorder of that information are not the same person, the business record will be treated as hearsay (the business record itself) within hearsay (the recorder of that information). However, if the business record was created during the ordinary course of business, then that record may be excused from the hearsay rule altogether under the business record exception, Rule 803(6).

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

- **U.S. v. Kuo, 2011 WL 145471 (E.D.N.Y 2011)** (911 recordings fell under the business record exception, but the recordings themselves contained therein were admissible only if statements made by 911 callers fell under another independent hearsay exception)
- **Grizzell v. City of Columbus Div. of Police, 461 F.3d 711 (6th Cir. 2006)** (both statements were party admissions – the employee's statement qualified under party admission, since the statement was made within the scope of his agency)
- **U.S. v. Taylor, 462 F.3d 1023 (8th Cir. 2006)** (police report containing citizen's report of a missing handgun was properly excluded by district court since it contained double hearsay and did not fall under the government records hearsay exception because police reports are generally excluded except the firsthand observations by an officer)
- **U.S. v. Gurr, 471 F.3d 144 (D.C. Cir. 2006), cert. denied, 550 U.S. 919, 127 S. Ct. 2146 (2007)** (trial court erred in admitting statements because of double hearsay in report)
- **Munley v. Carlson, 125 F. Supp. 2d 1117 (N.D. Ill. 2000)** (witness testified that statements made by plaintiff and his friend about supporting claims of police brutality and splitting proceeds of civil suit were admissible where first level was party admission under Rule 801(d)(2)(A) and second level was adoptive admission under Rule 801(d)(2)(B))
- **Cook v. Arrowsmith Shelburne, Inc., 69 F.3d 1235 (2d Cir. 1995)** (plaintiff testified that her supervisors told her she was being dismissed because general manager did not respect women in positions of authority and wanted a man to replace her; the supervisors' statements were admissions by agents of party opponent under Rule 801(d)(2)(D) and not hearsay)

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

- **In re Greenwood Air Crash, 924 F. Supp. 1511 (S.D. Ind. 1995)** (police report of air crash containing statements by spouses of pilot and passenger about the purpose for flight were admitted as admissions and under the Rule 803(3) "state of mind" exception)
- **Armbruster v. Unisys Corp., 32 F.3d 768 (3d Cir. 1994)** (an out-of-court statement made by the vice president of the defendant corporation that the company wanted to weed-out older employees was inadmissible double hearsay in an age discrimination case where the identity of the original speaker to the vice president was unknown)
- **U.S. v. Sallins, 993 F.2d 344 (3d Cir. 1993)** (a record that a 911 call was made was admissible under Rule 803(8), but the actual details of the call were inadmissible as the second level of hearsay)
- **Hill v. Rolleri, 615 F.2d 886 (9th Cir. 1980)** (a report prepared by an officer investigating the accident in which a car and a tractor-trailer truck collided was possibly incorrectly admitted under the public records hearsay exception because the report contained statements of a witness, thereby making it subject to double hearsay)
- **Carden v. Westinghouse Elec. Corp., 850 F.2d 996 (3d Cir. 1988)** (a statement by a supervisor to the plaintiff that the company wanted a younger person for a new position was inadmissible double hearsay in an age discrimination case where the identity of the original speaker was unknown)

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

807 – Residual ("Catch-All") Exception

Rule 807 is the "catch-all" provision, which grants admissibility of trustworthy statements that are "not specifically covered by" other exceptions in Article XIII of the Federal Rules of Evidence. In order for a piece of evidence to come in under Rule 807, there must be (1) circumstantial guarantees of trustworthiness; (2) materiality; (3) probative value; (4) interests of justice; and (5) notice.

- **In re Slatkin, 525 F.3d 805 (9th Cir. 2008)** (plea agreement admissible under residual exception)
- **U.S. v. Banks, 514 F.3d 769 (8th Cir. 2008)** (ATF purchase form obtained from pawn shop that sold gun had circumstantial guarantee of trustworthiness)
- **In re Columbia Securities Litigation, 155 F.R.D. 466 (S.D.N.Y. 1994)** (articles from Forbes Magazine and Reuters admitted under residual exception)

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

# IMPROPER CHARACTER EVIDENCE (I)

**FRE 404**

**Questions that trigger improper character evidence elicit testimony for the purpose of proving that a person acted in a particular way on a particular occasion based on the character or disposition of that person. The rule largely refers to a person's tendency to act in conformity with a particular trait, such the traits of violence, dishonesty, or criminal activity. This is a general rule of exclusion that applies to both civil and criminal proceedings.**

Examples

- "Would you agree or disagree that your husband was a peaceful man?"
- "Oh, when I first met Abraham, he was one of the gentlest and kind men on earth. He was just a lawyer. He became President much later."
- "Had you ever previously seen John Wilkes Booth act violently?"
- "Did Mr. Booth's work in *Julius Caesar* affect his propensity for violence?"

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

FRE 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 a Defendant or Victim in a Criminal Case*****.** The following exceptions apply in a criminal case:

**(A)** 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)** subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may:

**(i)** offer evidence to rebut it; and

**(ii)** offer evidence of the defendant's same trait; and

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

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

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

**(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 a 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 request by a defendant in a criminal case, the prosecutor must:

**(A)** provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and

**(B)** do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice.

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

Summary

Typically, character evidence is only admitted for three purposes at trial: (1) to prove character, if character is a substantive issue in the litigation; (2) to prove, through circumstantial evidence, an aspect of an individual's conduct; or (3) impeach or strengthen the credibility of a witness.

Character evidence may be offered in three forms:

1. as opinion
2. as reputation evidence, and
3. as evidence of specific instances of conduct.

Several exceptions exist for the rule against character evidence. One of the most commonly used exceptions for character evidence is habit evidence, which is generally admissible. Evidence may be submitted for the purpose of proving that an individual acted in a particular way on a particular occasion in question based on that person's tendency to *reflexively* respond to a particular situation in a particular way (See Rule 406).

Rule 404(b) is also important to note, since it expresses the principle that prior misconduct is inadmissible to show criminal propensity, i.e., "he did it once, so he will do it again!" This type of evidence is considered too prejudicial for the jury in most instances.

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

404(b) also lists admissible reasons for character evidence: motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

Overall, character evidence is generally inadmissible. However, a criminal defendant may present character evidence about himself or about the victim; the prosecution will be allowed to present rebuttal character evidence in this instance. Also, if the character evidence is introduced to attack credibility under Rules 607, 608, and 609, it may be introduced.

Case Law (Improper Character Evidence)

- **U.S. v. Wallace, 759 F.3d 486 (5th Cir. 2014)** (defendants charged with distributing meth; prior state convictions for possession and manufacture of meth permitted as long as jury instructed it is only to consider such evidence to show knowledge, intent, and absence of mistake – i.e., that the two defendants knew each other as more than friends and were familiar with the meth business)
- **Zubulake v. UBS Warburg LLC., 382 F. Supp. 2d 536 (S.D.N.Y. 2005)** (defendant employer could not use evidence of plaintiff's prior employment to show she had a propensity for certain performance deficiencies)
- **U.S. v. Fulmer, 108 F.3d 1486 (1st Cir. 1997)** (evidence that the defendant was seeking vengeance for a difficult family relationship was admissible to show his motive for threatening a federal agent who refused to pursue criminal sanctions against the family)

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

- **Brunet v. United Gas Pipeline Co., 15 F.3d 500 (5th Cir. 1994)** (evidence of prior convictions admissible to show towboat company was negligent in hiring crew)
- **U.S. v. Whittington, 26 F.3d 456 (4th Cir. 1994)** (testimony describing the defendant as a "dangerous woman," a "rat," and a "snake" was improper character evidence)
- **U.S. v. Jenkins, 7 F.3d 803 (8th Cir. 1993)** (prior narcotic sales were held to be inadmissible character evidence in a prosecution for the same crime)
- **U.S. v. Simpson, 992 F.2d 1224 (D.C. Cir. 1993)** (admission of propensity evidence almost always constitutes error)
- **Loughan v. Firestone Tire & Rubber Co., 749 F.2d 1519 (11th Cir. 1985)** (evidence from three sources regarding plaintiff's drinking practices over six-year period sufficient to establish his habit of drinking on the job)
- **U.S. v. Murray, 618 F.2d 892 (2d Cir. 1980)** (in a prosecution for conspiracy to import and distribute cocaine and marijuana, the testimony of a codefendant that the defendants had shown him a garbage bag full of marijuana was admissible to show opportunity and intent to distribute large quantities of drugs)
- **Reyes v. Missouri Pac. R. Co., 589 F.2d 791 (5th Cir. 1979)** (evidence of four prior misdemeanor convictions for public intoxication was considered character evidence and held inadmissible to show that the plaintiff was intoxicated at the time he was run over by a train as he lay on the railroad tracks at night)
- **U.S. v. Wyers, 546 F.2d 599 (5th Cir. 1977)** (reference to the defendant being unemployed is not character evidence under Rule 404(a))

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.

# IMPROPER WITNESS CHARACTER EVIDENCE (TRUTHFULNESS) (J)

**FRE 608**

**Questions that improperly bolster or attack the credibility of a witness for his or her character for truthfulness may be objected to. Opinion or reputation evidence can be offered on the truthfulness or untruthfulness of a witness. However, when this evidence is used to bolster a witness's credibility, it can only be admitted after the witness's credibility has been attacked. Furthermore, this rule limits character testimony to the trait of truthfulness. General character evidence is not permitted.**

Examples

- "Mrs. Lincoln, you are under oath. Have you ever lied before?"
- "Are you an honest person?"
- "Please describe the viewing box in a way that's consistent with your honest character."
- "I'm only here to say what I saw. I am an honest person."

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

FRE 608. A Witness.

(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, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:

(1) the witness; or

(2) another witness whose character the witness being cross-examined has testified about.

By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

Summary

Similar to Rule 404(a), this rule allows character evidence to be introduced when it bears on a witness's credibility. However, these types of questions are limited only to the trait of truthfulness. In accordance with Rule 405(a), both opinion and reputation evidence are allowed to prove a witness's character for truthfulness. Additionally, a witness's character for truthfulness may be bolstered on rebuttal after the witness's character was attacked previously.

Rule 608 prohibits the use of extrinsic evidence to prove specific instances of conduct to attack or support credibility, unless that evidence is (1) used to show conviction of a crime pursuant to Rule 609; (2) explored during cross-examination and at the judge's discretion to verify a witness's character for truthfulness or untruthfulness; or (3) to bolster or attack the character of another witness to whose character the witness currently on the stand has testified.

On cross-examination, the attorney must have a good-faith basis to believe the witness actually engaged in conduct that is relevant to her character for truthfulness. If the witness on the stand denies the conduct, such acts may not be proved by extrinsic evidence, and the questioning party must accept the witness's answer as is.

Lastly, as a note of warning, Rule 608(b) should not be over-interpreted. It only applies to a witness's character for truthfulness or untruthfulness. It does *not* bar extrinsic evidence offered

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

for general impeachment purposes, such as contradictions, prior inconsistent statements, bias, or mental capacity.

Case Law (Truthfulness)

- **U.S. v. Abair, 746 F.3d 260 (7th Cir. 2014)** (government lacked sufficient basis for believing defendant intentionally lied on student aid form and tax return)
- **United States v. Holden, 557 F.3d 698 (6th Cir. 2009)** (excluded evidence of witness's prior drug treatment under 608, since prior drug use was not relevant to the witness's character for truthfulness)
- **United States v. Bah, 574 F.3d 106 (2d Cir. 2009)** (where defendant offered character testimony through reputation for truthfulness in the community, trial court allowed cross-examination of character witness about former customer's letter accusing defendant of fraud)
- **United States v. Jackson, 549 F.3d 963 (5th Cir. 2008)** (testimony on victim's reputation in prison community allowed, including his propensity for violence, but victim's disciplinary records involving specifics acts inadmissible under 608)
- **U.S. v. Skelton, 514 F.3d 433 (5th Cir. 2008)** (evidence introduced to contradict a witness's testimony as to a material issue did not trigger Rule 608(b))
- **U.S. v. Cudlitz, 72 F.3d 992 (1st Cir. 1996)** (the crime of soliciting arson is not sufficiently probative of untruthfulness to be used in an attack on a witness's character for veracity)

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

- **U.S. v. DeGeratto, 876 F.2d 576 (7th Cir. 1989)** (government lacked sufficient evidence to permit a good faith belief that DeGeratto knowingly helped the prostitution operation)
- **U.S. v. Cole, 617 F.2d 151 (5th Cir. 1980)** (it was proper under Rule 608(b) to impeach a witness by showing he submitted a false excuse for being absent from work)
- **U.S. v. Reid, 634 F.2d 469 (9th Cir. 1980) (**a character for dishonesty was reflected in a witness's false statements in a letter)
- **U.S. v. McClintic, 570 F.2d 685 (8th Cir. 1978**) (the defendant's attempt to swindle a ring buyer was an act that reflected upon his character for truthfulness)

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

# IMPROPER WITNESS CHARACTER EVIDENCE (CONVICTIONS) (K)

**FRE 609**

**Generally, questions about a witness's prior convictions are inadmissible unless (a) the crime involves dishonesty or false statement, or (b) the crime was a felony and the probative value is greater than the danger of prejudice to the defendant. Additionally, the conviction will be admissible if the conviction or release is within the last 10 years unless the court finds the danger of prejudice too great. If the conviction is more than 10 years old, then written notice and opportunity to be heard must be given to the opposing party.**

Examples

- "You want the jury to believe you, even though you were arrested for driving without a license twelve years ago?"
- "You want the jury to take the word of a petty thief?"
- "So, you claim to be an honest person, but then, why were you convicted 12 years ago for armed robbery?"

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

FRE 609. Impeachment by Evidence of a Criminal Conviction.

(a) **In General.** The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

(1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:

(A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and

(B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and

(2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving — or the witness's admitting — a dishonest act or false statement.

(b) **Limit on Using the Evidence After 10 Years.** This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if:

(1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and

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

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

(c) **Effect of a Pardon, Annulment, or Certificate of Rehabilitation.** Evidence of a conviction is not admissible if:

(1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding that the person has been rehabilitated, and the person has not been convicted of a later crime punishable by death or by imprisonment for more than one year; or

(2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) **Juvenile Adjudications.** Evidence of a juvenile adjudication is admissible under this rule only if:

(1) it is offered in a criminal case;

(2) the adjudication was of a witness other than the defendant;

(3) an adult's conviction for that offense would be admissible to attack the adult's credibility; and

(4) admitting the evidence is necessary to fairly determine guilt or innocence.

(e) **Pendency of an Appeal.** A conviction that satisfies this rule is admissible even if an appeal is pending. Evidence of the pendency is also admissible.

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

Summary

Rule 609 is a delicate rule and subject to careful scrutiny by the court "because of the inherent danger that a jury may convict a defendant because he is a bad person instead of because the evidence of the crime with which he is charged proves him guilty." **U.S. v. Holloway, 1 F.3d 307, 311 (5th Cir. 1993)**. Under Rule 609, a prior conviction can be admitted for impeachment purposes, but may not contain surrounding details. Only the general nature and punishment of the felony may be admitted.

Crimes of dishonesty or false statement, regardless of the punishment (whether felony or misdemeanor), can be used to impeach any witness at any time. As long as the conviction is less than 10 years old, a party may introduce such evidence. Some examples of these types of crimes include perjury, bank fraud, embezzlement, false statements to government officials, failure to file tax returns, false and misleading statements in the sale of securities, and making false claims to the U.S. government. Examples of crimes that have been excluded as a "crime of dishonesty or false statement" include petty shoplifting, smuggling drugs, marijuana possession, bank robbery, rape, arson, and prostitution.

Juvenile adjudications can never be used to impeach a criminal defendant, but they can be used against a witness in a criminal case if the conviction is of a type that would be admissible to attack the credibility of an adult.

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

Case Law (Prior Convictions)

- **U.S. v. Greenidge, 495 F.3d 85 (3d Cir. 2007), cert. denied, 128 S. Ct. 551 (2007)** (in a bank fraud case, stealing money from his employer was admitted, with judge finding that such evidence was not similar enough to bank fraud to raise an impermissible propensity inference)
- **United States v. Headbird, 461 F.3d 1074 (8th Cir. 2006)** (defendant's prior convictions properly admitted because prior felony convictions are highly probative of credibility as "one who has transgressed society's norms by committing a felony is less likely than most to be deterred from lying under oath.")
- **Elcock v. Kmart Corp., 233 F.3d 734 (3d Cir. 2000)** (evidence that witness was owner of a corporation that had been convicted of embezzling money was admissible to impeach the witness)
- **Old Chief v. United States, 519 U.S. 172 (1997)** (if the defendant does not testify, prior convictions cannot be admitted for "impeachment" purposes)
- **Hunnicutt v. Wright, 986 F.2d 119 (5th Cir. 1993)** (a witness's felony convictions which were more than ten years old, and evidence of witness's incarceration were inadmissible)
- **U.S. v. Sanders, 964 F.2d 295 (4th Cir. 1992)** (where the defendant was on trial for assault with a knife, a prior conviction for the same conduct should have been excluded because it was highly prejudicial)

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

- **Altobello v. Borden Confectionery Prods., Inc., 872 F.2d 215 (7th Cir. 1989)** (misdemeanor conviction for tampering with electric meters to reduce electric bill involved deceit and was properly admitted to impeach a witness's credibility under "crimes of dishonesty")
- **U.S. v. Gordon, 780 F.2d 1165 (5th Cir. 1986)** (limiting cross-examination to the number of convictions, the nature of the crimes and the dates and times of the convictions and excluding the particular facts of defendant's previous offenses)
- **United States v. Klayer, 707 F.2d 892 (6th Cir. 1983)** (even though conviction was on appeal, defendant could still be impeached with the prior conviction at trial)

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

# LEADING (L)

**FRE 611**

**On direct examination, questions which put the desired answer in the mouth of the witness by suggesting the desired answer are objectionable leading questions. On direct examination, the witness is supposed to be testifying, not the attorney. Rule 611(c) only allows leading questions on cross-examination, and therefore "Leading" is never an available objection on cross-examination.**

Examples

- "Mrs. Lincoln, describe for us the horrific incident at Ford's Theater last year."
- "Mrs. Lincoln, your husband was killed by a shot from a Derringer, right?"
- "After a few minutes, your husband was shot, correct?"
- "Was it absolutely terrorizing to hear that loud bang?"

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

FRE 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 Cross-Examination.** Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility. The court may allow inquiry into additional matters as if on direct 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, an adverse party, or a witness identified with an adverse party.

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

Summary

Rule 611 deals generally with the scope of a trial judge's authority to exercise reasonable control over the trial proceedings, including the mode of interrogating witnesses and presenting evidence. The rule contemplates flexibility and discretion so that the truth will be ascertained and the interests of the public and the parties promoted. In short, the three main objectives of Rule 611 are to discover the truth in an efficient manner, avoid wasting time, and protect the witnesses from improper examination questions.

**Possible Objections under Rule 611:** Argumentative, Compound, Narrative, Leading, Mischaracterization, Nonresponsive, Asked & Answered, Vague, Facts not in Evidence

Case Law (Leading)

- **U.S. v. Cisneros-Gutierrez, 517 F.3d 751 (5th Cir. 2008)** (leading questions were permitted where witness was hostile and had extensive "memory problems")
- **U.S. v. Rojas, 520 F.3d 876 (8th Cir. 2008)** (leading questions permitted of ten-year-old victim of aggravated sexual abuse)
- **United States v. Anderson, 446 F.3d 870 (8th Cir. 2006)** (Generally, leading questions are not permitted during direct examination, but where they are necessary for the development of witness's testimony, they may be permitted at the discretion of the trial judge)

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

- **United States v. Londondio, 420 F.3d 777 (8th Cir. 2005)** (Trial judge may permit the use of leading questions on direct examination when eliciting information on preliminary matters)
- **Stine v. Marathon Oil Co., 976 F.2d 254 (5th Cir. 1992)** ("any good trial advocate who is allowed leading questions can both testify for witness and argue the client's case")

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

# MISCHARACTERIZATION OF THE EVIDENCE (M)

**FRE 611**

**Questions that elicit testimony which incorrectly purport to state or summarize testimony or other evidence are objectionable as mischaracterization of the evidence. Additionally, testimony that misstates the law is also objectionable as mischaracterization. Frequently, counsel will preface a question with a reference to how the witness testified on direct examination. The reference must always be accurate. Otherwise, the witness's answer may assume the truth of the false preface, which prejudices the opposing party and misleads the jury.**

Examples

- "On direct examination, you claimed your plan to escape was to run back down the stairs, but instead, you ended up jumping over the balcony, right?"
- "In light of Ms. Hale's testimony on direct that she aided and abetted the killing of the President, how would you describe her character for truthfulness?"
- "On direct, you testified that you used a single shot Derringer because you knew the blue smoke would give you cover, right?"

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

FRE 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 Cross-Examination.** Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility. The court may allow inquiry into additional matters as if on direct 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, an adverse party, or a witness identified with an adverse party.

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

Summary

Rule 611 deals generally with the scope of a trial judge's authority to exercise reasonable control over the trial proceedings, including the mode of interrogating witnesses and presenting evidence. The rule contemplates flexibility and discretion so that the truth will be ascertained and the interests of the public and the parties promoted. In short, the three main objectives of Rule 611 are to discover the truth in an efficient manner, avoid wasting time, and protect the witnesses from improper examination questions.

**Possible Objections under Rule 611:** Argumentative, Compound, Narrative, Leading, Mischaracterization, Nonresponsive, Asked & Answered, Vague, Facts not in Evidence

Case Law (Mischaracterizes the Evidence)

- **U.S. v. Donato, 99 F.3d 426 (D.C. Cir. 1996)** (prosecutor's error in mischaracterizing evidence)
- **U.S. v. Haldar, 751 F.3d 450 (7th Cir. 2014)** (trial counsel is not permitted to misstate evidence or misquote a witness's testimony)
- **U.S. v. Watson, 171 F.3d 695 (D.C. Cir. 1999)** (same)
- **U.S. v. Gonzalez-Montoya, 161 F.3d 643 (10th Cir. 1998)** (trial counsel is not permitted to misstate the law or state it in a manner calculated to confused the jury)

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

# NON-RESPONSIVE (N)

**FRE 611**

**A witness's answers that put forth information not required by the attorney's questions are objectionable as non-responsive. Any question that extends beyond the specific information sought by the question is objectionable, and when a non-responsive answer injects highly prejudicial information, a mistrial may be necessary. This objection is ONLY available for a witness's answer.**

Examples

- "I really don't want to talk about that. I'd rather discuss what should happen to the man who murdered the President."
- "Not to my knowledge. All I know is that Mr. Parker is an alcoholic lush."
- "Look, that's not really relevant. What is relevant is that the defendant is a sick animal that needs to be put down."

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

FRE 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 Cross-Examination.** Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility. The court may allow inquiry into additional matters as if on direct 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, an adverse party, or a witness identified with an adverse party.

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

Summary

Rule 611 deals generally with the scope of a trial judge's authority to exercise reasonable control over the trial proceedings, including the mode of interrogating witnesses and presenting evidence. The rule contemplates flexibility and discretion so that the truth will be ascertained and the interests of the public and the parties promoted. In short, the three main objectives of Rule 611 are to discover the truth in an efficient manner, avoid wasting time, and protect the witnesses from improper examination questions.

**Possible Objections under Rule 611:** Argumentative, Compound, Narrative, Leading, Mischaracterization, Nonresponsive, Asked & Answered, Vague, Facts not in Evidence

Case Law (Non-Responsive)

- **U.S. v. Rivera, 61 F.3d 131 (2d Cir. 1995)** (non-responsive answers stating that defendant previously was in prison combined with incriminating hearsay information warranted mistrial)
- **Silbergleit v. First Interstate Bank of Fargo, N.A., 37 F.3d 394 (8th Cir. 1994)** (non-responsive references to plaintiff as rich, Jewish, and receiving unemployment compensation were designed to impassion and prejudice jury; mistrial)

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

# IMPROPER LAY OPINION (O)

**FRE 701**

**A question or answer may be objected to on the basis of improper lay opinion if the question and/or answer elicits information that is not based on the witness's personal knowledge, where adequate foundation has not been laid, or when the lay witness is being asked a question that requires expert testimony under Rule 702. Otherwise, lay witnesses are permitted to give opinion testimony about events which they have personally observed, or is based on the witness's prior experience or practices.**

Examples

- "I turned my head to the left. There was a big cloud of blue smoke that came from the one-shot Derringer." (Lay witness with no evidence of knowledge about one-shot Derringers)
- "Was the President close enough to the viewing box door to be in the range of a Derringer?" (Lay witness with no evidence of knowledge about one-shot Derringers)
- "Agree or disagree: a Derringer was the best firearm for this type of shot." (Lay witness with no evidence of knowledge about one-shot Derringers)

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

- “Little could save him. A shunt could have reduced the pressure on his brain, but the wound was inevitably fatal.” (Lay witness with no evidence of medical knowledge)

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

FRE 701. Opinion Testimony by Lay Witness

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

(a) rationally based on the witness's perception;

(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and

(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Summary

Lay opinion testimony is admissible when it is (a) rationally based on perceptions, (b) helpful to the trier of fact, and (c) not expert opinion under rule 702. Often times, lay opinion testimony will be admitted, as long as proper foundation is laid. The foundation must show that the opinion is based on the witness's rational perceptions or previous experiences or practices. No opinion of law may be given by a lay witness.

However, lay witnesses may express opinions, inferences, or conclusions, as long as they are helpful to understanding or fact determination.

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

Case Law (Improper Lay Opinion)

- **U.S. v. Toll, 804 F.3d 1344 (11th Cir. 2015)** (accountant who had not been qualified as an expert allowed to testify for prosecution as lay witness that defendant's accounting did not satisfy generally accepted accounting principles)
- **U.S. v. J.J., 704 F.3d 1219 (9th Cir. 2013)** (lay witnesses who had some, but limited, personal observation and interaction with defendant, were allowed to testify defendant appeared to be of average intelligence and maturity for someone in his late teens, as defendant was; used in decision to permit adult rather than juvenile prosecution)
- **United States v. Page, 521 F.3d 101 (1st Cir. 2008)** (testimony from police officers regarding the typical method of criminals during a drug transaction was permissible lay opinion testimony after foundation was laid showing officers had requisite experience)
- **United States v. Kaplan, 490 F.3d 110 (2d Cir. 2007)** (no rational basis for opinion testimony where witness's perception was based on vague interactions with defendant)
- **United States v. Hoffecker, 530 F.3d 137 (2008)** (testimony about interpretation of a tape-recorded conversation is impermissible lay opinion; also implicates best evidence rule)
- **Union Pac. Res. Co. v. Chesapeake Energy Corp., 236 F.3d 684 (Fed. Cir. 2001)** (lay opinion must be based upon personal perception or specialized knowledge and would assist the trier-of-fact in understanding the evidence)

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

- **Hollywood Fantasy Corp. v. Gabor, 151 F.3d 203 (5th Cir. 1998)** (lay witness was allowed to testify on the meaning of a term in the contract based upon his experience in the industry and as the drafter of the document)
- **Winant v. Bostic, 5 F.3d 767 (4th Cir. 1993)** (testimony of a state official about the party's state of mind was admissible because it was based on prior professional dealings and discussions with party regarding real estate permits)

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

# PRIVILEGE (P)

## FRE 502

**Questions that ask for the witness to disclose privileged communications are objectionable. Case law has established several different types of privileged communications. The most well-known and most frequently used form of privilege in trial settings is the Attorney-Client Privilege. Any question that asks a witness to divulge communications between her and her attorney, in which the witness believed she was consulting her attorney to obtain professional legal advice, is privileged communications and therefore, inadmissible.**

Examples

- "Is that the truth, or did your attorney tell you to say that?"
- "Can you please explain what you told your attorney during the client intake meeting?"
- "Mr. Booth, you told your attorney that you hated the Confederacy?"
- "What did you tell your doctor regarding how you broke your leg on April 14th of last year?" (Physician-Patient Privilege)

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

FRE 502. Attorney-Client Privilege and Work Product; Limitations of Waiver

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

(a) **Disclosure Made in a Federal Proceeding or to a Federal Office or Agency; Scope of a Waiver**. When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if:

(1) the waiver is intentional;

(2) the disclosed and undisclosed communications or information concern the same subject matter; and

(3) they ought in fairness to be considered together.

(b) **Inadvertent Disclosure**. When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:

(1) the disclosure is inadvertent;

(2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and

(3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26 (b)(5)(B).

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

(c) **Disclosure Made in a State Proceeding**. When the disclosure is made in a state proceeding and is not the subject of a state-court order concerning waiver, the disclosure does not operate as a waiver in a federal proceeding if the disclosure:

(1) would not be a waiver under this rule if it had been made in a federal proceeding; or

(2) is not a waiver under the law of the state where the disclosure occurred.

(d) **Controlling Effect of a Court Order**. A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court — in which event the disclosure is also not a waiver in any other federal or state proceeding.

(e) **Controlling Effect of a Party Agreement**. An agreement on the effect of disclosure in a federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(f) **Controlling Effect of this Rule**. Notwithstanding Rules 101 and 1101, this rule applies to state proceedings and to federal court-annexed and federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if state law provides the rule of decision.

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

(g) **Definitions**. In this rule:

(1) “attorney-client privilege” means the protection that applicable law provides for confidential attorney-client communications; and

(2) “work-product protection” means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

Summary

Regardless of prejudicial or probative value, any communications that are deemed privileged will be excluded. The policy behind the rule of privilege is to foster and protect the confidential communications between members of society and professionals who handle sensitive information (attorneys, physicians, clergy, etc.).

Privilege can be waived at any time by (1) failing to make a timely objection; (2) disclosing the privileged communications to a third person; (3) consenting to privilege waiver by the person holding the privilege; or (4) acting in a way that shows consent to waive privilege. Additionally, any communications between an attorney and a client in furtherance of the commission of a crime or fraud are not protected.

The main types of privilege are as follows:

- Attorney-Client (including client as a corporation)
- Work-Product Privilege
    - Any materials prepared by an attorney in anticipation of litigation that disclose the attorney's mental processes and impressions are privileged under the Work-Product Doctrine.
- Psychotherapist-Patient
- Physician-Patient
- Clergy-Communicant

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

- Marital

Case Law (Privilege)

- **Upjohn Co. v. United States, 449 U.S. 383 (1981)** (seminal attorney-client privilege case; attorney-client privilege "rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out.")
- **WebXchange Inc. v. Dell Inc., 264 F.R.D. 123 (D. Del. 2010)** (emails from inventor to Hindu gurus protected under Clergy-Communicant privilege)
- **Lenz v. Universal Music Corp., 97 U.S.P.Q.2d 1145 (N.D. Cal. 2010)** (client's disclosure—on Facebook, in e-mails, and in other electronic communications—of his communication with his attorney waived his privilege)
- **Simon v. Cook, 261 Fed. Appx. 873 (6th Cir. 2008)** (if a witness's mental health is at issue in the case, then psychotherapist-patient privilege is waived; only in Sixth Circuit)
- **In re Seagate Tech., LLC, 497 F.3d 1360 (Fed. Cir. 2007)** (once a client waives privilege, all communications about the same subject matter are no longer privileged)
- **U.S. v. Bad Wound, 203 F.3d 1072 (8th Cir. 2000)** (an individual cannot be compelled to testify, but is not excluded from testifying, against his or her spouse at the time of trial)
- **Swidler & Berlin v. United States, 524 U.S. 399 (1998)** (attorney-client privilege encourages full disclosure during legal representation)
- **Jaffee v. Redmond, 518 U.S. 1 (1996)** (seminal psychotherapist-patient privilege case)

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

- **U.S. v. Marashi, 913 F.2d 724 (9th Cir. 1990)** (no marital privilege after divorce)
- **U.S. v. Gordon, 655 F.2d 478 (2d Cir. 1981)** (defendant's business communications to priest he employed in nonreligious capacity were not protected)
- **United States v. Nobles, 422 U.S. 225 (1975)** (seminal Work-Product Doctrine case)
- **Mass. Mut. Life Ins. Co. v. Brei, 311 F.2d 463 (2d Cir. 1962)** (physician-patient privilege continues after death of patient)

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

# RELEVANCE (R)

## FRE 402

**All evidence introduced at trial must pass the relevancy threshold. If an item of evidence is not relevant to any matter at issue in the case, then it is objectionable as having a lack of relevance. "Relevant evidence" is evidence that (1) relates to a fact of consequence to the case and (2) tends to make that fact more or less probable.**

Examples

- "If you had to guess, what was the best play you had previously seen at Ford's Theatre?"
- "If you could have chosen someone other than Clara Harris to accompany you, who would it have been?"
- "What's your favorite flavor of ice cream?"
- "What punishment should the defendant receive?"

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

FRE 401. Test 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.

FRE 402. General Admissibility of Relevant Evidence

…

Irrelevant evidence is not admissible.

Summary

The rule is written with a presumption that all evidence is relevant – "all relevant evidence is admissible except…" "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. Relevance involves both materiality and probative value. In the wise words of McCormick on Evidence, "Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case.

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

Probative value deals with the tendency of the evidence to establish the proposition that it is offered to prove."

The threshold under Rule 401 is very low. The degree of materiality and probativity necessary for the evidence to be considered relevant is minimal.

Even though a piece of evidence may be relevant, it can still be excluded under Rule 403 as cumulative, prejudicial, or confusing.

Case Law (Relevance)

- **Plyler v. Whirlpool Corp., 751 F.3d 509 (7th Cir. 2014)** (in products liability case, evidence of emotional impact of divorce relevant to rebut the claim that fire caused plaintiff's emotional distress)
- **Collins v. Marriott Intern., Inc., 749 F.3d 951 (11th Cir. 2014)** (plaintiff's intoxication is normally relevant in tort cases, especially in a comparative negligence assessment for the apportionment of liability)
- **U.S. v. Molton, 743 F.3d 479 (7th Cir. 2014)** (gang affiliation must be treated carefully to avoid guilt by association; gang membership was relevant to explain why defendant, a convicted felon, would have an assault rifle)

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

- **In re City of New York, 475 F. Supp. 2d 235 (E.D. N.Y. 2007), judgment aff'd and remanded, 522 F.3d 279 (2d Cir. 2008)** (in action brought by passengers injured in ferry crash, evidence that city's internal rule required two pilots to be present in pilothouse at all times ferry is underway was relevant under Rule 402, despite the fact that two pilots were not legally required)
- **U.S. v. Sells, 477 F.3d 1226 (10th Cir. 2007)** (evidence of methamphetamine manufactured in another home on same property as defendant's residence irrelevant when no evidence connected defendant with other home)
- **Skultin v. Bushnell, 82 F. Supp. 2d 1258 (D. Utah 2000)** (evidence that two plaintiffs were adult entertainers and third worked in legal brothel irrelevant in civil rights action)

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

# SPECULATION (S)

**FRE 602**

**Any question or answer that is characterized as a "guess" or mere conjecture is objectionable on the basis of speculation. Speculation as to what could have happened in a case is of little probative value. Questions calling for the witness to "speculate" about certain events or evidence are inadmissible. Similarly, answers that are not grounded in first-hand information from personal knowledge are inadmissible.**

**An objection based on Speculation indicates that regardless of how much foundation may be attempted to be laid, a witness could never answer the question. Often times, a speculation objection will also call for a lack of foundation objection, and vice versa.**

Examples

- "How many rebels thought the same way you did?"
- "Was everyone paying attention in the theatre?"
- "The success of a murder like this required intimate knowledge of Ford's Theatre, wouldn't you agree?"
- "Is there intelligent life in the Vega Star System?"

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

FRE 602. Need for Personal Knowledge

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.

Summary

The Speculation objection falls within the realm of competency for a witness, since a witness can only be competent to testify if he/she is testifying about things that are within the witness's own personal knowledge. Speculation, by definition, is absent of personal knowledge.

However, the required threshold showing to the judge that a witness possesses the requisite personal knowledge is low. The rule states that only enough personal knowledge "to support a finding" by a rational juror is required, even if the judge believes the witness does not possess the requisite personal knowledge.

Speculation and lack of foundation can often be used interchangeably. However, some practitioners believe that the objection of speculation should only be used for questions or answers where no possible foundation could be laid under any circumstance. For example, the

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

examining counsel asked the witness, “What was everyone in the theatre thinking about at that time?” No matter what, foundation could never be laid for the witness to accurately answer that question based on personal knowledge. Indeed, the only way the witness could answer that question properly without triggering a speculation objection is if the witness could read the minds of every single person in the theatre at that exact time. In this instance, the objection of speculation would be more proper than the objection of lack of foundation because although foundation is absent, no foundation could ever be laid to properly answer the question. Therefore, the question and answer call for pure speculation.

On the other hand, assume examining counsel asked, “How full was the theatre that night?” The witness could properly answer this question if foundation had been laid previously that placed the witness at the theatre on that night. Once foundation is laid that she attended the theatre that night and sat in a viewing box where she could visibly see the majority of the theatre sections, then she can properly answer this question with her personal knowledge. However, if foundation is not laid, then her answer lacks foundation. Additionally, because it lacks foundation, it is speculative at the time of asking. Therefore, either lack of foundation or speculation could be used as a proper objection in this situation.

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

Case Law (Speculation)

- **U.S. v. Wilkens, 742 F.3d 354 (8th Cir. 2014)** (evidence which is vague and speculative is not competent proof and should not be admitted into evidence)
- **Chapa v. U.S., 497 F.3d 883 (8th Cir. 2007)** (testimony about what action witness would have taken if she had known grandchild was being abused properly excluded as speculative)
- **Lust v. Sealy, Inc., 383 F.3d 580 (7th Cir. 2004)** (hypothetical question called for speculation)
- **Athridge v. Aetna Cas. and Sur. Co., 474 F. Supp. 2d 102 (D.D.C. 2007)** (testimony by witnesses as to what they would have done is purely speculative)
- **Visser v. Packer Eng'g Assocs., Inc**., 924 F.2d 655, 659 (7th Cir. 1991) (opinions and inferences must be grounded in observation or other first-hand personal experience and may not consist of flights of fancy, speculations, hunches, intuitions, or rumors about matters remote from that experience)

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

# ASKED & ANSWERED (T)

**FRE 611**

**If a question has already been asked and answered, then it is objectionable. This objection ONLY applies to attorney questions, not witness answers.**

Examples

- "Can you please tell the jury one more time what happened that day?"
- "Explain to the court, again, why you didn't run?"
- "I'm not sure everyone heard you the first time – you were arrested on drug charges, right?"

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

FRE 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 Cross-Examination.** Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility. The court may allow inquiry into additional matters as if on direct 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, an adverse party, or a witness identified with an adverse party.

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

Summary

Rule 611 deals generally with the scope of a trial judge's authority to exercise reasonable control over the trial proceedings, including the mode of interrogating witnesses and presenting evidence. The rule contemplates flexibility and discretion so that the truth will be ascertained and the interests of the public and the parties promoted. In short, the three main objectives of Rule 611 are to discover the truth in an efficient manner, avoid wasting time, and protect the witnesses from improper examination questions.

**Possible Objections under Rule 611:** Argumentative, Compound, Narrative, Leading, Mischaracterization, Nonresponsive, Asked & Answered, Vague, Facts not in Evidence

Case Law (Asked & Answered)

- **U.S. v. Abair, 746 F.3d 260 (7th Cir. 2014)** (prosecutor kept repeating the same improper accusatory questions)
- **U.S. v. Dawson, 434 F.3d 956 (7th Cir. 2006)** (trial judge must not allow cross-examination to get out of hand, confuse the jury and prolong the trial unnecessarily with repetitive questions)
- **United States v. Segal, 534 F.2d 578 (3d Cir. 1976)** (trial judge has wide discretion to prevent repetition of questions)

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

# UNFAIR PREJUDICE (U)

**FRE 403**

**This is the "catch-all" rule of the Federal Rules of Evidence. It may be applied with any other rule. Evidence, regardless of relevance, may be excluded if its probative value is substantially outweighed by the risk of unfair prejudice, confusion, or delay. Use this objection only when necessary, as the courts favor admissibility over exclusion and therefore, apply the rule sparingly.**

Examples

- "For the jury, please hold your hand as one would hold a gun and yell, 'Bang, you're dead.'"
- "As an actor, you had jumped from that balcony several times in a previous play titled 'Killers on the Run,' right?"
- "I never spoke to him again. I cry myself to sleep every night because I am in inconsolable pain."
- "Is that when all his brains splattered across your lap like a bowl of spaghetti?"

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

FRE 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, 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, wasting time, or needlessly presenting cumulative evidence.

Summary

This is the classic balancing rule – balancing probativity of certain evidence with its prejudicial reach. Rule 403 grants power to the court to exclude otherwise relevant evidence whose probative value is substantially outweighed by the danger of unfair prejudice. Since all evidence is meant to be prejudicial against one party or the other, the prejudice must be "unfair" for it to be excluded under Rule 403.

Exclusion under Rule 403 is absolute. Once a piece of evidence is deemed too prejudicial to be admitted into court, no other rule of evidence can operate to admit the evidence. The 403 balance is a fact-sensitive inquiry, but the balance is always in favor of admissibility.

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

Case Law (Unfair Prejudice)

- **U.S. v. Delgado-Marrero, 744 F.3d 167 (1st Cir. 2014)** (in drug trafficking case, court made serious mistake in weighing the danger of unfair prejudice by admitting evidence of homosexuality, which had minimal probative value)
- **Aycock v. R.J. Reynolds Tobacco Co., 769 F.3d 1063 (11th Cir. 2014)** (error to exclude decedents history of alcohol abuse in wrongful death suit claiming product caused his cancer)
- **U.S. v. Nevels, 490 F.3d 800 (10th Cir. 2007)** (evidence is unfairly prejudicial if it "tends to affect adversely jury's attitude toward defendant wholly or apart from its judgment as to his guilt or innocence of the crime charged")
- **U.S. v. Thompson, 359 F.3d 470 (7th Cir. 2004)** (under Rule 403, the district court did not err in allowing the government to cross-examine a defense witness as to non-specific threats made against her by the defendant in order to explain her prior inconsistent statements)
- **U.S. v. Frost, 234 F.3d 1023 (8th Cir. 2000)** ("Unfair prejudice 'speaks to the capacity of some concededly relevant evidence to lure the fact-finder into declaring guilt on a ground different from proof specific to the offense charged.")
- **Rubert-Torres v. Hospital San Pablo, Inc., 205 F.3d 472 (1st Cir. 2000)** (the trial court's refusal to allow a severely disabled minor plaintiff to be viewed by the jury so that an expert witness could physically demonstrate his testimony based in part on the

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

plaintiff's appearance was an abuse of discretion; the court gave no reason for her exclusion and made no Rule 403 findings on the record)

- **U.S. v. Torres-Flores, 827 F.2d 1031 (5th Cir. 1987)** (the probative value of a "mug shot" photo of the defendant was outweighed by its prejudicial impact because there was a "definite possibility" that it impressed upon the jury the defendant's bad character)
- **Carter v. Hewitt, 617 F.2d 961 (3d Cir. 1980)** ("a classic example of unfair prejudice is a jury's conclusion, after hearing a recitation of a defendant's prior criminal record, that, since the defendant committed so many other crimes, he must have committed this one too")
- **U.S. v. McRae, 593 F.2d 700 (5th Cir. 1979)** (admission of a color photograph of the murder victim shot in the eye was not unfairly prejudicial since the evidence tended to establish the elements of the offense)

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

# VAGUE (V)

**FRE 611**

**Questions that are confusing or unclear as to their meaning or scope are objectionable as vague and/or ambiguous. Any question or answer that could be susceptible to multiple interpretations will be considered "vague."**

Examples

- "Start at the beginning, go slowly, and tell us everything."
- "Can you please unpack that for me?"
- "Please elaborate."
- "When you arrived, was death waiting?"
- "He's one of those guys sitting over there."

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

FRE 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 Cross-Examination.** Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility. The court may allow inquiry into additional matters as if on direct 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, an adverse party, or a witness identified with an adverse party.

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

Summary

Rule 611 deals generally with the scope of a trial judge's authority to exercise reasonable control over the trial proceedings, including the mode of interrogating witnesses and presenting evidence. The rule contemplates flexibility and discretion so that the truth will be ascertained and the interests of the public and the parties promoted. In short, the three main objectives of Rule 611 are to discover the truth in an efficient manner, avoid wasting time, and protect the witnesses from improper examination questions.

**Possible Objections under Rule 611:** Argumentative, Compound, Narrative, Leading, Mischaracterization, Nonresponsive, Asked & Answered, Vague, Facts not in Evidence

Case Law (Vague)

- **U.S. v. Abair, 746 F.3d 260 (7th Cir. 2014)** (prosecutor in trial used vague, confusing and highly improper compound questions)
- **U.S. v. Clark, 613 F.2d 391 (2d Cir. 1979)** ("The question excluded was confusing to court, counsel and the witness alike.")
- **U.S. v. Wall, 371 F.2d 398 (6th Cir. 1967)** (perjury conviction reversed, since it was based on response to ambiguous question)

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

# ULTIMATE ISSUE (Z)

**FRE 704**

**When an expert is testifying, an expert may express an opinion that addresses an ultimate issue of fact, but opinions or inferences regarding the mental state of the defendant are reserved for the trier of fact when that mental state is an element of the crime charged or a defense to that crime. Just because a lay witness is opining on an ultimate issue does not make it automatically objectionable. However, in order for a lay witness or expert to testify to an ultimate issue, materiality and foundation requirements must be met.**

Examples

- "Did Mr. Booth murder President Lincoln?"
- "In your opinion, do you believe the defendant broke into the house with malicious intent?"
- "Can you testify as to the mental state of the defendant prior to and during the crime?"

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

FRE 704. Opinion on Ultimate Issue

(a) **In General — Not Automatically Objectionable**. An opinion is not objectionable just because it embraces an ultimate issue.

(b) **Exception**. In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.

Summary

Ultimate opinions are allowed for experts and lay witnesses. However, Rule 704(b) prevents testimony in criminal cases involving a mental issue. Although an ultimate issue opinion may be admitted under Rule 704(a), it may still be excluded because it is not "helpful" to the trier of fact under Rule 701, does not "assist" the trier of fact under Rule 702, or fails the probativity-prejudicial balancing of Rule 403.

When attempting to exclude testimony under Rule 704, consider whether the testimony meets relevancy and materiality requirements, whether the testimony is usurping the role of the jury, whether the testimony is even helpful to the jury, and whether the testimony is barred by another rule of evidence.

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

Case Law (Ultimate Issue)

- **U.S. v. Huether, 673 F.3d 789 (8th Cir. 2012)** (computer forensic expert allowed to state that defendant was the one who had put child porn on the hard drives confiscated from defendants' residences; no violation of Rule 704(b), although this may have been an ultimate opinion, it was not a mental state)
- **U.S. v. Graf, 610 F.3d 1148 (9th Cir. 2010)** (an attorney's testimony that he told defendant that the company's medical plans did not comply with state and federal law and that marketing them would be a crime was admissible not to show that it was a crime but to show that defendant was on notice that his conduct was illegal; if it had been admitted to show that it was in fact illegal, it would be impermissible testimony on a matter of law under Rule 701 and Rule 702)
- **Sundance, Inc. v. DeMonte Fabricating Ltd., 550 F.3d 1356 (Fed. Cir. 2008)** (patent lawyer with little technical expertise could not testify as to noninfringement and invalidity of patent)
- **Berckeley Inv. Group, Ltd. v. Colkitt, 455 F.3d 195 (3d Cir. 2006)** (expert witness could testify about the customs and practices in the securities industry, but she could not testify to whether a party complied with legal duties under security laws)
- **C.P. Interests, Inc. v. Cal. Pools, Inc., 238 F.3d 690 (5th Cir. 2001)** (expert witnesses will not be allowed to present conclusions of law to the trier-of-fact)
- **Lightfoot v. Union Carbide Corp., 110 F.3d 898 (2d Cir. 1997)** (lay opinion testimony may address the ultimate issue)

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

# NOTE ON F, S, & G

## The Dichotomy Among Lack of Foundation (F), Speculation (S), and Assumes Facts Not in Evidence (G)

The objection bases **"Lack of Foundation," "Speculation,"** and **"Assumes Facts Not in Evidence"** originate from F.R.E. 602 and F.R.E. 611. Lack of Foundation (F) and Speculation (S) find their bases in F.R.E. 602, while Assumes Facts Not in Evidence finds its basis in F.R.E. 611. Often times, these objections may seem interchangeable, and in many instances, each of these objection bases will be proper. However, for most improper questions and answers, one of these objection bases is clearly better than the others. Thus, we have decided to separate the three bases each into their own objections:

- Lack of Foundation = "F"
- Speculation = "S"
- Assumes Facts Not in Evidence = "G"

Rather than grouping these objections into one single key (e.g., "F"), we decided to separate each of these objections because each objection basis is actually slightly different than the others. Therefore, such a dichotomy will serve to maximize the educational benefit of the Trial Boom™ experience because it will challenge you to truly identify, understand, and apply the important nuances that distinguish F, S, and G from one other.

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

Another motivating factor behind the separation pertains to the user experience. By separating these three objections, the gameplay mechanics become more fun and interactive. Without these delineations, you might simply be hitting the "F" key a lot.

Here is how we are differentiating among the three objection bases:

- An objection based on **Lack of Foundation** indicates that it MIGHT be possible for the witness to potentially know the answer, but simply additional predicate questions need to be asked. For example: "What is the weather like today in London?" The witness might certainly know that answer (yes, it might be hearsay), but simply additional predicate questions need to be asked first (e.g., "Where were you earlier today?" Answer: "I just flew in from London.").
- An objection based on **Speculation** indicates that no matter how much foundation is attempted to be laid, the witness cannot possibly answer the question based on his/her personal knowledge. For example: "Is there intelligent life in the Vega star system?"
- An objection based on **Assuming Facts Not in Evidence** indicates that the attorney is asking a question, but there is information contained in the question that has not yet been established in this trial through this specific witness. For example: "Mr. Booth, when did you stop kicking puppies for a hobby?" If this witness has not first admitted that he, in fact, kicked puppies at one time in his life, then this question Assumes Facts Not in Evidence (and yes, it is also argumentative…and yes, who would kick a puppy?!).

Throughout Trial Boom™ exams and cases, many improper questions and answers will have multiple correct objection bases, especially regarding F, S, and G (e.g., F & S are both correct; F

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

& G are both correct). However, many exams will undoubtedly contain questions and/or answers where Foundation may be lacking, but if Speculation is the better objection, objecting to the more general “Lack of Foundation” may not be rewarded as highly or may technically be marked as incorrect (e.g., if no adequate foundation could possibly be laid, for example).

We hope this note on F, S, and G makes sense. Our goal is to provide you with unparalleled levels of education, realistic courtroom simulations, and, of course, fun. Enjoy!

– The Trial Boom Team

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

# AUTHORS & CONTRIBUTORS

**Professor David Schott**, Chief Legal Education Officer

Colorado Reg. No. 29802; Illinois Attorney Reg. No. 6205485

Since July 2008, David Schott has served as a full-time faculty member, Professor of the Practice, and Director of the Center for Advocacy at the University of Denver Sturm College of Law. Under his leadership, the Center for Advocacy has risen to be consistently recognized and ranked as one of the Top 12 law school advocacy programs in the United States (per USNWR).

In his capacity on the law school faculty, David has taught Evidence, Advanced Evidence, Trial Advocacy I, II and III courses, serves as the head coach for the law school's National Trial Team, and has presented at numerous seminars, roundtables, and educational events. David is also the National Evidence Lecturer for Themis Bar Review.

David graduated with Dean's List Honors from Carnegie-Mellon University in Pittsburgh, Pennsylvania. David received his Juris Doctorate Degree with Moot Court Honors from the University of Pittsburgh School of Law.

David practiced law as a full-time trial attorney from 1990 to 2009 during which time he presented 36 jury trials to verdict. David began his legal career in Cook County, Illinois (Chicago), where David completed a four-year tenure with the Cook County State's Attorney's Office. David then served as General Counsel for an international development company,

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

where under David's litigation management, the company prevailed in its $33 million prosecution of a contract and trademark infringement claims in Federal District Court. In 1997, David immigrated to Denver, Colorado where he opened his law practice. David continues to practice in an Of Counsel capacity to this day. David's Federal and State Court practice has consisted of civil trial and domestic relations litigation. David has also served as business counsel, operations advisor, Board of Directors advisor, and trial/litigation counsel, to a range of entities.

In 2005, before assuming a full-time faculty position at the University of Denver Sturm College of Law in 2009, David began serving on the Adjunct Faculty of the University of Denver Sturm College of Law. David has also served on the faculty of the National Institute for Trial Advocacy (NITA), the Constitutional Rights Foundation, the National Institute of Legal Education, and has taught management, ethics, and negotiation at the collegiate level. From 1999 to 2008, David served in a volunteer capacity as head coach for the Regis Jesuit and Bear Creek High School Mock Trial Teams.

With a passion for helping youth, in 2004, David established The Providence Foundation of Law & Leadership with the mission of providing scholarship funding to high school students who display an interest in the justice system and dedication to their community. In 2007, David received the Charles B. Dillion Award of Merit for his work in public service. David has also been recognized by Denver's ABC affiliate, KMGH, as an "Everyday Hero."

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.

**Roderick O'Dorisio**, Founder & CEO

Colorado Reg. No. Forthcoming Fall 2018 (fingers crossed ☺)

Roderick O'Dorisio is a third-year law student at the University of Denver, Sturm College of Law. He graduated this May and will be taking the Colorado Bar in July. Rod earned his Bachelor of Science in Computer Science at the University of Denver (DU) in August 2015, while being the first student to enter DU's prestigious 3+3 program (3 years undergrad, 3 years law school). He also received minors in Chinese, Mathematics, Economics, and Leadership Studies. His senior distinction project in computer science was titled "Python for Quantitative Trading and Financial Analytics" and involved LED boards, Raspberry Pi's, and high-velocity trading algorithms using market sentiment from social media platforms. Prior to law school, Rod worked as a software engineer for Jeppesen-Sanderson (subsidiary of Boeing) and Raytheon Company.

As a law student at Sturm, Rod has been published in the Denver Law Review (You've Got Mail! Decoding the Bits and Bytes of the Fourth Amendment after *Ackerman*, 94 Denv. L. Rev. 651 (2017)), the Denver Law Review Online (Torts in the Virtual World (2017) and The Current State of Drone Law and the Future of Drone Delivery (2016)), and the Federal Circuit Bar Journal (Testing the White Hat Effect in Patent Litigation, 27 F.C.B.J. 155 (2017), co-authored with Professor Bernard Chao). He is also a recipient of the Provost Scholarship.

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

Trial Boom was born out of Rod's passions for both law and technology. During his second year in law school, while in Evidence class, Rod began searching for simulation tools to help him better understand the rules of evidence and how they are applied in a courtroom. Coming up empty-handed, Rod decided to build his own courtroom simulator. With the help of genius minds (far smarter than Rod's) from both the legal education and the software development worlds, the Trial Boom courtroom simulator was created.

Rod is also a registered patent agent (#75363) and has been prosecuting patents for almost two years, specifically in the computer software and electrical engineering art areas. If he's not in the office, chances are he's up in the air flying a Cessna 172. He is an avid aviator and received his instrument rating in 2017.

**© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.**

WWW.TRIALBOOM.COM

© 2018

© Copyright 2018 Trial Boom LLC. No claim to original U.S. Government Works.