Volume 1

CHAPTER 1.	PRELIMINARY N	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. SPI	ECIFIC 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

3 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
3 2:37	In general
3 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
2:43.5	0 Internet searches and medical information
2:43.6	
	subjects
3.	ECONOMIC AND FINANCIAL FACTS
3 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 gonoral
2:50 2:51	In general Historical facts of national, international and
3 2.51	general scope
2:52	—State and local historical facts
2:53	—Related subjects
, 2.00	related subjects
5.	BOUNDARIES, GEOGRAPHY, AND
	TOPOGRAPHY
2:54	In general
2:55	—Boundaries; political geography
2:56	—Distances between locations

Ş	2:57	Geography and topography
§	2:58	Particular location within political subdivision
	6.	TRAFFIC AND TRAVEL
•		In general —Public thoroughfares
8		—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
8	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
$\S 2:75$	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
$\S~2:80.50$	Bureau of immigration; other governments

2. LEGISLATION AND RELATED MATTERS

§ 2:81 "Public," "private," and "local" state statutes

§ 2:82	Statutory history: Legality and character of statute
§ 2:83 § 2:84	Legislative history; legislative intent Municipal charters and acts affecting
§ 2:85	municipalities 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; miscellanous records
$\S 2:91$	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
$\S 2:95$	In general
$\S 2:96$	Litigation documents as adjudicative fact
$\S~2:97$	—Law; legislative, evaluative, or basic fact
§ 2:98	Documents in case being litigated
$\S 2:99$	Other cases and courts
§ 2:100	Related proceedings
$\S 2:101$	—Issue preclusion; res judicata
$\S 2:102$	—Collateral proceedings
$\S 2:103$	—Other related proceedings
§ 2:104	Purpose for which judicial notice is taken: The hidden hearsay issue
\$ 2:104.	Judicial notice of factual finding in another case
$\S 2:105$	Unrelated cases
$\S 2:106$	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	—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

§ 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

$\S 4:25$	—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
8 4.49	to presumed fact —Satisfying the burden
§ 4:43 § 4:44	—Shifting the burden
§ 4.44 § 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 F	ed.	R.	Evid.
	301						

D. OTHER PROCEDURAL ISSUES

1	1	$\boldsymbol{\cap}$	1	٦	1	J	C	1	Г	ľ	Т	T	Tr	L.	T	\cap	1	V.	Τ.	Δ	T	.]	Γ	r	V	٠.	Δ	1	J	Γ	" (17	Δ	I		П	\Box	T	η	11	V
1	L. '	U	•	,	Ι.	v	1	•				ι.	Ι.	ı	Ľ	ι.	J	Ľ	N A	-		1			1	- 1	-	л	N.	L	,	V.	М	۱	1	ш		, ,	- 1		1

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

 § 4:60 "Cancellation" approach § 4:61 "Comparative weight" approach § 4:62 —Bases of comparison § 4:63 —Comparative weight approach: Specifia applications § 4:64 Presumption of innocence 	§ 4:59	In general
§ 4:62 —Bases of comparison § 4:63 —Comparative weight approach: Specifical applications	§ 4:60	"Cancellation" approach
§ 4:63 —Comparative weight approach: Specifi applications	§ 4:61	"Comparative weight" approach
applications	§ 4:62	—Bases of comparison
11	§ 4:63	—Comparative weight approach: Specific
§ 4:64 Presumption of innocence		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" presumption

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

§ 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	REVOND	REASONA	BLE	DOUBT
L.		THADUNA	111111	1/(/(/////

§ 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
8 5.0 50	"T

§ 5:6.50 "Jury's job is to find the facts" instruction

Harmless error § 5:7

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
8 5.19 50	Doct conviction proceedings

§ 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

JONES ON EVIDENCE, 7TH ED
§ 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

\$ 5:41.50 \$ 5:41.70 \$ 5:42 \$ 5:43 \$ 5:44 \$ 5:45 \$ 5:46 \$ 5:47	
D. C	ORROBORATION REQUIREMENT
1.	ACCOMPLICE TESTIMONY
	a. Overview
§ 5:48 § 5:49	In general Juvenile offenders
	b. Defining "Accomplice"
§ 5:50 § 5:51 § 5:52	In general Issue of fact or law; judicial instruction Larceny; receiving stolen property
	c. Degree of Corroboration Required
§ 5:53 § 5:54	Federal rule "Tending to connect"
	d. Jury Instructions
§ 5:55 § 5:56	In general 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 § 5:60	In general Quality or persuasiveness of corroborating evidence
	b. The "Trustworthiness" Test
§ 5:61	In general

§ 5:62 § 5:63	—Federal law: <i>Smith</i> , <i>Opper</i> , <i>Wong Sun</i> State consideration of the "trustworthiness" rule
	c. Other Issues
§ 5:64 § 5:65 § 5:66	Crimes without a "corpus delicti" Admissions amounting to less than a full confession Issue for court or jury
4.	DEFENSE WITNESS AS "ACCOMPLICE"
§ 5:67	Introduction
	a. Federal Case Law
§ 5:69	U.S. v. Nolte Washington v. Texas U.S. v. Tirouda; United States v. Cool
	b. Evaluation
§ 5:71 § 5:72 § 5:73 § 5:74 § 5:75	The false equivalency Prosecutor's Procedural and Tactical Advantages Risk of fabrication Impression of judicial partiality 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

xviii

- § 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

	T)	. •
a.	Presum	ntion
a.	I I Coulli	DOTOL

- § 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 or 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
$\S 9:3.50$	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

xxii

S 0.10	Consider many income and a
§ 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

xxiv

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; Respondent 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

§ 11:3.50	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 <i>Old Chief</i> 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
- § 11:20 Fed. R. Evid. 104(a), 104(b)
- § 11:21 Corresponding state provisions

xxvi

	11:22	Role of judge and jury; Generally
§	11:23	—Distinctions between admissibility and conditional relevance
8	11:24	Procedural implications; motions
	11:25	Order of proof
	11:26	—FRE 611(a); corresponding state law
Ι). LIN	MITED ADMISSIBILITY
Ş	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	
	11:32.70	· · · · · · · · · · · · · · · · · · ·
8	11:33	Limiting instruction
F		IDENCE MADE RELEVANT BY ADVERSE RTY
	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
- § 12:17 Means of proof

xxviii

8	12:18	—То	show	notice	or	foreseea	bility	v
•	1-110	10	DIIO II	1100100	01	101 00000	CIIIO.	,

3. SUBSEQUENT INCIDENTS; ABSENCE OF OTHER INCIDENTS

§ 12:19	Subsequent incidents
§ 12:20	Absence of similar accidents, complaints, or
	claims
\$ 10.00 FO	

§ 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

or identify oneself

a. Flight

	8
§ 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

xxix

- § 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

"MISSING WITNESS" INFERENCE

a. In General

- § 13:15 Overview Vocabulary: "arguing party," "requesting party," "non-§ 13:15.30 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"
- Availability to prosecution and police § 13:19
- § 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

C. FINANCIAL CONDITION OF PARTIES; DAMAGES

1	TNI	GENERA	Г
	I I N	CTP/INP/D.AI	Ι.

§ 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

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

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

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

xxxii

§ 15:6	Motor vehicle cases; Other dangerous instrumentalities
§ 15:7	Negligent hiring or supervision
§ 15:7.30	Medical malpractice: negligent credentialling
§ 15.7.50 § 15:8	Negligent hiring or supervision—Related
8 15.6	evidence issues
	evidence issues
2.	DEFAMATION
§ 15:9	In general
§ 15:10	Admissibility to prove truth of statement
§ 15:11	Reputation and character as measure of
5 10.11	damages
0	_
3.	OTHER CIVIL ACTIONS
§ 15:12	Personal injury and wrongful death actions
§ 15:13	Miscellany
C. CR	IMINAL 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
۷.	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 § 15:21.30	
8 10.21.00	When may the prosecutor offer rebuttal evidence of
	defendant's predisposition?
§ 15:22	"Subjective" approach—Prior specific acts; lack of
2 TO.44	prior criminal record
8 15.99	-
§ 15:23	"Subjective" approach—Reputation and
	opinion testimony; Hearsay

xxxiii

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

xxxiv

§ 16:23 Time

§ 16:24 § 16:25 § 16:26	Expert opinion testimony Limiting the number of character witnesses Instructing the jury about character evidence
E. PR	OSECUTORIAL RESPONSE
1.	WHAT CONSTITUTES "OPENING THE DOOR"?
\$ 16:27 \$ 16:28 \$ 16:28.10 \$ 16:28.20 \$ 16:28.30 \$ 16:28.40 \$ 16:29	 —Prior to trial or in opening statement before the state presents evidence —While cross-examining a prosecution witness
\$ 16:29 \$ 16:29.10 \$ 16:29.20 \$ 16:29.30 \$ 16:31	Defendant's testimony—General rule What kinds of questions (or answers) open the door
2. § 16:32	PROSECUTORIAL OPTIONS Overview a. Cross-examine the Witness About Defendant's Prior Acts
§ 16:33 § 16:34	In general Overview
\$ 16:35 \$ 16:36 \$ 16:37 \$ 16:38 \$ 16:39	(1) Subject-Matter of Questions In general Type of conduct Factual basis for the question Procedure Time (2) Wording of Questions
§ 16:40	"Have you heard?" "Did you know?" "Were you aware?"

	Jones on Evidence, 7th E
§ 16:41 § 16:41.	Questions assuming defendant's guilt Questions about the facts underlying the charges
	(3) Other Issues
\$ 16:42 \$ 16:43 \$ 16:44 \$ 16:45 \$ 16:45.	Unfair prejudice "Fighting fire with fire" Instruction
	b. Negative Character Witness
§ 16:46	In general
Cl	VIDENCE RELATING TO VICTIM'S HARACTER OR ANOTHER PERSON'S HARACTER IN GENERAL
§ 16:47 § 16:48 § 16:49 § 16:50 § 16:51	Introduction; "victim"; another person Restrictions on evidence as to victim's character Prosecutorial response
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

§ 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

xxxvi

- § 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

xxxvii

Jones on Evidence, 7th Ed

§ 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
$\S 17:6.14$	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
$\S 17:6.45$	Utah
§ 17:6.46	Vermont

xxxviii

§ 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

§ 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

xxxix

3.	PROVING THE EXTRINSIC ACT
	a. Burden of Production or Persuasion
§ 17:27 § 17:28 § 17:29	In general Huddleston v. U.S State law
	b. Satisfying the Burden; Defendant's Right to Rebut
\$ 17:30 \$ 17:31 \$ 17:32 \$ 17:33 \$ 17:34 \$ 17:35 \$ 17:36	In general Sufficiency as to purpose Satisfying the Huddleston standard Satisfying more rigorous standards Use of otherwise inadmissible evidence Accomplice or complainant testimony Defendant's right to rebut
	c. Order of Proof; Double Jeopardy
§ 17:37 § 17:38 § 17:38.50	"Other act" evidence and the order of proof Extrinsic act evidence and double jeopardy other procedural issues
	MISSIBILITY TO PROVE IDENTITY AND NDUCT
§ 17:39	"Identity" and "conduct"
1.	IDENTITY
§ 17:40	In general; Admissibility depends on relevance, not "category"
§ 17:41 § 17:41.50	"Fungible" or "prosaic" similarity O Social media profiles; similar emails
	a. "Modus Operandi"; "Signature Crimes"
§ 17:42 § 17:43	In general —"Signature crimes"
	b. "Common Scheme; Plan"
§ 17:44 § 17:45	Overview "Preparation"; steps toward ultimate goal; ongoing conspiracy

§ 17:26

Pre-Use notice

Table of Con	ITENTS
§ 17:46	"Common scheme or plan"—Sufficient common features
§ 17:46.30	"Preparation"; steps toward ultimate goal; ongoing conspiracy—Domestic partners
2. CO	ONDUCT
\$ 17:47 \$ 17:48 \$ 17:49 \$ 17:50 \$ 17:50.30 \$ 17:50.80	When is "conduct" an issue: In general Absence of accident; doctrine of chances Corroborate accomplice or complainant testimony Scheme or plan Drug paraphernalia cases Arson and fire insurance cases
	THER BASES TO INFER IDENTITY OR ONDUCT
a.	Motive as Proof of Identity or Conduct
§ 17:51 § 17:52 § 17:53	In general —Theft, fraud, etc —Defendant's drug addiction; Other
§ 17:53.30	compulsive behavior Person's use of drugs or alcohol shortly before the crime or other act
§ 17:54	In general—Violent crimes
§ 17:54.10	Assault on defendant's present or former spouse, boyfriend, girlfriend or on the latter's new spouse boyfriend, girlfriend—Prior assaults or infidelity; threats; similar conduct
§ 17:54.20	Domestic assault prosecutions: Assault on other (or former) members in the defendant's household or family
§ 17:54.50	Possession of weapon
b.	Opportunity, Knowledge, Ability, Skill
§ 17:55 Op	pportunity

- § 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 Other mental states § 17:68

3. SPECIFIC APPLICATIONS

§ 17:68.50 Theft § 17:69 Fraud § 17:69.50 Obstruction of justice, destruction of evidence, etc. § 17:69.70 Burglary Violent crimes: Extrinsic violent crimes, acts, and § 17:70 § 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 Violent crimes; non-violent extrinsic acts § 17:70.80 § 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

E. "OTHER" PURPOSES AND SITUATIONS

§ 17:72 In general

In general

§ 17:73

§ 17:84

§ 17:85

§ 17:86

§ 17:87

§ 17:87.50

§ 17:87.60

mind

Motive

Explain why police acted

"Background" evidence

Additional "other purposes"

$\begin{array}{ccc} {\bf 1.} & {\bf CREDIBILITY, CORROBORATION,} \\ & {\bf IMPEACHMENT} \end{array}$

§ 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
§ 17:78.1	"Reverse 404(b)": the standard for admissibility
§ 17:78.3	0 —"Reverse 404(b)": evidence relating to a
	government witness or to an alleged accomplice, coconspirator, or victim
§ 17:78.4	0 —"Reverse 404(b)" evidence in violent crimes
§ 17:78.5	O —"Reverse 404(b)" evidence in drug prosecutions and other contraband cases
§ 17:78.6	0 —"Reverse 404(b) evidence" in other prosecutions
§ 17:78.7	0 "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

Explain relationship between co-conspirators or defendant and victim; fear; other state of

Interlocutory appeals by the government

F. PROBATIVE VALUE AND PREJUDICE

0 4	- 00	_	
Ø 1	7:88	()ve	rview

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

CHAPTER 18. HABIT; ROUTINE PRACTICE

A. OVERVIEW

§ 18:1 Habit

xliv

§ 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
§ 19:15.5¢	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
	MISSIBILITY 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
§ 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

xlvi

T_{A}	BLE	OF	CON	ישרו	тс
	18176	()r		יו או וו	V I .

§ 19:32 § 19:33	—Evidence of violence—Complainant's prior, unconsummated sexual interest in defendant
E. BL	AS; MOTIVE TO LIE
§ 19:34	In general
1.	RELEVANCE
\$ 19:35 \$ 19:36 \$ 19:37 \$ 19:38 \$ 19:39 \$ 19:40	To deny infidelity Motive related to prostitution Protect reputation for chastity or heterosexuality Vengeance or spite Underage complainants Motive related to drugs
2.	RESTRICTING ADMISSIBILITY
§ 19:41	In general
	IOR RAPE ALLEGATIONS MADE BY MPLAINANT
1.	APPLICABILITY OF RAPE SHIELD LEGISLATION
§ 19:42 § 19:43 § 19:44	In general Prior false accusations Prior true accusations
2.	MATTERS OF PROOF
§ 19:45 § 19:46 § 19:47	Proving complainant made a prior accusation Proving the prior accusation was false; discovery Extent of admissibility
	MEDIATELY SURROUNDING RCUMSTANCES
\$ 19:48 \$ 19:49 \$ 19:50 \$ 19:51 \$ 19:52	In general Complainant's attire Conduct with the defendant Discussion of complainant's prior sexual behavior Conduct with others; public conduct

H. "PATTERN," "PROMISCUITY," PROSTITUTION

- § 19:53 "Pattern"; promiscuity
- § 19:54 Evidence relating to prostitution—Admissibility
- $\S 19:55$ ——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
- § 19:66 "Technical issues and policy concerns"
- § 19:67 Statutory authority
- § 19:68 Case law
- § 19:69 Evaluation

xlviii

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 When the rule applies; behavior covered and not covered
- § 20:4 Endorsement of propensity inference; credibility; constitutionality
- § 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§ 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 plain	ntiff
§ 22:21 Plaintiff's settlement with another defende	ant
§ 22:21.50 Plaintiff's settlement with another defended tortfeasor states	ant in joint
§ 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

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
e	00.10	agreement by defendant
8	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
§	23:20	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
§	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

	T 3 T	OTINTO AT	
Δ		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	0	Implied assertions and state law
§ 24:20.20	0	Receipts, bills, etc. with name and address as nonhearsay evidence that the person lives at that address; similar situations
§ 24:20.30	0	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	0	Georgia code provision
§ 24:23		Declarant's state of mind
§ 24:24		To show notice, knowledge or impact upon the hearer
$\S 24:25$		—Criminal cases, in general
§ 24:25.50		
§ 24:26		To explain why the police acted as they did
§ 24:26.10	0	—Why police acted: General rule
§ 24:26.20	0	To explain why the police acted as they did: the "opened door" ("invited error") doctrine
§ 24:26.30	0	Attacks on the quality of the investigation; civil actions alleging police misconduct
§ 24:26.40	0	Claims that the police officers are lying
§ 24:26.50	0	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		cuments linking nondeclarant defendants to rimes or to each other
§ 24:30		show relationship between declarant and nother
§ 24:31	"To	p prove the words were spoken"
8 24:32	Pr	oving 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 25A:10.50	Crawford 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"

lviii

§ 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
- $\S~25A{:}28$ $\;$ 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

88	25A·31	to	25A:33	[Reserve	dī
~~	400.01	w	4(1/1,(1))	TILESELUE	L I

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

§ 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 INCOURT 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

lxii

	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

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
§ 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: Tome v. U.S.;

§ 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. O	THER 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
T X 7	DDE	TOTAL IDENTIFICATIONS

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

lxiv

§	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	U.S. v. Owens: 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

$\S 27:1$	Introduction
§ 27:2	Defining "party"; "privity" between party and declarant
§ 27:3	"Opposing party"
§ 27.3 § 27:4	Role of judge and jury; standard for appellate review
§ 27.4 § 27:4.50	Weight to be given; "judicial admissions"
§ 27.4.50 § 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 \$ 27:10 \$ 27:11 \$ 27:12	Means of proof Burden of production or burden of persuasion Ambiguity; other substantive reasons to exclude "Representative capacity"		
C.	ADOPTIVE ADMISSIONS		
§ 27:13	Explicit adoption		
§ 27:14	Implicit adoption; Adoption by conduct		
§ 27:15 § 27:16	Tacit adoption by silence —Criminal cases		
§ 27:17	Use of defendant's silence to impeach; other uses		
SI	III. STATEMENTS BY AN AUTHORIZED SPOKESPERSON, AGENT, EMPLOYEE OR SERVANT		
A.	IN GENERAL		
§ 27:18	Overview		
§ 27:18.50 § 27:19	Sixth Amendment Confrontation Clause Fed. R. Evid. 801(d)(2)(C)		
§ 27:19 § 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		
В.	REQUIREMENTS AND ISSUES		
	1. In general		
$\S~27:24$	Generally		
	2. Relationship Between Declarant, Party & Statement		
$\S 27:25$	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		

lxvi

\$ 27:31 \$ 27:32 \$ 27:33 \$ 27:34 \$ 27:35 \$ 27:36 \$ 27:37	Lack of first-hand knowledge "In-house" statements Statements in pleadings and related documents —Statements by attorneys in court Out-of-court statements by a party's attorney Statements by government agents Translator or interpreter as agent
IV. ST	TATEMENTS BY COCONSPIRATORS
A.	IN GENERAL
§ 27:38 § 27:39 § 27:40 § 27:41	Overview Fed. R. Evid. 801(d)(2)(E) Corresponding state provisions Jurisdictions without statutory provisions
В.	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 \$ 27:44 \$ 27:45 \$ 27:46	Generally Issue for judge or jury Prosecutor's burden of proof Evidence to be considered
	b. Means of proof; Sufficiency of proof
\$ 27:47 \$ 27:48 \$ 27:48.50 \$ 27:49 \$ 27:50	Generally Existence of the conspiracy Organized crime and RICO conspiracies Declarant's participation Defendant's participation
	3. "During" and "in Furtherance" of the Conspiracy
§ 27:51 § 27:52	In general Statements made before the conspiracy allegedly began or defendant became a participant

§ 27:53	"During" the conspiracy
$\S 27:54$	Defendant's withdrawal from the conspiracy
$\S 27:55$	"Concealment phase"
$\S 27:56$	In furtherance
$\S 27:57$	—Georgia rule
C.	OTHER PROCEDURAL ISSUES
§ 27:58	Order of proof
$\S 27:59$	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
§ 28:15	Young children as declarants
§ 28:16	Calls to 911

lxviii

§ 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

٨	STATEMENTS	OF DUVCIOAT	CENICATIONS
A	STATEMENTS	OFPHYSICAL	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 (<i>Hillmon</i> 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§ 29:18.130 General rule of inadmissibility

TABLE OF CONTENTS

Exceptions
Other situations
Factually specific relevance
To rebut defendant's description of his relationship with the victim
Γhe "forfeiture" theory
Victim's statements offered by defendant
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"

"Pertinent"; cause; fault; identifying the assailant—
In general
"Pertinent"; cause; fault—Statements as to medical history
"Self-serving" statements
Sexual assault, child abuse and domestic violence cases, in general
Domestic violence and sexual assault: Adult complainants
"Pertinent"; cause; fault—Child abuse cases; "tender years" exceptions
Sixth Amendment Confrontation Clause—In general
—Adult declarants
—Statements by children
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

lxxii

Volume 5

CHAPTER 32. REFRESHING MEMORY; RECORDED RECOLLECTION

T	DEFE	PCHINO	MEMORY
1.	KRFR		IVI PAVICA KA

	Overview Verbal refreshment by leading questions Use of documents and other media; Vocabulary
A.	FEDERAL RULE; UNIFORM RULE; STATE LAW
§ 32:4 § 32:5 § 32:6 § 32:7	Fed. R. Evid. 612 Jencks Act Uniform Rule 612 States and other jurisdictions
В.	"WRITING, RECORD, OBJECT," ETC.
§ 32:8 § 32:9	In general —Privileged writings; Confidential documents
C.	NEED FOR AND EFFECT OF "REFRESHMENT"
§ 32:10 § 32:11	In general Use of "refreshment" materials to impeach
D.	PROCEDURE AND RELATED ISSUES
§ 32:12 § 32:13	
§ 32:14	Distinguishing recorded memory and impeachment by prior inconsistent statements
E.	ADVERSE PARTY'S ACCESS AND USE
§ 32:15 § 32:16 § 32:17 § 32:18	Access to materials used while testifying Access to materials used before testifying Sanctions for non-production Limiting access or use
§ 32:19	Introduction into evidence

II. THE "RECORDED RECOLLECTION" EXCEPTION TO THE HEARSAY RULE

A .		Δ	r TON	TACAT
Α	INTR		I J (; ; i	. () /

9 32.21 III genera	8	32:21	In	genera
--------------------	---	-------	----	--------

§ 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

lxxiv

§ 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

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

§ 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

\$ 22.00	In managed
§ 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**

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

lxxvi

§ 34:7 § 34:8 § 34:9 § 34:10	Timeliness of the record Trustworthiness clause in the original rule Sixth Amendment Confrontation Clause Authentication			
III. TI	HE 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				
В.	"MATTERS OBSERVED AND REPORTED PURSUANT TO DUTY"			
	1. In General			
§ 34:12 § 34:13	Fed. R. Evid. 803(8)(A)(ii); state law 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 befendant 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	GEN	ERAL	
41.	44.1	OLL:		4

- § 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

lxxviii

§ 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

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

Sixth Amendment Confrontation Clause

I. INTRODUCTION

§ 34A:1 In general

§ 34:58

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

lxxx

		observed" and "factual findings" hearsay exceptions
§	34A:25.	
§	34A:25.	<u> </u>
8	34A:25.	
8	34A:25.	35 —Facts
§	34A:25.	40 —Issue and holding
§	34A:25.	50 —Suggestions as to how Longino could have testified
§	34A:25.	majority's "thoughts" about whether Rast's notes and/or report are "testimonial"
	34A:25.	
_	34A:25.	
	34A:25.	
§	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 "Ghostbusters 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-Melendez-Diaz case law

§ 34A:34 § 34A:35	Controlled substances: Circumstantial proof Controlled substances: Harmless error		
	b. Fingerprints		
§ 34A:36 § 34A:37 § 34A:38 § 34A:39 § 34A:40	Overview Collecting the latent print Transporting the latent print: authentication Authenticating the exemplar 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 <i>Melendez-Diaz, Bullcoming</i> , and <i>Williams</i> ?		
§ 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		

lxxxii

§ 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)

lxxxiii

§ 35:13	Records of decuments affecting an interest in property: Fed. R. Evid. 803(14)—State law		
§ 35:14	Applications and issues		
§ 35.14 § 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		
В.	STATEMENTS IN ANCIENT DOCUMENTS		
§ 35:19	In general; Fed. R. Evid. 803(16)		
§ 35:20	Corresponding state law		
§ 35:21	Issues and applications		
	ARKET REPORTS; COMMERCIAL UBLICATIONS, 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		
В.	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		

lxxxiv

§ 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

lxxxv

§ 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		
В.	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

lxxxvi

η	LABIE	OF	Conte	פידואי

\$ 36:7 \$ 36:8 \$ 36:9 \$ 36:10 \$ 36:11 \$ 36:12 \$ 36:13 \$ 36:14 \$ 36:15	Illness or infirmity Absence from the hearing —The deposition requirement —Absence and the confrontation clause		
II. "D	ECLARANT UNAVAILABLE" EXCEPTIONS		
A.	FORMER TESTIMONY		
	1. Introductory Matters		
§ 36:16 § 36:17 § 36:18	In general; Fed. R. Evid. 804(b) Vocabulary; "Cast of characters"; Issues Sixth Amendment Confrontation Clause		
	2. Federal and State Law		
§ 36:19 § 36:20	Fed. R. Evid. 804(b)(1) State law		
	3. Declarant Unavailability; Nature of Prior Proceeding		
§ 36:21 § 36:22	Declarant unavailability Nature of prior proceeding		
	4. Identity of Adverse Party		
§ 36:23 § 36:24 § 36:25	Criminal litigation Civil litigation —"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		
§ 36:29	—Prior trial		
§ 36:30	—Grand jury testimony		
§ 36:31	—Motions to suppress		

lxxxvii

§ 36:32 § 36:33 § 36:34	—Preliminary hearings—Depositions—Other proceedings			
	6. Different Adverse Parties			
§ 36:35 § 36:36	In civil litigation Use in criminal cases			
	7. Other Issues			
§ 36:37 § 36:38	Offering the testimony Impeachment and rehabilitation of former testimony and witness			
§ 36:39	Objections			
§ 36:40	Other hearsay exceptions; Other legal issues			
В.	DYING DECLARATIONS			
	1. Overview			
§ 36:41 § 36:42 § 36:43	In general Common law requirements 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	2 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			

lxxxviii

§ 36:57	Fed. R. E	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		ithout a codified rule		
		nmon Requirements and Issues		
§ 36:63		s" within the exception		
§ 36:64		ng as to declarant		
§ 36:65	First-har the stat	nd knowledge or "belief" in the truth of ement		
§ 36:66		nts that are both disserving and		
§ 36:67		nt must be against interest at time		
§ 36:68		ty of in-court witness		
		secutor's Use of Statements against al Interest; Confrontation Clause		
§ 36:69	In genera	al		
	a.	Williams on		
§ 36:70		nt" defined; "Collateral" statements; son v. United States		
§ 36:71	State rea	action to Williamson		
§ 36:72	Applying	Williamson; Redaction		
	b.	Sixth Amendment Confrontation Clause; <i>Lilly v. Virginia</i>		
§ 36:73	Backg	round		
\$ 36:74		v. Virginia		
\$ 36:74.3		ford v. Washington		
	c.	Factors Effecting Adverse Nature and Trustworthiness of Statement		
§ 36:75	Overview	7		
§ 36:76	The state	ement		
§ 36:77	The decla	arant		
	d.	The Person to Whom the Statement Was Made		
\$ 36:78	In genera	al		

	36:79		rileged communications
	36:80		tements made to law enforcement officials
Š	36:81	Star	tements to friends, relatives, acquaintances,
			e. Plea Allocutions
e	00.00	т	
	36:82	_	general
	36:83 36:84		ated issues v York rule on guilty plea allocutions
υ	30.01	2,0,	f. Other Issues
S	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
Ş	36:87	Stat	tements offered by defendant in exculpation
	36:88		rroborating
		cir	cumstances trustworthiness"
§	36:89		lying the trustworthiness-corroboration quirement
§	36:90	_	circumstances surrounding the making of estatement
_	36:91	Ext	rinsic corroboration or contradiction
§	36:92	_	declarant's credibility; Information within e statement
§	36:93	The	strength of the corroboration required
§	36:94	[Res	served] [Reserved]
		5.	Statements against "Civil" Interests
§	36:95	In g	general
-	36:96	Pro	prietary interest
-	36:97		uniary and litigational interests
§	36:98	Pen	al interest; "Social" interest
		6.	Other Hearsay Exceptions and Evidence Rules
§	36:99		atements against interest compared to dmissions by party-opponent
§	36:100		conspirator 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] [Reserved]

E. FORFEITURE BY WRONGDOING

- § 36:108 In General [Deleted]
- § 36:108.05 Introduction

1. CONSTITUTIONAL CONSIDERATIONS

- § 36:108.10 Crawford, Davis, Reynolds
- § 36:108.15 The "purpose" or "design" issue
- § 36:108.20 Giles v. California: facts
- § 36:108.25 The result in *Giles*: "by the numbers"
- § 36:108.30 Giles: The history of the Confrontation Clause and the forfeiture doctrine
- § 36:108.35 Giles: the "guilt by a preponderance" issue
- § 36:108.40 Giles: Defining the requisite mental state; "intent to silence"
- § 36:108.45 Giles: Part II-D-2 of Justice Scalia's opinion

2. APPLICATION OF THE FORFEITURE DOCTRINE IN DOMESTIC VIOLENCE CASES

- § 36:108.60 Giles: Overview
- § 36:108.68 Giles: The "intent to silence" requirement
- § 36:108.71 Giles: 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 <i>Pinkerton</i> 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

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
§ 37:10	The declarant
§ 37:11	—Bias or motive
§ 37:12	The statement itself
§ 37:13	To whom the statement was made and in what circumstances
$\S 37:14$	Time
§ 37:15	Repetition; Consistency
§ 37:16	Extrinsic corroboration
$\S 37:17$	The witness
§ 37:18	Other trustworthiness issues
C.	CONSTITUTIONAL CONSIDERATIONS
§ 37:19	Sixth Amendment Confrontation Clause
§ 37:20	Defendant's constitutional right to present

CHAPTER 38. MISCELLANEOUS HEARSAY ISSUES

evidence

§ 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

Jones on Evidence, 7th Ed

```
§ 39:3
         Prior versions of Fed. R. Evid. 701
§ 39:4
         Equivalent state law: Overview
§ 39:5
         Alabama
         Alaska
§ 39:6
§ 39:7
         Arizona
§ 39:8
         Arkansas
§ 39:9
         California
§ 39:10
         Colorado
§ 39:11
         Connecticut
§ 39:12
         Delaware
         District of Columbia
§ 39:13
§ 39:14
         Florida
§ 39:15
         Georgia
§ 39:16
         Hawaii
         Idaho
§ 39:17
§ 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
         North Carolina
§ 39:38
         North Dakota
§ 39:39
§ 39:40
         Ohio
§ 39:41
         Oklahoma
§ 39:42
         Oregon
§ 39:43
         Pennsylvania
         Rhode Island
```

§ 39:44

South Carolina
South Dakota
Tennessee
Texas
Utah
Vermont
Virginia
Washington
West Virginia
Wisconsin
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	Overview
§ 39:62	Fed. R. Evid. 701, as amended; corresponding
	state law
§ 39:63	The "percipient witness" rule
§ 39:64	—Treating physician or nurse as "percipient witness"
§ 39:65	—Hierarchy, common practices of organization
§ 39:66	"Custom and usage"; professional or "industry" experience; authentication of documents
§ 39:67	Testimony by law enforcement officials; "dual witness" situation
§ 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: 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

xcvi

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 examplars: Constitutional considerations
- § 40:28 Voice examplars: 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
§ 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
_	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 as to the meaning of out-of-court statements; hand gestures; handshakes
§ 40:45.10	Testimony as to meaning of gestures
§ 40:45.30	Non-participant testimony translating non-English statements
§ 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

xcviii

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
- § 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

Appendix 42A. Sample Notice of Deposition Duces
Tecum of the Expert and Exhibit
Specifying Documents

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
5 10.12	qualification—Identification of expert witness
§ 43:13	Use of discovery to ascertain expert witness
, 10.10	qualification
§ 43:14	Qualifying parties and lay witnesses as experts
	TER 44. FED. R. EVID. 702,
<i>DAUB</i>	ERT, AND ITS PROGENY
§ 44:1	Before Fed. R. Evid. 702: <i>Frye</i> and the "general acceptance" test
§ 44:2	The enactment of Fed. R. Evid. 702 and the <i>Frye</i> "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
<i>5</i>	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 <i>Daubert</i> hearing?
§ 44:17	Applying Daubert: Substance
§ 44:18	Applying <i>Daubert</i> : Other relevant factors
§ 44:19	Applying <i>Daubert</i> : May a judge accept an
	expert's "ipse dixit"?

§ 44:20	Applying <i>Daubert</i> : When expert testimony is excluded
§ 44:21	When <i>Frye</i> and <i>Daubert</i> do not apply: Pure opinion rule
§ 44:22	When <i>Frye</i> and <i>Daubert</i> do not apply: Conclusions based on "experience and observations"
§ 44:23	When <i>Frye</i> and <i>Daubert</i> do not apply: Evaluation and comment
§ 44:24	When <i>Frye</i> and <i>Daubert</i> do not apply: "Regularly employed method"
§ 44:25	When <i>Frye</i> and <i>Daubert</i> 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 Frye to Daubert; Fed. R. Evid. 702 § 45:3 Amendments to Fed. R. Evid. 702 § 45:4 Fed. R. Evid. 702 and corresponding state law § 45:5 § 45:6 Alabama § 45:7 Alaska Arizona § 45:8 § 45:9 Arkansas § 45:10 California § 45:11 Colorado § 45:12 Connecticut § 45:13 Delaware District of Columbia § 45:14 § 45:15 Florida § 45:16 Georgia Hawai'i § 45:17 § 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 New Jersey § 45:36 § 45:37 New Mexico § 45:38 New York § 45:39 North Carolina North Dakota § 45:40 § 45:41 Ohio § 45:42 Oklahoma § 45:43 Oregon § 45:44 Pennsylvania § 45:45 Rhode Island South Carolina § 45:46 § 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

§ 45:56

Wisconsin

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

6 40 5	
§ 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
9	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 New York § 46:59 North Carolina § 46:60 § 46:61 North Dakota § 46:62 Ohio Oklahoma § 46:63 § 46:64 Oregon § 46:65 Pennsylvania § 46:66 Rhode Island South Carolina § 46:67 § 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 Wyoming § 46:77

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

§ 47:1 History of the ultimate issue rule

§ 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
СНАІ	OTER 48 FED R EVID 705

CHAPTER 48. FED. R. EVID. 705

- History of Fed. R. Evid. 705 and amendments thereto
- Fed. R. Evid. 705 § 48:2
- § 48:3 Fed. R. Evid. 705 in practice
- § 48:4 Construction of Fed. R. Evid. 705 in conjunction with Fed. R. Evid. 703
- Construction of Fed. R. Evid. 705 with Fed. R. § 48:5 Civ. P. 26(a)(2) regarding disclosures
- 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
- Court-appointed expert witness versus court-§ 49:3 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	
§ 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	
§ 49:40	Ohio
§ 49:41	Oklahoma
§ 49:42	Oregon
§ 49.42 § 49:43	Pennsylvania
§ 49.45 § 49:44	Rhode Island
§ 49:44 § 49:45	South Carolina
8 49:40	South Carolina

§ 49:46 South Dakota § 49:47 Tennessee § 49:48 Texas § 49:49 Utah § 49:50 Vermont Virginia § 49:51 Washington § 49:52 West Virginia § 49:53 § 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).
8 50.16	Companyating experts: Fed R Civ P 26(h)(A)(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?

§ 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 docto
§ 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

§ 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"
- § 54:14 "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
- § 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

cxiv

§ 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

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

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

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

- § 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

cxviii

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; <i>State v. J.L.G.</i>
§ 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

§ 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
§ 57:66.3	0 Expert testimony: Fantasizing vs. intent
§ 57:67	Expert testimony that defendant <i>lacks</i> 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
В.	TESTIMONY RELATING TO "GROOMING"
§ 57:70	Lay witness testimony describing defendant's "grooming" activity

§ 57:73 Qualifying the expert

§ 57:71

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

I. INTRODUCTORY MATTERS

- § 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

cxxii

§ 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 New Hampshire § 58:42 § 58:43 New Jersey § 58:44 New Mexico § 58:45 New York North Carolina § 58:46 North Dakota § 58:47 § 58:48 Ohio § 58:49 Oklahoma § 58:50 Oregon Pennsylvania § 58:51 § 58:52 Rhode Island § 58:53 South Carolina § 58:54 South Dakota § 58:55 Tennessee § 58:56 Texas Utah § 58:57 § 58:58 Vermont § 58:59 Virginia § 58:60 Washington § 58:61 West Virginia § 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 Fed. R. Evid. 704(b) and state equivalents § 58:66 § 58:67 Fed. R. Evid. 608 and state equivalents § 58:68 Hearsay; "rule of completeness"; Rule 106 ADMISSIBILITY WHERE PARTIES SO D. STIPULATE § 58:69 States that reject stipulations of admissibility States that permit stipulated admissibility § 58:70 § 58:71 Preconditions to stipulated admissibility; other stipulation issues OTHER TRIAL ISSUES AND \mathbf{E} .

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

cxxiv

§ 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

§ 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 R	ELATED 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

cxxvi

TABLE OF	CONTENTS
§ 60:9 § 60:10 § 60:11	Touch DNA; trace DNA Secondary transfer Low copy number ("LCN") DNA, a/k/a "low template DNA," "high sensitivity DNA"
	CIZURE AND RETENTION OF A USPECT'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; <i>Maryland v. King</i> ; state approaches
§ 60:15	Use of DNA profile obtained in earlier cases; retention of profile after acquittal; other Fourth Amendment issues
В.	FIFTH AMENDMENT ISSUES
§ 60:16	Refusal to voluntarily submit biological samples—In general
§ 60:17	Refusal to voluntarily submit a DNA sample
	DMISSIBILITY OF DNA EVIDENCE AT RIAL
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
В.	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

cxxvii

§ 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; United States v. Gissantaner		
§ 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		
0.00.05	methodologies; "sperm fraction"		
§ 60:35	Court acceptance of the reliability of mtDNA and Y-STR DNA		
	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		
cxxviii			

defendant

§ 60:45

§ 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		

Absence of DNA evidence implicating a

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

§ 61:8 § 61:9	Speed with which the witness identifies a suspect Minor details
	ACTORS DURING A CRIME THAT AFFECT YEWITNESS ACCURACY
A.	GENERALLY
§ 61:10	Introduction: "estimator variables"
В.	EYEWITNESS CHARACTERISTICS
§ 61:11 § 61:12 § 61:13 § 61:14 § 61:15	Child eyewitnesses Elderly eyewitnesses Law enforcement officers Alcoholic intoxication and marijuana use Eyewitness bias
C.	PERPETRATOR CHARACTERISTICS
§ 61:16 § 61:17	Cross-race identifications ("race bias") Hats; clothing; disguises; facial distinctiveness or its lack
D.	CRIME CHARACTERISTICS
§ 61:18 § 61:19 § 61:20 § 61:21	Exposure time; degree, type of attention Lighting and distance Stress Weapon focus
IV. S	YSTEM VARIABLES
§ 61:22 § 61:23 § 61:24 § 61:25	Introduction; comprehensive state directives Witness interviews by police officers Composites Showups
§ 61:26	Pre-identification instructions
§ 61:27 § 61:28	The fillers (stand-ins) at the lineup The way lineups are conducted; "double blind"
§ 61:29	procedure "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 <i>Daubert</i> to expert testimony on eyewitness identification

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

I. GENERALLY

e	00.1	T / 1 / 1
8	62:1	Introduction

§ 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)
	4 7 4 47 474			

- § 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

B. VOICE IDENTIFICATION

§ 62:8 Unrecorded conversations and encounters: The eyewitness analogy

§ 62:9	Recorded conversations and encounters:		
§ 62:10	Introduction 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. FO	OREIGN 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)		
В.	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		

cxxxii

§ 62:31 § 62:32	Should the recording be played for the jury? The alternatives
	3. Jury Instructions; Jury Access to Translations During Deliberations
§ 62:33 § 62:34	Jury instructions Jury access to translations during deliberation
	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
В.	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
 - 2. Scope and Form of Permissible Expert Testimony
- 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	
$\S 62:58$	Prosecutions involving criminal organizations	
§ 62:59	Other crimes and situations	
В.	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	
§ 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	

cxxxiv

§ 62:86

 $\S 62:87$

§ 62:88

§ 62:89

In general

C. PARTICULAR ISSUES IN DRUG PROSECUTIONS

	In general
§ 62:68	III 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
§ 62:83.3	-
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

Homicide prosecutions; other crimes of violence

Use in serial crime cases; "linkage"; Fed. R.

Evid. 404(b) and state equivalents

Sexually motivated homicide

INVESTIGATIVE ANALYSIS"; "LINKAGE"

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