

## **Annotated Rule Comparison: Notable Changes In the Restyled Rules of Evidence**

This document compares the newly restyled Federal Rules of Evidence, which took effect on December 1, 2011, with the former language. We present the two versions of each rule side by side, with key words and phrases underlined. The underlining matches that in our text, *Learning Evidence*, and should help you spot changes more easily.

The Advisory Committee did not intend any of the restyling changes to alter the rules' substance. Instead, as the committee declares in its official notes to the restyling project, the changes are "stylistic only." These changes aim to make the Rules of Evidence "more easily understood" and to "make style and terminology consistent throughout the rules."

But the restyling project altered some language within every Rule of Evidence. Some of the changes may affect how professors present the rules in class, as well as how lawyers and judges talk about the rules in the courtroom. In addition, a few of the changes arguably have substantive effect; they may at least provoke new arguments from courtroom advocates.

We have annotated the rules to identify changes that you as professors, students, practitioners, or judges may want to know about. We do not note *every* change made by restyling. Those changes are so numerous that the annotations would lose their purpose. Instead, we selected only changes that might affect (1) classroom presentations; (2) courtroom advocacy and decisions; or (3) references to the rules by practitioners and judges.

As in the *Learning Evidence* text, we use formatting to make the rules more readable. These formatting changes include insertion of bullet points and paragraph breaks in some rules. Apart from these changes, the text of both former and restyled rules matches the official versions. If you need to quote the official rules—including the formats in those rules—please refer to the "Official Text of the Restyled Rules of Evidence" on our website.

In compiling this document we relied upon comments from many colleagues and students, most notably John Mitchell, Wes Porter, and participants in the Evidence listserv maintained by Roger Park. We also relied on the excellent materials prepared by the Restyling Project's Reporter, Daniel Capra, for the Advisory Committee. Those materials are available publicly at <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/ResearchingRules/AgendaBooks.aspx>. We hope this annotated version of the restyled rules will help you with your study or practice of evidence.

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Former Language	Restyled Language
<p style="text-align: center;"><b>ARTICLE I. GENERAL PROVISIONS</b></p> <p style="text-align: center;"><b>Rule 101. Scope</b></p>	<p style="text-align: center;"><b>ARTICLE I. GENERAL PROVISIONS</b></p> <p style="text-align: center;"><b>Rule 101. Scope; Definitions</b></p>
<p>These rules govern proceedings</p> <ul style="list-style-type: none"> <li>• in the <u>courts of the United States</u></li> <li>• and before the United States <u>bankruptcy judges</u></li> <li>• and United States <u>magistrate judges</u>,</li> </ul> <p>to the extent and with the exceptions stated in <u>Rule 1101</u>.</p>	<p>(a) <b>Scope.</b> These rules apply to proceedings in <u>United States courts</u>. The specific courts and proceedings to which the rules apply, along with exceptions, are set out in <u>Rule 1101</u>.</p>
	<p>(b) <b>Definitions.</b> In these rules:</p> <ol style="list-style-type: none"> <li>(1) “civil case” means a civil action or proceeding;</li> <li>(2) “criminal case” includes a criminal proceeding;</li> <li>(3) “public office” includes a public agency;</li> <li>(4) “record” includes a memorandum, report, or data compilation;</li> <li>(5) a “rule prescribed by the Supreme Court” means a rule adopted by the Supreme Court under statutory authority; and</li> <li>(6) a reference to any kind of written material or any other medium includes electronically stored information.</li> </ol>

## Notes

- Unlike the former rule, Restyled Rule 101 does not specify that the rules apply to magistrates and bankruptcy judges. That detail still appears in Restyled Rule 1101; the deletion simply eliminates duplication between the rules.
- Restyled Rule 101(b) adds a definition section to the rules. That section is quite limited, including only six terms. These terms are not the most frequently used or most important words in the rules; instead, the Advisory Committee used these definitions to eliminate cumbersome phrases from some of the substantive rules. By defining “record” to include “a memorandum, report, or data compilation,” for example, the restyled rules streamline Rule 803(6), which articulates the business records exception to the rule against hearsay.
- Rule 101(b)(6) updates all of the rules to include “electronically stored information” within any reference to “written material or any other medium.” The Advisory Committee concluded that updating the rules in this manner was not a substantive change: Courts were already applying the rules to electronically stored information.<sup>1</sup> The new definition simply acknowledges those results.

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<sup>1</sup> See Daniel J. Capra, *Commentary on the Restyled Federal Rules of Evidence*, 2011 LexisNexis Emerging Issues 5875 (Comment on Restyled Rule 106).

Former Language	Restyled Language
<b>Rule 102. Purpose and Construction</b>	<b>Rule 102. Purpose</b>
<p>These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.</p>	<p>These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.</p>

### Notes

- The restyled rule uses the word “should” instead of “shall.” The Advisory Committee eliminated the word “shall” throughout the rules because that word can have several meanings. For this hortatory rule, the committee determined that “shall” was equivalent to “should.”

Former Language	Restyled Language
<p><b>Rule 103. Rulings on Evidence</b></p> <p>(a) <b>Effect of erroneous ruling.</b> Error may not be predicated upon a ruling which admits or excludes evidence <u>unless a substantial right</u> of the party is affected, and</p> <p>(1) <b>Objection.</b> In case the ruling is one <u>admitting evidence</u>, a <u>timely objection or motion to strike</u> appears of record, stating the <u>specific ground</u> of objection, if the specific ground was not apparent from the context; or</p> <p>(2) <b>Offer of proof.</b> In case the ruling is one <u>excluding evidence</u>, the <u>substance</u> of the evidence was <u>made known</u> to the court by offer or was apparent from the context within which questions were asked.</p> <p>Once the court makes a <u>definitive ruling</u> on the record admitting or excluding evidence, either at or before trial, a party <u>need not renew</u> an objection or offer of proof to preserve a claim of error for appeal.</p>	<p><b>Rule 103. Rulings on Evidence</b></p> <p>(a) <b>Preserving a Claim of Error.</b> A party may claim error in a ruling to admit or exclude evidence <u>only if</u> the error affects a <u>substantial right</u> of the party and:</p> <p>(1) if the ruling <u>admits evidence</u>, a party, on the record:</p> <p>(A) <u>timely objects or moves to strike</u>; and</p> <p>(B) states the <u>specific ground</u>, unless it was apparent from the context; or</p> <p>(2) if the ruling <u>excludes evidence</u>, a party <u>informs the court</u> of its <u>substance</u> by an <u>offer of proof</u>, unless the substance was apparent from the context.</p> <p>(b) <b>Not Needing to Renew an Objection or Offer of Proof.</b> Once the court <u>rules definitively</u> on the record — either before or at trial — a party <u>need not renew</u> an objection or offer of proof to preserve a claim of error for appeal.</p>
<p>(b) <b>Record of offer and ruling.</b> The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.</p>	<p>(c) <b>Court’s Statement About the Ruling; Directing an Offer of Proof.</b> The court may make any statement about the character or form of the evidence, the objection made, and the ruling. The court may direct that an offer of proof be made in question-and-answer form.</p>

Former Language	Restyled Language
<b>Rule 103. Rulings on Evidence</b>	<b>Rule 103. Rulings on Evidence</b>
<p><b>(c) Hearing of jury.</b> In jury cases, proceedings shall be conducted, to the extent practicable, so as to <u>prevent inadmissible evidence</u> from being <u>suggested to the jury</u> by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.</p>	<p><b>(d) Preventing the Jury from Hearing Inadmissible Evidence.</b> To the extent practicable, the court must conduct a jury trial so that <u>inadmissible evidence</u> is <u>not suggested to the jury</u> by any means.</p>
<p><b>(d) Plain error.</b> Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.</p>	<p><b>(e) Taking Notice of Plain Error.</b> A court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved.</p>

### Notes

- The restyled rule moves the last sentence of Rule 103(a) to its own section, 103(b). This improves readability and underlines the fact that parties need not renew objections through the common-law practice of noting exceptions.
- This change, however, alters the lettering of other sections within the rule. Former 103(b) became 103(c), former 103(c) became 103(d), etc.
- Restyled Rule 103(d) replaces the word “shall” with “must.” The new language sounds more obligatory, but accords with longstanding practice: Trial judges take all appropriate measures to prevent the jury from hearing inadmissible evidence. The restyled rule, like the former one, requires judges to comply with this obligation only “to the extent practicable.” That caveat makes clear that “must” is not an absolute command.
- Restyled Rule 103(e), which sets out the plain error standard, refers to a claim of error that “was not properly preserved.” The former rule described plain errors that “were not brought to the attention of the court.” The standards at first appear different, because an error might be brought to the court’s attention but not properly preserved. But this difference does not affect operation of the plain error rule: The point of the rule, under either formula, is that in limited circumstances courts can reverse even in the face of a procedural default.

Former Language	Restyled Language
<b>Rule 104. Preliminary Questions</b>	<b>Rule 104. Preliminary Questions</b>
<p><b>(a) Questions of admissibility generally.</b> Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be <u>determined by the court, subject to the provisions of subdivision (b)</u>. In making its determination it is <u>not bound by the rules of evidence except those with respect to privileges</u>.</p>	<p><b>(a) In General.</b> <u>The court must decide</u> any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is <u>not bound by evidence rules, except those on privilege</u>.</p>
<p><b>(b) Relevancy conditioned on fact.</b> When the <u>relevancy</u> of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of <u>evidence sufficient to support a finding</u> of the fulfillment of the condition.</p>	<p><b>(b) Relevance That Depends on a Fact.</b> When the <u>relevance</u> of evidence depends on whether a fact exists, proof must be introduced <u>sufficient to support a finding</u> that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.</p>
<p><b>(c) Hearing of jury.</b> Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.</p>	<p><b>(c) Conducting a Hearing So That the Jury Cannot Hear It.</b> The court must conduct any hearing on a preliminary question so that the jury cannot hear it if:</p> <ul style="list-style-type: none"> <li><b>(1)</b> the hearing involves the admissibility of a confession;</li> <li><b>(2)</b> a defendant in a criminal case is a witness and so requests; or</li> <li><b>(3)</b> justice so requires.</li> </ul>

Former Language	Restyled Language
<b>Rule 104. Preliminary Questions</b>	<b>Rule 104. Preliminary Questions</b>
(d) <b>Testimony by accused.</b> The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.	(d) <b>Cross-Examining a Defendant in a Criminal Case.</b> By testifying on a preliminary question, a defendant in a criminal case does not become subject to cross-examination on other issues in the case.
(e) <b>Weight and credibility.</b> This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.	(e) <b>Evidence Relevant to Weight and Credibility.</b> 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.

### Notes

- Restyled Rule 104(b) moves away from the concept of “conditional relevance.” Rather than speaking of “relevancy conditioned on fact,” the restyled section discusses “relevance that depends on a fact.” Students should find the new wording more clear, although the concept remains difficult. Professors may want to warn students that some lawyers and judges will continue to refer to 104(b) as governing “conditional relevance.” Otherwise, students may not connect that shorthand phrase with this section.
- The former text of Rule 104 used the word “shall” in three sections. The Advisory Committee changed this word to “must” in restyled sections 104(a) and 104(c), and to “may” in section 104(b). The first two substitutions make no substantive change: Judges must rule on preliminary questions (section 104(a)), and they must rule outside the jury’s presence in specified circumstances (section 104(c)).

But the change from “shall” to “may” in section 104(b) is somewhat more controversial. The committee could not use “must” in this section because conditionally relevant evidence may violate another rule. Declaring that a judge “must” admit conditionally relevant evidence would trump all other rules of evidence. On the other hand, “may” seems to give judges more discretion than they enjoyed under the former rule’s reference to “shall.” The committee members struggled with this challenge during several sessions. The final wording attempts to convey the committee’s sense that (1) judges must apply the “sufficient to support a finding” standard to determine conditional relevance; (2) evidence satisfying

that standard is not automatically admissible, because it may violate another rule of evidence; and (3) judges retain discretion to admit conditionally relevant evidence subject to later connection or to defer admission of that evidence.

Despite these attempts, a few scholars continue to criticize the use of “may” in Rule 104(b). The new wording may also prompt some uncertainty among judges. These issues fall outside the scope of most introductory evidence classes, but advanced students may want to discuss the problem.

- Restyled Rule 104(d) changes “accused” to “defendant in a criminal case.” The Advisory Committee made this change throughout the rules to achieve consistency. At an early meeting, the committee also noted that it preferred “defendant in a criminal case” over “accused” because some courts had interpreted the latter word to include civil defendants accused of misconduct.
- The reference to “other evidence” in Restyled Rule 104(e) is somewhat inartful. The section means that parties may always introduce evidence to challenge the weight or credibility of admitted evidence—even if the latter evidence was admitted after a Rule 104 determination. The word “other” distinguishes between the weight/credibility evidence and the evidence being attacked.

Former Language	Restyled Language
<b>Rule 105. Limited Admissibility</b>	<b>Rule 105. Limiting Evidence That Is Not Admissible Against Other Parties or for Other Purposes</b>
<p>When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, <u>upon request</u>, <u>shall</u> restrict the evidence to its proper scope and <u>instruct the jury</u> accordingly.</p>	<p>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, <u>on timely request</u>, <u>must</u> restrict the evidence to its proper scope and <u>instruct the jury</u> accordingly.</p>

### Notes

- Restyled Rule 105 substitutes “must” for “shall,” but this substitution makes no substantive change. Courts have viewed their duty to restrict evidence and give limiting instructions as mandatory.

Former Language	Restyled Language
<b>Rule 106. Remainder of or Related Writings or Recorded Statements</b>	<b>Rule 106. Remainder of or Related Writings or Recorded Statements</b>
<p>When a <u>writing or recorded statement</u> or part thereof is introduced by a party, an adverse party may require the introduction <u>at that time</u> of any <u>other part</u> or <u>any other writing or recorded statement</u> which ought in <u>fairness</u> to be considered <u>contemporaneously</u> with it.</p>	<p>If a party introduces all or part of a <u>writing or recorded statement</u>, an adverse party may require the introduction, <u>at that time</u>, of any <u>other part</u> — or <u>any other writing or recorded statement</u> — that in <u>fairness</u> ought to be considered <u>at the same time</u>.</p>

### Notes

- The restyled rule’s reference to a “writing or recorded statement” incorporates the new definitional provision in Restyled Rule 101(b)(6). Under that provision, “a reference to any kind of written material or any other medium includes electronically stored information.” Restyled Rule 106, in other words, now includes any electronically stored information; this accords with court decisions under the former rule.

The expansion does *not* affect the relationship between Rule 106 and oral statements. Courts have uniformly held that Rule 106 does not apply to oral, unrecorded statements; some courts have softened this result by holding that Rule 611 gives trial judges discretion to fashion a completeness rule for oral statements. The restyling of Rules 106 and 611 affects neither of these positions.

Former Language	Restyled Language
<p align="center"><b>ARTICLE II. JUDICIAL NOTICE</b></p> <p align="center"><b>Rule 201. Judicial Notice of Adjudicative Facts</b></p>	<p align="center"><b>ARTICLE II. JUDICIAL NOTICE</b></p> <p align="center"><b>Rule 201. Judicial Notice of Adjudicative Facts</b></p>
<p><b>(a) Scope of rule.</b> This rule governs only judicial notice of <u>adjudicative</u> facts.</p>	<p><b>(a) Scope.</b> This rule governs judicial notice of an <u>adjudicative</u> fact only, not a legislative fact.</p>
<p><b>(b) Kinds of facts.</b> A judicially noticed fact must be one <u>not subject to reasonable dispute</u> in that it is either</p> <p>(1) <u>generally known</u> within the territorial jurisdiction of the trial court or</p> <p>(2) capable of <u>accurate and ready determination</u> by resort to sources whose accuracy cannot reasonably be questioned.</p>	<p><b>(b) Kinds of Facts That May Be Judicially Noticed.</b> The court may judicially notice a fact that is <u>not subject to reasonable dispute</u> because it:</p> <p>(1) is <u>generally known</u> within the trial court’s territorial jurisdiction; or</p> <p>(2) can be <u>accurately and readily determined</u> from sources whose accuracy cannot reasonably be questioned.</p>
<p><b>(c) When discretionary.</b> A court <u>may</u> take judicial notice, whether requested or not.</p> <p><b>(d) When mandatory.</b> A court <u>shall</u> take judicial notice if <u>requested</u> by a party and <u>supplied</u> with the necessary information.</p>	<p><b>(c) Taking Notice.</b> The court:</p> <p>(1) <u>may</u> take judicial notice on its own; or</p> <p>(2) <u>must</u> take judicial notice if a party <u>requests</u> it and the court is <u>supplied</u> with the necessary information.</p>

Former Language	Restyled Language
<p><b>Rule 201. Judicial Notice of Adjudicative Facts</b></p>	<p><b>Rule 201. Judicial Notice of Adjudicative Facts</b></p>
<p>(e) <b>Opportunity to be heard.</b> A party is entitled upon timely request to an <u>opportunity to be heard</u> as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the <u>request may be made after</u> judicial notice has been taken.</p> <p>(f) <b>Time of taking notice.</b> Judicial notice may be taken at <u>any stage</u> of the proceeding.</p>	<p>(d) <b>Timing.</b> The court may take judicial notice at <u>any stage</u> of the proceeding.</p> <p>(e) <b>Opportunity to Be Heard.</b> On timely request, a party is <u>entitled to be heard</u> on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice <u>before notifying a party</u>, the party, <u>on request, is still entitled to be heard.</u></p>
<p>(g) <b>Instructing jury.</b> In a <u>civil action</u> or proceeding, the court shall instruct the jury to accept as <u>conclusive</u> any fact judicially noticed. In a <u>criminal case</u>, the court shall instruct the jury that it may, but is <u>not required to</u>, accept as conclusive any fact judicially noticed.</p>	<p>(f) <b>Instructing the Jury.</b> In a <u>civil case</u>, the court must instruct the jury to accept the noticed fact as <u>conclusive</u>. In a <u>criminal case</u>, the court must instruct the jury that it <u>may or may not</u> accept the noticed fact as conclusive.</p>

**Notes**

- Restyled Rule 201(a) expressly states that the rule does not apply to legislative facts. This addition simply clarifies existing law: The Advisory Committee’s original 1975 note contrasted adjudicative and legislative facts. By incorporating this language in the restyled rule, the more recent committee made the distinction more accessible to readers.
- Restyled Rule 201 combines sections (c) and (d) into separately numbered subsections of 201(c). The restyled rule also moves the provision on timing from section (f) to section (d). These changes aid understanding without changing substance. Students and practitioners, however, will have to remember these changes when reading judicial opinions or doing electronic searches.
- Former Rule 201(d) provided that the court “shall” take notice under certain circumstances. Restyled Rule 201(c)(2) replaces that “shall” with “must.” This does not change the provision’s substantive meaning: As the subtitle of former Rule 201(d) indicated, the “shall” in that provision was mandatory.

- Similarly, Restyled Rule 201(f) replaces “shall” with “must” in describing the court’s role when instructing the jury. Again, this change reflects well established law: The court has no discretion when instructing the jury about judicially noticed facts.
- During the restyling project, the committee noted a substantive issue in Rule 201: By allowing a court to take judicial notice “at any stage of the proceeding,” the rule would allow an appellate court to take judicial notice of a fact favoring the prosecution in a criminal case. This practice would violate the defendant’s constitutional right to trial by jury. Addressing this issue was not a stylistic matter, so the committee asked its consultant to prepare a memo on a possible substantive amendment.<sup>2</sup> The committee has not yet pursued that issue.

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<sup>2</sup> Advisory Committee on Evidence Rules, Materials of October 2008 Meeting, at 62 (available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Evidence/EV2008-10.pdf>).

Former Language	Restyled Language
<p style="text-align: center;"><b>ARTICLE III. PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS</b></p> <p><b>Rule 301. Presumptions in General in Civil Actions and Proceedings</b></p>	<p style="text-align: center;"><b>ARTICLE III. PRESUMPTIONS IN CIVIL CASES</b></p> <p><b>Rule 301. Presumptions in Civil Cases Generally</b></p>
<p>In all civil actions and proceedings <u>not otherwise provided</u> for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the <u>burden of going forward</u> with evidence to <u>rebut or meet</u> the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.</p>	<p>In a civil case, <u>unless a federal statute or these rules provide otherwise</u>, the party against whom a presumption is directed has the <u>burden of producing evidence</u> to <u>rebut</u> the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.</p>

**Notes**

- The Advisory Committee simplified two key phrases in this rule. First, it shortened “the burden of going forward with evidence to rebut or meet the presumption” to “the burden of producing evidence to rebut the presumption.” Before making this change, the committee confirmed that no court had drawn a distinction between the verbs “rebut” and “meet.” It also confirmed that the phrase “producing evidence” was equivalent to the phrase “going forward with evidence.” These changes eliminate unnecessary words and enhance the rule’s readability.
- Second, the committee changed “the burden of proof in the sense of the risk of nonpersuasion” to simply “the burden of persuasion.” This change, like the first one, simplifies a phrase without altering substance. Federal courts varied somewhat in their interpretation of the former phrase: Most courts described Rule 301’s default presumption as a “bursting bubble” presumption, but the circuits diverged in the details of how that presumption operated. The restyled language does not change that debate.
- Restyled Rule 301 makes a third, very minor change: It refers to a “civil case,” rather than “civil actions and proceedings.” A new definitional section in Restyled Rule 101(b)(1)

avoids any possibility of substantive change by defining “civil case” to mean “a civil action or proceeding.”

Former Language	Restyled Language
<p><b>Rule 302. Applicability of State Law in Civil Actions and Proceedings</b></p>	<p><b>Rule 302. Applying State Law to Presumptions in Civil Cases</b></p>
<p>In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which <u>State law</u> supplies the rule of decision is determined in accordance with State law.</p>	<p>In a civil case, <u>state law</u> governs the effect of a presumption regarding a claim or defense for which state law supplies the rule of decision.</p>

**Notes**

- Former Rule 302 directed courts to apply state law to presumptions “respecting a fact which is an element of a claim or defense” whenever state law governed that claim or defense. A 1975 Advisory Committee note suggested that the words “respecting a fact which is an element” excluded “tactical” presumptions; in other words, federal law would govern tactical presumptions even on diversity claims. But the committee did not give any examples of tactical presumptions, and commentators have debated both whether Congress intended such a distinction and whether it is possible to draw such a line.

Against this background, the more recent Advisory Committee considered whether the rule’s restyled language, which applies state law to “a presumption regarding a claim or defense,” would change the treatment of tactical presumptions. The committee concluded that, whatever Rule 302’s intended impact on tactical presumptions, the new language would not change that effect. A presumption “respecting a fact which is an element of a claim or defense” is the same as one “regarding a claim or defense.” The committee preferred the latter language because it is simpler and easier to apply.

- Restyled Rule 302, like Rule 301, refers simply to a “civil case,” rather than “civil actions and proceedings.” A new definitional section in Restyled Rule 101(b)(1) avoids any substantive change by defining “civil case” to mean “a civil action or proceeding.”

Former Language	Restyled Language
<p style="text-align: center;"><b>ARTICLE IV. RELEVANCY AND ITS LIMITS</b></p> <p style="text-align: center;"><b>Rule 401. Definition of “Relevant Evidence”</b></p>	<p style="text-align: center;"><b>ARTICLE IV. RELEVANCE AND ITS LIMITS</b></p> <p style="text-align: center;"><b>Rule 401. Test for Relevant Evidence</b></p>
<p>“Relevant evidence” means evidence having <u>any tendency</u> to make the existence of <u>any fact that is of consequence</u> to the determination of the action <u>more probable or less probable</u> than it would be without the evidence.</p>	<p>Evidence is relevant if:</p> <p>(a) it has <u>any tendency</u> to make a <u>fact more or less probable</u> than it would be without the evidence; and</p> <p>(b) the fact is <u>of consequence</u> in determining the action.</p>

### Notes

There are no notable changes in this rule.

Former Language	Restyled Language
<p align="center"><b>Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible</b></p>	<p align="center"><b>Rule 402. General Admissibility of Relevant Evidence</b></p>
<p>All relevant evidence is admissible, except as otherwise provided</p> <ul style="list-style-type: none"> <li>• by the Constitution of the United States,</li> <li>• by Act of Congress,</li> <li>• by these rules,</li> <li>• or by other rules prescribed by the Supreme Court pursuant to statutory authority.</li> </ul> <p>Evidence which is not relevant is not admissible.</p>	<p>Relevant evidence is admissible unless any of the following provides otherwise:</p> <ul style="list-style-type: none"> <li>• the United States Constitution;</li> <li>• a federal statute;</li> <li>• these rules; or</li> <li>• other rules prescribed by the Supreme Court.</li> </ul> <p>Irrelevant evidence is not admissible.</p>

**Notes**

- Former Rule 402, like several other rules, referred to “rules prescribed by the Supreme Court pursuant to statutory authority.” This phrase included rules adopted under the Rules Enabling Act, but not rules created under the Court’s general supervisory power. The restyled rules maintain this limit, but transfer it to a new definitional section in Restyled Rule 101(b)(5). As that section makes clear, Restyled Rule 402’s reference to “rules prescribed by the Supreme Court” includes only rules “adopted by the Supreme Court under statutory authority.”

Former Language	Restyled Language
<p><b>Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time</b></p>	<p><b>Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons</b></p>
<p>Although relevant, evidence <u>may</u> be excluded if its probative value is <u>substantially outweighed</u></p> <ul style="list-style-type: none"> <li>• by the danger of <u>unfair</u> prejudice, confusion of the issues, or misleading the jury, or</li> <li>• by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.</li> </ul>	<p>The court <u>may</u> exclude relevant evidence if its probative value is <u>substantially outweighed</u> by a danger of one or more of the following:</p> <ul style="list-style-type: none"> <li>• <u>unfair</u> prejudice,</li> <li>• confusing the issues, misleading the jury,</li> <li>• undue delay, wasting time, or needlessly presenting cumulative evidence.</li> </ul>

### Notes

There are no notable changes in this rule.

Former Language	Restyled Language
<p><b>Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes</b></p>	<p><b>Rule 404. Character Evidence; Crimes or Other Acts</b></p>
<p><b>(a) Character evidence generally.</b> Evidence of a person’s character or a trait of character is not admissible for the <u>purpose of proving action in conformity therewith</u> on a particular occasion, <u>except</u>:</p> <p><b>(1) Character of accused.</b> In a <u>criminal case</u>, evidence of a <u>pertinent trait</u> of character offered</p> <ul style="list-style-type: none"> <li>• by an <u>accused</u>, or</li> <li>• by the <u>prosecution to rebut the same</u>, or</li> <li>• if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the <u>same trait</u> of character of the accused offered by the <u>prosecution</u>;</li> </ul> <p><b>(2) Character of alleged victim.</b> In a <u>criminal case</u>, and <u>subject to the limitations imposed by Rule 412</u>,</p> <ul style="list-style-type: none"> <li>• evidence of a <u>pertinent trait</u> of character of the <u>alleged victim</u> of the crime offered by an <u>accused</u>, or</li> <li>• by the <u>prosecution to rebut the same</u>, or</li> <li>• evidence of a character trait of <u>peacefulness</u> of the alleged victim offered by the <u>prosecution</u> in a <u>homicide case</u> to <u>rebut</u> evidence that the alleged victim was the <u>first aggressor</u>;</li> </ul> <p><b>(3) Character of witness.</b> Evidence of the <u>character of a witness</u>, as provided in Rules 607, 608, and 609.</p>	<p><b>(a) Character Evidence.</b></p> <p><b>(1) <i>Prohibited Uses.</i></b> Evidence of a person’s character or character trait is not admissible <u>to prove</u> that on a particular occasion the person <u>acted in accordance with the character or trait</u>.</p> <p><b>(2) <i>Exceptions for a Defendant or Victim in a Criminal Case.</i></b> The following exceptions apply in a <u>criminal case</u>:</p> <p><b>(A)</b> a <u>defendant</u> may offer evidence of the defendant’s <u>pertinent trait</u>, and if the evidence is admitted, the <u>prosecutor</u> may offer evidence to <u>rebut</u> it;</p> <p><b>(B)</b> subject to the limitations in <u>Rule 412</u>, a <u>defendant</u> may offer evidence of an <u>alleged victim’s pertinent trait</u>, and if the evidence is admitted, the <u>prosecutor</u> may:</p> <ul style="list-style-type: none"> <li><b>(i)</b> offer evidence to <u>rebut</u> it; and</li> <li><b>(ii)</b> offer evidence of the <u>defendant’s same trait</u>; and</li> </ul> <p><b>(C)</b> in a <u>homicide case</u>, the <u>prosecutor</u> may offer evidence of the alleged victim’s trait of <u>peacefulness</u> to <u>rebut</u> evidence that the victim was the <u>first aggressor</u>.</p> <p><b>(3) <i>Exceptions for a Witness.</i></b> Evidence of a <u>witness’s character</u> may be admitted under Rules 607, 608, and 609.</p>

Former Language	Restyled Language
<p><b>Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes</b></p>	<p><b>Rule 404. Character Evidence; Crimes or Other Acts</b></p>
<p><b>(b) Other crimes, wrongs, or acts.</b>            Evidence of other crimes, wrongs, or acts is <u>not admissible</u> to prove the character of a person in order to show action in conformity therewith. It <u>may</u>, however, be admissible for <u>other purposes</u>, <u>such as</u> proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, <u>provided that</u></p> <ul style="list-style-type: none"> <li>upon request by the accused, the prosecution in a <u>criminal case</u> shall provide <u>reasonable notice</u> in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the <u>general nature</u> of any such evidence it intends to introduce at trial.</li> </ul>	<p><b>(b) Crimes, Wrongs, or Other Acts.</b></p> <p><b>(1) <i>Prohibited Uses.</i></b> Evidence of a crime, wrong, or other act is <u>not admissible</u> to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.</p> <p><b>(2) <i>Permitted Uses; Notice in a Criminal Case.</i></b> This evidence <u>may</u> be admissible for <u>another purpose</u>, <u>such as</u> proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a <u>criminal case</u>, the prosecutor <u>must</u>:</p> <p><b>(A)</b> provide <u>reasonable notice</u> of the <u>general nature</u> of any such evidence that the prosecutor intends to offer at trial; and</p> <p><b>(B)</b> do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice.</p>

**Notes**

- Restyled Rules 404(a) and 404(b) no longer use the distinctive phrase “in conformity with,” substituting the simpler “in accordance with.” This makes no substantive change, but students should note that professors, judges, and practitioners may continue to use the older phrase.

- Restyled Rule 404(b) uses the word “must” rather than “shall” to designate the prosecution’s duty to provide notice to a criminal defendant. This change clarifies the mandatory nature of notice. On the other hand, the restyled rule omits the phrase “provided that,” which conditions admissibility on notice. As the Reporter to the Restyling Project noted, this omission may make a substantive change. Under the previous rule, 404(b) evidence was admissible against a criminal defendant only if the prosecution provided proper notice. By breaking that link, the restyled rule may allow the court to admit the prosecution’s evidence while imposing a different sanction for the failed notice.<sup>3</sup>
- Section 404(a)’s general prohibition against using character evidence now appears in subsection 404(a)(1), while the exceptions for criminal cases appear in subsections 404(a)(2)(A), (B), and (C). This renumbering may confuse students and new lawyers examining earlier case law, in which 404(a)(1) expressed the first part of the criminal-case exception.

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<sup>3</sup> Daniel J. Capra, *Commentary on the Restyled Federal Rules of Evidence*, 2011 LexisNexis Emerging Issues 5875(Comment on Restyled Rule 404(b)).

Former Language	Restyled Language
<b>Rule 405. Methods of Proving Character</b>	<b>Rule 405. Methods of Proving Character</b>
<p><b>(a) Reputation or opinion.</b> In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to <u>reputation</u> or by testimony in the form of an <u>opinion</u>. On <u>cross-examination</u>, inquiry is allowable into relevant <u>specific instances</u> of conduct.</p> <p><b>(b) Specific instances of conduct.</b> In cases in which character or a trait of character of a person is an <u>essential element</u> of a charge, claim, or defense, proof may also be made of <u>specific instances</u> of that person's conduct.</p>	<p><b>(a) By Reputation or Opinion.</b> When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's <u>reputation</u> or by testimony in the form of an <u>opinion</u>. On <u>cross-examination</u> of the character witness, the court may allow an inquiry into relevant <u>specific instances</u> of the person's conduct.</p> <p><b>(b) By Specific Instances of Conduct.</b> When a person's character or character trait is an <u>essential element</u> of a charge, claim, or defense, the character or trait may also be proved by relevant <u>specific instances</u> of the person's conduct.</p>

**Notes**

There are no notable changes in this rule.

Former Language	Restyled Language
<b>Rule 406. Habit; Routine Practice</b>	<b>Rule 406. Habit; Routine Practice</b>
<p>Evidence of the <u>habit</u> of a person or of the <u>routine practice</u> of an organization, whether <u>corroborated or not</u> and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.</p>	<p>Evidence of a person’s <u>habit</u> or an organization’s <u>routine practice</u> 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 <u>regardless of whether it is corroborated</u> or whether there was an eyewitness.</p>

### Notes

- Restyled Rule 406, like Restyled Rule 404, uses the phrase “in accordance” rather than “in conformity with.” This is not a substantive change, but professors may want to warn students that some judges and lawyers will use the older phrase.
- The restyled rule also replaces the operative phrase “is relevant” with “may be admitted.” The Advisory Committee discussed at length whether this change was substantive; the committee concluded that it was not. The change makes the language of Rule 406 more consistent with that of other rules.

Former Language	Restyled Language
<p align="center"><b>Rule 407. Subsequent Remedial Measures</b></p>	<p align="center"><b>Rule 407. Subsequent Remedial Measures</b></p>
<p>When, <u>after an injury or harm</u> allegedly caused by an event, <u>measures</u> are taken that, if taken previously, would have made the injury or harm <u>less likely to occur</u>, evidence of the subsequent measures is <u>not admissible to prove</u></p> <ul style="list-style-type: none"> <li>• negligence,</li> <li>• culpable conduct,</li> <li>• a defect in a product,</li> <li>• a defect in a product’s design, or</li> <li>• a need for a warning or instruction.</li> </ul> <p>This rule does not require the exclusion of evidence of subsequent measures when <u>offered for another purpose</u>, such as</p> <ul style="list-style-type: none"> <li>• proving <u>ownership, control, or feasibility</u> of precautionary measures, <u>if controverted</u>, or</li> <li>• <u>impeachment</u>.</li> </ul>	<p>When <u>measures</u> are taken that would have made <u>an earlier injury or harm less likely to occur</u>, evidence of the subsequent measures is <u>not admissible to prove</u>:</p> <ul style="list-style-type: none"> <li>• negligence;</li> <li>• culpable conduct;</li> <li>• a defect in a product or its design; or</li> <li>• a need for a warning or instruction.</li> </ul> <p>But the court may admit this evidence for <u>another purpose</u>, such as</p> <ul style="list-style-type: none"> <li>• <u>impeachment</u> or —</li> <li>• <u>if disputed</u> — proving <u>ownership, control, or the feasibility</u> of precautionary measures.</li> </ul>

**Notes**

- The former rule listed five forbidden purposes for introducing evidence of subsequent remedial measures. The restyled rule preserves the same substance, but groups the forbidden purposes into just four bullet points.
- The Advisory Committee changed the phrase “if controverted” to the simpler phrase “if disputed.” One public comment suggested that “disputed” is a more lenient standard than “controverted,” because the latter suggested that the opponent had to offer affirmative evidence. The committee concluded that there was no substantive difference between the two standards; it also noted that case law did not always require affirmative evidence to “controvert” one of the issues specified in the rule.<sup>4</sup> Students and new lawyers, however,

<sup>4</sup> Advisory Committee on Evidence Rules, Materials of April 2010 Meeting, at 25 (available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/EV04-2010-min.pdf>).

should remember that cases decided under the previous language remain binding; a significant number of judicial opinions apply the “if controverted” language.

- The committee changed the double negative, “does not require the exclusion,” to the simpler statement, “may admit.” Committee members discussed at length whether this change would have any substantive effect. They concluded that it would not, but prepared a special note to make this clear. Restyled Rule 407 has been published with an Advisory Committee Note stating:

Rule 407 previously provided that evidence was not excluded if offered for a purpose not explicitly prohibited by the Rule. To improve the language of the Rule, it now provides that the court may admit evidence if offered for a permissible purpose. There is no intent to change the process for admitting evidence covered by the Rule. It remains the case that if offered for an impermissible purpose, it must be excluded, and if offered for a purpose not barred by the Rule, its admissibility remains governed by the general principles of Rules 402, 403, 801, etc.

The committee made analogous changes to Rules 408 and 411; similar notes accompany those rules.

Former Language	Restyled Language
<p><b>Rule 408. Compromise and Offers to Compromise</b></p>	<p><b>Rule 408. Compromise Offers and Negotiations</b></p>
<p><b>(a) Prohibited uses.</b> Evidence of the following is not admissible <u>on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:</u></p> <p>(1) <u>furnishing or offering or promising to furnish—or accepting or offering or promising to accept—a valuable consideration in compromising or attempting to compromise the claim;</u> and</p> <p>(2) <u>conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.</u></p> <p><b>(b) Permitted uses.</b> This rule does not require exclusion if the evidence is offered for <u>purposes not prohibited</u> by subdivision (a). Examples of permissible purposes include</p> <ul style="list-style-type: none"> <li>• proving a witness’s bias or prejudice;</li> <li>• negating a contention of undue delay; and</li> <li>• proving an effort to obstruct a criminal investigation or prosecution.</li> </ul>	<p><b>(a) Prohibited Uses.</b> Evidence of the following is not admissible — <u>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:</u></p> <p>(1) <u>furnishing, promising, or offering — or accepting, promising to accept, or offering to accept — a valuable consideration in compromising or attempting to compromise the claim;</u> and</p> <p>(2) <u>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.</u></p> <p><b>(b) Exceptions.</b> The court may admit this evidence for <u>another purpose</u>, such as</p> <ul style="list-style-type: none"> <li>• proving a witness’s bias or prejudice,</li> <li>• negating a contention of undue delay, or</li> <li>• proving an effort to obstruct a criminal investigation or prosecution.</li> </ul>

## Notes

- The committee deleted the word “liability” from Rule 408(a) after concluding that “liability” was a subset of “validity.” The deletion makes the rule easier to read without changing its substantive impact. To assuage any concerns about this change, the committee published a special note accompanying Restyled Rule 408:

The Committee deleted the reference to “liability” on the ground that the deletion makes the Rule flow better and easier to read, and because “liability” is covered by the broader term “validity.” Courts have not made substantive decisions on the basis of any distinction between validity and liability. No change in current practice or in the coverage of the Rule is intended.

- The committee also reduced the phrase “public office or agency” in Rule 408(a)(2) to “public office.” But Restyled Rule 101(b)(3) clarifies that a public office “includes a public agency.” The new definitional section allowed the committee to streamline the text of several rules, while accommodating the fact that some federal statutes distinguish between public offices and agencies.
- In Restyled Rule 408(b), the committee changed the phrase “does not require exclusion” to “may admit.” This change resembles ones made in Rules 407 and 411. As with those rules, the committee published a special note indicating that the new phrase signals no substantive change:

Rule 408 previously provided that evidence was not excluded if offered for a purpose not explicitly prohibited by the Rule. To improve the language of the Rule, it now provides that the court may admit evidence if offered for a permissible purpose. There is no intent to change the process for admitting evidence covered by the Rule. It remains the case that if offered for an impermissible purpose, it must be excluded, and if offered for a purpose not barred by the Rule, its admissibility remains governed by the general principles of Rules 402, 403, 801, etc.

Former Language	Restyled Language
<b>Rule 409. Payment of Medical and Similar Expenses</b>	<b>Rule 409. Offers to Pay Medical and Similar Expenses</b>
Evidence of <u>furnishing or offering or promising to pay medical, hospital, or similar expenses</u> occasioned by an injury is not admissible to <u>prove liability</u> for the injury.	Evidence of <u>furnishing, promising to pay, or offering to pay medical, hospital, or similar expenses</u> resulting from an injury is not admissible to <u>prove liability</u> for the injury.

**Notes**

There are no notable changes in this rule.

Former Language	Restyled Language
<p><b>Rule 410. Inadmissibility of Pleas, Plea Discussions, and Related Statements</b></p>	<p><b>Rule 410. Pleas, Plea Discussions, and Related Statements</b></p>
<p>Except as otherwise provided in this rule, evidence of the following is not, <u>in any civil or criminal proceeding, admissible against the defendant</u> who made the plea or was a participant in the plea discussions:</p> <p>(1) a <u>plea of guilty</u> which was later <u>withdrawn</u>;</p> <p>(2) a plea of <u>nolo contendere</u>;</p> <p>(3) any <u>statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas</u>; or</p> <p>(4) <u>any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.</u></p>	<p>(a) <b>Prohibited Uses.</b> <u>In a civil or criminal case, evidence of the following is not admissible against the defendant</u> who made the plea or participated in the plea discussions:</p> <p>(1) a <u>guilty plea</u> that was later <u>withdrawn</u>;</p> <p>(2) a <u>nolo contendere</u> plea;</p> <p>(3) a <u>statement made during a proceeding on either of those pleas</u> under Federal Rule of Criminal Procedure 11 or a comparable state procedure; or</p> <p>(4) a <u>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.</u></p>

Former Language	Restyled Language
<p><b>Rule 410. Inadmissibility of Pleas, Plea Discussions, and Related Statements</b></p>	<p><b>Rule 410. Pleas, Plea Discussions, and Related Statements</b></p>
<p>However, such a statement is admissible</p> <p>(i) in any proceeding wherein</p> <ul style="list-style-type: none"> <li>• <u>another statement</u> made in the course of the same plea or plea discussions has been introduced and</li> <li>• the statement <u>ought in fairness</u> be considered contemporaneously with it, or</li> </ul> <p>(ii) in a criminal proceeding for <u>perjury or false statement</u> if</p> <ul style="list-style-type: none"> <li>• the statement was made by the defendant under oath,</li> <li>• on the record and</li> <li>• in the presence of counsel.</li> </ul>	<p><b>(b) Exceptions.</b> The court may admit a statement described in Rule 410(a)(3) or (4):</p> <p><b>(1)</b> in any proceeding in which <u>another statement</u> made during the same plea or plea discussions has been introduced, if <u>in fairness</u> the statements ought to be considered together; or</p> <p><b>(2)</b> in a criminal proceeding <u>for perjury or false statement</u>, if</p> <ul style="list-style-type: none"> <li>• the defendant made the statement under oath,</li> <li>• on the record, and</li> <li>• with counsel present.</li> </ul>

**Notes**

There are no notable changes in this rule.

Former Language	Restyled Language
<b>Rule 411. Liability Insurance</b>	<b>Rule 411. Liability Insurance</b>
<p>Evidence that a person was or was not <u>insured against liability</u> is not admissible <u>upon the issue whether the person acted negligently or otherwise wrongfully</u>.</p> <p>This rule does not require the exclusion of evidence of insurance against liability when <u>offered for another purpose</u>, such as</p> <ul style="list-style-type: none"> <li>• proof of agency, ownership, or control, or</li> <li>• bias or prejudice of a witness.</li> </ul>	<p>Evidence that a person was or was not <u>insured against liability</u> is not admissible <u>to prove whether the person acted negligently or otherwise wrongfully</u>.</p> <p>But the court may admit this evidence for <u>another purpose</u>, such as</p> <ul style="list-style-type: none"> <li>• proving a witness’s bias or prejudice or</li> <li>• proving agency, ownership, or control.</li> </ul>

## Notes

- The former rule prohibited insurance-related evidence “upon the issue whether the person acted negligently or otherwise wrongfully.” This phrase forbid insurance-related evidence whether it proved *or disproved* the allegedly wrongful behavior. The 1975 Advisory Committee’s notes to Rule 411 underscored this dual focus, observing: “The courts have with substantial unanimity rejected evidence of liability insurance for the purpose of proving fault, and absence of liability insurance as *proof of lack of fault* (emphasis added).”

The restyled rule more concisely forbids evidence about insurance “to prove whether the person acted negligently or otherwise wrongfully.” The Advisory Committee intended the word “whether” to encompass evidence proving *or disproving* wrongful behavior.<sup>5</sup> The language is not quite as clear as the words used in Restyled Rule 408, which forbids evidence “to prove or disprove,” but the rules have different drafting and restyling histories. The Advisory Committee clearly intended the word “whether” in Restyled Rule 411 to include proof supporting or disputing liability, and the word accomplishes that result. The restyled language, therefore, makes no substantive change.

<sup>5</sup> Advisory Committee on Evidence Rules, Materials of November 2009 Meeting, at 156 (available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Evidence/EV2009-11.pdf>).

- Restyled Rule 411 changes the phrase “does not require the exclusion of” to “may admit.” The committee made similar changes in Rules 407 and 408. In all three cases, the committee agreed that the change was not substantive. But to allay any fear of a substantive change, the committee published the following note with Restyled Rule 411:

Rule 411 previously provided that evidence was not excluded if offered for a purpose not explicitly prohibited by the Rule. To improve the language of the Rule, it now provides that the court may admit evidence if offered for a permissible purpose. There is no intent to change the process for admitting evidence covered by the Rule. It remains the case that if offered for an impermissible purpose, it must be excluded, and if offered for a purpose not barred by the Rule, its admissibility remains governed by the general principles of Rules 402, 403, 801, etc.

Similar notes accompany Restyled Rules 407 and 408.

Former Language	Restyled Language
<p align="center"><b>Rule 412. Sex Offense Cases; Relevance of Alleged Victim’s Past Sexual Behavior or Alleged Sexual Predisposition</b></p>	<p align="center"><b>Rule 412. Sex-Offense Cases: The Victim’s Sexual Behavior or Predisposition</b></p>
<p><b>(a) Evidence Generally Inadmissible.</b> The following evidence is not admissible in any <u>civil or criminal proceeding</u> involving alleged <u>sexual misconduct</u> <u>except</u> as provided in subdivisions (b) and (c):</p> <p>(1) Evidence offered to prove that any alleged victim engaged in other <u>sexual behavior</u>.</p> <p>(2) Evidence offered to prove any alleged victim’s <u>sexual predisposition</u>.</p> <p><b>(b) Exceptions.</b></p> <p>(1) In a <u>criminal case</u>, the following evidence is admissible, <u>if otherwise admissible</u> under these rules:</p> <p>(A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other <u>physical evidence</u>;</p> <p>(B) evidence of specific instances of sexual behavior by the alleged victim <u>with respect to the person accused</u> of the sexual misconduct</p> <ul style="list-style-type: none"> <li>• offered by the accused to prove consent or</li> <li>• by the prosecution; and</li> </ul> <p>(C) evidence the exclusion of which would violate the <u>constitutional rights</u> of the defendant.</p>	<p><b>(a) Prohibited Uses.</b> The following evidence is not admissible in a <u>civil or criminal proceeding</u> involving alleged <u>sexual misconduct</u>:</p> <p>(1) evidence offered to prove that a victim engaged in other <u>sexual behavior</u>; or</p> <p>(2) evidence offered to prove a victim’s <u>sexual predisposition</u>.</p> <p><b>(b) Exceptions.</b></p> <p>(1) <b>Criminal Cases.</b> The court may admit the following evidence in a <u>criminal case</u>:</p> <p>(A) evidence of specific instances of a victim’s sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other <u>physical evidence</u>;</p> <p>(B) evidence of specific instances of a victim’s sexual behavior <u>with respect to the person accused</u> of the sexual misconduct, if offered</p> <ul style="list-style-type: none"> <li>• by the defendant to prove consent or</li> <li>• if offered by the prosecutor; and</li> </ul> <p>(C) evidence whose exclusion would violate the defendant’s <u>constitutional rights</u>.</p>

Former Language	Restyled Language
<p align="center"><b>Rule 412. Sex Offense Cases; Relevance of Alleged Victim’s Past Sexual Behavior or Alleged Sexual Predisposition</b></p>	<p align="center"><b>Rule 412. Sex-Offense Cases: The Victim’s Sexual Behavior or Predisposition</b></p>
<p>(2) In a <u>civil case</u>, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is <u>otherwise admissible</u> under these rules and its <u>probative value substantially outweighs</u> the danger</p> <ul style="list-style-type: none"> <li>• of <u>harm to any victim</u> and</li> <li>• of <u>unfair prejudice to any party</u>.</li> </ul> <p>Evidence of an alleged victim’s reputation is admissible only if it has been <u>placed in controversy by the alleged victim</u>.</p>	<p>(2) <i>Civil Cases.</i> In a <u>civil case</u>, the court may admit evidence offered to prove a victim’s sexual behavior or sexual predisposition if its <u>probative value substantially outweighs</u> the danger</p> <ul style="list-style-type: none"> <li>• of <u>harm to any victim</u> and</li> <li>• of <u>unfair prejudice to any party</u>.</li> </ul> <p>The court may admit evidence of a victim’s reputation only if the <u>victim has placed it in controversy</u>.</p>
<p><b>(c) Procedure To Determine Admissibility.</b></p> <p>(1) A party intending to offer evidence under subdivision (b) must—</p> <p>(A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and</p> <p>(B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim’s guardian or representative.</p>	<p><b>(c) Procedure to Determine Admissibility.</b></p> <p>(1) <i>Motion.</i> If a party intends to offer evidence under Rule 412(b), the party must:</p> <p>(A) file a motion that specifically describes the evidence and states the purpose for which it is to be offered;</p> <p>(B) do so at least 14 days before trial unless the court, for good cause, sets a different time;</p> <p>(C) serve the motion on all parties; and</p> <p>(D) notify the victim or, when appropriate, the victim’s guardian or representative.</p>

Former Language	Restyled Language
<p align="center"><b>Rule 412. Sex Offense Cases; Relevance of Alleged Victim’s Past Sexual Behavior or Alleged Sexual Predisposition</b></p>	<p align="center"><b>Rule 412. Sex-Offense Cases: The Victim’s Sexual Behavior or Predisposition</b></p>
<p>(2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.</p>	<p>(2) <i>Hearing.</i> Before admitting evidence under this rule, the court must conduct an in camera hearing and give the victim and parties a right to attend and be heard. Unless the court orders otherwise, the motion, related materials, and the record of the hearing must be and remain sealed.</p> <p>(d) <b>Definition of “Victim.”</b> In this rule, “victim” includes an alleged victim.</p>

### Notes

- Former Rule 412 used the phrase “alleged victim” in several places. The restyled rule improves readability by replacing that phrase with “victim.” To avoid any fear of substantive change, the restyled rule includes a new section (d) defining “victim” to include an “alleged victim.”

Former Language	Restyled Language
<p align="center"><b>Rule 413. Evidence of Similar Crimes in Sexual Assault Cases</b></p>	<p align="center"><b>Rule 413. Similar Crimes in Sexual-Assault Cases</b></p>
<p>(a) In a <u>criminal case</u> in which the defendant is accused of an offense of <u>sexual assault</u>, evidence of the defendant’s commission of <u>another offense or offenses of sexual assault</u> is admissible, and may be considered for its bearing on <u>any matter to which it is relevant</u>.</p> <p>(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.</p> <p>(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.</p> <p>(d) For purposes of this rule and Rule 415, “offense of sexual assault” means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved—</p> <p>(1) any conduct proscribed by chapter 109A of title 18, United States Code;</p> <p>(2) contact, without consent, between any part of the defendant’s body or an object and the genitals or anus of another person;</p>	<p>(a) <b>Permitted Uses.</b> In a <u>criminal case</u> in which a defendant is accused of a <u>sexual assault</u>, the court may admit evidence that the defendant committed <u>any other sexual assault</u>. The evidence may be considered on <u>any matter to which it is relevant</u>.</p> <p>(b) <b>Disclosure to the Defendant.</b> If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses’ statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.</p> <p>(c) <b>Effect on Other Rules.</b> This rule does not limit the admission or consideration of evidence under any other rule.</p> <p>(d) <b>Definition of “Sexual Assault.”</b> In this rule and Rule 415, “sexual assault” means a crime under federal law or under state law (as “state” is defined in 18 U.S.C. § 513) involving:</p> <p>(1) any conduct prohibited by 18 U.S.C. chapter 109A;</p> <p>(2) contact, without consent, between any part of the defendant’s body — or an object — and another person’s genitals or anus;</p>

Former Language	Restyled Language
<p><b>Rule 413. Evidence of Similar Crimes in Sexual Assault Cases</b></p>	<p><b>Rule 413. Similar Crimes in Sexual-Assault Cases</b></p>
<p>(3) contact, without consent, between the genitals or anus of the defendant and any part of another person’s body;</p> <p>(4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or</p> <p>(5) an attempt or conspiracy to engage in conduct described in paragraphs (1)–(4).</p>	<p>(3) contact, without consent, between the defendant’s genitals or anus and any part of another person’s body;</p> <p>(4) deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person; or</p> <p>(5) an attempt or conspiracy to engage in conduct described in subparagraphs (1)–(4).</p>

**Notes**

- Former Rule 413(a) stated that evidence of prior sexual assaults “is admissible.” The restyled rule adopts an active construction: “the court may admit.” The Advisory Committee concluded that this change should not affect the substantive law. Courts construed the former language to override Rule 404’s general ban on propensity evidence, but to maintain restrictions imposed by all other rules. Evidence offered under Rule 413, therefore, must satisfy rules related to hearsay, authentication, etc. In particular, the courts have applied Rule 403 to evidence offered under Rule 413.

The committee designed the new language to achieve the same results. Indeed, given changes in other rules, it worried that courts might read the old formula (“is admissible”) to mandate admission of any evidence offered under Rule 413.

It is possible that the restyled language will subtly affect judicial decisions. Although case law uniformly applies Rule 403 to evidence offered under Rule 413, the circuits differ in how they reconcile the two rules.<sup>6</sup> The wording change could affect advocacy and outcomes on this already difficult issue. But the problem stems, not from the restyled language, but from the underlying tension between Rule 413 (drafted by Congress over the Advisory Committee’s resistance) and other rules of evidence.

- The former rule contained the word “shall” in sections (b) and (c). The restyled rule recognizes that these were mandatory provisions, substituting the words “must” and “does.” There is no change in substantive meaning.

<sup>6</sup> See *Martinez v. Cui*, 608 F.3d 54 (1st Cir. 2010) (summarizing approaches).

Former Language	Restyled Language
<p align="center"><b>Rule 414. Evidence of Similar Crimes in Child Molestation Cases</b></p>	<p align="center"><b>Rule 414. Similar Crimes in Child-Molestation Cases</b></p>
<p>(a) In a <u>criminal case</u> in which the defendant is accused of an offense of <u>child molestation</u>, evidence of the defendant’s commission of <u>another offense or offenses of child molestation</u> is admissible, and may be considered for its bearing on <u>any matter to which it is relevant</u>.</p> <p>(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.</p> <p>(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.</p>	<p>(a) <b>Permitted Uses.</b> In a <u>criminal case</u> in which a defendant is accused of <u>child molestation</u>, the court may admit evidence that the defendant committed <u>any other child molestation</u>. The evidence may be considered on <u>any matter to which it is relevant</u>.</p> <p>(b) <b>Disclosure to the Defendant.</b> If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses’ statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.</p> <p>(c) <b>Effect on Other Rules.</b> This rule does not limit the admission or consideration of evidence under any other rule.</p>

Former Language	Restyled Language
<p align="center"><b>Rule 414. Evidence of Similar Crimes in Child Molestation Cases</b></p>	<p align="center"><b>Rule 414. Similar Crimes in Child-Molestation Cases</b></p>
<p>(d) For purposes of this rule and Rule 415, “child” means a person below the age of fourteen, and “offense of child molestation” means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved—</p> <p>(1) any conduct proscribed by chapter 109A of title 18, United States Code, that was committed in relation to a child;</p> <p>(2) any conduct proscribed by chapter 110 of title 18, United States Code;</p> <p>(3) contact between any part of the defendant’s body or an object and the genitals or anus of a child;</p> <p>(4) contact between the genitals or anus of the defendant and any part of the body of a child;</p> <p>(5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or</p> <p>(6) an attempt or conspiracy to engage in conduct described in paragraphs (1)–(5).</p>	<p>(d) <b>Definition of “Child” and “Child Molestation.”</b> In this rule and Rule 415:</p> <p>(1) “child” means a person below the age of 14; and</p> <p>(2) “child molestation” means a crime under federal law or under state law (as “state” is defined in 18 U.S.C. § 513) involving:</p> <p>(A) any conduct prohibited by 18 U.S.C. chapter 109A and committed with a child;</p> <p>(B) any conduct prohibited by 18 U.S.C. chapter 110;</p> <p>(C) contact between any part of the defendant’s body — or an object — and a child’s genitals or anus;</p> <p>(D) contact between the defendant’s genitals or anus and any part of a child’s body;</p> <p>(E) deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on a child; or</p> <p>(F) an attempt or conspiracy to engage in conduct described in subparagraphs (A)–(E).</p>

## **Notes**

- Former Rule 414(a), like Rule 413(a), used the phrase “is admissible.” The Restyled Rule, again in parallel with Restyled Rule 413(a), changes this language to “the court may admit.” See the notes under Rule 413 for further discussion of this change; courts have construed Rule 414 in the same manner as Rule 413.
- The former rule contained the word “shall” in sections (b) and (c). The restyled rule recognizes that these were mandatory provisions, substituting the words “must” and “does.” There is no change in substantive meaning.

Former Language	Restyled Language
<p><b>Rule 415. Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation</b></p>	<p><b>Rule 415. Similar Acts in Civil Cases Involving Sexual Assault or Child Molestation</b></p>
<p>(a) In a <u>civil case</u> in which a claim for damages or other relief is predicated on a party’s alleged commission of conduct constituting an offense of <u>sexual assault or child molestation</u>, evidence of that party’s commission of <u>another offense or offenses of sexual assault or child molestation</u> is admissible and <u>may be considered as provided in Rule 413 and Rule 414</u> of these rules.</p> <p>(b) A party who intends to offer evidence under this Rule shall disclose the evidence to the party against whom it will be offered, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.</p> <p>(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.</p>	<p>(a) <b>Permitted Uses.</b> In a <u>civil case</u> involving a claim for relief based on a party’s alleged <u>sexual assault or child molestation</u>, the court may admit evidence that the party committed <u>any other sexual assault or child molestation</u>. The evidence <u>may be considered as provided in Rules 413 and 414</u>.</p> <p>(b) <b>Disclosure to the Opponent.</b> If a party intends to offer this evidence, the party must disclose it to the party against whom it will be offered, including witnesses’ statements or a summary of the expected testimony. The party must do so at least 15 days before trial or at a later time that the court allows for good cause.</p> <p>(c) <b>Effect on Other Rules.</b> This rule does not limit the admission or consideration of evidence under any other rule.</p>

**Notes**

- Former Rule 415(a), like Rules 413(a) and 414(a), used the phrase “is admissible.” The Restyled Rule, again parallel to the other rules, changes this language to “the court may admit.” See the notes under Rule 413 for further discussion of this change; courts have construed this language in Rule 415 consistent with the language in Rule 413.
- The former rule contained the word “shall” in sections (b) and (c). The restyled rule recognizes that these were mandatory provisions, substituting the words “must” and “does.” There is no change in substantive meaning.

Former Language	Restyled Language
<p style="text-align: center;"><b>ARTICLE V. PRIVILEGES</b></p> <p style="text-align: center;"><b>Rule 501. General Rule</b></p>	<p style="text-align: center;"><b>ARTICLE V. PRIVILEGES</b></p> <p style="text-align: center;"><b>Rule 501. Privilege in General</b></p>
<p>Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof <u>shall be governed by the principles of the common law</u> as they may be interpreted by the courts of the United States in the light of reason and experience.</p> <p>However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with <u>State law</u>.</p>	<p><u>The common law</u> — as interpreted by United States courts in the light of reason and experience — <u>governs a claim of privilege</u> unless any of the following provides otherwise:</p> <ul style="list-style-type: none"> <li>• the United States Constitution;</li> <li>• a federal statute; or</li> <li>• rules prescribed by the Supreme Court.</li> </ul> <p>But in a civil case, <u>state law</u> governs privilege regarding a claim or defense for which state law supplies the rule of decision.</p>

**Notes**

- Former Rule 501, like several other rules, referred to “rules prescribed by the Supreme Court pursuant to statutory authority.” This phrase included rules adopted under the Rules Enabling Act, but not rules created under the Court’s general supervisory power. The restyled rules maintain this limit, but transfer it to a new definitional section in Restyled Rule 101(b)(5). As that section makes clear, Restyled Rule 501’s reference to “rules prescribed by the Supreme Court” includes only rules “adopted by the Supreme Court under statutory authority.”
- The restyled rule omits the cumbersome reference to claims of privilege by “a witness, person, government, State, or political subdivision thereof.” This phrase, the Advisory Committee concluded, includes *all* possible claims of privilege. Accordingly, the committee substituted the simple phrase: “a claim of privilege.”

- Restyled Rule 501, like several other rules, reduces the phrase “civil actions and proceedings” to “civil case.” Restyled Rule 101(b)(1) avoids any inadvertent substantive change by defining “civil case” to mean “a civil action or proceeding.”
- Former Rule 501 used the word “shall” in two places. The restyled rule omits those references by adopting active voice (e.g., “governs” rather than “shall be governed”).

Former Language	Restyled Language
<p><b>Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver</b></p>	<p><b>Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver</b></p>
<p>The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.</p>	<p>The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.</p>
<p><b>(a) Disclosure made in a Federal proceeding or to a Federal office or agency; scope of a waiver.</b> When the disclosure is made in a Federal proceeding or to a Federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a Federal or State proceeding only if:</p> <ul style="list-style-type: none"> <li><b>(1)</b> the waiver is intentional;</li> <li><b>(2)</b> the disclosed and undisclosed communications or information concern the same subject matter; and</li> <li><b>(3)</b> they ought in fairness to be considered together.</li> </ul>	<p><b>(a) Disclosure Made in a Federal Proceeding or to a Federal Office or Agency; Scope of a Waiver.</b> When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if:</p> <ul style="list-style-type: none"> <li><b>(1)</b> the waiver is intentional;</li> <li><b>(2)</b> the disclosed and undisclosed communications or information concern the same subject matter; and</li> <li><b>(3)</b> they ought in fairness to be considered together.</li> </ul>

Former Language	Restyled Language
<p><b>Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver</b></p>	<p><b>Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver</b></p>
<p><b>(b) Inadvertent disclosure.</b> When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if:</p> <ul style="list-style-type: none"> <li>(1) the disclosure is inadvertent;</li> <li>(2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and</li> <li>(3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).</li> </ul>	<p><b>(b) Inadvertent Disclosure.</b> When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:</p> <ul style="list-style-type: none"> <li>(1) the disclosure is inadvertent;</li> <li>(2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and</li> <li>(3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).</li> </ul>
<p><b>(c) Disclosure made in a State proceeding.</b> When the disclosure is made in a State proceeding and is not the subject of a State-court order concerning waiver, the disclosure does not operate as a waiver in a Federal proceeding if the disclosure:</p> <ul style="list-style-type: none"> <li>(1) would not be a waiver under this rule if it had been made in a Federal proceeding; or</li> <li>(2) is not a waiver under the law of the State where the disclosure occurred.</li> </ul>	<p><b>(c) Disclosure Made in a State Proceeding.</b> When the disclosure is made in a state proceeding and is not the subject of a state-court order concerning waiver, the disclosure does not operate as a waiver in a federal proceeding if the disclosure:</p> <ul style="list-style-type: none"> <li>(1) would not be a waiver under this rule if it had been made in a federal proceeding; or</li> <li>(2) is not a waiver under the law of the state where the disclosure occurred.</li> </ul>

Former Language	Restyled Language
<p><b>Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver</b></p>	<p><b>Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver</b></p>
<p><b>(d) Controlling effect of a court order.</b> A Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other Federal or State proceeding.</p>	<p><b>(d) Controlling Effect of a Court Order.</b> A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court — in which event the disclosure is also not a waiver in any other federal or state proceeding.</p>
<p><b>(e) Controlling effect of a party agreement.</b> An agreement on the effect of disclosure in a Federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.</p>	<p><b>(e) Controlling Effect of a Party Agreement.</b> An agreement on the effect of disclosure in a federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.</p>
<p><b>(f) Controlling effect of this rule.</b> Notwithstanding Rules 101 and 1101, this rule applies to State proceedings and to Federal court-annexed and Federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if State law provides the rule of decision.</p>	<p><b>(f) Controlling Effect of this Rule.</b> Notwithstanding Rules 101 and 1101, this rule applies to state proceedings and to federal court-annexed and federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if state law provides the rule of decision.</p>
<p><b>(g) Definitions.</b> In this rule:</p> <p>(1) “attorney-client privilege” means the protection that applicable law provides for confidential attorney-client communications; and</p> <p>(2) “work-product protection” means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.</p>	<p><b>(g) Definitions.</b> In this rule:</p> <p>(1) “attorney-client privilege” means the protection that applicable law provides for confidential attorney-client communications; and</p> <p>(2) “work-product protection” means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.</p>

**Notes**

- There are no notable changes in this rule. Congress adopted the rule in fall 2008, and the Advisory Committee applied restyling principles when preparing the original version of the rule.

Former Language	Restyled Language
<p style="text-align: center;"><b>ARTICLE VI. WITNESSES</b></p> <p style="text-align: center;"><b>Rule 601. General Rule of Competency</b></p>	<p style="text-align: center;"><b>ARTICLE VI. WITNESSES</b></p> <p style="text-align: center;"><b>Rule 601. Competency to Testify in General</b></p>
<p><u>Every person</u> is competent to be a witness <u>except</u> as otherwise provided in these rules.</p> <p><u>However</u>, in <u>civil</u> actions and proceedings, with respect to an element of a claim or defense as to which <u>State law</u> supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.</p>	<p><u>Every person</u> is competent to be a witness <u>unless</u> these rules provide otherwise.</p> <p>But in a <u>civil</u> case, state law governs the witness's competency regarding a claim or defense for which <u>state law</u> supplies the rule of decision.</p>

### Notes

- Former Rule 601 used the word “shall.” The restyled rule omits this reference by adopting the active voice: “shall be determined” is now “governs.”

Former Language	Restyled Language
<p style="text-align: center;"><b>Rule 602. Lack of Personal Knowledge</b></p>	<p style="text-align: center;"><b>Rule 602. Need for Personal Knowledge</b></p>
<p>A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.</p> <p>Evidence to prove personal knowledge <u>may</u>, but need not, consist of the witness' <u>own testimony</u>.</p> <p>This rule is <u>subject to</u> the provisions of rule 703, relating to opinion testimony by expert witnesses.</p>	<p>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.</p> <p>Evidence to prove personal knowledge <u>may</u> consist of the witness's <u>own testimony</u>.</p> <p>This rule does <u>not apply to</u> a witness's expert testimony under Rule 703.</p>

### Notes

There are no notable changes in this rule.

Former Language	Restyled Language
<b>Rule 603. Oath or Affirmation</b>	<b>Rule 603. Oath or Affirmation to Testify Truthfully</b>
Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.	Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience.

### Notes

- Restyled Rule 603 uses the word “must” instead of “shall” to clarify the fact that giving an oath or affirmation is mandatory for witnesses. This is consistent with how courts had interpreted the rule.
- The restyled rule more concisely describes the form of the oath/affirmation. Although the language differs from the traditional words used by some courts, no commentators perceive any substantive change in the rule. Several have praised the elegance of the new wording.
- Many other legal documents, including Federal Rule of Criminal Procedure 6(a)(2), require a witness to “take” an oath rather than “give” one. The Advisory Committee, in contrast, decided to use the word “give” in both this rule and Rule 604. Although “take” appears to be the more common usage, there is no substantive difference between the two.

Former Language	Restyled Language
<b>Rule 604. Interpreters</b>	<b>Rule 604. Interpreter</b>
An interpreter is subject to the provisions of these rules relating to <u>qualification as an expert</u> and the administration of an <u>oath or affirmation</u> to make a true translation.	An interpreter must be <u>qualified</u> and must give an <u>oath or affirmation</u> to make a true translation.

### Notes

- Former Rule 604 subjected interpreters “to the provisions . . . relating to qualification of an expert,” while the restyled rule requires interpreters simply to “be qualified.” The Advisory Committee explicitly broadened this language to continue established judicial practice, which did not require all interpreters to qualify as experts. Some courts, for example, have allowed caretakers or family members to serve as interpreters when they understand an impaired witness’s distinctive signals or speech. *See, e.g., United States v. Ball*, 367 F.3d 452, 463-64 (5th Cir. 2004). The restyled rule more easily accommodates that practice.<sup>7</sup>

The restyling thus changed the literal substance of Rule 604, while maintaining case law rendered under the rule. This outcome offers an interesting point of discussion: When judicial practice deviates from a rule’s literal text, what course avoids substantive change?

- Restyled Rule 604 requires the interpreter to “give” an oath rather than to “take” one. This usage, like the analogous language in Rule 603, is somewhat unusual but the meaning is clear.

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<sup>7</sup> For insights into the committee deliberation on this issue, see Advisory Committee Materials for October 2008 Meeting, at 86, (available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Evidence/EV2008-10.pdf>); Advisory Committee Materials for April 2010 Meeting, at 141-42, (available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Evidence/EV2010-04.pdf>).

Former Language	Restyled Language
<b>Rule 605. Competency of Judge as Witness</b>	<b>Rule 605. Judge's Competency as a Witness</b>
The <u>judge</u> presiding at the trial may not testify in that trial as a witness. <u>No objection</u> need be made in order to preserve the point.	The <u>presiding judge</u> may not testify as a witness at the trial. A party <u>need not object</u> to preserve the issue.

**Notes**

There are no notable changes in this rule.

Former Language	Restyled Language
<p><b>Rule 606. Competency of Juror as Witness</b></p>	<p><b>Rule 606. Juror’s Competency as a Witness</b></p>
<p>(a) <b>At the trial.</b> A member of the <u>jury</u> may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party shall be afforded an opportunity to <u>object out of the presence of the jury.</u></p> <p>(b) <b>Inquiry into validity of verdict or indictment.</b></p> <p>Upon an inquiry into the <u>validity of a verdict or indictment,</u> a juror may <u>not testify</u> as to</p> <ul style="list-style-type: none"> <li>• any <u>matter or statement occurring during the course</u> of the jury’s deliberations or</li> <li>• to the <u>effect of anything</u> upon that or any other juror’s mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or</li> <li>• concerning the juror’s <u>mental processes</u> in connection therewith.</li> </ul> <p>But a juror may testify about</p> <ol style="list-style-type: none"> <li>(1) whether <u>extraneous prejudicial information</u> was improperly brought to the jury’s attention,</li> <li>(2) whether any <u>outside influence</u> was improperly brought to bear upon any juror, or</li> <li>(3) whether there was a <u>mistake in entering</u> the verdict onto the verdict form.</li> </ol> <p>A juror’s <u>affidavit or evidence of any statement</u> by the juror may not be received on a matter about which the juror would be precluded from <u>testifying.</u></p>	<p>(a) <b>At the Trial.</b> A <u>juror</u> may not testify as a witness before the other jurors at the trial. If a juror is called to testify, the court must give a party an opportunity to <u>object outside the jury’s presence.</u></p> <p>(b) <b>During an Inquiry into the Validity of a Verdict or Indictment.</b></p> <p>(1) <b><i>Prohibited Testimony or Other Evidence.</i></b> During an inquiry into the <u>validity of a verdict or indictment,</u> a juror may <u>not testify</u> about</p> <ul style="list-style-type: none"> <li>• any <u>statement made or incident that occurred during</u> the jury’s deliberations;</li> <li>• the <u>effect of anything</u> on that juror’s or another juror’s vote; or</li> <li>• any juror’s <u>mental processes</u> concerning the verdict or indictment.</li> </ul> <p>The court may not receive a juror’s <u>affidavit or evidence</u> of a juror’s statement on these matters.</p> <p>(2) <b><i>Exceptions.</i></b> A juror may testify about whether:</p> <ol style="list-style-type: none"> <li>(A) <u>extraneous prejudicial information</u> was improperly brought to the jury’s attention;</li> <li>(B) an <u>outside influence</u> was improperly brought to bear on any juror; or</li> <li>(C) a <u>mistake</u> was made <u>in entering</u> the verdict on the verdict form.</li> </ol>

## Notes

- Restyled Rule 606(a) replaces “shall” with “must” in describing a party’s right to object outside the jury’s presence. This change accords with courts’ interpretation of “shall” as mandatory.
- Rule 606(a) formerly gave “the opposing party” a right to object to a juror’s testimony. The Advisory Committee noted that “case law generally uses the term ‘opposing’ or ‘opponent’ to refer to a party on the other side of the ‘v,’” but that the former rules used these and other terms (like “adverse party”) inconsistently. In this rule, the committee determined that the drafters intended to give a right of objection to any party negatively affected by the juror’s testimony. Implementing this understanding, the Restyled Rule 606(a) refers simply to “a party.”<sup>8</sup>

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<sup>8</sup> Advisory Committee on Evidence Rules, Materials for the October 2010 Meeting, at 185, (available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Evidence/EV2010-10.pdf>).

Former Language	Restyled Language
<b>Rule 607. Who May Impeach</b>	<b>Rule 607. Who May Impeach a Witness</b>
The credibility of a witness may be attacked by <u>any party</u> , including the party calling the witness.	<u>Any party</u> , including the party that called the witness, may attack the witness's credibility.

**Notes**

There are no notable changes in this rule.

Former Language	Restyled Language
<p><b>Rule 608. Evidence of Character and Conduct of Witness</b></p>	<p><b>Rule 608. A Witness’s Character for Truthfulness or Untruthfulness</b></p>
<p><b>(a) Opinion and reputation evidence of character.</b> The credibility of a witness may be attacked or supported by evidence <u>in the form of opinion or reputation</u>, but subject to these limitations:</p> <p>(1) the evidence may refer <u>only to character for truthfulness or untruthfulness</u>, and</p> <p>(2) evidence of <u>truthful character is admissible only after the character of the witness for truthfulness has been attacked</u> by opinion or reputation evidence or otherwise.</p>	<p><b>(a) Reputation or Opinion Evidence.</b> A witness’s credibility may be attacked or supported by testimony about the witness’s <u>reputation for having a character for truthfulness or untruthfulness</u>, or by testimony in the <u>form of an opinion</u> about that character.</p> <p>But evidence of <u>truthful character is admissible only after the witness’s character for truthfulness has been attacked</u>.</p>
<p><b>(b) Specific instances of conduct.</b> <u>Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’ character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence.</u> They may, however, in the <u>discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination</u> of the witness</p> <p>(1) concerning the <u>witness’ character for truthfulness or untruthfulness</u>, or</p> <p>(2) concerning the <u>character for truthfulness or untruthfulness of another witness</u> as to which character the witness being cross-examined has testified.</p> <p>The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused’s or the witness’ privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness.</p>	<p><b>(b) Specific Instances of Conduct.</b> <u>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.</u> But the <u>court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness</u> of:</p> <p>(1) the <u>witness</u>; or</p> <p>(2) <u>another witness whose character the witness being cross-examined has testified about</u>.</p> <p>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.</p>

## Notes

- Rule 608(a) formerly allowed “evidence in the form of opinion or reputation.” The restyled rule seems to distinguish for the first time between opinion and reputation, allowing “testimony about the witness’s reputation . . . or . . . testimony in the form of an opinion.” But this change parallels longstanding usage in Rule 405(a), which formerly allowed “testimony as to reputation or . . . testimony in the form of an opinion.” The Advisory Committee updated 405(a)’s language slightly, then applied the formula to 608(a). In other words, the committee concluded that 405(a) and 608(a) allow similar forms of testimony, and it opted for 405(a)’s language to describe that testimony.
- Restyled Rule 608(b) eliminates the redundant phrase “discretion of the court,” relying solely on the verb “may.”
- The Advisory Committee considered changing the reference to “cross-examination” in Rule 608(b), because courts also allow parties to invoke 608(b) when impeaching witnesses on direct examination. Rule 607 supports the latter practice by allowing parties to impeach their own witnesses; changing 608(b)’s reference to cross-examination would have eliminated tension between the two rules. The committee decided, however, that changing Rule 608(b) in this manner would have been substantive. It elected to maintain the reference to “cross-examination” but to add a note documenting the tension with Rule 607 and the courts’ established practice. That note reads:

The Committee is aware that the Rule’s limitation of bad-act impeachment to “cross-examination” is trumped by Rule 607, which allows a party to impeach witnesses on direct examination. Courts have not relied on the term “on cross-examination” to limit impeachment that would otherwise be permissible under Rules 607 and 608. The Committee therefore concluded that no change to the language of the Rule was necessary in the context of a restyling project.

- Many lawyers find the final sentence of Rule 608 difficult to understand. The restyled version is shorter, but may still challenge some students. The sentence means that a witness may assert the privilege against self incrimination when asked about matters related solely to character for truthfulness—even if the witness has testified fully about other matters on direct examination. A witness who testifies about seeing an automobile accident, in other words, may invoke the Fifth Amendment when asked on cross-examination: “Didn’t you embezzle funds from your employer?”

Former Language	Restyled Language
<p><b>Rule 609. Impeachment by Evidence of Conviction of Crime</b></p>	<p><b>Rule 609. Impeachment by Evidence of a Criminal Conviction</b></p>
<p>(a) <b>General rule.</b> <u>For the purpose of attacking the character for truthfulness of a witness,</u></p> <p>(1) evidence that a witness <u>other than an accused</u> has been convicted of a crime <u>shall be admitted</u>, subject to <u>Rule 403</u>, if the crime was punishable by <u>death or imprisonment in excess of one year</u> under the law under which the witness was convicted,</p> <p>and evidence that <u>an accused</u> has been convicted of such a crime <u>shall be admitted</u> if the court determines that the <u>probative value of admitting this evidence outweighs its prejudicial effect to the accused</u>; and</p> <p>(2) evidence that any witness has been convicted of a crime <u>shall be admitted regardless of the punishment</u>, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of <u>dishonesty or false statement</u> by the witness.</p>	<p>(a) <b>In General.</b> The following rules <u>apply to attacking a witness’s character for truthfulness</u> by evidence of a criminal conviction:</p> <p>(1) for a crime that, in the convicting jurisdiction, was punishable <u>by death or by imprisonment for more than one year</u>, the evidence:</p> <p>(A) <u>must be admitted</u>, subject to <u>Rule 403</u>, in a <u>civil case</u> or in a <u>criminal case</u> in which the witness is <u>not a defendant</u>; and</p> <p>(B) <u>must be admitted</u> in a <u>criminal case</u> in which the witness is a <u>defendant</u>, if the <u>probative value of the evidence outweighs its prejudicial effect to that defendant</u>; and</p> <p>(2) for any crime <u>regardless of the punishment</u>, the evidence <u>must be admitted</u> if the court can readily determine that establishing the elements of the crime required proving — or the witness’s admitting — a <u>dishonest act or false statement</u>.</p>

Former Language	Restyled Language
<p><b>Rule 609. Impeachment by Evidence of Conviction of Crime</b></p>	<p><b>Rule 609. Impeachment by Evidence of a Criminal Conviction</b></p>
<p>(b) <b>Time limit.</b> Evidence of a conviction under this rule is not admissible if a period of <u>more than ten years</u> has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the <u>interests of justice</u>, that the probative value of the conviction supported by <u>specific facts and circumstances substantially outweighs</u> its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient <u>advance written notice</u> of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.</p>	<p>(b) <b>Limit on Using the Evidence After 10 Years.</b> This subdivision (b) applies if <u>more than 10 years</u> have passed since the witness’s conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if:</p> <ol style="list-style-type: none"> <li>(1) its probative value, supported by <u>specific facts and circumstances, substantially outweighs</u> its prejudicial effect; and</li> <li>(2) the proponent gives an adverse party <u>reasonable written notice</u> of the intent to use it so that the party has a fair opportunity to contest its use.</li> </ol>
<p>(c) <b>Effect of pardon, annulment, or certificate of rehabilitation.</b> Evidence of a conviction is not admissible under this rule if</p> <ol style="list-style-type: none"> <li>(1) the conviction has been the subject of a <u>pardon, annulment, certificate of rehabilitation</u>, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has <u>not been convicted of a subsequent crime that was punishable by death or imprisonment in excess of one year</u>, or</li> </ol>	<p>(c) <b>Effect of a Pardon, Annulment, or Certificate of Rehabilitation.</b> Evidence of a conviction is not admissible if:</p> <ol style="list-style-type: none"> <li>(1) the conviction has been the subject of a <u>pardon, annulment, certificate of rehabilitation</u>, or other equivalent procedure based on a finding that the person has been rehabilitated, and the person has <u>not been convicted of a later crime punishable by death or by imprisonment for more than one year</u>; or</li> </ol>

Former Language	Restyled Language
<p><b>Rule 609. Impeachment by Evidence of Conviction of Crime</b></p>	<p><b>Rule 609. Impeachment by Evidence of a Criminal Conviction</b></p>
<p>(2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a <u>finding of innocence</u>.</p>	<p>(2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a <u>finding of innocence</u>.</p>
<p><b>(d) Juvenile adjudications.</b> Evidence of juvenile adjudications is <u>generally not admissible</u> under this rule.</p> <p>The court may, however, in a <u>criminal case</u> allow evidence of a juvenile adjudication of a <u>witness other than the accused</u> if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is <u>necessary for a fair determination of the issue of guilt or innocence</u>.</p>	<p><b>(d) Juvenile Adjudications.</b> Evidence of a juvenile adjudication is admissible under this rule <u>only if</u>:</p> <ol style="list-style-type: none"> <li>(1) it is offered in a <u>criminal case</u>;</li> <li>(2) the adjudication was of a <u>witness other than the defendant</u>;</li> <li>(3) an adult’s conviction for that offense would be admissible to attack the adult’s credibility; and</li> <li>(4) admitting the evidence is <u>necessary to fairly determine guilt or innocence</u>.</li> </ol>
<p><b>(e) Pendency of appeal.</b> The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.</p>	<p><b>(e) Pendency of an Appeal.</b> A conviction that satisfies this rule is admissible even if an appeal is pending. Evidence of the pendency is also admissible.</p>

**Notes**

- Restyled Rule 609(a) substitutes the word “must” for “shall” in three places. The final substitution, in 609(a)(2), clearly does not change the rule’s meaning: Courts have consistently interpreted 609(a)(2), which governs impeachment with crimes of dishonesty,

as mandatory. The new direction that courts “must” admit these convictions reflects established law.

Some observers believe that the other two changes will subtly change judicial practice. The rule formerly stated that evidence of felony convictions “shall be admitted” subject to a special balancing test (for a criminal defendant) or Rule 403 (for all other witnesses). The new language directs that this evidence “must be admitted” subject to those tests. Professor Jeffrey Bellin submitted a comment suggesting that the change might push district judges toward admitting more evidence of convictions.<sup>9</sup>

The Advisory Committee rejected this argument, adhering to its commitment to replace the ambiguous word “shall” with more definite words like “must,” “may,” or “should.” As a logical matter, the committee’s decision seems correct: The restyled rule gives trial judges the same directions that the former rule did.<sup>10</sup> But the word “must” does give a stronger ring to these two provisions, as critics like Bellin have suggested. Time will tell whether trial judges admit evidence of more convictions under the restyled rule.

- Restyled Rule 609(b) eliminates a reference to “the interests of justice.” The Advisory Committee struck “intensifier” phrases like this as unnecessary.

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<sup>9</sup> Advisory Committee on Evidence Rules, Materials of April 2010 Meeting, at 328 (available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/EV04-2010-min.pdf>).

<sup>10</sup> Advisory Committee on Evidence Rules, Materials of April 2010 Meeting, at 154 (available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/EV04-2010-min.pdf>).

<b>Former Language</b>	<b>Restyled Language</b>
<b>Rule 610. Religious Beliefs or Opinions</b>	<b>Rule 610. Religious Beliefs or Opinions</b>
Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.	Evidence of a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility.

**Notes**

There are no notable changes in this rule.

Former Language	Restyled Language
<p style="text-align: center;"><b>Rule 611. Mode and Order of Interrogation and Presentation</b></p>	<p style="text-align: center;"><b>Rule 611. Mode and Order of Examining Witnesses and Presenting Evidence</b></p>
<p><b>(a) Control by court.</b> The court shall exercise <u>reasonable control</u> over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.</p> <p><b>(b) Scope of cross-examination.</b> Cross-examination should be limited to the <u>subject matter of the direct examination</u> and matters affecting the <u>credibility</u> of the witness. The court may, in the exercise of <u>discretion</u>, permit inquiry into additional matters as if on direct examination.</p> <p><b>(c) Leading questions.</b> Leading questions <u>should not</u> be used on the direct examination of a witness <u>except</u> as may be <u>necessary to develop the witness' testimony</u>.</p> <p><u>Ordinarily</u> leading questions should be permitted on <u>cross-examination</u>. When a party calls a <u>hostile witness</u>, an <u>adverse party</u>, or a <u>witness identified with an adverse party</u>, interrogation may be by leading questions.</p>	<p><b>(a) Control by the Court; Purposes.</b> The court should exercise <u>reasonable control</u> over the mode and order of examining witnesses and presenting evidence so as to:</p> <ul style="list-style-type: none"> <li>(1) make those procedures effective for determining the truth;</li> <li>(2) avoid wasting time; and</li> <li>(3) protect witnesses from harassment or undue embarrassment.</li> </ul> <p><b>(b) Scope of Cross-Examination.</b> Cross-examination should not go beyond the <u>subject matter of the direct examination</u> and matters affecting the witness's <u>credibility</u>. The court <u>may allow</u> inquiry into additional matters as if on direct examination.</p> <p><b>(c) Leading Questions.</b> Leading questions <u>should not</u> be used on direct examination <u>except</u> as <u>necessary to develop the witness's testimony</u>.</p> <p><u>Ordinarily</u>, the court should allow leading questions:</p> <ul style="list-style-type: none"> <li>(1) on <u>cross-examination</u>; and</li> <li>(2) when a party calls a <u>hostile witness</u>, an <u>adverse party</u>, or a <u>witness identified with an adverse party</u>.</li> </ul>

## Notes

- Restyled Rule 611 replaces the archaic words “interrogation” and “interrogating” with “examining” in both the title and text.
- Advisory Committee members debated the best replacement for “shall” in the opening words of this rule, settling on “should” as the word that best expresses the combination of discretion and control that a judge exercises over matters governed by the rule. Recall that the committee agreed to eliminate the ambiguous word “shall” from the rules.
- Restyled Rule 611(b) eliminates the redundant phrase “in the exercise of discretion,” relying simply on the discretionary verb “may.”
- The final phrase of former Rule 611(c), “interrogation may be by leading questions,” was ambiguous: Did the “may” refer to the parties or to the court? If the word referred to the parties, then the rule gave parties the option to use leading questions whenever they examined a hostile witness, an adverse party, or a witness identified with an adverse party—and the court had to allow that examination. If, on the other hand, the word referred to the court, then the court decided whether to allow leading questions under these circumstances.

Arguments could be made for either interpretation. In general, the rules grant discretion to the court rather than the parties. But the Advisory Committee noted that other portions of Rule 611 address the parties more directly. The committee decided, for example, that the opening sentences of 611(b) and (c) constrain the *parties* rather than just the court. I.e., the parties should restrict cross-examination to the scope of direct, rather than relying upon the court to police that matter. For this reason, the committee rejected proposals to restyle the opening sentences of 611(b) and (c) as expressions of the court’s power.<sup>11</sup> Applying the same reasoning, the final sentence of former Rule 611(c) should be read as an expression of the parties’ discretion.

The Reporter, however, identified at least one case in which an appellate court held that the trial court has discretion to bar leading questions under Rule 611(c). *Rodriguez v. Banco Cent.*, 990 F.2d 7 (1st Cir. 1993).<sup>12</sup> The reasoning in that case was somewhat ambiguous: The court focused on Rule 611(a), holding that the trial court may control examination under that section regardless of how courts interpret Rule 611(c). But the decision confirms that trial courts may prohibit leading questions even when posed to hostile witnesses, adverse parties, or witnesses identified with an adverse party.

After reviewing this history, the committee framed the final sentence of Restyled Rule 611(c) as a direction to the court, rather than to the parties. The committee, however, added a caveat to the court’s discretion: The restyled rule states that “[o]rdinarily, the court should allow leading questions . . . when a party calls a hostile witness, an adverse

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<sup>11</sup> Advisory Committee on Evidence Rules, Materials for the April 2009 Meeting, at 24 (available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Evidence/EV2009-04.pdf>).

<sup>12</sup> *Id.*

party, or a witness identified with an adverse party.” (Emphasis added.) This formula retains established interpretations of the rule, which generally allow parties to use leading questions under the named circumstances but reserve some discretion for the court.

Former Language	Restyled Language
<p><b>Rule 612. Writing Used To Refresh Memory</b></p>	<p><b>Rule 612. Writing Used to Refresh a Witness’s Memory</b></p>
<p><u>Except</u> as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh memory for the purpose of testifying, either—</p> <ol style="list-style-type: none"> <li>(1) <u>while testifying</u>, or</li> <li>(2) <u>before testifying</u>, if the court in its <u>discretion</u> determines it is necessary in the interests of justice,</li> </ol> <p>an <u>adverse party</u> is entitled</p> <ul style="list-style-type: none"> <li>• to have the writing produced at the hearing,</li> <li>• to <u>inspect</u> it,</li> <li>• to <u>cross-examine</u> the witness thereon, and</li> <li>• to <u>introduce in evidence</u> those portions which relate to the testimony of the witness.</li> </ul> <p>If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal.</p> <p>If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in <u>criminal cases</u> when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.</p>	<p>(a) <b>Scope.</b> This rule gives an adverse party certain options when a witness uses a writing to refresh memory:</p> <ol style="list-style-type: none"> <li>(1) <u>while testifying</u>; or</li> <li>(2) <u>before testifying</u>, if the court decides that justice requires the party to have those options.</li> </ol> <p>(b) <b>Adverse Party’s Options; Deleting Unrelated Matter.</b> <u>Unless</u> 18 U.S.C. § 3500 provides otherwise in a criminal case, an <u>adverse party</u> is entitled</p> <ul style="list-style-type: none"> <li>• to have the writing produced at the hearing,</li> <li>• to <u>inspect</u> it,</li> <li>• to <u>cross-examine</u> the witness about it, and</li> <li>• to <u>introduce in evidence</u> any portion that relates to the witness’s testimony.</li> </ul> <p>If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record.</p> <p>(c) <b>Failure to Produce or Deliver the Writing.</b> If a writing is not produced or is not delivered as ordered, the court may issue any appropriate order. But if the prosecution does not comply in a <u>criminal case</u>, the court must strike the witness’s testimony or — if justice so requires — declare a mistrial.</p>

## **Notes**

- Former Rule 612 used the word “shall” in four places. The Advisory Committee replaced three of these uses with “must,” clarifying that the references are mandatory. Two of these references appear in Restyled Rule 612(b), and one appears at the end of Restyled Rule 612(c). But the committee translated the fourth “shall,” appearing at the beginning of the rule’s final sentence, to “may.” That reference, now appearing in the first sentence of Restyled Rule 612(c), gives the court discretion to issue “any appropriate order” in cases of noncompliance that do not involve the prosecution. All of these changes reflect established understanding of the rule.

Former Language	Restyled Language
<p align="center"><b>Rule 613. Prior Statements of Witnesses</b></p>	<p align="center"><b>Rule 613. Witness’s Prior Statement</b></p>
<p><b>(a) Examining witness concerning prior statement.</b> In examining a witness concerning a prior statement made by the witness, whether written or not,</p> <ul style="list-style-type: none"> <li>• the statement <u>need not be shown</u> nor its contents disclosed to the <u>witness</u> at that time,</li> <li>• but on request the same shall be <u>shown</u> or disclosed to <u>opposing counsel</u>.</li> </ul> <p><b>(b) Extrinsic evidence of prior inconsistent statement of witness.</b> <u>Extrinsic evidence</u> of a prior inconsistent statement by a witness is not admissible unless</p> <ul style="list-style-type: none"> <li>• the witness is afforded <u>an opportunity to explain or deny</u> the same and</li> <li>• the opposite party is afforded <u>an opportunity to interrogate the witness</u> thereon, or the <u>interests of justice</u> otherwise require.</li> </ul> <p>This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).</p>	<p><b>(a) Showing or Disclosing the Statement During Examination.</b> When examining a witness about the witness’s prior statement,</p> <ul style="list-style-type: none"> <li>• a party <u>need not show it</u> or disclose its contents to the <u>witness</u>.</li> <li>• But the party must, on request, <u>show it</u> or disclose its contents to an <u>adverse party’s attorney</u>.</li> </ul> <p><b>(b) Extrinsic Evidence of a Prior Inconsistent Statement.</b> <u>Extrinsic evidence</u> of a witness’s prior inconsistent statement is admissible only if</p> <ul style="list-style-type: none"> <li>• the witness is given an <u>opportunity to explain or deny</u> the statement and</li> <li>• an adverse party is given an opportunity to <u>examine the witness</u> about it, or if <u>justice so requires</u>.</li> </ul> <p>This subdivision (b) does not apply to an opposing party’s statement under Rule 801(d)(2).</p>

**Notes**

- Restyled Rule 613(a) substitutes “must” for “shall.” This change is consistent with established interpretations of the rule.
- The former rule referred to “opposing counsel” in section (a) and to “the opposite party” in section (b). Restyled Rule 613 substitutes “an adverse party’s attorney” and “an adverse

party” for these references. The Advisory Committee recognized that the new phrases might be broader than the existing ones: In other contexts, such as when interpreting Rule 801(d)(2) (statements of an opposing party), some courts have interpreted “opposing party” to include only a party on the other side of the “v.” It appears, however, that no case law limits Rule 613 in this manner.<sup>13</sup> The use of “adverse party,” therefore, should make no substantive change.

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<sup>13</sup> After the issue arose in committee discussions, the Reporter promised to investigate all uses of “opposing” or “adverse” parties in the rules. The published committee materials contain no further discussion of this issue in relation to Rule 613, suggesting that the Reporter found no case law limiting the scope of “opposing party” in this rule. Our own research similarly revealed no case law limiting Rule 613 in this way.

Former Language	Restyled Language
<p><b>Rule 614. Calling and Interrogation of Witnesses by Court</b></p>	<p><b>Rule 614. Court’s Calling or Examining a Witness</b></p>
<p>(a) <b>Calling by court.</b> The court may, on its own motion or at the suggestion of a party, call witnesses, and <u>all parties are entitled to cross-examine</u> witnesses thus called.</p> <p>(b) <b>Interrogation by court.</b> The court may interrogate witnesses, whether called by itself or by a party.</p> <p>(c) <b>Objections.</b> Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the <u>next available opportunity when the jury is not present.</u></p>	<p>(a) <b>Calling.</b> The court may call a witness on its own or at a party’s request. <u>Each party is entitled to cross-examine</u> the witness.</p> <p>(b) <b>Examining.</b> The court may examine a witness regardless of who calls the witness.</p> <p>(c) <b>Objections.</b> A party may object to the court’s calling or examining a witness either at that time or at the <u>next opportunity when the jury is not present.</u></p>

### Notes

There are no notable changes in this rule.

Former Language	Restyled Language
<p><b>Rule 615. Exclusion of Witnesses</b></p>	<p><b>Rule 615. Excluding Witnesses</b></p>
<p>At the <u>request of a party</u> the court <u>shall order</u> witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its <u>own motion</u>. This rule does not authorize exclusion of</p> <ul style="list-style-type: none"> <li>(1) a <u>party</u> who is a natural person, or</li> <li>(2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or</li> <li>(3) a person whose presence is shown by a party to be essential to the presentation of the party’s cause, or</li> <li>(4) a person authorized by statute to be present.</li> </ul>	<p>At a <u>party’s request</u>, the court must order witnesses excluded so that they cannot hear other witnesses’ testimony. Or the court may do so <u>on its own</u>. But this rule does not authorize excluding:</p> <ul style="list-style-type: none"> <li>(a) a <u>party</u> who is a natural person;</li> <li>(b) an officer or employee of a party that is not a natural person, after being designated as the party’s representative by its attorney;</li> <li>(c) a person whose presence a party shows to be essential to presenting the party’s claim or defense; or</li> <li>(d) a person authorized by statute to be present.</li> </ul>

**Notes**

- The first line of Restyled Rule 615 uses the word “must” instead of “shall” to clarify the judge’s obligation to exclude witnesses when requested to do so by a party. This change is consistent with established interpretations of the rule.
- To accord with styling conventions, the restyled rule uses letters rather than numbers to designate sections. Rule 615(2), for example, became Restyled Rule 615(b). Opinions rarely cite the sections of this rule by number, so the change should not affect research.

Former Language	Restyled Language
<p style="text-align: center;"><b>ARTICLE VII. OPINIONS AND EXPERT TESTIMONY</b></p> <p><b>Rule 701. Opinion Testimony by Lay Witnesses</b></p>	<p style="text-align: center;"><b>ARTICLE VII. OPINIONS AND EXPERT TESTIMONY</b></p> <p><b>Rule 701. Opinion Testimony by Lay Witnesses</b></p>
<p>If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are</p> <p>(a) rationally based on the <u>perception</u> of the witness, and</p> <p>(b) <u>helpful</u> to a clear understanding of the witness' testimony or the determination of a fact in issue, and</p> <p>(c) <u>not based on scientific, technical, or other specialized knowledge</u> within the scope of Rule 702.</p>	<p>If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:</p> <p>(a) rationally based on the witness's <u>perception</u>;</p> <p>(b) <u>helpful</u> to clearly understanding the witness's testimony or to determining a fact in issue; and</p> <p>(c) <u>not based on scientific, technical, or other specialized knowledge</u> within the scope of Rule 702.</p>

### Notes

- Several rules in Article VII refer to both “opinions” and “inferences.” After researching the case law, the Advisory Committee found no difference between these concepts; inferences are just one type of opinion. For simplicity, the restyled rules refer only to opinions. To reassure users that this change was not substantive, the committee appended a special note to each of the affected rules:

The Committee deleted all reference to an “inference” on the grounds that the deletion made the Rule flow better and easier to read, and because any “inference” is covered by the broader term “opinion.” Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in established practice is intended.

Former Language	Restyled Language
<p align="center"><b>Rule 702. Testimony by Experts</b></p>	<p align="center"><b>Rule 702. Testimony by Expert Witnesses</b></p>
<p>If <u>scientific, technical, or other specialized knowledge</u> will <u>assist</u> the trier of fact to understand the evidence or to determine a fact in issue, a witness <u>qualified as an expert</u> by <u>knowledge, skill, experience, training, or education</u>, may testify thereto in the form of an opinion or otherwise, if</p> <p>(1) the testimony is based upon <u>sufficient facts or data</u>,</p> <p>(2) the testimony is the product of <u>reliable principles and methods</u>, and</p> <p>(3) the witness has <u>applied the principles and methods reliably</u> to the facts of the case.</p>	<p>A witness who is <u>qualified as an expert</u> by <u>knowledge, skill, experience, training, or education</u> may testify in the form of an opinion or otherwise if:</p> <p>(a) <u>the expert’s scientific, technical, or other specialized knowledge</u> will <u>help</u> the trier of fact to understand the evidence or to determine a fact in issue;</p> <p>(b) the testimony is based on <u>sufficient facts or data</u>;</p> <p>(c) the testimony is the product of <u>reliable principles and methods</u>; and</p> <p>(d) the expert has <u>reliably applied the principles and methods</u> to the facts of the case.</p>

**Notes**

There are no notable changes in this rule.

Former Language	Restyled Language
<p><b>Rule 703. Bases of Opinion Testimony by Experts</b></p>	<p><b>Rule 703. Bases of an Expert’s Opinion Testimony</b></p>
<p>The facts or data in the particular case upon which an expert bases an opinion or inference may be those <u>perceived by or made known to the expert at or before the hearing</u>.</p> <p>If of a type <u>reasonably relied upon by experts</u> in the particular field in forming opinions or inferences upon the subject, the facts or data <u>need not be admissible</u> in evidence in order for the opinion or inference to be admitted.</p> <p>Facts or data that are otherwise inadmissible <u>shall not be disclosed</u> to the jury by the proponent of the opinion or inference <u>unless the court determines</u> that their <u>probative value</u> in assisting the jury to evaluate the expert’s opinion <u>substantially outweighs their prejudicial effect</u>.</p>	<p>An expert may base an opinion on facts or data in the case that the expert has been <u>made aware of</u> or <u>personally observed</u>.</p> <p>If <u>experts</u> in the particular field would <u>reasonably rely</u> on those kinds of facts or data in forming an opinion on the subject, they <u>need not be admissible</u> for the opinion to be admitted.</p> <p>But if the facts or data would otherwise be inadmissible, the proponent of the opinion may <u>disclose them</u> to the jury <u>only if</u> their <u>probative value</u> in helping the jury evaluate the opinion <u>substantially outweighs their prejudicial effect</u>.</p>

**Notes**

- Former Rule 703, like several other rules in Article VII, referred to both “opinions” and “inferences.” After researching the case law, the Advisory Committee found no difference between these concepts: An inference is one type of opinion. For simplicity, the restyled rule refers only to opinions. To reassure users that this change was not substantive, the committee appended a special note to each of the affected rules:

The Committee deleted all reference to an “inference” on the grounds that the deletion made the Rule flow better and easier to read, and because any “inference” is covered by the broader term “opinion.” Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

- Rule 703 formerly provided that data “shall not be disclosed to the jury . . . unless.” The restyled rule eliminates the ambiguous “shall” by adopting a more active voice: A proponent “may disclose” data “only if” particular conditions are met.

Former Language	Restyled Language
<p><b>Rule 704. Opinion on Ultimate Issue</b></p>	<p><b>Rule 704. Opinion on an Ultimate Issue</b></p>
<p>(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference <u>otherwise admissible</u> is not objectionable because it embraces an <u>ultimate issue</u> to be decided by the trier of fact.</p> <p>(b) No <u>expert witness</u> testifying with respect to the mental state or condition of a defendant in a <u>criminal case</u> may state an opinion or inference as to whether the defendant <u>did or did not have the mental state or condition constituting an element</u> of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.</p>	<p><b>(a) In General — Not Automatically Objectionable.</b> An opinion is not objectionable <u>just because</u> it embraces an <u>ultimate issue</u>.</p> <p><b>(b) Exception.</b> In a <u>criminal case</u>, an <u>expert witness</u> must not state an opinion about whether the defendant <u>did or did not have a mental state or condition that constitutes an element</u> of the crime charged or of a defense. Those matters are for the trier of fact alone.</p>

**Notes**

- Former Rule 704, like several other rules in Article VII, referred to “an opinion or inference.” After researching the case law, the Advisory Committee found no difference between these concepts: An inference is one type of opinion. For simplicity, the restyled rule refers only to opinions. To reassure users that this change was not substantive, the committee appended a special note to each of the affected rules:

The Committee deleted all reference to an “inference” on the grounds that the deletion made the Rule flow better and easier to read, and because any “inference” is covered by the broader term “opinion.” Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

Former Language	Restyled Language
<p><b>Rule 705. Disclosure of Facts or Data Underlying Expert Opinion</b></p>	<p><b>Rule 705. Disclosing the Facts or Data Underlying an Expert’s Opinion</b></p>
<p>The expert may testify in terms of opinion or inference and give reasons therefor <u>without first testifying to the underlying facts or data</u>, unless the court requires otherwise. The expert may in any event <u>be required</u> to disclose the underlying facts or data on cross-examination.</p>	<p>Unless the court orders otherwise, an expert may state an opinion — and give the reasons for it — <u>without first testifying to the underlying facts or data</u>. But the expert may <u>be required</u> to disclose those facts or data on cross-examination.</p>

**Notes**

- Former Rule 705, like several other rules in Article VII, referred to “an opinion or inference.” After researching the case law, the Advisory Committee found no difference between these concepts: An inference is one type of opinion. For simplicity, the restyled rule refers only to opinions. To reassure users that this change was not substantive, the committee appended a special note to each of the affected rules:

The Committee deleted all reference to an “inference” on the grounds that the deletion made the Rule flow better and easier to read, and because any “inference” is covered by the broader term “opinion.” Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

Former Language	Restyled Language
<p><b>Rule 706. Court Appointed Experts</b></p>	<p><b>Rule 706. Court-Appointed Expert Witnesses</b></p>
<p><b>(a) Appointment.</b> The court may on its <u>own motion or on the motion of any party</u> enter an order to show cause why expert witnesses should not be appointed, and may request the parties to <u>submit nominations</u>.</p> <p>The court may appoint any expert witnesses <u>agreed upon</u> by the parties, and may appoint expert witnesses of its <u>own selection</u>.</p> <p>An expert witness shall not be appointed by the court unless the <u>witness consents</u> to act. A witness so appointed shall be informed of the witness' <u>duties by the court</u> in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate.</p> <p>A witness so appointed shall <u>advise the parties</u> of the witness' findings, if any; the witness' <u>deposition</u> may be taken by any party; and the witness may be <u>called to testify</u> by the court or any party.</p> <p>The witness shall be subject to <u>cross-examination</u> by each party, including a party calling the witness.</p>	<p><b>(a) Appointment Process.</b> On a <u>party's motion or on its own</u>, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to <u>submit nominations</u>.</p> <p>The court may appoint any expert that the <u>parties agree on</u> and any of its <u>own choosing</u>.</p> <p>But the court may only appoint <u>someone who consents</u> to act.</p> <p><b>(b) Expert's Role.</b> The court must inform the expert of the <u>expert's duties</u>. The court may do so in writing and have a copy filed with the clerk or may do so orally at a conference in which the parties have an opportunity to participate. The expert:</p> <ol style="list-style-type: none"> <li><b>(1)</b> must <u>advise the parties</u> of any findings the expert makes;</li> <li><b>(2)</b> may be <u>deposed</u> by any party;</li> <li><b>(3)</b> may be <u>called to testify</u> by the court or any party; and</li> <li><b>(4)</b> may be <u>cross-examined</u> by any party, including the party that called the expert.</li> </ol>

Former Language	Restyled Language
<b>Rule 706. Court Appointed Experts</b>	<b>Rule 706. Court-Appointed Expert Witnesses</b>
<p><b>(b) Compensation.</b> Expert witnesses so appointed are entitled to <u>reasonable compensation</u> in whatever <u>sum the court may allow</u>. The compensation thus fixed is payable from funds which may be provided by law in <u>criminal cases</u> and civil actions and proceedings involving <u>just compensation</u> under the fifth amendment. In other <u>civil actions</u> and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.</p>	<p><b>(c) Compensation.</b> The expert is entitled to a <u>reasonable compensation</u>, as <u>set by the court</u>. The compensation is payable as follows:</p> <ol style="list-style-type: none"> <li><b>(1)</b> in a <u>criminal case</u> or in a civil case involving <u>just compensation</u> under the Fifth Amendment, from any funds that are provided by law; and</li> <li><b>(2)</b> in any other <u>civil case</u>, by the parties in the proportion and at the time that the court directs — and the compensation is then charged like other costs.</li> </ol>
<p><b>(c) Disclosure of appointment.</b> In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.</p>	<p><b>(d) Disclosing the Appointment to the Jury.</b> The court may authorize disclosure to the jury that the court appointed the expert.</p>
<p><b>(d) Parties' experts of own selection.</b> Nothing in this rule limits the parties in calling expert witnesses of their own selection.</p>	<p><b>(e) Parties' Choice of Their Own Experts.</b> This rule does not limit a party in calling its own experts.</p>

## Notes

- The Advisory Committee divided former Rule 706(a) into two sections, one governing the expert's appointment and the other describing the expert's role. Creation of the latter section, numbered (b), required the committee to renumber the remaining sections. Watch for this renumbering when examining cases decided before December 2011.
- Former Rule 706 used the word "shall" seven times. The restyled rule substitutes "may" or "must" according to established practice. These changes make no substantive change, but they illustrate the different meanings that the former rules gave the word "shall."

- Former Rule 706(b) referred to “civil actions and proceedings.” The restyled rule simplifies this phrase to “civil case.” To remove any concern about an inadvertent substantive change, Restyled Rule 101(b)(1) defines “civil case” as “a civil action or proceeding.”

Former Language	Restyled Language
<p style="text-align: center;"><b>ARTICLE VIII. HEARSAY</b></p> <p style="text-align: center;"><b>Rule 801. Definitions</b></p>	<p style="text-align: center;"><b>ARTICLE VIII. HEARSAY</b></p> <p style="text-align: center;"><b>Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay</b></p>
<p>The following definitions apply under this article:</p> <p><b>(a) Statement.</b> A “statement” is (1) an <u>oral or written assertion</u> or (2) <u>nonverbal conduct</u> of a person, if it is <u>intended</u> by the person as an <u>assertion</u>.</p> <p><b>(b) Declarant.</b> A “declarant” is a person who makes a statement.</p> <p><b>(c) Hearsay.</b> “Hearsay” is a <u>statement</u>, other than one made by the <u>declarant</u> while <u>testifying at the trial or hearing</u>, offered in evidence to prove <u>the truth of the matter asserted</u>.</p> <p>....</p>	<p><b>(a) Statement.</b> “Statement” means a person’s <u>oral assertion</u>, <u>written assertion</u>, or <u>nonverbal conduct</u>, if the person <u>intended</u> it as an <u>assertion</u>.</p> <p><b>(b) Declarant.</b> “Declarant” means the person who made the statement.</p> <p><b>(c) Hearsay.</b> “Hearsay” means a <u>statement</u> that:</p> <p style="padding-left: 20px;"><b>(1)</b> the <u>declarant does not make while testifying at the current trial or hearing</u>; and</p> <p style="padding-left: 20px;"><b>(2)</b> a party offers in evidence to prove the <u>truth of the matter asserted</u> in the statement.</p> <p>....</p>

**Notes**

- The Advisory Committee discussed whether the final phrase in former Rule 801(a) (“if it is intended by the person as an assertion”) modified just subsection (2) or both subsections (1) and (2). The committee concluded that the former rule was ambiguous on this point, and that courts differed in their interpretation. Choosing one of those interpretations would have created a substantive change for other courts. The committee thus preserved the ambiguity in Restyled Rule 801(a). The committee noted, however, that even if the restyled rule’s final phrase applies only to “nonverbal conduct,” Rule 801(c)(2) imposes a similar requirement on other types of expression. To count as hearsay, a party must offer a

statement to “prove the truth of the matter asserted in the statement.” That requirement limits hearsay to statements in which the party intended to make a particular assertion.

- Restyled Rule 801(c) inserts the word “current” in the phrase “while testifying at the trial or hearing.” This change confirms that statements made at *other* trials or hearings are hearsay (although they may be admissible under one of the exceptions or exemptions). The clarification does not change the law.
- The Advisory Committee retained the sacred phrase “truth of the matter asserted,” but added the clarifying words “in the statement.” This addition will not eliminate all confusion about the mystical formula “truth of the matter asserted,” but it may make the formula a little easier for students and lawyers to apply.

Former Language	Restyled Language
<p style="text-align: center;"><b>Rule 801. Definitions</b></p>	<p style="text-align: center;"><b>Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay</b></p>
<p>....</p> <p><b>(d) Statements which are not hearsay.</b> A statement is <u>not hearsay</u> if—</p> <p><b>(1) Prior statement by witness.</b></p> <ul style="list-style-type: none"> <li>• The declarant <u>testifies</u> at the trial or hearing and</li> <li>• is subject to <u>cross-examination</u> concerning the statement, and</li> <li>• the statement is                     <ul style="list-style-type: none"> <li>(A) <u>inconsistent</u> with the declarant’s testimony, and was given under <u>oath</u> subject to the penalty of perjury at a <u>trial, hearing, or other proceeding, or in a deposition</u>, or</li> <li>(B) <u>consistent</u> with the declarant’s testimony and is offered to <u>rebut</u> an express or implied charge against the declarant of recent fabrication or improper influence or motive, or</li> <li>(C) one of <u>identification of a person</u> made after perceiving the person;</li> </ul> </li> </ul> <p>....</p>	<p>....</p> <p><b>(d) Statements That Are Not Hearsay.</b> A statement that meets the following conditions is <u>not hearsay</u>:</p> <p><b>(1) A Declarant-Witness’s Prior Statement.</b></p> <ul style="list-style-type: none"> <li>• The declarant <u>testifies</u> and</li> <li>• is subject to <u>cross-examination</u> about a prior statement, and</li> <li>• and the statement:                     <ul style="list-style-type: none"> <li>(A) is <u>inconsistent</u> with the declarant’s testimony and was given under <u>penalty of perjury</u> at a <u>trial, hearing, or other proceeding or in a deposition</u>;</li> <li>(B) is <u>consistent</u> with the declarant’s testimony and is offered to <u>rebut</u> an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or</li> <li>(C) <u>identifies a person</u> as someone the declarant perceived earlier.</li> </ul> </li> </ul> <p>....</p>

## **Notes**

- Former Rule 801(d)(1)(A) admitted a witness's prior inconsistent statement only if the statement "was given under oath subject to the penalty of perjury" at a prior proceeding or deposition. The restyled rule omits the oath requirement, demanding only that the prior statement "was given under penalty of perjury" at the prior proceeding or deposition. Courts already administer the provision in that manner: They will, for example, admit a statement given under an affirmation rather than an oath.

Former Language	Restyled Language
<p style="text-align: center;"><b>Rule 801. Definitions</b></p>	<p style="text-align: center;"><b>Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay</b></p>
<p>....</p> <p><b>(d) Statements which are not hearsay.</b> A statement <u>is not hearsay</u> if . . .</p> <p><b>(2) Admission by party-opponent.</b> The statement is offered <u>against a party</u> and is</p> <p>(A) the party’s <u>own statement</u>, in either an individual or a representative capacity or</p> <p>(B) a statement of which the party has <u>manifested an adoption</u> or belief in its truth, or</p> <p>(C) a statement by a <u>person authorized</u> by the party to make a statement concerning the subject, or</p> <p>(D) a statement by the party’s <u>agent or servant</u> concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or</p> <p>(E) a statement by a <u>coconspirator</u> of a party <u>during the course</u> and in <u>furtherance</u> of the conspiracy.</p> <p>The contents of the statement <u>shall be considered</u> but are <u>not alone sufficient</u> to establish</p> <ul style="list-style-type: none"> <li>• the declarant’s <u>authority</u> under subdivision (C),</li> <li>• the <u>agency or employment</u> relationship and scope thereof under subdivision (D), or</li> <li>• the existence of the <u>conspiracy</u> and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).</li> </ul>	<p>....</p> <p><b>(d) Statements That Are Not Hearsay.</b> A statement that meets the following conditions is <u>not hearsay</u>: . . .</p> <p><b>(2) <i>An Opposing Party’s Statement.</i></b> The statement is offered <u>against an opposing party</u> and:</p> <p>(A) was <u>made by the party</u> in an individual or representative capacity;</p> <p>(B) is one the party <u>manifested that it adopted</u> or believed to be true;</p> <p>(C) was made by a <u>person</u> whom the party <u>authorized</u> to make a statement on the subject;</p> <p>(D) was made by the party’s <u>agent or employee</u> on a matter within the scope of that relationship and while it existed; or</p> <p>(E) was made by the party’s <u>coconspirator during</u> and in <u>furtherance</u> of the conspiracy.</p> <p>The statement <u>must be considered</u> but does <u>not by itself</u> establish</p> <ul style="list-style-type: none"> <li>• the declarant’s <u>authority</u> under (C);</li> <li>• the existence or scope of the <u>relationship</u> under (D);</li> <li>• or the existence of the <u>conspiracy</u> or participation in it under (E).</li> </ul>

## Notes

- Restyled Rule 801(d)(2) changes the name of this widely used hearsay exemption from “Admission by party-opponent” to “An Opposing Party’s Statement.” This change more accurately describes the scope of the exemption, which admits statements by an opposing party even if they were not “admissions.” The switch also eliminates confusion with Rule 804(b)(3)’s exception for declarations against interest. This change is not substantive, but students should know that practitioners, judges, and older cases may refer to “admissions” and “party-opponent statements” rather than to an “opposing party’s statement.”
- Courts split over whether a party could use former Rule 801(d)(2) to admit a statement against a party on the same side of the litigation. The First and Sixth Circuits allowed this practice,<sup>14</sup> while the Second and Eleventh Circuits did not.<sup>15</sup> Opinions in the first group stressed the policies underlying Rule 801(d)(2), as well as the former rule’s broad reference to any statement “offered against a party.” Decisions in the second camp focused on the former rule’s caption, “Admission by party-opponent.” A codefendant or co-plaintiff, these courts held, is not a “party-opponent.”

The restyled rule favors the second group of rulings. The text of Restyled Rule 801(d)(2) now admits only statements “offered against an *opposing* party” (emphasis added). This language appears to reject the decisions of the First and Sixth Circuits—making a substantive change in those circuits. The Advisory Committee apparently did not know about the First and Sixth Circuit decisions; its materials cite only the contrary results of the Second and Eleventh Circuits. Time will tell how the courts respond to this change in Rule 801(d)(2). Given the committee’s commitment to avoiding substantive changes, the First and Sixth Circuits may adhere to their positions—and other circuits may feel free to follow them, despite the apparently contrary language in the restyled rule.

- The Advisory Committee replaced the word “shall” in the final sentence of 801(d)(2) with the word “must.” Courts now “must” consider statements by agents, authorized speakers, and coconspirators when determining whether agency, authorization, or conspiracy exists. The word “must” sounds more emphatic than “shall,” but does not change the law: The former rule used “shall” in its mandatory sense. It is important to remember that, although the court must *consider* the proffered statement, it need not accept the statement as true. Under the restyled rule, as under the former one, a court may determine that references to agency, authorization, or conspiracy are not credible.

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<sup>14</sup> United States v. Horton, 847 F.2d 313, 324 (6th Cir. 1988); United States v. Palow, 777 F.2d 52, 56 (1st Cir. 1985).

<sup>15</sup> United States v. Harwood, 998 F.2d 91, 97 (2d Cir. 1993); United States v. Gossett, 877 F.2d 901, 28 Fed. R. Evid. Serv. 826 (11th Cir. 1989).

Former Language	Restyled Language
<b>Rule 802. Hearsay Rule</b>	<b>Rule 802. The Rule Against Hearsay</b>
<p>Hearsay is not admissible <u>except</u></p> <ul style="list-style-type: none"> <li>• as provided by these rules or</li> <li>• by other rules prescribed by the Supreme Court pursuant to statutory authority or</li> <li>• by Act of Congress.</li> </ul>	<p>Hearsay is not admissible <u>unless</u> any of the following provides otherwise:</p> <ul style="list-style-type: none"> <li>• a federal statute;</li> <li>• these rules; or</li> <li>• other rules prescribed by the Supreme Court.</li> </ul>

**Notes**

- Restyled Rule 802 is titled “The Rule Against Hearsay” rather than “Hearsay Rule.” This title more accurately captures the general prohibition against hearsay. Other rules in Article VIII now refer to the “rule against hearsay” rather than a “hearsay rule.”
- Former Rule 802, like several other rules, referred to “rules prescribed by the Supreme Court pursuant to statutory authority.” This phrase included rules adopted under the Rules Enabling Act, but not rules created under the Court’s general supervisory power. The restyled rules maintain this limit, but transfer it to a new definitional section in Restyled Rule 101(b)(5). As that section makes clear, Restyled Rule 802’s reference to “rules prescribed by the Supreme Court” includes only rules “adopted by the Supreme Court under statutory authority.”

Former Language	Restyled Language
<p align="center"><b>Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial</b></p>	<p align="center"><b>Rule 803. Exceptions to the Rule Against Hearsay — Regardless of Whether the Declarant Is Available as a Witness</b></p>
<p>The following are not excluded by the hearsay rule, even though the declarant is available as a witness:</p> <p><b>(1) Present sense impression.</b> A statement <u>describing or explaining</u> an event or condition made while the declarant <u>was perceiving</u> the event or condition, or <u>immediately thereafter</u>.</p> <p>.....</p>	<p>The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:</p> <p><b>(1) <i>Present Sense Impression.</i></b> A statement <u>describing or explaining</u> an event or condition, made while or <u>immediately after</u> the declarant <u>perceived</u> it.</p> <p>.....</p>

**Notes**

There are no notable changes in this section.

Former Language	Restyled Language
<p style="text-align: center;"><b>Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial</b></p>	<p style="text-align: center;"><b>Rule 803. Exceptions to the Rule Against Hearsay — Regardless of Whether the Declarant Is Available as a Witness</b></p>
<p>The following are not excluded by the hearsay rule, even though the declarant is available as a witness:</p> <p>.....</p> <p><b>(2) Excited utterance.</b> A statement <u>relating to a startling event</u> or condition made while the declarant was <u>under the stress of excitement</u> caused by the event or condition.</p> <p>.....</p>	<p>The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:</p> <p>.....</p> <p><b>(2) <i>Excited Utterance.</i></b> A statement <u>relating to a startling event</u> or condition, made while the declarant was <u>under the stress of excitement</u> that it caused.</p> <p>.....</p>

**Notes**

There are no notable changes in this section.

Former Language	Restyled Language
<p align="center"><b>Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial</b></p>	<p align="center"><b>Rule 803. Exceptions to the Rule Against Hearsay — Regardless of Whether the Declarant Is Available as a Witness</b></p>
<p>The following are not excluded by the hearsay rule, even though the declarant is available as a witness:</p> <p>....</p> <p><b>(3) Then existing mental, emotional, or physical condition.</b> A statement of the declarant’s <u>then existing</u></p> <ul style="list-style-type: none"> <li>• state of mind,</li> <li>• emotion,</li> <li>• sensation, or</li> <li>• physical condition</li> </ul> <p>(such as intent, plan, motive, design, mental feeling, pain, and bodily health),</p> <p><u>but not</u> including a statement of memory or belief <u>to prove</u> the fact remembered or believed <u>unless</u> it relates to the execution, revocation, identification, or terms of declarant’s will.</p> <p>....</p>	<p>The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:</p> <p>....</p> <p><b>(3) <i>Then-Existing Mental, Emotional, or Physical Condition.</i></b> A statement of the declarant’s <u>then-existing</u></p> <ul style="list-style-type: none"> <li>• state of mind (such as motive, intent, or plan) or</li> <li>• emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health),</li> </ul> <p><u>but not</u> including a statement of memory or belief <u>to prove</u> the fact remembered or believed <u>unless</u> it relates to the validity or terms of the declarant’s will.</p> <p>....</p>

**Notes**

There are no notable changes in this section.

Former Language	Restyled Language
<p style="text-align: center;"><b>Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial</b></p>	<p style="text-align: center;"><b>Rule 803. Exceptions to the Rule Against Hearsay — Regardless of Whether the Declarant Is Available as a Witness</b></p>
<p>The following are not excluded by the hearsay rule, even though the declarant is available as a witness:</p> <p>....</p> <p><b>(4) Statements for purposes of medical diagnosis or treatment.</b> Statements made for <u>purposes of medical diagnosis or treatment</u> and</p> <ul style="list-style-type: none"> <li>• describing medical history, or</li> <li>• past or present symptoms, pain, or sensations, or</li> <li>• the inception or general character of the cause or external source thereof</li> </ul> <p>insofar as <u>reasonably pertinent</u> to diagnosis or treatment.</p> <p>....</p>	<p>The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:</p> <p>....</p> <p><b>(4) <i>Statement Made for Medical Diagnosis or Treatment.</i></b> A statement that:</p> <p>(A) is <u>made for</u> — and is <u>reasonably pertinent to</u> — <u>medical diagnosis or treatment</u>; and</p> <p>(B) describes</p> <ul style="list-style-type: none"> <li>• medical history;</li> <li>• past or present symptoms or sensations;</li> <li>• their inception; or</li> <li>• their general cause.</li> </ul> <p>....</p>

**Notes**

- Restyled Rule 803(4) omits the word “pain” because the phrase “symptoms or sensations” includes that concept. The Advisory Committee reviewed cases decided under this rule, finding none that distinguished “pain” from “symptoms or sensations.”
- The restyled rule also shortens the phrase “general character of the cause or external source thereof” to “general cause.” Again, the committee reviewed relevant cases, finding that an “external source” is simply one type of “general cause.”

Former Language	Restyled Language
<p style="text-align: center;"><b>Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial</b></p>	<p style="text-align: center;"><b>Rule 803. Exceptions to the Rule Against Hearsay — Regardless of Whether the Declarant Is Available as a Witness</b></p>
<p>The following are not excluded by the hearsay rule, even though the declarant is available as a witness:</p> <p>....</p> <p><b>(5) Recorded recollection.</b> A <u>memorandum or record</u> concerning a matter</p> <ul style="list-style-type: none"> <li>• about which a <u>witness once had knowledge</u></li> <li>• but <u>now has insufficient recollection</u> to enable the witness to testify fully and accurately,</li> <li>• shown to have been <u>made or adopted</u> by the witness when the matter was <u>fresh</u> in the witness’ memory and</li> <li>• to <u>reflect that knowledge correctly</u>.</li> </ul> <p>If admitted, the memorandum or record</p> <ul style="list-style-type: none"> <li>• <u>may be read</u> into evidence</li> <li>• but may <u>not</u> itself be received as <u>an exhibit unless</u> offered by an adverse party.</li> </ul> <p>....</p>	<p>The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:</p> <p>....</p> <p><b>(5) Recorded Recollection.</b> A <u>record</u> that:</p> <ul style="list-style-type: none"> <li>(A) is on a matter the <u>witness once knew</u> about <u>but now cannot recall</u> well enough to testify fully and accurately;</li> <li>(B) was <u>made or adopted</u> by the witness when the matter was <u>fresh</u> in the witness’s memory; and</li> <li>(C) <u>accurately reflects</u> the witness’s knowledge.</li> </ul> <p>If admitted, the record <u>may be read</u> into evidence but may be received as an <u>exhibit only if offered by an adverse party</u>.</p> <p>....</p>

**Notes**

- To improve readability of Rule 803(5) and several other rules, the Advisory Committee created a new definitional section providing that the word “record” includes a “memorandum, report, or data compilation.” See Restyled Rule 101(b)(4). That

definitional section allowed the committee to refer simply to a “record” in Restyled Rule 803(5).

- Note that another new definitional section, Rule 101(b)(6), declares that “a reference to any kind of written material or any other medium includes electronically stored information.” That section confirms Rule 803(5)’s application to electronically stored information.
- Former Rule 803(5) used the word “accurately” in one phrase and “correctly” in another. The Advisory Committee changed the second reference so that the rule uses “accurately” in both places. Research revealed that the courts have used these words interchangeably, and the committee concluded that the word “accurately” better described the rule’s requirements.

Former Language	Restyled Language
<p style="text-align: center;"><b>Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial</b></p>	<p style="text-align: center;"><b>Rule 803. Exceptions to the Rule Against Hearsay — Regardless of Whether the Declarant Is Available as a Witness</b></p>
<p>The following are not excluded by the hearsay rule, even though the declarant is available as a witness:</p> <p>....</p> <p><b>(6) Records of regularly conducted activity.</b> A memorandum, report, <u>record</u>, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses,</p> <ul style="list-style-type: none"> <li>• made at or near the time by, or from information transmitted by, a person with <u>knowledge</u>,</li> <li>• if kept in the <u>course of a regularly conducted</u> business activity, and</li> <li>• if it was the <u>regular practice</u> of that business activity to make the memorandum, report, record or data compilation,</li> <li>• all as shown by the testimony of the custodian or other <u>qualified witness</u>, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification,</li> <li>• <u>unless</u> the source of information or the method or circumstances of preparation indicate lack of trustworthiness.</li> </ul> <p>The term “business” as used in this paragraph includes business, institution, association, profession, occupation, and calling of <u>every kind</u>, whether or not conducted for profit.</p> <p>....</p>	<p>The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:</p> <p>....</p> <p><b>(6) <i>Records of a Regularly Conducted Activity.</i></b> A <u>record</u> of an act, event, condition, opinion, or diagnosis if:</p> <ul style="list-style-type: none"> <li><b>(A)</b> the record was made at or near the time by — or from information transmitted by — someone with <u>knowledge</u>;</li> <li><b>(B)</b> the record was kept in the <u>course of a regularly conducted</u> activity of a <u>business</u>, organization, occupation, or calling, <u>whether or not for profit</u>;</li> <li><b>(C)</b> making the record was a <u>regular practice</u> of that activity; and</li> <li><b>(D)</b> all these conditions are shown by the testimony of the custodian or another <u>qualified witness</u>, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and</li> <li><b>(E)</b> neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.</li> </ul> <p>....</p>

## Notes

- Rule 803(6) formerly applied to a “memorandum, report, record, or data compilation, in any form.” The restyled rule reduces this unwieldy phrase to “record.” The Advisory Committee achieved this result by adding a definitional section to Rule 101. Restyled Rule 101(b)(4) makes clear that “‘record’ includes a memorandum, report, or data compilation,” while Restyled Rule 101(b)(6) provides that “a reference to any kind of written material or any other medium includes electronically stored information.” These new definitional sections maintain Rule 803(6)’s full breadth.
- Note that the restyled rule omits a separate definition of “business.” Instead, Restyled Rule 803(6) incorporates that language into subsection (B)’s foundation requirement.
- The committee considered modifying the trustworthiness clause, which appears in Restyled Rule 803(6)(E), to clarify that the *opponent* of a proffered business record bears the burden of showing lack of trustworthiness; most courts have interpreted the provision that way. The committee discovered, however, that a few courts had construed the provision to place the burden on the record’s proponent. Given this conflict, the committee decided to retain the former rule’s ambiguous language.

Some readers have suggested that the restyled rule’s new lettering scheme implies that a record’s proponent bears the burden of establishing trustworthiness: If a proponent must establish foundation requirements (A)–(D), then courts may require the proponent to establish factor (E) as well. But the language of Restyled 803(6)(D) weighs against this interpretation. That subsection, like the former rule, refers to a custodian or other qualified witness establishing the *preceding* requirements. The trustworthiness caveat in 803(6)(E) appears after that assignment of responsibility, just as it does in the former rule. Responsibility for establishing a lack of trustworthiness, therefore, is ambiguous—again, just as in the former rule.

After completing the restyling project, the Advisory Committee discussed amending Rule 803(6)(E) to place the burden of proof clearly on a party opposing introduction of a business record. The committee noted that this result accorded with both policy and the decisions of most courts. In the end, however, the committee decided not to proceed with an amendment: It concluded “that any problems in applying the Rules are the result of a few outlier cases, that amending the Rules could create new problems for courts and litigants, and that the Rules clearly place the burden of establishing untrustworthiness on the party who opposes admitting the evidence.”<sup>16</sup> This decision leaves placement of the burden of proof ambiguous; it also underscores the committee’s belief that the restyling did nothing to reallocate that burden.

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<sup>16</sup> Report of the Evidence Rules Advisory Committee to the Standing Committee on Rules of Practice and Procedure (Apr. 8, 2011) (available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/EV04-2011.pdf>).

Former Language	Restyled Language
<p style="text-align: center;"><b>Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial</b></p>	<p style="text-align: center;"><b>Rule 803. Exceptions to the Rule Against Hearsay — Regardless of Whether the Declarant Is Available as a Witness</b></p>
<p>The following are not excluded by the hearsay rule, even though the declarant is available as a witness:</p> <p>....</p> <p><b>(7) Absence of entry in records kept in accordance with the provisions of paragraph (6).</b> Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form,</p> <ul style="list-style-type: none"> <li>• kept in accordance with the provisions of <u>paragraph (6)</u>, to prove the nonoccurrence or nonexistence of the matter,</li> <li>• if the matter was of a kind of which a memorandum, report, record, or data compilation was <u>regularly made and preserved</u>,</li> <li>• <u>unless</u> the sources of information or other circumstances indicate lack of <u>trustworthiness</u>.</li> </ul> <p>....</p>	<p>The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:</p> <p>....</p> <p><b>(7) Absence of a Record of a Regularly Conducted Activity.</b> Evidence that a matter is not included in a record described in <u>paragraph (6)</u> if:</p> <ul style="list-style-type: none"> <li><b>(A)</b> the evidence is admitted to prove that the matter did not occur or exist;</li> <li><b>(B)</b> a record was <u>regularly kept</u> for a matter of that kind; and</li> <li><b>(C)</b> neither the possible source of the information nor other circumstances indicate a lack of <u>trustworthiness</u>.</li> </ul> <p>....</p>

**Notes**

- Restyled Rule 803(7) replaces the cumbersome phrase “memoranda, reports, records, or data compilations, in any form” with a simple reference to a “record.” Like several other sections of Rule 803, this reference draws upon the new definitional provisions of Rule 101(b). Subsection (4) of Restyled Rule 101(b) provides that the word “record” includes “a memorandum, report, or data compilation,” while subsection (6) declares that “a reference to any kind of written material or any other medium includes electronically stored information.” Restyled Rule 803(7) thus retains the former rule’s breadth.

- The Advisory Committee considered whether to clarify Rule 803(7)'s allocation of the burden of proof on trustworthiness; this discussion paralleled the one related to Rule 803(6). As with the latter rule, the committee decided to leave the allocation ambiguous.

Former Language	Restyled Language
<p style="text-align: center;"><b>Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial</b></p>	<p style="text-align: center;"><b>Rule 803. Exceptions to the Rule Against Hearsay — Regardless of Whether the Declarant Is Available as a Witness</b></p>
<p>The following are not excluded by the hearsay rule, even though the declarant is available as a witness:</p> <p>....</p> <p><b>(8) Public records and reports.</b> Records, reports, statements, or data compilations, in any form, of <u>public offices or agencies</u>, setting forth</p> <p>(A) the <u>activities</u> of the office or agency, or</p> <p>(B) <u>matters observed</u> pursuant to <u>duty</u> imposed by law as to which matters there was a duty to report, <u>excluding</u>, however, in criminal cases matters observed by police officers and other law enforcement personnel, or</p> <p>(C) in civil actions and proceedings and against the Government in criminal cases, <u>factual findings</u> resulting from an investigation made pursuant to authority granted by law, <u>unless</u> the sources of information or other circumstances indicate lack of <u>trustworthiness</u>.</p> <p>....</p>	<p>The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:</p> <p>....</p> <p><b>(8) Public Records.</b> A record or statement of a <u>public office</u> if:</p> <p>(A) it sets out:</p> <p>(i) the office’s <u>activities</u>;</p> <p>(ii) a <u>matter observed</u> while under a legal <u>duty</u> to report, <u>but not including</u>, in a criminal case, a matter observed by law-enforcement personnel; or</p> <p>(iii) in a civil case or against the government in a criminal case, <u>factual findings</u> from a legally authorized investigation; and</p> <p>(B) neither the source of information nor other circumstances indicate a lack of <u>trustworthiness</u>.</p> <p>....</p>

**Notes**

- Restyled Rule 803(8), like other sections of Restyled Rule 803, refers simply to a “record” rather than to “[r]ecords, reports, . . . or data compilations, in any form.” The new definitional provisions in Rule 101(b) make the latter references unnecessary.

- On the other hand, the committee retained the reference to a “statement” in Restyled Rule 803(8). This reference includes oral statements, which would not fall within Restyled Rule 101(b)(4)’s definition of “record.” Reference to both records and statements, therefore, was necessary to retain the scope of the public records exception.<sup>17</sup>
- Restyled Rule 803(8) substitutes “public office” for the phrase “public offices or agencies.” Once again, however, a new definitional section maintains the rule’s scope: Restyled Rule 101(b)(3) provides that “‘public office’ includes a public agency.”
- Commentators had noted an ambiguity in former Rule 803(8): Did the trustworthiness clause at the end of the rule apply to all three categories of public records or only to the final category? The Advisory Committee found that courts uniformly had applied the caveat to all three categories, so the committee decided to remodel the rule to reflect that result. The restyled rule’s structure, with the trustworthiness clause appearing in subsection (B), makes clear that the clause applies to all three categories of public records.
- As in Restyled Rules 803(6) and 803(7), the committee did not explicitly allocate the burden of proof on the trustworthiness clause; it attempted to preserve the rule’s ambiguity on that issue.
- Beware the internal renumbering of Restyled Rule 803(8): To clarify application of the trustworthiness provision, the Advisory Committee relabeled the three categories of public records as (A)(i), (ii), and (iii), while designating the trustworthiness provision as subsection (B). This change may create some confusion among students and practitioners. Former Rule 803(B) referred to a category of public records, while Restyled Rule 803(B) refers to the trustworthiness provision. The committee adopted the new numbering scheme during the last stage of restyling, after public comments were closed, so it may not have realized the confusion this change might cause.

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<sup>17</sup> See Advisory Committee on Evidence Rules, Materials of April 2010 Meeting, at 207–08 (available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/EV04-2010-min.pdf>).

Former Language	Restyled Language
<p style="text-align: center;"><b>Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial</b></p>	<p style="text-align: center;"><b>Rule 803. Exceptions to the Rule Against Hearsay — Regardless of Whether the Declarant Is Available as a Witness</b></p>
<p>The following are not excluded by the hearsay rule, even though the declarant is available as a witness:</p> <p>....</p> <p><b>(9) Records of vital statistics.</b> Records or data compilations, in any form, of <u>births, fetal deaths, deaths, or marriages</u>, if the report thereof was made to a <u>public office</u> pursuant to <u>requirements of law</u>.</p> <p>....</p>	<p>The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:</p> <p>....</p> <p><b>(9) <i>Public Records of Vital Statistics.</i></b> A record of a birth, death, or marriage, if reported to a public office in accordance with a legal duty.</p> <p>....</p>

**Notes**

- Restyled Rule 803(9) no longer refers to “data compilations, in any form,” but the new definitional sections in Restyled Rule 101(b) plug that gap. Restyled Rule 101(b)(4) provides that a “record” includes a memorandum, report, or data compilation,” while section 101(b)(6) declares that “a reference to any kind of written material or any other medium includes electronically stored information.”
- The new definition of “public office” in Restyled Rule 101(b)(3) slightly expands the scope of Restyled Rule 803(9). Because of the new definitional section, Restyled Rule 803(9)’s reference to a “public office” now includes any “public agency.” Former Rule 803(9) did not include public agencies.

Former Language	Restyled Language
<p style="text-align: center;"><b>Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial</b></p>	<p style="text-align: center;"><b>Rule 803. Exceptions to the Rule Against Hearsay — Regardless of Whether the Declarant Is Available as a Witness</b></p>
<p>The following are not excluded by the hearsay rule, even though the declarant is available as a witness:</p> <p>....</p> <p><b>(10) Absence of public record or entry.</b> To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter</p> <ul style="list-style-type: none"> <li>• of which a record, report, statement, or data compilation, in any form, was <u>regularly made and preserved</u> by a public office or agency,</li> </ul> <p>evidence in the form of a <u>certification</u> in accordance with rule 902, or <u>testimony, that diligent search</u> failed to disclose the record, report, statement, or data compilation, or entry.</p> <p>....</p>	<p>The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:</p> <p>....</p> <p><b>(10) Absence of a Public Record.</b> <u>Testimony</u> — or a <u>certification</u> under Rule 902 — <u>that a diligent search</u> failed to disclose a public record or statement if the testimony or certification is admitted to prove that:</p> <p style="padding-left: 40px;"><b>(A)</b> the record or statement does not exist; or</p> <p style="padding-left: 40px;"><b>(B)</b> a matter did not occur or exist, if a public office <u>regularly kept</u> a record or statement for a matter of that kind.</p> <p>....</p>

**Notes**

- As in several other rules, the committee streamlined references to records, reports, and data compilations by new definitions in Restyled Rule 101(b). Section 101(b)(4) provides that a “‘record’ includes a memorandum, report, or data compilation,” while section 101(b)(6) declares that “a reference to any kind of written material or any other medium includes electronically stored information.” These definitions allowed the committee to replace some of Rule 803(10)’s verbiage with simple references to a “record.”
- The committee concluded that the reference to an “entry” at the end of former Rule 803(10) was unnecessary because an entry is itself a public record.

- The committee preserved Rule 803(10)'s reference to a "statement," just as it maintained a similar reference in Rule 803(8).
- The restyled rule refers only to a "public office," rather than a "public office or agency." Restyled Rule 101(b)(3) allows that shorthand by defining all references to "public office" to include public agencies.

Former Language	Restyled Language
<p style="text-align: center;"><b>Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial</b></p>	<p style="text-align: center;"><b>Rule 803. Exceptions to the Rule Against Hearsay — Regardless of Whether the Declarant Is Available as a Witness</b></p>
<p>The following are not excluded by the hearsay rule, even though the declarant is available as a witness:</p> <p>....</p> <p><b>(11) Records of religious organizations.</b> Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of <u>personal or family history</u>, contained in a <u>regularly kept record of a religious organization</u>.</p> <p><b>(12) Marriage, baptismal, and similar certificates.</b> Statements of <u>fact</u> contained in a <u>certificate</u> that the maker performed a <u>marriage or other ceremony</u> or administered a sacrament, made by a <u>clergyman, public official, or other person authorized</u> by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the <u>time of the act</u> or within a <u>reasonable time</u> thereafter.</p> <p>....</p>	<p>The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:</p> <p>....</p> <p><b>(11) <i>Records of Religious Organizations Concerning Personal or Family History.</i></b> A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.</p> <p><b>(12) <i>Certificates of Marriage, Baptism, and Similar Ceremonies.</i></b> A statement of fact contained in a certificate:</p> <ul style="list-style-type: none"> <li>(A) made by a person who is authorized by a religious organization or by law to perform the act certified;</li> <li>(B) attesting that the person performed a marriage or similar ceremony or administered a sacrament; and</li> <li>(C) purporting to have been issued at the time of the act or within a reasonable time after it.</li> </ul> <p>....</p>

**Notes**

There are no notable changes in these sections.

Former Language	Restyled Language
<p style="text-align: center;"><b>Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial</b></p>	<p style="text-align: center;"><b>Rule 803. Exceptions to the Rule Against Hearsay — Regardless of Whether the Declarant Is Available as a Witness</b></p>
<p>The following are not excluded by the hearsay rule, even though the declarant is available as a witness:</p> <p>....</p> <p><b>(13) Family records.</b> Statements of fact concerning <u>personal or family history</u> contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.</p> <p><b>(14) Records of documents affecting an interest in property.</b> The record of a document purporting to <u>establish or affect an interest in property</u>,</p> <ul style="list-style-type: none"> <li>• as proof of the <u>content of the original recorded document</u> and its execution and delivery by each person by whom it purports to have been executed, if</li> <li>• the record is a <u>record of a public office</u> and</li> <li>• an <u>applicable statute authorizes the recording of documents of that kind in that office.</u></li> </ul> <p>....</p>	<p>The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:</p> <p>....</p> <p><b>(13) <i>Family Records.</i></b> A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.</p> <p><b>(14) <i>Records of Documents That Affect an Interest in Property.</i></b> The record of a document that purports to establish or affect an interest in property if:</p> <ul style="list-style-type: none"> <li>(A) the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;</li> <li>(B) the record is kept in a public office; and</li> <li>(C) a statute authorizes recording documents of that kind in that office.</li> </ul> <p>....</p>

**Notes**

There are no notable changes in these sections.

Former Language	Restyled Language
<p style="text-align: center;"><b>Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial</b></p>	<p style="text-align: center;"><b>Rule 803. Exceptions to the Rule Against Hearsay — Regardless of Whether the Declarant Is Available as a Witness</b></p>
<p>The following are not excluded by the hearsay rule, even though the declarant is available as a witness:</p> <p>....</p> <p><b>(15) Statements in documents affecting an interest in property.</b> A statement contained in a document purporting <u>to establish or affect an interest in property</u> if the matter stated was <u>relevant to the purpose</u> of the document,</p> <p><u>unless</u> dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.</p> <p><b>(16) Statements in ancient documents.</b> Statements in a document in existence <u>twenty years</u> or more the <u>authenticity</u> of which is established.</p> <p>....</p>	<p>The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:</p> <p>....</p> <p><b>(15) <i>Statements in Documents That Affect an Interest in Property.</i></b> A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document’s purpose — unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.</p> <p><b>(16) <i>Statements in Ancient Documents.</i></b> A statement in a document that is at least <u>20 years old</u> and whose <u>authenticity</u> is established.</p> <p>....</p>

**Notes**

There are no notable changes in these sections.

Former Language	Restyled Language
<p style="text-align: center;"><b>Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial</b></p>	<p style="text-align: center;"><b>Rule 803. Exceptions to the Rule Against Hearsay — Regardless of Whether the Declarant Is Available as a Witness</b></p>
<p>The following are not excluded by the hearsay rule, even though the declarant is available as a witness:</p> <p>....</p> <p><b>(17) Market reports, commercial publications.</b> Market quotations, tabulations, lists, directories, or other published <u>compilations</u>, generally <u>used and relied upon</u> by the public or by persons in particular occupations.</p> <p><b>(18) Learned treatises.</b> To the extent called to the attention of an <u>expert witness</u> upon cross-examination or <u>relied upon</u> by the expert witness in direct examination,</p> <ul style="list-style-type: none"> <li>• statements contained in published treatises, periodicals, or pamphlets</li> <li>• on a subject of history, medicine, <u>or other science or art</u>,</li> <li>• established as a <u>reliable authority</u> by the testimony or admission of the witness or by other expert testimony or by judicial notice.</li> </ul> <p>If admitted, the statements may be <u>read into evidence</u> but may not be received as exhibits.</p> <p>....</p>	<p>The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:</p> <p>....</p> <p><b>(17) <i>Market Reports and Similar Commercial Publications.</i></b> Market quotations, lists, directories, or other <u>compilations</u> that are generally <u>relied on</u> by the public or by persons in particular occupations.</p> <p><b>(18) <i>Statements in Learned Treatises, Periodicals, or Pamphlets.</i></b> A statement contained in a treatise, periodical, or pamphlet if:</p> <ul style="list-style-type: none"> <li><b>(A)</b> the statement is called to the attention of an <u>expert witness</u> on cross-examination or <u>relied on</u> by the expert on direct examination; and</li> <li><b>(B)</b> the publication is established as a <u>reliable authority</u> by the expert’s admission or testimony, by another expert’s testimony, or by judicial notice.</li> </ul> <p>If admitted, the statement may be <u>read into evidence</u> but not received as an exhibit.</p> <p>....</p>

**Notes**

- The Advisory Committee eliminated the word “tabulations” in Restyled Rule 803(17) as redundant.

- The committee also replaced the phrase “used and relied upon” in Rule 803(17) with the simpler reference “relied on.” The Advisory Committee examined cases decided under this exception and found that they focused on reliance rather than use. Indeed, the committee noted that “relied” is a narrower term than “used”—a person may use a document without relying upon it. For these reasons, the committee concluded that the word “used” was unnecessary.
- Restyled Rule 803(17), finally, omits the modifier “published” from the reference to compilations. Although the Advisory Committee’s materials do not explain this omission, the word seems to have played no role in court decisions applying this hearsay exception. Historically, courts have focused on whether a compilation was “relied upon by the public or by persons in particular occupations,” rather than on whether the compilation was “published” in any conventional sense. The rise of internet compilations has further blurred the line between published and unpublished materials. Omission of the word “published” from Restyled Rule 803(17), therefore, is unlikely to alter existing law.
- Restyled Rule 803(18) likewise omits the modifier “published” from its initial reference to a “treatise, periodical, or pamphlet.” But the word “publication” in subsection (B) should preserve any requirement of publication. The words “treatise” and “periodical” may also connote publication. The restyled rule, therefore, seems to accord with cases holding that material admitted under the learned treatise exception must be published in some form.<sup>18</sup>
- Restyled Rule 803(18) omits the former rule’s reference to “a subject of history, medicine, or other science or art.” The committee concluded that this reference was intended to embrace all subjects, so that a list was unnecessary.
- The new definitional section in Restyled Rule 101(b)(6) extends the exceptions in 803(17) and (18) to “electronically stored information.” Note, however, that this expansion does not override 803(18)’s reference to “publications.” Rule 101(b)(6) makes clear that Rule 803(18) applies to electronically stored versions of a publication, such as the electronic version of a treatise. Private emails, on the other hand, do not fall within Restyled Rule 803(18): Emails constitute “electronically stored information,” but they do not fit the other requirements of Restyled Rule 803(18).

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<sup>18</sup> See *United States v. Jones*, 712 F.2d 115 (5<sup>th</sup> Cir. 1983) (“The learned treatise exception is confined to published works that have been subjected to widespread collegial scrutiny.”) (refusing to apply the exception to the transcript of an expert’s testimony from another trial).

Former Language	Restyled Language
<p style="text-align: center;"><b>Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial</b></p>	<p style="text-align: center;"><b>Rule 803. Exceptions to the Rule Against Hearsay — Regardless of Whether the Declarant Is Available as a Witness</b></p>
<p>The following are not excluded by the hearsay rule, even though the declarant is available as a witness:</p> <p>.....</p> <p><b>(19) Reputation concerning personal or family history.</b> <u>Reputation</u> among members of a <u>person’s family</u> 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 <u>similar fact of personal or family history</u>.</p> <p><b>(20) Reputation concerning boundaries or general history.</b> <u>Reputation in a community</u>, arising <u>before the controversy</u>, as to boundaries of or customs affecting <u>lands</u> in the community, and reputation as to events of <u>general history</u> important to the community or State or nation in which located.</p> <p><b>(21) Reputation as to character.</b> <u>Reputation</u> of a person’s <u>character</u> among associates or in the community.</p> <p>.....</p>	<p>The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:</p> <p>.....</p> <p><b>(19) <i>Reputation Concerning Personal or Family History.</i></b> A reputation among a person’s family by blood, adoption, or marriage — or among a person’s associates or in the community — concerning the person’s birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.</p> <p><b>(20) <i>Reputation Concerning Boundaries or General History.</i></b> A reputation in a community — arising before the controversy — concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.</p> <p><b>(21) <i>Reputation Concerning Character.</i></b> A reputation among a person’s associates or in the community concerning the person’s character.</p> <p>.....</p>

**Notes**

There are no notable changes in these sections.

Former Language	Restyled Language
<p style="text-align: center;"><b>Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial</b></p>	<p style="text-align: center;"><b>Rule 803. Exceptions to the Rule Against Hearsay — Regardless of Whether the Declarant Is Available as a Witness</b></p>
<p>The following are not excluded by the hearsay rule, even though the declarant is available as a witness:</p> <p>....</p> <p><b>(22) Judgment of previous conviction.</b> Evidence of a <u>final judgment</u>,</p> <ul style="list-style-type: none"> <li>• entered after a <u>trial or upon a plea of guilty</u> (but not upon a plea of nolo contendere),</li> <li>• adjudging a person guilty of a crime punishable by <u>death or imprisonment in excess of one year</u>,</li> <li>• to prove any fact <u>essential to sustain the judgment</u>,</li> <li>• but not including, when offered by the Government in a criminal prosecution for purposes <u>other than impeachment</u>, judgments against persons <u>other than the accused</u>.</li> </ul> <p>The pendency of an appeal may be shown but does not affect admissibility.</p> <p><b>(23) Judgment as to personal, family, or general history, or boundaries.</b> Judgments as proof of matters of <u>personal, family or general history, or boundaries, essential</u> to the judgment, if the same would be provable by evidence of <u>reputation</u>.</p> <p><b>(24) [Other exceptions.]</b> [Transferred to Rule 807]</p>	<p>The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:</p> <p>....</p> <p><b>(22) <i>Judgment of a Previous Conviction.</i></b> Evidence of a final judgment of conviction if:</p> <ul style="list-style-type: none"> <li>(A) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;</li> <li>(B) the conviction was for a crime punishable by death or by imprisonment for more than a year;</li> <li>(C) the evidence is admitted to prove any fact essential to the judgment; and</li> <li>(D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.</li> </ul> <p>The pendency of an appeal may be shown but does not affect admissibility.</p> <p><b>(23) <i>Judgments Involving Personal, Family, or General History, or a Boundary.</i></b> A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:</p> <ul style="list-style-type: none"> <li>(A) was essential to the judgment; and</li> <li>(B) could be proved by evidence of reputation.</li> </ul> <p><b>(24) [Other Exceptions.]</b> [Transferred to Rule 807.]</p>

**Notes**

There are no notable changes in these sections.

Former Language	Restyled Language
<p align="center"><b>Rule 804. Hearsay Exceptions; Declarant Unavailable</b></p>	<p align="center"><b>Rule 804. Exceptions to the Rule Against Hearsay — When the Declarant Is Unavailable as a Witness</b></p>
<p><b>(a) Definition of unavailability.</b> “Unavailability as a witness” includes situations in which the declarant—</p> <ul style="list-style-type: none"> <li>(1) is exempted by ruling of the court on the ground of <u>privilege</u> from testifying concerning the subject matter of the declarant’s statement; or</li> <li>(2) <u>persists in refusing</u> to testify concerning the subject matter of the declarant’s statement despite an order of the court to do so; or</li> <li>(3) testifies to a <u>lack of memory</u> of the subject matter of the declarant’s statement; or</li> <li>(4) is unable to be present or to testify at the hearing because of <u>death</u> or then existing <u>physical or mental illness</u> or infirmity; or</li> <li>(5) is <u>absent</u> from the hearing and the proponent of a statement has been unable to procure the declarant’s attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant’s attendance or testimony) by process or other reasonable means.</li> </ul> <p>A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the <u>procurement or wrongdoing of the proponent</u> of a statement <u>for the purpose of preventing</u> the witness from attending or testifying.</p>	<p><b>(a) Criteria for Being Unavailable.</b> A declarant is considered to be unavailable as a witness if the declarant:</p> <ul style="list-style-type: none"> <li>(1) is exempted from testifying about the subject matter of the declarant’s statement because the court rules that a <u>privilege</u> applies;</li> <li>(2) <u>refuses to testify</u> about the subject matter despite a court order to do so;</li> <li>(3) testifies to <u>not remembering</u> the subject matter;</li> <li>(4) cannot be present or testify at the trial or hearing because of <u>death</u> or a then-existing infirmity, <u>physical illness, or mental illness</u>; or</li> <li>(5) is <u>absent</u> from the trial or hearing and the statement’s proponent has not been able, by process or other reasonable means, to procure:             <ul style="list-style-type: none"> <li>(A) the declarant’s attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or</li> <li>(B) the declarant’s attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).</li> </ul> </li> </ul> <p>But this subdivision (a) does not apply if the statement’s <u>proponent procured or wrongfully caused</u> the declarant’s unavailability as a witness <u>in order to prevent</u> the declarant from attending or testifying.</p>

## Notes

- Sections 804(a)(4) and (5) formerly referred to a witness's absence from a "hearing." The Advisory Committee expanded these references to "trial or hearing" in the restyled rule. This change does not alter established law; courts clearly deemed trials a type of "hearing" under the former provisions. The change is notable only because the restyling usually contracted references rather than expanding them. The committee implemented this change to achieve consistency with other rules.
- Former Rule 804(a) provided that unavailability "includes" the five situations listed in that rule. The restyled rule states that "[a] declarant is considered to be unavailable" in the same five situations. The former rule arguably gave examples of unavailability, while the restyled one recites an exhaustive list; some observers have argued that this change is substantive.

Few cases address this issue, but at least one court construed the former rule as an illustrative list.<sup>19</sup> That court held that the four-year-old child of a homicide victim was "unavailable" to testify because of the child's fear of the courtroom. Courts addressing similar issues under the restyled rule will have to determine whether that ruling was an aberration and, if not, whether the restyled rule maintains the same illustrative meaning.

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<sup>19</sup> *Government of the Virgin Islands v. Riley*, 754 F. Supp. 61 (D.V.I. 1991).

Former Language	Restyled Language
<p align="center"><b>Rule 804. Hearsay Exceptions; Declarant Unavailable</b></p>	<p align="center"><b>Rule 804. Exceptions to the Rule Against Hearsay — When the Declarant Is Unavailable as a Witness</b></p>
<p>(b) <b>Hearsay exceptions.</b> The following are not excluded by the hearsay rule if the declarant is <u>unavailable</u> as a witness:</p> <p>(1) <b>Former testimony.</b> Testimony</p> <ul style="list-style-type: none"> <li>• given as a witness at another <u>hearing</u> of the same or a different proceeding, or in a <u>deposition</u> taken in compliance with law in the course of the same or another proceeding,</li> <li>• if the <u>party</u> against whom the testimony is now offered, or, in a <u>civil action</u> or proceeding, a <u>predecessor in interest</u>,</li> <li>• had an <u>opportunity</u> and</li> <li>• <u>similar motive</u> to develop the testimony by direct, cross, or redirect examination.</li> </ul> <p>....</p>	<p>(b) <b>The Exceptions.</b> The following are not excluded by the rule against hearsay if the declarant is <u>unavailable</u> as a witness:</p> <p>(1) <b>Former Testimony.</b> Testimony that:</p> <ul style="list-style-type: none"> <li>(A) was given as a witness at a <u>trial, hearing, or lawful deposition</u>, whether given during the current proceeding or a different one; and</li> <li>(B) is now offered against a <u>party</u> who had — or, in a <u>civil case</u>, whose <u>predecessor in interest</u> had — an <u>opportunity and similar motive</u> to develop it by direct, cross-, or redirect examination.</li> </ul> <p>....</p>

**Notes**

- Restyled Rule 804(b)(1) changes “civil action or proceeding” to “civil case.” A new definitional section, Restyled Rule 101(b)(1), eliminates any possibility of substantive change by noting that “‘civil case’ means a civil action or proceeding.”

Former Language	Restyled Language
<p align="center"><b>Rule 804. Hearsay Exceptions; Declarant Unavailable</b></p>	<p align="center"><b>Rule 804. Exceptions to the Rule Against Hearsay — When the Declarant Is Unavailable as a Witness</b></p>
<p>(b) <b>Hearsay exceptions.</b> The following are not excluded by the hearsay rule if the declarant is <u>unavailable</u> as a witness:</p> <p>....</p> <p>(2) <b>Statement under belief of impending death.</b> In a prosecution for <u>homicide or in a civil action</u> or proceeding, a statement made by a declarant while <u>believing</u> that the declarant’s death was <u>imminent</u>, <u>concerning the cause or circumstances</u> of what the declarant believed to be impending death.</p> <p>....</p>	<p>(b) <b>The Exceptions.</b> The following are not excluded by the rule against hearsay if the declarant is <u>unavailable</u> as a witness:</p> <p>....</p> <p>(2) <i>Statement Under the Belief of Imminent Death.</i> In a prosecution for <u>homicide or in a civil case</u>, a statement that the declarant, while <u>believing</u> the declarant’s death to be <u>imminent</u>, made <u>about its cause or circumstances</u>.</p> <p>....</p>

**Notes**

- Former Rule 804(b)(2) used the words “impending” and “imminent” to describe the nearness of the declarant’s approaching death. After researching the rule’s history, relevant case law, and other sources, the Advisory Committee concluded that these two words are synonymous. The restyled rule uses the single descriptor, “imminent,” to achieve consistency.

Former Language	Restyled Language
<p align="center"><b>Rule 804. Hearsay Exceptions; Declarant Unavailable</b></p>	<p align="center"><b>Rule 804. Exceptions to the Rule Against Hearsay — When the Declarant Is Unavailable as a Witness</b></p>
<p>(b) <b>Hearsay exceptions.</b> The following are not excluded by the hearsay rule if the declarant is <u>unavailable</u> as a witness:</p> <p>....</p> <p>(3) <b>Statement against interest.</b> A statement that:</p> <p>(A) a <u>reasonable person</u> in the declarant’s position would have made only if the person believed it to be true because, <u>when made</u>, it</p> <ul style="list-style-type: none"> <li>• was so contrary to the declarant’s <u>proprietary or pecuniary interest</u> or</li> <li>• had so great a tendency to <u>invalidate the declarant’s claim</u> against someone else or</li> <li>• to expose the declarant <u>to civil or criminal liability</u>; and</li> </ul> <p>(B) is supported by <u>corroborating</u> circumstances that clearly indicate its trustworthiness, if it is <u>offered in a criminal case</u> as one that tends to <u>expose the declarant to criminal liability</u>.</p> <p>....</p>	<p>(b) <b>The Exceptions.</b> The following are not excluded by the rule against hearsay if the declarant is <u>unavailable</u> as a witness:</p> <p>....</p> <p>(3) <i>Statement Against Interest.</i> A statement that:</p> <p>(A) a <u>reasonable person</u> in the declarant’s position would have made only if the person believed it to be true because, <u>when made</u>, it</p> <ul style="list-style-type: none"> <li>• was so contrary to the declarant’s <u>proprietary or pecuniary interest</u> or</li> <li>• had so great a tendency to <u>invalidate the declarant’s claim</u> against someone else or</li> <li>• to expose the declarant <u>to civil or criminal liability</u>; and</li> </ul> <p>(B) is supported by <u>corroborating</u> circumstances that clearly indicate its trustworthiness, if it is <u>offered in a criminal case</u> as one that tends to <u>expose the declarant to criminal liability</u>.</p> <p>....</p>

## **Notes**

- While engaged in the restyling project, the Advisory Committee proposed a substantive change to Rule 804(b)(3). That change, which took effect on December 1, 2010, expanded 804(b)(3)'s corroboration requirement to include statements offered by the prosecution in criminal cases. The Advisory Committee restyled the section while making this substantive change, so Restyled Rule 804(b)(3) is identical to the former (post-2010) one.
- Restyled Rule 804(b)(3), like previous versions of the rule, requires corroboration in a "criminal case." A new definitional section in Restyled Rule 101(b)(2) defines "criminal case" to include "a criminal proceeding." This expansion reflects existing practice under Rule 804(b)(3).

Former Language	Restyled Language
<p align="center"><b>Rule 804. Hearsay Exceptions; Declarant Unavailable</b></p>	<p align="center"><b>Rule 804. Exceptions to the Rule Against Hearsay — When the Declarant Is Unavailable as a Witness</b></p>
<p>(b) <b>Hearsay exceptions.</b> The following are not excluded by the hearsay rule if the declarant is <u>unavailable</u> as a witness:</p> <p>....</p> <p><b>(4) Statement of personal or family history.</b></p> <p>(A) A statement concerning the declarant’s own <u>birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history</u>, even though declarant had no means of acquiring personal knowledge of the matter stated; or</p> <p>(B) a statement concerning the foregoing matters, and death also, <u>of another person</u>, if the declarant was related to the other by blood, adoption, or marriage or was so <u>intimately associated</u> with the other’s family as to be likely to have accurate information concerning the matter declared.</p> <p>....</p>	<p>(b) <b>The Exceptions.</b> The following are not excluded by the rule against hearsay if the declarant is <u>unavailable</u> as a witness:</p> <p>....</p> <p><b>(4) <i>Statement of Personal or Family History.</i></b> A statement about:</p> <p>(A) the declarant’s own <u>birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption, or marriage, or similar facts of personal or family history</u>, even though the declarant had no way of acquiring personal knowledge about that fact; or</p> <p>(B) <u>another person</u> 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 <u>intimately associated</u> with the person’s family that the declarant’s information is likely to be accurate.</p> <p>....</p>

**Notes**

There are no notable changes in this section.

Former Language	Restyled Language
<p><b>Rule 804. Hearsay Exceptions; Declarant Unavailable</b></p>	<p><b>Rule 804. Exceptions to the Rule Against Hearsay — When the Declarant Is Unavailable as a Witness</b></p>
<p><b>(b) Hearsay exceptions.</b> The following are not excluded by the hearsay rule if the declarant is <u>unavailable</u> as a witness:</p> <p>....</p> <p><b>(5) [Other exceptions.]</b> [Transferred to Rule 807]</p> <p><b>(6) Forfeiture by wrongdoing.</b> A statement offered against a party that has engaged or acquiesced in <u>wrongdoing</u> that was <u>intended</u> to, and did, procure the <u>unavailability</u> of the declarant as a witness.</p>	<p><b>(b) The Exceptions.</b> The following are not excluded by the rule against hearsay if the declarant is <u>unavailable</u> as a witness:</p> <p>....</p> <p><b>(5) [Other Exceptions.]</b> [Transferred to Rule 807.]</p> <p><b>(6) <i>Statement Offered Against a Party That Wrongfully Caused the Declarant’s Unavailability.</i></b> A statement offered against a party that <u>wrongfully</u> caused — or acquiesced in wrongfully causing — the declarant’s <u>unavailability</u> as a witness, and did so <u>intending</u> that result.</p>

**Notes**

There are no notable changes in these sections.

Former Language	Restyled Language
<b>Rule 805. Hearsay Within Hearsay</b>	<b>Rule 805. Hearsay Within Hearsay</b>
Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.	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.

**Notes**

There are no notable changes in this rule.

Former Language	Restyled Language
<p><b>Rule 806. Attacking and Supporting Credibility of Declarant</b></p>	<p><b>Rule 806. Attacking and Supporting the Declarant’s Credibility</b></p>
<p>When a <u>hearsay</u> statement, <u>or a statement defined in Rule 801(d)(2)(C), (D), or (E)</u>, has been admitted in evidence,</p> <ul style="list-style-type: none"> <li>• the credibility of the declarant may be attacked,</li> <li>• and if attacked may be supported,</li> </ul> <p>by <u>any evidence</u> which would be admissible for those purposes if <u>declarant had testified as a witness</u>.</p> <p>Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant’s hearsay statement, is <u>not subject to</u> any requirement that the declarant may have been afforded an <u>opportunity to deny or explain</u>.</p> <p>If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement <u>as if under cross-examination</u>.</p>	<p>When a <u>hearsay</u> statement — <u>or a statement described in Rule 801(d)(2)(C), (D), or (E)</u> — has been admitted in evidence,</p> <ul style="list-style-type: none"> <li>• the declarant’s credibility may be attacked,</li> <li>• and then supported,</li> </ul> <p>by <u>any evidence</u> that would be admissible for those purposes <u>if the declarant had testified as a witness</u>.</p> <p>The court may admit evidence of the declarant’s inconsistent statement or conduct, <u>regardless of</u> when it occurred or whether the declarant had an <u>opportunity to explain or deny it</u>.</p> <p>If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement <u>as if on cross-examination</u>.</p>

**Notes**

There are no notable changes in this rule.

Former Language	Restyled Language
<p align="center"><b>Rule 807. Residual Exception</b></p>	<p align="center"><b>Rule 807. Residual Exception</b></p>
<p>A statement <u>not specifically covered by Rule 803 or 804</u> but having <u>equivalent circumstantial guarantees of trustworthiness</u>, is not excluded by the hearsay rule, if the court determines that</p> <p>(A) the statement is offered as evidence of a <u>material fact</u>;</p> <p>(B) the statement is <u>more probative</u> on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and</p> <p>(C) the general purposes of these rules and the <u>interests of justice</u> will best be served by admission of the statement into evidence.</p> <p>However, a statement may not be admitted under this exception unless the proponent of it <u>makes known to the adverse party</u> sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent’s intention to offer the statement and the particulars of it, including the name and address of the declarant.</p>	<p>(a) <b>In General.</b> Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is <u>not specifically covered by a hearsay exception in Rule 803 or 804</u>:</p> <p>(1) the statement has <u>equivalent circumstantial guarantees of trustworthiness</u>;</p> <p>(2) it is offered as evidence of a <u>material fact</u>;</p> <p>(3) it is <u>more probative</u> on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and</p> <p>(4) admitting it will best serve the purposes of these rules and the <u>interests of justice</u>.</p> <p>(b) <b>Notice.</b> The statement is admissible only if, before the trial or hearing, the proponent <u>gives an adverse party reasonable notice</u> of the intent to offer the statement and its particulars, including the declarant’s name and address, so that the party has a fair opportunity to meet it.</p>

**Notes**

There are no notable changes in this rule.

Former Language	Restyled Language
<p style="text-align: center;"><b>ARTICLE IX. AUTHENTICATION AND IDENTIFICATION</b></p> <p style="text-align: center;"><b>Rule 901. Requirement of Authentication or Identification</b></p>	<p style="text-align: center;"><b>ARTICLE IX. AUTHENTICATION AND IDENTIFICATION</b></p> <p style="text-align: center;"><b>Rule 901. Authenticating or Identifying Evidence</b></p>
<p><b>(a) General provision.</b> The requirement of authentication or identification as a <u>condition precedent</u> to admissibility is satisfied by evidence sufficient to <u>support a finding</u> that the matter in question is <u>what its proponent claims</u>.</p>	<p><b>(a) In General.</b> To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to <u>support a finding</u> that the item is <u>what the proponent claims</u> it is.</p>
<p><b>(b) Illustrations.</b> By way of <u>illustration only</u>, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:</p>	<p><b>(b) Examples.</b> The following are <u>examples only</u> — not a complete list — of evidence that satisfies the requirement:</p>
<p><b>(1) Testimony of witness with knowledge.</b> Testimony that a matter is what it is claimed to be.</p>	<p><b>(1) <i>Testimony of a Witness with Knowledge.</i></b> Testimony that an item is what it is claimed to be.</p>
<p><b>(2) Nonexpert opinion on handwriting.</b> Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.</p>	<p><b>(2) <i>Nonexpert Opinion About Handwriting.</i></b> A nonexpert's opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation.</p>
<p><b>(3) Comparison by trier or expert witness.</b> Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.</p>	<p><b>(3) <i>Comparison by an Expert Witness or the Trier of Fact.</i></b> A comparison with an authenticated specimen by an expert witness or the trier of fact.</p>

Former Language	Restyled Language
<p align="center"><b>Rule 901. Requirement of Authentication or Identification</b></p>	<p align="center"><b>Rule 901. Authenticating or Identifying Evidence</b></p>
<p><b>(4) Distinctive characteristics and the like.</b> Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.</p>	<p><b>(4) <i>Distinctive Characteristics and the Like.</i></b> The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.</p>
<p><b>(5) Voice identification.</b> Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.</p>	<p><b>(5) <i>Opinion About a Voice.</i></b> 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.</p>
<p><b>(6) Telephone conversations.</b> Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.</p>	<p><b>(6) <i>Evidence About a Telephone Conversation.</i></b> For a telephone conversation, evidence that a call was made to the number assigned at the time to:</p> <ul style="list-style-type: none"> <li><b>(A)</b> a particular person, if circumstances, including self-identification, show that the person answering was the one called; or</li> <li><b>(B)</b> a particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone.</li> </ul>

Former Language	Restyled Language
<p><b>Rule 901. Requirement of Authentication or Identification</b></p>	<p><b>Rule 901. Authenticating or Identifying Evidence</b></p>
<p><b>(7) Public records or reports.</b> Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.</p>	<p><b>(7) Evidence About Public Records.</b> Evidence that:</p> <ul style="list-style-type: none"> <li>(A) a document was recorded or filed in a public office as authorized by law; or</li> <li>(B) a purported public record or statement is from the office where items of this kind are kept.</li> </ul>
<p><b>(8) Ancient documents or data compilation.</b> Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.</p>	<p><b>(8) Evidence About Ancient Documents or Data Compilations.</b> For a document or data compilation, evidence that it:</p> <ul style="list-style-type: none"> <li>(A) is in a condition that creates no suspicion about its authenticity;</li> <li>(B) was in a place where, if authentic, it would likely be; and</li> <li>(C) is at least 20 years old when offered.</li> </ul>
<p><b>(9) Process or system.</b> Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.</p>	<p><b>(9) Evidence About a Process or System.</b> Evidence describing a process or system and showing that it produces an accurate result.</p>
<p><b>(10) Methods provided by statute or rule.</b> Any method of authentication or identification provided by Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority.</p>	<p><b>(10) Methods Provided by a Statute or Rule.</b> Any method of authentication or identification allowed by a federal statute or a rule prescribed by the Supreme Court.</p>

## Notes

- The Advisory Committee sought a phrase to describe the many types of evidence covered by Article IX. Former Rule 901(a) referred to “the matter in question,” while 901(b)(1) referred to the “matter.” But the word “matter” is quite abstract; its use in Rule 901 also evoked the confusing (and unrelated) phrase “truth of the matter asserted” in Rule 801. The committee settled on the terms “item of evidence” and “item” as more accurate descriptions of the evidence embraced by Article IX. The switch from “matter” to “item” was not intended to alter the types of evidence requiring authentication or identification.
- Restyled Rule 901(a) omits the awkward phrase “condition precedent.” The restyled rule simply notes that authentication or identification is a “requirement” for admitting evidence.
- The new definitional section in Restyled Rule 101(b)(3) expands Rule 901(b)(7)’s reference to a “public office.” The latter reference now includes any “public agency.” Former Rule 901 did not explicitly include public agencies, but the rule was interpreted broadly; the new definitional section should work no substantive change.
- The Advisory Committee shortened Rule 901(b)(7)’s reference to “public record, report, statement, or data compilation, in any form” to “public record or statement.” The new definitional section in Restyled Rule 101(b)(4) defines “record” to include “a memorandum, report, or data compilation,” maintaining the rule’s expansiveness. Restyled Rule 101(b)(6) complements this change by confirming that “a reference to any kind of written material or any other medium includes electronically stored information.”
- Former Rule 901(b)(10), like several other rules, referred to “rules prescribed by the Supreme Court pursuant to statutory authority.” That phrase included rules adopted under the Rules Enabling Act, but not rules created under the Court’s general supervisory power. The restyled rules maintain this limit, but transfer it to a new definitional section in Restyled Rule 101(b)(5). As that section makes clear, Restyled Rule 901’s reference to “rules prescribed by the Supreme Court” includes only rules “adopted by the Supreme Court under statutory authority.”

Former Language	Restyled Language
<p align="center"><b>Rule 902. Self-authentication</b></p>	<p align="center"><b>Rule 902. Evidence That Is Self-Authenticating</b></p>
<p>Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:</p> <p><b>(1) Domestic public documents under seal.</b> A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.</p>	<p>The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:</p> <p><b>(1) <i>Domestic Public Documents That Are Sealed and Signed.</i></b> A document that bears:</p> <p><b>(A)</b> 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</p> <p><b>(B)</b> a signature purporting to be an execution or attestation.</p>
<p><b>(2) Domestic public documents not under seal.</b> A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.</p>	<p><b>(2) <i>Domestic Public Documents That Are Not Sealed but Are Signed and Certified.</i></b> A document that bears no seal if:</p> <p><b>(A)</b> it bears the signature of an officer or employee of an entity named in Rule 902(1)(A); and</p> <p><b>(B)</b> another public officer who has a seal and official duties within that same entity certifies under seal — or its equivalent — that the signer has the official capacity and that the signature is genuine.</p>

Former Language	Restyled Language
<p><b>Rule 902. Self-authentication</b></p>	<p><b>Rule 902. Evidence That Is Self-Authenticating</b></p>
<p><b>(3) Foreign public documents.</b> A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.</p>	<p><b>(3) Foreign Public Documents.</b> A document that purports to be signed or attested by a person who is authorized by a foreign country’s law 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:</p> <ul style="list-style-type: none"> <li><b>(A)</b> order that it be treated as presumptively authentic without final certification; or</li> <li><b>(B)</b> allow it to be evidenced by an attested summary with or without final certification.</li> </ul>

Former Language	Restyled Language
<p><b>Rule 902. Self-authentication</b></p>	<p><b>Rule 902. Evidence That Is Self-Authenticating</b></p>
<p><b>(4) Certified copies of public records.</b> A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.</p>	<p><b>(4) <i>Certified Copies of Public Records.</i></b> 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:</p> <p><b>(A)</b> the custodian or another person authorized to make the certification; or</p> <p><b>(B)</b> a certificate that complies with Rule 902(1), (2), or (3), a federal statute, or a rule prescribed by the Supreme Court.</p>
<p><b>(5) Official publications.</b> Books, pamphlets, or other publications purporting to be issued by public authority.</p>	<p><b>(5) <i>Official Publications.</i></b> A book, pamphlet, or other publication purporting to be issued by a public authority.</p>
<p><b>(6) Newspapers and periodicals.</b> Printed materials purporting to be newspapers or periodicals.</p>	<p><b>(6) <i>Newspapers and Periodicals.</i></b> Printed material purporting to be a newspaper or periodical.</p>
<p><b>(7) Trade inscriptions and the like.</b> Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.</p>	<p><b>(7) <i>Trade Inscriptions and the Like.</i></b> An inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control.</p>
<p><b>(8) Acknowledged documents.</b> Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.</p>	<p><b>(8) <i>Acknowledged Documents.</i></b> 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.</p>

Former Language	Restyled Language
<p><b>Rule 902. Self-authentication</b></p>	<p><b>Rule 902. Evidence That Is Self-Authenticating</b></p>
<p><b>(9) Commercial paper and related documents.</b> Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.</p>	<p><b>(9) <i>Commercial Paper and Related Documents.</i></b> Commercial paper, a signature on it, and related documents, to the extent allowed by general commercial law.</p>
<p><b>(10) Presumptions under Acts of Congress.</b> Any signature, document, or other matter declared by Act of Congress to be presumptively or prima facie genuine or authentic.</p>	<p><b>(10) <i>Presumptions Under a Federal Statute.</i></b> A signature, document, or anything else that a federal statute declares to be presumptively or prima facie genuine or authentic.</p>

Former Language	Restyled Language
<p><b>Rule 902. Self-authentication</b></p>	<p><b>Rule 902. Evidence That Is Self-Authenticating</b></p>
<p><b>(11) Certified domestic records of regularly conducted activity.</b> The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority, certifying that the record—</p> <p>(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;</p> <p>(B) was kept in the course of the regularly conducted activity; and</p> <p>(C) was made by the regularly conducted activity as a regular practice.</p> <p>A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.</p>	<p><b>(11) <i>Certified Domestic Records of a Regularly Conducted Activity.</i></b> The original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)-(C), as shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record — and must make the record and certification available for inspection — so that the party has a fair opportunity to challenge them.</p>

Former Language	Restyled Language
<p><b>Rule 902. Self-authentication</b></p>	<p><b>Rule 902. Evidence That Is Self-Authenticating</b></p>
<p><b>(12) Certified foreign records of regularly conducted activity.</b> In a civil case, the original or a duplicate of a foreign record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration by its custodian or other qualified person certifying that the record—</p> <p>(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;</p> <p>(B) was kept in the course of the regularly conducted activity; and</p> <p>(C) was made by the regularly conducted activity as a regular practice.</p> <p>The declaration must be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.</p>	<p><b>(12) <i>Certified Foreign Records of a Regularly Conducted Activity.</i></b> In a civil case, the original or a copy of a foreign record that meets the requirements of Rule 902(11), modified as follows: the certification, rather than complying with a federal statute or Supreme Court rule, must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the country where the certification is signed. The proponent must also meet the notice requirements of Rule 902(11).</p>

**Notes**

- Restyled Rule 902(2) modestly expands the self-authentication of public documents that are not under seal. The former provision admitted those documents if (a) they were signed and

(b) a qualified public officer “certifie[d] under seal” that the signature was genuine. The former rule, in other words, required a seal of some type. The restyled rule allows self-authentication if the public officer certifies the signature “under seal — or its equivalent.” This change, arguably, changes the substantive law. But one of the goals of restyling was “to accommodate technological advances in the presentation of evidence.”<sup>20</sup> The committee considered the change in Rule 902(2) consistent with that goal.

- Restyled Rule 902, like Restyled Rule 901(a), omits the confusing and unnecessary phrase “condition precedent.” The rule also parallels Restyled Rule 901(a) by referring collectively to “items of evidence.” These changes have no substantive impact.
- The new definitional section in Restyled Rule 101(b)(3) expands Rule 902(4)’s reference to a “public office.” The latter phrase now includes any “public agency.” Former Rule 902 did not explicitly include public agencies, but the rule was interpreted broadly; the new definitional section should work no substantive change.
- Restyled Rule 902(4) refers simply to “an official record” rather than to an “official record or report or entry therein, . . . including data compilations in any form.” The new definitional sections in Restyled Rule 101(b)(4) & (6) preserve the expansive meaning of “record.”
- Former Rule 902(11), like several other rules, referred to “rules prescribed by the Supreme Court pursuant to statutory authority.” This phrase included rules adopted under the Rules Enabling Act, but not rules created under the Court’s general supervisory power. The restyled rules maintain this limit, but transfer it to a new definitional section in Restyled Rule 101(b)(5). As that section makes clear, Restyled Rule 902(11)’s reference to “rules prescribed by the Supreme Court” includes only rules “adopted by the Supreme Court under statutory authority.”

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<sup>20</sup> Daniel J. Capra, *Commentary on the Restyled Federal Rules of Evidence*, 2011 LexisNexis Emerging Issues 5875 (2011).

Former Language	Restyled Language
<b>Rule 903. Subscribing Witness' Testimony Unnecessary</b>	<b>Rule 903. Subscribing Witness's Testimony</b>
The testimony of a subscribing witness is <u>not necessary</u> to authenticate a writing <u>unless</u> required by the laws of the jurisdiction whose laws govern the validity of the writing.	A subscribing witness's testimony is <u>necessary</u> to authenticate a writing <u>only if</u> required by the law of the jurisdiction that governs its validity.

**Notes**

There are no notable changes in this rule.

Former Language	Restyled Language
<p style="text-align: center;"><b>ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS</b></p> <p style="text-align: center;"><b>Rule 1001. Definitions</b></p>	<p style="text-align: center;"><b>ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS</b></p> <p style="text-align: center;"><b>Rule 1001. Definitions That Apply to This Article</b></p>
<p>For purposes of this article the following definitions are applicable:</p> <p><b>(1) Writings and recordings.</b> “Writings” and “recordings” consist of</p> <ul style="list-style-type: none"> <li>• letters, words, or numbers, or their equivalent,</li> <li>• set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.</li> </ul> <p><b>(2) Photographs.</b> “Photographs” include still photographs, X-ray films, video tapes, and motion pictures.</p> <p><b>(3) Original.</b> An “original” of a writing or recording is</p> <ul style="list-style-type: none"> <li>• the writing or recording <u>itself</u> or</li> <li>• any <u>counterpart intended to have the same effect</u> by a person executing or issuing it.</li> <li>• An “original” of a photograph includes the <u>negative or any print</u> therefrom.</li> <li>• If data are stored in a computer or similar device, any <u>printout or other output readable by sight, shown to reflect the data accurately</u>, is an “original”.</li> </ul>	<p>In this article:</p> <p><b>(a)</b> A “writing” consists of letters, words, numbers, or their equivalent set down in any form.</p> <p><b>(b)</b> A “recording” consists of letters, words, numbers, or their equivalent recorded in any manner.</p> <p><b>(c)</b> A “photograph” means a photographic image or its equivalent stored in any form.</p> <p><b>(d)</b> An “original” of a writing or recording means</p> <ul style="list-style-type: none"> <li>• the writing or recording <u>itself</u> or</li> <li>• any <u>counterpart intended to have the same effect</u> by the person who executed or issued it.</li> <li>• For electronically stored information, “original” means any <u>printout — or other output readable by sight — if it accurately reflects</u> the information.</li> <li>• An “original” of a photograph includes the <u>negative or a print</u> from it.</li> </ul>

Former Language	Restyled Language
<b>Rule 1001. Definitions</b>	<b>Rule 1001. Definitions That Apply to This Article</b>
<p><b>(4) Duplicate.</b> A “duplicate” is a counterpart produced by the <u>same impression</u> as the original, or from the <u>same matrix</u>, or by means of <u>photography</u>, including enlargements and miniatures, or by <u>mechanical or electronic re-recording</u>, or by <u>chemical reproduction</u>, or by other <u>equivalent techniques</u> which <u>accurately reproduces</u> the original.</p>	<p><b>(e)</b> A “duplicate” means a counterpart produced by a <u>mechanical, photographic, chemical, electronic, or other equivalent process</u> or technique that <u>accurately reproduces</u> the original.</p>

**Notes**

- Restyled Rule 1001, like the former rule, defines a series of terms used throughout Article X. These definitions apply only to the eight rules in Article X. Within that article, the specific definitions supersede the general definitions in Restyled Rule 101(b). The committee attempted to avoid any confusion on the latter point by using somewhat different terms in Article X than those defined in Restyled Rule 101(b). Restyled Rule 1001(a), for example, defines a “writing,” while Restyled Rule 101(b)(6) expands references to “written material.”
- The Advisory Committee eliminated many of the specific references in this rule. Restyled Rule 1101, for example, omits express mention of “still photographs, X-ray films, video tapes, and motion pictures.” In place of these specifics, the committee crafted general definitions intended to encompass old, new, and future technologies.

Former Language	Restyled Language
<b>Rule 1002. Requirement of Original</b>	<b>Rule 1002. Requirement of the Original</b>
To <u>prove the content</u> of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.	An original writing, recording, or photograph is required in order to <u>prove its content</u> unless these rules or a federal statute provides otherwise.

**Notes**

There are no notable changes in this rule.

Former Language	Restyled Language
<b>Rule 1003. Admissibility of Duplicates</b>	<b>Rule 1003. Admissibility of Duplicates</b>
<p>A duplicate is admissible to the <u>same extent</u> as an original unless</p> <p>(1) a genuine question is raised as to the <u>authenticity</u> of the original or</p> <p>(2) in the circumstances it would be <u>unfair</u> to admit the duplicate in lieu of the original.</p>	<p>A duplicate is admissible to the <u>same extent</u> as the original unless a genuine question is raised about the original's <u>authenticity</u> or the circumstances make it <u>unfair</u> to admit the duplicate.</p>

**Notes**

There are no notable changes in this rule.

Former Language	Restyled Language
<p align="center"><b>Rule 1004. Admissibility of Other Evidence of Contents</b></p>	<p align="center"><b>Rule 1004. Admissibility of Other Evidence of Content</b></p>
<p>The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if—</p> <p><b>(1) Originals lost or destroyed.</b> All originals are lost or have been destroyed, unless the proponent lost or destroyed them in <u>bad faith</u>; or</p> <p><b>(2) Original not obtainable.</b> No original can be obtained by any available <u>judicial process or procedure</u>; or</p> <p><b>(3) Original in possession of opponent.</b> At a time when an original was under the control of the party against whom offered, that party was <u>put on notice</u>, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or</p> <p><b>(4) Collateral matters.</b> The writing, recording, or photograph is not <u>closely related to a controlling issue</u>.</p>	<p>An original is not required and other evidence of the content of a writing, recording, or photograph is admissible if:</p> <p><b>(a)</b> all the originals are lost or destroyed, and not by the proponent acting in <u>bad faith</u>;</p> <p><b>(b)</b> an original cannot be obtained by any available <u>judicial process</u>;</p> <p><b>(c)</b> the party against whom the original would be offered had control of the original; was at that time <u>put on notice</u>, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or</p> <p><b>(d)</b> the writing, recording, or photograph is not <u>closely related to a controlling issue</u>.</p>

**Notes**

There are no notable changes in this rule.

Former Language	Restyled Language
<p align="center"><b>Rule 1005. Public Records</b></p>	<p align="center"><b>Rule 1005. Copies of Public Records to Prove Content</b></p>
<p>The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by</p> <ul style="list-style-type: none"> <li>• copy, certified as correct in accordance with <u>rule 902</u> or</li> <li>• testified to be correct by a <u>witness who has compared it with the original</u>.</li> </ul> <p>If a copy which complies with the foregoing cannot be obtained by the exercise of <u>reasonable diligence</u>, then <u>other evidence</u> of the contents may be given.</p>	<p>The proponent may use a copy to prove the content of an official record — or of a document that was recorded or filed in a public office as authorized by law — if these conditions are met:</p> <ul style="list-style-type: none"> <li>• the record or document is otherwise admissible; and</li> <li>• the copy is certified as correct in accordance with <u>Rule 902(4)</u> or is testified to be correct by a <u>witness who has compared it with the original</u>.</li> </ul> <p>If no such copy can be obtained by <u>reasonable diligence</u>, then the proponent may use <u>other evidence</u> to prove the content.</p>

**Notes**

- Restyled Rule 1001 does not define “record,” so the general definition in Restyled Rule 101(b)(4) applies to Rule 1005. The records referenced here, therefore, include memoranda, reports, and data compilations.

Former Language	Restyled Language
<b>Rule 1006. Summaries</b>	<b>Rule 1006. Summaries to Prove Content</b>
<p>The contents of voluminous writings, recordings, or photographs which <u>cannot conveniently be examined in court</u> may be presented in the form of a <u>chart, summary, or calculation</u>. The originals, or duplicates, shall be made <u>available for examination or copying</u>, or both, by other parties at reasonable time and place. <u>The court may order</u> that they be produced in court.</p>	<p>The proponent may use a <u>summary, chart, or calculation</u> to prove the content of voluminous writings, recordings, or photographs that <u>cannot be conveniently examined in court</u>. The proponent must make the originals or duplicates <u>available for examination or copying</u>, or both, by other parties at a reasonable time and place. And the <u>court may order</u> the proponent to produce them in court.</p>

### Notes

- Restyled Rule 1006 substitutes the word “must” for “shall.” This reflects the mandatory meaning of “shall” in the former rule.

Former Language	Restyled Language
<p align="center"><b>Rule 1007. Testimony or Written Admission of Party</b></p>	<p align="center"><b>Rule 1007. Testimony or Statement of a Party to Prove Content</b></p>
<p>Contents of writings, recordings, or photographs may be proved</p> <ul style="list-style-type: none"> <li>• by the <u>testimony or deposition</u> of the party against whom offered or</li> <li>• by that party's <u>written admission</u>,</li> </ul> <p>without accounting for the nonproduction of the original.</p>	<p>The proponent may prove the content of a writing, recording, or photograph by the <u>testimony, deposition, or written statement</u> of the party against whom the evidence is offered. The proponent need not account for the original.</p>

### Notes

- Restyled Rule 1007, like Restyled Rule 801(d)(2), eliminates the misleading word “admission.” Any “statement of [a] party” may prove the content of a writing; parties need not worry whether the statement is an “admission.”

Former Language	Restyled Language
<p align="center"><b>Rule 1008. Functions of Court and Jury</b></p>	<p align="center"><b>Rule 1008. Functions of the Court and Jury</b></p>
<p>When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is <u>ordinarily for the court</u> to determine in accordance with the provisions of rule 104. However, when an issue is raised</p> <p>(a) whether the asserted writing <u>ever existed</u>, or</p> <p>(b) whether <u>another</u> writing, recording, or photograph produced at the trial is the <u>original</u>, or</p> <p>(c) whether <u>other evidence</u> of contents <u>correctly reflects</u> the contents,</p> <p>the issue is for the trier of fact to determine as in the case of other issues of fact.</p>	<p><u>Ordinarily, the court determines</u> whether the proponent has fulfilled the factual conditions for admitting other evidence of the content of a writing, recording, or photograph under Rule 1004 or 1005.</p> <p>But in a jury trial, the jury determines — in accordance with Rule 104(b) — any issue about whether:</p> <p>(a) an asserted writing, recording, or photograph <u>ever existed</u>;</p> <p>(b) <u>another</u> one produced at the trial or hearing is the <u>original</u>; or</p> <p>(c) <u>other evidence</u> of content <u>accurately reflects</u> the content.</p>

**Notes**

There are no notable changes in this rule.

Former Language	Restyled Language
<p><b>ARTICLE XI. MISCELLANEOUS RULES</b></p> <p><b>Rule 1101. Applicability of Rules</b></p>	<p><b>ARTICLE XI. MISCELLANEOUS RULES</b></p> <p><b>Rule 1101. Applicability of the Rules</b></p>
<p><b>(a) Courts and judges.</b> These rules apply to the United States <u>district courts</u>, the District Court of <u>Guam</u>, the District Court of the <u>Virgin Islands</u>, the District Court for the <u>Northern Mariana Islands</u>, the United States <u>courts of appeals</u>, the <u>United States Claims Court</u>, and to United States <u>bankruptcy judges</u> and United States <u>magistrate judges</u>, in the actions, cases, and proceedings and to the extent hereinafter set forth. The terms “judge” and “court” in these rules include United States bankruptcy judges and United States magistrate judges.</p>	<p><b>(a) To Courts and Judges.</b> These rules apply to proceedings before:</p> <ul style="list-style-type: none"> <li>• United States <u>district courts</u>;</li> <li>• United States <u>bankruptcy and magistrate judges</u>;</li> <li>• United States <u>courts of appeals</u>;</li> <li>• the United States <u>Court of Federal Claims</u>; and</li> <li>• the district courts of <u>Guam</u>, the <u>Virgin Islands</u>, and the <u>Northern Mariana Islands</u>.</li> </ul>
<p><b>(b) Proceedings generally.</b> These rules apply generally to <u>civil</u> actions and proceedings, including <u>admiralty</u> and maritime cases, to <u>criminal</u> cases and proceedings, to <u>contempt</u> proceedings <u>except</u> those in which the court may act <u>summarily</u>, and to proceedings and cases under <u>title 11, United States Code</u>.</p>	<p><b>(b) To Cases and Proceedings.</b> These rules apply in:</p> <ul style="list-style-type: none"> <li>• <u>civil</u> cases and proceedings, including bankruptcy, <u>admiralty</u>, and maritime cases;</li> <li>• <u>criminal</u> cases and proceedings; and</li> <li>• <u>contempt</u> proceedings, <u>except</u> those in which the court may act <u>summarily</u>.</li> </ul>
<p><b>(c) Rule of privilege.</b> The rule with respect to <u>privileges applies at all stages</u> of all actions, cases, and proceedings.</p>	<p><b>(c) Rules on Privilege.</b> The rules on <u>privilege apply to all stages</u> of a case or proceeding.</p>

Former Language	Restyled Language
<p><b>Rule 1101. Applicability of Rules</b></p>	<p><b>Rule 1101. Applicability of the Rules</b></p>
<p><b>(d) Rules inapplicable.</b> The rules (<u>other than with respect to privileges</u>) do not apply in the following situations:</p> <p><b>(1) Preliminary questions of fact.</b> The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under rule 104.</p> <p><b>(2) Grand jury.</b> Proceedings before grand juries.</p> <p><b>(3) Miscellaneous proceedings.</b></p> <ul style="list-style-type: none"> <li>• Proceedings for <u>extradition</u> or rendition;</li> <li>• <u>preliminary examinations</u> in criminal cases;</li> <li>• <u>sentencing</u>, or granting or revoking <u>probation</u>;</li> <li>• issuance of <u>warrants</u> for arrest, criminal summonses, and search warrants;</li> <li>• and proceedings with respect to release on <u>bail</u> or otherwise.</li> </ul>	<p><b>(d) Exceptions.</b> These rules — <u>except for those on privilege</u> — do not apply to the following:</p> <p><b>(1)</b> the court’s determination, under Rule 104(a), on a <u>preliminary question of fact</u> governing admissibility;</p> <p><b>(2)</b> <u>grand-jury</u> proceedings; and</p> <p><b>(3)</b> miscellaneous proceedings <u>such as</u>:</p> <ul style="list-style-type: none"> <li>• <u>extradition</u> or rendition;</li> <li>• issuing an <u>arrest warrant</u>, criminal summons, or search warrant;</li> <li>• a <u>preliminary examination</u> in a criminal case;</li> <li>• <u>sentencing</u>;</li> <li>• granting or revoking <u>probation</u> or supervised release; and</li> <li>• considering whether to release on <u>bail</u> or otherwise.</li> </ul>
<p><b>(e) Rules applicable in part.</b> In the following proceedings these rules apply to the extent that matters of evidence are not provided for in the statutes which govern procedure therein or in other rules prescribed by the Supreme Court pursuant to statutory authority: [listing of statutes omitted].</p>	<p><b>(e) Other Statutes and Rules.</b> A federal statute or a rule prescribed by the Supreme Court may provide for admitting or excluding evidence independently from these rules.</p>

**Notes**

- Rule 1101(d)(3) lists miscellaneous proceedings in which the Rules of Evidence do not apply. The former rule read as an exhaustive list; its only open-ended portion was the final

reference to “proceedings with respect to release on bail or otherwise.” As the district court observed in *United States v. Honken*, that language “[did] not create a ‘catchall’ category of ‘miscellaneous proceedings’ to which the Rules of Evidence do not apply. Rather, that language modifie[d] only conditions of release.”<sup>21</sup>

The Restyled Rule substitutes an illustrative list for the exhaustive one. Restyled Rule 1101(d)(3) declares that the Rules of Evidence do not apply in “miscellaneous proceedings such as,” followed by a list of particular proceedings. In our opinion, this is a substantive change.

The committee considered the change stylistic because it found that some courts had already extended 1101(d)(3) to a variety of unenumerated proceedings. “It would seem useful,” the committee concluded, “to let the practitioner know that the rule is not exclusive. Adding ‘such as’ is not a substantive change because it simply recognizes, and does not attempt to change, the substantive law.”<sup>22</sup>

The committee was correct that some courts have read Rule 1101(d)(3) broadly. But that practice is more controversial than the committee realized. In the *Honken* case, the court refused to apply 1103(d)(3) to a hearing on whether to shackle the defendant in a murder prosecution; the court concluded that the Rules of Evidence apply fully to that determination. Similarly, in *United States v. Vaccaro*,<sup>23</sup> the court refused to apply Rule 1101(d)(3) to a hearing on bond forfeiture. In reaching that conclusion, the court stressed the need to “read Fed. R. Evid. 1101(d)(3) narrowly.”<sup>24</sup> Courts have also refused to apply 1101(d)(3) to a hearing on whether to continue a restraining order<sup>25</sup> and to one on a class action certification.<sup>26</sup>

Courts, in sum, have disputed the scope of Rule 1101(d)(3). The restyled rule appears to change the terms of that debate by recasting the provision as an illustrative rule rather than an exhaustive one. Scholars and practitioners should watch for how this change affects court rulings.

- In addition to the general change in Rule 1101(d)(3), the committee added one type of proceeding, those related to “supervised release,” to the list of proceedings described in the section. Courts had already analogized those proceedings to ones granting or revoking parole; this change seems less substantive than the more general one.

<sup>21</sup> 378 F. Supp. 2d 1010, 1023 (N.D. Iowa 2004).

<sup>22</sup> Advisory Committee on Evidence Rules, Materials for the April 2009 Meeting, at 170 (available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Evidence/EV2009-04.pdf>).

<sup>23</sup> 719 F. Supp. 1510 (D. Nev. 1989), *appeal dismissed*, 931 F.2d 605 (9th Cir. 1991), *aff'd after remand*, 51 F.3d 189 (9th Cir. 1995). The court emphatically adhered to its position in response to the government’s motion for reconsideration. 719 F. Supp. 1522 (D. Nev. 1989).

<sup>24</sup> *Id.* at 1515.

<sup>25</sup> *United States v. Veon*, 538 F. Supp. 237, 249 (E.D. Cal. 1982) (“Inasmuch as the rules do not specify as an exception a hearing relating to the continuation of a restraining order, it would appear that by the very terms of the rules they apply to this proceeding.”).

<sup>26</sup> *Lewis v. First Am. Title Ins. Co.*, 265 F.R.D. 536, 544 (“Rule 1101 . . . does not except or change the application of the FRE at the class certification stage.”). *See also* *Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928, 938 (7th Cir. 1989)(class action “[f]airness proceedings . . . are not among the proceedings excepted from the Rules of Evidence”) (dictum).

- Restyled section (e) eliminates the former rule's list of federal statutes that modify applicability of the Federal Rules of Evidence. Instead, the restyled section notes generally that a statute or Supreme Court rule may affect applicability of the rules.

Former Language	Restyled Language
<b>Rule 1102. Amendments</b>	<b>Rule 1102. Amendments</b>
Amendments to the Federal Rules of Evidence may be made as provided in section 2072 of title 28 of the United States Code.	These rules may be amended as provided in 28 U.S.C. § 2072.

**Notes**

There are no notable changes in this rule.

<b>Former Language</b>	<b>Restyled Language</b>
<b>Rule 1103. Title</b>	<b>Rule 1103. Title</b>
These rules may be known and cited as the Federal Rules of Evidence.	These rules may be cited as the Federal Rules of Evidence.

**Notes**

There are no notable changes in this rule.