THE COURTS

Title 225—RULES OF EVIDENCE

SUPREME COURT OF PENNSYLVANIA

Pennsylvania Rules of Evidence

Order

Now, this 8th day of May, 1998, upon recommendation of the Pennsylvania Supreme Court Ad Hoc Committee on Evidence; the proposed draft of the Pennsylvania Rules of Evidence having been published in the *Pennsylvania Bulletin* (Vol. 27, No. 11 at 1282 et seq., March 15, 1997); and public review of the proposal having been solicited, received, and considered:

It Is Hereby Ordered pursuant to Article V, Section 10 of the Constitution of the Commonwealth of Pennsylvania that the Pennsylvania Rules of Evidence are hereby adopted in the attached form.

This *Order* shall be processed in accordance with Pa.R.J.A. 103(b), and shall be effective October 1, 1998.

JOHN P. FLAHERTY,
Chief Justice

Preface

The Comments to these rules have been prepared by the Ad Hoc Committee on Evidence for the convenience of the Bench and Bar. They have not been adopted by the Supreme Court of Pennsylvania, and it is not intended that they have precedential significance.

The Comments are designed to identify the sources for the rules, to compare the Pennsylvania Rules of Evidence to the Federal Rules of Evidence, and to explain the differences. Although the Pennsylvania rules closely follow the format of the Federal Rules, the guiding principle has been to preserve the Pennsylvania law of evidence. For that reason, the decisions of other courts applying the Federal Rules are not intended to have precedential significance. Whenever a rule departs from Pennsylvania law the Comments identify the departure.

Annex A

TITLE 225. RULES OF EVIDENCE

ARTICLE I. GENERAL PROVISIONS

Rule

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

These rules are applicable 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. See, e.g., Pa.C.R.P. 1305 (rules of evidence shall be followed in compulsory arbitration hearings, with specific provisions relating to the admissibility of certain written evidence and official documents).

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 criminal cases. In criminal cases, the accused is entitled to relief for an erroneous ruling unless the court is convinced beyond a reasonable doubt that the error is harmless. See *Commonwealth v. Story*, 476 Pa. 391, 383 A.2d 155 (1978). Civil cases are governed by Pa.R.C.P. 126 which permits the court to disregard an erroneous ruling "which does not affect the substantial rights of the parties." Pa.R.E. 103(a) does not change the existing rule.

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) and (a)(2). The term "motion in limine" has been added and the last three words have been changed. Motions in limine permit the trial court to make rulings on evidence prior to trial or at trial but before the evidence is offered. Such motions can expedite the trial and assist in producing just determinations. A ruling on a motion in limine on the record is sufficient to preserve the issue for appeal, without renewal of the objection or offer at trial. The change in language is intended to make clear that the requirement that offers of proof be made is applicable to testimonial and other types of evidence.

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 some capital cases, the Supreme Court has relaxed traditional waiver concepts. 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 (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 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 (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.

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

Paragraph 104(b) is identical to F.R.E. 104(b) and appears to be consistent with 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). Paragraph 104(c) 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 is necessary to prevent the jury from hearing prejudicial information. 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), however, when the accused in a criminal case testifies only with regard to a prelimi-

nary 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) to clarify the meaning of this paragraph. See 21 Wright and Graham, *Federal Practice and Procedure* § 5058 (1977). 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. In addition to the approach taken by Pa.R.E. 105, there are other ways to deal with evidence that is admissible as to one party or for one purpose, but not admissible as to another party or for another purpose. For example, the evidence may be redacted. See *Commonwealth v. Johnson*, 474 Pa. 410, 378 A.2d 859 (1977). Or, 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; *McShain v. Indemnity Ins. 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 rule is identical to F.R.E. 106. It is consistent with Pennsylvania law. See *Pedretti v. Pittsburgh Rys. Co.*, 417 Pa. 581, 209 A.2d 289 (1965). A similar principle is expressed in Pa.R.C.P. 4020(a)(4), which states: "If only part of a deposition is offered in evidence by a party, any other party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts."

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 2 McCormick, *Evidence* § 328 (4th ed. 1992).

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

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

Paragraph (c) is consistent with Pennsylvania practice.

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

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

Paragraph (f) resolves an apparent inconsistency in Pennsylvania law. Pennsylvania law has not been completely consistent with regard to whether a court may take judicial notice at the pleading stage of proceedings. See *Clouser v. Shamokin Packing Co.*, 240 Pa. Super. 268, 361 A.2d 836 (1976) (trial court generally should not take

judicial notice at the pleading stage); *Bykowski v. Chesed Co.*, 425 Pa. Super. 595, 625 A.2d 1256 (1993) (trial court may take judicial notice in ruling on motion for judgment on the pleadings). Similarly, older authority has held that judicial notice may not be taken at the appellate stage. See *Wilson v. Pennsylvania R.R. Co.*, 421 Pa. 419, 219 A.2d 666 (1966). More recently, the Supreme Court has taken judicial notice at the appellate stage. See *Commonwealth v. Tau Kappa Epsilon*, 530 Pa. 416, 609 A.2d 791 (1992). Pa.R.E. 201(f) permits judicial notice to be taken at any stage.

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

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

Pa.R.E. 301 is similar to F.R.E. 301 in that it does not modify existing law. Pa.R.E. 301 differs from F.R.E. 301 in that this rule does not establish the effect of a presumption on the burden of proof.

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, 54, 389 A.2d 79, 82 (1978): "Evidence which tends to establish some fact material to the case, or which tends to make a fact at issue more or less probable, is relevant." Whether evidence has a tendency to make a given fact more or less probable is to be determined by the court in the light of reason, experience, scientific principles and the other testimony offered in the case.

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

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

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 rule-making and decisional law. These rules of evidence are not intended to supersede other provisions of law, unless they do so expressly or by necessary implication.

Examples of decisionally created rules of exclusion that are not abrogated by the adoption of these rules include: the corpus delicti 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).

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

Although relevant, evidence may be excluded if its probative value is 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." Pa.R.E. 403 eliminates the word "substantially" to conform the text of the rule more closely to Pennsylvania law. See *Commonwealth v. Boyle*, 498 Pa. 486, 447 A.2d 250 (1982);

Morrison v. Commonwealth, Dept. of Pub. Welfare, 538 Pa. 122, 646 A.2d 565 (1994).

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

With regard to evidence of other crimes, wrongs or acts of the defendant in a criminal case, see Pa.R.E. 404(b)(3).

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

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

(i) In a criminal case, evidence of a pertinent trait of character of the complainant 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 (impeachment of witness), 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 (b)(2) of this rule may be admitted in a criminal case only upon a showing that the probative value of the evidence outweighs its potential for prejudice.

(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

The basic principle of Pa.R.E. 404 is consistent with F.R.E. 404 and Pennsylvania law. Pa.R.E. 404, with certain enumerated exceptions, provides that character evidence cannot be used to prove conduct. Under this rule, evidence that an employee had a character trait of absent-mindedness would not be admissible to prove that on a particular occasion he or she failed to fasten the safety latch on a piece of equipment. The rule does not preclude the use of character evidence for other purposes, including where character is an element of a claim or defense. See, e.g., *Dempsey v. Walso Bureau, Inc.*, 431 Pa. 562, 246 A.2d 418 (1968) (negligent employment); *Commonwealth ex rel. Grimes v. Grimes*, 281 Pa. Super 484, 422 A.2d 572 (1980) (parental fitness).

The exceptions to the Rule differ from F.R.E. 404 as indicated below.

Subsection (a). Subsection (a) of the rule differs from F.R.E. 404(a). The exception provided at Pa.R.E. 404(a)(2)(iii) does not appear in the federal rule. It is consistent with Pennsylvania decisional law. See *Bell v. Philadelphia*, 341 Pa. Super. 534, 491 A.2d 1386 (1985).

Subsection (a)(2) is consistent with Pennsylvania law. See, e.g., *Commonwealth v. Dillon*, 528 Pa. 417, 598 A.2d 963 (1991); *Commonwealth v. Amos*, 445 Pa. 297, 284 A.2d 748 (1971); see also Pa.R.E. 405 (regarding means of proof of the complainant's character for violence).

Subsection (b). This rule is similar to F.R.E. 404(b) in recognizing legitimate evidentiary purposes for the introduction of evidence of other crimes, wrongs or bad acts. Unlike the federal rule, however, Pennsylvania law provides a distinct standard for balancing the inherent prejudice of such evidence against its probative value. Under federal law, if evidence of other crimes, wrongs or bad acts is offered for a legitimate evidentiary purpose, the evidence is admissible if it meets the general standard of F.R.E. 403. F.R.E. 403 provides that relevant evidence is admissible unless its probative value is substantially outweighed by prejudicial danger. Under Pennsylvania law, evidence of other crimes, wrongs or bad acts offered for a legitimate evidentiary purpose is admissible only if its probative value outweighs the potential for prejudice. See *Commonwealth v. Morris*, 493 Pa. 164, 425 A.2d 715 (1981). Pa.R.E. 404(b)(3) codifies Pennsylvania decisional law and is an exception to the general rule defined by Pa.R.E. 403.

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. 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:

(1) In civil cases where character or a trait of character is admissible as an element of a claim or defense, character may be proved by specific instances of conduct.

(2) In criminal cases where character or a trait of character is admissible under Pa.R.E. 404(a)(2), the accused may prove the complainant's character or trait of character by specific instances of conduct.

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. See *Com. v. Lopinson*, 427 Pa. 284, 234 A.2d 552 (1967).

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 because Pa.R.E. 405(a) prohibits cross-examination of reputation witnesses offered on behalf of a defendant in a criminal case regarding arrests of the defendant not resulting in conviction. This is consistent with Pennsylva-

nia law. See *Commonwealth v. Scott*, 496 Pa. 188, 436 A.2d 607 (1981). Where a reputation witness is cross-examined regarding specific instances of conduct, the court should take care that the cross-examiner has a reasonable basis for the questions asked. See *Commonwealth v. Adams*, 426 Pa. Super. 332, 626 A.2d 1231 (1993).

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

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

Subsection (b)(1). With regard to civil cases, Pa.R.E. 405(b)(1) is identical to the federal rule in permitting proof of character by specific instances of conduct where character is an essential element of the claim or defense. This is consistent with Pennsylvania law. See *Matusak v. Kulczewski*, 295 Pa. 208, 145 A. 94 (1928); *Dempsey v. Walso Bureau, Inc.*, 431 Pa. 562, 246 A.2d 418 (1968); *Commonwealth ex rel. Grimes v. Grimes*, 281 Pa. Super. 484, 422 A.2d 572 (1980).

Subsection (b)(2). In criminal cases under Pa.R.E. 404(a)(2), the accused may offer evidence of a pertinent trait of character of the complainant. In such a case the trait may be proven by specific instances of conduct. This is consistent with Pennsylvania law. See *Commonwealth v. Dillon*, 528 Pa. 417, 598 A.2d 963 (1991); *Commonwealth v. Amos*, 445 Pa. 297, 284 A.2d 748 (1971).

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 is consistent with 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. See, e.g., *Commonwealth v. Rivers*, 537 Pa. 394, 644 A.2d 710 (1994) (allowing testimony based on familiarity with another's conduct); *Baldridge*, 378 Pa. at 570; 106 A.2d at 811 (testimony of uniform practice apparently permitted without examples of specific instances).

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 advisory committee's note (quoting 1 McCormick, *Evidence* § 162).

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

Pa.R.E. 407 is consistent with Pennsylvania law. It restates the traditional Pennsylvania doctrine that evidence of subsequent remedial measures is not admissible to prove fault or negligence. See *Baran v. Reading Iron Co.*, 202 Pa. 274, 51 A. 979 (1902).

Pa.R.E. 407 differs from F.R.E. 407 in several ways. First, F.R.E. 407 provides that evidence of subsequent measures is not admissible to prove "a defect in a product, a defect in a product's design, or a need for a warning or instruction." Pa.R.E. 407 is silent on the issue whether it excludes subsequent remedial measures when offered to prove a defect in strict products liability. The Pennsylvania Superior Court has issued partially conflicting decisions on whether subsequent remedial measures are admissible to prove defect in strict products 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. 407 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.

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. F.R.E. 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). Pa.R.E. 407 does not, however, address whether measures taken by another party are admissible against a party that did not take the measures.

Regardless of Pa.R.E. 407, evidence of subsequent remedial measures is not admissible unless it satisfies the standards of Pa.R.E. 401, 402, and 403.

The last sentence of Pa.R.E. 407 differs from F.R.E. 407 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.

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 an admission of fact 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, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Comment

This rule is similar to F.R.E. 408. Contrary to its federal counterpart, however, Pa.R.E. 408 does not bar the use of all statements and conduct occurring during settlement negotiations. In this respect, the rule is consistent with Pennsylvania law that distinct admissions of fact made during settlement discussions are admissible. See *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).

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).

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

§ 6141. Effect of certain settlements

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

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

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

See *Hatfield v. Continental Imports, Inc.*, 530 Pa. 551, 610 A.2d 446 (1992) (evidence of Mary Carter agreement admissible to show bias or prejudice, and not excluded by § 6141(c)).

Under Pa.R.E. 408, as under F.R.E. 408, evidence of offers to compromise or completed compromises is admissible when used to prove an effort to obstruct a criminal investigation or prosecution. This is consistent with Pennsylvania law. See *Commonwealth v. Pettinato*, 360 Pa. Super. 242, 520 A.2d 437 (1987). Pa.R.E. 408 does not permit, however, the use of evidence relating to good faith compromises or offers to compromise when made for the purpose of reaching an agreement such as those 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. See 42 Pa.C.S.A. § 6141(c) (payment of expenses not admissible) (text quoted in Comment to Pa.R.E. 408); 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 Pa.R.E. 408 (but not F.R.E. 408), collateral admissions of fact 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 by the defendant and the statement ought in fairness to be considered contemporaneously with it, or (2) in a criminal proceeding for perjury, false swearing or unsworn falsification to authorities if the statement was made by the defendant, under oath, and in the presence of counsel.

Comment

This rule is similar 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).

Pa.R.E. 410 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); Pa.R.Crim.P. 177(b), 179(b).

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

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

§ 6142. Pleas in vehicle matters

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

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

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 consistent with Pennsylvania law that evidence of insurance may be admitted, notwithstanding some prejudicial effect, if the evidence is relevant to prove an issue other than negligence or wrongful conduct. E.g., *Beechwoods Flying Serv. v. Al Hamilton Contracting Corp.*, 504 Pa. 618, 476 A.2d 350 (1984); *Price v. Yellow Cab Co.*, 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.R. Co.*, 167 Pa. Super. 244, 74 A.2d 531 (1950). As with all evidence, evidence not excluded by this rule may be excluded under Pa.R.E. 403.

Rule 412. Sex Offense Cases: Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition (Rape Shield Law) [Not Adopted].

Comment

Pennsylvania has not adopted a Rule of Evidence comparable to F.R.E. 412. In Pennsylvania this subject is governed by 18 Pa.C.S. § 3104 (the "Rape Shield Law").

18 Pa.C.S.A. § 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).

F.R.E. 412 is applicable in civil cases. There is no comparable provision in Pennsylvania law.

ARTICLE V. PRIVILEGES

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 the Court finds that because of a mental condition or immaturity the person:

(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

Pa.R.E. 601(a) differs from F.R.E. 601. F.R.E. 601 abolishes all existing grounds of incompetency except for those specifically provided in later rules dealing with witnesses and in civil actions governed by state law. Pa.R.E. 601(b) has no counterpart in the Federal Rules.

Pa.R.E. 601(a) is consistent with Pennsylvania statutory law. 42 Pa.C.S.A. §§ 5911 and 5921 provide that all witnesses are competent except as otherwise provided. Pennsylvania statutory law provides several instances in which witnesses are incompetent. See, e.g., 42 Pa.C.S.A. § 5922 (persons convicted in a Pennsylvania court of perjury incompetent in civil cases); 42 Pa.C.S.A. § 5924 (spouses incompetent to testify against each other in civil cases with certain exceptions set out in 42 Pa.C.S.A. §§ 5925, 5926, and 5927); 42 Pa.C.S.A. §§ 5930—5933 and 20 Pa.C.S.A. § 2209 ("Dead Man's statutes").

Pa.R.E. 601(a) does not recognize any decisional grounds for incompetency. At one time Pennsylvania law provided that neither a husband nor a wife was competent to testify to non-access or absence of sexual relations if the effect of that testimony would illegitimatize a child born during the marriage. See *Commonwealth ex rel. Leider v. Leider*, 434 Pa. 293, 254 A.2d 306 (1969). This rule was abandoned in *Commonwealth ex rel. Savruk v. Derby*, 235 Pa. Super. 560, 344 A.2d 624 (1975).

Pa.R.E. 601(b) is consistent with Pennsylvania law concerning the competency of persons with a mental defect and children of tender years. See *Commonwealth v. Goldblum*, 498 Pa. 455, 447 A.2d 234 (1982) (mental capacity); *Rosche v. McCoy*, 397 Pa. 615, 156 A.2d 307 (1959) (immaturity). The application of the standards in Pa.R.E. 601(b) is a factual question to be resolved by the Court. 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.

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

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 opinion testimony by expert witnesses.

Comment

This rule is identical to F.R.E. 602. It is consistent with Pennsylvania law.

Firsthand or personal knowledge is a universal requirement of the law of evidence. See *Johnson v. Peoples Cab Co.*, 386 Pa. 513, 514-15, 126 A.2d 720, 721 (1956) ("The primary object of a trial in our American courts is to bring to the tribunal, which is passing on the dispute involved, those persons who know of their own knowledge the facts to which they testify."). Pa.R.E. 602 refers to Pa.R.E. 703 to make clear that there is no conflict with Rule 703, which permits an expert to base an opinion on facts not within the expert's personal knowledge.

It is implicit in Pa.R.E. 602 that the party calling the witness has the burden of proving personal knowledge. This is consistent with Pennsylvania law. *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 state, "the rule is a specialized application of the provisions of Rule 104(b) on conditional relevancy." Thus, the issue of personal knowledge is a question to be decided by the jury, and the judge may do no more than determine if the evidence is sufficient to support a finding of such knowledge. 27 Wright & Gold, *Federal Practice and Procedure* § 6027 (1990). 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; the witness may not, however, testify to the truth of the statement if the witness has no personal knowledge of the truth of the statement. Whether the hearsay statement is admissible is governed by Pa.R.E. 801 through 805. Generally speaking, the firsthand knowledge requirement of Rule 602 is applicable to the declarant of a hearsay statement. 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. See *Salvitti v. Throppe*, 343 Pa. 642, 23 A.2d 445 (1942); *Carswell v. SEPTA*, 259 Pa. Super. 167, 393 A.2d 770 (1978). Moreover, Pa.R.E. 804(b)(4) explicitly dispenses with the need for personal knowledge for statements of personal or family history. In addition, Pa.R.E. 803(19), (20) and (21) impliedly do away with the personal knowledge requirement for statements dealing with reputation concerning personal or family history, boundaries or general history, and a person's character.

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 rule is identical to F.R.E. 603, which was designed to be flexible enough to cover persons with any or no

religious beliefs, persons with mental defects, and children. F.R.E. 603 advisory committee notes. The rule is consistent with Pennsylvania law. See *Dunsmore v. Dunsmore*, 309 Pa. Super. 503, 455 A.2d 723 (1983) (holding that it was error to allow a witness to testify without oath or affirmation); *Commonwealth ex rel. Freeman v. Superintendent*, 212 Pa. Super. 422, 242 A.2d 903 (1968) (same). Pennsylvania law requires both the mentally impaired and children to understand the obligation to tell the truth. See *Commonwealth v. Mazzoccoli*, 475 Pa. 408, 380 A.2d 786 (1977); *Commonwealth v. Kosh*, 305 Pa. 146, 157 A. 479 (1931).

Pa.R.E. 603 is also consistent with 42 Pa.C.S.A. § 5901. Although § 5901 provides that every witness "shall take an oath in the usual or common form by laying the hand upon an open copy of the Holy Bible or by lifting up the right hand and pronouncing or assenting to" a specific incantation set forth in the statute, it also permits affirmation by a witness who desires to do so. See also 42 Pa.C.S.A. § 5902 (providing that a person's capacity to testify "shall not be affected by his opinions on matters of religion" and that no witness shall be questioned "concerning his religious beliefs"). Religious belief as a ground for impeachment is treated in Pa.R.E. 610.

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; the only change is the explicit reference to Pa.R.E. 702 and 603, rather than the general reference to "the provisions of these rules" in F.R.E. 604.

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 Pa.R.E. 604, an interpreter is treated as an expert witness who must have the necessary skill to translate correctly and who must promise to do so by oath or affirmation.

Pa.R.E. 604 is consistent with those Pennsylvania statutes providing for the appointment of interpreters for the deaf. See 42 Pa.C.S.A. § 7103 (deaf party in a civil case); 2 Pa.C.S.A. 505.1 (deaf party in hearing before Commonwealth agency); 42 Pa.C.S.A. § 8701 (deaf defendant in criminal case); see also *Commonwealth v. Wallace*, 433 Pa. Super. 518, 641 A.2d 321 (1994) (applying § 8701). Under each of these statutes, an interpreter must be "qualified and trained to translate for or communicate with deaf persons" and must "swear or affirm that he will make a true interpretation to the deaf person and that he will repeat the statements of the deaf person to the best of his ability."

There is little statutory authority for the appointment of interpreters, but the practice is well established. See Pa.R.Crim.P. 264(b) (authorizing presence of interpreter while investigating grand jury is in session if supervising judge determines necessary for presentation of evidence); 51 Pa.C.S.A. § 5507 (under regulations prescribed by governor, convening authority of military court may appoint interpreters). The decision whether to appoint an interpreter is within the discretion of the trial court. See *Commonwealth v. Pana*, 469 Pa. 43, 364 A.2d 895 (1976) (holding that it was an abuse of discretion to fail to appoint an interpreter for a criminal defendant who had difficulty in understanding and expressing himself in English).

Rule 605. Competency of Judge as Witness.

The judge presiding at a trial or other proceeding may not testify as a witness in that trial or proceeding.

Comment

This rule differs from F.R.E. 605. Pa.R.E. 605 departs from the first sentence of F.R.E. 605 to clarify the meaning of the rule. The second sentence of F.R.E. 605 which provides, "[n]o objection need be made in order to preserve the point," has not been adopted.

Pa.R.E. 605 makes a judge absolutely incompetent to be a witness on any matter in any proceeding at which the judge presides. Cf., *Municipal Publications, Inc. v. Court of Common Pleas*, 507 Pa. 194, 489 A.2d (1985) (applying Canon 3C of the Pennsylvania Code of Judicial Conduct, and holding that at a hearing on a motion to recuse a judge, the judge himself could not testify on the issues raised in the motion and continue to preside at the hearing).

There is no Pennsylvania authority on the meaning of "testify as a witness." However, based upon the legislative history of F.R.E. 605, a judge may be said to "testify" even if he has not been called to the witness stand. See 27 Wright & Gold, *Federal Practice and Procedure* § 6063 (1990) (citing *United States v. Lillie*, 953 F.2d 1188 (10th Cir. 1992) (judge in bench trial taking a view without knowledge or presence of counsel and parties)); *Jones v. Beneficial Trust Life Ins. Co.*, 800 F.2d 1397 (5th Cir. 1986) (introduction at trial of judge's pretrial ruling); *United States v. Pritchett*, 699 F.2d 317 (6th Cir. 1983) (judge's comments from bench).

Pa.R.E. 605 does not include the final sentence of F.R.E. 605, which provides, in effect, an "automatic" objection to testimony by the presiding judge. The Federal Rule includes the "automatic" objection to free the opponent of the testimony from having to choose between waiving a challenge to the testimony by not objecting and risking offense to the judge by objecting. F.R.E. 605 advisory committee notes. This puts undue emphasis on the sensibilities of trial judges. Moreover, since courts have applied F.R.E. 605 to situations where the trial judge has not been called to the stand, the "automatic" objection precludes the only means of alerting the trial judge to the need for 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 the Trial.* A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(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

Pa.R.E. 606(a) is identical to F.R.E. 606(a). Section (a) is contrary to the traditional common law rule and Pennsylvania law. See 6 Wigmore, *Evidence* § 1910 (Chadbourn rev. 1976); 1 McCormick, *Evidence* § 68 (4th ed. 1992); *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). See 27 Wright & Gold, *Federal Practice and Procedure* § 6071 nn. 59-73 (1990). Of course, the calling of a juror as a witness will be a rarity; voir dire will generally expose a juror's knowledge of facts relevant to a case, which will usually mean disqualification of the juror for cause.

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

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

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

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

Finally, the words "extraneous prejudicial information" in the first exception of the Federal Rule have been replaced by the phrase "prejudicial facts not of record and beyond common knowledge and experience." This makes clear that the exception is directed at evidence brought before the jury which was not presented during the trial, and which was not tested by the processes of the adversary system and subjected to judicial screening for a determination of admissibility. The qualification of "common knowledge and experience" is a recognition that all jurors bring with them some common facts of life. See generally, 27 Wright and Gold, *Federal Practice and Procedure: Evidence*, § 6075 (1990).

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

Pennsylvania cases have also recognized the two exceptions to juror incompetency set forth in the second sentence of Pa.R.E. 606(b). *Carter v. U.S. Steel Corp.*, 529 Pa. 409, 604 A.2d 1010 (1992); *Commonwealth v. Williams, supra; Welshire v. Bruaw*, 331 Pa. 392, 200 A.2d 67 (1938). Note that when jurors are permitted to testify about facts not of record and outside influences, they may not be questioned about the effect upon them of what was improperly brought to their attention. See *Carter, supra*; 3 Weinstein & Berger, *Evidence* ¶ 606[5] at pp.606-53—606-55. Pa.R.E. 606(b) does not purport to set forth the substantive grounds for setting aside verdicts because of an irregularity.

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

Pa.R.E. 607(a) is identical to F.R.E. 607. The Federal Rules have no provision similar to section (b).

Section (a)—Pa.R.E. 607(a) abolishes completely the common law rule that prohibited a party from impeaching a witness called by that party. The common law rule, which applied to all forms of impeachment, has been criticized. See *Chambers v. Mississippi*, 410 U.S. 284 (1973); 3A Wigmore, *Evidence* §§ 897-99 (Chadbourn rev. 1970); 1 McCormick, *Evidence* § 38 (4th ed. 1992). To the extent that there are any vestiges of the "no impeachment" prohibition remaining in Pennsylvania, Pa.R.E. 607(a) sweeps them away.

Pa.R.E. 607(a) allows impeachment by all of the methods provided for in Pa.R.E. 607(b), 608, 609 and 613.

Section (b)—The methods that may be used to impeach credibility are subject to Pa.R.E. 401, which defines

relevant evidence. For example, the United States Supreme Court held that the Federal Rules clearly contemplated that evidence of bias could be used to impeach credibility even though nothing in those Rules specifically covered the subject. *United States v. Abel*, 469 U.S. 45 (1984). The Court pointed to F.R.E. 401, defining relevancy, and F.R.E. 402, providing for the admissibility of all relevant evidence, in support of its holding. Id. 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." Id. 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 words "except as otherwise provided by statute or these Rules" in Pa.R.E. 607(b) incorporate a number of provisions that circumscribe the breadth of the Rule. See, e.g., 18 Pa.C.S.A. § 3104 (the Rape Shield Law). Impeachment evidence is also subject to Pa.R.E. 403, which provides that relevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice. Similarly, Pa.R.E. 501, which preserves all privileges "as they now exist or may be modified by law," would exclude any evidence relevant to credibility that might be covered by existing or later developed privileges, including those created by case law. In addition, Pa.R.E. 607(b) is limited and supplemented by Pa.R.E. 608 (dealing with evidence of character and conduct of a witness), Pa.R.E. 609 (relating to impeachment by evidence of conviction of crime), Pa.R.E. 610 (covering religious beliefs or opinions) and Pa.R.E. 613 (regarding prior statements of witnesses).

Pa.R.E. 607(b), however, is not curtailed by 42 Pa.C.S.A. § 5918, which prohibits, with certain exceptions, the questioning of a defendant who testifies in a criminal case for the purpose of showing that the defendant has committed, been convicted of or charged with another offense or that the defendant has a bad character or reputation. In *Commonwealth v. 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 honesty or integrity, it may always be attacked by showing shortcomings in any of those areas. See *Commonwealth v. Gwaltney*, 497 Pa. 505, 442 A.2d 236 (1982); *Commonwealth v. Hamm*, 474 Pa. 487, 378 A.2d 1219 (1977); (McCormick, *Evidence*, § 44 (4th ed. 1992).

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.

(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

Pa.R.E. 608(a)(1) and (2) differ from F.R.E. 608(a) in that they permit character for truthfulness or untruthfulness to be proven only by reputation evidence. Opinion evidence is not admissible. This approach is consistent with Pennsylvania law. See *Commonwealth v. Lopinson*, 427 Pa. 284, 234 A.2d 552 (1967), vacated on other grounds, 392 U.S. 647 (1968); see also Pa.R.E. 405(a) and Pa.R.E. 803(21). Pa.R.E. 608(a)(1) and (a)(2) are also consistent with Pennsylvania law to the effect that evidence of character for untruthfulness is admissible to attack credibility. See *Commonwealth v. Payne*, 205 Pa. 101, 54 A. 489 (1903). Evidence to support or bolster a witness' character for truthfulness is admissible only if there has first been an attack on that trait of character. See *Commonwealth v. Fowler*, 434 Pa. Super. 148, 642 A.2d 517 (1994); *Commonwealth v. Smith*, 389 Pa. Super. 626, 567 A.2d 1080 (1989).

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

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

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

Like F.R.E. 608(b), however, Pa.R.E. 608(b)(2) permits a character witness to be cross-examined, in the discretion of the court, concerning specific instances of conduct of the principal witness. However, unlike the Federal Rule, Pa.R.E. 608(b)(2) makes it clear that although the cross-examination concerns the specific acts of the principal witness, those specific acts affect the credibility of the character witness only. This is in accord with Pennsylvania law. See *Commonwealth v. Peterkin*, 511 Pa. 299, 513 A.2d 373 (1986); *Commonwealth v. Adams*, 426 Pa. Super. 332, 626 A.2d 1231 (1993). In addition, it excludes the use

of arrests; this, too, is consistent with Pennsylvania law. See *Commonwealth v. Scott*, 496 Pa. 188, 436 A.2d 607 (1981). Because cross-examination concerning specific incidents of conduct is subject to abuse, the cross-examination is not automatic; rather, its use is specifically placed in the discretion of the court, and like all other relevant evidence, it is subject to the balancing test of Pa.R.E. 403. Moreover, the court should take care that the cross-examiner has a reasonable basis for the questions asked. See *Adams, supra*.

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

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

(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

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

As a general rule, evidence of a jury verdict of guilty or a plea of guilty or nolo contendere may not be used to impeach before the court has pronounced sentence. See *Commonwealth v. Zapata*, 455 Pa. 205, 314 A.2d 299 (1974). In addition, evidence of admission to an Accelerated Rehabilitative Disposition program under Pa.R.Crim.P. 176-186 may not be used to impeach credibility. See *Commonwealth v. Krall*, 290 Pa. Super. 1, 434 A.2d 99 (1981).

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

Pa.R.E. 609(b) differs slightly from F.R.E. 609(b) in that the phrase "supported by specific facts and circumstances," used in the latter with respect to the balancing of probative value and prejudicial effect, has been eliminated. Pa.R.E. 609(b) basically tracks what was said in *Commonwealth v. Randall*, 515 Pa. 410, 528 A.2d 1326 (1987). Where the date of conviction or last date of confinement is within ten years of the trial, evidence of the conviction of a crimen falsi is per se admissible. If more than ten years have elapsed, the evidence may be used only after written notice and the trial judge's determination that its probative value substantially outweighs its prejudicial effect. The relevant factors for making this determination are set forth in *Binhum, supra*, and *Commonwealth v. Roots*, 482 Pa. 33, 393 A.2d 364 (1978). For the computation of the ten-year period, where there has been a reincarceration because of a parole violation, see *Commonwealth v. Jackson*, 526 Pa. 294, 585 A.2d 1061 (1991).

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

under Pa.R.E. 609(c), but is admissible in rebuttal if the conviction is used to impeach. *Commonwealth v. Quaranta*, 295 Pa. 264, 145 A.2d 89 (1926).

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

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

Pa.R.E. 609(e) is identical to F.R.E. 609(e). There is no Pennsylvania law on this issue. According to the Advisory Committee Notes to F.R.E. 609(e), a witness may be impeached by evidence of a prior conviction regardless of a pending appeal because of the "presumption of correctness that ought to attend judicial proceedings." This is the predominant view. 1 McCormick, *Evidence*, § 42 (4th ed. 1992).

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, that no witness shall be questioned about those beliefs or opinions, and that no evidence shall be heard on those subjects for the purpose of affecting "competency or credibility." This is also consistent with Pennsylvania decisional law. See *Commonwealth v. Greenwood*, 488 Pa. 618, 413 A.2d 655 (1980); *Commonwealth v. Mimms*, 477 Pa. 553, 358 A.2d 334 (1978).

Pa.R.E. 610 bars evidence of a witness' religious beliefs or opinions only when offered to show that the beliefs or opinions affect the witness' truthfulness because of their nature. Pa.R.E. 610 does not bar such evidence introduced for other purposes. See *McKim v. Philadelphia Transp. Co.*, 364 Pa. 237, 72 A.2d 122 (1950); *Commonwealth v. Riggins*, 373 Pa. Super. 243, 542 A.2d 1004 (1988).

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

Pa.R.E. 611(a) is identical to F.R.E. 611(a). It places responsibility for the conduct of the trial squarely within the discretion of the trial judge and spells out guidelines for the exercise of that discretion. It is consistent with Pennsylvania law. See *Commonwealth v. Smith*, 518 Pa. 15, 540 A.2d 246 (1988); see also Pa.R.Civ.P. 223 (relating to the conduct of civil jury trials); Pa.R.Civ.P. 224 (relating to the order of proof in civil cases).

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

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

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

When the accused in a criminal case is the witness, there is an interplay between the limited scope of cross-examination and the accused's privilege against self-

incrimination. When the accused testifies generally as to facts tending to negate or raise doubts about the prosecution's evidence, he or she has waived the privilege and may not use it to prevent the prosecution from bringing out on cross-examination every circumstance related to those facts. See *Commonwealth v. Green*, 525 Pa. 424, 581 A.2d 544 (1990). However, when the accused's testimony is more selective or limited, the waiver of the privilege is only coextensive with the permissible scope of cross-examination relative to the accused's direct testimony; it is not a general waiver. See *Commonwealth v. Camm*, 443 Pa. 253, 277 A.2d 325 (1971); *Commonwealth v. Ulen*, 414 Pa. Super. 502, 607 A.2d 77 (1992), rev'd on other grounds, 359 Pa. 51, 650 A.2d 416 (1994).

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

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

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

A party who calls a hostile witness, adverse party or one identified with an adverse party may use leading questions because these witnesses are "unfriendly" to the party calling them and there is little risk that they will be susceptible to any suggestions inherent in the questions. The risk of susceptibility to suggestion is present, however, when a party to whom the witness is "friendly" (i.e. to whom the witness is not hostile, an adverse party or one identified with the an adverse party) interrogates the witness. The last clause of Pa.R.E. 611(c) restricts the use of leading questions by a party to whom the witness is "friendly." The word "usually," however, was included to give the court discretion to permit leading questions in an appropriate case. For example, leading questions may be appropriate when the testimony of a witness who was called and examined as a hostile witness by one party substantially harms the interest of another party with whom the witness is neither friendly nor unfriendly.

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

Pa.R.E. 612 and F.R.E. 612 are substantively equivalent, but differ somewhat in language and structure:

1. Pa.R.E. 612 covers the same subject matter as F.R.E. 612, but does so in two sections rather than one lengthy paragraph. The organization of Pa.R.E. 612 is derived, in part, from the Uniform Rules of Evidence, Rule 612 (1974).

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

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

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

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

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

Section (a) The right to refresh a witness' memory is well established in Pennsylvania. See *Commonwealth v. Payne*, 455 Pa. 503, 317 A.2d 208 (1974). Although usually the witness' memory is refreshed by a writing, most courts recognize that many other things, such as photographs, can spur the memory. 1 McCormick, *Evidence* § 9 (4th ed. 1992) ("any memorandum or other object may be used as a stimulus to present memory,

without restriction by rule as to authorship, guarantee of correctness or time of making.") The addition of the words "or other item" in section (a) takes this into account.

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

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

Pa.R.E. 612(a) gives the adverse party access to the item used to refresh the witness' memory while the witness is testifying. This is consistent with Pennsylvania law. See *Commonwealth v. Proctor*, supra; see also *Commonwealth v. Allen*, 220 Pa. Super. 403, 289 A.2d 476 (1972). The rule protects against the risk that the item used to refresh memory may suggest testimony to the witness instead of refreshing present recollection. Production of the item to the adverse party is discretionary with the court, however, when it is used to refresh memory before testifying. See *Commonwealth v. Samuels*, 235 Pa. Super. 192, 340 A.2d 880 (1975); *Commonwealth v. Fromal*, 202 Pa. Super. 45, 195 A.2d 174 (1963).

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

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

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

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

Pa.R.E. 612(a), like F.R.E. 612, applies to the use of a writing or other item to refresh memory "for the purpose of testifying." In the Federal Rule, the phrase was intended "to safeguard against using the rule as a pretext for wholesale exploration of an opposing party's files and to insure that access is limited only to those writings which may fairly be said in fact to have an impact upon the testimony of the witness." F.R.E. 612 advisory committee notes; see, e.g., *Sporck v. Peil, supra* (deposition witness examined large number of documents, selected by counsel, in preparation for testifying at deposition).

Section (b)—Except for the changes concerning sanctions in criminal cases when the prosecution fails to comply with an order to produce, Pa.R.E. 612(b) is the same as the last three sentences of F.R.E. 612. An adverse party has rights only to those parts of any materials used to refresh memory that bear upon the witness' testimony. When the party who did the refreshing contends that some part of what the witness was shown goes beyond the scope of the testimony, Pa.R.E. 609(b) requires the court to make an in camera inspection and to remove any extraneous matter. Of course, what is excised must be preserved in the event that the redaction is challenged on appeal. This is a well recognized technique.

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

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 opposing party is given an opportunity to cross-examine the witness about the statement, and the statement is offered to rebut an express or implied charge of:

(1) fabrication, bias, improper influence or motive or faulty memory and the statement was made before that which has been charged existed or arose; or

(2) having made a prior inconsistent statement, which the witness has denied or explained, and the consistent statement supports the witness' denial or explanation.

Comment

Pa.R.E. 613 differs from F.R.E. 613 both in organization and substance. Both Pa.R.E. 613 and F.R.E. 613 cover impeachment by prior inconsistent statements, but only Pa.R.E. 613 deals with rehabilitation by prior consistent statements.

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 examination about it, section (a) repudiates the decision in the *Queen's Case*, 129 Eng. Rep. 9761 (1820). Pa.R.E. 613(a) resolves the ambiguity in the scant Pennsylvania authority on this point. Compare *Kann v. Bennett*, 223 Pa. 36, 72 A. 342 (1909) (before witness may be cross-examined about prior inconsistent statement, witness must be shown the statement and asked if he wrote it) with *Commonwealth v. Petrakovich*, 459 Pa. 511, 329 A.2d 844 (1974) (overlooking *Kann* case, court stated it had never considered question of showing statement to witness, and found no need to resolve question under facts of case).

Section (b).—The first sentence of section (b) of Pa.R.E. 613 differs from F.R.E. 613(b). Like the Federal Rule, Pa.R.E. 613(b) permits introduction of extrinsic evidence of a prior inconsistent statement only if the witness was confronted with or informed of the statement, thus providing the witness with a chance to deny or explain the statement. Pa.R.E. 613(b), however, requires that the witness be confronted or informed during the examination; the Federal Rule sets no particular time or sequence. F.R.E. 613 advisory committee notes.

Pa.R.E. 613(b) follows the traditional common law approach. It establishes that the witness must be shown or made of aware of the prior inconsistent statement before extrinsic evidence of the statement may be introduced, unless relaxation of the rule would serve the interests of justice. This is a departure from Pennsylvania authority, which gives the trial court discretion whether to require showing or disclosure of the statement. 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 rationale for the last sentence of section (b), which exempts admissions of a party-opponent, is that "parties have ample opportunities to testify and explain or deny statements attributed to them." 28 Wright & Gold, *Federal Practice and Procedure* § 6205 (1993). The exemption is in accord with Pennsylvania law. *Commonwealth by Truscott v. Binenstock*, 358 Pa. 644, 57 A.2d 884 (1948); *Commonwealth v. Dilworth*, 289 Pa. 498, 137 A. 683 (1927).

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

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

Pa.R.E. 613(c)(1) is in accord with Pennsylvania law. See *Commonwealth v. Hutchinson*, 521 Pa. 482, 556 A.2d 370 (1989) (to rebut charge of recent fabrication); *Commonwealth v. Smith*, 518 Pa. 15, 540 A.2d 246 (1988) (to counter alleged corrupt motive); *Commonwealth v. Swinson*, 426 Pa. Super. 167, 626 A.2d 627 (1993) (to negate charge of faulty memory); *Commonwealth v. McEachin*, 371 Pa. Super. 188, 537 A.2d 883 (1988), appeal denied, 520 Pa. 603, 553 A.2d 965 (1988) (to offset implication of improper influence). All of these cases require that the consistent statement must have been made before the fabrication, bias, etc.

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

Usually, evidence of a prior consistent statement is rebuttal evidence that may not be introduced until after witness has testified on direct examination and an express or implied attack has been made on the witness' testimony in one of the ways set forth in Pa.R.E. 613(c). But in at least two situations, Pennsylvania Courts have upheld the admission of a prior consistent statement in anticipation of an attack on the witness. See *Commonwealth v. Smith*, 518 Pa. 15, 540 A.2d 246 (1988) (prior consistent statements by prosecution witness admitted on direct examination where defense counsel's opening statement suggested that the witness had motives to fabricate evidence against the defendant to obtain a lenient sentence for herself); *Commonwealth v. Freeman*, 295 Pa. Super. 467, 441 A.2d 1327 (1982) (evidence of prompt complaint of rape by alleged victim may be introduced in prosecution's case in chief because alleged victim's testimony is "automatically vulnerable to attack by the defendant as recent fabrication in the absence of evidence of hue and cry on her part.").

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

Pa.R.E. 614(a) and (b) differ from F.R.E. 614(a) and (b) in several respects. The phrase relating to the court's "function as an impartial arbiter" and the provision for notice have been added in Pa.R.E. 614(a), and the clause regarding "interest of justice" has been added in Pa.R.E. 614 (b). The additions dealing with the court as an "impartial arbiter" and the "interest of justice" are consistent with Pennsylvania law. See *Commonwealth v. Crews*, 429 Pa. 16, 239 A.2d 350 (1968); *Commonwealth v. DiPasquale*, 424 Pa. 500, 230 A.2d 449 (1967); *Commonwealth v. Myma*, 278 Pa. 505, 123 A. 486 (1924).

The provision requiring notice of the court's intention to call a witness will give all parties an opportunity to be heard regarding the need for this, to object and to prepare for the cross-examination of the witness.

Unlike F.R.E. 614(c), Pa.R.E. 614(c) does not permit objection to the court's calling or interrogating witnesses "at the next available opportunity when the jury is not present." The Federal Rule permits this to relieve counsel of "the embarrassment" which might arise by objecting to the judge's questions in the jury's presence. F.R.E. 614(c) advisory committee notes. This rationale is comparable to the rationale for the "automatic" objection when the judge is called as a witness in F.R.E. 605. Under the Pennsylvania rules, the appropriate time for objecting to the calling of a witness by the court is when the court gives notice of its intention as required by Pa.R.E. 614(a). The court's notice should always take place out of the presence of the jury. When the court's questions to a witness are thought to be objectionable, the issue must be raised when the questions are put. In this way, the jury will not hear the evidence sought if the objection is sustained.

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

Pa.R.E. 615 differs from F.R.E. 615. Pa.R.E. 615 uses the term "sequestration" instead of "exclusion" and substitutes "learn of" for "hear" in the first sentence. It also puts sequestration within the discretion of the court rather than making it mandatory upon motion of a party. Finally, Pa.R.E. 615 adds the guardian of a minor or incapacitated person to the first category of persons whom the court may not sequester.

Sequestration, i.e., barring a witness from the courtroom during the testimony of other witnesses and prohibiting direct and indirect communication both in and out of the courtroom is designed to discourage and expose fabrication, collusion, inaccuracies and inconsistencies. 1 McCormick, *Evidence*, § 50 (4th ed. 1992). Placing it within the discretion of the trial court is in conformity with Pennsylvania law. See *Commonwealth v. Albrecht*, 510 Pa. 603, 511 A.2d 764 (1986) (the decision of the trial court on whether or not to sequester a witness will not be reversed absent a clear abuse of discretion). Examples of abuse of discretion may be found in *Commonwealth v. Fant*, 480 Pa. 586, 391 A.2d 1040 (1978) and *Commonwealth v. Turner*, 371 Pa. 417, 88 A.2d 915 (1952) (refusal to sequester detectives who allegedly witnessed inculpatory statement).

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

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

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

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

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.

Pa.R.E. 701 is consistent with Pennsylvania law. See *Lewis v. Mellor*, 259 Pa. Super. 509, 393 A.2d 941 (1978) (adopting F.R.E. 701). Under *Lewis*, lay opinion may embrace the ultimate issue. See Pa.R.E. 704. The trial judge may exclude the opinion if the trial judge decides that it would not be helpful, or would confuse, mislead, or prejudice the jury, or would waste time. *Lewis*, 259 Pa. Super. at 523-24, 393 A.2d at 949.

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 differs from F.R.E. 702 in that the words "beyond that possessed by a lay person" have been added to make the rule consistent with Pennsylvania law. See *Commonwealth v. Dunkle*, 529 Pa. 168, 602 A.2d 830 (1992).

Adoption of Pa.R.E. 702 does not alter Pennsylvania's adoption of the standard in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), which requires scientific evidence to have "general acceptance" in the relevant scientific community. See *Commonwealth v. Dunkle, supra; Commonwealth v. Nazarovitch*, 496 Pa. 97, 436 A.2d 170 (1981); *Commonwealth v. Topa*, 471 Pa. 223, 369 A.2d 1277 (1977). In 1993, the United States Supreme Court held that Frye was superseded in the federal courts by the adoption of F.R.E. 702. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Pennsylvania courts have not yet decided whether the rationale in *Daubert* supersedes or modifies the Frye test in Pennsylvania. *Commonwealth v. Crews*, 536 Pa. 508, n.2, 640 A.2d 395 (1994).

Pa.R.E. 702 does not change the Pennsylvania rule for 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 Supreme Court stated:

> 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 the requirement that an expert's opinion must be expressed with reasonable certainty. See *McMahon v. Young*, 442 Pa. 484, 276 A.2d 534 (1971).

Pa.R.E. 702 states that an expert may testify in the form of an "opinion or otherwise." Much of the literature assumes that experts testify only in the form of an opinion. The language "or otherwise" reflects the fact that experts frequently are called upon to educate the trier of fact about the scientific or technical principles relevant to the case. See F.R.E. 702 advisory committee notes.

Rule 703. Bases of Opinion Testimony by Experts.

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Comment

Pa.R.E. 703 is identical to F.R.E. 703 and is consistent with 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. See *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 on evidence which is otherwise inadmissible if the evidence 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). If it be feared that enlargement of permissible data may tend to break down the rules of exclusion unduly, notice should be taken that the rule requires that the facts or data be "of a type reasonably relied upon by experts in the particular field." See F.R.E. 702 advisory committee notes. Whether evidence is reasonably relied upon by the expert is a preliminary question for determination by the trial court under Pa.R.E. 104.

When an expert testifies about the underlying facts and data that support the expert's opinion and the testimony would be otherwise inadmissible, the trial court should instruct the jury to consider the testimony only to explain the basis for the expert's opinion, and not as substantive evidence. *Compare* Pa.R.E. 105.

An expert's testimony is inadmissible if the opinion is not the opinion of the expert testifying, but rather a recitation or reaction to an opinion given by an expert who does not testify. See *Primavera v. Celotex Corp.*, 415 Pa. Super. 41, 608 A.2d 515 (1992).

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 Pennsylvania law. F.R.E. 704(b) has not been adopted.

Under Pennsylvania law, the trial judge has discretion to allow lay opinion on the ultimate issue. The judge must balance the helpfulness of the testimony against its potential to cause confusion or prejudice. See *Lewis v. Mellor*, 259 Pa. Super. 509, 393 A.2d 941 (1978); Pa.R.E. 701 and its comment.

Pennsylvania law allows expert opinion testimony on the ultimate issue. See *Commonwealth v. Daniels*, 480 Pa. 340, 390 A.2d 172 (1978); *Cooper v. Metropolitan Life Ins. Co.*, 323 Pa. 295, 186 A. 125 (1936). As with lay opinions, the trial judge has discretion to admit or exclude expert opinions on the ultimate issue depending on the helpful-

ness of the testimony versus its potential to cause confusion or prejudice. See *Kozak v. Struth*, 515 Pa. 554, 531 A.2d 420 (1987); *Commonwealth v. Brown*, 408 Pa. Super. 246, 596 A.2d 840 (1991).

Pa.R.E. 704 omits F.R.E. 704(b) which prohibits an expert from testifying with respect to whether the defendant in a criminal case did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. When the Superior Court in *Lewis v. Mellor*, adopted F.R.E. 704 in 1978, it only contained part (a). F.R.E. 704(b) was added in 1984. The Pennsylvania Supreme Court has consistently held that expert psychiatric testimony is admissible to negate the specific intent to kill which is essential to first degree murder. See *Commonwealth v. Terry*, 513 Pa. 381, 521 A.2d 398 (1987); *Commonwealth v. Garcia*, 505 Pa. 304, 479 A.2d 473 (1984); *Commonwealth v. Walzack*, 468 Pa. 210, 360 A.2d 914 (1976).

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 and substance of Pa.R.E. 705 differ significantly from F.R.E. 705. The Federal Rule generally does not require an expert witness to disclose the facts upon which an opinion is based prior to expressing the opinion. Instead, the cross-examiner bears the burden of probing the basis of the opinion. Pennsylvania does not follow the Federal Rule. See *Kozak v. Struth*, 515 Pa. 554, 560, 531 A.2d 420, 423 (1987) (declining to adopt F.R.E. 705, the Court reasoned that "requiring the proponent of an expert opinion to clarify for the jury the assumptions upon which the opinion is based avoids planting in the juror's mind a general statement likely to remain with him in a jury room when the disputed details are lost.") Relying on cross examination to illuminate the underlying assumption, as F.R.E. 705 does, may further confuse jurors already struggling to follow complex testimony. Id.

Accordingly, *Kozak* requires disclosure of the facts used by the expert in forming an opinion. The disclosure can be accomplished in several ways. One way is to ask the expert to assume the truth of testimony the expert has heard or read. *The Kroeger Co. v. W.C.A.B.*, 101 Pa. Cmwlth. 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).

The salient facts relied upon as the basis of the expert opinion must be in the record so that the jury may evaluate the opinion. See *Commonwealth v. Rounds*, 518 Pa. 204, 542 A.2d 997 (1988). The expert's testimony regarding the facts or data on which the opinion is based is subject to Pa.R.E. 703.

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 trial court's power to appoint experts. Pa.R.E. 706 provides only the procedures for obtaining the testimony of experts after the court has appointed them.

Pennsylvania law provides for the appointment of experts in some instances. See 23 Pa.C.S.A. § 5104 (disputed paternity proceeding); Pa.R.C.P. 1515 & 1530(e) (in equity proceedings, court may appoint accountants and auditors as experts). In *Commonwealth v. Correa*, 437 Pa. Super. 1, 648 A.2d 1199 (1994), the Superior Court held that the trial court had inherent power to appoint an expert.

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

ARTICLE VIII. HEARSAY

Introductory Comment

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, five exceptions in which the declarant must be unavailable, and three exceptions in which the testimony of the declarant is necessary, for a total of 24.

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.

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 (1970):

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

statements in issue were admitted under an arguably recognized hearsay exception. . . .

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

In 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 of confrontation under Article I, § 9 of the Pennsylvania Constitution.

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.

Comment

Pa.R.E. 801 is identical to subsections (a), (b) and (c) of F.R.E. 801. It is consistent with Pennsylvania law. F.R.E. 801(d) is not adopted. The subjects of F.R.E. 801(d), admissions and prior statements of witnesses, are covered in Pa.R.E. 803(25), Pa.R.E. 803.1., and Pa.R.E. 613(c).

a. *Statement*.

The definition of "statement" is consistent with Pennsylvania law. See, e.g., *Rafter v. Raymark Indus., Inc.*, 429 Pa. Super. 360, 632 A.2d 897 (1993) (oral or written assertion); *Commonwealth v. Rush*, 529 Pa. 498, 605 A.2d 792 (1992) (non-verbal conduct intended as an assertion). Communications that are not assertions are not hearsay. These would include questions, greetings, expressions of gratitude, exclamations, offers, instructions, warnings, etc.

b. *Declarant*.

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

c. *Definition of Hearsay*.

Subsection (c), which defines hearsay, is consistent with Pennsylvania law, although the Pennsylvania cases have usually used the phrase "out-of-court statement," in place of the phrase "other than one made by the declarant while testifying at the trial or hearing." See *Heddings v. Steele*, 514 Pa. 569, 526 A.2d 349 (1987). The adoption of the language of the Federal Rule is not intended to change existing law.

A statement, other than one made by the declarant while testifying at the trial or hearing (an out-of-court statement), is hearsay only if it is offered to prove the truth of the matter asserted. There are many situations in which evidence of an out-of-court statement is offered for a purpose other than to prove the truth of the matter asserted.

Sometimes an out-of-court statement has direct legal significance, whether or not it is true. For example, one or more out-of-court statements may constitute an offer, an acceptance, a promise, a guarantee, a notice, a representation, a misrepresentation, defamation, perjury, compliance with a contractual or statutory obligation, etc.

More often, an out-of-court statement, whether or not it is true, constitutes circumstantial evidence from which the trier of fact may infer, alone or in combination with other evidence, the existence or non-existence of a fact in issue. For example, a declarant's out-of-court statement may imply his or her particular state of mind, or it may imply that a particular state of mind ensued in the recipient. Evidence of an out-of-court statement, particularly if it is proven untrue by other evidence, may imply the existence of a conspiracy, or fraud. Evidence of an out-of-court statement made by a witness, if inconsistent with the witness' testimony, may imply that the witness is an unreliable historian. Conversely, evidence of an out-of-court statement made by a witness that is consistent with the witness' testimony may imply the opposite. See Pa.R.E. 613.

Rule 802. Hearsay Rule.

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

Comment

Pa.R.E. 802 is similar to F.R.E. 802. It differs by referring to other rules prescribed by the Pennsylvania Supreme Court, rather than the United States Supreme Court, and by referring to statutes in general, rather than Acts of Congress. This rule is consistent with Pennsylvania law.

Often, hearsay will be admissible under an exception provided by these rules. See, e.g., Pa.R.E. 803, 803.1 and 804. On occasion, hearsay may be admitted pursuant to another rule promulgated by the Pennsylvania Supreme Court. For example, in civil cases, all or part of a deposition may be admitted pursuant to Pa.R.C.P. 4020, or a videotape deposition of an expert witness may be admitted pursuant to Pa.R.C.P. 4017.1(g).

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.A. § 6104. See Comment located at Pa.R.E. 803(8) [Not Adopted].

2. A record of vital statistics may be admitted pursuant to 35 Pa.C.S.A. § 450.810. See Comment located at Pa.R.E. 803(9) [Not Adopted].

3. In an action arising out of a contract under the Uniform Commercial Code, a document in due form 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.A. § 1202.

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

5. In a criminal case, a deposition of a witness may be admitted pursuant to 42 Pa.C.S.A. § 5919.
6. In a criminal case, an out-of-court statement of a witness under 13 years of age, describing certain kinds of sexual abuse, may be admitted pursuant to 42 Pa.C.S.A. § 5985.1.
7. In a dependency hearing, an out-of-court statement of a witness under 14 years of age, describing certain types of sexual abuse, may be admitted pursuant to 42 Pa.C.S.A. § 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.A. § 3368(d).

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

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) Then Existing Mental, Emotional, or Physical Condition.

(4) Statements for Purposes of Medical Diagnosis or Treatment.

(5) Recorded Recollection [Not Adopted].

(6) Records of Regularly Conducted Activity.

(7) Absence of Entry in Records Kept in Accordance With the Provisions of Paragraph (6) [Not Adopted].

(8) Public Records and Reports [Not Adopted].

(9) Records of Vital Statistics [Not Adopted].

(10) Absence of Public Record or Entry [Not Adopted].

(11) Records of Religious Organizations.

(12) Marriage, Baptismal, and Similar Certificates.

(13) Family Records.

(14) Records of Documents Affecting an Interest in Property.

(15) Statements in Documents Affecting an Interest in Property.

(16) Statements in Ancient Documents.

(17) Market Reports, Commercial Publications.

(18) Learned Treatises [Not Adopted].

(19) Reputation Concerning Personal or Family History.

(20) Reputation Concerning Boundaries or General History.

(21) Reputation as to Character.

(22) Judgment of Previous Conviction [Not Adopted].

(23) Judgment as to Personal, Family, or General History, or Boundaries [Not Adopted].

(24) Other Exceptions [Not Adopted].

(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 Pennsylvania law. See *Commonwealth v. Peterkin*, 511 Pa. 299, 513 A.2d 373 (1986).

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

(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 Pennsylvania law. See *Allen v. Mack*, 345 Pa. 407, 28 A.2d 783 (1942); *Commonwealth v. Barnes*, 310 Pa. Super. 480, 456 A.2d 1037 (1983).

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 with, or immediately after, the startling event. It is sufficient if the stress of excitement created by the startling event or condition persists as a substantial factor in provoking the utterance.

There is no set time interval following a startling event or condition after which an utterance relating to it will be ineligible for exception to the hearsay rule as an excited utterance. In *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.

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

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."

This exception is consistent with Pennsylvania law. See *Commonwealth v. Pronkoskie*, 477 Pa. 132, 383 A.2d 858 (1978) (statements of present physical condition and emotional feelings); *Commonwealth v. Marshall*, 287 Pa. 512, 135 A. 301 (1926) (statement of intent or plan); *Ickes v. Ickes*, 237 Pa. 582, 85 A. 885 (1912) (statement of motive or design).

The exception for a declarant's statement of memory or belief concerning declarant's will is consistent with Pennsylvania law. See *Glockner v. Glockner*, 263 Pa. 393, 106 A. 731 (1919); *In re Kirkander*, 326 Pa. Super. 380, 474 A.2d 290 (1984).

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

Comment

Pa.R.E. 803(4) is similar to F.R.E. 803(4) in that both admit statements made for purposes of medical treatment. Pa.R.E. 803(4) differs from F.R.E. 803(4) because it permits admission of statements made for purposes of medical diagnosis only if they are made in contemplation of treatment. Statements made to persons retained solely for the purpose of litigation are not admissible under this rule. The rationale for admitting statements for purposes of treatment is that the declarant has a very strong motivation to speak truthfully. This rationale is not applicable to statements made for purposes of litigation. Pa.R.E. 803(4) is consistent with Pennsylvania law. See *Commonwealth v. Smith*, 545 Pa. 487, 681 A.2d 1288 (1996).

An expert medical witness may base an opinion on the declarant's statements of the kind discussed in this Rule, even though the statements were not made for purposes of treatment, if the statements comply with Pa.R.E. 703. Such statements may be disclosed as provided in Pa.R.E. 705, but are not substantive evidence.

This exception is not limited to statements made to physicians. Statements to a nurse have been held to be admissible. See *Smith, supra*. Statements as to causation may be admissible, but statements as to fault or identification of the person inflicting harm have been held to be inadmissible. See *Smith, supra*.

(5) *Recorded Recollection* [Not Adopted].

Comment

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

(6) *Records of Regularly Conducted Activity.* A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, 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 difference is that Pa.R.E. 803(6) does not include opinions and diagnoses. This is consistent with Pennsylvania law. See *Williams v. McClain*, 513 Pa. 300, 520 A.2d 1374 (1987); *Commonwealth v. DiGiacomo*, 463 Pa. 449, 345 A.2d 605 (1975). The second difference is that Pa.R.E. 803(6) allows the court to exclude business records that would otherwise qualify for exception to the hearsay rule if the "sources of information or 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."

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

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

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

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

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

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

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

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

(7) *Absence of Entry in Records Kept in Accordance With the Provisions of Paragraph (6)* [Not Adopted].

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.

On analysis, absence of an entry in a business record is circumstantial evidence,—it tends to prove something by implication, not assertion. Its admissibility is governed by principles of relevance, not hearsay. See Pa.R.E. 401, et seq.

Pennsylvania law is in accord with the object of F.R.E. 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. See *Klein v. F.W. Woolworth Co.*, 309 Pa. 320, 163 A. 532 (1932) (absence of person's name in personnel records admissible to prove that he was not an employee). See also *Stack v. Wapner*, 244 Pa. Super. 278, 368 A.2d 292 (1976).

(8) *Public Records and Reports* [Not Adopted].

Comment

Pennsylvania has not adopted F.R.E. 803(8). An exception to the hearsay rule for public records is provided by 42 Pa.C.S.A. § 6104:

(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.

Subsection (b) of the statute is limited to "facts." It does not include opinions or diagnoses. This is consistent with Pa.R.E. 803(6), as well as Pennsylvania decisional law interpreting 42 Pa.C.S.A. § 6108 (Uniform Business Records As Evidence Act). See Comment to Pa.R.E. 803(6).

(9) *Records of Vital Statistics* [Not Adopted].

Comment

Pennsylvania has not adopted F.R.E. 803(9). Records of vital statistics are also business records and may be excepted to the hearsay rule by Pa.R.E. 803(6). Records of vital statistics are public records and they may be excepted to the hearsay rule by 42 Pa.C.S.A. § 6104 (text quoted in Comment to Pa.R.E. 803(8)).

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 35 P. S. § 450.810 which provides:

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.

(10) *Absence of Public Record or Entry* [Not Adopted].

Comment

Pennsylvania has not adopted F.R.E. 803(10) for the same reasons that it did not adopt F.R.E. 803(7). See Comment to Pa.R.E. 803(7).

42 Pa.C.S.A. § 6104(b), provides for admissibility of evidence of the absence of an entry in a public record to prove the nonexistence of a fact:

(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.

Pennsylvania also has a complementary statute, 42 Pa.C.S.A. § 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) *Records of Religious Organizations*. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

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.

42 Pa.C.S.A. § 6110 provides:

(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.

(12) *Marriage, Baptismal, and Similar Certificates*. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

Comment

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

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

Comment

Pa.R.E. 803(13) is identical to F.R.E. 803(13). It is consistent with Pennsylvania law. See *Carskadden v. Poorman*, 10 Watts 82 (1840).

(14) *Records of Documents Affecting an Interest in Property*. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

Comment

Pa.R.E. 803(14) is identical to F.R.E. 803(14). It is consistent with Pennsylvania law. See *David v. Titusville & Oil City Ry. Co.*, 114 Pa. 308, 6 A. 736 (1886).

(15) *Statements in Documents 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 similar to F.R.E. 803(15). It differs in 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 in it.

Pa.R.E. 803(15) appears inconsistent with dictum in *Brock v. Atlantic Refining Co.*, 273 Pa. 76, 80, 116 A. 552, 553 (1922), which states 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 dictum, 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).

(16) *Statements in Ancient Documents*. 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 reduces the age to 20 years.

Pa.R.E. 803(16) is consistent with Pennsylvania law. See *Louden v. Apollo Gas Co.*, 273 Pa. Super. 549, 417 A.2d 1185 (1980); *Commonwealth ex rel. Ferguson v. Ball*, 227 Pa. 301, 121 A. 191 (1923).

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

Comment

Pa.R.E. 803(17) is identical to F.R.E. 803(17). It is consistent with Pennsylvania law. See *Rosche v. McCoy*, 397 Pa. 615, 156 A.2d 307 (1959).

When the price or value of goods that are regularly bought and sold in a commodity market is at issue, 13 Pa.C.S.A. § 2724 provides:

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) *Learned Treatises* [Not Adopted].

Comment

Pennsylvania has not adopted F.R.E. 803(18). Pennsylvania does not recognize an exception to the hearsay rule for learned treatises. See *Majdic v. Cincinnati Machine Co.*, 370 Pa. Super. 611, 537 A.2d 334 (1988).

(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 sources from which the reputation may be drawn to include (1) a person's associates and (2) the community. Prior Pennsylvania decisional law, none of which is recent, limited the source to the person's family. See *Picken's Estate*, 163 Pa. 14, 29 A. 875 (1894); *American Life Ins. and Trust Co. v. Rosenagle*, 77 Pa. 507 (1875).

(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. See *Hostetter v. Commonwealth*, 367 Pa. 603, 80 A.2d 719 (1951).

(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). See *Commonwealth v. Lopinson*, 427 Pa. 284, 234 A.2d 552 (1967); Comment to Pa.R.E. 405.

(22) *Judgment of Previous Conviction* [Not Adopted].

Comment

Pennsylvania has not adopted F.R.E. 803(22).

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, only if offered against the party convicted.

3. The judgment of conviction is admissible as evidence of any fact essential to sustain the conviction when offered against any party (this is the federal rule for felonies, except that the Government cannot offer someone else's conviction against the defendant in a criminal case, other than for purposes of impeachment).

4. The judgment of conviction is neither conclusive nor admissible as evidence to prove a fact essential to sustain the conviction (common law rule).

For felonies and other major crimes, Pennsylvania takes approach number one. In subsequent litigation, the convicted party is estopped from denying or contesting any fact essential to sustain the conviction. Once a party is estopped from contesting a fact, no evidence need be introduced by an adverse party to prove it. See *Hurtt v. Stirone*, 416 Pa. 493, 206 A.2d 624 (1965); *In re Estate of Bartolovich*, 420 Pa. Super. 419, 616 A.2d 1043 (1992) (judgment of conviction conclusive under Slayer's Act, 20 Pa.C.S.A. § 8801-8815).

For minor offenses, Pennsylvania takes approach number four; it applies the common law rule. Evidence of a conviction is inadmissible to prove a fact necessary to sustain the conviction. See *Loughner v. Schmelzer*, 421 Pa. 283, 218 A.2d 768 (1966).

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

(23) *Judgment as to Personal, Family, or General History or Boundaries* [Not Adopted].

Comment

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

(24) *Other Exceptions* [Not Adopted].

Comment

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

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

Comment

Pa.R.E. 803(25) differs from F.R.E. 801(d)(2), in that the word "shall" in the second sentence has been replaced with the word "may."

The federal rules call an admission by a party-opponent an exception to the definition of hearsay, and place it in rule 801 under the heading of "Definitions." The Pennsylvania rules, like the common law, call an admission by a party-opponent an exception to the hearsay rule. The Pennsylvania rules, therefore, place admissions by a party opponent in Pa.R.E. 803 with other exceptions to the hearsay rule in which the availability of the declarant is immaterial. The difference between the federal and Pennsylvania formulations is organizational. It has no substantive effect.

The second sentence of Pa.R.E. 803(25), as amended, is consistent with Pennsylvania law. See *Commonwealth v. Smith*, 523 Pa. 577, 568 A.2d 600 (1989); *Commonwealth v. Dreibelbis*, 493 Pa. 466, 426 A.2d 1111 (1981).

The personal knowledge rule (Pa.R.E. 602) is not applicable to admissions. See *Salvitti v. Throppe*, 343 Pa. 642, 23 A.2d 445 (1942).

A. *Party's Own Statement*. The admissibility of a party's own statement offered against the party as an exception to the hearsay rule is consistent with Pennsylvania law. See *Salvitti v. Throppe*, supra.

B. *Adoptive Admission*. Pa.R.E. 803(25)(b) is consistent with Pennsylvania law. See *Commonwealth v. Cheeks*, 429 Pa. 89, 239 A.2d 793 (1968) (party expressly adopted statement); *Commonwealth v. Coccioletti*, 493 Pa. 103, 425 A.2d 387 (1981) (party impliedly adopted statement by failing to deny the truth of a statement that party would be expected to deny under the circumstances).

C. *Statement by Authorized Agent*. Admitting, as an exception to the hearsay rule, the statement of a person authorized to speak for the party against the party is

consistent with Pennsylvania law. See *McGarity v. New York Life Ins. Co.*, 359 Pa. 308, 59 A.2d 47 (1948).

D. *Statement by Agent Concerning Matter Within Scope of Agency*. This exception to the hearsay rule is new to Pennsylvania law. It is consistent with the overwhelming majority of American jurisdictions.

E. *Statement by a Co-conspirator*. The admissibility of a statement by a coconspirator as provided by this rule is consistent with Pennsylvania law. See *Commonwealth v. Mayhue*, 536 Pa. 271, 639 A.2d 421 (1994); *Commonwealth v. Dreibelbis*, 493 Pa. 466, 426 A.2d 1111 (1981).

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 inconsistent statements as exceptions to the hearsay rule, not exceptions to the definition of hearsay. Subsections (b) and (c) are an expansion of the exception as defined in the federal rule. Pa.R.E. 803.1(1) is consistent with Pennsylvania law. See *Commonwealth v. Halstead*, 542 Pa. 318, 666 A.2d 655 (1995); *Commonwealth v. Lively*, 530 Pa. 464, 610 A.2d 7 (1992).

(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.
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) is consistent with Pennsylvania law, although we have found no reported cases dealing with prior identification of a thing, as distinguished from a person. See *Commonwealth v. Ly*, 528 Pa. 523, 599 A.2d 613 (1991); *Commonwealth v. Saunders*, 386 Pa. 149, 125 A.2d 442 (1956).

(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, to qualify recorded recollection as an exception to the hearsay rule, the witness must testify that the record correctly reflects the knowledge that the witness once had. In other words, the witness must vouch for the reliability of the record. The federal rule is ambiguous on this point and the applicable federal cases are conflicting.
3. Pa.R.E. 803.1(3) allows the record to be received as an exhibit, and grants the trial judge discretion to show it to the jury in exceptional circumstances, even when not offered by an adverse party.

Pa.R.E. 803.1(3) is consistent with Pennsylvania law. See *Commonwealth v. Cargo*, 498 Pa. 5, 444 A.2d 639 (1982); *Commonwealth v. Cooley*, 484 Pa. 14, 398 A.2d 637 (1979).

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) Other Exceptions [Not Adopted].

(6) Forfeiture by Wrongdoing.

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 is consistent with case law applying the four hearsay exceptions that require unavailability.

The exceptions to the hearsay rule in F.R.E. 804(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 F.R.E. 804(a).

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.

(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 Pennsylvania law.

Pennsylvania has two statutes that provide exceptions to the hearsay rule for former testimony. Both are entitled, "Notes of evidence at former trial." 42 Pa.C.S. § 5917 applies only to criminal cases. 42 Pa.C.S. § 5934 applies only to civil cases. Both are reenactments of statutes that were originally passed in 1887.

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, e.g., *Commonwealth v. Graves*, 484 Pa. 29, 398 A.2d 644 (1979); *Commonwealth v. Rodgers*, 472 Pa. 435, 372 A.2d 771 (1977). The addition of an "adequate" opportunity to cross-examine is consistent with Pennsylvania law. See *Commonwealth v. Bazemore*, 531 Pa. 582, 614 A.2d 684 (1992)(requiring a "full and fair" opportunity to cross-examine).

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 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.A. § 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.A. § 5325 sets forth the procedure for taking depositions, by either prosecution or defendant, outside Pennsylvania.

Again, the Pennsylvania Supreme Court, as a matter of common law development, has recognized an exception to the hearsay rule for depositions that is broader than the statute. See *Commonwealth v. Stasko*, 471 Pa. 373, 370 A.2d 350 (1977).

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

> (3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds
>
> (a) that the witness is dead, or
>
> (b) that the witness is at a greater distance than one hundred (100) miles from the place of trial or is outside the Commonwealth, unless it appears that the absence of the witness was procured by the party offering the deposition, or
>
> (c) that the witness is unable to attend or testify because of age, sickness, infirmity or imprisonment, or
>
> (d) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena, or
>
> (e) upon application and notice that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used....
>
> (5) A deposition upon oral examination of a medical witness, other than a party, may be used at trial for any purpose whether or not the witness is available to testify.

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

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

Medical testimony by deposition

> (a) *General rule.*—The testimony of any physician licensed to practice medicine may be taken by oral interrogation in the manner prescribed by general rule for the taking of depositions.
>
> (b) *Admissibility.*—A deposition taken under subsection (a) shall be admissible in a civil matter.

(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 similar to F.R.E. 804(b)(2), except that the Pennsylvania rule applies in all cases, not just in homicide cases and civil actions. This is a departure from prior Pennsylvania law, which applied the exception only to statements made by the victim in a criminal prosecution for homicide.

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).

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, robbery, or rape. It should also be trustworthy enough to be introduced against a party in a civil case.

(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 by requiring corroborating circumstantial evidence of 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. See *Rudisill v. Cordes*, 333 Pa. 544, 5 A.2d 217 (1939) (civil case); *Commonwealth v. Williams*, 537 Pa. 1, n.8, 640 A.2d 1251 (1994) (criminal case).

(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) differs from F.R.E. 804(b)(4) by requiring the statement of pedigree to be made before the controversy arose, i.e, ante litem motem.

Pa.R.E. 804(b)(4) expands prior Pennsylvania decisional law in two respects:

1. The exception applies if the declarant is unavailable, as "unavailability" is defined in Pa.R.E. 804(a). Formerly, it was required that the declarant be dead. See *In re McClain's Estate*, 481 Pa. 435, 392 A.2d 1371 (1978). The need for the evidence is the same, whether the declarant is dead or unavailable to testify for one of the other reasons delineated in Pa.R.E. 804(a).
2. Under Pa.R.E. 804(b)(4)(B), the declarant need not be related to the person of whom he or she spoke. It is sufficient that the declarant be so closely associated with the person's family as to have accurate information. Formerly, a familial relationship was required. See *In re Garrett's Estate*, 371 Pa. 284, 89 A.2d 531 (1952). A statement of this type by a person closely associated with the person or family of which he or she spoke is likely to be sufficiently reliable to justify an exception to the hearsay rule.

Pennsylvania retains the requirement that the statement must be made before the controversy arose. See *In re McClain's Estate, supra; In re Garrett's Estate, supra*.

(5) *Other Exceptions* [Not Adopted].

Comment

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

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

Comment

Pa.R.E. 804(b)(6) is identical to F.R.E. 804(b)(6). This exception is new to Pennsylvania law.

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 Pennsylvania law. See *Commonwealth v. Galloway*, 302 Pa. Super. 145, 448 A.2d 568 (1982).

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 similar to F.R.E. 806, except that Pa.R.E. 806 makes no reference to Rule 801(d)(2). The subject matter of F.R.E. 801(d)(2) (admissions) is covered by Pa.R.E. 803(25). The change is not substantive. Pa.R.E. 806 is consistent with Pennsylvania law. See *Commonwealth v. Davis*, 363 Pa. Super. 562, 526 A.2d 1205 (1987), appeal denied 518 Pa. 624, 541 A.2d 1135 (1988).

The requirement that a witness be given an opportunity to explain or deny the making of an inconsistent statement provided by Pa.R.E. 613(b) is not applicable when the prior inconsistent statement is offered to impeach a statement admitted under an exception to the hearsay rule. In most cases, the declarant will not be on the stand at the time when the hearsay statement is offered and for that reason the requirement of Pa.R.E. 613(b) is not appropriate.

The last sentence of Pa.R.E. 806 allows the party against whom a hearsay statement has been admitted to call the declarant as a witness and cross-examine the declarant about the statement. This is consistent with Pennsylvania law. See *Commonwealth v. Haber*, 351 Pa. Super. 79, 505 A.2d 273 (1986).

Rule 807. Residual Exception [Not Adopted].

Comment

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

ARTICLE IX. AUTHENTICATION AND IDENTIFICATION

Rule
901. Requirement of Authentication or Identification.
902. Self-Authentication.
903. Subscribing Witness' Testimony Unnecessary.

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) and consistent with Pennsylvania law. Although the authentication or identification requirement has not been authoritatively defined, Pennsylvania courts have imposed the requirement. It may be expressed as follows: When a party offers evidence contending either expressly or impliedly that the evidence is connected with a person, place, thing or event, the party must provide evidence sufficient to support a finding of the contended connection. See *Commonwealth v. Pollock*, 414 Pa. Super. 66, 606 A.2d 500 (1992); *Commonwealth v. Hudson*, 489 Pa. 620, 414 A.2d 1381 (1980).

In some cases, real evidence may not be relevant unless its condition at the time of trial is similar to its condition at the time of the incident in question. In such cases, the party offering the evidence must also introduce evidence sufficient to support a finding that the condition is similar. Pennsylvania law treats this requirement as an aspect of authentication. See *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).

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

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

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

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

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

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

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

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

Paragraph 901(b)(9) is identical to F.R.E. 901(b)(9). There is very little authority in Pennsylvania discussing authentication of evidence as provided in this illustration. The paragraph is consistent with the authority that exists. For example, in *Commonwealth v. 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. The court used a similar approach in *Commonwealth v. Westwood*, 324 Pa. 289, 188 A. 304 (1936) (test for gun powder residue) and in other cases to admit various kinds of scientific evidence. See *Commonwealth v. Middleton*, 379 Pa. Super. 502, 550 A.2d 561 (1988) (electrophoretic analysis of dried blood); *Commonwealth v. Rodgers*, 413 Pa. Super. 498, 605 A.2d 1228 (1992) (results of DNA/RFLP testing).

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

There are a number of statutes that provide for authentication or identification of various types of evidence. See, e.g., 42 Pa.C.S.A. § 6103 (official records within the Commonwealth); 42 Pa.C.S.A. § 5328 (domestic records outside the Commonwealth and foreign records); 35 P. S. § 450.810 (vital statistics); 42 Pa.C.S.A. § 6106 (documents filed in a public office); 42 Pa.C.S.A. § 6110 (certain registers of marriages, births and burials records); 75 Pa.C.S.A. § 1547(c) (chemical tests for alcohol and controlled substances); 75 Pa.C.S.A. § 3368 (speed timing devices); 75 Pa.C.S.A. § 1106(c) (certificates of title); 42 Pa.C.S.A. § 6151 (certified copies of medical records); 23 Pa.C.S.A. § 5104 (blood tests to determine paternity); 23 Pa.C.S.A. § 4343 (genetic tests to determine paternity).

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

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 extrinsic evidence of authentication or identification. In other words, the requirement that a proponent must present authentication or identification evidence as a condition precedent to admissibility, as provided by Pa.R.E. 901(a), is inapplicable to the evidence discussed in Pa.R.E. 902. The rationale for the rule is that, for the types of evidence covered by Pa.R.E. 902, the risk of forgery or deception is so small, and the likelihood of discovery of forgery or deception is so great, that the cost of presenting extrinsic evidence and the waste of court time is not justified. Of course, this rule does not preclude the opposing party from contesting the authenticity of the evidence. In that situation, authenticity is to be resolved by the finder of fact.

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

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

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

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

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

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, print-

ing, 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).

Paragraphs 1001(1) and (2) have no precise equivalent in Pennsylvania law, but the definitions of the terms writings, recordings and photographs are consistent with lay and legal usage in Pennsylvania.

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

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

Pa.R.E. 1002 differs from F.R.E. 1002 to eliminate the reference to Federal law and to make the Rule conform to Pennsylvania law. Pa.R.E. 1002 is consistent with Pennsylvania law.

This rule corresponds to the common law "best evidence rule." See *Warren v. Mosites Constr. Co.*, 253 Pa. Super. 395, 385 A.2d 397 (1978). The rationale for the rule was not expressed in Pennsylvania cases, but commentators have mentioned four reasons justifying the rule.

(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 Pa.R.E. 1004(4). That rule provides that the original is not required when the writing, recording or photograph is not closely related to a controlling issue.

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), and attachments, see *L.C.S. Colliery, Inc. v. Globe Coal Co.*, 369 Pa. 1, 84 A.2d 776 (1951). On the other hand, writings are not usually treated as subject to the rule if they are only evidence of the transaction, thing or event. See *Hamill-Quinlan, Inc. v. Fisher*, 404 Pa. Super. 482, 591 A.2d 309 (1991); *Noble C. Quandel Co. v. Slough Flooring, Inc.*, 384 Pa. Super. 236, 558 A.2d 99 (1989). Thus, testimony as to a person's age may be offered; it is not necessary to produce a birth certificate. See *Commonwealth ex rel. Park v. Joyce*, 316 Pa. 434, 175 A. 422 (1934). Or, a party's earnings may be proven by testimony; it is not necessary to offer business records. See *Noble C. Quandel Co. v. Slough Flooring, Inc.*, 384 Pa. Super. 236, 558 A.2d 99 (1989).

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

(1993) (video tape); *Anderson v. Commonwealth*, 121 Pa. 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 and 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 Bd. 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 light of modern practice. Pleading and discovery rules such as Pa.R.C.P. 4009.1 (requiring production of originals of documents and photographs etc.) and Pa.R.Crim.P. 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, Pa.R.E. 1003 should tend to eliminate purely technical objections and unnecessary delay. In those cases where the opposing party raises a genuine question as to authenticity or the fairness of using a duplicate, the trial court may require the production of the original under this rule.

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. 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).

Paragraphs 1004(2), 1004(3) and 1004(4) are consistent with Pennsylvania law. See *Otto v. Trump*, 115 Pa. 425, 8 A. 786 (1887) (consistent with Pa.R.E. 1004(2)); *Abercrombie v. Bailey*, 326 Pa. 65, 190 A. 725 (1937) (consistent with Pa.R.E. 1004(3)); *Durkin v. Equine Clinics, Inc.*, 313 Pa. Super. 75, 459 A.2d 417 (1983) (consistent with Pa.R.E. 1004(4)); *McCullough v. Holland Furnace Co.*, 293 Pa. 45, 141 A. 631 (1928) (consistent with Pa.R.E. 1004(4)); see also Comment to Pa.R.E. 1002.

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

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 Mfg. 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.

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 is consistent with Pennsylvania practice.

[Pa.B. Doc. No. 98-798. Filed for public inspection May 22, 1998, 9:00 a.m.]

Title 255—LOCAL COURT RULES

DELAWARE COUNTY

Adoption of Civil Rule *205.2; Misc. No. 98-80157

Order

And Now, this 4th day of May, 1998, it is hereby *Ordered* that Civil Rule *205.2 be adopted as follows:

Rule *205.2—Filing Legal Papers with the Office of Judicial Support.

The facing page of all pleadings, petitions, motions and all other matters filed with the Office of Judicial Support shall provide a space, 3 inches in height, on the top right under the docket number for the use of the Office of Judicial Support in affixing the date and time of the filing.

By the Court

A. LEO SERENI,
President Judge

[Pa.B. Doc. No. 98-799. Filed for public inspection May 22, 1998, 9:00 a.m.]

DELAWARE COUNTY

Amendment of Civil Rule *241(b); Misc. No. 98-80156

Order

And Now, this 4th day of May, 1998, it is hereby *Ordered* that Civil Rule *241(b) be amended to read as follows: (b) Assessment of damage cases may be certified as ready for trial at any time by sending a certificate of readiness to all other parties and filing two copies of the certificate and one copy of a certification of service with the Court Administrator.

By the Court

A. LEO SERENI,
President Judge

[Pa.B. Doc. No. 98-800. Filed for public inspection May 22, 1998, 9:00 a.m.]

DELAWARE COUNTY

Amendment of Civil Rules *1920.53(a), (d) and (f); Misc. No. 98-80154

Order

And Now, this 4th day of May, 1998, it is hereby *Ordered* that Civil Rules *1920.53(a) and (f) be amended by the deletion of all reference to the former Divorce Code; and that Civil Rule *1920.53(d) be amended to increase from thirty (30) days to forty-five (45) days the time in which the master shall set a hearing date.

By the Court

A. LEO SERENI,
President Judge

[Pa.B. Doc. No. 98-801. Filed for public inspection May 22, 1998, 9:00 a.m.]

DELAWARE COUNTY

Amendment and Redesignation of Civil Rule *206 B2; Misc. No. 98-80150

Order

And Now, this 4th day of May, 1998, it is hereby *Ordered* that Civil Rule *206 B2 be redesignated *206C and amended to read as follows:

Emergency Matters or Stays of Proceedings in Family and in Non-Family Matters.

(a) Redesignated (1)

(b) Redesignated (2)

(c) Redesignated (3)

(d) Redesignated (4) and (5) and amended to read as follows:

The moving party shall make a good faith effort to give all parties affected by the application as much advance notice as reasonably possible of the date and time he/she intends to present his/her application and shall attach to the application a certification of the good faith effort that has been made. This certification shall provide the specific details of the moving party's efforts to comply with the advance notice requirement of this section to include, but not limited to, the method(s) by which notice was sought to be given, the date(s) and time(s) when notice was sought to be given, the address(es) and/or phone number(s) and/or fax number(s) at which notice was sought to be given and the identity(ies) of the party(ies) to whom notice was sought to be given. When the court fixes a hearing date following the submission of an application under this Rule, a second certification shall be filed by the moving party providing similar specific information setting forth the efforts that have been made to give to all affected parties as much notice as possible of the date, time and place set by the court for the hearing.

(5) Except in emergency situations no stay of proceedings shall be granted without actual prior notice to all parties affected thereby.

By the Court

A. LEO SERENI,
President Judge

[Pa.B. Doc. No. 98-802. Filed for public inspection May 22, 1998, 9:00 a.m.]

DELAWARE COUNTY

Renumbering of Civil Rule *223(a)(4); Misc. No. 98-80152

Order

And Now, this 4th day of May, 1998, it is hereby *Ordered* that the Civil Rule *223(a)(4) be renumbered *223(a)(5) to conform to the numbering of Pa.R.C.P. 223(a).

By the Court

A. LEO SERENI,
President Judge

[Pa.B. Doc. No. 98-803. Filed for public inspection May 22, 1998, 9:00 a.m.]

DELAWARE COUNTY

Renumbering of Civil Rule *228(a), (b) and (c); Misc. No. 98-80153

Order

And Now, this 4th day of May, 1998, it is hereby *Ordered* that Civil Rule *228(a), (b) and (c) be renumbered *223(a)(5), (6) and (7) to conform to the subject matter of Pa.R.C.P. 223(a).

By the Court

A. LEO SERENI,
President Judge

[Pa.B. Doc. No. 98-804. Filed for public inspection May 22, 1998, 9:00 a.m.]

DELAWARE COUNTY

Rescission of Civil Rule *1915.4 and the Adoption in Its Place of Civil Rule *1915.19; Misc. No. 98-80151

Order

And Now, this 4th day of May, 1998, it is hereby *Ordered* that Civil Rule *1915.4 be rescinded and that Civil Rule *1915.19 be adopted in its place, as follows:

Rule *1915.19—Seminar for Separated and Divorced Parents.

(a) If a case is not resolved at the first conciliation conference, the court may order the parties to attend an educational seminar. The court may also order such attendance at any time sua sponte or by stipulation of the parties.

(b) This seminar should be conducted in the courthouse complex or at such other location approved by the court.

(c) Each party shall be responsible for payment of his/her share of the seminar costs prior to the seminar. The provider shall waive for any party who has been qualified by the court to proceed in forma pauperis that party's share of the costs.

(d) A certificate of compliance shall be given to the attendees and filed by the provider with the Office of Judicial Support.

(e) Any party who fails to comply with the court's order directing completion of this educational seminar may be subject to a finding of contempt; and the court may impose whatever sanctions it deems appropriate including, but not limited to, an order imposing the payment of counsel fees. A hearing on a custody petition shall not be delayed by a party's refusal or delay in complying with this order.

By the Court

A. LEO SERENI,
President Judge

[Pa.B. Doc. No. 98-805. Filed for public inspection May 22, 1998, 9:00 a.m.]

DELAWARE COUNTY

Rescission of Civil Rules *204(a) and 227.5; Misc. No. 98-80155

Order

And Now, this 4th day of May, 1998, it is hereby *Ordered* that Civil Rules *204(a) and *227.5 be rescinded

as superfluous in the case of *204(a) and is not an appropriate subject for local rule making in the case of *227.5.

By the Court

A. LEO SERENI,
President Judge

[Pa.B. Doc. No. 98-806. Filed for public inspection May 22, 1998, 9:00 a.m.]

DELAWARE COUNTY

Rescission of Civil Rules *1920.4(f); 1920.12(d); 1920.31(d), (e) and (g); 1920.42(d); 1920.43(d), (e), (f) and (g); 1920.51(f); 1920.76(a) and (b) and 1920.89; Misc. No. 98-80158

Order

And Now, this 4th day of May, 1998, it is hereby *Ordered* that Civil Rules *1920.4(f); *1920.12(d); *1920.31(d), (e) and (g); *1920.42(d); *1920.43(d), (e), (f) and (g); *1920.51(f); *1920.76(a) and (b) and *1920.89 be rescinded as not in conformity with the Pennsylvania Rules of Civil Procedure and/or as inconsistent with present local practice.

By the Court

A. LEO SERENI,
President Judge

[Pa.B. Doc. No. 98-807. Filed for public inspection May 22, 1998, 9:00 a.m.]

DISCIPLINARY BOARD OF THE SUPREME COURT

Notice of Disbarment

Notice is hereby given that Robert H. Obringer, who resides outside the Commonwealth of Pennsylvania, having been disbarred from the practice of law in the State of New Jersey, the Supreme Court of Pennsylvania issued an Order dated May 5, 1998, disbarring Robert H. Obringer from the Bar of this Commonwealth. In accordance with Rule 217(f), Pa.R.D.E., since this formerly admitted attorney has never practiced in Pennsylvania, this notice is published in the *Pennsylvania Bulletin.*

ELAINE M. BIXLER,
Secretary and Executive Director
The Disciplinary Board of the
Supreme Court of Pennsylvania

[Pa.B. Doc. No. 98-808. Filed for public inspection May 22, 1998, 9:00 a.m.]

Notice of Disbarment

Notice is hereby given that John William Morris, who resides outside the Commonwealth of Pennsylvania, having been disbarred from the practice of law in the State of New Jersey, the Supreme Court of Pennsylvania issued an Order dated May 5, 1998, disbarring John William Morris from the Bar of this Commonwealth. In accordance with Rule 217(f), Pa.R.D.E., since this formerly admitted attorney has never practiced in Pennsylvania, this notice is published in the *Pennsylvania Bulletin.*

ELAINE M. BIXLER,
Secretary and Executive Director
The Disciplinary Board of the
Supreme Court of Pennsylvania

[Pa.B. Doc. No. 98-809. Filed for public inspection May 22, 1998, 9:00 a.m.]

Notice of Suspension

Notice is hereby given that the Supreme Court of Pennsylvania issued an Order dated May 5, 1998, suspending Jill Louise Rygwalski from the Bar of this Commonwealth for a period of five (5) years, retroactive to November 13, 1995. In accordance with Rule 217(f), Pa.R.D.E., since this formerly admitted attorney resides outside the Commonwealth of Pennsylvania, this notice is published in the *Pennsylvania Bulletin.*

ELAINE M. BIXLER,
Secretary and Executive Director
The Disciplinary Board of the
Supreme Court of Pennsylvania

[Pa.B. Doc. No. 98-810. Filed for public inspection May 22, 1998, 9:00 a.m.]
