AMERICAN BANKRUPTCY INSTITUTE

2018 Southeast Bankruptcy Workshop

Skills/Young Lawyers Track

Litigation Skills

CONCURRENT SESSION

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Hon. Frank J. Santoro
U.S. Bankruptcy Court (E.D. Va.); Norfolk

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SELECTED ISSUES IN BANKRUPTCY LITIGATION ©

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MODERATOR
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SPEAKERS:

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APPENDICES

HON. FRANK SANTORO was appointed as a U.S. Bankruptcy Judge on February 21, 2008, sitting in Norfolk and Newport News, Virginia. He received undergraduate degrees, with honors, in political science, and economics and finance from Allegheny College in 1976, where he was also a member of Phi Beta Kappa. He received his J.D. degree from the Marshall Wythe School of Law at the College of William and Mary in 1979.

Prior to his appointment, Judge Santoro was the managing partner of Marcus, Santoro & Kozak, P.C., located in Portsmouth and Chesapeake, Virginia, where his practice concentrated in bankruptcy, corporate reorganizations and corporate finance. He served as standing Chapter 13 Trustee beginning in 1987 and also a Chapter 7 Panel Trustee from December 1981 through May 1990. He was a former law clerk to Judge Hal J. Bonney, Jr. He has been a frequent speaker at seminars and is a fellow of the American College of Bankruptcy. In 2003, Judge Santoro was selected by his peers as the outstanding bankruptcy lawyer in Virginia.

Judge Santoro stays busy with his children and grandchildren. He is active in a variety of civic organizations and is an official USTA Ironman.

G. WILLIAM McCARTHY has been representing debtors and creditors for forty years, specializing in corporate and partnership restructurings, both in and out of bankruptcy courts. Though primarily representing debtors, he has also served as counsel for various creditors' committees, for trustee's in chapter 11 cases and for receivers in state court cases. He has also been appointed as trustee in chapter 11 cases, receiver in state court matters, and as liquidating trustee in both chapter 11 and in Chapter 9 hospital cases.

Types of engagements range from master planned developments to office parks to apartment complexes to environmentally challenged unimproved land; and from manufacturing companies in the furniture, textile, and automobile industries to automobile dealers and trucking companies; and to soybean milling companies and other agricultural companies to communications companies, employment companies, and health care companies, nursing homes and hospitals.

Bill also serves as a mediator, having completed the St John's University School of Law Bankruptcy Mediation Training. He has served as an adjunct professor at the University of South Carolina Law School and regularly lectures to law students and lawyers.

THOMAS J. SALERNO is a partner in Stinson Leonard Street's financial restructuring practice, resident in the firm's Phoenix office. He has been involved in restructurings in the United States, the United Kingdom, Germany, France, Switzerland and the Czech and Slovak Republics. In addition, he taught *Comparative International Insolvency* at the University of Salzburg. Mr. Salerno was named as one of 12 Outstanding Bankruptcy Attorneys in 1998 and 2000 by *Turnarounds & Workouts*, a newsletter published by Beard Group, Inc. in Washington DC, and is a member of the select group of insolvency professionals listed in the *K&A Restructuring Professionals Registry*. He is also listed in *The Best Lawyers in America* and selected as the Restructuring Lawyer Of The Year in Phoenix for 2009 and 2013by this publication. He was selected by his peers for inclusion in *Southwest Super Lawyers,* a distinction honoring the top 5 percent of lawyers in the region, from 2007 until present. In 2007, Mr. Salerno was one of three Arizona-based lawyers to be listed in *The International Who's Who of Insolvency &Restructuring Lawyers*. He is rated AV by Martindale-Hubbell's rating system.

Mr. Salerno has extensive experience representing distressed companies, acquirers and creditors in financial restructurings and bankruptcy proceedings, pre- and post-bankruptcy workouts, and corporate recapitalizations. He has represented clients in diverse industries such as casinos, resort hotels, real estate, high-tech manufacturing, electricity generation, agribusiness, construction, health care, airlines and franchised fast-food operations. He has also served as an expert witness on US insolvency law in litigation in Germany. He has represented parties in insolvency proceedings in 30 states and five countries. Mr. Salerno headed the US delegation to the Czech Republic in advising the Czech Government in the historic revamping of its bankruptcy law, which took effect in January 2008. He has also advised on revamping insolvency laws in the Dominican Republic and Costa Rica. He is a member of the UNCITRAL working group on its Insolvency Law Reform Project, completed in early 2007. He was lead counsel in the historic Chapter 11 proceeding resulting the sale of the *Phoenix Coyotes* to the NHL (the first time the NHL has acquired one of its teams) in 2009.

In addition to numerous articles in both national and international journals, Mr. Salerno is the author of "An Overview of the Restructuring Process," which appeared in *Best Practices for Corporate Restructuring,* published in 2006 by *Aspatore Books.* He is also the co-author of "Chapter 11 Cases Involving Professional Sports Franchises: Special Issues" published in *Collier's On Bankruptcy*; the *Executive Guide to Corporate Bankruptcy*, originally published in 2001 by Beard Publications (with the Second Edition published in 2010); co-author and an executive editor of the three-volume treatise *Advanced Chapter 11 Bankruptcy Practice*, published by Aspen Law Publications; and co-author of the two volume *Bankruptcy Litigation and Practice; A Practitioners' Guide – 4th Edition*, also published byAspen Law Publications. Mr. Salerno served as a director of the American Bankruptcy Institute, where he also served on the executive committee, and formerly was a director of the American Bankruptcy Board of Certification, Inc. He is a past chair of the Bankruptcy Section of the State Bar of Arizona and a Fellow of the American College of Bankruptcy.

Mr. Salerno is a graduate of Rutgers University (BA, 1979, *summa cum laude*) and University of Notre Dame School of Law (JD, 1882, *cum laude*), where he served on the *Notre Dame Law Review*.

RORY D. WHELEHAN is a partner in the Greenville, South Carolina office of Womble Bond Dickinson (US) LLP, where his practice focusses on bankruptcy matters.

PART I

DIRECT EXAMINATIONS IN BANKRUPTCY LITIGATION

"Every man is bound to leave a story better than he found it."

Mary Augusta Ward
Robert Elsmer (1888)

1. *WHAT DO I NEED TO PROVE THROUGH THIS WITNESS?*

- Outline of fact/opinion to be elicited from witness
- List of Exhibits to be offered into evidence through the witness
- Alerts—where and how can this witness hurt my case on direct or on cross?
- Do I need/want this witness—if rather no what are my alternatives?

2. *IMPORTANCE OF EARLY CONTACT*

- Get to the witness early and first if possible
- Memorialize their testimony—by recording or signed written statement
- If not hostile, do NOT take deposition unless there is a compelling reason
- Get the witness invested in your case—make him or her a part of the team
- Get documents and physical evidence

3. *PREPARE THE WITNESS—PART I (DEPO PREP)*

- The beginning of good direct comes with preparation for the possible deposition from the other side
- Assist the witness in the preparation for the deposition
  - Review statements or transcripts of recorded statements

– Deposition prep is fine—Witness should not be defensive

4. *PREPARE THE WITNESS—PART II (TRIAL PREP)*

- Go over with witness their role in the trial
- Review all prior statements with witness
- Review all documents related to witness' testimony
- Review documents to be admitted by witness
- Talk about documentary admission procedure—*See* Part II
- Rehearse at least critical parts if possible.

5. *PREPARE THE WITNESS FOR CROSS EXAMINATION*

- Reduce the fear of cross
- Talk about the likely cross examination topics in the testimony
- Best advice:

– Listen to the question
– Be truthful
– Don't guess or speculate—"If you don't know, say you don't know."

- Rehearse with a sample cross—"sandpaper" the witness

6. *"PRESENTATION" OF THE WITNESS*

- The witness is the "Star"

– Get Court comfortable with witness
– Try to have Court look at witness rather than you ("location, location, location")
– Encourage witness to look at the Judge
– Rehearse work with the exhibits
– Give the witness credibility with your own attention, deference and respect

7. *THE "EXPERT" WITNESS*

- "An expert is a fool 50 miles from home." Prof. Frank Booker, Univ. of Notre Dame Law School (1980)
- *FRE 702*—an expert must be qualified as such in order for such testimony to be admissible. Two (2) prerequisites:

  - ***First***, testimony must be subject of "scientific, technical, or other specialized knowledge" needed to assist truer of fact to understand evidence or to determine a fact in issue.
  - ***Second***, expert witness must be qualified as an expert by:
    - Knowledge;
    - Skill;
    - Experience;
    - Training; or
    - Education.

- *Daubert v. Merrill Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993) (trial court has to "ensure that the courtroom door remains closed to junk science"—the trial court as "gatekeepers").

- *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999) (review of factors trial courts should consider in determining whether proffered expert testimony "is the product of reliable principles and methods").

- *Lippe v. Bairnco Corp.*, 288 BR 678 (SDNY), *aff'ed* 99 Fed. Appx. 274 (2d Cir. 2004).

- *In re Med Diversified, Inc.* 346 BR 621 (Bankr E.D.N.Y. 2006) (Bernstein, J.)[1] — the Court as advocate?

  - *See also* Bernstein, Seabury & Williams, "The Empowerment of Bankruptcy Courts In Addressing Financial Expert Testimony," 80 *Am. Bankr. L.J.* 377 (Summer 2006).

[1] Judge Bernstein retired from the bench on July 31, 2007 and, as of August 1, 2007, is a law professor at John Marshall Law School in Atlanta.

- ***Specific FREs Related To Expert Witnesses***

  - ***FRE 702*** – experts may testify as to opinions, while lay witnesses may not (FRE 701)

  - ***FRE 703*** – the facts/data relied upon by experts, even if inadmissible by themselves (such as hearsay, etc.), if of the type reasonably relied upon by experts, may form the basis of expert's opinion.[2]

  - ***FRE 704(a)*** – experts (with exceptions related to criminal matters) may testify as to "ultimate issue" (*e.g.* signature is forged).

  - ***FRE 615*** – be sure to exclude adverse expert witnesses! Don't give them time/opportunity to bolster their case by sitting through your expert's testimony!

  - ***FRE 706*** – court can appoint its own experts. This has been used in bankruptcy cases to evaluate proposed sale transactions (*PMH Resources*) and to resolve valuation issues in contested, complex matters (*Calpine Energy)*.

  - ***FRE 1006*** – summaries are admissible if underlying documents are disclosed and made available to other side. Summaries are very helpful in dealing with experts, particularly in bankruptcy cases.

8. *PRESENTATION OF TESTIMONY*

- Organized presentation—if the Court is lost, you're lost!
- Preliminary questions to get settled in
- "Headline": Hit a high point early
- Use Visuals and Exhibits—if it fits
- Pacing—Questions that are too open allow witness to ramble and are boring to hear

– Work up short-answer-questions and long-answer-questions
– Rehearse—"We will get there."

9. *"CHALLENGES"—AKA PROBLEMS*

- Inability to lead
- Jumping ahead by witness
- Problem of omitted testimony
- The "bad" witness—too young; too forgetful; too much the advocate; just plain sleazy

[2] This makes practical sense. Without it, how would an appraiser ever be able to opine about comparable sales?

PART II

INTRODUCTION OF DOCUMENTARY EXHIBITS

"It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed."

Benjamin N. Cardozo
Shepherd v. United States,
290 U.S. 96, 104 (1933)

1. *INTRODUCTION*

A. *TWO "BIBLES"*

- *Fundamentals Of Trial Techniques* by Thomas A. Mauet (Little Brown & Co.)
- *Bankruptcy Evidence Manual* by Hon. Barry Russell (West Bankruptcy Series)

B. *"I-A-O-U" RULE FOR DOCUMENTARY EXHIBITS*

- ***I***dentify
- ***A***uthenticate
- ***O***ffer
- ***U***se ***only after admitted***
- *See* Section 3, below—Recite and use the "***Evidence Mantra***"

2. *MARKING THE EXHIBIT*

A. *"WALKING" METHOD*

- Present to Clerk
- Request that exhibit be marked "Trustee's Exhibit Number X"
- Show Exhibit to opposing counsel
- Get permission to approach witness (if needed in your Courtroom)
- Hand Exhibit to witness

B. *"EXHIBIT BINDER" METHOD*

- Obtain numbering system from Clerk and prepare Binder with all your exhibits numbered or lettered.
- Notebooks for:
  - You
  - Witness
  - Judge
  - Opposing Counsel
  - Extra (2)

3. *THE "EVIDENCE MANTRA"*

A. *THE FOUR ESSENTIAL PHRASES*

"Memorize and Recite"—three (3) simple question that will deceive people into believing you know what you're doing! Amaze your friends!

- ***Identification:*** "Sir/Ma'am, I hand you what has been marked as Trustee's/Debtor's/Creditor's/Officious Meddler's Exhibit "X" for identification, and ask you to examine it please. Can you identify Exhibit "X" for the record?"
- ***Authentication:*** "Is that a copy of your signature on page 3?" or "Is this a copy of the letter that you received on or about X date?"
- "Is this a complete copy of the letter?"
- ***Offer.*** "Trustee offers Exhibit "X" into evidence."
- ***NOW*** you can use the Exhibit!

B. *OFFERING THE EXHIBIT*

- VERY important—without this step the exhibit is not in the evidentiary record.

4. *EVIDENTIARY OBJECTIONS—"JUST WHEN IT WAS GOING SO WELL…"*

A. *INITIAL TESTS—["OPRAH"]—IS THE EXHIBIT/ EVIDENCE…*

- Offered?
- Probative vs. Prejudicial?
- Relevant? (aka "material")
- Authenticated?
- Hearsay?

B. *PROBATIVE VS. PREJUDICIAL—"WEIGHT THE EFFECT"*

- Is it probative?
- Is it unduly prejudicial?

C. *RELEVANCE—FEDERAL RULES OF EVIDENCE ("FRE") 401*

1. RELEVANT EVIDENCE—

- Makes a fact of consequence to the outcome of the proceeding more probable or less probable

2. FRE 403—WHEN RELEVANT EVIDENCE IS INADMISSIBLE—OR "WHEN GOOD EVIDENCE GOES BAD"

- Danger of unfair prejudice
- Confusing
- Misleading
- Delay or waste of time
- Needlessly cumulative evidence—"the Exhibit speaks for itself"

D. *AUTHENTICATION—FRE 901*

- Proof must be offered the Exhibit is, in fact, what it is claimed to be
- ***Common Objection***—"Lack of foundation"
- ***"Self Authenticating Documents"—FRE 902***
  - Twelve (12) types of documents that are "self authenticating"
  - May still be irrelevant, or prejudicial, but don't need a witness to lay an evidentiary foundation
  - ***The "Self Authenticating Twelve"***
    - Domestic public documents under seal (FRE 902 (1))
    - Domestic public documents not under seal (FRE 902(2))
    - Foreign public documents (FRE 902(3))
    - Certified copies of records (FRE 902(4))
    - Official publications (FRE 902(5)) (*e.g.* Dept. of Agriculture Bulletin)
    - Newspapers and periodicals (FRE 902(6))
    - Trade inscriptions (*e.g.* "made by XYZ Co.") (FRE 902(7))
    - Acknowledged documents (*e.g.* notarized documents) (FRE 902(8))
    - Commercial paper and related documents (FRE 902(9))
    - Presumptions under acts of Congress (FRE 902(10))
    - Certified domestic records of regularly conducted activity (*e.g.* certified "business records exception documents") (FRE 902(11))
    - Certified foreign records of regularly conducted activity (FRE 902(12))

E. *HEARSAY—"He's just telling me what the other guy said."*

- *See* FRE 801-807
- ***What is "hearsay?"*** A statement by someone other than by the witness on the stand (the "Declarant," in FRE 801(b) lingo) offered to prove the truth of the matter asserted. FRE 801(c).
  - "John told me Sarah told him she never even read the financial statement."
- ***What is a "statement?"*** Oral or written assertion, or non-verbal conduct. FRE 801(a).
  - ***Oral***: "John told me Mary told him…" (this can be "double hearsay," or "hearsay written hearsay").
  - ***Written***: Document authored by someone other than the declarant.
  - ***Non-Verbal***: "I saw John nod his head 'yes' when asked the question."
- ***Hearsay Is Not Admissible—FRE 802***
  - Why? No chance to challenge the Declarant on cross examination.
- ***What Is Not Hearsay? FRE 801 (d).***
  - Two things:
    - ***Prior statement by witness*** - if made at the trial or hearing (therefore presumably under oath) and subject to cross examination which is: (a) inconsistent with declarant's testimony in another trial, hearing or deposition at which time declarant is under oath; ***or*** (b) consistent with current testimony and introduced to rebut inference of recent fabrication; ***or*** (c) one of identification of a person.
    - ***Admission by a party opponent***—statement offered against a party which is: (a) party's own statement in either individual or representative capacity; ***or*** (b) a statement in which party has manifested an adoption or belief in its truth; ***or*** (c) a statement by a person authorized by the party to make a statement concerning the subject matter; ***or*** (d) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment made during such agency/employment; ***or*** (e) a statement by a co-

conspirator of a party during the course and in furtherance of the conspiracy.

- ***Hearsay Exceptions—"So its hearsay, but it's OK hearsay." FRE 803-804, 807. Three Kinds:***
    - ***Exceptions Whether Declarant Is Available Or Not—"The Big 23" (FRE 803)—(the exceptions that usually come up in bankruptcy cases are set out in bold and italics)***
        - ***Present sense impression ("She said, 'look at that great sunrise!'") –FRE 803(1).***
        - Excited utterance ("Just after the car almost hit us, he said 'Man I'm glad I hid that stolen money where my wife could find it!'") FRE 803(2).
        - Then existing mental emotional or physical condition ("He told me he was suffering from depression.") FRE 803(3).
        - Statement made for purposes of medical diagnosis/treatment ("She told me, as the attending doctor, that she suffered from seizures.") FRE 803(4).
        - ***Recorded recollection (witness showing the witnesses own notes from prior time when notes were made when events were fresh in witness' mind) FRE 803(5).***
        - ***Records of regularly conducted activity (written report kept in ordinary course of business) FRE 803(6).***
        - ***Absence of entry in records kept in regularly conducted activity—FRE 803(7).***
        - ***Public records/reports (police or other public agency records, reports, etc.) FRE 803(8).***
        - ***Records of vital statistics (birth or death certificates, etc.) FRE 803(9).***
        - ***Absence of public record or entry (prove through testimony that appropriate person searched and could not find the public record) FRE 803(10).***
        - Records of religious organizations (marriage certificates, etc.) FRE 803 (11).
        - Marriage, baptismal and similar certificates –FRE 803(12).
        - Family records (family genealogies, engravings on family, jewelry, etc) FRE 803(13).

- ***Public records of documents affecting an interest in property (deeds, bill of sale, etc)—803(14).***
- ***Statements in documents affecting an interest in property—FRE 803(15).***
- Statements in "ancient" documents (documents in existence 20+ years whose authenticity is not in dispute) FRE 803(16).
- ***Market reports, commercial publications (directories, market quotations generally used and relied upon by public or persons in particular occupations) FRE 803(17).***
- ***"Learned treatises" (if used by expert witness in direct examination) FRE 803(18).***
- Reputation concerning personal or family history (regarding a person's birth, marriage, death, blood relationships) FRE 803(19).
- Reputation concerning boundaries or general history (regarding reputation in general community established before dispute arose) FRE 803(20).
- ***Reputation as to character (among associates or in community) FRE 803(21).***
- Judgment of previous conviction (for felonies, not including *nolo contendore* pleas—even if on appeal) FRE 803(23).

o ***Exceptions Only When Declarant Is Not Available—"The Big 6" (FRE 804)***

- "***Unavailability***"—can't obtain testimony because of: (a) privilege; (b) unlawful refusal to testify; (c) asserts lack of memory; (d) dead or ill; (e) outside scope of service of process. FRE 804(a).
- ***Former testimony*** (under oath at trial, hearing or deposition) FRE 804(b)(1).
- ***Statement under belief of impending death*** (no one tells a lie when they think they're about to meet their maker!) FRE 804(b)(2).
- ***Statement against interest***—(see also FRE 801(a)—Statement by party opponent) FRE 804(b)(3).
- ***Statement of personal or family history*** (declarant's own out of court statement regarding own birth, marriage, divorce, family, or about those

same things regarding a blood relative) FRE 804 (b)(4).

- ***Forfeiture by wrongdoing*** (where declarant was involved in making sure he/she was unavailable as a witness) FRE 804(b)(6).

- ***"Residual" Exception—"Yeah, it's blatant hearsay, but its <u>good</u> blatant hearsay"—FRE 807***
  - Any Statement not covered by exception in FRE 803 or 804 if court determines: (a) involves material facts; ***and*** (b) better evidence is not available; ***and*** (c) interests of justice will be served.
  - Must be disclosed to other party in advance, with name/address of declarant.

F. ***WHAT IF IT'S NOT THE ORIGINAL?***

- So what?—*See* FRE 1003

G. *See also Common Evidentiary Objections* attached hereto as Appendix II.

5. *"BUSINESS RECORD POLKA"*

- ***<u>Problem</u>:*** So what if the document came out of someone's business files from 8 years ago—the person who signed/sent it isn't around, nor is the person who received it? It's classic hearsay at that point.
- ***<u>Solution</u>:*** Do the "Business Record Polka"! *See* FRE 803(6). Ask the following six (6) questions:

- ***<u>QUESTION NO. 1</u>***

Q: "Can you identify Exhibit X?"
A: "It's a [business record]."

- ***<u>QUESTION NO. 2</u>***

Q: "When was it made?"
A: "It was made at the time of the transaction it recorded."

- ***QUESTION NO. 3***

  Q: "Who made it?"
  A: "My Bookkeeper."
  [It was made based on information from a person that had actual knowledge off what was entered.]

- ***QUESTION NO. 4***

  Q: "How is this record prepared?"
  A: "It's prepared regularly in the course of our business."

- ***QUESTION NO. 5***

  Q: "Who is the person responsible for these records?"
  A: "My Bookkeeper and I are."

- ***QUESTION NO. 6***

  Q: "Where is the Original?"
  A: "At my office."
  Q: "What's the difference between Exhibit 14 and the original?"
  A: "There is no difference."

6. *COMBATING OBJECTIONS*

- Keep your cool.
- Think about every objection that could be made to your evidence.
- Lay the proper foundation to begin with.
- Be prepared to respond.
- When the objection is made respond with rule that allows the evidence.

PART III

EFFECTIVE CROSS EXAMINATIONS IN BANKRUPTCY LITIGATION

"More cross-examinations are suicidal than homicidal."

Emory R. Buckner
Francis Lewis Wellman
Art Of Cross-Examination
(1936)

1. *UNDERSTANDING THE PURPOSES OF CROSS-EXAMINATION—*

- To ***blunt*** the effect of a good direct examination.
- To ***discredit*** a biased, waivering or untruthful witness or sloppy expert.
- To ***highlight*** helpful facts ignored or minimized in direct examination of a hostile witness.
- To ***obtain factual building blocks*** to support your closing argument or post-trial brief.
- The "***slaughterhouse theory***" of cross examination—keep those doggies rollin….

2. *TO CROSS OR NOT TO CROSS—THAT IS INDEED THE QUESTION!*

- Is it always necessary?

3. *"THIRTEEN RULES OF EFFECTIVE CROSS-EXAMINATION IN BANKRUPTCY LITIGATION."* [3]

- ***Items marked with" 📠" are derived from interviews with various bankruptcy judges.***

- ***Preliminary Observation.***

  - Learning to effectively cross-examine takes practice and experience. Even very experienced bankruptcy litigators review transcripts and wince at misfired questions or omitted questions or follow-ups!
  - There is rarely a "perfect" cross-examination, but some are more effective than others.

[3] Not sold in any store—act now and receive a set of Ginszu steak knives and a three-year supply of Rice-a-Roni, "the San Francisco treat!"

- ***RULE ONE: Choose Your "Themes" And Avoid "Overkill."***

  - Overextensive or overaggressive cross-examination detracts from effectiveness, and can make the judge sympathizes with the witness being "bullied."
  - At the end of a cross-examination, a judge should be able, in a summary fashion, to tick off the handful of points central to the examiner's ***theme***.[4]
    - ***"Themes"*** are chosen or refined based upon either (or both) discovery and/or testimony on direct.
  - It is apparent to most experienced bankruptcy judges when a cross-examination has no clear objective or themes—the cross-examinations tend to ramble, often become argumentative, and a re-hash of direct examination.
  - Choose your points well—picking apart a witness' every word is ineffective, looks like quibbling, and ultimately dilutes the impact of the stronger points.
  - Be sure to return to your themes if a difficult witness insists on moving away from the issues.

[4] One judge interviewed said he likes a summary at the conclusion of a cross-examination by the examiner (such as "So, to summarize, you testified to X, correct? And Y, correct? And Z, correct?"). This judge acknowledged that such testimony may be cumulative and subject to an "asked and answered" objection, but he finds it helpful.

- ***RULE TWO: PREPARE. PREPARE. PREPARE. (Did I mention preparation?)***

  - A trial is a play—no actor likes to perform a play without adequate preparation.
  - The only way to choose effective "themes" is to be prepared—

    - Where does this witness' testimony fit into the scheme of the case?
    - What "factual building blocks" is this witness providing to the other side that need to be discredited or minimized, or what facts do you need from this witness for your case?

  - Avoid "fishing expeditions," otherwise known as discovery in open Court! Nothing is worse than a lawyer's attempt to do discovery through cross-examination—it is often unorganized and leads to confusion or worse (*e.g.* factual testimony adverse to a lawyer's case).

  - In order to be prepared for effective impeachment, you must be very familiar with depositions taken of key witnesses and other discovery taken in the case.

> ***Example***
>
> In preparation for cross-examinations of key witnesses, and where wording is crucial (*see* Rule Three, below), the following is helpful:
>
> **Cross-Exam Outline**
>
> 1. The sky was blue on October 14, 1999—correct? [Depo. Tr. At 51:1-3].
>
> 2. You were in a position to see the sky that day, correct? [Depo. Tr. At 53:5-18].
>
> Etc.
>
> This allows you to go right to the impeachment spot without fumbling around.

  - Preparation is ***KEY*** to effective impeachment! (*See* Rule Three, below.)

- ***RULE THREE: LEARN TO EFFECTIVELY IMPEACH BASED ON PRIOR INCONSISTENT TESTIMONY!***

  - Impeachment is allowed only under Fed. R. Evid. 801(d). Elements: The prior statement from which the impeachment will come: (1) must be ***inconsistent*** with the testimony; and (2) must have been ***given under oath*** subject to the rules of perjury. Interestingly, a lawyer may impeach his or her own witness. FRE 607.
  - Most common uses of impeachment—changes in testimony from a prior deposition or judicial proceeding.

    Learn to set up an impeachment! In order for it to be effective and helpful to the trier of fact, the cross-examiner must first clearly establish: (1) that the testimony given in the trial is clearly inconsistent with the prior statement under oath; and (2) that inconsistency is material and relevant.

Example [5]

Q: Sir, you testified on direct examination that the sky was blue on Saturday, October 14, 1999, isn't that correct?

A: Yes.

Q: You recall I took your deposition on August 1?

A: Yes.

Q: And you were under oath at that deposition, isn't that correct?

A: Yes, I believe so.

Q: Sir, do you recall the following exchange—counsel, deposition transcript, page 10, starting at line 12—:

Q (by me): So what color was the sky that day?

A (by you): What day?

Q: October 14, 1999.

A: It was red—a bright red.

Do you recall that, sir?

A: Yes, I suppose.

[5] In some jurisdictions, local rules of practice require that the witness be shown the transcript and counsel must allow the witness to read along to ensure the transcript is being correctly read. Check your local jurisdiction.

DO NOT: (1) Ask the witness if he/she was lying under oath then, or now; (2) Ask if he or she is trying to change his/her testimony; (3) Ask if you read it correctly; or (4) Ask anything else. ***THE POINT IS MADE, THE IMPEACHMENT IS DONE.*** At this point, it will be up to the other side on re-direct examination to attempt to rehabilitate the witness.[6]

[6] If you are prepared and impeach properly and effectively once or twice with a witness, you'll find either the witness stops playing with you and flies right, or gets so flustered he or she anticipates impeachment. An example of the latter occurred in the cross-examination of a feasibility expert in a recent contested plan confirmation where the debtor's expert was impeached 3 times—he was a bit "skittish" after that:

> **Q (By Mr. Salerno):** Sir, in the debtor's projections, they use a five percent FF&E [Furniture, Fixtures and Equipment] reserve, correct?
>
> **A (By Debtor's Expert):** That's correct.
>
> **Q:** And isn't it true—particularly with older limited service hotel properties—that a four to five FF&E is not considered sufficient by many industry experts in order for that hotel to remain competitive.
>
> **A:** Yes—in fact, during the deposition on Monday, I believe you played a tape in which Mr. Warnick—the principal and founder and owner of our firm—made that very statement. However, I would point out—well, if you're going to ask me to give an answer, Mr. Salerno—
>
> **Q:** Keep going, sir. I'm not cutting you off—just keep going.
>
> **A:** —let me qualify it. I mean, these yes and no answers are just leading you to a track that you'd like to go, but I don't think they're fair in terms of getting to the facts of the issues. Yet generally speaking, more than four percent is the industry norm, but we're talking—now let's qualify that—let's put conditions—
>
> **Q:** Qualify away, sir.
>
> **A:** You're talking more than four percent for a reserve over the entire life of the property, which can be at as much as 40 or 50 years, and we're talking about a seven-year period here.
>
> **Q:** Sir, are you done?
>
> **A:** And you're also talking generally and not looking at market-specific issues. Yes. I will answer yes, but—
>
> * * *
>
> **Q:** So the truth is, the founder of your company, Warnick & Company—Richard Warnick—believes that four to five percent is not sufficient in limited hotel service industry; isn't it?
>
> **A:** Generally speaking, over the long haul of the property, a 50-year term—40 to 50 year life.

- Most common mistakes that annoy judges, and worse, detract from the effectiveness of your cross-examination:
  - Attempting to impeach when the testimony given in Court is not clearly inconsistent—it leads to quibbling and argument.
  - Attempting to impeach before clearly establishing the inconsistent testimony (*e.g.* going right to deposition transcript without refreshing the judge's recollection as to what the "offending" testimony was).
  - Attempts to impeach where the inconsistency is less than clear.

Example

Q: So sir, you testified on direct that the sky was blue on October 14, 1999—correct?

A: Yeah.

Q: Sir, and turn to—

A: Sir, if I can—

Q: Keep going—keep going–

A: —if I might just add. The—well, you're saying yes, no, yes, no, but there's more to the matter. The issue of having sufficient FF&E reserves is an issue of remaining competitive. If you look in a specific market, and the remainder of the competitors in that market are older properties, are properties that aren't maintaining the same reserve levels, then a four percent reserve may well be sufficient. And in fact, in these submarkets, nearly 60 percent of the properties are over ten years old, and a third of them are over 20 years old, and most of them are owned by mom and pop operators. So if you want to take a broad generality and try and apply it to the specific circumstances, I just don't think that's fair.

Q: Sir, I'm asking you, generally speaking, if in the limited service hotel sector a four to five percent FFE reserve is not sufficient—that's the point of these questions.

A: Generally speaking, yes.

Q: And the debtor's hotels are limited service hotels, correct?

A: Yes.

Whew! I thought we'd never get to that "generally, yes" answer! The expert was flustered, and came across as wanting to "qualify" everything.

Q: Sir, you recall that I took your deposition (etc.)?

A: Yeah, I forget the date—whenever it was.

Q: You were under oath at the deposition, correct?

A: Yeah, I raised my right hand and all that.

Q: Do you recall the following exchange—counsel, deposition transcript, page 52, line 7—

Q (by me): So what color was the sky then—that day—do you know?

A (by you): I don't remember.

Q: Was it red? Blue? Orange?

A: I don't recall—it could've been.

Q: Could have been what?

A: Red, orange—I'm not real sure.

Do you recall that, sir?

This is wasted impeachment—it's unclear, and ineffective. If this is done too often, it insults and annoys the judges.

Ill-prepared counsel trying to impeach! You lose the flow and effect.

Example

Q: Now, if I heard correctly you said the sky was blue on the fourteenth of October, right?

A: You heard correctly.

Q: Fine. You remember I took your deposition (etc., etc.).

A: Yeah, yeah.

Q: Now….hold on, it's here somewhere…uhmm, [to co-counsel] Where's the transcript? Do you have it?… If the Court will give me just a …. Oh, here it is…no, that's the other one…. Oh, oh, right—here it is…. Now, sir, you were under oath at that deposition, weren't you?

A: I raised my right hand and all that.

Q: Very good. Now, do you remember when I asked you…just a second…. It think it was about page 12 [flipping through transcript]…. No, maybe page 22 [more flipping]…. With the Court's indulgence…. Oh, here it is—page 32, starting on line 7—no, 8—….

At this point, the effectiveness and pace is lost.

- ***RULE FOUR: CONTROL THE FLOW AND THE PACE—IT'S YOUR SHOW!***

  - Judges like concise, crisp, and organized cross-examinations—keep it moving as much as possible. Difficult witnesses can slow you down, but try to keep on your pace.

  - A key element to this is good preparation and a clearly defined objective or "theme"—without it, cross-examinations can become confused, rambling and ineffective.

  - Use leading questions unless there's a good reason not to.

  - With a difficult or evasive witness, ask the Court to instruct the witness to answer directly—Bankruptcy Judges know when a witness is being difficult, and it hurts the witness' credibility.

  - Avoid compound questions! They'll not only draw an objection (and slow down your pace), but also confuse the witness and maybe the judge.

Example

Q: So, you'd agree with me that there's no equity in these properties and the debtor really can't put together a feasible plan of reorganization, wouldn't you?

A: Which question…I'm not sure…

[Opposing Counsel]: Objection! The question is vague and compound. The witness clearly doesn't understand it.

[Whereupon counsel debate on the record for 3-5 minutes about whether the question was clear, and by the end of the exercise, everyone has forgotten what the whole point of the question was.]

- ***RULE FIVE: DON'T LET DIFFICULT COUNSEL OR WITNESSES THROW YOU OFF YOUR THEMES OR QUESTIONS.***

  - If you think a question is important, don't let an evasive or difficult witness fluster you—go back to your question.

Example

Q: Sir, you'd agree that the 9% interest rate proposed in the debtor's plan would be too low if the loan-to-value was 100%, wouldn't you?

A: Well, I wonder if the values were properly determined in light of the current market conditions.

Q: That's fine, sir, but my question to you is if the loan-to-value was 100%, the debtor's proposed 9% interest rate would be too low, correct?

A: Well, how are you defining loan-to-value? I'm not sure we're talking about the same thing here….

[Etc., etc. After a few rounds of this, the Judge will likely instruct the witness to answer the question. For a real life example, see, note 4, supra.]

  - If necessary, ask the Court to direct a witness to answer a question. While you may not get it on your first request, after numerous/repeated evasive answers, the Court will help rein in the witness.

  - Don't let verbose opposing counsel, making long-winded speaking objections, throw you! In fact, the more obstreperous they become, the more they will annoy the Judge, and more importantly telegraph to the Judge that they're worried about what the testimony is going to be.

Example

Q: So the sky was blue on October 14, 1999, isn't that correct sir?

[Opposing Counsel]: I object, your Honor! That question is vague and ambiguous, and argumentative! It has no relevance to this matter, and is clearly designed to badger this witness. It may also involve inadmissible hearsay, and also violates the best evidence rule. As counsel is fully aware, whether the sky was blue or gray or purple or yellow is perhaps the ultimate conclusion in this case, blah, blah, blah.

[Court]: Overruled.

Q: Sir, the sky was blue on October 14, 1999, correct?

A: Yes.

- ***RULE SIX: BE SURE YOU'VE COVERED YOUR THEMES.***

  As part of your preparation, be sure your bases are fully covered. Don't leave out crucial questions!

Levity Break

In a terrible accident at a railroad crossing, a train smashed into a car and pushed it nearly four hundred yards down the track. Though no one was killed, the driver took the train company to court.

At the trial, the engineer insisted that he had given the driver ample warning by waving his lantern back and forth for nearly a minute. He even stood and convincingly demonstrated how he'd done it. The court believed his story, and the suit was dismissed.

"Congratulations," the lawyer said to the engineer when it was over. "You did superbly under cross-examination."

"Thanks," he said, "but he sure had me worried."

"How's that?" The lawyer asked.

"I was afraid he was going to ask if the damned lantern was lit!"

  At the end of cross-examination, ask the Court for a moment to collect your thoughts and double check your notes. If co-counsel is in the courtroom, ask to be sure you've covered everything.

- ***RULE SEVEN: WHILE PREPARATION IS CRUCIAL, DON'T GET WED TO YOUR NOTES.***

  - Often, attorneys are so focused on their notes and covering their questions, they don't listen to the witness' answers and miss wonderful follow up questions.

> ***Example***
>
> **Q:** So, on April 18, 2000, this debtor didn't have sufficient cash available to even make its payroll, did it?
>
> **A:** We would have except for the money we loaned our [non-debtor] affiliate to cover *its* cash shortages.
>
> **Q:** Right, but this debtor couldn't meet its payroll burden, correct?
>
> ***[And counsel moves on, without following up on why a debtor was lending a non-debtor affiliate money when it was itself facing cash shortfalls].***

- ***RULE EIGHT: AVOID "JURY-DIRECTED" HISTRIONICS.***

  - Bankruptcy Judges are very sophisticated triers of fact in most of the areas in which testimony is given in bankruptcy cases (*e.g.* valuation, feasibility, etc.)—Bankruptcy Judges are not usually swayed by the types of histrionics that may help influence a jury (such as righteously indignant objections,[7] eye-rolling, etc.). Get to the point.

[7] After all, why just "Object" when you can ***"OBJECT, YOUR HONOR, TO THAT RIDICULOUS QUESTION!"***

- ***RULE NINE: DON'T TRY TO MAKE YOUR CLOSING ARGUMENT THROUGH YOUR CROSS EXAMINATION.***

  - Too often, lawyers try to get hostile witnesses, through cross examination, to agree to their entire theory of the case. This doesn't work—just get the factual building blocks and save the eloquent concluding argument for your closing argument or post-trial brief.

> ***Example***
>
> **Q:** So you'd agree with me, sir, that given the assumptions we've just been through, there's no possible way the debtor's plan could ever be feasible, isn't that correct?
>
> ***[The hostile witness will argue with you, and understandably so. This question is really argumentative, and belongs in closing arguments.]***

- ***RULE TEN: KNOW WHEN TO STOP (Or "Please, question responsibly").***

  - Too often, lawyers beat a dead horse—make your points, sit down, and shut up! The Bankruptcy Judge will be grateful for your brevity, and a well-made point will hit the mark the first time effectively.

  - Asking too many questions opens up areas that allow the witness to expound, qualify, or explain away problematic testimony.

- ***RULE ELEVEN: DON'T SIMPLY REHASH DIRECT.***

  - Some lawyers, believing they simply must cross-examine every witness, use their cross-examination simply re-hashing the witnesses' direct testimony. It's not only boring to Judges, but it emphasizes the direct by allowing the witness to repeat it again.

  - Sometimes, rehashing direct may have a tactical purpose—such as if competing experts used the same methodology, and counsel wishes to bolster the methodology.

- ***RULE TWELVE: THE JUDGE CAN READ!***

  Many judges hate it when lawyers ask witnesses to read from a document that's already in evidence to make a point—it's already in evidence. Having the witness read it aloud doesn't necessarily give it any more weight.[8]

Example

Q: Sir, the secured creditor bargained for prime plus seven percent default interest, isn't that correct?

A: I don't know.

Q: Sir, please look at Lender Ex. 15—do you have it there? Fine. Look at page 23 of Ex. 14.

A: What page?

Q: 23.

A: Okay.

Q: Please read the third full paragraph from the top.

[No response as the witness reads to herself.]

Q: No—please read it out loud.

A: Starting from the top of the page?

Q: No, starting 3 lines down, where it says: "Lender shall be paid…"—do you see that?

A: Not on page 23.

[Counsel approaches witness—they search for the reference, etc. At this point, since the document is in evidence, counsel can read from it at closing. Having the witness read from it adds nothing.][9]

[8] If the document was authored by the witness who is an adverse party, it may be used as impeachment under the theory of admission by a party-opponent under F.R.E. 801(d)(2).

[9] What's more, it is objectionable. The witness' testimony would be cumulative, and the document in evidence speaks for itself.

- ***RULE THIRTEEN: THE "GREAT RULE"—NEVER ASK A QUESTION WHOSE ANSWER YOU DON'T KNOW!***

- While many attribute this golden rule to Irving Younger, in fact it has a much more literary pedigree:

> Never, never, never, on cross-examination ask a witness a question you don't already know the answer to was a tenet I absorbed with my baby food. Do it, and you'll often get an answer you don't want, an answer that might wreck your case.
>
> Harper Lee
> *To Kill A Mockingbird* [10]
> 1960

- Of course, like any self-respecting rule, there are ***exceptions***. These should be used sparingly!

  - ***Do you really care what the response is?***

    - **Example:** You know another adverse witness (such as the opposing parties' expert) will testify to X, which is a fact helpful to your case (through discovery or otherwise). You ask, on cross, this adverse witness the same question.
      - Either: (a) this witness will agree to X, in which case he/she helps support or corroborate the other witness; or (b) this adverse witness will disagree and testify to Y, thereby putting them in conflict with other opposing witnesses.

  - ***Desperation!***

    - Your case is in a shambles already, and another bad answer can't hurt you too much more. This is rarely useful, but sometimes it pays off. In the immortal words of fictional detective Harry Callaghan: ***"Do you feel lucky today, punk? Well, do 'ya?"*** *Dirty Harry (1977)*

[10] Who can forget the prosecutor's extraordinary blunder in the classic trial of O.J. Simpson when he smugly asked the defendant to "try on the gloves." Oops! Unfortunately, trial work, unlike golf, has no "Mulligan" rule!

4. CONCLUSION.

Effective cross-examination is a great advocacy tool. With experts, it is essential to the American process. As stated by then-Chief Judge of the Fifth Circuit David L. Bazelon in 1973:

> Challenging an expert and questioning his expertise is the lifeblood of our legal system—whether it is a psychiatrist discussing mental disturbances, a physicist testifying on the environmental impact of a nuclear power plan, or a General Motor executive insisting on the impossibility of meeting Federal anti-pollution standards by 1975. It is the only way a judge or jury can decide whom to trust.
>
> *Dallas Times Herald*
> May 13, 1973

Do it properly, and you've acquired a great advocacy skill.

APPENDIX I

FEDERAL RULES OF EVIDENCE

(FRE 2014 Version)

THE FEDERAL RULES OF EVIDENCE ("FRE") (2014)

RULE 101. SCOPE

(a) Scope.

These rules govern proceedings in the courts of the United States and before the United States bankruptcy judges and United States magistrate judges, to the extent and with the exceptions stated in rule 1101.

(b) Definitions.

In these rules:

(1) "civil case" means a civil action or proceeding;

(2) "criminal case" includes a criminal proceeding;

(3) "public office" includes a public agency;

(4) "record" includes a memorandum, report, or data compilation;

(5) a "rule prescribed by the Supreme Court" means a rule adopted by the Supreme Court under statutory authority; and

(6) a reference to any kind of written material or any other medium includes electronically stored information.

RULE 102. PURPOSE AND CONSTRUCTION

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

RULE 103. RULINGS ON EVIDENCE

(a) Preserving a Claim of Error.

A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:

(1) if the ruling admits evidence, a party, on the record:

(A) timely objects or moves to strike; and

(B) states the specific ground, unless it was apparent from the context; or

(2) if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.

(b) Not Needing to Renew an Objection or Offer of Proof.

Once the court rules definitively on the record—either before or at trial—a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

(c) Court's Statement About the Ruling; Directing an Offer of Proof.

The court may make any statement about the character or form of the evidence, the objection made, and the ruling. The court may direct that an offer of proof be made in question-and-answer form.

(d) Preventing the Jury from Hearing Inadmissible Evidence.

To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.

(e) Taking Notice of Plain Error.

A court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved.

RULE 104. PRELIMINARY QUESTIONS

(a) In General.

The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.

(b) Relevancy That Depends on a Fact.

When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.

(c) Conducting a Hearing So That the Jury Cannot Hear It.

The court must conduct any hearing on a preliminary question so that the jury cannot hear it if:

(1) the hearing involves the admissibility of a confession;

(2) the defendant in a criminal case is a witness and so requests; or

(3) justice so requires.

(d) Cross-Examining a Defendant in a Criminal Case.

By testifying on a preliminary question, a defendant in a criminal case does not become subject to cross-examination on other issues in the case.

(e) Evidence Relevant to Weight and Credibility.

This rule does not limit a party's right to introduce before the jury evidence that is relevant to the weight or credibility of other evidence.

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

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

RULE 106. REMAINDER OF OR RELATED WRITINGS OR RECORDED STATEMENTS

If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part — or any other writing or recorded statement — that in fairness ought to be considered at the same time.

RULE 201. JUDICIAL NOTICE OF ADJUDICATIVE FACTS

(a) Scope of rule.

This rule governs judicial notice of an adjudicative fact only, not a legislative fact.

(b) Kinds of Facts That May be Judicially Noticed.

The court may judicially notice a fact that is not subject to reasonable dispute because it:

(1) is generally known within the trial court's territorial jurisdiction; or

(2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

(c) Taking Notice.

The court:

(1) may take judicial notice on its own; or

(2) must take judicial notice if a party request it and the court is supplied with the necessary information.

(d) Timing.

Judicial notice may be taken at any stage of the proceeding.

(e) Opportunity to Be Heard.

On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

(f) Instructing the Jury.

In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.

RULE 301. PRESUMPTIONS IN CIVIL ACTIONS GENERALLY

In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.

RULE 302. APPLYING STATE LAW TO PRESUMPTIONS IN CIVIL CASES

In a civil case, state law governs the effect of a presumption regarding a claim or defense for which state law supplies the rule of decision.

RULE 401. TEST FOR RELEVANT EVIDENCE

Evidence is relevant if:

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

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

RULE 402. GENERAL ADMISSIBILITY OF RELEVANT EVIDENCE

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

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

Irrelevant evidence is not admissible.

RULE 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.

RULE 404. CHARACTER EVIDENCE; CRIMES OR OTHER ACTS

a) Character Evidence.

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

(2) *Exceptions for 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.

(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.

RULE 405. METHODS OF PROVING CHARACTER

(a) By Reputation or Opinion.

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

(b) Specific Instances of Conduct.

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

RULE 406. HABIT; ROUTINE PRACTICE

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

RULE 407. SUBSEQUENT REMEDIAL MEASURES

When measure are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:

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

But the court may admit this evidence for another purpose, such as impeachment or – if disputed – proving ownership, control, or the feasibility of precautionary measures

RULE 408. COMPROMISE OFFERS AND NEGOTIATIONS

(a) Prohibited uses.

Evidence of the following is not admissible – on behalf of any party – either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:

> (1) furnishing, promising, or offering — or accepting, promising to accept, or offering to accept — a valuable consideration in compromising or attempting to compromise the claim; and

(2) conduct or a statement made during compromise negotiations about the claim — except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.

(b) Permitted uses.

The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

RULE 409. PAYMENT OF MEDICAL AND SIMILAR EXPENSES

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

RULE 410. PLEAS, PLEA DISCUSSIONS, AND RELATED STATEMENTS

(a) Prohibited Uses.

In a civil or criminal case, evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions:

(1) a guilty plea that was later withdrawn;

(2) a nolo contendere plea;

(3) a statement made during a proceeding on either of those pleas under Federal Rule of Criminal Procedure 11 or a comparable state procedure; or

(4) a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea.

(b) Exceptions.

The court may admit a statement described in Rule 410(a)(3) or (4):

(1) in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if in fairness the statements ought to be considered together; or

(2) in a criminal proceeding for perjury or false statement, if the defendant made the statement under oath, on the record, and with counsel present.

RULE 411. LIABILITY INSURANCE

Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully. But the court may admit this evidence for

another purpose, such as proving a witness's bias or prejudice or proving agency, ownership, or control.

RULE 412. SEX OFFENSE CASES: THE VICTIM

(a) Prohibited Uses.

The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct:

(1) evidence offered to prove that a victim engaged in other sexual behavior; or

(2) evidence offered to prove a victim's sexual predisposition.

(b) Exceptions.

(1) *Criminal Cases*. The court may admit the following evidence in a criminal case:

(A) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;

(B) evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and

(C) evidence whose exclusion would violate the defendant's constitutional rights.

(2) *Civil Cases*. In a civil case, the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy.

(c) Procedure to Determine Admissibility.

(1) *Motion*. If a party intends to offer evidence under Rule 412(b), the party must:

(A) file a motion that specifically describes the evidence and states the purpose for which it is to be offered;

(B) do so at least 14 days before trial unless the court, for good cause, sets a different time;

(C) serve the motion on all parties; and

(D) notify the victim or, when appropriate, the victim's guardian or representative.

(2) *Hearing*. Before admitting evidence under this rule, the court must conduct an in camera hearing and give the victim and parties a right to attend and be heard. Unless the court orders otherwise, the motion, related materials, and the record of the hearing must be and remain sealed.

(d) Definition of "Victim." In this rule, "victim" includes an alleged victim. (As amended Apr. 26, 2011, eff. Dec. 1, 2011.)

RULE 413. SIMILAR CRIMES IN SEXUAL ASSAULT CASES

(a) Permitted Uses.

In a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault. The evidence may be considered on any matter to which it is relevant.

(b) Disclosure to the Defendant.

If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses' statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.

(c) Effect on Other Rules.

This rule does not limit the admission or consideration of evidence under any other rule.

(d) Definition of "Sexual Assault."

In this rule and Rule 415, "sexual assault" means a crime under federal law or under state law (as "state" is defined in 18 U.S.C. § 513) involving:

(1) any conduct prohibited by 18 U.S.C. chapter 109A;

(2) contact, without consent, between any part of the defendant's body — or an object — and another person's genitals or anus;

(3) contact, without consent, between the defendant's genitals or anus and any part of another person's body;

(4) deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person; or

(5) an attempt or conspiracy to engage in conduct described in subparagraphs (1)–(4). (As amended Apr. 26, 2011, eff. Dec. 1, 2011.)

RULE 414. SIMILAR CRIMES IN CHILD MOLESTATION CASE

(a) Permitted Uses.

In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other child molestation. The evidence may be considered on any matter to which it is relevant.

(b) Disclosure to the Defendant.

If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses' statement or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.

(c) Effect on Other Rules.

This rule does not limit the admission or consideration of evidence under any other rule.

(d) Definition of "Child" and "Child Molestation."

In this rule and rule 415:

(1) "child" means a person below the age of 14; and

(2) "child molestation" means a crime under federal law or under state law (as "state" is defined in 18 U.S.C. § 513) involving:

(A) any conduct prohibited by 18 U.S.C. chapter 109A and committed with a child;

(B) any conduct prohibited by 18 U.S.C. chapter 110;

(C) contact between any part of the defendant's body—or an object—and a child's genitals or anus;

(D) contact between the defendant's genitals or anus and any part of a child's body;

(E) deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on a child; or

(F) an attempt or conspiracy to engage in conduct described in paragraphs (A)–(E).

RULE 415. SIMILAR ACTS IN CIVIL INVOLVING SEXUAL ASSAULT OR CHILD MOLESTATION

(a) Permitted Uses.

In a civil case involving a claim for relief based on a party's alleged sexual assault or child molestation, the court may admit evidence that the party committed any other sexual assault or child molestation. The evidence may be considered as provided in Rules 413 and 414.

(b) Disclosure to the Opponent.

If a party intends to offer this evidence, the party must disclose it to the party against whom it will be offered, including witnesses' statements or a summary of the expected testimony. The party must do so at least 15 days before trial or at a later time that the court allows for good cause.

(c) Effect on Other Rules.

This rule does not limit the admission or consideration of evidence under any other rule.

RULE 501. PRIVILEGES IN GENERAL

The common law — as interpreted by United States courts in the light of reason and experience — governs a claim of privilege unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute; or
- rules prescribed by the Supreme Court.

But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

RULE 502. ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT; LIMITATIONS ON 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).

(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.

(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."

RULE 601. COMPETENCY TO TESTIFY IN GENERAL

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

RULE 602. NEED FOR PERSONAL KNOWLEDGE

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.

RULE 603. OATH OR AFFIRMATION TO TESTIFY TRUTHFULLY

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

RULE 604. INTERPRETER

An interpreter must be qualified and must give an oath or affirmation to make a true translation.

RULE 605. JUDGE'S COMPETENCY AS A WITNESS

The presiding judge may not testify as a witness at the trial. A party need not object to preserve the issue.

RULE 606. JUROR'S COMPETENCY AS A WITNESS

(a) At the Trial.

A juror may not testify as a witness before the other jurors at the trial. If a juror is called to testify, the court must give a party an opportunity to object outside the jury's presence.

(b) During an Inquiry into the Validity of a Verdict or Indictment.

(1) *Prohibited Testimony or Other Evidence.* During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

(2) *Exceptions.* A juror may testify about whether:

(A) extraneous prejudicial information was improperly brought to the jury's attention;

(B) an outside influence was improperly brought to bear on any juror; or

(C) a mistake was made in entering the verdict on the verdict form.

RULE 607. WHO MAY IMPEACH A WITNESS

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

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

(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.

RULE 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.

(c) Effect of pardon, annulment, or certificate of rehabilitation.

Evidence of a conviction is not admissible if:

(1) the conviction has been the subject of a pardon, 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 appeal.

A conviction that satisfies this rule is admissible even if an appeal is pending. Evidence of the pendency is also admissible.

RULE 610. RELIGIOUS BELIEFS OR OPINIONS

Evidence of a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility.

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

(a) Control by court.

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 the 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.

RULE 612. WRITING USED TO REFRESH A WITNESS'S MEMORY

(a) Scope.

This rule gives an adverse party certain options when a witness uses a writing to refresh memory:

(1) while testifying; or

(2) before testifying, if the court decides that justice requires the party to have those options.

(b) Adverse Party's Options; Deleting Unrelated Matter.

Unless 18 U.S.C. § 3500 provides otherwise in a criminal case, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record.

(c) Failure to Produce or Deliver the Writing.

If a writing is not produced or is not delivered as ordered, the court may issue any appropriate order. But if the prosecution does not comply in a criminal case, the court must strike the witness's testimony or — if justice so requires — declare a mistrial.

RULE 613. WITNESS'S PRIOR STATEMENTS

(a) Showing or Disclosing the Statement During Examination.

When examining a witness about the witness's prior statement, a party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party's attorney.

(b) Extrinsic Evidence of Prior Inconsistent Statement.

Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).

Rule 614. Court's Calling or Examining a Witness

(a) Calling.

The court may call a witness on its own or at a party's request. Each party is entitled to cross-examine the witness.

(b) Examining.

The court may examine a witness regardless of who calls the witness.

(c) Objections.

A party may object to the court's calling or examining a witness either at that time or at the next opportunity when the jury is not present.

RULE 615. EXCLUDING WITNESSES

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

(a) a party who is a natural person;
(b) an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney;
(c) a person whose presence a party shows to be essential to presenting the party's claim or defense; or
(d) a person authorized by statute to be present.

RULE 701. OPINION TESTIMONY BY LAY WITNESSES

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

(a) rationally based on the witness's perception;
(b) helpful to clearly understanding the witness's testimony or to determining a fact in issues; and
(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

RULE 702. TESTIMONY BY EXPERT WITNESSES

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(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.

RULE 703. BASES OF AN EXPERT'S OPINION TESTIMONY

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

RULE 704. OPINION ON AN 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.

RULE 705. DISCLOSING THE FACTS OR DATA UNDERLYING AN EXPERT'S OPINION

Unless the court orders otherwise, an expert may state an opinion — and give the reasons for it — without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

RULE 706. COURT-APPOINTED EXPERT WITNESSES

(a) Appointment Process.

On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.

(b) Expert's Rule.

The court must inform the expert of the expert's duties. The court may do so in writing and have a copy filed with the clerk or may do so orally at a conference in which the parties have an opportunity to participate. The expert:

(1) must advise the parties of any findings the expert makes;
(2) may be deposed by any party;
(3) may be called to testify by the court or any party; and
(4) may be cross-examined by any party, including the party that called the expert.

(c) Compensation.

The expert is entitled to a reasonable compensation, as set by the court. The compensation is payable as follows:

(1) in a criminal case or in a civil case involving just compensation under the Fifth Amendment, from any funds that are provided by law; and
(2) in any other civil case, by the parties in the proportion and at the time that the court direct — and the compensation is then charged like other costs.

(c) Disclosure the Appointment to the Jury.

The court may authorize disclosure to the jury that the court appointed the expert.

(d) Parties' Choice of Their Own Experts.

This rule does not limit a party in calling its own experts.

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

(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 a 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 to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or
(C) identifies a person as someone the declarant perceived earlier.

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

(A) was made by the party in an individual or representative capacity;
(B) is one the party manifested that it adopted or believed to be true;
(C) was made by a person whom the party authorized to make a statement on the subject;
(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or
(E) was made by the party's coconspirator during and in furtherance of the conspiracy.
(D) 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).

RULE 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.

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

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

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

(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, 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) **Statements Made for Medical Diagnosis or Treatment**. A statement that:

- (A) is made for —and is reasonably pertinent to—medical treatment; and
- (B) described 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 not 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 Regularly Conducted Activity**. A record of an act, event, condition, opinion, or diagnosis if:

- (A) the record was made at or near the time by — or from information transmitted by — someone with knowledge;
- (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
- (C) making the record was a regular practice of that activity;
- (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and
- (E) neither the source of information nor 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) neither the possible source of the information nor 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;
(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) neither the source of information nor 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 Public Record or Entry**. 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.

(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:

(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:

(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 or conviction if:

(A) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;
(B) the conviction was for a crime punishable by death or by imprisonment for more than a year;

(C) the evidence is admitted to prove any fact essential to the judgment; and
(D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.

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

(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]

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

(a) Criteria for Being Unavailable.

A declarant is considered to be unavailable as a witness if the declarant:

(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:

(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 action or proceeding, 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:
(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 Cause the Declarant's Unavailability.* A statement offered against a party that wrongfully cause—or acquiesced in wrongfully causing—the declarant's unavailability as a witness, and did so intending the result.

RULE 805. HEARSAY WITHIN HEARSAY

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

RULE 806. ATTACKING AND SUPPORTING THE DECLARANT'S CREDIBILITY

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.

RULE 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.

RULE 901. AUTHENTICATING OR IDENTIFYING EVIDENCE

(a) In General

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

(b) Examples.

The following are example only — not a complete list − of evidence that satisfies the requirement:

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

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

(3) *Comparison by an Expert Witness or Trier of Fact*. A comparison with an authenticated specimen by an expert witness or the trier of fact.

(4) *Distinctive Characteristics and the Like*. The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances..

(5) *Opinion About a Voice.* An opinion identifying a person's voice — whether heard firsthand or through mechanical or electronic transmission or recording — based on hearing the voice at any time under circumstances that connect it with the alleged speaker.

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

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

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

(7) *Evidence About Public Records*. Evidence that:

(A) a document was recorded or filed in a public office as authorized by law; or

(B) a purported public record or statement is from the office where items of this kind are kept.

(8) *Evidence About Ancient Documents or Data Compilation*. For a document or data compilation, evidence that it:

(A) is in a condition that creates no suspicion about its authenticity;

(B) was in a place where, if authentic, it would likely be; and

(C) is at least 20 years old when offered.

(9) *Evidence About a Process or System*. Evidence describing a process or system and showing that it produces an accurate result.

(10) *Methods Provided by a Statute or Rule*. Any method of authentication or identification allowed by a federal statute or a rule prescribed by the Supreme Court.

RULE 902. EVIDENCE THAT IS SELF-AUTHENTICATING

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

(1) **Domestic Public Documents That Are Sealed and Signed**. A document that bears:

(A) a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; and

(B) a signature purporting to be an execution or attestation.

(2) **Domestic Public Documents That Are Not Sealed But Are Signed and Certified**. A document that bears no seal if:

(A) it bears the signature of an officer or employee of an entity named in Rule 902(1)(A); and
(B) another public officer who has a seal and official duties within that same entity certifies under seal — or its equivalent — that the signer has the official capacity and that the signature is genuine.

(3) **Foreign Public Documents**. A document that purports to be signed or attested by a person who is authorized by a foreign country's law to do so. The document must be accompanied by a final certification that certifies the genuineness of the signature and official position of the signer or attester — or of any foreign official whose certificate of genuineness relates to the signature or attestation or is in a chain of certificates of genuineness relating to the signature or attestation. The certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States. If all parties have been given a reasonable opportunity to investigate the document's authenticity and accuracy, the court may, for good cause, either:
(A) order that it be treated as presumptively authentic without final certification; or
(B) allow it to be evidenced by an attested summary with or without final certification.

(4) **Certified Copies of Public Records**. A copy of an official record — or a copy of a document that was recorded or filed in a public office as authorized by law — if the copy is certified as correct by:
(A) the custodian or another person authorized to make the certification.; or
(B) a certificate that complies with Rule 902(1), (2), or (3), a federal statute, or a rule prescribed by the Supreme Court.

(5) **Official Publications**. A book, pamphlet, or other publication purporting to be issued by a public authority.

(6) **Newspapers and Periodicals**. Printed materials purporting to be a newspaper or periodical.

(7) **Trade Inscriptions and the Like**. An inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control.

(8) **Acknowledged Documents**. A document accompanied by a certificate of acknowledgment that is lawfully executed by a notary public or another officer who is authorized to take acknowledgments.

(9) **Commercial Paper and Related Documents**. Commercial paper, a signature on it, and related documents, to the extent allowed by general commercial law.

(10) **Presumptions Under a Federal Statute**. A signature, document, or anything else that a federal statute declares to be presumptively or prima facie genuine or authentic.

(11) **Certified Domestic Records of a Regularly Conducted Activity**. The original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)-(C), as shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record — and must make the record and certification available for inspection — so that the party has a fair opportunity to challenge them.

(12) **Certified Foreign Records of a Regularly Conducted Activity**. In a civil case, the original or a copy of a foreign record that meets the requirements of Rule 902(11), modified as follows: the certification, rather than complying with a federal statute or Supreme Court rule, must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the country where the certification is signed. The proponent must also meet the notice requirements of Rule 902(11).

RULE 903. SUBSCRIBING WITNESS'S TESTIMONY

A subscribing witness's testimony is necessary to authenticate a writing only if required by the law of the jurisdiction that governs its validity.

RULE 1001. DEFINITIONS THAT APPLY TO THIS ARTICLE

In this article:

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

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

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

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

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

RULE 1002. REQUIREMENT OF THE ORIGINAL

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

RULE 1003. ADMISSIBILITY OF DUPLICATES

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

RULE 1004. ADMISSIBILITY OF OTHER EVIDENCE OF CONTENT

An original is not required and other evidence of the content of a writing, recording, or photograph is admissible if:

(a) all the originals are lost or destroyed, and not by the proponent acting in bad faith;

(b) an original cannot be obtained by any available judicial process;

(c) the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or

(d) the writing, recording, or photograph is not closely related to a controlling issue.

RULE 1005. COPIES OF PUBLIC RECORDS TO PROVE CONTENT

The proponent may use a copy to prove the content of an official record — or of a document that was recorded or filed in a public office as authorized by law — if these conditions are met: the record or document is otherwise admissible; and the copy is certified as correct in accordance with Rule 902(4) or is testified to be correct by a witness who has compared it with the original. If no such copy can be obtained by reasonable diligence, then the proponent may use other evidence to prove the content.

RULE 1006. SUMMARIES TO PROVE CONTENT

The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.

RULE 1007. TESTIMONY OR STATEMENT OF A PARTY TO PROVE CONTENT

The proponent may prove the content of a writing, recording, or photograph by the testimony, deposition, or written statement of the party against whom the evidence is offered. The proponent need not account for the original.

RULE 1008. FUNCTIONS OF COURT AND JURY

Ordinarily, the court determines whether the proponent has fulfilled the factual conditions for admitting other evidence of the content of a writing, recording, or photograph under Rule 1004

or 1005. But in a jury trial, the jury determines — in accordance with Rule 104(b) — any issue about whether:

(a) an asserted writing, recording, or photograph ever existed

(b) another one produced at the trial or hearing is the original; or

(c) other evidence of content accurately reflects the content.

RULE 1101. APPLICABILITY OF THE RULES

(a) Courts and judges.

These rules apply to proceedings before:

- United States district court;
- United States bankruptcy and magistrate judges;
- United States court of appeals;
- the United States Court of Federal Claims; and
- the district court of Guam, the Virgin Islands, and the Northern Mariana Islands.

(b) To Cases and Proceedings.

These rules apply in:

- civil cases and proceedings, including bankruptcy, admiralty, and maritime cases;
- criminal cases and proceedings; and
- contempt proceedings, except those in which the court may act summarily.

(c) Rules on Privilege.

The rules on privilege apply to all stages of a case or proceedings.

(d) Exceptions.

These rules — except for those on privilege — do not apply to the following:

(1) the court's determination, under Rule 104(a), on a preliminary question of fact governing admissibility;

(2) grand jury proceedings; and

(3) miscellaneous proceedings such as:

- extradition or rendition;
- issuing an arrest warrant, criminal summons, or search warrant;
- a preliminary examination in a criminal cases;
- sentencing;
- granting or revoking probation or supervised release and;
- considering whether to release on bail or otherwise.

(e) Other Statutes and Rules.

A federal statute or a rule prescribed by the Supreme Court may provide for admitting or excluding evidence independently from these rules.

RULE 1102. AMENDMENTS

These rules may be amended as provided in 28 U.S.C. § 2072.

RULE 1103. TITLE

These rules may be cited as the Federal Rules of Evidence.

APPENDIX II

COMMON EVIDENTIARY OBJECTIONS
(The "Big 8")

1. "***Lack of Foundation***" **[RE 602; 901 (for documents)]**
   - Question assumes a fact not in evidence ("What color was the light", but don't establish that the witness ever saw the light in question.)
   - Ask witness a question where you haven't:
     - Established witnesses' knowledge of fact (how does he/she know what he/she is testifying about); ***or***
     - Try to use a documentary exhibit without establishing proper foundation.

2. "***Irrelevant***" or "***Immaterial***" **[RE 402]**
   - What does this have to do with anything?

3. "***Hearsay***" **[RE 802]**

   Out of Court statement made by person other than the testifying witness, offered to prove the truth of the matter asserted. **[RE 801(c)]**
   - ***Witness***: "John told me that the debtor told him that the debtor lied to the bank."
   - ***Exceptions***:
     - Prior inconsistent statement under oath (aka "***impeachment***") **[RE 613; 801(d)(1)]**
     - Admission by party opponent (Plaintiff: "Debtor told me he lied to the bank.") **[RE 801(d)(2)]**

4. "***Cumulative***" or "***Exhibit Speaks For Itself***" **[RE 403]**
   - Lawyer lays proper foundation for documentary exhibit, and then ask witness to testify from document.
   - Exhibit (document) is in evidence. To simply now have witness read from the exhibit is cumulative evidence—same evidence twice

5. "***Leading***" **[RE 611(c)]**
   - On direct examination, question suggests the answer.
   - ***Question***: "On 3/1/08 you received the e-mail, correct?"

6. "***Compound Question***" **[RE 403]**
   - Question asks 2 questions in one.
   - ***Question***: "On March 1, 2008 did you send the e-mail and called the banker on the phone?"

7. "***Argumentative***" **[RE 403]**
   - Question is not seeking to elicit a fact but rather is argument—usually an issue on cross examination
   - ***Question***: "You were being obnoxious and threatening when you sent the 3/1/08 e-mail, weren't you?"

8. "***Calls for Speculation***" **[RE 701] [Not applicable to Experts]**
   - Question asks witness to speculate
   - ***Question***: "What do you think the debtor was thinking when he sent those e-mails?"

APPENDIX III

"CHEAT SHEET" – EVIDENTIARY FOUNDATIONS QUESTION BY QUESTION

A. "BUSINESS RECORD POLKA"

- ***Problem:*** So what if the document came out of someone's business files from 8 years ago—the person who signed/sent it isn't around, nor is the person who received it? It's classic hearsay at that point.

  - ***Solution:*** Do the "Business Record Polka"! *See* FRE 803(6). Ask the following six (6) questions:

- ***QUESTION NO. 1***

  Q: "Can you identify Exhibit X?"
  A: "It's a [business record]."

- ***QUESTION NO. 2***

  Q: "When was it made?"
  A: "It was made at the time of the transaction it recorded."

- ***QUESTION NO. 3***

  Q: "Who made it?"
  A: "My Bookkeeper."

  [It was made based on information from a person that had actual knowledge off what was entered.]

- ***QUESTION NO. 4***

  Q: "How is this record prepared?"
  A: "It's prepared regularly in the course of our business."

- ***QUESTION NO. 5***

  Q: "Who is the person responsible for these records?"
  A: "My Bookkeeper and I are."

- ***QUESTION NO. 6***

  Q: "Where is the Original?"
  A: "At my office."
  Q: "What's the difference between Exhibit 14 and the original?"
  A: "There is no difference."

B. LETTER/E MAIL SENT/RECEIVED BY WITNESS

A. ***Hand/Examine:*** "I'm ***handing*** you what has been marked as Exhibit X—can you ***examine*** Exhibit X please?" *(OK)*

B. ***Identify:*** "Can you ***identify*** Exhibit X for me please?" *(E-mail I sent/ received dated 3/1/08)*

C. ***Establish Foundation:*** "Is that a ***true and correct copy*** of the e-mail you sent/ received on 3/1/08?" *(Yes)*

D. ***OFFER INTO EVIDENCE! [Don't Forget—Very Important!)***

- ***"Your Honor, I offer Exhibit X into evidence."***

C. PHOTOGRAPH (Assume Photo Of A Speed Limit Sign)

A. Ms. Witness, were you present at the accident scene on July 8, 2009? *(Yes)*

B. When did you arrive at the scene? *(Approximately 8:29 pm)*

C. Are you familiar with the scene as it looked on July 8, 2009? *(Yes)*

- ***Give a copy of Exhibit to opposing counsel***

D. *Your Honor,* may *I approach the witness? (If required by courtroom protocol)*

E. Ms. Witness, I am handing you a photograph marked Exhibit X, and I ask you to please examine it.

F. Can you identify Exhibit X? *(Yes)*

G. What is it? (*A photograph of the speed limit sign near the intersection where the collision occurred.)*

H. ***If Witness Took Photo:*** Did you take the photograph? *(Yes)*

- ***No need for witness to actually have taken the photo.*** If witness did not take the photo, go to ***Question J,*** below.

I. When did you take it? *(Approximately two weeks alter the collision.)*

J. Where were you standing when you took the photograph marked as Exhibit X? *(Approximately 2 feet away from the sign, facing west.)*

K. ***Your Honor, I offer Exhibit X into evidence.***

D. DEMONSTRATIVE EXHIBITS *(Such as maps, charts, models, reproductions, etc.)*

The foundation is essentially the same as that for a photograph (see above). The witness must be familiar with the scene, location, or structure as it appeared at the relevant time, and must testify that the exhibit is a reasonably accurate representation.

I. Example One: Diagram of Strip Mall Layout

A. "Mr. Witness, are you familiar with the strip mall as it appeared on X date?" [Yes]

B. "How are you familiar with the strip mall?" ***[e.g.*** *I've worked there for 10 years; I shop there regularly; etc.]*

C. "I'm handing you what has been marked as Exhibit X (same protocol as above), and would ask you to examine it please."

D. "Can you identify Exhibit X? (Yes) What is Exhibit X? *[It is* a *diagram of the strip mall]*

E. 'Is Exhibit X a ***reasonably accurate representation*** of the strip mall as it appeared on X date?" *[Yes]*

F. (If desired or necessary for case, more detailed questions can be asked to provide additional foundation such as, "Is the diagram drawn to scale?", etc. as relevant to testimony)

G. "Your Honor, I offer Exhibit X into evidence."

II. Example Two: Ticket (not real ticket, but a facsimile/reproduction)

A. "Mr. Witness, are you familiar with the tickets that were sold [on the relevant date and/or for the relevant concert]?" [Yes]

B. "How are you familiar with those tickets?" [e.g. / *bought one; I've been selling tickets at the hall for 10 years; I've been attending concerts every Saturday for the past year; etc.]*

C. "I'm handing you what has been marked as Exhibit X, and would ask that you examine it please."

D. "Can you identify Exhibit X? [Yes] What is Exhibit X? *[It looks like a reproduction* of *a ticket that was sold at the concert hall]*

E. "Is Exhibit X a ***reasonably accurate representation*** of a ticket that was sold [on the relevant date / at the relevant concert]?" *[Yes]*

F. *"Your* ***Honor, 1 offer Exhibit X into evidence."***