THE COURTS

Title 204—JUDICIAL SYSTEM GENERAL PROVISIONS

PENNSYLVANIA COMMISSION ON SENTENCING

[204 PA. CODE CH. 303]

Adoption of Sentencing Guidelines

The Pennsylvania Commission on Sentencing is hereby submitting revised sentencing guidelines, (204 Pa. Code § 303.1—§ 303.18) for consideration by the General Assembly. The Commission adopted the revised sentencing guidelines on June 6, 1996, published them for comment at 26 Pa.B. 3404 (July 20, 1996), and held public hearings on August 29, 1996, September 4, 1996 and September 6, 1996. The Commission modified the proposed guidelines on December 5, 1996, published them for comment at 27 Pa.B. 289 (January 18, 1997), and held a public hearing on February 21, 1997. Immediately following the public hearing, the Commission adopted the revised sentencing guidelines found in Annex A.

As specified by statute, the General Assembly has ninety days from the date of this publication [March 15, 1997] to review the revisions to the sentencing guidelines (42 Pa.C.S. § 2155). Unless rejected by concurrent resolution during that period, these revised guidelines will become effective on Friday, June 13, 1997 and will apply to all offenses committed on or after that date.

SENATOR DAVID HECKLER
Chair

Commentary on Annex A

Reasons for Changes to the Guidelines

After an extensive multi-year review of the guidelines, a revised set of sentencing guidelines became effective on August 12, 1994. The Commission is proposing changes to these sentencing guidelines for the following reasons. First, there were concerns brought to the attention of the Commission that the revised recommendations for violent offenders, particularly for repeat violent offenders, were not harsh enough. The Commission evaluated this issue and agreed that some violent offenders warranted more severe sentences than the current guidelines recommend. The second reason for changing the guidelines is to address the new legislation passed since the revised guidelines took effect. In January, 1995, Governor Tom Ridge convened a Special Session on Crime [Special Session No. 1] that, along with the regular legislative session [1995-1996 Session], resulted in the passage of a number of new laws. One of the most notable was the adoption of the '3 strikes' legislation that revised the mandatory sentences for violent offenders. The Commission is proposing changes that provide some consistency between the '3 strikes' legislation and the guidelines. The third reason for some of the proposed changes is to address areas of inconsistency in the guidelines. The proposed changes provide better consistency in how offenses are viewed with respect to Offense Gravity Score ranking (OGS) and Prior Record Score (PRS) calculations.

Revisions to Sentence Recommendations

1. *More severe sentences for violent offenders.* The current guidelines focus on providing harsher penalties for violent offenders while recommending community based alternatives for certain non-violent offenders. However, concerns have been raised that the sentences for certain violent offenders, particularly repeat violent offenders, are not harsh enough. The Commission re-evaluated the recommendations for violent offenders and decided that the concerns were justified and thus, is proposing more severe sentence recommendations for violent offenders. Some of the violent offenses have been re-ranked in order to address this issue. The Commission is also proposing harsher sentence recommendations in response to legislative changes that increased the statutory limit for Murder 3 and inchoate murder (attempts, solicitations and conspiracies) and that re-drafted the sexual assault statute.

2. *'3 strikes' offenses.* In 1995 the legislature passed, and the Governor signed, a '3 strikes' statute that provides harsher mandatory penalties for certain violent offenders. To provide some consistency between the '3 strikes' legislation and the guideline recommendations, the Commission decided to include the offenses designated as "crimes of violence" in the '3 strikes' legislation in the upper tier of the guidelines that recommend state incarceration in all cases. The major change involves assigning a higher Offense Gravity Score ranking to the offense of Burglary (structure adapted for overnight accommodation/person present) so that it is ranked in the upper tier of the guidelines with the most serious offenses.

3. *More severe sentences for Repeat Felony 1/Felony 2 (RFEL) offenders.* The current guidelines include a Prior Record Score category for Repeat Felony 1/Felony 2 (RFEL) offenders. This category was created to isolate the more serious felony offenders. The Commission is proposing an increase in sentence recommendations for such offenders.

4. *Revision of RS-RIP cells.* The current guideline recommendation for four cells of the matrix is RS-RIP (i.e.—sentence recommendations limited to restorative sanctions and restrictive intermediate punishments), which recommends up to 30 days in a restrictive intermediate punishment program but does not recommend incarceration. The Commission proposes that these recommendations be changed to RS-1, thus expanding the cells to include 30 days of incarceration. This is consistent with Commission policy that has established a rough equivalency between restrictive intermediate punishment and incarceration in areas of the matrix that allow for incarceration. That is, the maximum length of time in an RIP program is the same as the maximum length of confinement. Allowing 30 days of incarceration also provides more flexibility for counties that do not have Intermediate Punishment sentencing authority or resources to support RIP programs.

5. *Expand sentencing levels.* Current guidelines provide four sentencing levels which target certain types of offenders and describe sentencing options available for each level. The proposed guidelines increase to five the number of sentencing levels. Previous Level 4 is proposed as Level 5, and the newly proposed Level 4 generally includes those offenders who by statute are permitted to serve a state sentence in a county facility.

6. *Limit Level 1 recommendations.* Current guidelines provide a standard sentence recommendation of RS for offenders with an OGS of 1 or 2 and PRS of 0 or 1. The proposed guidelines would continue to provide RS as a

standard recommendation for offenders who have an OGS=1 or 2 and PRS=0, but would expand the recommendations for offenders with a PRS=1 to include an incarceration option.

7. *Permit Level 4 RIP exchange.* Currently, the guidelines allow for an exchange of RIP for certain offenders who would otherwise receive a county jail sentence (i.e. maximum sentence under two years and minimum sentence under one year). The proposed change would allow an RIP exchange for certain state offenders who are eligible to serve their sentence in a county jail (i.e. maximum sentence under five years and minimum sentence under 2.5 years). This proposed change is indicated by the dark grey areas of the grid and referenced as Level 4.

8. *Deadly Weapon Enhancement (DWE).* Statute requires the guidelines to provide for enhanced sentences if the offender possessed a deadly weapon during the commission of the offense. Currently the amount of time is based upon the seriousness of the offense. The Commission is proposing that the DWE also make a distinction between offenders who use vs. possess the weapon during the commission of the offense.

Revisions to the Offense Gravity Score

1. *Redefine OGS categories.* The Commission is proposing an increase in the number of Offense Gravity Score categories from thirteen to fourteen. Included in this increase are two additional categories in the upper tier of the guidelines where recommendations are limited to state incarceration and one less Offense Gravity Score category in the area of the guidelines where recommendations are generally limited to county incarceration.

2. *New/Amended Offenses.* Legislation passed since the last adoption of sentencing guidelines [May 1994] and the end of the 1996 Session [December 1996] created new offenses or amended previously existing offenses. Additionally, due to the changes in the Offense Gravity Score categories, a number of offenses previously assigned OGS scores have been changed. The proposed OGS and PRS assignment for offenses considered by the Commission are included as part of the text of the proposed guidelines.

3. *Omnibus Offense Gravity Score Policy.* The Commission has a policy that provides for an Omnibus Offense Gravity Score to be applied to new offenses or offenses that have a change in the statutory grading. The omnibus score, which is based upon the statutory grade of the offense, remains in place until the Commission has the opportunity to rank the offense. Recently, however, the General Assembly increased the statutory grading of some offenses (e.g. attempted murder was changed from a felony 2 to a felony 1) that ended up resulting in a lower recommendation based upon the omnibus score. The Commission is proposing a change to the omnibus policy to assure that when the statutory grading for an offense is raised, that the omnibus score for the offense does not result in a lower score, and thus lower recommendation, than what currently exists.

Revisions to the Prior Record Score

1. *Assignment of points.* The Commission is proposing changes in how offenses are counted for the purposes of the Prior Record Score (PRS). These changes provide better consistency between how these offenses are counted in the Prior Record Score and how they are ranked for the Offense Gravity Score. Under the proposal, 4 points are assigned to all completed "three strikes" offenses. Some of these violent offenses, in particular Arson (F1) and Robbery (F1) are subcategorized for Prior Record Score purposes. Three points are assigned to all inchoates of 4 point offenses, certain drug felonies involving 50 grams or more, and all F1 offenses not otherwise designated. Two points are assigned to the remaining drug felonies and all F2 offenses not otherwise designated. One point is assigned to all F3 offenses, and an expanded list of designated Misdemeanor 1 offenses. The M1 offenses, chosen due to the serious nature of the offenses, fall into three categories: M1 offenses involving weapons, M1 offenses involving death or danger to children, and M1 Driving Under the Influence. All other misdemeanors, including M2 or M3 weapons misdemeanors, are designated as "Other Misdemeanors" and scored collectively based upon the total number of misdemeanors involved.

2. *Prior juvenile offenses.* The Commission is proposing two changes concerning the use of prior juvenile adjudications. First, in accordance with the recent legislative change that allows prior juvenile adjudications to be considered in the sentencing for misdemeanor offenses (Act 13 of 1995), the Commission is proposing a change to the juvenile adjudication criteria that would also allow prior juvenile offenses to count when the currently sentenced offense is either a felony or misdemeanor. Currently, they can only count when the current offense is a felony. Second, the Commission is proposing a change to the juvenile lapsing provision that includes the completed '3-strikes' offenses (i.e.—4 point PRS offenses) in the list of juvenile offenses that would never lapse for the purposes of Prior Record Score calculation.

3. *Former Pennsylvania offenses.* The Commission is proposing several changes in Prior Record Score miscellaneous provisions. The first proposal is to reinsert in the text a phrase contained in the 1991 guidelines but inadvertently omitted from the 1994 guidelines: "When a prior conviction is for a crime which has a summary grade, and the grade of the conviction is unknown, the prior conviction shall not be counted in the Prior Record Score."

4. *Excluded offenses.* The Commission also proposes a change to the policy regarding excluded offenses. The current policy holds that if a previous conviction increases the maximum sentence applicable to the current offense, the previous conviction is excluded from calculation of the Prior Record Score. The proposal changes the text by replacing maximum sentence applicable to the current offense with grade of a subsequent offense, a phrase similar to that used in the original text of the guidelines. The original text was revised in 1986, primarily to accommodate drug convictions. However, the text was revised again in 1988, at which time the drug convictions were excluded from the policy. This proposal simplifies the policy by returning to the original term. The proposal would also extend the policy so that any previous conviction that increases the grade of an offense, either a current or previous offense, would be excluded from calculation of the Prior Record Score. This proposal removes the 'double counting' of a conviction, which was the premise of this policy.

Definition of Transaction

The current guidelines utilize the concept of transaction to determine how the prior record is applied to multiple offenses and how current multiple offenses are counted in future Prior Record Scores. The definition of transaction is important as it influences current and future sentence recommendations. The current definition of transaction has resulted in confusion in the field and has been interpreted in different ways among the counties. Thus, the Commission proposes deleting the current definition

of transaction and adopting a policy which considers each conviction separately and takes into account the sentence previously imposed in determining the Prior Record Score. Under the proposal, all prior convictions are counted in the Prior Record Score, except those which did not increase a term of probation, intermediate punishment, partial or total confinement. In determining the sentence recommendation, the Prior Record Score is attached to each conviction offense.

Guideline recommendations for Driving Under the Influence (DUI) and Homicide by Vehicle while DUI

Currently, the only two offenses that do not have an Offense Gravity Score (OGS) assigned to them are Driving Under the Influence (75 Pa.C.S. § 3731) and Homicide by Vehicle while DUI (75 Pa.C.S. § 3735). The guideline recommendation for these two offenses has always been application of the mandatory statute governing them. The proposed change would assign an OGS = 2 to Driving Under the Influence when it is a M2 (1st or 2nd conviction) and an OGS = 3 when it is a M1 (3rd or subsequent conviction). An OGS = 8 would be assigned to Homicide by Vehicle while DUI. As always, any mandatory statute governing these offenses would supersede the guideline recommendations.

The Commission also is proposing the elimination of the subcategorization of DUI according to whether there is serious bodily injury or not, in light of the new offense of Aggravated Assault by Vehicle while DUI. The proposed OGS scores for Homicide by Vehicle and Involuntary Manslaughter when there is also a conviction for DUI were raised to be consistent with the recommendation for Aggravated Assault.

It should be noted that with incorporation of DUI into the sentencing guidelines, the Prior Record Score, based on previous DUI and non-DUI offenses, will be used to determine a sentence recommendation for a current conviction for DUI.

Multiple offenses overlapping different guidelines

Current guideline policy states that the guidelines apply to offenses that occur on or after the effective date of the guidelines. When there are amendments to the guidelines, offenses that occur before the effective date of the amendments are subject to the prior guidelines, while offenses that occur after the effective date of the amendments are subject to the new guidelines. When there are multiple offenses and the dates of the offenses are unknown, there has been no guideline policy. Thus, the Commission is proposing a policy that would indicate that the most recent guidelines apply if the specific dates are undetermined.

Technical changes

The Commission proposes three technical changes to the guidelines: 1) a clarification that the guidelines do apply to persons who plead guilty or nolo contendere, not just to persons found guilty through trial; 2) that the Guideline Sentence Form be submitted to the Commission within 30 days, rather than 20 days, of sentencing; and 3) clarification that the original guidelines were effective July 22, 1982 and were invalidated due to a procedural technicality, but that new guidelines did become effective again April 25, 1988.

Annex A

TITLE 204. JUDICIAL SYSTEM GENERAL PROVISIONS

PART VIII. CRIMINAL SENTENCING

CHAPTER 303. SENTENCING GUIDELINES

§ 303.1. Sentencing guidelines standards.

(a) The court shall consider the sentencing guidelines in determining the appropriate sentence for offenders convicted of, or pleading guilty or nolo contendere to, felonies and misdemeanors.

(b) The sentencing guidelines do not apply to sentences imposed as a result of the following: accelerated rehabilitative disposition; disposition in lieu of trial; direct or indirect contempt of court; violations of protection from abuse orders; revocation of probation, intermediate punishment or parole.

(c) The sentencing guidelines shall apply to all offenses committed on or after the effective date of the guidelines. Amendments to the guidelines shall apply to all offenses committed on or after the date the amendment becomes part of the guidelines.

(1) When there are current multiple convictions for offenses that overlap two sets of guidelines, the former guidelines shall apply to offenses that occur prior to the effective date of the amendment and the later guidelines shall apply to offenses that occur on or after the effective date of the amendment. If the specific dates of the offenses cannot be determined, then the later guidelines shall apply to all offenses.

(2) The initial sentencing guidelines went into effect on July 22, 1982 and applied to all crimes committed on or after that date. Amendments to the guidelines went into effect in June 1983, January 1986 and June 1986. On October 7, 1987 the Pennsylvania Supreme Court invalidated the guidelines due to a procedural error that occurred in 1981 when the legislature rejected the first set of guidelines. New guidelines were drafted and became effective on April, 25, 1988. Amendments to the guidelines went into effect August 9, 1991 and December 20, 1991. A revised set of guidelines became effective August 12, 1994. The current set of guidelines become effective June 13, 1997.

(d) In every case in which the court imposes a sentence for a felony or misdemeanor, the court shall make as a part of the record, and disclose in open court at the time of sentencing, a statement of the reason or reasons for the sentence imposed. In every case where the court imposes a sentence outside the sentencing guidelines, the court shall provide a contemporaneous written statement of the reason or reasons for the deviation from the guidelines. These reasons shall be recorded on the Guideline Sentence Form, a copy of which is forwarded to the Commission on Sentencing.

(e) A Pennsylvania Commission on Sentencing Guideline Sentence Form shall be completed at the court's direction and shall be made a part of the record no later than 30 days after the date of each sentencing and a copy shall be forwarded to the Pennsylvania Commission on Sentencing.

§ 303.2. Procedure for determining the guideline sentence.

(a) The procedure for determining the guideline sentence shall be as follows:

(1) Determine the Offense Gravity Score as described in §§ 303.3 and 303.15.

(2) Determine the Prior Record Score as described in §§ 303.4—303.8.

(3) Determine the guideline sentence recommendation as described in §§ 303.9—303.14, including Deadly Weapon Enhancement and Youth/School Enhancement (§ 303.10), and aggravating or mitigating circumstances (§ 303.13).

§ 303.3. Offense gravity score—general.

(a) An Offense Gravity Score is given for each offense. The Offense Gravity Scores are located in § 303.15.

(b) Subcategorized offenses. Certain offenses are subcategorized and scored by the Commission according to the particular circumstances of the offense. The court determines which Offense Gravity Score, located in § 303.15, applies. These offenses are designated by an asterisk [*].

(c) Inchoate offenses. Inchoate offenses are scored as follows:

(1) Convictions for attempt, solicitation, or conspiracy to commit a Felony 1 offense receive an Offense Gravity Score of one point less than the offense attempted, solicited, or which was the object of the conspiracy.

(2) Convictions for attempt, solicitation, or conspiracy to commit any offense which is not a Felony 1 offense, receive the Offense Gravity Score of the offense attempted, solicited, or which was the object of the conspiracy.

(3) Convictions for attempt, solicitation, or conspiracy to commit any offense under The Controlled Substance, Drug, Device and Cosmetic Act (35 P. S. §§ 780-101—780-144) receive the Offense Gravity Score of the offense attempted, solicited, or which was the object of the conspiracy.

(4) Exception for inchoate murder convictions. Convictions for attempt, solicitation, or conspiracy to commit murder receive the Offense Gravity Score of 14 if there is serious bodily injury and 13 if there is no serious bodily injury.

(d) Ethnic Intimidation. Convictions for Ethnic Intimidation (18 Pa. C.S. § 2710) receive an Offense Gravity Score that is one point higher than the offense which was the object of the Ethnic Intimidation. When the object offense is Murder of the Third Degree, a conviction for Ethnic Intimidation receives the highest Offense Gravity Score.

(e) Violations of The Controlled Substance, Drug, Device and Cosmetic Act (35 P. S. §§ 780-101—780-144). If any mixture or compound contains any detectable amount of a controlled substance, the entire amount of the mixture or compound shall be deemed to be composed of the controlled substance. If a mixture or compound contains a detectable amount of more than one controlled substance, the mixture or compound shall be deemed to be composed entirely of the controlled substance which has the highest Offense Gravity Score.

(1) Exception for prescription pills. The exception to subsection (e) above is for violations of 35 P. S. § 780-113 (a)(12) (relating to fraudulent prescriptions) when prescription pills of Schedule II are involved. For such violations it is the number of pills rather than the amount of the controlled substance which is considered in determining the Offense Gravity Score. (See § 303.15.)

(f) Omnibus Offense Gravity Scores. The Omnibus Offense Gravity Score is applied when the offense is not otherwise listed in § 303.15, or when the grade of an offense listed in § 303.15 has changed, unless application of this section would result in a lower Offense Gravity Score for an increased grading of the offense. The Omnibus Offense Gravity Scores are provided below and in the listing at § 303.15:

Felony 1	8
Felony 2	7
Felony 3	5
Felonies not subclassified by the General Assembly	5
Misdemeanor 1	3
Misdemeanor 2	2
Misdemeanor 3	1
Misdemeanors not subclassified by the General Assembly	1

§ 303.4. Prior Record Score—categories.

(a) Prior Record Score categories. Determination of the correct Prior Record Score category under this section is based on the type and number of prior convictions (§ 303.5) and prior juvenile adjudications (§ 303.6). There are eight Prior Record Score categories: Repeat Violent Offender [REVOC], Repeat Felony 1 and Felony 2 Offender [RFEL], and point-based categories of 0, 1, 2, 3, 4 and 5.

(1) Repeat Violent Offender Category [REVOC]. Offenders who have two or more previous convictions or adjudications for four point offenses (§ 303.7(a)(1) and § 303.15) and whose current conviction carries an Offense Gravity Score of 9 or higher shall be classified in the Repeat Violent Offender Category.

(2) Repeat Felony 1/Felony 2 Offender Category [RFEL]. Offenders who have previous convictions or adjudications for Felony 1 and/or Felony 2 offenses which total 6 or more in the prior record, and who do not fall within the Repeat Violent Offender Category, shall be classified in the repeat Felony 1/Felony 2 Offender Category.

(3) Point-based Categories (0-5). Offenders who do not fall into the REVOC or RFEL categories shall be classified in a Point-based Category. The Prior Record Score shall be the sum of the points accrued based on previous convictions or adjudications, up to a maximum of five points.

§ 303.5. Prior Record Score—prior convictions.

(a) All prior convictions shall be counted in the Prior Record Score, except certain prior convictions from sentences described in (b).

(b) When a sentence for a prior conviction was imposed totally concurrent to another sentence, or was served totally concurrent to another sentence, only the conviction with the greatest number of points under § 303.7 shall be counted.

(c) Totally concurrent. A conviction is considered totally concurrent if the sentence imposed did not increase the term of probation, intermediate punishment, partial or total confinement of any sentence.

§ 303.6. Prior Record Score—prior juvenile adjudications.

(a) Juvenile adjudication criteria. Prior juvenile adjudications are counted in the Prior Record Score when the following criteria are met:

(1) The juvenile offense occurred on or after the offender's 14th birthday, and

(2) There was an express finding by the juvenile court that the adjudication was for a felony or one of the Misdemeanor 1 offenses listed in § 303.7(a)(4).

(b) Only the most serious juvenile adjudication of each prior disposition is counted in the Prior Record Score. No other prior juvenile adjudication shall be counted in the Prior Record Score.

(c) Lapsing of juvenile adjudications. Prior juvenile adjudications for four point offenses listed in § 303.7(a)(1) shall always be included in the Prior Record Score, provided the criteria in subsection (a) above are met:

(1) All other juvenile adjudications not identified above in subsection (a) lapse and shall not be counted in the Prior Record Score if the offender was 28 years of age or older at the time the current offense was committed.

(2) Nothing in this section shall prevent the court from considering lapsed prior adjudications at the time of sentencing.

§ 303.7. Prior Record Score—guideline points scoring.

(a) Scoring of prior convictions and adjudications is provided below and in the listing of offenses at § 303.15:

(1) Four Point Offenses. Four points are added for each prior conviction or adjudication for the following offenses:

Murder, and attempt, solicitation or conspiracy to commit Murder
Voluntary Manslaughter
Drug Delivery Resulting in Death
Aggravated Assault (causing serious bodily injury)
Kidnapping
Rape
Involuntary Deviate Sexual Intercourse
Arson (resulting in bodily injury or a person inside at start)
Burglary (adapted structure, person present)
Robbery (inflicts serious bodily injury)
Robbery of Motor Vehicle (inflicts serious bodily injury)
Ethnic Intimidation to any Felony 1 offense

(2) Three Point Offenses. Three points are added for each prior conviction or adjudication for the following offenses:

All other Felony 1 offenses not listed in § 303.7 (a)(1).
All inchoates to offenses listed in § 303.7 (a)(1).
Sexual Assault
Aggravated Indecent Assault
Violation of 35 P. S.§§ 780-113(a)(12)(14) or (30) involving 50 grams or more, including inchoates involving 50 grams or more.

(3) Two Point Offenses. Two points are added for each prior conviction or adjudication for the following offenses:

All other Felony 2 offenses not listed in § 303.7 (a)(1) or (a)(2).
All felony drug violations not listed in § 303.7 (a)(2), including inchoates.

(4) One Point Offenses. One point is added for each prior conviction or adjudication for the following offenses:

All other felony offenses not listed in § 303.7 (a)(1), (a)(2) or (a)(3).
Any of the following Misdemeanor 1 offenses that involve weapons:
Possessing Instruments of Crime
Prohibited Offensive Weapons
Possession of Weapon on School Property
Possession of Firearm or Other Dangerous Weapon in Court Facility
Violations of the Pennsylvania Uniform Firearms Act

Any of the following Misdemeanor 1 offenses that involve death or danger to children:
Involuntary Manslaughter
Simple Assault (against child by adult)
Luring a Child into a Vehicle
Indecent Assault (involving minors)
Indecent Exposure (person less than age 16 present)
Endangering Welfare of Children
Dealing in Infant Children
Corruption of Minors (of a sexual nature)
Homicide by Vehicle

Driving Under the Influence of Alcohol or Controlled Substance when the grade is a Misdemeanor 1.

(5) Other Misdemeanor Offenses. All other misdemeanor offenses are designated by an "m" in the offense listing at § 303.15, and are scored as follows:

(i) One point is added if the offender was previously convicted of two or three misdemeanors.

(ii) Two points are added if the offender was previously convicted of four to six misdemeanors.

(iii) Three points are added if the offender was previously convicted of seven or more misdemeanors.

§ 303.8. Prior Record Score—miscellaneous.

(a) Prior convictions and adjudications of delinquency. A prior conviction means "previously convicted" as defined in 42 Pa.C.S. § 2154(a)(2). A prior adjudication of delinquency means "previously adjudicated delinquent" as defined in 42 Pa.C.S. § 2154(a)(2). In order for an offense to be considered in the Prior Record Score, both the commission of and conviction for the previous offense must occur before the commission of the current offense.

(b) Inchoate offenses. Unless otherwise provided in § 303.7 or § 303.15, a prior conviction or adjudication of delinquency for criminal attempt, criminal solicitation or criminal conspiracy is scored under § 303.7 based upon the grade of the inchoate offense.

(c) Ethnic Intimidation. Unless otherwise provided in § 303.7 or § 303.15, a prior conviction or adjudication of delinquency for Ethnic Intimidation is scored under § 303.7 based upon the grade of the Ethnic Intimidation.

(d) Former Pennsylvania offenses.

(1) A prior conviction or adjudication of delinquency under former Pennsylvania law is scored as a conviction for the current equivalent Pennsylvania offense.

(2) When there is no current equivalent Pennsylvania offense, prior convictions or adjudications of delinquency are scored under § 303.7 based on the grade of the offense. When a prior conviction or adjudication of delinquency was for a felony, but the grade of the felony is unknown, it shall be treated as a Felony 3. When a prior conviction was for a misdemeanor, but the grade of the misdemeanor is unknown, it shall be treated as a Misdemeanor 3. When it cannot be determined if the prior conviction was a felony or a misdemeanor, it shall be treated as a Misdemeanor 3. When a prior conviction is for a crime which has a summary grade, and the grade of the conviction is unknown, the prior conviction shall not be counted in the Prior Record Score.

(e) A prior conviction or adjudication of delinquency for an offense which was misgraded is scored as a conviction for the current equivalent Pennsylvania offense.

(f) Out-of-state, federal or foreign offenses.

(1) An out-of-state, federal or foreign conviction or adjudication of delinquency is scored as a conviction for the current equivalent Pennsylvania offense.

(2) When there is no current equivalent Pennsylvania offense, determine the current equivalent Pennsylvania grade of the offense based on the maximum sentence permitted, and then apply § 303.8(d)(2).

(g) Excluded offenses. The following types of offenses shall not be scored in the Prior Record Score:

(1) Summary offenses, violations of local ordinances, and dispositions under Pa.R.Crim.P. Rules 175-186 (relating to accelerated rehabilitative disposition), 35 P. S. § 780-117 (relating to probation without verdict) or 35 P. S. § 780-118 (relating to disposition in lieu of trial or criminal punishment), shall not be used in computing the Prior Record Score.

(2) Any prior conviction which contributed to an increase in the grade of a subsequent conviction shall not be used in computing the Prior Record Score.

§ 303.9. Guideline sentence recommendation: general.

(a) Basic sentence recommendations. Guideline sentence recommendations are based on the Offense Gravity Score and Prior Record Score. In most cases, the sentence recommendations are found in the Basic Sentencing Matrix (§ 303.16). The Basic Sentencing Matrix specifies a range of sentences (i.e.—standard range) that shall be considered by the court for each combination of Offense Gravity Score [OGS] and Prior Record Score [PRS].

(b) Deadly Weapon Enhancement sentence recommendations. If the court determines that an offender possessed a deadly weapon pursuant to § 303.10(a)(1), the court shall instead consider the DWE/Possessed Matrix (§ 303.17). If the court determines that an offender used a deadly weapon pursuant to § 303.10(a)(2), the court shall instead consider the DWE/Used Matrix (§ 303.18). Both enhanced matrices specify a range of sentences (i.e.—standard range) that shall be considered by the court for each combination of Offense Gravity Score [OGS] and Prior Record Score [PRS].

(c) Youth/School Enhancement sentence recommendations. If the court determines that an offender violated the drug act pursuant to § 303.10(b), 12 months shall be added to the lower limit of the standard range of the applicable sentencing matrix and 36 months shall be added to the upper limit of the standard range of the applicable sentencing matrix. The range of sentences (i.e.— standard range) shall be considered by the court for each combination of Offense Gravity Score [OGS] and Prior Record Score [PRS].

(d) Aggravated and mitigated sentence recommendations. To determine the aggravated and mitigated sentence recommendations, apply § 303.13.

(e) Numeric sentence recommendations. All numbers in sentence recommendations suggest months of minimum confinement pursuant to 42 Pa.C.S. § 9755(b) (partial confinement) and § 9756(b) (total confinement).

(f) Alphabetic sentence recommendations. RS in the sentence recommendation, an abbreviation for Restorative Sanctions, suggests use of the least restrictive, non-confinement sentencing alternatives described in 42 Pa.C.S. § 9753 (determination of guilt without further penalty), § 9754 (order of probation) and § 9758 (fine), and include § 9763 (intermediate punishment) when limited to restorative sanction programs (see § 303.12(a)(5)). 42 Pa.C.S.§ 9721(c) (mandatory restitution) is also included in RS. No specific recommendations are provided for periods of supervision or amounts of fines for these non-confinement sentencing alternatives. RIP in the sentence recommendation, an abbreviation for Restrictive Intermediate Punishments, suggests use of Restrictive Intermediate Punishments pursuant to § 303.12(a)(4).

(g) When the guideline sentence recommendation exceeds that permitted by 18 Pa.C.S. § 1103 and § 1104 (relating to sentence of imprisonment for felony and misdemeanor) and 42 Pa.C.S. § 9755(b) and § 9756(b) (relating to sentence of partial and total confinement) or other applicable statute setting the maximum term of confinement, then the statutory limit is the longest guideline sentence recommendation. For the purposes of the guidelines, the statutory limit is the longest legal minimum sentence, which is one-half the maximum allowed by law.

(h) Mandatory sentences. The court has no authority to impose a sentence less than that required by a mandatory minimum provision established in statute. When the guideline range is lower than that required by a mandatory sentencing statute, the mandatory minimum requirement supersedes the sentence recommendation. When the sentence recommendation is higher than that required by a mandatory sentencing statute, the court shall consider the guideline sentence recommendation.

(i) Driving Under the Influence. The court shall consider the sentence recommendations pursuant to this section (§ 303.9) for an offender convicted under 75 Pa.C.S. § 3731 (Driving Under the Influence of Alcohol or Controlled Substance). The court may use a qualified Restrictive Intermediate Punishment pursuant to § 303.12(a)(6) to satisfy the mandatory minimum requirement.

§ 303.10. Guideline sentence recommendations: enhancements.

(a) Deadly Weapon Enhancement.

(1) When the court determines that the offender possessed a deadly weapon during the commission of the current conviction offense, the court shall consider the DWE/Possessed Matrix (§ 303.17). An offender has possessed a deadly weapon if any of the following were on the offender's person or within his immediate physical control:

(i) Any firearm, (as defined in 42 Pa.C.S.§ 9712) whether loaded or unloaded, or

(ii) Any dangerous weapon (as defined in 18 Pa.C.S.§ 913), or

(iii) Any device, implement, or instrumentality designed as a weapon or capable of producing death or serious bodily injury where the court determines that the defendant intended to use the weapon to threaten or injure another individual.

(2) When the court determines that the offender used a deadly weapon during the commission of the current conviction offense, the court shall consider the DWE/Used Matrix (§ 303.18). An offender has used a deadly weapon if any of the following were employed by the offender in a way that threatened or injured another individual or in the furtherance of the crime:

(i) Any firearm, (as defined in 42 Pa.C.S.§ 9712) whether loaded or unloaded, or

(ii) Any dangerous weapon (as defined in 18 Pa.C.S.§ 913), or

(iii) Any device, implement, or instrumentality capable of producing death or serious bodily injury.

(3) There shall be no Deadly Weapon Enhancement for the following offenses:

Possessing Instruments of Crime
Prohibited Offensive Weapons
Possession of Weapon on School Property
Possession of Firearm or Other Dangerous Weapon in Court Facility
Simple Assault (18 Pa.C.S. § 2701(a)(2))
Aggravated Assault (18 Pa.C.S. § 2702(a)(4))
Violations of the Pennsylvania Uniform Firearms Act
Any other offense for which possession of a deadly weapon is an element of the statutory definition.

(4) The Deadly Weapon Enhancement shall apply to each conviction offense for which a deadly weapon is possessed or used.

(b) Youth/School Enhancement

(1) When the court determines that the offender either distributed a controlled substance to a person or persons under the age of 18 in violation of 35 P. S. § 780-114, or manufactured, delivered or possessed with intent to deliver a controlled substance within 1000 feet of a public or private elementary or secondary school, the court shall consider the range of sentences described in § 303.9(c).

(2) The Youth/School Enhancement only applies to violations of 35 P. S. § 780-113(a)(14) and (a)(30).

(3) The Youth/School Enhancement shall apply to each violation which meets the criteria above.

§ 303.11. Guideline sentence recommendation: sentencing levels.

(a) Purpose of sentence. In writing the sentencing guidelines, the Pennsylvania Commission on Sentencing strives to provide a benchmark for the judges of Pennsylvania. The sentencing guidelines provide sanctions proportionate to the severity of the crime and the severity of the offender's prior conviction record. This establishes a sentencing system with a primary focus on retribution, but one in which the recommendations allow for the fulfillment of other sentencing purposes including rehabilitation, deterrence, and incapacitation. To facilitate consideration of sentencing options consistent with the intent of the sentencing guidelines, the Commission has established five sentencing levels. Each level targets certain types of offenders, and describes ranges of sentencing options available to the court.

(b) Sentencing levels. The sentencing level is based on the standard range of the sentencing recommendation. Refer to § 303.9 to determine which sentence recommendation (i.e.—Basic, Deadly Weapon Enhancement or Youth/School Enhancement) applies. The descriptions of the five sentencing levels are as follows:

(1) Level 1—Level 1 provides sentence recommendations for the least serious offenders with no more than one prior misdemeanor conviction, such that the standard range is limited to Restorative Sanctions [RS]. The primary purpose of this level is to provide the minimal control necessary to fulfill court-ordered obligations. The following sentencing option is available:

Restorative Sanctions (see § 303.9(f))

(2) Level 2—Level 2 provides sentence recommendations for generally non-violent offenders and those with numerous less serious prior convictions, such that the standard range requires a county sentence but permits both incarceration and non-confinement. The standard range is defined as having an upper limit of less than 12 months and a lower limit of Restorative Sanctions [RS]. The primary purposes of this level are control over the offender and restitution to victims. Treatment is recommended for drug dependent offenders. The following sentencing options are available:

Total confinement in a county facility under a county sentence (see 61 P. S. § 331.17).

Partial confinement in a county facility

Restrictive Intermediate Punishments (see § 303.12(a) for eligibility criteria)

Restorative Sanctions (see § 303.9(f))

(3) Level 3—Level 3 provides sentence recommendations for serious offenders and those with numerous prior convictions, such that the standard range requires incarceration or a Restrictive Intermediate Punishment [RIP], but in all case permits a county sentence. The standard range is defined as having a lower limit of incarceration of less than 12 months. The primary purposes of this level are retribution and control over the offender. If eligible, treatment is recommended for drug dependent offenders in lieu of incarceration. The following sentencing options are available:

Total confinement in a state facility.

Total confinement in a state facility, with participation in the State Motivational Boot Camp (see § 303.12(b) for eligibility criteria)

Total confinement in a county facility under a state or county sentence (see 61 P. S. § 331.17).

Partial confinement in a county facility.

Restrictive Intermediate Punishment (see § 303.12(a) for eligibility criteria)

(4) Level 4—Level 4 provides sentence recommendations for very serious offenders and those with numerous prior convictions, such that the standard range requires state incarceration but permits it to be served in a county facility. The standard range is defined as having a lower limit of incarceration of greater than 12 months but less than 30 months, but limited to offenses with an Offense Gravity Score of less than 9. The primary purposes of the sentencing options at this level are punishment and incapacitation. However, it is recognized that certain offenders at this level are permitted to serve a sentence of total confinement in a county facility, and some nonviolent offenders may benefit from drug and alcohol treatment. The following sentencing options are available:

Total confinement in a state facility.

Total confinement in a state facility, with participation in the State Motivational Boot Camp (see § 303.12(b) for eligibility criteria)

Total confinement in a county facility as a state offender. (see 61 P. S. § 331.17).

Restrictive Intermediate Punishment (see § 303.12.(a) for eligibility criteria)

(5) Level 5—Level 5 provides sentence recommendations for the most violent offenders and those with major drug convictions, such that the conviction has an Offense Gravity Score of 9 or greater or the standard range requires state incarceration in a state facility. The standard range in such a case is defined as having a lower limit of 30 months or greater. The primary purposes of the sentencing options at this level are punishment commensurate with the seriousness of the criminal be-

havior and incapacitation to protect the public. The following sentencing options are available:

Total confinement in a state facility.

Total confinement in a state facility, with participation in the State Motivational Boot Camp (see § 303.12(b) for eligibility criteria)

§ 303.12. Guideline sentence recommendations: sentencing programs.

(a) County intermediate punishment program.

(1) Eligibility.

(i) The following regulations and statutes govern operation of and eligibility for county intermediate punishment programs:

37 Pa. Code § 451.1 et seq.

42 Pa.C.S. § 9729, § 9763, and § 9773.

61 P. S. § 1101—§ 1114.

204 Pa.Code Chapter 303.

(ii) Sentence recommendations which include an option of Restrictive Intermediate Punishments for certain offenders are designated as shaded cells in the guideline matrices.

(2) The county intermediate punishment plan provides a mechanism to advise the court of the extent and availability of services and programs authorized in the county. This plan includes information on the appropriate classification and use of county programs based on program-specific requirements.

(3) Intermediate punishments classifications. In order to incorporate intermediate punishment programs into the sentencing levels, the Commission has classified intermediate punishment programs as Restrictive Intermediate Punishments (RIP) and restorative sanction programs. Additionally, specific intermediate punishment programs have been identified in legislation (42 Pa.C.S. § 9763(c)) and regulation (37 Pa. Code § 451.52) as authorized sentences for conviction under 75 Pa.C.S. § 3731(e) (relating to Driving Under the Influence of Alcohol or Controlled Substance); the Commission has classified these programs as qualified Restrictive Intermediate Punishments.

(4) Restrictive Intermediate Punishments (RIP). Restrictive Intermediate Punishments are defined as programs that provide for strict supervision of the offender. Restrictive Intermediate Punishments may be imposed only if the court has been granted sentencing authority by the Pennsylvania Commission on Crime and Delinquency (pursuant to 42 Pa.C.S. § 9729). The county intermediate punishment board is required to develop assessment and evaluation procedures to assure the appropriate targeting of offenders. All programs must meet the minimum standards provided in the Pennsylvania Commission on Crime and Delinquency regulations [37 Pa.Code Chapter 451] for intermediate punishments.

(i) Restrictive Intermediate Punishments (RIP) either:

(A) house the offender full or part time; or

(B) significantly restrict the offender's movement and monitor the offender's compliance with the program(s); or

(C) involve a combination of programs that meet the standards set forth above.

(ii) An offender under consideration for Restrictive Intermediate Punishments at Level 4 or Level 3 shall have a diagnostic assessment of dependency on alcohol or other drugs conducted by one of the following: the Pennsylvania Department of Health's Office of Drug and Alcohol Programs (ODAP) or a designee; the county authority on drugs and alcohol or a designee; or clinical personnel of a facility licensed by the Office of Drug and Alcohol Programs.

(iii) An offender assessed to be dependent shall be evaluated for purposes of a treatment recommendation by one of the above listed assessors. The evaluation shall take into account the level of motivation of the offender. If sentenced to a Restrictive Intermediate Punishment, the sentence shall be consistent with the level of care and length of stay prescribed in the treatment recommendation, regardless of the standard range sentencing recommendation.

(iv) An offender assessed as not in need of drug or alcohol treatment may be placed in any approved Restrictive Intermediate Punishment program. Each day of participation in a Restrictive Intermediate Punishment program or combination of programs shall be considered the equivalent of one day of total confinement.

(v) The court may impose a qualified Restrictive Intermediate Punishment in lieu of incarceration for any conviction under 75 Pa.C.S. § 3731 (relating to Driving Under the Influence of Alcohol or Controlled Substance).

(5) Restorative sanction programs. Restorative sanction programs are the least restrictive, non-confinement intermediate punishments. Restorative sanction programs are generally used in conjunction with Restrictive Intermediate Punishments as the level of supervision is reduced, but may also be used as separate sanctions under any of the non-confinement sentencing alternatives provided in the statute (see § 303.9(f)).

(i) Restorative sanction programs:

(A) are the least restrictive in terms of constraint of offender's liberties;

(B) do not involve the housing of the offender (either full or part time); and

(C) focus on restoring the victim to pre-offense status.

(6) Qualified Restrictive Intermediate Punishments. In accordance with 37 Pa. Code § 451.52 (relating to sentencing restrictions for driving under the influence convictions), qualified Restrictive Intermediate Punishment programs may be used to satisfy the mandatory minimum sentencing requirements of 75 Pa.C.S. § 3731.

(i) Qualified Restrictive Intermediate Punishment programs include:

(A) residential inpatient drug and alcohol programs or residential rehabilitative center programs; or

(B) house arrest and electronic monitoring combined with drug and alcohol treatment.

(b) State Motivational Boot Camp.

(1) Eligibility.

(i) The following statute governs operation of and eligibility for the State Motivational Boot Camp:

61 P. S. § 1121—§ 1129

(ii) Sentence recommendations which include boot camp eligible offenders are designated by the letters BC in the cells of the Basic Sentencing Matrix (§ 303.16).

(2) The court shall indicate on the offender's commitment order and the Guideline Sentence Form if the

offender is authorized as eligible for the boot camp program. The Department of Corrections makes the final determination as to whether the offender will be accepted into the boot camp program.

§ 303.13. Guideline sentence recommendations: aggravated and mitigated circumstances.

(a) When the court determines that an aggravating circumstance(s) is present, it may impose an aggravated sentence as follows:

(1) For the Offense Gravity Scores of 9, 10, 11, 12, 13 and 14, the court may impose a sentence that is up to 12 months longer than the upper limit of the standard range.

(2) For the Offense Gravity Score of 8, the court may impose a sentence that is up to 9 months longer than the upper limit of the standard range.

(3) For the Offense Gravity Scores of 6 and 7, the court may impose a sentence that is up to 6 months longer than the upper limit of the standard range.

(4) For the Offense Gravity Scores of 1, 2, 3, 4, and 5, the court may impose a sentence that is up to 3 months longer than the upper limit of the standard range.

(5) When the standard range is Restorative Sanctions (RS), the aggravated sentence recommendation is RIP-3.

(b) When the court determines that a mitigating circumstance(s) is present, it may impose a mitigated sentence as follows:

(1) For the Offense Gravity Scores of 9, 10, 11, 12, 13, and 14, the court may impose a sentence that is up to 12 months shorter than the lower limit of the standard range.

(2) For the Offense Gravity Score of 8, the court may impose a sentence that is up to 9 months shorter than the lower limit of the standard range.

(3) For the Offense Gravity Scores of 6 and 7, the court may impose a sentence that is up to 6 months shorter than the lower limit of the standard range.

(4) For the Offense Gravity Scores of 1, 2, 3, 4, and 5, the court may impose a sentence that is up to 3 months shorter than the lower limit of the standard range.

(5) When the bottom of the standard range is less than or equal to 3 months of incarceration, the lower limit of the mitigated sentence recommendation is Restorative Sanctions (RS).

(6) In no case where a Deadly Weapon Enhancement is applied may the mitigated sentence recommendation be lower than 3 months.

(c) When the court imposes an aggravated or mitigated sentence, it shall state the reasons on the record and on the Guideline Sentence Form, a copy of which is forwarded to the Commission on Sentencing.

§ 303.14. Guideline sentence recommendations—fines and restitution.

(a) Fines and restitution.

(1) Fines and restitution, as provided by law, may be added to any guideline sentence.

(2) A fine, within the limits established by law, shall be considered by the court when the offender is convicted of 35 P. S. § 780-113(a)(12), (14) or (30), and the drug involved is 2.5 or more grams of any of the following: a controlled substance or counterfeit substance classified in Schedule I or II and which is a narcotic; phencyclidine, methamphetamine, or cocaine, including the isomers, salts, compounds, salts of isomers, or derivatives of phencyclidine, methamphetamine, or cocaine; or is one thousand pounds or more of marijuana. Such fine shall be of an amount that is at least sufficient to exhaust the assets utilized in, and the proceeds obtained by the offender from, the illegal possession, manufacture, or distribution of controlled substances. Such fine shall not include assets concerning which the attorney for the Commonwealth has filed a forfeiture petition or concerning which he has given notice to the court of his intent to file a forfeiture petition.

(3) Fines and restitution may be utilized as part of an intermediate punishment sentence or as a nonconfinement sentencing alternative (see Restorative Sanction § 303.9(f)).

§ 303.15. Offense Listing

CRIMES CODE OFFENSES

18 Pa.C.S. §	OFFENSE TITLE	STATUTORY CLASS	§ 303.3 OFFENSE GRAVITY SCORE	§ 303.7 PRIOR RECORD POINTS
901	Criminal Attempt [INCHOATE]	18 Pa.C.S. § 905	See § 303.3(c)	See § 303.8(b)
902	Criminal Solicitation [INCHOATE]	18 Pa.C.S. § 905	See § 303.3(c)	See § 303.8(b)
903	Criminal Conspiracy [INCHOATE]	18 Pa.C.S. § 905	See § 303.3(c)	See § 303.8(b)
907 (a)	Possessing Instruments of Crime (criminal instruments)	M1	3	1
907 (b)	Possessing Instruments of Crime (weapon)	M1	4	1

* = Subcategorized Offenses. See 303.3(b).
m = Other Misdemeanor Offenses. See 303.7(a)(5).
INCHOATE = Inchoates to 4 point PRS offenses. See 303.3(c) and 303.8(b) for all other inchoates.

18 Pa.C.S. §	OFFENSE TITLE	STATUTORY CLASS	§ 303.3 OFFENSE GRAVITY SCORE	§ 303.7 PRIOR RECORD POINTS
907 (c)	Possessing Instruments of Crime (unlawful body armor)	F3	5	1
908	Prohibited Offensive Weapons	M1	4	1
909	Manufacture, Distribution or Possession of Master Key for Motor Vehicles	M1	3	m
910	Manufacture, Distribution or Possession of Devices for Theft of Telecommunications	F3	5	1
910	Manufacture, Distribution or Possession of Devices for Theft of Telecommunications	M1	3	m
911	Corrupt Organizations	F1	8	3
912	Weapon on School Property	M1	4	m
913 (a)(1)	Possession of Firearm or Other Dangerous Weapon in Court Facility	M3	1	m
913 (a)(2)	Possession of Firearm or Other Dangerous Weapon in Court Facility (intend for crime)	M1	3	m
2102	Desecration of Flag	M3	1	m
2103	Insults to Flag	M2	2	m
2502 (a)	Murder, First Degree	Murder of the First Degree	18 Pa.C.S. § 1102(a)	4
2502 (a) INCHOATE	Attempt/Solicitation/Conspiracy [SBI] to First Degree Murder	18 Pa.C.S. § 1102(c)	14	4
2502 (a) INCHOATE	- Attempt/Solicitation/Conspiracy [No SBI] to First Degree Murder	18 Pa.C.S. § 1102(c)	13	4
2502 (b)	Murder, Second Degree	Murder of the Second Degree	18 Pa.C.S. § 1102(b)	4
2502 (b) INCHOATE	- Attempt/Solicitation/Conspiracy [SBI] to Second Degree Murder	18 Pa.C.S. § 1102(c)	14	4
2502 (b) INCHOATE	- Attempt/Solicitation/Conspiracy [No SBI] to Second Degree Murder	18 Pa.C.S. § 1102(c)	13	4
2502 (c)	Murder, Third Degree	F1	14	4
2502 (c) INCHOATE	- Attempt/Solicitation/Conspiracy [SBI] to Third Degree Murder	18 Pa.C.S. § 1102(c)	14	4
2502 (c) INCHOATE	- Attempt/Solicitation/Conspiracy [No SBI] to Third Degree Murder	18 Pa.C.S. § 1102(c)	13	4
2503	Manslaughter, Voluntary	F1	11	4
2503 INCHOATE	- Attempt/Solicitation/Conspiracy to Voluntary Manslaughter	18 Pa.C.S. § 905	10	3
2504*	Manslaughter, Involuntary (when there is also a conviction for DUI arising from the same INCIDENT)	M1	8	1
2504*	Manslaughter, Involuntary (when there is not a conviction for DUI arising from the same INCIDENT)	M1	6	1
2504	Manslaughter, Involuntary (victim under 12 years)	F2	8	2
2505 (b)	Suicide, Aids or Solicits	F2	6	2
2505 (b)	Suicide, Aids or Solicits	M2	2	m
2506	Drug Delivery Resulting in Death	F1	13	4
2506 INCHOATE	Attempt/Solicitation/Conspiracy to Drug Delivery Resulting in Death	18 Pa.C.S. § 905	12	3

* = Subcategorized Offenses. See 303.3(b).
m = Other Misdemeanor Offenses. See 303.7(a)(5).
INCHOATE = Inchoates to 4 point PRS offenses. See 303.3(c) and 303.8(b) for all other inchoates.

18 Pa.C.S. §	OFFENSE TITLE	STATUTORY CLASS	§ 303.3 OFFENSE GRAVITY SCORE	§ 303.7 PRIOR RECORD POINTS
2701	Simple Assault	M2	3	m
2701 (b)(1)	Simple Assault (mutual consent)	M3	1	m
2701 (b)(2)	Simple Assault (against child by adult)	M1	4	1
2702 (a)(1)*	Aggravated Assault (causes serious bodily injury)	F1	11	4
2702 (a)(1)* INCHOATE	- Attempt/Solicitation/Conspiracy to Aggravated Assault (causes SBI)	18 Pa.C.S. § 905	10	3
2702 (a)(1)*	Aggravated Assault (attempts to cause serious bodily injury)	F1	10	3
2702 (a)(2)*	Aggravated Assault (causes serious bodily injury police, etc.)	F1	11	4
2702 (a)(2)* INCHOATE	- Attempt/Solicitation/Conspiracy to Aggravated Assault (causes SBI to police, etc.)	18 Pa.C.S. § 905	10	3
2702 (a)(2)*	Aggravated Assault (attempts to cause serious bodily injury, police, etc.)	F1	10	3
2702 (a)(3)	Aggravated Assault (causes or attempts to cause bodily injury, police, etc.)	F2	6	2
2702 (a)(4)	Aggravated Assault (causes or attempts to cause bodily injury with a deadly weapon)	F2	8	2
2702 (a)(5)	Aggravated Assault (teacher)	F2	6	2
2702 (a)(6)	Aggravated Assault (fear SBI)	F2	6	2
2703	Assault by Prisoner	F2	6	2
2705	Recklessly Endangering Another Person	M2	3	m
2706	Terroristic Threats	M1	3	m
2707 (a)	Propulsion of Missiles into an Occupied Vehicle	M1	3	m
2707 (b)	Propulsion of Missiles onto a Roadway	M2	2	m
2708	Use of Tear Gas in Labor Dispute	M1	3	m
2709 (b)	Stalking, Subsequent Offense	F3	5	1
2709 (b)	Stalking	M1	3	m
2710	Ethnic Intimidation	18 Pa.C.S. § 2710(b)	See § 303.3(d)	See § 303.8(c)
2712	Assault on Sports Official	M1	3	m
2713 (a)(1)(2)	Neglect of Care-dependent Person (SBI)	F1	10	3
2713 (a)(1)(2)	Neglect of Care-dependent Person (BI)	M1	4	m
2901	Kidnapping	F1	10	4
2901 INCHO-ATE	- Attempt/Solicitation/Conspiracy to Kidnapping	18 Pa.C.S. § 905	9	3
2902	Unlawful Restraint	M1	3	m
2903	False Imprisonment	M2	2	m
2904 (c)	Interference with the Custody of Children	F3	4	1
2904 (c)(1)	Interference with the Custody of Children	F2	6	2
2904 (c)(2)	Interference with the Custody of Children	M2	2	m
2905	Interference w/Custody of Committed Persons	M2	4	m
2906	Criminal Coercion	M1	3	m
2906	Criminal Coercion	M2	2	m
2907	Disposition of Ransom	F3	5	1
2909	Concealment of Whereabouts of a Child	F3	4	1

* = Subcategorized Offenses. See 303.3(b).
m = Other Misdemeanor Offenses. See 303.7(a)(5).
INCHOATE = Inchoates to 4 point PRS offenses. See 303.3(c) and 303.8(b) for all other inchoates.

18 Pa.C.S. §	OFFENSE TITLE	STATUTORY CLASS	§ 303.3 OFFENSE GRAVITY SCORE	§ 303.7 PRIOR RECORD POINTS
2910	Luring a Child into a Motor Vehicle	M1	5	1
3121	Rape	F1	12	4
3121 INCHOATE	- Attempt/Solicitation/Conspiracy to Rape	18 Pa.C.S. § 905	11	3
3122.1	Statutory Sexual Assault	F2	7	2
3123	Involuntary Deviate Sexual Intercourse	F1	12	4
3123 INCHOATE	- Attempt/Solicitation/Conspiracy to Involuntary Deviate Sexual Intercourse	18 Pa.C.S. § 905	11	3
3124.1	Sexual Assault	F2	11	3
3125	Aggravated Indecent Assault	F2	10	3
3126 (a)(1)-(6), (8)	Indecent Assault	M2	4	m
3126 (a)(7)	Indecent Assault (involving minors)	M1	5	1
3127	Indecent Exposure (person present is 16 years of age or older)	M2	3	m
3127	Indecent Exposure (person present is less than 16 years of age)	M1	4	1
3301(a)*	Arson Endangering Persons (where a person is inside the structure when the fire is started or when bodily injury results, either directly or indirectly, at the scene of the fire)	F1	10	4
3301 (a)* INCHOATE	- Attempt/Solicitation/Conspiracy to Arson Endangering Persons (person inside or bodily injury results)	18 Pa.C.S. § 905	9	3
3301(a)*	Arson Endangering Persons (where no person is inside the structure when the fire is started and no bodily injury results either directly or indirectly, at the scene of the fire)	F1	9	3
3301 (c)	Arson, Endangering Property	F2	6	2
3301 (d)	Arson, Reckless Burning	F3	5	1
3301 (e)	Arson, Failure to Report	M1	3	m
3301 (f)	Arson, Possess Explosive Material	F3	5	1
3301 (g)	Arson, Disclosure of True Owner	M3	1	m
3302 (a)	Catastrophe, Causing	F1	10	3
3302 (a)	Catastrophe, Recklessly Causing	F2	6	2
3302 (b)	Catastrophe, Risking	F3	4	1
3303	Failure to Prevent Catastrophe	M2	2	m
3304	Criminal Mischief (over $5,000)	F3	5	1
3304	Criminal Mischief (over $1,000)	M2	2	m
3304	Criminal Mischief (over $500)	M3	1	m
3304	Criminal Mischief (over $150 under (a)(4))	M3	1	m
3305	Tampering w/Fire Hydrants	M3	1	m
3307	Institutional Vandalism (over $5,000)	F3	5	1
3307	Institutional Vandalism	M2	2	m
3309	Agricultural Vandalism (over $5,000)	F3	5	1
3309	Agricultural Vandalism (over $1,000)	M1	3	m
3309	Agricultural Vandalism (over $500)	M2	2	m

* = Subcategorized Offenses. See 303.3(b).
m = Other Misdemeanor Offenses. See 303.7(a)(5).
INCHOATE = Inchoates to 4 point PRS offenses. See 303.3(c) and 303.8(b) for all other inchoates.

18 Pa.C.S. §	OFFENSE TITLE	STATUTORY CLASS	§ 303.3 OFFENSE GRAVITY SCORE	§ 303.7 PRIOR RECORD POINTS
3309	Agricultural Vandalism ($500 or less)	M3	1	m
3502*	Burglary (of a structure adapted for overnight accommodation in which at the time of the offense any person is present)	F1	9	4
3502* INCHOATE	- Attempt/Solicitation/Conspiracy to Burglary (structure adapted for overnight accommodation, person present)	18 Pa.C.S. § 905	8	3
3502*	Burglary (of a structure adapted for overnight accommodation in which at the time of the offense no person is present)	F1	7	3
3502*	Burglary (of a structure not adapted for overnight accommodation in which at the time of the offense any person is present)	F1	6	3
3502	Burglary (of a structure not adapted for overnight accommodation in which at the time of the offense no person is present)	F2	5	2
3503 (a)(1)(ii)	Trespass, Criminal	F2	4	2
3503 (a)(1)(i)	Trespass, Criminal	F3	3	1
3503 (b)	Trespass, Defiant	M3	1	m
3701 (a)(1)(i)	Robbery (inflicts serious bodily injury)	F1	12	4
3701 (a)(1)(i) INCHOATE	- Attempt/Solicitation/Conspiracy to Robbery (SBI)	18 Pa.C.S. § 905	11	3
3701 (a)(1)(ii)	Robbery (threatens another with or intentionally puts him in fear of immediate serious bodily injury)	F1	10	3
3701 (a)(1)(iii)	Robbery (commits or threatens immediately to commit any F1 or F2)	F1	9	3
3701 (a)(1) (iv)	Robbery (threatens or inflicts bodily injury or intentionally puts him in fear of immediate bodily injury)	F2	7	2
3701 (a)(1)(v)	Robbery (physically takes or removes property by force, however slight)	F3	5	1
3702*	Robbery of Motor Vehicle (inflicts serious bodily injury)	F1	12	4
3702* INCHOATE	- Attempt/Solicitation/Conspiracy to Robbery of a Motor Vehicle (SBI)	18 Pa.C.S. § 905	11	3
3702*	Robbery of a Motor Vehicle (does not inflict serious bodily injury)	F1	9	3
3921	Theft by Unlawful Taking, During Disaster	F2	7	2
3921*	Theft by Unlawful Taking or Disposition (over $100,000)	F3	8	1
3921*	Theft By Unlawful Taking or Disposition (over $50,000 to $100,000)	F3	7	1
3921*	Theft By Unlawful Taking or Disposition (over $25,000 to $50,000)	F3	6	1
3921*	Theft by Unlawful Taking or Disposition (over $2,000 to $25,000, or if the property is a firearm, automobile, airplane, motorcycle, motorboat, or other motor- propelled vehicle)	F3	5	1
3921	Theft by Unlawful Taking or Disposition ($2,000 or less, from person or by threat or in breach of fiduciary obligation)	M1	3	m

* = Subcategorized Offenses. See 303.3(b).
m = Other Misdemeanor Offenses. See 303.7(a)(5).
INCHOATE = Inchoates to 4 point PRS offenses. See 303.3(c) and 303.8(b) for all other inchoates.

18 Pa.C.S. §	OFFENSE TITLE	STATUTORY CLASS	§ 303.3 OFFENSE GRAVITY SCORE	§ 303.7 PRIOR RECORD POINTS
3921	Theft by Unlawful Taking or Disposition ($200 to $2,000)	M1	3	m
3921	Theft by Unlawful Taking or Disposition ($50 to less than $200)	M2	2	m
3921	Theft by Unlawful Taking or Disposition (less than $50)	M3	1	m
3922*	Theft by Deception (over $100,000)	F3	8	1
3922*	Theft By Deception (over $50,000 to $100,000)	F3	7	1
3922*	Theft By Deception (over $25,000 to $50,000)	F3	6	1
3922*	Theft by Deception (over $2,000 to $25,000, or if the property is a firearm, automobile, airplane, motorcycle, motorboat, or other motor-propelled vehicle)	F3	5	1
3922	Theft by Deception ($2,000 or less, from person or by threat or in breach of fiduciary obligation)	M1	3	m
3922	Theft by Deception ($200 to $2,000)	M1	3	m
3922	Theft by Deception ($50 to less than $200)	M2	2	m
3922	Theft by Deception (less than $50)	M3	1	m
3923*	Theft by Extortion (over $100,000)	F3	8	1
3923*	Theft by Extortion (over $50,000 to $100,000)	F3	7	1
3923*	Theft by Extortion (over $25,000 to $50,000)	F3	6	1
3923*	Theft by Extortion (over $2,000 to $25,000, or if the property is a firearm, automobile, airplane, motorcycle, motorboat, or other motor-propelled vehicle)	F3	5	1
3923	Theft by Extortion ($2,000 or less, from person or by threat or in breach of fiduciary obligation)	M1	4	m
3923	Theft by Extortion ($200 to $2,000)	M1	4	m
3923	Theft by Extortion ($50 to less than $200)	M2	2	m
3923	Theft by Extortion (less than $50)	M3	1	m
3924*	Theft of Property Lost, Mislaid, or Delivered by Mistake (over $100,000)	F3	8	1
3924*	Theft of Property Lost, Mislaid, or Delivered by Mistake (over $50,000 to $100,000)	F3	7	1
3924*	Theft of Property Lost, Mislaid, or Delivered by Mistake (over $25,000 to $50,000)	F3	6	1
3924*	Theft of Property Lost, Mislaid, or Delivered by Mistake (over $2,000 to $25,000, or if the property is a firearm, automobile, airplane, motorcycle, motorboat, or other motor-propelled vehicle)	F3	5	1
3924	Theft of Property Lost, Mislaid or Delivered by Mistake ($2,000 or less, from person or by threat or in breach of fiduciary obligation)	M1	3	m
3924	Theft of Property Lost, Mislaid or Delivered by Mistake ($200 to $2,000)	M1	3	m
3924	Theft of Property Lost, Mislaid or Delivered by Mistake ($50 to less than $200)	M2	2	m
3924	Theft of Property Lost, Mislaid or Delivered by Mistake (less than $50)	M3	1	m

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m = Other Misdemeanor Offenses. See 303.7(a)(5).
INCHOATE = Inchoates to 4 point PRS offenses. See 303.3(c) and 303.8(b) for all other inchoates.

18 Pa.C.S. §	OFFENSE TITLE	STATUTORY CLASS	§ 303.3 OFFENSE GRAVITY SCORE	§ 303.7 PRIOR RECORD POINTS
3925	Theft by Receiving Stolen Property, During Disaster	F2	7	2
3925*	Theft by Receiving Stolen Property (over $100,000)	F3	8	1
3925*	Theft by Receiving Stolen Property (over $50,000 to $100,000)	F3	7	1
3925*	Theft by Receiving Stolen Property (over $25,000 to $50,000)	F3	6	1
3925*	Theft by Receiving Stolen Property (over $2,000 to $25,000, or if the property is a firearm, automobile, airplane, motorcycle, motorboat, or other motor-propelled vehicle, or if the receiver is in the business of buying or selling stolen property)	F3	5	1
3925	Theft by Receiving Stolen Property ($2,000 or less, from person or by threat or in breach of fiduciary obligation)	M1	3	m
3925	Theft by Receiving Stolen Property ($200 to $2,000)	M1	3	m
3925	Theft by Receiving Stolen Property ($50 to less than $200)	M2	2	m
3925	Theft by Receiving Stolen Property (less than $50)	M3	1	m
3926*	Theft of Services (over $100,000)	F3	8	1
3926*	Theft of Services (over $50,000 to $100,000)	F3	7	1
3926*	Theft of Services (over $25,000 to $50,000)	F3	6	1
3926*	Theft of Services (over $2,000 to $25,000, or if the property is a firearm, automobile, airplane, motorcycle, motor-boat, or other motor-propelled vehicle)	F3	5	1
3926	Theft of Services ($2,000 or less, from person or by threat or in breach of fiduciary obligation)	M1	3	m
3926	Theft of Services ($200 to $2,000)	M1	3	m
3926	Theft of Services ($50 to less than $200)	M2	2	m
3926	Theft of Services (less than $50)	M3	1	m
3926 (e)	Theft of Services (sale transfer of device for diversion of services)	M3	1	m
3927*	Theft by Failure to Make Required Disposition of Funds Received (over $100,000)	F3	8	1
3927*	Theft by Failure to Make Required Disposition of Funds Received (over $50,000 to $100,000)	F3	7	1
3927*	Theft by Failure to Make Required Disposition of Funds Received (over $25,000 to $50,000)	F3	6	1
3927*	Theft by Failure to Make Required Disposition of Funds Received (over $2,000 to $25,000, or if the property is a firearm, automobile, airplane, motorcycle, motorboat, or other motor- propelled vehicle)	F3	5	1
3927	Theft by Failure to Make Required Disposition of Funds Received ($2,000 or less, from person or by threat or in breach of fiduciary obligation)	M1	3	m
3927	Theft by Failure to Make Required Disposition of Funds Received ($200 to $2,000)	M1	3	m

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18 Pa.C.S. §	OFFENSE TITLE	STATUTORY CLASS	§ 303.3 OFFENSE GRAVITY SCORE	§ 303.7 PRIOR RECORD POINTS
3927	Theft by Failure to Make Required Disposition of Funds Received ($50 to less than $200)	M2	2	m
3927	Theft by Failure to Make Required Disposition of Funds Received (less than $50)	M3	1	m
3928	Unauthorized Use of Auto (during disaster)	F2	7	2
3928	Unauthorized Use of Auto	M2	2	m
3929	Theft, Retail (during disaster)	F2	7	2
3929	Theft, Retail (>$2,000, firearm, motor veh.)	F3	5	1
3929	Theft, Retail (third or subsequent conviction)	F3	3	1
3929	Theft, Retail (first or second offense, $150 or more)	M1	2	m
3929	Theft, Retail (second offense, less than $150)	M2	2	m
3929.1	Library Theft (3rd; subsequent offense)	F3	5	1
3929.1	Library Theft (1st; 2nd over $150)	M1	3	m
3929.1	Library Theft (2nd less than $150)	M2	2	m
3930	Theft of Trade Secrets by Force, Violence, or Burglary	F2	7	2
3930	Theft of Trade Secrets	F3	5	1
3931	Theft of Unpublished Dramas and Musical Compositions (over $2,000 or if the property is a firearm, automobile, airplane, motorcycle, motorboat, or other motor-propelled vehicle)	F3	5	1
3931	Theft of Unpublished Dramas and Musical Compositions ($2,000 or less, from person or by threat or in breach of fiduciary obligation)	M1	3	m
3931	Theft of Unpublished Dramas and Musical Compositions ($200 to $2,000)	M1	3	m
3931	Theft of Unpublished Dramas and Musical Compositions ($50 to less than $200)	M2	2	m
3931	Theft of Unpublished Dramas and Musical Compositions (less than $50)	M3	1	m
3932*	Theft of Leased Property (over $100,000)	F3	8	1
3932*	Theft of Leased Property (over $50,000 to $100,000)	F3	7	1
3932*	Theft of Leased Property (over $25,000 to $50,000)	F3	6	1
3932*	Theft of Leased Property (over $2,000 to $25,000, or if property is a firearm, automobile, airplane, motorcycle, motorboat, or other motor-propelled vehicle)	F3	5	1
3932	Theft of Leased Property ($2,000 or less from person or by threat or in breach of fiduciary obligation)	M1	3	m
3932	Theft of Leased Property ($200 to $2,000)	M1	3	m
3932	Theft of Leased Property ($50 to less than $200)	M2	2	m
3932	Theft of Leased Property (less than $50)	M3	1	m
3933 (a)(1)	Unlawful Use of Computer	F3	5	1
3933 (a)(2)(3)	Unlawful Use of Computer	M1	3	m
4101	Forgery (money, stocks, etc.)	F2	4	2

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18 Pa.C.S. §	OFFENSE TITLE	STATUTORY CLASS	§ 303.3 OFFENSE GRAVITY SCORE	§ 303.7 PRIOR RECORD POINTS
4101	Forgery (will, deed, etc.)	F3	3	1
4101	Forgery (other)	M1	3	m
4102	Simulating Antiques	M1	3	m
4103	Fraudulent Destruction of Recordable Instruments	F3	5	1
4104 (a)	Tampering with Records or Identification	M1	3	m
4105 (c)(1)(ii)	Bad Checks ($200 <$500)	M3	1	m
4105 (c)(1)(iii)	Bad Checks ($500 <$1000)	M2	2	m
4105 (c)(1)(iv)	Bad Checks ($1,000 <$75,0000)	M1	3	m
4105 (c)(1)(v)	Bad Checks ($75,000 or more)	F3	5	1
4105 (c)(2)	Bad Checks (3rd or subseq./<$75,000)	M1	3	m
4105 (c)(2)	Bad Checks (3rd or subseq./ $75,000 or more)	F3	5	1
4106	Credit Cards (more than $500)	F3	3	1
4106	Credit Cards ($50 or more but less than $500)	M2	2	m
4107 (a.1)(1)(i)	Deceptive or Fraudulent Business Practices (< $2,000)	F3	5	1
4107 (a.1)(1)(ii)	Deceptive or Fraudulent Business Practices ($200 - $2,000)	M1	3	m
4107 (a.1)(1)(iii)	Deceptive or Fraudulent Business Practices (< $200)	M2	2	m
4107 (a.1)(1)(iv)	Deceptive or Fraudulent Business Practices (amt. not ascertained)	M2	2	m
4107 (a.1)(3)(i)	Deceptive or Fraudulent Business Practices (< $2,000; victim 60 yrs.+)	F2	7	2
4107 (a.1)(3)(ii)	Deceptive or Fraudulent Business Practices ($200 - $2,000; victim 60 yrs. +)	F3	5	1
4107 (a.1)(3)(iii)	Deceptive or Fraudulent Business Practices (< $200; victim 60 yrs. +)	M1	3	m
4107 (a.1)(3)(iv)	Deceptive or Fraudulent Business Practices (amt. not ascertained; victim 60 yrs.+)	M1	3	m
4107.1	Deception Relating to Kosher Foods	M3	1	m
4107.2	Deception Relating to Certification of Minority Business Enterprise or Women's Business Enterprise	F3	4	1
4108	Commercial Bribery and Breach of Duty	M2	2	m
4109	Rigging Public Contest	M1	3	m
4110	Defrauding Secured Creditors	M2	2	m
4111	Fraud in Insolvency	M2	2	m
4112	Receiving Deposits; Failed Institution	M2	2	m
4113	Misapplication of Entrusted Property (over $50)	M2	2	m
4113	Misapplication of Entrusted Property ($50 or less)	M3	1	m
4114	Securing Execution of Documents by Deception	M2	2	m
4115	Falsely Impersonating Persons Privately Employed	M2	2	m
4116 (g)(1)	Copying; Recording Devices (100 or more motion picture devices or 1,000 or more sound recording devices)	F3	5	1

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18 Pa.C.S. §	OFFENSE TITLE	STATUTORY CLASS	§ 303.3 OFFENSE GRAVITY SCORE	§ 303.7 PRIOR RECORD POINTS
4116 (g)(1)	Copying; Recording Devices (second or subsequent conviction at time of sentencing)	F2	7	2
4116 (g)(2)	Copying; Recording Devices (any other violation)	M1	3	m
4116 (g)(2)	Copying; Recording Devices (any other violation; second or subsequent conviction at time of sentencing)	F3	5	1
4116.1	Unlawful Operation of Recording Device in Motion Picture Theater (first violation)	M1	3	m
4116.1	Unlawful Operation of Recording Device in Motion Picture Theater (second or subsequent conviction at time of sentencing)	F3	4	1
4117 (a)	Insurance Fraud	F3	4	1
4117 (b)	Insurance Fraud	M1	3	m
4118	Washing Titles [vehicles]	F3	4	1
4119 (c)(1)	Trademark Counterfeiting	M1	3	m
4119 (c)(2)	Trademark Counterfeiting	F3	5	1
4119 (c)(3)	Trademark Counterfeiting	F2	7	2
4301	Bigamy	M2	3	m
4302	Incest	F2	7	2
4303	Concealing Death of Child	M1	3	m
4304	Endangering Welfare of Children	M1	5	1
4304	Endangering Welfare of Children (course of conduct)	F3	6	1
4305	Dealing in Infant Children	M1	4	1
4701	Bribery, Official and Political Matters	F3	5	1
4702	Threats, Official and Political Matters	F3	5	1
4702	Threats, Official and Political Matters	M2	2	m
4703	Retaliation for Past Official Action	M2	2	m
4902	Perjury	F3	5	1
4903 (a)	False Swearing	M2	2	m
4903 (b)	False Swearing	M3	1	m
4904 (a)	Unsworn Falsification to Authorities	M2	2	m
4904 (b)	Unsworn Falsification to Authorities	M3	1	m
4905	False Alarms	M1	3	m
4906 (a)	False Reports to Law Enforcement Officials	M2	2	m
4906 (b)	False Reports to Law Enforcement Officials	M3	1	m
4909	Witness Taking Bribe	F3	5	1
4910	Tampering with Physical Evidence	M2	2	m
4911	Tampering w/Public Records or Information	F3	4	1
4911	Tampering w/Public Records or Information	M2	2	m
4912	Impersonating a Public Servant	M2	2	m
4913	Impersonating Notary Public	M1	3	m
4952	Intimidation of Witnesses or Victims	F3	7	1
4952	Intimidation of Witnesses or Victims	M2	5	m
4953	Retaliation Against Witness or Victim	F3	8	1

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18 Pa.C.S. §	OFFENSE TITLE	STATUTORY CLASS	§ 303.3 OFFENSE GRAVITY SCORE	§ 303.7 PRIOR RECORD POINTS
4953	Retaliation Against Witness or Victim	M2	5	m
5101	Obstructing Justice	M2	3	m
5102	Obstruction of Justice by Picketing	M2	2	m
5103	Unlawfully Listening to Jury Deliberations	M3	1	m
5104	Resisting Arrest	M2	2	m
5105	Apprehension, Hindering (if conduct liable to be charged is F1 or F2)	F3	4	1
5105	Apprehension, Hindering	M2	2	m
5107	Aiding Consummation of Crime (of F1/F2)	F3	5	1
5107	Aiding Consummation of Crime	M2	2	m
5108	Compounding	M2	2	m
5109	Barratry	M3	1	m
5110	Contempt of General Assembly	M3	1	m
5111	Dealing in Proceeds of Unlawful Activities	F1	8	3
5121 (d)(1)(i)(ii)(iii)*	Escape (from a halfway house, pre-release center, treatment center, work-release center, work-release, or by failing to return from an authorized leave or furlough)	F3	5	1
5121 (d)(1)(i)(ii)(iii)*	Escape (all other escapes from this subsection)	F3	6	1
5121 (d)(2)	Escape	M2	3	m
5122 (a)(1)	Weapons, Providing to Inmate	M1	8	m
5122 (a)(2)	Weapons, Possession by Inmate	M1	4	m
5122 (a)(3)	Weapons or Implements for Escape (tools)	M2	3	m
5123 (a)	Contraband (provide controlled substance to confined person)	F2	7	2
5123 (a.2)	Contraband (possession of controlled substance by confined person)	M1	3	m
5123 (b)	Contraband (money)	M3	1	m
5123 (c)	Contraband (other)	M1	3	m
5124	Default in Required Appearance	F3	4	1
5124	Default in Required Appearance	M2	2	m
5125	Absconding Witness	M3	1	m
5126	Avoiding Apprehension	F3	5	1
5126	Avoiding Apprehension	M2	2	m
5301	Official Oppression	M2	2	m
5302	Speculating on Official Action	M2	2	m
5501	Riot	F3	4	1
5502	Failure to Disperse	M2	2	m
5503	Disorderly Conduct	M3	1	m
5504	Harassment by Communication	M3	1	m
5506	Loitering and Prowling	M3	1	m
5507	Obstructing Highways	M3	1	m
5508	Disrupting Meetings	M3	1	m
5509	Desecration of Venerated Objects	M2	2	m

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18 Pa.C.S. §	OFFENSE TITLE	STATUTORY CLASS	§ 303.3 OFFENSE GRAVITY SCORE	§ 303.7 PRIOR RECORD POINTS
5510	Abuse of Corpse	M2	3	m
5511 (a)(2)	Cruelty to Animals	F3	5	1
5511 (a)(2.1)(i)	Cruelty to Animals	M2	3	m
5511 (a)(2.1)(ii)	Cruelty to Animals	F3	5	1
5511 (a)(1)	Cruelty to Animals	M2	3	m
5511 (h.1)	Cruelty to Animals	F3	5	1
5512	Lotteries	M1	3	m
5513	Gambling Devices	M1	3	m
5514	Pool Selling and Bookmaking	M1	3	m
5515	Prohibiting Paramilitary Training	M1	3	m
5703	Interception, Disclosure or Use of Wire, Electronic or Oral Communications	F3	5	1
5705	Possession, Sale, Distribution, Manufacture or Advertisement of Interception Devices	F3	5	1
5719	Unlawful Use of Intercepted Communications	M2	2	m
5771	Pen Register and Trap and Trace Devices	M3	1	m
5901	Open Lewdness	M3	1	m
5902 (a)	Prostitution	M3	1	m
5902 (a)(b)(d)(e) when (a.1),(c)(v) or (e.1) applies	Prostitution and Related Offenses (HIV or Aids related)	F3	5	1
5902 (b)(d) when (c)(1)(i)(ii)(iv) applies	Prostitution and Related Offenses	F3	5	1
5902 (b) when (c)(1)(iii) applies	Prostitution Involving Minors	F3	8	1
5902 (b)	Prostitution	M2	3	m
5902 (e)	Patronizing Prostitutes	M3	1	m
5903	Obscene Materials (subsequent offense)	F3	5	1
5903	Obscene Materials	M1	3	m
5904	Public Exhibition of Insane or Deformed Person	M2	2	m
6105*	Persons Not to Possess, Use, Manufacture, Control, Sell or Transfer Firearms (loaded)	M1	5	1
6105*	Persons Not to Possess, Use, Manufacture, Control, Sell or Transfer Firearms (unloaded)	M1	4	1
6106*	Firearms, Not to be Carried Without a License (loaded or ammunition in possession or control of defendant)	F3	5	1
6106*	Firearms, Not to be Carried Without a License (unloaded and ammunition not in possession or control of defendant)	F3	4	1
6107	Prohibited Conduct during Emergency	M1	3	1
6108*	Carrying Firearms on Public Streets or Public Property in Philadelphia (loaded or ammunition in possession or control of defendant)	M1	5	1
6108*	Carrying Firearms on Public Streets or Public Property in Philadelphia (unloaded and ammunition not in possession or control of defendant)	M1	4	1

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18 Pa.C.S. §	OFFENSE TITLE	STATUTORY CLASS	§ 303.3 OFFENSE GRAVITY SCORE	§ 303.7 PRIOR RECORD POINTS
6110.1 (a)	Possession of Firearm by Minor	M1	3	1
6110.1 (c)	Possession of Firearms by Minor (responsibility of adult)	F3	7	1
6111 (g)(1)	Sale or Transfer of Firearms	M2	2	m
6111 (g)(2)(3)(4)	Sale or Transfer of Firearms (to ineligibles; unlawful request for criminal history; false statements)	F3	5	1
6111 (h)	Sale or Transfer of Firearms (subsequent)	F2	7	2
6112	Retail Dealer Required to be Licensed	M1	3	1
6113	Licensing of Dealers	M1	3	1
6115	Loans, Lending, Giving Firearms Prohibited	M1	3	1
6116	False Evidence of Identity	M1	3	1
6117	Altering Marks of Identification	F2	7	2
6121	Certain Bullets Prohibited	F3	5	1
6122	Proof of License	M1	3	1
6161	Carrying Explosives	M2	3	m
6162	Shipping Explosives	M3	3	m
6301 (a)(1)*	Corruption of Minors (when of a sexual nature)	M1	5	m
6301 (a)(1)*	Corruption of Minors	M1	4	1
6301 (a)(2)	Corruption of Minors (second violation of truancy in year)	M3	1	m
6302	Sale or Lease of Weapons	M1	4	m
6303	Sale of Starter Pistols	M1	4	m
6304	Sale of Air Rifles	M3	1	m
6306	Furnish Cigarettes to Minors (3rd and subsequent offenses)	M3	1	m
6307	Misrepresentation of Age to Secure Alcohol (subsequent offense)	M3	1	m
6309	Representing that Minor is of Age	M3	1	m
6310	Inducement of Minors to Buy Liquor	M3	1	m
6310.1	Selling Liquor to Minors	M3	1	m
6310.2	Manufacture or Sale of False ID	M2	2	m
6310.3	Carrying False ID (subsequent offense)	M3	1	m
6311	Tattooing (a minor)	M3	1	m
6312 (b)	Sexual Abuse of Children (taking photos)	F2	7	2
6312 (c)	Sexual Abuse of Children (selling photos)	F3	6	1
6312 (d)	Possession of Child Pornography	F3	5	1
6501 (a)(3)	Scattering Rubbish (2nd; subsequent offense)	M1	3	m
6501 (a)(3)	Scattering Rubbish (1st. offense)	M2	2	m
6501 (a)(1)(2)	Scattering Rubbish (2nd; subsequent offense)	M3	1	m
6504	Public Nuisances	M2	2	m
6703	Military Decorations	M3	1	m
6707	False Registration of Domestic Animals	M3	1	m
6709	Use of Union Labels	M3	1	m
6901	Extension of Water Line	M3	1	m

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18 Pa.C.S. §	OFFENSE TITLE	STATUTORY CLASS	§ 303.3 OFFENSE GRAVITY SCORE	§ 303.7 PRIOR RECORD POINTS
6910	Unauthorized Sale of Tickets	M3	1	m
7102	Drugs to Race Horses	M1	3	m
7103	Horse Racing	M3	1	m
7104	Fortune Telling	M3	1	m
7107	Unlawful Actions by Athlete Agents	M1	3	m
7302 (a)	Sale of Solidified Alcohol	M2	2	m
7302 (b)	Labeling of Solidified Alcohol	M1	3	m
7303	Sale or Illegal Use of Solvents	M3	1	m
7306	Incendiary Devices	M1	3	m
7307	Out of State Convict Made Goods	M2	2	m
7308	Unlawful Advertising of Insurance Business	M2	2	m
7309	Unlawful Coercion in Contracting Insurance	M1	3	m
7310	Furnishing Free Insurance	M3	1	m
7311	Unlawful Collection Agency Practices	M3	1	m
7312	Debt Pooling	M3	1	m
7313	Buying Food Stamps($1,000 or more)	F3	5	1
7313	Buying Food Stamps(< $1,000)	M1	3	m
7314	Fraudulent Traffic in Food Orders ($1,000 or more)	F3	5	1
7314	Fraudulent Traffic in Food Orders (< $1,000)	M1	3	m
7316	Keeping Bucket-Shop	M3	1	m
7317	Accessories, Bucket-Shop	M3	1	m
7318	Maintaining Bucket-Shop Premises	M3	1	m
7319	Bucket-Shop Contracts	M3	1	m
7321	Lie Detector Tests	M2	2	m
7322	Demanding Property to Secure Employment	M3	1	m
7323	Discrimination on Account of Uniform	M2	2	m
7324	Unlawful Sale of Dissertations, Thesis, Term Papers	M3	1	m
7326	Disclosure of Confidential Tax Information	M3	1	m
7328	Operation of Certain Establishments	M3	1	m
7503	Interest of Certain Architects in Public Works Contracts	M3	1	m
7504	Appointment of Special Police	M3	1	m
7507	Breach of Privacy	M2	2	m
	Offenses not otherwise listed [OMNIBUS]	F1	8	3
		F2	7	2
		F3	5	1
		FELONY NOT CLASSIFIED	5	1
		M1	3	m
		M2	2	m
		M3	1	m
		MISD. NOT CLASSIFIED	1	m

* = Subcategorized Offenses. See 303.3(b).
m = Other Misdemeanor Offenses. See 303.7(a)(5).
INCHOATE = Inchoates to 4 point PRS offenses. See 303.3(c) and 303.8(b) for all other inchoates.

DRUG ACT OFFENSES

35 P. S. § 780-113(a)	DESCRIPTION	STATUTORY CLASS	§ 303.3 OFFENSE GRAVITY SCORE	§ 303.7 PRIOR RECORD POINTS
(1)	Manufacture/Sale/Delivery of Adulterated Drug	M	4	m
(2)	Adulteration of Controlled Substance	M	4	m
(3)	False Advertisement	M	4	m
(4)	Removal of Detained Substance	M	5	m
(5)	Adulteration of Sellable Controlled Substance	M	4	m
(6)	Forging ID Under Act	M	5	m
(7)	Defraud Trademark	M	5	m
(8)	Selling Defrauded Trademark	M	5	m
(9)	Having Equipment to Defraud	M	5	m
(10)	Illegal Sale of Nonproprietary Drug	M	4	m
(11)	Illegal Pharmacy Operations	M	5	m
(12)*	Acquisition of Controlled Substance by Fraud:			
	Heroin, Other Narcotics of Schedule I and II, Cocaine, PCP, Methamphetamine (> 1,000g)	F	13	3
	Heroin, Other Narcotics of Schedule I and II, Cocaine, PCP, Methamphetamine (100g to 1000g)	F	11	3
	Heroin, Other Narcotics of Schedule I and II, Cocaine, PCP, Methamphetamine (50g to < 100 g)	F	10	3
	Heroin, Other Narcotics of Schedule I and II, Cocaine, PCP, Methamphetamine (10g to <50g)	F	8	2
	Heroin (1g to <10 g)	F	7	2
	Other Narcotics of Schedule I and II, Cocaine, PCP, Methamphetamine (2.5g to <10g)	F	7	2
	Heroin (<1g)	F	6	2
	Other Narcotics of Schedule I and II, Cocaine, PCP, Methamphetamine (<2.5g)	F	6	2
	Marijuana (50 lbs. or greater or 51 or more live plants)	F	8	2
	Marijuana (10 lbs. to <50 lbs. or 21 to <51 live plants)	F	7	2
	Marijuana (1 lb. to <10 lbs. or 10 to <21 live plants)	F	5	2
	Marijuana (<1 lb. or <10 live plants)	F	3	2
	Prescription Pills of Schedule II (> 100 pills)	F	10	2
	Prescription Pills of Schedule II (51-100 pills)	F	9	2
	Prescription Pills of Schedule II (21-50 pills)	F	8	2
	Prescription Pills of Schedule II (1-20 pills)	F	6	2
	Schedule I and II Drugs not listed	F	5	2
	Schedule III and IV Drugs	F	5	2
	Schedule V Drugs	M	3	m
(13)	Dispense of Drugs to Drug Dependent Person	M	4	m

* = Subcategorized Offenses. See 303.3(b).
m = Other Misdemeanor Offenses. See 303.7(a)(5).

35 P. S. § 780-113(a)	DESCRIPTION	STATUTORY CLASS	§ 303.3 OFFENSE GRAVITY SCORE	§ 303.7 PRIOR RECORD POINTS
(14)*	Delivery by Practitioner:			
	Heroin, Other Narcotics of Schedule I and II, Cocaine, PCP, Methamphetamine (> 1,000g)	F	13	3
	Heroin, Other Narcotics of Schedule I and II, Cocaine, PCP, Methamphetamine (100g to 1000g)	F	11	3
	Heroin, Other Narcotics of Schedule I and II, Cocaine, PCP, Methamphetamine (50g < 100g)	F	10	3
	Heroin, Other Narcotics of Schedule I and II, Cocaine, PCP, Methamphetamine (10g to <50g)	F	8	2
	Heroin (1g to <10 g)	F	7	2
	Other Narcotics of Schedule I and II, Cocaine, PCP, Methamphetamine (2.5g to <10g)	F	7	2
	Heroin (< 1g)	F	6	2
	Other Narcotics of Schedule I and II, Cocaine, PCP, Methamphetamine (<2.5g)	F	6	2
	Marijuana (50 lbs. or greater or 51 or more live plants)	F	8	2
	Marijuana (10 lbs. to <50 lbs. or 21 to <51 live plants)	F	7	2
	Marijuana (1 lb. to <10 lbs. or 10 to <21 live plants)	F	5	2
	Marijuana (<1 lb. or <10 live plants)	F	3	2
	Schedule I and II Drugs not listed	F	5	2
	Schedule III and IV Drugs	F	5	2
	Schedule V Drugs	M	3	m
(15)	Illegal Retail Sale	M	4	m
(16)	Simple Possession	M	3	m
(17)	Dispensing of Drugs Without Label	M	4	m
(18)	Illegal Sale Container	M	4	m
(19)	Intentional Unauthorized Purchase	M	5	m
(20)	Divulging Trade Secret	M	4	m
(21)	Failure to Keep Records	M	2	m
(22)	Refusal of Inspection	M	2	m
(23)	Unauthorized Removal of Seals	M	5	m
(24)	Failure to Obtain License	M	2	m
(25)	Manufacture by Unauthorized Party	M	5	m
(26)	Distribution by Registrant of Controlled Substance	M	5	m
(27)	Use of Fictitious Registration Number	M	5	m
(28)	False Application Material	M	5	m
(29)	Production of Counterfeit Trademarks	M	5	m

* = Subcategorized Offenses. See 303.3(b).
m = Other Misdemeanor Offenses. See 303.7(a)(5).

35 P. S. § 780-113(a)	DESCRIPTION	STATUTORY CLASS	§ 303.3 OFFENSE GRAVITY SCORE	§ 303.7 PRIOR RECORD POINTS
(30)*	Possession With Intent to Deliver (PWID):			
	Heroin, Other Narcotics of Schedule I and II, Cocaine, PCP, Methamphetamine (> 1,000g)	F	13	3
	Heroin, Other Narcotics of Schedule I and II, Cocaine, PCP, Methamphetamine (100g to 1000g)	F	11	3
	Heroin, Other Narcotics of Schedule I and II, Cocaine, PCP, Methamphetamine (50g to <100g)	F	10	3
	Heroin, Other Narcotics of Schedule I and II, Cocaine, PCP, Methamphetamine (10g to <50g)	F	8	2
	Heroin (1g to <10 g)	F	7	2
	Other Narcotics of Schedule I and II, Cocaine, PCP, Methamphetamine (2.5g to <10g)	F	7	2
	Heroin (<1g)	F	6	2
	Other Narcotics of Schedule I and II, Cocaine, PCP, Methamphetamine (<2.5g)	F	6	2
	Marijuana (50 lbs. or greater or 51 or more live plants)	F	8	2
	Marijuana (10 lbs. to <50 lbs. or 21 to <51 live plants)	F	7	2
	Marijuana (1 lb. to <10 lbs. or 10 to <21 live plants)	F	5	2
	Marijuana (<1 lb. or <10 live plants)	F	3	2
	Schedule I and II Drugs not listed	F	5	2
	Schedule III and IV Drugs	F	5	2
	Schedule V Drugs	M	3	m
(31)	Small Amount of Marijuana	M	1	m
(32)	Possession of Paraphernalia	M	1	m
(33)	PWID Paraphernalia (no minor)	M	3	m
(33)	PWID Paraphernalia (minor w/Conditions)	M2	4	m
(34)	Ad for Drug Paraphernalia	M	1	m
(35)	Illegal Sale of Non controlled Substance	F	6	2
(36)	Designer Drugs	F	5	2
(37)	Possession of Steroids	M	4	m
	Offenses not otherwise listed [OMNIBUS]	F1	8	3
		F2	7	2
		F3	5	1
		FELONY NOT CLASSIFIED	5	1
		M1	3	m
		M2	2	m
		M3	1	m
		MISD. NOT CLASSIFIED	1	m

* = Subcategorized Offenses. See 303.3(b).
m = Other Misdemeanor Offenses. See 303.7(a)(5).

ENVIRONMENTAL OFFENSES

35 P. S. §	OFFENSE TITLE	STATUTORY CLASS	§ 303.3 OFFENSE GRAVITY SCORE	§ 303.7 PRIOR RECORD POINTS
6018.101-6018.1002	SOLID WASTE MANAGEMENT ACT			
	Knowingly Transports, etc. Hazardous Waste Without Permit	F1	9	1
	Transports, etc. Hazardous Without Permit	F2	7	2
	Violation of Act; DER Order, etc.	M3	1	m
691.1-691.1001	CLEAN STREAMS LAW			
	Violation of Act; DER Order	M3	1	m
4001-4015	AIR POLLUTION CONTROL ACT			
	Knowingly Releases Hazardous Air Pollutant	F1	9	1
	Violation of Act ; DER Order	M2	2	m
	Negligently Releases Hazardous Air Pollution	M3	1	m
721.1-721.17	SAFE DRINKING WATER ACT			
	Knowingly Introduces Contaminant Into Public Water	M1	3	m
	Violation of Act; DER Order	M3	1	m

* = Subcategorized Offenses. See 303.3(b).
m = Other Misdemeanor Offenses. See 303.7(a)(5).

JUDICIAL CODE

42 Pa.C.S. §	OFFENSE TITLE	STATUTORY CLASS	§ 303.3 OFFENSE GRAVITY SCORE	§ 303.7 PRIOR RECORD POINTS
9793 (e)	Failure to Register [sexually violent offenses]	F3	6	1
9795 (d)	Failure to Register [sexually violent predator]	F3	6	1
9796 (e)	Failure to Register [residence of sexually violent predator]	F3	6	1

m = Other Misdemeanor Offenses. See 303.7(a)(5).

VEHICLE LAW OFFENSES

75 Pa.C.S.§	OFFENSE TITLE	STATUTORY CLASS	§ 303.3 OFFENSE GRAVITY SCORE	§ 303.7 PRIOR RECORD POINTS
3712	Abandonment/Stripping of Vehicles	M3	1	m
3731	Driving Under the Influence (1st conviction in 7 years) [MANDATORY MINIMUM=48 HOURS]	M2	2	m
3731	Driving Under the Influence (2nd conviction in 7 years) [MANDATORY MINIMUM=30 DAYS]	M2	2	m
3731	Driving Under the Influence (3rd conviction in 7 years) [MANDATORY MINIMUM=90 DAYS]	M1	3	1
3731	Driving Under the Influence (4th/subseq. conviction in 7 years) [MANDATORY MINIMUM=1 YEAR]	M1	3	1
3732*	Homicide by Vehicle (when there is also a conviction for DUI arising from the same INCIDENT)	M1	8	1

* = Subcategorized Offenses. See 303.3(b).
m = Other Misdemeanor Offenses. See 303.7(a)(5).

75 Pa.C.S.§	OFFENSE TITLE	STATUTORY CLASS	§ 303.3 OFFENSE GRAVITY SCORE	§ 303.7 PRIOR RECORD POINTS
3732*	Homicide by Vehicle (when there is not a conviction for DUI arising from the same INCIDENT)	M1	6	1
3733	Fleeing or Aluding Police	M2	2	m
3735	Homicide by Vehicle while DUI [MANDATORY MINIMUM=3 YEARS]	F2	8	2
3735.1	Aggravated Assault by Vehicle while DUI	F2	7	2
3742 (b)(1)	Accident Involving Death or Personal Injury (failure to stop)	M1	3	m
3742 (b)(2)	Accident Involving Death or Personal Injury (resulting in SBI) [MANDATORY MINIMUM= 90 DAYS]	F3	5	1
3742 (b)(3)	Accident Involving Death or Personal Injury (resulting in death) [MANDATORY MINIMUM=1 YEAR]	F3	6	1
3742.1 (b)(1)	Accident Involving Death or Personal Injury (license suspended)	M2	2	m
3742.1 (b)(1)	Accident Involving Death or Personal Injury (no license issued)	M3	1	m
3742.1 (b)(2) *	Accident Involving Death or Personal Injury (SBI, license suspended)	F3	4	1
3742.1 (b)(2) *	Accident Involving Death or Personal Injury (death, no license issued)	F3	5	1
3742.1 (b)(2) *	Accident Involving Death or Personal Injury (SBI, license suspended)	M1	3	m
3742.1 (b)(2) *	Accident Involving Death or Personal Injury (death, no license issued)	M1	4	m
3743	Accident Involving Damage to Attended Vehicle	M3	1	m
7102	Falsify Vehicle Identification	M1	3	m
7102	Falsify Vehicle Identification	M3	1	m
7103	Deal in Vehicles with Removed Identification	F3	5	1
7103	Deal in Vehicles with Removed Identification	M3	1	m
7111	Deal in Stolen Plates	M1	3	m
7112	False Report of Theft or Vehicle Conversion	M3	1	m
7121	False Application for Title/Registration	M1	3	m
7122	Altered or Forged Title or Plates	M1	3	m
7132	Prohibited Activities Related to Odometers (1st or subsequent offense, subchapter D)	F3	4	1
7133	Permissible Activities Related to Odometers (1st or subsequent offense, subchapter D)	F3	4	1
7134	Odometer Disclosure Requirement (1st or subsequent offense, subchapter D)	F3	4	1
7135	Odometer Mileage Statement (1st or subsequent offense, subchapter D)	F3	4	1
7136	Conspiracy to Violate (1st or subsequent offense, subchapter D)	F3	4	1
7137	Violation of Unfair Trade Practices (1st or subsequent offense, subchapter D)	F3	4	1
7752(b)	Unauthorized Disposition of Forms	M3	1	m
8306(b)	Willful Violations	M3	1	m
8306(c)	Subsequent Willful Violations	M2	2	m

* = Subcategorized Offenses. See 303.3(b).
m = Other Misdemeanor Offenses. See 303.7(a)(5).

75 Pa.C.S.§	OFFENSE TITLE	STATUTORY CLASS	§ 303.3 OFFENSE GRAVITY SCORE	§ 303.7 PRIOR RECORD POINTS
	Offenses not otherwise listed [OMNIBUS]:	F1	8	3
		F2	7	2
		F3	5	1
		FELONY NOT CLASSIFIED	5	1
		M1	3	m
		M2	2	m
		M3	1	m
		MISD. NOT CLASSIFIED	1	m

* = Subcategorized Offenses. See 303.3(b).
m = Other Misdemeanor Offenses. See 303.7(a)(5).

§ 303.16. Basic Sentencing Matrix.

			Prior Record Score								
Level	OGS	Example Offenses	0	1	2	3	4	5	RFEL	REVOC	AGG/MIT
LEVEL 5 State Incar	14	*Murder 3* *Inchoate Murder/ SBI*	72-240	84-240	96-240	120-240	168-240	192-240	204-240	240	+/- 12
	13	*Inchoate Murder/no SBI* Drug Del. Result in Death PWID Cocaine, etc. (>1,000 gms)	60-78	66-84	72-90	78-96	84-102	96-114	108-126	240	+/- 12
	12	*Rape* *IDSI* *Robbery (SBI)* *Robbery/car (SBI)*	48-66	54-72	60-78	66-84	72-90	84-102	96-114	120	+/- 12
	11	*Agg Asslt (SBI)* *Voluntary Manslaughter* Sexual Assault PWID Cocaine, etc. (100-1,000 gms)	36-54 BC	42-60	48-66	54-72	60-78	72-90	84-102	120	+/- 12
	10	*Kidnapping* *Arson (person inside)* *Agg Asslt (att. SBI)* *Robbery (threat. SBI)* Agg. Indecent. Assualt Causing Catastrophe (F1) PWID Cocaine, etc. (50-<100 gms)	22-36 BC	30-42 BC	36-48	42-54	48-60	60-72	72-84	120	+/- 12
	9	*Robbery/car (no SBI)* *Robbery (F1/F2)* *Burglary (home/ person)* *Arson (no person)*	12-24 BC	18-30 BC	24-36 BC	30-42 BC	36-48 BC	48-60	60-72	120	+/- 12

Level	OGS	Example Offenses	0	1	2	3	4	5	RFEL	REVOC	AGG/MIT
LEVEL 4 State Incar/ RIP trade	8 [F1]	Agg. Asslt. (BI w/DW) Agg. Asslt. (att. BI w/DW) Invol. Mansl. (when DUI) Hom. by Vehicle (when DUI) Theft (>$100,000) PWID Cocaine, etc. (10-<50 gms)	9-16 BC	12-18 BC	15-21 BC	18-24 BC	21-27 BC	27-33 BC	40-52	NA	+/- 9
LEVEL 3 State/ Cnty Incar RIP trade	7 [F2]	Robbery (inflicts/ threatens BI) Burglary (home/ no person) Statutory Sexual Assault Theft (>$50,000-$100,000) Arson (no person) PWID Cocaine, etc. (2.5-<10 gms)	6-14 BC	9-16 BC	12-18 BC	15-21 BC	18-24 BC	24-30 BC	35-45 BC	NA	+/- 6
	6	Invol. Mansl. (when no DUI) Hom. by Vehicle (when no DUI) Burglary (not home/person) Theft (>$25,000-$50,000) Arson (property) PWID Cocaine, etc. (<2.5 gms)	3-12 BC	6-14 BC	9-16 BC	12-18 BC	15-21 BC	21-27 BC	27-40 BC	NA	+/- 6
LEVEL 2 Cnty Incar RIP RS	5 [F3]	Burglary (not home/no person) Corruption of Minors Robbery (prop by force) Firearms (loaded) Theft (>$2000-$25,000) PWID (1-<10 lb of marij)	RS-9	1-12 BC	3-14 BC	6-16 BC	9-16 BC	12-18 BC	24-36 BC	NA	+/- 3
	4	Indecent Assault Forgery (will, deed) Firearms (unloaded) Crim. Trespass (breaks in)	RS-3	RS-9	RS-<12	3-14 BC	6-16 BC	9-16 BC	21-30 BC	NA	+/- 3
	3 [M1]	Simple Assault Terr. Threats Theft ($200-$2000) Retail Theft (3rd) DUI (M1) Drug Poss.	RS-1	RS-6	RS-9	RS-<12	3-14 BC	6-16 BC	12-18 BC	NA	+/- 3

Level	OGS	Example Offenses	0	1	2	3	4	5	RFEL	REVOC	AGG/MIT
LEVEL 1	2 [M2]	Theft ($50-<$200) Retail Theft (1st, 2nd) DUI (M2) Bad Checks	RS	RS-2	RS-3	RS-4	RS-6	1-9	6-<12	NA	+/- 3
RS	1 [M3]	Most Misd. 3's; Theft (<$50) Drug Paraph. Poss. Small Amount Marij.	RS	RS-1	RS-2	RS-3	RS-4	RS-6	3-6	NA	+/- 3

1. Shaded areas of the matrix indicate restrictive intermediate punishments may be imposed as a substitute for incarceration.
2. When restrictive intermediate punishments are appropriate, the duration of the restrictive intermediate punishment program shall not exceed the guideline ranges.
3. When the range is RS through a number of months (e.g. RS-6), RIP may be appropriate.

Key:
CNTY =county
INCAR =incarceration
PWID =possession with intent to deliver
REVOC =repeat violent offender category
RFEL =repeat felony 1/felony 2 offender category
RIP =restrictive intermediate punishments
RS =restorative sanctions
<;> =less than;greater than
BC =boot camp
Italics=Three Strikes Offense

§ 303.17. DWE/Possessed Matrix

Prior Record Score

Level	OGS	Deadly Weapon	0	1	2	3	4	5	RFEL	REVOC	AGG/MIT
Level 5	14	Possessed	81-240	93-240	105-240	129-240	177-240	201-240	213-240	240	+/-12
	13	Possessed	69-87	75-93	81-99	87-105	93-111	105-123	117-135	240	+/-12
	12	Possessed	57-75	63-81	69-87	75-93	81-99	93-111	105-123	120	+/-12
	11	Possessed	45-63	51-69	57-75	63-81	69-87	81-99	93-111	120	+/-12
	10	Possessed	31-45	39-51	45-57	51-63	57-69	69-81	81-93	120	+/-12
	9	Possessed	21-33	27-39	33-45	39-51	45-57	57-69	69-81	120	+/-12
Level 4	8	Possessed	15-22	18-24	21-27	24-30	27-33	33-39	46-58	NA	+/-9
	7	Possessed	12-20	15-22	18-24	21-27	24-30	30-36	41-51	NA	+/-6
	6	Possessed	9-18	12-20	16-22	18-24	21-27	27-33	33-46	NA	+/-6
Level 3	5	Possessed	6-15	7-18	9-20	12-22	15-22	18-24	30-42	NA	+/-3
	4	Possessed	3-6	3-12	3-<15	6-17	9-19	12-19	24-33	NA	+/-3
	3	Possessed	3-4	3-9	3-12	3-<15	6-17	9-19	15-21	NA	+/-3
	2	Possessed	3-3	3-5	3-6	3-7	3-9	4-12	9-<15	NA	+/-3
	1	Possessed	3-3	3-4	3-5	3-6	3-7	3-9	6-9	NA	+/-3

§ 303.18. DWE/Used Matrix

Prior Record Score

Level	OGS	Deadly Weapon	0	1	2	3	4	5	RFEL	REVOC	AGG/MIT
Level 5	14	Used	90-240	102-240	114-240	138-240	186-240	210-240	222-240	240	+/-12
	13	Used	78-96	84-102	90-108	96-114	102-120	114-132	126-144	240	+/-12
	12	Used	66-84	72-90	78-96	84-102	90-108	102-120	114-132	120	+/-12
	11	Used	54-72	60-78	66-84	72-90	78-96	90-108	102-120	120	+/-12
	10	Used	40-54	48-60	54-66	60-72	66-78	78-90	90-102	120	+/-12
	9	Used	30-42	36-48	42-54	48-60	54-66	66-78	78-90	120	+/-12
Level 4	8	Used	21-28	24-30	27-33	30-36	33-39	39-45	52-64	NA	+/-9
	7	Used	18-26	21-28	24-30	27-33	30-36	36-42	47-57	NA	+/-6
	6	Used	15-24	18-26	21-28	24-30	27-33	33-39	39-52	NA	+/-6

Level	OGS	Deadly Weapon	0	1	2	3	4	5	RFEL	REVOC	AGG/MIT
Level 3	5	Used	12-21	13-24	15-26	18-28	21-28	24-30	36-48	NA	+/-3
	4	Used	6-9	6-15	6->18	9-20	12-22	15-22	27-36	NA	+/-3
	3	Used	6-7	6-12	6-15	6-<18	9-20	12-22	18-24	NA	+/-3
	2	Used	6-6	6-8	6-9	6-10	6-12	7-15	12-<18	NA	+/-3
	1	Used	6-6	6-7	6-8	6-9	6-10	6-12	9-12	NA	+/-3

[Pa.B. Doc. No. 97-400. Filed for public inspection March 14, 1997, 9:00 a.m.]

Title 210—APPELLATE PROCEDURE

PART II. INTERNAL OPERATING PROCEDURE

[210 PA. CODE CH. 67]

Repealing of § 67.52: Reporting of Opinions; Publications

Please be advised that the Commonwealth of Pennsylvania has repealed Section 411 of its Internal Operating Procedures, 210 Pa. Code § 67.52, as obsolete. That section provided:

Annex A

TITLE 210. APPELLATE PROCEDURE

PART II. INTERNAL OPERATING PROCEDURE

CHAPTER 67. INTERNAL OPERATING PROCEDURES OF THE COMMONWEALTH COURT

DECISIONS

§ 67.52. Reporting of Opinions; Publications.

Official bound volume opinions of the Commonwealth Court are published periodically by Murrelle Printing Company as the *Pennsylvania Commonwealth Court Reports*, with the approval of and by agreement between the Commonwealth Court and the publisher. Advance reports of the opinions of the Commonwealth Court are not officially published under the authority of the court but are published with the consent of the Commonwealth Court by the West Publishing Company, *Atlantic Reporter*.

In June of 1995, the court ceased publication of the Commonwealth Court Reports.

G. RONALD DARLINGTON,
Executive Administrator
Commonwealth Court of Pennsylvania

[Pa.B. Doc. No. 97-401. Filed for public inspection March 14, 1997, 9:00 a.m.]

Title 225—RULES OF EVIDENCE

SUPREME COURT OF PENNSYLVANIA AD HOC COMMITTEE ON EVIDENCE

Proposed Pennsylvania Rule of Evidence

In 1995 the Supreme Court authorized its Ad Hoc Committee on Evidence to draft Rules of Evidence to be considered for adoption by the Court. The Committee has drafted these Rules, and the Court has now authorized the publication of the Rules for comments and suggestions by interested persons.

Written comments should be submitted no later than June 1, 1997 and directed to:

Pennsylvania Supreme Court
Ad Hoc Committee on Evidence
c/o A.O.C.P., Office of Judicial Services
1515 Market Street, Suite 1428
Philadelphia, PA 19102

Comments

The comments accompanying the Proposed Rules were drafted for discussion purposes only. It is intended that the comments will be substantially revised after the period for comment and suggestion has been concluded.

NANCY M. SOBOLEVITCH,
Court Administrator of Pennsylvania

Annex A

TITLE 225. RULES OF EVIDENCE

ARTICLE I. GENERAL PROVISIONS

Rule 101. Scope and Citation of the Rules.

(a) *Scope*. These rules of evidence shall govern proceedings in all courts of the Commonwealth of Pennsylvania's unified judicial system, except as otherwise provided by law.

(b) *Citation*. These rules of evidence are adopted by the Supreme Court of Pennsylvania under the authority of Article V § 10(c) of the Constitution of Pennsylvania,

adopted April 23, 1968. They shall be known as the Pennsylvania Rules of Evidence and shall be cited as "Pa.R.E."

Comment

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

These rules are applicable only to courts. They are applicable in all divisions of the Courts of Common Pleas including the Civil Division, Criminal Division, Trial Division, Orphans' Court Division and Family Division. They are not applicable to other tribunals, such as administrative agencies and arbitration panels, except as provided by law or unless the tribunal chooses to apply them.

Rule 102. Purpose and Construction.

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

Comment

This rule is identical to F.R.E. 102.

Rule 103. Rulings on Evidence.

(a) *Effect of Erroneous Ruling*. Error may not be predicated upon a ruling which admits or excludes evidence unless

(1) *Objection*. In case the ruling is one admitting evidence, a timely objection, motion to strike or motion in limine appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) *Offer of Proof*. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or by motion in limine or was apparent from the context within which the evidence was offered.

(b) *Record of Offer and Ruling*. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) *Hearing of Jury*. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

Comment

Paragraph 103(a) differs from F.R.E. 103(a) in that the Federal Rule says "Error may not be predicated upon a ruling which admits or excludes evidence unless *a substantial right of the party is affected, and*." (emphasis added). The italicized words have been deleted because they are inconsistent with Pennsylvania law in both criminal and civil cases. In criminal cases the accused is entitled to relief for an erroneous ruling unless the court is convinced beyond a reasonable doubt that the error is harmless. See *Commonwealth v. Story*, 476 Pa. 391, 383 A.2d 155 (1978). In civil cases, Pa.R.C.P. 126 permits the court to disregard an erroneous ruling "which does not affect the substantial rights of the parties." The deletion of the underlined words is intended to retain the present Pennsylvania law in both criminal and civil cases.

Paragraphs 103(a)(1) and (a)(2) are consistent with Pennsylvania law. See *Dilliplaine v. Lehigh Valley Trust Co.*, 457 Pa. 255, 322 A.2d 114 (1974); *Commonwealth v. Clair*, 458 Pa. 418, 326 A.2d 272 (1974). Paragraphs 103(a)(1) and (a)(2) are similar to F.R.E. 103(a)(1)—(a)(2). The term "motion in limine" has been added in paragraph (a)(2), and the last three words have been changed. Motions in limine permit the trial court to make rulings on evidence prior to trial or at trial but before the evidence is offered. Such motions can expedite the trial and assist in producing just determinations. Care must be taken, however, to assure that the record is preserved should there be post trial motions or appeals. The change in language is intended to make it clear that the requirement that offers of proof be made is applicable to testimonial and other types of evidence.

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

F.R.E. 103(d) permits a court to grant relief for "plain errors affecting substantial rights although they were not brought to the attention of the court." This paragraph has been deleted because it is inconsistent with paragraphs (a)(1) and (a)(2) and with Pennsylvania law as established in *Dilliplaine* and *Clair*. In capital cases, the Supreme Court has relaxed traditional waiver concepts and has considered alleged errors on their merits. See *Commonwealth v. Zettlemoyer*, 500 Pa. 16, 454 A.2d 937 (1982).

Rule 104. Preliminary Questions.

(a) *Questions of Admissibility Generally*. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) *Relevancy Conditioned on Fact*. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) *Hearing of Jury*. Hearings on the admissibility of evidence alleged to have been obtained in violation of the defendant's rights shall in all cases be conducted outside the presence of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.

(d) *Testimony by Accused*. The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.

(e) *Weight and Credibility*. Even though the court has decided that evidence is admissible, this does not preclude a party from offering evidence relevant to the weight or credibility of that evidence.

Comment

Paragraph 104(a) is identical to F.R.E. 104(a). The first sentence is consistent with Pennsylvania law. See *Commonwealth v. Chester*, 526 Pa. 578, 587 A.2d 1367, cert. denied, *Laird v. Pennsylvania*, 502 U. S. 849 and *Chester v. Pennsylvania*, 502 U. S. 959 (1991).

The second sentence of paragraph 104(a) is based on the premise that, by and large, the law of evidence is a "child of the jury system" and that the rules of evidence should not be applied when the judge is the fact finder. The theory is that the judge should be empowered to hear any relevant evidence in order to resolve questions of admissibility. Under the Federal Rule the court may consider even the allegedly inadmissible evidence in deciding whether to admit the evidence. See *Bourjaily v. United States*, 483 U. S. 171, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987). There is no express authority in Pennsylvania on whether the court is bound by the rules of evidence in making its determinations on preliminary questions. In view of this, the approach of the Federal Rule has been adopted.

The Federal Rules have not specifically resolved the question of whether the allegedly inadmissible evidence may be sufficient in and of itself to establish its own admissibility. See *Bourjaily v. United States*, *supra*. This question cannot be resolved in the abstract. Certainly, there are some instances in which the disputed evidence will be sufficiently reliable to establish its own admissibility. For example, Pa.R.E. 902 provides that some evidence is self-authenticating. But, in some cases, additional evidence will be required. Sufficiency of the evidence is a question that must be resolved by the trial court on a case-by-case basis.

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

The first sentence of paragraph 104(c) differs from the first sentence of F.R.E. 104(c) in that the federal rule says "Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury." The first sentence of Pa.R.E. 104(c) has been changed to be consistent with Pa.R.Crim.P. 323(f), which requires hearings outside the presence of the jury in all cases in which it is alleged that the evidence was obtained in violation of the defendant's rights.

The second sentence of paragraph 104(c) is identical to the second sentence of F.R.E. 104(c) and indicates that hearings on other preliminary matters, both criminal and civil, shall be conducted outside the jury's presence when required by the interests of justice. Certainly, the court should conduct the hearing outside the presence of the jury when the court believes that it will be necessary to do so in order to prevent prejudicial information being heard by the jury. The right of an accused to have his testimony on a preliminary matter taken outside the presence of the jury does not appear to have been discussed in Pennsylvania law.

Paragraph 104(d) is identical to F.R.E. 104(d). In general, when a party offers himself as a witness, the party may be questioned on all relevant matters in the case. See *Agate v. Dunleavy*, 398 Pa. 26, 156 A.2d 530 (1959). Under Pa.R.E. 104(d), when the accused in a criminal case testifies only with regard to a preliminary matter, he or she may not be cross-examined as to other matters. Although there is no Pennsylvania authority on this point, it appears that this rule is consistent with Pennsylvania practice. This approach is consistent with paragraph 104(c) in that it is designed to preserve the defendant's right not to testify generally in the case.

Paragraph 104(e) differs from F.R.E. 104(e) in order to clarify the meaning of this paragraph. See 21 Wright and Graham, *Federal Practice and Procedure* § 5058. This paragraph is consistent with Pennsylvania law.

Rule 105. Limited Admissibility.

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court upon request shall, or on its own initiative may, restrict the evidence to its proper scope and instruct the jury accordingly.

Comment

This rule differs from F.R.E. 105, in that the language "or on its own initiative may" has been added. This rule as amended is consistent with Pennsylvania law. It should be noted that there are other approaches that may be utilized when evidence is admissible as to one party or for one purpose, but not admissible as to another party or for another purpose. The evidence may be redacted. See *Commonwealth v. Johnson*, 474 Pa. 410, 378 A.2d 859 (1977). A severance may be an appropriate remedy. See *Commonwealth v. Young*, 263 Pa. Super. 333, 397 A.2d 1234 (1979). Where the danger of unfair prejudice outweighs probative value, the evidence may be excluded. See Pa.R.E. 403 and *McShain v. Indemnity Insurance Co. of North America*, 338 Pa. 113, 12 A.2d 59 (1940).

Rule 106. Remainder of or Related Writings or Recorded Statements.

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Comment

This section is identical to F.R.E. 106. It is consistent with Pennsylvania law. See *Pedretti v. Pittsburgh Railways Co.*, 417 Pa. 581, 209 A.2d 289 (1965). A similar principle is expressed in Pa.R.C.P. 4020(a)(4) which provides "If only part of a deposition is offered in evidence by a party, any other party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts."

The purpose of Pa.R.E. 106 is to give the adverse party an opportunity to correct a misleading impression that may be created by the use of portions of a writing or recorded statement that are taken out of context. This rule gives the adverse party the right to correct the misleading impression at the time that the evidence is introduced. The trial court has discretion to decide whether other parts, or other writings or recorded statements, ought in fairness to be considered contemporaneously with the original portion.

ARTICLE II. JUDICIAL NOTICE

Rule 201. Judicial Notice of Adjudicative Facts.

(a) *Scope of Rule*. This rule governs only judicial notice of adjudicative facts.

(b) *Kinds of Facts*. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) *When Discretionary*. A court may take judicial notice, whether requested or not.

(d) *When Mandatory*. A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) *Opportunity to Be Heard*. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) *Time of Taking Notice*. Judicial notice may be taken at any stage of the proceeding.

(g) *Instructing Jury*. The court shall instruct the jury that it may, but is not required to, accept as conclusive, any fact judicially noticed.

Comment

This rule is identical to F.R.E. 201, except for paragraph (g).

Paragraph (a) limits the application of this rule to adjudicative facts. This rule is not applicable to judicial notice of law. Adjudicative facts are facts about the events, persons and places relevant to the matter before the court. See McCormick, *Evidence* § 328 (4th ed. 1992).

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

Paragraph (b) is consistent with Pennsylvania law. See, *Appeal of Albert*, 372 Pa. 13, 92 A.2d 663 (1952); *In re Siemens' Estate*, 346 Pa. 610, 31 A.2d 280 (1943), cert. denied, 320 U. S. 758, 64 S. Ct. 66, 88 L.Ed. 452 (1943).

Paragraph (c) is consistent with Pennsylvania practice.

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

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

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

Paragraph (g) differs from F.R.E. 201(g). Under the Federal Rule the court is required to instruct the jury to accept as conclusive any fact judicially noticed in a civil case. In a criminal case the judicially noticed fact is not treated as conclusive.

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

ARTICLE III. PRESUMPTIONS

Rule 301. General Rule.

Presumptions as they now exist or may be modified by law shall be unaffected by the adoption of these rules.

Comment

The Federal Rules of Evidence do not modify the existing law with regard to presumptions. These rules take a similar approach.

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.

Comment

Pa.R.E. 401 is identical to F.R.E. 401. The rule codifies existing Pennsylvania law, as represented by the Supreme Court's definition of relevance in *Commonwealth v. Scott*, 480 Pa. 50, 389 A.2d 79, 82 (1978): "Evidence which tends to establish some fact material to the case, or which tends to make a fact at issue more or less probable, is relevant." See also, *Commonwealth v. Stewart*, 461 Pa. 274, 336 A.2d 282, 284 (1975), describing the relevance inquiry under Pennsylvania law. Whether evidence has a tendency to make a given fact more or less probable is to

be determined by the court in the light of reason, experience, scientific principles and the other testimony offered in the case.

A finding of relevance may be conditional, or dependent on facts not yet of record. Under Pa.R.E. 104(b) such evidence may be admitted subject to the introduction of further evidence demonstrating that all conditions necessary to a finding of relevance have been met.

The word, "fact," as used in Pa.R.E. 401 should be construed liberally to conform to existing Pennsylvania law. In conformity with existing law, the rule applies to proof of a negative, or "negative evidence." See, e.g., *Klein v. Woolworth*, 309 Pa. 320, 163 A. 532 (1932), holding that the absence of entries in a payroll record was relevant and admissible to prove that a person was not an employee, and *Stack v. Wapner*, 244 Pa. Super.. 278, 368 A.2d 292 (1976), holding that the absence of entries in a hospital record was relevant and admissible to prove that the defendant-physician was not present during a critical time period. These same principles appear in statutory law. Under 42 Pa.C.S. § 6104(b) the absence of entries in an official record is relevant and admissible to prove the nonexistence of a fact, provided the fact is of the type that would have been recorded pursuant to an official duty. See also, Comment under subsection (7) of Pa.R.E. 803, regarding the absence of entries in records of regularly conducted activity.

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

All relevant evidence is admissible, except as otherwise provided by law. Evidence that is not relevant is not admissible.

Comment

Pa.R.E. 402 is substantively the same as F.R.E. 402. The only variance is in the language of the exceptions clause in the first sentence. The exceptions clause of the federal rule specifically enumerates the various sources of federal rulemaking power. Pa.R.E. 402 substitutes the phrase, "by law," to encompass analogous sources of rulemaking power within the Commonwealth.

The rule states a fundamental concept of the law of evidence. Relevant evidence is admissible; evidence that is not relevant is not admissible. This concept is modified by the exceptions clause of the rule, which states another fundamental principle of evidentiary law. Evidence otherwise relevant may be excluded by operation of constitutional law, by statute, by rules of evidence created by decisional law, by these rules, or by other rules promulgated by the Supreme Court.

As noted in the Comment to Pa.R.E. 101, a principal goal of these rules is to construct a comprehensive code of evidence governing court proceedings in the Commonwealth. Pa.R.E. 402 explicitly recognizes, however, that these rules cannot be all inclusive. The law of evidence is also shaped by constitutional principle, legislative enactment, procedural rulemaking and decisional law. These rules of evidence are not intended to supersede other provisions of law, unless they do so expressly, or by necessary implication.

Examples of decisionally created rules of exclusion that are not abrogated by the adoption of these rules include: the corpus delecti rule, *Commonwealth v. Ware*, 459 Pa. 334, 329 A.2d 258 (1974); the collateral source rule, *Boudwin v. Yellow Cab Co.*, 410 Pa. 31, 188 A.2d 259 (1963); the parol evidence rule, *Gianni v. R. Russell and Co., Inc.*, 281 Pa. 320, 126 A. 791 (1924); and the rule excluding certain evidence to rebut the presumption of legitimacy, *John M. v. Paula T.*, 524 Pa. 306, 571 A.2d 1380 (1990), cert. denied, 498 U. S. 850.

Option I

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice.

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

Comment

Pa.R.E. 403 differs from F.R.E. 403. The federal rule provides that relevant evidence may be excluded if its probative value is "substantially outweighed" by the danger of unfair prejudice. Pa.R.E. 403 eliminates the word, "substantially," in order to conform the text of the rule more closely to decisional law.

"Unfair prejudice" means a tendency to suggest decision on an improper basis or to divert the jury's attention away from their duty of weighing the evidence impartially.

Pa.R.E. 403 provides a single standard for civil and criminal cases. The rule may differ in application, however, because evidentiary questions in criminal cases may have a constitutional dimension not found in civil cases. In criminal cases, procedural rules cannot be applied to the detriment of the defendant's due process right to a fair trial. See, generally, *Chambers v. Mississippi*, 410 U. S. 284 (1973); *Commonwealth v. Spiewak*, 533 Pa. 1, 617 A.2d 696 (1992). The absence of analogous constitutional constraints in civil cases may result in more liberal application of the rule in civil cases.

Civil cases. Pennsylvania decisional law prior to adoption of this rule did not reflect a uniform standard for balancing probative value against prejudice in civil cases. Although a number of intermediate appellate cases have used the language of the federal rule in discussing the admissibility of contested evidence, see, e.g., *Daset Mining Co. v. Industrial Fuels Corp*., 326 Pa.Super. 14, 473 A.2d 584, 588 (1984), *Whyte v. Robinson*, 421 Pa.Super. 33, 617 A.2d 380, 383 (1992), an equal number of cases have been decided without reference to a standard for balancing probative value against prejudice. See, e.g., *Morrison v. Com., Dept. of Pub. Welfare*, 538 Pa. 122, 646 A.2d 565, 572 (1994); *Egelkamp v. Egelkamp*, 362 Pa.Super. 269, 524 A.2d 501, 504 (1987); *Christy v. Darr*, 78 Pa.Cmwlth. 354, 467 A.2d 1362, 1364 (1983). Codification of a uniform standard by adoption of this rule is not intended to change substantive law regarding the admissibility of evidence in civil cases.

Criminal cases. Pa.R.E. 403 is consistent with existing law in criminal cases. See, *Commonwealth v. Boyle*, 498 Pa. 486, 447 A.2d 250, 254 (1982); *Commonwealth v. Cohen*, 529 Pa. 552, 605 A.2d 1212, 1218 (1992); *Commonwealth v. Abu-Jamal*, 521 Pa. 188, 555 A.2d 846, 854 (1989); *Commonwealth v. Ulatowski*, 472 Pa. 53, 371 A.2d 186, 191, n. 11 (1977).

In criminal cases, there are exceptions to the application of this general standard. The degree of prejudice associated with certain types of evidence has been found high enough to shift the balance away from admissibility and towards exclusion, and the evidence is not admitted unless the proponent can demonstrate that its probative value outweighs its potential for unfair prejudice. See, *Commonwealth v. Morris*, 493 Pa. 164, 425 A.2d 715, 729

(1981) (even where a legitimate evidentiary purpose is demonstrated, evidence of other crimes is not admissible unless its probative value is shown to outweigh its potential for prejudice); *Commonwealth v. Buehl*, 510 Pa. 363, 508 A.2d 1167, 1182 (1986)(inflammatory photographs are admissible only upon a showing that the photos are of such evidentiary value that their need clearly outweighs the potential for unfair prejudice); *Commonwealth v. Sullivan*, 472 Pa. 129, 371 A.2d 468, 481 (1977) (same). Pa.R.E. 403 does not overrule decisional law favoring the exclusion of certain types of evidence which the courts have found to be highly prejudicial in criminal cases. Under Pa.R.E. 403 courts may continue to recognize that the prejudice inherent in certain types of evidence is strong enough to shift the balance towards exclusion.

With regard to evidence of other crimes, wrongs or acts of the defendant in a criminal case, Pa.R.E. 404(b)(iii) codifies the standard set by *Commonwealth v. Morris*, supra. Rule 404(b)(iii) provides that such evidence, when offered for a legitimate evidentiary purpose, is admissible only upon a showing that the probative value outweighs the potential for prejudice.

Rule 404. Character Evidence Not Admissible To Prove Conduct; Exceptions; 0ther 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 as follows:

(1) *Character of Accused*. In a criminal case, evidence of a pertinent trait of character of the accused is admissible when offered by the accused, or by the prosecution to rebut the same.

(2) *Character of Alleged Victim*.

(i) In a criminal case, evidence of a pertinent trait of character of the alleged victim is admissible when offered by the accused, or by the prosecution to rebut the same.

(ii) In a homicide case, where the accused has offered evidence that the deceased was the first aggressor, evidence of a character trait of the deceased for peacefulness is admissible when offered by the prosecution to rebut the same.

(iii) In a civil action for assault and battery, evidence of a character trait of violence of the plaintiff may be admitted when offered by the defendant to rebut evidence that the defendant was the first aggressor.

(3) *Character of witness*. Evidence of a pertinent trait of character of a witness is admissible as provided in rules 607 (who may impeach), 608 (character and conduct of witness) and 609 (evidence of conviction of crime).

(b) *Other Crimes, Wrongs, or Acts*.

(1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.

(2) Evidence of other crimes, wrongs, or acts may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

(3) Evidence of other crimes, wrongs, or acts proffered under subsection (ii) of this rule may be admitted only upon a showing that the probative value of the evidence outweighs its potential for prejudice.

(4) In criminal cases, the prosecution shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of any such evidence it intends to introduce at trial.

Comment

Pa.R.E. 404 differs from F.R.E. 404. The differences are discussed in the subsection Comments that follow.

Subsection (a). Pa.R.E. 404(a) is substantively the same as F.R.E. 404(a). The rules differ only as to structure. Although the exception provided at Rule (a)(2)(iii) does not appear in the federal rule, it is consistent with both federal and Pennsylvania decisional law. See, *Hackbart v. Cincinnati Bengals*, 601 F.2d 516 (10th Cir. 1979); *Bell v. Philadelphia*, 341 Pa. Super.. 534, 491 A.2d 1386 (1985).

This rule does not control the use of character evidence in civil actions where character is an element of a claim or defense. For example, in actions for negligent entrustment, evidence of the defendant's knowledge of the character of the person to whom he entrusted some duty is both relevant and admissible. It is not excluded by this rule, because it is not offered to prove action in conformity therewith. Pa.R.E. 405 (b)(i) provides that in a civil action where character is an element of a claim or defense, character may be proved either by reputation evidence or by specific instances of conduct.

Subsection (a)(2) is a restatement of Pennsylvania law. In cases of homicide and assault, an accused who claims self-defense is permitted to introduce evidence of the alleged victim's violent or aggressive character for the following purposes: (i) to demonstrate the reasonableness of the accused's apprehension of immediate danger; or (ii) to show that the alleged victim was, in fact, the aggressor. For the first purpose, there must be a showing that the accused had knowledge of the alleged victim's violent character. For the second purpose, the accused's knowledge of the alleged victim's character for violence is not required. *Commonwealth v. Dillon*, 528 Pa. 417, 598 A.2d 963, 965 (1991). Under *Commonwealth v. Amos*, 445 Pa. 297, 284 A.2d 748 (1971), evidence of the alleged victim's criminal record for violence is admissible for both purposes. See, also, Pa.R.E. 405, providing that the alleged victim's character for violence may be proven either by reputation evidence or by specific instances of conduct.

After the accused has offered evidence regarding the alleged victim's violent character, the prosecution is permitted to rebut such evidence by offering proof of the peaceful character of the alleged victim. Under Pa.R.E. 405, the peaceful character of the alleged victim may be proven by reputation evidence.

Subsection (b). This subsection reflects the courts' long-standing concern regarding the prejudicial impact of evidence of other crimes, wrongs and acts in the trial of a criminal accused. In *Commonwealth v. Spruill*, 480 Pa. 601, 391 A.2d 1048 (1978) the Court characterized evidence of other crimes as, "probably only equalled by a confession in its prejudicial impact upon a jury." Id. at 606, 391 A.2d at 1050. "The presumed effect of such evidence is to predispose the minds of the jurors to believe the accused guilty, and thus effectually to strip him of the presumption of innocence." Id. In *Commonwealth v. Morris*, 493 Pa. 164, 425 A.2d 715, 720 (1981), the Court held that evidence of other crimes, wrongs or acts offered for a legitimate evidentiary purpose is admissible, "if the probative worth . . . outweighs the tendency to prejudice the jury". Pa.R.E. 404(b)(iii) adopts the standard used in *Morris*.

The Supreme Court has cautioned lower courts against liberal interpretation of the "other purposes" clause to

permit the introduction of other crimes evidence under subsection (b)(ii). *Commonwealth v. Spruill*, 391 A.2d at 1050. Cases in which the Supreme Court has approved admission of evidence under the "other purposes" clause include: where the other crimes were part of a chain or sequence of events which formed the history of the case and were part of its natural development, *Commonwealth v. Lark*, 518 Pa. 290, 543 A.2d 491 (1988), and where the defendant used other crimes to threaten or intimidate the alleged victim. *Commonwealth v. Claypool*, 508 Pa. 198, 495 A.2d 176 (1985).

Rule 405. Methods of Proving Character.

(a) *Reputation Evidence.* In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation. A witness whose testimony is to be admitted under this Rule may not be called at trial under this Rule unless the party seeking to call the witness makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet the evidence, the proponent's intention in calling the witness, the particulars of the witness' expected testimony, and the name and address of the witness. The particulars of the witness' expected testimony should include the identity of any person the witness spoke to in the community in order to reach a conclusion about the person's reputation for the relevant trait of character, the nature of the information provided by such person(s) in the community, and what relationship, if any, the person in the community has with the person who is the subject of the testimony. On cross-examination of the reputation witness, inquiry is allowable into specific instances of conduct probative of the character trait in question, except that in criminal cases inquiry into arrests of the accused not resulting in conviction is not permissible.

(b) *Specific Instances of Conduct.* Specific instances of conduct are not admissible to prove character or a trait of character, except as follows:

(i) In civil cases, specific instances of a person's conduct may be admitted to prove character or a trait of character, where character or a trait of character is an element of a claim or defense.

(ii) In criminal cases, the accused may prove the alleged victim's character or a trait of character by specific instances of conduct.

Comment

Pa.R.E. 405 differs from F.R.E. 405. One of the principal points of divergence is that Pennsylvania law does not permit proof of character by opinion evidence. Such evidence is admissible to prove character under the federal rules. In criminal cases, Pennsylvania law also imposes additional restrictions on the use of specific acts evidence to prove character. These restrictions are discussed in the subsection Comments that follow.

Reputation evidence is an exception to the hearsay rule under Pa.R.E. 803(21).

Subsection (a). Pa.R.E. 405(a) differs from F.R.E. 405 in providing that reputation witnesses offered on behalf of a defendant in a criminal case may not be cross-examined regarding arrests of the defendant not resulting in conviction. There is no similar restriction under the federal rule. The restriction set forth in Pa.R.E. 405(a) derives from *Commonwealth v. Scott*, 496 Pa. 188, 436 A.2d 607, 611—612 (1981), holding that arrests not resulting in conviction may not be used to impeach testimony that the accused was a person of good character. Pa.R.E. 405(a) also differs from F.R.E. 405 in that it provides a notice requirement. This requirement is intended to eliminate unfair surprise.

See, also, Comment to Pa.R.E. 608(b), infra, regarding the use of specific instances of conduct, either on cross-examination or as extrinsic evidence, to attack or support the credibility of a witness.

Subsection (b). Pa.R.E. 405(b) is substantively the same as F.R.E. 405(b). The difference between the two rules is essentially structural. The federal rule does not distinguish between civil and criminal cases in permitting the use of specific instances of conduct to prove character. Pa.R.E. 405(b) does distinguish civil and criminal cases.

Subsection (b)(i). With regard to civil cases, Pa.R.E. 405(b)(i) is identical to the federal rule in permitting proof of character by specific instances of conduct only where character is an essential element of the claim or defense. Historically, the use of specific acts to prove character was prohibited under Pennsylvania law. *Frazier v. Pennsylvania R.R. Co.*, 38 Pa. 104 (1861), *Rosenstiel v. Pittsburg Rys. Co.*, 230 Pa. 273, 79 A. 556 (1911); *Commonwealth v. Jones*, 280 Pa. 368, 124 A. 486 (1924). The rationale for exclusion was that such evidence would confuse the case with collateral issues, prolong the trial, and mislead and distract the jury. *Rosensteil*, 79 A. at 559. Without overruling these earlier cases, the Court in *Matusak v. Kulczewski*, 295 Pa. 208, 145 A. 94 (1928) held that specific acts of conduct were admissible to prove character in a suit for alienation of affection. Specific acts of conduct have more recently been admitted to prove character in actions alleging negligent employment, *Dempsey v. Walso Bureau, Inc.*, 431 Pa. 562, 246 A.2d 418 (1968), and in custody cases on the issue of parental fitness. *Commonwealth ex rel. Grimes v. Grimes*, 281 Pa. Super. 484, 422 A.2d 572 (1980). Pa.R.E. 405 is intended to reflect the approach of these cases by permitting specific instances of conduct to prove character in a civil action only where character is an element of a claim or defense.

Subsection (b)(ii). Under F.R.E. 405(b) criminal cases are subject to the general rule that specific instances of conduct are admissible to prove character, where character is an element of the claim or defense. Pa.R.E. 405(b)(ii) is facially more restrictive than the federal rule by permitting specific acts evidence to prove character in criminal cases in only one instance: when offered by the defendant to prove the character of the alleged victim. This rule is consistent with Pennsylvania law. See, *Commonwealth v. Dillon*, 528 Pa. 417, 598 A.2d 963 (1991); *Commonwealth v. Amos*, 445 Pa. 297, 284 A.2d 748 (1971). See also, Comment to Pa.R.E. 404(a)(2), supra, regarding the admissibility of character evidence on behalf of a defendant in a criminal case to prove the alleged victim's character for violence in support of a claim of self-defense. Although different in form, Pa.R.E. 405(b)(ii) does not differ significantly from the federal rule in substance, since there are few, if any, identifiable instances in criminal cases where character will be an essential element of the claim or defense.

Rule 406. Habit; Routine Practice.

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

Comment

This rule is identical to F.R.E. 406 and restates Pennsylvania law. See *Baldridge v. Matthews*, 378 Pa. 566, 106 A.2d 809 (1954)(uniform practice of hotel permitted to establish conduct in conformity with practice). The concepts of "habit" and "routine practice" denote conduct that occurs with fixed regularity in repeated specific situations. Like the federal rule, Pa.R.E. 406 does not set forth the ways in which habit or routine practice may be proven, but leaves this for case-by-case determination. Evidence of specific past instances of conduct, as well as opinion based on adequate factual foundation, are potential methods of proof. See, e.g., *Commonwealth v. Rivers*, 537 Pa. 394, 644 A.2d 710 (1994) (allowing testimony based on familiarity with another's conduct); *Baldridge*, 106 A.2d at 811 (testimony of uniform practice apparently permitted without examples of specific instances). The court may determine whether evidence of specific instances of conduct should be treated as a preliminary question. The questions whether testimony on habit or routine practice is supported by adequate foundation, or should be conditionally received subject to further foundation, are matters for the court's discretion.

Evidence of habit must be distinguished from evidence of character. Character applies to a generalized propensity to act in a certain way without reference to specific conduct, and frequently contains a normative, or value-laden, component (e.g., a character for truthfulness). Habit connotes one's conduct in a precise factual context, and frequently involves mundane matters (e.g., recording the purpose for checks drawn). The Advisory Committee's Note to F.R.E. 406 sets forth a description of this distinction: "Character is a generalized description of one's disposition in respect to a general trait, such as honesty, temperance, or peacefulness. . . . A habit, on the other hand, is the person's regular practice of meeting a particular kind of situation with a specific type of conduct, such as the habit of going down a particular stairway two stairs at a time, or of giving the hand-signal for a left turn, or of alighting from railway cars while they are moving." F.R.E. 406 adv. comm. notes ¶ 2 (quoting *McCormick on Evidence* § 162 p. 340).

Option I

Rule 407. Subsequent Remedial Measures.

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove that the party who took the measures was negligent or engaged in culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for impeachment or to prove other controverted matters, such as ownership, control, or feasibility of precautionary measures.

Comment

This rule is similar to F.R.E. 407. The rule restates the traditional Pennsylvania doctrine that evidence of subsequent remedial measures is not admissible to prove fault or negligence. *Baran v. Reading Iron Co.*, 202 Pa. 274, 51 A. 979 (1902).

Pa.R.E. 407 is silent on the issue whether it excludes subsequent remedial measures when offered to prove a defect in strict liability. The Pennsylvania Superior Court has issued partially conflicting decisions on whether subsequent remedial measures are admissible to prove defect in strict liability cases. *Compare Matsko v. Harley Davidson Motor Co., Inc.*, 325 Pa. Super. 452, 473 A.2d 155 (1984)(proof of recall admitted to prove defect)(2 1 split opinion), with *Connelly v. Roper Corp.*, 404 Pa. Super. 67, 590 A.2d 11 (1991)(post-sale design changes not admissible to prove design defect)(2 1 split opinion); *Dunkle v. West Penn Power Co.*, 400 Pa. Super. 334, 583 A.2d 814 (1990)(post-sale safety standard not admissible to prove defective design or inadequate warning where no recall required); and *Gottfried v. American Can Co.*, 339 Pa. Super. 403, 489 A.2d 222 (1985)(post-sale design changes not admissible to prove design defect). Pa.R.E. allows the Pennsylvania courts to continue to develop the law in this area, leaving the Supreme Court of Pennsylvania free to decide this matter in the context of a case or controversy.

The majority of federal circuits to address this issue have decided that F.R.E. 407 does not permit subsequent remedial measures to be used to prove defect in strict liability cases. See *Raymond v. Raymond Corp.*, 938 F.2d 1518, 1522 (1st Cir. 1991); *Chase v. G.M. Corp.*, 856 F.2d 17, 22 (4th Cir. 1988); *Gauthier v. AMF, Inc.*, 788 F.2d 634, 637 (9th Cir. 1986); *Flaminio v. Honda Motor Co.*, 733 F.2d 463, 469 (7th Cir. 1984); *Alexander v. Conveyors & Dumpers, Inc.*, 731 F.2d 1221, 1229 (5th Cir. 1984); *Grenada Steel Indus., Inc. v. Alabama Oxygen Co.*, 695 F.2d 883, 888 (5th Cir. 1983); *Hall v. American Steamship Co.*, 688 F.2d 1062, 1066—67 (6th Cir. 1982); *Josephs v. Harris Corp.*, 677 F.2d 985, 991 (3d Cir. 1982); *Cann v. Ford Motor Co.*, 658 F.2d 54, 60 (2d Cir. 1981), cert. denied, 456 U. S. 960 (1982); *Werner v. Upjohn Co.*, 628 F.2d 848 (4th Cir. 1980), cert. denied, 449 U. S. 1080 (1981); *Knight v. Otis Elevator Co.*, 596 F.2d 84, 91 (3d Cir. 1979). See also *Dine v. Western Exterminating Co.*, 1988 U. S. Dist. Lexis 4745 (D.D.C. March 9, 1988). Two federal circuits, the Eighth and the Tenth, have held that Rule 407 does not exclude evidence of subsequent remedial measures in strict liability actions. See *Huffman v. Caterpillar Tractor Co.*, 908 F.2d 1470, 1483 (10th Cir. 1990); *Donahue v. Phillips Petroleum Co.*, 866 F.2d 1008, 1013 (8th Cir. 1989); *Roth v. Black & Decker, U. S., Inc.*, 737 F.2d 779, 782 (8th Cir. 1984); *Herndon v. Seven Bar Flying Serv., Inc.*, 716 F.2d 1322, 1327 (10th Cir. 1983), cert. denied, 466 U. S. 958 (1984). See also *McFarland v. Bruno Mach. Co.*, 626 N.E.2d 659, 664 (Ohio 1994) (the Ohio Supreme Court held that Ohio Rule 407, a duplicate of the federal rule, should not apply in a strict products liability case). The Eighth Circuit apparently is reconsidering its position. See *Burke v. Deere & Co.*, 6 F.3d 497, 506 (8th Cir. 1993) ("[T]his case illustrates the dangers inherent in our present approach and further . . . it may indeed be wise to revisit the issue en banc in a proper case."); see also *DeLuryea v. Winthrop Laboratories*, 697 F.2d 222, 227—29 (8th Cir. 1983) (allowing 407 to exclude evidence in a strict products liability setting).

Pa.R.E. 407 makes clear in the first sentence that the rule of exclusion operates only in favor of a party who took the subsequent remedial measures. The federal version of Rule 407 is silent as to whether there is any restriction on the actor who must have taken the subsequent remedial measure for the rule to preclude admissibility of such evidence. The majority of federal courts have held that the rule does not apply when one other than the allegedly liable party takes the action because the reason for the rule (to encourage remedial measures) is not implicated. See, e.g., *TLT-Babcock, Inc. v. Emerson Electric Co.*, 33 F.3d 397 (4th Cir. 1994) (collecting cases). The rule does not, however, address whether measures taken by another party are admissible against a party that did not take the measures. To be admissible, such evidence must satisfy the standards of Pa.R.E. 401, 402

and 403. E.g., *Leaphart v. Whiting Corp.*, 387 Pa. Super. 253, 564 A.2d 165 (1989)(repairs to product made by plaintiff's employer not admissible in strict liability action against product seller/installer and component part manufacturers), allocatur denied, 525 Pa. 619, 620, 577 A.2d 890, 891 (1990); *Moe v. Avions Marcel Dassault-Breguet Aviation*, 727 F.2d 917 (10th Cir. 1984); *O'Dell v. Hercules, Inc.*, 904 F.2d 1194 (8th Cir. 1990) (excluding evidence under Rule 403 as prejudicial and irrelevant).

The last sentence of Pa.R.E. has been altered from the federal rule to make clear that, when subsequent remedial measures are offered to prove issues such as ownership, control or feasibility of precautionary measures, those issues must be controverted. Pennsylvania recognizes the admissibility of subsequent remedial measures to prove controverted issues other than negligence or culpable conduct, such as the feasibility of precautions, and the rule incorporates this recognition. See, e.g., *Incollingo v. Ewing*, 444 Pa. 299, 282 A.2d 206 (1971); *Haas v. Commonwealth of Pennsylvania Dept. of Transp.*, 113 Pa. Cmwlth. 218, 536 A.2d 865 (1988) (evidence of subsequent erection of warning sign not permitted to show feasibility of same where issue not controverted).

Option II

Rule 407. Subsequent Remedial Measures.

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove that the party who took the measures was negligent or engaged in culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered to prove other controverted matters, such as ownership, control, feasibility of precautionary measures, or a defect in strict liability cases, or when offered for impeachment purposes.

Comment

Pa.R.E. 407 is similar to its federal counterpart, but differs substantially in its formulation.

Pa.R.E. 407 is a limited exception to the general evidential precept set forth in Pa.R.E. 402 that all relevant evidence is admissible. Evidence of subsequent remedial measures, when not relevant, may be excluded under Pa.R.E. 402.

Pa.R.E. 407 applies both to civil and criminal cases, though its most common application, by far, is in civil cases for personal injuries, or other damages, resulting from an accident.

Pa.R.E. 407 is the result of a public policy decision that must choose between two evils. On balance, it is thought that the chances that finders of fact, usually juries, will reach wrong decisions in cases because they have been deprived of relevant evidence of subsequent remedial measures, are outweighed by the chances that parties being charged with fault for causing accidents, or other undesirable events, will not take timely remedial measures to prevent recurrences for fear that their actions will be used against them in litigation arising out of the initial event.

Pa.R.E. 407, unlike its federal counterpart, makes it clear that it may be used to exclude evidence of subsequent remedial measures only by the party who took them. For example, a defendant manufacturer of a machine involved in an accident to a plaintiff worker cannot use Pa.R.E. 407 to exclude relevant evidence that the worker's employer put a guard on the machine after the accident. (If the evidence is not relevant, the manufacturer can use Rule 402 to exclude it.) The federal rule is ambiguous, but after many years of litigation various circuits seem to have reached a consensus that it should be interpreted to preclude use by anyone other than a party who has taken the subsequent remedial measures. See *TLT-Babcock, Inc. v. Emerson Electric Co.*, 33 F.3d 397 (4th Cir. 1994) (collecting cases).

Pa.R.E. 407 also differs from its federal counterpart in making clear that evidence of subsequent remedial measures may be admitted to prove a defect in a strict products liability case. Federal Rule of Evidence 407 is ambiguous on this point. More than 20 years after its enactment, federal court decisions still conflict with respect to its meaning.

Pennsylvania has long held that evidence of subsequent remedial measures may not be introduced to prove antecedent negligence. See *Baran v. Reading Iron Co.*, 202 Pa. 274, 51 A. 979 (1902). However, Pennsylvania has been resolutely meticulous in holding that concepts of negligence and fault have no place in a suit for damages based on strict products liability. See *Azzarello v. Black Bros. Co., Inc.*, 480 Pa. 547, 391 A.2d 1020 (1978); *Lewis v. Coffing Hoist Div.*, 515 Pa. 334, 528 A.2d 590 (1987); *Walton v. Avco Corp.*, 530 Pa. 568, 610 A.2d 454 (1992).

Therefore, when Pa.R.E. 407 says that evidence of subsequent remedial measures is not admissible to prove "negligence or culpable conduct," it does not encompass claims based on strict liability, i.e., liability without fault. Pa.R.E. 407 is thus consistent with current Pennsylvania law as enunciated in *Matsko v. Harley Davidson Motor Co., Inc.*, 325 Pa. Super. 452, 473 A.2d 155 (1984).

Pa.R.E. 407 also avoids another pitfall in the federal formulation. In listing examples of purposes for which evidence of subsequent remedial measures may be admitted, Federal Rule of Evidence 407 is worded ambiguously. It is not clear whether the words, "if controverted," are intended to apply only to the immediately preceding example (feasibility of precautionary measures), or to all preceding examples. At any rate, Pa.R.E. 407 makes it clear that evidence of subsequent remedial measures may be admitted only to prove "controverted matters."

Rule 408. Compromise and Offers to Compromise.

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Comment

This rule, which is substantially similar to F.R.E. 408, excludes the use of evidence of compromises in civil cases to prove either liability for a claim or validity of an amount in controversy. Contrary to its federal counterpart, Pa.R.E. 408 does not bar the use of all statements and conduct occurring during settlement negotiations. In this respect, the rule continues existing Pennsylvania law that distinct admissions of fact made during settlement discussions are admissible. *Rochester Machine Corp. v.*

Mulach Steel Corp., 498 Pa. 545, 449 A.2d 1366 (1982)(plurality); *Heyman v. Hanauer*, 302 Pa. 56, 152 A. 910 (1930); *Hammel v. Christian*, 416 Pa. Super. 78, 610 A.2d 979 (1992), allocatur denied, 533 Pa. 652, 624 A.2d 111 (1993).

Like the federal rule, Pa.R.E. 408 permits evidence relating to compromises and offers to compromise to be admitted for purposes other than proving liability, such as showing bias or prejudice. See *Heyman v. Hanauer*, 302 Pa. 56, 152 A. 910 (1930) (if proposal was offer to settle, it could have been used to impeach witness).

In allowing compromises to be used for "other purposes," Pa.R.E. reconciles partially conflicting authority in Pennsylvania on the admissibility of completed compromises. 42 Pa.C.S.A. § 6141 provides, in pertinent part, as follows:

§ 6141. Effect of certain settlements

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

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

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

Based on section 6141(c), a panel of the Superior Court in *Wilkerson v. Allied Van Lines, Inc.*, 360 Pa. Super. 523, 521 A.2d 25 (1987), allocatur denied, 518 Pa. 61, 540 A.2d 268 (1980), cert. denied, 488 U. S. 827 (1988), held that a completed settlement could not be introduced to show bias, prejudice or interest. Recent cases from the Supreme Court of Pennsylvania indicate, however, that reasons such as public policy and the right to a fair cross-examination require that evidence of a settlement be admitted for purposes other than showing liability for a claim or the amount of a claim. See *Hatfield v. Continental Imports, Inc.*, 530 Pa. 551, 610 A.2d 446 (1992)(permitting evidence of agreement akin to "Mary Carter" agreement to be used to show bias); *Hammel v. Christian*, 416 Pa. Super. 78, 610 A.2d 979 (1992), allocatur denied, 533 Pa. 652, 624 A.2d 111 (1993). Moreover, 42 Pa. Cons. Stat. Ann. §§ 6141(a) (c) can be interpreted to exclude evidence only when offered as a party's admission of liability.

Consistent with Pennsylvania law, Pa.R.E. 408 follows the federal rule that does not exclude evidence of offers to compromise or completed compromises when used to prove an effort to obstruct a criminal investigation or prosecution. This is consistent with Pennsylvania law. See *Commonwealth v. Pettinato*, 360 Pa. Super. 242, 520 A.2d 437 (1987). The rule would not permit, however, the use of evidence relating to good faith compromises or offers to compromise when made for the purpose of reaching an agreement such as those sanctioned by Pa.R.Crim.P. 314 (relating to dismissal of criminal charges not committed by force or violence upon payment of restitution) or Pa.R.Crim.P. 145 (relating to dismissal upon satisfaction or agreement). The court may need to conduct, out of the hearing of the jury, a preliminary inquiry into the circumstances surrounding compromises in criminal matters to determine whether to permit such evidence.

Rule 409. Payment of Medical and Similar Expenses.

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

Comment

This rule is identical to F.R.E. 409 and is consistent with Pennsylvania law. 42 Pa.C.S. § 6141(c)(payment of expenses not admissible); see also *Burns v. Joseph Flaherty Co.*, 278 Pa. 579, 123 A. 496 (1924)(guarantee of medical expenses cannot be used as basis for liability). As with F.R.E. 409 (and as with Pa.R.E. 408), collateral factual admissions made in the course of offering to pay for medical expenses are not excluded by this rule.

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

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

(1) a plea of guilty which was later withdrawn;

(2) a plea of nolo contendere;

(3) any statement made in the course of any proceedings under Rules 59, 177, 179 or 319 of the Pennsylvania Rules of Criminal Procedure, Fed. R. Crim. P. 11, or any comparable rule or provision of law of another state regarding the pleas identified in subsections (1) and (2) of this rule; or

(4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which does not result in a plea of guilty or which results in a plea of guilty later withdrawn.

(b) *Exception*. A statement made in the course of a plea, proceedings or discussions identified in subsection (a) of this rule is admissible (1) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness to be considered contemporaneously with it, or (2) in a criminal proceeding for perjury, false swearing or unsworn falsification to authorities.

Comment

This rule is functionally equivalent to F.R.E. 410. References to Rules 59, 177, 179 and 319 of the Pennsylvania Rules of Criminal Procedure and the comparable rules or other provisions of other states have been added. Unlike the federal rule, subsection (b) of the Pennsylvania rule is set forth separately to indicate that it creates an exception applicable to all of subsection (a). Subsection (b) also refers to the Pennsylvania analogues to false statement under federal law. Subsection (b) of the Pennsylvania rule also does not expressly include the federal requirement that statements need be made by the defendant under oath, on the record and in the presence of counsel because, for example, prosecutions for unsworn falsifications to authorities do not require a statement under oath. See 18 Pa.C.S.A. § 4904. The rule permits

case law to decide whether any further limitations on the rule should be imposed. As modified, the rule reflects present Pennsylvania law. See *Commonwealth v. Jones*, 375 Pa. Super. 194, 544 A.2d 54 (1988); *Commonwealth ex rel. Warner v. Warner*, 156 Pa. Super. 465, 40 A.2d 886 (1945).

The conviction that results from a plea of nolo contendere, as distinct from the plea itself, may be used to impeach in a later proceeding (subject to Pa.R.E. 609), and to establish an element of a charge in a later administrative proceeding. See *Commonwealth v. Snyder*, 408 Pa. 253, 182 A.2d 495 (1962)(conviction based on nolo contendere plea could be used to impeach witness in later criminal proceeding), cert. denied, 371 U. S. 957 (1963); *Eisenberg v. Commonwealth, Department of Public Welfare*, 512 Pa. 181, 516 A.2d 333 (1986)(conviction based on nolo contendere plea permitted to establish element of charge in administrative proceeding).

In addition, Pennsylvania has a statute that governs the admissibility of pleas in summary proceedings involving motor vehicle matters. The statute, which appears at 42 Pa.C.S.A. § 6142, provides as follows:

§ 6142. Pleas in vehicle matters

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

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

Rule 411. Liability Insurance.

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

Comment

This rule is identical to F.R.E. 411 and is a restatement of Pennsylvania law that evidence of insurance can be admitted notwithstanding some prejudicial effect if the evidence of insurance is itself relevant to prove an issue in the case. E.g., *Beechwoods Flying Serv. v. Al Hamilton Contracting Corp.*, 504 Pa. 618, 476 A.2d 350 (1984); *Price v. Yellow Cab Co. of Philadelphia*, 443 Pa. 56, 278 A.2d 161 (1971) (plurality) (collecting cases); *Fleischman v. Reading*, 388 Pa. 183, 130 A.2d 429 (1957); *Copozi v. Hearst Publishing Co.*, 371 Pa. 503, 92 A.2d 177 (1952); *McGowan v. Devonshire Hall Apartments*, 278 Pa. Super. 229, 420 A.2d 514 (1980); *Jury v. New York Central R. Co.*, 167 Pa. Super. 244, 74 A.2d 531 (1950). The rule lists examples of issues on which evidence of insurance could be relevant. As with all evidence, evidence not excluded by this rule must satisfy the standard of Pa.R.E. 403.

Rule 412 [See Comment]

Comment

Pennsylvania has not adopted a Rule of Evidence comparable to F.R.E. 412, "Rape Cases; Relevance of Victim's Past Behavior." In Pennsylvania this subject is governed by 18 Pa.C.S. § 3104 (the "Rape Shield Law") and by decisional law which has redefined, on constitutional grounds, the statute's application.

18 Pa.C.S. § 3104 provides as follows:

§ 3104. Evidence of victim's sexual conduct

(a) **General rule**.—Evidence of specific instances of the alleged victim's past sexual conduct, opinion evidence of the alleged victim's past sexual conduct, and reputation evidence of the alleged victim's past sexual conduct shall not be admissible in prosecutions under this chapter except evidence of the alleged victim's past sexual conduct with the defendant where consent of the alleged victim is at issue and such evidence is otherwise admissible pursuant to the rules of evidence.

(b) **Evidentiary proceedings**.—A defendant who proposes to offer evidence of the alleged victim's past sexual conduct pursuant to subsection (a) shall file a written motion and offer of proof at the time of trial. If, at the time of trial, the court determines that the motion and offer of proof are sufficient on their faces, the court shall order an in camera hearing and shall make findings on the record as to the relevance and admissibility of the proposed evidence pursuant to the standards set forth in subsection (a).

The statute permits evidence of past sexual conduct to be introduced in only one instance: past sexual conduct with the defendant is admissible where relevant to the issue of consent. In response to a number of constitutional challenges, Pennsylvania courts have defined further exceptions to the statute's rule of exclusion, holding that evidence of prior sexual conduct is not barred in the following circumstances: (1) where the evidence is constitutionally required to permit a jury to make a fair determination of the defendant's guilt or innocence, *Commonwealth v. Spiewak*, 533 Pa. 1, 617 A.2d 696, 701—702 (1992); (2) where the evidence is relevant to explain the presence of semen, injury or other objective signs of intercourse, *Commonwealth v. Marjorana*, 503 Pa. 602, 470 A.2d 80, 81 (1983); and (3) where the evidence may demonstrate the complainant's bias, interest, prejudice, or motive. See, *Commonwealth v. Eck*, 413 Pa. Super. 538, 605 A.2d 1248 (1992); *Commonwealth v. Wall*, 413 Pa. Super. 599, 606 A.2d 449, appeal denied, 532 Pa. 645, 614 A.2d 1142 (1992); *Commonwealth v. Poindexter*, 372 Pa. Super. 566, 539 A.2d 1341, appeal denied, 520 Pa. 573, 549 A.2d 134 (1988); see also, *Davis v. Alaska*, 415 U. S. 308 (1974). The exceptions recognized in these cases are consistent with F.R.E. 412.

There is no correspondent legislative authority in Pennsylvania for excluding evidence of past sexual conduct in civil actions. If evidence of sexual character or conduct in a civil action is otherwise relevant and admissible under these rules, it is not excludable under 18 Pa.C.S. § 3104.

ARTICLE V. PRIVILEGES

Rule
501. General Rule.

Rule 501. General Rule.

Privileges as they now exist or may be modified by law shall be unaffected by the adoption of these rules.

Comment

The Federal Rules of Evidence do not modify the existing law with regard to privileges. These rules take a similar approach.

ARTICLE VI. WITNESSES

Rule 601. Competency.

(a) *General Rule.* Every person is competent to be a witness except as otherwise provided by statute or in these Rules.

(b) *Disqualification for Specific Defects.* A person is incompetent to testify if because of a mental condition or immaturity, the Court finds that he or she:

(1) is, or was, at any relevant time, incapable of perceiving accurately;

(2) is unable to express himself or herself so as to be understood either directly or through an interpreter;

(3) has an impaired memory; or

(4) does not sufficiently understand the duty to tell the truth.

Comment

Section (a) of this Rule differs from F.R.E. 601, which abolishes all existing grounds of incompetency not specifically provided for in later rules dealing with witnesses, except in civil actions where state law supplies the rule of decision. Section (b) has no counterpart in the Federal Rules. Pa. R.E. 601 tracks current Pennsylvania statutory and decisional law, except to the extent that spousal incompetency to testify as to non-access may still persist.

Section (a).—Pennsylvania has several statutes relating to the competency of witnesses. Under 42 Pa.C.S.A. § 5911, all persons are fully competent as witnesses in any criminal proceeding except as "otherwise provided in this subchapter." Similarly, 42 Pa.C.S.A. § 5921 states that in civil cases, a liability for costs, a right to compensation and any interest in the question on trial or any other interest or policy of law shall not make any person incompetent, with the same exception. What has been "otherwise provided" places a number of limits on these general rules.

Originally, 42 Pa.C.S.A. § 5912 made those convicted of perjury or subornation of perjury in a Pennsylvania court incompetent to testify in criminal cases, except in a proceeding to punish or prevent injury or violence to the convicted person's person or property. Under 42 Pa.C.S.A. § 5922, the same disqualification applies in civil cases. Later, 42 Pa.C.S.A. § 5912 was amended by the Act of April 22, 1993, P. L. 2, No. 2, so that those convicted of perjury or subornation of perjury are now fully competent to testify in criminal cases; the disqualification in civil cases persists.

The marital relationship has been the source of various statutes affecting competency. Initially, a husband and wife were not competent to testify against each other (with certain exceptions having to do generally with their conduct toward one another or their children) either in criminal proceedings, 42 Pa.C.S.A. § 5913, or civil matters, 42 Pa.C.S.A. § 5924. However, in both criminal and civil cases, in which a spouse is a party, when that spouse makes an attack upon the other's character or conduct, the latter becomes a competent witness in rebuttal. 42 Pa.C.S.A. §§ 5915, 5925 and 5926. Moreover, in an action by either a husband or wife against the other to recover or protect the separate property of either, both are fully competent witnesses. 42 Pa.C.S.A. § 5927.

This framework was changed when 42 Pa.C.S.A. § 5913 was amended by the Act of June 29, 1989, P. L. 69, No. 16, to convert spousal incompetency in criminal cases into a waivable privilege not to testify against a then lawful spouse and to make the privilege unavailable in certain types of cases. The amendment was in line with the holding in *Trammel v. United States*, 445 U. S. 40 (1980). No comparable change was made with respect to spousal incompetency in civil matters; in fact, the Act of Dec. 19, 1990, P. L. 1240, No. 206, § 4, confirmed this disqualification. In addition, the other provisions regarding spousal rebuttal testimony in both criminal and civil cases and full spousal competency in actions to recover or protect separate property have been left undisturbed.

At early common law, all parties to the litigation and all persons having a pecuniary or proprietary interest in its outcome were incompetent. When this all-encompassing disqualification was abolished in this country (this was accomplished in Pennsylvania by the enactments now embodied in 42 Pa.C.S.A. §§ 5911 and 5921, referred to above), one vestige of it was retained—the dead man's statutes. Pennsylvania's version is found in 42 Pa.C.S.A. §§ 5930 5933. Section 5930 provides generally that where any party "to a thing or contract in action" has died or "been adjudged a lunatic" and his right has passed "to a party on the record who represents his interest in the subject in controversy" neither any surviving party to such thing or contract nor "any other person whose interest shall be adverse to such right of the deceased or lunatic party" shall be competent to testify to any matter occurring before the death or adjudication of lunacy of said party. There are certain exceptions in § 5930 relating to remaining partners, joint promisors or promisees, persons claiming by devolution and ejectment actions against several joint defendants. In addition, under § 5932, one who would otherwise be incompetent may be called to testify against his or her own interest after which he or she becomes fully competent; the same section makes one fully competent upon the filing of record of a release of his or her interest. Finally, § 5933 allows one who would otherwise be incompetent to testify to any relevant matter if the matter occurred between him or her and another living person who testifies at the trial against the interest of the otherwise incompetent person. (Section 5931 is intended to make clear that "the general language" of § 5930 does not remove the incompetency created by certain other specified statutes.) There is a special application of the dead man's statute in 20 Pa.C.S.A. § 2209, which prohibits a surviving spouse from testifying to the creation of the marital status in matters dealing with claims for the elective share of a surviving spouse. For a discussion of these statutes, see Packel & Poulin, *Pennsylvania Evidence* § 601.5.

Section (b).—The tests for competency in this section come into play with respect to persons suffering from some mental defect and children of tender years. The Advisory Committee on the Federal Rules decided not to include in F.R.E. 601 any mental or moral qualifications for testifying. Notes of the Advisory Committee to Rule 601. Pennsylvania decisions have taken a different tack, and section (b) is derived from those decisions.

The cases have not created any hard and fast rules; the existence of a mental defect does not automatically disqualify (*Commonwealth v. Ware*, 459 Pa. 334, 329 A.2d 258 (1974)), and no minimum age has been established (*compare Rosche v. McCoy*, 397 Pa. 615, 156 A.2d 307, 310 (1959), where there is a questionable intimation that a child of four was incompetent per se, with *Commonwealth v. Stohr*, 361 Pa. Super. 293, 522 A.2d 589 (1987), upholding trial court's determination that a child of four and one-half years was competent). Instead, the competency of the mentally defective and of young children has been determined by the standards set forth in section (b). *Commonwealth v. Goldblum*, 498 Pa. 455, 447 A.2d 234 (1982) (mental capacity); *Commonwealth v. Mazzoccoli*, 475 Pa. 408, 380 A.2d 786 (1977) (minor witness). As section (b) specifically provides, the application of the standards is a factual question, to be resolved by the court. The court's determination should seldom, if ever, be reversed. Packel & Poulin, *Pennsylvania Evidence*, §§ 601.6, 601.7. Expert testimony has been used when competency under these standards has been an issue. E.g., *Commonwealth v. Baker*, 466 Pa. 479, 353 A.2d 454 (1976); *Commonwealth v. Gaerttner*, 355 Pa. Super. 203, 484 A.2d 92 (1984). Pa.R.E. 601(b) is intended to preserve existing law and not to expand it.

Historically, the law in Pennsylvania was that neither a husband nor a wife was competent to testify as to non-access or absence of sexual relations if the effect would be to "bastardize" a child born during their marriage. *Jane's Estate*, 147 Pa. 527, 23 A. 892 (1892); *Commonwealth v. DiMatteo*, 124 Pa. Super. 277, 188 A. 425 (1936). However, in *Commonwealth ex rel. Leider v. Leider*, 434 Pa. 293, 254 A.2d 306 (1969), this holding was limited. There, a wife sought support from her second husband for a child conceived and born during her first marriage. Both the wife and her first husband testified as to non-access, and the wife testified that the second husband was the child's father. The Supreme Court decided that the testimony concerning non-access was competent, stating that it did not bastardize the child because the subsequent marriage to the putative father legitimized the child; hence the Court said it was not necessary to question the rule.

What the Supreme Court avoided in *Leider*, the Superior Court met head on in *Commonwealth ex rel. Savruk v. Derby*, 235 Pa. Super. 560, 344 A.2d 624 (1975), and held that it was time to abandon the rule. But later, in *Commonwealth v. Ritchie*, 324 Pa. Super. 557, 472 A.2d 220 (1984), remanded on another issue, 509 Pa. 357, 502 A.2d 148 (1985), modified, 480 U. S. 39 (1986), the Superior Court cited both Leider and Savruk in allowing a wife to testify to non-access. And in *McKenzie v. Harris*, 679 F.2d 8 (3d Cir. 1982), the Third Circuit held that under Pennsylvania law a husband and wife were incompetent to testify to non-access.

The stigma and disability that once attached to illegitimacy, the reasons said to support the rule, have been largely eliminated. Moreover, the actual parentage of a child may be shown by other evidence. See, e.g., 23 Pa.C.S.A. § 5104, the Uniform Act on Blood Tests to Determine Paternity. Hence, there does not appear to be any sound reason to continue to bar the spousal testimony, and under Pa.R.E. 601, it will now be admissible.

Finally, there is the matter of the use of testimony based upon hypnotically refreshed recollection. One of the issues concerning such testimony is whether it raises a question of competency or admissibility. The issue is analyzed in Wright & Gold, *Federal Practice and Procedure: Evidence*, § 6011, and the authors conclude that it is question of competency. However, as they point out, there are no federal decisions that have used F.R.E. 601 as a basis for decision and many state and Federal courts have relied upon admissibility rules concerning scientific evidence or the principles underlying F.R.E. 403 (Pa.R.E. 403 is an exact counterpart), providing for the exclusion of evidence when its probative value is outweighed by the danger of unfair prejudice, confusion or waste of time. It could be said that the section (b)(3) of Pa.R.E. 601, relating to impaired memory, applies (i.e., has the witness' otherwise impaired memory been cured by the hypnosis), and Pa.R.E. 602, requiring a finding that a witness has personal knowledge of that about which he or she proposes to testify, may be pertinent also (see the Comment to that Rule).

The leading case in Pennsylvania tackled the issue as one concerning scientific evidence. In *Commonwealth v. Nazarovitch*, 496 Pa. 97, 436 A.2d 170 (1981), the Supreme Court rejected hypnotically refreshed testimony, where the witness had no prior independent recollection, because applying the test of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), for scientific testimony, it was not convinced that the process of hypnosis as a means of restoring forgotten or repressed memory had gained sufficient acceptance in its field. *Nazarovitch* has been applied in *Commonwealth v. Smoyer*, 505 Pa. 83, 476 A.2d 1304 (1984) and *Commonwealth v. Romanelli*, 522 Pa. 222, 560 A.2d 1384 (1989), both of which held that when a witness has been hypnotized, he or she may testify concerning those matters recollected prior to hypnosis, but not about matters recalled only during or after hypnosis. Pa.R.E. 601 is not intended to change these results.

However, there is a constitutional limit on these decisions. In *Rock v. Arkansas*, 483 U. S. 44, (1987), the United States Supreme Court held that a defendant in a criminal case has a constitutional right to testify in his or her own behalf and that a per se rule that prohibited hypnotically refreshed testimony violated that right; the reliability of that testimony must be examined on a case-by-case basis. The Court stated that it was expressing no opinion concerning the testimony of witnesses other than a defendant in a criminal case. Id. at 58, n.15.

Rule 602. Lack of Personal Knowledge.

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

Comment

This Rule is identical to F.R.E. 602. Firsthand or personal knowledge is a universal requirement of the law of evidence. See *Johnson v. Peoples Cab Co.*, 386 Pa. 513, 126 A.2d 720 (1956) ("The primary object of a trial in our American courts is to bring to the tribunal, which is passing on the dispute involved, those persons who know

of their own knowledge the facts to which they testify . . . ."). The reference to Rule 703 makes it clear that there is no conflict between Rule 602 and that Rule, allowing an expert to base an opinion on facts not within the expert's personal knowledge.

It is implicit in this Rule that the party calling the witness has the burden of proving personal knowledge. This is consistent with Pennsylvania law. *Carney v. Pennsylvania R.R. Co.*, 428 Pa. 489, 240 A.2d 71 (1968). As the Advisory Committee's Notes to F.R.E. 602 put it, "the rule is a specialized application of the provisions of Rule 104(b) on conditional relevancy." This supports the conclusion that the issue of personal knowledge is a question to be decided by the jury, and the judge may do no more than determine if the evidence is sufficient to support a finding of such knowledge. Wright & Gold, *Federal Practice and Procedure: Evidence*, § 6027. Although it is not altogether clear, this appears to be consistent with Pennsylvania law. See *Commonwealth v. Pronkoskie*, 477 Pa. 132, 383 A.2d 858 (1978).

A witness having firsthand knowledge of a hearsay statement, who testifies to the making of the statement, satisfies Pa. R.E. 602; but the witness may not testify to the truth of the statement if the witness has no personal knowledge of that. Whether the hearsay statement is admissible is governed by Pa.R.E. 801 through 805. Generally speaking, the firsthand knowledge requirement of Rule 602 is applicable to the declarant of a hearsay statement. See, e.g., *Commonwealth v. Pronkoskie*, supra, and *Carney v. Pennsylvania* R.R. Co., supra. However, in the case of admissions of a party opponent, covered by Pa.R.E. 803(25), personal knowledge is not required. *Salvitti v. Throppe*, 343 Pa. 642, 23 A.2d 445 (1942); *Carswell v. SEPTA*, 259 Pa. Super. 167, 393 A.2d 770 (1978). Moreover, Pa.R.E. 804(b)(4) explicitly dispenses with the need for personal knowledge with respect to statements of personal or family history, and Pa.R.E. 803(19), (20) and (21), dealing with statements of reputation concerning personal or family history, boundaries or general history and a person's character, respectively, impliedly do away with the requirement.

This Rule has a bearing on the question of the admissibility of testimony given after the witness has been hypnotized. When the testimony concerns facts developed entirely through the hypnotic process, can it be said that the witness "has personal knowledge"? The answer depends upon whether hypnosis is accepted as a scientifically valid means of restoring the witness' forgotten or repressed memory of what was actually perceived. If it is not, then there can be no finding that the witness "has personal knowledge" as the rule requires. The law developed by the Pennsylvania cases is that the testimony of a witness who has been hypnotized, which is based on prior recollection, is admissible, but testimony arising completely from the hypnosis is not. *Commonwealth v. Nazarovitch*, 496 Pa. 97, 436 A.2d 170 (1981); *Commonwealth v. Smoyer*, 505 Pa. 83, 476 A.2d 1304 (1984); *Commonwealth v. Romanelli*, 522 Pa. 222, 560 A.2d 1384 (1989). These cases, and the constitutional limits imposed upon them in criminal prosecutions by *Rock v. Arkansas*, 483 U. S. 44, 107 S.Ct. 2704 (1987), are discussed more fully in the Comment to Pa.R.E. 601.

Rule 603. Oath or Affirmation.

Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.

Comment

This is the same as F.R.E. 603, which was designed to be flexible enough to deal with all manner of religious beliefs or lack thereof, mental defectives and children. Notes of the Advisory Committee to Rule 603. An understanding of the obligation to tell the truth has been required of both the mentally impaired and children. *Commonwealth v. Kosh*, 305 Pa. 146, 157 A. 479 (1931) and *Commonwealth v. Mazzoccoli*, 475 Pa. 408, 380 A.2d 786 (1977). The Rule does not conflict with 42 Pa.C.S.A. § 5901 which provides that every witness "shall take an oath in the usual or common form by laying the hand upon an open copy of the Holy Bible or by lifting up the right hand and pronouncing or assenting to" a specific incantation set forth in the statute. That statute also permits affirmation by a witness who desires to do so. See also, 42 Pa.C.S.A. § 5902, which provides that a person's capacity to testify "shall not be affected by his opinions on matters of religion" and that no witness shall be questioned "concerning his religious beliefs." Religious belief as a ground for impeachment is treated in Pa. R.E. 610. In *Dunsmore v. Dunsmore*, 309 Pa. Super. 503, 455 A.2d 723 (1983) and *Commonwealth ex rel. Freeman v. Superintendent*, 212 Pa. Super. 422, 431—432, 242 A.2d 903, 908 (1968), it was held to be error to allow a witness to testify without oath or affirmation.

Rule 604. Interpreters.

An interpreter is subject to the provisions of Rule 702 (relating to qualification as an expert) and Rule 603 (relating to the administration of an oath or affirmation).

Comment

This Rule adopts the substance of F.R.E. 604, but explicitly refers to Pa.R.E. 702 and 603 rather than the general reference in the Federal Rule to "the provisions of these rules."

The need for an interpreter whenever a witness' natural mode of expression or the language of a document is not intelligible to the trier of fact is well settled. 3 Wigmore, *Evidence*, § 911 (Chadbourn rev. 1970). Under this Rule, an interpreter is treated as an expert witness who must have the necessary skill to translate correctly and who must promise to do so by oath or affirmation.

There are statutes in Pennsylvania providing for the appointment of interpreters for a deaf party throughout the proceeding in a civil case (42 Pa.C.S.A. § 7103), and in a hearing before a Commonwealth agency (2 Pa.C.S.A. 505.1) and for a deaf defendant throughout the proceeding in a criminal case (42 Pa.C.S.A. § 8701). (The application of the latter statute was considered at length in *Commonwealth v. Wallace*, 433 Pa. Super. 518, 641 A.2d 321 (1994).) Under each of these statutes, an interpreter must be "qualified and trained to translate for an communicate with deaf persons" and must "swear or affirm that he will make a true interpretation to the deaf person and that he will repeat the statements of the deaf person to the best of his ability." Obviously, Pa.R.E. 604 is consistent with these statutes. Pa.R.Crim.P. 264(b) authorizes the presence of an interpreter while an investigating grand jury is in session if the supervising judge determines this is necessary for the presentation of the evidence. Finally, the Pennsylvania Code of Military Justice provides (51 Pa.C.S.A. § 5507) that under regulations prescribed by the governor, the convening authority of a military court may appoint interpreters.

All of the foregoing deal with the use of interpreters in special situations. Although there has been no general statute or rule covering the appointment of interpreters

to translate testimony or documents since the repeal of 17 P. S. § 1875 and 28 P. S. §§ 441—444 by the Judiciary Repealer Act of 1978, the use of interpreters is well established in practice. Packel & Poulin, *Pennsylvania Evidence*, § 604. Under Pennsylvania law, the decision to use an interpreter is within the sound discretion of the trial judge. *Commonwealth v. Pana*, 469 Pa. 43, 364 A.2d 895 (1976); *Commonwealth v. Carrillo*, 319 Pa. Super. 115, 465 A.2d 1256 (1983). Since this Rule makes an interpreter subject to Pa.R.E. 702, under which the trial judge will have to decide if an interpreter is needed to "assist the trier of fact to understand the evidence," it will not cause any disruption of the Pennsylvania practice.

The most common use of an interpreter is to translate witness testimony or documents primarily for the trier of fact, and it is to this situation that the rule is basically directed. However, when a party in a civil case or a defendant in a criminal case has difficulty speaking or understanding English, it is that person, rather than the trier of fact, who needs the interpreter. The statutes dealing with interpreters for deaf parties and defendants recognize this; they require the interpreter to be present throughout the proceedings to translate both what the deaf person might say for the benefit of the trier of fact and what others participating in the proceeding (witnesses, attorneys, the judge) might say for the benefit of the deaf person. In a criminal case, a defendant's need for an interpreter in the circumstances posited, raises serious constitutional questions, because without an interpreter, the defendant's rights to consult with counsel, to confront witnesses against him or her, to be "present" at the trial and to testify in his or her own behalf are placed in jeopardy. These concerns were taken into account in *Commonwealth v. Pana*, supra, where the court held that when a defendant obviously has difficulties understanding and expressing himself in English, even though he has some familiarity with the language, the failure to appoint an interpreter so that the defendant can testify in Spanish is an abuse of discretion requiring a new trial. See also, *United States ex rel. Negron v. New York*, 434 F.2d 386 (2d Cir. 1970); and cf. *United States v. Carron*, 488 F.2d 12 (1st Cir. 1973), cert. denied, 416 U. S. 907, 94 S.Ct. 1613 (1974).

Rule 605. Competency of Judge as Witness.

The judge presiding at the trial may not testify as a witness in that trial.

Comment

This Rule differs from F.R.E. 605; the phrase "in that trial," which follows the word "testify" in the first sentence in the Federal Rule, has been moved to the end of the sentence and the final sentence of the Federal Rule, which dispenses with the need for an objection, has been eliminated. Pa.R.E. 605 makes a judge absolutely incompetent to be a witness on any matter in any trial at which the judge presides; it is one of the exceptions contemplated by Pa.R.E. 601.

Canon 3C of the Pennsylvania Code of Judicial Conduct requires a judge "to disqualify himself in a proceeding in which his impartiality might reasonably be questioned," including where "he has . . . personal knowledge of disputed evidentiary facts . . . [or knows that he is] likely to be a material witness in the proceeding." (There are similar provisions in 28 U.S.C. § 455.) From the phrases "knowledge of disputed evidentiary facts" and "likely to be a material witness," it can be argued that the Canon does not require disqualification if the judge is to testify only as to immaterial formal matters that are not in dispute. This is the position taken in 6 Wigmore, *Evidence*, § 1909 (Chadbourn rev. 1976) and in the Model Code of Evidence, Rule 302. Canon 3C was relied upon in *Municipal Publications, Inc. v. Court of Common Pleas*, 507 Pa. 194, 489 A.2d 1286 (1985), which held that at a hearing on a motion to recuse a judge, the judge himself may not testify concerning the issues raised in the motion and continue to preside at the hearing. Since the judge's testimony obviously went to the heart of the motion to recuse, the decision sheds no light on the scope of the Canon. But Pa.R.E. 605, like its Federal counterpart, leaves no room for argument; it bars all testimony by a presiding judge.

What is the meaning of "testify as a witness"? There is no Pennsylvania authority on the matter. However, based upon the legislative history of F.R.E. 605, it has been suggested that a judge may be said to "testify" even if he has not been called to the witness stand, and the rule has been so applied. See Wright & Gold, *Federal Practice and Procedure: Evidence*, § 6063, (citing *United States v. Lillie*, 953 F.2d 1188 (10th Cir. 1992) (judge in a bench trial taking a view without the knowledge or presence of counsel and the parties)); *Jones v. Beneficial Trust Life Ins. Co.*, 800 F.2d 1397 (5th Cir. 1986) (introduction at trial of the judge's pretrial ruling); and *United States v. Pritchett*, 699 F.2d 317 (6th Cir. 1983) (judge's comments from the bench).

The final sentence of the Federal Rule provides, in effect, an "automatic" objection to testimony by the presiding judge. The stated purpose for this is that the opponent of the testimony would otherwise have to choose between waiver of a challenge to it or the risk of offending the judge by making an objection. Notes of the Advisory Committee to F.R.E. 605. This puts undue emphasis on the sensibilities of trial judges. Moreover, since the Rule has been applied to situations where the trial judge has not been called to the stand, as pointed out above, requiring an objection will often be the means by which the judge may be "brought up short" and provided with an opportunity to take corrective action before it is too late. For these reasons, Pa.R.E. 605 takes the opposite approach—an objection must be made to preserve the issue of violation of the Rule. This is consistent with the provisions of Pa.R.E. 103 that error may not be predicated on a ruling admitting evidence in the absence of a timely objection, motion to strike or motion in limine. Of course, the court should provide an opportunity for the making of the objection out of the presence of the jury.

Rule 606. Competency of Juror as Witness.

(a) *At Trial*. A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) *Inquiry into Validity of Verdict*. Upon an inquiry into the validity of a verdict, including a sentencing verdict pursuant to 42 Pa.C.S.A. § 9711 (relating to capital sentencing proceedings), a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions in reaching a decision upon the verdict or concerning the juror's mental processes in connection therewith, and a juror's affidavit or evidence of any statement by the juror about any of these subjects may not be received. However, a juror may testify concerning whether prejudicial facts not of record, and beyond common knowledge and experience, were

improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.

Comment

Section (a) of this Rule is the same as F.R.E. 606(a). It is another of the incompetency exceptions to Pa.R.E. 601. Section (a) is contrary to the traditional common law rule (see 6 Wigmore, *Evidence*, § 1910 (Chadbourn rev. 1976) and 1 McCormick, *Evidence*, § 68 (4th ed. 1992)), with which the law of Pennsylvania is in accord. *Howser v. Commonwealth*, 51 Pa. 332 (1866) (jurors are competent witnesses in both civil and criminal cases); *Commonwealth v. Sutton*, 171 Pa. Super. 105, 90 A.2d 264 (1952). Since the adoption of the Federal Rules, most states have enacted or promulgated provisions consistent with the substance of section (a). Wright & Gold, *Federal Practice and Procedure: Evidence*, § 6071, notes 59—73. Of course, the calling of a juror as a witness will be a rarity; a juror's knowledge of facts relevant to a case will generally be exposed on voir dire with the resultant disqualification of the juror for cause.

Note that section (a) bars a jury member from testifying "before that jury in the trial of the case in which the juror is sitting." The phrase "before that jury" did not appear in the preliminary draft of F.R.E. 606(a); its addition leads to the conclusion that a juror may testify outside the presence of the rest of the jury on matters occurring during the course of the trial. 3 Weinstein & Berger, *Evidence*, ¶ 606[02], at p. 606—18. *United States v. Robinson*, 645 F.2d 616 (8th Cir. 1981), cert. denied, 454 U. S. 875 (1981), held that on a motion for a mistrial, the Federal Rule did not bar a juror from testifying, out of the presence of the other jurors, concerning his observation of the accused being escorted from the court house under guard. In *United States v. Day*, 830 F.2d 1099 (10th Cir. 1987), the court, in a dictum, stated that a juror, who was not called, could have been called to testify at a hearing during the course of trial on the question of whether bias arose from brief remarks passing between the juror and the investigating F.B.I. agent. Current Pennsylvania law is in accord; see *Commonwealth v. Santiago*, 456 Pa. 265, 318 A.2d 737 (1974), where jurors were permitted to testify at a hearing in chambers during the trial on the question of whether they received improper prejudicial information.

Section (b) of this Rule is based upon F.R.E. 606(b) with certain language and organizational changes that do not alter substance. This section, too, is an incompetency exception to Pa. R.E. 601; but note that the incompetency is limited to the three areas set forth in the first sentence of the redrafted section. These areas are broadly stated to embody all of the elements relevant to a jury's deliberations and decisions of which a juror would have personal knowledge.

The reference to sentencing verdicts in capital cases does not appear in the Federal Rule. It reflects existing Pennsylvania law. *Commonwealth v. Williams*, 514 Pa. 62, 522 A.2d 1058 (1987). The indicting grand jury has now been abolished in all counties of Pennsylvania pursuant to Article I, § 10 of the Pennsylvania Constitution and 42 Pa.C.S.A. 8931(b) and criminal proceedings are now initiated statewide by information. Accordingly, the word "indictment" which is in the Federal Rule, has been removed throughout Pa.R.E. 601(b).

In the interest of simplification and the elimination of redundancy, the language "as influencing the juror to assent to or dissent from," used in connection with effects upon a juror's mind or emotions, has been deleted in favor of the phrase "in reaching a decision upon." No substantive change is intended.

The sentence structure of the Federal Rule has been changed. The exceptions to juror incompetency appear as the second sentence of section (b) and the provision concerning juror affidavits and evidence of juror statements, with minor language differences, has been moved from the end of the section and placed at the end of the first sentence since it is to the subjects thereof that it is relevant. These structural changes should facilitate the reading and understanding of the section.

Finally, the words "extraneous prejudicial information" in the first exception of the Federal Rule have been replaced by "prejudicial facts not of record and beyond common knowledge and experience." This should make clear that the exception is directed at evidence brought before the jury, which was not presented during the trial, and which was not tested by the processes of the adversary system and subjected to judicial scrutiny for a determination of admissibility. The qualification of "common knowledge and experience" is a recognition that all jurors bring with them some common facts of life. See generally, Wright & Gold, *Federal Practice and Procedure: Evidence*, § 6075. A juror who brings facts not of record to the jury's attention is, in effect, testifying in violation of section (a).

Section (b), like its Federal counterpart, is designed to protect all "components of a jury's deliberations, including arguments, statements, discussions, mental and emotional reactions, votes and any other feature of the process," while allowing juror testimony concerning extraneous matters that have the effect of subverting those deliberations. Notes of the Advisory Committee to F.R.E. 606(b). The section is more detailed and expansive than the rule articulated in the Pennsylvania cases. See *Pittsburgh Nat'l. Bank v. The Mutual Ins. Co.*, 493 Pa. 96, 101, 425 A.2d 383, 386 (1981), and cases cited therein (Pennsylvania rule is a "canon of 'no impeachment' with a narrow exception of 'allowing post-trial testimony of extraneous influences which might have . . . [prejudiced] the jury during deliberations' "). Nevertheless, the results of the cases are generally in accord with the section. The decisions have consistently protected the elements of the jury's deliberations in the circumstances covered by the first sentence of section (b). *Commonwealth v. Pierce*, 453 Pa. 319, 309 A.2d 371 (1973) (jurors not competent to testify that two members of the jury took notes during trial and brought them into jury room); *Commonwealth v. Zlatovich*, 440 Pa. 388, 269 A.2d 469 (1970) (after verdict, testimony could not be received that a juror was afraid to return a verdict of not guilty by reason of insanity because of fear that defendant might be released later); *Commonwealth v. Patrick*, 416 Pa. 437, 206 A.2d 295 (1965) (trial court correctly refused to consider juror's post-trial affidavit alleging coercion by other jurors); *Commonwealth v. Filer*, 249 Pa. 171, 94 A. 822 (1915) (on motion for new trial, court may not consider affidavits of four jurors explaining what influenced them in reaching a conclusion).

Pennsylvania cases have also recognized the exceptions set forth in the second sentence of section (b). *Carter v. U. S. Steel Corp.*, 529 Pa. 409, 604 A.2d 1010 (1992), cert. denied, 506 U. S. 864 (1992) (proper to conduct post-trial hearing to determine whether newspaper article and television broadcast concerning matters involved in the case were brought to jury's attention during deliberations); *Commonwealth v. Williams, supra*, 514 Pa. at 75

81, 522 A.2d at 1065—1068 (jurors competent to testify, that during capital sentencing proceeding, they received information through an alternate juror that defendant had pending murder charges from another jurisdiction); *Commonwealth v. Sero*, 478 Pa. 440, 387 A.2d 63 (1978) (after verdict in a murder case, juror may testify that another juror told her that she had learned, through what was double hearsay, that defendant, although not a religious person, had begun studying the Bible after his wife's death); *Welshire v. Bruaw*, 331 Pa. 392, 200 A.2d 67 (1938) (jurors permitted to testify that a tipstaff told jury, which was engaged in extended deliberations, that trial judge would give them "the devil" if they did not reach a verdict promptly). *Pittsburgh Nat'l. Bank v. The Mutual Life Ins. Co.*, 493 Pa. 96, 425 A.2d 383 (1981), stands against this array of decisions; it held that, after the verdict in an automobile accident case, the trial court correctly refused to take testimony concerning a juror's having examined a car similar to the one involved in the case. See also, *Friedman v. Ralph Brothers, Inc.*, 314 Pa. 247, 171 A. 700 (1934). This result would be changed under the first exception of section (b). See cases cited in Wright & Gold, *Federal Practice and Procedure: Evidence*, § 6075, notes 18—19. In any event, the vitality of the decision is questionable after the *Carter* case, supra.

Note that when jurors are permitted to testify about facts not of record and outside influences, they may not be questioned about the effect upon them of what was improperly brought to their attention. *Carter*, 529 Pa. at 415—416, 604 A.2d at 1013—1014; see 3 Weinstein & Berger, *Evidence*, ¶ 606[5] at pp. 606-53—606-55. Moreover, after hearing juror testimony, a verdict may still be upheld on the grounds that there was no prejudice. See, e.g., Carter 529 Pa. at 420—424, 614 A.2d at 1016—1018; *Sero*, 478 Pa. at 448—449, 387 A.2d at 67.

Rule 607. Impeachment of Witness.

(a) *Who May Impeach*. The credibility of any witness may be attacked by any party, including the party calling the witness.

(b) *Evidence to Impeach*. The credibility of a witness may be impeached by any evidence relevant to that issue, except as otherwise provided by statute or these Rules.

Comment

Section (a) of this Rule is the same as F.R.E. 607; but the Federal Rules have no provision similar to section (b).

Section (a).—The original common law view prohibited a party from impeaching a witness called by that party, and the prohibition applied to all forms of impeachment. The reasons advanced in support of this view were that the party calling the witness (1) was morally bound by the testimony given, (2) vouched for the witness' trustworthiness, and (3) could coerce desired testimony under an implied threat of attacking the character of the witness by impeachment. As the weakness of these reasons became apparent, many exceptions to the common law rule were developed. See generally, 3A Wigmore, *Evidence*, §§ 896—918 (Chadbourn rev. 1970); 1 McCormick, *Evidence*, § 38 (4th ed. 1992).

Pa. R.E. 607(a) abolishes the common law prohibition completely. Numerous Pennsylvania decisions have continued to enunciate a general rule of no impeachment; but many exceptions have been recognized. Thus, it has been said that there is a difference between impeaching one's own witness and contradicting that witness by presenting other evidence. *Commonwealth v. Myrick*, 468 Pa. 155, 360 A.2d 598 (1976); *Commonwealth v. Mahoney*, 460 Pa. 201, 331 A.2d 488 (1975). Note also that Pa.R.C.P. 4020(d) provides that "any party may rebut any relevant evidence contained in a deposition whether introduced by him or any other party." It has also been held that the prosecution in a criminal case may examine its own witness as to matters bearing on the character, bias or interest of the witness in anticipation of an attack by the defense. *Commonwealth v. Bricker*, 525 Pa. 362, 581 A.2d 147 (1990) (existence and terms of a plea agreement with the witness; but written agreement itself could not be sent out with jury unless appropriately redacted); *Commonwealth v. Garrison*, 398 Pa. 47, 157 A.2d 75 (1959) (criminal past of the witness). Impeachment by a prior inconsistent statement (and this is what has been involved in most of the cases) has been allowed if the testimony of one's own witness is unexpected, contradicts the prior statement, harms the party calling the witness and the impeachment is limited in scope. *Commonwealth v. Thomas*, 459 Pa. 371, 329 A.2d 277 (1974). However, the need for surprise has been dispensed with "when the interests of truth and justice seem to require it." *Commonwealth v. Brady*, 510 Pa. 123, 134—35, 507 A.2d 66, 72 (1986), *Commonwealth v. Gee*, 467 Pa. 123, 136—137, 354 A.2d 875, 881 (1976). Moreover, under a long-standing statute, a party in a civil case is permitted to call an adverse party or a person having an adverse interest as a witness "under the rules of evidence applicable to cross-examination" and "shall not be concluded by [the witness'] testimony." 42 Pa.C.S.A. § 5935. The last quoted provision has been interpreted to mean that the witness' testimony may be rebutted or contradicted by other evidence, but if it is not, it is conclusively taken to be true. *Kelly v. Oxgrove Development Corp.*, 456 Pa. 306, 319 A.2d 424 (1974); *Rogan Estate*. 404 Pa. 205, 171 A.2d 177 (1961).

If, then, there are any vestiges of the "no impeachment" prohibition remaining in Pennsylvania, Pa.R.E. 607(a) sweeps them away, and no longer will there be any need to resort to hair-splitting exceptions. The rule will allow impeachment by all of the methods provided for in Pa.R.E. 607(b), 608, 609 and 613. Under existing law, impeachment evidence will have no substantive effect unless it is an admission of a party opponent within Pa.R.E. 803(25), a prior inconsistent statement covered by Pa. R.E. 803.1(1), which reflects the holding in *Commonwealth v. Lively*, 530 Pa. 464, 610 A.2d 7 (1992), or a statement of identification under Pa.R.E. 803.1(2).

Section (b).—The methods that may be used to impeach credibility are tied to Pa.R.E. 401, which defines relevant evidence. In *United States v. Abel*, 469 U. S. 45 (1984), the United States Supreme Court held that the Federal Rules clearly contemplated that evidence of bias could be used to impeach credibility even though nothing in those Rules specifically covered the subject. The Court pointed to F.R.E. 401, defining relevancy, and F.R.E. 402, providing for the admissibility of all relevant evidence, in support of its holding. The Court commented that "[a] successful showing of bias . . . would have a tendency to make the facts to which [the witness] testified less probable in the eyes of the jury than it would be without such testimony." *Abel*, 469 U. S. at 51.

Pa.R.E. 401 and 402 are similar to their Federal counterparts, and they, too, support the impeaching of credibility by any means having any tendency to cast doubt on the witness' testimony. However, the "except as otherwise provided by statute or these Rule" language of Rule 607(b) incorporates a number of provisions that circumscribe the breadth of the Rule. See, e.g., the Rape Shield Law, 18 Pa.C.S.A. § 3104. Rule 403 also comes into play, so that evidence relevant to credibility may be

excluded if its probative value is outweighed by the danger of unfair prejudice, etc. Next Rule 501, which preserves all privileges "as they now exist or may be modified by law," must be taken into account. This would exclude any evidence relevant to credibility that might be covered by existing or later developed privileges, including those created by case law. In addition, Rule 607(b) is limited and supplemented by Rule 608 (dealing with evidence of character and conduct of a witness), Rule 609 (relating to impeachment by evidence of conviction of crime), Rule 610 (covering religious beliefs or opinions) and Rule 613 (regarding prior statements of witnesses). However, the broad principle of relevance in Rule 607(b) is not curtailed by 42 Pa.C.S.A. § 5918, which provides that, with certain exceptions, a defendant who testifies in a criminal case may not be questioned to show that he or she has committed, been convicted of or charged with any other offense or to show bad character or reputation. In *Commonwealth v. Bighum*, 452 Pa. 554, 307 A.2d 255 (1973), this statute was interpreted to apply only to cross-examination. Hence it affects only the timing and method of impeachment of a defendant; it does not bar the impeachment entirely.

Since the credibility of any witness depends upon his or her powers of perception, capacity to remember, ability to communicate accurately and veracity or integrity, it may always be attacked by showing shortcomings in any of those areas. *Commonwealth v. Gwaltney*, 497 Pa. 505, 442 A.2d 236 (1982); *Commonwealth v. Hamm*, 474 Pa. 487, 378 A.2d 1219 (1977); 1 McCormick, *Evidence*, § 44 (4th ed. 1992). These attacks may be carried out in a number of ways.

A witness' credibility may be challenged by questions showing that he or she has a selective memory. *Commonwealth v. Perdue*, 387 Pa. Super. 473, 564 A.2d 489 (1982). Evidence of alcohol consumption by a witness may also be considered by a jury as affecting perception and memory. *Hannon v. City of Philadelphia*, 120 Pa. Cmwlth. 383, 548 A.2d 693 (1988). On the same theory, evidence of use of drugs by a witness is admissible. *Commonwealth v. Yost*, 478 Pa. 327, 386 A.2d 956 (1978); *Commonwealth v. Skibicki*, 402 Pa. Super. 160, 586 A.2d 446 (1990); *Commonwealth v. Duffy*, 238 Pa. Super. 161, 353 A.2d 50 (1975). It should be noted that neither alcoholism nor drug addiction in and of themselves is sufficient to impeach; to be admissible, a witness' consumption of alcohol or use of drugs must have occurred at or near the time of the event that is the subject of the witness' testimony.

A mental defect or disability which affects a witness' perception, memory, ability to communicate or truth telling may also give rise to an assault on credibility. *Commonwealth v. Butler*, 232 Pa. Super. 283, 331 A.2d 678 (1974). In *Commonwealth v. Dudley*, 353 Pa. Super. 615, 510 A.2d 1235 (1986), appeal denied, 514 Pa. 634, 522 A.2d 1104 (1987), the Superior Court held that it was error to exclude evidence that a witness (a rape victim) had received psychiatric treatment one month after the event, had suffered a psychiatric episode two months after the incident and six months before trial, and had experienced hallucinations and mental instability. See also, *Commonwealth v. Chuck*, 227 Pa. Super. 612, 323 A.2d 123 (1974) (treatment in a mental hospital within seven months of the date of trial is enough to raise a jury question as to the effect of a mental disorder on credibility).

Cohen v. Albert Einstein Medical Center, 405 Pa. Super. 392, 592 A.2d 720 (1991), appeal denied 529 Pa. 644, 602 A.2d 855 (1992), was a medical malpractice case for an alleged arm injury resulting from an improper intramuscular injection. Plaintiff testified about the injection and the harm it produced. The Superior Court held that it was error to exclude expert testimony that plaintiff suffered from Munchausen Syndrome (the repeated fabrication of illness in order to assume the role of a sick person) because this bore directly upon plaintiff's ability to recount truthfully the event and symptoms of which he complained. 405 Pa. Super. at 401—406, 592 A.2d at 724—727.

A witness may also be impeached by impugning his or her honesty. This can be accomplished by showing bias (prejudice against or hostility toward a party), interest (some relation between the witness and the cause at issue) or corruption (a conscious false intent). 3A Wigmore, *Evidence*, § 945 (Chadbourne rev. 1970). In *Commonwealth v. Collins*, 519 Pa. 58, 64—65, 545 A.2d 882, 885—886 (1988), the Supreme Court stated that " . . . any witness may be impeached by showing his bias or hostility or by proving facts which make such feelings probable . . . "; see also *United States v. Abel*, supra.

In *Commonwealth v. Dawson*, 486 Pa. 321, 405 A.2d 1230 (1979), a detective testified about the defendant's confession, which defendant contended had been fabricated. It was held that it was reversible error not to allow the defendant to show that the detective was subject to disciplinary action growing out of certain events involved in the case. The Supreme Court said that "the alleged misconduct and disciplining could have motivated [the detective] to fabricate the confession and otherwise give false testimony. Evidence thereon would have been relevant to his motivation and credibility." Id. at 324, 405 A.2d at 1231.

Commonwealth v. Baxton, 242 Pa. Super. 98, 363 A.2d 1178 (1976), held that the defendant could cross-examine a prosecution witness, who had a juvenile record, to show that he testified in return for the continuation of his probationary status and an agreement that he would not be prosecuted for the incident out of which the charges against the defendant grew. Later, the same result was reached under somewhat similar circumstances in *Commonwealth v. Gay*, 369 Pa. Super. 340, 535 A.2d 189 (1988).

Hatfield v. Continental Imports, Inc., 530 Pa. 551, 610 A.2d 446 (1972), was a products liability case in which the original defendants joined the maker of the product as an additional defendant. The Supreme Court held that evidence of an agreement between the plaintiff and the original defendants was an admissible to establish that the latter would benefit if the plaintiffs prevailed and therefore had an interest in the plaintiff's success.

Rule 608. Evidence of Character and Conduct of Witness.

(a) *Reputation Evidence of Character*. The credibility of a witness may be attacked or supported by evidence in the form of reputation as to character, but subject to the following limitations:

(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 reputation evidence or otherwise.

(3) A witness whose testimony is to be admitted under this Rule may not be called at trial under this Rule unless the party seeking to call the witness makes known

to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet the evidence, the proponent's intention in calling the witness, the particulars of the witness' expected testimony, and the name and address of the witness. The particulars of the witness' expected testimony should include the identity of any person the witness spoke to in the community in order to reach a conclusion about the person's reputation for truthfulness, the nature of the information provided by such person(s) in the community, and what relationship, if any, the person in the community has with the person whose reputation for truthfulness was called into question.

(b) *Specific Instances of Conduct*. Except as provided in Rule 609 (relating to evidence of conviction of crime),

(1) the character of a witness for truthfulness may not be attacked or supported by cross-examination or extrinsic evidence concerning specific instances of the witness' conduct; however,

(2) in the discretion of the court, the credibility of a witness who testifies as to the reputation of another witness for truthfulness or untruthfulness may be attacked by cross-examination concerning specific instances of conduct (not including arrests) of the other witness, if they are probative of truthfulness or untruthfulness; but extrinsic evidence thereof is not admissible.

Comment

Section (a).—Pa.R.E. 608(a) differs from F.R.E. 608(a) in that it permits character for truthfulness or untruthfulness to be shown by evidence only in the form of reputation, whereas the Federal Rule allows evidence in the form of opinion as well, and there is no counterpart to subsection (3) in the Federal Rule. This Rule is one of the specific exceptions to the prohibition in Pa.R.E. 404(a) against the use of character to show action in conformity therewith. It is well established in Pennsylvania that evidence of a witness' reputation for truthfulness or untruthfulness may be used to support or attack credibility. *Commonwealth v. Payne*, 205 Pa. 101, 54 A. 489 (1903); *In the Interest of Lawrence J.*, 310 Pa. Super. 351, 456 A.2d 647 (1983). This applies also to the accused in a criminal case when he or she takes the stand. *Commonwealth v. Lopinson*, 427 Pa. 284, 234 A.2d 552 (1967), vacated on other grounds, 392 U. S. 647 (1968). Note that reputation of a person's character is covered by the exception to the hearsay rule in Pa.R.E. 803(21). Pa.R.E. 608(a) is new. It is intended to eliminate surprise, and unfair disadvantage to the party whose witness' credibility is attacked by reputation evidence.

Section (a) of the Rule is also in accord with those Pennsylvania cases that have held that evidence is not admissible to bolster a witness' character for truthfulness until there has been an attack upon that character. See e.g., *Commonwealth v. Fowler*, 434 Pa. Super. 148, 642 A.2d 517 (1994); *Commonwealth v. Smith*, 389 Pa. Super. 626, 567 A.2d 1080 (1989); *Commonwealth v. Lemanski*, 365 Pa. Super. 332, 529 A.2d 1085 (1987). However, there is some intimation in *Commonwealth v. Scott*, 496 Pa. 188, 436 A.2d 607 (1981) that where the accused in a criminal case takes the stand, evidence of a good reputation for honesty is admissible even in the absence of an attack on character; and compare Pa.R.E. 404(a)(1) allowing the accused in a criminal case to offer "evidence of a pertinent trait of character." In allowing character for truthfulness or untruthfulness to be proved only by reputation, section (a) is consistent with existing Pennsylvania law. *Commonwealth v. Lopinson, supra*, and *Commonwealth v. Smith, supra*.

Section (b).—Pa.R.E. 608(b) also differs from F.R.E. 608(b). Except for evidence of conviction of crime (Pa.R.E. 609 and F.R.E. 609), both ban all use of extrinsic evidence of specific instances of conduct for the purpose of attacking or supporting a witness' credibility, but they diverge in their treatment of cross-examination concerning specific instances of conduct.

Under the Federal Rule, in the discretion of the court, and if probative of truthfulness or untruthfulness, specific instances may be inquired into on cross-examination of a witness concerning the witness' own character or concerning the character of another witness as to which the witness being cross-examined has testified. In the latter case, it can be argued that not only do the specific instances undermine the credibility of the witness being examined (the "character witness") but that they also bear upon the truthfulness or untruthfulness of the other witness (the "principal witness"). See Wright and Gold, *Federal Practice and Procedure: Evidence*, § 6120.

Subsection (b)(1) of Pa.R.E. 608 prohibits all use of specific instances of a witness' own conduct for the purpose of attacking his or her character for truthfulness. Subsection (b)(2), like the Federal Rule, permits a character witness to be cross-examined, in the discretion of the court, concerning specific instances of conduct of the principal witness. However, unlike the Federal Rule, subsection (b)(2) makes it clear that those specific instances affect the credibility of the character witness only, and in addition, it excludes the use of arrests.

Section (b) is in accord with Pennsylvania law. Beginning with *Stout v. Rassel*, 2 Yeates 334 (1798) and *Elliot v. Boyles*, 31 Pa. 65 (1857), the Courts, with two exceptions, have consistently stated that specific instances of a witness' own conduct, not resulting in a conviction, may not be used to impeach that witness' credibility. See, e.g., *Commonwealth v. Katchmer*, 453 Pa. 461, 464, 309 A.2d 591, 593 (1973) "[w]e have long held that prior bad acts not resulting in conviction are not available to impeach a witness' credibility . . ."); *Marshall v. Carr*, 271 Pa. 271, 114 A. 500 (1922); *Berliner v. Schoenberg*, 117 Pa. Super. 254, 178 A.2d 330 (1935).

But in *Downey v. Weston*, the Supreme Court stated, "[i]t is true that evidence of . . . some past events throwing light on human character is admissible on cross-examination, but this is restricted to evidence which bears directly on the witness' 'character for truth'. . . ." 451 Pa. 259, 264, 301 A.2d 635, 639 (1973) (emphasis in original.) The Court went on to hold that the connection between an alleged breach of medical ethics and the credibility of a physician witness was too tenuous. A similar pronouncement was made in *Commonwealth v. Gaddy*, 468 Pa. 303, 362 A.2d 217 (1976), and again the Supreme Court held that the act in question (drug use generally) was not sufficiently related to "character for truth."

Later, however, in *Commonwealth v. Taylor*, 475 Pa. 564, 381 A.2d 418 (1977), in holding that it was error to allow a witness to be cross-examined about his arrests, the Supreme Court commented (with no reference to *Downey* or *Gaddy*): "We have also held that a witness may not be impeached by questions concerning criminal activity not resulting in arrest." 475 Pa. at 468, n. 4, 381 A.2d at 419, n.4. (citations omitted.) Later, in *Commonwealth v. Cragle*, 281 Pa. Super. 434, 435—441, 422 A.2d 547, 548—550 (1980), the Superior Court held that it was not error to preclude questioning of a prosecution witness concerning his having received stolen goods on several occasions. The Court considered the *Downey* case and

after analysis of the decision, concluded that it was not meant to overrule the well established existing law banning resort to specific instances of conduct to impeach, and the Court pointed to the reiteration of that principle in *Taylor*, *supra*, as support for its position. Subsection (b)(1) follows *Taylor, Cragle* and the earlier line of cases; and see also *Butler v. Flo-Ron Vending Co.*, 383 Pa. Super. 633, 642, 557 A. 2d 730, 734 (1989). Subsection (b)(1) is generally consistent with 42 Pa.C.S.A. § 5918, which provides that a defendant who testifies in a criminal case, may not be questioned to show that "he has been of bad character or reputation unless" the defendant has attempted to establish his or her own good character or reputation or has testified against a co-defendant. See Comment to Pa.R.E. 607 for a fuller description of this statute.

Subsection (b)(2) of the Rule deals with challenges to the credibility of a character witness who testifies concerning the character for truthfulness or untruthfulness of a principal witness. For this purpose, it provides that the court, in its discretion, may allow cross-examination of the character witness concerning specific instances of the principal witness' conduct (other than arrests), if they are probitive of truthfulness or untruthfulness.

Commonwealth v. Peterkin, 511 Pa. 299, 513 A.2d 373 (1986), was an appeal from a death sentence imposed following a conviction of first degree murder. Among other issues, defendant asserted the ineffectiveness of his trial counsel in not interviewing and presenting certain character witnesses. At a post-trial evidentiary hearing, counsel explained that he did not delve into character testimony because the prosecution had damaging evidence of defendant's bad character, consisting of facts gathered in an investigation of defendant for fraud and evidence that he had been discharged from the service for desertion and later reenlisted under a false name. The Supreme Court held that counsel had a reasonable basis for not pursuing the character testimony because the potential harm from cross-examination of the character witnesses concerning defendant's acts of misconduct outweighed any value from their testimony. The Court said ". . . Although evidence of good character may not be rebutted by evidence of specific acts of misconduct," a witness who testifies as to an accused's good character may be cross-examined regarding the witness' knowledge of particular acts of misconduct by the accused "to test the accuracy of [the witness'] testimony and the standard by which [the witness] measures reputation . . ." 511 Pa. at 318, 513 A.2d at 382. (citations omitted.) See also, *Commonwealth v. Adams*, 426 Pa. Super. 332, 626 A.2d 1231 (1993), where the Superior Court held that a witness who had testified that the accused in a criminal case had an excellent reputation for being a peaceful, law abiding citizen could be asked on cross-examination if he remembered telling the police that he knew the accused sells bags of cocaine. The Court stated that the question tested whether the witness possessed a sound standard of what constitutes a good reputation. This theory would apply also where the character evidence concerned the accused's truthfulness and the specific instances were probative of that trait.

Under *Peterkin*, *Adams*, and subsection (b)(2), although the cross-examination concerns the specific acts of the principal witness, it is admitted not for its effect upon his or her credibility, but only for its effect on the credibility of the character witness. Because this type of inquiry is subject to abuse, the cross-examination is not automatic; its use is specifically placed in the discretion of the court, and like all other relevant evidence, it is subject to the balancing test of Pa.R.E. 403. Moreover, the court should take care that the cross-examiner has a reasonable basis for the questions asked. See *Adams*, 426 Pa. Super. at 337, 620 A.2d at 1234.

With the one exception (evidence of conviction of crime under Pa.R.E. 609)) referred to in the introductory clause to section (b), the use of specific acts of misconduct provided for in subsection (b)(2) is limited to what can be developed on cross-examination. If the character witness denies knowledge of the alleged acts, that's the end of the matter; other witnesses can not be called to prove the acts. This is in conformity with the usual practice. 1 McCormick, *Evidence*, § 41 (1992 ed.).

The exclusion of arrests in subsection (b)(2) is based upon *Commonwealth v. Scott*, 496 Pa. 188, 436 A.2d 607 (1981), where the Supreme Court, abrogating earlier case law, held that it was error to rule that a proposed witness, who would testify that an accused had a good reputation for honesty and peacefulness, could be cross-examined about the accused's prior arrests that did not result in convictions. The Court's reasoning was that an arrest alone is not inconsistent with innocence, yet it has a great potential to create undue prejudice. See also, *Commonwealth v. Percell*, 499 Pa. 589, 454 A.2d 542 (1982) and *Commonwealth v. Jackson*, 475 Pa. 604, 381 A.2d 438 (1977), applying the prohibition against the use of arrests not resulting in convictions to the cross-examination of a witness about the witness' own arrests. In the *Peterkin* case, supra, the Court distinguished the Scott decision on the ground that it "was founded upon the 'undue prejudice' inherent in the knowledge of prior arrests," whereas none of the conduct in the matter then before the Court involved arrests. 511 Pa. at 319, n. 13, 513 A.2d at 383, n. 13.

The last paragraph of F.R.E. 608(b), which provides that the giving of testimony by an accused or any other witness is not a waiver of the privilege against self-incrimination when they are examined about matters relating only to credibility, is not included in Pa.R.E. 608. Since subsection (b)(1) of the Rule bars cross-examination of any witness concerning specific acts of the witness' own conduct, the provision is not needed.

Rule 609. Impeachment by Evidence of Conviction of Crime.

(a) *General Rule.* For the purpose of attacking the credibility of any witness, evidence that the witness has been convicted of a crime, whether by verdict or by plea of guilty or nolo contendere, shall be admitted if it involved dishonesty or false statement.

(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 outweighs its prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest its use.

(c) *Effect of Pardon or Other Equivalent Procedure or Successful Completion of Rehabilitation Program.* Evidence of a conviction is not admissible under this rule if the conviction has been the subject of one of the following:

(1) a pardon or other equivalent procedure based on a specific finding of innocence; or

(2) a pardon or other equivalent procedure based on a specific finding of rehabilitation of the person convicted, and that person has not been convicted of any subsequent crime.

(d) *Juvenile Adjudications.* In a criminal case only, evidence of the adjudication of delinquency for an offense under the Juvenile Act, 42 Pa.C.S.A. §§ 6301 et seq., may be used to impeach the credibility of a witness if conviction of the offense would be admissible to attack the credibility of an adult.

(e) *Pendency of Appeal.* The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

Comment

Section (a).—Subject to the time limitation set forth in section (b), section (a) of this Rule and F.R.E. 609(a)(2) both permit the impeachment of any witness by evidence of conviction of a crime involving dishonesty or false statement whatever the punishment for that crime may be. However, this Rule rejects the use of evidence of conviction of a crime punishable by death or imprisonment of more than one year, which is allowed under F.R.E. 609(a)(1) subject to certain balancing tests. This limitation on the type of crime is in accord with Pennsylvania law. *Commonwealth v. Randall,* 515 Pa. 410, 528 A.2d 1326 (1987); *Commonwealth v. Bighum,* 452 Pa. 554, 307 A.2d 255 (1973).

Section (a) of this Rule, unlike F.R.E. 609(a)(2), specifically provides that a conviction based upon a plea of nolo contendere may be used to impeach; this, too, is consistent with Pennsylvania law. *Commonwealth v. Snyder,* 408 Pa. 253, 182 A.2d 495 (1962), cert. denied, 371 U. S. 957 (1963). See also, *Eisenberg v. Commonwealth Dept. of Public Welfare,* 512 Pa. 181, 516 A.2d 333 (1986), an administrative proceeding to terminate a health provider's participation in Pennsylvania's medical assistance program on the grounds that the provider had been "convicted" of a Medicaid related criminal offense within the meaning of 55 Pa. Code § 1101.77(a)(6). The Supreme Court held that the imposition of sentence upon the provider's nolo plea to a charge of Medicaid mail fraud was a "conviction" under the applicable regulation. The Court quoted with approval from *Sokoloff v. Saxbe,* 501 F.2d 571, 574 (2 Cir. 1974) as follows: "Where . . . a statute (or judicial rule) attaches legal consequences to the fact of a conviction, the majority of courts have held that there is no valid distinction between a conviction upon a plea of nolo contendere and a conviction after a guilty plea or trial." *Eisenberg,* 512 Pa. at 187, 516 A.2d at 336.

As a general rule, before sentence has been pronounced, evidence of a jury verdict of guilty or a plea of guilty or nolo contendere may not be used to impeach, *Commonwealth v. Zapata,* 455 Pa. 205, 314 A.2d 299 (1974), unless that evidence would support a claim of bias or improper motive. *Commonwealth v. Williams,* 524 Pa. 218, 570 A.2d 75 (1990); *Commonwealth v. Hill,* 523 Pa. 270, 566 A.2d 252 (1989), reargument denied, 525 Pa. 505, 582 A.2d 587 (1990). Evidence of admission to an Accelerated Rehabilitative Disposition program under Pa.R.Crim.P. 176—186 may not be used to impeach credibility. Admission to the program places the criminal proceedings in abeyance subject to reactivation under certain conditions; hence, there has been no conviction. *Commonwealth v. Krall,* 290 Pa. Super. 1, 434 A.2d 99 (1981). The result should be the same for a drug dependent offender admitted to the rehabilitation and treatment programs provided for in The Controlled Substance, Drug, Device and Cosmetic Act, 35 Pa.C.S.A. §§ 708—117 and 708—118, where there is also no immediate adjudication and trial on the charges is deferred pending further developments.

Where it is the accused in a criminal case whose credibility is sought to be impeached, 42 Pa.C.S.A. § 5918, which is referred to in the Comments to Pa.R.E. 607 and 608, again comes into play. It was pointed out in the former Comment that its prohibition against questioning a defendant who testifies about conviction "of any offense other than the one for which he is on trial" has been interpreted literally to apply only to cross-examination. Hence, evidence of conviction of a crime may be introduced in rebuttal after the defendant has testified. *Commonwealth v. Bighum,* 452 Pa. 554, 307 A.2d 255 (1973).

Section (b).—Pa.R.E. 609(b) is the same as F.R.E. 609(b) and basically tracks what was said in *Commonwealth v. Randall,* 515 Pa. 410, 528 A.2d 1326 (1987). Where the date of conviction or last date of confinement is within ten years of the trial date, evidence of the conviction of a crime involving dishonesty or false statement is per se admissible. If a period greater than ten years has elapsed, the evidence may be used only after advance written notice and the trial judge's determination that its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect. In *Randall,* the Supreme Court stated that the factors enumerated in *Bighum,* and *Commonwealth v. Roots,* 482 Pa. 33, 393 A.2d 364 (1978) would be relevant in determining whether convictions more than ten years old should be admitted.

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

Section (d).—Pa.R.E. 609(d) is different from F.R.E. 609(d). Under the latter, evidence of juvenile adjudications is generally inadmissible; however, the court may allow such evidence in a criminal case against a witness other than the accused to the same extent as it could be used to attack the credibility of an adult, if satisfied that this is necessary for a fair determination of the issue of guilt or innocence. Section (d) of Pa.R.E. 609 permits a broader use of juvenile adjudications; it is dictated by 42 Pa.C.S.A. § 6354, as amended by Act No. 13 of May 12, 1995, effective July 11, 1995, which changed the law of Pennsylvania.

Prior to Act No. 13, juvenile adjudications could not be used to impeach the credibility of any witness. *Commonwealth v. Katchmer*, 453 Pa. 461, 308 A.2d 591 (1973). As a result of Act No. 13, in criminal cases, impeachment with evidence of juvenile adjudications of delinquency for an offense is put on the same basis as evidence of conviction of a crime under Pa.R.E. 609(a), i.e., it may be used to impeach any witness, including the accused, if the offense involves dishonesty or false statement. Juvenile adjudications continue to be inadmissible in civil cases for impeachment purposes. However, both before and after the passage of Act No. 13, a juvenile adjudication could be used in civil cases where the juvenile put his or her reputation or character in issue. 42 Pa.C.S.A. § 6354(b)(3). According to the 1976 Official Comment on this provision, it "is intended to remove the shield from a plaintiff in a civil proceeding where he places his reputation or character in issue, e.g., libel actions."

Finally, it should be noted that in a criminal case the accused has a right under the confrontation clause of the U. S. Constitution to use the juvenile record of a witness, regardless of the type of offense involved, to show the witness' possible bias, e.g., that the witness is on probation under a juvenile adjudication. *Davis v. Alaska*, 415 U. S. 309 (1974); *Commonwealth v. Simmons*, 521 Pa. 218, 555 A.2d 860 (1989), and see cases referred to in Comment to Pa.R.E. 607(b).

Section (e).—This part of this Rule is the same as F.R.E. 609(e). According to the Notes of the Advisory Committee, the provision that a pending appeal does not preclude impeachment by evidence of a prior conviction is based upon the "presumption of correctness that ought to attend judicial proceedings." This is the predominant view. 1 McCormick, *Evidence*, § 42 (4th ed. 1992). The second sentence of section (e) allows evidence of the appeal to be offered to permit the jury to mitigate the impeachment. *United States v. Klayer*, 707 F.2d 892 (6th Cir. 1983), cert. denied, 464 U. S. 858 (1983).

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.

Comment

This Rule is identical to F.R.E. 610. It is consistent with 42 Pa.C.S.A. § 5902, which provides that religious beliefs and opinions shall not affect a person's "capacity" to testify and that no witness shall be questioned about those beliefs or opinions, and no evidence shall be heard on those subjects for the purpose of affecting "competency or credibility." Pennsylvania decisional law is the same. *Commonwealth v. Greenwood*, 488 Pa. 618, 413 A.2d 655 (1980); *Commonwealth v. Mimms*, 477 Pa. 553, 358 A.2d 334 (1978).

The Rule bars evidence of religious beliefs or opinions of a witness only when it is offered for the purpose of showing that, because of their nature, the witness' truthfulness is affected. Evidence introduced for other purposes is not prohibited. *McKim v. Phila. Transp. Co.*, 364 Pa. 237, 72 A.2d 122 (1950) (where plaintiffs alleged loss of earnings from their occupations as religious ministers, questions concerning religious affiliation could be asked to explore impairment of earning power); *Commonwealth v. Riggins*, 373 Pa. Super. 243, 542 A.2d 1004 (1988) (where murder victim, in a dying declaration, said that one of his assailants was a Muslim, prosecution could elicit testimony that defendant was a Black Muslim for purposes of identification); see generally, *Commonwealth v. Cottam*, 420 Pa. Super. 311, 616 A.2d 988 (1992), appeal denied, 535 Pa. 673, 636 A.2d 632 (1993).

Rule 611. Mode and Order of Interrogation and Presentation.

(a) *Control by Court*. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time and (3) protect witnesses from harassment or undue embarrassment.

(b) *Scope of Cross-Examination*. Cross-examination of a witness other than a party in a civil case should be limited to the subject matter of the direct examination and matters affecting credibility; however, the court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination. A party witness in a civil case may be cross-examined by an adverse party on any matter relevant to any issue in the case, including credibility, unless the court, in the interests of justice, limits the cross-examination with respect to matters not testified to on direct examination.

(c) *Leading Questions*. Leading questions should not be used on the direct or redirect examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily, leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party or a witness identified with an adverse party, interrogation may be by leading questions; a witness so examined should usually be interrogated by all other parties as to whom the witness is not hostile or adverse as if under redirect examination.

Comment

Section (a) of Pa.R.E. 611 is the same as F.R.E. 611(a). However, sections (b) and (c) of the Rule differ from those sections of the Federal Rule.

Section (a).—This section places responsibility for how the trial should be conducted squarely within the discretion of the trial judge and spells out guidelines for the exercise of that discretion. It follows Pennsylvania law. *Commonwealth v. Smith*, 518 Pa. 15, 540 A.2d 246 (1988); see also Pa.R.C.P. 223 (relating to the conduct of civil jury trials) and Pa.R.C.P. 224 (relating to the order of proof in civil cases).

Section (b).—F.R.E. 611(b) limits the scope of cross-examination to matters testified to on direct, and matters bearing on credibility, unless the court in its discretion allows inquiry into additional matters as if on direct examination. This has been the traditional view in the Federal courts and many State courts. Except when the accused in a criminal case is the witness, when cross-examination is thus limited, the evidence sought to be developed is not lost; its introduction is merely deferred. The cross-examiner may present the evidence by calling the witness as his or her own.

Pa.R.E. 611(b), which is based on Pennsylvania law, applies the traditional view to all witnesses, other than a party in a civil case, but allows the cross-examination of the latter on all relevant issues, plus matters affecting credibility. *Agate v. Dunleavy*, 398 Pa. 26, 156 A.2d 530 (1959); *Greenfield v. Philadelphia*, 282 Pa. 344, 127 A. 768 (1925). Note, however, that both of these decisions state that the broadened scope of cross-examination of a party in a civil case does not alter the long-standing rule that a defendant may not put in his or her defense under

cover of cross-examination of the plaintiff; the qualifying clause in the last sentence of section (b) will give the trial judge discretion to follow this rule.

In applying the rule of limited cross-examination in a civil case to a non-party witness, the Supreme Court said in *Conley v. Mervis*, 324 Pa. 577, 582, 188 A. 350, 353 (1936) that, "cross-examination may embrace any matter germane to the direct examination, qualifying or destroying it, or tending to develop facts which have been improperly suppressed or ignored by the [witness]."

The use of the limited cross-examination rule to preclude a defendant in a criminal case from cross-examining a prosecution witness about matters beyond the scope of the direct examination has been upheld in *Commonwealth v. Cessna*, 371 Pa. Super. 89, 537 A.2d 834 (1988) and *Commonwealth v. Lobel*, 294 Pa. Super. 550, 440 A.2d 602 (1982). The Superior Court pointed out that the defendant may present the evidence sought on cross-examination by calling the witness as a defense witness. The defendant did this in the *Lobell* case, but failed to exercise this prerogative in the *Cessna* case.

Under the first sentence of Pa.R.E. 611(b), the limited cross-examination rule is applicable to witnesses in a criminal case. When the accused is the witness, there is an interplay between any rule of evidence regarding scope of cross-examination and the accused's privilege against self-incrimination.

When the accused testifies generally as to facts tending to negate or raise doubts about the prosecution's evidence, he or she has waived the privilege, and may not use it to prevent the prosecution from bringing out on cross-examination every circumstance relating to those facts, and the prosecution may examine the accused on any matters tending to refute all inferences or deductions arising from the direct examination. *Commonwealth v. Green*, 525 Pa. 424, 581 A.2d 544 (1990). However, the outcome is different when the accused's testimony is more selective, e.g., in a trial on an information charging two offenses, the accused chooses to testify about only one of the charges, or in a case involving a confession, the accused's testimony is confined to the issue of voluntariness of the confession.

The latter situation occurred in *Commonwealth v. Camm*, 443 Pa. 253, 277 A.2d 325 (1971), cert. denied, 405 U. S. 1046 (1972). There the defendant was convicted of murder in the second degree. The primary evidence against him was his written confession. At the trial, the defendant took the stand for the express purpose of challenging the voluntariness of the confession, and testified only about the treatment accorded him and the course of events leading up to his signing of the confession. In his closing argument, the prosecutor made adverse references to the defendant's failure to deny the killing when he was on the stand. The Supreme Court held that since the defendant had testified only about the voluntariness of his confession, "the waiver of his privilege was co-extensive with the permissible scope of cross-examination relative to that subject; it was not a general waiver . . . . " 443 Pa. at 264, 277 A.2d at 331. Accordingly, the prosecutor's comment, inviting the jury to draw an adverse inference from the defendant's failure to testify as to his innocence, violated his rights under the Fifth Amendment of the U. S. Constitution. 443 Pa. at 268, 277 A.2d at 332—333. However, the Court went on to hold that the error was harmless beyond a reasonable doubt.

The waiver issue arose also in *Commonwealth v. Ulen*, 414 Pa. Super. 502, 607 A.2d 779 (1992), rev'd. on other grounds, 539 Pa. 51, 650 A.2d 416 (1994), a prosecution for the possession of and attempt to deliver a controlled substance. The defendant presented only one witness, the tenor of whose testimony was that the drugs belonged to another person. In rebuttal the prosecution called a witness who testified that the defendant's witness and the defendant had tried to suborn her to give false testimony about ownership of the drugs. Defendant then took the stand and testified only to contradict the prosecution's rebuttal evidence. In his closing argument, the prosecutor alluded to the limited scope of the defendant's testimony and his failure to controvert any of the evidence relating to the events leading to his arrest. The Superior Court, following the decision in the *Camm* case, held that the prosecutor's remarks were improper because the defendant "did not waive entirely his Fifth Amendment privilege by taking the stand to refute the Commonwealth's rebuttal evidence. The waiver occurred only with respect to the area of inquiry opened by his surrebuttal testimony." 414 Pa. Super. at 526—27, 607 A.2d at 791—92. Here again, the Court held that the error was harmless.

Section (c).—Pa.R.E. 611(c) makes two changes in the comparable section of the Federal Rule. First of all, the words "or redirect" do not appear in the first sentence of the latter; they are intended to remove any doubt that the rule on leading questions applies to redirect as well as direct examination. *Commonwealth v. Reidenbaugh*, 282 Pa. Super. 300, 422 A.2d 1126 (1980). Secondly, a clause has been added to the last sentence of section (c) to provide that the permission to use leading questions given to a party who calls a hostile witness, an adverse party or one identified with an adverse party, usually should not be extended to other parties if the witness is not hostile or adverse to them.

Section (c) is generally in accord with Pennsylvania law. A leading question has been defined as one which indicates or suggests the answer desired by the examiner. *Commonwealth v. Chambers*, 528 Pa. 558, 599 A.2d 630 (1991), cert. denied, 504 U. S. 946 (1992); *Commonwealth v. Dreibelbis*, 493 Pa. 466, 426 A.2d 1111 (1981). As set forth in section (c), leading questions should not be used on direct examination, but may be employed on cross. Rogan Estate, 404 Pa. 205, 171 A.2d 177 (1961). The right to lead a witness on cross-examination is qualified in section (c), as it is in the Federal Rule, by the word "ordinarily." This qualification is meant to be a basis for denying the use of leading questions when the cross-examination is in form only rather than in fact, e.g., the questioning of a party by his or her own attorney after having been called by an opponent, or the cross-examination of an insured defendant who is friendly to the plaintiff. See Notes of the Advisory Committee to F.R.E. 611.

Leading questions may be put to a hostile witness, *Commonwealth v. Settles*, 442 Pa. 159, 275 A.2d 61 (1971), and to an adverse party. Agate 398 Pa. at 29, 156 A.2d at 531. Section (c) is consistent also with 42 Pa.C.S.A. § 5935. That statute authorizes the calling and cross-examination of an adverse party or a person having an adverse interest; this, of course, embraces the use of leading questions.

The reason a party who calls a hostile witness or adverse party or one identified with the latter may use leading questions is that such persons are "unfriendly" to the party calling them, and there is little risk that they will be susceptible to any suggestions inherent in the questions. But that risk is present when any of those

witnesses is interrogated by a party as to whom the witness is not hostile, an adverse party or one identified with the latter. The last clause of section (c) restricts the use of leading questions in those circumstances; however, the word "usually" is meant to qualify the restriction so that it may be set aside in an appropriate case; e.g., a witness called and examined as a hostile witness by one party, whose testimony substantially harms the interest of another party with whom the witness is neither friendly nor unfriendly.

Rule 612 Writing or Other Item Used to Refresh Memory.

(a) *Right to Refresh Memory and Production of Refreshing Materials.* A witness may use a writing or other item to refresh memory for the purpose of testifying. If the witness does so, either

(1) while testifying, or

(2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,

an adverse party is entitled to have the writing or other item produced at the hearing, trial or deposition, to inspect it, to cross-examine the witness on it and to introduce in evidence those portions which relate to the testimony of the witness.

(b) *Redaction of Writing or Other Item and Sanctions.* If it is claimed that the writing or other item contains matters not related to the subject matter of the testimony, the court shall examine it in camera, excise any portion not so related and order delivery of the remainder to the party entitled to it. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing or other item is not produced or delivered pursuant to an order under this section, the court shall make any order justice requires, except that in criminal cases when the prosecution does not comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial, or the court may use contempt procedures.

Comment

This Rule differs from F.R.E. 612 in the following respects:

1. The subject matter of Pa.R.E. 612 and F.R.E. 612 is the same but the former covers it in two sections whereas the latter deals with it in one lengthy paragraph. The organization of Pa.R.E. 612 is derived, in part, from the Uniform Rules of Evidence, Rule 612 (1974).

2. The right to refresh memory which is implicit in the Federal Rule is set forth explicitly at the beginning of Pa.R.E. 612.

3. The reference to 18 U.S.C. § 3500 (the Jencks Act) which appears in the Federal Rule has been eliminated because it is inapposite.

4. In Pa.R.E. 612 the words "or other item" have been added after the word "writing" wherever it appears.

5. The words "trial or deposition" have been added in Pa.R.E. 612(a) after the word "hearing" primarily to dispel any doubt about the applicability of the rule to depositions. The addition of "trial" is for the sake of completeness.

6. In the last sentence of Pa.R.E. 612(b), the words "elects not to" which appear after the word "prosecution" have been replaced by the words "does not" and "contempt procedures" have been added to the sanctions which may be employed in criminal cases.

Despite these changes, Pa.R.E. 612 and its Federal counterpart are substantively equivalent.

Section (a).—The right of a witness to refresh his or her memory provided for in section (a), is well established in Pennsylvania. *Commonwealth v. Payne*, 455 Pa. 503, 317 A.2d 208 (1974). Although in most cases, it is a writing that is used for this purpose, it is recognized that many other things can spur one's memory (e.g., photographs). Most courts "adhere to the view that any memorandum or other object may be used as a stimulus to present memory, without restriction by rule as to authorship, guarantee of correctness or time of making." 1 McCormick, *Evidence*, § 9 (4th ed. 1992). The addition of the words "or other item" in section (a) takes this into account.

This is consistent with Pennsylvania law. *Dean Witter Reynolds, Inc. v. Genteel*, 346 Pa. Super. 336, 499 A.2d 637 (1985) (well settled that a witness "may use any writing or other aid to refresh or revive his or her present recollection of past events . . . "); *Commonwealth v. Fromal*, 202 Pa. Super. 45, 195 A.2d 174 (1963) (means of refreshing memory are almost unlimited). An item may be used to refresh memory even though it is inadmissible in evidence. *Commonwealth v. Weeden*, 457 Pa. 436, 322 A.2d 343 (1974), cert. denied, 420 U. S. 937 (1974) (dictum); *Panik v. Didra*, 370 Pa. 488, 88 A.2d 730 (1952); *Dean Witter*, 346 Pa. Super. at 344, 494 A.2d at 641.

The procedures for refreshing a witness' memory are reviewed in *Commonwealth v. Proctor*, 253 Pa. Super. 369, 385 A.2d 383 (1978). The Superior Court stated that it must be shown that the witness' present memory is inadequate, that a writing or other object could refresh the witness' memory and that reference to the writing or other object does actually refresh the witness' memory. 253 Pa. Super. at 373, 385 A.2d at 385. This was followed in *Solomon v. Baum*, 126 Pa. Cmwlth. 646, 560 A.2d 878 (1989), holding that an accident investigation report could not be shown to a police officer who testified that he had an independent present recollection of the accident.

The theory of the memory refreshing process is that the recollection of the hazy witness will be jogged by bringing a writing or other item to the witness' attention so that he or she will then have a present recall of the past events. It follows, therefore, that the witness must testify from present memory and not from the writing or other item, and having served its purpose, the writing or other item may not be introduced into evidence by the proponent of the testimony. *Commonwealth v. Canales*, 454 Pa. 422, 311 A.2d 572 (1973). This process differs from the exception to the hearsay rule for recorded recollection, where a prior memorandum or other record, made by a witness who has insufficient present memory to testify accurately, is itself admitted into evidence if it meets the requirements of Pa.R.E. 803.1(3).

When a witness is shown something for the purpose of refreshing memory, there is a danger that what the witness looks at will be unduly suggestive of what his or her testimony should be, and that what is then put forth as rekindled present recollection is in fact not that at all. Giving the adverse party access to what was shown to the witness to use in cross-examination and to introduce into evidence is a way of protecting against this risk.

The 1972 proposed version of F.R.E. 612, which was submitted to Congress, provided for access as of right to a writing when it was used to refresh a memory both while

testifying and before testifying. Notes of the Advisory Committee on 1972 Proposed Rule 612. This was amended by the House Judiciary Committee "so as still to require the production of writings used . . . while testifying but to render the production of writings used . . . before testifying discretionary with the court in the interests of justice." Notes of the Committee on the Judiciary, House Report No. 93 650. It was this version of the Federal Rule that was finally adopted. Pa.R.E. 612(a) takes the same approach, and this is consistent with the Pennsylvania decisions.

In Proctor, 253 Pa. Super. at 374, 385 A.2d at 385—86, the court said that it was clearly settled that once a witness has resorted to a writing to refresh memory while testifying, "the adverse party is entitled to inspect the writing and have it available for reference in cross-examining the witness." Id. (emphasis added); see *Commonwealth v. Allen*, 220 Pa. Super. 403, 289 A.2d 476 (1972). However, when a writing is used to refresh memory before testifying, production of it to the adverse party is discretionary with the court. *Commonwealth v. Samuels*, 235 Pa. Super. 192, 340 A.2d 880 (1975); *Commonwealth v. Fromal*, 202 Pa. Super. at 47—50, 195 A.2d at 175—176. In the latter case, a policeman, who testified without notes, admitted on cross-examination that before trial he had refreshed his recollection by reading the police file containing day by day reports of the investigation. In holding that there was no abuse of discretion in denying defendant access to the file, the Superior Court pointed out that in view of the length and scope of the file, the opportunity for abuse and confusion was obvious, and there was a great likelihood of raising many collateral issues with no real guide for limiting cross-examination of the witness.

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

There is no Pennsylvania authority on the question of whether the adverse party may introduce into evidence the writing or other item used to refresh memory. Pa.R.E. 612(a), like F.R.E. 612, specifically provides that this may be done. This will enable the trier of fact to put the whole matter, i.e., what the witness was shown and how the witness testified on direct examination and cross-examination, in proper context. The evidence is received only for impeachment purposes unless it comes within one of the exceptions to the hearsay rule in Pa.R.E. 803, 803.1 and 804(b).

By its terms, Pa.R.E. 612(a) is made applicable to testimony given at a deposition; this is not what was done in F.R.E. 612, which refers only to having "the writing produced at a hearing." Nevertheless, most of the cases have applied the Federal Rule to depositions based upon Fed. R. Civ. P. 30(c), which states: "Examination and cross-examination of witnesses [at a deposition] may proceed as permitted at trial under the provisions of the Federal Rules of Evidence." Wright and Gold, *Federal Practice and Procedure: Evidence*, § 6183; see, e.g., *Sporck v. Peil*, 759 F.2d 312, (3d Cir. 1985), cert. denied, 474 U. S. 903.

There are no Pennsylvania cases considering this issue, and the Pennsylvania Rules of Civil Procedure do not have a provision similar to Fed. R. Civ. P. 30(c). However, by statute and procedural rules, Pennsylvania has provided for the introduction of deposition testimony at trial in certain circumstances. The procedure for taking a deposition outside of Pennsylvania by either the prosecution or defendant in a criminal case is set forth in 42 Pa.C.S.A. § 5325, and a deposition taken pursuant to that statute may be read into evidence at the trial of any criminal matter under 42 Pa.C.S.A. § 5919, unless the deponent is present at the trial, has been or can be subpoenaed, or his or her attendance could otherwise be procured. In addition, Pa.R.Crim.P. 9015 authorizes the taking of a deposition upon order of the court or by agreement of the parties to preserve the testimony of any witness who may be unavailable for trial or "when due to exceptional circumstances, it is in the interests of justice that the witness' testimony be preserved." Pa.R.Crim.P. 9015A sets forth the procedures for videotaping the deposition.

In civil cases, Pa.R.C.P. 4020(a)(3) provides that the deposition of a witness, whether or not a party, may be used at the trial by any party for any purpose if the witness is unavailable within the terms of that Rule or there are exceptional circumstances, and under subsection (a)(5) of that Rule, the deposition of a non-party medical witness may be used for any purpose whether or not the witness is available (and see also 42 Pa.C.S.A. § 5936). Moreover, Pa.R.C.P. 4017.1(g) authorizes the use at trial of a videotape deposition of a medical witness or an expert witness, other than a party, for any purpose even though the witness may be available.

Because of these statutes and procedural rules, there are many possibilities for the introduction of a deposition into evidence at the trial, and one can never be sure in advance when these possibilities will become realities. In view of this, the need of an adverse party to test a deponent, who has used a writing or other item to refresh memory, by getting access to the writing or other item and cross-examining the deponent on it, is as great at the deposition as it would be at trial. Apart from this, if deposition testimony can be challenged, any suggestion arising from the refreshing can be exposed immediately with the result that it may be eliminated at the time of trial. For these reasons, Pa.R.E. 612(a) is specifically made applicable to depositions.

By its terms, Pa.R.E. 612(a) applies to the use of a writing or other item to refresh memory "for the purpose of testifying." F.R.E. 612 contains the same phrase, and the Advisory Committee explained that it was intended "to safeguard against using the rule as a pretext for wholesale exploration of an opposing party's files and to insure that access is limited only to those writings which may fairly be said in fact to have an impact upon the testimony of the witness." This view of the phrase was recognized in *Sporck*, 759 F.2d at 317 19, in a case in which a deposition witness had examined a large number of documents, selected for him by counsel, in preparation for testifying at the deposition.

Section (b).—Except for the changes noted above concerning sanctions in criminal cases when the prosecution fails to comply with an order to produce, Pa.R.E. 612(b) is the same as the last three sentences of F.R.E. 612. An adverse party has rights only to those parts of any materials used to refresh memory that bear upon the witness' testimony. When the party who did the refreshing contends that some part of what the witness was shown goes beyond the scope of the testimony, section (b) requires the court to make an in camera inspection and to remove any extraneous matter. Of course, what is excised

must be preserved in the event that the redaction is challenged on appeal. This process is a well recognized technique.

The last sentence of section (b) is aimed at what in all probability will be the rare case of a failure to comply with an order to produce. In a civil case, the court is given broad discretion to deal with this. The problem is akin to the failure of a party to comply with discovery orders, and Pa.R.C.P. 4019 provides for a wide range of sanctions in that case. Similarly, under section (b), the court may employ a sanction best calculated to remedy the harm caused by the failure to produce.

When the prosecution does not produce in a criminal case, this interferes with the defendant's right to confront the witness by limiting cross-examination. Striking the witness' testimony will generally be a sufficient cure. However, if the testimony is so significant that the jury would be hard put to disregard it, despite its having been stricken, a mistrial may be in order. Since declaring a mistrial may create double jeopardy problems, which could preclude a retrial (see, e.g., *Oregon v. Kennedy*, 456 U. S. 667 (1982)), care must be exercised in employing this sanction.

The elimination of the word "elects," which appears in F.R.E. 612 in connection with the prosecution's noncompliance with an order to produce, is meant to remove any implication that the prosecution has an option to withhold refreshing materials. This complements the inclusion in Pa.R.E. 612(b) of contempt procedures as an additional sanction, thus providing the court with a means of forcing compliance with an order to produce when an occasion arises where the witness' testimony or what was shown to the witness is important to the defendant's theory of the case.

Rule 613. Prior Statements of Witnesses.

(a) Examining Witness Concerning Prior Statement A witness may be examined concerning a prior statement made by the witness, whether written or not, and the statement need not be shown or its contents disclosed to the witness at that time, but on request the statement or contents shall be shown or disclosed to opposing counsel.

(b) *Extrinsic Evidence of Prior Inconsistent Statement of Witness*. Unless the interests of justice otherwise require, extrinsic evidence of a prior inconsistent statement by a witness is admissible only if, during the examination of the witness,

(1) the statement, if written, is shown to, or if not written, its contents are disclosed to, the witness;

(2) the witness is given an opportunity to explain or deny the making of the statement; and

(3) the opposite party is given an opportunity to question the witness.

This section does not apply to admissions of a party-opponent as defined in rule 803(25) (relating to admissions by a party opponent).

(c) *Evidence of Prior Consistent Statement of Witness*. Evidence of a prior consistent statement by a witness is admissible for rehabilitation purposes if the opposite party is given an opportunity to question the witness concerning the statement, and the statement is offered to rebut an expressed or implied charge of:

(1) recent fabrication, bias, improper influence or other motive, and the consistent statement, or where there are two or more consistent statements, at least one of the statements was made before the charged fabrication, bias, improper influence or other motive;

(2) faulty memory at the trial and the consistent statement was made prior to the onset of any alleged defect in memory; or

(3) inconsistent accounts arising from the admission of evidence of an alleged prior inconsistent statement of the witness, which the witness has denied or explained, and under all the surrounding circumstances, the consistent statement is related to or supports the witness' denial or explanation of the inconsistent statement.

Comment

This Rule differs from F.R.E. 613 both in organization and in many substantive respects. Unlike its Federal counterpart, it covers both impeachment by prior inconsistent statements and rehabilitation by prior consistent statements; the Federal rule deals only with the former.

Section (a).—This section of the Rule is identical to F.R.E. 613(a). By dispensing with the need to show the prior statement or disclose its contents to the witness before proceeding with an examination about it, section (a) repudiates the decision in the *Queen's* Case, 2 Br. & B. 284, 129 Eng. Rep. 9761 (1820). What scant authority there is in Pennsylvania on this point is ambiguous. In *Kann v. Bennett*, 223 Pa. 36, 72 A. 342 (1909), the Supreme Court stated, relying only on 1 Greenleaf, *Evidence* § 88 (Lewis ed. 1896), that before a witness may be cross-examined about a prior inconsistent statement, the witness must be shown the statement and asked if he wrote it. But later, in *Commonwealth v. Petrakovich*, 459 Pa. 511, 329 A.2d 844 (1974), the Court, overlooking the *Kann* case, said it never had had occasion to consider the question, and found it unnecessary to resolve the matter under the facts involved in the case before it. Section (a) settles the matter.

Section (b).—The first sentence of section (b) of the Rule differs from F.R.E. 613(b) by providing that extrinsic evidence of a prior inconsistent statement may be introduced only if the witness was confronted with or informed of the statement during his or her examination, thus providing the witness with a chance to deny or explain the statement; the Federal Rule also provides for furnishing the witness with this opportunity, but sets no particular time or sequence for when this must be done. Notes of the Advisory Committee on Rule 613. Section (b) of the Rule follows the traditional common law approach, and it is different from the statements found in several Pennsylvania decisions to the effect that it is not mandatory that a witness be shown or be made aware of a prior inconsistent statement before extrinsic evidence of it may be introduced, but that the matter is one within the discretion of the trial court. See, e.g., *Commonwealth v. Manning*, 495 Pa. 652, 435 A.2d 1207 (1981); *Commonwealth v. Dennison*, 441 Pa. 334, 272 A.2d 180 (1971). The first sentence of section (b) changes the emphasis of these cases by establishing the traditional common law approach as the preferred and usual manner of proceeding in all cases except where the interests of justice would be better served by a relaxation of the rule.

The rationale for the last sentence of section (b) exempting certain admissions of a party opponent from the requirements of the section is that "parties have ample opportunities to testify and explain or deny statements attributed to them." Wright & Gold, *Federal Practice and Procedure: Evidence* § 6205. The exemption is in accord with Pennsylvania law. *Commonwealth by Truscott v. Binenstock*, 358 Pa. 644, 57 A.2d 884 (1948); *Commonwealth v. Dilworth*, 289 Pa. 498, 137 A. 683 (1927).

Finally, it should be remembered, as noted in the Comment to Pa.R.E. 607(a), that a prior inconsistent statement may be used only for impeachment purposes and not substantively unless it is an admission of a party opponent under Pa.R.E. 803(25), the statement of a witness other than a party opponent within the hearsay exception of Pa.R.E. 803.1(1), which is a codification of *Commonwealth v. Lively*, 530 Pa. 464, 610 A.2d 7 (1992), or a statement of prior identification under the hearsay exception of Pa.R.E. 803.1(2).

Section (c).—This section of this Rule covering the use of prior consistent statements for rehabilitation purposes, does not appear in F.R.E. 613. Instead, some consistent statements are dealt with in the Federal Rules as part of the definition of statements that are not hearsay. Under F.R.E. 801(d)(1)(B), a prior statement of a declarant, who testifies at the trial or hearing and is subject to cross-examination, is not hearsay, and is substantive evidence, when the statement is consistent with the declarant's testimony and it "is offered to rebut an express or implied charge against the declarant of recent fabrication, or improper influence or motive." Section (c) adds "bias," "faulty memory" and "inconsistent accounts" to the kind of charges that may be rebutted by a consistent statement. In addition, it clearly provides in subsection (c)(1) that the consistent statement must have been made before the fabrication, bias, improper influence or other motive. Although F.R.E. 801(d)(1)(B) is silent on this point, the U. S. Supreme Court recently held that it permits the introduction of a declarant's consistent statements as substantive evidence only when they were made before the challenged fabrication, influence or motive. *Tome v. United States*, 513 U. S. 150 (1995).

It should be remembered that under section (c), a prior consistent statement is always received for rehabilitative purposes only and not as substantive evidence. See Comment d. to Pa.R.E. 801 (relating to the definition of hearsay).

Subsection (c)(1) is consistent with existing Pennsylvania law. *Commonwealth v. Hutchinson*, 521 Pa. 482, 556 A.2d 370 (1989) (use of consistent statement to rebut charge of recent fabrication); *Commonwealth v. Smith*, 518 Pa. 15, 540 A.2d 246 (1988) (use of consistent statement to counter alleged corrupt motive); *Commonwealth v. McEachin*; 371 Pa. Super. 188, 537 A.2d 883 (1988), appeal denied, 520 Pa. 603, 553 A.2d 965 (1988) (use of consistent statement to negate improper influence). All of these cases require that the consistent statement be made before the fabrication, corrupt motive or improper influence, otherwise the statement does not logically negate any of these charges.

Subsection (c)(2) is intended to cover those instances where the accuracy of the witness' memory at the trial is attacked on the grounds that because of the passage of time, some intervening mental deficiency or the like, the trial testimony is suspect. Evidence of a prior consistent statement made shortly after the event before there was time to forget or before any intervening defect will support the accuracy of the trial testimony. In *Commonwealth v. Swinson*, 426 Pa. Super. 167, 626 A.2d 627 (1993), where there had been a searching cross-examination of a robbery victim designed to cast doubt on his memory, the prosecution was permitted to introduce evidence of the victim's prior consistent statement given to the police two days after the robbery. See also, 1 McCormick, *Evidence*, § 47 at n. 18 (4th ed. 1992). As previously noted, there is no counterpart to subsection (c)(2) in the Federal Rules.

Subsection (c)(3) is directed at the situation of an attack upon a witness with a prior inconsistent statement. Note that this type of attack does not necessarily connote that the witness has lied; it may indicate only that the witness is mistaken, confused or generally unreliable.

Subsection (c)(3) has some support in, but is not completely congruent with, the Pennsylvania decisions. In *Commonwealth v. Berrios*, 495 Pa. 444, 434 A.2d 1173, 1177 (1981), the Supreme Court held that a witness' consistent statement can be used for rehabilitation purposes to counteract the witness' inconsistent statement where the former is made prior to the latter. From the Court's statement of the facts, one could infer that the witness was confronted with his inconsistent statements and made no denial; however, the Court did not discuss this in reaching the result. See also, *Commonwealth v. Fisher*, 447 Pa. 405, 290 A.2d 262 (1972). The Court, in *Risbon v. Cottom*, 387 Pa. 155, 127 A.2d 101 (1956), allowed the use of a consistent statement for rehabilitation where it preceded the making of an inconsistent statement that the witness had denied making.

However, in *Commonwealth v. White*, 340 Pa. 139, 16 A.2d 407 (1940), where the defendant in a murder case admitted making a confession and offered a lame explanation, the Court held that the defendant's consistent statement, made after his confession, was not admissible; the Court placed no emphasis on either the explanation or the timing of the consistent statement. The Court, adopting language from the opinion of the trial judge, said "[w]here as in the case of this defendant and his witnesses, the self contradiction is conceded, it remains as a damaging fact, and is in no sense explained away by the consistent statement . . . . No matter how many times the consistent story may have been told, the inconsistent one is not erased." Id. at 142—44, 16 A.2d at 408—09. The *White* decision was distinguished in *Commonwealth v. Willis*, 380 Pa. Super. 555, 552 A.2d 682 (1988), on the ground that in that case, the witness' consistent statement was made after the admitted inconsistent statement, whereas in the case before the court the consistent statement came first, and under all the circumstances, including the witness' explanation, it buttressed the witness' credibility. Subsequently, in *Commonwealth v. Jubilee*, 403 Pa. Super. 589, 589 A.2d 1112 (1991), appeal denied, 529 Pa. 617, 600 A.2d 534 (1991), the Superior Court refused to follow *Willis*, adhering instead to the decision in White, in a case where the inconsistent statement was admitted and explained and the consistent statement came later.

The keys to admissibility of a consistent statement under subsection (c)(3) are the witness' denial or plausible explanation of the alleged inconsistent statement and the consistent statement's relation to or support of the denial or explanation. In view of the requirements of section (b), it is unlikely that a witness will not have an opportunity to deny or explain an alleged inconsistency. Where the witness denies making the alleged inconsistent statement, the consistent statement should almost invariably be admitted, regardless of its timing. When the witness admits and explains the inconsistent statement, the use of the consistent statement will depend upon the nature of the explanation and all of the circumstances that prompted the making of the consistent statement; the timing of that statement, although not conclusive, is one of the factors to be considered. If the witness acknowledges making the inconsistent statement and offers no explanation, a consistent statement, whether made earlier or later, should not be admitted.

Usually, evidence of a prior consistent statement is rebuttal evidence that may not be introduced until after witness has testified on direct examination and an express or implied attack has thereafter been made on the witness' testimony in one of the ways set forth in subsection (c). But in at least two situations, Pennsylvania Courts have upheld the admission of a prior consistent statement in anticipation of an attack on the witness.

In *Commonwealth v. Smith*, 518 Pa. 15, 540 A.2d 246 (1988), the Supreme Court, affirming a conviction of murder, held that the trial judge did not abuse his discretion when he permitted the Commonwealth to introduce prior consistent statements made by a witness for the prosecution on direct examination of the witness. The justification for this was that defense counsel, in his opening address to the jury, suggested that the witness, who had pled guilty to other lesser offenses in connection with the murder, had motives to fabricate evidence against the defendant in order to obtain a lenient sentence for herself.

A similar preemptive use of a prior consistent statement has been countenanced in rape cases where evidence of a prompt complaint of rape by the alleged victim may be introduced in the prosecution's case in chief. *Commonwealth v. Freeman*, 295 Pa. Super. 467, 477, 441 A.2d 1327, 1332 (1982). The Superior Court stated that "the testimony of a woman that she was raped is automatically vulnerable to attack by the defendant as recent fabrication in the absence of evidence of hue and cry on her part."

Rule 614. Calling and Interrogation of Witnesses by Court.

(a) *Calling by Court*. Consistent with its function as an impartial arbiter, the court, with notice to the parties, may, on its own motion or at the suggestion of a party call witnesses, and all parties are entitled to cross-examine witnesses thus called.

(b) *Interrogation by Court*. Where the interest of justice so requires, the court may interrogate witnesses, whether called by itself or by a party.

(c) *Objections*. An objection to the calling of a witness by the court must be made at the time of the court's notice of an intention to call the witness. An objection to a question by the court must be made at the time the question is asked; when requested to do so, the court shall give the objecting party an opportunity to make objections out of the presence of the jury.

Comment

This Rule differs from F.R.E. 614 in several respects. The phrase relating to the court's "function as an impartial arbiter" and the provision for notice have been added in section (a), and the clause regarding "interest of justice" has been added in section (b). The additions dealing with the court as an "impartial arbiter" and the "interest of justice" are cautions to any trial judges who might be inclined to inject themselves too much into the trial of a case. The provision for notice of the court's intention to call a witness will give all parties an opportunity to be heard upon the need for this, to object thereto and to prepare for the cross-examination of the witness.

Section (c) changes the Federal Rule by eliminating the option of objecting to the calling or interrogation of the witnesses by the court "at the next available opportunity when the jury is not present." The purpose of this option is to relieve counsel of "the embarrassment" which might arise by objecting to the judge's questions in the jury's presence, a theory comparable to that which prompted the "automatic" objection in F.R.E. 605 when the judge is called as a witness. Notes of the Advisory Committee to F.R.E. 614(c). The option has been removed from Pa.R.E. 614(c) just as the "automatic" objection was done away with in Pa.R.E. 605. The appropriate time for objecting to the calling of a witness by the court is when notice of the court's intention to do so is given as required by section (a) of the Rule, and this should always take place out of the presence of the jury.

When the court's questions to a witness are thought to be objectionable, the issue should be raised when the questions are put. In this way, the jury will not hear the evidence sought if the objections are sustained—a far better course than an instruction to the jury to disregard the evidence when the objections are not made until some time after the questions have been asked and answered. The fear of "embarrassment" from making the objections in the jury's presence is in all probability an exaggeration; throughout a trial, jurors are accustomed to hearing objections and the rulings thereon, and they are always admonished that no inferences should be drawn from the objections or the rulings. In the extreme case (e.g., persistent questioning thought to be objectionable), opportunity for a side-bar conference should be provided as set forth in the final clause of section (c). In requiring objections, section (c) is consistent with the provisions of Pa.R.E. 103(a)(1) regarding objections generally.

Pa.R.E. 614 is basically consistent with Pennsylvania law. It is well established that, "as a general rule, a trial judge may in the exercise of a sound discretion call and examine witnesses of his own accord . . ." *Commonwealth v. Crews*, 429 Pa. 16, 239 A.2d 350 (1968); *Commonwealth v. DiPasquale*, 424 Pa. 500, 230 A.2d 449 (1967). The leading case on the interrogation of witnesses by the court is *Commonwealth v. Myma*, 278 Pa. 505, 508, 123 A.2d 486, 487 (1924) where the Supreme Court said: "Witnesses should be interrogated by the judge only when he conceives the interest of justice so requires. It is better to permit counsel to bring out the evidence and clear up disputed points on cross-examination unaided by the court; but where an important fact is indefinite or a disputed point needs to be clarified, the court may see that it is done by taking part in the examination . . . . "See also, *Commonwealth v. Roldan*, 524 Pa. 366, 572 A.2d 1214 (1990); see generally, 1 McCormick, Evidence, § 8 (4th ed. 1992).

When the court does question a witness, an instruction that the jury should not conclude that the court has any opinion concerning the merits of the case or the credibility of the witness is appropriate. *Commonwealth v. Blount*, 387 Pa. Super. 603, 564 A.2d 952 (1989); *Fleck v. Durawood, Inc.*, 365 Pa. Super. 123, 529 A.2d 3 (1987).

Rule 615. Sequestration of Witnesses.

At the request of a party or on its own motion, the court may order witnesses sequestered so that they cannot learn of the testimony of other witnesses. This section does not authorize sequestration of the following:

(1) a party who is a natural person or the guardian of a party who is a minor or an incapacitated person;

(2) an officer or employee of a party which is not a natural person (including the Commonwealth) designated as its representative by its attorney; or

(3) a person whose presence is shown by a party to be essential to the presentation of the party's cause.

Comment

Besides using the term "sequestration" instead of "exclusion," and substituting "learn of" for "hear" in the first sentence, this Rule differs from F.R.E. 615 by placing sequestration within the discretion of the court rather than making it mandatory upon motion of a party and by adding the guardian of a minor or incapacitated person to the first category of those who may not be sequestered.

Sequestration, i.e., barring a witness from the courtroom during the testimony of certain other witnesses and prohibiting direct and indirect communication both in and out of the courtroom, is designed to prevent a witness from learning what other witnesses have said or intend to say as a means of discouraging and exposing fabrication, collusion, inaccuracies and inconsistencies. 1 McCormick, *Evidence*, § 50 (4th ed. 1992). This rule is in conformity with Pennsylvania law. *Commonwealth v. Albrecht*, 510 Pa. 603, 619—620, 511 A.2d 764, 772 (1986) ("The decision of whether or not to sequester a witness is within the province of the trial judge and, absent a clear abuse of discretion, will not be reversed . . . .") Examples of abuse of discretion may be found in *Commonwealth v. Fant*, 480 Pa. 586, 391 A.2d 1040 (1978), cert. denied, 441 U. S. 951, 99 S.Ct. 2180 (1979) and *Commonwealth v. Turner*, 371 Pa. 417, 88 A.2d 915 (1952). In *Fant*, the Court, in a murder case, denied the defendant's motion to sequester several prosecution witnesses who had made no pretrial identifications of him, and permitted them to make identifications in the courtroom. In *Turner*, an important element in the prosecution's case was an alleged inculpatory statement made by defendant to two detectives; defendant denied making the statements. His motion to sequester the detectives was denied by the trial court.

The three categories of persons who may not be sequestered are, with some slight differences, akin to those in the Federal Rule. Clause (1) covers natural persons who are parties; their exclusion would raise constitutional problems of confrontation and due process. It also includes guardians of parties who are minors or incapacitated persons; this brings the rule into conformity with Pa.R.C.P. 2027 (minors) and 2053 (incapacitated persons), which place the conduct of actions on behalf of those parties under the supervision and control of their guardians. Clause (2) applies to the designated representatives of a party which is not a natural personal. The parenthetical phrase relating to the Commonwealth does not appear in F.R.E. 615(2); it is meant to make clear what is said to be intended by the Federal Rule, that in a criminal case, the prosecution has a right to have the law enforcement agent primarily responsible for investigating the case at the counsel table to assist in presenting the case, even though the agent will be a witness. See Notes of the Committee on the Judiciary, Senate Report No. 93—1274, and Notes of the Advisory Committee to F.R.E. 615(2). Clause (3) refers to persons such as the one who handled the transaction involved in the case or an expert relied upon by counsel for advice in managing the litigation.

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

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

Rule
701. Opinion Testimony by Lay Witnesses.
702. Testimony by Experts.
703. Basis of Expert Testimony.
704. Opinion on Ultimate Issue.
705. Disclosure of Facts or Data Underlying Expert Opinion.
706. Court Appointed Experts.

Rule 701. Opinion Testimony by Lay Witnesses.

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are rationally based on the perception of the witness and helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Comment

This rule is identical to F.R.E. 701 except for the deletion of the (a) and (b) divisions within the text of the rule. No substantive changes result from this deletion.

The Superior Court decision in *Lewis v. Mellor*, 259 Pa. Super. 509, 393 A.2d 941 (1978) (en banc), adopted F.R.E. 701 and in doing so condensed and somewhat changed, but did not specifically overrule, earlier Pennsylvania evidence law. Prior to *Lewis*, there were four rules that prohibited lay witness opinion testimony: *Travelers Ins. Co. v. Heppenstall*, 360 Pa. 433, 61 A.2d 809 (1948) (no lay opinion testimony where opinion requires special training, education or experience); *Smith v. Clark*, 411 Pa. 142, 190 A.2d 441 (1963) (no lay opinion testimony where the opinion is not based on personal knowledge); *Graham v. Pennsylvania Co.*, 139 Pa. 149, 21 A. 151 (1891) (no lay opinion testimony whenever the circumstances can be fully and adequately described to the jury, and are such that their bearing on the issue can be estimated by all men without special knowledge or training); *Starner v. Wirth*, 440 Pa. 177, 269 A.2d 674 (1970) (no lay opinion testimony going to the ultimate issue in the case).

Under Lewis, lay opinion is admissible where it is based on a witness' first-hand knowledge, rationally based on perception and "helpful" to the fact finder in determining or clarifying facts in issue; it may embrace the ultimate issue. If the trial judge decides that the proffered opinion would not be helpful, or if even helpful, would confuse, mislead, or prejudice the jury, or would waste time, the trial judge may exclude it. *Lewis*, 259 Pa. Super. at 523—24, 393 A.2d at 949. The trial judges discretion in this regard will be reversed on appeal only in cases where the discretion has been clearly abused, and actual prejudice has occurred. Id. Pa.R.E. 701 is, for the most part, consistent with Pennsylvania common law which has long deviated from the traditional exclusionary principal that witnesses may testify only to facts and not to opinions or inferences. Lay witnesses have been permitted to express opinions in such areas as intoxication, *Whyte v. Robinson*, 421 Pa. Super. 33, 617 A.2d 380 (1992); mental capacity, *Weir by Gasper v. Ciao*, 364 Pa. Super. 490, 528 A.2d 616 (1987), aff'd, 521 Pa. 491, 556 A.2d 819 (1989); mental condition/sanity, *In re Owens Estate*, 167 Pa. Super. 10, 74 A.2d 705 (1950); *Commonwealth v. Young*, 276 Pa. Super. 409, 419 A.2d 523 (1980) (citing *Commonwealth v. Knight*, 469 Pa. 57, 364 A.2d 902 (1976)); physical condition, *Travelers Ins. Co. v. Heppenstall Co.*, 360 Pa. 433, 61 A.2d 809 (1948); speed, *Catina v. Maree*, 498 Pa. 443, 447 A.2d 228 (1982); and value, *Richards v. Sun Pipe Line Co.*, 431 Pa. Super. 429, 636 A.2d 1162 (1994). The Pennsylvania Supreme Court has not reviewed the decision in *Lewis*.

Additionally, the Superior Court has permitted voice identification through lay opinion testimony when the witness is familiar with, and is able to identify, a voice by its sound or tone quality. See *Sterling v. Huey*, 155 Pa. Super. 398, 38 A.2d 515 (1944) (shooting victim identified his assailant by voice, shouted from a distance greater than 300 yards); *Commonwealth v. Johnson*, 201 Pa. Super. 448, 193 A.2d 833 (1963) (multiple rape victims identified their attacker by voice only because visual identification was impossible in the darkness); *Commonwealth v. Woodbury*, 329 Pa. Super. 34, 477 A.2d 890 (1984) (when a person was murdered in a hallway, a witness identified the assailant by voice through her closed apartment door). See also, *United States v. Whitaker*, 372 F. Supp. 154 (M.D. Pa.), aff'd, 503 F.2d 1400 (3d Cir. 1974) (one who first hears a person's voice over the telephone may later identify it as the one heard in a face-to-face conversation).

See also, Pa.R.E. 602 (witness may not testify to a matter unless witness has personal knowledge of it).

Rule 702. Testimony By Experts.

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

Comment

Pa.R.E. 702 is more restrictive than F.R.E. 702. Under Pa.R.E. 702 expert opinion testimony, to be admissible, must (1) "assist the trier of fact to understand the evidence or to determine a fact in issue" (the federal standard for admissibility), and (2) pertain to specialized knowledge "beyond that possessed by a layperson."

Case law in Pennsylvania has consistently rejected expert opinion testimony pertaining to the credibility of a witness. See, e.g., *Commonwealth v. Simmons*, 541 Pa. 211, 662 A.2d 621 (1995); *Commonwealth v. Dunkle*, 529 Pa. 168, 602 A.2d 830 (1992); *Commonwealth v. Davis*, 518 Pa. 77, 541 A.2d 315 (1988); *Commonwealth v. Gallagher*, 519 Pa. 291, 547 A.2d 355 (1988); *Commonwealth v. Seese*, 512 Pa. 439, 517 A.2d 920 (1986); *Commonwealth v. O'Searo*, 466 Pa. 224, 352 A.2d 30 (1976).

Pa.R.E. 702 is consistent with explicatory language contained in some of these cases stating that expert opinion testimony is admissible only when its subject matter is "beyond the knowledge or experience of the average layman." See *Commonwealth v. O'Searo*, 466 Pa. 224, 352 A.2d 30 (1976); *Commonwealth v. Dunkle*, 529 Pa. 168, 602 A.2d 830 (1992).

With respect to the admissibility of expert scientific evidence, Pennsylvania, additionally, has heretofore applied the standard promulgated by the United States Court of Appeals for the District of columbia in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), i.e., the evidence must have acquired "general acceptance" in the relevant scientific community. See *Commonwealth v. Topa*, 471 Pa. 223, 369 A.2d 1277 (1977); *Commonwealth v. Nazarovitch*, 496 Pa. 97, 436 A.2d 170 (1981); *Commonwealth v. Dunkle*, 529 Pa. 168, 602 A.2d 830 (1992).

The Frye standard was generally applied in the federal courts, and in most states, until the United States Supreme Court, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U. S. 579 (1993), held that it was superseded in the federal courts by the adoption of F.R.E. 702. The new standard enunciated in the *Daubert* case makes the admission of new or novel scientific evidence somewhat easier by providing that general acceptance in the relevant scientific community is only one factor to be considered in determining admissibility. Other factors include whether the expert's opinion is grounded in the methods and procedures of science (as opposed to subjective belief or unsupported speculation), whether the technique or methodology used by the expert can be or has been tested for "falsifiability, or refutability," its known or potential rate of error, the existence and maintenance of standards controlling the technique's operation, and whether the expert's opinion has been subjected to peer review and publication.

In *Commonwealth v. Crews*, 536 Pa. 508, n.2, 640 A.2d 395 (1994), the Pennsylvania Supreme Court, after reviewing the United States Supreme Court's opinion in the Daubert case, said: "Whether or not the rationale of *Daubert* will supersede or modify the *Frye* test in Pennsylvania is left to another day."

Adoption of Pa.R.E. 702 has not, in and of itself, decided this issue. Whether Pennsylvania will adhere to the *Frye* standard for admission of expert scientific testimony, or whether it will adopt the *Daubert* standard, awaits a ruling by the Pennsylvania Supreme Court.

Case law in Pennsylvania is liberal in qualifying a witness to testify as an expert. In *Miller v. Brass Rail Tavern, Inc.*, 541 Pa. 474, 480—81, 664 A.2d 525, 528 (1995), the Court said:

> The test to be applied when qualifying a witness to testify as an expert witness is whether the witness has any reasonable pretension to specialized knowledge on the subject under investigation. If he does, he may testify and the weight to be given to such testimony is for the trier of fact to determine.

Pa.R.E. 702 does not change Pennsylvania case law on this point.

Expert testimony, like lay testimony, is subject to Pa.R.E. 403, i.e., it is excludable if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or one or more of the other factors enumerated therein.

Rule 703. Basis of Expert Testimony.

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.

Comment

Pa.R.E. 703 is identical to F.R.E. 703 and consistent with current Pennsylvania law. Historically, Pennsylvania courts limited the facts or data upon which an expert could base an opinion to those obtained from firsthand knowledge or from the trial record. *Collins v. Hand*, 431 Pa. 378, 246 A.2d 398 (1968). Beginning in 1971 with *Commonwealth v. Thomas*, 444 Pa. 436, 282 A.2d 693 (1971), Pennsylvania courts have endorsed and expanded the principle that experts may base their opinions upon evidence which is otherwise inadmissible as long as it is of a type reasonably relied upon by experts in the particular field. See *Commonwealth v. Daniels*, 480 Pa. 340, 390 A.2d 172 (1978); *Commonwealth v. Bowser*, 425 Pa. Super. 24, 624 A.2d 125 (1993); *In Re Glosser Bros.*,

Inc., 382 Pa. Super. 177, 555 A.2d 129 (1989); *Bolus v. United Penn Bank*, 363 Pa. Super. 247, 525 A.2d 1215 (1987).

Pennsylvania courts follow such a rule and allow experts to testify in such a manner for practical reasons. An expert's opinion may be based upon years of professional experience, schooling and knowledge, not all of which can be presented on a firsthand basis in court. *Primavera v. Celotex Corp.*, 415 Pa. Super. 41, 608 A.2d 515 (1992), appeal denied, 533 Pa. 641, 622 A.2d 1374 (1993). The fact that experts reasonably and regularly rely on this type of information merely to practice their profession lends strong indicia of reliability to source material, when it is presented through a qualified expert's eyes. Id. Thus, when the expert witness has consulted numerous sources and uses that information, together with his or her own professional knowledge and experience, to arrive at an opinion, that opinion is regarded as evidence in its own right and not hearsay in disguise. *Commonwealth v. Daniels*, 480 Pa. 340, 390 A.2d 172 (1978). In *Daniels*, a forensic pathologist was permitted to testify as to his opinion regarding the cause and manner of the victims death based upon material which such an expert customarily relies on in the practice of his profession. This material included, in part, information gathered in interviews with hospital residents, certain hospital records, the death certificate, police reports, etc. But this type of an exception is not limited to the medical profession. In *In Re Glosser Bros., Inc.*, the court allowed opinion testimony by a stock valuation expert who used appraisal reports, not admitted into evidence and conducted by an independent appraisal company, to determine the value of shares in a leveraged buyout. Such testimony was permitted because the appraisal was the type of source material that an expert valuing stock would reasonably rely on in forming an opinion. But see *Spotts v. Reidell*, 345 Pa. Super. 37, 497 A.2d 630 (1985) (testimony of defendant doctor as to preoperative conversation with pathologist regarding nature of polyp to be removed found not admissible under doctrine that expert can express opinion based, in part, on reports of others where hearsay was oral and not written, and was used to justify course of action by defendant doctor).

When an expert testifies as to the underlying facts and data that support the expert's opinion and the testimony would be otherwise inadmissible, the trial judge should instruct the jury only to consider the testimony to explain the basis for the expert's opinion, and not as substantive evidence.

However, an expert's testimony is inadmissible if the opinion given is not the opinion of the expert testifying but rather a recitation or reaction to an opinion given by another expert not testifying. See *Dierolf v. Slade*, 399 Pa. Super. 9, 581 A.2d 649 (1990) (medical expert's testimony inadmissible when merely a reaction to another expert's report rather than own medical opinion); *Primavera v. Celotex Corp.*, 415 Pa. Super. 41, 608 A.2d 515 (1992) (expert may not act as a mere conduit or transmitter of the content of an extra-judicial source); *Foster v. McKeesport Hospital*, 260 Pa. Super. 485, 394 A.2d. 1031 (1978) (expert opinion based on belief that another expert, since deceased, was a competent physician ruled inadmissible). The premise for this proposition is that the basis for the expert's opinion should be part of the record in order for the jury to evaluate the expert's opinion and the credibility of the expert's testimony. *Commonwealth v. Rounds*, 518 Pa. 204, 542 A.2d 997 (1988); *Allen v. Kaplan*, 439 Pa. Super. 263, 653 A.2d 1249 (1995).

Evidence admitted under this rule is subject to the balancing test as outlined in Pa.R.E. 403. Furthermore, Pa.R.E. 104 authorizes the court, in its discretion, to resolve any and all preliminary questions regarding the admissibility of evidence under this rule.

Rule 704. Opinion on Ultimate Issue.

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.

Comment

Pa.R.E. 704 is substantively the same as F.R.E. 704(a) and is consistent with current Pennsylvania law. However, this rule completely deletes F.R.E. 704(b) as discussed below.

The text of Pa.R.E. 704 does not limit opinion on the ultimate issue to experts. Expert testimony on the ultimate issue is already permitted in Pennsylvania. *Commonwealth v. Daniels*, 480 Pa. 340, 390 A.2d 172 (1978). Pennsylvania law allows lay opinion on the ultimate issue subject to the trial judges discretion based upon a consideration of the helpfulness of the testimony tempered by a consideration of whether its admission will cause confusion or prejudice. *Lewis v. Mellor*, 259 Pa. Super. 509, 393 A.2d 941 (1978) (en banc).

The Pennsylvania Supreme Court discussed expert opinion testimony on the ultimate issue in *Kozak v. Struth*, 515 Pa. 554, 531 A.2d 420 (1987). *Kozak* cited *Lewis v. Mellor*, for the assertion that it is up to the judge to decide if testimony which goes to the ultimate issue is confusing for the jury. In *Kozak*, the court prohibited expert testimony on the ultimate issue of causation and due care. There is a long line of cases, however, including Superior Court interpretations of *Kozak*, solidifying the view that Pennsylvania permits expert testimony on the ultimate issue where it will not be misleading or cause confusion or prejudice. See *Milan v. Commonwealth*, 153 Pa. Commwlth. 276, 620 A.2d 721 (1993), appeal denied, 535 Pa. 650, 633 A.2d 154 (1993) (permitting an accident reconstruction expert to testify on the ultimate issue as to the causation of an accident because the opinion was based on the contents of a police accident report and other documents previously testified to by a trooper and the driver); *Porter v. Kalas*, 409 Pa. Super. 159, 597 A.2d 709 (1991) (permitting a real estate lawyer to testify as an expert and assist the trier of fact as to title searches and deeds and opine about the ultimate issue of whether an express easement was still valid); *Commonwealth v. Brown*, 408 Pa. Super. 246, 596 A.2d 840 (1991) (permitting a police officer, qualified as an expert, to testify to the ultimate issue of whether, in his opinion, a defendant possessed drugs with the intent to deliver rather than for personal use); *In Interest of Paul S.*, 380 Pa. Super. 476, 552 A.2d 288 (1988) (permitting the opinion of a caseworker as to the ultimate issue of which parent should get legal and physical custody of a minor child). Thus, Pa.R.E. 704 does not change current Pennsylvania law.

Pa.R.E. 704 omits F.R.E. 704(b) which prohibits an expert from testifying as to the mental state or condition of a criminal defendant with regard 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. When the Pennsylvania Superior Court in *Lewis v. Mellor*, adopted F.R.E. 704 in 1978, it only contained part (a). F.R.E. 704(b), or the "Hinkley Rule," was added on October 12, 1984, as part of the Insanity Defense Reform Act, 18 U.S.C. § 17. *McCormick, Evidence* § 12 (4th Ed. 1992).

Pennsylvania law permits ultimate issue testimony about the defendant's mental state. In *Commonwealth v. Walzack*, 468 Pa. 210, 360 A.2d 914 (1976), the Supreme Court held admissible expert psychiatric testimony concerning the mental capacity to form the type of specific intent required in a prosecution for first-degree murder. The Pennsylvania Supreme Court has consistently held that expert psychiatric testimony is admissible to negate the specific intent to kill which is essential to first degree murder. *Commonwealth v. Anderson*, 410 Pa. Super. 524, 600 A.2d 577 (1991) (citing *Commonwealth v. Terry*, 513 Pa. 381, 521 A.2d 398 (1987), cert. denied, 482 U. S. 920, (1987)); *Commonwealth v. Garcia*, 505 Pa. 304, 479 A.2d 473 (1984); *Commonwealth v. Walzack*, 468 Pa. 210, 360 A.2d 914 (1976). Thus, Pennsylvania law is quite different from Federal law in that Pennsylvania courts have found expert testimony as to mental state in first degree murder cases both relevant and competent and therefore admissible.

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

The expert may testify in terms of opinion or inference and give reasons therefor; however, the expert must testify as to the facts or data on which the opinion or inference is based.

Comment

The text as well as the interpretation of Pa.R.E. 705 differs significantly from F.R.E. 705. The federal rule generally does not require an expert witness to disclose the facts upon which an opinion is based prior to expressing the opinion. Instead, the cross-examiner bears the burden of probing the basis of the opinion. In *Kozak v. Struth*, 515 Pa. 554, 531 A.2d 420 (1987), the Pennsylvania Supreme Court declined to adopt F.R.E. 705 stating that "[we believe] that requiring the proponent of an expert opinion to clarify for the jury the assumptions upon which the opinion is based avoids planting in the jurors mind a general statement likely to remain with him in a jury room when the disputed details are lost." *Kozak*, 515 Pa. at 560, 531 A.2d at 423. Relying on cross examination to illuminate the underlying assumption, as F.R.E. 705 does, may further confuse jurors already struggling to follow complex testimony. Id.

Accordingly, *Kozak* requires disclosure of the facts used by the expert in forming an opinion when not based on personal knowledge. Such disclosure can be accomplished in several ways. For example, the expert can be asked to assume the truth of the testimony of a witness or witnesses whose testimony the expert has heard or read. The *Kroeger Co. v. W.C.A.B.*, 101 Pa. Cmwlth. Ct. 629, 516 A.2d 1335 (1986); *Tobash v. Jones*, 419 Pa. 205, 213 A.2d 588 (1965). Another option is to pose a hypothetical question to the expert. *Dietrich v. J.I. Case Co.*, 390 Pa. Super. 475, 568 A.2d 1272 (1990); *Hussy v. May Department Stores, Inc.*, 238 Pa. Super. 431, 357 A.2d 635 (1976).

It is essential that the salient facts relied upon as the basis of the opinion be in the record. *Commonwealth v. Rounds*, 518 Pa. 204, 542 A.2d 997 (1988). The jury must be able to evaluate the expert's opinion and can only do so if the facts on which the opinion is based are part of the record. Id. See also, Pa.R.E. 703.

Further, the expert witness cannot be asked to state his opinion upon the whole case, "because that necessarily includes the determination of what are the facts, and this can only be done by the jury" *Kozak v. Struth*, supra (citing *Yardley v. Cuthburtson*, 108 Pa. 395, 450, 1 A. 765, 773 (1885)).

When an expert's opinion is based on personal knowledge and not on assumed facts, there is no requirement that the expert be questioned in any particular manner. *Commonwealth v. Neil*, 362 Pa. 507, 67 A.2d 276 (1949).

Rule 706. Court Appointed Experts.

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

Comment

Pa.R.E. 706 differs from F.R.E. 706. Unlike the federal rule, Pa.R.E. 706 does not affect the scope of the courts existing powers to appoint experts. This rule is limited to providing the procedures for obtaining the testimony of such experts, once appointed.

Currently, there are few instances allowing for the court-appointment of expert witnesses. Experts are appointed in disputed paternity proceeding under 23 Pa.C.S. 5104, and, in equity proceedings under Pa.R.C.P. 1515 and 1530(e), the court may appoint accountants and auditors as experts. A 1944 case did allow for the appointment of experts in civil matters. *Galante v. West Penn Power Co.*, 349 Pa. 616, 37 A.2d 548 (1944). A later decision pointed out the lack of statutory authority or procedures for courts to appoint or compensate expert witnesses in Pennsylvania. *Poltorak v. Sandy*, 236 Pa. Super. 355, 345 A.2d 201 (1975) (Spaeth, J., dissenting). In criminal cases, the Superior Court recognized the trial judge's inherent power to appoint an expert under the state constitution:

> As a general rule a trial judge may in the exercise of [a] sound discretion call and examine witnesses of his own accord. In fact, under certain circumstances, it is necessary and imperative for the court to do so. As stated in 9 Wigmore, Evidence § 2484 (3d ed. 1940), "The general judicial power itself, expressly allotted in every State Constitution, implies inherently a power to investigate as auxiliary to the power to decide; and the power to investigate implies necessarily a power to summon and question witnesses."

Commonwealth v. Correa, 437 Pa. Super. 1, 648 A.2d 1199, 1201 n.2 (1994), citing *Commonwealth v. DiPasquale*, 424 Pa. 500, 230 A.2d 449, 450—451 (1967).

See also, Pa.R.E. 614 (Calling and Interrogation of Witnesses By Court).

ARTICLE VIII. HEARSAY

Comment

The Hearsay Problem

The problem with hearsay is that it is thought to be an untrustworthy kind of evidence, so unreliable that it should not be considered by the trier of fact in resolving the issues in a case. In *Commonwealth v. Smith*, 523 Pa. 577, 568 A.2d 600 (1989), the Supreme Court, reversing the murder conviction and death sentence of a former

high school principal on the ground that hearsay had been admitted against him at trial, explained:

The predicate supporting the rejection of hearsay evidence is its assumed unreliability because the declarant from which the statement originates is not before the trier of fact and therefore cannot be challenged as to the accuracy of the information sought to be conveyed.

Testimony, ideally, should have the following three indicia of reliability:

(1) it should be given under oath, subject to the penalty of perjury;

(2) it should be given in the presence of the trier of fact; and

(3) it should be subject to contemporaneous cross-examination by parties-opponent.

All hearsay lacks one or more of the above characteristics. Therefore, hearsay is a relatively untrustworthy kind of evidence. This is true as a general rule. But the exception proves the rule, and there are many exceptions.

From an evidential point of view, four main approaches can be taken:

(1) Admit all hearsay in evidence, to be considered by the trier of fact for what it is worth;

(2) Exclude all hearsay from evidence;

(3) Have the trial judge evaluate each individual item of hearsay that is offered, and admit it if the judge thinks that it is substantially more trustworthy than hearsay in general, or that its admission is otherwise necessary in order to do justice in the particular case at hand; and

(4) Classify hearsay into categories that, on the whole, have substantially greater trustworthiness than hearsay in general, and admit an item of hearsay only if it fits within one of these categories.

Approaches (1) and (2) are easy to administer, but both are rejected as too inflexible, and likely to lead to many unjust results. Approach (3) has initial attractiveness, but its implementation would require the exercise of too much discretion by too many judges with too many personal evidential points of view, thus making the admissibility of a particular item of hearsay at trial too hard to predict.

All American jurisdictions have opted for approach (4), i.e., they classify hearsay that they consider exceptionally trustworthy into numerous categories and call them exceptions to the hearsay rule. The number of exceptions that there are depends upon the fineness with which they are classified.

The Federal Rules of Evidence list 24 exceptions to the hearsay rule in which the availability of the declarant is immaterial, five exceptions in which the declarant must be unavailable, and four exceptions to the definition of hearsay (which are, in reality, exceptions to the hearsay rule), for a total of 33.

The Pennsylvania Rules of Evidence, while following the federal numbering system as far as possible, recognize fewer exceptions, and arrange them more logically. Article VIII of the Pennsylvania Rules of Evidence lists 16 exceptions to the hearsay rule in which the availability of the declarant is immaterial, four exceptions in which the declarant must be unavailable, and three exceptions in which the testimony of the declarant is necessary, for a total of 23.

Thus, the hearsay rule, considered together with its many exceptions, is class oriented. An offered item of hearsay is excepted to the hearsay rule if it fits within one of the categorized exceptions thereto, regardless of whether the offered item itself appears particularly trustworthy. Individualized trustworthiness is a criterion for exception to the hearsay rule only when hearsay is offered under the business records exception (Pa.R.E. 803(6)), the residual exception (Pa.R.E. 803(24)), or the exception for a statement against penal interest (Pa.R.E. 804(b)(3)). It is also a criterion under the statutory exceptions for public records (42 Pa.C.S. § 6104(b)), and for certain statements concerning sexual abuse made by children (42 Pa.C.S. § 5985.1 applies in criminal cases; 42 Pa.C.S. § 5986 applies in dependency proceedings).

Defendant's Constitutional Right of Confrontation in Criminal Cases

The hearsay rule is applicable both in civil and criminal cases. In a criminal case, however, hearsay that is offered against a defendant under an exception to the hearsay rule may sometimes be excluded because its admission would violate defendant's right "to be confronted with the witnesses against him" under the Sixth Amendment to the United States Constitution, or Article I, § 9, of the Pennsylvania Constitution.

Constitutional provisions providing a right of confrontation to a defendant in a criminal case are, many say, a reaction to the infamous seventeenth century trial of Sir Walter Raleigh. The redoubtable Raleigh was accused of high treason. The Crown, over Raleigh's objection, was allowed to introduce in evidence an affidavit signed by Lord Cobham, who was then imprisoned in the Tower of London, in which Cobham asserted that both he and Sir Walter were participants in a plot to overthrow Queen Elizabeth and replace her on the throne with Arabella Stewart. Raleigh was convicted. (He wasn't beheaded, though. That occurred many years later, as a punishment for subsequent transgressions.)

The relationship between the hearsay rule and the Confrontation Clause in the Sixth Amendment was explained by the Supreme Court in *California v. Green*, 399 U. S. 149, 155—56, 90 S.Ct. 1930, 26 LEd.2d 489 (1970):

> While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception. . . .
>
> Given the similarity of the values protected . . . the modification of a State's hearsay rules to create new exceptions for the admission of evidence against a defendant, will often raise questions of compatibility with the defendant's constitutional right to confrontation.

More recently, in *Idaho v. Wright*, 497 U. S. 805, 814, 110 SCt 3139, 111 LEd2.d 638 (1990), the Supreme Court said, "The Confrontation Clause . . . bars the admission of some evidence that would otherwise be admissible under an exception to the hearsay rule."

In short, when hearsay is offered against a defendant in a criminal case, the defendant may interpose three separate objections: (1) admission of the evidence would violate the hearsay rule, (2) admission of the evidence

would violate defendant's right to confront the witnesses against him under the Sixth Amendment to the United States Constitution, and (3) admission of the evidence would violate defendant's right to confront the witnesses against him under Article I, § 9, of the Pennsylvania Constitution.

As a rule of judicial economy, the court will usually, but not always, rule upon the hearsay objection first, and decide the constitutional issues only if it has to.

Rule 801. Definitions.

The following definitions apply under this article:

(a) *Statement*. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(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) [See Comment]

Comment

Pa.R.E. 801 is identical to subsections (a), (b) and (c) of F.R.E. 801. It is consistent with prior Pennsylvania law. Subsection (d), which the federal rule entitles "Statements Which Are Not Hearsay," is not adopted. The subjects thereof, admissions and prior statements of witnesses, are really exceptions to the hearsay rule. They are covered in Pa.R.E. 803(25) and Pa.R.E. 803.1, respectively. They are also discussed later in this Comment.

a. Statement

Subsection (a) defines "statement" as an oral or written assertion or nonverbal conduct intended as an assertion. It would have been simpler just to use the word assertion to define hearsay. For the sake of uniformity, Pennsylvania uses the federal formulation, as do most states.

Subsection (a)(2), which includes nonverbal conduct as hearsay, when intended as an assertion, is consistent with prior Pennsylvania law. See *Commonwealth v. Rush*, 529 Pa. 498, 605 A.2d 792 (1992), a prosecution for, inter alia, aggravated assault. The victim testified that the man who attacked her said that his hobby was making picture frames out of cigarette boxes. A detective testified that he went to defendant's home and asked his mother if she had any picture frames made by her son, and that she then went upstairs and got a picture frame made out of cigarette boxes. The Court, reversing a conviction, held that the detective's testimony was hearsay and its admission was reversible error.

b. Declarant

Subsection (b) is also consistent with prior Pennsylvania law. For hearsay purposes, the "declarant" is the person who makes an out-of-court assertion, not the person who repeats it on the witness stand.

c. Definition of Hearsay

Subsection (c), which defines hearsay, is also consistent with prior Pennsylvania decisional law. See *Heddings v. Steele*, 514 Pa. 569, 573, 526 A.2d 349 (1987), in which the Court said, "[h]earsay is an out-of-court statement offered into evidence to prove the truth of the matter asserted." See also, *Commonwealth v. Rosario*, 438 Pa. Super. 241, 652 A.2d 354 (1994).

In short, the definition of hearsay is three-pronged. Hearsay is:

1. an assertion,
2. made out of court, and
3. offered to prove its truth.

For hearsay purposes, an assertion is an intended expression of fact or opinion. It may be (1) oral, (2) written, or (3) behavioral. For example, a witness to a crime may be asked by the police to pick out the culprit from a lineup. The witness may say, "The man on the left did it." Or the witness may fill out a written form designating the man on the left. Or the witness may silently point to the man on the left. In all of these cases the witness has made an assertion. If at trial a police officer relates what the witness said or did at the lineup to identify the culprit, the testimony of the officer is hearsay.

For hearsay purposes, an assertion is considered out-of-court unless "made by the declarant while testifying at the trial or hearing." Pa.R.E. 801(c).

Only some, not all, out-of-court assertions are hearsay. As explained by the United States Supreme Court in *Anderson v. United States*, 417 U. S. 211, 219 (1974):

> Out-of-court statements constitute hearsay only when offered in evidence to prove the truth of the matter asserted.

The upshot is that evidence of most out-of-court utterances is not hearsay, either because the utterance is not an assertion, or because it is not offered to prove its truth.

Out-of-court utterances that are not assertions include greetings, pleasantries, expressions of gratitude, questions, offers, instructions, warnings, demands, exclamations, expressions of emotion, etc.

See, for example, *Commonwealth v. DiSilvio*, 232 Pa. Super. 386, 335 A.2d 785 (1975), a prosecution for, inter alia, bookmaking. The court, affirming a conviction, approved admission of testimony from police officers that, while executing a search warrant at defendant's premises, they answered in excess of fifty telephone calls in which the callers either asked to speak to defendant, or gave instructions to place bets, or both. The callers' utterances were not assertions of fact or opinion, and thus not hearsay. They had probative value, though, as circumstantial evidence from which the trier of fact could reasonably infer that the premises were being used for illegal gambling.

Out-of-court assertions that are not offered to prove their truth include those that have direct legal significance, regardless of their truth. These include assertions that constitute all or part of a contract, deed, will, notice, demand, disclosure, threat, obscenity, defamation, perjury, warranty, representation allegedly relied upon, etc. Indeed, when an out-of-court assertion is offered to prove perjury or defamation, the offerer will attempt to prove that the assertion is false.

Most out-of-court assertions that are not offered to prove their truth are offered as circumstantial evidence from which the existence or non-existence of a fact in issue may be inferred.

For example, an assertion, regardless of its truth, may be offered to prove the state of mind of the declarant. See, *In re Ryman*, 139 Pa. Super. 212, 11 A.2d 677 (1940), a proceeding to have a man declared incompetent and to have a guardian of his property appointed. The court

approved admission of testimony that the man had asserted that his wife was unfaithful, that he was not the father of some of her children, and that they were trying to poison him. The assertions were not admitted to prove their truth. Thus they were not hearsay. They were admitted as circumstantial evidence that the declarant's mind was unbalanced.

See also, *Commonwealth v. Boyle*, 498 Pa. 486, 447 A.2d 250 (1982), in which the Court affirmed the second conviction of Tony Boyle, a former president of the United Mine Workers Union, for the murder of rival candidate "Jock" Yablonski, his wife, and his daughter. The Court approved the Commonwealth's introduction of certain testimony that Boyle gave at his first trial, which the Commonwealth later proved to be false, "as proof of a consciousness of guilt."

Some non-hearsay assertions, particularly those that accompany ambiguous conduct, are referred to as "verbal acts." For example, an assertion that accompanies a transfer of property, regardless of its truth, may indicate whether the transfer is a loan, a repayment of a loan, a gift, or a bailment. If the transferor said, while transferring some money, "You are my favorite nephew. I never forget your birthday," this would be circumstantial evidence that the transfer was a gift. (The assertions are not hearsay because they are not offered to prove that the recipient was declarant's favorite nephew, or that declarant never forgets his birthday.)

An out-of-court utterance may be offered to prove the state of mind of one who heard it. See *Commonwealth v. Principatti*, 260 Pa. 587, 104 A 53, 56—58 (1918), in which the Court, reversing a conviction of first degree murder, held it reversible error to exclude, inter alia, defendant's offer to prove that the decedent, nine days prior to the killing, told defendant that he was a member of the dreaded "Black Hand Gang" sent over to murder defendant. Such assertion, regardless of its truth, was relevant to show that defendant reasonably feared the victim and, if believed by the jury, might have resulted in a verdict of acquittal (justifiable homicide by reason of self-defense), or of voluntary manslaughter, instead of murder.

See also, *Wasserman v. Fifth & Reed Hospital*, 442 Pa. Super. 563, 660 A.2d 600, 607—08 (1995), a suit for personal injuries by a lady who ingested oven cleaner solution (it had been placed in a vinegar container) at the defendant hospital's cafeteria. Plaintiff, who suffered a recurrence of a dormant ulcerative colitis condition following her meal, testified that one of her treating physicians told her that this created an increased risk that she would eventually develop colon cancer. The court, affirming a substantial jury verdict for plaintiff, approved admission of her testimony on the ground that the physician's assertion was not offered for its truth, and thus was not hearsay. It was circumstantial evidence from which the jury could infer that plaintiff suffered significant mental pain and suffering, for which she was entitled to be compensated.

Most nonverbal conduct is not assertive. Hence, most evidence thereof is not hearsay.

d. Federal Rule Not Adopted

Pa.R.E. 801 does not include a counterpart to F.R.E. 801(d), which excepts all admissions by a party-opponent, and some prior statements by witnesses, to the definition of hearsay set forth in subsection (c). This internal inconsistency of F.R.E. 801 adds an unnecessary and confusing complexity to rules that are otherwise logically arranged. Excepting an assertion to the definition of hearsay does nothing more, nor less, than except it to the hearsay rule. Exceptions to the hearsay rule belong in Rules 803 and 804, not in Rule 801.

An admission by a party-opponent, which is considered an exception to the hearsay rule at common law, and in Pennsylvania decisional law, is covered by Pa.R.E. 803(25), thus placing it in the same rule (803) with other exceptions to the hearsay rule in which the availability of the declarant is immaterial.

Prior statements of a witness were not considered substantive evidence at common law. Thus they were not hearsay. Thus there was no reason to except them to the hearsay rule. However, recent Pennsylvania decisional law has recognized some prior inconsistent statements of a witness, and statements of prior identification, as substantive evidence, and has excepted them to the hearsay rule. These prior statements, along with recorded recollection, are covered by Pa.R.E. 803.1, which delineates exceptions to the hearsay rule in which the current testimony of the declarant is necessary.

Unlike the Federal Rules of Evidence, Pennsylvania adheres to the common law and does not treat any prior consistent statement of a witness as substantive evidence. Therefore, no prior consistent statement comes within the definition of hearsay in Pa.R.E. 801(c). Therefore, there is no need to except any prior consistent statements from the hearsay rule (or from the definition of hearsay).

The admissibility of a prior consistent statement is governed by principles of relevance, not hearsay. See Pa.R.E. 613(b).

Rule 802. Hearsay Rule.

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

Comment

Pa.R.E. 802 is similar to its federal counterpart. It differs by referring to other rules prescribed by the Pennsylvania Supreme Court, rather than the United States Supreme Court, and by referring to statutes in general, rather than Acts of Congress.

The words "not admissible" do not mean that hearsay will automatically be excluded from evidence. An opposing party must make a timely objection. As the Pennsylvania Supreme Court explained in *Jones v. Spidle*, 446 Pa. 103, 106, 286 A.2d 366, 367 (1971):

> It is well established that hearsay evidence, admitted without objection, is accorded the same weight as evidence legally admissible as long as it is relevant and material to the issues in question.

Generally, hearsay is excludable, if timely objected to, unless it comes within one of the exceptions to the hearsay rule enumerated in Pa.R.E. 803, 803.1, and 804.

Caveat: Just because hearsay comes within one of the exceptions enumerated in these rules, does not mean that it is admissible in evidence. All it means is that it cannot be excluded by a hearsay objection. It may be excluded because it is irrelevant, or inflammatory, or privileged, or for a host of other reasons.

On occasion, hearsay may be admitted pursuant to another rule promulgated by the Pennsylvania Supreme Court. For example, in civil cases all or part of a deposition may be admitted pursuant to Pa.R.C.P. No. 4020, or a videotape deposition of an expert witness pursuant to Pa.R.C.P. No. 4017.1(g).

Also, hearsay may be admitted pursuant to a state statute. Examples include:

1. A public record may be admitted pursuant to 42 Pa.C.S. § 6104. See Comment located at Pa.R.E. 803(8).

2. A record of vital statistics may be admitted pursuant to 35 Pa.C.S. § 450.810. See Comment located at Pa.R.E. 803(9).

3. In an action arising out of a contract under the Uniform Commercial Code, a document in due form purporting to be a bill of lading, policy or certificate of insurance, official weigher's or inspector's certificate, consular invoice, or any other document authorized or required by the contract to be issued by a third party, may be introduced as prima facie evidence of the document's own authenticity and of the facts stated therein by the third party, pursuant to 13 Pa.C.S. § 1202.

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

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

6. In a criminal case, an out-of-court assertion of a witness under 13 years of age, describing certain kinds of sexual abuse, may be admitted, pursuant to 42 Pa.C.S. § 5985.1.

7. In a dependency hearing, an out-of-court assertion of a witness under 14 years of age, describing certain types of sexual abuse, may be admitted, pursuant to 42 Pa.C.S. § 5986.

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

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

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial.

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

(1) Present Sense Impression.

(2) Excited Utterance.

(3) Statement of Then Existing Mental, Emotional, or Physical Condition.

(4) Statement Made for Purposes of Medical Diagnosis or Treatment.

(5) [Vacant. See Comment.]

(6) Record of Regularly Conducted Activity.

(7) [Vacant. See Comment.]

(8) [Vacant. See Comment.]

(9) [Vacant. See Comment.]

(10) [Vacant. See Comment.]

(11) Record of Religious Organization.

(12) Marriage, Baptismal, or Similar Certificate.

(13) Family Record.

(14) Record of Document Affecting an Interest in Property.

(15) Statement in Document Affecting an Interest in Property.

(16) Statement in Ancient Document.

(17) Market Report, Commercial Publication.

(18) [Vacant. See Comment.]

(19) Reputation Concerning Personal or Family History.

(20) Reputation Concerning Boundaries or General History.

(21) Reputation as to Character.

(22) [Vacant. See Comment.]

(23) [Vacant. See Comment.]

(24) [Vacant. See Comment.]

(25) Admission by Party-Opponent.

(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.

Comment

Pa.R.E. 803(1) is identical to F.R.E. 803(1). It is consistent with prior Pennsylvania law.

For this exception to apply, declarant need not be excited or otherwise emotionally affected by the event or condition perceived. The trustworthiness of the assertion arises from its timing. The requirement of contemporaneousness, or near contemporaneousness, reduces the chance of premeditated prevarication or loss of memory.

For example, the assertions of a sportscaster describing and explaining what he observes on a baseball field as a game is taking place are quintessential present sense impressions. However, the sportscaster's between-innings or post-game analysis does not qualify for this hearsay exception.

If a present sense impression is made under stress of excitement from the event or condition that it describes or explains, then it overlaps the exception for an excited utterance. See Pa.R.E. 803(2). This is often the case. For example, if a sportscaster is excited by the sporting event that he is watching, his play-by-play description qualifies both as a present sense impression and as an excited utterance. If he is bored by it, his description qualifies only as a present sense impression.

The most common use of this exception in the federal courts has been to permit a witness to relate assertions that someone made immediately after participating in a telephone conversation, repeating or summarizing what was said on the phone. See *United States v. Portsmouth Paving Corp.*, 694 F2d 312, 321—23 (4th Cir. 1982); *United States v. Peacock*, 654 F2d 339, 350 (5th Cir 1981); *United States v. Earley*, 657 F2d 195, 197—98 (8th Cir 1981); *Phoenix Mutual Life Insurance Co. v. Adams*, 828 F.Supp. 379, (D.S.C. 1993), aff'd, 30 F.3d 554 (4th Cir. 1994).

In Pennsylvania an exception to the hearsay rule for a present sense impression was first recognized in Chief Justice Jones' plurality opinion in *Commonwealth v. Coleman*, 458 Pa. 112, 326 A.2d 387 (1974).

Subsequently, in a majority opinion, the Court said that an exception to the hearsay rule for a present sense impression is recognized in Pennsylvania under the "res gestae" rubric. *Commonwealth v. Pronkoskie*, 477 Pa. 132, 383 A.2d 858, 860 (1978).

Later, in *Commonwealth v. Peterkin*, 511 Pa. 299, 312, 513 A.2d 373 (1986), the Court, affirming a conviction of murder, approved, under the present sense exception to the hearsay rule, admission of testimony from a witness for the prosecution that, shortly before the crime, one victim made assertions to him over the telephone that defendant was locking a door and getting into the car of a second victim.

Accord: *Commonwealth v. Harris*, 422 Pa. Super. 6, 658 A.2d 392 (1995), a murder case. The court, affirming a conviction, approved admission of testimony from a witness for the prosecution that the victim, during a telephone conversation about one and one-half hours before she was found dead, said her door bell was ringing, left the phone briefly, then came back and whispered that it was defendant at her door.

(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.

Comment

Pa.R.E. 803(2) is identical to F.R.E. 803(2). It is consistent with prior Pennsylvania law.

This exception has a more narrow base than the exception for a present sense impression, because it requires an event or condition that is startling. However, it is broader in scope because an excited utterance (1) need not describe or explain the startling event or condition; it need only relate to it, and (2) need not be made contemporaneously therewith, or immediately thereafter. It is sufficient if the stress of excitement created by the startling event or condition persists as a substantial factor in provoking the utterance.

The prerequisite to an excited utterance is a startling event or condition. The startling event or condition is usually something dramatic, like an accident or a crime. But it need not be, so long as it has an exciting effect on the declarant.

A surprising discovery can precipitate an excited utterance. A classic example occurred when the renowned Greek mathematician, Archimedes, finally ascertained how he could calculate the volume of an irregular solid. One day he observed the amount of water that spilled over the side of his full bathtub when he stepped into it. He became excited and reportedly ran naked through the streets of Syracuse, shouting, "Eureka! Eureka!" (I found it!)

A more recent example appears in *State v. Carlson*, 311 Or. 201, 808 P.2d 1002 (1991), a drug case. A policeman testified that, when responding to a report of a domestic dispute at an apartment house, he asked defendant about what appeared to be needle marks on his arm. Defendant said that the marks were injuries that he had received from working on a car. His wife, who overheard this, broke in by yelling, "You liar, you got them from shooting up in the bedroom with all your stupid friends!" The court, affirming a conviction, approved admission of the policeman's testimony under Oregon Evid. Code § 803(2), which is identical to Pa.R.E. 803(2). The court said that while defendant's lie to the policeman would not ordinarily cause excitement, in the particular circumstances involved its actual effect on his wife was upsetting (exciting). The court explained:

> Whether an event or condition is sufficiently startling cannot be determined from the nature of the event or condition itself. For the purposes of the excited utterance exception, an event or condition is not inherently startling. The startling-nature component is a relational concept, i.e., whether an event is sufficiently startling to qualify cannot be determined without focusing on the event's effect on the declarant. 311 Or. at 216, 808 P.2d at 1011.

There is no set time interval following a startling event or condition after which an utterance relating thereto will be ineligible for exception to the hearsay rule as an excited utterance. Each case is governed by its individual circumstances. The general rule is that an utterance following a startling event or condition must be made soon enough thereafter that it can reasonably be considered a product of the stress of excitement engendered thereby, rather than of intervening reflection or deliberation.

In *Commonwealth v. Gore*, 262 Pa. Super. 540, 547—48, 396 A.2d 1302, 1305 (1978), the court explained:

> The declaration need not be strictly contemporaneous with the existing cause, nor is there a definite and fixed time limit. . . . Rather, each case must be judged on its own facts, and a lapse of time of several hours has not negated the characterization of a statement as an "excited utterance." . . . The crucial question, regardless of the time lapse, is whether, at the time the statement is made, the nervous excitement continues to dominate while the reflective processes remain in abeyance.

In the federal courts the existence of a startling event or condition may be inferred from the excited utterance alone, or in combination with surrounding circumstances. See *Insurance Co. v. Mosley*, 75 U. S. 397, (1869); *United States v. Moore*, 791 F.2d 566 (7th Cir 1986).

However, Pennsylvania decisional law has required the startling event or condition to be proved by extrinsic evidence. See Commonwealth v. Barnes, 310 Pa. Super. 480, 456 A.2d 1037 (1983), a prosecution for, inter alia, robbing Lemuel Rock, a man who died prior to trial. A policeman testified that, in response to a call on his radio, he went to Rock's apartment where Rock, in an excited state, told him that defendant had entered Rock's apartment, assaulted Rock, and stolen $300. The court, reversing a conviction, held it reversible error to admit the policeman's testimony. The court explained:

> [T]he only evidence that a startling event had in fact occurred was contained in the statement sought to be admitted as a spontaneous reaction thereto. The extra-judicial statement was the only evidence in the case that Rock had been beaten or that any crime had been committed. There was no independent evidence that a forced entry of Rock's apartment had been made . . . no independent evidence that he had $300 in his possession prior to the alleged robbery, and no independent evidence that money in any amount had been stolen . . . .
>
> We are thus presented with the troublesome situation in which the excited utterance itself is being used to prove that an exciting event did, in fact, occur. This circuitous reasoning is unacceptable. Where there is no independent evidence that a startling event has occurred, an alleged excited utter-

ance cannot be admitted as an exception to the hearsay rule. 315 Pa. Super. at 485; 456 A.2d at 1039 40.

With the adoption of Pa.R.E. 104(a), it appears that the court may now take the proffered excited utterance itself into consideration, along with extrinsic evidence, in determining whether a sufficient foundation exists to permit admission of the excited utterance as an exception to the hearsay rule. See Pa.R.E. 104(a), and Comment thereunder.

Pennsylvania decisional law has also espoused the minority position that an excited utterance may not be in narrative form, or attempt to explain past events. See *Cody v. SKF Industries, Inc.*, 447 Pa. 558, 291 A.2d 772 (1972), a worker's compensation case. The court, holding that an assertion made by a man to his wife, after returning home, that he had injured his head in an accident at work, was not admissible as an excited utterance, said:

> The basis for the admission of the utterance is its spontaneity, thus all utterances which do not display the mandated instinctive naturalness must be excluded for fear that the words will emanate in whole or in part from the declarant's reflective faculties. The declaration must be spoken under conditions which insure that it is not the result of premeditation, consideration or design, and it cannot be in the form of a narration or attempted explanation of past events. Id. at 564, 291 A.2d at 775.

Pennsylvania decisional law also holds that declarant's personal knowledge of the facts that he asserts cannot be inferred from his excited utterance alone. There must be other corroborating evidence introduced sufficient to enable the trier of fact reasonably to conclude that he actually perceived the event of which he spoke. See *Carney v. Pennsylvania Railroad Co.*, 428 Pa. 489, 240 A.2d 71 (1968). On analysis, this is simply an application of the separate evidential rule that a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. See Pa.R.E. 602.

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

Comment

Pa.R.E. 803(3) is similar to F.R.E. 803(3). The wording has been changed to improve readability, and to eliminate a confusing double negative. The meaning remains the same.

This exception combines what might otherwise be considered several different exceptions to the hearsay rule. The common factor is that they are all sometimes referred to by the non specific phrase, "state of mind." (Some out-of-court assertions that are not hearsay, because they are not offered to prove their truth, are also referred to as "state of mind.")

Assertion of Then Existing Intent

This exception includes an assertion of the declarant's then existing intent, plan or design. The leading case is *Mutual Life Insurance Co. v. Hillmon*, 145 U. S. 285 (1892), a suit for the proceeds of insurance on the life of John Hillmon. The defense was that the body found in a miner's camp was that of a man named Walters, not that of Hillmon. Defendant sought, unsuccessfully, to introduce evidence of letters written by Walters to his sister and fiancee approximately two weeks before the body was found, in which Walters declared his immediate intention to accompany Hillmon on a westward journey. The United States Supreme Court held it reversible error to exclude this evidence, explaining:

> A man's state of mind or feeling can only be manifested to others by countenance, attitude or gesture, or by sounds or words, spoken or written. The nature of the fact to be proved is the same, and evidence of its proper tokens is equally competent to prove it, whether expressed by aspect or conduct, by voice or pen. When the intention to be proved is important only as qualifying an act, its connection with that act must be shown, in order to warrant the admission of declarations of the intention. But whenever the intention is of itself a distinct and material fact in a chain of circumstances, it may be proved by contemporaneous oral or written declarations of the party.
>
> The existence of a particular intention in a certain person at a certain time being a material fact to be proved, evidence that he expressed that intention at that time is as direct evidence of the fact, as his own testimony that he then had that intention would be. After his death there can hardly be any other way of proving it; and while he is still alive, his own memory of his state of mind at a former time is no more likely to be clear and true than a bystander's recollection of what he then said, and is less trustworthy than letters written by him at the very time and under circumstances precluding a suspicion of misrepresentation. Id. at 295.

Only an assertion of present intent is encompassed by this exception to the hearsay rule. An out-of-court assertion of past intent remembered is excludable hearsay. See *Shepard v. United States*, 290 U. S. 96, 104—06 (1933), in which the United States Supreme Court explained:

> There are times when a state of mind, if relevant, may be proved by contemporaneous declarations of . . . intent. . . . Declarations of intention, casting light upon the future, have been sharply distinguished from declarations of memory, pointing backwards to the past. There would be an end, or nearly that, to the rule against hearsay if the distinction were ignored.

Pennsylvania has long recognized an exception to the hearsay rule for an assertion of present intent. See *Commonwealth v. Marshall*, 287 Pa. 512, 135 A. 301 (1926), a murder case. The Court, affirming a conviction, approved admission of testimony that on the morning of the day she was killed the victim told a fellow passenger on a train that she was going to meet defendant that evening. The Court explained:

> Intention, viewed as a state of mind, is a fact, and the commonest way for such a fact to evince itself is through spoken or written declarations. It is therefore because of the impossibility, in many cases, of proving intention apart from personal declarations, that they are admitted. The true basis of their admission, then, is necessity, because of which an exception to the hearsay rule is recognized, rather than that they are part of the res gestae. Id. at 522; 135 A. at 304.

See also, *Commonwealth v. Henderson*, 324 Pa. Super. 538, 472 A.2d 211 (1984).

See also, *Smith v. Smith*, 364 Pa. 1, 70 A.2d 630 (1950), in which the court held admissible evidence of defendant's out-of-court assertion that he intended to stay in Florida. This was relevant on the issue of his domicile at the time that he filed for divorce from the plaintiff. There has been a lot of academic debate over whether, under the rationale of the *Hillmon* case, evidence of an out-of-court assertion of intent by A can be introduced as circumstantial evidence of subsequent conduct by B. Whatever the correct answer, this issue is one of relevance, not hearsay. So far as the hearsay rule is concerned, if a person's intent at a particular point in time is relevant to an issue in the case, evidence of the person's then existing expression thereof is excepted to the hearsay rule.

Assertion of Then Existing Motive

This exception includes an assertion of the declarant's then existing motive. A leading case is *Lawlor v. Loewe*, 235 U. S. 522 (1915), a civil antitrust suit brought by hat manufacturers against labor union organizers, under the Sherman Act. The United States Supreme Court, affirming judgments for plaintiffs, approved admission of testimony from plaintiffs' salesmen that potential customers told them that they would not buy plaintiffs' hats because of the boycott sponsored by defendants. The court, per Justice Oliver Wendell Holmes, said, "The reasons given by customers for ceasing to deal with sellers of the Loewe hats, including letters from dealers to Loewe & Co., were admissible." Id. at 536.

However, evidence of an out-of-court assertion of the facts behind the declarant's motive is excludable hearsay. See *Buckeye Powder Co. v. E.I. DuPont de Nemours Powder Co.*, 248 U. S. 55 (1918).

Pennsylvania has long recognized evidence of a declarant's out-of-court assertion of his then existing motive as an exception to the hearsay rule. See *Ickes v. Ickes*, 237 Pa. 582, 591, 85 A. 885, 887—88 (1912), in which the Court said:

> When the court determines in any case that a man's state of mind, or the reason why he did a certain act, is a relevant principal fact to be ascertained, that is the particular thing under immediate investigation, and what he may have said concerning it is usually the best and only evidence that can be obtained on the subject; but the proofs must always be restricted to declarations indicating the state of mind at the time of their utterance.

When evidence of this character is produced sufficient to show a then present intention, or state of mind, it may be assumed to have continued and formed the motive which controlled the doing of a subsequent act following closely thereafter, if, under all the surrounding circumstances, one would naturally associate the two together; and it is for the jury to draw the conclusion.

See also, *Adoption of Harvey*, 375 Pa. 1, 99 A.2d 276 (1953).

Assertion of Then Existing Physical or Emotional Feeling

This exception includes an assertion of the declarant's then existing physical or emotional feeling. A leading case is *Shepard v. United States*, 290 U. S. 96, 104—05 (1933), in which the Supreme Court explained:

> There are times when a state of mind, if relevant, may be proved by contemporaneous declarations of feeling. . . . Thus, in proceedings for the probate of a will, where the issue is undue influence, the declarations of a testator are competent to prove his feelings for his relatives, but are incompetent as evidence of his conduct or of theirs. . . . In suits for alienation of affections, letters passing between the spouses are admissible in aid of a like purpose. . . . In damage suits for personal injuries, declarations by the patient to bystanders or physicians are evidence of suffering or symptoms . . . but are not received to prove the acts, the external circumstances through which the injuries came about.

Under Pennsylvania decisional law evidence of a declarant's out-of-court assertion of his then existing physical or emotional feeling is excepted to the hearsay rule under the rubric of the non specific phrase, "res gestae." In *Commonwealth v. Pronkoskie*, 477 Pa. 132, 383 A.2d 858 (1978), the Court said that the res gestae exception to the hearsay rule includes "(1) declarations as to present bodily conditions; (2) declarations of present mental states and emotions. . . ."

See also, *Commonwealth v. Blackwell*, 343 Pa. Super. 201, 494 A.2d 426 (1985), in which a declarant's out-of-court assertion to a nurse, "I'm so frightened," was held admissible to prove his fright at the time.

Pennsylvania decisional law also includes this exception to the hearsay rule under the rubric of the non specific phrase, "state of mind." See *Adoption of Harvey*, 375 Pa. 1, 99 A.2d 276 (1953).

Assertion of Memory or Belief Concerning Declarant's Will

This exception includes a declarant's assertion of memory or belief concerning declarant's will. The exception has long been recognized in Pennsylvania, at least when the declarant is dead. See *Lappe v. Gfeller*, 211 Pa. 462, 60 A 1049 (1905); *Glockner v. Glockner*, 263 Pa. 393, 106 A 731 (1919).

In a more modern case, *In Re Kirkander*, 326 Pa. Super. 380, 474 A.2d 290 (1984), two daughters challenged the probate of their father's will. The court, holding it reversible error to preclude the daughters from introducing testimony as to assertions made by their father shortly before his death, about what was in his will, said:

> A decedent's utterance regarding his planned disposition of his estate, said after the questioned will was supposedly executed, has been admitted in a will contest; since, if a will is to be admitted to probate, a decedent must have been aware of its contents. . . . Therefore, contestants should have been allowed to introduce testimony concerning statements allegedly made by the decedent regarding his testamentary scheme. Id. at 386, 474 A.2d at 293.

Pa.R.E. 803(3) makes it clear that the exception applies whether or not the declarant is dead. Disputes concerning wills, though, usually don't arise until the testator (declarant) dies.

(4) *Statement Made for Purposes of Medical Diagnosis or Treatment.* A statement made for purposes of medical treatment, or medical diagnosis in contemplation of treatment, and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof, insofar as reasonably pertinent to treatment, or diagnosis in contemplation of treatment.

Comment

Pa.R.E. 803(4) is similar to F.R.E. 803(4), with one major difference. The federal rule excepts to the hearsay rule assertions made for purposes of medical diagnosis, whether or not treatment is contemplated. This means that in the federal courts doctors or other medical personnel who are hired to examine a party for litigation purposes only can testify to what the party told them, and this testimony will be admitted as substantive evidence, excepted to the hearsay rule. Pa.R.E. 803(4), on the other hand, includes assertions made for purposes of medical diagnosis only when treatment is contemplated.

The rationale for this exception to the hearsay rule was well set forth by Judge Learned Hand in *Meaney v. United States*, 112 F2d 538, 539—40 (2d Cir 1940):

> A man goes to his physician expecting to recount all that he feels, and often he has with some care searched his consciousness to be sure that he will leave out nothing. If his narrative of present symptoms is to be received as evidence of the facts, as distinguished from mere support for the physician's opinion, these parts of it can only rest upon his motive to disclose the truth because his treatment will in part depend upon what he says. . . .
>
> The same reasoning applies with exactly the same force to a narrative of past symptoms. . . . A patient has an equal motive to speak the truth; what he has felt in the past is as apt to be important in his treatment as what he feels at the moment.

The assertion need not be made by the patient. It may be made by someone else on the patient's behalf, such as a mother concerning her child, or a policeman concerning an unconscious victim of an accident or crime.

The assertion need not be made to a doctor. It may be made to a nurse, ambulance attendant, physical therapist, admitting clerk at a hospital, etc., for relay to a physician or other health care practitioner. It is the purpose of the assertion, i.e., to aid in medical treatment, or diagnosis leading to treatment, not the identity of its immediate recipient, that qualifies it for exception to the hearsay rule.

An assertion made for purposes of medical treatment, or diagnosis in contemplation of treatment, has long been excepted to the hearsay rule in Pennsylvania, at least when it relates to the patient's symptoms. See *Freedman v. Mutual Life Insurance Co. of New York*, 342 Pa. 404, 21 A.2d 81 (1941).

Pennsylvania decisional law has been ambiguous as to whether assertions concerning the cause of a patient's injuries are included in the exception. In *Ferne v. Chadderton*, 375 Pa. 302, 305—06, 100 A.2d 854, 856 (1953), the Court said:

> It has long been the law in this commonwealth that a doctor may testify to the symptoms and history of anatomical violence related by a patient, which enable the doctor properly to treat and prescribe for the patient.

However, in *Cody v. SKF Industries, Inc*, 447 Pa. 558, 291 A.2d 772 (1972), a worker's compensation case, the Court said that the law theretofore in Pennsylvania had been that an assertion of symptoms that was made for purposes of medical treatment was excepted to the hearsay rule, but an assertion as to the cause of an injury was not, unless it was part of the "res gestae." The Court then expanded the exception and approved admission, as substantive evidence, of testimony from the worker's treating physician that the worker, since deceased, said that he had been struck over the head by a garage door at work three days previously. The court said, in footnote 4, "We leave for another time and appropriate case the question of whether this rule would apply outside the workmen's compensation area." Id. at 569, 291 A.2d at 77.

Thereafter, in *Commonwealth v. Blackwell*, 343 Pa. Super. 426, 494 A.2d 201 (1985), a murder case, the Superior Court, citing the *Cody* case, held admissible evidence that the victim, who suffered from heart disease, told a nurse at the hospital to which he was taken by police that he was having trouble breathing, that he was frightened, and that he had just been abducted at gunpoint and robbed.

In *Commonwealth v. Sanford*, 397 Pa. Super. 581, 594 98, 580 A.2d 784 (1990), a prosecution for various crimes arising out of the sexual assault of a three year old girl, the victim was taken to the hospital with an inflamed vagina. The Superior Court, again citing the *Cody* case, approved admission of testimony from the girl's treating physician at the hospital relating her description to him of the assault.

And, in *Commonwealth v. Smith*, _____ Pa. _____ , 681 A.2d 1288 (1996), the Supreme Court confirmed that its holding in the *Cody* case, i.e., that an assertion as to the cause of an injury or illness is encompassed by this exception to the hearsay rule, is not limited to worker's compensation cases.

Pa.R.E. 803(4) is consistent with the Supreme Court's opinion in the *Smith* case, and makes clear that Pennsylvania now excepts all assertions made for purposes of medical treatment, or diagnosis in contemplation of treatment, to the hearsay rule. This includes not only symptoms, past and present, but also the cause thereof.

Caveat: Any assertion as to the cause of a patient's injuries must be reasonably pertinent to diagnosis or treatment, to qualify for this exception to the hearsay rule. In *Commonwealth v. Smith*, _____Pa. _____, 681 A.2d 1288, 1292 (1996), the Court explained:

> By way of example, a person's statement, "I was hit by a car," made for the purpose of receiving medical treatment would come within the exception. It is important for doctors to know how the person sustained the injuries. However, a person's statement, "I was hit by the car which went through the red light," would not come within the exception, or at least that part of the statement which indicated that the car "went through the red light" would not. It is inconsequential and irrelevant to medical treatment to know that the car went through the red light.

See also, *Hreha v. Benscoter*, 381 Pa. Super. 556, 554 A.2d 525 (1989).

Usually the identity of a person who inflicts harm on a patient is not reasonably pertinent to diagnosis or treatment of the patient's injuries. In *Commonwealth v. Smith*, _____Pa. _____, 681 A.2d 1288 (1996), a prosecution for aggravated assault, the Court held it reversible error to permit a nurse to testify that a five year old girl told the nurse that her father (the defendant) placed her under scalding hot water.

No doubt one who is contemplating medical treatment for illness or injuries has strong incentive to tell the truth to his or her health care providers, and to be accurate in doing so, to insure that the medical treatment will be effective. Therefore, assertions that he or she makes for this purpose are especially trustworthy, substantially

more so than hearsay in general. This is what justifies their exception to the hearsay rule.

This rationale is not valid when a physician, or other health care provider, is consulted for a purpose unrelated to medical treatment, such as an examination solely to prepare the examiner to testify as a witness for one side or the other. That is why Pennsylvania, like several other states, departs from the federal rule, and does not include within this exception to the hearsay rule assertions made to health care providers unconnected with treatment.

Note: A physician, who is presented as an expert medical witness, may testify to a patient's assertions concerning the patient's symptoms, and the inception and cause thereof, as part of the history upon which the physician, in part, bases his or her opinion. See Pa.R.E. 703, 705. When offered only to help explain the foundation for an expert witness's opinion, the assertions are not substantive evidence, i.e., are not hearsay. Thus, evidence of assertions made by a patient to an examining physician will often come to the attention of the jury, regardless of its exception to the hearsay rule.

(5) *[See Comment]*

Comment

Recorded recollection, the subject of F.R.E. 803(5), is dealt with in Pa.R.E. 803.1(3). It is an exception to the hearsay rule in which the current testimony of the declarant is necessary.

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

Comment

Pa.R.E. 803(6) is similar to F.R.E. 803(6), but with two differences, one major and one minor. The major difference is that Pa.R.E. 803(6), consistent with prior Pennsylvania decisional law, does not include opinions and diagnoses in the exception. The minor difference is that Pa.R.E. 803(6) allows the court to exclude business records that would otherwise qualify for exception to the hearsay rule if the "sources of information or other circumstances indicate lack of trustworthiness." The federal rule allows the court to do so only if "the source of information or the method or circumstances of preparation indicate lack of trustworthiness."

The biggest regularly conducted business activity is that of government, federal, state and local. Governmental records are included within this exception to the hearsay rule. That is one reason that Pennsylvania has not adopted Federal Rule of Evidence 803(8), dealing with public records. See Comment under Pa.R.E. 803(8).

For example, police reports are business records. See *Commonwealth v. Graver*, 461 Pa. 131, 334 A.2d 667 (1975), a suit to enjoin the operation of a taproom as a nuisance. The court approved admission of police department records listing the dates, times, and names of policemen dispatched to the area of the taproom, their observations, and the actions that they took.

Pa.R.E. 803(6) differs only slightly from 42 Pa.C.S. § 6108, which is an adaptation of the Uniform Business Records as Evidence Act, a prototype statute that was originally promulgated by the National Conference of Commissioners on Uniform State Laws in 1936, but was later withdrawn by it. 42 Pa.C.S. § 6108 provides:

> (a) *Short title of section.* This section shall be known and may be cited as the "Uniform Business Records as Evidence Act."
>
> (b) *General Rule.* A record of an act, condition or event shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business at or near the time of the act, condition or event, and if, in the opinion of the tribunal, the sources of information, method and time of preparation were such as to justify its admission.
>
> (c) *Definition.* As used in this section "business" includes every kind of business, profession, occupation, calling, or operation of institutions whether carried on for profit or not.

Pa.R.E. 803(6) is worded a little broader than the statute. By expressly referring to a "data compilation," and including a record "in any form," it clearly encompasses computerized data storage, a form of record retention that is assuming increased importance in this cybernetic age.

Both Pa.R.E. 803(6) and the statute define "business" broadly, but Pa.R.E. 803(6) expressly includes an association, and the statute does not.

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

Other than that, there appears to be little difference between Pa.R.E. 803(6) and the statute. Therefore, decisional law under the statute should, by and large, continue to be good precedent.

Pennsylvania decisional law holds that opinions contained in business records are not excepted to the hearsay rule. See *Commonwealth v. DiGiacomo*, 463 Pa. 449, 345 A.2d 605 (1975); *Williams v. McClain*, 513 Pa. 300, 520 A.2d 1374 (1987).

However, the line between opinion and fact is not sharply defined. See, e.g., *Commonwealth v. Campbell*, 244 Pa. Super. 505, 509—10, 368 A.2d 1299 (1976), a rape case. The Commonwealth introduced an entry in a hospital record asserting that spermatozoa was present in the victim's vagina. The Superior Court held, 5 to 2, affirming a conviction, that this entry was one of fact, not opinion.

Business records are considered by the part, not the whole, for purposes of this exception to the hearsay rule. One entry may be excepted to the hearsay rule, and another may not, though both are contained in the same document or other form of data compilation.

See *Haas v. Kasnot*, 371 Pa. 580, 92 A.2d 171 (1952), a suit for personal injuries arising out of an automobile accident. A police report was introduced by defendant,

pursuant to the Uniform Business Records as Evidence Act (now 42 Pa.C.S. § 6108). The Court, reversing a jury verdict for defendant, said that certain entries in the report were admissible, such as the investigating police officer's observations as to the weather and the location of the cars after the accident. But it was error to admit entries describing how the accident happened that were based on information obtained from unidentified witnesses. In the language of the Uniform Business Records As Evidence Act, the "sources of information" were not such as to justify their admission.

To qualify for this exception to the hearsay rule, a record must have been made "at or near the time" of the act, event, or condition that it reports. However, there is no set length of time after which an entry in a business record will be too stale to qualify for exception to the hearsay rule. As the Court explained in *In Re Estate of Indyk*, 488 Pa. 567, 572, 413 A.2d 371, 373, n.2 (1979), the appropriate test of contemporaneity is whether the time span between the event and its entry "is so great that it suggests a danger of inaccuracy resulting from memory lapse."

See *Henderson v. Zubik*, 390 Pa. 521, 136 A22d 127 (1957), a suit by one former partner against another to recover his share of the net profits of a business that bought and sold steel and scrap iron. Under the accounting system employed by the partnership, no book entries were made at the time that the material was purchased. However, when it was sold entries were made naming the purchaser, the sale price, and the original purchase price, the latter item being dependent on the memory and recollection of the entrant. The court, affirming a jury verdict for plaintiff, held that the trial judge properly exercised his discretion to admit the entries under the business records exception to the hearsay rule, despite the delay in recording the purchase prices.

To be excepted to the hearsay rule, a business record must be authenticated by the testimony of a "custodian or other qualified witness." This often is, but need not be, the person who made the entries in question, or the custodian of the record at the time of trial. It is sufficient if "the authenticating witness can provide sufficient information relating to the preparation and maintenance of the records to justify a presumption of trustworthiness of the business records." Indyk, 488 Pa. at 573, 413 A.2d at 373—74.

Pennsylvania will not except an entry in a business record to the hearsay rule if the subject matter of the entry is extraneous to the purpose of the business. See *Commonwealth v. Harris*, 351 Pa. 325, 41 A.2d 688 (1945), a murder case. The court held that an entry in a hospital record that the victim said that he had been shot by a white man was not pathologically germane to the hospital's business. Therefore, it was not excepted to the hearsay rule.

Pennsylvania may also refuse to except an entry in a business record to the hearsay rule if the source of the information contained in the entry is not known. See *Isaacson v. Mobile Propane Corp*, 315 Pa. Super. 42, 461 A.2d 625 (1983), a suit for personal injuries allegedly caused by an explosion. Defendant offered in evidence an entry in the emergency room record of a hospital that asserted that plaintiff's legs had been run over by a fire truck. The court approved exclusion of this evidence because the source of the recorded information was not known.

The exception to the hearsay rule for an entry in a business record is one of the most important, and most useful, of the hearsay exceptions. By avoiding the necessity of calling as witnesses all those who supply, and all those who record, information that a business regularly collects, records, and keeps, trials are made easier, shorter, and less expensive. And business enterprises are less disrupted by the demands of litigation.

The right of the court to exclude from evidence an entry in a business record that would otherwise qualify for exception to the hearsay rule, because the circumstances indicate that it is not trustworthy, is a valuable safeguard with which few other hearsay exceptions are endowed.

Caveat: If offered against a defendant in a criminal case, an entry in a business record, though excepted to the hearsay rule, may be excluded if its admission would violate defendant's right to confront the witnesses against him, under either the Sixth Amendment to the United States Constitution, or Article I, § 9, of the Pennsylvania Constitution.

See *Commonwealth v. McCloud*, 457 Pa. 310, 322 A.2d 653 (1974), a murder case. The Court, reversing a conviction, held that admission of an autopsy report under the Uniform Business Records as Evidence Act (now 42 Pa.C.S. § 6108), to prove the cause of death, violated defendant's constitutional right of confrontation under Article I, § 9, of the Pennsylvania Constitution.

(7) *[See Comment].*

Comment

Pennsylvania has not adopted F.R.E. 803(7), which reads as follows:

> *Absence of Entry in Records Kept in Accordance With the Provisions of Paragraph (6).* Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

Principles of logic and internal consistency have led Pennsylvania to reject this rule. The absence of an entry in a record is not hearsay, as defined in Pa.R.E. 801(c). Hence, it appears irrational to except it to the hearsay rule.

Pennsylvania law is in accord with the object of Federal Rule of Evidence 803(7), i.e., to allow evidence of the absence of a record of an act, event, or condition to be introduced to prove the nonoccurrence or nonexistence thereof, if the matter was one which would ordinarily be recorded.

On analysis, absence of an entry in a business record is circumstantial evidence, i.e., it tends to prove something by implication, not assertion. Its admissibility is governed by principles of relevance, not hearsay. See Pa.R.E. 401, et seq.

For example, assume that in the ordinary course of its business Harvard University records and preserves the names of all its graduates. Evidence that the University's records do not list the name of Fred Zilch may be offered as circumstantial evidence from which the trier of fact may infer that Zilch did not graduate from Harvard.

See *Klein v. F.W. Woolworth Co.*, 309 Pa. 320, 163 A.532 (1932), a suit for personal injuries caused by a fall in defendant's store. Morse, a witness for plaintiff, testified

that he was defendant's janitor at the time of the accident, and had washed and oiled the floor, but had not powdered it to make it reasonably safe to walk on. Defendant's bookkeeper then testified for defendant that she kept payroll records of all defendant's employees, and that Morse's name did not appear therein. The Court held that this absence of a business entry was proper evidence to be considered by the jury, along with other evidence in the case, on the issue of whether Morse was defendant's employee at the time of the accident.

See also, *Stack v. Wapner*, 244 Pa. Super. 278, 368 A.2d 292 (1976), a medical malpractice case. Plaintiffs alleged that physicians at a hospital failed to monitor the administration of Pitocin (a labor inducing drug) to the wife-plaintiff. The court, affirming judgments for plaintiffs, held that plaintiffs properly overcame testimony from the defendant physicians that they were present in the labor room, by introducing evidence of the absence of entries to that effect on the labor room chart. Plaintiffs had previously introduced evidence of an official hospital policy requiring such entries.

(8) *[See Comment].*

Comment

Pennsylvania has not adopted F.R.E. 803(8), which reads as follows:

> *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 cases, 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.

Pennsylvania has not adopted the federal rule for several reasons:

1. Experience with Federal Rule of Evidence 803(8) in the federal courts has not been exemplary. It has spawned a lot of litigation, particularly over the meaning and scope of terms like "law enforcement personnel," and "factual findings." Conflicts abound in reported federal cases over whether particular investigative findings and conclusions, such as those made by the Equal Employment Opportunities Commission, should be admitted under the rule.

2. Public records are business records. Therefore, entries therein may be excepted to the hearsay rule pursuant to Pa.R.E. 803(6).

3. An exception to the hearsay rule for public records is provided by 42 Pa.C.S. § 6104:

(a) *General rule.*—A copy of a record of governmental action or inaction authenticated as provided in section 6103 (relating to proof of official records) shall be admissible as evidence that the governmental action or inaction disclosed therein was in fact taken or omitted.

(b) *Existence of facts.*—A copy of a record authenticated as provided in section 6103 disclosing the existence or nonexistence of facts which have been recorded pursuant to official duty or would have been so recorded had the facts existed shall be admissible as evidence of the existence or nonexistence of such facts, unless the sources of information or other circumstances indicate lack of trustworthiness.

It is worthy of note that subsection (b) of the statute is limited to "facts." This is consistent with Pa.R.E. 803(6), as well as Pennsylvania decisional law interpreting 42 Pa.C.S. § 6108 (Uniform Business Records As Evidence Act). See Comment to Pa.R.E. 803(6).

Examples of public records that have qualified for exception to the hearsay rule under the statute include a computer printout obtained from the Pennsylvania Bureau of Employment Compensation showing a schedule of payments made to defendant (*Commonwealth v. Visconto*, 301 Pa. Super. 543, 448 A.2d 41 (1982)); a certified copy of a report from the United States Weather Bureau (*Haas v. Kasnot*, 371 Pa. 580, 92 A.2d 171 (1952)); life expectancy tables published by the United States Department of Health, Education and Welfare (*Rosche v. McCoy*, 397 Pa. 615, 156 A.2d 307 (1959)); and a chart on speed and stopping distances contained in the Digest of Vehicle Code of Pennsylvania, compiled and issued by the Pennsylvania Department of Revenue (*Finnin v. Neubert*, 378 Pa. 40, 105 A.2d 77 (1954); *DeMarco and Rose v. Ross*, 392 Pa. 1, 139 A.2d 634 (1958); *Grippo v. Pennsylvania Truck Lines, Inc.*, 402 Pa. 1, 165 A.2d 618 (1960)).

The facts contained in a public record need not have originated with a public employee. The facts may have come from private individuals who were under a duty to report to a public agency. See *Commonwealth v. Visconto*, 301 Pa. Super. 543, 448 A.2d 41 (1982), a prosecution for making false statements to obtain public assistance. The court, affirming a conviction, approved admission of a document listing wages paid by the Pittsburgh Hilton Hotels Corporation (Hilton) to a group of employees, including defendant, that Hilton had filed with the Pennsylvania Department of Welfare pursuant to statute. The document was qualified by certification of an officer in the Department, which had retained custody of the document.

Pennsylvania has no counterpart to Federal Rule of Evidence 803(8)(C), which excepts to the hearsay rule "factual findings resulting from an investigation made pursuant to authority granted by law."

In *Beech Aircraft Corp. v. Rainey*, 488 U. S. 153, (1988), the United States Supreme Court, resolving a conflict among the federal circuits, held that the "factual findings" referred to in the rule include opinions, so long as the opinions are based on factual investigations.

Adoption of this rule would conflict with long standing Pennsylvania decisional law that favors subjecting all those who express opinions, particularly expert witnesses, to contemporaneous cross-examination, under oath, in the presence of the trier of fact.

Investigational findings that are not in the opinion category may qualify for exception to the hearsay rule under Pa.R.E. 803(6). Examples include demographic information that is gathered and recorded statistically by the United States Bureau of the Census in the ordinary course of its business, or information on the incidence and mortality rates of various diseases that is gathered, recorded and published by the United States Center for Disease Control. But a governmental investigator's conclusion as to the probable cause of an airplane crash, which was the subject of the United State Supreme Court's opinion in the Rainey case, would not qualify for exception to the hearsay rule in Pennsylvania.

Note: Investigational findings by reputable persons or organizations, private or governmental, may be relied upon by an expert witness, in part, in forming the witness's opinion, if they are of a type reasonably relied upon by other experts in the witness's particular field of expertise. They may thus be brought to the attention of the trier of fact, though they will not be substantive evidence. See Pa.R.E. 703.

(9) *[See Comment].*

Comment

Pennsylvania has not adopted F.R.E. 803(9), which reads as follows:

Records of Vital Statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

Pennsylvania has not adopted the federal rule because it is not needed, for the following reasons:

1. Records of vital statistics are business records. Therefore, they may be excepted to the hearsay rule pursuant to Pa.R.E. 803(6).

2. *Records of vital statistics are public records.* Therefore, they may be excepted to the hearsay rule by 42 Pa.C.S. § 6104:

(a) *General rule.*—A copy of a record of governmental action or inaction authenticated as provided in section 6103 (relating to proof of official records) shall be admissible as evidence that the governmental action or inaction disclosed therein was in fact taken or omitted.

(b) *Existence of facts.*—A copy of a record authenticated as provided in section 6103 disclosing the existence or nonexistence of facts which have been recorded pursuant to official duty or would have been so recorded had the facts existed shall be admissible as evidence of the existence or nonexistence of such facts, unless the sources of information or other circumstances indicate lack of trustworthiness.

3. The Vital Statistics Law of 1953 (35 P. S. § 450.101 et seq.) provides for registration of births, deaths, fetal deaths, and marriages, with the State Department of Health. The records of the Department, and duly certified copies thereof, are excepted to the hearsay rule by section 810 of the statute (35 P. S. § 450.810):

Any record or duly certified copy of a record or part thereof which is (1) filed with the department in accordance with the provisions of this act and the regulations of the Advisory Health Board and which (2) is not a "delayed" record filed under section seven hundred two of this act or a record "corrected" under section seven hundred three of this act shall constitute prima facie evidence of its contents, except that in any proceeding in which paternity is controverted and which affects the interests of an alleged father or his successors in interest no record or part thereof shall constitute prima facie evidence of paternity unless the alleged father is the husband of the mother of the child.

Most of the litigation arising out of this exception to the hearsay rule involves death certificates. A death certificate is generally admissible to prove the fact of death, the date of death, and the physical cause of death (e.g., heart attack, infection, drowning, trauma). See *Castor v. Ruffing*, 178 Pa. Super. 124, 112 A.2d 412 (1955), in which the court held that a death certificate was properly admitted to prove that the decedent died of heat exhaustion.

However, it has been held that a death certificate is not prima facie evidence to prove the manner of death, i.e., whether it was natural, accidental, suicide, homicide, etc.

See *Pittsburgh National Bank v. Mutual Life Insurance Co. of New York*, 273 Pa. Super. 592, 417 A.2d 1206 (1980), aff'd, 493 Pa. 96, 425 A.2d 383 (1981), a suit for accidental death benefits under three life insurance policies. The court, affirming a jury verdict for defendant, said that the trial judge correctly ruled that a death certificate was not admissible to prove that the death was accidental.

See also, *Heffron v. Prudential Insurance Co.*, 137 Pa. Super. 69, 8 A.2d 491 (1939).

In *Kondrat v. W.C.A.B.*, 145 Pa. Commonwealth Ct. 428, 603 A.2d 689 (1992), the court held that a death certificate is not admissible to prove the physical cause of death if it was signed by a lay coroner. However, the validity of this holding has been called into question by the Supreme Court's more recent opinion in *Miller v. The Brass Rail Tavern, Inc.*, 541 Pa. 474, 664 A.2d 525 (1995), holding that a lay coroner may be qualified to give expert opinion testimony with respect to time of death.

Extraneous matter entered in a record of vital statistics is not excepted to the hearsay rule. See *District of Columbia's Appeal*, 343 Pa. 65, 21 A.2d 883 (1941), an audit of the account of a trust. The court held that a death certificate was admissible to prove the fact and date of death, but not to prove the date of birth. The recital of the date of birth was an extraneous entry.

See also, *Meyers v. Metropolitan Insurance Co*, 36 D. & C.2d 479 (1964), in which the court held that a death certificate could not be introduced to prove the circumstances leading up to the cause of death.

Marriage records of foreign countries are excepted to the hearsay rule in Pennsylvania. See *Estate of Loik*, 493 Pa. 512, 426 A.2d 1134 (1981), a will contest. The court held it reversible error to exclude a Soviet marriage certificate offered as evidence that decedent married a claimant on August 10, 1940.

(10) *[See Comment].*

Comment

Pennsylvania has not adopted F.R.E. 803(10), which reads as follows:

Absence of Public Record or Entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

Pennsylvania has not adopted this rule for the same reasons that it did not adopt F.R.E. 803(7). See Comment under Pa.R.E. 803(7).

Pennsylvania law is in general accord with the object of F.R.E. 803(10), i.e., to allow evidence of the absence of a public record to be introduced to prove the nonoccurrence or nonexistence of a matter of which a record would normally be made and preserved by a public office or agency. Such evidence may consist of (1) testimony that a diligent search failed to disclose the record, or (2) a

certificate that no such record exists prepared in accordance with 42 Pa.C.S. § 6103.

Absence of an entry in a public record is circumstantial evidence, i.e., it tends to prove something by implication, not assertion. Its admissibility is governed by principles of relevance, not hearsay. See Pa.R.E. 401, et seq.

A statute, 42 Pa.C.S. § 6104(b), provides, in pertinent part, for admissibility of evidence of the absence of an entry in a public record to prove the nonexistence of a fact:

> (b) *Existence of facts.*—A copy of a record authenticated as provided in section 6103 disclosing the . . . nonexistence of facts which . . . would have been . . . recorded had the facts existed shall be admissible as evidence of the . . . nonexistence of such facts, unless the sources of information or other circumstances indicate lack of trustworthiness.

For example, evidence that the taxpayer records of the Pennsylvania Department of Revenue for 1994 do not list the name of Fred Zilch may be offered as circumstantial evidence that Zilch did not file a tax return that year.

See *Commonwealth v. Cunningham*, 275 Pa. Super. 46, 418 A.2d 603 (1980), a prosecution for carrying a firearm without a license. The court, affirming a conviction, approved admission of a certificate signed by the commissioner of state police, as well as by the director of its records division, asserting that the records of the state police did not show that defendant had been issued a license to carry a pistol. This evidence was admitted pursuant to former 28 P. S. § 110, the predecessor of 42 Pa.C.S. § 6104.

Pennsylvania also has a complementary statute, 42 Pa.C.S. § 5328, entitled "Proof of Official Records," which provides, in pertinent part:

> (d) *Lack of records.*—A written statement that after diligent search no record or entry of a specified tenor is found to exist in the records designated by the statement, authenticated as provided in this section in the case of a domestic record, or complying with the requirements of this section for a summary in the case of a record in a foreign country, is admissible as evidence that the records contain no such record or entry.

(11) *Record of Religious Organization.* Statements of births, marriages, divorces, deaths, legitmacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

Comment

Pa.R.E. 803(11) is identical to F.R.E. 803(11). It is an expansion of a more limited exception that was statutorily adopted in Pennsylvania.

This is a minor exception to the hearsay rule. These days public records are normally available to prove pedigree, in the absence of knowledgeable live witnesses. Introducing church records is pretty much a last resort.

A limited exception to the hearsay rule for records of a religious organization is provided by 42 Pa.C.S. § 6110:

> (a) *General rule.*—The registry kept by any religious society in their respective meeting book or books of any marriage, birth or burial, within this Commonwealth, shall be held good and authentic, and shall be allowed of upon all occasions whatsoever.
>
> (b) *Foreign burials.*—The registry of burials of any religious society or corporate town, in places out of the United States, shall be prima facie evidence of the death of any person whose burial is therein registered, and of the time of his interment, if the time be stated in the registry, and extracts from such registries, certified by the proper officers, in the mode of authentication usual in the place in which they are made and authenticated as provided in section 5328 (relating to proof of official records), shall be received as copies of such registries, and be evidence accordingly.

This is a time honored statute. Subsection (a) was originally enacted in 1700, and subsection (b) in 1837.

For some unexplained reason, the statute provides for the admission of records of burials that take place either in Pennsylvania or a foreign country, but not burials that take place in one of the other 49 states in this country.

Marriages and births must take place within Pennsylvania to be covered by the statute. See *In Re Garrett's Estate*, 371 Pa. 284, 89 A.2d 531 (1952), in which the court held that private church records from Hungary were not admissible to establish the birth of individuals or their parentage. (Such records would now be excepted to the hearsay rule by Pa.R.E. 803(11)).

The adoption of Pa.R.E. 803(11) conforms Pennsylvania evidential law to that prevailing in the federal courts, and in at least eighty percent of the state courts throughout the country.

(12) *Marriage, Baptismal, or Similar Certificate.* Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

Comment

Pa.R.E. 803(12) is identical to F.R.E. 803(12). It is consistent with prior Pennsylvania law, though cases are sparse.

This is a minor exception to the hearsay rule. It encompasses only an assertion contained in a marriage, baptismal, or similar certificate that the maker performed the ceremony and the date thereof.

Proof that the maker of the certificate was authorized to perform the ceremony is required. If the maker was a public official, the court may take judicial notice thereof under Pa.R.E. 201. However, if the maker was an official of a religious organization, judicial notice is less likely, and evidence thereof may have to be produced.

This exception to the hearsay rule was recognized in *District of Columbia's Appeal*, 343 Pa. 65, 73, 21 A.2d 883, 888 (1941), in which the court said:

> The appellees argue the admissibility of the recitals of birth dates in the baptismal records of Helen Fink and Cora Fink . . . . It is settled in this state that such certificates are admissible to prove the fact and date of baptism . . . but not to prove the birth date . . . .

In *Estate of Loik*, 493 Pa. 512, 426 A.2d 1134 (1981), a will contest, the Court held that a Soviet marriage certificate was admissible to prove that a claimant was married to the decedent.

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

Comment

Pa.R.E. 803(13) is identical to F.R.E. 803(13). It seems to be consistent with prior Pennsylvania law, though there are no recent reported cases.

This is a minor exception to the hearsay rule. These days public records are normally available to prove pedigree, in the absence of knowledgeable live witnesses. Introducing something like an entry in a family bible, or an engraving on an urn or tombstone, is pretty much a last resort.

There is some time honored precedent for this exception to the hearsay rule in Pennsylvania decisional law. In *Douglass's Lessee v. Sanderson*, 2 Dall. 116 (1791), the Court approved admission of a leaf cut out of a family bible on which were written the name and date of birth of a man under whom the plaintiff's lessor claimed title to real estate.

(14) *Record of Document Affecting an Interest in Property.* The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

Comment

Pa.R.E. 803(14) is identical to F.R.E. 803(14). It seems to be consistent with prior Pennsylvania law, though cases are sparse.

This is a minor exception to the hearsay rule. Many documents affecting an interest in property, such as deeds, mortgages, security interests under the Uniform Commercial Code, etc., are recorded, pursuant to statute. A copy or other record of such a document, kept by the public office in which the document is recorded, is excepted to the hearsay rule if offered to prove the content of the original and its proper execution and delivery.

This exception to the hearsay rule has been recognized in Pennsylvania decisional law. In *David v. Titusville & Oil City Railway Co.*, 114 Pa. 308, 6 A. 736 (1886), the Court held that records of deeds that were recorded in accordance with a Pennsylvania statute were admissible to establish the contents of the originals and, inferentially, to establish their due execution and delivery.

(15) *Statement in Document Affecting an Interest in Property.* A statement contained in a document, other than a will, purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

Comment

Pa.R.E. 803(15) is identical to F.R.E. 803(15), except that Pennsylvania does not include a statement made in a will.

Pa.R.E. 803(15) is consistent with 21 P. S. § 451, which provides that an affidavit, swearing to matters delineated in the statute, that may affect the title to real estate in Pennsylvania, filed in the county in which the real estate is located, shall be admissible evidence of the facts stated therein.

Pa.R.E. 803(15) appears inconsistent with dictum in *Brock v. Atlantic Refining Co.*, 273 Pa. 76, 80, 116 A. 552, 553 (1922), that "recitals in deeds are mere hearsay, and inadmissible as against third persons who claim by a paramount title." However, the holding in the Brock case approved admission of such a recital on the ground that there was an exception "in the case of ancient deeds accompanied by possession."

Whatever the significance of the above cited ancient dictum, unaccompanied by a collateral holding, Pa.R.E. 803(15) brings Pennsylvania law close to that which now prevails in the great majority of jurisdictions in this country.

Pennsylvania's variation from the federal rule with respect to wills is consistent with its more recent decisional law. See *In Re Estate of Kostik*, 514 Pa. 591, 526 A.2d 746 (1987), a suit over a widow's right to elect against her late husband's will. He disinherited her, and asserted in his will that she had wilfully and maliciously deserted him. The Court, holding for the widow, said that statements contained in a will "have no evidentiary value as proof of a fact in issue." Id. at 595—96, 526 A.2d at 748 49.

Note: If a document purporting to establish or affect an interest in property is 30 years old, an assertion therein may qualify for exception to the hearsay rule under Pa.R.E. 803(16) (statement in ancient document). If the declarant is dead, or otherwise unavailable, an assertion of pedigree in such a document may qualify for exception to the hearsay rule under Pa.R.E. 804(b)(4) (statement of personal or family history).

(16) *Statement in Ancient Document.* Statements in a document in existence thirty years or more the authenticity of which is established.

Comment

Pa.R.E. 803(16) is similar to F.R.E. 803(16), except that Pennsylvania adheres to the common law view that a document must be at least 30 years old to qualify as an ancient document. The federal rule would reduce the age to 20 years.

This is a venerable exception to the hearsay rule, one long recognized at common law. For some reason, it seems to be seldom utilized in Pennsylvania, if the dearth of reported cases is any indication.

One fairly recent case is *Louden v. Apollo Gas Co.*, 273 Pa. Super. 549, 417 A.2d 1185 (1980), in which the court approved admission, as an ancient document, of an unrecorded memorandum of agreement that granted a natural gas transmission pipe line easement to defendant's predecessor in interest. The court emphasized that it was (1) more than 30 years old, (2) free from suspicious alterations and erasures, and (3) in the custody of the party legally entitled to it.

There appears to be no good reason to reduce the age of an ancient document, for hearsay purposes, to 20 years, and compelling reasons not to do so. The case of *Jarndyce and Jarndyce*, so eloquently chronicled by Charles Dickens in Bleak House, is apocryphal, yet instructive concerning the possibility that a particularly complex item of litigation may, on occasion, grace the courts for a score or more years. See, e.g., *Pennsylvania Human Relations Commission v. School District of Phila.*, 161 Pa. Commonwealth Ct. 658, 638 A.2d 304 (1994). If the age of

an ancient document were reduced to 20 years, it might be possible for the plaintiff in such a case to introduce his own complaint as substantive evidence, excepted to the hearsay rule as an ancient document. And so with other pleadings, exhibits and briefs.

Assertions in old documents are no more trustworthy than assertions in new documents. The rationale for this exception to the hearsay rule is necessity, i.e., the need to prove facts when witnesses are no longer available to testify about them. Life expectancies in this country, and throughout most of the world, have increased over the last century. Therefore, there is greater likelihood today that witnesses will be available to testify to matters that are memorialized in a 30 year old document than when the common law rule was established. Therefore, a lengthening, not a shortening, of the time span for defining an ancient document would seem to be justified.

On the whole, it seems safer, and wiser, to reject the federal formulation and retain the common law definition of an ancient document, one that is at least 30 years old.

(17) *Market Report, Commercial Publication.* Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

Comment

Pa.R.E. 803(17) is identical to F.R.E. 803(17). It is consistent with prior Pennsylvania law.

A publication may be qualified for this exception by the testimony of a knowledgeable witness. Alternatively, its qualification for the exception may be judicially noticed by the trial judge under Pa.R.E. 201.

This exception to the hearsay rule has been recognized in Pennsylvania decisional law. See *Rosche v. McCoy*, 397 Pa. 615, 156 A.2d 307 (1959), holding that standard life expectancy and annuity tables are excepted to the hearsay rule.

More recently, the Pennsylvania Supreme Court, in dictum, said that a trial judge could properly have taken judicial notice of used car values contained in the Redbook published by National Market Reports, Inc., if only there had been evidence presented concerning the condition of the car in question. See *Savoy v. Beneficial Consumer Discount Co.*, 503 Pa. 74, 458 A.2d 465 (1983).

When the price or value of goods that are regularly bought and sold in a commodity market is at issue, the Uniform Commercial Code, which has been adopted by all states save Louisiana, not only excepts relevant market reports and similar publications to the hearsay rule, but expressly makes them admissible in evidence. Section 2 724 of the Code, which has been adopted in Pennsylvania as 13 Pa.C.S. § 2724, provides:

> Whenever the prevailing price or value of any goods regularly bought and sold in any established commodity market is in issue, reports in official publications or trade journals or newspapers or periodicals of general circulation published as the reports of such markets shall be admissible in evidence. The circumstances of the preparation of such a report may be shown to affect its weight but not its admissibility.

(18) *[See Comment].*

Comment

Pennsylvania has not adopted F.R.E. 803(18), which reads as follows:

Learned Treatise. 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. If admitted, the statements may be read into evidence but may not be received as exhibits.

Opinions from the Pennsylvania Supreme Court have never discussed an exception to the hearsay rule for learned treatises. However, in 1988 the Superior Court said that Pennsylvania does not recognize an assertion in a learned treatise as an exception to the hearsay rule. *Majdic v. Cincinnati Machine Co.*, 370 Pa. Super. 611, 537 A.2d 334 (1988).

Case law in Pennsylvania has allowed an assertion in a learned treatise to be brought to the attention of the trier of fact if an expert witness testifies that it is authoritative. *Nigro v. Remington Arms Co., Inc.*, 432 Pa. Super. 60, 637 A.2d 983 (1993). The Superior Court said that the passages from the book, though not admissible as substantive evidence to prove that the rifle was safe, were properly admitted to bolster the credibility of Davis, since they were consistent with his testimony that the rifle was safe.

Also, under Pa.R.E. 703, an expert witness may base his opinion, in part, on information obtained from a publication, whether or not it has been qualified as a learned treatise, so long as it is of a type reasonably relied upon by experts in the witness' particular field of expertise in forming opinions or inferences on the subject. In such case, the witness may bring the publication to the attention of the trier of fact.

Moreover, an expert witness may be cross-examined with a learned treatise so long as the witness, or any other expert witness in the case, testifies that the treatise is an authoritative publication on the subject at issue. See *McDaniel v. Merck, Sharp & Dohme*, 367 Pa. Super. 600, 533 A.2d 436 (1987).

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

Comment

Pa.R.E. 803(19) is identical to F.R.E. 803(19). It changes prior Pennsylvania decisional law by expanding the venue from which the reputation may be drawn to include (1) a person's associates, and (2) the community. Prior Pennsylvania decisional law, none of which is recent, limited the venue to the person's family.

Reputation evidence is composite hearsay. It attempts to persuade the trier of fact that something is true because many people say so. Reputation, at least among family members, has long been recognized at common law as an exception to the hearsay rule for matters of personal or family history, such as birth, marriage, ancestry, etc. These things are generally referred to as matters of pedigree.

A common example of this exception to the hearsay rule is the testimony of a witness concerning his own age. A witness, of course, has no personal recollection of his

birth. His testimony as to his age, therefore, must be based on reputation among his family, and, perhaps, close friends and associates.

Time honored decisional law in Pennsylvania recognizes this exception to the hearsay rule, but appears to limit it to reputation among family members. See *American Life Insurance and Trust Co. v. Rosenagle*, 77 Pa. 507, 516 (1875), in which the court said:

> The term pedigree includes not only descent and relationship, but also the facts of birth, marriage and death, and the times when these events happened. These facts may be established by general repute in the family, proved by a surviving member of it, in all cases where they occur incidentally and in relation to pedigree . . . .

In *Picken's Estate*, 163 Pa. 14, 18, 29 A.875, 875 (1894), the court, quoting from Wharton's *Treatise on Evidence*, declared:

> Common reputation in a family connection as to who are members of the family is admissible, when no superior evidence is attainable, or in connection with superior evidence, to prove pedigree, legitimacy, and marriage.

The above decisional law from the nineteenth century represents the old common law view that the venue from which reputation may be drawn should be limited to the family. Times, though, have changed. People travel more, and, for good or ill, spend less time with their families. They tend to work and socialize in other communities, to which they have ever greater accessibility. Therefore, it makes sense to expand the venue from which reputation evidence of pedigree may be drawn.

At any rate, the federal courts and at least 80 percent of our sister states have already done so. By adopting Pa.R.E. 803(19), Pennsylvania conforms to what is now, by far, the majority view in the country.

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

Comment

Pa.R.E. 803(20) is identical to F.R.E. 803(20). It is consistent with prior Pennsylvania law, at least with respect to boundaries of land.

This is a minor exception to the hearsay rule. Boundaries of land and easements thereon are usually proved by reference to deeds and other documentary evidence. Events of general history are often judicially noticed.

So far as this exception to the hearsay rule applies to boundaries of land in the community, it is consistent with prior Pennsylvania decisional law. See *Hostetter v. Commonwealth*, 367 Pa. 603, 606, 80 A.2d 719, 719 (1951), in which the Court said "[m]aps, surveys, monuments, pedigree and even reputation evidence have been held to be admissible to establish boundaries . . . ."

With respect to "customs" affecting lands in the community, we have found no reported cases.

With respect to "events of general history," we also have found no reported cases. Courts generally take judicial notice of events of substantial historical importance, most of which are not controverted. However, when the historical event is of modest renown, formal proof may be necessary. If the event took place so long ago that there are no living witnesses to verify it, an exception to the hearsay rule for reputation evidence concerning the event can be justified on the basis of necessity.

F.R.E. 803(20) was adopted more than 20 years ago, and at least 80 percent of the states have already followed suit. There appears to be no good reason why Pennsylvania should not now conform to what is, by far, the majority rule in this country. Pa.R.E. 803(20) does just that.

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

Comment

Pa.R.E. 803(21) is identical to F.R.E. 803(21). It is consistent with prior Pennsylvania law. It is also consistent with Pa.R.E. 404(a), 405(a), and 608(a).

In any case in which it is relevant to prove a trait of human character, reputation evidence thereof may be offered as an exception to the hearsay rule. This exception is recognized in all states, in addition to the federal courts. (Cases conflict, however, concerning the breadth of the community from which the reputation may be drawn, and concerning the foundation that must be laid to qualify a witness to testify to another's reputation.) The most common trait of character that is the subject of reputation evidence is truthfulness. See Pa.R.E. 608(a).

In criminal cases, a trait of character that is often the subject of reputation evidence is defendant's law abiding disposition. Defendant has a right to offer such evidence. This is commonly called "placing his character in issue." If defendant does so, the prosecution may, in rebuttal, offer evidence of defendant's bad reputation for a law abiding disposition. A leading and often cited case is *Michelson v. United States*, 335 U. S. 469 (1948). See Pa.R.E. 404(a)(1).

(22) *[See Comment].*

Comment

Pennsylvania has not adopted F.R.E. 803(22), which reads as follows:

> *Judgment of Previous Conviction*. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging 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. The pendency of an appeal may be shown but does not affect admissibility.

This exception to the hearsay rule is a relatively new one. It was not recognized at common law, and it is not recognized in Pennsylvania.

The mere fact that a judgment of criminal conviction exists, as distinguished from the facts upon which it is based, is sometimes relevant. It may be proved by (1) persuading the court to take judicial notice of it pursuant to Pa.R.E. 201, or (2) introducing a record of it. Such a record qualifies for exception to the hearsay rule as a business and public record. See Pa.R.E. 803(6) and 42 Pa.C.S. § 6104.

With respect to facts essential to sustain a judgment of criminal conviction, there are four basic approaches that a court can take:

1. The judgment of conviction is conclusive, i.e., estops the party convicted from contesting any fact essential to sustain the conviction.

2. The judgment of conviction is admissible as evidence of any fact essential to sustain the conviction, if and only if offered against the party convicted.

3. The judgment of conviction is admissible as evidence of any fact essential to sustain the conviction when offered against any party (this is the federal rule with respect to a felony, except that the Government cannot offer somebody else's conviction against the defendant in a criminal case, other than for purposes of impeachment).

4. The judgment of conviction is neither conclusive nor admissible as evidence to prove a fact essential to sustain the conviction (common law rule).

With respect to a felony or other major crime, Pennsylvania takes approach number one. In subsequent litigation, the convicted party is estopped from denying or contesting any fact essential to sustain the conviction. Once a party is estopped from contesting a fact, no evidence need be introduced by an adverse party to prove it. This is collateral estoppel. Pennsylvania applies it both offensively and defensively.

The leading case is *Hurtt v. Stirone*, 416 Pa. 493, 206 A.2d 624 (1965), an action to recover money extorted from plaintiff by defendant, a labor leader. Defendant had previously been convicted in federal court of violating the Hobbs Anti-Racketeering Act, 18 U.S.C. § 1951. Extortion from plaintiff was a fact essential to sustain the criminal conviction. The Court, affirming a directed verdict for plaintiff, held that defendant was estopped from contesting the alleged extortion.

See also, *Folino v. Young*, 523 Pa. 532, 568 A.2d 171 (1990), a suit for personal injuries arising out of a motor vehicle accident. At a previous criminal trial defendant was convicted of (1) driving at an unsafe speed (summary offense), and (2) homicide by vehicle (misdemeanor of first degree). The Court held that defendant was estopped from contesting the allegation that he was driving at an unsafe speed at the time of the accident. Thus he was guilty of negligence per se. Though a summary offense is not, in and of itself, a serious enough offense to trigger collateral estoppel, it does so when a conviction thereof is a necessary operative fact in a simultaneous conviction of a more serious crime.

The Slayer's Act prohibits any person who participates in the wilful and unlawful killing of any other person from profiting financially thereby. 20 Pa.C.S. § 8801 et seq. It also provides that a record of conviction of having participated in such a killing "shall be admissible in evidence" against the slayer in a civil action. 20 Pa.C.S. § 8814.

In *In re Kravitz Estate*, 418 Pa. 319, 211 A.2d 443 (1965), the widow of Max Kravitz, who was shot and killed, made claim under his will. The Court, interpreting similar language in the preceding Slayer's Act, held that admission of the record of the widow's conviction of the second degree murder of her husband estopped her from denying that she wilfully and unlawfully killed her husband. Therefore, the Slayer's Act prevented her from inheriting from his estate.

A judgment of conviction of a felony or other major crime estops the party convicted from contesting any fact essential to sustain the conviction, whether or not an appeal is pending. The judgment is considered final unless or until it is reversed. See *Shaffer v. Smith*, 543 Pa. 526, 673 A.2d 872 (1996).

With respect to a minor offense, Pennsylvania takes approach number four, i.e., it applies the common law rule. Evidence of a conviction thereof is inadmissible to prove a fact necessary to sustain the conviction. See *Loughner v. Schmelzer*, 421 Pa. 283, 218 A.2d 768 (1966), a suit for personal injuries arising out of a motor vehicle accident. The Court held it reversible error to admit evidence that plaintiff was convicted of a traffic violation (failing to drive on the right side of the road).

On analysis, evidence of a criminal conviction, if offered to prove a fact essential to sustain the conviction, is double hearsay, i.e., hearsay on two levels.

The first level of hearsay is the assertion of judge or members of a jury that a fact necessary to sustain a finding of guilty is true. This assertion is not only excludable as hearsay, it is excludable for other reasons.

Assume, for example, that Zilch is convicted by a jury of murder. If one of the jurors were called as a witness in a subsequent case and asked whether Zilch poisoned his wife, the juror's testimony would be excludable under Pa.R.E. 602 because the juror had no personal knowledge of the matter. If the juror's testimony on this point is considered opinion, it would be excludable under Pa.R.E. 701 and 702, since the juror does not qualify as an expert witness.

The second level of hearsay is the testimony of one or more witnesses for the prosecution, who testified to facts inculpating the defendant. It is the testimony of one or more of these witnesses that is being introduced, second-hand, via evidence of the criminal conviction. This constitutes former testimony, which is excludable unless it qualifies for exception to the hearsay rule under Pa.R.E. 804(b)(1).

Note: A plea of guilty to a crime is excepted to the hearsay rule as an admission of all facts essential to sustain a criminal conviction thereof, but only when offered against the pleader by a party-opponent. See Pa.R.E. 803(25).

A plea of guilty to a crime may also qualify for exception to the hearsay rule as a statement against penal interest, if the declarant is unavailable to testify at trial. See Pa.R.E. 804(b)(3).

(23) *[See Comment].*

Comment

Pennsylvania has not adopted F.R.E. 803(23), which reads as follows:

Judgment as to Personal, Family, or General History, or Boundaries. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

This is a minor exception to the hearsay rule. It was not recognized at common law. It is not recognized in Pennsylvania.

The Comment to Pa.R.E. 803(22) applies here, also.

Moreover, there is an additional reason for rejecting Federal Rule of Evidence 803(23). Judgments in divorce, custody, and other domestic relations cases are often the result of a stipulation of facts, agreement not to contest, and general collusion between the parties. The facts essential to support these judgments are less trustworthy

than hearsay in general, not more so, and thus do not qualify for exception to the hearsay rule under generally accepted criteria therefor.

(24) *[See Comment].*

Comment

Pennsylvania has not adopted F.R.E. 803(24) which reads as follows:

> *Other Exceptions.* A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

The Federal Rule is inconsistent with Pennsylvania law, which does not recognize a catch-all exception to the hearsay rule.

OPTION I

(25) *Admission by Party-Opponent.* The statement is offered against a party and is (A) the party's own statement in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Comment

Pa.R.E. 803(25) is the same as F.R.E. 801(d)(2). The federal rules, though, call an admission by a party-opponent an exception to the definition of hearsay, and place it in rule 801 under the heading of "Definitions." Pennsylvania calls an admission by a party-opponent just what it is called at common law, an exception to the hearsay rule, and places it in rule 803 along with other exceptions to the hearsay rule in which the availability of the declarant is immaterial. The difference between the federal and Pennsylvania formulations is organizational, not ideological.

No assertion made by a party, if offered in evidence by a party-opponent, may be excluded as hearsay. It may be excluded because it is irrelevant, or privileged, or unduly prejudicial, or for other reasons, but never because it is hearsay.

An assertion made by a party in the pleadings, requests for admission, pretrial memoranda, or certain other documents that are prepared in accordance with court rules, is called a "judicial admission." If offered in evidence by a party-opponent, it is conclusive. It estops the party from denying or contradicting the assertion.

See *Nasim v. Shamrock Welding Supply Co.*, 387 Pa. Super. 225, 563 A.2d 1266 (1989), in which the court held it reversible error to permit defendant to introduce evidence refuting an assertion that it made in a petition to join an additional defendant. Defendant had asserted in the petition that it was the supplier of a product that plaintiff alleged was defective.

Cf. *General Equipment Manufacturers v. Westfield Insurance Co.*, 430 Pa. Super. 526, 635 A.2d 173 (1993), in which the court held that an averment in a party's pleading was not admissible when offered by a party-opponent who had denied the averment in a responsive pleading. Apparently the two conflicting judicial admissions canceled each other out.

A party's plea of guilty to a crime is an admission, and may be offered in evidence by a party-opponent. See *Cromley v. Gardner*, 253 Pa. Super. 467, 385 A.2d 433 (1978), a wrongful death suit arising out of a motor vehicle accident. The court held that defendant's plea of guilty to a charge of driving under the influence in a prior criminal action was admissible when offered against him by plaintiff as an admission by him that he was driving while drunk, evidence that the jury was entitled to take into account in determining whether he was negligent.

However, a plea of guilty that is later withdrawn, a plea of nolo contendere, or assertions made in connection with plea discussions, may not be admissible for public policy reasons. See Pa.R.E. 410.

A statute provides that a plea of guilty or nolo contendere to a summary offense under the Pennsylvania Motor Vehicle Code is not admissible in a civil case arising out of the same incident. 42 Pa.C.S. § 6142.

Most of the evidential problems that arise with admissions by a party-opponent concern vicarious admissions, i.e., assertions made by A that are offered as admissions against B. Vicarious admissions include admissions by adoption, by agent, and by a coconspirator.

It is sometimes said that a vicarious admission "binds" a party, or that a principal is "bound" by an agent's admission. This is incorrect. An admission (other than a "judicial admission," which is discussed above) is just one item of evidence to be considered by the trier of fact, along with other evidence of record, to resolve matters at issue. An admission may be denied, explained, contradicted, or otherwise attacked by the party against whom it is offered, just like any other item of evidence introduced against the party.

An admission by a party-opponent qualifies for exception to the hearsay rule whether it be an assertion of fact or opinion, and whether or not the declarant had personal knowledge of the matter asserted.

See, e.g., *Salvitti v. Throppe*, 343 Pa. 642, 23 A.2d 445 (1942), a personal injury case arising out of a motor vehicle accident. Defendant was not present at the accident, but was the owner of a truck involved therein. After the accident he visited the plaintiffs and admitted that the accident was his driver's fault. The Court, affirming a jury verdict for plaintiffs, approved admission of this evidence and said "[p]ersonal knowledge . . . is not required in the case of an admission by a party." Id. at 644, 23 A.2d at 446.

An admission by a party-opponent is sometimes referred to, inappropriately, as an "admission against interest." When an admission by a party-opponent is offered in evidence, it was usually contrary to the interest of the declarant at the time that it was made, but there is no

requirement that this be so. (There is a separate, more limited, exception to the hearsay rule for a statement against interest. See Pa.R.E. 804(b)(3)).

A. Party's Own Statement

A party's own assertion, in either an individual or a representative capacity, is the most typical kind of admission by a party-opponent. If the party is a representative, such as a trustee, or guardian, or personal representative of an estate, there is no need to determine in what capacity the party was acting when making the assertion, at least for hearsay purposes. This is consistent with prior Pennsylvania decisional law dealing with a real party in interest.

See *Geelen v. Pennsylvania Railroad Co.*, 400 Pa. 240, 161 A.2d 595 (1960), a wrongful death action by the administrator of the estate of a motorist who was struck and killed by defendant's train at a grade crossing. After a jury verdict for plaintiff, the trial court awarded defendant a new trial. The Court, affirming, held that the trial judge committed reversible error when he refused to allow the railroad to introduce as substantive evidence a statement signed by the motorist's widow about two months after the accident reciting various details concerning the manner of the occurrence. The court said,

> Decedent's widow, while technically not a party of record in her individual capacity, was a party beneficially and directly interested and her prior admissions or statements concerning material facts constituted substantive evidence. Such statements, thus proven, should be admitted as substantive proof of the facts asserted therein . . . .

Id. at 245, 161 A.2d at 598.

B. Adoptive Admission

On occasion a party will, expressly or impliedly, manifest a belief in the truth of an assertion made by another. The party thereby adopts the other's assertion as the party's own, at least for purposes of the hearsay rule. This is an adoptive admission. Its exception to the hearsay rule is consistent with prior Pennsylvania decisional law.

See *Geelen v. Pennsylvania Railroad Co.*, 400 Pa. 240, 161 A.2d 595 (1960), a wrongful death action arising out of a grade crossing accident. A claims agent for the defendant railroad wrote a statement about the accident. The decedent's widow signed it, thus adopting it as her own. The Court held it admissible as substantive evidence, upon offer by the railroad, as an admission by a party-opponent.

A party may adopt another's assertion verbally or behaviorally. For example, a party may adopt another's assertion by replying, "I agree." Or the party may adopt another's assertion by nodding his head in assent. See *United States v. Joshi*, 896 F.2d 1303 (11th Cir. 1990).

A party may also adopt another's assertion behaviorally by remaining silent in the face of accusation in circumstances in which the party would be expected to deny the accusation were it not true, i.e., when assent appears to be the most reasonable explanation for silence. See *United States v. Hale*, 422 U. S. 171, (1975); *Commonwealth v. Coccioletti*, 493 Pa. 103, 425 A.2d 387 (1981).

See also, *Burton v. Horn & Hardart Baking Co.*, 371 Pa. 60, 88 A.2d 873 (1952), in which the Court said that silence in the face of accusation constitutes assent "only when no other explanation is equally consistent with silence." Id. at 63—4, 88 A.2d at 875.

And see *Chambers v. Montgomery*, 411 Pa. 339, 192 A.2d 355 (1963), a civil assault and battery case. The Court, affirming a jury verdict for plaintiff, said that defendant's silence in the face of an accusation that he struck plaintiff was properly admitted as an admission of a party-opponent.

Caveat: In a criminal case, a suspect's silence in the face of accusation, after the suspect has received *Miranda* warnings, cannot be introduced against the suspect as an adoptive admission without violating the due process clause of the United States Constitution. See *Doyle v. Ohio*, 426 U. S. 610, 617—18, 96 SCt 2240, 49 LEd2d 91 (1976).

Moreover, in Pennsylvania a defendant's post arrest silence cannot be used substantively, or even to impeach credibility if defendant elects to testify at trial, regardless of whether *Miranda* warnings were given. See *Commonwealth v. Turner*, 499 Pa. 579, 454 A.2d 537 (1982). The Court based this ruling on Art I, § 9, of the Pennsylvania Constitution, which provides that an accused "cannot be compelled to give evidence against himself."

See also, *Commonwealth v. Easley*, 483 Pa. 337, 396 A.2d 1198 (1979).

C. Statement by Authorized Agent

An assertion made by an agent, if authorized to speak for the principal, may be introduced against the principal by a party-opponent as an admission. This is consistent with prior Pennsylvania decisional law.

Lawyers are agents of their clients with, on occasion, authority to speak for them. See *McGarity v. New York Life Insurance Co.*, 359 Pa. 308, 59 A.2d 47 (1948), in which the executors of a decedent's estate sued to collect accidental death benefits under life insurance policies. The insured died without regaining consciousness after an automobile accident in which the car that he was driving went out of control and crashed against a house. Thereafter, plaintiffs' lawyers wrote a letter to the lady who owned the damaged house, denying that the decedent was liable therefor, and asserting that he had been seen to slump at his wheel, apparently unconscious from a heart seizure, prior to the accident. The Court, holding that this improvident assertion by their lawyers was admissible against plaintiffs as an admission, explained,

> Counsel were clearly acting within the scope of their authority in making such a statement, and therefore, it being pertinent to the present issue, it was admissible in evidence with the same force and effect as if it had been made directly by plaintiffs themselves . . . .

Id. at 314, 59 A.2d at 50.

Very few agents, though, have authority to speak for their principals. They may have authority and responsibility to do many things, but seldom authority to represent their principals in speaking to others about them. Thus an exception to the hearsay rule for an assertion made by an agent only when the agent was authorized by the principal to speak about the matter has only limited application.

D. Statement by Agent Concerning Matter Within Scope of Agency

An assertion made by an agent may be introduced against the principal if (1) it concerns a matter within the scope of the agency, and (2) it was made during the existence of the agency. This is a departure from prior Pennsylvania law, but not a surprising one for the following reasons:

1. The old common law, which would not permit an agent's assertion to be admitted against the principal unless the agent was authorized to speak on the principal's behalf, has often been criticized on the ground that it leads to unjust results. For example, after a bad traffic accident, a bus driver may admit to an investigating policeman that the accident was his fault and that he ran a red light. The common law rule would preclude an injured party from introducing the bus driver's assertions against the bus company. The bus company, the theory goes, hired the bus driver to drive a bus, not to speak for the bus company.

2. The federal courts and over eighty percent of the states have abandoned the common law view in favor of the view expressed in F.R.E. 801(d)(2)(D). This is now, by far, the majority rule, and experience with it throughout the country has been good.

3. The Pennsylvania Supreme Court has not had occasion to visit the issue for decades. The last reported case in which it applied the old common law rule was *Murray v. Siegel*, 413 Pa. 23, 195 A.2d 790 (1963). It did so there, without discussion, in two short sentences at the end of its opinion, citing cases from 1886 and 1930.

4. Pennsylvania has not been consistent in its application of the common law rule. See, e.g., *Treon v. W.A. Shipman & Son*, 275 Pa. 246, 119 A 74 (1922), a suit for personal injuries. Plaintiff, a pedestrian, was hit by a car driven by a partner in the defendant undertaking business. Defendant denied lilability on the ground that the partner was on a personal errand, not partnership business, at the time of the accident. Plaintiff and his wife testified that sometime after the accident the partner (driver) appeared at plaintiff's home and told them that he was going to the casket works on business at the time of the accident. The Court, reversing a judgment n.o.v., and reinstating a jury verdict for plaintiff, held that the partner's statement was admissible against the partnership as an admission by its agent. The Court mentions nothing about any showing that the partner had authority to speak for the partnership when he visited the injured plaintiff at his home.

5. In *Carswell v. SEPTA*, 259 Pa. Super. 167, 393 A.2d 770 (1978), Judge Spaeth, in a plurality opinion, proposed a new exception to the hearsay rule for vicarious admissions, outside the framework of party admissions.

6. In *DeFrancesco v. Western Pennsylvania Water Co.*, 329 Pa. Super. 508, 478 A.2d 1295 (1984), the Superior Court, in a lengthy, analytic opinion, referred to the "often harsh results" of the common law rule, reluctantly applied it to the case at hand, and urged the Pennsylvania Supreme Court to undertake "a forthright appraisal" of the subject, and consider adoption of a less restrictive exception to the hearsay rule for vicarious admissions.

E. Statement by a Co-conspirator.

An assertion made by a co-conspirator of a party may be introduced against the party as the party's own admission if the assertion was made in the course of and in furtherance of the conspiracy. This is consistent with prior Pennsylvania decisional law.

An assertion by a co-conspirator is nothing more than a special kind of assertion by a partner (agent), which is admissible against a fellow partner (principal) as an admission. As Justice Oliver Wendell Holmes explained in *United States v. Kissel*, 218 U. S. 601, 608 (1910), "[a] conspiracy is a partnership in criminal purposes."

Like the partners that they are, coconspirators are considered agents one for another, so that the assertion of one, made in the course and scope of the conspiracy, is the admission of all. In *Anderson v. United States*, 417 U. S. 211, 218 n.6, (1974), the Supreme Court said:

> The rationale for both the hearsay-conspiracy exception and its limitations is the notion that conspirators are partners in crime . . . . As such, the law deems them agents of one another. And just as the declarations of an agent bind the principal only when the agent acts within the scope of his authority, so the declaration of a conspirator must be made in furtherance of the conspiracy charged in order to be admissible against his partner.

Moreover, when a person joins an existing conspiracy, the person thereby adopts all the prior assertions of the conspirators that were made during the course and in furtherance of the conspiracy. These prior assertions are excepted to the hearsay rule when offered in evidence by a party-opponent. See *United States v. Gypsum Co.*, 333 U. S. 364 (1948). This principle of law was explained graphically in *United States v. Baines*, 812 F.d 41, 42 (1st Cir 1987):

> [A] conspiracy is like a train. When a party knowingly steps aboard, he is part of the crew, and assumes conspirator's responsibility for the existing freight-or conduct-regardless of whether he is aware of just what it is composed. . . . Fed.R.Evid. 801(d)(2)(E) does not change the common law. . . .

In order to qualify an out-of-court assertion for exception to the hearsay rule as a statement of a coconspirator, the offerer must prove, to the satisfaction of the court, five things:

1. That a conspiracy existed;

2. That the party against whom the evidence is offered participated in the conspiracy;

3. That the declarant participated in the conspiracy;

4. That the assertion was made in the course of the conspiracy; and

5. That the assertion was made in furtherance of the conspiracy.

In *Bourjaily v. United States*, 483 U. S. 171 (1987), the Supreme Court, interpreting Federal Rule of Evidence 104(a), said that (1) the trial judge must determine whether the above five foundational factors exist, (2) the judge must make this determination by a preponderance of the evidence, and (3) the judge may consider the proffered hearsay assertion itself in determining whether the foundational factors exist to support its introduction in evidence.

The Supreme Court expressly declined, though, to decide whether the trial judge can rely solely on the proffered out-of-court assertion, without corroborative extrinsic evidence. Since then lower federal courts have consistently held that such corroborative extrinsic evidence is necessary. Such holdings are consistent with prior Pennsylvania decisional law. See, e.g., *Commonwealth v. Dreibelbis*, 493 Pa. 466, 426 A.2d 1111 (1981). See Pa.R.E. 104(a), and Comment thereto.

The United States Supreme Court has held that this exception to the hearsay rule, as applied in the federal courts, does not encompass assertions made by a coconspirator after the central purpose of the conspiracy has been accomplished, i.e., when the miscreants are in the process of covering up the crime and taking care to escape detection. See Krulewitch v. United States, 336 U. S. 440 (1949); *Grunewald v. United States*, 353 U. S. 391 (1957).

Pennsylvania decisional law holds that an assertion made by a conspirator in an attempt to conceal a completed crime may be admitted against coconspirators when the concealment of the crime was an integral part of the common design to which the conspirators agreed. See, e.g., *Commonwealth v. Mayhue*, 536 Pa. 271, 639 A.2d 421 (1994).

OPTION II

(25) *Admission by Party-Opponent.* The statement is offered against a party and is (A) the party's own statement in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Comment

Pa.R.E. 803(25) is similar to F.R.E. 801(d)(2). The federal rules, though, call an admission by a party-opponent an exception to the definition of hearsay, and place it in rule 801 under the heading of "Definitions." Pennsylvania calls an admission by a party-opponent just what it is called at common law, an exception to the hearsay rule, and places it in rule 803 along with other exceptions to the hearsay rule in which the availability of the declarant is immaterial. The difference between the federal and Pennsylvania formulations is organizational, not ideological. Pa.R.E. 803(25) also differs in that there is no exception for "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." This provision of the Federal rule is inconsistent with Pennsylvania law that admits statements by agents only when the agent has been authorized to speak on behalf of the principal. See *Murray v. Siegal*, 413 Pa. 23, 195 A.2d 790 (1963); *Durkin v. Equine Clinics, Inc.*, 376 Pa. Super. 557, 546 A.2d 665 (1988); appeal denied, 524 Pa. 608, 569 A.2d 1367 (1989); *DeFrancesco v. Western Pennsylvania Water Co.*, 329 Pa. Super. 508, 478 A.2d 1295 (1984).

No assertion made by a party, if offered in evidence by a party-opponent, may be excluded as hearsay. It may be excluded because it is irrelevant, or privileged, or unduly prejudicial, or for other reasons, but never because it is hearsay.

An assertion made by a party in the pleadings, requests for admission, pretrial memoranda, or certain other documents that are prepared in accordance with court rules, is called a "judicial admission." If offered in evidence by a party-opponent, it is conclusive. It estops the party from denying or contradicting the assertion.

See *Nasim v. Shamrock Welding Supply Co.*, 387 Pa. Super. 225, 563 A.2d 1266 (1989), in which the court held it reversible error to permit defendant to introduce evidence refuting an assertion that it made in a petition to join an additional defendant. Defendant had asserted in the petition that it was the supplier of a product that plaintiff alleged was defective.

Cf. *General Equipment Manufacturers v. Westfield Insurance Co.*, 430 Pa. Super. 526, 635 A.2d 173 (1993), in which the court held that an averment in a party's pleading was not admissible when offered by a party-opponent who had denied the averment in a responsive pleading. Apparently the two conflicting judicial admissions canceled each other out.

A party's plea of guilty to a crime is an admission, and may be offered in evidence by a party-opponent. See *Cromley v. Gardner*, 253 Pa. Super. 467, 385 A.2d 433 (1978), a wrongful death suit arising out of a motor vehicle accident. The court held that defendant's plea of guilty to a charge of driving under the influence in a prior criminal action was admissible when offered against him by plaintiff as an admission by him that he was driving while drunk, evidence that the jury was entitled to take into account in determining whether he was negligent.

However, a plea of guilty that is later withdrawn, a plea of nolo contendere, or assertions made in connection with plea discussions, may not be admissible for public policy reasons. See Pa.R.E. 410.

A statute provides that a plea of guilty or nolo contendere to a summary offense under the Pennsylvania Motor Vehicle Code is not admissible in a civil case arising out of the same incident. 42 Pa.C.S. § 6142.

Most of the evidential problems that arise with admissions by a party-opponent concern vicarious admissions, i.e., assertions made by A that are offered as admissions against B. Vicarious admissions include admissions by adoption, by agent, and by a coconspirator.

It is sometimes said that a vicarious admission "binds" a party, or that a principal is "bound" by an agent's admission. This is incorrect. An admission (other than a "judicial admission," which is discussed above) is just one item of evidence to be considered by the trier of fact, along with other evidence of record, to resolve matters at issue. An admission may be denied, explained, contradicted, or otherwise attacked by the party against whom it is offered, just like any other item of evidence introduced against the party.

An admission by a party-opponent qualifies for exception to the hearsay rule whether it be an assertion of fact or opinion, and whether or not the declarant had personal knowledge of the matter asserted.

See, e.g., *Salvitti v. Throppe*, 343 Pa. 642, 23 A.2d 445 (1942), a personal injury case arising out of a motor vehicle accident. Defendant was not present at the accident, but was the owner of a truck involved therein. After the accident he visited the plaintiffs and admitted that the accident was his driver's fault. The Court, affirming a jury verdict for plaintiffs, approved admission of this evidence and said "[p]ersonal knowledge . . . is not required in the case of an admission by a party." Id. at 644, 23 A.2d at 446.

An admission by a party-opponent is sometimes referred to, inappropriately, as an "admission against interest." When an admission by a party-opponent is offered in evidence, it was usually contrary to the interest of the declarant at the time that it was made, but there is no requirement that this be so. (There is a separate, more limited, exception to the hearsay rule for a statement against interest. See Pa.R.E. 804(b)(3)).

A. Party's Own Statement

A party's own assertion, in either an individual or a representative capacity, is the most typical kind of admission by a party-opponent. If the party is a representative, such as a trustee, or guardian, or personal representative of an estate, there is no need to determine in what capacity the party was acting when making the assertion, at least for hearsay purposes. This is consistent with prior Pennsylvania decisional law dealing with a real party in interest.

See *Geelen v. Pennsylvania Railroad Co.*, 400 Pa. 240, 161 A.2d 595 (1960), a wrongful death action by the administrator of the estate of a motorist who was struck and killed by defendant's train at a grade crossing. After a jury verdict for plaintiff, the trial court awarded defendant a new trial. The Court, affirming, held that the trial judge committed reversible error when he refused to allow the railroad to introduce as substantive evidence a statement signed by the motorist's widow about two months after the accident reciting various details concerning the manner of the occurrence. The court said,

> Decedent's widow, while technically not a party of record in her individual capacity, was a party beneficially and directly interested and her prior admissions or statements concerning material facts constituted substantive evidence. Such statements, thus proven, should be admitted as substantive proof of the facts asserted therein . . . .

Id. at 245, 161 A.2d at 598.

B. Adoptive Admission

On occasion a party will, expressly or impliedly, manifest a belief in the truth of an assertion made by another. The party thereby adopts the other's assertion as the party's own, at least for purposes of the hearsay rule. This is an adoptive admission. Its exception to the hearsay rule is consistent with prior Pennsylvania decisional law.

See *Geelen v. Pennsylvania Railroad Co.*, 400 Pa. 240, 161 A.2d 595 (1960), a wrongful death action arising out of a grade crossing accident. A claims agent for the defendant railroad wrote a statement about the accident. The decedent's widow signed it, thus adopting it as her own. The Court held it admissible as substantive evidence, upon offer by the railroad, as an admission by a party-opponent.

A party may adopt another's assertion verbally or behaviorally. For example, a party may adopt another's assertion by replying, "I agree." Or the party may adopt another's assertion by nodding his head in assent. See *United States v. Joshi*, 896 F.2d 1303 (11th Cir. 1990).

A party may also adopt another's assertion behaviorally by remaining silent in the face of accusation in circumstances in which the party would be expected to deny the accusation were it not true, i.e., when assent appears to be the most reasonable explanation for silence. See *United States v. Hale*, 422 U. S. 171, (1975); *Commonwealth v. Coccioletti*, 493 Pa. 103, 425 A.2d 387 (1981).

See also, *Burton v. Horn & Hardart Baking Co.*, 371 Pa. 60, 88 A.2d 873 (1952), in which the Court said that silence in the face of accusation constitutes assent "only when no other explanation is equally consistent with silence." Id. at 63—4, 88 A.2d at 875.

And see *Chambers v. Montgomery*, 411 Pa. 339, 192 A.2d 355 (1963), a civil assault and battery case. The Court, affirming a jury verdict for plaintiff, said that defendant's silence in the face of an accusation that he struck plaintiff was properly admitted as an admission of a party-opponent.

Caveat: In a criminal case, a suspect's silence in the face of accusation, after the suspect has received *Miranda* warnings, cannot be introduced against the suspect as an adoptive admission without violating the due process clause of the United States Constitution. See *Doyle v. Ohio*, 426 U. S. 610, 617—18, 96 SCt 2240, 49 LEd2d 91 (1976).

Moreover, in Pennsylvania a defendant's post arrest silence cannot be used substantively, or even to impeach credibility if defendant elects to testify at trial, regardless of whether *Miranda* warnings were given. See *Commonwealth v. Turner*, 499 Pa. 579, 454 A.2d 537 (1982). The Court based this ruling on Art I, § 9, of the Pennsylvania Constitution, which provides that an accused "cannot be compelled to give evidence against himself."

See also, *Commonwealth v. Easley*, 483 Pa. 337, 396 A.2d 1198 (1979).

C. Statement by Authorized Agent

An assertion made by an agent, if authorized to speak for the principal, may be introduced against the principal by a party-opponent as an admission. This is consistent with prior Pennsylvania decisional law.

Lawyers are agents of their clients with, on occasion, authority to speak for them. See *McGarity v. New York Life Insurance Co.*, 359 Pa. 308, 59 A.2d 47 (1948), in which the executors of a decedent's estate sued to collect accidental death benefits under life insurance policies. The insured died without regaining consciousness after an automobile accident in which the car that he was driving went out of control and crashed against a house. Thereafter, plaintiffs' lawyers wrote a letter to the lady who owned the damaged house, denying that the decedent was liable therefor, and asserting that he had been seen to slump at his wheel, apparently unconscious from a heart seizure, prior to the accident. The Court, holding that this improvident assertion by their lawyers was admissible against plaintiffs as an admission, explained,

> Counsel were clearly acting within the scope of their authority in making such a statement, and therefore, it being pertinent to the present issue, it was admissible in evidence with the same force and effect as if it had been made directly by plaintiffs themselves . . . .

Id. at 314, 59 A.2d at 50.

Very few agents, though, have authority to speak for their principals. They may have authority and responsibility to do many things, but seldom authority to represent their principals in speaking to others about them. Thus an exception to the hearsay rule for an assertion made by an agent only when the agent was authorized by the principal to speak about the matter has only limited application.

D. Statement by a Co-conspirator.

An assertion made by a co-conspirator of a party may be introduced against the party as the party's own admission if the assertion was made in the course of and in furtherance of the conspiracy. This is consistent with prior Pennsylvania decisional law.

An assertion by a co-conspirator is nothing more than a special kind of assertion by a partner (agent), which is admissible against a fellow partner (principal) as an admission. As Justice Oliver Wendell Holmes explained in *United States v. Kissel*, 218 U. S. 601, 608 (1910), "[a] conspiracy is a partnership in criminal purposes."

Like the partners that they are, coconspirators are considered agents one for another, so that the assertion of one, made in the course and scope of the conspiracy, is the admission of all. In *Anderson v. United States*, 417 U. S. 211, 218 n.6, (1974), the Supreme Court said:

> The rationale for both the hearsay-conspiracy exception and its limitations is the notion that conspirators are partners in crime . . . . As such, the law

> deems them agents of one another. And just as the declarations of an agent bind the principal only when the agent acts within the scope of his authority, so the declaration of a conspirator must be made in furtherance of the conspiracy charged in order to be admissible against his partner.

Moreover, when a person joins an existing conspiracy, the person thereby adopts all the prior assertions of the conspirators that were made during the course and in furtherance of the conspiracy. These prior assertions are excepted to the hearsay rule when offered in evidence by a party-opponent. See *United States v. Gypsum Co.*, 333 U. S. 364 (1948). This principle of law was explained graphically in *United States v. Baines*, 812 F.d 41, 42 (1st Cir 1987):

> [A] conspiracy is like a train. When a party knowingly steps aboard, he is part of the crew, and assumes conspirator's responsibility for the existing freight—or conduct—regardless of whether he is aware of just what it is composed. . . . Fed.R.Evid. 801(d)(2)(E) does not change the common law. . . .

In order to qualify an out-of-court assertion for exception to the hearsay rule as a statement of a coconspirator, the offerer must prove, to the satisfaction of the court, five things:

1. That a conspiracy existed;

2. That the party against whom the evidence is offered participated in the conspiracy;

3. That the declarant participated in the conspiracy;

4. That the assertion was made in the course of the conspiracy; and

5. That the assertion was made in furtherance of the conspiracy.

In *Bourjaily v. United States*, 483 U. S. 171 (1987), the Supreme Court, interpreting Federal Rule of Evidence 104(a), said that (1) the trial judge must determine whether the above five foundational factors exist, (2) the judge must make this determination by a preponderance of the evidence, and (3) the judge may consider the proffered hearsay assertion itself in determining whether the foundational factors exist to support its introduction in evidence.

The Supreme Court expressly declined, though, to decide whether the trial judge can rely solely on the proffered out-of-court assertion, without corroborative extrinsic evidence. Since then lower federal courts have consistently held that such corroborative extrinsic evidence is necessary. Such holdings are consistent with prior Pennsylvania decisional law. See, e.g., *Commonwealth v. Dreibelbis*, 493 Pa. 466, 426 A.2d 1111 (1981). See Pa.R.E. 104(a), and Comment thereto.

The United States Supreme Court has held that this exception to the hearsay rule, as applied in the federal courts, does not encompass assertions made by a coconspirator after the central purpose of the conspiracy has been accomplished, i.e., when the miscreants are in the process of covering up the crime and taking care to escape detection. See *Krulewitch v. United States*, 336 U. S. 440 (1949); *Grunewald v. United States*, 353 U. S. 391, (1957).

Pennsylvania decisional law holds that an assertion made by a conspirator in an attempt to conceal a completed crime may be admitted against coconspirators when the concealment of the crime was an integral part of the common design to which the conspirators agreed. See, e.g., *Commonwealth v. Mayhue*, 536 Pa. 271, 639 A.2d 421 (1994).

Rule 803.1. Hearsay Exceptions; Testimony of Declarant Necessary.

The following statements, as hereinafter defined, are not excluded by the hearsay rule if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement:

(1). Inconsistent Statement of Witness.

(2). Statement of Identification.

(3). Recorded Recollection.

(1) *Inconsistent Statement of Witness.* A statement by declarant that is inconsistent with the declarant's testimony, and (a) was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (b) is a writing signed and adopted by the declarant, or (c) is a verbatim contemporaneous recording of an oral statement.

Comment

Subsection (a) is similar to F.R.E. 801(d)(1)(A), except that Pennsylvania classifies the described inconsistent statement as an exception to the hearsay rule, not an exception to the definition of hearsay. See Comment to Pa.R.E. 801.

Subsections (b) and (c) constitute an expansion of the exception as defined in the federal rule, and are based on recent Pennsylvania decisional law.

An out-of-court statement made by a witness, inconsistent with the witness's testimony at trial, may be offered to impeach the witness's credibility. In such event, it is not hearsay, since it is not offered to prove its truth. It is, instead, circumstantial evidence from which the trier of fact may infer that the witness is not a reliable historian. Its admissibility is governed by principles of relevance, not hearsay. See Pa.R.E. 613.

Until recently Pennsylvania adhered to the common law view that an inconsistent statement of a witness was admissible for impeachment purposes only, never as substantive evidence. See *Commonwealth v. Waller*, 498 Pa. 33, 39 n.2, 444 A.2d 653, 656 n.2 (1982).

Came then the seminal case of *Commonwealth v. Brady*, 510 Pa. 123, 507 A.2d 66 (1986), in which defendant was charged with murdering a security guard during the course of a burglary at a plant. Later on the day of the crime, defendant's girl friend gave a recorded statement to the police in which she asserted that she witnessed the murder, and recounted the details thereof. Prior to trial, however, she recanted and said that neither she nor defendant entered the plant or had anything to do with the murder. She so testified, to no one's surprise, when called by the prosecution as a witness at trial. There was no confession, no other eyewitness, and not enough circumstantial evidence to take the case to the jury, unless, i.e., the trial judge would allow the witness's prior inconsistent statement to be introduced as substantive evidence. The trial judge did so. Defendant was convicted.

The Pennsylvania Supreme Court, affirming the conviction, overturned close to two centuries of decisional law in the Commonwealth and held that the witness's recorded statement, inconsistent with her testimony at trial, was properly admitted as substantive evidence, and was excepted to the hearsay rule.

In *Commonwealth v. Lively*, 530 Pa. 464, 610 A.2d 7 (1992), the Court fleshed out and clarified the exception to the hearsay rule that it had adopted in the Brady case. Pa.R.E. 803.1(1) is drafted in accordance therewith.

In *Commonwealth v. Halsted*, 542 Pa. 318, 666 A.2d 655, 661 (1996), a majority of the Supreme Court (concurring opinion by Justice Zappala, joined by Justices Flaherty, Cappy and Castille) said that "a verbatim contemporaneous recording of an oral statement" qualifies for this exception to the hearsay rule only if it is an audiotape or videotape recording. It cannot be a police officer's handwritten notes.

Permitting some prior inconsistent statements of witnesses to be introduced as substantive evidence, excepted to the hearsay rule, has had an ancillary effect on Pennsylvania trial practice. A party may now "set up" a witness, i.e., call a witness whom the party knows will testify adversely to the party for the sole purpose of introducing the witness's prior inconsistent statement as substantive evidence. This is what the prosecuting attorney did in the Brady case, supra.

See also, *Commonwealth v. Carter*, 443 Pa. Super. 231, 661 A.2d 390, 392 (1995).

However, if extrinsic evidence of a prior inconsistent statement is introduced in evidence, the witness must usually be confronted with it and given an opportunity to explain or deny it. See Pa.R.E. 613(b).

(2) *Statement of Identification.* A statement by a witness of identification of a person or thing, made after perceiving the person or thing, provided that the witness testifies to the making of the prior identification.

Comment

Pa.R.E. 803.1(2) differs from F.R.E. 801(d)(1)(C) in several respects:

1. Pa.R.E. 803.1(2) classifies a statement of identification as an exception to the hearsay rule, not an exception to the definition of hearsay. See Comment to Pa.R.E. 801.

2. Pa.R.E. 803.1(2) is broader than its federal counterpart in that it includes identification of a thing, in addition to a person.

3. Pa.R.E. 803.1(2) is more restrictive than its federal counterpart in that it requires the witness to testify to making the identification.

Pa.R.E. 803.1(2) appears to be consistent with prior Pennsylvania decisional law, though we have found no reported cases dealing with prior identification of a thing, as distinguished from a person.

Testimony by a witness that the witness previously identified a person is often offered in evidence, particularly in criminal cases. If the witness makes an in-court identification, the previous identification is a prior consistent statement, and may be admissible as corroborative or rehabilitative evidence. See Pa.R.E. 613(c).

If a witness cannot make an in-court identification, the witness's prior statement of identification may be a prior inconsistent statement. Such a statement is usually admissible for impeachment purposes only, but if offered as substantive evidence will sometimes qualify for exception to the hearsay rule. See Pa.R.E. 803.1(1).

More importantly, evidence of a witness's prior statement of identification, if the witness testifies to making the identification, may be offered and admitted as substantive evidence under this exception to the hearsay rule.

It is a lamentable, but indisputable, fact of life: memory fades with the passage of time. Experience teaches us that a statement of identification made a short time after an encounter is likely to be more reliable than one made a long time thereafter.

For example, a woman who was robbed may not, a year or so later, in the unfamiliar surroundings of a courtroom, be able to identify the robber, who may have altered his physical appearance and attire for the purpose of avoiding recognition. But that same woman may be able to testify with great assurance that she positively identified the person who robbed her shortly thereafter at the station house, or in a lineup, or from a photograph presented to her by the police. This fresh identification by the witness, when testified to by a police officer or other observer, has substantially greater indicia of reliability than hearsay in general, thus justifying its exception to the hearsay rule.

If the woman who was robbed had promptly thereafter drawn a sketch of the robber, or provided details for the drawing of a sketch by a police artist, the sketch would be excepted to the hearsay rule as the witness's recorded recollection, in the absence of a sufficient current recollection. See Pa.R.E. 803.1(3). Thus the exceptions to the hearsay rule for a prior statement of identification and that for recorded recollection are complementary.

The rationale for excepting a prior statement of identification to the hearsay rule is well explained in the seminal case of *People v. Gould*, 54 Cal.2d 621, 626, 354 P.2d 865, 867, 7 Cal Rptr 273, 275 (1960):

> Evidence of an extra-judicial identification is admissible, not only to corroborate an identification made at the trial . . . but as independent evidence of identity. Unlike other testimony that cannot be corroborated by proof of prior consistent statements unless it is first impeached . . . evidence of an extra-judicial identification is admitted regardless of whether the testimonial identification is impeached, because the earlier identification has greater probative value than an identification made in the courtroom after the suggestions of others and the circumstances of the trial may have intervened to create a fancied recognition in the witness' mind. . . . The failure of the witness to repeat the extra-judicial identification in court does not destroy its probative value, for such failure may be explained by loss of memory or other circumstances. The extra-judicial identification tends to connect the defendant with the crime, and the principal danger of admitting hearsay evidence is not present since the witness is available at the trial for cross-examination.

Pennsylvania decisional law first recognized an exception to the hearsay rule for a prior statement of identification in *Commonwealth v. Saunders*, 386 Pa. 149, 125 A.2d 442 (1956), though without much explanation.

More recently, in *Commonwealth v. Ly*, 528 Pa. 523, 532, 599 A.2d 613, 617 (1991), the Court said that "where witnesses are in court and subject to cross-examination, a police officer may testify concerning pre-trial identification by the witness."

This exception to the hearsay rule was applied multiply in *Commonwealth v. Doa*, 381 Pa. Super. 181, 553 A.2d 416 (1989), a prosecution for robbery and related crimes. The court, affirming convictions, approved admission of

testimony from a police detective that five witnesses, who were unable to make in-court identifications of defendants at trial, had identified them from photographic arrays nine days after the robbery. The court also approved admission of testimony from an assistant district attorney that one of the same witnesses identified defendant Doa at his preliminary hearing.

For the same reasons that a statement of prior identification of a person merits exception to the hearsay rule, so, too, does a statement of prior identification of a thing.

For example, shortly after a robbery a witness may be asked by the police to describe the robber. He may also be asked to describe an article of stolen goods, or the robber's clothing, or a weapon brandished by the robber, or the getaway car. At time of trial, when the witness's memory is no longer fresh, he may be unable to repeat any of these identifications. Evidence that the witness previously identified the robber's automobile as a blue Cadillac with New Jersey license plates and the right rear tail light missing is just as reliable as evidence that the witness previously identified the robber as a white man in his twenties about six feet tall with long black hair.

We have found no Pennsylvania cases that discuss prior identification of a thing as an exception to the hearsay rule. However, in *United States v. Booz*, 451 F2d 719 (3d Cir 1971), which was decided prior to the adoption of the Federal Rules of Evidence, the Third Circuit approved admission of a witness's prior identification of the license number of a truck that he observed at the scene of a bank robbery, which number he promptly relayed to an FBI agent. At trial, testimony verifying the prior identification was presented from the witness and the agent who wrote the number down.

(3) *Recorded Recollection.* A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory, providing that the witness testifies that the record correctly reflects that knowledge. If admitted, the memorandum or record may be read into evidence and received as an exhibit, but may be shown to the jury only in exceptional circumstances or when offered by an adverse party.

Comment

Pa.R.E. 803.1(3) is similar to F.R.E. 803(5), but differs in the following ways:

1. Pa.R.E. 803.1(3) classifies recorded recollection as an exception to the hearsay rule in which the testimony of the declarant is necessary, not as an exception in which the availability of the declarant is immaterial.

2. Pa.R.E. 803.1(3) makes clear that, in order to qualify recorded recollection to the hearsay rule, the witness must testify that the record correctly reflects the knowledge that the witness once had, i.e., the witness must vouch for the reliability of the record. The federal rule is ambiguous on this point, and federal cases thereunder are conflicting.

3. Pa.R.E. 803.1(3) allows the record to be received as an exhibit, and grants the trial judge discretion to show it to the jury in exceptional circumstances, even when not offered by an adverse party.

Pa.R.E. 803.1(3) is consistent with prior Pennsylvania decisional law.

The rationale for excepting recorded recollection to the hearsay rule is much the same as that for excepting a prior statement of identification. See Pa.R.E. 803.1(2) and Comment thereto. The recorded past observation of a witness, when the matter was fresh in the witness's memory, is more trustworthy than the present eroded recollection of the witness, particularly if the witness currently vouches for the correctness of the matter recorded.

Because the witness must testify at trial and vouch for the correctness of the recorded information, and must be willing to undergo cross-examination concerning it, the trier of fact has substantial opportunity to gauge the credibility of the witness, even though the witness testifies to a faded, or fading, memory of the matters recorded.

This exception to the hearsay rule has proved useful to the prosecution in criminal cases in dealing with a "turncoat witness," i.e., one who makes a statement implicating the defendant prior to trial, but who, when trial comes, testifies to a loss of memory concerning the crime.

See *Commonwealth v. Shaw*, 494 Pa. 364, 431 A.2d 897 (1981), a murder case. A witness, who was an accomplice of defendant, made a confession that implicated defendant. At trial the witness testified to a loss of memory concerning some, but not all, of the assertions in his confession. He also testified that what he had said in his confession was the truth. The Court, affirming a conviction, approved admission of the confession as recorded recollection. The Court explained that recorded recollection qualifies for exception to the hearsay rule if the declarant lacks "sufficient" present recollection of the matter recorded. Declarant need not lack all present recollection thereof.

See also, *Commonwealth v. Cargo*, 498 Pa. 5, 444 A.2d 639 (1982), another murder case. A witness was interviewed by a police detective, who recorded his statement, on the morning following the crime. At trial the witness testified to a memory loss concerning the murder. He said, at various times during his testimony, that he had told the truth to the detective when his statement was recorded, and that he didn't remember whether he told the detective the truth. The Court, affirming a conviction, said that recorded recollection qualifies for exception to the hearsay rule if the witness vouches for the correctness of the recorded information at some time in his testimony. If he gives conflicting testimony on the point, it goes to the weight, not the admissibility, of the recorded recollection.

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 statements, as hereinafter defined, are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former Testimony.

(2) Statement Under Belief of Impending Death.

(3) Statement Against Interest.

(4) Statement of Personal or Family History.

(5) [Vacant. See Comment]

Comment

Pa.R.E. 804(a) is identical to F.R.E. 804(a). Though there is no common definition of unavailability for hearsay purposes in prior Pennsylvania law, the rule does not conflict with case law applying the four hearsay exceptions that require unavailability.

Pa.R.E. 804(b) differs somewhat from F.R.E. 804(b). The differences are explained in the Comments to the rule's subdivisions, which define individual exceptions to the hearsay rule.

The exceptions to the hearsay rule in subsection (b) apply only if the declarant is unavailable to testify in person. It seems reasonable to apply the same definition of unavailability to all of them. This definition is supplied by subsection (a).

a. Definition of Unavailability

There is little that is controversial about the five kinds of unavailability spelled out in this rule. They have been culled from case law throughout the country, refined a little, and categorized. The rule seems to have worked satisfactorily in the federal courts, and in the many states that have adopted rules patterned after it.

(1) *Privilege.* A ruling of court is required before a witness becomes unavailable because of a privilege not to testify. Assertion of a privilege by a witness, or by a lawyer, is not enough, without a court ruling.

(2) *Refusal to Testify.* An order of court is required before the refusal of a witness to testify makes the witness unavailable. The witness's refusal, in and of itself, is not enough.

(3) *Memory Loss.* If a witness testifies, under oath, to a memory loss concerning the subject matter of the hearsay statement sought to be introduced under Pa.R.E. 804(b), the witness is unavailable. It doesn't matter whether you believe the witness or not.

(4) *Death or Illness.* This is a common type of unavailability. Death is fairly conclusive. However, a ruling by the court may be necessary to determine whether an illness, physical or mental, of a witness is serious enough to prevent the witness from testifying in person, thus making the witness unavailable.

(5) *Absence of Witness.* When the witness simply doesn't show up in court, the party who wants to introduce evidence of the witness's out-of-court assertion under Pa.R.E. 804(b) has the burden of convincing the court that the party has used due diligence to contact the witness, subpoena the witness if possible, or persuade the witness to appear voluntarily if the witness can't be subpoenaed.

Moreover, if the hearsay sought to be introduced is a dying declaration (Pa.R.E. 804(b)(2)), a statement against interest (Pa.R.E. 804(b)(3)), or a statement of pedigree (Pa.R.E. 804(b)(4)), the proponent must also convince the court that he could not reasonably have taken the deposition of the witness, either in the same or another jurisdiction.

Caveat: Pa.R.E. 804(a) contains a proviso at the end: if it can be shown that the offerer of hearsay under Pa.R.E. 804(b) wrongfully caused the witness to become unavailable, for the purpose of preventing the witness from testifying in person, then the witness will not be considered unavailable. In other words, the offerer forfeits the right to introduce the hearsay.

b. Hearsay Exceptions

There are four exceptions to the hearsay rule in which the offerer of the out-of-court assertion must show that the declarant is unavailable to testify at trial, as unavailability is defined in subsection (a). A Comment pertinent to each of these exceptions follows its definition.

(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 adequate opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Comment

Pa.R.E. 804(b)(1) is identical to F.R.E. 804(b)(1), except that it adds the word "adequate" in front of opportunity. It is consistent with prior Pennsylvania law.

Pennsylvania has two statutes, both of which enact exceptions to the hearsay rule for former testimony, and both of which are entitled, "Notes of evidence at former trial." 42 Pa.C.S. § 5917 applies only to criminal cases. 42 Pa.C.S. § 5934 applies only to civil cases. Both are reenactments of statutes that were originally passed in 1887.

These two statutes, which are limited in scope, have less significance than they might otherwise have because the Pennsylvania Supreme Court has recognized a broader exception to the hearsay rule for former testimony as a matter of its developing common law.

See *Commonwealth v. Rodgers*, 472 Pa. 435, 372 A.2d 771 (1977), a murder case. The Court, affirming a conviction, approved admission, upon offer by the Commonwealth, of testimony given by a witness at defendant's preliminary hearing. The witness refused to testify at defendant's trial on the ground of the Fifth Amendment.

See also, *Commonwealth v. Graves*, 484 Pa. 29, 398 A.2d 644 (1979), a murder case. The Court, affirming a conviction, approved admission, upon offer by the Commonwealth, of testimony given by a witness at a previous trial of defendant. The Court held that the witness was unavailable because he expressed a partial loss of memory concerning pertinent events. The Court explained that it was applying the common law exception to the hearsay rule for former testimony, not 42 Pa.C.S. § 5917.

The party against whom former testimony is offered must have had a similar motive to examine or cross-examine the witness at the prior hearing, not necessarily the same motive.

Testimony given at a preliminary hearing in a criminal case is a recurring problem. The issue at a preliminary hearing is whether probable cause to prosecute defendant exists. This is different than the issue at trial, which is whether defendant is guilty beyond a reasonable doubt. Defendant's motive to cross-examine a witness at a preliminary hearing is sometimes the same as at trial, i.e., to destroy the credibility of the witness. Sometimes, though, defendant's motive at a preliminary hearing is one of discovery, particularly when defendant is convinced that a finding of probable cause is a fait accompli. Sometimes defendant may cross-examine cursorily, or not at all, preferring, as a matter of strategy, to save his best shots for trial.

Nonetheless, most cases have held that testimony given at a preliminary hearing by a subsequently unavailable witness is excepted to the hearsay rule when offered against defendant at trial. See *California v. Green*, 399 U. S. 149 (1970); *Commonwealth v. Clarkson*, 438 Pa. 523, 265 A.2d 802 (1970); *Commonwealth v. Rodgers*, 472 Pa. 435, 372 A.2d 771 (1977).

Cf. *Commonwealth v. Bazemore*, 531 Pa. 582, 614 A.2d 684 (1992), a homicide case. The Commonwealth sought to introduce testimony that a witness for the prosecution, subsequently unavailable, gave at defendant's preliminary hearing. At the time of the preliminary hearing, defendant had not been informed (1) that the witness had made a prior inconsistent statement, (2) that the witness had a criminal record, and (3) that the district attorney was, at that time, contemplating filing criminal charges against the witness for homicide and conspiracy in connection with the same incident that gave rise to the criminal charges against defendant. The Court, ruling on a motion in limine, excluded the evidence. Defendant, in the circumstances, had not had an adequate opportunity to cross-examine and impeach the credibility of the witness at the preliminary hearing.

The *Bazemore* case is a good example of why the word "adequate" was added in front of the word "opportunity" in Pa.R.E. 804(b)(1).

Depositions

Depositions are the most common form of prior testimony that is introduced at a modern trial. Their use is provided for not only by Pa.R.E. 804(b)(1), but also by statute and written rules of procedure promulgated by the Pennsylvania Supreme Court.

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

Depositions in criminal matters

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

42 Pa.C.S. § 5325 sets forth the procedure for taking depositions, by either prosecution or defendant, outside Pennsylvania. A prior statute, enacted in 1909, had provided for the taking of such depositions by the defendant only (former 19 P. S. § 611).

Again, the Pennsylvania Supreme Court, as a matter of common law development, has recognized an exception to the hearsay rule for depositions that is broader than the statute. In Commonwealth v. Stasko, 471 Pa. 373, 370 A.2d 350 (1977), the Court approved admission of a videotape deposition of a sick witness who was located within Pennsylvania. It was taken by the Commonwealth pursuant to court order less than two weeks prior to trial.

In civil cases, the introduction of depositions, or parts thereof, at trial is provided for by Pa.R.C.P. No. 4020(a)(3) and (5):

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

(a) that the witness is dead, or

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

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

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

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

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

The term "medical witness" in Pa.R.C.P. No. 4020(a)(5) is not limited to physicians. It includes, for example, a registered nurse when testifying about her care of a patient. See *Russell v. Albert Einstein Medical Center*, 543 Pa. 532, 673 A.2d 876 (1996).

A videotape deposition of a medical witness, or any expert witness, other than a party to the case, may be introduced in evidence at trial, regardless of the witness's availability, pursuant to Pa.R.C.P. No. 4017.1(g).

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

Medical testimony by deposition

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

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

(2) *Statement Under Belief of Impending Death.* 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.

Comment

Pa.R.E. 804(b)(2) is the same as F.R.E. 804(b)(2), except that the Pennsylvania rule applies in all cases, not just in homicide cases and civil actions. This is a departure from prior Pennsylvania decisional law, which applied the exception only to assertions made by the victim in a criminal prosecution for homicide.

This is one of the more venerable exceptions to the hearsay rule. It is usually referred to as the exception for a "dying declaration."

The declarant doesn't have to be dying, though. He just has to think that he is. If he survives and is available to testify at trial, his out-of-court declarations do not qualify for this exception to the hearsay rule. If he doesn't survive, or survives and is not available to testify, as availability is defined in Pa.R.E. 804(a), they do.

The rationale for this exception to the hearsay rule was set forth in *Commonwealth v. Smith*, 454 Pa. 515, 517—18, 314 A.2d 224, 225 (1973):

> The reliability of a dying declaration is provided not by an oath, nor by cross-examination; rather, its admissibility is based on the premise that no one "who is immediately going into the presence of his Maker will do so with a lie upon his lips." *Luch, L.J., Regina v. Osman*, 15 Cox C.C. 1, 3 (Eng. 1881).

True enough, if a man believes that hellfire and brimstone will follow should he die with a lie on his lips, his dying declaration will likely represent what he believes to be the truth. But this is far from a guarantee thereof. A dying man, in extremis, may be less lucid than normal. Or his dying declaration may be based on suspicion, not personal knowledge. Like Sherlock Holmes, he may be paranoid, and quick, without proof, to attribute his ill fortune to an old enemy. "This is Moriarty's doing."

See *Commonwealth v. Fugmann*, 330 Pa. 4, 198 A 99 (1938), a murder case, in which the victim received a bomb in the mail. Before he died, the victim said, "Fugmann done this." The Court excluded evidence of this assertion on the ground that the victim had no personal knowledge of who sent the bomb. It wasn't offered as a dying declaration, but the court, in dictum, indicated that the result would have been the same had it been so offered.

As the United States Supreme Court explained in *Shepard v. United States*, 290 U. S. 96, 101 (1933):

> Homicide may not be imputed to a defendant on the basis of mere suspicions, though they are the suspicions of the dying. To let the declaration in, the inference must be permissible that there was knowledge or the opportunity for knowledge as to the acts that are declared . . . . The form is not decisive, though it be that of a conclusion, a statement of the result with the antecedent steps omitted. . . . "He murdered me," does not cease to be competent as a dying declaration because in the statement of the act there is also an appraisal of the crime. . . . One does not hold the dying to the observance of all the niceties of speech to which conformity is exacted from a witness on the stand. What is decisive is something deeper and more fundamental than any difference of form. The declaration is kept out if the setting of the occasion satisfies the judge, or in reason ought to satisfy him, that the speaker is giving expression to suspicion or conjecture, and not known facts.

In *Commonwealth v. Miller*, 490 Pa. 457, 470—71, 417 A.2d 128, 135 (1980), the Court said that to qualify for exception to the hearsay rule, a dying declaration "must be based on observations of the declarant and may not merely be an expression of opinion based on reflection or reasoning."

This is, on analysis, an application of a separate evidential rule. If the circumstances indicate that declarant does not have personal knowledge of the matter asserted, the declaration is excludable. See Pa.R.E. 602.

The common law has traditionally, but illogically, excepted a dying declaration to the hearsay rule in a criminal prosecution for homicide, but not in a criminal prosecution for another crime, or in a civil case. Prior Pennsylvania case law followed the common law. See *Commonwealth v. Antonini*, 165 Pa. Super. 501, 69 A.2d 436 (1949).

Reasoned analysis dictates a change. If a dying declaration is trustworthy enough to be introduced against a defendant charged with murder, it should be trustworthy enough to be introduced against a defendant charged with attempted murder, or robbery, or rape. It should also be trustworthy enough to be introduced against a party in a civil case, where, presumably, the stakes are less important than a person's life.

The Advisory Committee appointed by the United States Supreme Court to draft the Federal Rules of Evidence drafted the dying declaration exception to apply in all cases. Traditionalists objected. Congress, in its wisdom, compromised and redrafted Federal Rule of Evidence 804(b)(2) so that it applies in homicide cases and civil cases, but not in nonhomicide criminal cases. This may have been good politics, but it is not good logic. Nor is it good law.

Many states, 23 so far, that have adopted rules of evidence patterned after the Federal Rules of Evidence, depart therefrom and apply the dying declaration exception to the hearsay rule in all cases. Pennsylvania now joins them.

Note: A dying declaration will sometimes qualify for exception to the hearsay rule as an excited utterance. See Pa.R.E. 803(2). See also, *Sadowski v. Eazor Express, Inc.*, 213 Pa. Super. 471, 249 A.2d 842 (1968).

(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. In a criminal case, a statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Comment

The first sentence of Pa.R.E. 804(b)(3) is identical to the first sentence of F.R.E. 804(b)(3). The second sentence differs in that it requires corroborating circumstantial trustworthiness before an assertion against the declarant's penal interest can be introduced by either side in a criminal case. The federal formulation requires such

corroboration only when the statement is offered to exculpate the defendant.

Pa.R.E. 804(b)(3) is consistent with prior Pennsylvania decisional law.

Indiscriminate and inappropriate use of the hybrid term, "admission against interest," has spawned confusion between this exception to the hearsay rule and the separate exception for an admission by a party-opponent. The differences between the two exceptions are significant.

An admission by a party-opponent (1) must be made by, or attributed to, a party in the case, (2) may be introduced only against the party who made the admission, or a party to whom it is attributed, (3) may be introduced whether or not the declarant is available, and (4) need not be contrary to the declarant's interest when made. See Pa.R.E. 803(25).

A statement against interest (1) may be made by anyone, (2) may be introduced against any party, (3) may be introduced only if the declarant is unavailable, and (4) must have been contrary to the declarant's interest (pecuniary, proprietary, or penal) when made.

The rationale for an exception to the hearsay rule for a statement against interest is set forth in *Chambers v. Mississippi*, 410 U. S. 284, 298—99 (1973):

> A number of exceptions have developed over the years to allow admission of hearsay statements made under circumstances that tend to assure reliability and thereby compensate for the absence of the oath and opportunity for cross-examination. Among the most prevalent of these exceptions is the one applicable to declarations against interest—an exception founded on the assumption that a person is unlikely to fabricate a statement against his own interest at the time it is made.

At common law this exception to the hearsay rule encompassed only an assertion against declarant's pecuniary or proprietary interest. It did not include an assertion against declarant's penal interest. This was the law in the federal courts, and the majority view in the state courts, prior to the enactment of Federal Rule of Evidence 804(b)(3) in 1975.

Currently the federal courts, and virtually all state courts, recognize an exception to the hearsay rule for a statement against the declarant's penal interest, at least in some circumstances. There are a number of variations. Cases conflict concerning if, and when, circumstantial corroboration of trustworthiness is required. A few states do not include within the exception a statement that implicates both declarant and defendant when offered against the defendant in a criminal case.

Assertion Against Pecuniary or Proprietary Interest

An assertion against pecuniary or proprietary interest, by an unavailable declarant, has long been excepted to the hearsay rule at common law. It has also long been excepted to the hearsay rule in Pennsylvania, though cases are few and far between.

"Pecuniary" and "proprietary" interests are usually considered together, for purposes of the hearsay rule, and rightly so, because there is a substantial overlap. An assertion against a declarant's proprietary interest, i.e., against the declarant's legal interest in real or personal property, will also be against the declarant's pecuniary interest, unless the property is worthless.

At any rate, Pennsylvania decisional law recognizes an exception to the hearsay rule for an assertion against either the declarant's pecuniary interest, or proprietary interest, or both. See *Heddings v. Steele*, 514 Pa. 569, 526 A.2d 349 (1987).

Assertion Against Penal Interest

Prior to 1973, Pennsylvania followed the common law and did not recognize an exception to the hearsay rule for an assertion against the declarant's penal interest.

Then came *Chambers v. Mississippi*, 410 U. S. 284, (1973), a murder case. The United States Supreme Court, reversing a conviction, held that defendant's constitutional right to due process was violated because a Mississippi state court would not permit him to introduce out-of-court assertions against penal interest made by a witness. The witness had confessed to others that he had committed the crime with which defendant was charged.

Following hot on the heels of the *Chambers* case, the Superior Court recognized an exception to the hearsay rule for an assertion against penal interest in *Commonwealth v. Hackett*, 225 Pa. Super. 22, 307 A.2d 334 (1973), a drug case. The opinion appeared to limit the exception to an assertion that was (1) offered by a defendant in a criminal case for exculpation, and (2) made in circumstances that particularly indicated trustworthiness.

Next year the Supreme Court followed suit. In *Commonwealth v. Nash*, 457 Pa. 296, 324 A.2d 344 (1974), the Court held it reversible error to preclude defendant from introducing evidence that another person admitted that he committed the robbery with which defendant was charged. However, there was no majority opinion. The members of the Court expressed differing views about the scope of the exception.

A year later a plurality of the Supreme Court narrowed the exception substantially. In *Commonwealth v. Colon*, 461 Pa. 577, 337 A.2d 554 (1975), a murder case, defendant unsuccessfully sought to introduce the confession of one Jose Hernandez, in which Hernandez asserted that he killed the victim while acting alone. The plurality opinion for the Court, affirming a conviction, said that an assertion against penal interest is severable, and only that portion of the assertion that is against declarant's penal interest is excepted to the hearsay rule. Thus Hernandez' assertion that he acted alone was not excepted to the hearsay rule. (His assertion that he committed the murder was properly excluded as irrelevant, since the prosecution's theory was that he and defendant acted in concert.)

(It turns out that the Pennsylvania Supreme Court's plurality was ahead of its time. In *Williamson v. United States*, _____U. S. _____, 114 S.Ct 2431 (1994), the United States Supreme Court, resolving a split in the federal circuits, held that Federal Rule of Evidence 804(b)(3) does not except to the hearsay rule a non self-inculpatory assertion, even when contained in a narrative that is generally self-inculpatory. The Supreme Court explained:

> The fact that a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts. One of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature.

114 S.Ct. at 2435.

In *Commonwealth v. Goldblum*, 498 Pa. 455, 447 A.2d 228 (1982), the Court, affirming a conviction of murder, arson, and other crimes, approved admission, upon offer by the prosecution, of testimony relating assertions against penal interest that were made by the deceased victim (he told a witness that defendant promised him money to set fire to defendant's restaurant, and that he did so).

In *Commonwealth v. Bracero*, 515 Pa. 355, 528 A.2d 936 (1987), the Court, affirming a conviction of burglary, approved exclusion of evidence offered by defendant that somebody else, in the course of a social conversation that occurred about a week after the burglary, confessed to the crime. There was no majority opinion, though.

Then, in *Commonwealth v. Williams*, 537 Pa. 1, 640 A.2d 1251 (1994), the Court, affirming a conviction of murder, held that testimony offered by defendant that an inmate of a state prison subsequently confessed to the crime was not excepted to the hearsay rule. The Court, in a majority opinion, said, citing the *Bracero* case:

> Declarations against penal interest are admissible as an exception to the hearsay rule only where there are existing circumstances that provide clear assurances that such declarations are trustworthy and reliable.

537 Pa. at 26 n.8, 640 A.2d at 1263 n.8.

Pa.R.E. 803(b)(3) follows this recent evidential pronouncement from the Pennsylvania Supreme Court and requires circumstantial corroboration of trustworthiness before excepting an assertion against penal interest to the hearsay rule in any criminal case, whether offered by prosecution or defendant.

Courts, over the years, have expressed skepticism about such evidence when offered by the defendant in a criminal case. Courts are particularly suspicious of postconviction evidence that a witness for the prosecution has made an out-of-court recantation of incriminating testimony given at trial, i.e., has admitted perjury. See *Commonwealth v. Woods*, 394 Pa. Super. 223, 575 A.2d 601 (1990), in which the court refused to admit, as an assertion against penal interest, a recanting affidavit of the chief prosecution witness, at a postconviction hearing.

Courts have expressed skepticism about this type of evidence when offered by the prosecution, too. For example, a confessor's assertion that incriminates another may well be inspired by revenge, a natural proclivity to pass the buck, a desire to curry favor with authorities, or an attempt to divert attention to others.

If an assertion against penal interest was excepted to the hearsay rule, without circumstantial corroboration of its trustworthiness, and was offered against the defendant in a criminal case, it would probably be excluded because its admission would violate defendant's right to confront the witnesses against him under either the Sixth Amendment of the United States Constitution, or Article I, § 9 of the Pennsylvania Constitution.

See *Lee v. Illinois*, 476 U. S. 530 (1986), a murder case. The United States Supreme Court, reversing a conviction, held that defendant's constitutional right to confront the witnesses against him was violated when the government was allowed to introduce a nontestifying codefendant's confession that implicated them both.

The Pennsylvania Supreme Court has agreed, unanimously, not to recognize an exception to the hearsay rule for an assertion against social interest, an exception that is recognized in at least ten states. See *Heddings v. Steele*, 514 Pa. 569, 526 A.2d 349 (1987).

(4) *Statement of Personal or Family History.* A statement, made before the controversy arose:

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

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

Comment

Pa.R.E. 804(b)(4) is similar to F.R.E. 804(b)(4), except that it requires the statement of pedigree to be made ante litem motem. It represents a slight broadening of prior Pennsylvania decisional law.

This is generally known as the exception to the hearsay rule for a statement of "pedigree." It is a minor exception to the hearsay rule. These days matters of pedigree are usually proved by public records, or by testimony from knowledgeable witnesses.

When no record exists, and no knowledgeable witnesses are available, assertions made by deceased, or otherwise unavailable, family members, or persons intimately associated therewith, may be the only evidence on the issue of pedigree that exists. On the assumption that it is better to have some evidence, hearsay though it is, than no evidence at all, this exception to the hearsay rule is justified.

Pa.R.E. 804(b)(4) expands prior Pennsylvania decisional law in two respects:

> (1) The declarant no longer needs to be dead. The exception applies if the declarant is unavailable, as "unavailability" is defined in Pa.R.E. 804(a).
>
> (2) The declarant no longer needs to be related to the family of which he spoke. The exception now applies if the declarant "was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared."

The primary reason for this expansion is to conform Pennsylvania law more closely to the law in other jurisdictions, i.e., the federal courts and at least eighty percent of the states. This now represents, by far, the majority view.

In addition, the expansion makes sense. The need for the evidence is the same, whether the declarant is dead, or whether the declarant is unavailable to testify for one of the other reasons delineated in Pa.R.E. 804(a). And a declaration concerning pedigree by one who is "so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared," should be as trustworthy, if not more so, than a declaration by anybody that happens to be related to the other by blood or marriage.

Pennsylvania has, though, retained the requirement that an assertion of pedigree, to qualify for exception to the hearsay rule, be made ante litem motem. This is an important indicium of trustworthiness that outweighs the desirability of uniformity among jurisdictions.

An assertion of pedigree may also, on occasion, qualify for exception to the hearsay rule pursuant to the exceptions for an entry in a business record (Pa.R.E. 803(6)), a public record (42 Pa.C.S. § 6104), a record of a religious organization (Pa.R.E. 803 (11)), a marriage, baptismal and similar certificate (Pa.R.E. 803(12)), a family record (Pa.R.E. 803(13)), a document affecting an interest in property (Pa.R.E. 803(15)), an ancient document (Pa.R.E. 803(16)), reputation concerning pedigree (Pa.R.E. 803(19)), and an assertion against interest (Pa.R.E. 804(b)(3)).

The exception to the hearsay rule for an assertion of pedigree is not employed often. When it is, it is usually in an estate case.

A. Declarant's Own Pedigree

In *In re McClain's Estate*, 481 Pa. 435, 392 A.2d 1371 (1978), four alleged grandnieces of decedent challenged the probate of his will, and the validity of several of his inter vivos conveyances. To prove their relationship to decedent, they offered testimony of a witness as to declarations made by the testator himself about his family and relatives. The trial judge excluded this testimony because there was no proof, dehors the declarations themselves, that the testator was related to the claimants. The Court held it reversible error to exclude the testimony. The Court said:

> [W]hen the out-of-court declarant is the very person whose pedigree is in issue, the declarations are admissible under the pedigree exception to hearsay upon a showing that (1) the declarant is dead, and (2) the declarations were made before the controversy arose.

Id. at 441, 392 A.2d 1374.

Note: Under Pa.R.E. 804(b)(4) the declarant does not have to be dead. Unavailability, as defined in Pa.R.E. 804(a), will suffice.

B. Another Person's Pedigree

In *In re Garrett's Estate*, 371 Pa. 284, 89 A.2d 531 (1952), a wealthy widow died intestate. Nearly 26,000 claims were filed by persons alleging to be her next of kin. The Court, affirming rejection of one such claim, said:

> Pedigree is an exception, arising ex necessitate, to the hearsay rule. Pedigree may be proved by certain limited types of hearsay evidence, including . . . declarations of members of the family.. . .
>
> Declarations as to pedigree are admissible if (1) the declarant is dead; (2) the declarations were made before the controversy arose or as is frequently said, "ante litem motam"; and (3) the declarant was related to the family of which he spoke, and this relationship is proved by evidence dehors the declaration. The rule does not require that the witness who testifies in court must be related to the person whose pedigree is under consideration, but that the declarant whose statements are given in evidence by the witness was so related . . . .

Id. at 287 88, 89 A.2d at 532—33.

Note: Under Pa.R.E. 804(b)(4), the declarant does not have to be dead, nor does the declarant have to be related to the family of which he spoke. See discussion, above.

(5) *[See Comment].*

Comment

Pennsylvania has not adopted F.R.E. 804(b)(5) which reads as follows:

> *Other Exceptions.* A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

The Federal rule is inconsistent with Pennsylvania law, which does not recognize a catch-all exception to the hearsay rule.

Rule 805. Hearsay Within Hearsay

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

Comment

Pa.R.E. 805 is identical to F.R.E. 805. It is consistent with prior Pennsylvania law.

See *Commonwealth v. Galloway*, 302 Pa. Super. 145, 448 A.2d 568 (1982), a prosecution for, inter alia, aggravated assault. The victim, who was defendant's wife, appeared at a local hospital in a hysterical state, and was ministered to by a nurse. At trial the nurse testified that the victim said that defendant said that he was going to kill her. The court, affirming a conviction, approved admission of this testimony. The court explained:

> As to the victim's statements . . . concerning the declaration made by Appellant that he was going to kill the victim, Appellant claims this was hearsay on hearsay.
>
> First, the statement was admissible, as between Appellant and victim, as an admission. See *Commonwealth v. Cooley*, 484 Pa. 14, 398 A.2d 637 (1979). Secondly, as between the victim and the witness, the excited utterance exception . . . qualifies it for admission.
>
> Therefore, Appellant's claim is meritless.

Id. at 158—59, 448 A.2d 575.

Double, or multiple, hearsay is often encountered with respect to business records. The assertion of the entrant is one level of hearsay. If the entrant recorded information supplied by somebody else, then somebody else's assertion is the second level of hearsay. If the person who supplied the information was a person "with knowledge," and if the person's assertion was recorded and kept "in the course of a regularly conducted business activity," both levels of hearsay may be excepted to the hearsay rule by Pa.R.E. 803(6). If not, then another exception to the hearsay rule must be satisfied before the entry will be excepted to the hearsay rule.

For example, a police officer may make a prompt written report following a motor vehicle accident. So far as an entry in the report reflects the officer's own

observations, it is a single level of hearsay and is excepted to the hearsay rule by Pa.R.E. 803(6). If an entry in the report relates a statement made by one of the drivers of the vehicles involved, this is a second level of hearsay. Such an entry is excepted to the hearsay rule if offered by a party-opponent by Pa.R.E. 803(25). But if an entry in the report relates a statement made by a bystander, which lacks circumstantial indicia of reliability, that entry would not be excepted to the hearsay rule.

See *Haas v. Kasnot*, 371 Pa. 580, 92 A.2d 171 (1952), a suit for personal injuries arising out of an automobile accident. A police report was introduced by defendant, pursuant to the Uniform Business Records as Evidence Act (now 42 Pa.C.S. § 6108). The Court, reversing a jury verdict for defendant, said that certain entries in the report were admissible, such as the investigating police officer's observations as to the weather and the location of the cars after the accident. But it was error to admit entries describing how the accident happened, since the police obtained that information second hand from their post accident interviews of unidentified witnesses.

As the court explained in *Hreha v. Benscoter*, 381 Pa. Super. 556, 565, 554 A.2d 525, 529 (1989), "[w]here a business record contains multiple levels of hearsay . . . it is admissible only if each level falls within a recognized exception to the hearsay rule."

Rule 806. Attacking and Supporting Credibility of Declarant.

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

Comment

Pa.R.E. 806 is the same as F.R.E. 806, except that it makes no reference to Rule 801(d)(2). That is because there is no Pa.R.E. 801(d)(2). The subject matter of F.R.E. 801(d)(2) (admissions) is covered by Pa.R.E. 803(25). At any rate, Pa.R.E. 806 has the same effect as F.R.E. 806.

Pa.R.E. 806 is consistent with prior Pennsylvania decisional law.

Pa.R.E. 806 is a codification of common sense. If an out-of-court assertion of a nontestifying witness is introduced against a party, pursuant to an exception to the hearsay rule, the party has no opportunity to cross-examine the witness and thereby expose the weaknesses of the witness's assertion. The party, then, should have the right to impeach the credibility of the witness by whatever other means are available. This includes introduction of any inconsistent statement that the witness has made, in which case it would be impossible to enforce the Rule in Queen Caroline's Case, or the modified version thereof set forth in Pa.R.E. 613(b). You can't confront a witness who isn't there with an inconsistent statement, or anything else.

See *Commonwealth v. Davis*, 363 Pa. Super. 562, 526 A.2d 1205 (1987), a murder case. Defendant introduced testimony that a defense witness gave at defendant's preliminary hearing, after the witness became unavailable at trial. The Commonwealth then called a policeman who read into evidence a prior inconsistent statement that he took from the witness immediately following the crime. The court, affirming a conviction, held, over a hearsay objection, that this evidence was properly admitted to impeach the credibility of the witness, whose former testimony had been introduced by defendant.

The last sentence of Pa.R.E. 806 allows the party against whom a hearsay statement has been admitted to call the declarant as a witness and cross-examine him or her about the statement.

ARTICLE IX. AUTHENTICATION AND IDENTIFICATION

Rule 901. Requirement of Authentication or Identification

(a) *General Provision.* The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) *Illustrations.* By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) *Testimony of Witness With Knowledge.* Testimony that a matter is what it is claimed to be.

(2) *Nonexpert Opinion on Handwriting.* Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) *Comparison by Trier or Expert Witness.* Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) *Distinctive Characteristics and the Like.* Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) *Voice Identification.* Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) *Telephone Conversations.* Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) *Public Records or Reports.* Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) *Ancient Documents or Data Compilation.* Evidence that a document or data compilation, in any form, (A) is

in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 30 years or more at the time it is offered.

(9) *Process or System*. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) *Methods Provided by Law*. Any method of authentication or identification provided by statute or by other rules prescribed by the Supreme Court.

Comment

Paragraph 901(a) is identical to F.R.E. 901(a). This paragraph is consistent with Pennsylvania law. Although the authentication or identification requirement has not been authoritatively defined, Pennsylvania courts have imposed the requirement. It may be expressed as follows: When a party offers evidence contending either expressly or impliedly that the evidence is connected with a person, place, thing or event, the party must provide evidence sufficient to support a finding of the contended connection. See *Commonwealth v. Pollock*, 414 Pa. Super. 66, 606 A.2d 500 (1992); *Commonwealth v. Hudson*, 489 Pa. 620, 414 A.2d 1381 (1980).

Authentication or identification is a category of relevancy dependent upon the fulfillment of a condition of fact. See Pa.R.E. 104(b). As such, the proponent of the evidence must provide evidence sufficient to support a finding of the contended connection. This is consistent with Pennsylvania law. See *Commonwealth v. Carpenter*, 472 Pa. 510, 372 A.2d 806 (1977).

In some cases real evidence may not be relevant unless its condition at the time of trial is similar to its condition at the time of the incident in question. In such cases the party offering the evidence must also offer evidence sufficient to support a finding that the condition is similar. Pennsylvania law treats this requirement as an aspect of authentication. See *Commonwealth v. Hudson*, 489 Pa. 620, 414 A.2d 1381 (1980); *Heller v. Equitable Gas Co.*, 333 Pa. 433, 3 A.2d 343 (1939).

Demonstrative evidence such as photographs, motion pictures, diagrams and models must be authenticated by evidence sufficient to support a finding that the demonstrative evidence fairly and accurately represents that which it purports to depict. See *Nyce v. Muffley*, 384 Pa. 107, 119 A.2d 530 (1956). Paragraph 901(b) is identical to F.R.E. 901(b). The illustrations are not intended to be all-inclusive or exclusive.

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

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

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

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

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

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

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

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

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

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

There are a number of statutes that provide for authentication or identification of various types of evidence. See, e.g., 42 Pa.C.S.A. § 6103 (official records within the Commonwealth); 42 Pa.C.S.A. § 5328 (domestic records outside the Commonwealth and foreign records) 35 P. S. § 450.810 (vital statistics); 42 Pa.C.S.A. § 6106 (documents filed in a public office); 42 Pa.C.S.A. § 6110 (certain registers of marriages, births and burials records); 75 Pa.C.S.A. § 1547(c) (chemical tests for alcohol and controlled substances); 75 Pa.C.S.A. § 3368 (speed timing devices); 75 Pa.C.S.A, § 1106(c) (certificates of title); 42 Pa.C.S.A. § 6151 (certified copies of medical records); 23 Pa.C.A. § 5104 (blood tests to determine paternity); 23 Pa.C.S.A. § 4343 (genetic tests to determine paternity).

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

Rule 902. Self-Authentication.

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) *Domestic Public Documents Under Seal.* A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) *Domestic Public Documents Not Under Seal.* A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) *Foreign Public Documents.* A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) *Certified Copies of Public Records.* A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any statute or rule prescribed by the Supreme Court.

(5) *Official Publications.* Books, pamphlets, or other publications purporting to be issued by public authority.

(6) *Newspapers and Periodicals.* Printed materials purporting to be newspapers or periodicals.

(7) *Trade Inscriptions and the Like.* Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) *Acknowledged Documents.* Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) *Commercial Paper and Related Documents.* Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(10) *Presumptions Authorized by Statute.* Any signature, document or other matter declared by statute to be presumptively or prima facie genuine or authentic.

Comment

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

Paragraphs 902(1), (2), (3) and (4) deal with self-authentication of various kinds of public documents and records and are identical to F.R.E. 902(1), (2), (3) and (4). These paragraphs are consistent with Pennsylvania statutory law. See 42 Pa.C.S.A. § 6103 (official records within the Commonwealth); 42 Pa.C.S.A. § 5328 (domestic records outside the Commonwealth and foreign records) 35 P. S. § 450.810 (vital statistics); 42 Pa.C.S.A. § 6106 (documents filed in a public office). It is not intended that these paragraphs supersede the existing statutory provisions.

Paragraphs 902(5), (6) and (7) are identical to F.R.E. 902(5), (6) and (7). There are no corresponding statutory provisions in Pennsylvania, although 45 Pa.C.S.A. § 506 (judicial notice of the contents of the *Pennsylvania Code* and the *Pennsylvania Bulletin*) is similar to 902(5). Despite the fact that these paragraphs are new to Pennsylvania, their adoption is amply supported by the rationale for this rule. It is very unlikely that these items would be forged. Such forgery would be reasonably discoverable with minimal effort by the opposing party, and the cost and time consumption involved in proving authenticity is not justified by the minimal risks.

Paragraph 902(8) is identical to F.R.E. 902(8). It is consistent with Pennsylvania law. See *Sheaffer v. Baeringer*, 346 Pa. 32, 29 A.2d 697 (1943); *Williamson v. Barrett*, 147 Pa. Super. 460, 24 A.2d 546 (1942). An acknowledged document is a type of official record and the treatment of acknowledged documents is consistent with Paragraphs 902(1), (2), (3) and (4).

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

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

Rule 903. Subscribing Witness' Testimony Unnecessary.

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

Comment

This rule is identical to F.R.E. 903. The rule is consistent with Pennsylvania law, in that there are no laws in Pennsylvania requiring the testimony of a subscribing witness to authenticate a writing.

ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

Rule 1001. Definitions

For purposes of this article the following definitions are applicable:

(1) *Writings and Recordings.* "Writings" and "recordings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(2) *Photographs.* "Photographs" include still photographs, X ray films, video tapes, and motion pictures.

(3) *Original.* An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original."

(4) *Duplicate.* A "duplicate" is a copy produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.

Comment

This rule is identical to F.R.E. 1001, except that the word "copy" in Pa.R.E. 1001(4) replaces the word "counterpart" used in F.R.E. 1001(4).

Paragraph 1001(1) and (2) have no precise equivalent in Pennsylvania law, but the definitions of the terms writings, recordings and photographs are consistent with lay and legal usage in Pennsylvania.

The definition of an original writing, recording or photograph contained in paragraph 1001(3) appears to be consistent with Pennsylvania practice.

The definition of an original of data stored in a computer or similar device in paragraph 1001(3) is consistent with Rule Pa.R.E. 901(b)(9) (authentication of evidence produced by a process or system).

Paragraph 1001(4) defines the term duplicate. This term is important because of the admissibility of duplicates under Pa.R.E. 1003. This Rule differs from the Federal Rule in that the word "counterpart" has been replaced by the word "copy." The word copy is used to mean a copy that was not intended to have the same effect as the original. Pennsylvania law has permitted the use of duplicates produced by the same impression as the original, as is the case with carbon copies. See *Brenner v. Lesher*, 332 Pa. 522, 2 A.2d 731 (1938); *Commonwealth v. Johnson*, 373 Pa. Super. 312, 541 A.2d 332, appeal denied, 520 Pa. 596, 552 A.2d 250 (1988); *Pennsylvania Liquor Control Bd. v. Evolo*, 204 Pa. Super. 225, 203 A.2d 332 (1964). Pennsylvania has not treated other duplicates as admissible unless the original was shown to be unavailable through no fault of the proponent. *Hera v. McCormick*, 425 Pa. Super. 432, 625 A.2d 682 (1993); *Warren v. Mosites Construction Co.*, 253 Pa. Super. 395, 385 A.2d 397 (1978). For this reason, the definition of duplicates, other than those produced by the same impression as the original, is new to Pennsylvania law. The justification for adopting the new definition is discussed in the Comment to Pa.R.E. 1003.

Rule 1002. Requirement of Original.

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules, by other rules prescribed by the Supreme Court, or by statute.

Comment

This rule differs from F.R.E. 1002 in order to eliminate the reference to federal law and to make the paragraph conform to Pennsylvania law; Pa.R.E. 1002 is consistent with Pennsylvania law.

This rule corresponds to the common law "best evidence rule." See *Warren v. Mosites Construction Co.*, 253 Pa. Super. 395, 385 A.2d 397 (1978). The rationale for the rule was not expressed in Pennsylvania cases, but commentators mentioned four reasons justifying the rule.

(1) The exact words of many documents, especially operative or dispositive documents, such as deeds, wills or contracts, are so important in determining a party's rights accruing under those documents.

(2) Secondary evidence of the contents of documents, whether copies or testimony is susceptible to inaccuracy.

(3) The rule inhibits fraud because it allows the parties to examine the original documents to detect alterations and erroneous testimony about the contents of the document.

(4) The appearance of the original may furnish information as to its authenticity.

5 Weinstein & Berger, *Weinstein's Evidence* § 1002(2) (Sandra D. Katz rev. 1994).

The common law formulation of the rule provided that the rule was applicable when the terms of the document were "material." The materiality requirement has not been eliminated, but is now dealt with in rule 1004(4). That rule provides that the original is not required when the writing, recording or photograph is not closely related to a controlling issue.

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

Traditionally, the best evidence rule applied only to writings. Photographs, which under the definition established by Pa.R.E. 1001(2) include x-ray films, videotapes, and motion pictures, are usually only evidence of the transaction, thing or event. It is only rarely that a photograph would be operative or dispositive, but in cases involving matters such as infringement of copyright, defamation, pornography and invasion of privacy the requirement for the production of the original should be applicable. See Weinstein and Berger, *Weinstein's Evidence*, § 1002(2) [01] (1993). There is some recent authority for this treatment of photographs in Pennsylvania. See *Commonwealth v. Lewis*, 424 Pa. Super. 531, 623 A.2d 355 (1993) (video tape); *Anderson v. Commonwealth*, 121 Pa. Cmwlth. 521, 550 A.2d 1049 (1988) (film).

Rule 1003. Admissibility of Duplicates.

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

Comment

This rule is identical to F.R.E. 1003. This rule is a modest extension of Pennsylvania law.

Under the traditional best evidence rule, copies of documents were not routinely admissible. This view dated back to the time when copies were made by hand copying and were therefore subject to inaccuracy. On the other hand, Pennsylvania courts have admitted copies made by techniques that are more likely to produce accurate copies. For example, when a writing is produced in duplicate or multiplicate each of the copies is treated as admissible for purposes of the best evidence rule. See *Brenner v. Lesher*, 332 Pa. 522, 2 A.2d 731 (1938); *Pennsylvania Liquor Control Board v. Evolo*, 204 Pa. Super. 225, 203 A.2d 332 (1964).

In addition, various Pennsylvania statutes have treated some accurate copies as admissible. See 42 Pa.C.S.A. § 6104 (governmental records in the Commonwealth); 42 Pa.C.S.A. § 5328 (domestic records outside the Commonwealth and foreign records); 42 Pa.C.S.A. § 6106 (documents recorded or filed in a public office); 42 Pa.C.S.A. § 6109 (photographic copies of business and public records); 42 Pa.C.S.A. § 6151 59 (certified copies of medical records).

The extension of similar treatment to all accurate copies seems justified in the light of modern practice. Pleading and discovery rules such as Pa.R.C.P. 4009(a) (requiring production of originals of documents and photographs etc.) and Pa.R.Crim.P. 305(B)(1)(f) and (g) (requiring disclosure of originals of documents, photographs and recordings of electronic surveillance) will usually provide an adequate opportunity to discover fraudulent copies. As a result, this rule should tend to eliminate purely technical objections and unnecessary delay. In those cases where the opposing party raises a genuine question as to authenticity or the fairness of using a duplicate the trial court may require the production of the original under this rule.

Rule 1004. Admissibility of Other Evidence of Contents.

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if—

(1) *Originals Lost or Destroyed*. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) *Original Not Obtainable*. No original can be obtained by any available judicial process or procedure; or

(3) *Original in Possession of Opponent*. At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or

(4) *Collateral Matters*. The writing, recording, or photograph is not closely related to a controlling issue.

Comment

This rule is identical to F.R.E. 1004.

Paragraph 1004(1) is consistent with Pennsylvania law in that the original is not required when the original has been lost or destroyed, unless the proponent lost or destroyed it in bad faith. See *Olson & French, Inc. v. Commonwealth*, 399 Pa. 266, 160 A.2d 401 (1960); *Brenner v. Lesher*, 332 Pa. 522, 2 A.2d 731 (1938). When the proponent of the evidence alleges that it is lost, there should be evidence that a sufficient search was made. See *Brenner v. Lesher*, 332 Pa. 522, 2 A.2d 731 (1938); *Hera v. McCormick*, 425 Pa. Super. 432, 625 A.2d 682 (1993).

Paragraph 1004(2) is consistent with Pennsylvania law in that the original is not required when the original is not obtainable by any available judicial process or procedure. See *Otto v. Trump*, 115 Pa. 425, 8 A. 786 (1887).

Paragraph 1004(3) is consistent with Pennsylvania law in that production of the original is not required when the original was under control of the party against whom it is offered at a time when that party was put on notice that the contents would be a subject of proof. See *Abercrombie v. Bailey*, 326 Pa. 65, 190 A. 725 (1937).

Paragraph 1004(4) is consistent with Pennsylvania law in that production of the original is not required where the original is not closely related to a controlling issue. See *McCullough v. Holland Furnace Co.*, 293 Pa. 45, 141 A. 631 (1928); *Durkin v. Equine Clinics, Inc.*, 313 Pa. Super. 75, 459 A.2d 417 (1983).

Under F.R.E. 1004 there are no degrees of secondary evidence. When production of the original is not required, the proffering party need not offer a duplicate even if that is available; the proffering party may present any evidence including oral testimony. See F.R.E. 1004, Advisory Committee's Note. There is some authority in Pennsylvania that seems to require the next best evidence when presentation of the original is not required. See *Otto v. Trump*, 115 Pa. 425, 8 A. 786 (1887); *Stevenson, Bowen & Nesmith v. Hoy*, 43 Pa. 191 (1862). This approach, creating a hierarchy of preferences, seems to add an unnecessary level of complexity. The normal motivation of a party to produce the most convincing evidence together with the availability of discovery to uncover fraud seems adequate to control abuse, and thus, Pa.R.E. 1004 follows the approach of F.R.E. 1004.

Rule 1005. Public Records.

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

Comment

The language of the first sentence of this rule differs somewhat from F.R.E. 1005 to conform more closely to Pa.R.E. 901 and 902. The changes are not intended to be substantive. This rule is consistent with Pennsylvania law. There are several statutes that provide that copies of various kinds of public documents and records are admissible. See Comments to Pa.R.E. 901 and 902.

Rule 1006. Summaries.

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

Comment

This rule is identical to F.R.E. 1006 and is consistent with Pennsylvania law. See *Scaife Co. v. Rockwell-Standard Corp.*, 446 Pa. 280, 285 A.2d 451 (1971); *Royal Pioneer Paper Box Manufacturing Co. v. Louis Dejonge & Co.*, 179 Pa. Super. 155, 115 A.2d 837 (1955); *Keller v. Porta*, 172 Pa. Super. 651, 94 A.2d 140 (1953).

Rule 1007. Testimony or Written Admission of Party.

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party's written admission, without accounting for the nonproduction of the original.

Comment

This rule is identical to F.R.E. 1007. There is no precise equivalent to Pa.R.E. 1007 under Pennsylvania law, but the rule is consistent with Pennsylvania practice. Pa.R.C.P. 1019(h) requires a party to attach a copy of a writing to a pleading, if any claim or defense is based on the writing. A responsive pleading admitting the accuracy of the writing would preclude an objection based on the original writings rule. Similarly, Pa.R.C.P. 4014(a) permits a party to serve any other party with a request for admission as to the genuineness, authenticity, correctness, execution, signing, delivery, mailing or receipt of any document described in the request. Pa.R.C.P. 4014(d) provides that any matter admitted is conclusively established.

Pa.R.E. 1007 is somewhat more expansive but serves the same purpose of eliminating frivolous objections.

Rule 1008. Functions of Court and Jury.

When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of Pa.R.E. 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

Comment

This rule is identical to F.R.E. 1008 except for the reference to "Pa.R.E." instead of "rule." There is no equivalent to this rule under Pennsylvania law but this approach appears to conform to Pennsylvania practice.

[Pa.B. Doc. No. 97-402. Filed for public inspection March 14, 1997, 9:00 a.m.]

DISCIPLINARY BOARD OF THE SUPREME COURT

Notice of Disbarment

Notice is hereby given that Frederick C. Creasy, Jr. has been disbarred from the practice of law in the State of Arizona by Order of the Supreme Court of Arizona dated September 19, 1996. The Supreme Court of Pennsylvania issued an order dated February 28, 1997 disbarring Frederick C. Creasy, Jr. from the practice of law in this Commonwealth, to be effective March 30, 1997.

ELAINE M. BIXLER,
Secretary
The Disciplinary Board of the Supreme Court of Pennsylvania

[Pa.B. Doc. No. 97-403. Filed for public inspection March 14, 1997, 9:00 a.m.]

Notice of Disbarment

Notice is hereby given that Llewellyn Dewitt has been disbarred from the practice of law in the District of Columbia by Order of the District of Columbia Court of Appeals dated October 3, 1996. The Supreme Court of Pennsylvania issued an Order dated February 28, 1997 disbarring Llewellyn Dewitt from the practice of law in this Commonwealth, to be effective March 30, 1997.

ELAINE M. BIXLER,
Secretary
The Disciplinary Board of the
Supreme Court of Pennsylvania

[Pa.B. Doc. No. 97-404. Filed for public inspection March 14, 1997, 9:00 a.m.]