

Table of Contents

Volume 1

CHAPTER 1. PRELIMINARY MATTERS

- § 1:1 How the pieces fit together
- § 1:2 “Evidence” and “proof”
- § 1:3 Forms of evidence; stipulations and judicial notice
- § 1:4 Fed. R. Evid. 401 and relevance
- § 1:5 Testimonial inferences; direct and circumstantial evidence
- § 1:6 “Competent,” “satisfactory” and “admissible” evidence
- § 1:7 Variations based on type of tribunal
- § 1:8 Variations based on type of action
- § 1:9 Federal rules of evidence; Uniform Rules of Evidence; state evidence codes
- § 1:10 What law governs
- § 1:11 Standard of appellate review
- § 1:11.50 Government pretrial appeal in criminal cases
- § 1:12 Harmless error

CHAPTER 2. JUDICIAL NOTICE

A. INTRODUCTION

- § 2:1 Types of information subject to judicial notice
- § 2:2 Judicial notice of law
- § 2:3 Judicial notice of “adjudicative facts”
- § 2:4 Judicial notice of “legislative facts”
- § 2:5 Elementary factual data; evaluative data
- § 2:6 Distinguishing between judicial notice of adjudicative fact and other types of judicial notice

B. JUDICIAL NOTICE OF ADJUDICATIVE FACTS

1. IN GENERAL

- § 2:7 “Adjudicative facts”; indisputability

- § 2:8 Fed. R. Evid. 201: Judicial notice
- § 2:8.50 Corresponding state judicial notice rules
- § 2:9 Facts of common knowledge
- § 2:10 Facts “capable of accurate and ready determination”
- § 2:11 Jurors’ knowledge of facts
- § 2:12 Judge’s personal knowledge of facts
- § 2:12.50 Documents: distinguishing between judicial notice of their existence, and the truth or interpretation of their contents

2. PROCEDURAL ISSUES

- § 2:13 Mandatory and discretionary judicial notice
- § 2:13.50 Standard of review for lower court’s judicial notice ruling
- § 2:14 Opportunity to be heard
- § 2:15 Judicial notice and pretrial motions
- § 2:16 —Discovery motions
- § 2:17 —Summary judgment and similar motions
- § 2:18 Contradictory evidence, jury instruction: Civil cases
- § 2:19 Jury instruction and contradictory evidence in criminal cases
- § 2:20 —Conclusive or permissive instruction
- § 2:21 —Admissibility of contradicting evidence
- § 2:22 —Effect of rule on definition of “adjudicative fact”
- § 2:23 Notice taken postverdict, on appeal, or post-preliminary injunction
- § 2:24 —Venue and territorial jurisdiction
- § 2:25 —Appellate notice of adjudicative facts, generally
- § 2:26 —Postverdict events
- § 2:27 —Appellate judicial notice of law
- § 2:28 —Criminal appeals

C. SPECIFIC FACTS JUDICIALLY NOTICED

- § 2:29 Generally
- § 2:29.50 —Learned treatises used to cross-examine experts

1. OCCUPATIONAL AND BUSINESS FACTS

- § 2:30 In general
- § 2:31 —Attorneys

TABLE OF CONTENTS

- § 2:32 —Automotive industry
- § 2:33 Banking; financial transactions, generally
- § 2:34 Building and construction industry
- § 2:35 Insurance
- § 2:36 Other occupational and business facts, customs and usages

2. HUMAN HABITS, TRAITS, AND DISEASES

- § 2:37 In general
- § 2:38 Facts relating to gender, sex, and relationships between the sexes
 - § 2:39 —Conception, gestation, and birth
 - § 2:40 —Family relationships
 - § 2:41 —Societal attitudes about sexuality
 - § 2:42 —Judicial notice and prosecutions for rape
 - § 2:43 —Miscellaneous facts judicially noticed
- § 2:43.50 Internet searches and medical information
- § 2:43.60 Judicial notice and COVID-19 pandemic-related subjects

3. ECONOMIC AND FINANCIAL FACTS

- § 2:44 In general
- § 2:45 World or national economic events
- § 2:46 —Current financial data: Inflation, interest rates, published financial statistics, etc
- § 2:47 —Facts relating to real estate and agriculture
- § 2:48 —Stocks, bonds, and investment capital
- § 2:49 —Miscellaneous facts

4. HISTORICAL FACTS

- § 2:50 In general
- § 2:51 Historical facts of national, international and general scope
 - § 2:52 —State and local historical facts
 - § 2:53 —Related subjects

5. BOUNDARIES, GEOGRAPHY, AND TOPOGRAPHY

- § 2:54 In general
- § 2:55 —Boundaries; political geography
- § 2:56 —Distances between locations

- § 2:57 Geography and topography
- § 2:58 Particular location within political subdivision

6. TRAFFIC AND TRAVEL

- § 2:59 In general
- § 2:60 —Public thoroughfares
- § 2:61 —Motor vehicles and their operation
- § 2:62 —Other means of transportation
- § 2:63 Driver reaction times and stopping distances
- § 2:64 —Driver reaction time
- § 2:65 —Breaking and stopping distances
- § 2:66 —Evaluative or adjudicative fact?
- § 2:67 —Admissibility as evidence

7. MISCELLANEOUS

- § 2:68 Habits, traits, and diseases of animals
- § 2:69 Phenomena of nature, seasons, plants, and time
- § 2:70 Science; laws of physics, chemistry, etc
- § 2:71 Meaning of words, phrases, abbreviations, and symbols
- § 2:71.50 Current conditions and events
- § 2:71.70 Judicial notice and information from the internet

D. JUDICIAL NOTICE OF LAW AND GOVERNMENT AFFAIRS

1. IN GENERAL

- § 2:72 Introduction; historical background
- § 2:73 Federal-state issues
- § 2:74 Statutory regulation of judicial notice of law
- § 2:75 Law of other states and nations; International law
- § 2:76 —Law of sister states
- § 2:77 —Law of other nations
- § 2:78 —Procedure
- § 2:79 —International law
- § 2:80 Foreign governmental matters
- § 2:80.50 Bureau of immigration; other governments

2. LEGISLATION AND RELATED MATTERS

- § 2:81 “Public,” “private,” and “local” state statutes

TABLE OF CONTENTS

- § 2:82 Statutory history: Legality and character of statute
- § 2:83 Legislative history; legislative intent
- § 2:84 Municipal charters and acts affecting municipalities
- § 2:85 Ordinances and other acts of local governments
- § 2:86 Acts of incorporation
- § 2:87 Miscellaneous legislative matters

3. JUDICIAL MATTERS

a. Judicial Administration and Miscellaneous Records

- § 2:88 In general
- § 2:89 Judicial notice of a court's own jurisdiction
- § 2:90 Judicial officers, rules and administration; miscellaneous records
- § 2:91 Judicial hierarchy
- § 2:92 —Notice of inferior court's authority, location, and personnel
- § 2:93 —Lower court's rules, procedures and administration
- § 2:94 Interjurisdictional issues

b. Litigation Documents

- § 2:95 In general
- § 2:96 Litigation documents as adjudicative fact
- § 2:97 —Law; legislative, evaluative, or basic fact
- § 2:98 Documents in case being litigated
- § 2:99 Other cases and courts
- § 2:100 Related proceedings
- § 2:101 —Issue preclusion; res judicata
- § 2:102 —Collateral proceedings
- § 2:103 —Other related proceedings
- § 2:104 Purpose for which judicial notice is taken:
The hidden hearsay issue
- § 2:104.50 Judicial notice of factual finding in another case
- § 2:105 Unrelated cases
- § 2:106 Subsequent developments
- § 2:107 Procedure after taking judicial notice

4. EXECUTIVE, ADMINISTRATIVE, AND REGULATORY MATTERS

- § 2:108 Domestic governmental matters, generally

- § 2:109 Public officials and their functions
- § 2:110 Official acts, regulations, reports, records, etc
- § 2:111 —Regulations
- § 2:112 —Acts, reports, and records in general
- § 2:113 —Procedural issues
- § 2:114 Officials' signatures and seals
- § 2:115 Trademarks

CHAPTER 3. BURDENS OF PROOF IN CIVIL CASES: GENERAL PRINCIPLES

A. DEFINING AND ALLOCATING BURDENS

- § 3:1 Introduction
- § 3:2 Definitions: Burdens of pleading, persuasion, production; prima facie case
- § 3:3 —Burden of pleading
- § 3:4 —Burden of proof
- § 3:5 —Burden of persuasion
- § 3:6 —Burden of production; prima facie case
- § 3:7 Burdens and presumptions
- § 3:8 Burdens of persuasion: Preponderance of evidence; clear and convincing evidence
- § 3:9 Burdens of persuasion—Preponderance of evidence
- § 3:10 —Clear and convincing evidence
- § 3:11 Allocating burdens in civil cases—Overview
- § 3:12 —General principles
- § 3:12.50 —Jurisdiction
- § 3:12.75 Allocating burdens in civil cases—Standing
- § 3:13 Allocating burdens in civil cases—Affirmative or negative form of pleading as controlling
- § 3:14 —Options and considerations
- § 3:15 Defenses and counterclaims
- § 3:16 —Denial
- § 3:17 —Burden-divided defenses
- § 3:18 —Affirmative defenses
- § 3:19 —Counterclaims and setoffs
- § 3:20 Constitutional considerations
- § 3:21 —Due process
- § 3:22 —Free exercise
- § 3:23 —Freedom of speech and press
- § 3:23.50 —Equal protection
- § 3:24 Foundation facts

TABLE OF CONTENTS

§ 3:25	Affirmative or negative assertions and facts
§ 3:26	“Disfavored contentions”
§ 3:27	Comparative availability of proof
§ 3:28	Other considerations

B. PROCEDURAL ISSUES

§ 3:29	In general
§ 3:29.10	Shifting burdens; motions to dismiss
§ 3:29.30	Burden of proof and jurisdiction
§ 3:29.50	Summary judgment motions and burdens of proof
§ 3:30	Shifting burdens; motion for directed verdict
§ 3:31	—Satisfying plaintiff’s burden of production; defendant’s motion for a directed verdict at close of plaintiff’s case
§ 3:32	—Drawing inferences
§ 3:33	—Witness credibility
§ 3:34	—Shifting burdens: Burden of persuasion
§ 3:35	—Shifting burdens: Burden of production
§ 3:36	Shifting burdens—Application to defendant’s case-in-chief
§ 3:37	—Denial
§ 3:38	Burden-divided defense, affirmative defense, counterclaim, setoff
§ 3:39	—Satisfying defendant’s burden of production; plaintiff’s motion for a directed verdict at close of defendant’s case
§ 3:40	—Shifting burdens: Burden of persuasion
§ 3:41	—Shifting burden of production: Affirmative defenses and counterclaims
§ 3:42	—Shifting burden of production: Denial
§ 3:43	Directed verdict for party with burden of persuasion
§ 3:44	Right to open and close as affected by burden of proof
§ 3:44.50	Burden of proof and settlement
§ 3:45	Substance or procedure; conflict of law; diversity

CHAPTER 4. INFERENCES AND PRESUMPTIONS: GENERAL PRINCIPLES

A. INTRODUCTORY MATTERS

- § 4:1 Inferences
- § 4:2 Nature of presumption; “prima facie evidence” statutes
- § 4:3 Terms used (and misused) in connection with inferences and presumptions
- § 4:4 Reasons underlying creation of presumptions
- § 4:5 —Probability
- § 4:6 —Procedural fairness
- § 4:7 —Procedural economy, regularity, convenience
- § 4:8 —Public policy
- § 4:9 Different approaches to impact of presumptions in civil litigation
- § 4:10 “Thayer” theory
- § 4:11 “Morgan” theory
- § 4:12 Individual classification of presumptions
- § 4:13 —“Probability” theory
- § 4:14 —“Public policy” theory
- § 4:15 —Presumption as evidence
- § 4:16 —Evaluation

B. LEGISLATIVE AND JUDICIAL REGULATION OF PRESUMPTIONS

1. FEDERAL LAW

a. Rule 301

- § 4:17 Fed. R. Evid. 301
- § 4:18 Introduction
- § 4:19 Thayer, or “broader” construction?
- § 4:20 Legislative history

b. Nonrule 301 Presumptions

- § 4:21 In general
- § 4:22 —Overview
- § 4:23 —“Otherwise provided”: Plain language test v. Congressional intent test
- § 4:24 —Effect of pre-Rule 301 case law construing statutory and nonstatutory presumptions

TABLE OF CONTENTS

- § 4:25 —Regulatory proceedings and presumptions
- § 4:26 —State variations

2. STATE REGULATION OF PRESUMPTIONS

- § 4:27 Overview
- § 4:28 —States following federal rule 301
- § 4:29 —“Thayer” jurisdictions
- § 4:30 —“Morgan” jurisdictions
- § 4:31 —“Public policy theory” jurisdictions
- § 4:32 —“Probability theory” jurisdictions
- § 4:32.50 Maryland rule
- § 4:33 —State judicial regulation of presumptions
- § 4:34 State provisions governing presumptions: Text

C. PROCEDURAL EFFECTS OF PRESUMPTIONS

- § 4:35 In general
- § 4:35.50 Jurisdictional presumptions
- § 4:36 Jury instructions: Preliminary comment
- § 4:37 Hypothetical fact pattern
- § 4:38 Proving and rebutting the basic facts—
Overview
- § 4:39 —Burden of production
- § 4:40 —Shifting burden of production
- § 4:41 —Rebutting basic facts
- § 4:42 Satisfying and shifting burden of production as
to presumed fact
- § 4:43 —Satisfying the burden
- § 4:44 —Shifting the burden
- § 4:45 Effect of failure to rebut presumed fact
- § 4:46 —Nonjury trial
- § 4:47 —Jury instruction
- § 4:48 Rebutting presumed fact: Sufficiency of
evidence to avoid directed verdict
- § 4:49 Rebutting presumed fact: Impact; jury
instruction
- § 4:50 —Thayer (“Bursting Bubble”) presumption
- § 4:51 —Reformist (“Morgan”) presumption
- § 4:52 —“Hybrid” presumption
- § 4:52.50 —Maryland rule
- § 4:52.60 Presumption of reliance and securities class-action
litigation

- § 4:53 Afterword: Legislative history of Fed. R. Evid.
301

D. OTHER PROCEDURAL ISSUES

1. CONSTITUTIONALITY AND VALIDITY

- § 4:54 In general
§ 4:55 Constitutionality: “Rational connection” test
§ 4:56 Validity of administrative presumptions
§ 4:57 “Conclusive presumptions”
§ 4:57.50 Other Constitutional considerations

2. PYRAMIDING PRESUMPTIONS OR INFERENCES

- § 4:58 In general

3. CONFLICTING OR INCONSISTENT PRESUMPTIONS

- § 4:59 In general
§ 4:60 “Cancellation” approach
§ 4:61 “Comparative weight” approach
§ 4:62 —Bases of comparison
§ 4:63 —Comparative weight approach: Specific applications
§ 4:64 Presumption of innocence

4. BURDENS AND PRESUMPTIONS: CHOICE OF LAW

- § 4:65 In general
§ 4:66 “Traditional” theory
§ 4:67 “Contact” theory
§ 4:68 Restatement
§ 4:69 Specific applications
§ 4:70 “Conclusive” presumptions

5. FEDERAL-STATE ISSUES; RULE 302

- § 4:71 In general
§ 4:72 Fed. R. Evid. 302; “substantive”-“tactical” dichotomy
§ 4:73 Federal Rule 302; “substantive”-“tactical” dichotomy—Distinguishing between substantive and tactical

TABLE OF CONTENTS

§ 4:74 State equivalents to Federal Rule 302

**CHAPTER 5. BURDENS AND
PRESUMPTIONS IN CRIMINAL CASES**

§ 5:1 In general

A. BURDEN OF PROOF

1. BEYOND REASONABLE DOUBT

- § 5:2 In general
- § 5:3 To define or not define
- § 5:4 “Important life decision” definition
- § 5:5 “Moral certainty” definition
- § 5:6 Other attempts at definition
- § 5:6.50 “Jury’s job is to find the facts” instruction
- § 5:7 Harmless error

2. PRESUMPTION OF INNOCENCE

- § 5:8 In general
- § 5:9 “Assumption,” not “presumption”
- § 5:10 Taylor and Whorton
- § 5:11 What constitutes proper instruction
- § 5:11.50 Timing of instruction
- § 5:12 “Totality of circumstances”
- § 5:13 Other presumption of innocence issues
- § 5:13.50 —Post conviction proceedings

**3. SUFFICIENCY: SATISFYING
GOVERNMENT’S BURDEN OF
PRODUCTION**

- § 5:14 Defendant’s motions for directed verdict
- § 5:15 General principles
- § 5:15.50 Ex post facto laws
- § 5:16 Circumstantial evidence
- § 5:16.50 —Nature of substance or object
- § 5:17 “Pyramiding inferences”
- § 5:17.50 —Standard on habeas

4. AFFIRMATIVE DEFENSES

1. In General

- § 5:18 In general

- § 5:19 Burdens of pleading and production
- § 5:20 —Burden of persuasion
- § 5:21 Rivera and Patterson
- § 5:22 Martin v. Ohio
- § 5:23 Evaluation

2. Statute of Limitations

- § 5:23.10 Introduction
- § 5:23.30 How the statute of limitations “works”; issues likely to arise
- § 5:23.50 Constitutional considerations: *Smith v. U.S.*
- § 5:23.70 Residual due process issue
- § 5:23.90 Allocating the burden

5. BURDENS AT OTHER CRIMINAL PROCEEDINGS

- § 5:24 In general
- § 5:25 Suppression litigation
- § 5:26 Other issues

B. CONSTITUTIONAL PRINCIPLES GOVERNING PRESUMPTIONS

- § 5:27 In general
- § 5:28 “Rational basis”
- § 5:29 “Mandatory” and “permissive” presumptions
- § 5:30 —Distinction between “permissive” and “mandatory” presumptions
- § 5:31 —Significance of distinction
- § 5:32 —Degree of probability
- § 5:33 —Assessing validity
- § 5:34 —Application
- § 5:35 —The Allen dissent
- § 5:36 Post-Allen case law

C. SPECIFIC APPLICATIONS

- § 5:37 Jurisdiction and venue
- § 5:38 Mental state
- § 5:39 —General rule
- § 5:40 —Intent
- § 5:41 —Insanity
- § 5:41.30 Possession of unlawful items

TABLE OF CONTENTS

§ 5:41.50	Competency to stand trial
§ 5:41.70	Intoxication and mens rea
§ 5:42	Intent to distribute drugs based on quantity possessed
§ 5:43	Alcohol tests: Presumption of impairment
§ 5:44	Possession of stolen property
§ 5:45	“Presumption” that witnesses tell truth
§ 5:46	Other presumptions
§ 5:47	Other applications

D. CORROBORATION REQUIREMENT

1. ACCOMPLICE TESTIMONY

a. Overview

§ 5:48	In general
§ 5:49	Juvenile offenders

b. Defining “Accomplice”

§ 5:50	In general
§ 5:51	Issue of fact or law; judicial instruction
§ 5:52	Larceny; receiving stolen property

c. Degree of Corroboration Required

§ 5:53	Federal rule
§ 5:54	“Tending to connect”

d. Jury Instructions

§ 5:55	In general
§ 5:56	Sample instructions

2. SEX OFFENSE COMPLAINANT

§ 5:57	General rule: Corroboration not required
--------	--

3. CONFESSIONS AND ADMISSIONS

§ 5:58	In general
a. The “Corpus Delicti Rule”	
§ 5:59	In general
§ 5:60	Quality or persuasiveness of corroborating evidence
b. The “Trustworthiness” Test	
§ 5:61	In general

- § 5:62 —Federal law: *Smith, Opper, Wong Sun*
- § 5:63 State consideration of the “trustworthiness” rule

c. Other Issues

- § 5:64 Crimes without a “corpus delicti”
- § 5:65 Admissions amounting to less than a full confession
- § 5:66 Issue for court or jury

4. DEFENSE WITNESS AS “ACCOMPLICE”

- § 5:67 Introduction

a. Federal Case Law

- § 5:68 *U.S. v. Nolte*
- § 5:69 *Washington v. Texas*
- § 5:70 *U.S. v. Tirouda; United States v. Cool*

b. Evaluation

- § 5:71 The false equivalency
- § 5:72 Prosecutor’s Procedural and Tactical Advantages
- § 5:73 Risk of fabrication
- § 5:74 Impression of judicial partiality
- § 5:75 The coerced or “tampered” witness

CHAPTER 6. PRESUMPTION RELATING TO OFFICIAL CONDUCT

A. GENERALLY

- § 6:1 In general
- § 6:2 True presumption
- § 6:3 —Other applications of principle
- § 6:4 Burden of persuasion
- § 6:5 Application to particular officers
- § 6:6 Administrative and regulatory agencies
- § 6:7 Legislative acts

B. REGULARITY OF JUDICIAL PROCEEDINGS

- § 6:8 In general
- § 6:9 Personal jurisdiction
- § 6:10 Subject-matter jurisdiction
- § 6:11 Service
- § 6:12 —General v special jurisdiction

TABLE OF CONTENTS

- § 6:13 —Probate courts
- § 6:14 Judgments in other states
- § 6:15 Regularity of proceedings subsequent to gaining jurisdiction

CHAPTER 7. BURDENS AND PRESUMPTIONS RELATING TO FAMILY

A. MARRIAGE

- § 7:1 In general

1. EXISTENCE AND VALIDITY

- § 7:2 Ceremonial marriage: Validity and continuance
- § 7:3 Presumption from cohabitation
- § 7:4 —Common-law marriage
- § 7:5 —Cohabitation and repute
- § 7:6 —Proof of basic facts
- § 7:7 —Rebutting presumption; Shifting burdens
- § 7:8 —Applicability in criminal cases
- § 7:9 Presumptions from cohabitation without marriage

2. VALIDITY OF SECOND MARRIAGE

- § 7:10 General rule
- § 7:11 Basic fact: Second marriage; common-law marriage
- § 7:12 —Who may invoke presumption
- § 7:13 Strength and effect of presumption
- § 7:14 Rebutting presumption

3. RELATIONSHIP BETWEEN SPOUSES

- § 7:15 In general
- § 7:16 Property ownership
- § 7:17 Gifts and advancements
- § 7:18 Agency; Duty to provide
- § 7:19 Spouse's crimes and torts

B. LEGITIMACY, PARENTAGE, CUSTODY

- § 7:20 In general
- § 7:21 Distinguishing issues

1. LEGITIMACY

a. Presumption

§ 7:22 In general

§ 7:23 Scope of presumption

b. Overcoming Presumption

§ 7:24 Who may challenge legitimacy

§ 7:25 Grounds

§ 7:26 —Lack of access

§ 7:27 —Husband's impotency or sterility

§ 7:28 Burden of persuasion; Scientific tests

2. PARENTAGE

§ 7:29 In general

§ 7:30 Scientific evidence

§ 7:31 Litigation context: Unmarried woman sues
putative father

§ 7:32 —Wife alleges nonhusband is father

§ 7:33 Putative father claims paternity

3. PARENTAL RIGHTS AND CUSTODY

§ 7:34 Custody: Maternal preference; primary caretaker
preference

§ 7:35 Termination of parental rights

§ 7:36 Undoing relinquishment of rights

4. PRESUMPTIONS RELATING TO CHILD'S CAPACITY

§ 7:37 Capacity for crime

§ 7:38 Capacity for tort

§ 7:39 —Negligence

§ 7:40 Intentional torts

§ 7:41 Inherently dangerous or adult activities

§ 7:42 Contributory negligence

Volume 2

CHAPTER 8. BURDENS, PRESUMPTIONS, AND INFERENCES RELATING TO WILLS AND INTRAFAMILY TRANSFERS

A. WILLS: PREPARATION, EXECUTION, AND CONTENTS

- § 8:1 Attestation and execution
- § 8:2 Presumptions of construction
- § 8:3 Interlineations
- § 8:4 Lost, missing, or mutilated will
- § 8:5 Contract to make joint wills
- § 8:6 Presumptions as to revocation and subsequent bequests
- § 8:7 Presumptions relating to omitted heirs
- § 8:8 Presumption relating to adopted children
- § 8:9 Testamentary capacity

B. UNDUE INFLUENCE AND FRAUD

- § 8:10 In general
- § 8:11 Confidential or fiduciary relationship
- § 8:12 Burdens and presumptions
- § 8:13 Legacy to participant in preparation of will or to one closely associated with participant
- § 8:14 Bequests to testator's attorney or attorney's associate
- § 8:14.50 Fraud and intrafamily transfers to avoid exposure of assets

C. OTHER INTRAFAMILY TRANSFERS

- § 8:15 Unexplained transfer within family: Presumption of gift
- § 8:16 Presumption of advancement
- § 8:17 Intrafamily services presumed gratuitous

CHAPTER 9. BURDENS, PRESUMPTIONS, AND INFERENCES RELATING TO NEGLIGENCE

A. GENERAL PRINCIPLES

- § 9:1 Overview
- § 9:2 “Negligence” defined; burden of proof
- § 9:3 Contributory negligence
- § 9:3.50 Comparative negligence
- § 9:4 Conduct of decedent or party rendered incapable of testifying
- § 9:5 Last clear chance
- § 9:6 Assumption of risk
- § 9:6.50 Indemnification and negligence
- § 9:7 Admissibility of habit and character evidence
- § 9:7.50 Intervening or superseding causes

B. STANDARD OF CARE

1. IN GENERAL

- § 9:8 Overview

2. STATUTES AND REGULATIONS

- § 9:9 Effect of violation of statute or rule

3. INDUSTRY CODES AND STANDARDS

- § 9:10 In general
- § 9:11 —Procedural issues

4. CUSTOMS AND USAGES

- § 9:12 In general
- § 9:13 Establishing custom exists
- § 9:14 Medical profession: “Locality” rule
- § 9:15 Knowledge of custom
- § 9:16 Custom in violation of law or public policy
- § 9:17 Party’s own rules and regulations

C. RES IPSA LOQUITUR

- § 9:18 In general

TABLE OF CONTENTS

- § 9:19 Specific requirements
- § 9:20 Multiple defendants; Effect of status of parties
- § 9:21 Effect of pleading or proving specific negligence
- § 9:21.50 Judicial instruction on res ipsa

D. EVIDENCE OF LIABILITY INSURANCE

1. IN GENERAL

- § 9:22 Rule of inadmissibility
- § 9:23 Fed. R. Evid. 411
- § 9:24 Corresponding state legislation

2. EXCEPTIONS TO EXCLUSION

- § 9:25 In general
- § 9:26 Agency, employment, ownership, control
- § 9:27 Impeachment: Bias, interest, or motive
- § 9:28 Admissions and documents referring to insurance
- § 9:29 Other valid purposes
- § 9:29.50 Consequences of improper admission of liability insurance

E. SPECIFIC APPLICATIONS

1. AUTOMOBILES AND MOTOR VEHICLE ACCIDENTS

- § 9:30 In general
- § 9:31 Ownership of vehicle based on registration, license plates, or markings
- § 9:32 Presumption nonowner drove with owner's permission
- § 9:33 Agency presumed or inferred from use of owner's vehicle
- § 9:34 Imputation or presumption of agency from owner's presence in vehicle
- § 9:35 Lack of automobile registration or driver's license as basis for inference of negligence; Negligent entrustment
- § 9:36 Seat belt evidence; Effect of legislation
- § 9:37 Presumptions relating to cause of accident
- § 9:38 Application of res ipsa loquitur

- § 9:39 Presumption owner liable for parking or moving violation

2. COMMON CARRIERS

- § 9:40 Death or injury of passenger
§ 9:41 Damage to, or loss of, property

3. OTHER SPECIFIC APPLICATIONS

- § 9:42 Bailment cases
§ 9:43 Medical malpractice cases
§ 9:44 Premises liability, premises security, and construction defect
§ 9:45 Premises liability cases—"Slip-and-fall" cases
§ 9:46 Product liability cases
§ 9:47 Other cases

CHAPTER 10. MISCELLANEOUS MATTERS: BURDENS, PRESUMPTIONS, AND INFERENCES

A. COMMUNICATIONS

- § 10:1 Letters; presumption of delivery from mailing
§ 10:2 —Proof of basic facts
§ 10:2.50 —Statutes requiring registered or certified mail
§ 10:3 —Rebutting presumption
§ 10:4 Telegrams
§ 10:4.50 E-mail; other communications technology

B. LIFE AND DEATH

- § 10:5 Presumption life continues; suicide
§ 10:6 Death: Presumption from absence or age
§ 10:7 Extent and quality of search required
§ 10:8 Presumption as to time of occurrence
§ 10:8.50 Death: burdens and presumptions regarding manner of death
§ 10:9 Presumption or inference from specific peril or special circumstances
§ 10:10 Survivorship; Presumptions from common disaster

TABLE OF CONTENTS

C. COMMERCIAL MATTERS; DOCUMENTS

1. GENERALLY

§ 10:11 In general

2. CONTRACTS

§ 10:12 Applicable law

§ 10:13 Validity

§ 10:14 Commercial paper; Uniform Commercial Code

§ 10:15 Payment

§ 10:15.10 Indemnification agreements

3. SPECIAL RELATIONSHIPS

§ 10:16 Agency; Respondeat superior

§ 10:17 Fiduciary or confidential relationships

§ 10:17.10 Employment; employer-employee

D. POSSESSION AND OWNERSHIP OF PROPERTY

§ 10:18 Possession presumed lawful

§ 10:19 Ownership presumed from possession—Personal property; Commercial paper

§ 10:20 —Real property

E. MISCELLANY

§ 10:21 Names

§ 10:22 Special and miscellaneous proceedings

CHAPTER 11. RELEVANCE AND ITS COUNTERWEIGHTS

A. GENERAL PRINCIPLES

§ 11:1 Centrality of “relevance” in law of evidence; Fed. R. Evid. 402

§ 11:2 Relevance defined; Fed. R. Evid. 401 and corresponding state law

§ 11:3 Relevance defined; Fed. R. Evid. 401—Fact “of consequence”; “material” fact

§ 11:3.10 Relevance defined: Element of crime, cause of action or defense

- § 11:3.20 Relevance: Impeachment
- § 11:3.30 Subsequent acts relevant to show prior mental state
- § 11:3.50 Toward a broader definition of “relevance”
- § 11:4 Relevance defined; Fed. R. Evid. 401—“More or less probable”
- § 11:5 Relevance distinguished from admissibility, sufficiency, and weight of evidence; judge’s role
- § 11:6 Direct and circumstantial evidence
- § 11:7 Uses of circumstantial evidence
- § 11:8 Remote or abstract relevance; “equivocal” evidence; “inference on inference”; “collateral” impeachment

B. COUNTERWEIGHTS

1. IN GENERAL

- § 11:9 Introduction
- § 11:10 Fed. R. Evid. 403
- § 11:11 Corresponding state law
- § 11:11.50 Defense evidence in criminal cases

2. “DANGERS”

- § 11:12 In general
- § 11:13 “Probative value”
- § 11:14 “Unfair prejudice”
- § 11:15 Confusing; misleading
- § 11:16 Striking balance; minimizing dangers
- § 11:16.30 Prior conviction as element of crime: *Old Chief v. United States*; *Rehaif v. United States*
- § 11:16.50 State responses to *Old Chief* regarding prior convictions
- § 11:16.60 Applying *Old Chief*
- § 11:16.70 Sentence enhancement statutes

3. “CONSIDERATIONS”

- § 11:17 Delay; waste of time; cumulative
- § 11:18 Surprise

C. CONDITIONAL RELEVANCE; ORDER OF PROOF

- § 11:19 In general

TABLE OF CONTENTS

- § 11:20 Fed. R. Evid. 104(a), 104(b)
- § 11:21 Corresponding state provisions
- § 11:22 Role of judge and jury; Generally
- § 11:23 —Distinctions between admissibility and conditional relevance
- § 11:24 Procedural implications; motions
- § 11:25 Order of proof
- § 11:26 —FRE 611(a); corresponding state law

D. LIMITED ADMISSIBILITY

- § 11:27 In general
- § 11:28 Fed. R. Evid. 105
- § 11:29 Corresponding state law
- § 11:30 Admissible and inadmissible purposes
- § 11:31 Limited admissibility as to parties
- § 11:32 Right to confront and cross-examine
- § 11:32.30 *Gray v. Maryland*
- § 11:32.70 Case law after *Gray v. Maryland*
- § 11:33 Limiting instruction

E. EVIDENCE MADE RELEVANT BY ADVERSE PARTY

1. IN GENERAL

- § 11:34 Overview

2. “RULE OF VERBAL COMPLETENESS”

- § 11:35 In general
- § 11:36 Fed. R. Evid. 106
- § 11:37 Corresponding state rules
- § 11:38 Extent of admission; other documents or recordings
- § 11:39 —Otherwise inadmissible evidence; prejudice; confusion
- § 11:40 Time of admission

3. CURATIVE ADMISSIBILITY

- § 11:41 In general
- § 11:42 Requirement prior evidence should not have been admitted
- § 11:43 —Contrary view

- § 11:44 Prejudice requirement; Limitation on extent of admission
- § 11:45 Must prior evidence have been objected to?

CHAPTER 12. SIMILAR HAPPENINGS

A. OVERVIEW

- § 12:1 Requirement of sufficient similarity to facts at bar
- § 12:1.50 Other factual settings

B. OTHER ACCIDENTS AT SAME LOCATION

- § 12:2 In general
- § 12:3 “Substantial similarity”
- § 12:4 —Changes in location; Passage of time
- § 12:5 Subsequent accidents
- § 12:6 Admissibility to show notice of dangerous condition
- § 12:7 Admissibility to show existence of dangerous condition; causation
- § 12:8 Admissibility to “show negligence”
- § 12:9 —Of someone other than “location defendant”
- § 12:10 Temporary and recurring situations; “slip-and-fall” cases
- § 12:11 Absence of similar accidents, complaints, or claims

C. OTHER ACCIDENTS INVOLVING SAME OR SIMILAR PRODUCT

1. IN GENERAL

- § 12:12 Overview
- § 12:13 Relevance: Similarity, time

2. PURPOSE FOR WHICH EVIDENCE OFFERED

- § 12:14 Theory of liability asserted
- § 12:15 To show design defect or hazardous nature of product; causation; rebuttal; impeachment
- § 12:16 To show design defect or hazardous nature of product; Causation; Rebuttal; Impeachment—Postmanufacture alterations

TABLE OF CONTENTS

- § 12:17 Means of proof
- § 12:18 —To show notice or foreseeability

3. SUBSEQUENT INCIDENTS; ABSENCE OF OTHER INCIDENTS

- § 12:19 Subsequent incidents
- § 12:20 Absence of similar accidents, complaints, or claims
- § 12:20.50 Comparative injury statistics

D. OTHER CONTRACTS AND BUSINESS TRANSACTIONS

- § 12:21 In general; Parol evidence rule
- § 12:22 Other contracts involving parties
- § 12:23 Common practice, custom, or usage
- § 12:24 —Establishing existence of common practice, custom, or usage
- § 12:25 —Knowledge of practice, custom, or usage
- § 12:26 Notice

CHAPTER 13. OTHER APPLICATIONS OF GENERAL RELEVANCE PRINCIPLES

A. CIRCUMSTANTIAL EVIDENCE OF STATE OF MIND

1. IN GENERAL

- § 13:1 Overview

2. CONSCIOUSNESS OF GUILT

a. Flight

- § 13:2 In general
- § 13:3 Inference of flight from defendant's behavior
- § 13:4 Inference of consciousness of guilt from defendant's flight
- § 13:5 —Consciousness of guilt concerning crime charged
- § 13:5.50 Evidence of an alleged accomplice's flight
- § 13:6 Inference of guilt from consciousness of guilt

b. Other Evidence of Consciousness of Guilt

- § 13:7 False statements; refusal to make statement or identify oneself
- § 13:8 Suicide attempt
- § 13:8.50 Other evidence relating to consciousness of guilt

B. DESTRUCTION, NONPRODUCTION, OR FABRICATION OF EVIDENCE

1. IN GENERAL

- § 13:9 Overview
- § 13:10 Criminal cases: Due process issue
- § 13:10.50 —Failure to gather evidence
- § 13:11 Jencks act and “reverse jencks”
- § 13:12 Destroyed, missing or altered evidence: Presumption or inference
- § 13:13 Fabrication of evidence; killing, threatening, or bribing witnesses
- § 13:14 Criminal defendant’s refusal to produce exemplars
- § 13:14.50 Noncompliance with discovery and disclosure rules

2. “MISSING WITNESS” INFERENCE

a. In General

- § 13:15 Overview
- § 13:15.30 Vocabulary: “arguing party,” “requesting party,” “non-calling party”
- § 13:15.70 Argument, instruction, both, or neither
- § 13:16 Prerequisites
- § 13:17 “Unavailability”

b. Informants

- § 13:18 In general; “Informant’s privilege”
- § 13:19 Availability to prosecution and police
- § 13:20 Availability to defense
- § 13:21 Importance of informant’s testimony

c. Other Situations

- § 13:22 Present or former attorney
- § 13:23 Physician
- § 13:24 Spouse, relative, friend

TABLE OF CONTENTS

**C. FINANCIAL CONDITION OF PARTIES;
DAMAGES**

1. IN GENERAL

§ 13:25 Overview

**2. FINANCIAL CONDITION OF PLAINTIFF;
COLLATERAL SOURCE RULE**

§ 13:26 In general

§ 13:27 Erosion of collateral source rule

§ 13:28 —Medical malpractice and no-fault statutes

§ 13:29 —“Gratuitous” v “Nongratuitous” benefits

§ 13:30 —Other exceptions to rule

3. OTHER ISSUES

§ 13:31 Wrongful death actions: Change in family situation

§ 13:32 Compensation for inflation and discount rate

§ 13:33 Financial condition of defendant; Punitive damages

§ 13:34 —Actions for both compensatory and punitive damages

D. VALUE OF REAL PROPERTY

§ 13:35 In general

§ 13:36 Comparative sales method

§ 13:37 Miscellaneous issues

E. OTHER MATTERS

§ 13:38 Defense evidence another person committed crime

§ 13:38.10 *Chambers v. Mississippi*

§ 13:38.20 *Holmes v. South Carolina*

§ 13:38.30 Types of evidence offered

§ 13:38.40 Bases for exclusion

§ 13:38.50 How strong must the “nexus” be?

§ 13:38.60 Cases based on circumstantial evidence

§ 13:38.70 Where the alternate suspect is a government witness

§ 13:38.80 Suggested procedure; instructing the jury

§ 13:39 Criminal defendant’s possession of money

§ 13:40 Defendant's lack of funds

Volume 3

CHAPTER 14. CHARACTER EVIDENCE: BACKGROUND AND OVERVIEW

A. INTRODUCTORY MATTERS

- § 14:1 In general
- § 14:2 Litigation context: Whose character are we talking about?
- § 14:3 Relevancy, form, procedure
- § 14:4 Theories of relevancy
- § 14:5 Form: "Specific act" evidence; Reputation; Opinion

B. LEGISLATIVE AND JUDICIAL REGULATION

- § 14:6 Fed. R. Evid. 404–405
- § 14:6.30 Amendment to Fed. R. Evid. 404(a) in 2000
- § 14:6.70 Amendment to Fed. R. Evid. 404(a) in 2006
- § 14:7 Corresponding state provisions—Rule 404
- § 14:8 —Rule 405
- § 14:9 California
- § 14:10 Kansas
- § 14:11 States without evidence codes

CHAPTER 15. CHARACTER AS "ESSENTIAL ELEMENT" OF CRIME, CLAIM OR DEFENSE

A. IN GENERAL

- § 15:1 Introduction
- § 15:2 Fed. R. Evid. 404–405
- § 15:3 Corresponding state law
- § 15:4 When is character an "essential element"?

B. CIVIL LITIGATION

1. NEGLIGENT ENTRUSTMENT, HIRING OR SUPERVISION

- § 15:5 In general

TABLE OF CONTENTS

- § 15:6 Motor vehicle cases; Other dangerous instrumentalities
- § 15:7 Negligent hiring or supervision
- § 15:7.30 Medical malpractice: negligent credentialling
- § 15:8 Negligent hiring or supervision—Related evidence issues

2. DEFAMATION

- § 15:9 In general
- § 15:10 Admissibility to prove truth of statement
- § 15:11 Reputation and character as measure of damages

3. OTHER CIVIL ACTIONS

- § 15:12 Personal injury and wrongful death actions
- § 15:13 Miscellany

C. CRIMINAL CASES

1. CHARACTER AS ESSENTIAL ELEMENT OF CRIME

- § 15:14 Defendant's character
- § 15:15 —Multiple offender provisions
- § 15:16 Victim's character

2. AS ELEMENT OF A DEFENSE

a. In General

- § 15:17 Introduction
- § 15:18 Insanity; Diminished capacity
- § 15:19 Character of victim

b. Entrapment

- § 15:20 In general
- § 15:21 "Subjective" approach
- § 15:21.30 What constitutes raising the issue of entrapment?
When may the prosecutor offer rebuttal evidence of defendant's predisposition?
- § 15:22 "Subjective" approach—Prior specific acts; lack of prior criminal record
- § 15:23 "Subjective" approach—Reputation and opinion testimony; Hearsay

§ 15:24 “Objective” approach

CHAPTER 16. PERMISSIBLE USES OF “PROPENSITY INFERENCE” EVIDENCE

A. INTRODUCTION

§ 16:1 Introduction

B. CRIMINAL CASES, DEFENDANT’S CHARACTER: OVERVIEW

- § 16:2 In general
- § 16:3 Restrictions on defendant’s use of character evidence
- § 16:4 *Prosecutorial response*
- § 16:5 Fed. R. Evid. 404(a), 405(a)
- § 16:6 Corresponding state statutes
- § 16:7 Defining “character” and “trait”
- § 16:8 Evidence of specific acts
- § 16:9 Distinguishing “character evidence” from specific act evidence
- § 16:10 Prosecutor may not initiate; what constitutes “character evidence”

C. “PERTINENT TRAIT”

- § 16:11 In general
- § 16:11.30 Nicknames and aliases
- § 16:12 Violent crime; peacefulness
- § 16:13 Truthfulness, honesty, trustworthiness, reliability, etc
- § 16:14 —After defendant has testified
- § 16:15 Obedience to law
- § 16:16 Defendant’s religious beliefs or practices
- § 16:17 Sexual morality
- § 16:18 Other crimes and traits

D. REPUTATION AND OPINION TESTIMONY

- § 16:19 Overview
- § 16:20 Foundation for reputation testimony
- § 16:21 —“Community”
- § 16:22 Opinion

TABLE OF CONTENTS

- § 16:23 Time
- § 16:24 Expert opinion testimony
- § 16:25 Limiting the number of character witnesses
- § 16:26 Instructing the jury about character evidence

E. PROSECUTORIAL RESPONSE

1. WHAT CONSTITUTES “OPENING THE DOOR”?

- § 16:27 Overview
- § 16:28 Defense character witness
- § 16:28.10 Other ways defense counsel might open the door
- § 16:28.20 —Prior to trial or in opening statement before the state presents evidence
- § 16:28.30 —While cross-examining a prosecution witness
- § 16:28.40 —During direct examination of defense fact witnesses
- § 16:29 Defendant’s testimony on direct examination
- § 16:29.10 Defendant’s testimony—General rule
- § 16:29.20 —What kinds of questions (or answers) open the door
- § 16:29.30 —Regarding specific types of crimes
- § 16:30 Direct testimony of defense fact witness; opening statement; cross-examination of state witness
[Deleted]
- § 16:31 —Prosecutor’s cross-examination of defendant or defense witness

2. PROSECUTORIAL OPTIONS

- § 16:32 Overview
 - a. Cross-examine the Witness About Defendant’s Prior Acts
- § 16:33 In general
- § 16:34 Overview
 - (1) Subject-Matter of Questions
 - § 16:35 In general
 - § 16:36 Type of conduct
 - § 16:37 Factual basis for the question
 - § 16:38 Procedure
 - § 16:39 Time
 - (2) Wording of Questions
 - § 16:40 “Have you heard?” “Did you know?” “Were you aware?”

- § 16:41 Questions assuming defendant's guilt
- § 16:41.50 Questions about the facts underlying the charges

(3) Other Issues

- § 16:42 Proof defendant committed the specific acts
- § 16:43 Unfair prejudice
- § 16:44 "Fighting fire with fire"
- § 16:45 Instruction
- § 16:45.30 Impeaching the defendant as his own character witness

b. Negative Character Witness

- § 16:46 In general

F. EVIDENCE RELATING TO VICTIM'S CHARACTER OR ANOTHER PERSON'S CHARACTER

1. IN GENERAL

- § 16:47 Introduction; "victim"; another person
- § 16:48 Restrictions on evidence as to victim's character
- § 16:49 Prosecutorial response
- § 16:50 Fed. R. Evid. 404(a)(2)(B)
- § 16:51 Corresponding state law

2. VICTIM'S OR ANOTHER PERSON'S CHARACTER FOR VIOLENCE OR PEACEFULNESS; VICTIM AS INITIAL AGGRESSOR

a. Offered by Defendant

- § 16:52 The defense of justification; theories of relevance
- § 16:53 Reputation and opinion testimony
- § 16:54 Victim's prior acts of violence
- § 16:55 —As evidence of victim's character for violence
- § 16:56 —To support "reasonable belief" defense
- § 16:57 The "essential element" theory
- § 16:57.50 Other person's character or conduct

b. Character for Peacefulness Offered by the Prosecutor

- § 16:58 In general

TABLE OF CONTENTS

§ 16:59 The “initial aggressor” provision

3. OTHER TRAITS

§ 16:60 Sexual propensity

§ 16:61 Other traits

G. “PROPENSITY INFERENCE” EVIDENCE IN CIVIL CASES

§ 16:62 In general

§ 16:63 Exception for civil action charging criminal conduct

§ 16:64 —Civil assault actions

CHAPTER 17. ADMISSIBILITY OF EVIDENCE OF OTHER ACTS INDEPENDENT OF THE “PROPENSITY INFERENCE”

A. IN GENERAL

1. INTRODUCTORY MATTERS

§ 17:1 “Extrinsic Act” evidence

§ 17:2 Applicable in civil and criminal litigation; Vocabulary

§ 17:3 “Doctrine of chances”

§ 17:3.50 Special rules permitting the propensity inference

2. STATUTORY AND JUDICIAL REGULATION OF EXTRINSIC ACT EVIDENCE

a. Federal Law

§ 17:4 Fed. R. Evid. 404(b)

§ 17:5 Federal judicial commentary

b. State Law

§ 17:6 Corresponding state law

§ 17:6.01 Alabama

§ 17:6.02 Alaska

§ 17:6.03 Arizona

§ 17:6.04 Arkansas

§ 17:6.05	California
§ 17:6.06	Colorado
§ 17:6.07	Connecticut
§ 17:6.08	Delaware
§ 17:6.09	District of Columbia
§ 17:6.10	Florida
§ 17:6.11	Georgia
§ 17:6.12	Hawaii
§ 17:6.13	Idaho
§ 17:6.14	Illinois
§ 17:6.15	Indiana
§ 17:6.16	Iowa
§ 17:6.17	Kansas
§ 17:6.18	Kentucky
§ 17:6.19	Louisiana
§ 17:6.20	Maine
§ 17:6.21	Maryland
§ 17:6.22	Massachusetts
§ 17:6.23	Michigan
§ 17:6.24	Minnesota
§ 17:6.25	Mississippi
§ 17:6.26	Missouri
§ 17:6.27	Montana
§ 17:6.28	Nebraska
§ 17:6.29	Nevada
§ 17:6.30	New Hampshire
§ 17:6.31	New Jersey
§ 17:6.32	New Mexico
§ 17:6.33	New York
§ 17:6.34	North Carolina
§ 17:6.35	North Dakota
§ 17:6.36	Ohio
§ 17:6.37	Oklahoma
§ 17:6.38	Oregon
§ 17:6.39	Pennsylvania
§ 17:6.40	Rhode Island
§ 17:6.41	South Carolina
§ 17:6.42	South Dakota
§ 17:6.43	Tennessee
§ 17:6.44	Texas
§ 17:6.45	Utah
§ 17:6.46	Vermont

TABLE OF CONTENTS

§ 17:6.47	Virginia
§ 17:6.48	Washington
§ 17:6.49	West Virginia
§ 17:6.50	Wisconsin
§ 17:6.51	Wyoming
§ 17:7	States without evidence codes

3. AN ANALYTICAL MODEL

§ 17:8	In general
§ 17:9	“Purpose”
§ 17:10	The other steps in the process
§ 17:11	Application: An example
§ 17:11.50	Importance of defining the purpose or issue on which the evidence is offered

4. PRELIMINARY ISSUES

§ 17:12	What are “crimes, wrongs or acts”
§ 17:13	“Extrinsic” vs. “intrinsic” acts
§ 17:13.50	Acts “intrinsic” to a conspiracy; “engaging in the business”
§ 17:14	“Res gestae”; acts arising from same transaction; “inextricably intertwined” acts; “necessary to complete the story”
§ 17:15	The “similarity” requirement

B. PROCEDURAL ISSUES

1. JOINDER AND SEVERANCE

§ 17:16	In general
§ 17:17	Joinder and misjoinder of charges
§ 17:18	Severance

2. PRETRIAL OR OTHER PRE-USE NOTICE; PRESERVING THE ISSUE AGAINST A PRE- TRIAL RULING

§ 17:19	In general
§ 17:20	Pretrial notice
§ 17:21	Defense counsel need not request disclosure
§ 17:21.50	Specificity of objection
§ 17:22	General scope of the requirement
§ 17:23	Time notice must be served

- § 17:24 Adequacy of notice; trial court discretion
- § 17:25 Effects of noncompliance; the “good cause” exception
- § 17:26 Pre-Use notice
- § 17:26.10 Preserving the issue against a pretrial ruling

3. PROVING THE EXTRINSIC ACT

a. Burden of Production or Persuasion

- § 17:27 In general
- § 17:28 Huddleston v. U.S
- § 17:29 State law

b. Satisfying the Burden; Defendant’s Right to Rebut

- § 17:30 In general
- § 17:31 Sufficiency as to purpose
- § 17:32 Satisfying the Huddleston standard
- § 17:33 Satisfying more rigorous standards
- § 17:34 Use of otherwise inadmissible evidence
- § 17:35 Accomplice or complainant testimony
- § 17:36 Defendant’s right to rebut

c. Order of Proof; Double Jeopardy

- § 17:37 “Other act” evidence and the order of proof
- § 17:38 Extrinsic act evidence and double jeopardy
- § 17:38.50 other procedural issues

C. ADMISSIBILITY TO PROVE IDENTITY AND CONDUCT

- § 17:39 “Identity” and “conduct”

1. IDENTITY

- § 17:40 In general; Admissibility depends on relevance, not “category”
- § 17:41 “Fungible” or “prosaic” similarity
- § 17:41.50 Social media profiles; similar emails
 - a. “Modus Operandi”; “Signature Crimes”
 - § 17:42 In general
 - § 17:43 —“Signature crimes”
 - b. “Common Scheme; Plan”
 - § 17:44 Overview

TABLE OF CONTENTS

- § 17:45 “Preparation”; steps toward ultimate goal; ongoing conspiracy
- § 17:46 “Common scheme or plan”—Sufficient common features
- § 17:46.30 “Preparation”; steps toward ultimate goal; ongoing conspiracy—Domestic partners

2. CONDUCT

- § 17:47 When is “conduct” an issue: In general
- § 17:48 Absence of accident; doctrine of chances
- § 17:49 Corroborate accomplice or complainant testimony
- § 17:50 Scheme or plan
- § 17:50.30 Drug paraphernalia cases
- § 17:50.80 Arson and fire insurance cases

3. OTHER BASES TO INFER IDENTITY OR CONDUCT

a. Motive as Proof of Identity or Conduct

- § 17:51 In general
- § 17:52 —Theft, fraud, etc
- § 17:53 —Defendant’s drug addiction; Other compulsive behavior
- § 17:53.30 Person’s use of drugs or alcohol shortly before the crime or other act
- § 17:54 In general—Violent crimes
- § 17:54.10 Defendant’s prior assaults on or threats against the same victim; assault on defendant’s present or former spouse, boyfriend, girlfriend or on the latter’s new spouse, boyfriend, girlfriend; infidelity
- § 17:54.20 Domestic assault prosecutions: Assault on other (or former) members in the defendant’s household or family
- § 17:54.30 Special “pattern of domestic abuse” statutes
- § 17:54.50 Possession of weapon

b. Opportunity, Knowledge, Ability, Skill

- § 17:55 Opportunity
- § 17:56 —Prior or subsequent possession of weapons or other items
- § 17:57 Knowledge, ability, special skill

c. Miscellany

- § 17:58 In general

- § 17:58.50 Subsequent threats or similar conduct; consciousness of guilt
- § 17:59 Issues relating to narcotics; Other contraband
- § 17:59.50 Child battering cases

D. ADMISSIBILITY TO PROVE MENTAL STATE

1. IN GENERAL

- § 17:60 Introduction
- § 17:61 Degree of similarity
- § 17:62 Doctrine of chances
- § 17:63 Degree to which mental state must be contested

2. VARIOUS MENTAL STATES

- § 17:64 Intent; Motive or knowledge to prove intent
- § 17:65 —“Specific intent” crimes
- § 17:65.30 Other acts to prove lack of intent
- § 17:65.50 Conspiracy; intent to distribute in drug cases
- § 17:65.70 Evidence of addiction to show motive or intent
- § 17:66 Mental state: Absence of mistake or accident
- § 17:67 Knowledge as an element of crime or cause action
- § 17:68 Other mental states

3. SPECIFIC APPLICATIONS

- § 17:68.50 Theft
- § 17:69 Fraud
- § 17:69.50 Obstruction of justice, destruction of evidence, etc.
- § 17:69.70 Burglary
- § 17:70 Violent crimes: Extrinsic violent crimes, acts, and threats
- § 17:70.30 Domestic assaults: prior assault on same or previous partner or member of household
- § 17:70.70 Intent—Prosecutions for physical abuse of a child
- § 17:70.80 Violent crimes; non-violent extrinsic acts
- § 17:71 Application in drug cases
- § 17:71.30 —Categorical vs. factually specific application
- § 17:71.50 Assessing factually specific relevance in drug cases
- § 17:71.60 Other possession crimes
- § 17:71.70 Drunk driving prosecutions

TABLE OF CONTENTS

E. “OTHER” PURPOSES AND SITUATIONS

§ 17:72 In general

**1. CREDIBILITY, CORROBORATION,
IMPEACHMENT**

§ 17:73 In general

§ 17:74 Corroboration or explanation of witness’s testimony

§ 17:75 Impeachment

2. EVIDENCE RELATING TO NON-PARTIES

§ 17:76 In general

§ 17:77 Offered by plaintiff or prosecutor

§ 17:78 Use by defendant: “alternate suspect”; “reverse 404(b) evidence”—In general

§ 17:78.10 “Reverse 404(b)”: the standard for admissibility

§ 17:78.30 —“Reverse 404(b)”: evidence relating to a government witness or to an alleged accomplice, coconspirator, or victim

§ 17:78.40 —“Reverse 404(b)” evidence in violent crimes

§ 17:78.50 —“Reverse 404(b)” evidence in drug prosecutions and other contraband cases

§ 17:78.60 —“Reverse 404(b) evidence” in other prosecutions

§ 17:78.70 “Reverse 404(b)”: related issues and situations

3. USE IN CIVIL LITIGATION

§ 17:79 In general

§ 17:80 Negligence; Character for care

§ 17:81 Evidence of plaintiff’s prior litigiousness

§ 17:82 —Arson and fire insurance cases

§ 17:83 Employment discrimination and sexual harassment litigation

**4. ADDITIONAL “OTHER PURPOSES” AND
ISSUES**

§ 17:84 Explain relationship between co-conspirators or defendant and victim; fear; other state of mind

§ 17:85 Explain why police acted

§ 17:86 Motive

§ 17:87 Additional “other purposes”

- § 17:87.50 “Background” evidence
- § 17:87.60 Interlocutory appeals by the government

F. PROBATIVE VALUE AND PREJUDICE

- § 17:88 Overview

1. LEGITIMATE PROBATIVE VALUE

- § 17:89 In general
- § 17:90 Need
- § 17:91 Subsequent conduct
- § 17:92 Remoteness

2. UNFAIR PREJUDICE: ASSESSING AND MANAGING THE RISKS

a. In General

- § 17:93 Assessing the risk
- § 17:93.30 The “Hobson’s Choice”/“Catch 22” dilemma
- § 17:94 Managing the risk
- § 17:94.50 Defendant’s tactical dilemma: To object or not
- § 17:94.70 Should the judge give a cautionary instruction sua sponte?

b. Offer to Stipulate or Concede Facts or Issues

- § 17:95 In general
- § 17:96 Comparing probative value
- § 17:97 “Unequivocality” requirement
- § 17:98 Impact of unequivocal concession
- § 17:99 —Instructing the jury
- § 17:100 Admissibility to prove other, contested, facts
- § 17:101 Procedural issues relating to concessions
- § 17:101.50 Use of stipulation in summation

3. LIMITING INSTRUCTIONS

- § 17:102 In general
- § 17:103 Contents of the instruction: In general
- § 17:104 —Instructions about preliminary factual findings

TABLE OF CONTENTS

CHAPTER 18. HABIT; ROUTINE PRACTICE

A. OVERVIEW

- § 18:1 Habit
- § 18:2 Routine practice of organization

B. LEGISLATIVE AND JUDICIAL REGULATION

- § 18:3 Fed. R. Evid. 406
- § 18:4 Corresponding state statutes
- § 18:5 States without corresponding provisions

C. REQUIREMENTS FOR ADMISSIBILITY

- § 18:6 Specificity of situation
- § 18:7 Frequency of occurrence; uniformity of response
- § 18:8 Reflexive or volitional
- § 18:9 Means of proof
- § 18:10 Other restrictions

D. SPECIFIC APPLICATIONS

- § 18:11 Health care facilities and practitioners
- § 18:12 Assault
- § 18:13 Driving and pedestrian “habits”
- § 18:14 Intoxication and sobriety

CHAPTER 19. EVIDENCE RELATING TO A SEX OFFENSE COMPLAINANT’S PAST SEXUAL BEHAVIOR

A. INTRODUCTION

- § 19:1 In general

B. TRADITIONAL THEORIES OF RELEVANCE; “RAPE SHIELD” LEGISLATION

1. TRADITIONAL THEORIES OF RELEVANCE

- § 19:2 Defenses to a rape charge

- § 19:3 Traditional theories of relevance; The “Yes/Yes inference”

2. RAPE SHIELD; LEGISLATION

- § 19:4 In general; “prior” conduct
§ 19:5 Fed. R. Evid. 412
§ 19:6 Corresponding state legislation
§ 19:7 Procedure
§ 19:8 Defense discovery of complainant’s psychiatric or similar records
§ 19:9 Constitutionality
§ 19:10 Exceptions to exclusion
§ 19:11 “Relevancy” and “prejudice”
§ 19:12 Reputation and opinion evidence
§ 19:13 Applicability in other criminal actions or if complainant is dead
§ 19:14 Applicability in civil litigation

3. DEFINING SEXUAL “BEHAVIOR”, “CONDUCT”, “ACTIVITY”

- § 19:15 In general
§ 19:15.50 Evidence of complainant’s “romantic relationship” with another
§ 19:16 Other evidence of predisposition: Offers, conversation, dress, etc
§ 19:17 Complainant’s sexual fantasies or use of pornography

C. ADMISSIBILITY TO REBUT PHYSICAL EVIDENCE; EMOTIONAL TRAUMA

- § 19:18 In general
§ 19:19 Source of semen
§ 19:20 “Injury”
§ 19:21 Loss of virginity—Adult complainant
§ 19:22 —Child complainant
§ 19:23 Emotional trauma
§ 19:24 Infection
§ 19:25 Pregnancy
§ 19:25.30 Applicability to child pornography prosecutions

D. PRIOR SEXUAL CONDUCT BETWEEN DEFENDANT AND COMPLAINANT

- § 19:26 Relevance

TABLE OF CONTENTS

- § 19:27 Factors in assessing admissibility
- § 19:28 —Nature of the prior relationship
- § 19:29 —Passage of time
- § 19:30 —Similarity of facts
- § 19:31 —Allegations involving group sex
- § 19:32 —Evidence of violence
- § 19:33 —Complainant's prior, unconsummated sexual interest in defendant

E. BIAS; MOTIVE TO LIE

- § 19:34 In general

1. RELEVANCE

- § 19:35 To deny infidelity
- § 19:36 Motive related to prostitution
- § 19:37 Protect reputation for chastity or heterosexuality
- § 19:38 Vengeance or spite
- § 19:39 Underage complainants
- § 19:40 Motive related to drugs

2. RESTRICTING ADMISSIBILITY

- § 19:41 In general

F. PRIOR RAPE ALLEGATIONS MADE BY COMPLAINANT

1. APPLICABILITY OF RAPE SHIELD LEGISLATION

- § 19:42 In general
- § 19:43 Prior false accusations
- § 19:44 Prior true accusations

2. MATTERS OF PROOF

- § 19:45 Proving complainant made a prior accusation
- § 19:46 Proving the prior accusation was false; discovery
- § 19:47 Extent of admissibility

G. IMMEDIATELY SURROUNDING CIRCUMSTANCES

- § 19:48 In general

- § 19:49 Complainant's attire
- § 19:50 Conduct with the defendant
- § 19:51 Discussion of complainant's prior sexual behavior
- § 19:52 Conduct with others; public conduct

H. "PATTERN," "PROMISCUITY," PROSTITUTION

- § 19:53 "Pattern"; promiscuity
- § 19:54 Evidence relating to prostitution—Admissibility
- § 19:55 — —Means of proof

I. OTHER SITUATIONS AND CONSIDERATIONS

- § 19:56 Introduction

1. EVIDENCE ELICITED BY PROSECUTOR OR VOLUNTEERED BY COMPLAINANT; "OPENED DOOR" DOCTRINE

- § 19:57 In general
- § 19:58 What constitutes "opening the door"
- § 19:59 Evidence that complainant is or is not homosexual
- § 19:59.50 Complainant's subsequent conduct

2. MISCELLANY

- § 19:60 Child abuse cases: Admissibility on source of knowledge
- § 19:61 Complainant "confusion" or competence to consent
- § 19:62 Mistake of fact defense: "Reasonable belief" that complainant consented
- § 19:62.50 Evidence of similar crimes by a third party against a different victim

J. JUDICIAL ASSESSMENT OF WITNESS CREDIBILITY

- § 19:63 Introduction
- § 19:64 Conditional relevancy or technical admissibility
- § 19:65 Conditional relevancy

TABLE OF CONTENTS

- § 19:66 “Technical issues and policy concerns”
- § 19:67 Statutory authority
- § 19:68 Case law
- § 19:69 Evaluation

Volume 4

CHAPTER 20. EVIDENCE OF A SEX OFFENSE DEFENDANT’S PRIOR SEXUAL MISCONDUCT

I. DEFENDANT’S PRIOR SEXUAL MISCONDUCT

A. ADMISSIBILITY

- § 20:1 In general

B. CRIMINAL CASES INVOLVING ADULT COMPLAINANTS

1. Codification of Special Rules

a. Fed. R. Evid. 413

- § 20:2 In general
- § 20:3 What constitutes sexual assault; when the rule applies;
behavior covered and not covered
- § 20:4 Endorsement of propensity inference; credibility; due
process
- § 20:5 Applicability of Fed. R. Evid. 403
- § 20:6 Remoteness
- § 20:7 Proving defendant committed the extrinsic act
- § 20:8 Pretrial notice

b. Corresponding State Legislation

- § 20:9 In general

2. Jurisdictions Without Special Legislation

- § 20:10 “Permissive” approach
- § 20:10.50 —Applicability where other crimes are charged
- § 20:11 Traditional approach

3. Other situations and issues

- § 20:11.50 Evidence of similar crimes by a third party against a different victim

C. CRIMINAL CASES ALLEGING SEXUAL ABUSE OF A CHILD

- § 20:12 In general
§ 20:13 Fed. R. Evid. 414
§ 20:14 Corresponding state rules
§ 20:15 State without special rules: “Permissive” approach
§ 20:16 States without special rules: Traditional approach
§ 20:16.50 Defendant’s possession of child pornography
§ 20:16.55 Other acts evidence in child pornography trials
§ 20:16.70 Evidence of similar crimes by a third party against a different victim

D. CIVIL LITIGATION

- § 20:17 In general

CHAPTER 21. SUBSEQUENT REMEDIAL MEASURES

I. SUBSEQUENT REMEDIAL MEASURES IN GENERAL

- § 21:1 Overview
§ 21:2 Fed. R. Evid. 407
§ 21:3 Corresponding state law
§ 21:4 Form of evidence; Discovery
§ 21:5 Types of evidence excluded
§ 21:6 Third-party repairs; repairs by plaintiff

II. APPLICABILITY IN PRODUCTS LIABILITY LITIGATION

- § 21:7 In general
§ 21:8 —Examples of exclusion
§ 21:9 Government-mandated revisions
§ 21:10 State-federal conflicts

III. PREREQUISITES FOR EXCLUSION

- § 21:11 In general

TABLE OF CONTENTS

§ 21:12 “Event”; “after”

§ 21:13 “Remedial”; investigative reports

IV. EXCEPTIONS TO THE EXCLUSIONARY RULE

A. IN GENERAL

§ 21:14 Overview

B. IMPEACHMENT

§ 21:15 In general

§ 21:16 Potential for misuse

C. “FEASIBILITY”

§ 21:17 In general

§ 21:18 Relevance

§ 21:19 Time

§ 21:20 “If controverted”

§ 21:21 “Feasibility” as “utility” or “effectiveness”

§ 21:22 Impeachment; Setting a trap; Avoiding the trap

D. OTHER ISSUES

§ 21:23 Ownership, control

§ 21:24 Additional “other purposes”

§ 21:25 Measures mandated by a higher authority

CHAPTER 22. COMPROMISES AND OFFERS TO COMPROMISE; PAYMENT AND OFFERS TO PAY MEDICAL AND RELATED EXPENSES

I. COMPROMISES AND OFFERS TO COMPROMISE

A. COMPROMISE RULE: IN GENERAL

§ 22:1 Introduction

§ 22:2 Generally

§ 22:3 Fed. R. Evid. 408

§ 22:4 Corresponding state law

B. COMPROMISE RULE: SCOPE OF EXCLUSION

1. Settlements: Same Parties

- § 22:5 Overview
- § 22:6 Introduction
- § 22:7 Partial settlement
- § 22:8 Suit to enforce the compromise settlement
- § 22:9 Unperformed agreement
- § 22:10 New dispute between the same parties
- § 22:11 Party's own offer
- § 22:11.50 Rule 408 exclusions in civil cases
- § 22:11.70 Rule 408 and Pleadings

2. "Statements and Conduct"

- § 22:12 Common law rule
- § 22:13 The Rule 408 approach
- § 22:14 —States adhering to the common law approach
- § 22:15 Evidence not excluded

3. Criminal Cases

- § 22:16 Generally
- § 22:17 Plea bargaining

C. COMPROMISE RULE: PREREQUISITES FOR EXCLUSION

1. Other Parties

- § 22:18 Overview
- § 22:19 Generally
- § 22:20 Defendant's settlement with another plaintiff
- § 22:21 Plaintiff's settlement with another defendant
- § 22:21.50 Plaintiff's settlement with another defendant in joint tortfeasor states
- § 22:22 Standing

2. Context and Content of the Evidence

- § 22:23 "Claim"—Compromise or business negotiation
- § 22:24 Dispute as to claim or amount
- § 22:25 Mitigation of damages; Unrelated negotiations

TABLE OF CONTENTS

D. COMPROMISE RULE: EXCEPTIONS TO THE EXCLUSION OF EVIDENCE

1. “Other Purposes”

- § 22:26 Overview
- § 22:27 In general
- § 22:28 Bias or prejudice; “Mary Carter” agreements
- § 22:29 Impeachment generally
- § 22:30 Additional “purposes”

2. Issues Relating to Discovery

- § 22:31 Discovery in general
- § 22:32 “Otherwise discoverable”

E. COMPROMISE RULE: STATE-FEDERAL CONFLICTS

- § 22:33 Generally

F. PAYMENT AND OFFERS TO PAY MEDICAL AND RELATED EXPENSES

- § 22:34 In general
- § 22:35 Fed. R. Evid. 409; Corresponding state law
- § 22:36 Scope of exclusion
- § 22:37 Statements or conduct; Interplay with the “compromise evidence” rule
- § 22:38 Other purposes

CHAPTER 23. STATEMENTS RELATING TO PLEA BARGAINING

I. PLEA BARGAINING STATEMENTS

A. IN GENERAL

- § 23:1 Overview
- § 23:2 Defining plea bargaining
- § 23:3 Federal Rule 410
- § 23:4 State rules

B. SCOPE OF EXCLUSION

- § 23:5 In general

- § 23:6 Withdrawn pleas
- § 23:7 Nolo pleas
- § 23:8 Completed pleas not excluded
- § 23:9 Post-agreement statements; Breach of agreement by defendant
- § 23:10 Plea offers or statements offered in evidence by defendant

C. RELATED STATEMENTS

- § 23:11 Overview
- § 23:12 “Statement made [during] discussions with an attorney for the prosecuting authority”
- § 23:12.30 The “proffer”
- § 23:13 Distinguishing plea negotiations from other statements
- § 23:14 —“Confession bargaining”
- § 23:15 Statements offering to cooperate with police
- § 23:16 Derivative evidence (“fruit of the poisonous tree”)

D. EXCEPTIONS TO THE RULE

- § 23:17 In general
- § 23:18 Perjury; False statement
- § 23:19 Impeachment; Waiver
- § 23:19.10 When is testimony “inconsistent” with proffer statements
- § 23:20 Defendant’s rejection of plea, immunity, deferred prosecution or similar offer

E. WAIVER OF THE RULE’S PROTECTIONS AND RELATED RIGHTS

- § 23:21 In general
- § 23:22 Waiver: use of statements to impeach—*U.S. v. Mezzanatto*
- § 23:23 May prosecutor insist defendant waive other Rule 410 protections?
- § 23:24 “Knowing and voluntary waiver”
- § 23:25 Waiving the effective assistance of counsel
- § 23:26 Interpreting the agreement
- § 23:27 What constitutes a breach—Defendant’s conduct
- § 23:28 —Defense counsel’s tactics

TABLE OF CONTENTS

- § 23:29 If a defendant breaches and the prosecutor “rescinds” or “revokes” a plea, does this nullify the waiver as well?

CHAPTER 24. DEFINING HEARSAY

I. DEFINITION OF HEARSAY

A. IN GENERAL

- § 24:1 The hearsay problem: Testimonial inferences
§ 24:2 Defining hearsay: Fed. R. Evid. 801(c)
§ 24:3 Non-human “declarants”: Animals, machines, instruments, computers
§ 24:4 “Out-of-court”; “Other than . . . while testifying at the trial or hearing”
§ 24:5 Proving that a statement was made; what was said; by whom; when, where and to whom it was made; roles of judge and jury
§ 24:6 “Res gestae”
§ 24:7 Nature of tribunal or proceedings

B. “STATEMENT”

1. Introductory Matters

- § 24:8 Fed. R. Evid. 801(a); Corresponding state law
§ 24:9 Individual declaration or narration as a whole

2. Verbal Utterances

- § 24:10 Explicit verbal assertions
§ 24:11 “Implied assertions”
§ 24:12 Implied assertions and Fed. R. Evid. 801(a)
§ 24:13 Questions, commands, requests as assertions; The phone call scenario
§ 24:13.50 Other phone call issues
§ 24:14 Other oral and written utterances
§ 24:15 Silence; Lack of complaints

3. Nonverbal Conduct

- § 24:16 Assertive nonverbal conduct
§ 24:17 Nonverbal, nonassertive conduct
§ 24:18 Child’s use of anatomically correct dolls
§ 24:19 Audiotape, videotape, film

C. “OFFER[ED] IN EVIDENCE TO PROVE THE TRUTH OF THE MATTER ASSERTED IN THE STATEMENT”

1. In General

- § 24:20 Generally; implied assertions
- § 24:20.10 Implied assertions and state law
- § 24:20.20 Receipts, bills, etc. with name and address as nonhearsay evidence that the person lives at that address; similar situations
- § 24:20.30 Mail, bills, etc. with name and address as inadmissible hearsay
- § 24:21 Categories of nonhearsay

2. State of Mind

- § 24:22 Generally
- § 24:22.50 Georgia code provision
- § 24:23 Declarant’s state of mind
- § 24:24 To show notice, knowledge or impact upon the hearer
 - § 24:25 —Criminal cases, in general
 - § 24:25.50 Statements made by police while questioning a witness or suspect
- § 24:26 To explain why the police acted as they did
 - § 24:26.10 —Why police acted: General rule
 - § 24:26.20 To explain why the police acted as they did: the “opened door” (“invited error”) doctrine
 - § 24:26.30 Attacks on the quality of the investigation; civil actions alleging police misconduct
 - § 24:26.40 Claims that the police officers are lying
 - § 24:26.50 Cross-examination of police offers may open the door
- § 24:27 To show notice, knowledge or impact upon the hearer—Civil cases

3. Verbal Acts; Verbal Parts of Acts; Operative Legal Facts

- § 24:28 In general

4. Other Nonhearsay Purposes

- § 24:29 Documents linking nondeclarant defendants to crimes or to each other
- § 24:30 To show relationship between declarant and another

TABLE OF CONTENTS

- § 24:31 “To prove the words were spoken”
- § 24:32 Proving the non-existence of a supposed fact

CHAPTER 25. HEARSAY AND THE SIXTH AMENDMENT CONFRONTATION CLAUSE *[Deleted]*

CHAPTER 25A. THE NEW (OLD?) SIXTH AMENDMENT CONFRONTATION CLAUSE

I. INTRODUCTION

- § 25A:1 Overview; a summary of the “New” Confrontation Clause
- § 25A:2 The Confrontation Clause
- § 25A:3 *Ohio v. Roberts*: the “Trustworthiness” Approach

II. CRAWFORD AND ITS PROGENY; STATE RESPONSE

- § 25A:4 *Crawford*: the facts
- § 25A:5 Rejection of the “Trustworthiness” Approach
- § 25A:6 “Testimonial” statements and the Confrontation Clause
- § 25A:6.50 *Bullcoming* and *Bryant*: presaging the end of *Crawford*?
- § 25A:7 Uncertainties after *Crawford* and before *Davis*
- § 25A:8 *Davis*: facts and holding
- § 25A:9 Application of the Clause to non-“testimonial” hearsay statements: *Crawford* and *Davis*
- § 25A:9.20 *Whorton v. Bockting*
- § 25A:9.40 *Giles v. California*
- § 25A:9.60 *Michigan v. Bryant*
- § 25A:9.70 *Ohio v. Clark*
- § 25A:9.80 *Melendez-Diaz v. Massachusetts*; *Bullcoming v. New Mexico*; *Williams v. Illinois*
- § 25A:9.95 State response

III. DEFINING “TESTIMONIAL”

A. STATEMENTS ELICITED DURING “INTERROGATION” BY THE “POLICE”; 911 CALLS; OTHER GOVERNMENT OFFICIALS

§ 25A:9.97 “Testimoniality”

1. In general

§ 25A:10 *Crawford*

§ 25A:10.50 Who is a “government interrogator”;
“mandatory reporters”

2. Statements Made During an “Ongoing Emergency”

§ 25A:11 *Davis*: the “primary purpose” principle

§ 25A:11.50 *Davis*: the “primary purpose” principle—
Subsequent discussion of the “primary
purpose” test

§ 25A:12 *Davis*: “Objective” assessment of the
situation; warning against police
manipulation

§ 25A:13 *Davis*: Assessing the purpose of the
interrogation

§ 25A:14 The “evolution,” and “redaction,” of
statements

§ 25A:15 *Davis*: Applying the distinction between
testimonial and nontestimonial statements

§ 25A:16 *Bryant*: facts and summary of holding

§ 25A:17 *Bryant*: “objective” assessments of purpose,
emergency

§ 25A:17.30 *Bryant*: application to the facts; Justice
Scalia’s dissent; evaluation

§ 25A:17.50 *Bryant*: the Confrontation Clause and the
(presumed) reliability of contested
statements

§ 25A:17.70 Whose “purpose” governs: declarant’s,
interrogator’s, or both?

§ 25A:17.75 *Ohio v. Clark*: young children as declarants

§ 25A:17.80 Primary purpose “necessary but not always
sufficient to exclude”

§ 25A:18 Case law after *Davis* and *Bryant*

§ 25A:19 *Giles v. California*

B. OTHER STATEMENTS, OTHER CONTEXTS

§ 25A:19.50 Non-human “declarants”

TABLE OF CONTENTS

§ 25A:20	“Witness against”
§ 25A:21	“Solemn declaration”; <i>Crawford’s</i> “three formulations”; variations on the theme
§ 25A:22	Statements which are clearly “testimonial”
§ 25A:23	Statements which are clearly not “testimonial”
§ 25A:23.50	Can “non-accusing” statements be testimonial?
§ 25A:24	Testimonial statements offered for a non-hearsay purpose—In general; advice to defense counsel and prosecutors
§ 25A:24.05	Testimonial statements used to impeach a witness’s testimony: <i>Tennessee v. Street</i> ; subsequent case law
§ 25A:24.10	Testimonial statements used to impeach a nonwitness declarant’s previously admitted statements
§ 25A:24.15	Testimonial statements used to interrogate a person in custody
§ 25A:24.20	Testimonial statements offered to explain why the police did what they did
§ 25A:24.25	Other situations
§ 25A:24.50	Justice Thomas’ approach to “testimonial”

C. STATEMENTS IN SPECIFIC FACTUAL SITUATIONS

1. Statements Made by Defendants and Suspects

§ 25A:25	Party admissions
§ 25A:26	Statements made by suspects during interviews by law enforcement officials
§ 25A:27	Statements made to undercover officers, informants, crime victims; statements made among coconspirators

2. Statements Made by Confidential Informants or Undercover Officers

§ 25A:28	Informant’s statement to law enforcement officials
§ 25A:29	Informant’s statement to suspect during an investigation

3. Statements by or to Government Officials: Other Situations

§ 25A:30	In general
----------	------------

§§ 25A:31 to 25A:33 *[Reserved]*

4. Statements by and to Private Persons

- § 25A:34 In general
- § 25A:35 Perpetrator to relative, friend, acquaintance, etc.
- § 25A:36 Complainant to acquaintance, to doctor or to defendant
- § 25A:37 Dying declarations
- § 25A:37.50 Other situations

IV. SATISFYING THE “NEW” CONFRONTATION CLAUSE

1. GENERALLY

- § 25A:38 Overview; situations discussed in other chapters
- § 25A:38.50 “Opportunity” to cross-examine
- § 25A:39 Testimony at a prior proceeding
- § 25A:40 Statements offered for a non-hearsay purpose
- § 25A:40.30 Can a statement be “de-testimonialized”?
- § 25A:40.50 Expert testimony
- § 25A:41 Non-testimonial hearsay

2. THE “OPENED DOOR” RULE

- § 25A:42 In general
- § 25A:43 Subjects raised on cross-examination
- § 25A:44 The rule of verbal completeness
- § 25A:45 The Confrontation Clause and limited admissibility
- §§ 25A:46 to 25A:47 *[Reserved]*

V. PROCEDURAL ISSUES

- § 25A:48 Requirement of specific Confrontation Clause objection; standard of appellate review; retroactivity; collateral attack
- § 25A:49 Must the prosecutor call the declarant or only make him “available”?
- § 25A:49.50 Must the prosecutor question the declarant about the statement?
- § 25A:50 Proceedings other than trial

TABLE OF CONTENTS

§ 25A:50.50 Harmless error

VI. CHILD WITNESSES; DISTANT WITNESSES; AND OTHER CONFRONTATION CLAUSE ISSUES

A. CHILD WITNESSES

- § 25A:51 *Coy v. Iowa*
- § 25A:52 *Maryland v. Craig*
- § 25A:53 18 U.S.C. § 3509
- § 25A:54 State rules and variations
- § 25A:55 *Craig* and the self-representing defendant
- § 25A:56 The uncertain impact of *Crawford v. Washington*
- § 25A:57 [Reserved]

B. DISTANT WITNESSES

- § 25A:58 Fed. R. Crim. P. Rule 15
- § 25A:59 Testimony by closed-circuit TV in lieu of deposition

C. OTHER ISSUES

- § 25A:60 Surveillance videos

CHAPTER 26. PRIOR STATEMENT BY WITNESS

I. IN GENERAL

- § 26:1 Admissibility of prior statements, generally
- § 26:1.50 “Available for cross-examination about the statement”

II. PRIOR INCONSISTENT STATEMENTS

A. OVERVIEW

- § 26:2 In general; Cast of characters

B. CONSTITUTIONAL, LEGISLATIVE AND JUDICIAL REGULATION

- § 26:3 Fed. R. Evid. 613; Fed. R. Evid. 801(d)(1)(A)
- § 26:3.50 Pending amendment to Fed. R. Evid. 801(d)(1)(A)

- § 26:4 State provisions corresponding to Fed. R. Evid.
613
- § 26:5 State provisions corresponding to Fed. R. Evid.
801(d)(1)(A)
- § 26:6 Provisions in states without Fed. R. Evid.-
based evidence codes
- § 26:7 States without codified provisions
- § 26:8 Constitutional considerations; other evidence
rules

C. USE OF STATEMENT TO IMPEACH IN-COURT TESTIMONY

1. Overview

- § 26:9 In general

2. Cross-Examining the Witness About the Statement

- § 26:10 In general
- § 26:11 The “direct confrontation” approach
- § 26:12 The “delayed confrontation” and “tease, then
wait” approaches
- § 26:13 Demonstrating a good faith basis for the
cross-examination
- § 26:14 Questioning about “collateral” inconsistencies
- § 26:15 Degree of inconsistency
- § 26:16 Special issues relating to alibi witnesses and the
alibi defense

3. Extrinsic Evidence of the Prior Inconsistent Statement

- § 26:17 In general
- § 26:18 Timing of confrontation and extrinsic proof
- § 26:19 —Requiring “confrontation” or “foundation”
before extrinsic proof
- § 26:20 —Permitting extrinsic proof before
confrontation; “Sandbagging”
- § 26:21 “Inconsistent”; “relevant” v. “collateral”
inconsistency; extent of admissibility
- § 26:22 Proving the witness made the statement
- § 26:23 Extrinsic proof after the witness admits making
the statement
- § 26:24 Witness’s equivocation or claim of lack of

TABLE OF CONTENTS

	memory of the statement or the underlying events
§ 26:25	Witness's "explanation or denial"; Anticipatory rehabilitation
§ 26:26	Limiting instruction; Use in summation
	4. Impeachment by the Party Calling the Witness
§ 26:27	In general
§ 26:28	—Defining and proving "surprise"
§ 26:29	Defining "affirmative harm" to the calling party's case
	D. PRIOR INCONSISTENT STATEMENTS AS SUBSTANTIVE EVIDENCE
§ 26:29.30	In general
§ 26:30	Fed. R. Evid. 801(d)(1)(A) and state equivalents
§ 26:31	Claimed lack of memory; "subject to cross-examination"; surprise; affirmative harm
§ 26:32	"Trial, hearing, or other proceeding, or in a deposition"
§ 26:32.50	Sufficiency of prior inconsistent statement to convict
	III. PRIOR CONSISTENT STATEMENT
	A. IN GENERAL
§ 26:33	Introduction
§ 26:33.30	Procedure
§ 26:33.50	Proving the witness made the statement
§ 26:34	Degree of consistency; scope of admissibility
§ 26:35	Fed. R. Evid. 801(d)(1)(B); state provisions
§ 26:35.30	Equivalent state provisions
§ 26:36	Jurisdictions without a codified rule
	B. REBUT CHARGE OF RECENT FABRICATION OR IMPROPER INFLUENCE OR MOTIVE
§ 26:37	In general
§ 26:38	What constitutes a "charge of recent fabrication" or "recent improper motive or influence"
§ 26:39	The "pre-motive" requirement: <i>Tome v. U.S.</i> ; state law

- § 26:40 The pre-motive requirement: Raising the issue;
burden of persuasion
- § 26:40.10 Post-arrest statements to the police
- § 26:40.20 Assessing motive based on the witness's degree of
involvement in the crime
- § 26:40.30 Statements by alleged victim or other non-suspect
witness
- § 26:40.40 Witness's pre-arrest statement to non-law
enforcement officials
- § 26:40.50 Other situations
- § 26:40.60 Statements made after one supposed "improper
motive or fabrication" existed but before a second

C. OTHER USES

- § 26:41 In general
- § 26:41.10 Admissibility as substantive evidence: Fed. R. Evid.
801(d)(1)(B)(ii)
- § 26:41.20 Admissibility as substantive evidence: State law
- § 26:41.30 Relevance (in general)
- § 26:41.40 Relevance: Significance of time
- § 26:41.50 Relevance: Rebut attacks on the witness's memory
- § 26:41.60 To contest that the witness made the prior
inconsistent statement
- § 26:42 To contest the allegation that the prior statement
was inconsistent: Fed. R. Evid. Rules
801(d)(1)(B)(ii), 613, 106 and state equivalents;
"rule of completeness"
- § 26:42.10 Prior consistent (different) statement to rebut the
use of a prior inconsistent statement to attack the
witness's memory
- § 26:43 Other purposes

IV. PRE-TRIAL IDENTIFICATIONS

A. OVERVIEW; DUE PROCESS; RIGHT TO COUNSEL

- § 26:44 Overview
- § 26:45 "Suggestiveness" and due process; Right to
counsel

B. HEARSAY EXCEPTION; CONFRONTATION CLAUSE

- § 26:46 In general

TABLE OF CONTENTS

§ 26:47	Scope of the exception; Vocabulary
§ 26:48	Fed. R. Evid. 801(d)(1)(C); Corresponding provisions in “FRE jurisdictions”
§ 26:49	State legislative and judicial variations
§ 26:50	<i>U.S. v. Owens</i> ; Sixth Amendment Confrontation Clause
§ 26:51	—“Subject to cross-examination”
§ 26:51.50	Sufficiency of the statement to convict

C. OTHER ISSUES

§ 26:52	Means of identification: Photographs, descriptions, sketches
§ 26:53	Nature of witness’s in-court testimony proving the prior identification
§ 26:54	Exculpatory identification statements
§ 26:55	Trustworthiness

CHAPTER 27. ADMISSIONS

I. IN GENERAL

A. LEGAL ISSUES COMMON TO ALL OF THE “ADMISSION” EXCEPTIONS

§ 27:1	Introduction
§ 27:2	Defining “party”; “privity” between party and declarant
§ 27:3	“Opposing party”
§ 27:4	Role of judge and jury; standard for appellate review
§ 27:4.50	Weight to be given; “judicial admissions”
§ 27:5	Trustworthiness; First-hand knowledge
§ 27:5.50	“Against interest” not required; other issues relating to content or procedure

II. PARTY’S OWN STATEMENT; ADOPTIVE ADMISSIONS

A. INTRODUCTORY MATTERS

§ 27:6	In general
§ 27:7	Fed. R. Evid. 801(d)(2)(A), (B); corresponding state law

B. PARTY’S OWN STATEMENT

§ 27:8	Proving the party made the statement
--------	--------------------------------------

- § 27:9 Means of proof
- § 27:10 Burden of production or burden of persuasion
- § 27:11 Ambiguity; other substantive reasons to exclude
- § 27:12 “Representative capacity”

C. ADOPTIVE ADMISSIONS

- § 27:13 Explicit adoption
- § 27:14 Implicit adoption; Adoption by conduct
- § 27:15 Tacit adoption by silence
- § 27:16 —Criminal cases
- § 27:17 Use of defendant’s silence to impeach; other uses

III. STATEMENTS BY AN AUTHORIZED SPOKESPERSON, AGENT, EMPLOYEE OR SERVANT

A. IN GENERAL

- § 27:18 Overview
- § 27:18.50 Sixth Amendment Confrontation Clause
- § 27:19 Fed. R. Evid. 801(d)(2)(C)
- § 27:20 —Corresponding state law
- § 27:21 Fed. R. Evid. 801(d)(2)(D)
- § 27:22 —Corresponding state rules and statutes
- § 27:23 States without evidence codes

B. REQUIREMENTS AND ISSUES

1. In general

- § 27:24 Generally
- 2. Relationship Between Declarant, Party & Statement
 - § 27:25 Relationship between declarant and party
 - § 27:26 Matters of proof
 - § 27:27 —Authority to speak for or make admissions (common law rule)
 - § 27:28 —Subject matter of statement; scope of employment (Rule 801d(2)(D))
 - § 27:29 Wrongful discharge and employment discrimination litigation
- 3. Other Issues and Requirements
 - § 27:30 “During” the relationship; Casual or “off-duty” statements

TABLE OF CONTENTS

- § 27:31 Lack of first-hand knowledge
- § 27:32 “In-house” statements
- § 27:33 Statements in pleadings and related documents
- § 27:34 —Statements by attorneys in court
- § 27:35 Out-of-court statements by a party’s attorney
- § 27:36 Statements by government agents
- § 27:37 Translator or interpreter as agent

IV. STATEMENTS BY COCONSPIRATORS

A. IN GENERAL

- § 27:38 Overview
- § 27:39 Fed. R. Evid. 801(d)(2)(E)
- § 27:40 Corresponding state provisions
- § 27:41 Jurisdictions without statutory provisions

B. THE PREREQUISITES FOR ADMISSIBILITY; RELATED PROCEDURAL ISSUES

1. In General

- § 27:42 Overview; sufficiency of objection

2. Conspiracy; Declarant; Defendant

a. Procedural Issues

- § 27:43 Generally
- § 27:44 Issue for judge or jury
- § 27:45 Prosecutor’s burden of proof
- § 27:46 Evidence to be considered

b. Means of proof; Sufficiency of proof

- § 27:47 Generally
- § 27:48 Existence of the conspiracy
- § 27:48.50 Organized crime and RICO conspiracies
- § 27:49 Declarant’s participation
- § 27:50 Defendant’s participation

3. “During” and “in Furtherance” of the Conspiracy

- § 27:51 In general
- § 27:51.30 No first-hand knowledge requirement
- § 27:52 Statements made before the conspiracy

- allegedly began or defendant became a participant
- § 27:53 “During” the conspiracy
- § 27:54 Defendant’s withdrawal from the conspiracy
- § 27:55 “Concealment phase”
- § 27:56 In furtherance
- § 27:57 —Georgia rule

C. OTHER PROCEDURAL ISSUES

- § 27:58 Order of proof
- § 27:59 Confrontation clause issues
- § 27:60 Relationship of the statement, the conspiracy and the crime charged
- § 27:61 Other hearsay exceptions

CHAPTER 28. SPONTANEOUS STATEMENTS

I. INTRODUCTION

- § 28:1 “Res gestae”
- § 28:2 “Excited utterance”; “Present sense impression”
- § 28:3 Declarant availability “immaterial”
- § 28:4 First-hand knowledge
- § 28:5 The unidentified declarant
- § 28:6 Declarant competence
- § 28:7 Corroboration as to the event; trustworthiness or reliability of the statement; self-serving statements; witness credibility; individual assertions within the declarant’s narrative
- § 28:8 Standard of appellate review

II. EXCITED UTTERANCE

- § 28:9 Overview
- § 28:10 Fed. R. Evid. 803(2); Equivalent state provisions
- § 28:11 Jurisdictions without evidence codes
- § 28:12 The “event or condition”; effect on declarant
- § 28:12.50 Spontaneity
- § 28:13 Self-serving statements; motive to lie
- § 28:14 Time between event or condition and statement; length of statement

TABLE OF CONTENTS

§ 28:15	Young children and people with intellectual disability
§ 28:16	Calls to 911
§ 28:17	Contents of the statement: Statements “relating” to the event; secondary or subsequent event
§ 28:18	Statement in response to a question
§ 28:19	Writing as an excited utterance; text messages
§ 28:20	Sixth Amendment Confrontation Clause
§ 28:20.30	Confrontation Clause—Calls to 911
§ 28:20.50	—“Interrogation”
§ 28:20.70	—Statements by young children

III. PRESENT SENSE IMPRESSION

§ 28:21	Overview
§ 28:22	Fed. R. Evid. 803(1)
§ 28:23	Equivalent state law
§ 28:24	Time
§ 28:24.50	Muddying the waters
§ 28:25	Relationship of event and statement; writings as present sense impression
§ 28:25.50	Statements identifying a person
§ 28:26	Sixth Amendment Confrontation Clause

CHAPTER 29. THE “STATE OF MIND” EXCEPTION

I. IN GENERAL

§ 29:1	Introduction
§ 29:2	Fed. R. Evid. 803(3)
§ 29:3	Corresponding state provisions
§ 29:4	Comparable law in non-code jurisdictions
§ 29:5	Sixth Amendment Confrontation Clause

II. “THEN-EXISTING” STATE OF MIND; STATEMENTS OF MEMORY OR BELIEF

§ 29:6	In general
§ 29:7	State of mind as a basis to infer past or present facts
§ 29:8	State of mind as a basis to infer past facts— Present intent and prior events or conduct
§ 29:9	—As a basis to infer declarant’s mental state before the statement
§ 29:10	—To infer future mental state, facts, acts

III. SPONTANEITY; TRUSTWORTHINESS

- § 29:11 Spontaneity
- § 29:12 Trustworthiness

IV. SPECIFIC APPLICATIONS

A. STATEMENTS OF PHYSICAL SENSATIONS

- § 29:13 Generally

B. MENTAL STATE, GENERALLY

- § 29:14 Overview
- § 29:15 Defendant's mental state; statements by coconspirators, accomplices, and other non-victims
- § 29:16 Victim's state of mind
- § 29:17 Victim's state of mind as element of crime, cause of action or defense
- § 29:18 Victim's statements about the defendant: "But not including a statement of memory or belief to prove the fact remembered or believed"
- § 29:18.10 Whose mental state is relevant: the generalization
- § 29:18.15 If the defendant was aware of the victim's statement; victim's intent or plan (*Hillmon* doctrine)
- § 29:18.20 A (tragically) all-to-frequent scenario
- § 29:18.30 The contents of the statement; relevance vs. admissibility

(1) "I didn't do it"

- § 29:18.40 Introduction
- § 29:18.50 Defense: "Someone else murdered V; I didn't"
- § 29:18.60 Defense: "V committed suicide"
- § 29:18.70 "V died of natural causes"
- § 29:18.80 "V's death was an accidental result of V's own conduct"

(2) Defenses that focus on the defendant's state of mind when the defendant killed the victim

- § 29:18.90 Introduction
- § 29:18.100 Self-defense; or, the victim was the initial aggressor
- § 29:18.110 Insanity; provocation-extreme emotional disturbance; lack of premeditation

(3) "It was an accident"

- § 29:18.120 Introduction

TABLE OF CONTENTS

- § 29:18.130 General rule of inadmissibility
- § 29:18.140 Exceptions
 - (4) Other situations
- § 29:18.150 Factually specific relevance
- § 29:18.160 To rebut defendant's description of his relationship with the victim
- § 29:18.170 The "forfeiture" theory
- § 29:19 Victim's statements offered by defendant
- § 29:20 Civil litigation

C. STATEMENT OF INTENT AS A BASIS TO INFER CONDUCT

- § 29:21 Statement of intent as proof of declarant's subsequent conduct ("*Hillmon Doctrine*")
- § 29:22 As evidence of a non-declarant's subsequent conduct ("*Second Party Hillmon*")
- § 29:23 As a basis to infer how a non-declarant reacted to intended conduct

D. STATEMENTS RELATING TO WILLS

- § 29:24 Generally

CHAPTER 30. STATEMENTS FOR PURPOSES OF MEDICAL DIAGNOSIS OR TREATMENTS

I. ADMISSIBILITY OF STATEMENTS MADE FOR PURPOSES OF MEDICAL DIAGNOSIS OR TREATMENT

- § 30:1 In general
- § 30:2 Fed. R. Evid. 803(4)
- § 30:3 Corresponding state provisions
- § 30:4 States without statutes
- § 30:4.50 Injury, symptoms, condition, etc.; mental, emotional or psychological conditions or injuries
- § 30:5 The declarant; first-hand knowledge requirement
- § 30:6 Person to whom the statement was made
- § 30:6.50 Limiting the risk that the witness will merely bolster the complainant's credibility or go "too far" in other ways

- § 30:7 “Made for . . . diagnosis and/or treatment”
- § 30:8 “Pertinent”; cause; fault; identifying the assailant—
In general
- § 30:9 “Pertinent”; cause; fault—Statements as to
medical history
- § 30:10 “Self-serving” statements
- § 30:10.10 Sexual assault, child abuse and domestic violence
cases, in general
- § 30:10.20 Domestic violence and sexual assault: Adult
complainants
- § 30:11 “Pertinent”; cause; fault—Child abuse cases;
“tender years” exceptions
- § 30:12 Sixth Amendment Confrontation Clause—In general
- § 30:12.30 —Adult declarants
- § 30:12.70 —Statements by children
- § 30:13 Other hearsay exceptions

CHAPTER 31. SPECIAL EXCEPTIONS IN SEXUAL ASSAULT AND CHILD ABUSE CASES

I. OVERVIEW

- § 31:1 In general

II. “TENDER YEARS” EXCEPTION

- § 31:2 In general; age of declarant; subject-matter of
statement
- § 31:3 Procedure; trustworthiness; corroboration
- § 31:3.50 Sixth Amendment Confrontation Clause
- § 31:4 Declarant availability
- § 31:5 Other issues and requirements

III. “PROMPT OUTCRY” AND “FIRST COMPLAINT” EXCEPTIONS

- § 31:6 In general
- § 31:7 “Prompt outcry” or “fresh complaint” rule
- § 31:8 “First complaint”

IV. OTHER EXCEPTIONS

- § 31:9 Statements by children who allegedly witnessed a
physical or sexual assault

Volume 5

CHAPTER 32. REFRESHING MEMORY; RECORDED RECOLLECTION

I. REFRESHING MEMORY

- § 32:1 Overview
- § 32:2 Verbal refreshment by leading questions
- § 32:3 Use of documents and other media; Vocabulary

A. FEDERAL RULE; UNIFORM RULE; STATE LAW

- § 32:4 Fed. R. Evid. 612
- § 32:5 Jencks Act
- § 32:6 Uniform Rule 612
- § 32:7 States and other jurisdictions

B. “WRITING, RECORD, OBJECT,” ETC.

- § 32:8 In general
- § 32:9 —Privileged writings; Confidential documents

C. NEED FOR AND EFFECT OF “REFRESHMENT”

- § 32:10 In general
- § 32:11 Use of “refreshment” materials to impeach

D. PROCEDURE AND RELATED ISSUES

- § 32:12 Procedure
- § 32:13 —Offering party may not place contents before
the fact-finder
- § 32:14 Distinguishing recorded memory and
impeachment by prior inconsistent statements

E. ADVERSE PARTY’S ACCESS AND USE

- § 32:15 Access to materials used while testifying
- § 32:16 Access to materials used before testifying
- § 32:17 Sanctions for non-production
- § 32:18 Limiting access or use
- § 32:19 Introduction into evidence

§ 32:20 *[Reserved]*

II. THE “RECORDED RECOLLECTION” EXCEPTION TO THE HEARSAY RULE

A. INTRODUCTION

- § 32:21 In general
- § 32:22 The common law exception

B. FED. R. EVID. 803(5) AND CORRESPONDING STATE LAW

- § 32:23 Fed. R. Evid. 803(5)
- § 32:24 Corresponding state provisions
- § 32:25 Comparable law in non-code states
- § 32:26 Admissibility of particular statements

C. SPECIFIC REQUIREMENTS

- § 32:27 First-hand knowledge; Declarant must testify
- § 32:28 “Memorandum or record”
- § 32:29 “Made or adopted”; Multiple participants
- § 32:30 Specifying the declarant; Multiple hearsay issues
- § 32:31 “Insufficient recollection”
- § 32:32 Time between event, memorandum and adoption; Later transcription of notes
- § 32:33 Establishing accuracy; Trustworthiness
- § 32:34 —Recalcitrant witness
- § 32:35 Sixth Amendment Confrontation Clause

D. PROCEDURE

- § 32:36 Foundational questions: Cooperative witness
- § 32:37 Admissibility as an exhibit
- § 32:38 Opposing counsel’s tactical choices

CHAPTER 33. RECORDS OF REGULARLY CONDUCTED ACTIVITY (THE “BUSINESS RECORD” EXCEPTION TO THE HEARSAY RULE)

I. INTRODUCTION

- § 33:1 Historical background

TABLE OF CONTENTS

§ 33:2 Overview

II. FED. R. EVID. 803(6) AND CORRESPONDING STATE LAW

§ 33:3 Fed. R. Evid. 803(6)

§ 33:4 Corresponding state law

§ 33:5 Other jurisdictions

III. SPECIFIC REQUIREMENTS

A. “RECORD”; “BUSINESS”; “REGULARLY CONDUCTED”

§ 33:5.30 Overview

§ 33:5.60 “Record”

§ 33:6 In general

§ 33:7 Records of criminal activity

§ 33:8 Public or official records

B. ORIGINAL SOURCE OF INFORMATION

§ 33:9 Knowledge; Duty

§ 33:10 Exceptions to the “duty” requirement

C. MAKING THE RECORD: TIME, DUTY, “REGULARITY”

§ 33:11 Time

§ 33:12 Duty; regularity

D. SUBJECT MATTER OF THE RECORD: “OPINIONS, DIAGNOSES”

§ 33:13 In general

IV. TRUSTWORTHINESS; RELIANCE

§ 33:14 In general

§ 33:15 Reliance as proof of trustworthiness; evidence
suggesting inaccuracy

§ 33:16 Reports by law enforcement personnel

§ 33:17 Records made in contemplation of litigation

V. PROCEDURE

§ 33:18 Records themselves must be produced

- § 33:19 Foundation for admission: Sponsoring witness and testimony
- § 33:20 Authentication by certificate or affidavit: Fed. R. Evid. 803(6)(D); Fed. R. Evid. 902(11)
- § 33:21 Foreign business records
- § 33:22 Multiple entities

VI. OTHER ISSUES

- § 33:23 “Compression”; Multiple hearsay; Interplay with other rules
- § 33:24 Sixth Amendment Confrontation Clause
- § 33:25 Computer records

VII. ABSENCE OF RECORD OR ENTRY IN RECORD

- § 33:26 In general
- § 33:27 Fed. R. Evid. 803(7): Original version
- § 33:28 Fed. R. Evid. 803(7): The 2014 version
- § 33:29 State equivalents
- § 33:30 “Matter”; absence of a record of the “matter”; absence of a reference to the “matter” in an existing record
- § 33:31 Trustworthiness
- § 33:32 What is required: Testimony or only a certification?
- § 33:33 Contesting admissibility; pretrial discovery and disclosure
- § 33:34 Absence of “a record that was regularly kept for a matter of that kind”
- § 33:35 Lack of information in existing record

CHAPTER 34. PUBLIC RECORDS

I. LEGISLATIVE AND JUDICIAL REGULATION

- § 34:1 In general
- § 34:2 Fed. R. Evid. 803(8)
- § 34:3 Uniform Rule of Evidence 803(8)
- § 34:4 Corresponding state rules
- § 34:5 State rules modeled after the federal or uniform rules—Other jurisdictions

II. ISSUES COMMON TO ALL THREE SUBRULES

- § 34:6 Public agency; Information provided by private parties

TABLE OF CONTENTS

§ 34:7	Timeliness of the record
§ 34:8	Trustworthiness clause in the original rule
§ 34:9	Sixth Amendment Confrontation Clause
§ 34:10	Authentication

III. THE THREE SUBDIVISIONS

A. “ACTIVITIES OF THE OFFICE OR AGENCY”

§ 34:11	Fed. R. Evid. 803(8)(A)(i); state equivalents
§ 34:11.50	Confrontation Clause

B. “MATTERS OBSERVED AND REPORTED PURSUANT TO DUTY”

1. In General

§ 34:12	Fed. R. Evid. 803(8)(A)(ii); state law
§ 34:13	Public agency; Duty to observe and report

2. The Law Enforcement Exclusionary Clause

§ 34:14	Overview
§ 34:15	Who are “police officers and other law enforcement personnel”?
§ 34:16	Availability of the business record exception; Other exceptions
§ 34:17	Exceptions to the exclusionary clause
§ 34:18	—Routine, ministerial acts
§ 34:19	—Use by defendant or against officers preparing the report

C. “FACTUAL FINDINGS”

§ 34:20	Fed. R. Evid. 803(8)(A)(iii); state law
§ 34:21	Burdens of persuasion
§ 34:22	Defining “factual finding”
§ 34:23	Scope of the provision; The <i>Rainey</i> decision; State response
§ 34:24	Scope of admissibility; “Authority granted by law”
§ 34:25	Prosecutorial preclusion clause
§ 34:26	—Autopsy reports and death certificates
§ 34:27	—Laboratory reports

D. CONFRONTATION CLAUSE: LAB AND FORENSIC REPORTS

§ 34:28 Application of Rule 403

IV. TRUSTWORTHINESS

A. IN GENERAL

- § 34:29 Trustworthiness clause
- § 34:30 Burdens of persuasion
- § 34:31 Assessing trustworthiness: Overview; “reliability”; “credibility”; “accuracy”
- § 34:32 Timeliness
- § 34:33 “Skill of the investigator”
- § 34:34 Nature, quality of the investigation; Preliminary or interim reports
- § 34:35 “Motivation problems”
- § 34:36 —Government agency as litigant

B. SPECIFIC TYPES OF REPORTS AND FINDINGS

- § 34:37 Judicial findings; Administrative law judge findings
- § 34:38 E.E.O.C. and similar state agency reports
- § 34:39 Statements by prosecutors and police officers
- § 34:40 Factual findings in congressional reports
- § 34:41 Legal conclusions
- § 34:42 —“Special investigations” exclusionary clause
- § 34:43 Reports relating to traffic accidents: 23 U.S.C.A. § 409
- § 34:44 Immigration file records
- § 34:45 *[Reserved]*
- § 34:46 *[Reserved]*
- § 34:47 *[Reserved]*
- § 34:48 *[Reserved]*
- § 34:49 *[Reserved]*
- § 34:50 *[Reserved]*

V. OTHER EXCEPTIONS AND PROVISIONS

- § 34:51 Records of vital statistics; Fed. R. Evid. 803(9) and corresponding state law
- § 34:52 Applications and issues

TABLE OF CONTENTS

§ 34:53 —Death certificates

VI. ABSENCE OF PUBLIC RECORD OR ENTRY

§ 34:54 In general; Fed. R. Evid. 803(10); Equivalent state law

§ 34:55 Nature of the record

§ 34:56 Trustworthiness

§ 34:57 Form of proof; Certification; Form and contents

§ 34:58 Sixth Amendment Confrontation Clause

CHAPTER 34A. LAB AND FORENSIC REPORTS: THE CONFRONTATION CLAUSE

I. INTRODUCTION

§ 34A:1 In general

II. ADMINISTRATIVE REPORTS, CHAIN OF CUSTODY, EQUIPMENT TEST RESULTS, ETC.

A. OVERVIEW

§ 34A:2 In general

B. CHAIN OF CUSTODY

§ 34A:3 In general

§ 34A:4 *Melendez-Diaz*

§ 34A:5 Chain of custody in drug cases—A typical scenario

§ 34A:6 Post-*Crawford*, pre-*Melendez-Diaz* case law

§ 34A:7 *Williams*

§ 34A:7.50 Post-*Williams* case law

C. DOCUMENTS ESTABLISHING THAT EQUIPMENT WAS INSPECTED, TESTED, ETC.

§ 34A:8 In general

III. BIOLOGICAL, CHEMICAL, AND ELECTRONIC FORENSIC TESTS; FINGERPRINTS

A. OVERVIEW

- § 34A:9 Introduction: What's past is prologue; *Smith v. Arizona*

B. MELENDEZ-DIAZ V. MASSACHUSETTS

- § 34A:10 *Melendez-Diaz*: Introduction
§ 34A:11 *Melendez-Diaz*: The plurality's reasoning
§ 34A:12 *Melendez-Diaz*: Dissent and plurality:
Point-counterpoint

C. BULLCOMING V. NEW MEXICO

- § 34A:13 Overview
§ 34A:14 *Bullcoming*: Facts and evidence
§ 34A:15 Majority opinion
§ 34A:15.50 "Objective observations" v. "conclusions"
§ 34A:16 Three-Justice demurrer from majority
opinion Part IV
§ 34A:17 The Sotomayor-Kagan concurrence

D. WILLIAMS v. ILLINOIS; SMITH v. ARIZONA

- § 34A:18 *Williams*: Facts
§ 34A:19 *Williams*: The result, in brief: "Plurality"
and "dissent"
§ 34A:20 *Williams*: Hearsay, confrontation, and Rules
703 and 403
§ 34A:21 —Rules 703 and 403: Implications and post-
Williams case law
§ 34A:22 *Williams*: The "primary purpose" test
§ 34A:22.50 —Post-*Williams* case law
§ 34A:23 *Williams*: "Reliability" as a substitute for
confrontation
§ 34A:23.50 —Post-*Williams* case law
§ 34A:24 Justice Thomas' "formalized statements"
approach
§ 34A:24.50 —Post-*Williams* case law
§ 34A:25 The Thomas approach and the "matters

TABLE OF CONTENTS

	observed” and “factual findings” hearsay exceptions
§ 34A:25.10	<i>Smith v. Arizona</i> —Vocabulary: Terms used in the following sections
§ 34A:25.20	—Reminder—Forensic reports, the hearsay issue, and Fed. R. Evid. 703 and 705
§ 34A:25.30	<i>Smith v. Arizona</i>
§ 34A:25.35	—Facts
§ 34A:25.40	—Issue and holding
§ 34A:25.50	—Suggestions as to how Longino could have testified
§ 34A:25.60	—Part III of the opinion: The Kagan majority’s “thoughts” about whether Rast’s notes and/or report are “testimonial”
§ 34A:25.65	—Justice Thomas’ concurrence
§ 34A:25.70	—Justice Gorsuch’s concurring opinion
§ 34A:25.80	—The Alito-Roberts concurrence
§ 34A:25.90	—How the Rule 703-705 approach would work

E. WHO MUST BE CALLED TO TESTIFY?

1. Overview

§ 34A:26	Who must testify: The “ <i>Ghostbusters</i> question”
----------	---

2. Procedural Issues

§ 34A:27	Requiring the defense to assert the right prior to trial
§ 34A:28	Imposing other obligations on the defense

3. General Principles, Approaches, and Theories

§ 34A:29	Justice Breyer’s alternate approach: presumptive validity
§ 34A:30	May a supervisor or second analyst testify based on the first analyst’s report?
§ 34A:31	Analysis done solely by device producing a numerical printout

4. Specific Applications and Issues

a. Controlled Substances

§ 34A:32	Implications of <i>Melendez-Diaz</i>
§ 34A:33	Controlled substances: Post- <i>Melendez-Diaz</i> case law

- § 34A:34 Controlled substances: Circumstantial proof
- § 34A:35 Controlled substances: Harmless error

b. Fingerprints

- § 34A:36 Overview
- § 34A:37 Collecting the latent print
- § 34A:38 Transporting the latent print: authentication
- § 34A:39 Authenticating the exemplar
- § 34A:40 Comparison testimony

c. Other Applications and Issues

- § 34A:41 Report by individual who took biological sample; “cold case” implications
- § 34A:42 Testing breath, blood, urine, etc. for alcohol and other substances—Post-*Bullcoming* case law
- § 34A:43 DNA tests: Testimony by a lab supervisor
- § 34A:44 Testimony of another technician or analyst stating his or her own conclusions

F. AUTOPSIES

a. Post-*Crawford*, Pre-*Melendez-Diaz* Case Law

- § 34A:45 Initial efforts to categorize autopsies as nontestimonial
- § 34A:46 Autopsies on noncontroverted issues

b. *Melendez-Diaz*, *Bullcoming*, and *Williams*

- § 34A:47 *Melendez-Diaz*: “coroner’s reports”
- § 34A:48 *Melendez-Diaz*, *Bullcoming*, *Williams*: Plurality, dissenting and concurring opinions

c. Post-*Melendez-Diaz* Case Law

- § 34A:49 Are autopsies testimonial after *Melendez-Diaz*, *Bullcoming*, and *Williams*?
- § 34A:49.50 Subsidiary reports relied on by doctor performing autopsy
- § 34A:50 May a second doctor testify based on a first doctor’s autopsy?
- § 34A:51 May a second doctor testify—“Informal observations” vs. “solemnity”
- § 34A:52 —The “primary purpose” approach
- § 34A:53 —The Rule 703, “basis of testimony” approach

TABLE OF CONTENTS

- § 34A:53.50 Second doctor testimony—Independent basis
§ 34A:54 May a second doctor testify—Evaluation

**CHAPTER 35. MISCELLANEOUS
“DECLARANT AVAILABILITY
IMMATERIAL” EXCEPTIONS**

I. SCOPE OF CHAPTER

- § 35:1 Scope of chapter

**II. STATEMENTS RELATING TO PERSONAL
OR FAMILY HISTORY**

- § 35:2 In general

**A. RECORDS OF RELIGIOUS
ORGANIZATIONS**

- § 35:3 Historical background
§ 35:4 Fed. R. Evid. 803(11)
§ 35:5 Corresponding state law

**B. MARRIAGE, BAPTISMAL AND SIMILAR
CERTIFICATES**

- § 35:6 In general
§ 35:7 Fed. R. Evid. 803(12); Corresponding state law

C. STATEMENTS IN FAMILY RECORDS

- § 35:8 In general
§ 35:9 Fed. R. Evid. 803(13); Corresponding state law
§ 35:10 Requirements and restrictions; Applications

**III. DOCUMENTS RELATING TO PROPERTY;
ANCIENT DOCUMENTS**

**A. HEARSAY EXCEPTIONS RELATING TO
DOCUMENTS INVOLVING PROPERTY**

- § 35:11 In general
§ 35:12 Records of documents affecting an interest in property: Fed. R. Evid. 803(14)

- § 35:13 Records of documents affecting an interest in property: Fed. R. Evid. 803(14)—State law
- § 35:14 Applications and issues
- § 35:15 Statements in documents affecting an interest in property: Fed. R. Evid. 803(15)
- § 35:16 Statements in documents affecting an interest in property: Fed. R. Evid. 803(15)—State Law
- § 35:17 Statements in documents affecting an interest in property: Fed. R. Evid. 803(15)—Types of documents
- § 35:18 Types of factual recitations

B. STATEMENTS IN ANCIENT DOCUMENTS

- § 35:19 In general; Fed. R. Evid. 803(16)
- § 35:20 Corresponding state law
- § 35:21 Issues and applications

IV. MARKET REPORTS; COMMERCIAL PUBLICATIONS, LEARNED TREATISES

A. MARKET REPORTS; COMMERCIAL PUBLICATIONS

- § 35:22 In general
- § 35:23 Fed. R. Evid. 803(17); Corresponding state law
- § 35:24 Foundation requirements
- § 35:25 Various applications

B. LEARNED TREATISES

1. In General

- § 35:26 Overview
- § 35:27 “Custom and usage”
- § 35:28 Fed. R. Evid. 803(18); Uniform Rule 803(18)
- § 35:29 Corresponding state law

2. Satisfying the Requirements

- § 35:30 Trial judge’s role
- § 35:31 Nature, date, etc. of the publication
- § 35:32 “Reliable authority”; “Authoritative”
- § 35:33 Qualifying the publication
- § 35:34 What must be established as “reliable authority”

3. Manner of Use

- § 35:35 Admissibility on direct examination

TABLE OF CONTENTS

§ 35:36 Read or received; Limiting instruction

V. REPUTATION

§ 35:37 Overview

§ 35:38 Laying a foundation for reputation testimony;
“Community”

A. PERSONAL OR FAMILY HISTORY

§ 35:39 In general

§ 35:40 Fed. R. Evid. 803(19)

§ 35:41 Corresponding state law

§ 35:42 Issues and applications

B. REPUTATION CONCERNING BOUNDARIES OR GENERAL HISTORY

§ 35:43 In general

§ 35:44 Fed. R. Evid. 803(20)

§ 35:45 Corresponding state law

§ 35:46 Issues and applications

C. REPUTATION AS TO CHARACTER

§ 35:47 In general

§ 35:48 Fed. R. Evid. 803(21); Corresponding state rules

VI. PRIOR CONVICTIONS AND CIVIL JUDGMENTS

§ 35:49 In general

A. JUDGMENT OF PREVIOUS CONVICTION

§ 35:50 In general

§ 35:51 Nature of the crime: “Felony”

1. Statutory and Judicial Regulation

§ 35:52 Fed. R. Evid. 803(22)

§ 35:53 State rules similar to Fed. R. Evid. 803(22)

§ 35:54 Other states

2. Purpose for Which Conviction Is Offered

§ 35:55 Collateral estoppel or res ludicata; Element of
crime; To show multiple offender status; Etc

- § 35:56 “To prove any fact essential to sustain the judgment”
- § 35:57 Use of third-person’s conviction
- § 35:58 Plea of *nolo contendere* or no contest; “*Alford*” plea
- § 35:59 Admissibility of third persons’ guilty pleas under other hearsay exceptions

3. Misdemeanor Convictions

- § 35:60 In general
- § 35:61 Misdemeanor plea as party-admission
- § 35:62 Other exceptions and rules

4. Procedural Issues

- § 35:63 Proving the conviction
- § 35:64 Rebuttal evidence permitted
- § 35:65 Pendency of appeal
- § 35:66 Acquittals; Convictions which have been reversed; Absence of trial

B. JUDGMENT AS TO PERSONAL, FAMILY, OR GENERAL HISTORY, OR BOUNDARIES

- § 35:67 In general
- § 35:68 Fed. R. Evid. 803(23); Corresponding state law

CHAPTER 36. THE “DECLARANT UNAVAILABLE” EXCEPTIONS

I. “UNAVAILABILITY”

- § 36:1 Overview

A. IN GENERAL

- § 36:2 Introduction
- § 36:3 Fed. R. Evid. 804(a); Uniform R. Evid. 804(a)
- § 36:4 Corresponding state law
- § 36:5 Proponent’s burden of persuasion; “Good faith effort”; “Due diligence”

B. SPECIFIC DEFINITIONS OF UNAVAILABILITY

- § 36:6 Privilege

TABLE OF CONTENTS

§ 36:7	—Procedure and proof
§ 36:8	—Fifth Amendment privilege
§ 36:9	Refusal to testify
§ 36:10	Lack of memory
§ 36:11	Illness or infirmity
§ 36:12	Absence from the hearing
§ 36:13	—The deposition requirement
§ 36:14	—Absence and the confrontation clause
§ 36:15	“Procured unavailability”

II. “DECLARANT UNAVAILABLE” EXCEPTIONS

A. FORMER TESTIMONY

1. Introductory Matters

§ 36:16	In general; Fed. R. Evid. 804(b)
§ 36:17	Vocabulary; “Cast of characters”; Issues
§ 36:18	Sixth Amendment Confrontation Clause

2. Federal and State Law

§ 36:19	Fed. R. Evid. 804(b)(1)
§ 36:20	State law

3. Declarant Unavailability; Nature of Prior Proceeding

§ 36:21	Declarant unavailability
§ 36:22	Nature of prior proceeding

4. Identity of Adverse Party

§ 36:23	Criminal litigation
§ 36:24	Civil litigation
§ 36:25	—“Predecessor in interest”

5. Opportunity to Examine; Similarity of Issue; Motive to Examine

§ 36:26	Opportunity to examine; Subsequently discovered evidence, etc
§ 36:27	Similarity of issue
§ 36:28	Motive to examine—Procedural and tactical context; testimony offered only to impeach
§ 36:29	—Prior trial
§ 36:30	—Grand jury testimony
§ 36:31	—Motions to suppress

- § 36:32 —Preliminary hearings
- § 36:33 —Depositions
- § 36:34 —Other proceedings

6. Different Adverse Parties

- § 36:35 In civil litigation
- § 36:36 Use in criminal cases

7. Other Issues

- § 36:37 Offering the testimony
- § 36:38 Impeachment and rehabilitation of former testimony and witness
- § 36:39 Objections
- § 36:40 Other hearsay exceptions; Other legal issues

B. DYING DECLARATIONS

1. Overview

- § 36:41 In general
- § 36:42 Common law requirements
- § 36:43 Fed. R. Evid. 804(b)(2)
- § 36:44 Corresponding state statutes
- § 36:45 Non-code jurisdictions
- § 36:46 Actions other than homicide, civil and criminal

2. Specific Requirements

- § 36:47 Declarant's awareness of imminent, impending death
- § 36:48 Requirement of declarant's death
- § 36:49 Declarant's competence; First-hand knowledge

3. Other Issues

- § 36:50 Permissible contents of dying declarations
- § 36:51 Form of statement; How obtained
- § 36:52 Role of judge and jury
- § 36:53 Sixth Amendment Confrontation Clause
- § 36:54 Other hearsay provisions
- § 36:55 Impeachment of a dying declaration

C. THE "STATEMENT AGAINST INTEREST" EXCEPTION

1. Common Law and Current Practice

- § 36:56 In general

TABLE OF CONTENTS

§ 36:57	Fed. R. Evid. 804(b)(3)
§ 36:58	Pending amendment to Fed. R. Evid. 804(b)(3)
§ 36:59	State law substantially identical to Fed. R. Evid. 804(b)(3)
§ 36:60	Uniform Rule 804(b)(3) and state rules modeled thereon
§ 36:61	Other state provisions
§ 36:62	States without a codified rule
2. Common Requirements and Issues	
§ 36:63	“Interests” within the exception
§ 36:64	Disserving as to declarant
§ 36:65	First-hand knowledge or “belief” in the truth of the statement
§ 36:66	Statements that are both disserving and self-serving
§ 36:67	Statement must be against interest at time made
§ 36:68	Credibility of in-court witness
3. Prosecutor’s Use of Statements against Penal Interest; Confrontation Clause	
§ 36:69	In general
a. <i>Williamson</i>	
§ 36:70	“Statement” defined; “Collateral” statements; <i>Williamson v. United States</i>
§ 36:71	State reaction to <i>Williamson</i>
§ 36:72	Applying <i>Williamson</i> ; Redaction
b. Sixth Amendment Confrontation Clause; <i>Lilly v. Virginia</i>	
§ 36:73	Background
§ 36:74	<i>Lilly v. Virginia</i>
§ 36:74.30	<i>Crawford v. Washington</i>
c. Factors Effecting Adverse Nature and Trustworthiness of Statement	
§ 36:75	Overview
§ 36:76	The statement
§ 36:76.10	—Inherently untrustworthy statements
§ 36:76.20	—Assessing its self-inculpatory tendency—In general
§ 36:76.30	— —Specific applications

§ 36:76.40 Statements that are both inculpatory and exculpatory to the declarant

§ 36:76.50 “Collateral, neutral statements”

§ 36:77 The declarant

d. The Person to Whom the Statement Was Made

§ 36:78 In general

§ 36:79 Privileged communications

§ 36:80 Statements made to law enforcement officials

§ 36:81 Statements to friends, relatives, acquaintances, etc

e. Plea Allocutions

§ 36:82 In general

§ 36:83 Related issues

§ 36:84 New York rule on guilty plea allocutions

f. Other Issues

§ 36:85 Corroboration requirement

§ 36:85.10 What must be corroborated

§ 36:85.20 May a court consider extrinsic corroboration?

§ 36:85.30 Extrinsic corroboration: Current practice

§ 36:86 Other settings, factors and considerations

4. Defendant’s Use of Statements against Penal Interest

§ 36:87 Statements offered by defendant in exculpation

§ 36:88 “Corroborating circumstances . . . trustworthiness”

§ 36:89 Applying the trustworthiness-corroboration requirement

§ 36:90 The circumstances surrounding the making of the statement

§ 36:91 Extrinsic corroboration or contradiction

§ 36:92 The declarant’s credibility; Information within the statement

§ 36:93 The strength of the corroboration required

§ 36:94 [Reserved] *[Reserved]*

5. Statements against “Civil” Interests

§ 36:95 In general

§ 36:96 Proprietary interest

TABLE OF CONTENTS

§ 36:97	Pecuniary and litigational interests
§ 36:98	Penal interest; “Social” interest
6. Other Hearsay Exceptions and Evidence Rules	
§ 36:99	Statements against interest compared to admissions by party-opponent
§ 36:100	Coconspirator and state of mind exceptions
§ 36:101	Other hearsay provisions; Prior statement of witness
§ 36:102	Other evidence rules
D. STATEMENT OF PERSONAL OR FAMILY HISTORY; “PEDIGREE”	
§ 36:103	In general
§ 36:104	Fed. R. Evid. 804(b)(4)
§ 36:105	Corresponding state law
§ 36:106	Issues and requirements
§ 36:107	[Reserved] <i>[Reserved]</i>
E. FORFEITURE BY WRONGDOING	
§ 36:108	In General <i>[Deleted]</i>
§ 36:108.05	Introduction
1. Constitutional Considerations	
§ 36:108.10	<i>Crawford, Davis, Reynolds</i>
§ 36:108.15	The “purpose” or “design” issue
§ 36:108.20	<i>Giles v. California: facts</i>
§ 36:108.25	The result in <i>Giles</i> : “by the numbers”
§ 36:108.30	<i>Giles</i> : The history of the Confrontation Clause and the forfeiture doctrine
§ 36:108.35	<i>Giles</i> : the “guilt by a preponderance” issue
§ 36:108.40	<i>Giles</i> : Defining the requisite mental state; “intent to silence”
§ 36:108.45	<i>Giles</i> : Part II-D-2 of Justice Scalia’s opinion
2. Application of the Forfeiture Doctrine in Domestic Violence Cases	
§ 36:108.60	<i>Giles</i> : Overview
§ 36:108.68	<i>Giles</i> : The “intent to silence” requirement
§ 36:108.71	<i>Giles</i> : Defining “testimonial” in the domestic violence context—And in other contexts as well

- § 36:108.74 *Giles*: Inferring intent to silence: The Souter concurrence “majority”
- § 36:108.85 Application of the forfeiture doctrine: post-*Giles* case law
- 3. Forfeiture by Wrongdoing: Federal and State Rules
- § 36:108.87 Relationship to forfeiture exception to Confrontation Clause and hearsay objection
- § 36:108.90 Fed. R. Evid. 804(b)(6)
- § 36:108.95 State statutes and rules
- 4. Forfeiture by Wrongdoing: Specific Requirements
- § 36:109 “Wrongdoing”; “Acquiescence”
- § 36:109.30 “Caused” or “procured” the declarant’s unavailability
- § 36:109.50 *Cherry-Pinkerton*: Is forfeiture vicariously applicable via the *Pinkerton* rule?
- § 36:110 Burden of proof
- § 36:110.10 Burden of proof: “Intent to silence”
- § 36:110.30 Procedure
- § 36:110.70 Means of proof—Declarant is missing or dead
- § 36:110.80 —Declarant is alive & capable of testifying
- § 36:110.90 Sufficiency evaluations
- § 36:111 Other objections and issues

CHAPTER 37. THE “RESIDUAL EXCEPTION” TO THE HEARSAY RULE

I. LEGISLATIVE AND JUDICIAL REGULATION

- § 37:1 Introduction
- § 37:2 Fed. R. Evid. 807
- § 37:3 Corresponding state law
- § 37:3.01 Alabama
- § 37:3.02 Alaska
- § 37:3.03 Arizona
- § 37:3.04 Arkansas
- § 37:3.05 California
- § 37:3.06 Colorado
- § 37:3.07 Connecticut

TABLE OF CONTENTS

§ 37:3.08	Delaware
§ 37:3.09	District of Columbia
§ 37:3.10	Florida
§ 37:3.11	Georgia
§ 37:3.12	Hawaii
§ 37:3.13	Idaho
§ 37:3.14	Illinois
§ 37:3.15	Indiana
§ 37:3.16	Iowa
§ 37:3.17	Kansas
§ 37:3.18	Kentucky
§ 37:3.19	Louisiana
§ 37:3.20	Maine
§ 37:3.21	Maryland
§ 37:3.22	Massachusetts
§ 37:3.23	Michigan
§ 37:3.28	Nebraska

II. ISSUES AND REQUIREMENTS

A. IN GENERAL

§ 37:4	Overview
§ 37:5	“Not specifically covered”; “Near miss” approach
§ 37:6	“More probative”
§ 37:7	Notice
§ 37:8	Trial court’s findings and responsibilities; Standard of review on appeal; Other requirements and issues

B. “CIRCUMSTANTIAL GUARANTEES OF TRUSTWORTHINESS”

§ 37:9	In general
§ 37:9.10	Trustworthiness in child abuse cases
§ 37:10	The declarant
§ 37:11	—Bias or motive
§ 37:12	The statement itself
§ 37:13	To whom the statement was made and in what circumstances
§ 37:14	Time
§ 37:15	Repetition; Consistency
§ 37:16	Extrinsic corroboration
§ 37:17	The witness

§ 37:18 Other trustworthiness issues

C. CONSTITUTIONAL CONSIDERATIONS

§ 37:19 Sixth Amendment Confrontation Clause

§ 37:20 Defendant's constitutional right to present evidence

CHAPTER 38. MISCELLANEOUS HEARSAY ISSUES

§ 38:1 Hearsay within hearsay: Fed. R. Evid. 805 and corresponding state law

§ 38:1.50 Use of translator or interpreter as multiple hearsay

§ 38:2 Impeaching and rehabilitating the hearsay declarant: Fed. R. Evid. 806 and corresponding state law

§ 38:3 Roles of judge and jury

§ 38:4 Standards of appellate review

Volume 6

CHAPTER 39. LAY WITNESS OPINION: GENERAL PRINCIPLES

I. INTRODUCTION; LEGISLATIVE AND JUDICIAL REGULATION

§ 39:1 Introduction

§ 39:2 Fed. R. Evid. 701: The "restyled" text, effective December 1, 2011

§ 39:3 Prior versions of Fed. R. Evid. 701

§ 39:4 Equivalent state law: Overview

§ 39:5 Alabama

§ 39:6 Alaska

§ 39:7 Arizona

§ 39:8 Arkansas

§ 39:9 California

§ 39:10 Colorado

§ 39:11 Connecticut

§ 39:12 Delaware

§ 39:13 District of Columbia

§ 39:14 Florida

§ 39:15 Georgia

TABLE OF CONTENTS

§ 39:16	Hawaii
§ 39:17	Idaho
§ 39:18	Illinois
§ 39:19	Indiana
§ 39:20	Iowa
§ 39:21	Kansas
§ 39:22	Kentucky
§ 39:23	Louisiana
§ 39:24	Maine
§ 39:25	Maryland
§ 39:26	Massachusetts
§ 39:27	Michigan
§ 39:28	Minnesota
§ 39:29	Mississippi
§ 39:30	Missouri
§ 39:31	Montana
§ 39:32	Nebraska
§ 39:33	Nevada
§ 39:34	New Hampshire
§ 39:35	New Jersey
§ 39:36	New Mexico
§ 39:37	New York
§ 39:38	North Carolina
§ 39:39	North Dakota
§ 39:40	Ohio
§ 39:41	Oklahoma
§ 39:42	Oregon
§ 39:43	Pennsylvania
§ 39:44	Rhode Island
§ 39:45	South Carolina
§ 39:46	South Dakota
§ 39:47	Tennessee
§ 39:48	Texas
§ 39:49	Utah
§ 39:50	Vermont
§ 39:51	Virginia
§ 39:52	Washington
§ 39:53	West Virginia
§ 39:54	Wisconsin
§ 39:55	Wyoming

II. GENERAL PRINCIPLES

§ 39:56	Overview
---------	----------

- § 39:57 Personal knowledge, rational connection, “helpful”
- § 39:58 First-hand knowledge (perception)
- § 39:59 “Rational connection”
- § 39:60 “Helpful”; “ultimate issue” rule

III. DISTINGUISHING BETWEEN LAY AND EXPERT OPINION

- § 39:61 The importance of the distinction
- § 39:62 The 2000 amendment to Fed. R. Evid. 701
- § 39:62.10 Making the distinction: General criteria
- § 39:62.20 Subject matter
- § 39:62.30 Specialized knowledge
- § 39:62.40 Reasoning process
- § 39:62.50 The question asked; how the witness worded the answer
- § 39:63 The “percipient witness” rule; the supposed “on the job” exception
- § 39:64 The “percipient witness” rule—Treating physician or nurse as “percipient witness”
- § 39:64.40 The question asked; how the witness worded the answer
- § 39:65 The “percipient witness” rule—Hierarchy, relationship, common practices of organization; relationships in general; relationship of events to each other
- § 39:66 “Custom and usage”; professional or “industry” experience; authentication of documents
- § 39:67 Testimony by law enforcement officials; the “dual witness” issue
- § 39:68 Other subjects

IV. “OVERVIEW,” “BACKGROUND,” OR “COURSE OF INVESTIGATION” TESTIMONY; “SUMMARY” WITNESS

- § 39:69 In general
- § 39:70 Permissible uses: In general
- § 39:71 Permissible uses: To rebut accusations of shoddy investigation and the like
- § 39:72 Permissible uses: To provide background information
- § 39:73 Permissible uses: “Summary” witnesses:

TABLE OF CONTENTS

Complex facts, multiple transactions; Fed. R.
Evid. 1006

**CHAPTER 40. SUBJECTS OF LAY
WITNESS OPINION**

I. IDENTIFICATION OF PERSONS

**A. EYEWITNESS IDENTIFICATION
TESTIMONY: CONSTITUTIONAL
CONSIDERATIONS**

- § 40:1 Overview
- § 40:2 Pretrial and in-court identifications: Legal categories and principles; hearsay; Confrontation Clause
- § 40:3 Post-arraignment corporeal identifications held in the absence of counsel: *United States v. Wade* and *Gilbert v. California*
- § 40:4 All other pretrial identification procedures: The “Due Process” standard: *Kirby, Ash, Simmons, Brathwaite*
- § 40:5 *Biggers* and *Brathwaite*: “All, or Nothing at All”
- § 40:6 *Biggers* and *Brathwaite*: The Court’s due process factors
- § 40:7 *Perry v. New Hampshire*
- § 40:8 Assessment of the Supreme Court’s approach to eyewitness error
- § 40:9 State variations and developments

**B. IDENTITY OF INDIVIDUAL CAPTURED IN
A PHOTOGRAPH OR VIDEO RECORDING**

- § 40:10 Overview
- § 40:11 Restrictive approach
- § 40:12 Permissive approach
- § 40:13 Risk of unfair prejudice
- § 40:14 Identifying someone other than a defendant; other situations

**C. OTHER ISSUES RELATING TO
IDENTIFICATION AND PHYSICAL
DESCRIPTION**

- § 40:15 In general

- § 40:16 Opinion as to paternity or other blood-relation based on physical resemblance; comparison by jury

D. VOICE IDENTIFICATION

- § 40:17 Overview
- § 40:18 Testimony by an eye-witness to the conversation
- § 40:19 Voice recognition testimony: Fed. R. Evid. 901(b)(5) and corresponding state rules
- § 40:20 Self-identification by phone conversation participant: Fed. R. Evid. 901(b)(6)(A)
- § 40:21 Circumstantial evidence generally: Fed. R. Evid. 901(b)(4)
- § 40:22 Identifying and authenticating calls to and from business numbers: Fed. R. Evid. 901(b)(6)(B)
- § 40:23 Jury (or judge) comparing “X’s” voice to a voice on a contested recording; Fed. R. Evid. 901(b)(3)
- § 40:24 Identifying voice’s race or ethnic origin
- § 40:25 Suggestiveness and due process
- § 40:26 Trial strategy; instructing the jury
- § 40:27 Voice exemplars: Constitutional considerations
- § 40:28 Voice exemplars: Uses prior to and during trial
- § 40:29 Voice exemplars: Other issues

E. HANDWRITING

- § 40:30 In general; Fed. R. Evid. 901(b)(2)
- § 40:31 Adequacy of foundation: Rules 701 and 901(a)
- § 40:32 Familiarity “Acquired for the Current Litigation”; investigative familiarity
- § 40:33 Lay witness testimony that signatures appeared dissimilar
- § 40:34 Comparison by trier of fact: Fed. R. Evid. 901(b)(3)

II. MENTAL STATE; MEANING; INTENT; KNOWLEDGE

A. LAY OPINION RELATING TO MENTAL STATE, CAPACITY, EMOTION, ETC.

- § 40:35 In general; foundation; terminology
- § 40:36 Sanity or ability to form mens rea

TABLE OF CONTENTS

- § 40:37 Mental stability, competence, mood, emotion, etc.
- § 40:38 Mental stability, competence, etc.
- § 40:39 Mood, emotion, intent; reaction to specific events
- § 40:39.30 Opinion as to prevailing sentiment among others

B. LAY OPINION RELATING TO A PERSON'S ALCOHOL OR DRUG INTOXICATION

- § 40:40 In general
- § 40:41 Alcohol intoxication
- § 40:42 Controlled substance intoxication; effect on ability to perceive and remember

C. LAY OPINION AS TO THE MEANING OR TRUTH OF STATEMENTS OR TESTIMONY; INTENT; GUILTY KNOWLEDGE

- § 40:43 Opinion as to truth of testimony or out-of-court statements
- § 40:44 Police statement of belief or disbelief, or repeating others' statements, during an interrogation
- § 40:45 Testimony by a participant as to the meaning of out-of-court statements—Hand gestures; handshakes—Overview
 - § 40:45.20 —Technical terms, jargon, codes, other specialized terminology
 - § 40:45.30 Non-participant testimony translating non-English statements
 - § 40:45.40 Testimony by a participant as to the meaning of out-of-court statements—Interpretation based on participation in the events in question
 - § 40:45.60 —“Elliptical” private language between the parties
 - § 40:45.70 Testimony interpreting facial expression, body language, hand gestures and handshakes, and other non-verbal conduct
- § 40:46 Culpable knowledge; intent
- § 40:47 Informant or police opinion re intent and knowledge in drug prosecutions

D. OPINION THAT ANOTHER'S ACTION WAS MOTIVATED BY BIAS OR PREJUDICE

- § 40:48 Public encounters

§ 40:49 Employment-related litigation

III. FINANCIAL MATTERS

§ 40:50 Overview

§ 40:51 Value of a business; projected profits; lost profits

§ 40:52 Value (and lost value) of real and personal
property: Civil litigation

§ 40:53 “Value” testimony in criminal cases

§ 40:54 Testimony about financial and other records

§ 40:55 Lost wages, salary, benefits; value of services
rendered

IV. LAY WITNESS OPINION RELATING TO VEHICLES

§ 40:56 Speed

§ 40:57 Testimony relating to collisions and accidents

§ 40:58 Value; other vehicular-related issues

V. LAY OPINION AS TO NATURE OF OBJECTS, STAINS, SUBSTANCES, ETC.

§ 40:59 In general

§ 40:60 Controlled substances and other chemicals

VI. OTHER SUBJECTS AND ISSUES

§ 40:61 Character and habit

§ 40:62 Miscellaneous matters in criminal cases

§ 40:63 Injury and health-related matters

§ 40:64 Other matters

CHAPTER 41. EXPERT WITNESS TESTIMONY IN CIVIL CASES: AN OVERVIEW

§ 41:1 Introduction

§ 41:2 Overview

§ 41:3 Testimony by expert witnesses: Fed. R. Evid.
702

§ 41:4 Fed. R. Evid. 702 and *Daubert*

§ 41:5 Fed. R. Evid. 703: Bases of an expert’s opinion
testimony

§ 41:6 Fed. R. Evid. 704: Opinion on an ultimate issue

TABLE OF CONTENTS

- § 41:7 Fed. R. Evid. 705: Disclosing the facts or data underlying an expert's opinion
- § 41:8 Fed. R. Evid. 706: Court-appointed expert witness
- § 41:9 Subjects of expert witness testimony
- § 41:10 Discovery and expert witnesses

CHAPTER 42. EXPERT WITNESSES: A CIVIL PRACTITIONER'S PRIMER

- § 42:1 Introduction: Do you need an expert?
- § 42:2 Locating the best expert—A qualified expert with an admissible opinion
- § 42:3 How is an expert determined to be qualified?
- § 42:4 Consulting experts versus identified experts
- § 42:5 Procedural requirements for proper identification of experts
- § 42:6 Drafting the proper designation or identification of experts
- § 42:7 The expert report
- § 42:8 Expert discovery—Written discovery
- § 42:9 The expert deposition
- § 42:10 The *Daubert* hearing
- § 42:11 Experts at trial: In general
- § 42:12 Cross examination of expert witnesses
- § 42:13 Preservation of expert issues for appeal

CHAPTER 43. FED. R. EVID. 702 AND EXPERT TESTIMONY

- § 43:1 Fed. R. Evid. 702
- § 43:2 Admission of expert testimony *before* Fed. R. Evid. 702
- § 43:3 Fed. R. Evid. 702—History and amendments
- § 43:4 Expert qualification under Fed. R. Evid. 702
- § 43:5 Qualifying the expert: Technical versus scientific expert testimony
- § 43:6 “Specialized knowledge” and experience as a basis to qualify a particular witness
- § 43:7 Licensure as basis to qualify an expert witness
- § 43:8 Statutory requirements to testify as an expert
- § 43:9 Trial judge discretion re: expert witness qualification
- § 43:10 Procedural requirements for expert qualification—In general

- § 43:11 Specific subjects of expert qualification
- § 43:12 Procedural requirements for expert qualification—Identification of expert witness
- § 43:13 Use of discovery to ascertain expert witness qualification
- § 43:14 Qualifying parties and lay witnesses as experts

CHAPTER 44. FED. R. EVID. 702, DAUBERT, AND ITS PROGENY

- § 44:1 Before Fed. R. Evid. 702: *Frye* and the “general acceptance” test
- § 44:2 The enactment of Fed. R. Evid. 702 and the *Frye* “general acceptance” conflict
- § 44:3 Fed. R. Evid. 702, Fed. R. Evid. 703, and the *Daubert* trial court
- § 44:4 *Daubert*—“Relevance, reliability, ‘fit’ ”
- § 44:5 *Daubert*’s four nonexclusive factors to examine scientific methodology
- § 44:6 *Daubert*’s “gatekeeper” metaphor
- § 44:7 The *Daubert* dissent
- § 44:8 *General Elec. Co. v. Joiner*—“Principles, methodology and conclusions”
- § 44:9 *Kumho Tire*: “Technical or other specialized knowledge”
- § 44:10 *Kumho Tire*: Does *Daubert* apply to expert testimony based on experience or technical knowledge?
- § 44:11 *Kumho Tire*: Applying the *Daubert* factors to nonscientific expert testimony
- § 44:12 *Kumho Tire* and *Joiner*: The “abuse of discretion” standard
- § 44:13 Trial judge discretion and expert testimony: Appellate review—Federal court approaches
- § 44:14 —State court approaches
- § 44:15 *Daubert* procedural issues—What triggers a gatekeeper *Daubert* analysis?
- § 44:16 —What triggers a full *Daubert* hearing?
- § 44:17 Applying *Daubert*: Substance
- § 44:18 Applying *Daubert*: Other relevant factors
- § 44:19 Applying *Daubert*: May a judge accept an expert’s “ipse dixit”?
- § 44:20 Applying *Daubert*: When expert testimony is excluded

TABLE OF CONTENTS

- § 44:21 When *Frye* and *Daubert* do not apply: Pure opinion rule
- § 44:22 When *Frye* and *Daubert* do not apply: Conclusions based on “experience and observations”
- § 44:23 When *Frye* and *Daubert* do not apply: Evaluation and comment
- § 44:24 When *Frye* and *Daubert* do not apply: “Regularly employed method”
- § 44:25 When *Frye* and *Daubert* do not apply: “Assist the juror’s own observations or understanding”
- § 44:26 *Daubert*’s applicability at pretrial hearings and bench trials
- § 44:27 Methodologies, applications and conclusions
- § 44:28 Extent of exclusion

CHAPTER 45. STATE 702 EQUIVALENTS: *DAUBERT* OR *FRYE* STANDARD

- § 45:1 Introduction to *Frye*: The “general acceptance” standard
- § 45:2 Applying the *Frye* “general acceptance” test
- § 45:3 *Frye* to *Daubert*; Fed. R. Evid. 702
- § 45:4 Amendments to Fed. R. Evid. 702
- § 45:5 Fed. R. Evid. 702 and corresponding state law
- § 45:6 Alabama
- § 45:7 Alaska
- § 45:8 Arizona
- § 45:9 Arkansas
- § 45:10 California
- § 45:11 Colorado
- § 45:12 Connecticut
- § 45:13 Delaware
- § 45:14 District of Columbia
- § 45:15 Florida
- § 45:16 Georgia
- § 45:17 Hawai‘i
- § 45:18 Idaho
- § 45:19 Illinois
- § 45:20 Indiana
- § 45:21 Iowa
- § 45:22 Kansas

§ 45:23	Kentucky
§ 45:24	Louisiana
§ 45:25	Maine
§ 45:26	Maryland
§ 45:27	Massachusetts
§ 45:28	Michigan
§ 45:29	Minnesota
§ 45:30	Mississippi
§ 45:31	Missouri
§ 45:32	Montana
§ 45:33	Nebraska
§ 45:34	Nevada
§ 45:35	New Hampshire
§ 45:36	New Jersey
§ 45:37	New Mexico
§ 45:38	New York
§ 45:39	North Carolina
§ 45:40	North Dakota
§ 45:41	Ohio
§ 45:42	Oklahoma
§ 45:43	Oregon
§ 45:44	Pennsylvania
§ 45:45	Rhode Island
§ 45:46	South Carolina
§ 45:47	South Dakota
§ 45:48	Tennessee
§ 45:49	Texas
§ 45:50	Utah
§ 45:51	Vermont
§ 45:52	Virginia
§ 45:53	Washington
§ 45:54	West Virginia
§ 45:55	Wisconsin
§ 45:56	Wyoming

CHAPTER 46. FED. R. EVID. 703: BASES OF AN EXPERT'S OPINION TESTIMONY

§ 46:1	Bases for expert testimony: In general
§ 46:2	Fed. R. Evid. 703—Overview of amendments
§ 46:3	—Substantive 2000 amendment
§ 46:4	—Current language—2011 “restyling” amendment

TABLE OF CONTENTS

§ 46:5	Fed. R. Evid. 703’s permissible bases for expert testimony
§ 46:6	Fed. R. Evid. 703—Practical considerations in application
§ 46:7	Based on first-hand knowledge
§ 46:8	Otherwise inadmissible evidence: An overview
§ 46:9	Otherwise inadmissible evidence—General meaning of “reasonably relied upon by experts in the field”
§ 46:10	“Reasonably relied upon by experts in the field”—Law enforcement and forensic experts
§ 46:11	Otherwise inadmissible evidence: “Reasonably relied upon” hearsay
§ 46:12	Otherwise inadmissible evidence: Admissibility as basis evidence
§ 46:13	Otherwise inadmissible evidence: Considerations with medical and mental health experts
§ 46:14	Otherwise inadmissible evidence: Interplay with other rules, hearsay, and Confrontation Clause
§ 46:15	Opinion based on privileged information
§ 46:16	Bench trials and Rule 703
§ 46:17	Other bases: Opinion relying on other opinion
§ 46:18	Background information
§ 46:19	Specified standards as bases for opinion
§ 46:20	Bases for medical expert testimony
§ 46:21	Basis for testimony as to value, amount of damages, income; other financial matters
§ 46:22	Basis for testimony on other issues
§ 46:23	Based on trial testimony and exhibits
§ 46:24	Hypothetical questions—In general
§ 46:25	Specific subjects of hypothetical questions
§ 46:26	State law
§ 46:27	Alabama
§ 46:28	Alaska
§ 46:29	Arkansas
§ 46:30	Arizona
§ 46:31	California
§ 46:32	Colorado
§ 46:33	Connecticut
§ 46:34	Delaware
§ 46:35	District of Columbia
§ 46:36	Florida
§ 46:37	Georgia

§ 46:38	Hawaii
§ 46:39	Idaho
§ 46:40	Illinois
§ 46:41	Indiana
§ 46:42	Iowa
§ 46:43	Kansas
§ 46:44	Kentucky
§ 46:45	Louisiana
§ 46:46	Maine
§ 46:47	Maryland
§ 46:48	Massachusetts
§ 46:49	Michigan
§ 46:50	Minnesota
§ 46:51	Mississippi
§ 46:52	Missouri
§ 46:53	Montana
§ 46:54	Nebraska
§ 46:55	Nevada
§ 46:56	New Hampshire
§ 46:57	New Jersey
§ 46:58	New Mexico
§ 46:59	New York
§ 46:60	North Carolina
§ 46:61	North Dakota
§ 46:62	Ohio
§ 46:63	Oklahoma
§ 46:64	Oregon
§ 46:65	Pennsylvania
§ 46:66	Rhode Island
§ 46:67	South Carolina
§ 46:68	South Dakota
§ 46:69	Tennessee
§ 46:70	Texas
§ 46:71	Utah
§ 46:72	Vermont
§ 46:73	Virginia
§ 46:74	Washington
§ 46:75	West Virginia
§ 46:76	Wisconsin
§ 46:77	Wyoming

CHAPTER 47. FED. R. EVID. 704(A): OPINION ON ULTIMATE ISSUE (CIVIL)

§ 47:1	History of the ultimate issue rule
--------	------------------------------------

TABLE OF CONTENTS

§ 47:2	History of Fed. R. Evid. 704 and amendments thereto
§ 47:3	Fed. R. Evid. 704
§ 47:4	Policies underpinning Fed. R. Evid. 704
§ 47:5	Legal conclusion expressed as an expert opinion: The interplay of Fed. R. Evid. 702, 704(a), and 403
§ 47:6	Legal conclusion expressed as an expert opinion: Generally
§ 47:7	Expert opinion on ultimate issue: When is it permissible?
§ 47:8	Expert opinion on ultimate issue: When is it impermissible?
§ 47:9	Legal conclusion expressed as a lay opinion
§ 47:10	Effect of erroneous admission of legal conclusion
§ 47:11	Certainty of expert's opinion: General principles
§ 47:12	Certainty of expert's opinion: Medical malpractice actions
§ 47:13	Certainty of expert's opinion: Other types of actions
§ 47:14	Defining legal insanity: Generally
§ 47:15	State law counterparts

CHAPTER 48. FED. R. EVID. 705

§ 48:1	History of Fed. R. Evid. 705 and amendments thereto
§ 48:2	Fed. R. Evid. 705
§ 48:3	Fed. R. Evid. 705 in practice
§ 48:4	Construction of Fed. R. Evid. 705 in conjunction with Fed. R. Evid. 703
§ 48:5	Construction of Fed. R. Evid. 705 with Fed. R. Civ. P. 26(a)(2) regarding disclosures
§ 48:6	Construction of Fed. R. Evid. 705 and Fed. R. Civ. P. 56—Summary judgment

CHAPTER 49. FED. R. EVID. 706: COURT-APPOINTED EXPERT WITNESSES

§ 49:1	Fed. R. Evid. 706
§ 49:2	Appointment of experts under Fed. R. Evid. 706
§ 49:3	Court-appointed expert witness versus court-appointed technical advisor

§ 49:4	Corresponding state law
§ 49:5	Alabama
§ 49:6	Alaska
§ 49:7	Arizona
§ 49:8	Arkansas
§ 49:9	California
§ 49:10	Colorado
§ 49:11	Connecticut
§ 49:12	Delaware
§ 49:13	District of Columbia
§ 49:14	Florida
§ 49:15	Georgia
§ 49:16	Hawaii
§ 49:17	Idaho
§ 49:18	Illinois
§ 49:19	Indiana
§ 49:20	Iowa
§ 49:21	Kansas
§ 49:22	Kentucky
§ 49:23	Louisiana
§ 49:24	Maine
§ 49:25	Maryland
§ 49:26	Massachusetts
§ 49:27	Michigan
§ 49:28	Minnesota
§ 49:29	Mississippi
§ 49:30	Missouri
§ 49:31	Montana
§ 49:32	Nebraska
§ 49:33	Nevada
§ 49:34	New Hampshire
§ 49:35	New Jersey
§ 49:36	New Mexico
§ 49:37	New York
§ 49:38	North Carolina
§ 49:39	North Dakota
§ 49:40	Ohio
§ 49:41	Oklahoma
§ 49:42	Oregon
§ 49:43	Pennsylvania
§ 49:44	Rhode Island
§ 49:45	South Carolina

TABLE OF CONTENTS

§ 49:46	South Dakota
§ 49:47	Tennessee
§ 49:48	Texas
§ 49:49	Utah
§ 49:50	Vermont
§ 49:51	Virginia
§ 49:52	Washington
§ 49:53	West Virginia
§ 49:54	Wisconsin
§ 49:55	Wyoming

CHAPTER 50. CIVIL EXPERT DISCLOSURES AND EXPERT DISCOVERY: FED. R. CIV. P. 26(A)(2) AND 26(B)(4)

§ 50:1	Introduction and overview
§ 50:2	History of Fed R. Civ. P. 26(a)(2) and amendments thereto
§ 50:3	Fed. R. Civ. P. 26(a)(2)
§ 50:4	History of Fed. R. Civ. P. 26(b)(4) and amendments thereto
§ 50:5	Fed. R. Civ. P. 26(b)(4)
§ 50:6	Who is an expert
§ 50:7	What must be disclosed: In general—Fed. R. Civ. P. 26(a)(2)(A), (B), and (C)
§ 50:8	What must be disclosed: “Report” experts
§ 50:9	What must be disclosed: “Non-report” experts
§ 50:10	When must expert disclosures be made: Fed. R. Civ. P. 26(a)(2)(D)
§ 50:11	Supplementing expert disclosures: Fed. R. Civ. P. 26(e)
§ 50:12	Expert depositions: Fed. R. Civ. P. 26(b)(4)(A)
§ 50:13	Work-product protection for drafts: Fed. R. Civ. P. 26(b)(4)(B)
§ 50:14	Work-product protection for attorney-expert communications: Fed. R. Civ. P. 26(b)(4)(C)
§ 50:15	Consulting experts: Fed. R. Civ. P. 26(b)(4)(D).
§ 50:16	Compensating experts: Fed. R. Civ. P. 26(b)(4)(E)

CHAPTER 51. EXPERT WITNESSES IN CIVIL CASES: GENERAL SUBJECTS OF TESTIMONY

§ 51:1	Introduction/Overview
--------	-----------------------

- § 51:2 Does the subject require expert testimony?
- § 51:3 Accident reconstruction—Generally
- § 51:4 —Design defect
- § 51:5 —Tractor trailers
- § 51:6 —Trains and railroad
- § 51:7 —Generally: Lay witness testimony
- § 51:8 Capacity to form testamentary intent
- § 51:9 Contracts
- § 51:10 Copyright-Musicology
- § 51:11 Engineering
- § 51:12 Family law—Best interests of child
- § 51:13 Foreign law
- § 51:14 Handwriting analysis
- § 51:15 Insider trading—Economic incentives
- § 51:16 Insurance
- § 51:17 Negligence—Generally
- § 51:18 —Premises liability
- § 51:19 Police—Permissible police tactics, civil rights,
negligence
- § 51:20 Products liability
- § 51:21 Professional malpractice—Attorney’s handling of
a case
- § 51:22 Property valuation
- § 51:23 Toxic torts—Causation
- § 51:24 Trademark infringement action—Consumer
confusion
- § 51:25 Permissible subjects of expert testimony in
criminal cases

CHAPTER 52. EXPERT WITNESSES AND MEDICINE, MEDICAL MALPRACTICE, AND TOXICOLOGY

- § 52:1 Expert witness testimony and the medical field:
Generally
- § 52:2 Does the subject require expert testimony?
- § 52:3 Expert witness testimony and medical issues
generally
- § 52:4 Fed. R. Evid. 702 and qualification of the
medical expert witness
- § 52:5 Medical experts: Treating physician versus
nontreating physician
- § 52:6 Medical expert: Is a specialist required?

TABLE OF CONTENTS

§ 52:7	Basis for medical expert testimony—Education, training, experience
§ 52:8	—First-hand knowledge
§ 52:9	—Sources that contain hearsay
§ 52:10	—Medical opinion based on opinion of others—Generally
§ 52:11	— —Mental health and mental state
§ 52:12	—Other sources
§ 52:13	Medical malpractice and the standard of care—Generally
§ 52:14	—Local or national standard?
§ 52:15	The role of knowledge and time in the standard of care
§ 52:16	Standard of care: Criminal prosecution of doctor
§ 52:17	Experts and establishing medical causation
§ 52:18	Differential diagnosis and causation
§ 52:19	Medical causation: General and specific
§ 52:20	Causation: To a reasonable degree of medical certainty or probability
§ 52:21	Medical causation in strict liability and breach of warranty cases
§ 52:22	Speculation versus “certainty” in medical expert’s opinion
§ 52:23	Toxicology—Disease, injury and therapeutics
§ 52:24	Toxic torts and causation; general and specific
§ 52:25	Drugs and poisons

Volume 7

CHAPTER 53. EXPERT WITNESS TESTIMONY REGARDING DAMAGES

I. OVERVIEW: DAMAGES PRINCIPLES AND TYPES OF DAMAGES

§ 53:1	Introduction; chapter overview
§ 53:2	Damages in civil cases: General principles
§ 53:3	Damages as compensation to the injured party: Compensatory damages
§ 53:4	Damages as punishment to the defendant: Punitive damages
§ 53:5	Economic vs. noneconomic damages

- § 53:6 Excessive damages awards
- § 53:7 Future damages: General principles
- § 53:8 Inflation rates and related-expert testimony on damages awards
- § 53:9 Federal income tax and expert testimony on damages

II. SUBSTANTIVE LAW GOVERNING DAMAGES; PROCEDURAL REQUIREMENTS FOR EXPERTS OFFERING TESTIMONY ON DAMAGES

- § 53:10 Civil damages: The governing substantive law
- § 53:11 Fed. R. Civ. P. 26: Procedural requirements for experts offering damages testimony

III. FED. R. EVID. 702, *DAUBERT*, AND EXPERT TESTIMONY ON DAMAGES

- § 53:12 Fed. R. Evid. 702 and damages experts
- § 53:13 Fed. R. Evid. 702 and damages expert qualifications—“Knowledge, skill, experience, training, or education”
- § 53:14 *Daubert* and expert testimony on damages—Methodology
- § 53:15 Fed. R. Evid. 702, diversity-based jurisdiction, and state versus federal law considerations regarding accuracy of damages
- § 53:16 Fed R. Evid. 701 and 702; expert or lay opinion regarding damages to land and business
- § 53:17 Particular industry experience as basis for qualified damages expert
- § 53:18 Speculation by experts: Degree of permissive speculation
- § 53:19 Speculation on damages due to defendant misconduct
- § 53:20 Speculation challenge to expert testimony on damages
- § 53:21 Expert’s use of representative sample or statistical evidence

IV. EXPERT TESTIMONY ON SPECIFIC DAMAGE CLAIMS IN CIVIL CASES

- § 53:22 Expert damages testimony in tort cases: Overview

TABLE OF CONTENTS

§ 53:23	Expert testimony on economic damages in tort cases
§ 53:24	Lost past income: Is expert testimony required?
§ 53:25	Lost future income; lost earning capacity
§ 53:26	Fringe benefits (pensions) as lost future income
§ 53:27	Lost “credit expectancy”
§ 53:28	Past and future medical expenses
§ 53:29	Statutory limitations or reform in medical cases
§ 53:30	Past pain and suffering
§ 53:31	Future pain and suffering
§ 53:32	Loss of enjoyment (“hedonic damages”)
§ 53:33	Loss of consortium
§ 53:34	Statutory limitations on noneconomic damages
§ 53:35	Workers’ compensation claims
§ 53:36	Injury to real property
§ 53:37	Eminent domain
§ 53:38	Injury to leased property
§ 53:39	Damages in breach of contract and other business interests: An overview
§ 53:40	Lost profits: In general
§ 53:41	Lost profits: Business interruption loss
§ 53:42	Lost profits: Interest expenses
§ 53:43	Lost profits: New business ventures
§ 53:44	Class actions and expert testimony to establish class-wide damages
§ 53:45	Antitrust, fraud, and tortious interference: An overview
§ 53:46	Fraud
§ 53:47	Tortious interference with contractual relations; tortious interference with a business opportunity
§ 53:48	Intellectual property: An overview
§ 53:49	Copyright infringement
§ 53:50	Patent infringement and calculation of reasonable royalties
§ 53:51	Trademark infringement
§ 53:52	Misappropriation of trade secrets

V. EXPERT TESTIMONY AND DAMAGES IN CRIMINAL CASES

§ 53:53	Restitution damages and experts in criminal cases
---------	---

- § 53:54 The Mandatory Victims Restitution Act
- § 53:55 The Victim and Witness Protection Act
- § 53:56 Sexual exploitation and other abuse of children
- § 53:57 Fraud
- § 53:58 Criminal forfeiture

CHAPTER 54. EXPERT TESTIMONY AND DISCOVERY IN CRIMINAL CASES

I. INTRODUCTORY MATTERS

- § 54:1 Overview
- § 54:2 The prosecution's constitutional obligation to disclose: The *Brady* doctrine

II. FED. R. CRIM. P. 16; FED. R. CRIM. P. 12.2

- § 54:3 "Reports of examinations and tests": Fed. R. Crim. P. 16(a)(1)(F); Fed. R. Crim. P. 16(b)(1)(B)
- § 54:4 Expert witnesses: The government's obligation: Fed. R. Crim. P. 16(a)(1)(G); Fed. R. Crim. P. 16(a)(2)
- § 54:5 The defendant's obligation to disclose: Fed. R. Crim. P. 16(b)(1)(C); Fed. R. Crim. P. 16(b)(2)
- § 54:6 Parties' continuing duty to disclose: Fed. R. Crim. P. 16(c)
- § 54:7 "Mental condition" defense: Fed. R. Crim. P. 12.2

III. PRELIMINARY ISSUES

- § 54:8 Government's obligation: "Expert" vs. "lay" testimony; Fed. R. Evid. 1006
- § 54:9 No obligation to disclose rebuttal experts prior to trial; exception
- § 54:10 No obligation unless defense requests information; exceptions; timing of defense request

IV. ADEQUACY OF RESPONSE

- § 54:11 Underlying goals of discovery requirement
- § 54:12 Witness's qualifications
- § 54:13 Summary's "description" of "the witness's opinions"
- § 54:13.10 How the expert words conclusions

TABLE OF CONTENTS

- § 54:14 “Bases and reasons”; reports, documents, sources, etc.
- § 54:15 Interplay between Fed. R. Evid. 702 and Fed. R. Crim. P. 16(a)(1)(G) and 16(b)(1)(C)

V. REGULATING DISCOVERY

- § 54:16 Fed. R. Crim. P. 16(d); Fed. R. Crim. P. 2
- § 54:17 Timing
- § 54:18 Propriety of sanctions

CHAPTER 55. EXPERT TESTIMONY RELATING TO MENTAL STATE AS AN ELEMENT OF A CRIME, CAUSE OF ACTION, OR DEFENSE

I. INTRODUCTORY MATTERS

- § 55:1 “Mental state or condition”; “element”; “ultimate issue”
- § 55:2 Expertise
- § 55:3 Relevance; unfair prejudice; other objections
- § 55:4 Reliability; offer of proof; source of information; hearsay

II. THE “ULTIMATE ISSUE” RULE

- § 55:5 The common-law rule; original version of Fed. R. Evid. 704
- § 55:6 Fed. R. Evid. 704(b)
- § 55:7 Corresponding state law
- § 55:8 Judicial application of the rule

III. EXPERT TESTIMONY ON DEFENDANT’S MENTAL STATE

A. DEFINING LEGAL INSANITY

- § 55:9 In general
- § 55:10 Introduction
- § 55:11 The “cognitive” definition
- § 55:12 —18 U.S.C.A. § 17
- § 55:13 The “volitional” definition
- § 55:14 The “mens rea” definition

**B. RESTRICTIONS ON EXPERT TESTIMONY:
INSANITY DEFENSE**

- § 55:15 In general
- § 55:16 Impact of definition on burdens of pleading and persuasion
- § 55:17 Impact of definition on admissibility of expert testimony
- § 55:18 Contents of expert testimony; Fed. R. Evid. 704(b) and corresponding state rules; other restrictions on expert testimony
- § 55:19 *Clark v. Arizona*

**C. RESTRICTIONS ON EXPERT TESTIMONY:
MENS REA DEFENSE**

1. In General

- § 55:20 Overview
- § 55:21 Fed. R. Evid. 704(b), the Insanity Defense Reform Act, and the mens rea defense
- § 55:22 Wilfulness
- § 55:22.30 Justification defense

2. Specific Intent; General Intent

- § 55:23 Defining specific and general intent; importance of the distinction
- § 55:24 Expert testimony and defendant's capacity to form specific intent; diminished capacity; reckless, wanton or negligent conduct
- § 55:25 Specific intent and child sex abuse issues
- § 55:26 Intent to defraud
- § 55:27 Specific intent, general intent, and actus reus

**IV. EXPERT TESTIMONY ON OTHER MENTAL
STATE ELEMENTS AND ISSUES**

- § 55:28 Fifth and Sixth Amendment issues: *Estelle v. Smith*
- § 55:29 Mental retardation and the death penalty: *Atkins v. Virginia*; *Florida v. Hall*; *Moore v. Texas*
- § 55:30 Knowledge and intent in drug prosecutions
- § 55:31 Miscellany

TABLE OF CONTENTS

**CHAPTER 56. EXPERT TESTIMONY
RELATING TO WITNESS AND
DECLARANT CREDIBILITY**

I. IN GENERAL

- § 56:1 Introduction
- § 56:2 Expert testimony on witness or declarant
credibility: General principle
- § 56:2.30 Procedural issues and requirements

**II. TESTIMONY RELATING TO DOMESTIC
ABUSE “SYNDROMES” AND RELATED
MATTERS**

A. OVERVIEW

- § 56:3 In general

B. WHEN OFFERED BY DEFENSE COUNSEL

- § 56:4 When defendant pleads self-defense or accident
- § 56:5 The imminence requirement: “Sleeping victim”
cases and the like
- § 56:6 Other self-defense syndromes
- § 56:7 Insanity
- § 56:8 Partial defense to murder
- § 56:9 Where defendant is charged with being an
accomplice or with criminal neglect
- § 56:10 In mitigation of sentencing

C. WHEN OFFERED BY THE PROSECUTOR

- § 56:11 Where defendant is charged with killing or
assaulting the battered person
- § 56:12 Other prosecutorial uses of expertise regarding
abusive domestic relationships

D. CIVIL LITIGATION

- § 56:13 Admissibility in civil actions

III. POST-TRAUMATIC STRESS DISORDER AND RELATED CONDITIONS: ADULT COMPLAINANTS AND VICTIMS

A. SEX OFFENSE PROSECUTIONS: PTSD; RAPE TRAUMA SYNDROME

- § 56:14 Post-traumatic stress
- § 56:15 Rape trauma
- § 56:16 Admissibility as evidence that the sexual
assault did or did not occur
- § 56:17 Admissibility to explain the complainant's
subsequent behavior
- § 56:17.30 Testimony about sex trafficking victims' behavior
- § 56:18 Inadmissible for any purpose
- § 56:19 Evaluation

B. PTSD: OTHER SITUATIONS

- § 56:20 Criminal cases
- § 56:21 Civil litigation

IV. DISSOCIATIVE AMNESIA (“REPPRESSED MEMORY SYNDROME”)

A. IN GENERAL

- § 56:22 The ongoing controversy
- § 56:23 DA-RMS-related evidence: Introduction

B. ASSESSING THE RELIABILITY OF EVIDENCE RELATING TO RMS

- § 56:24 The applicable standard
- § 56:25 Jurisdictions applying *Daubert*, *Frye*, or similar
tests
- § 56:26 Jurisdictions that do not require an
admissibility hearing
- § 56:27 Intermediate standard
- § 56:28 Evaluation

C. ADMISSIBILITY OF “REPPRESSED MEMORY” EVIDENCE

- § 56:29 Overview
- § 56:30 Jurisdictions rejecting such testimony as
unreliable

TABLE OF CONTENTS

- § 56:31 Jurisdictions admitting testimony based on repressed-then-restored memory
- § 56:32 Spontaneous memory recovery unrelated to therapy

D. DISSOCIATE AMNESIA/REPRESSED MEMORY AND THE STATUTE OF LIMITATIONS

- § 56:33 Effect on the statute of limitations

V. EXPERT TESTIMONY REGARDING INTERROGATIONS AND SELF-INCRIMINATION

A. MENTAL CONDITION AND *MIRANDA*: CUSTODY, INTERROGATION, AND THE CAPACITY TO MAKE A “KNOWING, INTELLIGENT AND VOLUNTARY” WAIVER OF *MIRANDA* WARNINGS

- § 56:34 Introduction
- § 56:35 Supreme Court rulings on significance of defendant’s mental condition
- § 56:36 Voluntariness
- § 56:37 Custody
- § 56:38 Interrogation
- § 56:39 Waiver

B. EXPERT TESTIMONY ON FACTORS INDUCING FALSE SELF-INCRIMINATION

- § 56:40 Overview
- § 56:41 Testimony as to defendant’s mental condition (“dispositional factors”)
- § 56:42 Expert critique of interrogation tactics and techniques (“situational factors”)
- § 56:43 *People v. Bedessie*
- § 56:44 *U.S. v. Begay*

VI. OTHER CREDIBILITY-RELATED EXPERT TESTIMONY

- § 56:44.10 Expert testimony about “jailhouse informants”
- § 56:45 Miscellany

CHAPTER 57. EXPERT TESTIMONY RELATING TO CHILD ABUSE COMPLAINANTS, VICTIMS, AND DEFENDANTS

I. TESTIMONY ABOUT COMPLAINANTS AND VICTIMS

A. OVERVIEW

- § 57:1 The issue; “complainant”; “victim”
- § 57:2 Testimony about the presence or absence of physical evidence of abuse
- § 57:2.30 Testimony about complainant’s demeanor during interview or examination
- § 57:3 Expert testimony relating to children’s ability to perceive, remember, and relate; child interview techniques and susceptibility of child witnesses to suggestion; “false memory”
- § 57:3.30 The child’s out-of-court statements, the hearsay rule, and the Confrontation Clause

B. EVIDENCE RELATING TO THE CHILD’S BEHAVIOR DURING OR AFTER THE PERIOD OF ALLEGED ABUSE

- § 57:4 Child Sexual Abuse Accommodation Syndrome (CSAAS); roadmap to §§ 57:5 to 57:64
- § 57:5 The sharp division as to the admissibility of expert testimony; *State v. J.L.G.*
- § 57:6 Who is qualified to testify? What may the expert testify about?
- § 57:7 States admitting such evidence to prove that the child was (or was not) abused
- § 57:8 States rejecting such testimony altogether
- § 57:9 States permitting limited use of expert testimony
- § 57:10 Testimony that the child’s behavior is “consistent with” having been abused
- § 57:10.30 Expert testimony regarding “coaching”
- § 57:11 Explicit mention of a “syndrome,” “profile” or “disorder”; hypothetical questions; statistical evidence

TABLE OF CONTENTS

§ 57:12 Evaluation

C. JURISDICTION-BY-JURISDICTION ANALYSIS

§ 57:13	Federal courts
§ 57:14	Alabama
§ 57:15	Alaska
§ 57:16	Arizona
§ 57:17	Arkansas
§ 57:18	California
§ 57:19	Colorado
§ 57:20	Connecticut
§ 57:21	Delaware
§ 57:22	District of Columbia
§ 57:23	Florida
§ 57:24	Georgia
§ 57:25	Hawaii
§ 57:26	Idaho
§ 57:27	Illinois
§ 57:28	Indiana
§ 57:29	Iowa
§ 57:30	Kansas
§ 57:31	Kentucky
§ 57:32	Louisiana
§ 57:33	Maine
§ 57:34	Maryland
§ 57:35	Massachusetts
§ 57:36	Michigan
§ 57:37	Minnesota
§ 57:38	Mississippi
§ 57:39	Missouri
§ 57:40	Montana
§ 57:41	Nebraska
§ 57:42	Nevada
§ 57:43	New Hampshire
§ 57:44	New Jersey
§ 57:45	New Mexico
§ 57:46	New York
§ 57:47	North Carolina
§ 57:48	North Dakota
§ 57:49	Ohio
§ 57:50	Oklahoma

- § 57:51 Oregon
- § 57:52 Pennsylvania
- § 57:53 Rhode Island
- § 57:54 South Carolina
- § 57:55 South Dakota
- § 57:56 Tennessee
- § 57:57 Texas
- § 57:58 Utah
- § 57:59 Vermont
- § 57:60 Virginia
- § 57:61 Washington
- § 57:62 West Virginia
- § 57:63 Wisconsin
- § 57:64 Wyoming

II. EXPERT TESTIMONY ABOUT THE DEFENDANT

A. TESTIMONY RELATING TO “PROFILES,” STEREOTYPES, AND THE DEFENDANT

- § 57:65 “Profile” evidence offered by the prosecution
- § 57:66 Expert testimony debunking child molester stereotypes
- § 57:66.30 Expert testimony: Fantasizing vs. intent
- § 57:67 Expert testimony that defendant *lacks* the characteristics of a pedophile
- § 57:68 Must the defendant submit to examination by a prosecution expert?
- § 57:69 Expert testimony as to defendant’s intent

B. TESTIMONY RELATING TO “GROOMING”

- § 57:70 Lay witness testimony describing defendant’s “grooming” activity
- § 57:71 Expert testimony about “grooming”: Is it admissible? Is it required?
- § 57:72 Scope and contents of such testimony
- § 57:73 Qualifying the expert

TABLE OF CONTENTS

**CHAPTER 58. POLYGRAPH AND
OTHER TECHNOLOGY-BASED
EVIDENCE OF TRUTHFULNESS OR ITS
OPPOSITE**

I. INTRODUCTORY MATTERS

- § 58:1 The theory and history of polygraphy
- § 58:2 Polygraph testing techniques
- § 58:3 Control question test (CQT)
- § 58:4 Grading polygraph exams: Control question technique
- § 58:5 Judicial analysis of the CQT
- § 58:6 Relevant-irrelevant test (RIT)
- § 58:7 The “guilty knowledge” test

A. OTHER TECHNOLOGY-BASED EVIDENCE

- § 58:8 Functional magnetic resonance imaging (fMRI)
- § 58:9 Other attempts at detecting deception

**II. CONSTITUTIONALITY OF RESTRICTIONS
ON POLYGRAPH EVIDENCE**

- § 58:10 *U.S. v. Scheffer*

**III. ADMISSIBILITY OF POLYGRAPH
EVIDENCE: FEDERAL AND STATE LAW**

A. FEDERAL LAW

- § 58:11 Federal law

B. STATE LAW

- § 58:12 Admissibility of polygraph evidence, state law—
In general
- § 58:13 Alabama
- § 58:14 Alaska
- § 58:15 Arizona
- § 58:16 Arkansas
- § 58:17 California
- § 58:18 Colorado
- § 58:19 Connecticut

§ 58:20	Delaware
§ 58:21	District of Columbia
§ 58:22	Florida
§ 58:23	Georgia
§ 58:24	Hawaii
§ 58:25	Idaho
§ 58:26	Illinois
§ 58:27	Indiana
§ 58:28	Iowa
§ 58:29	Kansas
§ 58:30	Kentucky
§ 58:31	Louisiana
§ 58:32	Maine
§ 58:33	Maryland
§ 58:34	Massachusetts
§ 58:35	Michigan
§ 58:36	Minnesota
§ 58:37	Mississippi
§ 58:38	Missouri
§ 58:39	Montana
§ 58:40	Nebraska
§ 58:41	Nevada
§ 58:42	New Hampshire
§ 58:43	New Jersey
§ 58:44	New Mexico
§ 58:45	New York
§ 58:46	North Carolina
§ 58:47	North Dakota
§ 58:48	Ohio
§ 58:49	Oklahoma
§ 58:50	Oregon
§ 58:51	Pennsylvania
§ 58:52	Rhode Island
§ 58:53	South Carolina
§ 58:54	South Dakota
§ 58:55	Tennessee
§ 58:56	Texas
§ 58:57	Utah
§ 58:58	Vermont
§ 58:59	Virginia
§ 58:60	Washington
§ 58:61	West Virginia

TABLE OF CONTENTS

§ 58:62 Wisconsin

§ 58:63 Wyoming

C. APPLYING SPECIFIC RULES OF EVIDENCE TO POLYGRAPH RESULTS

§ 58:64 In general; Rule 702 and state equivalents

§ 58:65 Fed. R. Evid. 403 and state equivalents

§ 58:66 Fed. R. Evid. 704(b) and state equivalents

§ 58:67 Fed. R. Evid. 608 and state equivalents

§ 58:68 Hearsay; “rule of completeness”; Rule 106

D. ADMISSIBILITY WHERE PARTIES SO STIPULATE

§ 58:69 States that reject stipulations of admissibility

§ 58:70 States that permit stipulated admissibility

§ 58:71 Preconditions to stipulated admissibility; other stipulation issues

E. OTHER TRIAL ISSUES AND CIRCUMSTANCES

§ 58:72 Introduction

§ 58:73 Testimony that a witness or party took a polygraph

§ 58:74 Testimony that a person was (or was not) asked, or offered or refused, to take a polygraph

§ 58:75 Polygraph as part of witness’s plea or immunity agreement

§ 58:76 Statements made before, during, or after a polygraph test; demeanor during test

§ 58:77 Polygraphs and allegations of coerced confessions

§ 58:78 Polygraphs and allegations of coercion of witnesses

§ 58:79 The “opened door”; invited error

§ 58:80 Fire insurance litigation

§ 58:81 The need to object; tactical considerations

§ 58:82 Assessing the harm: Factors to be considered

§ 58:83 Miscellaneous trial-related issues

F. USES AND ISSUES OTHER THAN AT TRIAL

§ 58:84 Overview

- § 58:85 Pretrial discovery
- § 58:86 Admissibility at sentencing
- § 58:87 Polygraphs as a condition of probation, parole,
or community release
- § 58:88 Admissibility at motion for a new trial
- § 58:89 Admissibility at revocation proceedings—In
general
- § 58:90 Admissibility at probation/parole revocation
proceedings: Fifth Amendment considerations;
admissibility at later trials
- § 58:91 Administrative proceedings
- § 58:92 Use of polygraphs in employment situations
- § 58:93 Miscellany

G. OTHER POLYGRAPH-RELATED ISSUES

- § 58:94 The “right” to take, or compel another to take, a
polygraph

CHAPTER 59. EXPERT TESTIMONY RELATING TO FINGERPRINTS, PALM PRINTS, BARE FOOTPRINTS, AND THE LIKE

I. OVERVIEW

- § 59:1 Terminology; “defendant,” “source”; organizations
and sources
- § 59:2 Principles underlying fingerprint evidence
- § 59:3 Witness qualifications

II. DETECTION AND COMPARISON OF FINGERPRINTS

- § 59:4 Finding fingerprints at crime scenes or on
evidence
- § 59:5 Fourth and Fifth Amendment issues relating to
fingerprints
- § 59:6 Digital fingerprinting; electronic fingerprint
databases
- § 59:7 Comparison and identification of fingerprints

III. ADMISSIBILITY OF FINGERPRINT IDENTIFICATION TESTIMONY

- § 59:8 Necessity of expert testimony

TABLE OF CONTENTS

- § 59:9 Acceptance of expert testimony on fingerprint identification
- § 59:10 Post-*Daubert* litigation
- § 59:11 The Brandon Mayfield case and its aftermath
- § 59:12 The National Academy of Sciences 2009 Report; President’s Council of Advisors 2016 Report
- § 59:13 The National Academy of Sciences 2009 report—What the expert should (and should not) be permitted to say
- § 59:14 Use of the NAS Report and PCAST Report at trial
- § 59:15 Palm prints; bare footprints; etc.
- § 59:16 Comparing a photograph of a hand with defendant’s hand
- § 59:17 Digitally enhanced fingerprints

IV. RELATED ISSUES

- § 59:18 Sufficiency of fingerprint evidence to sustain a conviction
- § 59:19 Fact-specific challenges to fingerprint testimony
- § 59:20 Evidence regarding the absence of prints and the like
- § 59:21 Authentication of the known exemplar of the “source’s” fingerprints; hearsay and Confrontation Clause issues
- § 59:22 Other issues

CHAPTER 60. DNA EVIDENCE

I. SCIENTIFIC PRINCIPLES AND METHODOLOGY

- § 60:1 The discovery and structure of DNA
- § 60:2 How DNA works: A primer
- § 60:3 Isolation; reproduction (PCR)
- § 60:4 DNA “fingerprinting” techniques: STRs, VNTRs, SNPs
- § 60:5 “Nuclear” DNA; Mitochondrial DNA; Y-STR DNA
- § 60:6 Use of DNA in criminal investigations; “crime-relevant DNA”; “crime-relevant location”
- § 60:7 NDIS; CODIS; “matches” and “hits”; state DNA databases
- § 60:8 Paternity testing

- § 60:9 Touch DNA; trace DNA
- § 60:10 Secondary transfer
- § 60:11 Low copy number (“LCN”) DNA, a/k/a “low template DNA,” “high sensitivity DNA”

II. SEIZURE AND RETENTION OF A SUSPECT’S DNA

A. FOURTH AMENDMENT

- § 60:12 Seizing a DNA sample from someone who has not been arrested
- § 60:13 Statutes mandating postconviction surrender of DNA samples: Background
- § 60:14 Post-arrest, pre-conviction seizure of DNA sample and submission to database; *Maryland v. King*; state approaches
- § 60:15 Use of DNA profile obtained in earlier cases; retention of profile after acquittal; other Fourth Amendment issues

B. FIFTH AMENDMENT ISSUES

- § 60:16 Refusal to voluntarily submit biological samples—In general
- § 60:17 Refusal to voluntarily submit a DNA sample

III. ADMISSIBILITY OF DNA EVIDENCE AT TRIAL

A. IN GENERAL

- § 60:18 Scientific validity of DNA: In general; LCN (“low template”) (“high sensitivity”) DNA
- § 60:19 Chain of custody, integrity, possibility of fabrication, consumption of sample

B. EXPLAINING THE SIGNIFICANCE OF DNA EVIDENCE

- § 60:20 In general
- § 60:21 Statistical (quantitative) and evaluative (qualitative) explanations
- § 60:22 Testimony based on DNA population statistics; the “product” rule
- § 60:23 Probability statistics: Hearsay and Confrontation Clause issues

TABLE OF CONTENTS

§ 60:24	Qualitative testimony: Source attribution; “reasonable degree of scientific certainty”
§ 60:25	Partial profiles; partial matches
§ 60:26	Mixed sample cases
§ 60:27	Statistics: The “prosecutor’s fallacy”
§ 60:28	“Probabilistic software” estimating the “likelihood” that a mixed sample contains a suspect’s DNA
§ 60:28.10	STRmix; <i>United States v. Gissantaner</i>
§ 60:28.20	Other probabilistic software programs
§ 60:28.30	Expert testimony about probabilistic DNA evidence
§ 60:28.40	The New York experience: “FST”
§ 60:29	Statistics: Lab error rate

C. MITOCHONDRIAL DNA; Y-STR DNA

1. Background

§ 60:30	Introduction
---------	--------------

2. Scientific Principles

§ 60:31	Mitochondrial DNA
§ 60:32	How mtDNA is processed and compared: The basics
§ 60:33	MtDNA compared to nuclear DNA
§ 60:34	Y-STR DNA; Scientific principles and methodologies; “sperm fraction”
§ 60:35	Court acceptance of the reliability of mtDNA and Y-STR DNA
3. Testimony about mtDNA and Y-STR DNA	
§ 60:36	“Exclusion” or “non-exclusion”
§ 60:37	“Counting method”; “confidence intervals”
§ 60:38	The need for statistical testimony and what <i>not</i> to do
§ 60:39	Explaining the numbers
§ 60:40	Risk of confusion or unfair prejudice
§ 60:41	Special issues relating to hair
§ 60:42	Heteroplasmy

D. FAILURE TO TEST FOR DNA; ABSENCE OF DNA; INCONCLUSIVE RESULTS

§ 60:43	In general
§ 60:44	Failure to attempt to gather, or test for, DNA

§ 60:45 Absence of DNA evidence implicating a defendant

§ 60:46 Inconclusive results; the “CSI” effect

E. OTHER LEGAL ISSUES; NON-FORENSIC USES OF DNA

§ 60:47 Defense discovery

§ 60:48 Informing jury of defense’s right to conduct, or request the state to conduct, DNA testing

§ 60:49 DNA “contamination” by perpetrators

§ 60:50 DNA and the statute of limitations

§ 60:51 The Innocence Project

§ 60:52 Post-conviction analysis

§ 60:53 —42 U.S.C.A. § 1983 claims; state equivalents

§ 60:54 Ineffective assistance of counsel claims based on handling of DNA evidence

§ 60:55 Sufficiency of DNA evidence to support a conviction

§ 60:56 Use of familial DNA as investigative tool

§ 60:57 Rapid DNA

§ 60:58 Other potential forensic uses of DNA

§ 60:59 Miscellaneous issues and matter

§ 60:60 In general

CHAPTER 61. EXPERT TESTIMONY RELATING TO EYEWITNESS IDENTIFICATION

I. OVERVIEW

§ 61:1 History and recent developments

§ 61:2 The inefficacy of other ways to test and evaluate eyewitness identifications

II. THE NATURE OF HUMAN MEMORY

§ 61:3 Overview; additional sources of information

§ 61:4 “Forgetting curve” and retention interval

§ 61:5 Information acquired after (or before) the event; source monitoring errors; hindsight bias

§ 61:6 Eyewitness overconfidence in perception and memory; malleability of eyewitness confidence

§ 61:7 Unconscious transference

TABLE OF CONTENTS

- § 61:8 Speed with which the witness identifies a suspect
- § 61:9 Minor details

III. FACTORS DURING A CRIME THAT AFFECT EYEWITNESS ACCURACY

A. GENERALLY

- § 61:10 Introduction: “estimator variables”

B. EYEWITNESS CHARACTERISTICS

- § 61:11 Child eyewitnesses
- § 61:12 Elderly eyewitnesses
- § 61:13 Law enforcement officers
- § 61:14 Alcoholic intoxication and marijuana use
- § 61:15 Eyewitness bias

C. PERPETRATOR CHARACTERISTICS

- § 61:16 Cross-race identifications (“race bias”)
- § 61:17 Hats; clothing; disguises; facial distinctiveness or its lack

D. CRIME CHARACTERISTICS

- § 61:18 Exposure time; degree, type of attention
- § 61:19 Lighting and distance
- § 61:20 Stress
- § 61:21 Weapon focus

IV. SYSTEM VARIABLES

- § 61:22 Introduction; comprehensive state directives
- § 61:23 Witness interviews by police officers
- § 61:24 Composites
- § 61:25 Showups
- § 61:26 Pre-identification instructions
- § 61:27 The fillers (stand-ins) at the lineup
- § 61:28 The way lineups are conducted; “double blind” procedure
- § 61:29 “Relative” judgments; simultaneous or sequential lineups
- § 61:30 Recording the witness’s degree of confidence; avoiding feedback
- § 61:31 Multiple viewings

V. ADMISSIBILITY OF EXPERT TESTIMONY: ISSUES AND CONSIDERATIONS

- § 61:32 *Perry v. New Hampshire*
- § 61:33 Reliability and relevance
- § 61:34 Reliability
- § 61:35 Relevance and “helpfulness” in general
- § 61:36 Relevance: The presence or absence of corroboration
- § 61:37 Contents of expert testimony; hypothetical questions
- § 61:38 Special judicial instructions in addition to or in lieu of expert testimony
- § 61:39 Miscellaneous issues
- § 61:40 Federal courts: Application of *Daubert* to expert testimony on eyewitness identification

CHAPTER 62. OTHER EXPERT TESTIMONY ISSUES RELATING PRIMARILY TO CRIMINAL TRIALS

I. GENERALLY

- § 62:1 Introduction
- § 62:1.10 Fed. R. Evid. 704: Testimony as to an “ultimate issue”; use of legal terminology
- § 62:1.50 “Helpfulness” requirement

II. EXPERT TESTIMONY IDENTIFYING AN INDIVIDUAL AS THE SOURCE OF EVIDENCE

A. HANDWRITING ANALYSIS

- § 62:2 Introduction; “forensic document examiner” (FDE)
- § 62:3 Admissibility of expert testimony
- § 62:4 Obtaining and authenticating exemplars
- § 62:5 Qualifications of the witness
- § 62:6 Role of judge: Assessing “reliability,” not “credibility,” of the expert
- § 62:7 Contents of testimony; expert’s degree of certainty

TABLE OF CONTENTS

B. VOICE IDENTIFICATION

- § 62:8 Unrecorded conversations and encounters: The eyewitness analogy
- § 62:9 Recorded conversations and encounters: Introduction
- § 62:10 Expertise based on language, accent, or dialect
- § 62:11 Linguistic analysis and the like
- § 62:12 Spectrographic analysis (“voice prints”)
- § 62:13 Other situations

C. OTHER EXPERT TESTIMONY RELATING TO IDENTITY

- § 62:14 Microscopic hair analysis

III. FOREIGN LANGUAGE CONVERSATIONS

A. TRANSLATION OF FOREIGN LANGUAGE CONVERSATION AS EXPERT OPINION EVIDENCE

- § 62:15 Overview
- § 62:16 In general
- § 62:17 The translator
- § 62:18 Participant as translator
- § 62:19 Multiple translators, single witness
- § 62:20 Methods and procedures
- § 62:21 Advice to offering party (particularly prosecutors)

B. ADVERSE PARTY’S CHALLENGE TO TRANSCRIPT ACCURACY

- § 62:22 In general
- § 62:23 Timing of the challenge
- § 62:24 Cross-examining the offering party’s expert
- § 62:25 Adverse party’s expert witness
- § 62:26 Judge and jury
 - 1. Contents of Translations to Be Presented to the Jury
- § 62:27 In general
- § 62:28 Colloquialisms; slang

§ 62:29 Jargon; fact-specific references within the translation

2. Presenting Conversations and Translations to the Jury

§ 62:30 In general

§ 62:31 Should the recording be played for the jury?

§ 62:32 The alternatives

3. Jury Instructions; Jury Access to Translations During Deliberations

§ 62:33 Jury instructions

§ 62:34 Jury access to translations during deliberations

4. Court Reporter Act; Jones Act

§ 62:35 Court Reporter Act; Jones Act

IV. EXPERT TESTIMONY INTERPRETING INTERCEPTED COMMUNICATIONS: CODES, JARGON; RELATED ISSUES

A. IN GENERAL

§ 62:36 Overview

§ 62:37 Requirement that testimony be “helpful” to factfinder

§ 62:38 “Expert” or “lay witness” testimony

B. LAY WITNESS OPINION TESTIMONY

§ 62:39 Fed. R. Evid. 701; state equivalents

§ 62:40 Lay witness testimony by a participant in the conversation

§ 62:41 Lay witness testimony by a former member of the conspiracy

§ 62:42 Lay witness testimony by an officer based on participation in the investigation

C. EXPERT OPINION TESTIMONY

1. In General

§ 62:43 The need for expert testimony; qualifications

§ 62:44 Fed. R. Evid. 702; state equivalents

TABLE OF CONTENTS

2. Scope and Form of Permissible Expert Testimony

- § 62:45 Fed. R. Evid. 704; state equivalents
- § 62:46 Use of legal or non-legal terminology
- § 62:47 Interpreting conversations in light of other, admitted evidence
- § 62:48 Interpreting conversations in light of other, *unadmitted* evidence; hearsay and Confrontation Clause
- § 62:49 Testimony relating to a defendant's state of mind

3. Other issues and problems

- § 62:50 Special problems in narcotics cases
- § 62:51 Sample Rule 702 affidavits
- § 62:52 Agent or officer as fact witness and expert witness
- § 62:53 Sufficiency of expert testimony to support a conviction
- § 62:54 Other uses of expert testimony relating to recorded conversations

V. OTHER CRIMINAL LAW-RELATED SUBJECTS OF EXPERT TESTIMONY

A. "MODUS OPERANDI"

- § 62:55 In general; character evidence or "profiling" testimony
- § 62:56 Drug offense prosecutions
- § 62:57 Child sex abuse prosecutions
- § 62:58 Prosecutions involving criminal organizations
- § 62:59 Other crimes and situations

B. EXPERT TESTIMONY RELATING TO ORGANIZED CRIME FAMILIES, GANGS, TERRORIST ORGANIZATIONS

- § 62:60 In general
- § 62:61 Basis of knowledge
- § 62:62 The "dual-role witness": Officer as fact witness and expert witness
- § 62:63 Relevance: Organization as an element of a crime: RICO; other statutes

- § 62:64 Relevance in general
- § 62:65 Relevance and prejudice
- § 62:66 Contents of the testimony: Fed. R. Evid. 703,
hearsay and the Confrontation Clause
- § 62:67 Hypothetical questions

C. PARTICULAR ISSUES IN DRUG PROSECUTIONS

- § 62:68 In general
- § 62:69 “Modus operandi” testimony
 - 1. Drug Courier Prosecutions
 - § 62:70 Introduction
 - § 62:71 Relevance in general; “profile” evidence
 - § 62:72 Fed. R. Evid. 704(b)
 - § 62:73 What is permitted; what is not
 - § 62:74 Rebutting the “no fingerprint” defense
 - 2. Intent to sell or manufacture
 - § 62:75 Introduction
 - § 62:76 Fact or opinion
 - § 62:77 Lay or expert opinion
 - § 62:78 Permissible content of such testimony
 - § 62:79 “Mirroring” hypotheticals
 - § 62:80 —How various jurisdictions treat the issue
 - § 62:81 Intent to manufacture
 - 3. Miscellaneous Drug Prosecution Issues
 - § 62:82 Non-forensic evidence that a substance was a
controlled substance
 - § 62:83 Expert testimony that a sale occurred
 - § 62:83.30 Prosecutions of medical personnel and pharmacists

D. THE “DUAL-ROLE WITNESS”: OFFICER AS FACT WITNESS AND EXPERT WITNESS

- § 62:84 In general
- § 62:85 Role of counsel and trial judge; instructing the
jury

E. CRIME SCENE ANALYSIS; “CRIMINAL INVESTIGATIVE ANALYSIS”; “LINKAGE”

- § 62:86 In general

TABLE OF CONTENTS

- § 62:87 Homicide prosecutions; other crimes of violence
- § 62:88 Sexually motivated homicide
- § 62:89 Use in serial crime cases; “linkage”; Fed. R.
Evid. 404(b) and state equivalents

F. OTHER SUBJECTS OF EXPERT TESTIMONY IN CRIMINAL TRIALS

- § 62:90 Expertise relating to domestic violence
- § 62:91 Other topics of expert testimony

Volume 7 Pamphlet

Table of Cases

