2023 / 2024
MODIFIED RULES OF EVIDENCE

(Section 2 of 4)

MODIFIED RULES OF EVIDENCE:

2023 / 2024
MODIFIED RULES OF EVIDENCE [1]

In a trial, elaborate rules are used to regulate the admission of proof (i.e., oral or physical evidence). These rules are designed to ensure that both parties receive a fair hearing and to exclude any evidence deemed irrelevant, incompetent, untrustworthy, or unduly prejudicial. If it appears that a rule of evidence is being violated, an attorney may raise an objection to the presiding judge. The presiding judge then decides whether the rule has been violated and whether the evidence must be excluded from the record of the trial. In the absence of a properly made objection, however, the presiding judge will probably allow the evidence. The burden is on the team to know the rules and to be able to use them to protect their client and to limit the actions of opposing counsel and their witnesses (for example, to exclude hearsay and prevent unfair extrapolation).

The Mock Trial Rules of Evidence are a modified version of the Federal Rules of Evidence. If there is any conflict between the Mock Trial Rules of Evidence and the Federal or South Carolina Rules of Evidence, the Mock Trial Rules of Evidence will control.

Formal Rules of Evidence are quite complicated and differ depending on the court where the trial occurs. For purposes of the Mock Trial competition, the Rules of Evidence have been modified and simplified below. Not all presiding judges interpret the Rules of Evidence (or procedure) the same way and you must be prepared to point out the specific rule (quoting it, if necessary) and to argue persuasively for the interpretation and application of the rule you think proper. **No matter which way the presiding judge rules, accept the ruling with grace and courtesy.**

It is important to ensure the substance of the rule when making and defending an objection and not site the rule number only.

Rules of Evidence for use of the Middle and High School Mock Trial Competitions are included below and overrule any prior Rules of Evidence.

Anything outlined in a light grey box is something that South Carolina is providing as additional information.

ARTICLE I. GENERAL PROVISIONS

Rule 101 Scope

These rules govern proceedings in the South Carolina Mock Trial program.

Rule 102 Purpose and Construction

These rules shall be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and ascertain the truth and secure a just determination.

[1] The applicable rules of evidence have been streamlined for the High School Mock Trial Competition.

Rule 103 Reserved

Rule 104 Conditional Admission

(a) Reserved

(b) The court may admit proposed evidence on the condition that the proof necessary for admission be introduced later.

Rule 105 Limiting Evidence That Is Not Admissible Against Other Parties or for Other Purposes

If the court admits evidence that is admissible against a party or for a purpose – but not against another party or for another purpose – the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly.

Rule 106 Remainder of Related Writings or Recorded Statements

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 – any other writing or recorded statement – that in fairness ought to be considered at the same time.

ARTICLE II. JUDICIAL NOTICE

Rule 201 Judicial Notice of Adjudicative Facts

(a) This rule governs judicial notice of an adjudicative fact only, not a legislative fact; and

(b) The court may judicially notice a fact that is not subject to reasonable dispute because it is a matter of mathematical or scientific certainty. For example, the court could take judicial notice that 10 x 10 = 100 or that there are 5280 feet in a mile.

(c) The court:
1) May take judicial notice on its own; or
2) Must take judicial notice if a party requests it and the court is supplied with the necessary information.

(d) The court may take judicial notice at any stage in the proceeding.

(e) A party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed.

(f) In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.

ARTICLE III. PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS

No Federal Rules of Evidence under Article III apply to the Mock Trial program.

ARTICLE IV. RELEVANCY AND ITS LIMITS

Rule 401 Test for 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 Relevant Evidence

Relevant evidence is admissible unless these rules provide otherwise. Irrelevant evidence is not admissible.

Rule 403 Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

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.

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.

Official Comment:
In other words, mention of a person's typical behavior is not admissible when trying to prove that the person behaved in a way that matches the behavior discussed in the current case.

(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;

Official Comment:
In other words, once the character evidence is provided by the Defendant, the Prosecution/Plaintiff can attack these statements with character evidence that would normally be excluded as improper character evidence.

(B) 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;
(ii) Offer evidence of the defendant's same trait; and

Official Comment:
In other words, the accused in a criminal case can point out important and related character traits of the victim, such as aggressiveness, to defend him/herself. The Prosecution can then argue that the victim exhibited traits of peacefulness in the past. The Prosecution may also then argue that the defendant him/herself has exhibited aggressiveness in the past.

(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.

Official Comment:
In other words, if the charge against the Defendant is murder and the Defendant raises self-defense or otherwise alleges that the victim started the fight, then the Prosecutor may offer evidence that the victim was a peaceful person.

(3) **Exceptions for a Witness:** Evidence of a witness's character may be admitted under

Rule 607 Who May Impeach, and
Rule 608 A Witness's Character for Truthfulness or Untruthfulness; and
Rule 609 Impeachment by Evidence of a Criminal Conviction.

(b) Other 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:** 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.

Official Comment:
In other words, mention of a person's prior crimes, wrongs, or acts is not admissible to prove that the person acted in conformity with the prior bad acts. However, such evidence may be admissible to show motive, identity, common scheme or plan, intent, or absence of mistake or accident.

If Rule 404 is found to apply, see Rule 405.

Rule 405 Methods of Proving Character

(This rule applies only if character evidence is admissible.)

(a) **Reputation or Opinion:**
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 an inquiry into relevant specific instances of the person's conduct.

(b) **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.

Rule 408 Compromise and Offers to Compromise *(Civil Case Only)*

(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 *(Civil Case Only)*

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) A statement made during a proceeding on either of those pleas under Federal Rule of Criminal Procedure 11 or a comparable state procedure; 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) Prohibited Uses (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

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 proving agency, ownership, or control.

ARTICLE V. PRIVILEGES

Rule 501 General Rule

There are certain admissions and communications excluded from evidence on grounds of public policy. Among these are:
(1) Communications between spouses,
(2) Communications between attorney and client; and
(3) Communications between medical or mental health care providers and patients.

ARTICLE VI. WITNESSES

Rule 601 General Rule of Witness Competency

Every person is competent to be a witness.

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 Bases of Opinion Testimony by Experts. (Also see Rule 2.2 – Witnesses Bound by Statements.)

Rule 603 Oath or Affirmation

Before testifying, every witness is required to declare that the witness will testify truthfully, by oath or affirmation, by the oath provided in these materials. The bailiff swears in all witnesses at one time before opening statements as follows:

> "Do you promise the testimony you are about to give will faithfully and truthfully conform to the facts and rules of the Mock Trial competition?"

A video link showing the bailiff opening court can be viewed.

Visit www.scbar.org/lre and the click on the Middle School or High School Mock Trial logo on the main page. Go to *Videos for Coaches and Students* and then scroll through the video clips available.

Rule 607 Who May Impeach

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

A video link showing examples on how to impeach can be viewed.

Visit www.scbar.org/lre and the click on the Middle School or High School Mock Trial logo on the main page. Go to *Videos for Coaches and Students* and then scroll through the video clips available.

Rule 608 A Witness's Character for Truthfulness or Untruthfulness

(a) **Reputation or Opinion Evidence:**
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 Impeachment by Evidence of a Criminal Conviction, 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

(this rule applies only to witnesses with prior convictions)

(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 Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons, 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 its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect.

(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.

(e) **Pendency of an Appeal:**
A conviction that satisfies this rule is admissible even if an appeal is pending. Evidence of the pendency is also 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 Interrogation and Presentation

(a) **Control by Court; Purposes:**
The Court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:

(1) Make those procedures effective for determining the truth;

(2) Avoid wasting time; and

(3) Protect witnesses from harassment or undue embarrassment.

Scope of Direct Examination: *Direct questions shall be phrased to evoke facts from the witness. Witnesses may not be asked leading questions by the attorney who calls them. A leading question is one that suggests to the witness the answer desired by the examiner and often suggests a "yes" or "no" answer.*

Example of a Direct Question:

(1) "Mr. Patterson, what did you do immediately after seeing Mr. Winstead run from the house?"

(2) "Mr. Patterson, prior to today, have you ever met Mr. Winstead?" (Note: Although this is a "Yes" or "No" question, it is NOT a leading question because it does not suggest what the questioner wants the answer to be.

Example of a Leading Question:

"Mr. Patterson, is it not true that you knew Mr. Winstead prior to today?" (This conveys the intent of the question for the witness to answer "Yes" and is therefore improper for direct.

Example of a Question which calls for a Narrative (improper for direct):

"Mr. Patterson, tell us everything you know about Mr. Winstead."

While the purpose of direct examination is to get the witness to tell a story, the questions must ask for specific information. The questions must not be so broad that the witness is allowed to wander or "narrate" a whole story. Narrative questions are objectionable, but it is rare for an attorney on direct to ask a question (such as the example here) that is obviously too broad. Often, the issue does not arise until the witness goes clearly beyond what is necessary to answer the question. If that occurs, opposing counsel can object that "the witness is giving a narrative answer" (i.e., beyond what is necessary to answer the question.)

(b) **Scope of Cross-Examination:**

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

Cross-examination is the questioning of a witness by an attorney from the opposing side of the case. Cross-examination is not limited to direct questioning.

*(1) **Form of Questions:** An attorney may ask leading questions when cross-examining the opponent's witnesses. Questions tending to evoke a narrative answer shall be avoided. Example of a leading question: "Mrs. Winstead, isn't it true that your son chose of his own free will to join the army?"*

*(2) **Scope of Witness Examination:** In the Mock Trial competition, attorneys are allowed unlimited range on cross-examination of witnesses as long as questions are relevant to the case. Witnesses must be called by their own team and may not be recalled by either side. All desired questioning of a particular witness must be done by both sides in a single appearance on the witness stand.*

A video link showing cross-examination examples can be viewed.

Visit www.scbar.org/lre and the click on the Middle School or High School Mock Trial logo on the main page. Go to *Videos for Coaches and Students* and then scroll through the video clips available.

(c) **Leading Questions:**
Leading questions should not be used on direct examination except as necessary to develop the witness' 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.

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

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

Official Comment:

A team may treat its own witness as "hostile" under Rule 611(c). Any witness may portray the character as "hostile" and teams may develop strategy around that portrayal. Teams are cautioned; however, that scoring judges might see this as a tactic designed to use leading questions to bolster a weaker performance and could score down accordingly. A skilled team can use this technique strategically (that is, to provide a realistic portrayal of a character or to demonstrate a lawyer's ability to control a hostile witness) without over-relying on leading questions.

For example, a lawyer walking a weaker witness through a direct examination with leading question after leading question by calling the witness "hostile" will score lower. A lawyer who methodically challenges a hostile witness then forces an admission or other testimony with a well-timed leading question or two will score higher.

Rule 612 Writing Used to Refresh Memory

(a) Scope. This rule gives an adverse party certain options when a witness uses a writing to refresh memory:

(1) While testifying; or
(2) Before testifying, if the court decides that justice requires the party to have those options.

(b) Adverse Party's Options. An adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony.

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) Definitions – Statements That Are Not Hearsay – An Opposing Party's Statement.

Official Comment:

A cross-examining attorney may want to challenge the credibility of a witness by showing that the witness has testified in court in a way that is inconsistent with that witness' affidavit. This tactic is called "impeaching the witness." It may be executed by asking the witness whether s/he has ever given an affidavit inconsistent with the witness' testimony. If the witness maintains that s/he has not testified inconsistently, or states s/he does not remember making the statement, the cross-examining attorney may choose to present the witness's affidavit to him/her to prove the inconsistency. The attorney should ask the presiding judge's permission to approach the witness to show him/her the affidavit (or ask if s/he has a copy on the witness stand already). If permission is granted, the attorney should direct the witness and the court to the page and line containing the inconsistency. The lawyer can read the part of the affidavit containing the inconsistency or ask that the witness do so.

As a general rule, the affidavit itself should not be admitted into evidence. One exception; however, would be where a witness testifies in a manner inconsistent with a statement made in that witness's affidavit and maintains the inconsistency even when shown the portion of the affidavit which the cross-examining attorney believes is inconsistent. Under those circumstances, the cross-examining attorney may ask to enter the affidavit into evidence to prove the contradiction to the jury. Either side can request redaction of other portions of the affidavit not relevant to the impeachment. (In Mock Trial, the presiding Judge can order that such portions "be considered redacted" without the need for actual physical redaction.)

Note, however, if a witness is impeached with an inconsistent statement in his/her affidavit and admits making the statement (either before or after being shown the affidavit), there is no need to introduce the affidavit (or any portion thereof) into evidence, and such should not be requested.

Therefore, if a witness is asked whether he or she made the statement "X" in his/her affidavit and admits it, the attorney asking the question should move on to the next question. If the witness denies making the statement or testified he/she cannot remember making the statement, the attorney may ask permission to have the witness refer to his/her affidavit. If, after having been shown his/her affidavit, the witness maintains s/he did not make that statement, the attorney may request that the affidavit be admitted into evidence.

A video link showing how to impeach examples can be viewed.

Visit www.scbar.org/lre and the click on the Middle School or High School Mock Trial links on the left of the main page Go to *Videos for Coaches and Students* and then scroll through the video clips available.

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

Rule 701 Opinion Testimony by Lay Witness

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' 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 Testimony by Experts.

Rule 702 Testimony by Experts

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; and
(b) The testimony is based on sufficient facts or data.

Official Comment:

A witness cannot give expert opinions under Rule 702 Testimony by Experts until s/he has been tendered as an expert by the examining lawyer and recognized as such by the court. To have an expert witness admitted by the court, first ask the witness to testify as to his/her qualifications. Then ask the presiding judge that the expert witness be qualified as an expert in the field of _____ . The presiding judge then asks opposing counsel if there are any objections to having the witness recognized as an expert. Either there are no objections or there is an argument as to why the witness is not qualified as an expert. The presiding judge then rules if as to whether the witness is qualified as an expert.

Prior to the court's admission of a witness as an expert, the witness cannot provide any opinions and the attorneys shall object to any attempts by an undesignated expert to render opinion testimony. Once the witness is qualified and admitted as an expert by the court, the witness can offer only opinions that are within the witness' recognized field of expertise.

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 Ultimate Issue

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

(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

The following definitions apply under this article:

(a) **Statement:**
A "statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

(b) **Declarant:**
A "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 a 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;
(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 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).

Official Comment:

Hearsay generally has a three step analysis:

1) *Is it an "out-of-court" statement?*
2) *If so, is it offered to prove the truth of the out-of-court statement?*
3) *If so, is there an exception that allows the out-of-court statement to be admitted despite the fact that it is hearsay?*

An example of hearsay would be a witness saying, "I heard Bob Smith [who is not testifying in the case] say that he saw the Defendant kill the victim." If this is offered to try to prove that the Defendant killed the victim, the Defendant's attorney has no way of cross-examining Bob Smith about what he saw, or whether he has a bias against the Defendant, or whether there is any other reason to disbelieve the statement. Because we cannot test the credibility (truthfulness or untruthfulness) of the substance of Bob's statement, it is untrustworthy and shall not be admitted.

An example that would not be hearsay: a witness testifies "I heard Bob Smith tell the Defendant that the Defendant's child was at the hospital and was seriously injured." If this is offered to show why the Defendant raced to the hospital, it is not a statement being offered "for the truth of the matter asserted" (i.e., it is not offered to show the child was actually injured, this is not the point), then it would NOT be hearsay. The statement is being admitted to show why someone took some action, not for the truth of the statement. (And it is irrelevant whether the statement is actually true or not.) In this instance, the issue is whether or not the statement was made (and the witness can be cross-examined on this point), not the truth of the statement.

An example that is hearsay, but which is likely an exception (and therefore might be admitted): a witness testifies "I was talking on the phone with the victim when he told me the Defendant was knocking at his door." This is hearsay; however, it likely falls under exception Rule 803(1) – Present Sense Impression.

For the purposes of the Mock Trial competition, the exceptions to the hearsay rule which are listed herein (Rules 803 Exceptions to the Rule Against Hearsay – Regardless of Whether the Declarant is Available as a Witness and Rule 804 Hearsay Exceptions; Declarant Unavailable) can be used.

Rule 802 Hearsay Rule

Hearsay is not admissible except as provided by these Modified Rules of Evidence.

Rule 803 Exceptions to the Rule Against Hearsay – Regardless of Whether the Declarant is Available as a Witness

A video link showing the hearsay exceptions can be viewed.

Visit www.scbar.org/lre and the click on the Middle School or High School Mock Trial logo on the main page. Go to *Videos for Coaches and Students* and then scroll through the video clips available.

The following are not excluded by the hearsay rule, 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.

Examples of Then Existing Mental, Emotional, or Physical Conditions:

Emotional State:	*Bob said he was scared.*
Physical State:	*Jim said he had a headache.*
Mental State:	*He said he was going to take the car out and see how fast it would go.*

(4) **Statements 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.

(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 witness; and
(E) 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 a Regularly Conducted Activity:**
Evidence that a matter is not included in a record described in paragraph (6) 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 information or other circumstances indicate a lack of trustworthiness.

(8) **Public Records and Reports:**
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 from a legally authorized investigation; and
(B) The opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness.

(9) **Records of Vital Statistics:**
A record of a birth, death, or marriage, if reported to a public office in accordance with a legal duty.

(10) **Absence of a Public Record or Entry:**
Testimony that a diligent search failed to disclose a public record or statement if the testimony or certification is admitted to prove that:

(A) The record or statement does not exist; or
(B) A matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind.

(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.

(12) **Omitted**

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

(14) **Omitted**

(15) **Omitted**

(16) **Statements in Ancient Documents:**
A statement in a document that was prepared before January 1, 1998, and whose authenticity is established.

(17) **Omitted**

(18) **Statements in Learned Treatises, Periodicals, or Pamphlets:**
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.

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

(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.

(20) **Omitted**

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

(22) **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.

The pendency of an appeal may be shown, but does not affect admissibility.

(23) **Omitted**

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; or
(5) Is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:

(A) The declarant's attendance, in the case of a hearsay exception under Rule 804: Hearsay Exceptions – Declarant Unavailable: (b)(1) or (6): or
(B) The declarant's attendance or testimony, in the case of a hearsay exception under Rule 804: Hearsay Exceptions – Declarant Unavailable: (b)(2), (3), or (4).

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 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) **Not Applicable**

(6) **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 included 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: Definitions (d)(3)(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.

Rule 807 Residual Exception

Under the following conditions, a hearsay statement is not excluded by the rule against hearsay even if the statement is not admissible under a hearsay exception in Rule 803: Exceptions to the Rule Against Hearsay – Regardless of Whether the Declarant is Available as a Witness and Rule 804: Hearsay Exceptions – Declarant Unavailable:

(1) The statement is supported by sufficient guarantees of trustworthiness – after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement; and
(2) It is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.

ARTICLE IX – IMPROPER FORM OF QUESTION

Rule 901 Assuming Facts Not in Evidence

An attorney shall not ask a question that assumes unproven facts. However, an expert witness may be asked a question based upon stated assumptions, the truth of which is reasonably supported by the evidence.

Rule 902 Argumentative Questions

An attorney shall not ask a question that asks the witness to agree to a conclusion drawn by the question without eliciting testimony as to new facts; provided, however, that the Court may in its discretion allow limited use of argumentative questions on cross-examination.

Rule 903 Ambiguous Questions

An attorney shall not ask questions that are capable of being understood in two or more possible ways.

Rule 904 Lack of Proper Foundation

Exhibits are not to be admitted into evidence until they have been identified and shown to be authentic (unless identification and/or authenticity have been stipulated). Even after a proper foundation has been laid, the exhibits may still be objectionable due to relevance, hearsay, etc. "Authentic" means only that a document is what it appears to be, not that the statements contained in the document are necessarily true.