

2011 Pennsylvania Rules of Evidence (Restyled)

**Compared to Present Rules
Side by Side**

May 5, 2011

RULE 101

ARTICLE I. GENERAL PROVISIONS Rule 101. Scope and citation of the rules	ARTICLE I. GENERAL PROVISIONS Rule 101. Scope; Adoption and Citation
<p>(a) Scope. These rules of evidence shall govern proceedings in all courts of the Commonwealth of Pennsylvania's unified judicial system, except as otherwise provided by law.</p> <p>(b) Citation. These rules of evidence are adopted by the Supreme Court of Pennsylvania under the authority of Article V § 10(c) of the Constitution of Pennsylvania, adopted April 23, 1968. They shall be known as the Pennsylvania Rules of Evidence and shall be cited as "Pa.R.E."</p>	<p>(a) Scope. These rules of evidence govern proceedings in all courts of the Commonwealth of Pennsylvania's unified judicial system, except as otherwise provided by law.</p> <p>(b) Adoption and Citation. These rules of evidence are adopted by the Supreme Court of Pennsylvania under the authority of Article V § 10(c) of the Constitution of Pennsylvania, adopted April 23, 1968. They shall be known as the Pennsylvania Rules of Evidence and shall be cited as "Pa.R.E."</p>

Comment

EXPLANATORY COMMENTS	Preface to Comments
<p>The Comments to these rules were prepared by the Ad Hoc Committee on Evidence for the convenience of the Bench and Bar. They have not been adopted by the Supreme Court of Pennsylvania, and they do not have precedential significance.</p> <p>The Comments were designed to identify the sources for the rules, to compare the Pennsylvania Rules of Evidence to the Federal Rules of Evidence, and to explain the differences. The Comments are not intended to interpret the rules or to be an analysis of current case law, nor are they intended to be an annotation to the rules or a treatise on the intricacies of evidence law.</p> <p>Although the Pennsylvania rules closely follow the format of the Federal Rules, the guiding principle was generally to preserve the substance of Pennsylvania's common law of evidence. Whenever a rule departs from prior Pennsylvania law, the Comments usually identify the departure.</p>	<p>The original Comments to the Pennsylvania Rules of Evidence were prepared by the Ad Hoc Committee on Evidence. The Comments accompanied the Pennsylvania Rules of Evidence that were adopted by the Pennsylvania Supreme Court on May 8, 1998. The Pennsylvania Rules of Evidence closely followed the format, language, and style of the Federal Rules of Evidence, but the guiding principle was to preserve the Pennsylvania law of evidence. The original Comments reflected this approach by identifying the Pennsylvania sources of the law. The original Comments also compared the Pennsylvania Rules to the Federal Rules for the convenience of the Bench and Bar.</p> <p>The Federal Rules of Evidence were amended effective December 1, 2011. The goal of the Federal amendments was to make the rules more easily understood and to make the format and terminology more consistent, but to leave the substantive content unchanged. The Pennsylvania Rules of Evidence were rescinded and replaced on _____, and become effective on _____. They closely follow the format, language, and style of the amended Federal Rules of Evidence. The goal of the Pennsylvania Supreme Court's rescission and replacement of the Pennsylvania Rules of Evidence was likewise to make its rules more easily understood and to make the format and terminology more consistent, but to leave the substantive content unchanged. Once again, the guiding principle is to preserve the Pennsylvania law of evidence.</p> <p>These Comments are prepared by the Pennsylvania Supreme Court's Committee on Rules of Evidence for</p>

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Comment to Rule 101

A principal goal of these rules is to construct a comprehensive code of evidence governing court proceedings in the Commonwealth of Pennsylvania. However, these rules cannot be all-inclusive. Some of our law of evidence is governed by the Constitutions of the United States and of Pennsylvania. Some is governed by statute. Some evidentiary rules are contained in the Rules of Civil and Criminal Procedure and the rules governing proceedings before courts of limited jurisdiction. Traditionally, our courts have not applied the law of evidence in its full rigor in proceedings such as preliminary hearings, bail hearings, grand jury proceedings, sentencing hearings, parole and probation hearings, extradition or rendition hearings, and others. Traditional rules of evidence have also been relaxed to some extent in custody matters, *see, e.g.*, Pa. R.C.P. 1915.11(b) (court interrogation of a child), and other domestic relations matters, *see, e.g.*, Pa. R.C.P. 1930.3 (testimony by electronic means). The Pennsylvania Rules of Evidence are not intended to supersede these other provisions of law unless they do so expressly or by necessary implication.

These rules are applicable in the courts of the Commonwealth of Pennsylvania's unified judicial system. In some respects, these rules are applicable in administrative proceedings. *See, e.g.*, *Gibson v. W.C.A.B.*, 580 Pa. 470, 861 A.2d 938 (2004) (evidentiary rules 602, 701 and 702 applicable in agency proceedings in general, including workers' compensation proceedings). These rules are also applicable in compulsory arbitration hearings, with specific exceptions relating to the admissibility of certain written evidence and official documents. Pa. R.C.P. 1305.

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Decisional law is applicable to some evidentiary issues not covered by these rules. This would include for example, the *corpus delicti* rule, *see Commonwealth v. Fears*, 575 Pa. 281, 836 A.2d 52 (2003); the collateral source rule, *see Boudwin v. Yellow Cab Co.*, 410 Pa. 31, 188 A.2d 259 (1963); and the parol evidence rule, *see Yocca v. Pittsburgh Steelers Sports, Inc.*, 578 Pa. 479, 854 A.2d 425 (2004). The Pennsylvania Rules of Evidence are not intended to supersede these other provisions of law unless they do so expressly or by necessary implication.

These rules are applicable in the courts of the Commonwealth of Pennsylvania's unified judicial system. In some respects, these rules are applicable in administrative proceedings. *See, e.g.*, *Gibson v. W.C.A.B.*, 580 Pa. 470, 861 A.2d 938 (2004) (evidentiary rules 602, 701 and 702 applicable in agency proceedings in general, including Workers' Compensation proceedings). These rules are also applicable in compulsory arbitration hearings, with specific exceptions relating to the admissibility of certain written evidence and official documents. *See Pa.R.C.P. 1305.*

Note: Adopted May 8, 1998, effective October 1, 1998; Comment revised December 30, 2005, effective February 1, 2006; rescinded and replaced _____, 2011, effective _____, 2011.

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	<p>Committee Explanatory Reports:</p> <p>Final Report explaining the December 30, 2005 revision of the Comment published with the Court's Order at 36 Pa.B. 384 (January 28, 2008).</p> <p>Final Report explaining the _____, 2011 rescission and replacement published with the Court's Order at ___ Pa.B. __ (_____, 2011).</p>
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Rule 102

Rule 102. Purpose and construction	Rule 102. Purpose
These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.	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.

Comment

This rule is identical to F.R.E. 102.	This rule is identical to F.R.E. 102. Note: Adopted May 8, 1998, effective October 1, 1998; rescinded and replaced ____ __, 2011, effective ____ __, 2011. Committee Explanatory Reports: Final Report explaining the ____ __, 2011 rescission and replacement published with the Court's Order at __ Pa.B. __ (____ __, 2011).
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Rule 103

Rule 103. Rulings on evidence	Rule 103. Rulings on Evidence
<p>(a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling that admits or excludes evidence unless</p> <p>(1) <i>Objection.</i> In case the ruling is one admitting evidence, a timely objection, motion to strike or motion in limine appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or</p> <p>(2) <i>Offer of Proof.</i> In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or by motion in limine or was apparent from the context within which the evidence was offered.</p> <p>Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.</p>	<p>(a) Preserving a Claim of Error. A party may claim error in a ruling to admit or exclude evidence only:</p> <p>(1) if the ruling admits evidence, a party, on the record:</p> <p>(A) makes a timely objection, motion to strike, or motion <i>in limine</i>; and</p> <p>(B) states the specific ground, unless it was apparent from the context; or</p> <p>(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.</p> <p>(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.</p>
<p>(b) Record of Offer and Ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.</p>	<p>(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.</p>
<p>(c) Hearing of Jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.</p>	<p>(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.</p>

Comment

<p>Paragraph 103(a) differs from F.R.E. 103(a) in that the Federal rule says, “Error may not be predicated upon a ruling which admits or excludes evidence unless <i>a substantial right of the party is affected, and</i>” (emphasis added). The italicized words have been deleted because they are inconsistent with prior Pennsylvania case law in criminal cases. In criminal cases, the accused is entitled to relief for an erroneous ruling unless the court is convinced beyond a reasonable doubt that the error is harmless. See <i>Commonwealth v. Story</i>, 476 Pa. 391, 383 A.2d 155 (1978). Civil cases are governed by Pa.R.C.P. 126</p>	<p>Pa.R.E. 103(a) differs from F.R.E. 103(a). The Federal Rule says, “A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party....” In Pennsylvania criminal cases, the accused is entitled to relief for an erroneous ruling unless the court finds beyond a reasonable doubt that the error is harmless. See <i>Commonwealth v. Story</i>, 476 Pa. 391, 383 A.2d 155 (1978). Civil cases are governed by Pa.R.C.P. 126 which permits the court to disregard an erroneous ruling “which does not affect the substantial rights of the parties.” Pa.R.E. 103(a) is consistent with</p>
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Rule 103

which permits the court to disregard an erroneous ruling “which does not affect the substantial rights of the parties.” Pa.R.E. 103(a) does not change the existing rule.

Paragraphs (a)(1) and (a)(2) are consistent with prior Pennsylvania case law. See *Dilliplaine v. Lehigh Valley Trust Co.*, 457 Pa. 255, 322 A.2d 114 (1974); *Commonwealth v. Clair*, 458 Pa. 418, 326 A.2d 272 (1974). Paragraphs (a)(1) and (a)(2) are similar to F.R.E. 103(a)(1) and (a)(2). The term “motion *in limine*” has been added and the last three words have been changed. Motions *in limine* permit the trial court to make rulings on evidence prior to trial or at trial but before the evidence is offered. Such motions can expedite the trial and assist in producing just determinations. A ruling on a motion *in limine* on the record is sufficient to preserve the issue for appeal, without renewal of the objection or offer at trial. The change in language is intended to make clear that the requirement that offers of proof be made is applicable to testimonial and other types of evidence.

Pa.R.E. 103(a) was amended in 2001 by adding the second paragraph. The amendment, which is identical to the amendment to F.R.E. 103(a) that became effective December 1, 2000, is consistent with prior Pennsylvania case law. See *Bell v. City of Philadelphia*, 491 A.2d 1396 (Pa. Super 1985). It is also consistent with the second paragraph of this *Comment*.

Paragraphs (b) and (c) are identical to F.R.E. 103(b) and (c) and are consistent with Pennsylvania practice.

F.R.E. 103(d) permits a court to grant relief for “plain errors affecting substantial rights although they were not brought to the attention of the court.” This paragraph has been deleted because it is inconsistent with paragraphs (a)(1) and (a)(2) and with prior Pennsylvania case law as established in *Dilliplaine and Clair*.

Note: Adopted May 8, 1998, effective October 1, 1998; amended November 2, 2001; effective January 1, 2002.

Committee Explanatory Reports

Final Report explaining the November 2, 2001, amendments to paragraph (a) published with the Court’s Order at 31 Pa.B. 6384 (November 24, 2001).

Pennsylvania law.

Pa.R.E. 103(a)(1) specifically refers to motions *in limine*. These motions are not mentioned in the Federal rule. Motions *in limine* permit the trial court to make rulings on evidence prior to trial or at trial but before the evidence is offered. Such motions can expedite the trial and assist in producing just determinations.

Pa.R.E. 103(b), (c) and (d) are identical to F.R.E. 103(b), (c) and (d).

F.R.E. 103(e) permits a court to “take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved.” This paragraph has not been adopted because it is inconsistent with Pa.R.E. 103(a) and Pennsylvania law. See *Commonwealth v. Clair*, 458 Pa. 418, 326 A.2d 272 (1974); *Dilliplaine v. Lehigh Valley Trust Co.*, 457 Pa. 255, 322 A.2d 114 (1974).

Note: Adopted May 8, 1998, effective October 1, 1998; amended November 2, 2001, effective January 1, 2002; rescinded and replaced _____, 2011, effective _____, 2011.

Committee Explanatory Reports:

Final Report explaining the November 2, 2001 amendments to paragraph (a) published with the Court’s Order at 31 Pa.B. 6384 (November 24, 2001).

Final Report explaining the _____, 2011 rescission and replacement published with the Court’s Order at

Rule 103

	___ Pa.B. ___ (_____, 2011).
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Rule 104

Rule 104. Preliminary questions	Rule 104. Preliminary Questions
<p>(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.</p>	<p>(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.</p>
<p>(b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.</p>	<p>(b) Relevance 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.</p>
<p>(c) Hearing of jury. Hearings on the admissibility of evidence alleged to have been obtained in violation of the defendant's rights shall in all cases be conducted outside the presence of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.</p>	<p>(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:</p> <ol style="list-style-type: none"> (1) the hearing involves evidence alleged to have been obtained in violation of the defendant's rights; (2) a defendant in a criminal case is a witness and so requests; or (3) justice so requires.
<p>(d) Testimony by accused. The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.</p>	<p>(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.</p>
<p>(e) Weight and credibility. Even though the court has decided that evidence is admissible, this does not preclude a party from offering evidence relevant to the weight or credibility of that evidence.</p>	<p>(e) Weight and Credibility. Even though the court rules that evidence is admissible, this does not preclude a party from offering other evidence relevant to the weight or credibility of that evidence.</p>

Comment

<p>Paragraph 104(a) is identical to F.R.E. 104(a). The first sentence is consistent with prior Pennsylvania case law. See <i>Commonwealth v. Chester</i>, 526 Pa. 578, 587 A.2d 1367 (1991).</p> <p>The second sentence of paragraph 104(a) is based on the premise that, by and large, the law of evidence is a "child of the jury system" and that the rules of evidence need not be applied when the judge is the</p>	<p>Pa.R.E. 104(a) is identical to F.R.E. 104(a).</p> <p>The second sentence of Pa.R.E. 104(a) is based on the premise that, by and large, the law of evidence is a "child of the jury system" and that the rules of evidence need not be applied when the judge is the</p>
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Rule 104

fact finder. The theory is that the judge should be empowered to hear any relevant evidence to resolve questions of admissibility. This approach is consistent with Pennsylvania law. See *Commonwealth v. Raab*, 594 Pa. 18, 934 A.2d 695 (2007).

Pa.R.E. 104(a) does not resolve whether the allegedly inadmissible evidence alone is sufficient to establish its own admissibility. Some other rules specifically address this issue. For example, Pa.R.E. 902 provides that some evidence is self-authenticating. But under Pa.R.E. 803(25), the allegedly inadmissible evidence alone is not sufficient to establish some of the preliminary facts necessary for admissibility. In other cases the question must be resolved by the trial court on a case-by-case basis.

Paragraph 104(b) is identical to F.R.E. 104(b) and appears to be consistent with prior Pennsylvania case law. See *Commonwealth v. Carpenter*, 472 Pa. 510, 372 A.2d 806 (1977).

The first sentence of paragraph 104(c) differs from the first sentence of F.R.E. 104(c) in that the Federal Rule says "Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury." The first sentence of Pa.R.E. 104(c) has been changed to be consistent with Pa.R.Crim.P. 581(F), which requires hearings outside the presence of the jury in all cases in which it is alleged that the evidence was obtained in violation of the defendant's rights.

The second sentence of paragraph 104(c) is identical to the second sentence of F.R.E. 104(c). Paragraph 104(c) says that hearings on other preliminary matters, both criminal and civil, shall be conducted outside the jury's presence when required by the interests of justice. Certainly, the court should conduct a hearing outside the presence of the jury when the court believes that it is necessary to prevent the jury from hearing prejudicial information.

In *Commonwealth v. Washington*, 554 Pa. 559, 722 A.2d 643 (1998), a case involving child witnesses, the Supreme Court created a *per se* rule requiring competency hearings to be conducted outside the presence of the jury. In *Commonwealth v. Delbridge*, 578 Pa. 641, 855 A.2d 27 (2003), the Supreme Court held that a competency hearing is the appropriate way to explore an allegation that the memory of a child has been so corrupted or "tainted" by unduly suggestive or coercive interview techniques as to render the child incompetent to testify.

The right of an accused to have his or her testimony on a preliminary matter taken outside the presence of the jury, a right that the rule expressly recognizes, does not appear to have been discussed in prior

fact finder. The theory is that the judge should be empowered to hear any relevant evidence to resolve questions of admissibility. This approach is consistent with Pennsylvania law. See *Commonwealth v. Raab*, 594 Pa. 18, 934 A.2d 695 (2007).

Pa.R.E. 104(a) does not resolve whether the allegedly inadmissible evidence alone is sufficient to establish its own admissibility. Some other rules specifically address this issue. For example, Pa.R.E. 902 provides that some evidence is self-authenticating. But under Pa.R.E. 803(25), the allegedly inadmissible evidence alone is not sufficient to establish some of the preliminary facts necessary for admissibility. In other cases the question must be resolved by the trial court on a case-by-case basis.

Pa.R.E. 104(b) is identical to F.R.E. 104(b).

Pa.R.E. 104(c)(1) differs from F.R.E. 104(c)(1) in that the Federal Rule says "the hearing involves the admissibility of a confession;" Pa.R.E. 104(c)(1) is consistent with Pa.R.Crim.P. 581(F), which requires hearings outside the presence of the jury in all cases in which it is alleged that the evidence was obtained in violation of the defendant's rights.

Pa.R.E. 104(c)(2) and (3) are identical to F.R.E. 104(c)(2) and (3). Paragraph(c)(3) is consistent with *Commonwealth v. Washington*, 554 Pa. 559, 722 A.2d 643 (1998), a case involving child witnesses, in which the Supreme Court created a *per se* rule requiring competency hearings to be conducted outside the presence of the jury. In *Commonwealth v. Delbridge*, 578 Pa. 641, 855 A.2d 27 (2003), the Supreme Court held that a competency hearing is the appropriate way to explore an allegation that the memory of a child has been so corrupted or "tainted" by unduly suggestive or coercive interview techniques as to render the child incompetent to testify.

Rule 104

<p>Pennsylvania case law.</p> <p>Paragraph 104(d) is identical to F.R.E. 104(d). In general, when a party offers himself or herself as a witness, the party may be questioned on all relevant matters in the case. See <i>Agate v. Dunleavy</i>, 398 Pa. 26, 156 A.2d 530 (1959). Under Pa.R.E. 104(d), however, when the accused in a criminal case testifies only with regard to a preliminary matter, he or she may not be cross-examined as to other matters. Although there is no Pennsylvania authority on this point, it appears that this rule is consistent with Pennsylvania practice. This approach is consistent with paragraph 104(c) in that it is designed to preserve the defendant's right not to testify generally in the case.</p> <p>Paragraph 104(e) differs from F.R.E. 104(e) to clarify the meaning of this paragraph. See 21 Wright and Graham, <i>Federal Practice and Procedure</i> § 5058 (1977). This paragraph is consistent with prior Pennsylvania case law.</p> <p>Note: Adopted May 8, 1998, effective October 1, 1998; Comment revised March 29, 2001, effective April 1, 2001.</p> <p>Committee Explanatory Reports:</p> <p>Final Report explaining the March 29, 2001 revision of the Comment published with the Court's Order at 31 Pa.B. 1995 (April 14, 2001).</p>	<p>Pa.R.E. 104(d) is identical to F.R.E. 104(d). In general, when a party offers himself or herself as a witness, the party may be questioned on all relevant matters in the case. See <i>Agate v. Dunleavy</i>, 398 Pa. 26, 156 A.2d 530 (1959). Under Pa.R.E. 104(d), however, when the accused in a criminal case testifies with regard to a preliminary question only, he or she may not be cross-examined as to other matters. This is consistent with Pa.R.E. 104(c)(2) in that it is designed to preserve the defendant's right not to testify in the case in chief.</p> <p>Pa.R.E. 104(e) differs from F.R.E. 104(e) to clarify the meaning of this paragraph.</p> <p>Note: Adopted May 8, 1998, effective October 1, 1998; Comment revised March 29, 2001, effective April 1, 2001; rescinded and replaced _____, 2011, effective _____, 2011.</p> <p>Committee Explanatory Reports:</p> <p>Final Report explaining the March 29, 2001 revision of the Comment published with the Court's Order at 31 Pa.B. 1995 (April 14, 2001).</p> <p>Final Report explaining the _____, 2011 rescission and replacement published with the Court's Order at ___ Pa.B. __ (_____, 2011).</p>
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Rule 105

Rule 105. Limited Admissibility	Rule 105. Limiting Evidence That is Not Admissible Against Other Parties or for Other Purposes
When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court upon request shall, or on its own initiative may, restrict the evidence to its proper scope and instruct the jury accordingly.	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. The court may also do so on its own initiative.

Comment

<p>This rule differs from F.R.E. 105 in that the language “or on its own initiative may” has been added. This rule is consistent with Pennsylvania law. In addition to the approach taken by Pa.R.E. 105, there are other ways to deal with evidence that is admissible as to one party or for one purpose, but not admissible as to another party or for another purpose. For example, the evidence may be redacted. See <i>Commonwealth v. Johnson</i>, 474 Pa. 410, 378 A.2d 859 (1977). Or, a severance may be an appropriate remedy. See <i>Commonwealth v. Young</i>, 263 Pa. Super. 333, 397 A.2d 1234 (1979). Where the danger of unfair prejudice outweighs probative value, the evidence may be excluded. See Pa.R.E. 403; <i>McShain v. Indemnity Ins. Co. of North America</i>, 338 Pa. 113, 12 A.2d 59 (1940).</p> <p>Note: Adopted May 8, 1998, effective October 1, 1998; Comment revised March 10, 2000, effective immediately.</p> <p>Committee Explanatory Reports:</p> <p>Final Report explaining the March 10, 2000 revision of the Comment deleting “as amended” from the second sentence published with the Court’s Order at 30 Pa.B. 1641 (March 25, 2000).</p>	<p>The first sentence of Pa.R.E. 105 is identical to F.R.E. 105. The second sentence was added to conform to Pennsylvania practice. There are other ways to deal with evidence that is admissible against one party but not another, or for one purpose but not another. For example, the evidence may be redacted. See <i>Commonwealth v. Johnson</i>, 474 Pa. 410, 378 A.2d 859 (1977). In some cases, severance may be appropriate. See <i>Commonwealth v. Young</i>, 263 Pa. Super. 333, 397 A.2d 1234 (1979). Where the danger of unfair prejudice outweighs probative value the evidence may be excluded. See Pa.R.E. 403.</p> <p>Note: Adopted May 8, 1998, effective October 1, 1998; Comment revised March 10, 2000, effective immediately; rescinded and replaced _____, 2011, effective _____, 2011.</p> <p>Committee Explanatory Reports:</p> <p>Final Report explaining the March 10, 2000 revision of the Comment deleting “as amended” from the second sentence published with the Court’s Order at 30 Pa.B. 1641 (March 25, 2000).</p> <p>Final Report explaining the _____, 2011 rescission and replacement published with the Court’s Order at ___ Pa.B. __ (_____, 2011).</p>
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Rule 106

Rule 106. Remainder of related writings or recorded statements	Rule 106. Remainder of or Related Writings or Recorded Statements
When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.	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.

Comment

<p>This rule is identical to F.R.E. 106. It is consistent with Pennsylvania law. See <i>Pedretti v. Pittsburgh Rys. Co.</i>, 417 Pa. 581, 209 A.2d 289 (1965). A similar principle is expressed in Pa.R.C.P. 4020(a)(4), which states: “If only part of a deposition is offered in evidence by a party, any other party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts.”</p> <p>The purpose of Pa.R.E. 106 is to give the adverse party an opportunity to correct a misleading impression that may be created by the use of portions of a writing or recorded statement that are taken out of context. This rule gives the adverse party the right to correct the misleading impression at the time that the evidence is introduced. The trial court has discretion to decide whether other parts, or other writings or recorded statements, ought in fairness to be considered contemporaneously with the original portion.</p>	<p>This rule is identical to F.R.E. 106. A similar principle is expressed in Pa.R.C.P. 4020(a)(4), which states: “If only part of a deposition is offered in evidence by a party, any other party may require the offering party to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts.”</p> <p>The purpose of Pa.R.E. 106 is to give the adverse party an opportunity to correct a misleading impression that may be created by the use of a part of a writing or recorded statement that may be taken out of context. This rule gives the adverse party the opportunity to correct the misleading impression at the time that the evidence is introduced. The trial court has discretion to decide whether other parts, or other writings or recorded statements, ought in fairness to be considered contemporaneously with the proffered part.</p> <p>Note: Adopted May 8, 1998, effective October 1, 1998; rescinded and replaced _____, 2011, effective _____, 2011.</p> <p>Committee Explanatory Reports:</p> <p>Final Report explaining the _____, 2011 rescission and replacement published with the Court’s Order at ___ Pa.B. __ (_____, 2011).</p>
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Rule 201

ARTICLE II. JUDICIAL NOTICE Rule 201. Judicial notice of adjudicative facts	ARTICLE II. JUDICIAL NOTICE Rule 201. Judicial Notice of Adjudicative Facts
(a) Scope of rule. This rule governs only judicial notice of adjudicative facts.	(a) Scope. This rule governs judicial notice of an adjudicative fact only, not a legislative fact.
(b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.	(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: <ol style="list-style-type: none"> (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) When discretionary. A court may take judicial notice, whether requested or not. (d) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.	(c) Taking Notice. The court: <ol style="list-style-type: none"> (1) may take judicial notice on its own; or (2) must take judicial notice if a party requests it and the court is supplied with the necessary information.
(e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.	(d) Timing. The court may take judicial notice at any stage of the proceeding.
(f) Time of taking notice. 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.
(g) Instructing jury. The court shall instruct the jury that it may, but is not required to, accept as conclusive, any fact judicially noticed.	(f) Instructing the Jury. The court must instruct the jury that it may, but is not required to, accept as conclusive, any fact judicially noticed.

Comment

<p>This rule is identical to F.R.E. 201, except for paragraph (g).</p> <p>Paragraph (a) limits the application of this rule to adjudicative facts. This rule is not applicable to judicial notice of law. Adjudicative facts are facts about the events, persons and places relevant to the matter</p>	<p>This rule is identical to F.R.E. 201, except for paragraph (f).</p> <p>Pa.R.E. 201(a) limits the application of this rule to adjudicative facts. This rule is not applicable to judicial notice of law. Adjudicative facts are facts about the events, persons and places relevant to the matter</p>
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Rule 201

before the court. See 2 McCormick, *Evidence* § 328 (4th ed. 1992).

In determining the law applicable to a matter, the judge is sometimes said to take judicial notice of law. See 21 Wright and Graham, *Federal Practice and Procedure*, § 5102 (1977). In Pennsylvania, judicial notice of law has been regulated by decisional law and statute. See *In re Annual Controller's Reports for Years 1932, 1933, 1934, 1935 and 1936*, 333 Pa. 489, 5 A.2d 201 (1939) (judicial notice of public laws); 42 Pa.C.S.A. § 6107 (judicial notice of municipal ordinances); 42 Pa.C.S.A. § 5327 (judicial notice of laws of any jurisdiction outside the Commonwealth); 45 Pa.C.S.A. § 506 (judicial notice of the contents of the Pennsylvania Code and the Pennsylvania Bulletin). These rules are not intended to change existing provisions of law.

Paragraph (b) is consistent with Pennsylvania law. See *Appeal of Albert*, 372 Pa. 13, 92 A.2d 663 (1952); *In re Siemens' Estate*, 346 Pa. 610, 31 A.2d 280 (1943).

Paragraph (c) is consistent with Pennsylvania practice.

Paragraph (d) is new to Pennsylvania. Heretofore, the taking of judicial notice has been discretionary, not mandatory. The approach of the Federal Rule has been adopted because it has not been problematic in the jurisdictions that have adopted it.

Paragraph (e) provides that parties will have an opportunity to be heard on the propriety of the court's taking judicial notice. No formal procedure has been provided. Pennsylvania practice appears to have operated satisfactorily without a formal procedure.

Paragraph (f) resolves an apparent inconsistency in Pennsylvania law. Pennsylvania law has not been completely consistent with regard to whether a court may take judicial notice at the pleading stage of proceedings. See *Clouser v. Shamokin Packing Co.*, 240 Pa. Super. 268, 361 A.2d 836 (1976) (trial court generally should not take judicial notice at the pleading stage); *Bykowski v. Chesed Co.*, 425 Pa. Super. 595, 625 A.2d 1256 (1993) (trial court may take judicial notice in ruling on motion for judgment on the pleadings). Similarly, older authority has held that judicial notice may not be taken at the appellate stage. See *Wilson v. Pennsylvania R.R. Co.*, 421 Pa. 419, 219 A.2d 666 (1966). More recently, the Supreme Court has taken judicial notice at the appellate stage. See *Commonwealth v. Tau Kappa Epsilon*, 530 Pa. 416, 609 A.2d 791 (1992). Pa.R.E. 201(f) permits judicial notice to be taken at any stage.

Paragraph (g) differs from F.R.E. 201(g). Under the

before the court. See 2 McCormick, *Evidence* § 328 (6th ed. 2006).

In determining the law applicable to a matter, the judge is sometimes said to take judicial notice of law. In Pennsylvania, judicial notice of law has been regulated by decisional law and statute. See *In re Annual Controller's Reports for Years 1932, 1933, 1934, 1935 and 1936*, 333 Pa. 489, 5 A.2d 201 (1939) (judicial notice of public laws); 42 Pa.C.S. § 6107 (judicial notice of municipal ordinances); 42 Pa.C.S. § 5327 (judicial notice of laws of any jurisdiction outside the Commonwealth); 45 Pa.C.S. § 506 (judicial notice of the contents of the Pennsylvania Code and the Pennsylvania Bulletin). These rules are not intended to change existing provisions of law.

Pa.R.E. 201(f) differs from F.R.E. 201(f). Under the Federal Rule the court is required to instruct the jury to accept as conclusive any fact judicially noticed in a civil case. In a criminal case, the judicially noticed fact is not treated as conclusive. Under Pennsylvania law, the judicially noticed fact has not been treated as conclusive in either civil or criminal cases, and the opposing party may submit evidence to the jury to disprove the noticed fact. See *Appeal of Albert*, 372 Pa. 13, 92 A.2d 663 (1952); *Commonwealth v. Brown*, 428 Pa. Super. 587, 631 A.2d 1014 (1993).

Rule 201

Federal Rule the court is required to instruct the jury to accept as conclusive any fact judicially noticed in a civil case. In a criminal case, the judicially noticed fact is not treated as conclusive. Under Pennsylvania law, the judicially noticed fact has not been treated as conclusive in either civil or criminal cases, and the opposing party may submit evidence to the jury to disprove the noticed fact. *See Appeal of Albert*, 372 Pa. 13, 92 A.2d 663 (1952); *Commonwealth v. Brown*, 428 Pa. Super. 587, 631 A.2d 1014 (1993). This paragraph follows established Pennsylvania law.

Note: Adopted May 8, 1998, effective October 1, 1998; rescinded and replaced _____, 2011, effective _____, 2011.

Committee Explanatory Reports:

Final Report explaining the _____, 2011 rescission and replacement published with the Court's Order at ___ Pa.B. __ (_____, 2011).

Rule 301

ARTICLE III. PRESUMPTIONS Rule 301. General rule	ARTICLE III. PRESUMPTIONS Rule 301. Presumptions
Presumptions as they now exist or may be modified by law shall be unaffected by the adoption of these rules.	Presumptions as they now exist or may be modified by law shall be unaffected by the adoption of these rules.

Comment

<p>Pa.R.E. 301 is similar to F.R.E. 301 in that it does not modify existing law. Pa.R.E. 301 differs from F.R.E. 301 in that this rule does not establish the effect of a presumption on the burden of proof.</p>	<p>Pa.R.E. 301 is similar to F.R.E. 301 in that it does not modify existing law. Pa.R.E. 301 differs from F.R.E. 301 in that this rule does not establish the effect of a presumption on the burden of proof.</p> <p>Note: Adopted May 8, 1998, effective October 1, 1998; rescinded and replaced _____, 2011, effective _____, 2011.</p> <p>Committee Explanatory Reports:</p> <p>Final Report explaining the _____, 2011 rescission and replacement published with the Court's Order at ___ Pa.B. __ (_____, 2011).</p>
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Rule 401

ARTICLE IV. RELEVANCY AND ITS LIMITS Rule 401. Definition of “relevant evidence”	ARTICLE IV. RELEVANCE AND ITS LIMITS Rule 401. Test for Relevant Evidence
<p>“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.</p>	<p>Evidence is relevant if:</p> <p>(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and</p> <p>(b) the fact is of consequence in determining the action.</p>

Comment

<p>Pa.R.E. 401 is identical to F.R.E. 401. The rule codifies existing Pennsylvania law, as represented by the Supreme Court’s definition of relevance in <i>Commonwealth v. Scott</i>, 480 Pa. 50, 54, 389 A.2d 79, 82 (1978): “Evidence which tends to establish some fact material to the case, or which tends to make a fact at issue more or less probable, is relevant.” Whether evidence has a tendency to make a given fact more or less probable is to be determined by the court in the light of reason, experience, scientific principles and the other testimony offered in the case.</p> <p>The relevance of a piece of evidence may be conditional, or dependent on facts not yet of record. Under Pa.R.E. 104(b), the evidence may be admitted subject to the introduction of further evidence demonstrating that all conditions necessary to a finding of relevance have been met.</p>	<p>This rule is identical to F.R.E. 401.</p> <p>Whether evidence has a tendency to make a given fact more or less probable is to be determined by the court in the light of reason, experience, scientific principles and the other testimony offered in the case.</p> <p>The relevance of proposed evidence may be dependent on evidence not yet of record. Under Pa.R.E. 104(b), the court may admit the proposed evidence on the condition that the evidence supporting its relevance be introduced later.</p> <p>Note: Adopted May 8, 1998, effective October 1, 1998; rescinded and replaced _____, 2011, effective _____, 2011.</p> <p>Committee Explanatory Reports:</p> <p>Final Report explaining the _____, 2011 rescission and replacement published with the Court’s Order at ___ Pa.B. __ (_____, 2011).</p>
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Rule 402

Rule 402. Relevant evidence generally admissible; irrelevant evidence inadmissible	Rule 402. General Admissibility of Relevant Evidence
<p>All relevant evidence is admissible, except as otherwise provided by law. Evidence that is not relevant is not admissible.</p>	<p>All relevant evidence is admissible, except as otherwise provided by law. Evidence that is not relevant is not admissible.</p>

Comment

<p>Pa.R.E. 402 is similar to F.R.E. 402. The only variance is in the language of the exceptions clause in the first sentence. The exceptions clause of the federal rule specifically enumerates the various sources of federal rule-making power. Pa.R.E. 402 substitutes the phrase, “by law”, to encompass analogous sources of rule-making power within the Commonwealth.</p> <p>The rule states a fundamental concept of the law of evidence. Relevant evidence is admissible; evidence that is not relevant is not admissible. This concept is modified by the exceptions clause of the rule, which states another fundamental principle of evidentiary law. Evidence otherwise relevant may be excluded by operation of constitutional law, by statute, by rules of evidence created by decisional law, by these rules, or by other rules promulgated by the Supreme Court.</p> <p>As noted in the Comment to Pa.R.E. 101, a principal goal of these rules is to construct a comprehensive code of evidence governing court proceedings in the Commonwealth. Pa.R.E. 402 explicitly recognizes, however, that these rules cannot be all inclusive. The law of evidence is also shaped by constitutional principle, legislative enactment, procedural rule-making and decisional law. These rules of evidence are not intended to supersede other provisions of law, unless they do so expressly or by necessary implication.</p> <p>Examples of decisionally created rules of exclusion that are not abrogated by the adoption of these rules include: the corpus delicti rule, <i>Commonwealth v. Ware</i>, 459 Pa. 334, 329 A.2d 258 (1974); the collateral source rule, <i>Boudwin v. Yellow Cab Co.</i>, 410 Pa. 31, 188 A.2d 259 (1963); the parole evidence rule, <i>Gianni v. R. Russell and Co., Inc.</i>, 281 Pa. 320, 126 A. 791 (1924); and the rule excluding certain evidence to rebut the presumption of legitimacy, <i>John M. v. Paula T.</i>, 524 Pa. 306, 571 A.2d 1380 (1990).</p>	<p>Pa.R.E. 402 differs from F.R.E. 402. The Federal Rule specifically enumerates the various sources of federal rule-making power. Pa.R.E. 402 substitutes the phrase “by law”.</p> <p>Pa.R.E. 402 states a fundamental concept of the law of evidence. Relevant evidence is admissible; evidence that is not relevant is not admissible. This concept is modified by the exceptions clause of the rule, which states another fundamental principle of evidentiary law - relevant evidence may be excluded by operation of constitutional law, by statute, by these rules, by other rules promulgated by the Supreme Court or by rules of evidence created by case law.</p> <p>Examples of decisionally created rules of exclusion that are not abrogated by the adoption of these rules include: the <i>corpus delicti</i> rule, <i>Commonwealth v. Ware</i>, 459 Pa. 334, 329 A.2d 258 (1974); the collateral source rule, see <i>Boudwin v. Yellow Cab Co.</i>, 410 Pa. 31, 188 A.2d 259 (1963); the parole evidence rule, see <i>Yocca v. Pittsburgh Steelers Sports, Inc.</i>, 578 Pa. 479, 854 A.2d 425 (2004); and the rule excluding certain evidence to rebut the presumption of legitimacy, see <i>John M. v. Paula T.</i>, 524 Pa. 306, 571 A.2d 1380 (1990).</p> <p>Note: Adopted May 8, 1998, effective October 1, 1998; rescinded and replaced _____, 2011,</p>
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	<p>effective _____, 2011.</p> <p>Committee Explanatory Reports:</p> <p>Final Report explaining the _____, 2011 rescission and replacement published with the Court's Order at ___ Pa.B. __ (_____, 2011).</p>
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Rule 403

Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time	Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons
Although relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.	The court may exclude relevant evidence if its probative value is 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.

Comment

<p>Pa.R.E. 403 differs from F.R.E. 403. The federal rule provides that relevant evidence may be excluded if its probative value is “substantially outweighed.” Pa.R.E. 403 eliminates the word “substantially” to conform the text of the rule more closely to Pennsylvania law. See <i>Commonwealth v. Boyle</i>, 498 Pa. 486, 447 A.2d 250 (1982); <i>Morrison v. Commonwealth, Dept. of Pub. Welfare</i>, 538 Pa. 122, 646 A.2d 565 (1994).</p> <p>“Unfair prejudice” means a tendency to suggest decision on an improper basis or to divert the jury's attention away from its duty of weighing the evidence impartially.</p> <p>With regard to evidence of other crimes, wrongs or acts of the defendant in a criminal case, see Pa.R.E. 404(b)(3).</p>	<p>Pa.R.E. 403 differs from F.R.E. 403. The Federal Rule provides that relevant evidence may be excluded if its probative value is “substantially outweighed.” Pa.R.E. 403 eliminates the word “substantially” to conform the text of the rule more closely to Pennsylvania law. See <i>Commonwealth v. Boyle</i>, 498 Pa. 486, 447 A.2d 250 (1982).</p> <p>“Unfair prejudice” means a tendency to suggest decision on an improper basis or to divert the jury's attention away from its duty of weighing the evidence impartially.</p> <p>Note: Adopted May 8, 1998, effective October 1, 1998; rescinded and replaced _____, 2011, effective _____, 2011.</p> <p>Committee Explanatory Reports:</p> <p>Final Report explaining the _____, 2011 rescission and replacement published with the Court's Order at ___ Pa.B. __ (_____, 2011).</p>
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Rule 404

<p style="text-align: center;">Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes</p>	<p style="text-align: center;">Rule 404. Character Evidence; Crimes or Other Acts</p>
<p>(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:</p> <p>(1) <i>Character of accused.</i> In a criminal case, evidence of a pertinent trait of character of the accused is admissible when offered by the accused, or by the prosecution to rebut the same. If evidence of a trait of character of the alleged victim of the crime is offered by an accused and is admitted under subsection (2), evidence of the same trait of character of the accused is admissible if offered by the prosecution.</p> <p>(2) <i>Character of alleged victim.</i></p> <p>(i) In a criminal case, subject to limitations imposed by statute, evidence of a pertinent trait of character of the alleged victim is admissible when offered by the accused, or by the prosecution to rebut the same.</p> <p>(ii) In a homicide case, where the accused has offered evidence that the deceased was the first aggressor, evidence of a character trait of the deceased for peacefulness is admissible when offered by the prosecution to rebut the same.</p> <p>(iii) In a civil action for assault and battery, evidence of a character trait of violence of the plaintiff may be admitted when offered by the defendant to rebut evidence that the defendant was the first aggressor.</p> <p>(3) <i>Character of witness.</i> Evidence of a pertinent trait of character of a witness is admissible as provided in Rules 607 (Impeachment of Witness), 608 (Character and Conduct of Witness) and 609 (Evidence of Conviction of Crime).</p>	<p>(a) Character Evidence.</p> <p>(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.</p> <p>(2) Exceptions for a Defendant or Victim in a Criminal Case. The following exceptions apply in a criminal case:</p> <p>(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;</p> <p>(B) subject to limitations imposed by statute a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted the prosecutor may:</p> <p>(i) offer evidence to rebut it; and</p> <p>(ii) offer evidence of the defendant's same trait; and</p> <p>(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.</p> <p>(3) Exceptions for a Witness. Evidence of a witness's character may be admitted under Rules 607, 608, and 609.</p> <p>(4) Exception in a Civil Action for Assault and Battery. In a civil action for assault and battery, evidence of the plaintiff's character trait for violence may be admitted when offered by the defendant to rebut evidence that the defendant was the first aggressor.</p>

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<p>(b) Other crimes, wrongs, or acts.</p> <p>(1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.</p> <p>(2) Evidence of other crimes, wrongs, or acts may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.</p> <p>(3) Evidence of other crimes, wrongs, or acts proffered under subsection (b)(2) of this rule may be admitted in a criminal case only upon a showing that the probative value of the evidence outweighs its potential for prejudice.</p> <p>(4) In criminal cases, the prosecution shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.</p>	<p>(b) Crimes, Wrongs or Other Acts</p> <p>(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.</p> <p>(2) Permitted Uses. 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. In a criminal case this evidence is admissible only if the probative value of the evidence outweighs its potential for unfair prejudice.</p> <p>(3) Notice in a Criminal Case. In a criminal case the prosecutor must provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence the prosecutor intends to introduce at trial.</p>
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Comment

<p>Pa.R.E 404 is an exception to the general rule set forth in Pa.R.E 402 that all relevant evidence is admissible. Pa.R.E 404 is, in principle, consistent with F.R.E. 404. However, the Pennsylvania rule uses more subdivisions to enhance clarity and readability. A few substantive differences accommodate Pennsylvania statutory and prior case law.</p> <p>Section (a)</p> <p>This section promulgates a general rule that evidence of a person's character or trait of character is not admissible to prove conduct in conformity therewith on a particular occasion. The rationale is that the relevance of such evidence is usually outweighed by its potential for creating unfair prejudice, particularly with a jury.</p> <p>This general rule of inadmissibility is consistent with prior Pennsylvania case law. See, e.g., <i>Greenberg v. Aetna Ins. Co.</i>, 427 Pa. 494, 235 A.2d 582 (1967) (error to permit the plaintiff to testify that he served in the United States Armed Forces in World War II and distinguished himself with a heroic record). This section does not preclude the introduction of evidence of a person's character, or trait of character, to prove something other than conduct in conformity therewith. For example, a party must sometimes</p>	<p>Pa.R.E. 404(a) differs from F.R.E. 404(a). There are two differences. First, F.R.E. 404(a)(2)(B) gives the defendant the right to introduce evidence of a pertinent trait of character of the alleged victim of the crime subject to the limitations in F.R.E 412. The Pennsylvania Rule differs in that Pennsylvania has not adopted Rule 412. Instead, Pennsylvania recognizes statutory limitations on this right. In particular, 18 Pa. C.S. § 3104 (the Rape Shield Law) often prohibits the defendant from introducing evidence of the alleged victim's past sexual conduct, including reputation evidence. See Comment to Pa.R.E. 412 (Not Adopted), <i>infra</i>. Second, Pa.R.E 404(a)(4), which applies only to a civil action for assault and battery, is not part of the federal rule. It is based on <i>Bell v. Philadelphia</i>, 341 Pa. Super. 534, 491 A.2d 1386 (1985).</p> <p>Pa.R.E 404(a)(1) prohibits the use of evidence of a person's character or trait of character to prove conduct in conformity therewith on a particular occasion. The rationale is that the relevance of such evidence is usually outweighed by its tendency to create unfair prejudice, particularly with a jury. This does not prohibit the introduction of evidence of a person's character, or trait of character, to prove something other than conduct in conformity therewith. For example, a party must sometimes prove a</p>
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prove a person's characteristic because it is an element of the party's claim or defense. See, e.g., *Dempsey v. Walso Bureau, Inc.*, 431 Pa. 562, 246 A.2d 418 (1968) (alleged negligent employment of a violence-prone security guard); *Commonwealth ex rel. Grimes v. Grimes*, 281 Pa. Super 484, 422 A.2d 572 (1980) (parental fitness in a custody case); *Christiansen v. Silfies*, 446 Pa. Super. 464, 667 A.2d 396 (1995) (alleged negligent entrustment of a truck to a man with a poor driving record).

A person's trait of character is not the same as a person's habit. The distinction is discussed in the Comment to Rule 406, *infra*. If a person's trait of character leads to habitual behavior, evidence of the latter is admissible to prove conduct in conformity therewith on a particular occasion, pursuant to Rule 406.

Like the federal rule, section (a) has three subsections of exceptions. They should be read together with section (a) of Rule 405, which describes two methods of proving a person's character, or trait of character.

Subsection (1), which deals with the character of a defendant in a criminal case, is essentially the same as subsection (1) of F.R.E. 404(a). It allows the defendant to "put his character in issue," usually by calling character witnesses to testify to his good reputation for a law-abiding disposition, or other pertinent trait of character. If the defendant does so, the Commonwealth may (1) cross-examine such witnesses, subject to the limitations imposed by Rule 405(a), and (2) offer rebuttal evidence.

If a defendant in a criminal case chooses to offer evidence of a pertinent trait of character of an alleged victim under subsection (2)(i), then subsection (1) allows the Commonwealth to offer evidence that the defendant has the same trait of character. For example, in an assault and battery case, if the defendant introduces evidence that the alleged victim was a violent and belligerent person, the Commonwealth may counter by offering evidence that the defendant was also a violent and belligerent person. Thus, the jury will receive a balanced picture of the two participants to help it decide who was the first aggressor.

Subsection (2), unlike subsection (2) of F.R.E. 404(a), is divided into three subsections.

Subsection (i), like the federal rule, gives an accused the right to introduce evidence of a pertinent trait of character of the alleged victim of the crime with which the accused is charged. However, the Pennsylvania rule differs from the federal rule by recognizing statutory limitations on this right. In particular, 18 Pa. C.S. § 3104 (the Rape Shield Law) often prohibits the

person's character or trait of character because it is an element of the party's claim or defense. See Pa.R.E. 405(b) and its Comment.

A person's trait of character is not the same as a person's habit. The distinction is discussed in the Comment to Rule 406, *infra*. If a person's trait of character leads to habitual behavior, evidence of the latter is admissible to prove conduct in conformity therewith on a particular occasion, pursuant to Rule 406.

Pa.R.E. 404(a)(2)(A) which deals with the character of a defendant in a criminal case, is identical to F.R.E. 404(a)(2)(A). It allows the defendant to "put his character in issue," usually by calling character witnesses to testify to his good reputation for a law-abiding disposition, or other pertinent trait of character. If the defendant does so, the Commonwealth may (1) cross-examine such witnesses, subject to the limitations imposed by Rule 405(a), and (2) offer rebuttal evidence.

If a defendant in a criminal case chooses to offer evidence of a pertinent trait of character of an alleged victim under subsection (a)(2)(B), then subsection (a)(2)(B)(ii) allows the Commonwealth to offer evidence that the defendant has the same trait of character. For example, in an assault and battery case, if the defendant introduces evidence that the alleged victim was a violent and belligerent person, the Commonwealth may counter by offering evidence that the defendant was also a violent and belligerent person. Thus, the jury will receive a balanced picture of the two participants to help it decide who was the first aggressor.

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accused from introducing evidence of the alleged victim's past sexual conduct, including reputational evidence thereof. See Comment under Rule 412 (not adopted), *infra*.

Subsection (ii), which is essentially the same as the federal rule, applies only in homicide cases in which the defendant offers evidence that the deceased was the first aggressor. It allows the Commonwealth to rebut the defendant's evidence by introducing evidence of the deceased's good reputation for peacefulness.

Subsection (iii), which applies only to a civil action for assault and battery, is not part of the federal rule. It is based on *Bell v. Philadelphia*, 341 Pa. Super. 534, 491 A.2d 1386 (1985).

Section (b)

While Pa.R.E. 404(b) uses the comprehensive word "acts," the vast majority of cases applying it, and its federal counterpart, are criminal cases that deal with *bad* acts, i.e., acts that are also either crimes or non-criminal wrongs. However, the rule applies in civil cases, too, and it applies to good acts as well. See *Ansell v. Green Acres Contracting Co., Inc.*, 347 F.3d 515, 520 (3d Cir. 2003), interpreting the similar federal rule.

Evidence of other crimes, wrongs or bad acts, is powerful evidence. This is particularly so when it is offered against a defendant in a criminal case. By far the issue most often litigated under Rule 404(b) is whether such evidence can be introduced against an accused for some reason other than to prove that the accused acted in conformity with his (or her) prior bad conduct.

Section (b) is similar to section (b) of F.R.E. 404. Unlike the federal rule, it is divided into four subsections to enhance clarity:

Subsection (1), which uses the same language as the federal rule, treats evidence of other crimes, wrongs, or acts, the same as section (a) treats evidence of a person's character, or trait of character, i.e., it makes such evidence inadmissible to prove conduct in conformity therewith.

Subsection (1) is consistent with prior Pennsylvania case law. See *Commonwealth v. Fortune*, 464 Pa. 367, 346 A.2d 783 (1975) (in murder case, reversible error to admit evidence that the defendant participated in six robberies other than the one that culminated in the murder with which he was charged); *Commonwealth v. Seiders*, 531 Pa. 592, 614 A.2d 689 (1992) (in statutory rape case, reversible error to admit evidence that the defendant had previously

Pa.R.E. 404(b)(1) is identical to F.R.E. 404(b)(1). It prohibits the use of evidence of other crimes wrongs or acts to prove a person's character.

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been convicted of indecent assault and endangering the welfare of children).

Subsection (1) rejects an alternate holding in *Commonwealth v. Amos*, 445 Pa. 297, 284 A.2d 748 (1971), a murder case in which the defendant pled self-defense, that it was error to preclude the defendant from introducing the alleged victim's criminal record to prove that the victim was a man of "quarrelsome and violent character," and thus the aggressor.

Subsection (2), like the federal rule, contains a non-exhaustive list of purposes, other than proving character in order to show action in conformity therewith, for which evidence of other crimes, wrongs, or acts committed by a person may be admitted. When the evidence is admitted for such a purpose, the party against whom it is offered is entitled, upon request, to a limiting instruction to the jury. See *Commonwealth v. Hutchinson*, 571 Pa. 45, 811 A.2d 556 (2002). See also Pa.R.E. 105.

Subsection (3) is an adjunct to subsection (2). However, subsection (3) applies only in criminal cases. Unlike the federal rule, it creates a special balancing test that makes it harder for a party, usually but not always the Commonwealth, to introduce relevant evidence of other crimes, wrongs, or acts committed by a person. Under Rules 402 and 403, most other evidence, as far as relevance is concerned, is admissible unless its probative value is outweighed by one or more of the six negative factors set forth in Rule 403. Under subsection (3), relevant evidence of other crimes, wrongs, or acts committed by a person is admissible only if its probative value outweighs its potential for prejudice. This is a codification of an evidential rule enunciated in *Commonwealth v. Morris*, 493 Pa. 164, 425 A.2d 715 (1981).

When weighing the potential for prejudice of evidence of other crimes, wrongs, or acts, the trial court may consider whether, and how much, such potential for prejudice can be reduced by cautionary instructions. See *Commonwealth v. Nolen*, 535 Pa. 77, 634 A.2d 192 (1993); *Commonwealth v. LaCava*, 542 Pa. 160, 666 A.2d 221 (1995); *Commonwealth v. Miles*, 545 Pa. 500, 681 A.2d 1295 (1996).

Subsection (4), which applies only in criminal cases, and only to the Commonwealth, requires that reasonable notice be given before evidence of other crimes, wrongs, or acts is introduced at trial. It is the same as the federal rule. Its purpose is to prevent unfair surprise, and to give the defendant reasonable time to prepare an objection to, or ready a rebuttal for, such evidence.

Pa.R.E. 404(b)(2), like F.R.E. 404(b)(2), contains a non-exhaustive list of purposes, other than proving character, for which a person's other crimes wrongs or acts may be admissible. But it differs in several aspects. First, Pa.R.E. 404(b)(2) requires that the probative value of the evidence must outweigh its potential for prejudice. When weighing the potential for prejudice of evidence of other crimes, wrongs, or acts, the trial court may consider whether and how much such potential for prejudice can be reduced by cautionary instructions. See *Commonwealth v. LaCava*, 542 Pa. 160, 666 A.2d 221 (1995). When evidence is admitted for this purpose, the party against whom it is offered is entitled, upon request, to a limiting instruction. See *Commonwealth v. Hutchinson*, 571 Pa. 45, 811 A.2d 556 (2002). Second, the federal rule requires the defendant in a criminal case to make a request for notice of the prosecutor's intent to offer evidence of other crimes, wrongs or acts. This issue is covered in Pa.R.E. 404(b)(3) which is consistent with prior Pennsylvania practice in that the requirement that the prosecutor give notice is not dependent upon a request by the defendant.

Rule 404

<p>Note: Adopted May 8, 1998, effective October 1, 1998; Comment revised November 2, 2001; effective January 1, 2002.</p> <p>Committee Explanatory Reports:</p> <p>Final Report explaining the November 2, 2001, revision of Subsection (a) of the Comment published with the Court's Order at 31 Pa.B. 6384 (November 24, 2001).</p>	<p>Note: Adopted May 8, 1998, effective October 1, 1998; Comment revised November 2, 2001; effective January 1, 2002; rescinded and replaced _____, 2011, effective _____, 2011.</p> <p>Committee Explanatory Reports:</p> <p>Final Report explaining the November 2, 2001 revision of Subsection (a) of the Comment published with the Court's Order at 31 Pa.B. 6384 (November 24, 2001).</p> <p>Final Report explaining the _____, 2011 rescission and replacement published with the Court's Order at ___ Pa.B. __ (_____, 2011).</p>
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Rule 405

Rule 405. Methods of proving character	Rule 405. Methods of Proving Character
<p>(a) Reputation evidence. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation. On cross-examination of the reputation witness, inquiry is allowable into specific instances of conduct probative of the character trait in question, except that in criminal cases inquiry into allegations of other criminal misconduct of the accused not resulting in conviction is not permissible.</p>	<p>(a) By Reputation. When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation. Testimony about the witness's opinion as to the character or character trait of the person is not admissible.</p> <ol style="list-style-type: none"> (1) On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct probative of the character trait in question. (2) In a criminal case, on cross-examination of a character witness, inquiry into allegations of other criminal conduct by the defendant, not resulting in conviction, is not permissible.
<p>(b) Specific instances of conduct. Specific instances of conduct are not admissible to prove character or a trait of character, except as follows:</p> <ol style="list-style-type: none"> (1) In civil cases where character or a trait of character is admissible as an element of a claim or defense, character may be proved by specific instances of conduct. (2) In criminal cases where character or a trait of character is admissible under Pa.R.E. 404(a)(2), the accused may prove the complainant's character or trait of character by specific instances of conduct. 	<p>(b) By Specific Instances of Conduct. Specific instances of conduct are not admissible to prove character or a trait of character, except:</p> <ol style="list-style-type: none"> (1) In a civil case, when a person's character or a character trait is an essential element of a claim or defense, character may be proved by specific instances of conduct. (2) In a criminal case, when character or a character trait of an alleged victim is admissible under Pa.R.E. 404(a)(2)(B) the defendant may prove the character or character trait by specific instances of conduct.

Comment

<p>Pa.R.E. 405 differs from F.R.E. 405. One of the principal points of divergence is that Pennsylvania law does not permit proof of character by opinion evidence. See <i>Commonwealth v. Lopinson</i>, 234 A.2d 552 (Pa. 1967).</p> <p>Reputation evidence is an exception to the hearsay rule under Pa.R.E. 803(21).</p> <p>Subsection (a). Pa.R.E. 405(a) differs from F.R.E. 405 because Pa.R.E. 405(a) prohibits cross-examination of reputation witnesses offered on behalf of a</p>	<p>Pa.R.E. 405(a) differs from F.R.E. 405(a). The first sentence of Pa.R.E. 405(a) permits proof of character or a character trait by reputation testimony, as does F.R.E. 405(a). But the second sentence specifically prohibits opinion testimony about character or a trait of character. This prohibition is consistent with prior Pennsylvania law. See <i>Commonwealth v. Lopinson</i>, 427 Pa. 284, 234 A.2d 552 (1967), <i>vacated on other grounds</i>, 392 U.S. 647 (1968).</p> <p>Pa.R.E. 405(a) also differs from F.R.E. 405(a) in that there are two subparagraphs, Pa.R.E. 405(a)(1) and</p>
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Rule 405

defendant in a criminal case regarding arrests of the defendant not resulting in conviction. This is consistent with Pennsylvania law. See *Commonwealth v. Scott*, 436 A.2d 607 (Pa. 1981). Subsection (a) was amended in 2000 in view of *Commonwealth v. Morgan*, 739 A.2d 1033 (Pa. 1999). Where a reputation witness is cross-examined regarding specific instances of conduct, the court should take care that the cross-examiner has a reasonable basis for the questions asked. See *Commonwealth v. Adams*, 426 Pa. Super. 332, 626 A.2d 1231 (Pa. Super. 1993).

Subsection (b). Unlike F.R.E. 405(b), Pa.R.E. 405(b) distinguishes between civil and criminal cases in permitting the use of specific instances of conduct to prove character.

Cf. Pa.R.E. 608(b) (use of specific instances of conduct to attack or support credibility of witness, either on cross-examination or as extrinsic evidence).

Subsection (b)(1). With regard to civil cases, Pa.R.E. 405(b)(1) is identical to the Federal Rule in permitting proof of character by specific instances of conduct where character is an essential element of the claim or defense. This is consistent with Pennsylvania law. See *Matusak v. Kulczewski*, 145 A. 94 (Pa. 1928); *Dempsey v. Walso Bureau, Inc.*, 246 A.2d 418 (Pa. 1968); *Commonwealth ex rel. Grimes v. Grimes*, 422 A.2d 572 (Pa. Super. 1980).

Subsection (b)(2). In criminal cases under Pa.R.E. 404(a)(2), the accused may offer evidence of a pertinent trait of character of the complainant. In such a case the trait may be proven by specific instances of conduct. This is consistent with Pennsylvania law. See *Commonwealth v. Dillon*, 598 A.2d 963 (Pa. 1991); *Commonwealth v. Amos*, 284 A.2d 748 (Pa. 1971).

Note: Adopted May 8, 1998, effective October 1, 1998; amended July 20, 2000, effective October 1, 2000.

Committee Explanatory Reports:

Final Report explaining the July 20, 2000 amendment of paragraph (a) concerning allegations of other criminal misconduct published with the Court's Order at 30 Pa.B. 3920 (August 5, 2000).

Pa.R.E. 405(a)(2), dealing with cross-examination of a character witness. Pa.R.E. 405(a)(2) prohibits cross-examination of a criminal defendant's character witnesses regarding criminal conduct of the defendant not resulting in conviction. This is consistent with prior Pennsylvania law. See *Commonwealth v. Morgan*, 559 Pa. 248, 739 A.2d 1033 (1999). When a reputation witness is cross-examined regarding specific instances of conduct, the court should take care that the cross-examiner has a reasonable basis for the questions asked. See *Commonwealth v. Adams*, 426 Pa. Super. 332, 626 A.2d 1231 (1993).

Pa.R.E. 405(b) differs from F.R.E. 405(b). Unlike F.R.E. 405(b), Pa.R.E. 405(b) distinguishes between civil and criminal cases in permitting the use of specific instances of conduct to prove character.

With regard to civil cases, Pa.R.E. 405(b)(1) is similar to the Federal Rule in permitting proof of character by specific instances of conduct where character is an essential element of the claim or defense. This is consistent with prior Pennsylvania law. See *Matusak v. Kulczewski*, 295 Pa. 208, 145 A. 94 (1928); *Dempsey v. Walso Bureau, Inc.*, 431Pa. 562, 246 A.2d 418 (1968). With regard to criminal cases, under Pa.R.E. 404(a)(2)(B), the accused may offer evidence of a pertinent trait of character of the alleged crime victim. Under Pa.R.E. 405(b)(2) the trait may be proven by specific instances of conduct without regard to whether the trait is an essential element of the charge, or defense. This is consistent with prior Pennsylvania law. See *Commonwealth v. Dillon*, 528 Pa. 417, 598 A.2d 963 (1991).

Note: Adopted May 8, 1998, effective October 1, 1998; amended July 20, 2000; effective October 1, 2000; rescinded and replaced _____, 2011, effective _____, 2011.

Committee Explanatory Reports:

Final Report explaining the July 20, 2000 amendment of paragraph (a) concerning allegations of other criminal misconduct published with the Court's Order at 30 Pa.B. 3920 (August 5, 2000).

Final Report explaining the _____, 2011 rescission and replacement published with the Court's Order at ___ Pa.B. __ (_____, 2011).

Rule 406

Rule 406. Habit; routine practice	Rule 406. Habit; Routine Practice
Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.	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 there was an eyewitness.

Comment

<p>This rule is identical to F.R.E. 406 and is consistent with Pennsylvania law. <i>See Baldridge v. Matthews</i>, 378 Pa. 566, 106 A.2d 809 (1954)(uniform practice of hotel permitted to establish conduct in conformity with practice). The concepts of "habit" and "routine practice" denote conduct that occurs with fixed regularity in repeated specific situations. Like the federal rule, Pa.R.E. 406 does not set forth the ways in which habit or routine practice may be proven, but leaves this for case-by-case determination. <i>See, e.g., Commonwealth v. Rivers</i>, 537 Pa. 394, 644 A.2d 710 (1994) (allowing testimony based on familiarity with another's conduct); <i>Baldridge</i>, 378 Pa. at 570; 106 A.2d at 811 (testimony of uniform practice apparently permitted without examples of specific instances).</p> <p>Evidence of habit must be distinguished from evidence of character. Character applies to a generalized propensity to act in a certain way without reference to specific conduct, and frequently contains a normative, or value-laden, component (<i>e.g.</i>, a character for truthfulness). Habit connotes one's conduct in a precise factual context, and frequently involves mundane matters (<i>e.g.</i>, recording the purpose for checks drawn). The Advisory Committee's Note to F.R.E. 406 sets forth a description of this distinction: "Character is a generalized description of one's disposition in respect to a general trait, such as honesty, temperance, or peacefulness.... A habit, on the other hand, is the person's regular practice of meeting a particular kind of situation with a specific type of conduct, such as the habit of going down a particular stairway two stairs at a time, or of giving the hand-signal for a left turn, or of alighting from railway cars while they are moving." F.R.E. 406 advisory committee's note (quoting 1 McCormick, <i>Evidence</i> § 162).</p>	<p>This rule is identical to F.R.E. 406. The concepts of "habit" and "routine practice" denote conduct that occurs with fixed regularity in repeated specific situations. Like the Federal Rule, Pa.R.E. 406 does not set forth the ways in which habit or routine practice may be proven, but leaves this for case-by-case determination. <i>See, e.g., Commonwealth v. Rivers</i>, 537 Pa. 394, 644 A.2d 710 (1994) (allowing testimony based on familiarity with another's conduct); <i>Baldridge v. Matthews</i>, 378 Pa. 566, 570; 106 A.2d 809, 811 (1954) (testimony of uniform practice apparently permitted without examples of specific instances).</p> <p>Evidence of habit must be distinguished from evidence of character. Character applies to a generalized propensity to act in a certain way without reference to specific conduct, and frequently contains a normative, or value-laden, component (<i>e.g.</i>, a character for truthfulness). Habit connotes one's conduct in a precise factual context, and frequently involves mundane matters (<i>e.g.</i>, recording the purpose for checks drawn).</p> <p>Note: Adopted May 8, 1998, effective October 1, 1998; rescinded and replaced _____, 2011, effective _____, 2011.</p>
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Rule 406

	<p>Committee Explanatory Reports:</p> <p>Final Report explaining the _____, 2011 rescission and replacement published with the Court's Order at ___ Pa.B. __ (_____, 2011).</p>
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Rule 407

Rule 407. Subsequent remedial measures	Rule 407. Subsequent Remedial Measures
<p>When, after an injury or harm allegedly caused by an event, measures are taken which, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove that the party who took the measures was negligent or engaged in culpable conduct, or produced, sold, designed, or manufactured a product with a defect or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for impeachment, or to prove other matters, if controverted, such as ownership, control, or feasibility of precautionary measures.</p>	<p>When measures are taken by a party that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible against that party to prove:</p> <ul style="list-style-type: none"> • negligence; • culpable conduct; • a defect in a product or its design; or • a need for a warning or instruction. <p>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.</p>

Comment

<p>Pa.R.E. 407 is substantially the same as F.R.E. 407. The wording has been modified in order to clarify two ambiguities in the federal formulation.</p> <p>The first sentence of Pa.R.E. 407 makes clear that the rule of exclusion favors only the party who took the subsequent remedial measures. Though F.R.E. 407 is silent on the point, the courts have generally held that the federal rule does not apply when one other than the alleged tortfeasor takes the action because the reason for the rule (to encourage remedial measures) is not then implicated. <i>See, e.g., TLT-Babcock, Inc. v. Emerson Electric Co.</i>, 33 F.3d 397, 400 (4th Cir. 1994) (collecting cases).</p> <p>The last sentence of Pa.R.E. 407 makes clear that the rule's exception for evidence that is offered to prove matters such as ownership, control, or feasibility of precautionary measures, applies only when those issues are controverted. Though the federal rule, as worded, can be construed to mean that only feasibility need be controverted, the cases have generally interpreted it to mean that any issue for which evidence is admitted under the rule's exception must be controverted. <i>See, e.g., Hall v. American Steamship Co.</i>, 688 F.2d 1062, 1066-67 (6th Cir. 1982); <i>Hull v. Chevron U.S.A., Inc.</i>, 812 F.2d 584, 586-87 (10th Cir. 1987).</p> <p><i>Duchess v. Langston Corp.</i>, 564 Pa. 529, 769 A.2d 1131 (2001), is a case dealing with the admissibility of evidence of subsequent remedial measures in a strict product liability case, and, in particular, the</p>	<p>Pa.R.E. 407 differs from F.R.E. 407. The rule has been modified to clarify that the rule only protects the party that took the measures. Though F.R.E. 407 is silent on the point, the courts have generally held that the federal rule does not apply when one other than the alleged tortfeasor takes the action because the reason for the rule (to encourage remedial measures) is not then implicated. <i>See, e.g., TLT-Babcock, Inc. v. Emerson Electric Co.</i>, 33 F.3d 397, 400 (4th Cir. 1994) (collecting cases).</p>
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Rule 407

applicability of exceptions to the rule of exclusion when the evidence is offered to prove feasibility of precautionary measures, or to impeach the credibility of a witness.

The original wording of Pa.R.E. 407 applied to negligence cases, but, like the original wording of F.R.E 407, left open whether it applied to strict product liability cases. In *Duchess v. Langston Corp.*, 564 Pa. 529, 769 A.2d 1131 (2001), the Supreme Court held that it did. The rule was amended to make this clear.

Note: Adopted May 8, 1998, effective October 1, 1998; amended June 12, 2003, effective July 1, 2003; rescinded and replaced _____, 2011, effective _____, 2011.

Committee Explanatory Reports:

Final Report explaining the June 12, 2003 amendments published with the Court's Order at 33 Pa.B. 2973 (June 28, 2003).

Final Report explaining the _____, 2011 rescission and replacement published with the Court's Order at ___ Pa.B. __ (_____, 2011).

Rule 408

Rule 408. Compromise and offers to compromise	Rule 408. Compromise Offers and Negotiations
<p>(a) Prohibited uses. Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:</p> <p>(1) furnishing or offering or promising to furnish--or accepting or offering or promising to accept--a valuable consideration in compromising or attempting to compromise the claim; and</p> <p>(2) conduct or statements made in compromise negotiations.</p>	<p>(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:</p> <p>(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</p> <p>(2) conduct or a statement made during compromise negotiations about the claim.</p>
<p>(b) Permitted uses. This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.</p>	<p>(b) Exceptions. The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.</p>

Comment

<p>This rule differs from F.R.E. 408 as follows:</p> <p>The federal rule in paragraph (a)(2) permits the use in criminal cases of statements made to government investigators, regulators, or enforcement authority in negotiations in civil cases.</p> <p>The federal rule does not contain the last sentence of Pa.R.E. 408(b).</p> <p>This rule does not follow the common law rule that distinct admissions of fact made during settlement discussions are admissible. <i>See Rochester Machine Corp. v. Mulach Steel Corp.</i>, 449 A.2d 1366 (Pa. 1982), a plurality decision. Instead, like the federal rule, Pa.R.E. 408 permits evidence relating to compromises and offers to compromise to be admitted for purposes other than proving liability, such as showing bias or prejudice of a witness, but specifically prohibits use of such evidence to impeach a witness through a prior inconsistent statement or contradiction.</p>	<p>Pa.R.E. 408(a) differs from F.R.E. 408(a) in that the federal rule in paragraph (a)(2) contains language that seems to permit the use in criminal cases of statements made to government investigators, regulators, or enforcement authority in negotiations in civil cases. That language has not been adopted because the use of such statements might conflict with the policies underlying Pa.R.Crim.P. 586 (relating to dismissal of criminal charges not committed by force or violence upon payment of restitution) or Pa.R.Crim.P. 546 (relating to dismissal upon satisfaction or agreement).</p> <p>This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.</p> <p>Pa.R.E. 408(b) is identical to F.R.E. 408(b).</p>
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Rule 408

Admissibility of conduct and statements in mediations pursuant to the Mediation Act of 1996, 42 Pa.C.S. § 5949, are governed by that statute.

The rule is consistent with the Mediation Act of 1996. See 42 Pa. C.S. § 5949 (Confidential mediation communications and documents).

Pa.R.E. 408 is consistent with 42 Pa.C.S. § 6141 which provides, in pertinent part, as follows:

§ 6141. Effect of certain settlements

(a) Personal Injuries. Settlement with or any payment made to an injured person or to others on behalf of such injured person with the permission of such injured person or to anyone entitled to recover damages on account of injury or death of such person shall not constitute an admission of liability by the person making the payment or on whose behalf the payment was made, unless the parties to such settlement or payment agree to the contrary.

(b) Damages to Property. Settlement with or any payment made to a person or on his behalf to others for damages to or destruction of property shall not constitute an admission of liability by the person making the payment or on whose behalf the payment was made, unless the parties to such settlement or payment agree to the contrary.

(c) Admissibility in Evidence. Except in an action in which final settlement and release has been pleaded as a complete defense, any settlement or payment referred to in subsections (a) and (b) shall not be admissible in evidence on the trial of any matter.

See *Hatfield v. Continental Imports, Inc.*, 610 A.2d 446 (Pa. 1992)(evidence of “Mary Carter” agreement admissible to show bias or prejudice, and not excluded by § 6141(c)).

Under Pa.R.E. 408, as under F.R.E. 408, evidence of offers to compromise or completed compromises is admissible when used to prove an effort to obstruct a criminal investigation or prosecution. This is consistent with prior Pennsylvania case law. See *Commonwealth v. Pettinato*, 520 A.2d 437 (Pa. Super. 1987). Pa.R.E. 408 does not permit, however, the use of evidence relating to good faith compromises or offers to compromise when made for the purpose of reaching an agreement such as those

Admissibility of conduct and statements in mediations pursuant to the Mediation Act of 1996, 42 Pa.C.S. § 5949, is governed by that statute.

Pa.R.E. 408 is consistent with 42 Pa.C.S. § 6141 which provides, in pertinent part, as follows:

§ 6141. Effect of certain settlements

(a) Personal Injuries. Settlement with or any payment made to an injured person or to others on behalf of such injured person with the permission of such injured person or to anyone entitled to recover damages on account of injury or death of such person shall not constitute an admission of liability by the person making the payment or on whose behalf the payment was made, unless the parties to such settlement or payment agree to the contrary.

(b) Damages to Property. Settlement with or any payment made to a person or on his behalf to others for damages to or destruction of property shall not constitute an admission of liability by the person making the payment or on whose behalf the payment was made, unless the parties to such settlement or payment agree to the contrary.

(c) Admissibility in Evidence. Except in an action in which final settlement and release has been pleaded as a complete defense, any settlement or payment referred to in subsections (a) and (b) shall not be admissible in evidence on the trial of any matter.

Rule 408

sanctioned by Pa.R.Crim.P. 586 (relating to dismissal of criminal charges not committed by force or violence upon payment of restitution) or Pa.R.Crim. P. 546 (relating to dismissal upon satisfaction or agreement). The court may need to conduct, out of the hearing of the jury, a preliminary inquiry into the circumstances surrounding compromises in criminal matters to determine whether to permit such evidence.

Note: Adopted May 8, 1998, effective October 1, 1998; amended March 10, 2000; effective July 1, 2000; Comment revised March 29, 2001, effective April 1, 2001.

Committee Explanatory Reports:

Final Report explaining the March 10, 2000 amendments concerning the inadmissibility of evidence of conduct or statements made in compromise negotiations published at 30 Pa.B. 1643 (March 25, 2000).

Final Report explaining the March 29, 2001 revision of the Comment published with the Court's Order at 31 Pa.B. 1995 (April 14, 2001).

Note: Adopted May 8, 1998, effective October 1, 1998; amended March 10, 2000; effective July 1, 2000; Comment revised March 29, 2001, effective April 1, 2001; amended September 18, 2008, effective October 30, 2008; rescinded and replaced _____, 2011, effective _____, 2011.

Committee Explanatory Reports:

Final Report explaining the March 10, 2000 amendments concerning the inadmissibility of evidence of conduct or statements made in compromise negotiations published at 30 Pa.B. 1643 (March 25, 2000).

Final Report explaining the March 29, 2001 revision of the Comment published with the Court's Order at 31 Pa.B. 1995 (April 14, 2001).

Final Report explaining the September 18, 2008 amendments published with the Court's Order at 38 Pa.B. 5423 (October 4, 2008).

Final Report explaining the _____, 2011 rescission and replacement published with the Court's Order at _____ Pa.B. ____ (_____, 2011).

Rule 409

Rule 409. Payment of medical and similar expenses	Rule 409. Offers to Pay Medical and Similar Expenses
Evidence of furnishing or offering or promising to pay medical, hospital or similar expenses occasioned by an injury is not admissible to prove liability for the injury.	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.

Comment

<p>This rule is identical to F.R.E. 409 and is consistent with prior Pennsylvania law. See 42 Pa.C.S. § 6141(c) (payment to injured person and others generally not admissible) (text quoted in Comment to Pa.R.E 408); <i>Burns v. Joseph Flaherty Co.</i>, 278 Pa. 579, 123 A. 496 (1924) (guarantee of medical expenses cannot be used as basis for liability). As with F.R.E. 409, ancillary statements made in the course of paying, offering to pay, or promising to pay, medical, hospital, or similar expenses are not excluded by this rule. However, they may be excluded by Pa.R.E 408.</p>	<p>This rule is identical to F.R.E. 409.</p> <p>Note: Adopted May 8, 1998, effective October 1, 1998; Comment revised December 30, 2005, effective February 1, 2006; rescinded and replaced _____, 2011, effective _____, 2011.</p> <p>Committee Explanatory Reports:</p> <p>Final Report explaining the December 30, 2005 revision of the Comment published with the Court's Order at 36 Pa.B. 384 (January 28, 2006).</p> <p>Final Report explaining the _____, 2011 rescission and replacement published with the Court's Order at ___ Pa.B. __ (_____, 2011).</p>
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Rule 410

Rule 410. Inadmissibility of pleas, plea discussions and related statements	Rule 410. Pleas, Plea Discussions, and Related Statements
<p>(a) General rule. Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:</p> <p>(1) a plea of guilty which was later withdrawn;</p> <p>(2) a plea of <i>nolo contendere</i>;</p> <p>(3) any statement made in the course of any proceedings under Rules 409, 414, 424, 311, 313, or 590 of the Pennsylvania Rules of Criminal Procedure, Fed.R.Crim.P. 11, or any comparable rule or provision of law of Pennsylvania or any other jurisdiction regarding the pleas identified in subsections (1) and (2) of this rule; or</p> <p>(4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which does not result in a plea of guilty or which results in a plea of guilty later withdrawn.</p> <p>(b) Exception. A statement made in the course of a plea, proceedings, or discussions identified in subsection (a) of this rule is admissible (1) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced by the defendant and the statement ought in fairness to be considered contemporaneously with it, or (2) in a criminal proceeding for perjury, false swearing or unsworn falsification to authorities if the statement was made by the defendant, under oath, and in the presence of counsel.</p>	<p>(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:</p> <p>(1) a guilty plea that was later withdrawn;</p> <p>(2) a <i>nolo contendere</i> plea;</p> <p>(3) a statement made in the course of any proceedings under Rules 311, 313, 409, 414, 424, 550 or 590 of the Pennsylvania Rules of Criminal Procedure, Rule 11 of the Federal Rules of Criminal Procedure, or a comparable rule or procedure of another state; or</p> <p>(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.</p> <p>(b) Exceptions. The court may admit a statement described in Rule 410(a)(3) or (4):</p> <p>(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</p> <p>(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.</p>

Comment

<p>This rule is similar to F.R.E. 410. References to Rules 409, 414, 424, 311, 313, and 590 of the Pennsylvania Rules of Criminal Procedure and the comparable rules or other provisions of Pennsylvania or other jurisdictions have been added. Unlike the federal rule, subsection (b) of the Pennsylvania rule is set forth separately to indicate that it creates an exception applicable to all of subsection (a).</p> <p>Pa.R.E. 410 reflects present Pennsylvania law. See <i>Commonwealth v. Jones</i>, 544 A.2d 54 (Pa. Super.1988); <i>Commonwealth ex rel. Warner v.</i></p>	<p>Pa.R.E. 410(a)(3) differs from F.R.E. 410(a)(3) in that it refers to the Pennsylvania proceedings to which the paragraph applies rather than the federal proceedings.</p>
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Rule 410

Warner, 40 A.2d 886 (Pa. Super.1945); Pa.Rs.Crim.P. 311(B), 313(B).

Pa.R.E. 410 does not prohibit the use of a conviction that results from a plea of *nolo contendere*, as distinct from the plea itself, to impeach in a later proceeding (subject to Pa.R.E. 609) or to establish an element of a charge in a later administrative proceeding. See *Commonwealth v. Snyder*, 182 A.2d 495 (Pa. 1962) (conviction based on *nolo contendere* plea could be used to impeach witness in later criminal proceeding); *Eisenberg v. Commonwealth, Dep't. of Public Welfare*, 516 A.2d 333 (Pa. 1986)(conviction based on *nolo contendere* plea permitted to establish element of charge in administrative proceeding).

In addition, Pa.R.E. 410 does not govern the admissibility of pleas in summary proceedings involving motor vehicle matters, which is addressed in 42 Pa.C.S. § 6142. § 6142 provides:

§ 6142. Pleas in vehicle matters

(a) General Rule. A plea of guilty or *nolo contendere*, or a payment of the fine and costs prescribed after any such plea, in any summary proceeding made by any person charged with a violation of Title 75 (relating to vehicles) shall not be admissible as evidence in any civil matter arising out of the same violation or under the same facts or circumstances.

(b) Exception. The provisions of subsection (a) shall not be applicable to administrative or judicial proceedings involving the suspension of a motor vehicle or tractor operating privilege, learner's permit, or right to apply for a motor vehicle or tractor operating privilege, or the suspension of a certificate of appointment as an official inspection station, or the suspension of a motor vehicle, tractor, or trailer designation.

Note: Adopted May 8, 1998, effective October 1, 1998; Comment revised March 23, 1999, effective immediately; amended March 10, 2000, effective immediately; amended March 29, 2001, effective April 1, 2001.

Committee Explanatory Reports:

Final Report explaining the March 23, 1999 technical revisions of the Comment published with the Court's

Pa.R.E. 410 does not prohibit the use of a conviction that results from a plea of *nolo contendere*, as distinct from the plea itself, to impeach in a later proceeding (subject to Pa.R.E. 609) or to establish an element of a charge in a later administrative proceeding. See *Commonwealth v. Snyder*, 408 Pa. 253, 182 A.2d 495 (1962) (conviction based on *nolo contendere* plea could be used to impeach witness in later criminal proceeding); *Eisenberg v. Commonwealth, Dep't. of Public Welfare*, 512 Pa. 181, 516 A.2d 333 (Pa. 1986)(conviction based on *nolo contendere* plea permitted to establish element of charge in administrative proceeding).

There is also a statute governing the admissibility of guilty pleas and pleas of *nolo contendere* in cases charging summary motor vehicle violations when offered in civil cases arising out of the same facts. See 42 Pa.C.S. § 6142 which provides:

(a) General Rule. A plea of guilty or *nolo contendere*, or a payment of the fine and costs prescribed after any such plea, in any summary proceeding made by any person charged with a violation of Title 75 (relating to vehicles) shall not be admissible as evidence in any civil matter arising out of the same violation or under the same facts or circumstances.

(b) Exception. The provisions of subsection (a) shall not be applicable to administrative or judicial proceedings involving the suspension of a motor vehicle or tractor operating privilege, learner's permit, or right to apply for a motor vehicle or tractor operating privilege, or the suspension of a certificate of appointment as an official inspection station, or the suspension of a motor vehicle, tractor, or trailer registration.

Pa.R.E. 410(b) is identical to F.R.E. 410(b).

Note: Adopted May 8, 1998, effective October 1, 1998; Comment revised March 23, 1999, effective immediately; amended March 10, 2000, effective immediately; amended March 29, 2001, effective April 1, 2001; rescinded and replaced _____, 2011, effective _____, 2011.

Committee Explanatory Reports:

Final Report explaining the March 23, 1999 technical revisions of the Comment published with the Court's

Rule 410

<p>Order at 29 Pa.B. 1714 (April 3, 1999).</p> <p>Final Report explaining the March 10, 2000 technical amendments updating the rule published with the Court's Order at 30 Pa.B. 1641 (March 25, 2000).</p> <p>Final Report explaining the March 29, 2001 amendments published with the Court's Order at 31 Pa.B. 1995 (April 14, 2001).</p>	<p>Order at 29 Pa.B. 1714 (April 3, 1999).</p> <p>Final Report explaining the March 10, 2000 technical amendments updating the rule published with the Court's Order at 30 Pa.B. 1641 (March 25, 2000).</p> <p>Final Report explaining the March 29, 2001 amendments published with the Court's Order at 31 Pa.B. 1995 (April 14, 2001).</p> <p>Final Report explaining the _____, 2011 rescission and replacement published with the Court's Order at ___ Pa.B. __ (_____, 2011).</p>
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Rule 411

Rule 411. Liability insurance	Rule 411. Liability Insurance
Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.	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.

Comment

<p>This rule is identical to F.R.E. 411 and is consistent with Pennsylvania law that evidence of insurance may be admitted, notwithstanding some prejudicial effect, if the evidence is relevant to prove an issue other than negligence or wrongful conduct. <i>E.g.</i>, <i>Beechwoods Flying Serv. v. Al Hamilton Contracting Corp.</i>, 504 Pa. 618, 476 A.2d 350 (1984); <i>Price v. Yellow Cab Co.</i>, 443 Pa. 56, 278 A.2d 161 (1971) (plurality) (collecting cases); <i>Fleischman v. Reading</i>, 388 Pa. 183, 130 A.2d 429 (1957); <i>Copozi v. Hearst Publishing Co.</i>, 371 Pa. 503, 92 A.2d 177 (1952); <i>McGowan v. Devonshire Hall Apartments</i>, 278 Pa. Super. 229, 420 A.2d 514 (1980); <i>Jury v. New York Central R.R. Co.</i>, 167 Pa. Super. 244, 74 A.2d 531 (1950). As with all evidence, evidence not excluded by this rule may be excluded under Pa.R.E. 403.</p>	<p>This rule is identical to F.R.E. 411.</p> <p>Note: Adopted May 8, 1998, effective October 1, 1998; rescinded and replaced _____, 2011, effective _____, 2011.</p> <p>Committee Explanatory Reports:</p> <p>Final Report explaining the _____, 2011 rescission and replacement published with the Court's Order at ___ Pa.B. __ (_____, 2011).</p>
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Rule 412

Rule 412. Sex offense cases: Relevance of alleged victim's past sexual behavior or alleged sexual predisposition (Rape Shield Law) [Not Adopted]	Rule 412. Sex Offense Cases: The Victim's Sexual Behavior or Predisposition (Not Adopted)
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Comment

<p>Pennsylvania has not adopted a Rule of Evidence comparable to F.R.E. 412. In Pennsylvania this subject is governed by 18 Pa.C.S. § 3104 (the "Rape Shield Law").</p> <p>18 Pa.C.S.A. § 3104 provides as follows:</p> <p>§ 3104. Evidence of victim's sexual conduct</p> <p>(a) General rule.--Evidence of specific instances of the alleged victim's past sexual conduct, opinion evidence of the alleged victim's past sexual conduct, and reputation evidence of the alleged victim's past sexual conduct shall not be admissible in prosecutions under this chapter except evidence of the alleged victim's past sexual conduct with the defendant where consent of the alleged victim is at issue and such evidence is otherwise admissible pursuant to the rules of evidence.</p> <p>(b) Evidentiary proceedings.--A defendant who proposes to offer evidence of the alleged victim's past sexual conduct pursuant to subsection (a) shall file a written motion and offer of proof at the time of trial. If, at the time of trial, the court determines that the motion and offer of proof are sufficient on their faces, the court shall order an in camera hearing and shall make findings on the record as to the relevance and admissibility of the proposed evidence pursuant to the standards set forth in subsection (a).</p> <p>F.R.E. 412 is applicable in civil cases. There is no comparable provision in Pennsylvania law.</p>	<p>Pennsylvania has not adopted a Rule of Evidence comparable to F.R.E. 412. In Pennsylvania this subject is governed by 18 Pa.C.S. § 3104 (the "Rape Shield Law").</p> <p>18 Pa.C.S. § 3104 provides:</p> <p>§ 3104. Evidence of victim's sexual conduct</p> <p>(a) General rule. - Evidence of specific instances of the alleged victim's past sexual conduct, opinion evidence of the alleged victim's past sexual conduct, and reputation evidence of the alleged victim's past sexual conduct shall not be admissible in prosecutions under this chapter except evidence of the alleged victim's past sexual conduct with the defendant where consent of the alleged victim is at issue and such evidence is otherwise admissible pursuant to the rules of evidence.</p> <p>(b) Evidentiary proceedings. - A defendant who proposes to offer evidence of the alleged victim's past sexual conduct pursuant to subsection (a) shall file a written motion and offer of proof at the time of trial. If, at the time of trial, the court determines that the motion and offer of proof are sufficient on their faces, the court shall order an in camera hearing and shall make findings on the record as to the relevance and admissibility of the proposed evidence pursuant to the standards set forth in subsection (a).</p> <p>Note: Comment adopted May 8, 1998, effective October 1, 1998; rescinded and replaced _____, 2011, effective _____, 2011.</p> <p>Committee Explanatory Reports:</p> <p>Final Report explaining the _____, 2011 rescission and replacement published with the Court's Order at ___ Pa.B. __ (_____, 2011).</p>
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Rule 501

ARTICLE V. PRIVILEGES Rule 501. General rule	ARTICLE V. PRIVILEGES Rule 501. Privileges
Privileges as they now exist or may be modified by law shall be unaffected by the adoption of these rules.	Privileges as they now exist or may be modified by law shall be unaffected by the adoption of these rules.

Comment

<p>The Federal Rules of Evidence do not modify the existing law with regard to privileges. These rules take a similar approach.</p>	<p>Pa.R.E. 501 is similar to F.R.E. 501 in that this rule does not modify existing law.</p> <p>Note: Adopted May 8, 1998, effective October 1, 1998; rescinded and replaced _____, 2011, effective _____, 2011.</p> <p>Committee Explanatory Reports:</p> <p>Final Report explaining the _____, 2011 rescission and replacement published with the Court's Order at ___ Pa.B. __ (_____, 2011).</p>
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Rule 502

**Rule 502. Attorney-Client Privilege
and Work Product; Limitations on Waiver
[Not Adopted]**

**Rule 502. Attorney-Client Privilege
and Work Product; Limitations on Waiver
(Not Adopted)**

Rule 601

ARTICLE VI. WITNESSES Rule 601. Competency	ARTICLE VI. WITNESSES Rule 601. Competency
<p>(a) General Rule. Every person is competent to be a witness except as otherwise provided by statute or in these Rules.</p> <p>(b) Disqualification for Specific Defects. A person is incompetent to testify if the Court finds that because of a mental condition or immaturity the person:</p> <p style="padding-left: 20px;">(1) is, or was, at any relevant time, incapable of perceiving accurately;</p> <p style="padding-left: 20px;">(2) is unable to express himself or herself so as to be understood either directly or through an interpreter;</p> <p style="padding-left: 20px;">(3) has an impaired memory; or</p> <p style="padding-left: 20px;">(4) does not sufficiently understand the duty to tell the truth.</p>	<p>(a) General Rule. Every person is competent to be a witness except as otherwise provided by statute or in these rules.</p> <p>(b) Disqualification for Specific Defects. A person is incompetent to testify if the court finds that because of a mental condition or immaturity the person:</p> <p style="padding-left: 20px;">(1) is, or was, at any relevant time, incapable of perceiving accurately;</p> <p style="padding-left: 20px;">(2) is unable to express himself or herself so as to be understood either directly or through an interpreter;</p> <p style="padding-left: 20px;">(3) has an impaired memory; or</p> <p style="padding-left: 20px;">(4) does not sufficiently understand the duty to tell the truth.</p>

Comment

<p>Pa.R.E 601 differs from F.R.E. 601 and is intended to preserve existing Pennsylvania law. F.R.E. 601 abolishes all existing grounds of incompetency except for those specifically provided in later rules dealing with witnesses and in civil actions governed by state law. Pa.R.E 601(a) is consistent with Pennsylvania statutory law. 42 Pa.C.S.A. §§ 5911 and 5921 provide that all witnesses are competent except as otherwise provided. Pennsylvania statutory law provides several instances in which witnesses are incompetent. See, e.g., 42 Pa.C.S.A. § 5922 (persons convicted in a Pennsylvania court of perjury incompetent in civil cases); 42 Pa.C.S.A. § 5924 (spouses incompetent to testify against each other in civil cases with certain exceptions set out in 42 Pa.C.S.A. §§ 5925, 5926, and 5927); 42 Pa.C.S.A. §§ 5930-5933 and 20 Pa.C.S.A. § 2209 (“Dead Man’s statutes”).</p> <p>At one time Pennsylvania law provided that neither a husband nor a wife was competent to testify to non-access or absence of sexual relations if the effect of that testimony would illegitimize a child born during the marriage. See <i>Commonwealth ex rel. Leider v. Leider</i>, 434 Pa. 293, 254 A.2d 306 (1969). That rule was abandoned in <i>Commonwealth ex rel. Savruk v. Derby</i>, 235 Pa. Super. 560, 344 A.2d 624 (1975).</p>	<p>Pa.R.E. 601(a) differs from F.R.E. 601(a). It is consistent, instead, with Pennsylvania statutory law. 42 Pa.C.S. §§ 5911 and 5921 provide that all witnesses are competent except as otherwise provided. Pennsylvania statutory law provides several instances in which witnesses are incompetent. See, e.g., 42 Pa.C.S. § 5922 (persons convicted in a Pennsylvania court of perjury incompetent in civil cases); 42 Pa.C.S. § 5924 (spouses incompetent to testify against each other in civil cases with certain exceptions set out in 42 Pa.C.S. §§ 5925, 5926, and 5927); 42 Pa.C.S. §§ 5930-5933 and 20 Pa.C.S. § 2209 (“Dead Man’s statutes”).</p>
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Rule 601

Pa.R.E 601(b) has no counterpart in the Federal Rules and is consistent with Pennsylvania law concerning the factors for determining competency of a person to testify, including persons with a mental defect and children of tender years. See *Commonwealth v. Baker*, 466 Pa. 479, 353 A.2d 454 (1976) (standards for determining competency generally); *Commonwealth v. Goldblum*, 498 Pa. 455, 447 A.2d 234 (1982) (mental capacity); *Rosche v. McCoy*, 397 Pa. 615, 156 A.2d 307 (1959)(immaturity). In *Commonwealth v. Delbridge*, 578 Pa. 641, 855 A.2d 27 (2003), the Supreme Court reiterated concern for the susceptibility of children to suggestion and fantasy and held that a child witness can be rendered incompetent to testify where unduly suggestive or coercive interview techniques corrupt or "taint" the child's memory and ability to testify truthfully about that memory. See also *Commonwealth v. Judd*, 897 A.2d 1224 (2006).

The application of the standards in Pa.R.E 601(b) is a factual question to be resolved by the Court as a preliminary question under Rule 104. The party challenging competency bears the burden of proving grounds of incompetency by clear and convincing evidence. *Commonwealth v. Delbridge*, 578 Pa. at 664, 855 A.2d at 40. In *Commonwealth v. Washington*, 554 Pa. 559, 722 A.2d 643 (1998), a case involving child witnesses, the Supreme Court announced a *per se* rule requiring trial courts to conduct competency hearings outside the presence of the jury. Expert testimony has been used when competency under these standards has been an issue. E.g., *Commonwealth v. Baker*, 466 Pa. 479, 353 A.2d 454 (1976); *Commonwealth v. Gaerttner*, 355 Pa. Super. 203, 484 A.2d 92 (1984).

Pa.R.E 601(b) does not address the admissibility of hypnotically refreshed recollection. In *Commonwealth v. Nazarovitch*, 496 Pa. 97, 436 A.2d 170 (1981), the Supreme Court rejected hypnotically refreshed testimony, where the witness had no prior independent recollection. Applying the test of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) for scientific testimony, the Court was not convinced that the process of hypnosis as a means of restoring forgotten or repressed memory had gained sufficient acceptance in its field. *Commonwealth v. Nazarovitch*, *supra*; see also *Commonwealth v. Romanelli*, 522 Pa. 222, 560 A.2d 1384 (1989) (when witness has been hypnotized, he or she may testify concerning matters recollected prior to hypnosis, but not about matters recalled only during or after hypnosis); *Commonwealth v. Smoyer*, 505 Pa. 83, 476 A.2d 1304 (1984) (same). Pa.R.E 601(b) is not intended to change these results. For the constitutional implications when a defendant in a criminal case, whose memory has been hypnotically refreshed, seeks to testify, see *Rock v. Arkansas*, 483 U.S. 44

Pa.R.E. 601(b) has no counterpart in the Federal Rules. It is consistent with Pennsylvania law concerning the factors for determining competency of a person to testify, including persons with a mental defect and children of tender years. See *Commonwealth v. Baker*, 466 Pa. 479, 353 A.2d 454 (1976) (standards for determining competency generally); *Commonwealth v. Goldblum*, 498 Pa. 455, 447 A.2d 234 (1982) (mental capacity); *Rosche v. McCoy*, 397 Pa. 615, 156 A.2d 307 (1959) (immaturity).

Pennsylvania case law recognizes two other grounds for incompetency, a child's "tainted" testimony, and hypnotically refreshed testimony. In *Commonwealth v. Delbridge*, 578 Pa. 641, 855 A.2d 27 (2003), the Supreme Court reiterated concern for the susceptibility of children to suggestion and fantasy and held that a child witness can be rendered incompetent to testify where unduly suggestive or coercive interview techniques corrupt or "taint" the child's memory and ability to testify truthfully about that memory. See also *Commonwealth v. Judd*, 897 A.2d 1224 (Pa. Super. 2006).

In *Commonwealth v. Nazarovitch*, 496 Pa. 97, 436 A.2d 170 (1981), the Supreme Court rejected hypnotically refreshed testimony, where the witness had no prior independent recollection. Applying the test of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) for scientific testimony, the Court was not convinced that the process of hypnosis as a means of restoring forgotten or repressed memory had gained sufficient acceptance in its field. *Commonwealth v. Nazarovitch*, *supra*; see also *Commonwealth v. Romanelli*, 522 Pa. 222, 560 A.2d 1384 (1989) (when witness has been hypnotized, he or she may testify concerning matters recollected prior to hypnosis, but not about matters recalled only during or after hypnosis); *Commonwealth v. Smoyer*, 505 Pa. 83, 476 A.2d 1304 (1984) (same). Pa.R.E 601(b) is not intended to change these results. For the constitutional implications when a defendant in a criminal case, whose memory has been hypnotically refreshed, seeks to testify, see *Rock v. Arkansas*, 483 U.S. 44 (1987).

The application of the standards in Pa.R.E. 601(b) is a factual question to be resolved by the court as a preliminary question under Rule 104. The party challenging competency bears the burden of proving grounds of incompetency by clear and convincing evidence. *Commonwealth v. Delbridge*, 578 Pa. at 664, 855 A.2d at 40. In *Commonwealth v. Washington*, 554 Pa. 559, 722 A.2d 643 (1998), a case involving child witnesses, the Supreme Court announced a *per se* rule requiring trial courts to conduct competency hearings outside the presence of the jury. Expert testimony has been used when

Rule 601

(1987).	<p>competency under these standards has been an issue. See e.g., <i>Commonwealth v. Baker</i>, 466 Pa. 479, 353 A.2d 454 (1976); <i>Commonwealth v. Gaerttner</i>, 335 Pa. Super. 203, 484 A.2d 92 (1984).</p> <p>Note: Adopted May 8, 1998, effective October 1, 1998; amended November 2, 2007, effective December 14, 2007; rescinded and replaced _____, 2011, effective _____, 2011.</p> <p>Committee Explanatory Reports:</p> <p>Final Report explaining the _____, 2011 rescission and replacement published with the Court's Order at ___ Pa.B. __ (_____, 2011).</p>
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Rule 602

Rule 602. Lack of personal knowledge	Rule 602. Need for Personal knowledge
<p>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.</p>	<p>A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703.</p>

Comment

<p>This rule is identical to F.R.E. 602. It is consistent with Pennsylvania law.</p> <p>Firsthand or personal knowledge is a universal requirement of the law of evidence. <i>See Johnson v. Peoples Cab Co.</i>, 386 Pa. 513, 514-15, 126 A.2d 720, 721 (1956) (“The primary object of a trial in our American courts is to bring to the tribunal, which is passing on the dispute involved, those persons who know of their own knowledge the facts to which they testify.”). Pa.R.E. 602 refers to Pa.R.E. 703 to make clear that there is no conflict with Rule 703, which permits an expert to base an opinion on facts not within the expert's personal knowledge.</p> <p>It is implicit in Pa.R.E. 602 that the party calling the witness has the burden of proving personal knowledge. This is consistent with Pennsylvania law. <i>Carney v. Pennsylvania R.R. Co.</i>, 428 Pa. 489, 240 A.2d 71 (1968). As the Advisory Committee's Notes to F.R.E. 602 state, “the rule is a specialized application of the provisions of Rule 104(b) on conditional relevancy.” Thus, the issue of personal knowledge is a question to be decided by the jury, and the judge may do no more than determine if the evidence is sufficient to support a finding of such knowledge. 27 Wright & Gold, <i>Federal Practice and Procedure</i> § 6027 (1990). This appears to be consistent with Pennsylvania law. <i>See Commonwealth v. Pronkoskie</i>, 477 Pa. 132, 383 A.2d 858 (1978).</p> <p>A witness having firsthand knowledge of a hearsay statement who testifies to the making of the statement satisfies Pa.R.E. 602; the witness may not, however, testify to the truth of the statement if the witness has no personal knowledge of the truth of the statement. Whether the hearsay statement is admissible is governed by Pa.R.E. 801 through 805. Generally speaking, the firsthand knowledge requirement of Rule 602 is applicable to the declarant of a hearsay statement. <i>See, e.g., Commonwealth v. Pronkoskie</i>,</p>	<p>This rule is identical to F.R.E. 602.</p> <p>Personal or firsthand knowledge is a universal requirement of the law of evidence. <i>See Johnson v. Peoples Cab Co.</i>, 386 Pa. 513, 514-15, 126 A.2d 720, 721 (1956) (“The primary object of a trial in our American courts is to bring to the tribunal, which is passing on the dispute involved, those persons who know of their own knowledge the facts to which they testify.”). Pa.R.E. 602 refers to Pa.R.E. 703 to make clear that there is no conflict with Rule 703, which permits an expert to base an opinion on facts not within the expert's personal knowledge.</p> <p>It is implicit in Pa.R.E. 602 that the party calling the witness has the burden of proving personal knowledge. This is consistent with Pennsylvania law. <i>Carney v. Pennsylvania R.R. Co.</i>, 428 Pa. 489, 240 A.2d 71 (1968).</p> <p>Generally speaking, the personal knowledge requirement of Rule 602 is applicable to the declarant of a hearsay statement. <i>See, e.g., Commonwealth v. Pronkoskie</i>, 477 Pa. 132, 383 A.2d 858 (1978) and</p>
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Rule 602

supra and *Carney v. Pennsylvania R.R. Co.*, *supra*. However, in the case of admissions of a party opponent, covered by Pa.R.E. 803(25), personal knowledge is not required. See *Salvitti v. Throppe*, 343 Pa. 642, 23 A.2d 445 (1942); *Carswell v. SEPTA*, 259 Pa. Super. 167, 393 A.2d 770 (1978). Moreover, Pa.R.E. 804(b)(4) explicitly dispenses with the need for personal knowledge for statements of personal or family history. In addition, Pa.R.E. 803(19), (20) and (21) impliedly do away with the personal knowledge requirement for statements dealing with reputation concerning personal or family history, boundaries or general history, and a person's character.

Carney v. Pennsylvania R.R. Co., 428 Pa. 489, 240 A.2d 71 (1968). However, personal knowledge is not required for an opposing party's statement under Pa.R.E. 803(25). See *Salvitti v. Throppe*, 343 Pa. 642, 23 A.2d 445 (1942); *Carswell v. SEPTA*, 259 Pa. Super. 167, 393 A.2d 770 (1978). In addition, Pa.R.E. 804(b)(4) explicitly dispenses with the need for personal knowledge for statements of personal or family history, and Pa.R.E. 803(19), (20) and (21) impliedly do away with the personal knowledge requirement by permitting testimony as to reputation to prove personal or family history, boundaries or general history, and a person's character.

Note: Adopted May 8, 1998, effective October 1, 1998; rescinded and replaced _____, 2011, effective _____, 2011.

Committee Explanatory Reports:

Final Report explaining the _____, 2011 rescission and replacement published with the Court's Order at ___ Pa.B. ___ (_____, 2011).

Rule 603

Rule 603. Oath or affirmation	Rule 603. Oath or Affirmation to Testify Truthfully
<p>Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.</p>	<p>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.</p>

Comment

<p>This rule is identical to F.R.E. 603, which was designed to be flexible enough to cover persons with any or no religious beliefs, persons with mental defects, and children. F.R.E. 603 advisory committee notes. The rule is consistent with Pennsylvania law. <i>See Dunsmore v. Dunsmore</i>, 309 Pa. Super. 503, 455 A.2d 723 (1983) (holding that it was error to allow a witness to testify without oath or affirmation); <i>Commonwealth ex rel. Freeman v. Superintendent</i>, 212 Pa. Super. 422, 242 A.2d 903 (1968) (same). Pennsylvania law requires both the mentally impaired and children to understand the obligation to tell the truth. <i>See Commonwealth v. Mazzoccoli</i>, 475 Pa. 408, 380 A.2d 786 (1977); <i>Commonwealth v. Kosh</i>, 305 Pa. 146, 157 A. 479 (1931).</p> <p>Pa.R.E. 603 is also consistent with 42 Pa.C.S.A. § 5901. Although § 5901 provides that every witness “shall take an oath in the usual or common form by laying the hand upon an open copy of the Holy Bible or by lifting up the right hand and pronouncing or assenting to” a specific incantation set forth in the statute, it also permits affirmation by a witness who desires to do so. <i>See also</i> 42 Pa.C.S.A. § 5902 (providing that a person's capacity to testify “shall not be affected by his opinions on matters of religion” and that no witness shall be questioned “concerning his religious beliefs”). Religious belief as a ground for impeachment is treated in Pa.R.E. 610.</p>	<p>This rule is identical to F.R.E. 603.</p> <p>Note: Adopted May 8, 1998, effective October 1, 1998; rescinded and replaced _____, 2011, effective _____, 2011.</p> <p>Committee Explanatory Reports:</p> <p>Final Report explaining the _____, 2011 rescission and replacement published with the Court's Order at ___ Pa.B. __ (_____, 2011).</p>
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Rule 604

Rule 604. Interpreters	Rule 604. Interpreter
An interpreter is subject to the provisions of Rule 702 (relating to qualification as an expert) and Rule 603 (relating to the administration of an oath or affirmation).	An interpreter must be qualified and must give an oath or affirmation to make a true translation.

Comment

<p>This rule adopts the substance of F.R.E. 604; the only change is the explicit reference to Pa.R.E. 702 and 603, rather than the general reference to “the provisions of these rules” in F.R.E. 604.</p> <p>The need for an interpreter whenever a witness' natural mode of expression or the language of a document is not intelligible to the trier of fact is well settled. 3 Wigmore, <i>Evidence</i> § 911 (Chadbourn rev. 1970). Under Pa.R.E. 604, an interpreter is treated as an expert witness who must have the necessary skill to translate correctly and who must promise to do so by oath or affirmation.</p> <p>Pa.R.E. 604 is consistent with those Pennsylvania statutes providing for the appointment of interpreters for the deaf. See 42 Pa.C.S. § 7103 (deaf party in a civil case); 2 Pa.C.S. § 505.1 (deaf party in hearing before Commonwealth agency); 42 Pa.C.S. § 8701 (deaf defendant in criminal case); see also <i>Commonwealth v. Wallace</i>, 433 Pa. Super. 518, 641 A.2d 321 (1994) (applying § 8701). Under each of these statutes, an interpreter must be “qualified and trained to translate for or communicate with deaf persons” and must “swear or affirm that he will make a true interpretation to the deaf person and that he will repeat the statements of the deaf person to the best of his ability.”</p> <p>There is little statutory authority for the appointment of interpreters, but the practice is well established. See Pa.R.Crim.P. 231(B) (authorizing presence of interpreter while investigating grand jury is in session if supervising judge determines necessary for presentation of evidence); 51 Pa.C.S. § 5507 (under regulations prescribed by governor, convening authority of military court may appoint interpreters). The decision whether to appoint an interpreter is within the discretion of the trial court. See <i>Commonwealth v. Pana</i>, 469 Pa. 43, 364 A.2d 895 (1976) (holding that it was an abuse of discretion to fail to appoint an interpreter for a criminal defendant who had difficulty in understanding and expressing himself in English).</p>	<p>In 2006, legislation was enacted pertaining to the certification, appointment, and use of interpreters in judicial and administrative proceedings for persons having limited proficiency with the English language and persons who are deaf. See 42 Pa.C.S. §§ 4401-4438; 2 Pa.C.S. §§ 561-588. Pursuant to this legislation, the Administrative Office of the Pennsylvania Courts (“AOPC”) has implemented an interpreter program for judicial proceedings. See 204 Pa. Code §§ 221.101-.407. Information on the court interpreter program and a roster of court interpreters may be obtained from the AOPC web site at www.pacourts.us/t/aopc/courtinterpreterprog.</p>
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Rule 604

<p>Note: Adopted May 8, 1998, effective October 1, 1998; Comment revised March 29, 2001, effective April 1, 2001.</p> <p>Committee Explanatory Reports:</p> <p>Final Report explaining the March 29, 2001 revision of the Comment published with the Court's Order at 31 Pa.B. 1995 (April 14, 2001).</p>	<p>Note: Adopted May 8, 1998, effective October 1, 1998; Comment revised March 29, 2001, effective April 1, 2001; amended _____, 2011, effective _____, 2011; rescinded and replaced _____, 2011, effective _____, 2011.</p> <p>Committee Explanatory Reports:</p> <p>Final Report explaining the March 29, 2001 revision of the Comment published with the Court's Order at 31 Pa.B. 1995 (April 14, 2001).</p> <p>Final Report explaining the _____, 2011 rescission and replacement published with the Court's Order at _____ Pa.B. ____ (_____, 2011).</p>
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Rule 605

issue of violation of the Rule. This is consistent with the provisions of Pa.R.E. 103 that error may not be predicated on a ruling admitting evidence in the absence of a timely objection, motion to strike, or motion in limine. Of course, the court should provide an opportunity for the making of the objection out of the presence of the jury.

Note: Adopted May 8, 1998, effective October 1, 1998; rescinded and replaced _____, 2011, effective _____, 2011.

Committee Explanatory Reports:

Final Report explaining the _____, 2011 rescission and replacement published with the Court's Order at ___ Pa.B. __ (_____, 2011).

Rule 606

Rule 606. Competency of juror as witness	Rule 606. Juror's Competency as a Witness
<p>(a) At the trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.</p>	<p>(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.</p>
<p>(b) Inquiry into validity of verdict. Upon an inquiry into the validity of a verdict, including a sentencing verdict pursuant to 42 Pa.C.S.A. § 9711 (relating to capital sentencing proceedings), a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions in reaching a decision upon the verdict or concerning the juror's mental processes in connection therewith, and a juror's affidavit or evidence of any statement by the juror about any of these subjects may not be received. However, a juror may testify concerning whether prejudicial facts not of record, and beyond common knowledge and experience, were improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.</p>	<p>(b) During an Inquiry into the Validity of a Verdict or Indictment</p> <p>(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.</p> <p>(2) Exceptions. A juror may testify about whether:</p> <p>(A) prejudicial information not of record and beyond common knowledge and experience was improperly brought to the jury's attention; or</p> <p>(B) an outside influence was improperly brought to bear on any juror.</p>

Comment

<p>Pa.R.E. 606(a) is identical to F.R.E. 606(a). Section (a) is contrary to the traditional common law rule and Pennsylvania law. See 6 Wigmore, <i>Evidence</i> § 1910 (Chadbourn rev. 1976); 1 McCormick, <i>Evidence</i> '68 (4th ed. 1992); <i>Howser v. Commonwealth</i>, 51 Pa. 332 (1866) (jurors are competent witnesses in both civil and criminal cases); <i>Commonwealth v. Sutton</i>, 171 Pa. Super. 105, 90 A.2d 264 (1952). Since the adoption of the Federal Rules, most states have enacted or promulgated provisions consistent with the substance of section (a). See 27 Wright & Gold, <i>Federal Practice and Procedure</i> § 6071 nn. 59B73 (1990). Of course, the calling of a juror as a witness will be a rarity; voir dire will generally expose a juror's knowledge of facts relevant to a case, which will usually mean disqualification of the juror for cause.</p>	<p>Pa.R.E. 606(a) is identical to F.R.E. 606(a). Note that this paragraph bars a juror from testifying "before the other jurors at the trial." That phrase indicates that a juror may testify outside the presence of the rest of the jury on matters occurring during the course of the trial. See, e.g., <i>Commonwealth v. Santiago</i>, 456 Pa. 265, 318 A.2d 737 (1974) (jurors permitted to testify at hearing in chambers during trial on question of whether they received improper prejudicial information).</p>
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Rule 606

Note that section (a) bars a jury member from testifying “before that jury in the trial of the case in which the juror is sitting.” The phrase “before that jury” did not appear in the preliminary draft of F.R.E. 606(a); its addition leads to the conclusion that a juror may testify outside the presence of the rest of the jury on matters occurring during the course of the trial. 3 Weinstein & Berger, *Evidence* ¶ 606[02], at 606-18; see also *United States v. Robinson*, 645 F.2d 616 (8th Cir. 1981) (holding that on motion for mistrial, F.R.E. 606 did not bar juror from testifying, out of presence of other jurors, concerning his observation of accused being escorted from court house under guard); *United States v. Day*, 830 F.2d 1099 (10th Cir. 1987) (stating that during course of trial, juror could have been called to testify regarding whether bias arose from remarks between juror and investigating F.B.I. agent). Current Pennsylvania law is in accord. See *Commonwealth v. Santiago*, 456 Pa. 265, 318 A.2d 737 (1974) (jurors permitted to testify at hearing in chambers during trial on question of whether they received improper prejudicial information).

Pa.R.E. 606(b) is based upon F.R.E. 606(b) with certain language and organizational changes that do not alter substance. The reference to sentencing verdicts in capital cases does not appear in the Federal Rule; it reflects existing Pennsylvania law. See *Commonwealth v. Williams*, 514 Pa. 62, 522 A.2d 1058 (1987). The word “indictment,” which is in the Federal Rule, has been removed throughout Pa.R.E. 606(b) because the indicting grand jury has now been abolished throughout Pennsylvania pursuant to Article I, § 10 of the Pennsylvania constitution and 42 Pa.C.S.A. § 8931(b).

For simplification, the Federal Rule language “as influencing the juror to assent to or dissent from,” used in connection with effects upon a juror’s mind or emotions, has been deleted in favor of the phrase “in reaching a decision upon.” No substantive change is intended.

The sentence structure of the Federal rule has been changed. The two exceptions to juror incompetency appear as the second sentence of Pa.R.E. 606(b), and the provision concerning juror affidavits and evidence of juror’s statements, with minor language differences, has been moved from the end of the section and placed at the end of the first sentence, since it is to the subjects thereof that it is relevant.

Finally, the words “extraneous prejudicial information” in the first exception of the Federal Rule have been replaced by the phrase “prejudicial facts not of record and beyond common knowledge and experience.” This makes clear that the exception is directed at evidence brought before the jury which was not presented during the trial, and which was not tested

Pa.R.E. 606(b) differs from F.R.E. 606(b). First, the words, “extraneous prejudicial information” in F.R.E. 606(b)(2)(A) have been replaced by the phrase “prejudicial information not of record and beyond common knowledge and experience.” This makes clear that the exception is directed at evidence brought before the jury which was not presented

Rule 606

by the processes of the adversary system and subjected to judicial screening for a determination of admissibility. The qualification of “common knowledge and experience” is a recognition that all jurors bring with them some common facts of life. See *generally*, 27 Wright and Gold, Federal Practice and Procedure: Evidence, §6075 (1990).

Like its Federal counterpart, the first sentence of Pa.R.E. 606(b), making jurors incompetent to testify about the matters referred to therein, is designed to protect all “components of [a jury’s] deliberations, including arguments, statements, discussions, mental and emotional reactions, votes and any other feature of the process.” See F.R.E. 606(b) advisory committee notes. This is consistent with Pennsylvania law. See *Commonwealth v. Pierce*, 453 Pa. 319, 309 A.2d 371 (1973); *Commonwealth v. Zlatovich*, 440 Pa. 388, 269 A.2d 469 (1970); *Commonwealth v. Patrick*, 416 Pa. 437, 206 A.2d 295 (1965).

Pennsylvania cases have also recognized the first two exceptions to juror incompetency set forth in the second sentence of Pa.R.E. 606(b). *Pratt v. St. Christopher’s Hospital*, 866 A.2d 313 (Pa. 2005); *Commonwealth v. Williams, supra*; *Welshire v. Bruaw*, 331 Pa. 392, 200 A.2d 67 (1938). Note that when jurors are permitted to testify about facts not of record and outside influences, they may not be questioned about the effect upon them of what was improperly brought to their attention. See 3 Weinstein & Berger, *Evidence* ¶ 606[5] at pp. 606-53--606-55. Pa.R.E. 606(b) does not recognize the third exception to juror incompetency that appears in F.R.E. 606(b)--permitting juror testimony about whether there was a mistake in entering the verdict onto the verdict form. Pennsylvania law deals with possible mistakes in the verdict form by permitting the polling of the jury prior to the recording of the verdict. If there is no concurrence, the jury is directed to retire for further deliberations. See Pa.R.Crim.P. 648(G); *City of Pittsburgh v. DiNardo*, 410 Pa. 376, 189 A. 2d 886 (1963); *Barefoot v. Penn Central Transportation Co.*, 226 Pa. Super. 558, 323 A.2d 271 (1974). 606(b) does not purport to set forth the substantive grounds for setting aside verdicts because of an irregularity.

during the trial, and which was not tested by the processes of the adversary system and subjected to judicial screening for a determination of admissibility. The qualification of “common knowledge and experience” is a recognition that all jurors bring with them some common facts of life.

Second, Pa.R.E. 606(b)(2) does not contain the third exception to juror incompetency that appears in F.R.E. 606(b)(2)(C) - permitting juror testimony about whether there was a mistake in entering the verdict onto the verdict form. Pennsylvania law deals with possible mistakes in the verdict form by permitting the polling of the jury prior to the recording of the verdict. If there is no concurrence, the jury is directed to retire for further deliberations. See Pa.R.Crim.P. 648(G); *City of Pittsburgh v. Dinardo*, 410 Pa. 376, 189 A. 2d 886 (1963); *Barefoot v. Penn Central Transportation Co.*, 226 Pa. Super. 558, 323 A.2d 271 (1974).

Pa.R.E. 606(b) does not purport to set forth the substantive grounds for setting aside verdicts because of an irregularity.

Note: Adopted May 8, 1998, effective October 1, 1998; Comment revised September 17, 2007, October 17, 2007; rescinded and replaced _____, 2011, effective _____, 2011.

Committee Explanatory Reports:

Final Report explaining the September 17, 2007 revision of the Comment published with the Court’s

Rule 606

	<p>Order at 37 Pa.B. 5247 (September 29, 2007).</p> <p>Final Report explaining the _____, 2011 rescission and replacement published with the Court's Order at _____ Pa.B. _____ (_____, 2011).</p>
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Rule 607

Rule 607. Impeachment of witness	Rule 607. Who May Impeach a Witness, Evidence to Impeach a Witness
<p>(a) Who may impeach. The credibility of any witness may be attacked by any party, including the party calling the witness.</p> <p>(b) Evidence to impeach. The credibility of a witness may be impeached by any evidence relevant to that issue, except as otherwise provided by statute or these Rules.</p>	<p>(a) Who May Impeach a Witness. Any party, including the party that called the witness, may attack the witness's credibility.</p> <p>(b) Evidence to Impeach a Witness. The credibility of a witness may be impeached by any evidence relevant to that issue, except as otherwise provided by statute or these rules.</p>

Comment

<p>Pa.R.E. 607(a) is identical to F.R.E. 607. The Federal Rules have no provision similar to section (b).</p> <p>Section (a)--Pa.R.E. 607(a) abolishes completely the common law rule that prohibited a party from impeaching a witness called by that party. The common law rule, which applied to all forms of impeachment, has been criticized. <i>See Chambers v. Mississippi</i>, 410 U.S. 284 (1973); 3A Wigmore, <i>Evidence</i> §§ 897-99 (Chadbourn rev. 1970); 1 McCormick, <i>Evidence</i> § 38 (4th ed. 1992). To the extent that there are any vestiges of the "no impeachment" prohibition remaining in Pennsylvania, Pa.R.E. 607(a) sweeps them away.</p> <p>Pa.R.E. 607(a) allows impeachment by all of the methods provided for in Pa.R.E. 607(b), 608, 609 and 613.</p> <p>Section (b)--The methods that may be used to impeach credibility are subject to Pa.R.E. 401, which defines relevant evidence. For example, the United States Supreme Court held that the Federal Rules clearly contemplated that evidence of bias could be used to impeach credibility even though nothing in those Rules specifically covered the subject. <i>United States v. Abel</i>, 469 U.S. 45 (1984). The Court pointed to F.R.E. 401, defining relevancy, and F.R.E. 402, providing for the admissibility of all relevant evidence, in support of its holding. <i>Id.</i> The Court commented that "[a] successful showing of bias ... would have a tendency to make the facts to which [the witness] testified less probable in the eyes of the jury than it would be without such testimony." <i>Id.</i> at 51.</p> <p>Pa.R.E. 401 and 402 are similar to their Federal counterparts, and they, too, support the impeaching of credibility by any means having any tendency to cast doubt on the witness' testimony. However, the words "except as otherwise provided by statute or these</p>	<p>Pa.R.E. 607(a) is identical to F.R.E. 607. It abolishes the common law rule that prohibited a party from impeaching a witness called by that party.</p> <p>The Federal Rules have no provision similar to Pa.R.E. 607(b). Pa.R.E. 607(b) applies the test for relevant evidence of Pa.R.E. 401 to evidence offered to impeach the credibility of a witness. As is the case under Pa.R.E. 402, there are limits on the admissibility of evidence relevant to the credibility of a witness imposed by these rules. For example, Pa.R.E. 403 excludes relevant evidence if its probative value is outweighed by danger of unfair prejudice, etc., and there are specific limitations on impeachment imposed by Rules 608,609 and 610. There are statutory limitations such as 18 Pa.C.S. § 3104 (Rape Shield Law).</p>
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Rule 607

Rules” in Pa.R.E. 607(b) incorporate a number of provisions that circumscribe the breadth of the Rule. See, e.g., 18 Pa.C.S.A. § 3104 (the Rape Shield Law). Impeachment evidence is also subject to Pa.R.E. 403, which provides that relevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice. Similarly, Pa.R.E. 501, which preserves all privileges “as they now exist or may be modified by law,” would exclude any evidence relevant to credibility that might be covered by existing or later developed privileges, including those created by case law. In addition, Pa.R.E. 607(b) is limited and supplemented by Pa.R.E. 608 (dealing with evidence of character and conduct of a witness), Pa.R.E. 609 (relating to impeachment by evidence of conviction of crime), Pa.R.E. 610 (covering religious beliefs or opinions) and Pa.R.E. 613 (regarding prior statements of witnesses).

Pa.R.E. 607(b), however, is not curtailed by 42 Pa.C.S.A. § 5918, which prohibits, with certain exceptions, the questioning of a defendant who testifies in a criminal case for the purpose of showing that the defendant has committed, been convicted of or charged with another offense or that the defendant has a bad character or reputation. In *Commonwealth v. Bigham*, 452 Pa. 554, 307 A.2d 255 (1973), this statute was interpreted to apply only to cross-examination. Hence, it affects only the timing and method of impeachment of a defendant; it does not bar the impeachment entirely.

Since the credibility of any witness depends upon his or her powers of perception, capacity to remember, ability to communicate accurately and honesty or integrity, it may always be attacked by showing shortcomings in any of those areas. See *Commonwealth v. Gwaltney*, 497 Pa. 505, 442 A.2d 236 (1982); *Commonwealth v. Hamm*, 474 Pa. 487, 378 A.2d 1219 (1977); (McCormick, Evidence, § 44 (4th ed. 1992).

Pa.R.E. 607(b), however, is not curtailed by 42 Pa.C.S. § 5918, which prohibits, with certain exceptions, the questioning of a defendant who testifies in a criminal case for the purpose of showing that the defendant has committed, been convicted of or charged with another offense or that the defendant has a bad character or reputation. In *Commonwealth v. Bigham*, 452 Pa. 554, 307 A.2d 255 (1973), this statute was interpreted to apply only to cross-examination. Hence, it affects only the timing and method of impeachment of a defendant; it does not bar the impeachment entirely.

Note: Adopted May 8, 1998, effective October 1, 1998; rescinded and replaced _____, 2011, effective _____, 2011.

Committee Explanatory Reports:

Final Report explaining the _____, 2011 rescission and replacement published with the Court’s Order at ___ Pa.B. ___ (_____, 2011).

Rule 608

Rule 608. Evidence of character and conduct of witness	Rule 608. A Witness's Character for Truthfulness or Untruthfulness
<p>(a) Reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of reputation as to character, but subject to the following limitations:</p> <p>(1) the evidence may refer only to character for truthfulness or untruthfulness; and</p> <p>(2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by reputation evidence or otherwise.</p>	<p>(a) Reputation 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. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked. Opinion testimony about the witness's character for truthfulness or untruthfulness is not admissible.</p>
<p>(b) Specific instances of conduct. Except as provided in Rule 609 (relating to evidence of conviction of crime),</p> <p>(1) the character of a witness for truthfulness may not be attacked or supported by cross-examination or extrinsic evidence concerning specific instances of the witness' conduct; however,</p> <p>(2) in the discretion of the court, the credibility of a witness who testifies as to the reputation of another witness for truthfulness or untruthfulness may be attacked by cross-examination concerning specific instances of conduct (not including arrests) of the other witness, if they are probative of truthfulness or untruthfulness; but extrinsic evidence thereof is not admissible.</p>	<p>(b) Specific Instances of Conduct. Except as provided in Rule 609 (relating to evidence of conviction of crime),</p> <p>(1) the character of a witness for truthfulness may not be attacked or supported by cross-examination or extrinsic evidence concerning specific instances of the witness' conduct; however,</p> <p>(2) in the discretion of the court, the credibility of a witness who testifies as to the reputation of another witness for truthfulness or untruthfulness may be attacked by cross-examination concerning specific instances of conduct (not including arrests) of the other witness, if they are probative of truthfulness or untruthfulness; but extrinsic evidence thereof is not admissible.</p>

Comment

<p>Pa.R.E. 608(a)(1) and (2) differ from F.R.E. 608(a) in that they permit character for truthfulness or untruthfulness to be proven only by reputation evidence. Opinion evidence is not admissible. This approach is consistent with Pennsylvania law. See <i>Commonwealth v. Lopinson</i>, 427 Pa. 284, 234 A.2d 552 (1967), <i>vacated on other grounds</i>, 392 U.S. 647 (1968); see also Pa.R.E. 405(a) and Pa.R.E. 803(21). Pa.R.E. 608(a)(1) and (a)(2) are also consistent with Pennsylvania law to the effect that evidence of character for untruthfulness is admissible to attack credibility. See <i>Commonwealth v. Payne</i>, 205 Pa. 101, 54 A. 489 (1903). Evidence to support or bolster a witness' character for truthfulness is admissible only if there has first been an attack on that trait of character. See <i>Commonwealth v. Fowler</i>, 434 Pa.</p>	<p>Pa.R.E. 608(a) differs from F.R.E. 608(a) in that the Federal Rule permits character for truthfulness or untruthfulness to be attacked or supported by testimony about the witness's reputation or by opinion testimony. Under Pa.R.E. 608(a), opinion testimony is not admissible. This approach is consistent with Pennsylvania law. See <i>Commonwealth v. Lopinson</i>, 427 Pa. 284, 234 A.2d 552 (1967), <i>vacated on other grounds</i>, 392 U.S. 647 (1968). Compare Pa.R.E. 405(a).</p>
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Rule 608

Super. 148, 642 A.2d 517 (1994); *Commonwealth v. Smith*, 389 Pa. Super. 626, 567 A.2d 1080 (1989).

Pa.R.E. 608(b) differs from F.R.E. 608(b). Both ban all use of extrinsic evidence of specific instances of conduct for the purpose of attacking or supporting a witness' credibility, except for evidence of conviction of crime (Pa.R.E. 609 and F.R.E. 609). The two rules diverge, however, in their treatment of cross-examination concerning specific instances of conduct.

Under the F.R.E. 608(b), the court has discretion to permit cross-examination of a witness about specific instances of conduct in two situations: when the specific instances are probative of the witness' own character for truthfulness and when they concern the character for truthfulness of another witness and the witness being cross-examined has testified about the truthfulness of that witness. In the latter case, cross-examination about specific instances of conduct may undermine the credibility of the witness being cross-examined (the "character witness") and the credibility of the other witness (the "principal witness"). See 28 Wright and Gold, *Federal Practice and Procedure* § 6120 (1993).

Unlike F.R.E. 608(b), Pa.R.E. 608(b)(1) prohibits the use of specific instances of a witness' own conduct for the purpose of attacking the witness' character for truthfulness. This follows existing Pennsylvania law. See *Commonwealth v. Taylor*, 475 Pa. 464, 381 A.2d 418 (1977); *Commonwealth v. Coyle*, 281 Pa. Super. 434, 422 A.2d 547 (1980).

Like F.R.E. 608(b), however, Pa.R.E. 608(b)(2) permits a character witness to be cross-examined, in the discretion of the court, concerning specific instances of conduct of the principal witness. However, unlike the Federal Rule, Pa.R.E. 608(b)(2) makes it clear that although the cross-examination concerns the specific acts of the principal witness, those specific acts affect the credibility of the character witness only. This is in accord with Pennsylvania law. See *Commonwealth v. Peterkin*, 511 Pa. 299, 513 A.2d 373 (1986); *Commonwealth v. Adams*, 426 Pa. Super. 332, 626 A.2d 1231 (1993). In addition, it excludes the use of arrests; this, too, is consistent with Pennsylvania law. See *Commonwealth v. Scott*, 496 Pa. 188, 436 A.2d 607 (1981). Because cross-examination concerning specific incidents of conduct is subject to abuse, the cross-examination is not automatic; rather, its use is specifically placed in the discretion of the court, and like all other relevant evidence, it is subject to the balancing test of Pa.R.E. 403. Moreover, the court should take care that the cross-examiner has a reasonable basis for the questions asked. See *Adams, supra*.

Pa.R.E. 608(b)(1) differs from F.R.E. 608(b). Pa.R.E. 608(b)(1) prohibits the use of evidence of specific instances of conduct to support or attack credibility. This is consistent with Pennsylvania law. See *Commonwealth v. Cragle*, 281 Pa. Super. 434, 422 A.2d 547 (1980). F.R.E. 608(b)(1) prohibits the use of extrinsic evidence for this purpose, but permits cross-examination of a witness about specific instances of conduct reflecting on the witness's credibility within the court's discretion. Both the Pennsylvania and the Federal Rule refer the issue of attacking a witness's credibility with evidence of prior convictions to Rule 609.

Pa.R.E. 608(b)(2) is similar to F.R.E. 608(b); it permits a witness who has testified to another witness's character for truthfulness to be cross-examined, about specific instances of conduct of the principal witness, in the discretion of the court. Pa.R.E. 608(b)(2) makes it clear that although the cross-examination concerns the specific acts of the principal witness, that evidence affects the credibility of the character witness only. This is in accord with Pennsylvania law. See *Commonwealth v. Peterkin*, 511 Pa. 299, 513 A.2d 373 (1986); *Commonwealth v. Adams*, 426 Pa. Super. 332, 626 A.2d 1231 (1993). In addition, Pa.R.E. 608(b)(2) excludes the use of arrests; this, too, is consistent with Pennsylvania law. See *Commonwealth v. Scott*, 496 Pa. 188, 436 A.2d 607 (1981). Because cross-examination concerning specific instances of conduct is subject to abuse, the cross-examination is not automatic; rather, its use is specifically placed in the discretion of the court, and like all other relevant evidence, it is subject to the balancing test of Pa.R.E. 403. Moreover, the court should take care that the cross-examiner has a reasonable basis for the questions asked. See *Adams, supra*.

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Finally, Pa.R.E. 608 does not include the last paragraph of F.R.E. 608(b), which provides that the giving of testimony by an accused or any other witness is not a waiver of the privilege against self-incrimination when the examination concerns matters relating only to credibility. Pa.R.E. 608(b)(1) bars cross-examination of any witness concerning specific acts of the witness' own conduct; thus, the provision is not needed.

Finally, the last paragraph of F.R.E. 608(b), which provides that the giving of testimony by an accused or any other witness is not a waiver of the privilege against self-incrimination when the examination concerns matters relating only to credibility, is not adopted.

Note: Adopted May 8, 1998, effective October 1, 1998; rescinded and replaced _____, 2011, effective _____, 2011.

Committee Explanatory Reports:

Final Report explaining the _____, 2011 rescission and replacement published with the Court's Order at __ Pa.B. __ (_____, 2011).

Rule 609

Rule 609. Impeachment by evidence of conviction of crime	Rule 609. Impeachment by Evidence of a Criminal Conviction
<p>(a) General rule. For the purpose of attacking the credibility of any witness, evidence that the witness has been convicted of a crime, whether by verdict or by plea of guilty or <i>nolo contendere</i>, shall be admitted if it involved dishonesty or false statement</p>	<p>(a) In General. For the purpose of attacking the credibility of any witness, evidence that the witness has been convicted of a crime, whether by verdict or by plea of guilty or <i>nolo contendere</i>, must be admitted if it involved dishonesty or false statement.</p>
<p>(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.</p>	<p>(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:</p> <ol style="list-style-type: none"> (1) its probative value 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.
<p>(c) Effect of pardon or other equivalent procedure or successful completion of rehabilitation program. Evidence of a conviction is not admissible under this rule if the conviction has been the subject of one of the following:</p> <ol style="list-style-type: none"> (1) a pardon or other equivalent procedure based on a specific finding of innocence; or (2) a pardon or other equivalent procedure based on a specific finding of rehabilitation of the person convicted, and that person has not been convicted of any subsequent crime. 	<p>(c) Effect of Pardon or Other Equivalent Procedure. Evidence of a conviction is not admissible under this rule if the conviction has been the subject of one of the following:</p> <ol style="list-style-type: none"> (1) a pardon or other equivalent procedure based on a specific finding of innocence; or (2) a pardon or other equivalent procedure based on a specific finding of rehabilitation of the person convicted, and that person has not been convicted of any subsequent crime.
<p>(d) Juvenile Adjudications. In a criminal case only, evidence of the adjudication of delinquency for an offense under the Juvenile Act, 42 Pa.C.S. §§ 6301 et seq., may be used to impeach the credibility of a witness if conviction of the offense would be admissible to attack the credibility of an adult.</p>	<p>(d) Juvenile Adjudications. In a criminal case only, evidence of the adjudication of delinquency for an offense under the Juvenile Act, 42 Pa.C.S. §§ 6301 et seq., may be used to impeach the credibility of a witness if conviction of the offense would be admissible to attack the credibility of an adult.</p>
<p>(e) Pendency of Appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.</p>	<p>(e) Pendency of an Appeal. A conviction that satisfies this rule is admissible even if an appeal is pending. Evidence of the pendency is also admissible.</p>

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Comment

Pa.R.E. 609(a) differs from F.R.E. 609(a). Pa.R.E. 609(a), subject to the time limitations in Pa.R.E. 609(b), is similar to F.R.E. 609(a)(2) because it permits impeachment of any witness by evidence of conviction of a crime involving dishonesty or false statement, regardless of what the punishment for that crime may be. However, Pa.R.E. 609(a) does not permit use of evidence of conviction of a crime punishable by death or imprisonment for more than one year, which is allowed under F.R.E. 609(a)(1), subject to certain balancing tests. This limitation on the type of crime evidence admissible is consistent with prior Pennsylvania case law. See *Commonwealth v. Randall*, 515 Pa. 410, 528 A.2d 1326 (1987); *Commonwealth v. Bigham*, 452 Pa. 554, 307 A.2d 255 (1973). Moreover, Pa.R.E. 609(a), unlike F.R.E. 609(a)(2), specifically provides that a conviction based upon a plea of *nolo contendere* may be used to impeach; this, too, is consistent with prior Pennsylvania case law. See *Commonwealth v. Snyder*, 408 Pa. 253, 182 A.2d 495 (1962).

As a general rule, evidence of a jury verdict of guilty or a plea of guilty or *nolo contendere* may not be used to impeach before the court has pronounced sentence. See *Commonwealth v. Zapata*, 455 Pa. 205, 314 A.2d 299 (1974). In addition, evidence of admission to an Accelerated Rehabilitative Disposition program under Pa.Rs.Crim.P. 310-320 may not be used to impeach credibility. See *Commonwealth v. Krall*, 290 Pa. Super. 1, 434 A.2d 99 (1981).

Where the target of impeachment is the accused in a criminal case, 42 Pa.C.S. § 5918 again comes into play. See *Comment* to Pa.Rs.E. 607, 608 pointing out that § 5918's prohibition against questioning defendant who takes stand about conviction of any offense other than the one for which he is on trial applies only to cross-examination. Hence, evidence of conviction of a crime may be introduced in rebuttal after the defendant has testified. See *Commonwealth v. Bigham*, 452 Pa. 554, 307 A.2d 255 (1973).

Pa.R.E. 609(b) differs slightly from F.R.E. 609(b) in that the phrase "supported by specific facts and circumstances," used in the latter with respect to the balancing of probative value and prejudicial effect, has been eliminated. Pa.R.E. 609(b) basically tracks what was said in *Commonwealth v. Randall*, 515 Pa. 410, 528 A.2d 1326 (1987). Where the date of conviction or last date of confinement is within ten years of the trial, evidence of the conviction of a *crimen falsi* is *per se* admissible. If more than ten years have elapsed, the evidence may be used only after written notice and the trial judge's determination

Pa.R.E. 609(a) differs from F.R.E. 609(a). It is designed to be consistent with Pennsylvania case law. See *Commonwealth v. Randall*, 515 Pa. 410, 528 A.2d 1326 (1987); *Commonwealth v. Bigham*, 452 Pa. 554, 307 A.2d 255 (1973). In addition, Pa.R.E. 609(a), unlike F.R.E. 609(a)(2), specifically provides that a conviction based upon a plea of *nolo contendere* may be used to attack the credibility of a witness; this, too, is consistent with prior Pennsylvania case law. See *Commonwealth v. Snyder*, 408 Pa. 253, 182 A.2d 495 (1962).

As a general rule, evidence of a jury verdict of guilty or a plea of guilty or *nolo contendere* may not be used to attack the credibility of a witness before the court has pronounced sentence. See *Commonwealth v. Zapata*, 455 Pa. 205, 314 A.2d 299 (1974). In addition, evidence of admission to an Accelerated Rehabilitative Disposition program under Pa.R.Crim.P. 310-320 may not be used to attack credibility. See *Commonwealth v. Krall*, 290 Pa. Super. 1, 434 A.2d 99 (1981).

42 Pa.C.S. § 5918 provides (with certain exceptions) that when a defendant in a criminal case has been called to testify in his or her own behalf he or she cannot be cross-examined about prior convictions. However, evidence of a prior conviction or convictions of a crime or crimes admissible under paragraph (a) may be introduced in rebuttal after the defendant has testified. See *Commonwealth v. Bigham*, 452 Pa. 554, 307 A.2d 255 (1973).

Pa.R.E. 609(b) differs slightly from F.R.E. 609(b) in that the phrase "supported by specific facts and circumstances," used in F.R.E. 609(b)(1) with respect to the balancing of probative value and prejudicial effect, has been eliminated. Pa.R.E. 609(b) basically tracks what was said in *Commonwealth v. Randall*, 515 Pa. 410, 528 A.2d 1326 (1987). Where the date of conviction or last date of confinement is within ten years of the trial, evidence of the conviction of a *crimen falsi* is *per se* admissible. If more than ten years have elapsed, the evidence may be used only after written notice and the trial judge's determination

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that its probative value substantially outweighs its prejudicial effect. The relevant factors for making this determination are set forth in *Bigham, supra*, and *Commonwealth v. Roots*, 482 Pa. 33, 393 A.2d 364 (1978). For the computation of the ten-year period, where there has been a reincarceration because of a parole violation, see *Commonwealth v. Jackson*, 526 Pa. 294, 585 A.2d 1061 (1991).

Pa.R.E. 609(c) is similar to F. R. E. 609(c). There are no Pennsylvania cases dealing squarely with the matters covered by section (c). Where a pardon is based upon a finding that a defendant was in fact innocent, the conviction is a nullity and has no probative value; accordingly, there is no basis to permit its use. A pardon based upon a finding of rehabilitation is an indication that the character flaw which gave rise to the inference of untruthfulness has been overcome and so should no longer be taken into account. A subsequent conviction of any crime, whether or not it involves dishonesty or false statement, casts substantial doubt on the finding of rehabilitation and justifies use of the evidence. In the case of both types of pardon, the instrument embodying the pardon must set forth the finding of innocence or rehabilitation. A pardon granted to restore civil rights or to reward good behavior does not make evidence of the conviction inadmissible under Pa.R.E. 609(c), but is admissible in rebuttal if the conviction is used to impeach. *Commonwealth v. Quaranta*, 295 Pa. 264, 145 A.2d 89 (1926).

Pa.R.E. 609(d) differs from F.R.E. 609(d). Under the latter, evidence of juvenile adjudications is generally inadmissible to impeach credibility, except in criminal cases against a witness other than the accused where the court finds that the evidence is necessary for a fair determination of guilt or innocence. Pa.R.E. 609(d), to be consistent with 42 Pa.C.S. § 6354(b)(4), permits a broader use; a juvenile adjudication of an offense may be used to impeach in a criminal case if conviction of the offense would be admissible if committed by an adult. Juvenile adjudications may also be admissible for other purposes. See 42 Pa.C.S. § 6354(b)(1), (2), and (3).

Moreover, under the confrontation clause of the United States Constitution, the accused in a criminal case has the right to use the juvenile record of a witness to show the witness' possible bias, regardless of the type of offense involved. See *Davis v. Alaska*, 415 U.S. 309 (1974); *Commonwealth v. Simmons*, 521 Pa. 218, 555 A.2d 860 (1989).

Pa.R.E. 609(e) is identical to F.R.E. 609(e). There is no Pennsylvania law on this issue. According to the Advisory Committee Notes to F.R.E. 609(e), a witness may be impeached by evidence of a prior conviction regardless of a pending appeal because of the

that its probative value substantially outweighs its prejudicial effect. The relevant factors for making this determination are set forth in *Bigham, supra*, and *Commonwealth v. Roots*, 482 Pa. 33, 393 A.2d 364 (1978). For the computation of the ten-year period, where there has been a reincarceration because of a parole violation, see *Commonwealth v. Jackson*, 526 Pa. 294, 585 A.2d 1001 (1991).

Pa.R.E. 609(c) differs from F.R.E. 609(c) because the Federal Rule includes procedures that are not provided by Pennsylvania law.

Pa.R.E. 609(d) differs from F.R.E. 609(d). Under the latter, evidence of juvenile adjudications is generally inadmissible to impeach credibility, except in criminal cases against a witness other than the accused where the court finds that the evidence is necessary for a fair determination of guilt or innocence. Pa.R.E. 609(d), to be consistent with 42 Pa.C.S. § 6354(b)(4), permits a broader use; a juvenile adjudication of an offense may be used to impeach in a criminal case if conviction of the offense would be admissible if committed by an adult. Juvenile adjudications may also be admissible for other purposes. See 42 Pa.C.S. § 6354(b)(1), (2), and (3).

Pa.R.E. 609(e) is identical to F.R.E. 609(e).

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“presumption of correctness that ought to attend judicial proceedings.” This is the predominant view. 1 McCormick, *Evidence*, § 42 (4th ed. 1992).

Note: Adopted May 8, 1998, effective October 1, 1998; Comment revised March 29, 2001, effective April 1, 2001; rescinded and replaced _____, 2011, effective _____, 2011.

Committee Explanatory Reports:

Final Report explaining the March 29, 2001 revision of the Comment published with the Court’s Order at 31 Pa.B. 1995 (April 14, 2001).

Final Report explaining the _____, 2011 rescission and replacement published with the Court’s Order at _____ Pa.B. ____ (_____, 2011).

Rule 610

Rule 610. Religious beliefs or opinions	Rule 610. Religious Beliefs or Opinions
Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.	Evidence of a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility.

Comment

<p>This Rule is identical to F.R.E. 610. It is consistent with 42 Pa.C.S.A. § 5902, which provides that religious beliefs and opinions shall not affect a person's "capacity" to testify, that no witness shall be questioned about those beliefs or opinions, and that no evidence shall be heard on those subjects for the purpose of affecting "competency or credibility." This is also consistent with Pennsylvania decisional law. See <i>Commonwealth v. Greenwood</i>, 488 Pa. 618, 413 A.2d 655 (1980); <i>Commonwealth v. Mimms</i>, 477 Pa. 553, 358 A.2d 334 (1978).</p> <p>Pa.R.E. 610 bars evidence of a witness' religious beliefs or opinions only when offered to show that the beliefs or opinions affect the witness' truthfulness because of their nature. Pa.R.E. 610 does not bar such evidence introduced for other purposes. See <i>McKim v. Philadelphia Transp. Co.</i>, 364 Pa. 237, 72 A.2d 122 (1950); <i>Commonwealth v. Riggins</i>, 373 Pa. Super. 243, 542 A.2d 1004 (1988).</p>	<p>This rule is identical to F.R.E. 610. It is consistent with 42 Pa.C.S. § 5902, which provides that religious beliefs and opinions shall not affect a person's "capacity" to testify, that no witness shall be questioned about those beliefs or opinions, and that no evidence shall be heard on those subjects for the purpose of affecting "competency or credibility."</p> <p>Pa.R.E. 610 bars evidence of a witness's religious beliefs or opinions only when offered to show that the beliefs or opinions affect the witness's truthfulness. Pa.R.E. 610 does not bar such evidence introduced for other purposes. See <i>McKim v. Philadelphia Transp. Co.</i>, 364 Pa. 237, 72 A.2d 122 (1950); <i>Commonwealth v. Riggins</i>, 374 Pa. Super. 243, 542 A.2d 1004 (1988).</p> <p>Note: Adopted May 8, 1998, effective October 1, 1998; rescinded and replaced _____, 2011, effective _____, 2011.</p> <p>Committee Explanatory Reports:</p> <p>Final Report explaining the _____, 2011 rescission and replacement published with the Court's Order at ___ Pa.B. __ (_____, 2011).</p>
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Rule 611

Rule 611. Mode and order of interrogation and presentation	Rule 611. Mode and Order of Examining Witnesses and Presenting Evidence
<p>(a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time and (3) protect witnesses from harassment or undue embarrassment.</p>	<p>(a) Control by the Court; Purposes. The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:</p> <ol style="list-style-type: none"> (1) make those procedures effective for determining the truth; (2) avoid wasting time; and (3) protect witnesses from harassment or undue embarrassment.
<p>(b) Scope of cross-examination. Cross-examination of a witness other than a party in a civil case should be limited to the subject matter of the direct examination and matters affecting credibility; however, the court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination. A party witness in a civil case may be cross-examined by an adverse party on any matter relevant to any issue in the case, including credibility, unless the court, in the interests of justice, limits the cross-examination with respect to matters not testified to on direct examination.</p>	<p>(b) Scope of Cross-Examination. Cross-examination of a witness other than a party in a civil case should be limited to the subject matter of the direct examination and matters affecting credibility, however, the court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination. A party witness in a civil case may be cross-examined by an adverse party on any matter relevant to any issue in the case, including credibility, unless the court, in the interests of justice, limits the cross-examination with respect to matters not testified to on direct examination.</p>
<p>(c) Leading questions. Leading questions should not be used on the direct or redirect examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily, leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party or a witness identified with an adverse party, interrogation may be by leading questions; a witness so examined should usually be interrogated by all other parties as to whom the witness is not hostile or adverse as if under redirect examination.</p>	<p>(c) Leading Questions. Leading questions should not be used on direct or redirect examination except as necessary to develop the witness's testimony. Ordinarily, the court should allow leading questions:</p> <ol style="list-style-type: none"> (1) on cross-examination; and (2) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

Comment

<p>Pa.R.E. 611(a) is identical to F.R.E. 611(a). It places responsibility for the conduct of the trial squarely within the discretion of the trial judge and spells out guidelines for the exercise of that discretion. It is consistent with Pennsylvania law. See <i>Commonwealth v. Smith</i>, 518 Pa. 15, 540 A.2d 246 (1988); see also Pa.R.Civ.P. 223 (relating to the conduct of civil jury trials); Pa.R.Civ.P. 224 (relating to the order of proof in civil cases).</p>	<p>Pa.R.E. 611(a) is identical to F.R.E. 611(a).</p>
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Pa.R.E. 611(b) differs from F.R.E. 611(b). F.R.E. 611(b) limits the scope of cross-examination of all witnesses to matters testified to on direct and matters bearing on credibility, unless the court in its discretion allows inquiry into additional matters as if on direct examination. This has been the traditional view in the Federal courts and many State courts. The cross-examiner does not lose the opportunity to develop the evidence because, unless the witness is the accused in a criminal case, the cross-examiner may call the witness as his or her own. Therefore, the introduction of the evidence is merely deferred.

Pa.R.E. 611(b), which is based on Pennsylvania law, applies the traditional view in both civil and criminal cases to all witnesses except a party in a civil case. See *Woodland v. Philadelphia Transportation Co.*, 428 Pa. 379, 238 A.2d 593 (1968); *Commonwealth v. Cessna*, 371 Pa. Super., 89, 537 A.2d 834 (1988). In applying the rule of limited cross-examination, the Supreme Court said in *Conley v. Mervis*, 324 Pa. 577, 188 A.350 (1936) that "cross-examination may embrace any matter germane to the direct examination, qualifying or destroying it or tending to develop facts which have been improperly suppressed or ignored by the [witness]". See also *Commonwealth v. Lopinson*, 427 Pa. 300, 234 A.2d 562 (1961).

Under Pa.R.E. 611(b), a party in a civil case may be cross-examined on all relevant issues and matters affecting credibility. See *Agate v. Dunleavy*, 398 Pa. 26, 156 A.2d 530 (1959); *Greenfield v. Philadelphia*, 282 Pa. 344, 127 A.768 (1925). However, in both of those cases, the Court stated that the broadened scope of cross-examination of a party in a civil case does not permit a defendant to put in a defense through cross-examination of the plaintiff. The qualifying clause in the last sentence of Pa.R.E. 611(b) is intended to give the trial judge discretion to follow this longstanding rule.

When the accused in a criminal case is the witness, there is an interplay between the limited scope of cross-examination and the accused's privilege against self-incrimination. When the accused testifies generally as to facts tending to negate or raise doubts about the prosecution's evidence, he or she has waived the privilege and may not use it to prevent the prosecution from bringing out on cross-examination every circumstance related to those facts. See *Commonwealth v. Green*, 525 Pa. 424, 581 A.2d 544 (1990). However, when the accused's testimony is more selective or limited, the waiver of the privilege is only coextensive with the permissible scope of cross-examination relative to the accused's direct testimony; it is not a general waiver. See *Commonwealth v. Camm*, 443 Pa. 253, 277 A.2d 325 (1971); *Commonwealth v. Ulen*, 414 Pa. Super. 502, 607

Pa.R.E. 611(b) differs from F.R.E. 611(b). F.R.E. 611(b) limits the scope of cross-examination of all witnesses to matters testified to on direct and matters bearing on credibility, unless the court in its discretion allows inquiry into additional matters as if on direct examination. This has been the traditional view in the Federal courts and many State courts. The cross-examiner does not lose the opportunity to develop the evidence because, unless the witness is the accused in a criminal case, the cross-examiner may call the witness as his or her own. Therefore, the introduction of the evidence is merely deferred.

Pa.R.E. 611(b), which is based on Pennsylvania law, applies the traditional view in both civil and criminal cases to all witnesses except a party in a civil case. Under Pa.R.E. 611(b), a party in a civil case may be cross-examined on all relevant issues and matters affecting credibility. See *Agate v. Dunleavy*, 398 Pa. 26, 156 A.2d 530 (1959); *Greenfield v. Philadelphia*, 282 Pa. 344, 127 A. 768 (1925). However, in both of those cases, the Court stated that the broadened scope of cross-examination of a party in a civil case does not permit a defendant to put in a defense through cross-examination of the plaintiff. The qualifying clause in the last sentence of Pa.R.E. 611(b) is intended to give the trial judge discretion to follow this longstanding rule.

When the accused in a criminal case is the witness, there is an interplay between the limited scope of cross-examination and the accused's privilege against self-incrimination. When the accused testifies generally as to facts tending to negate or raise doubts about the prosecution's evidence, he or she has waived the privilege and may not use it to prevent the prosecution from bringing out on cross-examination every circumstance related to those facts. See *Commonwealth v. Green*, 525 Pa. 424, 581 A.2d 544 (1990). However, when the accused's testimony is limited to a narrow topic, there is some authority that the scope of cross-examination may be limited as well. See *Commonwealth v. Camm*, 443 Pa. 253, 277 A.2d 325 (1971); *Commonwealth v. Ulen*, 414 Pa. Super. 502, 607 A.2d 779 (1992), *rev'd on other grounds*, 539 Pa. 51, 650 A.2d 416 (1994).

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A.2d 77 (1992), *rev'd on other grounds*, 359 Pa. 51, 650 A.2d 416 (1994).

Pa.R.E. 611(c) makes two changes in the comparable section of the Federal Rule. First, Pa.R.E. 611(c) includes the words "or redirect", which do not appear in the first sentence of the Federal Rule. The additional words should remove any doubt that the rule on leading questions applies to redirect as well as direct examination. *See Commonwealth v. Reidenbaugh*, 282 Pa. Super. 300, 422 A.2d 1126 (1980). Second, the last sentence of section (c) includes a clause providing that when the court gives permission to use leading questions to a party who has called a hostile witness, an adverse party or one identified with an adverse party, the court should not extend that permission to other parties to whom the witness is not hostile or adverse.

Pa.R.E. 611(c) is consistent with Pennsylvania law. A leading question has been defined as one which indicates or suggests the answer desired by the examiner. *See Commonwealth v. Chambers*, 528 Pa. 558, 599 A.2d 630 (1991); *Commonwealth v. Dreibelbis*, 493 Pa. 466, 426 A.2d 1111 (1981). Leading questions may be used on cross-examination, but not on direct. *See Rogan Estate*, 404 Pa. 205, 171 A.2d 177 (1961). As in the Federal Rule, Pa.R.E. 611(c) qualifies the right to lead a witness on cross-examination by the word "ordinarily." That qualification permits the court to bar the use of leading questions when the cross-examination is in form only, such as when a party's own attorney questions the party after the party was called by an opponent, or when the plaintiff's attorney cross-examines an insured defendant who is friendly to the plaintiff. *See F.R.E. 611 advisory committee notes.*

Leading questions may be put to a hostile witness, *Commonwealth v. Settles*, 442 Pa. 159, 275 A.2d 61 (1978), and to an adverse party, *Agate, supra*. Pa.R.E. 611(c) is also consistent with 42 Pa.C.S.A. § 5935, which authorizes the calling and cross-examination of an adverse party or a person having an adverse interest. This authorization implies the use of leading questions.

A party who calls a hostile witness, adverse party or one identified with an adverse party may use leading questions because these witnesses are "unfriendly" to the party calling them and there is little risk that they will be susceptible to any suggestions inherent in the questions. The risk of susceptibility to suggestion is present, however, when a party to whom the witness is "friendly" (i.e. to whom the witness is not hostile, an adverse party or one identified with the an adverse party) interrogates the witness. The last clause of Pa.R.E. 611(c) restricts the use of leading questions by a party to whom the witness is "friendly." The word

Pa.R.E. 611(c) differs from F.R.E. 611(c) in that the word "redirect" has been added to the first sentence. This is consistent with Pennsylvania law. *See Commonwealth v. Reidenbaugh*, 282 Pa. Super. 300, 422 A.2d 1126 (1980).

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“usually”, however, was included to give the court discretion to permit leading questions in an appropriate case. For example, leading questions may be appropriate when the testimony of a witness who was called and examined as a hostile witness by one party substantially harms the interest of another party with whom the witness is neither friendly nor unfriendly.

Note: Adopted May 8, 1998, effective October 1, 1998; rescinded and replaced _____, 2011, effective _____, 2011.

Committee Explanatory Reports:

Final Report explaining the _____, 2011 rescission and replacement published with the Court's Order at ___ Pa.B. __ (_____, 2011).

Rule 612

Rule 612. Writing or other item used to refresh memory	Rule 612. Writing or Other Item Used to Refresh a Witness's Memory
<p>(a) Right to refresh memory and production of refreshing materials. A witness may use a writing or other item to refresh memory for the purpose of testifying. If the witness does so, either-</p> <p style="padding-left: 40px;">(1) while testifying, or</p> <p style="padding-left: 40px;">(2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,</p> <p style="padding-left: 80px;">an adverse party is entitled to have the writing or other item produced at the hearing, trial or deposition, to inspect it, to cross-examine the witness on it and to introduce in evidence those portions that relate to the testimony of the witness.</p> <p>(b) Redaction of writing or other item and sanctions. If it is claimed that the writing or other item contains matters not related to the subject matter of the testimony, the court shall examine it in camera, excise any portion not so related and order delivery of the remainder to the party entitled to it. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing or other item is not produced or delivered pursuant to an order under this section, the court shall make any order justice requires, except that in criminal cases when the prosecution does not comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial, or the court may use contempt procedures.</p>	<p>(a) Right to Refresh Memory. A witness may use a writing or other item to refresh memory for the purpose of testifying while testifying, or before testifying.</p> <p>(b) Rights of Adverse Party.</p> <p style="padding-left: 40px;">(1) If a witness uses a writing or other item to refresh memory while testifying, an adverse party is entitled to have it produced at the hearing, trial or deposition, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony.</p> <p style="padding-left: 40px;">(2) If a witness uses a writing or other item to refresh memory before testifying, and the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have it produced at the hearing, trial or deposition, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony.</p> <p>(c) Rights of Producing Party. If the producing party claims that the writing or other item includes unrelated matter, the court must examine it 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.</p> <p>(d) Failure to Produce or Deliver. If the writing or other item 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, or the court may use contempt procedures.</p>

Comment

<p>Pa.R.E. 612 and F.R.E. 612 are substantively equivalent, but differ somewhat in language and structure:</p> <p>1. Pa.R.E. 612 covers the same subject matter as</p>	<p>Pa.R.E. 612 differs from F.R.E. in several ways:</p> <p>Pa.R.E. 612 applies to writings and other items. This would include such things as photographs, videos, and recordings. F.R.E 612 applies only to writings.</p>
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F.R.E. 612, but does so in two sections rather than one lengthy paragraph. The organization of Pa.R.E. 612 is derived, in part, from the Uniform Rules of Evidence, Rule 612 (1974).

2. Pa.R.E. 612 explicitly sets forth the right to refresh memory, which is implicit in the Federal Rule.

3. Pa.R.E. 612 does not include the reference to 18 U.S.C. § 3500 (the Jencks Act) appearing in the Federal Rule, because it is inapposite.

4. Pa.R.E. 612 uses the phrase “writing or other item” where the Federal Rule uses the term “writing.”

5. Pa.R.E. 612(a) includes the words “trial or deposition” after the word “hearing” primarily to make clear that the rule applies to depositions. The addition of “trial” is for completeness.

6. The last sentence of Pa.R.E. 612(b) uses the phrase “prosecution does not” instead of the phrase “prosecution elects not to,” which appears in the Federal Rule. Additionally, Pa.R.E. 612(b) adds “contempt procedures” to the sanctions usable in criminal cases listed in the Federal Rule.

Section (a)--The right to refresh a witness' memory is well established in Pennsylvania. *See Commonwealth v. Payne*, 455 Pa. 503, 317 A.2d 208 (1974). Although usually the witness' memory is refreshed by a writing, most courts recognize that many other things, such as photographs, can spur the memory. 1 McCormick, *Evidence* § 9 (4th ed. 1992) (“any memorandum or other object may be used as a stimulus to present memory, without restriction by rule as to authorship, guarantee of correctness or time of making.”) The addition of the words “or other item” in section (a) takes this into account.

This is consistent with Pennsylvania law. *See Dean Witter Reynolds, Inc. v. Genteel*, 346 Pa. Super. 336, 499 A.2d 637 (1985); *Commonwealth v. Fromal*, 202 Pa. Super. 45, 195 A.2d 174 (1963). An item may be used to refresh memory even though it is inadmissible in evidence. *See Commonwealth v. Weeden*, 457 Pa. 436, 322 A.2d 343 (1974); *Panik v. Didra*, 370 Pa. 488, 88 A.2d 730 (1952); *Dean Witter*, 346 Pa. Super. at 344, 494 A.2d at 641.

The procedures for refreshing a witness' memory are reviewed in *Commonwealth v. Proctor*, 253 Pa. Super. 369, 385 A.2d 383 (1978).

Pa.R.E. 612(a) gives the adverse party access to the item used to refresh the witness' memory while the witness is testifying. This is consistent with Pennsylvania law. *See Commonwealth v. Proctor*, supra; *see also Commonwealth v. Allen*, 220 Pa.

The Pennsylvania rule is consistent with prior law. *See Commonwealth v. Proctor*, 253 Pa. Super. 369, 385 A.2d 383 (1978).

Pa.R.E. 612(a) states that a witness or a party has a right to refresh recollection. This is not expressly provided by F.R.E. 612.

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Super. 403, 289 A.2d 476 (1972). The rule protects against the risk that the item used to refresh memory may suggest testimony to the witness instead of refreshing present recollection. Production of the item to the adverse party is discretionary with the court, however, when it is used to refresh memory before testifying. See *Commonwealth v. Samuels*, 235 Pa. Super. 192, 340 A.2d 880 (1975); *Commonwealth v. Fromal*, 202 Pa. Super. 45, 195 A.2d 174 (1963).

Pa.R.E. 612(a), like F.R.E. 612(a), specifically provides that the adverse party may use the item in cross-examination and may introduce the item into evidence. There is no prior Pennsylvania authority on the issue of the item's admissibility. By admitting the item into evidence, the trier of fact can put the whole matter--what the witness was shown, how the witness testified on direct and cross examination--in proper context. The evidence is received for impeachment purposes only unless it comes within one of the exceptions to the hearsay rule in Pa.R.E. 803, 803.1 and 804(b).

Pa.R.E. 612(a) is not intended to change the rule that in a criminal case, written statements made by a witness to police prior to trial must be given to the defendant following the testimony of the witness on direct examination, even if the statements were not used to refresh memory. *Commonwealth v. Kantos*, 442 Pa. 343, 276 A.2d 830 (1971).

Pa.R.E. 612(a), unlike the Federal Rule, explicitly applies to deposition testimony. Most of the cases have applied the Federal Rule to depositions based upon Fed.R.Civ.P. 30(c), which states: "Examination and cross-examination of witnesses [at a deposition] may proceed as permitted at trial under the provisions of the Federal Rules of Evidence." 28 Wright & Gold, *Federal Practice and Procedure* § 6183 (1993); see, e.g., *Sporck v. Peil*, 759 F.2d 312 (3d Cir. 1985).

There are no Pennsylvania cases on this point and the Pennsylvania Rules of Civil Procedure do not have a provision similar to Fed.R.Civ.P. 30(c). In Pennsylvania, however, an adverse party's need for access to the item used to refresh memory is as great at a deposition as at trial because Pennsylvania statutes and procedural rules provide in certain circumstances for the introduction of deposition testimony at trial. Moreover, because the rule allows deposition testimony to be challenged, any suggestion arising from the refreshing can be exposed immediately and eliminated at the time of trial.

Pa.R.E. 612(a), like F.R.E. 612, applies to the use of a writing or other item to refresh memory "for the purpose of testifying." In the Federal Rule, the phrase was intended "to safeguard against using the rule as a pretext for wholesale exploration of an opposing

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party's files and to insure that access is limited only to those writings which may fairly be said in fact to have an impact upon the testimony of the witness." F.R.E. 612 advisory committee notes; see, e.g., *Sporck v. Peil, supra* (deposition witness examined large number of documents, selected by counsel, in preparation for testifying at deposition).

Section (b)--Except for the changes concerning sanctions in criminal cases when the prosecution fails to comply with an order to produce, Pa.R.E. 612(b) is the same as the last three sentences of F.R.E. 612.

An adverse party has rights only to those parts of any materials used to refresh memory that bear upon the witness' testimony. When the party who did the refreshing contends that some part of what the witness was shown goes beyond the scope of the testimony, Pa.R.E. 609(b) requires the court to make an in camera inspection and to remove any extraneous matter. Of course, what is excised must be preserved in the event that the redaction is challenged on appeal. This is a well recognized technique.

The last sentence of Pa.R.E. 612(b) targets what will likely be the rare case of a failure to comply with an order to produce. In a civil case, the court is given broad discretion. The problem is akin to the failure of a party to comply with discovery orders, for which Pa.R.Civ. P.4019 provides a wide range of sanctions. Similarly, under Pa.R.E. 609(b), the court may employ a sanction best calculated to remedy the harm caused by the failure to produce.

Note: Adopted May 8, 1998, effective October 1, 1998; amended March 23, 1999, effective immediately.

Committee Explanatory Reports:

Final Report explaining the March 23, 1999 technical amendments to paragraph (a) published with the Court's Order at 29 Pa.B. 1714 (April 3, 1999).

Pa.R.E. 612(b) reorganizes the material that appears in F.R.E. 612(a) and the first sentence of F.R.E.612(b) for clarity, includes the word "deposition" to clarify that the rule is applicable both at hearings and depositions, and deletes reference to 18 U.S.C. § 3500.

Paragraph (c) differs from the second sentence of F.R.E. 612(b) in that it refers to other items as well as writings.

Paragraph (d) differs from F.R.E. 612(c) in that it adds the phrase "or the court may use contempt procedures".

Note: Adopted May 8, 1998, effective October 1, 1998; amended March 23, 1999, effective immediately; rescinded and replaced _____, 2011, effective _____, 2011.

Committee Explanatory Reports:

Final Report explaining the March 23, 1999 technical amendments to paragraph (a) published with the Court's Order at 29 Pa.B. 1714 (April 3, 1999).

Final Report explaining the _____, 2011 rescission and replacement published with the Court's Order at ___ Pa.B. __ (_____, 2011).

Rule 613

Rule 613. Prior statements of witnesses	Rule 613. Witness's Prior Inconsistent Statement to Impeach; Witness's Prior Consistent Statement to Rehabilitate
<p>(a) Examining witness concerning prior inconsistent statement. A witness may be examined concerning a prior <i>inconsistent</i> statement made by the witness, whether written or not, and the statement need not be shown or its contents disclosed to the witness at that time, but on request the statement or contents shall be shown or disclosed to opposing counsel.</p>	<p>(a) Witness's Prior Inconsistent Statement to Impeach. A witness may be examined concerning a prior inconsistent statement made by the witness to impeach the witness's credibility. The statement need not be shown or its contents disclosed to the witness at that time, but on request the statement or contents must be shown or disclosed to an adverse party's attorney.</p>
<p>(b) Extrinsic evidence of prior inconsistent statement of witness. Unless the interests of justice otherwise require, extrinsic evidence of a prior inconsistent statement by a witness is admissible only if, during the examination of the witness,</p> <ul style="list-style-type: none"> (1) the statement, if written, is shown to, or if not written, its contents are disclosed to, the witness; (2) the witness is given an opportunity to explain or deny the making of the statement; and (3) the opposing party is given an opportunity to question the witness. <p>This section does not apply to admissions of a party-opponent as defined in Rule 803(25) (relating to admissions by a party-opponent).</p>	<p>(b) Extrinsic Evidence of a Witness's Prior Inconsistent Statement. Unless the interests of justice otherwise require, extrinsic evidence of a witness's prior inconsistent statement is admissible only if, during the examination of the witness,</p> <ul style="list-style-type: none"> (1) the statement, if written, is shown to, or if not written, its contents are disclosed to, the witness; (2) the witness is given an opportunity to explain or deny the making of the statement; and (3) an adverse party is given an opportunity to question the witness. <p>This paragraph does not apply to an opposing party's statement as defined in Rule 803(25).</p>
<p>(c) Evidence of prior consistent statement of witness. Evidence of a prior consistent statement by a witness is admissible for rehabilitation purposes if the opposing party is given an opportunity to cross-examine the witness about the statement, and the statement is offered to rebut an express or implied charge of:</p> <ul style="list-style-type: none"> (1) fabrication, bias, improper influence or motive, or faulty memory and the statement was made before that which has been charged existed or arose; or (2) having made a prior inconsistent statement, which the witness has denied or explained, and the consistent statement supports the witness' denial or explanation. 	<p>(c) Witness's Prior Consistent Statement to Rehabilitate. Evidence of a witness's prior consistent statement is admissible to rehabilitate the witness's credibility if the opposing party is given an opportunity to cross-examine the witness about the statement and the statement is offered to rebut an express or implied charge of:</p> <ul style="list-style-type: none"> (1) fabrication, bias, improper influence or motive, or faulty memory and the statement was made before that which has been charged existed or arose; or (2) having made a prior inconsistent statement, which the witness has denied or explained, and the consistent statement supports the witness's denial or explanation.

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Comment

<p>Pa.R.E. 613 differs from F.R.E. 613 both in organization and substance. Both Pa.R.E. 613 and F.R.E. 613 cover impeachment by prior inconsistent statements, but only Pa.R.E. 613 deals with rehabilitation by prior consistent statements.</p> <p>Section (a). This section of the rule is basically the same as F.R.E. 613(a), except that the word “inconsistent” does not appear in the federal rule. Its inclusion makes clear that both sections (a) and (b) involve attacks on credibility through prior inconsistencies. It has been suggested that its omission from the federal rule was a “drafting oversight.” Charles A. Wright & Victor J. Gold, <i>Federal Practice & Procedure</i> § 6203, n. 13 (1993); J. Weinstein, 3 <i>Weinstein's Evidence</i> § 613.02[1], n. 1 (1991). By dispensing with the need to show the prior statement or disclose its contents to the witness before proceeding with examination about it, section (a) repudiates the decision in the <i>Queen's Case</i>, 129 Eng. Rep. 9761 (1820). Pa.R.E. 613(a) resolves the ambiguity in the scant Pennsylvania authority on this point. <i>Compare Kann v. Bennett</i>, 72 A. 342 (Pa. 1909) (before witness may be cross-examined about prior inconsistent statement, witness must be shown the statement and asked if he wrote it) <i>with Commonwealth v. Petrakovich</i>, 329 A.2d 844 (Pa. 1974) (overlooking <i>Kann</i> case, court stated it had never considered question of showing statement to witness, and found no need to resolve question under facts of case).</p> <p>Section (b). The first sentence of section (b) of Pa.R.E. 613 differs from F.R.E. 613(b). Like the federal rule, Pa.R.E. 613(b) permits introduction of extrinsic evidence of a prior inconsistent statement only if the witness was confronted with or informed of the statement, thus providing the witness with a chance to deny or explain the statement. Pa.R.E. 613(b), however, requires that the witness be confronted or informed during the examination; the federal rule sets no particular time or sequence. F.R.E. 613 advisory committee notes.</p> <p>Pa.R.E. 613(b) follows the traditional common law approach. It establishes that the witness must be shown or made aware of the prior inconsistent statement before extrinsic evidence of the statement may be introduced, unless relaxation of the rule would serve the interests of justice. This is a departure from Pennsylvania authority, which gives the trial court discretion whether to require showing or disclosure of</p>	<p>Pa.R.E. 613 differs from F.R.E. 613 to clarify its meaning and to conform to Pennsylvania law.</p> <p>Pa.R.E. 613(a) and (b) are similar to F.R.E. 613(a) and (b), but the headings and the substance make it clear that the paragraphs are dealing with the use of an inconsistent statement to impeach. The disclosure requirement in paragraph (a) is intended to deter sham allegations of the existence of an inconsistent statement.</p> <p>Pa.R.E. 613(b) differs from F.R.E. 613(b) in that extrinsic evidence of a prior inconsistent statement is not admissible unless the statement is shown or disclosed to the witness during the witness's examination. Paragraph (b) is intended to give the witness and the party a fair opportunity to explain or deny the allegation.</p>
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the statement. See, e.g., *Commonwealth v. Manning*, 435 A.2d 1207 (Pa. 1981); *Commonwealth v. Dennison*, 272 A.2d 180 (Pa. 1971).

The rationale for the last sentence of section (b), which exempts admissions of a party-opponent, is that “parties have ample opportunities to testify and explain or deny statements attributed to them.” 28 Wright & Gold, *Federal Practice and Procedure* § 6205 (1993). The exemption is in accord with Pennsylvania law. *Commonwealth by Truscott v. Binstock*, 57 A.2d 884 (Pa. 1948); *Commonwealth v. Dilworth*, 137 A. 683 (Pa. 1927).

Finally, as noted in the *Comment* to Pa.R.E. 607(a), a prior inconsistent statement may be used only for impeachment purposes and not substantively unless it is an admission of a party opponent under Pa.R.E. 803(25), the statement of a witness other than a party-opponent within the hearsay exception of Pa.R.E. 803.1(1), or a statement of prior identification under the hearsay exception of Pa.R.E. 803.1(2).

Section (c). Pa.R.E. 613(c) does not appear in F.R.E. 613. F.R.E. 801(d)(1)(B) provides that the prior consistent statement of a testifying witness is not hearsay, and that the statement is admissible substantively if it is consistent with the witness' testimony and “is offered to rebut an express or implied charge of recent fabrication, or improper influence or motive.” Pa.R.E. 613(c) adds “bias,” “faulty memory,” and “prior inconsistent statement” to the kind of charges that may be rebutted by a consistent statement. In addition, it specifically provides in subsection (c)(1) that the consistent statement must have been made before the fabrication, bias, etc. Although F.R.E. 801(d)(1)(B) is silent on this point, the Supreme Court held that it permits the introduction of consistent statements as substantive evidence only when they were made before the challenged fabrication, influence, or motive. See *Tome v. United States*, 513 U.S. 150 (1995). Unlike the federal rule, under Pa.R.E. 613(c), a prior consistent statement is always received for rehabilitation purposes only and not as substantive evidence.

Pa.R.E. 613(c)(1) is in accord with Pennsylvania law. See *Commonwealth v. Hutchinson*, 556 A.2d 370 (Pa. 1989) (to rebut charge of recent fabrication); *Commonwealth v. Smith*, 540 A.2d 246 (Pa. 1988) (to counter alleged corrupt motive); *Commonwealth v. Swinson*, 626 A.2d 627 (Pa. Super. 1993) (to negate charge of faulty memory); *Commonwealth v. McEachin*, 537 A.2d 883 (Pa. Super. 1988), *appeal denied*, 553 A.2d 965 (Pa. 1988) (to offset implication of improper influence). All of these cases require that the consistent statement must have been made before the fabrication, bias, etc.

F.R.E. 613 does not contain a paragraph (c); it does not deal with rehabilitation of a witness with a prior consistent statement. Pa.R.E. 613(c) gives a party an opportunity to rehabilitate the witness with a prior consistent statement where there has been an attempt to impeach the witness. In most cases, a witness's prior statement is hearsay, but F.R.E. 801(d)(1)(B) treats some prior consistent statements offered to rebut impeachment as not hearsay. Pa.R.E. 613(c) is consistent with Pennsylvania law in that the prior consistent statement is admissible, but only to rehabilitate the witness. See *Commonwealth v. Hutchinson*, 521 Pa. 482, 556 A.2d 370 (1989) (to rebut charge of recent fabrication); *Commonwealth v. Smith*, 518 Pa.15, 540 A.2d 246 (1988) (to counter alleged corrupt motive); *Commonwealth v. Swinson*, 426 Pa. Super.167, 626 A.2d 627 (1993) (to negate charge of faulty memory); *Commonwealth v. McEachin*, 371 Pa. Super. 188, 537 A.2d 883 (1988) (to offset implication of improper influence).

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Pa.R.E. 613(c)(2) is arguably an extension of Pennsylvania law, but is based on the premise that when an attempt has been made to impeach a witness with an alleged prior inconsistent statement, a statement consistent with the witness' testimony should be admissible to rehabilitate the witness if it supports the witness' denial or explanation of the alleged inconsistent statement. Where there has been a denial of the alleged inconsistent statement, the consistent statement should almost invariably be admitted, regardless of its timing. When the witness admits and explains the inconsistent statement, the use of the consistent statement will depend upon the nature of the explanation and all of the circumstances that prompted the making of the consistent statement; the timing of that statement, although not conclusive, is one of the factors to be considered. If the witness acknowledges making the inconsistent statement and offers no explanation, a consistent statement, whether made earlier or later, should not be admitted.

Usually, evidence of a prior consistent statement is rebuttal evidence that may not be introduced until after a witness has testified on direct examination and an express or implied attack has been made on the witness' testimony in one of the ways set forth in Pa.R.E. 613(c). But in at least two situations, Pennsylvania Courts have upheld the admission of a prior consistent statement in anticipation of an attack on the witness. See *Commonwealth v. Smith*, 540 A.2d 246 (Pa. 1988) (prior consistent statements by prosecution witness admitted on direct examination where defense counsel's opening statement suggested that the witness had motives to fabricate evidence against the defendant to obtain a lenient sentence for herself); *Commonwealth v. Freeman*, 441 A.2d 1327 (Pa. Super. 1982) (evidence of prompt complaint of rape by alleged victim may be introduced in prosecution's case in chief because alleged victim's testimony is automatically vulnerable to attack by the defendant as recent fabrication in the absence of evidence of hue and cry on her part.”).

Note: Adopted May 8, 1998, effective October 1, 1998; amended March 23, 1999, effective immediately.

Committee Explanatory Reports:

Final Report explaining the March 23, 1999 technical amendments to paragraph (b)(3) published with the Court's Order at 29 Pa.B. 1714 (April 3, 1999).

Final Report explaining the March 10, 2000 amendments adding “inconsistent” to section (a) published with the Court's Order at 30 Pa.B. 1645 (March 25, 2000).

Pa.R.E. 613(c)(2) is arguably an extension of Pennsylvania law, but is based on the premise that when an attempt has been made to impeach a witness with an alleged prior inconsistent statement, a statement consistent with the witness's testimony should be admissible to rehabilitate the witness if it supports the witness's denial or explanation of the alleged inconsistent statement.

Note: Adopted May 8, 1998, effective October 1, 1998; amended March 23, 1999, effective immediately; amended March 10, 2000, effective July 1, 2000; rescinded and replaced _____, 2011, effective _____, 2011.

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Final Report explaining the March 10, 2000 amendments adding “inconsistent” to section (a)

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	<p>published with the Court's Order at 30 Pa.B. 1645 (March 25, 2000).</p> <p>Final Report explaining the _____, 2011 rescission and replacement published with the Court's Order at ___ Pa.B. __ (_____, 2011).</p>
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Rule 614

Rule 614. Calling and interrogation of witnesses by court	Rule 614. Court's Calling or Examining a Witness
<p>(a) Calling by Court. Consistent with its function as an impartial arbiter, the court, with notice to the parties, may, on its own motion or at the suggestion of a party call witnesses, and all parties are entitled to cross-examine witnesses thus called.</p>	<p>(a) Calling. Consistent with its function as an impartial arbiter, the court, with notice to the parties, may call a witness on its own or at a party's request. Each party is entitled to cross-examine the witness.</p>
<p>(b) Interrogation by court. Where the interest of justice so requires, the court may interrogate witnesses, whether called by itself or by a party.</p>	<p>(b) Examining. Where the interest of justice so requires, the court may examine a witness regardless of who calls the witness.</p>
<p>(c) Objections. An objection to the calling of a witness by the court must be made at the time of the court's notice of an intention to call the witness. An objection to a question by the court must be made at the time the question is asked; when requested to do so, the court shall give the objecting party an opportunity to make objections out of the presence of the jury.</p>	<p>(c) Objections. A party may object to the court's calling or examining a witness when given notice that the witness will be called or when the witness is examined. When requested to do so, the court must give the objecting party an opportunity to make objections out of the presence of the jury.</p>

Comment

<p>Pa.R.E. 614(a) and (b) differ from F.R.E. 614(a) and (b) in several respects. The phrase relating to the court's "function as an impartial arbiter" and the provision for notice have been added in Pa.R.E. 614(a), and the clause regarding "interest of justice" has been added in Pa.R.E. 614 (b). The additions dealing with the court as an "impartial arbiter" and the "interest of justice" are consistent with Pennsylvania law. <i>See Commonwealth v. Crews</i>, 429 Pa. 16, 239 A.2d 350 (1968); <i>Commonwealth v. DiPasquale</i>, 424 Pa. 500, 230 A.2d 449 (1967); <i>Commonwealth v. Myma</i>, 278 Pa. 505, 123 A. 486 (1924).</p> <p>The provision requiring notice of the court's intention to call a witness will give all parties an opportunity to be heard regarding the need for this, to object and to prepare for the cross-examination of the witness.</p> <p>Unlike F.R.E. 614(c), Pa.R.E. 614(c) does not permit objection to the court's calling or interrogating witnesses "at the next available opportunity when the jury is not present." The Federal Rule permits this to relieve counsel of "the embarrassment" which might arise by objecting to the judge's questions in the jury's presence. F.R.E. 614(c) advisory committee notes. This rationale is comparable to the rationale for the "automatic" objection when the judge is called as a witness in F.R.E. 605. Under the Pennsylvania rules, the appropriate time for objecting to the calling of a witness by the court is when the court gives notice of</p>	<p>Pa.R.E. 614(a) and (b) differ from F.R.E. 614(a) and (b) in several respects. The phrase relating to the court's "function as an impartial arbiter" has been added to Pa.R.E. 614(a), and the clause regarding "interest of justice" has been added in Pa.R.E. 614(b). These additions are consistent with Pennsylvania law. <i>See Commonwealth v. Crews</i>, 429 Pa. 16, 239 A.2d 350 (1968); <i>Commonwealth v. DiPasquale</i>, 424 Pa. 500, 230 A.2d 449 (1967); <i>Commonwealth v. Myma</i>, 278 Pa. 505, 123 A. 486 (1924).</p> <p>Pa.R.E. 614(a) also differs from F.R.E. 614(a) in that the Pennsylvania Rule requires the court to give notice of its intent to call a witness.</p> <p>Pa.R.E. 614(c), unlike F.R.E. 614(c), does not permit an objection to the court's calling or questioning a witness "at the next available opportunity when the jury is not present." Pa.R.E. 614(c) is consistent with Pa.R.E. 103(a)(1)(A), which requires a "timely objection." The requirement that the objecting party be given an opportunity make its objection out of the presence of the jury is consistent with Pa.R.E. 103(d).</p>
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its intention as required by Pa.R.E. 614(a). The court's notice should always take place out of the presence of the jury. When the court's questions to a witness are thought to be objectionable, the issue must be raised when the questions are put. In this way, the jury will not hear the evidence sought if the objection is sustained.

Note: Adopted May 8, 1998, effective October 1, 1998; rescinded and replaced _____, 2011, effective _____, 2011.

Committee Explanatory Reports:

Final Report explaining the _____, 2011 rescission and replacement published with the Court's Order at ___ Pa.B. __ (_____, 2011).

Rule 615

Rule 615. Sequestration of witnesses	Rule 615. Sequestering Witnesses
<p>At the request of a party or on its own motion, the court may order witnesses sequestered so that they cannot learn of the testimony of other witnesses. This section does not authorize sequestration of the following:</p> <p>(1) a party who is a natural person or the guardian of a party who is a minor or an incapacitated person;</p> <p>(2) an officer or employee of a party which is not a natural person (including the Commonwealth) designated as its representative by its attorney; or</p> <p>(3) a person whose presence is shown by a party to be essential to the presentation of the party's cause.</p>	<p>At a party's request the court may order witnesses sequestered so that they cannot learn of other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize sequestering:</p> <p>(a) a party who is a natural person;</p> <p>(b) an officer or employee of a party that is not a natural person (including the Commonwealth) after being designated as the party's representative by its attorney;</p> <p>(c) a person whose presence a party shows to be essential to presenting the party's claim or defense; or</p> <p>(d) a person authorized by statute or rule to be present.</p>

Comment

<p>Pa.R.E. 615 differs from F.R.E. 615. Pa.R.E. 615 uses the term "sequestration" instead of "exclusion" and substitutes "learn of" for "hear" in the first sentence. It also puts sequestration within the discretion of the court rather than making it mandatory upon motion of a party. Finally, Pa.R.E. 615 adds the guardian of a minor or incapacitated person to the first category of persons whom the court may not sequester.</p> <p>Sequestration, i.e., barring a witness from the courtroom during the testimony of other witnesses and prohibiting direct and indirect communication both in and out of the courtroom is designed to discourage and expose fabrication, collusion, inaccuracies and inconsistencies. 1 McCormick, Evidence, § 50 (4th ed. 1992). Placing it within the discretion of the trial court is in conformity with Pennsylvania law. See <i>Commonwealth v. Albrecht</i>, 510 Pa. 603, 511 A.2d 764 (1986) (the decision of the trial court on whether or not to sequester a witness will not be reversed absent a clear abuse of discretion). Examples of abuse of discretion may be found in <i>Commonwealth v. Fant</i>, 480 Pa. 586, 391 A.2d 1040 (1978) and <i>Commonwealth v. Turner</i>, 371 Pa. 417, 88 A.2d 915 (1952)(refusal to sequester detectives who allegedly witnessed inculpatory statement).</p> <p>The three categories of persons listed in Pa.R.E. 615 whom the court may not sequester are akin to those</p>	<p>Pa.R.E. 615 differs from F.R.E. 615 in that the word "sequestering" is used instead of the word "excluding", and the rule is discretionary not mandatory. Both of these are consistent with prior Pennsylvania law. See <i>Commonwealth v. Albrecht</i>, 510 Pa. 603, 511 A.2d 764 (1986). Pa.R.E. 615 uses the term "learn of" rather than the word "hear." This indicates that the court's order may prohibit witnesses from using other means of learning of the testimony of other witnesses. Pa.R.E. 615(b) adds the parenthetical (including the Commonwealth).</p> <p>Pa.R.E 615(d) differs from the Federal Rule in that it adds the words "or rule." This includes persons such as the guardian of a minor, see Pa.R.C.P. 2027, and the guardian of an incapacitated person, see Pa.R.C.P. 2053.</p>
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in the Federal Rule, with some slight differences. Clause (1) covers natural persons who are parties; their exclusion would raise constitutional problems of confrontation and due process. The inclusion of guardians of parties who are minors or incapacitated persons is consistent with Pa.R.Civ.P. 2027 (minors) and 2053 (incapacitated persons), which place the conduct of actions on behalf of those parties under the supervision and control of their guardians. Clause (2) applies to the designated representatives of a party that is not a natural person. The parenthetical phrase relating to the Commonwealth does not appear in F.R.E. 615(2); it is meant to make clear that in a criminal case, the prosecution has a right to have the law enforcement agent primarily responsible for investigating the case at the counsel table to assist in presenting the case, even though the agent will be a witness. See Notes of the Committee on the Judiciary, Senate Report No. 93-1274, and Advisory Committee Notes to F.R.E. 615(2). Clause (3) refers to persons such as the one who handled the transaction involved in the case or an expert relied upon by counsel for advice in managing the litigation.

The trial court has discretion in choosing a remedy for violation of a sequestration order. See *Commonwealth v. Smith*, 464 Pa. 314, 346 A.2d 757 (1975). Remedies include ordering a mistrial, forbidding the testimony of the offending witness, or an instruction to the jury. *Commonwealth v. Scott*, 496 Pa. 78, 436 A.2d 161 (1981).

The provisions of Pa.R.E. 615 are subject to the control of the trial court under Pa.R.E. 611(a).

The trial court has discretion in choosing a remedy for violation of a sequestration order. See *Commonwealth v. Smith*, 464 Pa. 314, 346 A.2d 757 (1975). Remedies include ordering a mistrial, forbidding the testimony of the offending witness, or an instruction to the jury. *Commonwealth v. Scott*, 496 Pa. 78, 436 A.2d 161 (1981).

Note: Adopted May 8, 1998, effective October 1, 1998; rescinded and replaced _____, 2011, effective _____, 2011.

Committee Explanatory Reports:

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Rule 701

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY Rule 701. Opinion testimony by lay witnesses	ARTICLE VII. OPINIONS AND EXPERT TESTIMONY Rule 701. Opinion Testimony by Lay Witnesses
<p>If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are rationally based on the perception of the witness, helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.</p>	<p>If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:</p> <ul style="list-style-type: none"> (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Comment

<p>This rule is identical to F.R.E. 701 except for the deletion of the (a) and (b) divisions within the text of the rule. No substantive changes result from this deletion.</p> <p>F.R.E. 701 was amended, effective December 1, 2000, to clarify that testimony based on scientific, technical, or specialized knowledge is governed by F.R.E. 702, and not F.R.E. 701. The 2001 amendment to Pa.R.E. 701 is likewise aimed at clarifying that testimony based on scientific, technical, and specialized knowledge is governed by Pa.R.E. 702.</p> <p>Pa.R.E. 701 is consistent with prior Pennsylvania case law. See <i>Lewis v. Mellor</i>, 259 Pa. Super. 509, 393 A.2d 941 (1978)(adopting F.R.E. 701). Under <i>Lewis</i>, lay opinion may embrace the ultimate issue. See Pa.R.E. 704. The trial judge may exclude the opinion if the trial judge decides that it would not be helpful, or would confuse, mislead, or prejudice the jury, or would waste time. <i>Lewis</i>, 259 Pa. Super. at 523-24, 393 A.2d at 949.</p> <p>Note: Adopted May 8, 1998, effective October 1, 1998; amended November 2, 2001; effective January 2, 2001.</p> <p>Committee Explanatory Reports:</p> <p>Final Report explaining the November 2, 2001, amendments published with the Court's Order at 31 Pa.B. (November 24, 2001).</p>	<p>This rule is identical to F.R.E. 701.</p> <p>Note: Adopted May 8, 1998, effective October 1, 1998; amended November 2, 2001, effective January 2, 2002; rescinded and replaced _____, 2011, effective _____, 2011.</p> <p>Committee Explanatory Reports:</p> <p>Final Report explaining the November 2, 2001, amendments published with the Court's Order at 31 Pa.B. 6384 (November 24, 2001).</p>
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Rule 701

	Final Report explaining the _____, 2011 rescission and replacement published with the Court's Order at _____ Pa.B. _____ (_____, 2011).
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Rule 702

Rule 702. Testimony by experts	Rule 702. Testimony by Expert Witnesses
<p>If scientific, technical or other specialized knowledge beyond that possessed by a layperson will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.</p>	<p>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:</p> <ul style="list-style-type: none"> (a) the expert’s scientific, technical or other specialized knowledge has gained general acceptance in its field; (b) the subject of the expert’s testimony is beyond the competence of a layperson; and (c) the expert’s testimony will help the trier of fact to understand the evidence or to determine a fact in issue.

Comment

<p>Pa.R.E. 702 differs from F.R.E. 702 in that the words “beyond that possessed by a lay person” have been added to make the rule consistent with Pennsylvania law. See <i>Commonwealth v. Dunkle</i>, 529 Pa. 168, 602 A.2d 830 (1992).</p> <p>Adoption of Pa.R.E. 702 does not alter Pennsylvania’s adoption of the standard in <i>Frye v. United States</i>, 293 F. 1013 (D.C. Cir. 1923), which requires scientific evidence to have “general acceptance” in the relevant scientific community. See <i>Commonwealth v. Dunkle, supra</i>; <i>Commonwealth v. Nazarovitch</i>, 496 Pa. 97, 436 A.2d 170 (1981); <i>Commonwealth v. Topa</i>, 471 Pa. 223, 369 A.2d 1277 (1977). In 1993, the United States Supreme Court held that <i>Frye</i> was superseded in the federal courts by the adoption of F.R.E. 702. <i>Daubert v. Merrell Dow Pharmaceuticals, Inc.</i>, 509 U.S. 579 (1993). In <i>Grady v. Frito-Lay, Inc.</i>, 576 Pa. 546, 839 A.2d 1038 (2003), a majority of the Pennsylvania Supreme Court rejected the <i>Daubert</i> standard and affirmed the applicability of the <i>Frye</i> standard in the Pennsylvania state courts.</p> <p>Pa.R.E. 702 does not change the Pennsylvania rule for qualifying a witness to testify as an expert. In <i>Miller v. Brass Rail Tavern, Inc.</i>, 541 Pa. 474, 480-81, 664 A.2d 525, 528 (1995), the Supreme Court stated:</p> <p style="padding-left: 40px;">The test to be applied when qualifying a witness to testify as an expert witness is whether the witness has any reasonable pretension to specialized knowledge on the subject under investigation. If he does, he may testify and the weight to be given to</p>	<p>Pa.R.E. 702 differs from F.R.E. 702. Pa.R.E. 702(a) applies the “general acceptance” test for the admissibility of scientific, technical, or other specialized knowledge. This test is consistent with Pennsylvania law. See <i>Grady v. Frito-Lay, Inc.</i>, 576 Pa. 546, 839 A.2d 1038 (2003). This rule rejects the federal test derived from <i>Daubert v. Merrell Dow Pharmaceuticals, Inc.</i>, 509 U.S. 579 (1993).</p> <p>Pa.R.E. 702(b) is consistent with Pennsylvania law. See <i>Commonwealth v. Dunkle</i>, 529 Pa.168, 602 A.2d 830 (1992).</p> <p>Pa.R.E. 702 does not change the Pennsylvania rule for qualifying a witness to testify as an expert. In <i>Miller v. Brass Rail Tavern, Inc.</i>, 541 Pa. 474, 480-81, 664 A.2d 525, 528 (1995), the Supreme Court stated:</p> <p style="padding-left: 40px;">The test to be applied when qualifying a witness to testify as an expert witness is whether the witness has any reasonable pretension to specialized knowledge on the subject under investigation. If he does, he may testify and the weight to be given to</p>
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Rule 702

<p>such testimony is for the trier of fact to determine.</p> <p>Pa.R.E. 702 does not change the requirement that an expert's opinion must be expressed with reasonable certainty. See <i>McMahon v. Young</i>, 442 Pa. 484, 276 A.2d 534 (1971).</p> <p>Pa.R.E. 702 states that an expert may testify in the form of an "opinion or otherwise." Much of the literature assumes that experts testify only in the form of an opinion. The language "or otherwise" reflects the fact that experts frequently are called upon to educate the trier of fact about the scientific or technical principles relevant to the case. See F.R.E. 702 advisory committee notes.</p>	<p>such testimony is for the trier of fact to determine.</p> <p>Pa.R.E. 702 does not change the requirement that an expert's opinion must be expressed with reasonable certainty. See <i>McMahon v. Young</i>, 442 Pa. 484, 276 A.2d 534 (1971).</p> <p>Pa.R.E. 702 states that an expert may testify in the form of an "opinion or otherwise." Much of the literature assumes that experts testify only in the form of an opinion. The language "or otherwise" reflects the fact that experts frequently are called upon to educate the trier of fact about the scientific or technical principles relevant to the case.</p> <p>Note: Adopted May 8, 1998, effective October 1, 1998; Comment revised April 1, 2004, effective May 10, 2004; rescinded and replaced _____, 2011, effective _____, 2011.</p> <p>Committee Explanatory Reports:</p> <p>Final Report explaining the _____, 2011 rescission and replacement published with the Court's Order at ___ Pa.B. __ (_____, 2011).</p>
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Rule 703

Rule 703. Bases of opinion testimony by experts	Rule 703. Bases of an Expert's Opinion Testimony
<p>The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.</p>	<p>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.</p>

Comment

<p>Pa.R.E. 703 differs from F.R.E. 703 as discussed below. Pa.R.E. 703 is consistent with prior Pennsylvania case law.</p> <p>F.R.E. 703 was amended on December 1, 2000, to add a balancing test that tilts against disclosure to a jury of otherwise inadmissible facts or data upon which an expert witness bases his or her opinion. In Pennsylvania, however, Pa.R.E. 705 requires an expert witness to testify as to the facts or data upon which the witness's opinion is based, whether or not the facts or data would otherwise be admissible in evidence.</p> <p>Historically, Pennsylvania courts limited the facts or data upon which an expert could base an opinion to those obtained from firsthand knowledge, or from substantive evidence admitted at trial. <i>See, e.g. Collins v. Hand</i>, 431 Pa. 378, 246 A.2d 398 (1968); <i>Murray v. Siegal</i>, 413 Pa. 23, 195 A.2d 790 (1963). In the case of <i>Commonwealth v. Thomas</i>, 444 Pa. 436, 282 A.2d 693 (1971), the Pennsylvania Supreme Court adopted a rule that allows a medical expert witness to offer an opinion that is based, in part, on otherwise inadmissible hearsay, if it is of a type that is customarily relied on by the expert in the practice of the expert's profession.</p> <p>Later case law expanded the evidential ruling in the <i>Thomas</i> case to various non-medical expert witnesses. <i>See, e.g., Steinhauer v. Wilson</i>, 336 Pa. Super. 155, 485 A.2d 477 (1984) (expert on construction costs); <i>Maravich v. Aetna Life & Casualty Co.</i>, 350 Pa. Super. 392, 504 A.2d 477 (1986) (fire marshal); <i>Kearns v. DeHaas</i>, 377 Pa. Super. 392, 546 A.2d 1226 (1988) (vocational expert); <i>In re Glosser Bros.</i>, 382 Pa. Super. 177, 555 A.2d 129 (1989) (tax accountant); <i>Commonwealth v. Bowser</i>, 425 Pa. Super. 24, 624 A.2d 125 (1993) (accident reconstruction expert).</p>	<p>This rule is identical to the first two sentences of F.R.E. 703. It does not include the third sentence of the Federal Rule that provides that the facts and data that are the bases for the expert's opinion are not admissible unless their probative value substantially outweighs their prejudicial effect. This is inconsistent with Pennsylvania law which requires that facts and data that are the bases for the expert's opinion must be disclosed to the trier of fact. <i>See Pa.R.E. 705.</i></p>
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Rule 703

Pa.R.E. 703 requires that the facts or data upon which an expert witness bases an opinion be “of a type reasonably relied upon by experts in the particular field” Whether the facts or data satisfy this requirement is a preliminary question to be determined by the trial court under Pa.R.E. 104(a). If an expert witness relies on novel scientific evidence, Pa.R.C.P.No. 207.1 sets forth the procedure for objecting, by pretrial motion, on the ground that the testimony is inadmissible under Pa.R.E. 702, or Pa.R.E. 703, or both.

When an expert testifies about the underlying facts and data that support the expert’s opinion and the evidence would be otherwise inadmissible, the trial judge, upon request shall or on his own initiative may instruct the jury to consider the facts and data only to explain the basis for the expert’s opinion, and not as substantive evidence.

An expert witness cannot be a mere conduit for the opinion of another. Cases hold that it is error for an expert witness to relate the opinion of a non-testifying expert unless the witness has reasonably relied upon it, in part, in forming the witness’s own opinion. See, e.g., *Foster v. McKeesport Hospital*, 260 Pa. Super. 485, 394 A.2d 1031 (1978); *Allen v. Kaplan*, 439 Pa. Super. 263, 653 A.2d 1249 (1995).

Note: Adopted September 11, 1998, effective October 1, 1998; September 11, 2003 Comment revised effective September 30, 2003.

Pa.R.E. 703 requires that the facts or data upon which an expert witness bases an opinion be “of a type reasonably relied upon by experts in the particular field” Whether the facts or data satisfy this requirement is a preliminary question to be determined by the trial court under Pa.R.E. 104(a). If an expert witness relies on novel scientific evidence, Pa.R.C.P. 207.1 sets forth the procedure for objecting, by pretrial motion, on the ground that the testimony is inadmissible under Pa.R.E. 702, or Pa.R.E. 703, or both.

When an expert testifies about the underlying facts and data that support the expert’s opinion and the evidence would be otherwise inadmissible, the trial judge upon request must, or on the judge’s own initiative may, instruct the jury to consider the facts and data only to explain the basis for the expert’s opinion, and not as substantive evidence.

An expert witness cannot be a mere conduit for the opinion of another. An expert witness may not relate the opinion of a non-testifying expert unless the witness has reasonably relied upon it in forming the witness’s own opinion. See, e.g., *Foster v. McKeesport Hospital*, 260 Pa. Super. 485, 394 A.2d 1031 (1978); *Allen v. Kaplan*, 439 Pa. Super. 263, 653 A.2d 1249 (1995).

Note: Adopted May 8, 1998, effective October 1, 1998; Comment revised September 11, 2003, effective September 30, 2003; rescinded and replaced _____, 2011, effective _____, 2011.

Committee Explanatory Reports:

Final Report explaining the September 11, 2003 revision of the Comment published with the Court’s Order at 33 Pa.B. 4784 (September 27, 2003).

Final Report explaining the _____, 2011 rescission and replacement published with the Court’s Order at ___ Pa.B. __ (_____, 2011).

Rule 704

Rule 704. Opinion on ultimate issue	Rule 704. Opinion on an Ultimate Issue
<p>Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.</p>	<p>An opinion is not objectionable just because it embraces an ultimate issue.</p>

Comment

<p>Pa.R.E. 704 is substantively the same as F.R.E. 704(a) and is consistent with Pennsylvania law. F.R.E. 704(b) has not been adopted.</p> <p>Under Pennsylvania law, the trial judge has discretion to allow lay opinion on the ultimate issue. The judge must balance the helpfulness of the testimony against its potential to cause confusion or prejudice. See <i>Lewis v. Mellor</i>, 259 Pa. Super. 509, 393 A.2d 941 (1978); Pa.R.E. 701 and its comment.</p> <p>Pennsylvania law allows expert opinion testimony on the ultimate issue. See <i>Commonwealth v. Daniels</i>, 480 Pa. 340, 390 A.2d 172 (1978); <i>Cooper v. Metropolitan Life Ins. Co.</i>, 323 Pa. 295, 186 A.125 (1936). As with lay opinions, the trial judge has discretion to admit or exclude expert opinions on the ultimate issue depending on the helpfulness of the testimony versus its potential to cause confusion or prejudice. See <i>Kozak v. Struth</i>, 515 Pa. 554, 531 A.2d 420 (1987); <i>Commonwealth v. Brown</i>, 408 Pa. Super. 246, 596 A.2d 840 (1991).</p> <p>Pa.R.E. 704 omits F.R.E. 704(b) which prohibits an expert from testifying with respect to whether the defendant in a criminal case did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. When the Superior Court in <i>Lewis v. Mellor</i>, adopted F.R.E. 704 in 1978, it only contained part (a). F.R.E. 704(b) was added in 1984. The Pennsylvania Supreme Court has consistently held that expert psychiatric testimony is admissible to negate the specific intent to kill which is essential to first degree murder. See <i>Commonwealth v. Terry</i>, 513 Pa. 381, 521 A.2d 398 (1987); <i>Commonwealth v. Garcia</i>, 505 Pa. 304, 479 A.2d 473 (1984); <i>Commonwealth v. Walzack</i>, 468 Pa. 210, 360 A.2d 914 (1976).</p>	<p>Pa.R.E. 704 is identical to F.R.E. 704(a).</p> <p>F.R.E. 704(b) is not adopted. The Federal Rule prohibits an expert witness in a criminal case from stating 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 a defense. This is inconsistent with Pennsylvania law. See <i>Commonwealth v. Walzack</i>, 468 Pa. 210, 360 A.2d 914 (1976).</p> <p>Note: Adopted May 8, 1998, effective October 1, 1998; rescinded and replaced _____, 2011, effective _____, 2011.</p>
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Rule 704

	<p>Committee Explanatory Reports:</p> <p>Final Report explaining the _____, 2011 rescission and replacement published with the Court's Order at ___ Pa.B. __ (_____, 2011).</p>
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Rule 706

Rule 705. Disclosure of facts or data underlying expert opinion	Rule 705. Disclosing the Facts or Data Underlying an Expert's Opinion
The expert may testify in terms of opinion or inference and give reasons therefor; however, the expert must testify as to the facts or data on which the opinion or inference is based.	If an expert states an opinion the expert must state the facts or data on which the opinion is based.

Comment

<p>The text and substance of Pa.R.E. 705 differ significantly from F.R.E. 705. The Federal Rule generally does not require an expert witness to disclose the facts upon which an opinion is based prior to expressing the opinion. Instead, the cross-examiner bears the burden of probing the basis of the opinion. Pennsylvania does not follow the Federal Rule. <i>See Kozak v. Struth</i>, 515 Pa. 554, 560, 531 A.2d 420, 423 (1987) (declining to adopt F.R.E. 705, the Court reasoned that “requiring the proponent of an expert opinion to clarify for the jury the assumptions upon which the opinion is based avoids planting in the juror’s mind a general statement likely to remain with him in a jury room when the disputed details are lost.”) Relying on cross examination to illuminate the underlying assumption, as F.R.E. 705 does, may further confuse jurors already struggling to follow complex testimony. <i>Id.</i></p> <p>Accordingly, <i>Kozak</i> requires disclosure of the facts used by the expert in forming an opinion. The disclosure can be accomplished in several ways. One way is to ask the expert to assume the truth of testimony the expert has heard or read. <i>The Kroeger Co. v. W.C.A.B.</i>, 101 Pa. Cmwlth. 629, 516 A.2d 1335 (1986); <i>Tobash v. Jones</i>, 419 Pa. 205, 213 A.2d 588 (1965). Another option is to pose a hypothetical question to the expert. <i>Dietrich v. J.I. Case Co.</i>, 390 Pa. Super. 475, 568 A.2d 1272 (1990); <i>Hussy v. May Department Stores, Inc.</i>, 238 Pa. Super. 431, 357 A.2d 635 (1976).</p> <p>The salient facts relied upon as the basis of the expert opinion must be in the record so that the jury may evaluate the opinion. <i>See Commonwealth v. Rounds</i>, 518 Pa. 204, 542 A.2d 997 (1988). The expert’s testimony regarding the facts or data on which the opinion is based is subject to Pa.R.E. 703.</p>	<p>The text and substance of Pa.R.E. 705 differ significantly from F.R.E. 705. The Federal Rule generally does not require an expert witness to disclose the facts upon which an opinion is based prior to expressing the opinion. Instead, the cross-examiner bears the burden of probing the basis of the opinion. Pennsylvania does not follow the Federal Rule. <i>See Kozak v. Struth</i>, 515 Pa. 554, 560, 531 A.2d 420, 423 (1987) (declining to adopt F.R.E. 705, the Court reasoned that “requiring the proponent of an expert opinion to clarify for the jury the assumptions upon which the opinion is based avoids planting in the juror’s mind a general statement likely to remain with him in the jury room when the disputed details are lost.”) Relying on cross-examination to illuminate the underlying assumption, as F.R.E. 705 does, may further confuse jurors already struggling to follow complex testimony. <i>Id.</i></p> <p>Accordingly, <i>Kozak</i> requires disclosure of the facts used by the expert in forming an opinion. The disclosure can be accomplished in several ways. One way is to ask the expert to assume the truth of testimony the expert has heard or read. <i>Kroeger Co. v. W.C.A.B.</i>, 101 Pa. Cmwlth. 629, 516 A.2d 1335 (1986); <i>Tobash v. Jones</i>, 419 Pa. 205, 213 A.2d 588 (1965). Another option is to pose a hypothetical question to the expert. <i>Dietrich v. J.I. Case Co.</i>, 390 Pa. Super. 475, 568 A.2d 1272 (1990); <i>Hussey v. May Department Stores, Inc.</i>, 238 Pa. Super. 431, 357 A.2d 635 (1976).</p> <p>When an expert testifies about the underlying facts and data that support the expert’s opinion and the evidence would be otherwise inadmissible, the trial judge upon request must, or on the judge’s own initiative may, instruct the jury to consider the facts and data only to explain the basis for the expert’s opinion, and not as substantive evidence.</p> <p>Note: Adopted May 8, 1998, effective October 1, 1998; rescinded and replaced _____, 2011, effective _____, 2011.</p>
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Rule 706

	<p>Committee Explanatory Reports:</p> <p>Final Report explaining the _____, 2011 rescission and replacement published with the Court's Order at ___ Pa.B. __ (_____, 2011).</p>
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Rule 706

Rule 706. Court appointed experts	Rule 706. Court-Appointed Expert Witnesses
Where the court has appointed an expert witness, the witness appointed shall advise the parties of the witness' findings, if any. The witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness. In civil cases, the witness' deposition may be taken by any party.	Where the court has appointed an expert witness, the witness appointed must advise the parties of the witness's findings, if any. The witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by any party, including a party calling the witness. In civil cases, the witness's deposition may be taken by any party.

Comment

<p>Pa.R.E. 706 differs from F.R.E. 706. Unlike the Federal Rule, Pa.R.E. 706 does not affect the scope of the trial court's power to appoint experts. Pa.R.E. 706 provides only the procedures for obtaining the testimony of experts after the court has appointed them.</p> <p>Pennsylvania law provides for the appointment of experts in some instances. See 23 Pa.C.S.A. § 5104 (disputed paternity proceeding); Pa.R.C.P. 1515 & 1530(e) (in equity proceedings, court may appoint accountants and auditors as experts). In <i>Commonwealth v. Correa</i>, 437 Pa. Super. 1, 648 A.2d 1199 (1994), the Superior Court held that the trial court had inherent power to appoint an expert.</p> <p>See also Pa.R.E. 614 (Calling and Interrogation of Witnesses By Court).</p>	<p>Pa.R.E. 706 differs from F.R.E. 706. Unlike the Federal Rule, Pa.R.E. 706 does not affect the scope of the trial court's power to appoint experts. Pa.R.E. 706 provides only the procedures for obtaining the testimony of experts after the court has appointed them.</p> <p>In <i>Commonwealth v. Correa</i>, 437 Pa. Super. 1, 648 A.2d 1199 (1994), abrogated on other grounds by <i>Commonwealth v. Weston</i>, 561 Pa. 199, 749 A.2d 458 (2000), the Superior Court held that the trial court had inherent power to appoint an expert. 23 Pa.C.S. § 5104 provides for the appointment of experts to conduct blood tests in paternity proceedings.</p> <p>See also Pa.R.E. 614 (Court's Calling or Examining a Witness).</p> <p>Note: Adopted May 8, 1998, effective October 1, 1998; rescinded and replaced _____, 2011, effective _____, 2011.</p> <p>Committee Explanatory Reports:</p> <p>Final Report explaining the _____, 2011 rescission and replacement published with the Court's Order at ___ Pa.B. __ (_____, 2011).</p>
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Rule 801

ARTICLE VIII. HEARSAY Rule 801. Definitions	ARTICLE VIII. HEARSAY Rule 801. Definitions That Apply to This Article
<p>The following definitions apply under this article:</p> <p>(a) Statement. A “statement” is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.</p>	<p>(a) Statement. “Statement” means a person’s oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.</p>
<p>(b) Declarant. A “declarant” is a person who makes a statement.</p>	<p>(b) Declarant. “Declarant” means the person who made the statement.</p>
<p>(c) Hearsay. “Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.</p>	<p>(c) Hearsay. “Hearsay” means a statement that</p> <p>(1) the declarant does not make while testifying at the current trial or hearing; and</p> <p>(2) a party offers in evidence to prove the truth of the matter asserted in the statement.</p>

Comment

<p>Pa.R.E. 801 is identical to subsections (a), (b) and (c) of F.R.E. 801. It is consistent with Pennsylvania law. F.R.E. 801(d) is not adopted. The subjects of F.R.E. 801(d), admissions and prior statements of witnesses, are covered in Pa.R.E. 803(25), Pa.R.E. 803.1., and Pa.R.E. 613(c).</p> <p>a. Statement. The definition of “statement” is consistent with Pennsylvania law. <i>See, e.g., Rafter v. Raymark Indus., Inc.</i>, 429 Pa. Super. 360, 632 A.2d 897 (1993) (oral or written assertion); <i>Commonwealth v. Rush</i>, 529 Pa. 498, 605 A.2d 792 (1992) (non-verbal conduct intended as an assertion). Communications that are not assertions are not hearsay. These would include questions, greetings, expressions of gratitude, exclamations, offers, instructions, warnings, etc.</p> <p>b. Declarant. Subsection (b) is consistent with Pennsylvania law. For hearsay purposes, the “declarant” is the person who makes an out-of-court statement, not the person who repeats it on the witness stand.</p> <p>c. Definition of Hearsay. Subsection (c), which defines hearsay, is consistent with Pennsylvania law, although the Pennsylvania cases have usually used the phrase “out-of-court statement,” in place of the phrase “other than one made by the declarant while testifying at the trial or hearing.” <i>See Heddings v. Steele</i>, 514 Pa. 569, 526 A.2d 349 (1987). The</p>	<p>Pa.R.E. 801(a), (b) and (c) are identical to F.R.E. 801(a), (b) and (c). The matters set out in F.R.E. 801(d)(1) (A Declarant-Witness’s Prior Statement) are covered in Pa.R.E. 803.1(1) and (2) and Pa.R.E. 613(c). The matters set out in F.R.E. 801(d)(2) (An Opposing Party’s Statement) are covered in Pa.R.E. 803(25).</p> <p>Communications that are not assertions are not hearsay. These would include questions, greetings, expressions of gratitude, exclamations, offers, instructions, warnings, etc.</p> <p>Pa.R.E. 801(c), which defines hearsay, is consistent with Pennsylvania law, although the Pennsylvania cases have usually defined hearsay as an “out-of-court statement offered to prove the truth of the matter asserted” instead of the definition used Pa.R.E. 801(c). <i>See Heddings v. Steele</i>, 514 Pa. 569, 526 A.2d 349 (1987). The adoption of the language of the</p>
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Rule 801

<p>adoption of the language of the Federal Rule is not intended to change existing law.</p> <p>A statement, other than one made by the declarant while testifying at the trial or hearing (an out-of-court statement), is hearsay only if it is offered to prove the truth of the matter asserted. There are many situations in which evidence of an out-of-court statement is offered for a purpose other than to prove the truth of the matter asserted.</p> <p>Sometimes an out-of-court statement has direct legal significance, whether or not it is true. For example, one or more out-of-court statements may constitute an offer, an acceptance, a promise, a guarantee, a notice, a representation, a misrepresentation, defamation, perjury, compliance with a contractual or statutory obligation, etc.</p> <p>More often, an out-of-court statement, whether or not it is true, constitutes circumstantial evidence from which the trier of fact may infer, alone or in combination with other evidence, the existence or non-existence of a fact in issue. For example, a declarant's out-of-court statement may imply his or her particular state of mind, or it may imply that a particular state of mind ensued in the recipient. Evidence of an out-of-court statement, particularly if it is proven untrue by other evidence, may imply the existence of a conspiracy, or fraud. Evidence of an out-of-court statement made by a witness, if inconsistent with the witness' testimony, may imply that the witness is an unreliable historian. Conversely, evidence of an out-of-court statement made by a witness that is consistent with the witness' testimony may imply the opposite. See Pa.R.E. 613.</p> <p>Note: Adopted May 8, 1998, effective October 1, 1998; Comment revised March 29, 2001, effective April 1, 2001.</p> <p>Committee Explanatory Reports:</p> <p>Final Report explaining the March 29, 2001 revision of the Comment published with the Court's Order at 31 Pa.B. 1995 (April 14, 2001).</p>	<p>Federal Rule is not intended to change existing law.</p> <p>A statement is hearsay only if it is offered to prove the truth of the matter asserted in the statement. There are many situations in which evidence of a statement is offered for a purpose other than to prove the truth of the matter asserted.</p> <p>Sometimes a statement has direct legal significance, whether or not it is true. For example, one or more statements may constitute an offer, an acceptance, a promise, a guarantee, a notice, a representation, a misrepresentation, defamation, perjury, compliance with a contractual or statutory obligation, etc.</p> <p>More often, a statement, whether or not it is true, constitutes circumstantial evidence from which the trier of fact may infer, alone or in combination with other evidence, the existence or non-existence of a fact in issue. For example, a declarant's statement may imply his or her particular state of mind, or it may imply that a particular state of mind ensued in the recipient. Evidence of a statement, particularly if it is proven untrue by other evidence, may imply the existence of a conspiracy, or fraud. Evidence of a statement made by a witness, if inconsistent with the witness's testimony, may imply that the witness is an unreliable historian. Conversely, evidence of a statement made by a witness that is consistent with the witness's testimony may imply the opposite. See Pa.R.E. 613(c).</p> <p>Note: Adopted May 8, 1998, effective October 1, 1998; Comment revised March 29, 2001, effective April 1, 2001; rescinded and replaced _____, 2011, effective _____, 2011.</p> <p>Committee Explanatory Reports:</p> <p>Final Report explaining the March 29, 2001 revision of the Comment published with the Court's Order at 31 Pa.B. 1995 (April 14, 2001).</p> <p>Final Report explaining the _____, 2011 rescission and replacement published with the Court's Order at ___ Pa.B. __ (_____, 2011).</p>
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Rule 802

Rule 802. Hearsay Rule	Rule 802. The Rule Against Hearsay
Hearsay is not admissible except as provided by these rules, by other rules prescribed by the Pennsylvania Supreme Court, or by statute.	Hearsay is not admissible except as provided by these rules, by other rules prescribed by the Pennsylvania Supreme Court, or by statute.

Comment

<p>Pa.R.E. 802 is similar to F.R.E. 802. It differs by referring to other rules prescribed by the Pennsylvania Supreme Court, rather than the United States Supreme Court, and by referring to statutes in general, rather than Acts of Congress. This rule is consistent with prior Pennsylvania case law.</p> <p>Often, hearsay will be admissible under an exception provided by these rules. See, e.g., Pa.Rs.E. 803, 803.1, and 804. On occasion, hearsay may be admitted pursuant to another rule promulgated by the Pennsylvania Supreme Court. For example, in civil cases, all or part of a deposition may be admitted pursuant to Pa.R.C.P. 4020, or a videotape deposition of an expert witness may be admitted pursuant to Pa.R.C.P. 4017.1(g).</p> <p>Also, hearsay may be admitted pursuant to a state statute. Examples include:</p> <ol style="list-style-type: none"> 1. A public record may be admitted pursuant to 42 Pa.C.S. § 6104. See <i>Comment</i> located at Pa.R.E. 803(8) [Not Adopted]. 2. A record of vital statistics may be admitted pursuant to 35 Pa.C.S. § 450.810. See <i>Comment</i> located at Pa.R.E. 803(9) [Not Adopted]. 3. In an action arising out of a contract under the Uniform Commercial Code, a document in due form 	<p>Pa.R.E. 802 differs from F.R.E. 802 in that it refers to other rules prescribed by the Pennsylvania Supreme Court, and to statutes in general, rather than federal statutes.</p> <p>Often, hearsay will be admissible under an exception provided by these rules. The organization of the Pennsylvania Rules of Evidence generally follows the organization of the Federal Rules of Evidence, but the Pennsylvania Rules' organization of the exceptions to the hearsay rule is somewhat different than the federal organization. There are three rules which contain the exceptions: Pa.R.E. 803 Exceptions to the Rule Against Hearsay – Regardless of Whether the Declarant is Available as a Witness, Pa.R.E. 803.1 Exceptions to the Rule Against Hearsay – Testimony of Declarant Necessary, and Pa.R.E. 804 Exceptions to the Rule Against Hearsay - When the Declarant is Unavailable as a Witness.</p> <p>On occasion, hearsay may be admitted pursuant to another rule promulgated by the Pennsylvania Supreme Court. For example, in civil cases, all or part of a deposition may be admitted pursuant to Pa.R.C.P. 4020, or a video deposition of an expert witness may be admitted pursuant to Pa.R.C.P. 4017.1(g). In preliminary hearings in criminal cases, the court may consider hearsay evidence pursuant to Pa.R.Crim.P. 542(E) and 1003(E).</p> <p>Also, hearsay may be admitted pursuant to a state statute. Examples include:</p> <ol style="list-style-type: none"> 1. A public record may be admitted pursuant to 42 Pa.C.S. § 6104. See <i>Comment</i> to Pa.R.E. 803(8) (Not Adopted). 2. A record of vital statistics may be admitted pursuant to 35 P.S. § 450.810. See <i>Comment</i> to Pa.R.E. 803(9) (Not Adopted).
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Rule 802

purporting to be a bill of lading, policy or certificate of insurance, official weigher's or inspector's certificate, consular invoice, or any other document authorized or required by the contract to be issued by a third party, may be introduced as *prima facie* evidence of the document's own authenticity and of the facts stated therein by the third party, pursuant to 13 Pa.C.S. § 1202.

4. In a civil case, a deposition of a licensed physician may be admitted pursuant to 42 Pa.C.S. § 5936.

5. In a criminal case, a deposition of a witness may be admitted pursuant to 42 Pa.C.S. § 5919.

6. In a criminal or civil case, an out-of-court statement of a witness 12 years of age or younger, describing certain kinds of sexual abuse, may be admitted pursuant to 42 Pa.C.S. § 5985.1.

7. In a dependency hearing, an out-of-court statement of a witness under 16 years of age, describing certain types of sexual abuse, may be admitted pursuant to 42 Pa.C.S. § 5986.

8. In a prosecution for speeding under the Pennsylvania Vehicle Code, a certificate of accuracy of an electronic speed timing device (radar) from a calibration and testing station appointed by the Pennsylvania Department of Motor Vehicles may be admitted pursuant to 75 Pa.C.S. § 3368(d).

On rare occasion, hearsay may be admitted pursuant to a federal statute. For example, when a person brings a civil action, in either federal or state court, against a common carrier to enforce an order of the Interstate Commerce Commission requiring the payment of damages, the findings and order of the Commission may be introduced as evidence of the facts stated in them. 49 U.S.C. § 11704(d)(1).

3. In a civil case, a deposition of a licensed physician may be admitted pursuant to 42 Pa.C.S. § 5936.

4. In a criminal case, a deposition of a witness may be admitted pursuant to 42 Pa.C.S. § 5919.

5. In a criminal or civil case, an out-of-court statement of a witness 12 years of age or younger, describing certain kinds of sexual abuse, may be admitted pursuant to 42 Pa.C.S. § 5985.1.

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7. In a prosecution for speeding under the Pennsylvania Vehicle Code, a certificate of accuracy of an electronic speed timing device (radar) from a calibration and testing station appointed by the Pennsylvania Department of Motor Vehicles may be admitted pursuant to 75 Pa.C.S. § 3368(d).

On rare occasion, hearsay may be admitted pursuant to a federal statute. For example, when a person brings a civil action, in either federal or state court, against a common carrier to enforce an order of the Interstate Commerce Commission requiring the payment of damages, the findings and order of the Commission may be introduced as evidence of the facts stated in them. 49 U.S.C. § 11704(d)(1).

Hearsay Exceptions and the Right of Confrontation of a Defendant in a Criminal Case

The exceptions to the hearsay rule in Rules 803, 803.1, and 804 and the exceptions provided by other rules or by statute are applicable both in civil and criminal cases. In a criminal case, however, hearsay that is offered against a defendant under an exception from the hearsay rule provided by these rules or by another rule or statute may sometimes be excluded because its admission would violate the defendant's right "to be confronted with the witnesses against him" under the Sixth Amendment of the United States Constitution, or "to be confronted with the witnesses against him" under Article I, § 9 of the Pennsylvania Constitution.

The relationship between the hearsay rule and the

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Confrontation Clause in the Sixth Amendment was explained by the United States Supreme Court in *California v. Green*, 399 U.S. 149, 155-56 (1970):

While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception....

Given the similarity of the values protected, however, the modification of a State's hearsay rules to create new exceptions for the admission of evidence against a defendant, will often raise questions of compatibility with the defendant's constitutional right to confrontation.

In *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court, overruling its prior opinion in *Ohio v. Roberts*, 448 U.S. 56 (1980), interpreted the Confrontation Clause to prohibit the introduction of "testimonial" hearsay from an unavailable witness against a defendant in a criminal case unless the defendant had an opportunity to confront and cross-examine the declarant, regardless of its exception from the hearsay rule, except, perhaps, if the hearsay qualifies as a dying declaration (Pa.R.E. 804(b)(2)).

In short, when hearsay is offered against a defendant in a criminal case, the defendant may interpose three separate objections: (1) admission of the evidence would violate the hearsay rule, (2) admission of the evidence would violate defendant's right to confront the witnesses against him under the Sixth Amendment of the United States Constitution, and (3) admission of the evidence would violate defendant's right "to be confronted with the witnesses against him" under Article I, § 9 of the Pennsylvania Constitution.

Note: Adopted May 8, 1998, effective October 1, 1998; Comment revised March 23, 1999, effective immediately; Comment revised March 10, 2000, effective immediately; Comment revised March 29, 2001, effective April 1, 2001.

Note: Adopted May 8, 1998, effective October 1, 1998; Comment revised March 23, 1999, effective immediately; Comment revised March 10, 2000, effective immediately; Comment revised March 29, 2001, effective April 1, 2001; rescinded and replaced _____, 2011, effective _____, 2011.

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<p>Committee Explanatory Reports:</p> <p>Final Report explaining the March 23, 1999 technical revisions to the Comment published with the Court's Order at 29 Pa.B. 1714 (April 3, 1999).</p> <p>Final Report explaining the March 10, 2000 changes updating the seventh paragraph of the Comment published with the Court's Order at 30 Pa.B. 1641 (March 25, 2000).</p> <p>Final Report explaining the March 29, 2001 revision of the Comment published with the Court's Order at 31 Pa.B. 1995 (April 14, 2001).</p>	<p>Committee Explanatory Reports:</p> <p>Final Report explaining the March 23, 1999 technical revisions to the Comment published with the Court's Order at 29 Pa.B. 1714 (April 3, 1999).</p> <p>Final Report explaining the March 10, 2000 changes updating the seventh paragraph of the Comment published with the Court's Order at 30 Pa.B. 1641 (March 25, 2000).</p> <p>Final Report explaining the March 29, 2001 revision of the Comment published with the Court's Order at 31 Pa.B. 1995 (April 14, 2001).</p> <p>Final Report explaining the _____, 2011 rescission and replacement published with the Court's Order at ___ Pa.B. __ (_____, 2011).</p>
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Rule 803

Rule 803. Hearsay exceptions; availability of declarant immaterial	Rule 803. Exceptions to the Rule Against Hearsay - Regardless of Whether the Declarant Is Available as a Witness
<p>The following statements, as hereinafter defined, are not excluded by the hearsay rule, even though the declarant is available as a witness:</p> <p>(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.</p>	<p>The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:</p> <p>(1) Present Sense Impression. A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.</p>

Comment

<p>Pa.R.E. 803(1) is identical to F.R.E. 803(1). It is consistent with Pennsylvania law. See <i>Commonwealth v. Peterkin</i>, 511 Pa. 299, 513 A.2d 373 (1986).</p> <p>For this exception to apply, declarant need not be excited or otherwise emotionally affected by the event or condition perceived. The trustworthiness of the statement arises from its timing. The requirement of contemporaneousness, or near contemporaneousness, reduces the chance of premeditated prevarication or loss of memory.</p>	<p>This rule is identical to F.R.E. 803(1).</p> <p>For this exception to apply, declarant need not be excited or otherwise emotionally affected by the event or condition perceived. The trustworthiness of the statement arises from its timing. The requirement of contemporaneousness, or near contemporaneousness, reduces the chance of premeditated prevarication or loss of memory.</p>
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Rule 803

Rule 803(2) Excited utterance.	Rule 803(2). Excited Utterance
<p>(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.</p>	<p>(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.</p>

Comment

<p>Pa.R.E. 803(2) is identical to F.R.E. 803(2). It is consistent with Pennsylvania law. See <i>Allen v. Mack</i>, 345 Pa. 407, 28 A.2d 783 (1942); <i>Commonwealth v. Barnes</i>, 310 Pa. Super. 480, 456 A.2d 1037 (1983).</p> <p>This exception has a more narrow base than the exception for a present sense impression, because it requires an event or condition that is <i>startling</i>. However, it is broader in scope because an excited utterance (1) need not describe or explain the startling event or condition; it need only <i>relate</i> to it, and (2) need not be made contemporaneously with, or immediately after, the startling event. It is sufficient if the stress of excitement created by the startling event or condition persists as a substantial factor in provoking the utterance.</p> <p>There is no set time interval following a startling event or condition after which an utterance relating to it will be ineligible for exception to the hearsay rule as an excited utterance. In <i>Commonwealth v. Gore</i>, 262 Pa. Super. 540, 547B48, 396 A.2d 1302, 1305 (1978), the court explained:</p> <p>The declaration need not be strictly contemporaneous with the existing cause, nor is there a definite and fixed time limit.... Rather, each case must be judged on its own facts, and a lapse of time of several hours has not negated the characterization of a statement as an “excited utterance.” ... The crucial question, regardless of the time lapse, is whether, at the time the statement is made, the nervous excitement continues to dominate while the reflective processes remain in abeyance.</p>	<p>This rule is identical to F.R.E. 803(2).</p> <p>This exception has a more narrow base than the exception for a present sense impression, because it requires an event or condition that is <i>startling</i>. However, it is broader in scope because an excited utterance (1) need not describe or explain the startling event or condition; it need only <i>relate</i> to it, and (2) need not be made contemporaneously with, or immediately after, the startling event. It is sufficient if the stress of excitement created by the startling event or condition persists as a substantial factor in provoking the utterance.</p> <p>There is no set time interval following a startling event or condition after which an utterance relating to it will be ineligible for exception to the hearsay rule as an excited utterance. In <i>Commonwealth v. Gore</i>, 262 Pa. Super. 540, 547, 396 A.2d 1302, 1305 (1978), the court explained:</p> <p>The declaration need not be strictly contemporaneous with the existing cause, nor is there a definite and fixed time limit.... Rather, each case must be judged on its own facts, and a lapse of time of several hours has not negated the characterization of a statement as an “excited utterance.” ... The crucial question, regardless of the time lapse, is whether, at the time the statement is made, the nervous excitement continues to dominate while the reflective processes remain in abeyance.</p>
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Rule 803

Rule 803(3) Then existing mental, emotional, or physical condition.	Rule 803(3). Then-Existing Mental, Emotional, or Physical Condition
<p>(3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition, such as intent, plan, motive, design, mental feeling, pain, and bodily health. A statement of memory or belief offered to prove the fact remembered or believed is included in this exception only if it relates to the execution, revocation, identification, or terms of declarant's will.</p>	<p>(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.</p>

Comment

<p>Pa.R.E. 803(3) is similar to F.R.E. 803(3). The wording has been changed to improve readability and to eliminate a confusing double negative. The meaning remains the same.</p> <p>This exception combines what might otherwise be considered several different exceptions to the hearsay rule. The common factor is that they are all sometimes referred to by the non specific phrase, "state of mind."</p> <p>This exception is consistent with Pennsylvania law. See <i>Commonwealth v. Pronkoskie</i>, 477 Pa. 132, 383 A.2d 858 (1978)(statements of present physical condition and emotional feelings); <i>Commonwealth v. Marshall</i>, 287 Pa. 512, 135 A. 301 (1926)(statement of intent or plan); <i>Ickes v. Ickes</i>, 237 Pa. 582, 85 A. 885 (1912)(statement of motive or design).</p> <p>The exception for a declarant's statement of memory or belief concerning declarant's will is consistent with Pennsylvania law. See <i>Glockner v. Glockner</i>, 263 Pa. 393, 106 A. 731 (1919); <i>In re Kirkander</i>, 326 Pa. Super. 380, 474 A.2d 290 (1984).</p>	<p>This rule is identical to F.R.E. 803(3).</p>
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Rule 803

Rule 803(4) Statements for purposes of medical diagnosis or treatment.	Rule 803(4). Statement Made for Medical Diagnosis or Treatment
<p>(4) Statements for purposes of medical diagnosis or treatment. A statement made for purposes of medical treatment, or medical diagnosis in contemplation of treatment, and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof, insofar as reasonably pertinent to treatment, or diagnosis in contemplation of treatment.</p>	<p>(4) Statement Made for Medical Diagnosis or Treatment. A statement that:</p> <p>(A) is made for – and is reasonably pertinent to – medical treatment or diagnosis in contemplation of treatment; and</p> <p>(B) describes medical history; past or present symptoms or sensations; their inception or general cause, insofar as reasonably pertinent to treatment, or diagnosis in contemplation of treatment.</p>

Comment

<p>Pa.R.E. 803(4) is similar to F.R.E. 803(4) in that both admit statements made for purposes of medical treatment. Pa.R.E. 803(4) differs from F.R.E. 803(4) because it permits admission of statements made for purposes of medical diagnosis only if they are made in contemplation of treatment. Statements made to persons retained solely for the purpose of litigation are not admissible under this rule. The rationale for admitting statements for purposes of treatment is that the declarant has a very strong motivation to speak truthfully. This rationale is not applicable to statements made for purposes of litigation. Pa.R.E. 803(4) is consistent with Pennsylvania law. See <i>Commonwealth v. Smith</i>, 545 Pa. 487, 681 A.2d 1288 (1996).</p> <p>An expert medical witness may base an opinion on the declarant's statements of the kind discussed in this Rule, even though the statements were not made for purposes of treatment, if the statements comply with Pa.R.E. 703. Such statements may be disclosed as provided in Pa.R.E. 705, but are not substantive evidence.</p> <p>This exception is not limited to statements made to physicians. Statements to a nurse have been held to be admissible. See <i>Smith, supra</i>. Statements as to causation may be admissible, but statements as to fault or identification of the person inflicting harm have been held to be inadmissible. See <i>Smith, supra</i>.</p>	<p>Pa.R.E. 803(4) differs from F.R.E. 803(4) in that it permits admission of statements made for purposes of medical diagnosis only if they are made in contemplation of treatment. Statements made to persons retained solely for the purpose of litigation are not admissible under this rule. The rationale for admitting statements for purposes of treatment is that the declarant has a very strong motivation to speak truthfully. This rationale is not applicable to statements made for purposes of litigation. Pa.R.E. 803(4) is consistent with Pennsylvania law. See <i>Commonwealth v. Smith</i>, 545 Pa. 487, 681 A.2d 1288 (1996).</p> <p>An expert medical witness may base an opinion on the declarant's statements of the kind discussed in this rule, even though the statements were not made for purposes of treatment, if the statements comply with Pa.R.E. 703. Such statements may be disclosed as provided in Pa.R.E. 705, but are not substantive evidence.</p> <p>This rule is not limited to statements made to physicians. Statements to a nurse have been held to be admissible. See <i>Smith, supra</i>. Statements as to causation may be admissible, but statements as to fault or identification of the person inflicting harm have been held to be inadmissible. See <i>Smith, supra</i>.</p>
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Rule 803

Rule 803(5) Recorded recollection [not adopted].	Rule 803(5). Recorded Recollection (Not Adopted)
(5) Recorded recollection [not adopted].	(5) Recorded Recollection (Not Adopted)

Comment

Recorded recollection is dealt with in Pa.R.E. 803.1(3). It is an exception to the hearsay rule in which the current testimony of the declarant is necessary.	Recorded recollection is dealt with in Pa.R.E. 803.1(3). It is an exception to the hearsay rule in which the testimony of the declarant is necessary.
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Rule 803

Rule 803(6) Records of regularly conducted activity.	Rule 803(6). Records of a Regularly Conducted Activity
<p>(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the sources of information or other circumstances indicate lack of trustworthiness. The term “business” as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.</p>	<p>(6) Records of a Regularly Conducted Activity. A record (which includes a memorandum, report, or data compilation in any form) of an act, event or condition if,</p> <ul style="list-style-type: none"> (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 other circumstances indicate a lack of trustworthiness.

Comment

<p>Pa.R.E. 803(6) is similar to F.R.E. 803(6), but with two differences. One difference is that Pa.R.E. 803(6) does not include opinions and diagnoses. This is consistent with prior Pennsylvania case law. See <i>Williams v. McClain</i>, 513 Pa. 300, 520 A.2d 1374 (1987); <i>Commonwealth v. DiGiacomo</i>, 463 Pa. 449, 345 A.2d 605 (1975). The second difference is that Pa.R.E. 803(6) allows the court to exclude business records that would otherwise qualify for exception to the hearsay rule if the “sources of information or <i>other circumstances</i> indicate lack of trustworthiness.” The Federal rule allows the court to do so only if “the source of information or <i>the method or circumstances of preparation</i> indicate lack of trustworthiness.”</p> <p>Rule 803(6) was amended in 2001 consistent with the December 1, 2000 amendments to F.R.E. 803(6) that permit records of regularly conducted activity to be authenticated by certification. This amendment is designed to save the expense and time consumption caused by calling needless foundation witnesses. The notice requirements provided in Pa.R.E. 902(11) and</p>	<p>Pa.R.E. 803(6) differs from F.R.E. 803(6). One difference is that Pa.R.E. 803(6) defines the term “record.” In the Federal Rules this definition appears at F.R.E. 101(b). Another difference is that Pa.R.E. 803(6) applies to records of an act, event or condition, but does not include opinions and diagnoses. This is consistent with prior Pennsylvania case law. See <i>Williams v. McClain</i>, 513 Pa. 300, 520 A.2d 1374 (1987); <i>Commonwealth v. DiGiacomo</i>, 463 Pa. 449, 345 A.2d 605 (1975). A third difference is that Pa.R.E. 803(6) allows the court to exclude business records that would otherwise qualify for exception to the hearsay rule if neither the “source of information nor <i>other circumstances</i> indicate lack of trustworthiness.” The Federal Rule allows the court to do so only if neither “the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.”</p>
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Rule 803

(12) will give other parties a full opportunity to test the adequacy of the foundation.

If offered against a defendant in a criminal case, an entry in a business record may be excluded if its admission would violate the defendant's constitutional right to confront the witnesses against him or her. See *Commonwealth v. McCloud*, 457 Pa. 310, 322 A.2d 653 (1974).

Pa.R.E. 803(6) differs only slightly from 42 Pa.C.S. § 6108, which provides:

(a) Short title of section. This section shall be known and may be cited as the "Uniform Business Records as Evidence Act."

(b) General Rule. A record of an act, condition or event shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business at or near the time of the act, condition or event, and if, in the opinion of the tribunal, the sources of information, method and time of preparation were such as to justify its admission.

(c) Definition. As used in this section "business" includes every kind of business, profession, occupation, calling, or operation of institutions whether carried on for profit or not.

Pa.R.E. 803(6) refers to "data compilation" and includes a record "in any form." This language encompasses computerized data storage.

Pa.R.E. 803(6) expressly includes an association in the definition of a business.

Pa.R.E. 803(6) places the burden on an opposing party to show that the sources of information or other circumstances indicate that a business record is untrustworthy, and thus does not qualify for exception to the hearsay rule. The statute places the burden on the proponent of the evidence to show circumstantial trustworthiness.

Pa.R.E. 803(6) permits records of regularly conducted activity to be authenticated by certification

If offered against a defendant in a criminal case, an entry in a record may be excluded if its admission would violate the defendant's constitutional right to confront the witnesses against him or her. See *Melendez-Diaz v. Massachusetts*, 557 U.S. , 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009)

Rule 803

Rule 803(7) Absence of entry in records kept in accordance with the provisions of paragraph (6) [not adopted].	Rule 803(7). Absence of a Record of a Regularly Conducted Activity (Not Adopted)
(7) Absence of entry in records kept in accordance with the provisions of paragraph (6) [not adopted].	(7) Absence of a Record of a Regularly Conducted Activity (Not Adopted)

Comment

<p>Pennsylvania has not adopted F.R.E. 803(7), which reads as follows:</p> <p style="padding-left: 40px;">Absence of Entry in Records Kept in Accordance With the Provisions of Paragraph (6). Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.</p> <p>Principles of logic and internal consistency have led Pennsylvania to reject this rule. The absence of an entry in a record is not hearsay, as defined in Pa.R.E. 801(c). Hence, it appears irrational to except it to the hearsay rule.</p> <p>On analysis, absence of an entry in a business record is circumstantial evidence,--it tends to prove something by implication, not assertion. Its admissibility is governed by principles of relevance, not hearsay. See Pa.R.E. 401, <i>et seq.</i></p> <p>Pennsylvania law is in accord with the object of F.R.E. 803(7), <i>i.e.</i>, to allow evidence of the absence of a record of an act, event, or condition to be introduced to prove the nonoccurrence or nonexistence thereof, if the matter was one which would ordinarily be recorded. See <i>Klein v. F.W. Woolworth Co.</i>, 309 Pa. 320, 163 A. 532 (1932)(absence of person's name in personnel records admissible to prove that he was not an employee). See also <i>Stack v. Wapner</i>, 244 Pa. Super. 278, 368 A.2d 292 (1976).</p>	<p>Pennsylvania has not adopted F.R.E. 803(7) which provides:</p> <p style="padding-left: 40px;">Evidence that a matter is not included in a record described in paragraph (6) if:</p> <ul style="list-style-type: none"> (A) the evidence is admitted to prove that the matter did not occur or exist; and (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. <p>Principles of logic and internal consistency have led Pennsylvania to reject this rule. The absence of an entry in a record is not hearsay, as defined in Pa.R.E. 801(c). Hence, it appears irrational to except it to the hearsay rule.</p> <p>On analysis, absence of an entry in a business record is circumstantial evidence - it tends to prove something by implication, not assertion. Its admissibility is governed by principles of relevance, not hearsay. See Pa.R.E. 401, <i>et seq.</i></p> <p>Pennsylvania law is in accord with the object of F.R.E. 803(7), <i>i.e.</i>, to allow evidence of the absence of a record of an act, event, or condition to be introduced to prove the nonoccurrence or nonexistence thereof, if the matter was one which would ordinarily be recorded. See <i>Klein v. F.W. Woolworth Co.</i>, 309 Pa. 320, 163 A. 532 (1932) (absence of person's name in personnel records admissible to prove that he was not an employee). See also <i>Stack v. Wapner</i>, 244 Pa. Super. 278, 368 A.2d 292 (1976).</p>
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Rule 803

Rule 803(8) Public records and reports [not adopted].	Rule 803(8). Public Records (Not Adopted)
(8) Public records and reports [not adopted].	(8) Public Records (Not Adopted)

Comment

<p>Pennsylvania has not adopted F.R.E. 803(8). An exception to the hearsay rule for public records is provided by 42 Pa.C.S.A. § 6104:</p> <p style="padding-left: 40px;">(a) General rule.--A copy of a record of governmental action or inaction authenticated as provided in section 6103 (relating to proof of official records) shall be admissible as evidence that the governmental action or inaction disclosed therein was in fact taken or omitted.</p> <p style="padding-left: 40px;">(b) Existence of facts.--A copy of a record authenticated as provided in section 6103 disclosing the existence or nonexistence of facts which have been recorded pursuant to official duty or would have been so recorded had the facts existed shall be admissible as evidence of the existence or nonexistence of such facts, unless the sources of information or other circumstances indicate lack of trustworthiness.</p> <p>Subsection (b) of the statute is limited to "facts." It does not include opinions or diagnoses. This is consistent with Pa.R.E. 803(6), as well as Pennsylvania decisional law interpreting 42 Pa.C.S.A. § 6108 (Uniform Business Records As Evidence Act). See Comment to Pa.R.E. 803(6).</p>	<p>Pennsylvania has not adopted F.R.E. 803(8). An exception to the hearsay rule for public records is provided by 42 Pa.C.S. § 6104 which provides:</p> <p style="padding-left: 40px;">(a) General rule.- A copy of a record of governmental action or inaction authenticated as provided in section 6103 (relating to proof of official records) shall be admissible as evidence that the governmental action or inaction disclosed therein was in fact taken or omitted.</p> <p style="padding-left: 40px;">(b) Existence of facts.- A copy of a record authenticated as provided in section 6103 disclosing the existence or nonexistence of facts which have been recorded pursuant to official duty or would have been so recorded had the facts existed shall be admissible as evidence of the existence or nonexistence of such facts, unless the sources of information or other circumstances indicate lack of trustworthiness.</p> <p>Subsection (b) of the statute is limited to "facts." It does not include opinions or diagnoses. This is consistent with Pa.R.E. 803(6), and Pennsylvania case law. See Comment to Pa.R.E. 803(6).</p>
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Rule 803

Rule 803(9) Records of vital statistics [not adopted].	Rule 803(9). Public Records of Vital Statistics (Not Adopted)
(9) Records of vital statistics [not adopted].	(9) Public Records of Vital Statistics (Not Adopted)

Comment

<p>Pennsylvania has not adopted F.R.E. 803(9). Records of vital statistics are also business records and may be excepted to the hearsay rule by Pa.R.E. 803(6). Records of vital statistics are public records and they may be excepted to the hearsay rule by 42 Pa.C.S.A. § 6104 (text quoted in Comment to Pa.R.E. 803(8)).</p> <p>The Vital Statistics Law of 1953 (35 P.S. § 450.101 <i>et seq.</i>) provides for registration of births, deaths, fetal deaths, and marriages, with the State Department of Health. The records of the Department, and duly certified copies thereof, are excepted to the hearsay rule by 35 P.S. § 450.810 which provides:</p> <p style="padding-left: 40px;">Any record or duly certified copy of a record or part thereof which is (1) filed with the department in accordance with the provisions of this act and the regulations of the Advisory Health Board and which (2) is not a “delayed” record filed under section seven hundred two of this act or a record “corrected” under section seven hundred three of this act shall constitute prima facie evidence of its contents, except that in any proceeding in which paternity is controverted and which affects the interests of an alleged father or his successors in interest no record or part thereof shall constitute prima facie evidence of paternity unless the alleged father is the husband of the mother of the child.</p>	<p>Pennsylvania has not adopted F.R.E. 803(9). Records of vital statistics are also records of a regularly conducted activity and may be excepted to the hearsay rule by Pa.R.E. 803(6). Records of vital statistics are public records and they may be excepted to the hearsay rule by 42 Pa.C.S. § 6104 (text quoted in Comment to Pa.R.E. 803(8)).</p> <p>The Vital Statistics Law of 1953, 35 P.S. § 450.101 <i>et seq.</i>, provides for registration of births, deaths, fetal deaths, and marriages, with the State Department of Health. The records of the Department, and duly certified copies thereof, are excepted to the hearsay rule by 35 P.S. § 450.810 which provides:</p> <p style="padding-left: 40px;">Any record or duly certified copy of a record or part thereof which is (1) filed with the department in accordance with the provisions of this act and the regulations of the Advisory Health Board and which (2) is not a “delayed” record filed under section seven hundred two of this act or a record “corrected” under section seven hundred three of this act shall constitute prima facie evidence of its contents, except that in any proceeding in which paternity is controverted and which affects the interests of an alleged father or his successors in interest no record or part thereof shall constitute prima facie evidence of paternity unless the alleged father is the husband of the mother of the child.</p>
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Rule 803

Rule 803(10) Absence of public record or entry [not adopted].	Rule 803(10). Absence of a Public Record (Not Adopted)
(10) Absence of public record or entry [not adopted].	(10) Absence of a Public Record (Not Adopted)

Comment

<p>Pennsylvania has not adopted F.R.E. 803(10) for the same reasons that it did not adopt F.R.E. 803(7). See Comment to Pa.R.E. 803(7).</p> <p>42 Pa.C.S.A. § 6104(b), provides for admissibility of evidence of the absence of an entry in a public record to prove the nonexistence of a fact:</p> <p style="padding-left: 40px;">(b) Existence of facts.--A copy of a record authenticated as provided in section 6103 disclosing the ... nonexistence of facts which ... would have been ... recorded had the facts existed shall be admissible as evidence of the ... nonexistence of such facts, unless the sources of information or other circumstances indicate lack of trustworthiness.</p> <p>Pennsylvania also has a complementary statute, 42 Pa.C.S.A. § 5328, entitled "Proof of Official Records," which provides, in pertinent part:</p> <p style="padding-left: 40px;">(d) Lack of records.--A written statement that after diligent search no record or entry of a specified tenor is found to exist in the records designated by the statement, authenticated as provided in this section in the case of a domestic record, or complying with the requirements of this section for a summary in the case of a record in a foreign country, is admissible as evidence that the records contain no such record or entry.</p>	<p>Pennsylvania has not adopted F.R.E. 803(10) for the same reasons that it did not adopt F.R.E. 803(7). See Comment to Pa.R.E. 803(7).</p> <p>42 Pa.C.S. § 6104(b), provides for admissibility of evidence of the absence of an entry in a public record to prove the nonexistence of a fact:</p> <p style="padding-left: 40px;">(b) Existence of facts.- A copy of a record authenticated as provided in section 6103 disclosing the ... nonexistence of facts which ... would have been ... recorded had the facts existed shall be admissible as evidence of the ... nonexistence of such facts, unless the sources of information or other circumstances indicate lack of trustworthiness.</p> <p>Pennsylvania also has a complementary statute, 42 Pa.C.S. § 5328, entitled "Proof of Official Records," which provides, in pertinent part:</p> <p style="padding-left: 40px;">(d) Lack of record.- A written statement that after diligent search no record or entry of a specified tenor is found to exist in the records designated by the statement, authenticated as provided in this section in the case of a domestic record, or complying with the requirements of this section for a summary in the case of a record in a foreign country, is admissible as evidence that the records contain no such record or entry.</p>
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Rule 803

<p>Rule 803(11) Records of religious organizations.</p>	<p>Rule 803(11). Records of Religious Organizations Concerning Personal or Family History</p>
<p>(11) Records of religious organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.</p>	<p>(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.</p>

Comment

<p>Pa.R.E. 803(11) is identical to F.R.E. 803(11). It is an expansion of a more limited exception that was statutorily adopted in Pennsylvania.</p> <p>42 Pa.C.S.A. § 6110 provides:</p> <p style="padding-left: 40px;">(a) General rule.--The registry kept by any religious society in their respective meeting book or books of any marriage, birth or burial, within this Commonwealth, shall be held good and authentic, and shall be allowed of upon all occasions whatsoever.</p> <p style="padding-left: 40px;">(b) Foreign burials.--The registry of burials of any religious society or corporate town, in places out of the United States, shall be prima facie evidence of the death of any person whose burial is therein registered, and of the time of his interment, if the time be stated in the registry, and extracts from such registries, certified by the proper officers, in the mode of authentication usual in the place in which they are made and authenticated as provided in section 5328 (relating to proof of official records), shall be received as copies of such registries, and be evidence accordingly.</p>	<p>This rule is identical to F.R.E. 803(11).</p>
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Rule 803

<p>Rule 803(12) Marriage, baptismal, and similar certificates.</p>	<p>Rule 803(12). Certificates of Marriage, Baptism, and Similar Ceremonies</p>
<p>(12) Marriage, baptismal, and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.</p>	<p>(12) Certificates of Marriage, Baptism, and Similar Ceremonies. A statement of fact contained in a certificate:</p> <ul style="list-style-type: none"> (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.

Comment

<p>Pa.R.E. 803(12) is identical to F.R.E. 803(12). It is consistent with Pennsylvania law. <i>See Estate of Loik</i>, 493 Pa. 512, 426 A.2d 1134 (1981); <i>District of Columbia's Appeal</i>, 343 Pa. 65, 21 A.2d 883 (1941).</p>	<p>This rule is identical to F.R.E. 803(12).</p>
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Rule 803

Rule 803(13) Family records.	Rule 803(13). Family Records
(13) Family records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.	(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.

Comment

Pa.R.E. 803(13) is identical to F.R.E. 803(13). It is consistent with Pennsylvania law. <i>See Carskadden v. Poorman</i> , 10 Watts 82 (1840).	This rule is identical to F.R.E. 803(13).
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Rule 803

Rule 803(14) Records of documents affecting an interest in property	Rule 803(14). Records of Documents That Affect an Interest in Property
<p>(14) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.</p>	<p>(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:</p> <ul style="list-style-type: none"> (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.

Comment

<p>Pa.R.E. 803(14) is identical to F.R.E. 803(14). It is consistent with Pennsylvania law. See <i>David v. Titusville & Oil City Ry. Co.</i>, 114 Pa. 308, 6 A. 736 (1886).</p>	<p>This rule is identical to F.R.E. 803(14).</p>
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Rule 803

Rule 803(16) Statements in ancient documents	Rule 803(16). Statements in Ancient Documents
(16) Statements in ancient documents. Statements in a document in existence thirty years or more the authenticity of which is established.	(16) Statements in Ancient Documents. A statement in a document that is at least 30 years old and whose authenticity is established.

Comment

<p>Pa.R.E. 803(16) is similar to F.R.E. 803(16), except that Pennsylvania adheres to the common law view that a document must be at least 30 years old to qualify as an ancient document. The federal rule reduces the age to 20 years.</p> <p>Pa.R.E. 803(16) is consistent with Pennsylvania law. See <i>Louden v. Apollo Gas Co.</i>, 273 Pa. Super. 549, 417 A.2d 1185 (1980); <i>Commonwealth ex rel. Ferguson v. Ball</i>, 227 Pa. 301, 121 A.191 (1923).</p>	<p>Pa.R.E. 803(16) differs from F.R.E. 803(16) in that Pennsylvania adheres to the common law view that a document must be at least 30 years old to qualify as an ancient document. The Federal Rule reduces the age to 20 years.</p> <p>Pa.R.E. 803(16) is consistent with Pennsylvania law. See <i>Louden v. Apollo Gas Co.</i>, 273 Pa. Super. 549, 417 A.2d 1185 (1980); <i>Commonwealth ex rel. Ferguson v. Ball</i>, 277 Pa. 301, 121 A.191 (1923).</p>
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Rule 803

Rule 803(17) Market reports, commercial publications.	Rule 803(17). Market Reports and Similar Commercial Publications
(17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.	(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.

Comment

<p>Pa.R.E. 803(17) is identical to F.R.E. 803(17). It is consistent with Pennsylvania law. <i>See Rosche v. McCoy</i>, 397 Pa. 615, 156 A.2d 307 (1959).</p> <p>When the price or value of goods that are regularly bought and sold in a commodity market is at issue, 13 Pa.C.S.A. § 2724 provides:</p> <p>Whenever the prevailing price or value of any goods regularly bought and sold in any established commodity market is in issue, reports in official publications or trade journals or newspapers or periodicals of general circulation published as the reports of such markets shall be admissible in evidence. The circumstances of the preparation of such a report may be shown to affect its weight but not its admissibility.</p>	<p>This rule is identical to F.R.E. 803(17).</p>
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Rule 803

Rule 803(18) Learned treatises [not adopted].	Rule 803(18). Statements in Learned Treatises, Periodicals, or Pamphlets (Not Adopted)
(18) Learned treatises [not adopted].	(18) Statements in Learned Treatises, Periodicals, or Pamphlets (Not Adopted)

Comment

<p>Pennsylvania has not adopted F.R.E. 803(18). Pennsylvania does not recognize an exception to the hearsay rule for learned treatises. <i>See Majdic v. Cincinnati Machine Co.</i>, 370 Pa. Super. 611, 537 A.2d 334 (1988).</p> <p>Regarding the permissible uses of learned treatises under Pennsylvania law, see <i>Aldridge v. Edmunds</i>, 750 A.2d 292 (Pa. 2000).</p>	<p>Pennsylvania has not adopted F.R.E. 803(18). Pennsylvania does not recognize an exception to the hearsay rule for learned treatises. <i>See Majdic v. Cincinnati Machine Co.</i>, 370 Pa. Super. 611, 537 A.2d 334 (1988).</p> <p>Regarding the permissible uses of learned treatises under Pennsylvania law, see <i>Aldridge v. Edmunds</i>, 561 Pa. 323, 750 A.2d 292 (Pa. 2000).</p>
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Rule 803

Rule 803(19) Reputation concerning personal or family history.	Rule 803(19). Reputation Concerning Personal or Family History
<p>(19) Reputation concerning personal or family history. Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.</p>	<p>(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.</p>

Comment

<p>Pa.R.E. 803(19) is identical to F.R.E. 803(19). It changes prior Pennsylvania decisional law by expanding the sources from which the reputation may be drawn to include (1) a person's associates and (2) the community. Prior Pennsylvania decisional law, none of which is recent, limited the source to the person's family. See <i>Picken's Estate</i>, 163 Pa. 14, 29 A. 875 (1894); <i>American Life Ins. and Trust Co. v. Rosenagle</i>, 77 Pa. 507 (1875).</p>	<p>This rule is identical to F.R.E. 803(19). It changed prior Pennsylvania case law by expanding the sources from which the reputation may be drawn to include (1) a person's associates; and (2) the community. Prior Pennsylvania case law, none of which is recent, limited the source to the person's family. See <i>Picken's Estate</i>, 163 Pa. 14, 29 A. 875 (1894); <i>American Life Ins. and Trust Co. v. Rosenagle</i>, 77 Pa. 507 (1875).</p>
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Rule 803

Rule 803(20) Reputation concerning boundaries or general history.	Rule 803(20). Reputation Concerning Boundaries or General History
<p>(20) Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.</p>	<p>(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.</p>

Comment

<p>Pa.R.E. 803(20) is identical to F.R.E. 803(20). It is consistent with prior Pennsylvania law, at least with respect to boundaries of land. <i>See Hostetter v. Commonwealth</i>, 367 Pa. 603, 80 A.2d 719 (1951).</p>	<p>This rule is identical to F.R.E. 803(20).</p>
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Rule 803

Rule 803(21) Reputation as to character.	Rule 803(21). Reputation Concerning Character
(21) Reputation as to character. Reputation of a person's character among associates or in the community.	(21) Reputation Concerning Character. A reputation among a person's associates or in the community concerning the person's character.

Comment

Pa.R.E. 803(21) is identical to F.R.E. 803(21). It is consistent with prior Pennsylvania law. It is also consistent with Pa.R.E. 404(a), 405(a), and 608(a). See <i>Commonwealth v. Lopinson</i> , 427 Pa. 284, 234 A.2d 552 (1967); Comment to Pa.R.E. 405.	This rule is identical to F.R.E. 803(21).
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Rule 803

Rule 803(22) Judgment of previous conviction [not adopted].	Rule 803(22). Judgment of a Previous Conviction (Not Adopted)
(22) Judgment of previous conviction [not adopted].	(22) Judgment of a Previous Conviction (Not Adopted)

Comment

<p>Pennsylvania has not adopted F.R.E. 803(22).</p> <p>With respect to facts essential to sustain a judgment of criminal conviction, there are four basic approaches that a court can take:</p> <ol style="list-style-type: none"> 1. The judgment of conviction is conclusive, <i>i.e.</i>, estops the party convicted from contesting any fact essential to sustain the conviction. 2. The judgment of conviction is admissible as evidence of any fact essential to sustain the conviction, only if offered against the party convicted. 3. The judgment of conviction is admissible as evidence of any fact essential to sustain the conviction when offered against any party (this is the federal rule for felonies, except that the Government cannot offer someone else's conviction against the defendant in a criminal case, other than for purposes of impeachment). 4. The judgment of conviction is neither conclusive nor admissible as evidence to prove a fact essential to sustain the conviction (common law rule). <p>For felonies and other major crimes, Pennsylvania takes approach number one. In subsequent litigation, the convicted party is estopped from denying or contesting any fact essential to sustain the conviction. Once a party is estopped from contesting a fact, no evidence need be introduced by an adverse party to prove it. <i>See Hurtt v. Stirone</i>, 416 Pa. 493, 206 A.2d 624 (1965); <i>In re Estate of Bartolovich</i>, 420 Pa. Super. 419, 616 A.2d 1043 (1992) (judgment of conviction conclusive under Slayer's Act, 20 Pa.C.S.A. §§ 8801-8815).</p> <p>For minor offenses, Pennsylvania takes approach number four; it applies the common law rule. Evidence of a conviction is inadmissible to prove a fact necessary to sustain the conviction. <i>See Loughner v. Schmelzer</i>, 421 Pa. 283, 218 A.2d 768 (1966).</p> <p>A plea of guilty to a crime is excepted to the hearsay</p>	<p>Pennsylvania has not adopted F.R.E. 803(22).</p> <p>With respect to facts essential to sustain a judgment of criminal conviction, there are four basic approaches that a court can take:</p> <ol style="list-style-type: none"> 1. The judgment of conviction is conclusive, <i>i.e.</i>, estops the party convicted from contesting any fact essential to sustain the conviction. 2. The judgment of conviction is admissible as evidence of any fact essential to sustain the conviction, only if offered against the party convicted. 3. The judgment of conviction is admissible as evidence of any fact essential to sustain the conviction when offered against any party (this is the federal rule for felonies, except that the Government cannot offer someone else's conviction against the defendant in a criminal case, other than for purposes of impeachment). 4. The judgment of conviction is neither conclusive nor admissible as evidence to prove a fact essential to sustain the conviction (common law rule). <p>For felonies and other major crimes, Pennsylvania takes approach number one. In subsequent litigation, the convicted party is estopped from denying or contesting any fact essential to sustain the conviction. Once a party is estopped from contesting a fact, no evidence need be introduced by an adverse party to prove it. <i>See Hurtt v. Stirone</i>, 416 Pa. 493, 206 A.2d 624 (1965); <i>In re Estate of Bartolovich</i>, 420 Pa. Super. 419, 616 A.2d 1043 (1992) (judgment of conviction conclusive under Slayer's Act, 20 Pa.C.S. §§ 8801-8815).</p> <p>For minor offenses, Pennsylvania takes approach number four; it applies the common law rule. Evidence of a conviction is inadmissible to prove a fact necessary to sustain the conviction. <i>See Loughner v. Schmelzer</i>, 421 Pa. 283, 218 A.2d 768 (1966).</p> <p>A plea of guilty to a crime is excepted to the hearsay</p>
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Rule 803

rule as an admission of all facts essential to sustain a conviction, but only when offered against the pleader by a party-opponent. See Pa.R.E. 803(25); see *also* Pa.R.E. 410. A plea of guilty may also qualify as an exception to the hearsay rule as a statement against interest, if the declarant is unavailable to testify at trial. See Pa.R.E. 804(b)(3).

rule as an admission of all facts essential to sustain a conviction, but only when offered against the pleader by a party-opponent. See Pa.R.E. 803(25); see *also* Pa.R.E. 410. A plea of guilty may also qualify as an exception to the hearsay rule as a statement against interest, if the declarant is unavailable to testify at trial. See Pa.R.E. 804(b)(3).

Rule 803

Rule 803(23) Judgment as to personal, family, or general history or boundaries [not adopted].	Rule 803(23). Judgments Involving Personal, Family, or General History or a Boundary (Not Adopted)
(23) Judgment as to personal, family, or general history or boundaries [not adopted].	(23) Judgments Involving Personal, Family, or General History or a Boundary (Not Adopted)

Comment

Pennsylvania has not adopted F.R.E. 803(23).	Pennsylvania has not adopted F.R.E. 803(23).
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Rule 803

Rule 803(24) Other exceptions [not adopted].	Rule 803(24). Other Exceptions (Not Adopted)
(24) Other exceptions [not adopted].	(24) Other Exceptions (Not Adopted)

Comment

Pennsylvania has not adopted F.R.E. 803(24) (now F.R.E. 807). The Federal Rule is often called the residual exception to the hearsay rule.	Pennsylvania has not adopted F.R.E. 803(24) (now F.R.E. 807).
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Rule 803

Rule 803(25) Admission by party-opponent.	Rule 803(25). An Opposing Party's Statement
<p>(25) Admission by party-opponent. The statement is offered against a party and is (A) the party's own statement in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement may be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).</p>	<p>(25) An Opposing Party's Statement. The statement is offered against an opposing party and:</p> <ul style="list-style-type: none"> (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. <p>The statement may 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).</p>

Comment

<p>Pa.R.E. 803(25) differs from F.R.E. 801(d)(2), in that the word "shall" in the second sentence has been replaced with the word "may."</p> <p>The federal rules call an admission by a party-opponent an exception to the definition of hearsay, and place it in Rule 801 under the heading of "Definitions." The Pennsylvania rules, like the common law, call an admission by a party-opponent an exception to the hearsay rule. The Pennsylvania rules, therefore, place admissions by a party-opponent in Pa.R.E. 803 with other exceptions to the hearsay rule in which the availability of the declarant is immaterial. The difference between the federal and Pennsylvania formulations is organizational. It has no substantive effect.</p> <p>The second sentence of Pa.R.E. 803(25) is consistent with Pennsylvania law. See <i>Commonwealth v. Smith</i>, 568 A.2d 600 (Pa. 1989); <i>Commonwealth v. Dreibelbis</i>, 426 A.2d 1111 (Pa. 1981).</p>	<p>Pa.R.E. 803(25) differs from F.R.E. 801(d)(2), in that the word "must" in the last paragraph has been replaced with the word "may."</p> <p>The Federal Rules treat these statements as "not hearsay" and places them in F.R.E 801(d)(2). The traditional view was that these statements were hearsay, but admissible as exceptions to the hearsay rule. The Pennsylvania Rules of Evidence follow the traditional view and place these statements in Pa.R.E. 803(25), as exceptions to the hearsay rule - regardless of the availability of the declarant. This differing placement is not intended to have substantive effect.</p> <p>The statements in this exception were traditionally, and in prior versions of both the Federal Rules of Evidence and the Pennsylvania Rules of Evidence, called admissions, although in many cases the statements were not admissions as that term is employed in common usage. The new phrase used in the federal rules – an opposing party's statement –</p>
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Rule 803

<p>The personal knowledge rule (Pa.R.E. 602) is not applicable to admissions. See <i>Salvitti v. Throppe</i>, 23 A.2d 445 (Pa. 1942).</p> <p>A. Party's own statement. The admissibility of a party's own statement offered against the party as an exception to the hearsay rule is consistent with Pennsylvania law. See <i>Salvitti v. Throppe, supra</i>.</p> <p>B. Adoptive admission. Pa.R.E. 803(25)(B) is consistent with Pennsylvania law. See <i>Commonwealth v. Cheeks</i>, 239 A.2d 793 (Pa. 1968) (party expressly adopted statement); <i>Commonwealth v. Coccioletti</i>, 425 A.2d 387 (Pa. 1981) (party impliedly adopted statement by failing to deny the truth of a statement that party would be expected to deny under the circumstances).</p> <p>C. Statement by authorized agent. Admitting, as an exception to the hearsay rule, the statement of a person authorized to speak for the party against the party is consistent with Pennsylvania law. See <i>McGarity v. New York Life Ins. Co.</i>, 59 A.2d 47 (Pa. 1948).</p> <p>D. Statement by agent concerning matter within scope of agency. This exception to the hearsay rule is new to Pennsylvania law. It is consistent with the overwhelming majority of American jurisdictions.</p> <p>E. Statement by a co-conspirator. The admissibility of a statement by a co-conspirator as provided by this rule is consistent with Pennsylvania law. See <i>Commonwealth v. Mayhue</i>, 639 A.2d 421 (Pa. 1994); <i>Commonwealth v. Dreibelbis</i>, 426 A.2d 1111 (Pa. 1981).</p> <p>Note: Adopted, May 8, 1998, effective October 1, 1998; Comment revised March 23, 1999, effective immediately; Comment received March 10, 2000, effective immediately; amended November 2, 2001, effective January 1, 2002.</p> <p>Committee Explanatory Reports:</p> <p>Final Report explaining the March 23, 1999 technical revisions to the Comment for paragraph 25 published with the Court's Order at 29 Pa.B. 1714 (April 3, 1999).</p> <p>Final Report explaining the March 10, 2000 revision of the Comment for paragraph 25 published with the</p>	<p>more accurately describes these statements and is adopted here.</p> <p>The personal knowledge rule (Pa.R.E. 602) is not applicable to an opposing party's statement. See <i>Salvitti v. Throppe</i>, 343 Pa. 642, 23 A.2d 445 (1942).</p> <p>Note: Adopted May 8, 1998, effective October 1, 1998; Comment revised March 23, 1999, effective immediately; Comment revised March 10, 2000, effective immediately; Comment revised May 16, 2001, effective July 1, 2001; amended November 2, 2001, effective January 1, 2002; rescinded and replaced _____, 2011, effective _____, 2011.</p> <p>Committee Explanatory Reports:</p> <p>Final Report explaining the March 23, 1999 technical revisions to the Comment for paragraph 25 published with the Court's Order at 29 Pa.B. 1714 (April 3, 1999).</p> <p>Final Report explaining the March 10, 2000 revision of</p>
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Rule 803

<p>Court's Order at 30 Pa.B. 1641 (March 25, 2000).</p> <p>Final Report explaining the November 2, 2001, amendments to paragraph 6 published with the Court's Order at 31 Pa.B. 6384 (November 24, 2001).</p>	<p>the Comment for paragraph 25 published with the Court's Order at 30 Pa.B. 1641 (March 25, 2000).</p> <p>Final Report explaining the May 16, 2001 revision of the Comment for paragraph 18 published with the Court's Order at 31 Pa.B. 2789 (June 2, 2001).</p> <p>Final Report explaining the November 2, 2001, amendments to paragraph 6 published with the Court's Order at 31 Pa.B. 6384 (November 24, 2001).</p> <p>Final Report explaining the _____, 2011 rescission and replacement published with the Court's Order at ___ Pa.B. __ (_____, 2011).</p>
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Rule 803.1

Rule 803.1. Hearsay exceptions; testimony of declarant necessary	Rule 803.1. Exceptions to the Rule Against Hearsay - Testimony of Declarant Necessary
<p>The following statements, as hereinafter defined, are not excluded by the hearsay rule if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement:</p> <p>(1) Inconsistent statement of witness. A statement by a declarant that is inconsistent with the declarant's subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (b) is a writing signed and adopted by the declarant, or (c) is a verbatim contemporaneous recording of an oral statement.</p>	<p>The following statements are not excluded by the rule against hearsay if the declarant testifies and is subject to cross-examination about the prior statement:</p> <p>(1) Prior Inconsistent Statement of Declarant-Witness. A prior statement by a declarant-witness that is inconsistent with the declarant-witness's testimony and:</p> <p>(A) was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition;</p> <p>(B) is a writing signed and adopted by the declarant; or</p> <p>(C) is a verbatim contemporaneous electronic, audiotaped, or videotaped recording of an oral statement.</p>

Comment

<p>Subsection (a) is similar to F.R.E. 801(d)(1)(A), except that the Pennsylvania rule classifies those kinds of inconsistent statements that are described therein as exceptions to the hearsay rule, not exceptions to the definition of hearsay. Subsections (b) and (c) are an expansion of the exception that is described in the federal rule.</p> <p>Pa.R.E. 803.1(1) is consistent with prior Pennsylvania case law. See <i>Commonwealth v. Brady</i>, 507 A.2d 66 (Pa. 1986) (seminal case that overruled close to two centuries of decisional law in Pennsylvania and held that the recorded statement of a witness to a murder, inconsistent with her testimony at trial, was properly admitted as substantive evidence, excepted to the hearsay rule); <i>Commonwealth v. Lively</i>, 610 A.2d 7 (Pa. 1992). To qualify as a "verbatim contemporaneous recording of an oral statement," the "recording" must be an electronic, audiotaped, or videotaped recording. See <i>Commonwealth v. Wilson</i>, 707 A.2d 1114 (Pa. 1998). Inconsistent statements of a witness that do not qualify as exceptions to the hearsay rule may still be introduced to impeach the credibility of the witness. See Pa.R.E. 613.</p>	<p>The Federal Rules treat statements corresponding to Pa.R.E. 803.1(1) and (2) as "not hearsay" and places them in F.R.E. 801(d)(1)(A) and (C). Pennsylvania follows the traditional approach that treats these statements as exceptions to the hearsay rule if the declarant testifies at the trial.</p> <p>Pa.R.E. 803.1(1) is consistent with prior Pennsylvania case law. See <i>Commonwealth v. Brady</i>, 510 Pa. 123, 507 A.2d 66 (1986) (seminal case that overruled close to two centuries of decisional law in Pennsylvania and held that the recorded statement of a witness to a murder, inconsistent with her testimony at trial, was properly admitted as substantive evidence, excepted to the hearsay rule); <i>Commonwealth v. Lively</i>, 530 Pa. 464, 610 A.2d 7 (1992). In <i>Commonwealth v. Wilson</i>, 550 Pa. 518, 707 A.2d 1114 (1998), the Supreme Court held that to be admissible under this rule an oral statement must be a verbatim contemporaneous recording in electronic, audiotaped, or videotaped form.</p> <p>An inconsistent statement of a witness that does not qualify as an exception to the hearsay rule may still be introduced to impeach the credibility of the witness. See Pa.R.E. 613.</p>
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Rule 803.1

Rule 803.1(2) Statement of identification.	Rule 803.1(2). Prior Statement of Identification
<p>(2) Statement of identification. A statement by a witness of identification of a person or thing, made after perceiving the person or thing, provided that the witness testifies to the making of the prior identification.</p>	<p>(2) Prior Statement of Identification by Declarant-Witness. A prior statement by a declarant-witness identifying a person or thing, made after perceiving the person or thing, provided that the declarant-witness testifies to the making of the prior statement.</p>

Comment

<p>Pa.R.E. 803.1(2) differs from F.R.E. 801(d)(1)(C) in several respects:</p> <ol style="list-style-type: none"> 1. Pa.R.E. 803.1(2) classifies a statement of identification as an exception to the hearsay rule, not an exception to the definition of hearsay . 2. Pa.R.E. 803.1(2) is broader than its federal counterpart in that it includes identification of a thing, in addition to a person. 3. Pa.R.E. 803.1(2) is more restrictive than its federal counterpart in that it requires the witness to testify to making the identification. <p>Pa.R.E. 803.1(2) is consistent with Pennsylvania law, although we have found no reported cases dealing with prior identification of a thing, as distinguished from a person. <i>See Commonwealth v. Ly</i>, 599 A.2d 613 (Pa. 1991); <i>Commonwealth v. Saunders</i>, 125 A.2d 442 (Pa. 1956).</p>	<p>Pennsylvania treats a statement meeting the requirements of Pa.R.E. 803.1(2) as an exception to the hearsay rule. F.R.E. 801(d)(1)(C) provides that such a statement is not hearsay. This differing organization is consistent with Pennsylvania law.</p> <p>Pa.R.E. 803.1(2) differs from F.R.E. 801(d)(1)(C) in several respects. It requires the witness to testify to making the identification. This is consistent with Pennsylvania law. <i>See Commonwealth v. Ly</i>, 528 Pa. 523, 599 A.2d 613 (1991). The Pennsylvania rule includes identification of a thing, in addition to a person.</p>
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Rule 803.1

Rule 803.1(3) Recorded recollection.	Rule 803.1(3). Recorded Recollection
<p>(3) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory, providing that the witness testifies that the record correctly reflects that knowledge. If admitted, the memorandum or record may be read into evidence and received as an exhibit, but may be shown to the jury only in exceptional circumstances or when offered by an adverse party.</p>	<p>(3) Recorded Recollection of Declarant-Witness. A memorandum or record made or adopted by a declarant-witness that:</p> <ul style="list-style-type: none"> (A) is on a matter the declarant-witness once knew about but now cannot recall well enough to testify fully and accurately; (B) was made or adopted by the declarant-witness when the matter was fresh in his or her memory; and (C) the declarant-witness testifies accurately reflects his or her knowledge at the time when made. <p>If admitted, the memorandum or record may be read into evidence and received as an exhibit, but may be shown to the jury only in exceptional circumstances or when offered by an adverse party.</p>

Comment

<p>Pa.R.E. 803.1(3) is similar to F.R.E. 803(5), but differs in the following ways:</p> <ol style="list-style-type: none"> 1. Pa.R.E. 803.1(3) classifies recorded recollection as an exception to the hearsay rule in which the testimony of the declarant is necessary, not as an exception in which the availability of the declarant is immaterial. 2. Pa.R.E. 803.1(3) makes clear that, to qualify recorded recollection as an exception to the hearsay rule, the witness must testify that the record correctly reflects the knowledge that the witness once had. In other words, the witness must vouch for the reliability of the record. The federal rule is ambiguous on this point and the applicable federal cases are conflicting. 3. Pa.R.E. 803.1(3) allows the record to be received as an exhibit, and grants the trial judge discretion to show it to the jury in exceptional circumstances, even when not offered by an adverse party. <p>Pa.R.E. 803.1(3) is consistent with Pennsylvania law. See <i>Commonwealth v. Cargo</i>, 444 A.2d 639 (Pa.</p>	<p>Pa.R.E. 803.1(3) is similar to F.R.E. 803(5), but differs in the following ways:</p> <ol style="list-style-type: none"> 1. Pennsylvania treats a statement meeting the requirements of Pa.R.E. 803.1(3) as an exception to the hearsay rule in which the testimony of the declarant is necessary. F.R.E. 803(5) treats this as an exception regardless of the availability of the declarant. This differing organization is consistent with Pennsylvania law. 2. Pa.R.E. 803.1(3)(C) makes clear that, to qualify a recorded recollection as an exception to the hearsay rule, the witness must testify that the memorandum or record correctly reflects the knowledge that the witness once had. In other words, the witness must vouch for the reliability of the record. The Federal Rule is ambiguous on this point and the applicable federal cases are conflicting. 3. Pa.R.E. 803.1(3) allows the memorandum or record to be received as an exhibit, and grants the trial judge discretion to show it to the jury in exceptional circumstances, even when not offered by an adverse party. <p>Pa.R.E. 803.1(3) is consistent with Pennsylvania law.</p>
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Rule 803.1

<p>1982); <i>Commonwealth v. Cooley</i>, 398 A.2d 637 (Pa. 1979).</p> <p>Note: Adopted May 8, 1998, effective October 1, 1998; amended March 10, 2000, effective July 1, 2000.</p> <p>Committee Explanatory Reports:</p> <p>Final Report explaining the amendment to subsection (1) and the updates to the Comment to subsection (1) published with the Court's Order at 30 Pa.B. 1646 (March 25, 2000).</p>	<p>See <i>Commonwealth v. Cargo</i>, 498 Pa. 5, 444 A.2d 639 (1982).</p> <p>Note: Adopted May 8, 1998, effective October 1, 1998; amended March 10, 2000, effective July 1, 2000; rescinded and replaced _____, 2011, effective _____, 2011.</p> <p>Committee Explanatory Reports:</p> <p>Final Report explaining the amendment to subsection (1) and the updates to the Comment to subsection (1) published with the Court's Order at 30 Pa.B. 1645 (March 25, 2000).</p> <p>Final Report explaining the _____, 2011 rescission and replacement published with the Court's Order at ___ Pa.B. __ (_____, 2011).</p>
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Rule 804

Rule 804. Hearsay exceptions; declarant unavailable	Rule 804. Exceptions to the Rule Against Hearsay – When the Declarant is Unavailable as a Witness
<p>(a) Definition of unavailability. “Unavailability as a witness” includes situations in which the declarant:</p> <p>(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or</p> <p>(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or</p> <p>(3) testifies to a lack of memory of the subject matter of the declarant's statement; or</p> <p>(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or</p> <p>(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.</p> <p>A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.</p>	<p>(a) Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant:</p> <p>(1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;</p> <p>(2) refuses to testify about the subject matter despite a court order to do so;</p> <p>(3) testifies to not remembering the subject matter;</p> <p>(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</p> <p>(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:</p> <p>(A) the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or</p> <p>(B) the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).</p> <p>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.</p>

Comment

<p>Pa.R.E. 804(a) is identical to F.R.E. 804(a). Though there is no common definition of unavailability for hearsay purposes in prior Pennsylvania law, the rule is consistent with case law applying the four hearsay exceptions that require unavailability.</p>	<p>This rule is identical to F.R.E. 804(a).</p>
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Rule 804

Rule 804(b) Hearsay Exceptions.	Rule 804(b). The Exceptions
<p>(b) Hearsay Exceptions. The following statements, as hereinafter defined, are not excluded by the hearsay rule if the declarant is unavailable as a witness:</p> <p>(1) <i>Former testimony.</i> Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an adequate opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.</p>	<p>(b) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:</p> <p>(1) Former Testimony. Testimony that:</p> <p>(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and</p> <p>(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.</p>

Comment

<p>Pa.R.E. 804(b)(1) is identical to F.R.E. 804(b)(1), except that it adds the word “adequate” in front of opportunity. It is consistent with Pennsylvania law.</p> <p>Pennsylvania has two statutes that provide exceptions to the hearsay rule for former testimony. Both are entitled, “Notes of evidence at former trial.” 42 Pa.C.S. § 5917 applies only to criminal cases. 42 Pa.C.S. § 5934 applies only to civil cases. Both are reenactments of statutes that were originally passed in 1887.</p> <p>These two statutes, which are limited in scope, have less significance than they might otherwise have because the Pennsylvania Supreme Court has recognized a broader exception to the hearsay rule for former testimony as a matter of its developing common law. <i>See, e.g., Commonwealth v. Graves</i>, 398 A.2d 644 (Pa. 1979); <i>Commonwealth v. Rodgers</i>, 372 A.2d 771 (Pa. 1977). The addition of an “adequate” opportunity to cross-examine is consistent with Pennsylvania law. <i>See Commonwealth v. Bazemore</i>, 614 A.2d 684 (Pa. 1992) (requiring a “full and fair” opportunity to cross-examine).</p> <p>Depositions</p> <p>Depositions are the most common form of prior testimony that is introduced at a modern trial. Their use is provided for not only by Pa.R.E. 804(b)(1), but also by statute and rules of procedure promulgated by the Pennsylvania Supreme Court.</p>	<p>Pa.R.E. 804(b)(1) is identical to F.R.E. 804(b)(1).</p> <p>In criminal cases the Supreme Court has held that former testimony is admissible against the defendant only if the defendant had a “full and fair” opportunity to examine the witness. <i>See Commonwealth v. Bazemore</i>, 531 Pa. 582, 614 A.2d 684 (1992).</p> <p>Depositions</p> <p>Depositions are the most common form of former testimony that is introduced at a modern trial. Their use is provided for not only by Pa.R.E. 804(b)(1), but also by statute and rules of procedure promulgated by the Pennsylvania Supreme Court.</p>
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Rule 804

The Judicial Code provides for the use of depositions in criminal cases. 42 Pa.C.S. § 5919 provides:

Depositions in criminal matters. The testimony of witnesses taken in accordance with section 5325 (relating to when and how a deposition may be taken outside this Commonwealth) may be read in evidence upon the trial of any criminal matter unless it shall appear at the trial that the witness whose deposition has been taken is in attendance, or has been or can be served with a subpoena to testify, or his attendance otherwise procured, in which case the deposition shall not be admissible.

42 Pa.C.S. § 5325 sets forth the procedure for taking depositions, by either prosecution or defendant, outside Pennsylvania.

Again, the Pennsylvania Supreme Court, as a matter of common law development, has recognized an exception to the hearsay rule for depositions that is broader than the statute. See *Commonwealth v. Stasko*, 370 A.2d 350 (Pa. 1977).

In civil cases, the introduction of depositions, or parts thereof, at trial is provided for by Pa.R.C.P. 4020(a)(3) and (5):

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds

(a) that the witness is dead, or

(b) that the witness is at a greater distance than one hundred (100) miles from the place of trial or is outside the Commonwealth, unless it appears that the absence of the witness was procured by the party offering the deposition, or

(c) that the witness is unable to attend or testify because of age, sickness, infirmity or imprisonment, or

(d) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena, or

(e) upon application and notice that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

The Judicial Code provides for the use of depositions in criminal cases. 42 Pa.C.S. § 5919 provides:

Depositions in criminal matters. The testimony of witnesses taken in accordance with section 5325 (relating to when and how a deposition may be taken outside this Commonwealth) may be read in evidence upon the trial of any criminal matter unless it shall appear at the trial that the witness whose deposition has been taken is in attendance, or has been or can be served with a subpoena to testify, or his attendance otherwise procured, in which case the deposition shall not be admissible.

42 Pa.C.S. § 5325 sets forth the procedure for taking depositions, by either prosecution or defendant, outside Pennsylvania.

In civil cases, the introduction of depositions, or parts thereof, at trial is provided for by Pa.R.C.P. 4020(a)(3) and (5).

Rule 804

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(5) A deposition upon oral examination of a medical witness, other than a party, may be used at trial for any purpose whether or not the witness is available to testify.

A videotape deposition of a medical witness, or any expert witness, other than a party to the case, may be introduced in evidence at trial, regardless of the witness's availability, pursuant to Pa.R.C.P. 4017.1(g).

By statute, the testimony of a licensed physician taken by deposition in accordance with the Pennsylvania Rules of Civil Procedure is admissible in a civil case. There is no requirement that the physician testify as an expert witness. 42 Pa.C.S. § 5936 provides:

Medical testimony by deposition

(a) General rule. The testimony of any physician licensed to practice medicine may be taken by oral interrogation in the manner prescribed by general rule for the taking of depositions.

(b) Admissibility. A deposition taken under subsection (a) shall be admissible in a civil matter.

A video deposition of a medical witness, or any expert witness, other than a party to the case, may be introduced in evidence at trial, regardless of the witness's availability, pursuant to Pa.R.C.P. 4017.1(g).

42 Pa.C.S. § 5936 provides that the testimony of a licensed physician taken by deposition in accordance with the Pennsylvania Rules of Civil Procedure is admissible in a civil case. There is no requirement that the physician testify as an expert witness.

Rule 804

Rule 804(b)(2) Statement under belief of impending death.	Rule 804(b)(2). Statement Under Belief of Imminent Death
(2) <i>Statement under belief of impending death.</i> A statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.	(2) Statement Under Belief of Imminent Death. A statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

Comment

<p>Pa.R.E. 804(b)(2) is similar to F.R.E. 804(b)(2), except that the Pennsylvania rule applies in all cases, not just in homicide cases and civil actions. This is a departure from prior Pennsylvania law, which applied the exception only to statements made by the victim in a criminal prosecution for homicide.</p> <p>The rationale for this exception from the hearsay rule was set forth in <i>Commonwealth v. Smith</i>, 454 Pa. 515, 314 A.2d 224, 225 (Pa. 1973):</p> <p>The reliability of a dying declaration is provided not by an oath, nor [sic] by cross-examination; rather, its admissibility is based on the premise that no one “who is immediately going into the presence of his Maker will do so with a lie upon his lips.” Luch, L.J., <i>Regina v. Osman</i>, 15 Cox C.C. 1, 3 (Eng. 1881).</p> <p>The common law traditionally, but illogically, excepted a dying declaration from the hearsay rule in a criminal prosecution for homicide, but not in a criminal prosecution for another crime, or in a civil case. Prior Pennsylvania case law followed the common law. See <i>Commonwealth v. Antonini</i>, 69 A.2d 436 (Pa. Super. 1949).</p> <p>Reasoned analysis dictated a change. If a dying declaration is trustworthy enough to be introduced against a defendant charged with murder, it is trustworthy enough to be introduced against a defendant charged with attempted murder, robbery, or rape. It is also trustworthy enough to be introduced against a party in a civil case.</p> <p>In <i>Crawford v. Washington</i>, 541 U.S. 36, 124 S.Ct. 1354 (2004), the Supreme Court interpreted the Confrontation Clause in the Sixth Amendment of the United States Constitution to prohibit the introduction of “testimonial” hearsay from an unavailable witness against a defendant in a criminal case unless the defendant had an opportunity to confront and cross-examine the declarant, regardless of its exception from the hearsay rule. However, in footnote 6, the</p>	<p>Pa.R.E. 804(b)(2) differs from F.R.E. 804(b)(2) in that the Federal Rule is applicable in criminal cases only if the defendant is charged with homicide. The Pennsylvania Rule is applicable in all civil and criminal cases, subject to the defendant's right to confrontation in criminal cases.</p> <p>In <i>Crawford v. Washington</i>, 541 U.S. 36 (2004), the Supreme Court interpreted the Confrontation Clause in the Sixth Amendment of the United States Constitution to prohibit the introduction of “testimonial” hearsay from an unavailable witness against a defendant in a criminal case unless the defendant had an opportunity to confront and cross-examine the declarant, regardless of its exception from the hearsay rule. However, in footnote 6, the Supreme</p>
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Rule 804

Supreme Court said that there may be an exception, *sui generis*, for those dying declarations that are testimonial.

Court said that there may be an exception, *sui generis*, for those dying declarations that are testimonial.

Rule 804

Rule 804(b)(3) Statement against interest.	Rule 804(b)(3). Statement Against Interest
<p>(3) <i>Statement against interest.</i> A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. In a criminal case, a statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.</p>	<p>(3) Statement Against Interest. A statement that:</p> <p>(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</p> <p>(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.</p>

Comment

<p>The first sentence of Pa.R.E. 804(b)(3) is identical to the first sentence of F.R.E. 804(b)(3). The second sentence differs by requiring corroborating circumstantial evidence of trustworthiness before an assertion against the declarant's penal interest can be introduced <i>by either side</i> in a criminal case. The federal formulation requires such corroboration only when the statement is offered to exculpate the defendant.</p> <p>Pa.R.E. 804(b)(3) is consistent with prior Pennsylvania decisional law. See <i>Rudisill v. Cordes</i>, 5 A.2d 217 (Pa. 1939) (civil case); <i>Commonwealth v. Williams</i>, 640 A.2d 1251, 1263 n. 8 (Pa. 1994) (criminal case).</p>	<p>This rule is identical to F.R.E. 804(b)(3).</p>
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Rule 804

Rule 804(b)(4) Statement of personal or family history	Rule 804(b)(4). Statement of Personal or Family History
<p>(4) <i>Statement of personal or family history.</i> A statement, made before the controversy arose:</p> <p>(A) concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or</p> <p>(B) concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage, or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.</p>	<p>(4) Statement of Personal or Family History. A statement made before the controversy arose about:</p> <p>(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</p> <p>(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.</p>

Comment

<p>Pa.R.E. 804(b)(4) differs from F.R.E. 804(b)(4) by requiring the statement of pedigree to be made before the controversy arose, i.e., ante litem motam.</p> <p>Pa.R.E. 804(b)(4) expands prior Pennsylvania decisional law in two respects:</p> <p>1. The exception applies if the declarant is unavailable, as "unavailability" is defined in Pa.R.E. 804(a). Formerly, it was required that the declarant be dead. <i>See In re McClain's Estate</i>, 392 A.2d 1371 (Pa. 1978). The need for the evidence is the same, whether the declarant is dead or unavailable to testify for one of the other reasons delineated in Pa.R.E. 804(a).</p> <p>2. Under Pa.R.E. 804(b)(4)(B), the declarant need not be related to the person of whom he or she spoke. It is sufficient that the declarant be so closely associated with the person's family as to have accurate information. Formerly, a familial relationship was required. <i>See In re Garrett's Estate</i>, 89 A.2d 531 (Pa. 1952). A statement of this type by a person closely associated with the person or family of which he or she spoke is likely to be sufficiently reliable to justify an exception to the hearsay rule.</p> <p>Pennsylvania retains the requirement that the statement must be made before the controversy</p>	<p>Pa.R.E. 804(b)(4) differs from F.R.E. 804(b)(4) by requiring that the statement be made before the controversy arose. <i>See In re McClain's Estate</i>, 481 Pa. 435, 392 A.2d 1371 (1978). This requirement is not imposed by the Federal Rule.</p>
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Rule 804

arose. See <i>In re McClain's Estate, supra</i> ; <i>In re Garrett's Estate, supra</i> .	
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Rule 804

Rule 804(b)(5) Other exceptions [not adopted].	Rule 804(b)(5). Other exceptions (Not Adopted)
<i>(5) Other exceptions [not adopted].</i>	(5) Other exceptions (Not Adopted)

Comment

Pennsylvania has not adopted F.R.E. 804(b)(5) (now F.R.E. 807). The Federal rule is often called the residual exception to the hearsay rule.	Pennsylvania has not adopted F.R.E. 804(b)(5) (now F.R.E. 807).
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Rule 804

Rule 804(b)(6) Forfeiture by wrongdoing.	Rule 804(b)(6). Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability
(6) <i>Forfeiture by wrongdoing.</i> A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.	(6) Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability. A statement offered against a party that wrongfully caused – or acquiesced in wrongfully causing – the declarant's unavailability as a witness, and did so intending that result.

Comment

<p>Pa.R.E. 804(b)(6) is identical to F.R.E. 804(b)(6). This exception is new to Pennsylvania law.</p> <p>Note: Adopted May 8, 1998, effective October 1, 1998; Comment revised March 10, 2000, effective immediately.</p> <p>Committee Explanatory Reports:</p> <p>Final Report explaining the March 10, 2000 revision of the Comment to paragraph (b)(4) published with the Court's Order at 30 Pa.B. 1641 (March 25, 2000).</p>	<p>This rule is identical to F.R.E. 804(b)(6).</p> <p>Note: Adopted May 8, 1998, effective October 1, 1998; Comment revised March 10, 2000, effective immediately; rescinded and replaced _____, 2011, effective _____, 2011.</p> <p>Committee Explanatory Reports:</p> <p>Final Report explaining the March 10, 2000 revision of the Comment to paragraph (b)(4) published with the Court's Order at 30 Pa.B. 1641 (March 25, 2000).</p> <p>Final Report explaining the _____, 2011 rescission and replacement published with the Court's Order at ___ Pa.B. __ (_____, 2011).</p>
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Rule 805

Rule 805. Hearsay within hearsay	Rule 805. Hearsay Within Hearsay
Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.	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.

Comment

<p>Pa.R.E. 805 is identical to F.R.E. 805. It is consistent with Pennsylvania law. See <i>Commonwealth v. Galloway</i>, 302 Pa. Super. 145, 448 A.2d 568 (1982).</p>	<p>This rule is identical to F.R.E. 805.</p> <p>Note: Adopted May 8, 1998, effective October 1, 1998; rescinded and replaced _____, 2011, effective _____, 2011.</p> <p>Committee Explanatory Reports:</p> <p>Final Report explaining the _____, 2011 rescission and replacement published with the Court's Order at ___ Pa.B. __ (_____, 2011).</p>
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Rule 806

Rule 806. Attacking and supporting credibility of declarant	Rule 806. Attacking and Supporting the Declarant's Credibility
<p>When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.</p>	<p>When a hearsay statement 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.</p>

Comment

<p>Pa.R.E. 806 is similar to F.R.E. 806, except that Pa.R.E. 806 makes no reference to Rule 801(d)(2). The subject matter of F.R.E. 801(d)(2) (admissions) is covered by Pa.R.E. 803(25). The change is not substantive. Pa.R.E. 806 is consistent with Pennsylvania law. See <i>Commonwealth v. Davis</i>, 363 Pa. Super. 562, 526 A.2d 1205 (1987), <i>appeal denied</i> 518 Pa. 624, 541 A.2d 1135 (1988).</p> <p>The requirement that a witness be given an opportunity to explain or deny the making of an inconsistent statement provided by Pa.R.E. 613(b) is not applicable when the prior inconsistent statement is offered to impeach a statement admitted under an exception to the hearsay rule. In most cases, the declarant will not be on the stand at the time when the hearsay statement is offered and for that reason the requirement of Pa.R.E. 613(b) is not appropriate.</p> <p>The last sentence of Pa.R.E. 806 allows the party against whom a hearsay statement has been admitted to call the declarant as a witness and cross-examine the declarant about the statement. This is consistent with Pennsylvania law. See <i>Commonwealth v. Haber</i>, 351 Pa. Super. 79, 505 A.2d 273 (1986).</p>	<p>Pa.R.E. 806 differs from F.R.E. 806 in that Pa.R.E. 806 makes no reference to Rule 801(d)(2). The subject matter of F.R.E. 801(d)(2) (an opposing party's statement) is covered by Pa.R.E. 803(25). The change is not substantive. Pa.R.E. 806 is consistent with Pennsylvania law. See <i>Commonwealth v. Davis</i>, 363 Pa. Super. 562, 526 A.2d 1205 (1987).</p> <p>The requirement that a witness be given an opportunity to explain or deny the making of an inconsistent statement provided by Pa.R.E. 613(b)(2) is not applicable when the prior inconsistent statement is offered to impeach a statement admitted under an exception to the hearsay rule. In most cases, the declarant will not be on the stand at the time when the hearsay statement is offered and for that reason the requirement of Pa.R.E. 613(b)(2) is not appropriate.</p> <p>Note: Adopted May 8, 1998, effective October 1, 1998; rescinded and replaced _____, 2011, effective _____, 2011.</p> <p>Committee Explanatory Reports:</p> <p>Final Report explaining the _____, 2011 amendments published with the Court's Order at ___ Pa.B. ___ (_____, 2011).</p>
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Rule 807

Rule 807. Residual exception [not adopted]	Rule 807. Residual Exception (Not Adopted)
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Comment

Pennsylvania has not adopted F.R.E. 807.	Pennsylvania has not adopted F.R.E. 807.
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Rule 901

ARTICLE IX. AUTHENTICATION AND IDENTIFICATION Rule 901. Requirement of authentication or identification	ARTICLE IX. AUTHENTICATION AND IDENTIFICATION Rule 901. Authenticating or Identifying Evidence
<p>(a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.</p>	<p>(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.</p>
<p>(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:</p>	<p>(b) Examples. The following are examples only – not a complete list – of evidence that satisfies the requirement:</p>
<p>(1) <i>Testimony of witness with knowledge.</i> Testimony that a matter is what it is claimed to be.</p>	<p>(1) Testimony of a Witness with Knowledge. Testimony that an item is what it is claimed to be.</p>
<p>(2) <i>Nonexpert opinion on handwriting.</i> Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.</p>	<p>(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.</p>
<p>(3) <i>Comparison by trier or expert witness.</i> Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.</p>	<p>(3) Comparison by an Expert Witness or the Trier of Fact. A comparison with an authenticated specimen by an expert witness or the trier of fact.</p>
<p>(4) <i>Distinctive characteristics and the like.</i> Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.</p>	<p>(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.</p>
<p>(5) <i>Voice identification.</i> Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.</p>	<p>(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.</p>
<p>(6) <i>Telephone conversations.</i> Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.</p>	<p>(6) Evidence About a Telephone Conversation. For a telephone conversation, evidence that a call was made to the number assigned at the time to:</p> <p>(A) a particular person, if circumstances, including self-identification, show that the person answering was the one called; or</p> <p>(B) a particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone.</p>

Rule 901

<p>(7) <i>Public records or reports.</i> Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.</p>	<p>(7) Evidence About Public Records. Evidence that:</p> <p>(A) a document was recorded or filed in a public office as authorized by law; or</p> <p>(B) a purported public record or statement is from the office where items of this kind are kept.</p>
<p>(8) <i>Ancient documents or data compilation.</i> Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 30 years or more at the time it is offered.</p>	<p>(8) Evidence About Ancient Documents or Data Compilations. For a document or data compilation, evidence that it:</p> <p>(A) is in a condition that creates no suspicion about its authenticity;</p> <p>(B) was in a place where, if authentic, it would likely be; and</p> <p>(C) is at least 30 years old when offered.</p>
<p>(9) <i>Process or system.</i> Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.</p>	<p>(9) Evidence About a Process or System. Evidence describing a process or system and showing that it produces an accurate result.</p>
<p>(10) <i>Methods provided by law.</i> Any method of authentication or identification provided by statute or by other rules prescribed by the Supreme Court.</p>	<p>(10) Methods Provided by a Statute or a Rule. Any method of authentication or identification allowed by a statute or a rule prescribed by the Supreme Court.</p>

Comment

<p>Paragraph 901(a) is identical to F.R.E. 901(a) and consistent with Pennsylvania law. Although the authentication or identification requirement has not been authoritatively defined, Pennsylvania courts have imposed the requirement. It may be expressed as follows: When a party offers evidence contending either expressly or impliedly that the evidence is connected with a person, place, thing or event, the party must provide evidence sufficient to support a finding of the contended connection. See <i>Commonwealth v. Pollock</i>, 414 Pa. Super. 66, 606 A.2d 500 (1992); <i>Commonwealth v. Hudson</i>, 489 Pa. 620, 414 A.2d 1381 (1980).</p> <p>In some cases, real evidence may not be relevant unless its condition at the time of trial is similar to its condition at the time of the incident in question. In such cases, the party offering the evidence must also introduce evidence sufficient to support a finding that the condition is similar. Pennsylvania law treats this requirement as an aspect of authentication. See <i>Commonwealth v. Hudson</i>, 489 Pa. 620, 414 A.2d 1381 (1980); <i>Heller v. Equitable Gas Co.</i>, 333 Pa. 433, 3 A.2d 343 (1939).</p>	<p>Pa.R.E. 901(a) is identical to F.R.E. 901(a) and consistent with Pennsylvania law. The authentication or identification requirement may be expressed as follows: When a party offers evidence contending either expressly or impliedly that the evidence is connected with a person, place, thing, or event, the party must provide evidence sufficient to support a finding of the contended connection. See <i>Commonwealth v. Hudson</i>, 489 Pa. 620, 414 A.2d 1381 (1980); <i>Commonwealth v. Pollock</i>, 414 Pa. Super. 66, 606 A.2d 500 (1992).</p> <p>In some cases, real evidence may not be relevant unless its condition at the time of trial is similar to its condition at the time of the incident in question. In such cases, the party offering the evidence must also introduce evidence sufficient to support a finding that the condition is similar. Pennsylvania law treats this requirement as an aspect of authentication. See <i>Commonwealth v. Hudson</i>, 489 Pa. 620, 414 A.2d 1381 (1980).</p>
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Rule 901

Demonstrative evidence such as photographs, motion pictures, diagrams and models must be authenticated by evidence sufficient to support a finding that the demonstrative evidence fairly and accurately represents that which it purports to depict. See *Nyce v. Muffley*, 384 Pa. 107, 119 A.2d 530 (1956).

Paragraph 901(b) is identical to F.R.E. 901(b).

Paragraph 901(b)(1) is identical to F.R.E. 901(b)(1). It is consistent with Pennsylvania law in that the testimony of a witness with personal knowledge may be sufficient to authenticate or identify the evidence. See *Commonwealth v. Hudson*, 489 Pa. 620, 414 A.2d 1381 (1980); *Heller v. Equitable Gas Co.*, 333 Pa. 433, 3 A.2d 343 (1939).

Paragraph 901(b)(2) is identical to F.R.E. 901(b)(2). It is consistent with 42 Pa.C.S.A. § 6111, which also deals with the admissibility of handwriting.

Paragraph 901(b)(3) is identical to F.R.E. 901(b)(3). It is consistent with Pennsylvania law. When there is a question as to the authenticity of an exhibit, the trier of fact will have to resolve the issue. This may be done by comparing the exhibit to authenticated specimens. See *Commonwealth v. Gipe*, 169 Pa. Super. 623, 84 A.2d 366 (1951) (comparison of typewritten document with authenticated specimen). Under this rule, the court must decide whether the specimen used for comparison to the exhibit is authentic. If the court determines that there is sufficient evidence to support a finding that the specimen is authentic, the trier of fact is then permitted to compare the exhibit to the authenticated specimen. Under Pennsylvania law, lay or expert testimony is admissible to assist the jury in resolving the question. See, e.g., 42 Pa.C.S.A. § 6111.

Paragraph 901(b)(4) is identical to F.R.E. 901(b)(4). Pennsylvania law has permitted evidence to be authenticated by circumstantial evidence similar to that discussed in this illustration. The evidence may take a variety of forms including: evidence establishing chain of custody, see *Commonwealth v. Melendez*, 326 Pa. Super. 531, 474 A.2d 617 (1984); evidence that a letter is in reply to an earlier communication, see *Roe v. Dwelling House Ins. Co. of Boston*, 149 Pa. 94, 23 A. 718 (1892); testimony that an item of evidence was found in a place connected to a party, see *Commonwealth v. Bassi*, 284 Pa. 81, 130 A. 311 (1925); a phone call authenticated by evidence of party's conduct after the call, see *Commonwealth v. Gold*, 123 Pa. Super. 128, 186 A. 208 (1936); and the identity of a speaker established by the content and circumstances of a conversation, see *Bonavitacola v. Cluver*, 422 Pa. Super. 556, 619 A.2d 1363 (1993).

Demonstrative evidence such as photographs, motion pictures, diagrams and models must be authenticated by evidence sufficient to support a finding that the demonstrative evidence fairly and accurately represents that which it purports to depict. See *Nyce v. Muffley*, 384 Pa. 107, 119 A.2d 530 (1956).

Pa.R.E. 901(b) is identical to F.R.E. 901(b).

Pa.R.E. 901(b)(1) is identical to F.R.E. 901(b)(1). It is consistent with Pennsylvania law in that the testimony of a witness with personal knowledge may be sufficient to authenticate or identify the evidence. See *Commonwealth v. Hudson*, 489 Pa. 620, 414 A.2d 1381 (1980).

Pa.R.E. 901(b)(2) is identical to F.R.E. 901(b)(2). It is consistent with 42 Pa.C.S. § 6111, which also deals with the admissibility of handwriting.

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Pa.R.E. 901(b)(4) is identical to F.R.E. 901(b)(4). Pennsylvania law has permitted evidence to be authenticated by circumstantial evidence similar to that discussed in this illustration. The evidence may take a variety of forms including: evidence establishing chain of custody, see *Commonwealth v. Melendez*, 326 Pa. Super. 531, 474 A.2d 617 (1984); evidence that a letter is in reply to an earlier communication, see *Roe v. Dwelling House Ins. Co. of Boston*, 149 Pa. 94, 23 A. 718 (1892); testimony that an item of evidence was found in a place connected to a party, see *Commonwealth v. Bassi*, 284 Pa. 81, 130 A. 311 (1925); a phone call authenticated by evidence of party's conduct after the call, see *Commonwealth v. Gold*, 123 Pa. Super. 128, 186 A. 208 (1936); and the identity of a speaker established by the content and circumstances of a conversation, see *Bonavitacola v. Cluver*, 422 Pa. Super. 556, 619 A.2d 1363 (1993).

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Paragraph 901(b)(5) is identical to F.R.E. 901(b)(5). Pennsylvania law has permitted the identification of a voice to be made by a person familiar with the alleged speaker's voice. See *Commonwealth v. Carpenter*, 472 Pa. 510, 372 A.2d 806 (1977).

Paragraph 901(b)(6) is identical to F.R.E. 901(b)(6). This paragraph appears to be consistent with Pennsylvania law. See *Smithers v. Light*, 305 Pa. 141, 157 A. 489 (1931); *Wahl v. State Workmen's Ins. Fund*, 139 Pa. Super. 53, 11 A.2d 496 (1940); see also 2 McCormick, Evidence § 226 (4th ed. 1992).

Paragraph 901(b)(7) is identical to F.R.E. 901(b)(7). This paragraph illustrates that public records and reports may be authenticated in the same manner as other writings. In addition, public records and reports may be self-authenticating as provided in Pa.R.E. 902. Public records and reports may also be authenticated as otherwise provided by statute. See paragraph 901(b)(10) and its Comment.

Paragraph 901(b)(8) is identical to F.R.E. 901(b)(8), except that the Pennsylvania rule requires thirty years, while the Federal Rule requires twenty years. This change makes the rule consistent with Pennsylvania law. See *Commonwealth ex rel. Ferguson v. Ball*, 277 Pa. 301, 121 A. 191 (1923); *Jones v. Scranton Coal Co.*, 274 Pa. 312, 118 A. 219 (1922).

Paragraph 901(b)(9) is identical to F.R.E. 901(b)(9). There is very little authority in Pennsylvania discussing authentication of evidence as provided in this illustration. The paragraph is consistent with the authority that exists. For example, in *Commonwealth v. Viscontio*, 301 Pa. Super. 543, 448 A.2d 41 (1982), a computer print-out was held to be admissible. In *Appeal of Chartier Valley School District*, 67 Pa. Cmwith. 121, 447 A.2d 317 (1982), computer studies were not admitted as business records, in part, because it was not established that the mode of preparing the evidence was reliable. The court used a similar approach in *Commonwealth v. Westwood*, 324 Pa. 289, 188 A. 304 (1936) (test for gun powder residue) and in other cases to admit various kinds of scientific evidence. See *Commonwealth v. Middleton*, 379 Pa. Super. 502, 550 A.2d 561 (1988) (electrophoretic analysis of dried blood); *Commonwealth v. Rodgers*, 413 Pa. Super. 498, 605 A.2d 1228 (1992) (results of DNA/RFLP testing).

Paragraph 901(b)(10) differs from F.R.E. 901(b)(10) to eliminate the reference to Federal law and to make the paragraph conform to Pennsylvania law.

There are a number of statutes that provide for authentication or identification of various types of evidence. See, e.g., 42 Pa.C.S.A. § 6103 (official

Pa.R.E. 901(b)(5) is identical to F.R.E. 901(b)(5). Pennsylvania law has permitted the identification of a voice to be made by a person familiar with the alleged speaker's voice. See *Commonwealth v. Carpenter*, 472 Pa. 510, 372 A.2d 806 (1977).

Pa.R.E. 901(b)(6) is identical to F.R.E. 901(b)(6). This paragraph appears to be consistent with Pennsylvania law. See *Smithers v. Light*, 305 Pa. 141, 157 A. 489 (1931); *Wahl v. State Workmen's Ins. Fund*, 139 Pa. Super. 53, 11 A.2d 496 (1940).

Pa.R.E. 901(b)(7) is identical to F.R.E. 901(b)(7). This paragraph illustrates that public records and reports may be authenticated in the same manner as other writings. In addition, public records and reports may be self-authenticating as provided in Pa.R.E. 902. Public records and reports may also be authenticated as otherwise provided by statute. See Pa.R.E. 901(b)(10) and its Comment.

Pa.R.E. 901(b)(8) differs from F.R.E. 901(b)(8), in that the Pennsylvania Rule requires thirty years, while the Federal Rule requires twenty years. This change makes the rule consistent with Pennsylvania law. See *Commonwealth ex rel. Ferguson v. Ball*, 277 Pa. 301, 121 A. 191 (1923).

Pa.R.E. 901(b)(9) is identical to F.R.E. 901(b)(9). There is very little authority in Pennsylvania discussing authentication of evidence as provided in this illustration. The paragraph is consistent with the authority that exists. For example, in *Commonwealth v. Viscontio*, 301 Pa. Super. 543, 448 A.2d 41 (1982), a computer print-out was held to be admissible. In *Appeal of Chartiers Valley School District*, 67 Pa. Cmwith. 121, 447 A.2d 317 (1982), computer studies were not admitted as business records, in part, because it was not established that the mode of preparing the evidence was reliable. The court used a similar approach in *Commonwealth v. Westwood*, 324 Pa. 289, 188 A. 304 (1936) (test for gun powder residue) and in other cases to admit various kinds of scientific evidence. See *Commonwealth v. Middleton*, 379 Pa. Super. 502, 550 A.2d 561 (1988) (electrophoretic analysis of dried blood); *Commonwealth v. Rodgers*, 413 Pa. Super. 498, 605 A.2d 1228 (1992) (results of DNA/RFLP testing).

Pa.R.E. 901(b)(10) differs from F.R.E. 901(b)(10) to eliminate the reference to Federal law and to make the paragraph conform to Pennsylvania law.

There are a number of statutes that provide for authentication or identification of various types of evidence. See, e.g., 42 Pa.C.S. § 6103 (official

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records within the Commonwealth); 42 Pa.C.S.A. § 5328 (domestic records outside the Commonwealth and foreign records); 35 P.S. § 450.810 (vital statistics); 42 Pa.C.S.A. § 6106 (documents filed in a public office); 42 Pa.C.S.A. § 6110 (certain registers of marriages, births and burials records); 75 Pa.C.S.A. § 1547(c) (chemical tests for alcohol and controlled substances); 75 Pa.C.S.A. § 3368 (speed timing devices); 75 Pa.C.S.A. § 1106(c) (certificates of title); 42 Pa.C.S.A. § 6151 (certified copies of medical records); 23 Pa.C.S.A. § 5104 (blood tests to determine paternity); 23 Pa.C.S.A. § 4343 (genetic tests to determine paternity).

In general, evidence may be authenticated or identified in any manner provided by statute, these rules or decisional law. In some situations, decisional law has required strict compliance with a statute providing for authentication or identification of evidence. *See Commonwealth v. Townsend*, 418 Pa. Super. 48, 613 A.2d 564 (1992); *Commonwealth v. Martorano*, 387 Pa. Super. 151, 563 A.2d 1229 (1989).

records within the Commonwealth); 42 Pa.C.S. § 5328 (domestic records outside the Commonwealth and foreign records); 35 P.S. § 450.810 (vital statistics); 42 Pa.C.S. § 6106 (documents filed in a public office); 42 Pa.C.S. § 6110 (certain registers of marriages, births and burials records); 75 Pa.C.S. § 1547(c) (chemical tests for alcohol and controlled substances); 75 Pa.C.S. § 3368 (speed timing devices); 75 Pa.C.S. § 1106(c) (certificates of title); 42 Pa.C.S. § 6151 (certified copies of medical records); 23 Pa.C.S. § 5104 (blood tests to determine paternity); 23 Pa.C.S. § 4343 (genetic tests to determine paternity).

Note: Adopted May 8, 1998, effective October 1, 1998; rescinded and replaced _____, 2011, effective _____, 2011.

Committee Explanatory Reports:

Final Report explaining the _____, 2011 rescission and replacement published with the Court's Order at ___ Pa.B. __ (_____, 2011).

Rule 902

Rule 902. Self-authentication	Rule 902. Evidence That Is Self-Authenticating
<p>Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:</p> <p>(1) Domestic public documents under seal. A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.</p>	<p>The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:</p> <p>(1) Domestic Public Documents That Are Sealed and Signed. A document that bears:</p> <p>(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</p> <p>(B) a signature purporting to be an execution or attestation.</p>
<p>(2) Domestic public documents not under seal. A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.</p>	<p>(2) Domestic Public Documents That Are Not Sealed But Are Signed and Certified. A document that bears no seal if:</p> <p>(A) it bears the signature of an officer or employee of an entity named in Rule 902(1)(A); and</p> <p>(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.</p>
<p>(3) Foreign public documents. A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or</p>	<p>(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:</p>

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<p>permit them to be evidenced by an attested summary with or without final certification.</p>	<p>(A) order that it be treated as presumptively authentic without final certification; or</p> <p>(B) allow it to be evidenced by an attested summary with or without final certification.</p>
<p>(4) Certified copies of public records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any statute or rule prescribed by the Supreme Court.</p>	<p>(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:</p> <p>(A) the custodian or another person authorized to make the certification; or</p> <p>(B) a certificate that complies with Rule 902(1), (2), or (3), a statute or a rule prescribed by the Supreme Court.</p>
<p>(5) Official publications. Books, pamphlets, or other publications purporting to be issued by public authority.</p>	<p>(5) Official Publications. A book, pamphlet, or other publication purporting to be issued by a public authority.</p>
<p>(6) Newspapers and periodicals. Printed materials purporting to be newspapers or periodicals.</p>	<p>(6) Newspapers and Periodicals. Printed material purporting to be a newspaper or periodical.</p>
<p>(7) Trade inscriptions and the like. Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.</p>	<p>(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.</p>
<p>(8) Acknowledged documents. Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.</p>	<p>(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.</p>
<p>(9) Commercial paper and related documents. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.</p>	<p>(9) Commercial Paper and Related Documents. Commercial paper, a signature on it, and related documents, to the extent allowed by general commercial law.</p>
<p>(10) Presumptions authorized by statute. Any signature, document or other matter declared by statute to be presumptively or prima facie genuine or authentic.</p>	<p>(10) Presumptions Authorized by Statute. A signature, document, or anything else that a statute declares to be presumptively or prima facie genuine or authentic.</p>
<p>(11) Certified domestic records of regularly conducted activity. The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person, verified as provided in Pa.R.C.P. 76, certifying that the record—</p> <p>(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;</p> <p>(B) was kept in the course of the regularly</p>	<p>(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 Pa.R.C.P. 76. 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.</p>

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<p>conducted activity; and</p> <p>(C) was made by the regularly conducted activity as a regular practice.</p> <p>A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.</p>	
<p>(12) Certified foreign records of regularly conducted activity. The original or a duplicate of a foreign record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration by its custodian or other qualified person certifying that the record--</p> <p>(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;</p> <p>(B) was kept in the course of the regularly conducted activity; and</p> <p>(C) was made by the regularly conducted activity as a regular practice.</p> <p>The declaration must be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.</p>	<p>(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 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).</p>

Rule 902 Comment

This rule permits some evidence to be authenticated without extrinsic evidence of authentication or identification. In other words, the requirement that a proponent must present authentication or identification evidence as a condition precedent to admissibility, as provided by Pa.R.E. 901(a), is inapplicable to the evidence discussed in Pa.R.E. 902. The rationale for the rule is that, for the types of evidence covered by Pa.R.E. 902, the risk of forgery or deception is so small, and the likelihood of discovery of forgery or deception is so great, that the cost of presenting extrinsic evidence and the waste of court time is not justified. Of course, this rule does not preclude the opposing party from contesting the authenticity of the evidence. In that situation, authenticity is to be resolved by the finder of fact.

Paragraphs 902(1), (2), (3) and (4) deal with self-authentication of various kinds of public documents and records. They are identical to F.R.E. 902(1), (2), (3) and (4), except that Pa.R.E. 901(4) eliminates the reference to Federal law. These paragraphs are consistent with Pennsylvania statutory law. See 42 Pa.C.S.A. § 6103 (official records within the Commonwealth); 42 Pa.C.S.A. § 5328 (domestic records outside the Commonwealth and foreign records); 35 P.S. § 450.810 (vital statistics); 42 Pa.C.S.A. § 6106 (documents filed in a public office).

Paragraphs 902(5), (6) and (7) are identical to F.R.E. 902(5), (6) and (7). There are no corresponding statutory provisions in Pennsylvania; however, 45 Pa.C.S.A. § 506 (judicial notice of the contents of the Pennsylvania Code and the Pennsylvania Bulletin) is similar to Pa.R.E. 902(5). Although these paragraphs are new to Pennsylvania, their adoption is amply supported by the rationale for Pa.R.E. 902.

Paragraph 902(8) is identical to F.R.E. 902(8). It is consistent with Pennsylvania law. See *Sheaffer v. Baeringer*, 346 Pa. 32, 29 A.2d 697 (1943); *Williamson v. Barrett*, 147 Pa. Super. 460, 24 A.2d 546 (1942); 21 P.S. §§ 291.1-291.13 (Uniform Acknowledgement Act); 57 P.S. §§ 147-169 (Notary Public Law). An acknowledged document is a type of official record and the treatment of acknowledged documents is consistent with Paragraphs 902(1), (2), (3) and (4).

Paragraph 902(9) is identical to F.R.E. 902(9). Pennsylvania law treats various kinds of commercial paper and documents as self-authenticating. See, e.g., 13 Pa.C.S.A. § 1202 (documents authorized or required by contract to be issued by a third party); 13 Pa.C.S.A. § 3505 (evidence of dishonor of negotiable instruments).

This rule permits some evidence to be authenticated without extrinsic evidence of authentication or identification. In other words, the requirement that a proponent must present authentication or identification evidence as a condition precedent to admissibility, as provided by Pa.R.E. 901(a), is inapplicable to the evidence discussed in Pa.R.E. 902. The rationale for the rule is that, for the types of evidence covered by Pa.R.E. 902, the risk of forgery or deception is so small, and the likelihood of discovery of forgery or deception is so great, that the cost of presenting extrinsic evidence and the waste of court time is not justified. Of course, this rule does not preclude the opposing party from contesting the authenticity of the evidence. In that situation, authenticity is to be resolved by the finder of fact.

Pa.R.E. 902(1), (2), (3) and (4) deal with self-authentication of various kinds of public documents and records. They are identical to F.R.E. 902(1), (2), (3) and (4), except that Pa.R.E. 901(4) eliminates the reference to Federal law. These paragraphs are consistent with Pennsylvania statutory law. See, e.g. 42 Pa.C.S. § 6103 (official records within the Commonwealth); 42 Pa.C.S. § 5328 (domestic records outside the Commonwealth and foreign records); 35 P.S. § 450.810 (vital statistics); 42 Pa.C.S. § 6106 (documents filed in a public office).

Pa.R.E. 902(5), (6) and (7) are identical to F.R.E. 902(5), (6) and (7). There are no corresponding statutory provisions in Pennsylvania; however, 45 Pa.C.S. § 506 (judicial notice of the contents of the Pennsylvania Code and the Pennsylvania Bulletin) is similar to Pa.R.E. 902(5).

Pa.R.E. 902(8) is identical to F.R.E. 902(8). It is consistent with Pennsylvania law. See *Sheaffer v. Baeringer*, 346 Pa. 32, 29 A.2d 697 (1943); *Williamson v. Barrett*, 147 Pa. Super. 460, 24 A.2d 546 (1942); 21 P.S. §§ 291.1-291.13 (Uniform Acknowledgement Act); 57 P.S. §§ 147-169 (Notary Public Law). An acknowledged document is a type of official record and the treatment of acknowledged documents is consistent with Pa.R.E. 902(1), (2), (3), and (4).

Pa.R.E. 902(9) is identical to F.R.E. 902(9). Pennsylvania law treats various kinds of commercial paper and documents as self-authenticating. See, e.g., 13 Pa.C.S. § 3505 (evidence of dishonor of negotiable instruments).

Rule 902

Paragraph 902(10) differs from F.R.E. 902(10) to eliminate the reference to Federal law and to make the paragraph conform to Pennsylvania law. In some Pennsylvania statutes, the self-authenticating nature of a document is expressed by language creating a “presumption” of authenticity. See 13 Pa.C.S.A. § 3505. In other Pennsylvania statutes, the self-authenticating nature of a document is expressed by language that the document is “prima facie” authentic or genuine. See 13 Pa.C.S.A. § 1202. This paragraph recognizes the continuing vitality of such statutes.

Paragraphs (11) and (12), which were added in 2001, permit the authentication of domestic and foreign records of regularly conducted activity by certification. This is new to Pennsylvania law for records of regularly conducted activity, but is consistent with Pa.R.E. 902(2), (3), and (4) which permit authentication of various kinds of public documents and records by certification. Pa.R.E. 902(11) is similar to F.R.E. 902(11). The language of Pa.R.E. 902(11) differs from F.R.E. 902(11) in that it refers to Pa.R.C.P. 76 rather than to federal law. Pa.R.E. 902(12) differs from F.R.E. 902(12) in that the words “in a civil case” are deleted. The words “in a civil case” appear in F.R.E. 902(12) because certification of foreign business records in federal criminal cases is allowed by 18 U.S.C. § 3505. Pennsylvania has no comparable statute. Instead, Pa.R.E. 902(12), as amended, allows certification of foreign business records in Pennsylvania criminal cases, as well as civil cases. The addition of paragraphs (11) and (12) is intended to implement the amendment of Pa.R.E. 803(6).

Note: Adopted May 8, 1998, effective October 1, 1998; amended November 2, 2001; effective January 1, 2002.

Committee Explanatory Reports:

Final Report explaining the November 2, 2001, amendments adding paragraphs (11) and (12) published with Court’s Order at 31 Pa.B. 6384 (November 24, 2001).

Pa.R.E. 902(10) differs from F.R.E. 902(10) to eliminate the reference to Federal law and to make the paragraph conform to Pennsylvania law. In some Pennsylvania statutes, the self-authenticating nature of a document is expressed by language creating a “presumption” of authenticity. See, e.g., 13 Pa.C.S. § 3505.

Pa.R.E. 902(11) and (12) permit the authentication of domestic and foreign records of regularly conducted activity by verification or certification. Pa.R.E. 902(11) is similar to F.R.E. 902(11). The language of Pa.R.E. 902(11) differs from F.R.E. 902(11) in that it refers to Pa.R.C.P. 76 rather than to Federal law. Pa.R.E. 902(12) differs from F.R.E. 902(12) in that it requires compliance with a Pennsylvania statute rather than a Federal statute.

Note: Adopted May 8, 1998, effective October 1, 1998; amended November 2, 2001, effective January 1, 2002; amended February 23, 2004, effective May 1, 2004; rescinded and replaced _____, 2011, effective _____, 2011.

Committee Explanatory Reports:

Final Report explaining the November 2, 2001 amendments adding paragraphs (11) and (12) published with Court’s Order at 31 Pa.B. 6384 (November 24, 2001).

Final Report explaining the February 23, 2004 amendment of paragraph (12) published with Court’s Order at 34 Pa.B. 1429 (March 13, 2004).

Final Report explaining the _____, 2011 rescission and replacement published with the Court’s Order at _____ Pa.B. _____ (_____, 2011).

Rule 903

Rule 903. Subscribing witness' testimony unnecessary	Rule 903. Subscribing Witness's Testimony
The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.	A subscribing witness's testimony is necessary to authenticate a writing only if required by the law of the jurisdiction that governs its validity.

Comment

<p>This rule is identical to F.R.E. 903. The rule is consistent with Pennsylvania law in that there are no laws in Pennsylvania requiring the testimony of a subscribing witness to authenticate a writing.</p>	<p>This rule is identical to F.R.E. 903. There are no laws in Pennsylvania requiring the testimony of a subscribing witness to authenticate a writing.</p> <p>Note: Adopted May 8, 1998, effective October 1, 1998; rescinded and replaced _____, 2011, effective _____, 2011.</p> <p>Committee Explanatory Reports:</p> <p>Final Report explaining the _____, 2011 rescission and replacement published with the Court's Order at ___ Pa.B. __ (_____, 2011).</p>
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Rule 1001

ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS Rule 1001. Definitions	ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS Rule 1001. Definitions That Apply to This Article
<p>For purposes of this article the following definitions are applicable:</p> <p>(1) Writings and recordings. “Writings” and “recordings” consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.</p> <p>(2) Photographs. “Photographs” include still photographs, X-ray films, video tapes, and motion pictures.</p> <p>(3) Original. An “original” of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An “original” of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an “original”.</p> <p>(4) Duplicate. A “duplicate” is a copy produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.</p>	<p>In this article:</p> <p>(a) A “writing” consists of letters, words, numbers, or their equivalent set down in any form.</p> <p>(b) A “recording” consists of letters, words, numbers, or their equivalent recorded in any manner.</p> <p>(c) A “photograph” means a photographic image or its equivalent stored in any form.</p> <p>(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.</p> <p>(e) A “duplicate” means a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.</p>

Comment

<p>This rule is identical to F.R.E. 1001, except that the word “copy” in Pa.R.E. 1001(4) replaces the word “counterpart” used in F.R.E. 1001(4).</p> <p>Paragraphs 1001(1) and (2) have no precise equivalent in Pennsylvania law, but the definitions of the terms writings, recordings and photographs are consistent with lay and legal usage in Pennsylvania.</p> <p>The definition of an original writing, recording or photograph contained in paragraph 1001(3) appears to be consistent with Pennsylvania practice.</p> <p>The definition of an original of data stored in a computer or similar device in paragraph 1001(3) is consistent with Pa.R.E. 901(b)(9) (authentication of evidence produced by a process or system).</p>	<p>This rule is identical to F.R.E. 1001.</p>
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Rule 1001

Paragraph 1001(4) defines the term duplicate. This term is important because of the admissibility of duplicates under Pa.R.E. 1003. This Rule differs from the Federal Rule in that the word “counterpart” has been replaced by the word “copy”. The word “counterpart” is used in paragraph 1001(3) to refer to a copy intended to have the same effect as the writing or recording itself. The word “copy” is used to mean a copy that was not intended to have the same effect as the original. Pennsylvania law has permitted the use of duplicates produced by the same impression as the original, as is the case with carbon copies. See *Brenner v. Leshner*, 332 Pa. 522, 2 A.2d 731 (1938); *Commonwealth v. Johnson*, 373 Pa. Super. 312, 541 A.2d 332 (1988); *Pennsylvania Liquor Control Bd. v. Evolo*, 204 Pa. Super. 225, 203 A.2d 332 (1964). Pennsylvania has not treated other duplicates as admissible unless the original was shown to be unavailable through no fault of the proponent. See *Hera v. McCormick*, 425 Pa. Super. 432, 625 A.2d 682 (1993); *Warren v. Mosites Constr. Co.*, 253 Pa. Super. 395, 385 A.2d 397 (1978). For this reason, the definition of duplicates, other than those produced by the same impression as the original, is new to Pennsylvania law. The justification for adopting the new definition is discussed in the Comment to Pa.R.E. 1003.

Paragraph 1001(e) defines the term duplicate. This term is important because of the admissibility of duplicates under Pa.R.E. 1003. Pennsylvania law has permitted the use of duplicates produced by the same impression as the original, as is the case with carbon copies. See *Brenner v. Leshner*, 332 Pa. 522, 2 A.2d 731 (1938); *Commonwealth v. Johnson*, 373 Pa. Super. 312, 541 A.2d 332 (1988); *Pennsylvania Liquor Control Bd. v. Evolo*, 204 Pa. Super. 225, 203 A.2d 332 (1964). Pennsylvania has not treated other duplicates as admissible unless the original was shown to be unavailable through no fault of the proponent. For this reason, the definition of duplicates, other than those produced by the same impression as the original, is new to Pennsylvania law. The justification for adopting the new definition is discussed in the Comment to Pa.R.E. 1003.

Note: Adopted May 8, 1998, effective October 1, 1998; rescinded and replaced _____, 2011, effective _____, 2011.

Committee Explanatory Reports:

Final Report explaining the _____, 2011 rescission and replacement published with the Court’s Order at __ Pa.B. __ (_____, 2011).

Rule 1002

Rule 1002. Requirement of original	Rule 1002. Requirement of the Original
To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules, by other rules prescribed by the Supreme Court, or by statute.	An original writing, recording, or photograph is required in order to prove its content unless these rules, other rules prescribed by the Supreme Court, or a statute provides otherwise.

Comment

<p>Pa.R.E. 1002 differs from F.R.E. 1002 to eliminate the reference to Federal law and to make the Rule conform to Pennsylvania law. Pa.R.E. 1002 is consistent with Pennsylvania law.</p> <p>This rule corresponds to the common law “best evidence rule.” See <i>Warren v. Mosites Constr. Co.</i>, 253 Pa. Super. 395, 385 A.2d 397 (1978). The rationale for the rule was not expressed in Pennsylvania cases, but commentators have mentioned four reasons justifying the rule.</p> <p>(1) The exact words of many documents, especially operative or dispositive documents, such as deeds, wills or contracts, are so important in determining a party’s rights accruing under those documents.</p> <p>(2) Secondary evidence of the contents of documents, whether copies or testimony, is susceptible to inaccuracy.</p> <p>(3) The rule inhibits fraud because it allows the parties to examine the original documents to detect alterations and erroneous testimony about the contents of the document.</p> <p>(4) The appearance of the original may furnish information as to its authenticity.</p> <p>5 Weinstein & Berger, <i>Weinstein’s Evidence</i> § 1002(2) (Sandra D. Katz rev. 1994).</p> <p>The common law formulation of the rule provided that the rule was applicable when the terms of the document were “material.” The materiality requirement has not been eliminated, but is now dealt with in Pa.R.E. 1004(4). That rule provides that the original is not required when the writing, recording or photograph is not closely related to a controlling issue.</p> <p>The case law has not been entirely clear as to when a</p>	<p>Pa.R.E. 1002 differs from F.R.E. 1002 to eliminate the reference to Federal law.</p> <p>This rule corresponds to the common law “best evidence rule.” See <i>Hera v. McCormick</i>, 425 Pa. Super. 432, 625 A.2d 682 (1993). The rationale for the rule was not expressed in Pennsylvania cases, but commentators have mentioned four reasons justifying the rule.</p> <p>(1) The exact words of many documents, especially operative or dispositive documents, such as deeds, wills or contracts, are so important in determining a party’s rights accruing under those documents.</p> <p>(2) Secondary evidence of the contents of documents, whether copies or testimony, is susceptible to inaccuracy.</p> <p>(3) The rule inhibits fraud because it allows the parties to examine the original documents to detect alterations and erroneous testimony about the contents of the document.</p> <p>(4) The appearance of the original may furnish information as to its authenticity.</p> <p>5 Weinstein & Berger, <i>Weinstein’s Evidence</i> § 1002(2) (Sandra D. Katz rev. 1994).</p> <p>The common law formulation of the rule provided that the rule was applicable when the terms of the document were “material.” The materiality requirement has not been eliminated, but is now dealt with in Pa.R.E. 1004(d). That rule provides that the original is not required when the writing, recording or photograph is not closely related to a controlling issue.</p> <p>The case law has not been entirely clear as to when a</p>
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Rule 1002

party is trying “to prove the content of a writing, recording, or photograph.” However, writings that are viewed as operative or dispositive have usually been considered to be subject to the operation of the rule. Such writings include deeds, see *Gallagher v. London Assurance Corp.*, 149 Pa. 25, 24 A. 115 (1892), contracts, see *In re Reuss' Estate*, 422 Pa. 58, 220 A.2d 822 (1966), and attachments, see *L.C.S. Colliery, Inc. v. Globe Coal Co.*, 369 Pa. 1, 84 A.2d 776 (1951). On the other hand, writings are not usually treated as subject to the rule if they are only evidence of the transaction, thing or event. See *Hamill-Quinlan, Inc. v. Fisher*, 404 Pa. Super. 482, 591 A.2d 309 (1991); *Noble C. Quandel Co. v. Slough Flooring, Inc.*, 384 Pa. Super. 236, 558 A.2d 99 (1989). Thus, testimony as to a person's age may be offered; it is not necessary to produce a birth certificate. See *Commonwealth ex rel. Park v. Joyce*, 316 Pa. 434, 175 A. 422 (1934). Or, a party's earnings may be proven by testimony; it is not necessary to offer business records. See *Noble C. Quandel Co. v. Slough Flooring, Inc.*, 384 Pa. Super. 236, 558 A.2d 99 (1989).

Traditionally, the best evidence rule applied only to writings. Photographs, which under the definition established by Pa.R.E. 1001(2) include x-ray films, videotapes, and motion pictures, are usually only evidence of the transaction, thing or event. It is rare that a photograph would be operative or dispositive, but in cases involving matters such as infringement of copyright, defamation, pornography and invasion of privacy, the requirement for the production of the original should be applicable. There is support for this approach in Pennsylvania law. See *Commonwealth v. Lewis*, 424 Pa. Super. 531, 623 A.2d 355 (1993) (video tape); *Anderson v. Commonwealth*, 121 Pa. Cmwith. 521, 550 A.2d 1049 (1988) (film).

party is trying “to prove the content of a writing, recording, or photograph.” However, writings that are viewed as operative or dispositive have usually been considered to be subject to the operation of the rule. On the other hand, writings are not usually treated as subject to the rule if they are only evidence of the transaction, thing or event. See *Hamill-Quinlan, Inc. v. Fisher*, 404 Pa. Super. 482, 591 A.2d 309 (1991); *Noble C. Quandel Co. v. Slough Flooring, Inc.*, 384 Pa. Super. 236, 558 A.2d 99 (1989). Thus, testimony as to a person's age may be offered; it is not necessary to produce a birth certificate. See *Commonwealth ex rel. Park v. Joyce*, 316 Pa. 434, 175 A. 422 (1934). Or, a party's earnings may be proven by testimony; it is not necessary to offer business records. See *Noble C. Quandel Co.*, *supra*.

Traditionally, the best evidence rule applied only to writings, but Pa.R.E. 1002 may be applicable to recordings or photographs. However, recordings and photographs are usually only evidence of the transaction, thing or event. It is rare that a recording or photograph would be operative or dispositive, but in cases involving matters such as infringement of copyright, defamation, pornography and invasion of privacy, the requirement for the production of the original should be applicable. There is support for this approach in Pennsylvania law. See *Commonwealth v. Lewis*, 424 Pa. Super. 531, 623 A.2d 355 (1993) (video tape); *Anderson v. Commonwealth*, 121 Pa. Cmwith. 521, 550 A.2d 1049 (1988) (film).

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Committee Explanatory Reports:

Final Report explaining the _____, 2011 rescission and replacement published with the Court's Order at ___ Pa.B. ___ (_____, 2011).

Rule 1003

Rule 1003. Admissibility of duplicates	Rule 1003. Admissibility of Duplicates
<p>A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.</p>	<p>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.</p>

Comment

<p>This rule is identical to F.R.E. 1003 and is a modest extension of Pennsylvania law.</p> <p>Under the traditional best evidence rule, copies of documents were not routinely admissible. This view dated back to the time when copies were made by hand copying and were therefore subject to inaccuracy. On the other hand, Pennsylvania courts have admitted copies made by techniques that are more likely to produce accurate copies. For example, when a writing is produced in duplicate or multiplicate each of the copies is treated as admissible for purposes of the best evidence rule. See <i>Brenner v. Leshner</i>, 332 Pa. 522, 2 A.2d 731 (1938); <i>Pennsylvania Liquor Control Bd. v. Evolo</i>, 204 Pa. Super. 225, 203 A.2d 332 (1964).</p> <p>In addition, various Pennsylvania statutes have treated some accurate copies as admissible. See 42 Pa.C.S. § 6104 (governmental records in the Commonwealth); 42 Pa.C.S. § 5328 (domestic records outside the Commonwealth and foreign records); 42 Pa.C.S. § 6106 (documents recorded or filed in a public office); 42 Pa.C.S. § 6109 (photographic copies of business and public records); 42 Pa.C.S. §§ 6151-59 (certified copies of medical records).</p> <p>The extension of similar treatment to all accurate copies seems justified in light of modern practice. Pleading and discovery rules such as Pa.R.C.P. 4009.1 (requiring production of originals of documents and photographs etc.) and Pa.R.Crim.P. 573 (B)(1)(f) and (g) (requiring disclosure of originals of documents, photographs and recordings of electronic surveillance) will usually provide an adequate opportunity to discover fraudulent copies. As a result, Pa.R.E. 1003 should tend to eliminate purely technical objections and unnecessary delay. In those cases where the opposing party raises a genuine question as to authenticity or the fairness of using a duplicate, the trial court may require the production of the original under this rule.</p>	<p>This rule is identical to F.R.E. 1003.</p> <p>Under the traditional best evidence rule, copies of documents were not routinely admissible. This view dated back to the time when copies were made by hand copying and were therefore subject to inaccuracy. On the other hand, Pennsylvania courts have admitted copies made by techniques that are more likely to produce accurate copies. For example, when a writing is produced in duplicate or multiplicate each of the copies is treated as admissible for purposes of the best evidence rule. See <i>Brenner v. Leshner</i>, 332 Pa. 522, 2 A.2d 731 (1938); <i>Pennsylvania Liquor Control Bd. v. Evolo</i>, 204 Pa. Super. 225, 203 A.2d 332 (1964).</p> <p>In addition, various Pennsylvania statutes have treated some accurate copies as admissible. See 42 Pa.C.S. § 6104 (governmental records in the Commonwealth); 42 Pa.C.S. § 5328 (domestic records outside the Commonwealth and foreign records); 42 Pa.C.S. § 6106 (documents recorded or filed in a public office); 42 Pa.C.S. § 6109 (photographic copies of business and public records); 42 Pa.C.S. §§ 6151-59 (certified copies of medical records).</p> <p>The extension of similar treatment to all accurate copies seems justified in light of modern practice. Pleading and discovery rules such as Pa.R.C.P. 4009.1 (requiring production of originals of documents and photographs etc.) and Pa.R.Crim.P. 573(B)(1)(f) and (g) (requiring disclosure of originals of documents, photographs and recordings of electronic surveillance) will usually provide an adequate opportunity to discover fraudulent copies. As a result, Pa.R.E. 1003 should tend to eliminate purely technical objections and unnecessary delay. In those cases where the opposing party raises a genuine question as to authenticity or the fairness of using a duplicate, the trial court may require the production of the original under this rule.</p>
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Rule 1003

<p>Note: Adopted May 8, 1998, effective October 1, 1998; Comment revised March 29, 2001, effective April 1, 2001.</p>	<p>Note: Adopted May 8, 1998, effective October 1, 1998; Comment revised March 29, 2001, effective April 1, 2001; rescinded and replaced _____, 2011, effective _____, 2011.</p>
<p>Committee Explanatory Reports:</p>	<p>Committee Explanatory Reports:</p>
<p>Final Report explaining the March 29, 2001 revision of the Comment published with the Court's Order at 31 Pa.B. 1995 (April 14, 2001).</p>	<p>Final Report explaining the March 29, 2001 revision of the Comment published with the Court's Order at 31 Pa.B. 1995 (April 14, 2001).</p>
	<p>Final Report explaining the _____, 2011 rescission and replacement published with the Court's Order at ___ Pa.B. __ (_____, 2011).</p>

Rule 1004

Rule 1004. Admissibility of other evidence of contents	Rule 1004. Admissibility of Other Evidence of Content
<p>The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if--</p> <p>(1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or</p> <p>(2) Original not obtainable. No original can be obtained by any available judicial process or procedure; or</p> <p>(3) Original in possession of opponent. At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or</p> <p>(4) Collateral matters. The writing, recording, or photograph is not closely related to a controlling issue.</p>	<p>An original is not required and other evidence of the content of a writing, recording, or photograph is admissible if:</p> <p>(a) all the originals are lost or destroyed, and not by the proponent acting in bad faith;</p> <p>(b) an original cannot be obtained by any available judicial process;</p> <p>(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</p> <p>(d) the writing, recording, or photograph is not closely related to a controlling issue.</p>

Comment

<p>This rule is identical to F.R.E. 1004.</p> <p>Paragraph 1004(1) is consistent with Pennsylvania law. <i>See Olson & French, Inc. v. Commonwealth</i>, 399 Pa. 266, 160 A.2d 401 (1960); <i>Brenner v. Leshner</i>, 332 Pa. 522, 2 A.2d 731 (1938). When the proponent of the evidence alleges that it is lost, there should be evidence that a sufficient search was made. <i>See Brenner v. Leshner</i>, 332 Pa. 522, 2 A.2d 731 (1938); <i>Hera v. McCormick</i>, 425 Pa. Super. 432, 625 A.2d 682 (1993).</p> <p>Paragraphs 1004(2), 1004(3) and 1004(4) are consistent with Pennsylvania law. <i>See Otto v. Trump</i>, 115 Pa. 425, 8 A. 786 (1887) (consistent with Pa.R.E. 1004(2)); <i>Abercrombie v. Bailey</i>, 326 Pa. 65, 190 A. 725 (1937) (consistent with Pa.R.E. 1004(3)); <i>Durkin v. Equine Clinics, Inc.</i>, 313 Pa. Super. 75, 459 A.2d 417 (1983) (consistent with Pa.R.E. 1004(4)); <i>McCullough v. Holland Furnace Co.</i>, 293 Pa. 45, 141 A. 631 (1928) (consistent with Pa.R.E. 1004(4)); <i>see also</i> Comment to Pa.R.E. 1002.</p> <p>Under F.R.E. 1004, when production of the original is not required, the proffering party need not offer a duplicate even if that is available; the proffering party may present any evidence including oral testimony.</p>	<p>This rule is identical to F.R.E. 1004.</p> <p>When the proponent of the evidence alleges that it is lost, there should be evidence that a sufficient search was made. <i>See Hera v. McCormick</i>, 425 Pa. Super. 432, 625 A.2d 682 (1993).</p> <p>Under Pa.R.E. 1004, when production of the original is not required, the proffering party need not offer a duplicate even if that is available; the proffering party may present any evidence including oral testimony.</p>
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Rule 1004

See F.R.E. 1004 advisory committee's note. There is no hierarchy of secondary evidence. There is some authority in Pennsylvania that seems to require the next best evidence when presentation of the original is not required. See *Otto v. Trump*, 115 Pa. 425, 8 A. 786 (1887); *Stevenson, Bowen & Nesmith v. Hoy*, 43 Pa. 191 (1862). This approach adds an unnecessary level of complexity. The normal motivation of a party to produce the most convincing evidence together with the availability of discovery to uncover fraud seems adequate to control abuse. Thus, Pa.R.E. 1004 follows the approach of F.R.E. 1004.

The normal motivation of a party to produce the most convincing evidence together with the availability of discovery to uncover fraud seems adequate to control abuse.

Note: Adopted May 8, 1998, effective October 1, 1998; rescinded and replaced _____, 2011, effective _____, 2011.

Committee Explanatory Reports:

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Rule 1005

Rule 1005. Public records	Rule 1005. Copies of Public Records to Prove Content
<p>The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by a copy as provided by Pa.R.E. 901 or 902, by statute, or by testimony of a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.</p>	<p>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.</p>

Comment

<p>The language of the first sentence of this rule differs somewhat from F.R.E. 1005 to conform more closely to Pa.R.E. 901 and 902. The changes are not intended to be substantive. This rule is consistent with Pennsylvania law. There are several statutes that provide that copies of various kinds of public documents and records are admissible. See Comments to Pa.R.E. 901 and 902.</p>	<p>This rule is identical to F.R.E. 1005.</p> <p>Note: Adopted May 8, 1998, effective October 1, 1998; rescinded and replaced _____, 2011, effective _____, 2011.</p> <p>Committee Explanatory Reports:</p> <p>Final Report explaining the _____, 2011 rescission and replacement published with the Court's Order at ___ Pa.B. __ (_____, 2011).</p>
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Rule 1006

Rule 1006. Summaries	Rule 1006. Summaries to Prove Content
<p>The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.</p>	<p>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.</p>

Comment

<p>This rule is identical to F.R.E. 1006 and is consistent with Pennsylvania law. See <i>Scaife Co. v. Rockwell-Standard Corp.</i>, 446 Pa. 280, 285 A.2d 451 (1971); <i>Royal Pioneer Paper Box Mfg. Co. v. Louis Dejonge & Co.</i>, 179 Pa. Super. 155, 115 A.2d 837 (1955); <i>Keller v. Porta</i>, 172 Pa. Super. 651, 94 A.2d 140 (1953).</p>	<p>This rule is identical to F.R.E. 1006.</p> <p>Note: Adopted May 8, 1998, effective October 1, 1998; rescinded and replaced _____, 2011, effective _____, 2011.</p> <p>Committee Explanatory Reports:</p> <p>Final Report explaining the _____, 2011 rescission and replacement published with the Court's Order at ___ Pa.B. ___ (_____, 2011).</p>
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Rule 1007

Rule 1007. Testimony or written admission of party	Rule 1007. Testimony or Statement of a Party to Prove Content
Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party's written admission, without accounting for the nonproduction of the original.	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.

Comment

<p>This rule is identical to F.R.E. 1007. There is no precise equivalent to Pa.R.E. 1007 under Pennsylvania law, but the rule is consistent with Pennsylvania practice. Pa.R.C.P. 1019(h) requires a party to attach a copy of a writing to a pleading if any claim or defense is based on the writing. A responsive pleading admitting the accuracy of the writing would preclude an objection based on the original writings rule. Similarly, Pa.R.C.P. 4014(a) permits a party to serve any other party with a request for admission as to the genuineness, authenticity, correctness, execution, signing, delivery, mailing or receipt of any document described in the request. Pa.R.C.P. 4014(d) provides that any matter admitted is conclusively established.</p>	<p>This rule is identical to F.R.E. 1007. There is no precise equivalent to Pa.R.E. 1007 under Pennsylvania law, but the rule is consistent with Pennsylvania practice. For example, Pa.R.C.P. 1019(h) requires a party to attach a copy of a writing to a pleading if any claim or defense is based on the writing. A responsive pleading admitting the accuracy of the writing would preclude an objection based on Rule 1002. Similarly, Pa.R.C.P. 4014(a) permits a party to serve any other party with a request for admission as to the genuineness, authenticity, correctness, execution, signing, delivery, mailing or receipt of any document described in the request. Pa.R.C.P. 4014(d) provides that any matter admitted is conclusively established.</p> <p>Note: Adopted May 8, 1998, effective October 1, 1998; rescinded and replaced _____, 2011, effective _____, 2011.</p> <p>Committee Explanatory Reports:</p> <p>Final Report explaining the _____, 2011 rescission and replacement published with the Court's Order at ___ Pa.B. ___ (_____, 2011).</p>
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Rule 1008

Rule 1008. Functions of court and jury	Rule 1008. Functions of the Court and Jury
<p>When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of Pa.R.E. 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.</p>	<p>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:</p> <ul style="list-style-type: none"> (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.

Comment

<p>This rule is identical to F.R.E. 1008 except for the reference to “Pa.R.E.” instead of “rule.” There is no equivalent to this rule under Pennsylvania law, but this approach is consistent with Pennsylvania practice.</p>	<p>This rule is identical to F.R.E. 1008.</p> <p>Note: Adopted May 8, 1998, effective October 1, 1998; rescinded and replaced _____, 2011, effective _____, 2011.</p> <p>Committee Explanatory Reports:</p> <p>Final Report explaining the _____, 2011 rescission and replacement published with the Court’s Order at ___ Pa.B. __ (_____, 2011).</p>
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