

# **2011 RULES OF EVIDENCE**

## **Pennsylvania Mock Trial Version**

### **Article I. General Provisions**

- 101. Scope
- 102. Purpose and Construction

### **Article IV. Relevancy and its Limits**

- 401. Definition of "Relevant Evidence"
- 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible
- 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time
- 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes
  - (a) Character Evidence.
  - (b) Other crimes, wrongs, or acts.
- 405. Methods of Proving Character
  - (a) Reputation or opinion.
  - (b) Specific instances of conduct.
- 406. Habit; Routine Practice
- 407. Subsequent Remedial Measures
- 408. Compromise and Offers to Compromise
- 409. Payment of Medical or Similar Expenses
- 410. Inadmissibility of Pleas, Plea Discussions, and Related Statements
- 411. Liability Insurance (civil case only)

### **Article V. Privileges**

- 501. General Rules

### **Article VI. Witnesses**

- 601. General Rule of Competency
- 602. Lack of Personal Knowledge
- 607. Who May Impeach
- 608. Evidence of Character and Conduct of Witness
  - (a) Opinion and reputation evidence of character.
  - (b) Specific instances of conduct.
- 609. Impeachment by Evidence or Conviction of Crime
  - (a) General Rule.
  - (b) Time Limit.
  - (c) Effect of pardon, annulment, or certificate of rehabilitation.
  - (d) Juvenile adjudication.
- 610. Religious Beliefs and Opinions
- 611. Mode and Order of Interrogation and Presentation
  - (a) Control by Court
  - (b) Scope of Cross examination
  - (c) Leading questions

- (d) Redirect/Recross
  - (e) *Permitted Objections*
  - (f) *Permitted Motions*
  - (g) Court Questioning.
612. Writing Used to Refresh Memory
613. Prior Statements of Witnesses
- (a) Examining Witness Concerning Prior Statement
  - (b) Extrinsic Evidence of Prior Inconsistent Statement of Witness
615. Sequestration of Witnesses

## **Article VII. Opinions and Expert Testimony**

701. Opinion Testimony by Lay Witnesses
702. Testimony by Experts
703. Bases of Opinion Testimony by Experts
704. Opinion on Ultimate Issue
705. Disclosure of Facts or Data Underlying Expert Opinion

## **Article VIII. Hearsay**

801. Definitions
- (a) "Statement" defined
  - (b) "Declarant" defined
  - (c) "Hearsay" defined
  - (d) Statements Which Are Not Hearsay
    - (1) Prior Statement by Witness
    - (2) Admission by Party-Opponent
802. Hearsay Rule
803. Hearsay Exceptions, Availability of Declarant Immaterial
- (1) Present Sense Impression
  - (2) Excited Utterance
  - (3) Then Existing Mental, Emotional, or Physical Condition
  - (4) Statements for Purposes of Medical Diagnosis or Treatment
  - (5) Recorded Recollection
  - (6) Records of Regularly Conducted Activity
  - (8) Public Records and Reports
  - (18) Learned Treatises
  - (21) Reputation as to Character
  - (22) Judgment of Previous Conviction
804. Hearsay Exceptions, Declarant Unavailable
- (a) Definition of Unavailability
  - (b) Hearsay Exceptions
    - (1) Former Testimony
    - (2) Statement Under Belief of Impending Death.
    - (3) Statement Against Interest
    - (4) Statement of Personal or Family History
    - (6) Forfeiture by Wrongdoing
805. Hearsay Within Hearsay

## **RULES OF EVIDENCE (Pa. Mock Trial Version)**

In American trials, complex rules are used to govern the admission of proof (i.e., oral or physical evidence). These rules are designed to ensure that all parties receive a fair hearing and to exclude evidence deemed irrelevant, incompetent, untrustworthy, unduly prejudicial, or otherwise improper. If it appears that a rule of evidence is being violated, an attorney may raise an objection to the judge. The judge then decides whether the rule has been violated and whether the evidence must be excluded from the record of the trial. In the absence of a properly made objection, however, the evidence will probably be allowed by the judge. The burden is on the mock trial team to know the Rules of Evidence (Pa. Mock Trial Version) and to be able to use them to protect their client and fairly limit the actions of opposing counsel and their witnesses.

For purposes of mock trial competition, the Rules of Evidence have been modified and simplified. Most of the Rules herein are based upon the Federal Rules of Evidence, and its numbering system. Where rule numbers or letters are skipped, those rules were not deemed applicable to mock trial procedure. *Text in italics indicates language substantially deviating from that contained in the Federal Rules of Evidence.*

Not all judges will interpret the Rules of Evidence (or procedure) the same way, and mock trial attorneys should be prepared to point out specific rules (quoting, if necessary) and to argue persuasively for the interpretation and application of the rule they think appropriate.

The Rules of Competition and these Rules of Evidence govern The Pennsylvania Statewide High School Mock Trial Competition.

## ARTICLE I. GENERAL PROVISIONS

### Rule 101. Scope

*These Rules of Evidence (Pa. Mock Trial Version) govern the trial proceedings of the Pennsylvania Statewide High School Mock Trial Competition.*

### Rule 102. Purpose and Construction

*These Rules are intended to secure fairness in administration of the trials, eliminate unjust delay, and promote the laws of evidence so that the truth may be ascertained.*

## ARTICLE IV. RELEVANCY AND ITS LIMITS

### Rule 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

### Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, *except as otherwise provided in these Rules*. Evidence which is not relevant is not admissible.

### Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

### Rule 404. Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes

(a) **Character evidence generally.** Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) **Character of accused.** In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404 (a) (2), evidence of the same trait of character of the accused offered by the prosecution;

(2) **Character of alleged victim.** In a criminal case, and subject to the limitations imposed by Rule 412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

(3) **Character of witness.** Evidence of the character of a witness, as provided in Rules 607, 608 and 609.

(b) **Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

#### **Rule 405. Methods of Proving Character**

(a) **Reputation or opinion.** -- In all cases where evidence of character or a character trait is admissible, proof may be made by testimony as to reputation or in the form of an opinion. On cross-examination, questions may be asked regarding relevant, specific conduct.

(b) **Specific instances of conduct.** -- In cases where character or a character trait is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

#### **Rule 406. Habit; Routine Practice**

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

#### **Rule 407. Subsequent Remedial Measures**

When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

#### **Rule 408. Compromise and Offers to Compromise**

(a) **Prohibited uses.** Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:

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

(2) conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority;

(b) **Permitted uses.** This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.

#### **Rule 409. Payment of Medical or Similar Expenses**

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

#### **Rule 410. Inadmissibility of Pleas, Plea Discussions, and Related Statements**

Except as otherwise provided in this Rule, evidence of the following is not, in any civil or criminal proceeding, admissible against a defendant who made the plea or was a participant in the plea discussions:

- (1) A plea of guilty which was later withdrawn;
- (2) A plea of nolo contendere;
- (3) Any statement made in the course of any proceeding under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the forgoing pleas; or
- (4) Any statement made in the course of plea discussions made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty which is later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought, in fairness, be considered with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

#### **Rule 411. Liability Insurance (*civil case only*)**

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

## **ARTICLE V. PRIVILEGES**

### **Rule 501. General Rule**

*There are certain admissions and communications excluded from evidence on grounds of public policy. Among these are:*

- 1. communications between husband and wife;*
- 2. communications between attorney and client;*
- 3. communications among grand jurors;*
- 4. secrets of state; and*
- 5. communications between psychiatrist and patient.*

## **ARTICLE VI. WITNESSES**

### **Rule 601. General Rule of Competency**

Every person is competent to be a witness.

### **Rule 602. Lack of Personal Knowledge**

A witness may not testify to a matter unless the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of Rule 703, related to opinion testimony by expert witnesses.

### **Rule 607. Who may Impeach**

The credibility of a witness may be attacked by any party, including the party calling the witness.

### **Rule 608. Evidence of Character and Conduct of Witness**

**(a) Opinion and reputation evidence of character.** -- The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations:

- (1) The evidence may refer only to character for truthfulness or untruthfulness, and
- (2) Evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

**(b) Specific instances of conduct.** -- Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of a crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the Court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness

- (1) Concerning the witness' character for truthfulness or untruthfulness, or
- (2) Concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination with respect to matters that relate only to character for truthfulness.

**Rule 609. Impeachment by Evidence of Conviction of Crime**  
*(this rule applies only to witnesses with prior convictions)*

(a) **General rule.** For the purpose of attacking the character for truthfulness of a witness,

(1) Evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) Evidence that any witness has been convicted of a crime shall be admitted regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.

(b) **Time limit.** Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) **Effect of pardon, annulment, or certificate of rehabilitation.** Evidence of a conviction is not admissible under this rule if

(1) The conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime that was punishable by death or imprisonment in excess of one year, or

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

(d) **Juvenile adjudication.** Evidence of juvenile adjudication is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

**Rule 610. Religious Beliefs or Opinions**

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.

## **Rule 611. Mode and Order of Interrogation and Presentation**

**(a) Control by Court.** -- The Court shall exercise reasonable control over questioning of witnesses and presenting evidence so as to (1) make the questioning and presentation effective for ascertaining the truth, (2) to avoid needless use of time, and (3) protect witnesses from harassment or undue embarrassment.

**(b) Cross examination.** --

*(1) The scope of cross examination shall not be limited to the scope of the direct examination, but may inquire into any relevant facts or matters contained in the witness' statement, including all reasonable inferences that can be drawn from those facts and matters, and may inquire into any omissions from the witness statement that are otherwise material and admissible.*

*(2) An attorney who asks a cross examination question requiring an answer outside the scope of the witness' affidavit is bound by the response given by the witness.*

**(c) Leading questions.** -- *Leading questions should not be used on direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily, leading questions are permitted on cross examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, leading questions may be used.*

**(d) Redirect/Recross.** -- *After cross examination, additional questions may be asked by the direct examining attorney, but questions must be limited to matters raised by the attorney on cross examination. Likewise, additional questions may be asked by the cross examining attorney on recross, but such questions must be limited to matters raised on redirect examination and should avoid repetition.*

**(e) Permitted Objections.** -- *The following are examples of objections permitted during a trial:*

- (1) Improper Leading Question*
- (2) Irrelevant Evidence*
- (3) Non-responsive Answer*
- (4) Hearsay*
- (5) Improper Opinion or Conclusion*
- (6) Unfair Extrapolation (Beyond the Scope of Witness' Affidavit) [Please Consult Rules of Competition]*
- (7) Argumentative*
- (8) Asked and Answered*
- (9) Failure to Lay a Proper Foundation*
- (10) Beyond the Scope of Cross or Redirect Examination*
- (11) Facts Not in Evidence (Raised Following Closing Argument) [Please Consult Rules of Competition]*

*Teams are not precluded from raising additional evidence objections so long as they are consistent with the Rules of Competition and these Rules of Evidence.*

**(f) Permitted Motions.** - *The only motion permissible is one requesting the judge to strike testimony following a successful objection to its admission.*

**(g) Court Questioning.** - *The presiding judge has discretion to ask questions and seek to clarify facts during the course of the trial.*

### **Rule 612. Writing Used to Refresh Memory**

If a written statement is used to refresh the memory of a witness either while or before testifying, the Court shall determine that the adverse party is entitled to have the writing produced for inspection. The adverse party may cross examine the witness on the material and introduce into evidence those portions which relate to the testimony of the witness.

### **Rule 613. Prior Statements of Witnesses**

**(a) Examining witness concerning prior inconsistent statement.** -- In examining a witness concerning a prior inconsistent statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

**(b) Extrinsic evidence of prior inconsistent statement of witness.** -- Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate.

### **Rule 615. Sequestration of Witnesses**

*Non-party witnesses are presumed sequestered but may remain in the court room during trial.*

## **ARTICLE VII. OPINIONS AND EXPERT TESTIMONY**

### **Rule 701. Opinion Testimony by Lay Witness**

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are

- (a) Rationally based on the perception of the witness and
- (b) Helpful to a clear understanding of the witness' testimony or the determination of a fact in issue; and
- (c) Not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

### **Rule 702. Testimony by Experts**

*(generally, experts will be specifically identified in the case materials)*

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if

- (1) The testimony is based upon sufficient facts or data,
- (2) The testimony is the product of reliable principles and methods, and
- (3) The witness has applied the principles and methods reliably to the facts of the case.

### **Rule 703. Bases of Opinion Testimony by Experts**

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

### **Rule 704. Opinion on Ultimate Issue**

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

### **Rule 705. Disclosure of Facts or Data Underlying Expert Opinion**

The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the Court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross examination.

## **ARTICLE VIII. HEARSAY**

### **Rule 801. Definitions**

The following definitions apply under this article:

(a) **Statement.** -- A "statement" is an oral or written assertion or nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) **Declarant.** -- A "declarant" is a person who makes a statement.

(c) **Hearsay.** -- "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) **Statements which are not hearsay.** A statement is not hearsay if:

(1) **Prior statement by witness.** The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement and the statement is

(A) Inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or

(B) Consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or

(C) One of identification of a person made after perceiving the person; or

(2) **Admission by a party-opponent.** The statement is offered against a party and is

(A) The party's own statement in either an individual or a representative capacity or

(B) A statement of which the party has manifested an adoption or belief in its truth, or

(C) A statement by a person authorized by the party to make a statement concerning the subject, or

(D) A statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or

(E) A statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

### **Rule 802. Hearsay Rule**

Hearsay is not admissible, except as provided by these rules.

### **Rule 803. Hearsay Exceptions, Availability of Declarant Immaterial**

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) **Present sense impression.** -- A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) **Excited utterance.** -- A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

**(3) Then existing mental, emotional, or physical conditions.** -- A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

**(4) Statements for purposes of medical diagnosis or treatment.** -- Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

**(5) Recorded Recollection.** -- A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

**(6) Records of regularly conducted activity.** -- A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

**(8) Public Records and Reports.** -- Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal case, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

**(18) Learned treatises.** -- To the extent called to the attention of an expert witness upon cross examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice.

**(21) Reputation as to character.** -- Reputation of a person's character among associates or in the community.

**(22) Judgment of previous conviction.** -- Evidence of a judgment finding a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused.

#### **Rule 804. Hearsay Exceptions, Declarant Unavailable**

**(a) Definition of unavailability.** “Unavailability as a witness” includes situations in which the declarant –

- (1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant’s statement; or
- (2) Persists in refusing to testify concerning the subject matter of the declarant’s statement despite an order of the court to do so; or
- (3) Testifies to a lack of memory of the subject matter of the declarant’s statement; or
- (4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
- (5) Is absent from the hearing and the proponent of a statement has been unable to procure the declarant’s attendance (or in the case of a hearsay exception under subdivision (b) (2), (3), or (4), the declarant’s attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

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

- (1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.
- (2) Statement under belief of impending death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant’s death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statement of personal or family history.

(A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or

(B) A statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(6) Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

#### **Rule 805. Hearsay within Hearsay**

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