

Unit 2—Overview of the Federal Rules of Evidence

The law of evidence is a set of rules and principles that govern the admissibility of evidence into various types of judicial and administrative proceedings. Evidence is any matter, verbal, physical or electronic that can be used to support the existence of a factual proposition. One of its main purposes is to protect the jury from being misled.

There are two basic categories of evidence, direct and circumstantial. Within these general groups there exist three types of evidence: testimonial, physical, and demonstrative. Any kind of evidence to be considered in a legal context must comply with the admissibility requirements of relevancy and materiality.

Direct evidence tends to show the existence of a fact in question without the intervention of proving any other fact: Is the evidence to be believed without inferences or conclusions from it? Direct evidence depends on the credibility of the witness. For example, W testifies that she saw D strangle V with a stocking. W's testimony is direct evidence on the issue of whether D did in fact strangle V with a stocking, since if that testimony is believed, the issue is resolved.

Circumstantial evidence depends on both the credibility of the witness and inferences from the witness. Circumstantial evidence is evidence which, even if believed, does not resolve the matter at issue unless additional reasoning is used to reach the proposition to which the evidence is directed. For example, consider the prosecution of D for strangling V. W, a policeman, testifies that shortly after hearing V's screams, he saw D running from the scene of the crime, and, after stopping D, found a stocking in D's pocket. While this testimony is direct evidence on the issues of whether D was at the scene of the crime, was fleeing, and had a stocking in his pocket, it is merely circumstantial evidence as to whether D did the strangling. This is so because only by the application of additional reasoning does the evidence lead to the proposition to which it is addressed.

The relevance of proffered evidence differs dramatically depending on whether the

evidence is direct or circumstantial. When evidence is direct, so long as it is offered to help establish a material issue, it cannot be irrelevant. Circumstantial evidence, even if offered to prove a material fact, will be found to be irrelevant if the evidence has no probative value, i.e., it does not affect the probability of the proposition to which it was directed.

Evidence may be testimonial (witness), physical (tangible objects and parts of the body), or demonstrative. Testimonial evidence is premised upon the witness' personal knowledge and relies on the person's five senses. Physical evidence is perceived as indisputable, scientifically sound and most important, neutral. The value of physical evidence cannot be understated. It is the silent, definitive witness. Physical evidence offers certainty and certainty equals proof. In 1953, the criminologist P.L. Kirk wrote that physical evidence cannot be absent because human witnesses are. It cannot perjure itself; only its interpretation can err. Only human failure to find it, study it, and understand it can diminish its value.

The means by which physical evidence becomes proof is through forensic science. It often involves submission of some tangible object that was directly involved in the situation or incident (document, passport, weapon, narcotics, drugs, clothing, tax return, blood, hair, etc). Demonstrative evidence serves as an audio-visual aid and is designed to assist the trier of fact in understanding the witness' testimony. It can include maps, models, x-rays, diagrams, models, computer graphics, statistics, etc.

Authentication

Authentication requires the party offering contested evidence to provide a basis for the fact finder to believe that the item is what the proponent claims it to be. It requires also that the evidence be in substantially the same condition it was when it was obtained or seized. The principles of authentication apply to any physical items described in testimony or offered into evidence, including witness statements. The most common form of authentication or identification of tangible objects (letters, memos, documents, photographs, tools, weapons, etc) is to simply have the witness identify them on the basis of his or her own personal knowledge (what the witness saw, heard, tasted, felt, or smelled). The proponent must introduce evidence

that the matter is what its party claims it is.

Evidence is susceptible to tampering, loss, substitution, degradation, or mistake and is not always capable of easy recognition. Therefore, the item must be authenticated. Aspects of authentication include the nature of the article; the circumstances surrounding its preservation and its custody; and the likelihood of alteration, degradation, contamination, or tampering (*Gallego v. U.S.*, 276 F.2d 914 (9th Cir. 1960)). The party intending to use the item as evidence must establish that the quality or condition has not substantially changed from its original state when collected or seized to when it is offered into evidence.

A complete independent historical accounting and rendition of the item must be documented to maintain the item's integrity, not just whether the item has been subject to change. Establishing the item's condition is accomplished through testimony of successive custodians, commonly called a chain of custody. This is typically established by having each person (each link in the chain) who has had contact with the item show (1) the circumstances under which custody was taken; (2) the precautions taken to prevent alteration, degradation, contamination, or tampering; (3) that change or tampering has not occurred; and (4) the circumstances under which the person relinquished care, custody, and control of the item. If the real evidence is fungible, not readily identifiable, or is of a type that might change in condition (narcotics), then it must be authenticated through a chain of custody. A short chain of custody significantly reduces the occurrence of problems. A serious or prolonged break in the item's accounting may render it admissible.

Example: D is charged with stabbing V to death. W is a police officer who inspected the crime scene shortly after the killing occurred. After W testifies about beginning the inspection of the crime scene, the following testimony would authenticate the knife as the murder weapon:

Prosecutor: What did you do during this inspection?

Witness: I looked for any evidence of what had killed the deceased.

Pros: What did you find?

W: I found a knife next to the body, which was a pearl-handled switchblade about 10

inches long, coated with a sticky red substance.

Pros: What did you do then?

W: In the case of a comparatively inexpensive object like this one, I mark it for identification by scratching my initials and date on the handle. They are right there.

Pros: Has the exhibit changed since you found it?

W: No, it seems to be in the same condition I found it.

Pros: Your Honor, I now offer People's exhibit no. 1 for identification into evidence.

Court: It will be received.

The trustworthiness of safeguarding an item's integrity cannot be understated, especially in criminal cases. The chain of custody is used to assist in the identification and authentication of evidence that (1) it is what it purports to be and (2) it has not been substantially changed for any reason from its original state. If the item has been substantially changed, its value is reduced or negated since it may mislead or confuse the jury. Therefore, it is not admissible. A reasonable degree of certainty is required to establish that the item has been traced accurately through its chain of custody.

The chain of custody method of authentication requires that every link in the chain—every person who has handled or possessed the object since it was first recognized as relevant—must explain what he did with it.

Example: D is charged with selling cocaine to an undercover agent. Before the prosecution may introduce a bag of white substance as being the cocaine sold by D, it would need to call the undercover agent, the person to whom he turned over the bag, the chemist who performed the test, the person to whom the chemist gave the drug, and anyone else who had custody of the drug up until the appearance of the packet in court. Each witness would testify how he handled the item (e.g., I put the glassine envelope into a large gray envelope, which I sealed and marked with the name of the case and the date, and placed it in the police safe used for evidence). Each witness would also be asked: (1) whether the condition of the object appears to be the same as when he or she had custody of it, and (2) whether anyone else had

access to the evidence during the time the witness had custody.

A key reason for the elaborate chain-of-custody method is to prevent tampering with evidence. The chain-of-custody method is most often used by the prosecution in a criminal case.

Where the evidence is “demonstrative” (i.e., used merely to illustrate some fact or evidence in the case) the function of authentication is quite different. Here, the object is authenticated not by showing that it is the one that was actually used in the underlying events, but rather, by showing that it fairly represents some aspect of the case.

Example: In a complicated multi-defendant bank robbery case, the prosecution offers into evidence a diagram showing the positions of the witnesses, victims, and defendants during the robbery. This diagram will have to be authenticated by a sponsoring witness who can testify that it fairly represents the actual positions of those involved. In this case, that will have to be someone who personally witnesses the robbery.

The Federal Rules of Evidence state a simple principle of authentication. FRE 901 provides that “the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponents claims. This general principle controls all authentications and identifications.

The FRE do not purport to give detailed standards for authenticating each of the many special types of evidence. Instead, FRE 901 (b) gives 10 illustrations of authentication. Here are 5 of those illustrations:

1. Testimony or witness with knowledge—testimony that a matter is what it is claimed to be.
2. Nonexpert opinion on handwriting—nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of litigation.
3. Comparison by trier or expert witness—comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

4. Voice identification—identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

5. Public records or reports—evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

Most authentication problems arise with respect to writings and other communications. Special rules have developed to handle some recurring issues in this area.

1. Authorship—usually, authentication of a writing will consist of showing who its author is.

2. No presumption of authenticity: The general requirement of authentication applies to writings and other communications every bit as much as it applies to non-assertive evidence like a knife or a bloodstained bedspread: no presumption of authenticity. Instead, the proponent bears the burden of making an affirmative showing that the writing or communication is authentic.

Example: D is charged with illegally possessing a firearm while a convicted felon. The prosecution attempts to prove that D was previously convicted of robbery in Colorado. To do this, the prosecution offers two documents that appear on their face to have come from the Denver Police Department: (1) a police record sheet recording the arrest and conviction of one Carl Smith for robbery and (2) a fingerprint card bearing the signature “Carl Smith,” which the prosecution’s handwriting expert says was signed by D and which the prosecution’s fingerprint expert says matches D’s known fingerprints. No one testifies as to the authenticity of these two documents and D objects to their admission on authenticity grounds. The trial judge overrules the objection.

On appeal, held that two documents were not properly authenticated and should not have been admitted. Testimony was needed to establish that these documents really did come

from the Denver PD. The testimony could have been supplied by an officer of the Denver PD. Alternatively, someone from the FBI could have testified about requesting and receiving the documents from the Denver PD. *U.S. v. Dockins*, 986 F.2d 888 (5th Cir. 1993).

3. Signature: Most dramatically, the requirement that documents be authenticated means that a writing's own recital regarding its authorship will not be automatically believed. Similarly, the fact that a document bears a particular person's signature does not by itself authenticate the document as being written by that person.

4. Distinctive characteristics: There is an increasing trend to allow a writing's distinctive characteristics and the circumstances surrounding it, to suffice for authentication.

Example: In a complicated antitrust case, the Ps seek introduction of certain diaries by Mr. Yajima, an employee of one of the Ds, who is now dead. The Ps claim that the diaries are authentic accounts of what took place at the meetings of an industry trade group at which the Ds conspired in restraint of trade. A court ruled that the plaintiffs have made a prima facie case for the diaries to be considered authentic. This conclusion is supported by a wide variety of internal and extrinsic clues, including (1) a logo of D's corporate employer, found on the diaries; (2) testimony given by Mr. Yajima in a prior proceeding; (3) the fact that Yajima's employer produced the diaries during discovery, and referred to them in its interrogatory answers; and (4) the diaries' similarity to other documents that had previously been authenticated. *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 505 F.Supp. 1190 (E.D. Pa. 1980).

The Admissibility of Evidence

Before an item can be considered as evidence, a proper legal foundation must be laid for its admission. Admissibility is premised upon relevance and materiality. Relevance is the unifying principle underlying evidentiary rules. Relevance involves analysis of the relationship between the factual proposition and substantive law. Evidence is relevant only if it

(1) tends to prove or disprove a proposition of fact (probative value);

Example: P is injured when he is hit by D's car. In a negligence suit against D, he offers testimony by W that she saw D driving at what she believed to be around 55 MPH. There is a

link between W's testimony and a factual proposition asserted by P (that D was traveling around 55 MPH)—W's testimony makes it more likely that D was actually traveling at 55 MPH than if W did not testify.

(2) is material to a charge, claim, or defense. There must be a link between the factual proposition which the evidence tends to establish and the substantive law.

Example: on the facts of the last example, assume that the speed limit at the site of the accident was 35 MPH. W's testimony satisfies this second link, because evidence that D was exceeding the speed limit by 20 MPH affects a fundamental substantive law issue in the case, namely, whether D was negligent. If, on the other hand, the local speed limit was 55 MPH this link would not be present.

Does the evidence have a tendency to make the existence of a fact more probable? Does the evidence have probative value (that which tends to produce belief)? If the answer is yes, then it is usually admitted as relevant evidence unless otherwise excluded by law or as being unduly prejudicial. Evidence that is not relevant is not admissible. The most common situation where the evidence is irrelevant involves legal irrelevance—if the item in question simply does not tie in with the legal elements of a claim or defense it will be irrelevant.

Example:

D is in a car accident and is convicted of the criminal offense of operating an unregistered vehicle. In a later suit, the sole issue is whether D behaved negligently during the accident. The conviction will be irrelevant, because driving an unregistered vehicle does not make it more likely that D drove negligently.

To be admissible as evidence, testimony must be limited to facts—not speculation or opinion (unless the witness is testifying as an expert) and must be based on the direct knowledge of the witness. In general, a witness has direct knowledge if the witness did the act, saw it done, or heard it directly from a party to the action. If the witness heard about the transaction from third parties, or read about it in documents prepared by third parties, the evidence may be excluded as hearsay.

Federal Rules of Evidence

Overview

The Federal Rules of Evidence govern the admissibility of evidence at civil and criminal trials in federal courts. The rules generally must be followed in all federal courts. Many state legislatures have adopted rules patterned after the federal rules for use in state courts. This is especially true for rules applicable to experts. The purpose of the rules is to provide a system for speedy and fair trials. The rules require evidence to be presented in a manner the legislative branch and appellate courts have determined is best designed to reach the truth.

One of the findings in *Mattco Forge v. Arthur Young & Co.*, 45 Cal. Rptr.2d 581 (Cal. Ct. App. 1995)(later overturned) related to the fact that the CPAs providing the litigation service did not have an adequate understanding of the applicable rules of evidence or rules of civil procedure. Thus, it is incumbent upon each student to learn the basics the rules of evidence and rules of procedure covered in this course.

Background

The Federal Rules of Evidence are organized into the following eleven articles:

- I. General Provisions
- II. Judicial Notice
- III. Presumptions in Civil Actions and Proceedings
- IV. Relevancy and Its Limits
- V. Privileges
- VI. Witnesses
- VII. Opinions and Expert Testimony
- VIII. Hearsay
- IX. Authentication and Identification
- X. Contents of Writings, Recordings, and Photographs
- XI. Miscellaneous Rules

Relevancy of Evidence

Rule 401—Definition of Relevant Evidence. This rule defines relevant evidence.

Evidence is relevant if it tends to prove or disprove an alleged fact. For example, in a civil fraud suit, if the plaintiff alleges the defendant embezzled cash deposits and deposited them into his or her bank account, the defendant's bank statement would be relevant evidence.

Rule 402—Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible.

Relevant evidence is generally admissible and irrelevant evidence is inadmissible. In the example above, the defendant's bank statements for accounts not used in the fraud would not be relevant to proving the funds were stolen and would not be admissible for that purpose. However, if the issue was the defendant's lifestyle, the bank statements might be relevant and might be admissible for that purpose.

Rule 403—Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time. While relevant evidence is generally admissible, relevant evidence may be excluded if it is unduly prejudicial, threatens to confuse the jury, or to cause an unnecessary delay, waste of time, or is needlessly repetitive.

When a court is weighing an item's probative value against its prejudicial effect, the court should normally compare the proffered item against other possible evidence on the same point. If the alternative evidence has the same or nearly the same probative effect, and much less prejudicial value, the court should normally insist that the less prejudicial item be used.

Example: D is charged with the crime of possession of a firearm while having a prior felony conviction and also with the crime of assault with a deadly weapon. D offers to stipulate that he has a prior felony conviction. The trial judge instead allows the prosecution to read the prior judgment to the jury. Consequently, the jury learns that the prior conviction was for aggravated assault and that D was sentenced to 5 years imprisonment on it. The Supreme Court of the US held that the judge should have compared the probative value and prejudicial effect of reading the actual judgment to the jury with the probative value and prejudicial effect of accepting the stipulation. *Old Chief v. U.S.*, 519 U.S. 172 (1997).

Rule 501—General Rule. Except as provided by the Constitution of the U.S. 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 shall be governed by the principles of the common law as they may be interpreted by the courts of the U.S. in the light of reason and experience. However, in civil actions and proceedings, with respect to the 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 state law.

Otherwise relevant evidence may be excluded if its admission would violate a recognized privilege. The most important privileges are:

This privilege precludes disclosure of communications between an attorney and client, but only if the following conditions are met:

- the client retained the attorney
- to provide legal advice
- and thereafter communicated with the attorney on a confidential basis and has not waived the privilege.

The privilege applies to individuals as well as corporations or other business entities. In the context of an investigation of a company, communications will generally be protected under the attorney-client privilege if the following elements are present:

- the communications were made by corporate employees to counsel
- the communications were made at the direction of corporate superiors in order for the company to obtain legal advice from counsel
- the employees were aware that the communications were being made in order for the company to obtain legal advice
- the information needed was not available from upper management
- the communications concerned matters within the scope of the employees' corporate duties

--the communications were confidential when made and were kept confidential by the company.

A general counsel's participation in an investigation conducted by management does not automatically create an attorney-client privilege. The key element is that the attorney is conducting the investigation for the purpose of providing legal advice.

Special care should be taken to ensure that the attorney-client privilege is not waived inadvertently by giving documents or communicating information to anyone outside the investigation team, including members of law enforcement. If information gathered during an investigation is shared with law enforcement, then the privilege may be waived not only as to information given, but also as to any other information relating to the same subject matter.

If a fraud examiner feels that a case should be referred for criminal prosecution, the examiner should consult with the attorney before providing any information to government or law enforcement authorities. For example, if an investigator submits a copy of his report to the prosecutor who initiates criminal proceedings based on the findings of the report, the criminal defendant may be able to require the investigator to provide all documents he or she used in writing the report. In such an instance, the investigator may be considered to have waived the privilege.

The attorney-client privilege prevents disclosure of the communications--the letters, memos or contents of telephone calls--between the attorney and client, not of the underlying facts or documentary evidence in the case. Similarly, the attorney-client privilege does not prevent disclosure of communications that relate to business rather than legal advice. The attorney-client privilege may not be asserted if the communication involved the attempted or actual commission of a present crime or fraud.

Marital Privilege--there are two forms of the marital or spousal privilege: 1) the confidential communications privilege, enabling either spouse to prevent the other from testifying regarding a communication during marriage between the two that was intended to be in confidence, and 2) the adversary testimony privilege, protecting spouses from being

compelled to testify against each other while they are married. Usually, the confidential communications privilege continues after the termination of the marriage; the adverse testimony privilege does not.

Law Enforcement Privilege—law enforcement agencies may legitimately withhold the identity of an informant unless disclosure is necessary to ensure that the defendant receives a fair trial. In such circumstances, the prosecution has to decide whether to forego prosecution or disclose the identity of the informant. In the private sector, there is no equivalent privilege. Fraud examiners or others who are investigating on behalf of a private client may be compelled by court order to disclose the identity of an informant or any other witness. This possibility should be disclosed to potential witnesses who may request confidentiality.

There are a number of other privileges that are less likely to be asserted in fraud actions, including the priest-penitent and physician-patient privileges.

Rule 601—General Rule of Competency. According to Rule 601, anyone can serve as a witness if they meet the other requirements of the Federal Rules of Evidence.

Rule 602—Lack of Personal Knowledge. Rule 602 excludes as fact witnesses people who do not have personal knowledge of the matter.

Rule 701—Opinion Testimony by Lay Witnesses. This rule allows witnesses who are not experts to provide opinion testimony as long as the opinion is based on the witness' rational perceptions and the testimony is helpful in resolving issues. This rule applies to internal auditors or other fraud investigators who have been designated as fact witnesses.

Rule 702—Testimony by Experts. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Thus, Rule 702 imposes five requirements that expert testimony must meet to be

admissible:

1. scientific, technical, or specialized knowledge will assist the trier of fact to understand the evidence

2. the witness must be qualified as an expert by knowledge, skill, experience, training, or education

3. the testimony must be based upon sufficient facts or data

4. the testimony must be the product of reliable principles and methods and

5. the witness must have applied these principles and methods reliably to the facts of the case.

A key question in the area of scientific evidence is the criteria trial courts use to permit expert witnesses to testify regarding scientific, technical, or other specialized knowledge. The underlying assumption of this issue is that juries tend to believe almost anything a professed expert says: therefore, judges should protect impressionable jurors from experts who lack objective credibility. The Supreme Court of the US has sought to resolve this question through rulings in three cases, commonly known as the “Daubert Troika.” These cases consist of *Daubert*, *Joiner*, and *Kumho Tire*. Rule 702 was amended to reflect the decision in these cases.

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

In this case, the U.S. Supreme Court announced that the Federal Rules of Evidence supersede the common law *Frye* test (*Frye v. U.S.*, 293 F. 1013 (1923)) for admission of scientific evidence. *Frye* required that a foundation for an expert’s scientific evidence include proof that the theory and technique were generally accepted within the relevant scientific community. Admission of scientific evidence at the federal court level depends on the consideration of many factors, including whether the theory has been tested, whether it has been subjected to peer review and publication, its error rate, whether there are standards for its operation, and whether it has widespread acceptance in the scientific community.

The *Daubert* court ruled that trial judges must make a pretrial determination of whether

expert scientific testimony should be admitted. The trial court judge must decide whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand a fact in issue. This involves a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology can be properly applied to the facts of a case.

The *Daubert* court did not set forth a definitive set of criteria for a trial judge to employ when making the decision concerning the admissibility of scientific, technical, or specialized knowledge testimony, but mentioned factors a judge may employ:

1—can the theory or technique be tested/

2—has the theory or technique been subjected to peer review and publication?

3—what is the technique’s known or potential rate of error?

4—do standards exist for controlling the technique’s operation and are the standards maintained?

5—is the theory or technique generally accepted within the expert community?

Daubert is an incomplete and confusing decision. It created a more stringent test for expert evidence admissibility, especially in civil cases.

The *Daubert* decision made judges “gatekeepers” of science and of expert evidence in courts of law. It has heightened the need for judicial awareness of scientific reasoning and methods. Evidentiary reliability is now based on scientific validity. At the same time, *Daubert* states Rule 702 requires that an expert’s opinion will have a reliable basis in the knowledge and experience of the discipline. The word “reliable” seems to be given two meanings at the same time. On the one hand, “reliable” means that a theory actually works (produces a correct or valid conclusion). On the other hand, “reliable” refers to meriting confidence worthy of dependence, i.e., may be accepted by the trier of fact.

Two extraordinary procedures exist to assist judges in problems of expert evidence or complex scientific evidence: court-appointed experts and special masters. Court-appointed experts can offer testimony at trial, can educate judges concerning fundamental concepts on

which experts differ, and can assess the methodology on which the parties' experts are basing their opinions. Special masters or magistrates may be appropriate in extraordinary cases in which the demanding nature of scientific issues is combined with the need for special skill in fact finding.

The rules of procedure at common law in limited situations permit circumvention of *Daubert's* formal regulations of evidence. This occurs through stipulation to facts, judicial notice based upon verifiable certainty, and learned treatises. Parties cannot stipulate to admission of scientifically unreliable evidence.

Common and anticipated challenges to expert evidence under *Daubert* are (1) is the expert qualified? (2) is the expert's opinion supported by scientific reasoning or methodology? (3) is the expert's opinion supported by reliable data? (4) is the expert's opinion so confusing or prejudicial that it should be excluded pursuant to Rule 403?

Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999).

In this case, the Supreme Court held that the general proposition of *Daubert's* reliability requirement applies to all expert opinions (technical and specialized knowledge), not just to scientific ones. The distinction between "scientific knowledge" and "technical" or "other specialized knowledge" is illusory and without support in the federal rules. Therefore, *Daubert* applies to all expert evidence and testimony regardless of whether it is "scientific" in nature. Accountants hired as expert witnesses are held to the standards established in *Daubert*. Furthermore, the trial court is not required to hold a *Daubert* hearing every time expert testimony is challenged. *Kumho* applies to both civil and criminal cases.

Rule 703—Bases of Opinion Testimony by Experts. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or

inference unless substantially outweighs their prejudicial effect.

Rule 703 was amended to emphasize that when an expert reasonably relies on inadmissible information to form an opinion or inference, the underlying information is not admissible simply because the opinion or inference is admitted. Courts have reached different results on how to treat inadmissible information when it is reasonably relied upon by an expert in forming an opinion or drawing an inference.

Rule 703 is not a hearsay exception. However, there is a danger that Rule 703 can be used as a “backdoor” hearsay exception—a crafty litigant could give hearsay to its expert for the purpose of having the expert refer to it as a basis for the expert’s opinion. Rule 703 regulates the expert’s use of inadmissible information, while Rule 702 regulates the methodology, reliability, adequacy of basis, and helpfulness of the opinion, as well as the qualification of the expert witness.

Under Rule 703, experts may testify as to what someone told them even though this would normally not be allowed under the hearsay rule. For example, an expert witness may respond to the following question:

Client’s attorney: What lead the PQC Controller to believe fraud had occurred?

Expert: Dalen Johnson, PQC’s Controller, became suspicious when he began receiving a large number of customer complaints.

This question is hearsay because the controller has merely told the expert what raised his suspicions. Fact witnesses are not allowed to testify about hearsay. Instead, the controller would have to be called to testify and asked what raised his suspicions. The expert witness can testify on this information because assertions by the client’s controller are normally relied upon by experts in the fraud field.

Rule 704—Opinion on Ultimate Issue. This rule allows experts to offer opinions concerning the ultimate issues to be decided in the case. The ultimate issues are those which, if found, will make the case for the defendant or plaintiff. For example, in a fraud trial the ultimate issues are Did the fraud occur? Did the defendant perpetrate it? And What was the

amount of the damages?

Rule 705—Disclosure of Facts or Data Underlying Expert Opinion. To streamline the expert's testimony during direct examination, Rule 705 generally allows experts to testify about their opinions or give reasons for their opinions without first testifying about the underlying facts or data. Thus, the expert can state his or her conclusions at the beginning of the testimony and can give the details later. While an expert is allowed to testify about the underlying facts or data during direct testimony, it is not usually required. However, the court will sometimes require the expert to disclose the underlying facts or data during cross-examination.

One use of this rule in fraud trials is that the attorney will not put into evidence the disbursement journal or general ledger. Yet, the expert can testify about the procedures performed on these documents without them being submitted as evidence.

Hearsay

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Hearsay is inadmissible for a number of reasons, primarily because the real witness is not available to be cross-examined nor can the jury evaluate the real witness' credibility or demeanor. Rule 802 of the Federal Rules of Evidence state that hearsay is not admissible as evidence unless otherwise provided for in the rules or law.

Example: P sues D for negligence, claiming that D drove her car into the back of P's tractor. D argues that the cause of the accident was not her negligence, but P's contributory negligence in driving a tractor without a rear light. D calls as a witness the insurance adjuster who investigated the accident. The adjuster testifies that P's son told him that the rear light on the tractor had been out for some time before the accident occurred. A North Dakota court held that the adjuster's testimony was inadmissible as hearsay since it repeated an out-of-court statement. *Leake v. Hager*, 175 N.W.2d 675 (N.D. 1970).

The non-lawyer generally thinks of hearsay as including only oral declarations made out of court. However, the rule in fact covers any kind of statement, whether oral or written, so long

as the statement is offered to show the truth of the matter asserted.

The key to the concept of hearsay is to remember that an out-of-court declaration is not, by itself, either hearsay or non-hearsay. The purpose for which the declaration is offered is dispositive: an out-of-court declaration may be offered into evidence for many purposes other than to prove the truth of the matter asserted in the declaration; in that event there is no hearsay problem.

Example: P, while shopping in a grocery store operated by D, slips on a puddle of ketchup. In defense of P's negligence suit against D, D claims that P failed to keep a proper lookout and failed to heed a warning from D's store manager. D offers the testimony of the store manager's wife that just before the accident her husband shouted to P, "Lady, please do not step in that ketchup." A court ruled that the statement was not hearsay. The manager's declaration is relevant to whether P was on notice of the dangerous condition, and is not being offered for the purpose of proving the truth of assertion. *Safeway Stores Inc. v. Combs*, 273 F.2d 295 (5th Cir. 1960).

The use of hearsay testimony presents four dangers: (1) ambiguity; (2) insincerity; (3) incorrect memory; and (4) inaccurate perception. Despite these dangers, courts over the years have carved out many exceptions to the hearsay rule.

There are numerous exceptions to the hearsay rule. Some were crafted out of necessity and others because certain types of statements, although hearsay, are considered to be highly reliable. The exceptions fall into two categories: (1) those that apply if the out of court declarant is available to testify, and (2) those that apply even if the defendant is unavailable. Examples of the former which may be relevant in fraud cases are:

Recorded recollections—a memorandum or record about a matter concerning which the witness once had knowledge but now has forgotten, and that was made or adopted by the witness when the matter was fresh in memory, and is shown to be accurate may be admissible. Such memoranda or records may also be shown to a witness who has temporarily forgotten the events in order to refresh the witness' recollection and allow the testimony to be more complete

or accurate.

Records of regularly conducted activity—business records, including computer printouts kept in the regular course of business, may be admissible, unless the source of information or the method of preparation indicate a lack of trustworthiness. The term “business” as used in the rule includes companies, institutions, associations, and occupations of every kind, whether or not conducted for profit. This exception allows voluminous business records to be admitted without the testimony of the employee who actually prepared the records.

Absence of an entry in business records—evidence that a matter is not included in the memoranda or reports kept in the regular course of business may be admissible to prove that a certain event did not occur, if the matter was one about which a memorandum or report regularly was made and preserved, unless the source of information or the circumstances indicate a lack of trustworthiness.

Public records and reports—records of public agencies that relate to their public duties, other than law enforcement reports in criminal cases, may be admissible, unless the circumstances indicate a lack of trustworthiness. Similarly, the absence of an entry in such public records may be offered to prove that an event did not occur.

There are a number of other exceptions, including statements and documents affecting an interest in property, statements and documents more than 20 years old, published market reports and commercial publications, previous convictions, as well as a catch-all exception which allows the court to admit a hearsay statement that (a) is offered as evidence of material fact, (b) is more probative than any other evidence available, and (c) would serve the interest of justice.

Hearsay exceptions that apply only if the declarant is unavailable—meaning that the declarant is either dead, asserting a privilege, or otherwise impossible to obtain as a witness—include the following:

Former testimony—testimony given by the declarant at another hearing is admissible if the party against whom the testimony is offered then had an opportunity and similar motive to

examine the witness as in the present trial.

Statements against interests—a hearsay statement that was against the declarant's interests, or that tended to subject the declarant to civil or criminal liability, is admissible. The theory is that a person would be unlikely to make such a statement unless it is fact true.

Other exceptions include statements made under a belief of impending death (but only for the purpose of identifying the perpetrator or establishing the circumstances of the death), and statements of personal or family history.

Out-of-court statements made by a party to the court proceeding, called admissions, are not considered hearsay and are admissible against the party who made them. The term admission is misleading because such statements are admissible if relevant for any purpose and not merely if they constitute a confession. For example, out-of-court statements demonstrating that a fraud defendant lied to investigators may be admissible to prove the defendant had guilty knowledge or intent even though the statements constitute an attempted denial of the crime.

Use of Originals

Article X is made up of Rules 1001-1008. These rules govern what can be admitted as a trial exhibit to support or summarize the expert's testimony. The rules are based on the concept that the "best evidence" should be presented.

Rule 1001—this rule defines various terms including writings, recordings, photographs, duplicate, and original.

Rule 1002—Requirement of Original. Originals of writings, recordings, or photographs are generally preferred as evidence and may be required when proving the content of the writings, recordings, or photographs. For example, in a fraud case the original documents must be presented if it is claimed they were forged or altered. Also, in a criminal fraud trial, the defendant's attorney will always ask for the originals or a chain of custody of the evidence in an effort to find some technicality on which to object to the admissibility of the evidence.

Rule 1003—Admissibility of Duplicates. Under this rule, copies of routine documents and

exhibits generally will be allowed in civil trials. There are two exceptions to this rule. Originals must be used if:

1. A question is raised as to the authenticity of the original
2. It would be unfair to admit the duplicate in lieu of the original.

Rule 1004—Admissibility of Other Evidence of Contents. This rule allows evidence other than the original to be submitted in certain cases when the original is not available. Situations when the original might be available include:

1. The original has been lost or destroyed;
2. The original cannot be obtained by any available judicial process or procedure;
3. The original is located outside the court's jurisdiction;
4. The information contained in the original is expected to harm the party's case and is withheld by the other party. The party has been told to bring the original to a hearing but does not do so.

Rule 1005—Public Records. In order to reduce the burden on public agencies for producing original records, this rule was written to give preference to certified or conformed copies of public records instead of requiring the original. For example, a certified copy of a birth certificate can be used instead of the original document.

Rule 1006—Summaries. Streamlined presentations such as summaries, graphs, charts, or calculations of voluminous and tedious detail may be used as long as the originals or duplicates are available for examination or copying at a reasonable time and place.

Documents

Documents, or as referred to in court, exhibits, are admissible if properly authenticated. The authentication requirement is met by proof that a document is in fact what the person offering it says it is. A letter, for example, may be authenticated if identified by the author, or the person who received it, or typed it, or by a person who can identify the signature or handwriting.

Rule 902 of the Federal Rules of Evidence states that some documents, such as certain public records, are self-authenticating, that is, admissible without calling a witness to

authenticate them. Other records that are self-authenticating include official publications issued by public authorities, and newspapers and periodicals.

In most court proceedings, including fraud cases, the original of a document is not required to be introduced into evidence unless the document is offered to prove its content. An example would be a document that is claimed to have been forged or altered. In most instances, the parties will agree—and the court allow—the liberal use of copies of routine documents and exhibits.

Demonstrative Evidence

Demonstrative evidence includes charts, graphs, and summaries that help to simplify complicated evidence for the jury. Such evidence is admissible if the court decides that it presents a fair and balanced summary or picture of the evidence and is not unduly prejudicial.

In complex fraud cases, such evidence is extremely useful, but care should be taken to keep the charts and exhibits simple. The evidence that is summarized must be made available to the other party, and the court may order that the underlying documentation be produced in court.

Examination and Impeachment of Witnesses

When a lawyer calls a witness, the lawyer's questioning of that witness is called the direct examination. Direct examination is usually used to establish those facts that are essential to the claim or defense of the party calling that witness. The direct examiner, in eliciting testimony from the witness, has two broad choices about how to question the witness: (1) to ask specific questions about the facts; or (2) to ask general questions eliciting a narrative from the witness. Each has its dangers and advantages.

The most important rule concerning direct testimony is that, generally, the examiner may not ask leading questions. A leading question is one that suggests to the witness the answer desired by the questioner.

Example: D is charged with armed bank robbery. W, a teller, has just testified that D walked up to her and demanded money. The prosecutor then asks, "Did D point a gun at you?"

This is a leading question since it would suggest to a reasonable person the answer desired by the questioner. There is no mechanical formula to determine whether a question is leading. Questions beginning with “Did not” will almost always be leading. Often, a question that lends itself to a simple “yes” or “no” answer will be leading. In general, the more specific the question, the more likely it is to be leading.

There are several situations in which leading questions are allowed even on direct examination. If the usual assumption that the witness is “friendly” to the party calling him is incorrect, leading questions may be asked. A witness who is biased in favor of an opposing party may be examined with leading questions. The witness’ demeanor on the stand may make it clear that he is “hostile” to the examiner, in which case leading questions may be used. Leading questions may be used to develop preliminary matters or matters that are not really in dispute. For instance, in our bank robbery example, if neither side disputes that W was on duty when a bank robbery took place, the question, “Were you on duty at the bank on the afternoon of September 12, 2003?” would be acceptable. Also, a quite specific question will be allowed if it merely suggests a subject rather than the desired answer. If a forgetful witness testifies leading questions may be used to refresh his memory.

Under traditional common law, a direct examiner usually may not impeach his witness. That is, the direct examiner may not cast doubt on the accuracy or truthfulness of his witness. However, the rule has been modified or abandoned in many jurisdictions.

After the party calling a witness has finished the direct examination, that party’s adversary has the opportunity to cross-examine the witness. Cross-examination is usually thought to be indispensable to the truth-finding process. Lack of the opportunity to cross-examine is the main reason for the rule against hearsay.

In contrast to direct examination, leading questions are usually permitted during cross-examination. The usual rule will be suspended if the witness is biased in favor of the cross-examiner.

Most jurisdictions impose limits on the scope of cross-examination. Most states and the

FRE limit the scope of cross-examination to matters testified to on the direct examination. Even in states that follow this rule, questions that are relevant to the witness' credibility are always regarded as within the proper scope of cross-examination. The trial court has discretion to permit cross-examination on matters that are not literally within the scope of direct.

After cross-examination, the party who called the witness has the opportunity to question him again in what is called redirect examination. Redirect is usually limited to aspects of the testimony that were brought out during cross-examination. After redirect, the cross-examiner will have a limited opportunity to conduct recross examination. The recross is limited to matters that were brought up on redirect.

Under the Federal Rules of Evidence and the Sixth Amendment—which guarantees a defendant the right to confront witnesses—the adverse party is entitled to offer evidence to impeach the testimony or credibility of a witness. Impeachment means that the examiner tries to show flaws in the witness. Cross-examination is an attempt to show flaws or inconsistencies in the witness' testimony. The tool of impeachment is designed to destroy the witness' credibility.

Impeachment is usually attempted by trying to show that the witness:

- is influenced by bias or self-interest
- made prior inconsistent statements
- has been convicted of a felony
- has a reputation for untruthfulness
- has a sensory or mental defect

Under Rule 609, evidence of a prior felony conviction may be admissible if the felony occurred within the last 10 years and the judge finds that the probative value of the evidence outweighs the prejudicial effect on the defendant. Evidence that a witness has been convicted of a crime that involves dishonesty or false statement may be admissible even if the crime is not a felony. Although evidence that a witness has a bad reputation for truthfulness may be admitted to impeach, proof of specific instances of misconduct or untruthfulness is inadmissible.

Forensic accountants should keep in mind that the above methods of impeachment may be used not only on the defendant and defense witnesses but also on witnesses for the prosecution. Inquiries should be made before trial to determine if a prosecution or defense witness is subject to impeachment, and, if so, appropriate steps should be taken.