

# RULES OF EVIDENCE

Updated September 2017



**EMPIRE MOCK TRIAL**  
EDUCATE. CONNECT. EMPOWER.

# Rules of Evidence

2017 Edition

*Adapted from the U.S. Federal Rules of Evidence*

## **Recognized Objections**

Teams are permitted to raise any objection falling within Empire Mock Trial's abridged version of the Federal Rules of Evidence (FRE). When FRE Rule numbers are not consecutive, Empire has omitted non-applicable sections of the FRE.

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### **I. Objections to the Form of the Question**

Leading (on direct) [611(c)]	Vague
Asked & Answered	Compound Question
Argumentative, Badgering the Witness	Assumes Facts Not in Evidence

### **II. Objections to the Form of the Question**

Relevance [401]	Lack of Foundation
Lack of Personal Knowledge [602]	Calls for Speculation [602]
Calls for Improper Opinion [701/702]	Ultimate Issue [704]
Calls for Hearsay [801]	Improper Character Evidence [404]
Cumulative [403]	More Prejudicial than Probative [403]
Calls for a Narrative Answer	Outside Scope of Re-Direct/Re-Cross

### **III. Objections to the Witness's Answer**

Relevance [401]	Lack of Foundation
Lack of Personal Knowledge [602]	Speculation [602]
Improper Opinion [701/702]	Ultimate Issue [704]
Hearsay [801]	Hearsay within Hearsay [805]
Improper Character Evidence [404]	Improper Bolstering [608(a)]
Cumulative [403]	More Prejudicial than Probative [403]
Narrative	Non-Responsive
Outside Scope of Re-Direct/Re-Cross	

## **Article I**

### *General Provisions*

#### **Rule 101. Scope; Definitions**

- (a) **Scope.** These rules apply to proceedings in the courts of the United States and the State of Empirion<sup>1</sup>.
- (b) **Definitions.** In these rules:
- (1) "civil case" means a civil action or proceeding;
  - (2) "criminal case" includes a criminal proceeding;
  - (3) "public office" includes a public agency;
  - (4) "record" includes a memorandum, report, or data compilation;
  - (5) a "rule prescribed by the Empirion Supreme Court" means a rule adopted by the Empirion Supreme Court under statutory authority; and
  - (6) a reference to any kind of written material or any other medium (includes electronically stored information).

#### **Rule 102. Purpose**

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

#### **Rule 103. Rulings on Evidence**

- (a) **Preserving a Claim of Error.** A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party, and:
- (1) If the ruling admits evidence, a party, on the record:
    - (A) timely objects or moves to strike; and
    - (B) states the specific ground, unless it was apparent from the context; or
  - (2) if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.
  - (3) **Use of evidence not admitted.** Notwithstanding an offer of proof made, materials ruled inadmissible or stricken by the court may not be used in closing argument.
- (b) **Preventing the Jury from Hearing Inadmissible Evidence.** To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.
- (c) **Taking Notice of Plain Error.** A court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved.

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<sup>1</sup> Comment: Empirion is recognized as being in the United States and governed by the U.S. Constitution.

## FEDERAL RULES OF EVIDENCE

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### **Rule 104. Preliminary Questions**

- (a) **In General.** The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.
- (b) **Relevance That Depends on a Fact.** When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit of the proposed evidence on the condition that the proof be introduced later.
- (c) **Evidence Relevant to Weight and Credibility.** This rule does not limit a party's right to introduce before the jury evidence that is relevant to the weight or credibility of other evidence.

### **Rule 105. Remainder of or Related Writings or Recorded Statements<sup>2</sup>**

If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part – or any other writing or recorded statement – that in fairness ought to be considered at the same time.

## **Article IV**

### *Relevancy and its Limits*

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

Evidence is relevant if:

- (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
- (b) the fact is of consequence in determining the action.

#### **Rule 402. General Admissibility of Relevance Evidence**

Relevant evidence is admissible unless any of the following provides otherwise:

- the United States Constitution;
- these rules; or
- other rules prescribed in Empirion. Irrelevant evidence is not admissible.

#### **Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, or Waste of Time**

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

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<sup>2</sup> Comment to 105: This rule of completeness applies only to material provided in the case packet. This rule does not reference any material not provided in the case packet.

## FEDERAL RULES OF EVIDENCE

*Abridged for Empire Mock Trial Programs (2017)*

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### **Rule 404. Character Evidence; Crimes or Other Acts**

#### **(a) Character Evidence.**

- (1) Prohibited Uses.** Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.
- (2) Exceptions for a Defendant or Victim in a Criminal Case.** The following exceptions apply in a criminal case:
  - (A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;
  - (B) subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may:
    - i. offer evidence to rebut it; and
    - ii. offer evidence of the defendant's same trait; and
  - (C) in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.
- (3) Exceptions for a Witness.** Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

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

- (1) Prohibited Uses.** Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
- (2) Permitted Uses; Notice in a Criminal Case.** This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:
  - (A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and
  - (B) do so before trial. The prosecution in a criminal case shall provide written notice of such intent prior to witness selection in the Pre-Trial Conference.

## FEDERAL RULES OF EVIDENCE

*Abridged for Empire Mock Trial Programs (2017)*

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### **Rule 405. Methods of Proving Character<sup>3</sup>**

- (a) **By Reputation or Opinion<sup>4</sup>.** When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross examination of the character witness, the court may allow inquiry into relevant specific instances of the person's conduct.
- (b) **By Specific Instances of Conduct.** When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct.

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

Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.

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

When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:

- negligence;
- culpable conduct;
- a defect in a product or its design; or
- a need for a warning or instruction

But the court may admit this evidence for another purpose, such as impeachment, or - if disputed - proving ownership, control, or the feasibility of precautionary measures.

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<sup>3</sup> Comment: The important thing to remember is that these rules are for "methods of proving character", meaning that in order for an attorney to even consider a 405 objection, the evidence must first meet the character standards set forth in Rule 404.

<sup>4</sup> Comment: Here's an example—The prosecution offers evidence that the accused, Joe Smith, has a **reputation** (permitted in the second line of 405 (a) above) in the community for aggressiveness to **rebut** testimony offered by the defense that Joe Smith has a reputation of being peaceful. If the door is opened by either side for opinion and/or reputation evidence on direct, inquiry as to **specific instances of conduct** is permitted on cross examination. So now the prosecution could ask the witness about a **specific** time when he witnessed the defendant strike a friend of his in the face.

## FEDERAL RULES OF EVIDENCE

*Abridged for Empire Mock Trial Programs (2017)*

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

- (a) **Prohibited Uses.** Evidence of the following is not admissible – on behalf of any party – either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:
- (1) furnishing, promising, or offering – or accepting, promising to accept, or offering to accept – a valuable consideration in compromising or attempting to compromise the claim; and
  - (2) conduct or a statement made during compromise negotiations about the claim – except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.
- (b) **Exceptions.** The court may admit this evidence for another purpose, such as proving a witness’s bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

### **Rule 409. Offers to Pay Medical and Similar Expenses**

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

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

- (a) **Prohibited Uses.** In a civil or criminal case, evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions:
- (1) a guilty plea that was later withdrawn;
  - (2) a nolo contendere plea;
  - (3) *omitted*; or
  - (4) a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea.
- (b) **Exceptions.** The court may admit a statement described in Rule 410(a)(3) or (4):
- (1) in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if in fairness the statements ought to be considered together; or
  - (2) in a criminal proceeding for perjury or false statement, if the defendant made the statement under oath, on the record and with counsel present.

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

Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, such as proving a witness’s bias or prejudice or proving agency, ownership, or control.

## **Article V**

### *Privileges*

#### **Rule 501. Privileges in General**

Only privileges granted by a statute of the state of Empirion or by Empirion case law shall be recognized.

## **Article VI**

### *Witnesses*

#### **Rule 601. Competency to Testify in General**

Every person is competent to be a witness unless these rules provide otherwise.

#### **Rule 602. Need for Personal Knowledge**

A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703.

#### **Rule 603. Oath or Affirmation to Testify Truthfully**

Before testifying, a witness shall be presumed to have been sworn in, by an oath or affirmation to testify truthfully administered in a form designed to impress that duty on the witness's conscience.

#### **Rule 605. Judge's Competency as a Witness**

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

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

Any party, including the party that called the witness, may attack the witness's credibility.



## FEDERAL RULES OF EVIDENCE

*Abridged for Empire Mock Trial Programs (2017)*

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### **Rule 608. A Witness's Character for Truthfulness or Untruthfulness**

- (a) **Reputation or Opinion Evidence**<sup>5</sup>. A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.
- (b) **Specific Instances of Conduct**. Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:
- (1) the witness; or
  - (2) another witness whose character the witness being cross-examined has testified about.

By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.

### **Rule 609. Impeachment by Evidence of a Criminal Conviction**

- (a) **In General**. The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:
- (1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:
    - (A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and
    - (B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant;
  - (2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving – or the witness's admitting – a dishonest act or false statement.
- (b) **Limit on Using the Evidence After 10 Years**. This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if:

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<sup>5</sup> **Comment:** This rule says two things—(1) On direct examination a witness' character for truthfulness may only be attacked by offering evidence in the form of reputation or opinion testimony. (2) A witness' character for truthfulness cannot be bolstered **until** it has been attacked. The appropriate objection is "Improper Bolstering." The defense must notify the prosecution before trial—using the character form—if it plans to introduce evidence of a witness's character for untruthfulness. This is so the prosecution can have the option of introducing positive evidence of the witness's character for truthfulness during its case-in-chief.

## FEDERAL RULES OF EVIDENCE

*Abridged for Empire Mock Trial Programs (2017)*

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- (1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and
  - (2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.
- (c) Effect of a Pardon, Annulment, or Certificate of Rehabilitation.** Evidence of a conviction is not admissible if:
- (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding that the person has been rehabilitated, and the person has not been convicted of a later crime punishable by death or by imprisonment for more than one year; or
  - (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.
- (d) Juvenile Adjudications.** Evidence of a juvenile adjudication is admissible under this rule only if:
- (1) it is offered in a criminal case;
  - (2) the adjudication was of a witness other than the defendant;
  - (3) an adult's conviction for that offense would be admissible to attack the adult's credibility; and
  - (4) admitting the evidence is necessary to fairly determine guilt or innocence.

*Comment: Crimes committed when a person is a minor, under the age of 18, are generally not admissible*

### **Rule 610. Religious Beliefs or Opinions**

Evidence of a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility.

### **Rule 611. Mode and Order of Examining Witnesses and Presenting Evidence**

- (a) Scope of Cross-Examination.** Cross-examination, other than the initial cross-examination, should not go beyond the subject matter of the direct examination immediately preceding it and matters affecting the witness's credibility. The court may allow inquiry into additional matters as if on direct examination.
- (b) Leading Questions.** Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. Ordinarily the court should allow leading questions:
- (1) on cross-examination; and
  - (2) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.
- (c) Redirect/Re-cross.** After cross examination, additional questions may be asked by the direct examining attorney, but questions must be limited to matters raised by the attorney on cross examination. Likewise, additional questions may be asked by

## FEDERAL RULES OF EVIDENCE

*Abridged for Empire Mock Trial Programs (2017)*

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the cross examining attorney on re- cross, but such questions must be limited to matters raised on redirect and should avoid repetition.

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

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

### **Rule 613. Witness's Prior Statement**

- (a) **Showing or Disclosing the Statement During Examination.** When examining a witness about the witness's prior statement, a party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party's attorney.
- (b) **Extrinsic Evidence of a Prior Inconsistent Statement.** Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).

### **Rule 614. Court's Calling or Examining a Witness**

Calling and/or examining of a witness by the court is not allowed.

### **Rule 615. Excluding Witnesses<sup>6</sup>**

At a party's request, the court must order witnesses constructively excluded so that they cannot hear other witnesses' testimony. But this rule does not authorize constructively excluding:

- (a) a party who is a natural person;
- (b) an officer or employee of a party that is not a natural person, after being designated as the party's representative; or
- (c) a person authorized by a statute provided in the case materials to be present.

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<sup>6</sup> Comment: This rule does not permit the actual exclusion of students portraying witnesses. Rather, it allows for the constructive exclusion of some witnesses.

## **Article VII**

### *Opinions and Expert Testimony*

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

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

- (a) rationally based on the witness's perception;
- (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
- (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

#### **Rule 702. Testimony by Expert Witnesses<sup>7</sup>**

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

#### **Rule 703. Bases of an Expert's Opinion Testimony**

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

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

- (a) **In General - Not Automatically Objectionable.** An opinion is not objectionable just because it embraces an ultimate issue.

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<sup>7</sup> Comment: A party seeking to introduce expert testimony must raise a motion to enter the witness as an expert before the expert opinion can be offered. This should be done after the appropriate 702 foundation is laid. Once a motion is requested, the judge will first determine if sufficient foundation of the witness's expertise has been established. If the judge feels that such foundation has been established, the judge will then ask opposing counsel if he/she has any objection to the admission of the expert. The court may then permit opposing counsel to voir dire the expert in accordance with Empire Rule 4.13.

## FEDERAL RULES OF EVIDENCE

*Abridged for Empire Mock Trial Programs (2017)*

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- (b) Exception.** In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.

### **Rule 705. Disclosing the Facts or Data Underlying an Expert's Opinion**

Unless the court orders otherwise, an expert may state an opinion – and give the reasons for it — without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross examination.

## **Article VIII**

### *Hearsay*

### **Rule 801. Definitions that Apply to this Article: Exclusions from Hearsay**

The following definitions apply under this article:

- (a) Statement.** "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.
- (b) Declarant.** "Declarant" means the person who made the statement.
- (c) Hearsay.** "Hearsay" means a statement that:
- (1) the declarant does not make while testifying at the current trial or hearing; and
  - (2) a party offers in evidence to prove the truth of the matter asserted in the statement.
- (d) Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay:
- (1) **A Declarant-Witness's Prior Statement.** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:
    - (A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;
    - (B) is consistent with the declarant's testimony and is offered:
      - (i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or
      - (ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; or
    - (C) identifies a person as someone the declarant perceived earlier.
  - (2) **An Opposing Party's Statement.** The statement is offered against an opposing party and:
    - (A) was made by the party in an individual or representative capacity;
    - (B) is one the party manifested that it adopted or believed to be true;

## FEDERAL RULES OF EVIDENCE

*Abridged for Empire Mock Trial Programs (2017)*

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- (C) was made by a person whom the party authorized to make a statement on the subject;
- (D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or
- (E) was made by the party's coconspirator during and in furtherance of the conspiracy.

The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

### **Rule 802. The Rule Against Hearsay**

Hearsay is not admissible unless any of the following provides otherwise:

- these rules; or
- other prescribed by the Empirion Supreme Court.

### **Rule 803. Exceptions to the Rule Against Hearsay**

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

- (1) Present Sense Impression.** A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.
- (2) Excited Utterance.** A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.
- (3) Then-Existing Mental, Emotional, or Physical Condition.** A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.
- (4) Statement Made for Medical Diagnosis or Treatment.** A statement that:
  - (A) is made for – and is reasonably pertinent to – medical diagnosis or treatment; and
  - (B) describes medical history; past or present symptoms or sensations; their inception; or their general cause.
- (5) Recorded Recollection.** A record that:
  - (A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;
  - (B) was made or adopted by the witness when the matter was fresh in the witness's memory; and
  - (C) accurately reflects the witness's knowledge.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

## FEDERAL RULES OF EVIDENCE

*Abridged for Empire Mock Trial Programs (2017)*

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- (6) Records of a Regularly Conducted Activity.** A record of an act, event, condition, opinion, or diagnosis if:
- (A) the record was made at or near the time by – or from information transmitted by — someone with knowledge;
  - (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
  - (C) making the record was a regular practice of that activity;
  - (D) all these conditions are shown by the testimony of the custodian or another qualified
  - (E) witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and
  - (F) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.
- (7) Absence of a Record of Regularly Conducted Activity.** Evidence that a matter is not included in a record described in paragraph (f) if:
- (A) the evidence is admitted to prove that the matter did not occur or exist;
  - (B) a record was regularly kept for a matter of that kind; and
  - (C) the opponent does not show that the possible source of the information or other circumstances indicate a lack of trustworthiness.
- (8) Public Records.** A record or statement of a public office if:
- (A) it sets out:
    - (i) the office’s activities;
    - (ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or
    - (iii) in a civil case or against the government in a criminal case, factual findings
    - (iv) from a legally authorized investigation; and
  - (B) the opponent does not show that the source of information or other circumstances indicate lack of trustworthiness.
- (9) Statements in Ancient Documents.** Statements in a document in existence twenty years or more the authenticity of which is established.
- (10) Statements in Learned Treatises, Periodicals, or Pamphlets.<sup>8</sup>** A statement contained in a treatise, periodical, or pamphlet if:
- (A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and
  - (B) the publication is established as a reliable authority by the expert’s admission or testimony, by another expert’s testimony, or by judicial notice.

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<sup>8</sup> Comment: This rule concerns published treatises, periodicals, or pamphlets that have been provided in the case packet. Mere reference to a title in the packet is insufficient; the entirety of the item must be provided in the case packet for this rule to be applicable.

## FEDERAL RULES OF EVIDENCE

*Abridged for Empire Mock Trial Programs (2017)*

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(C) If admitted, the statement may be read into evidence but not received as an exhibit.

**(11) Reputation Concerning Character.** A reputation among a person's associates or in the community concerning the person's character.

**(12) Judgment of a Previous Conviction.** Evidence of a final judgment of conviction if:

- (A) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;
- (B) the conviction was for a crime punishable by death or by imprisonment for more than a year;
- (C) the evidence is admitted to prove any fact essential to the judgment; and
- (D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.

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

**(a) Criteria for Being Unavailable.** A declarant is considered to be unavailable as a witness if the declarant:

- (1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;
- (2) refuses to testify about the subject matter despite a court order to do so;
- (3) testifies to not remembering the subject matter;
- (4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness.

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

**(b) The Exceptions.** The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness

**(1) Former Testimony.** Testimony that:

- (A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and
- (B) is now offered against a party who had – or, in a civil case, whose predecessor in interest had – an opportunity and similar motive to develop it by direct, cross, or redirect examination.

**(2) Statement Under the Belief of Imminent Death.** In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

**(3) Statement Against Interest.** A statement that:

- (A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a



## FEDERAL RULES OF EVIDENCE

*Abridged for Empire Mock Trial Programs (2017)*

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tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

**(4) Statement of Personal or Family History.** A statement about:

(A) the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption, or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or

(B) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

**(5) Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability.** A statement offered against a party that wrongfully caused – or acquiesced in wrongfully causing – the declarant's unavailability as a witness, and did so intending that result.

### **Rule 805. Hearsay Within Hearsay**

Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule.

### **Rule 806. Attacking and Supporting the Declarant's Credibility**

When a hearsay statement – or a statement described in Rule 801(d)(2)(C), (D), or (E) – has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

## **Article IX**

### *Authentication and Identification*

### **Rule 901. Authenticating or Identifying Evidence**

**(a) In General.** To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

## FEDERAL RULES OF EVIDENCE

*Abridged for Empire Mock Trial Programs (2017)*

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**(b) Examples.** The following are examples only – not a complete list – of evidence that satisfies the requirement:

- (1) Testimony of a Witness with Knowledge.** Testimony that an item is what it is claimed to be.
- (2) Nonexpert Opinion About Handwriting.** A nonexpert's opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation.
- (3) Comparison by an Expert Witness or the Trier of Fact.** A comparison with an authenticated specimen by an expert witness or the trier of fact.
- (4) Distinctive Characteristics and the Like.** The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.
- (5) Opinion About a Voice.** An opinion identifying a person's voice – whether heard firsthand or through mechanical or electronic transmission or recording – based on hearing the voice at any time under circumstances that connect it with the alleged speaker.
- (6) Evidence About a Telephone Conversation.** For a telephone conversation, evidence that a call was made to the number assigned at the time to:
  - (A) a particular person, if circumstances, including self-identification, show that the person answering was the one called; or
  - (B) a particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone.
- (7) Evidence About Public Records.** Evidence that:
  - (A) a document was recorded or filed in a public office as authorized by law; or
  - (B) a purported public record or statement is from the office where items of this kind are kept.
- (8) Evidence About Ancient Documents or Data Compilations.** For a document or data compilation, evidence that it:
  - (A) is in a condition that creates no suspicion about its authenticity;
  - (B) was in a place where, if authentic, it would likely be; and
  - (C) is at least 20 years old when offered.
- (9) Evidence About a Process or System.** Evidence describing a process or system and showing it produces an accurate result.
- (10) Methods Provided by a Statute or Rule.** Any method of authentication or identification allowed by a Empirion statute or a rule prescribed by the Empirion Supreme Court.

### **Rule 902. Evidence That Is Self-Authenticating**

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

## FEDERAL RULES OF EVIDENCE

*Abridged for Empire Mock Trial Programs (2017)*

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- (1) **Domestic Public Documents That Are Sealed and Signed.** A document that bears:
- (A) a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; and
  - (B) a signature purporting to be an execution or attestation.
- (2) **Domestic Public Documents That Are Not Sealed but Are Signed and Certified.** A document that bears no seal if:
- (A) it bears the signature of an officer or employee of an entity named in Rule 902(1)(A); and
  - (B) another public officer who has a seal and official duties within that same entity
  - (C) certifies under seal – or its equivalent – that the signer has the official capacity and that the signature is genuine.
- (3) **Foreign Public Documents.** A document that purports to be signed or attested by a person who is authorized by a foreign country's laws to do so. The document must be accompanied by a final certification that certifies the genuineness of the signature and official position of the signer or attester – or of any foreign official whose certificate of genuineness relates to the signature or attestation or is in a chain of certificates of genuineness relating to the signature or attestation. The certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States. If all parties have been given a reasonable opportunity to investigate the document's authenticity and accuracy, the court may, for good cause, either:
- (A) order that it be treated as presumptively authentic without final certification; or
  - (B) allow it 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 a copy of a document that was recorded or filed in a public office as authorized by law – if the copy is certified as correct by:
- (A) the custodian or another person authorized to make the certification; or
  - (B) a certificate that complies with Rule 902(1), (2), or (3) or a rule prescribed by the Empirion Supreme Court.
- (5) **Official Publications.** A book, pamphlet, or other publication purporting to be issued by a public authority.
- (6) **Newspapers and Periodicals.** Printed material purporting to be a newspaper or periodical.

## FEDERAL RULES OF EVIDENCE

*Abridged for Empire Mock Trial Programs (2017)*

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- (7) **Trade Inscriptions and the Like.** An inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control.
- (8) **Acknowledged Documents.** A document accompanied by a certificate of acknowledgment that is lawfully executed by a notary public or another officer who is authorized to take acknowledgments.
- (9) **Commercial Paper and Related Documents.** Commercial paper, a signature on it, and related documents, to the extent allowed by general commercial law.

### **Rule 903. Subscribing Witness's Testimony**

A subscribing witness's testimony is not necessary to authenticate a writing.

## **Article X**

*Contents of Writing, Recordings and Photographs*

### **Rule 1001. Definitions That Apply to This Article**

In this article:

- (a) A "writing" consists of letters, words, numbers, or their equivalent set down in any form.
- (b) A "recording" consists of letters, words, numbers, or their equivalent recorded in any manner.
- (c) A "photograph" means a photographic image or its equivalent stored in any form.
- (d) An "original" of a writing or recording means the writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it. For electronically stored information, "original" means any printout – or other output readable by sight – if it accurately reflects the information. An "original" of a photograph includes the negative or a print from it.
- (e) A "duplicate" means a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.

### **Rule 1002. Requirement of the Original**

An original writing, recording, or photograph is required in order to prove its content unless these rules or a Empirion statute provide otherwise.

### **Rule 1003. Admissibility of Duplicates**

A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate.