EVIDENCE

RULE-STATEMENT CHECKLIST

V. HEARSAY

~25% tested

A. DEFINITION AND ANALYTICAL APPROACH

GENERAL RULE Hearsay is an out-of-court statement offered to prove the truth of the matter asserted; it is inadmissible unless it is defined as non-hearsay, is an exemption, or falls within an exception. Analyze in order: (1) is it a statement offered for its truth, so that it is hearsay; and if so (2) is it exempt under Rule 801(d) or admissible under an exception in Rule 803, 804, or 807.

- ☐ **Definition.** Hearsay is a statement, other than one made by the declarant while testifying at the current trial or hearing, offered in evidence to prove the truth of the matter asserted in the statement (Rule 801(c)).
- ☐ **Statement.** A statement is a person's oral or written assertion, or nonverbal conduct intended by the person as an assertion; only assertive conduct or words can be hearsay (Rule 801(a)).
- ☐ **Declarant.** A declarant is the person who made the statement; machine-generated and animal-generated output is not a statement and cannot be hearsay.
- ☐ **Not for truth.** A statement offered for a purpose other than its truth is not hearsay, for example to show effect on the listener, notice, motive, knowledge, a verbal act with independent legal significance, or a prior inconsistent statement offered only to impeach.
- ☐ **Implied assertions and questions.** Questions, commands, and greetings that assert nothing are generally not hearsay; conduct or words not intended to assert the fact proved are treated as non-assertive and fall outside hearsay.
- ☐ **Constitutional overlay.** In a criminal case, admission of a testimonial hearsay statement against the accused violates the Confrontation Clause unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine, regardless of any hearsay exception.

B. EXEMPTIONS: STATEMENTS DEFINED AS NOT HEARSAY (801(D))

GENERAL RULE Certain statements are defined as not hearsay under Rule 801(d): prior statements by a testifying witness and statements of an opposing party.

- ☐ **Prior inconsistent statement.** A declarant-witness's prior inconsistent statement is not hearsay and is admissible for its truth only if it was given under penalty of perjury at a prior trial, hearing, other proceeding, or deposition (Rule 801(d)(1)(A)).
- ☐ **Prior consistent statement.** A declarant-witness's prior consistent statement is not hearsay if offered to rebut an express or implied charge of recent fabrication or improper influence or motive, or to rehabilitate credibility when attacked on another ground (Rule 801(d)(1)(B)).
- ☐ **Prior identification.** A declarant-witness's out-of-court identification of a person is not hearsay and is admissible substantively, provided the witness testifies and is subject to cross-examination (Rule 801(d)(1)(C)).
- ☐ **Opposing party's own statement.** A statement offered against an opposing party that was made by the party in an individual or representative capacity is not hearsay; it need not be against interest when made and the party need not have personal knowledge (Rule 801(d)(2)(A)).
- ☐ **Adoptive admission.** A statement is not hearsay if the party manifested that it adopted or believed it to be true, including by silence where a reasonable person would have denied the statement (Rule 801(d)(2)(B)).
- ☐ **Authorized and agent admissions.** A statement by a person the party authorized to speak, or by the party's agent or employee on a matter within the scope of that relationship and made during its existence, is not hearsay when offered against the party (Rule 801(d)(2)(C), (D)).
- ☐ **Coconspirator statement.** A statement by the party's coconspirator made during and in furtherance of the conspiracy is not hearsay; the contents may be considered but do not by themselves establish the conspiracy or participation (Rule 801(d)(2)(E)).

C. EXCEPTIONS: AVAILABILITY OF DECLARANT IMMATERIAL (803)

GENERAL RULE The Rule 803 exceptions apply whether or not the declarant is available to testify.

- ☐ **Present sense impression.** A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it, is admissible (Rule 803(1)).
- ☐ **Excited utterance.** A statement relating to a startling event or condition, made while the declarant was under the stress of excitement it caused, is admissible (Rule 803(2)).
- ☐ **State of mind.** A statement of the declarant's then-existing state of mind, emotion, sensation, or physical condition, such as intent, plan, or motive, is admissible, but not a statement of memory or belief offered to prove the fact remembered or believed except as to a will (Rule 803(3)).
- ☐ **Medical diagnosis or treatment.** A statement made for and reasonably pertinent to medical diagnosis or treatment, describing medical history, past or present symptoms, or their general cause, is admissible; statements of fault are generally not pertinent (Rule 803(4)).
- ☐ **Recorded recollection.** A record on a matter the witness once knew but now cannot recall well enough to testify fully, made or adopted when the matter was fresh in memory and shown to reflect it accurately, may be read into evidence but received as an exhibit only if offered by an adverse party (Rule 803(5)).
- ☐ **Business records.** A record of an act, event, condition, opinion, or diagnosis is admissible if kept in the regular course of a regularly conducted business activity, making the record was a regular practice, and it was made at or near the time by someone with knowledge, shown by a custodian or by certification, unless the source or circumstances indicate a lack of trustworthiness (Rule 803(6)).

- ☐ **Absence of a business record.** Evidence that a matter is not included in a business record may be admitted to prove the matter did not occur, if a record would regularly have been made and the absence is not shown to be untrustworthy (Rule 803(7)).
- ☐ **Public records.** A record of a public office is admissible if it sets out the office's activities, a matter observed under a legal duty (but not, in a criminal case, a matter observed by law enforcement offered against the accused), or factual findings from a legally authorized investigation offered in a civil case or against the government in a criminal case, unless untrustworthy (Rule 803(8)).
- ☐ **Learned treatise.** A statement in a published treatise, periodical, or pamphlet may be read into evidence if called to an expert's attention on cross or relied on by the expert on direct and established as a reliable authority, but the material is not received as an exhibit (Rule 803(18)).
- ☐ **Other 803 exceptions.** Also admissible regardless of availability are records of vital statistics, absence of a public record, ancient documents at least 20 years old, market reports, and reputation as to character, personal or family history, or boundaries and general history (Rule 803).

D. EXCEPTIONS REQUIRING UNAVAILABILITY (804) AND RESIDUAL (807)

GENERAL RULE The Rule 804 exceptions apply only if the declarant is unavailable, meaning exempt by privilege, refusing to testify, lacking memory, dead or ill, or absent and unprocurable; a party who wrongfully caused the unavailability cannot claim these exceptions.

- ☐ **Former testimony.** Testimony given at a trial, hearing, or deposition is admissible against a party who had, or whose predecessor in interest in a civil case had, an opportunity and similar motive to develop it by direct, cross, or redirect examination (Rule 804(b)(1)).
- ☐ **Dying declaration.** In a homicide prosecution or any civil case, a statement made by a now-unavailable declarant who believed death was imminent, concerning its cause or circumstances, is admissible (Rule 804(b)(2)).
- ☐ **Statement against interest.** A statement so contrary to the declarant's pecuniary, proprietary, civil, or penal interest that a reasonable person would have made it only if true is admissible; one exposing the declarant to criminal liability and offered to exculpate the accused needs corroborating circumstances indicating trustworthiness (Rule 804(b)(3)).
- ☐ **Statement of personal or family history.** A statement about the declarant's own or a relative's birth, adoption, marriage, ancestry, or similar family history is admissible even without firsthand knowledge (Rule 804(b)(4)).
- ☐ **Forfeiture by wrongdoing.** A statement is admissible against a party who wrongfully caused, or acquiesced in wrongfully causing, the declarant's unavailability and intended that result (Rule 804(b)(6)).
- ☐ **Residual exception.** A hearsay statement not covered by a specific exception may be admitted if it has sufficient guarantees of trustworthiness considering the totality of circumstances and corroborating evidence, is more probative on the point than other reasonably available evidence, and reasonable notice is given (Rule 807).
- ☐ **Hearsay within hearsay.** A statement containing another statement is admissible only if each layer independently satisfies an exemption or exception (Rule 805).

II. RELEVANCY AND EXCLUSION OF RELEVANT EVIDENCE

~25% tested

A. RELEVANCE BASELINE (401 TO 403)

GENERAL RULE Evidence is admissible only if relevant, and even relevant evidence may be excluded when its risks substantially outweigh its probative value.

- ☐ **Relevance.** Evidence is relevant if it has any tendency to make a fact of consequence more or less probable than it would be without the evidence (Rule 401).
- ☐ **Admissibility of relevant evidence.** Relevant evidence is admissible unless barred by the Constitution, a statute, the rules, or other Supreme Court rules; irrelevant evidence is inadmissible (Rule 402).
- ☐ **Rule 403 balancing.** A court may exclude relevant evidence if its probative value is substantially outweighed by a danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence (Rule 403).

B. CHARACTER, OTHER ACTS, AND HABIT (404 TO 406)

GENERAL RULE Character evidence is generally not admissible to prove conduct in conformity, subject to defined exceptions; habit evidence is admissible to show conforming conduct.

- ☐ **Propensity bar.** Evidence of a person's character or trait is not admissible to prove that on a particular occasion the person acted in accordance with that character (Rule 404(a)(1)).
- ☐ **Defendant and victim character in criminal cases.** A criminal defendant may offer evidence of a pertinent trait of the defendant or of the victim, and the prosecution may then rebut; in a homicide case the prosecution may offer the victim's trait of peacefulness to rebut evidence the victim was the first aggressor (Rule 404(a)(2)).
- ☐ **Methods of proving character.** When character is admissible as circumstantial evidence, it may be proved by reputation or opinion testimony; specific instances may be inquired into on cross-examination, and specific instances are usable on direct only when character is an essential element of a charge, claim, or defense (Rule 405).
- ☐ **Other acts (404(b)).** Evidence of other crimes, wrongs, or acts is not admissible to show propensity but may be admissible for another purpose such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident, subject to Rule 403 (Rule 404(b)).
- ☐ **Habit.** Evidence of a person's habit or an organization's routine practice may be admitted to prove conduct on a particular occasion was in accordance with the habit or routine, whether or not corroborated and regardless of eyewitnesses (Rule 406).

- ☐ **Sexual assault and child molestation.** In cases involving sexual assault or child molestation, evidence that the defendant committed another such offense is admissible and may be considered on any relevant matter, including propensity, subject to Rule 403 (Rules 413 to 415).
- ☐ **Rape shield.** In a case involving alleged sexual misconduct, evidence of a victim's other sexual behavior or predisposition is generally inadmissible, subject to limited exceptions such as proof of another source of injury, prior acts with the accused to show consent, and where exclusion would violate the defendant's constitutional rights (Rule 412).

C. POLICY-BASED EXCLUSIONS (407 TO 411)

GENERAL RULE Certain relevant evidence is excluded to promote social policies, but each exclusion bars only a specific use and permits others.

- ☐ **Subsequent remedial measures.** Evidence of measures taken after an injury that would have made it less likely is not admissible to prove negligence, culpable conduct, a product or design defect, or a need for warning, but may be admitted for another purpose such as ownership, control, or feasibility if disputed, or impeachment (Rule 407).
- ☐ **Compromise offers.** Conduct or statements made in compromising or attempting to compromise a disputed claim are not admissible to prove or disprove the claim's validity or amount or to impeach by prior inconsistent statement, though admissible for other purposes such as showing bias (Rule 408).
- ☐ **Medical expenses.** Evidence of offering or paying to pay medical, hospital, or similar expenses from an injury is not admissible to prove liability, although related admissions of fact are not automatically covered (Rule 409).
- ☐ **Pleas and plea discussions.** A withdrawn guilty plea, a nolo contendere plea, and statements made during plea discussions with the prosecutor that do not result in a guilty plea are not admissible against the defendant (Rule 410).
- ☐ **Liability insurance.** Evidence that a person was or was not insured against liability is not admissible to prove negligence or wrongful conduct, but may be admitted for another purpose such as proving agency, ownership, control, or witness bias (Rule 411).

I. PRESENTATION OF EVIDENCE ~20% tested

A. COMPETENCY, EXAMINATION, AND OBJECTIONS

GENERAL RULE Every witness is presumed competent, and the court controls the mode and order of proof.

- ☐ **Competency.** Every person is competent to be a witness unless a rule provides otherwise; a witness must have personal knowledge of the matter and must give an oath or affirmation to testify truthfully (Rules 601, 602, 603).
- ☐ **Dead Man and judge or juror.** In a civil case, state competency law may apply to an element governed by state law; a presiding judge may not testify at the trial, and a juror may not testify before the jury or, on validity of the verdict, except as to extraneous prejudicial information, outside influence, or a mistake on the verdict form (Rules 605, 606).
- ☐ **Leading questions.** Leading questions should not be used on direct examination except as necessary to develop testimony, but are permitted on cross-examination and when examining a hostile witness, an adverse party, or a witness identified with an adverse party (Rule 611(c)).
- ☐ **Scope and control.** The court exercises reasonable control over examining witnesses and presenting evidence to make it effective, avoid wasting time, and protect witnesses; cross-examination is generally limited to the subject matter of direct and matters affecting credibility (Rule 611).
- ☐ **Refreshing recollection.** A witness may use a writing to refresh memory while testifying; when it is so used, an adverse party is entitled to have it produced, inspect it, cross-examine on it, and introduce relevant portions (Rule 612).
- ☐ **Objections and offers of proof.** To preserve error, a party must make a timely objection stating the specific ground unless it is apparent, or make an offer of proof showing the substance of excluded evidence; a definitive ruling on a motion in limine preserves the issue without renewal at trial (Rule 103).
- ☐ **Limited admissibility.** When evidence is admissible for one purpose or against one party but not another, the court on request must restrict it to its proper scope and instruct the jury accordingly (Rule 105).

B. IMPEACHMENT AND REHABILITATION (607 TO 613, 806)

GENERAL RULE Any party may attack a witness's credibility, and the rules define the permissible methods and their limits.

- ☐ **Who may impeach.** Any party, including the party that called the witness, may attack the witness's credibility (Rule 607).
- ☐ **Character for truthfulness.** A witness's credibility may be attacked or supported by reputation or opinion evidence of character for truthfulness, but evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked (Rule 608(a)).
- ☐ **Specific instances of conduct.** Specific instances of a witness's conduct, if probative of truthfulness, may be inquired into on cross-examination but may not be proved by extrinsic evidence; the cross-examiner must have a good-faith basis and take the answer (Rule 608(b)).
- ☐ **Conviction of a crime.** A witness may be impeached with a prior conviction: crimes involving dishonesty or false statement are automatically admissible, while other felonies are admitted subject to Rule 403 balancing, or a heightened balance favoring the accused when the witness is a criminal defendant (Rule 609).
- ☐ **Remoteness and juvenile convictions.** If more than ten years have passed since conviction or release, the conviction is admissible only if its probative value substantially outweighs its prejudicial effect with notice, and juvenile adjudications and pardoned or annulled convictions are generally inadmissible (Rule 609).

- ☐ **Prior inconsistent statement.** A witness may be impeached with a prior inconsistent statement; extrinsic evidence is allowed only if the witness is given an opportunity to explain or deny and the opposing party to examine, unless the statement is an opposing party's statement, and this foundation is not required before questioning (Rule 613).
- ☐ **Bias and other non-collateral impeachment.** Bias, interest, motive to lie, sensory or mental defect, and contradiction on non-collateral matters may be shown by extrinsic evidence, as these are not treated as collateral.
- ☐ **Impeaching a hearsay declarant.** When a hearsay statement is admitted, the declarant's credibility may be attacked and supported as if the declarant had testified, and prior inconsistent statements or conduct may be used without giving the declarant a chance to explain (Rule 806).

C. OPINION AND EXPERT TESTIMONY (701 TO 706)

GENERAL RULE Lay opinion is limited to inferences within ordinary experience, while expert testimony must be reliable and helpful.

- ☐ **Lay opinion.** A lay witness may give opinion testimony that is rationally based on the witness's perception, helpful to understanding the testimony or determining a fact, and not based on specialized knowledge within the scope of expert testimony (Rule 701).
- ☐ **Expert qualification and reliability.** A qualified expert may testify in the form of an opinion if the specialized knowledge will help the trier of fact, the testimony rests on sufficient facts or data, it is the product of reliable principles and methods, and the expert has reliably applied them to the facts (Rule 702).
- ☐ **Bases of expert opinion.** An expert may base an opinion on facts or data personally observed, admitted in evidence, or reasonably relied upon by experts in the field even if inadmissible; inadmissible bases may be disclosed to the jury only if their probative value in helping evaluate the opinion substantially outweighs their prejudicial effect (Rule 703).
- ☐ **Ultimate issue.** An opinion is not objectionable merely because it embraces an ultimate issue, except that in a criminal case an expert may not state an opinion about whether the defendant did or did not have a mental state that is an element of the crime or a defense (Rule 704).
- ☐ **Opinion without disclosing basis.** An expert may state an opinion and give the reasons for it without first testifying to the underlying facts or data, but may be required to disclose them on cross-examination (Rule 705).

IV. WRITINGS, RECORDINGS, AND PHOTOGRAPHS

~10% tested

A. AUTHENTICATION (901 TO 903)

GENERAL RULE Before an item of evidence is admitted, its proponent must show it is what the proponent claims it to be.

- ☐ **Requirement.** To satisfy authentication, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims; the ultimate weight is for the jury (Rule 901(a)).
- ☐ **Methods.** Authentication may be shown by testimony of a witness with knowledge, comparison by an expert or the trier of fact with authenticated specimens, distinctive characteristics, voice or telephone identification, public records, ancient documents at least 20 years old and free of suspicion, and process or system reliability (Rule 901(b)).
- ☐ **Self-authentication.** Certain items are self-authenticating and need no extrinsic evidence, including certified public records, official seals, certified copies of business records, acknowledged documents, commercial paper, newspapers, periodicals, and trade inscriptions (Rule 902).
- ☐ **Handwriting and voice.** Nonexpert opinion on handwriting is admissible if based on familiarity not acquired for the litigation, and a voice may be identified by anyone who has heard it at any time under circumstances connecting it to the speaker (Rule 901(b)).

B. BEST EVIDENCE RULE (1001 TO 1008)

GENERAL RULE To prove the content of a writing, recording, or photograph, the original is generally required.

- ☐ **Original document rule.** An original writing, recording, or photograph is required to prove its content unless the rules or a statute provide otherwise; the rule applies only when the terms of the writing are themselves at issue or a witness relies on the writing rather than independent knowledge (Rule 1002).
- ☐ **Duplicates.** A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or it would be unfair to admit the duplicate (Rule 1003).
- ☐ **Admissibility of other evidence of content.** Other evidence of content is admissible if all originals are lost or destroyed without bad faith, no original can be obtained by available process, the original is in the possession of the opponent who fails to produce it after notice, or the content concerns a collateral matter (Rule 1004).
- ☐ **Summaries and definitions.** Voluminous writings or recordings that cannot be conveniently examined may be presented through a summary, chart, or calculation with the originals made available to other parties, and an original includes any counterpart intended to have the same effect and any accurate printout of electronically stored information (Rules 1006, 1001).

III. PRIVILEGES AND OTHER POLICY EXCLUSIONS

~10% tested

A. ATTORNEY-CLIENT AND WORK PRODUCT

GENERAL RULE Privileges protect confidential communications within certain relationships and belong to the holder, who may waive them; in federal court, privilege is generally governed by common law, except that state privilege law applies to a claim or defense governed by state law.

- ☐ **Attorney-client privilege.** A client holds a privilege to refuse to disclose and to prevent disclosure of confidential communications made to facilitate legal services between the client and the lawyer or their representatives; it protects communications, not underlying facts, and survives the client's death.

- ☐ **Scope and corporate clients.** The privilege covers communications intended to be confidential and extends to corporate employees who communicate with counsel at the direction of superiors on matters within their duties for the purpose of legal advice.
- ☐ **Exceptions and waiver.** There is no privilege for communications made to further a crime or fraud, in disputes between the attorney and client, or among joint clients later adverse to each other; the privilege is waived by voluntary disclosure to outsiders or, in some cases, by inadvertent disclosure without reasonable precautions.
- ☐ **Work product.** Materials prepared in anticipation of litigation are protected from discovery unless the party shows substantial need and inability to obtain the equivalent without undue hardship, and an attorney's mental impressions and legal theories receive nearly absolute protection.

B. OTHER CONFIDENTIAL-RELATIONSHIP PRIVILEGES

GENERAL RULE Several relationships give rise to privileges protecting confidential communications.

- ☐ **Spousal testimonial privilege.** In a criminal case, a witness spouse holds the privilege to refuse to testify against the defendant spouse about anything; it applies only during a valid marriage and covers events even before the marriage.
- ☐ **Confidential marital communications.** Either spouse may refuse to disclose and prevent disclosure of confidential communications made during a valid marriage; it survives divorce as to communications made while married and applies in civil and criminal cases.
- ☐ **Spousal privilege exceptions.** Neither spousal privilege applies in proceedings where one spouse is charged with a crime or tort against the other spouse or their child.
- ☐ **Physician and psychotherapist.** The psychotherapist-patient privilege, recognized in federal court and extending to licensed social workers, protects confidential communications for diagnosis or treatment of a mental condition; a physician-patient privilege exists only by statute in many states and typically does not apply where the patient's condition is placed at issue.
- ☐ **Clergy and other privileges.** Confidential communications to a member of the clergy in a spiritual capacity are privileged, and many jurisdictions recognize additional privileges such as accountant-client or a reporter's privilege by statute.

C. OTHER POLICY EXCLUSIONS AND PROCESS

GENERAL RULE Additional doctrines exclude evidence or govern how privileges and preliminary questions are handled.

- ☐ **Privilege against self-incrimination.** A witness may refuse to give testimony that could be used in a criminal prosecution against the witness, but the privilege is personal, does not extend to entities, and may be overcome by a grant of immunity.
- ☐ **Government privileges.** The government may invoke privileges for military and state secrets and for the identity of a confidential informant, the latter yielding when disclosure is essential to a fair determination of a defendant's guilt or innocence.
- ☐ **Preliminary questions.** The court decides preliminary questions about a witness's competence, the existence of a privilege, or admissibility, and in doing so is not bound by the rules of evidence except those on privilege (Rule 104(a)).
- ☐ **Conditional relevance.** When relevance depends on a fact, the court admits the evidence if a party introduces sufficient proof to support a finding that the fact exists, leaving the ultimate question to the jury (Rule 104(b)).
- ☐ **Judicial notice.** A court may take judicial notice of an adjudicative fact not subject to reasonable dispute because it is generally known or can be accurately and readily determined from reliable sources; in a civil case the jury must accept the fact, while in a criminal case it may but is not required to (Rule 201).