Teaching the “Portraits, Mosaics and Themes” of The Federal Rules of Evidence

Lee D. Schinasi
Table of Contents
Teaching the "Portraits, Mosaics and Themes" of The Federal Rules of Evidence

Part I. Background and Introduction

A. Turning a Constellation of Dots into an Understandable Matrix:

   1. Transition from the Common Law of Evidence to the Federal Rules of Evidence
   2. Placing the Federal Rules of Evidence in Context: Connection to First Year Courses

B. The Themes, Portraits and Mosaics of the Federal Rules of Evidence:

Part II. Examining the Rules and the Mosaics they Create

Category A. Article IV, VI, VII, X. The "Evidentiary Process:

   Article IV. Relevance and its limits
   Article VI. Witnesses
   Article VIII. Hearsay
   Article IX Authentication and Identification
   Article X. Contents of Writing, Recordings, and Photographs

Category B. Rules 611, 103, 104, 105 and 403. The "Evidentiary Mechanics" of Trying a Case:

   Rule 611. Mode and Order of Interrogation and Presentation
   Rule 103. Rulings on Evidence
   Rule 105. Limited Admissibility
   Rule 104. Preliminary Questions
   Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Category C. Rules 102, 401, 403, 601, 702, 801, 901, 1002. An "Evidentiary Preference" for Greater Admissibility:

   Rule 102. Purpose and Construction
   Rule 401. Definition of "Relevant Evidence"
   Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time
   Rule 601. General Rule of Competency
   Rule 702. Testimony by Experts
   Rule 801. The Hearsay Rule and Hearsay Exceptions
Rule 901. Requirement of Authentication or Identification
Rule 1002. Requirement of Original

Category D. Rules 403, 404, 405, 412-415, 608, and 609. The “Tipping Point” Rules – Who to Believe?

1. Rule of General Applicability:

   Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

2. Rules that Deal with Character Evidence:

   Rule 404(a). Character Evidence Not Admissible To Prove Conduct
   Rule 405. Methods of Proving Character

3. Rules that Deal with Character Evidence In Sex Offenses:

   Rule 412. Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition
   Rule 413. Evidence of Similar Crimes in Sexual Assault Cases
   Rule 414. Evidence of Similar Crimes in Child Molestation Cases
   Rule 415. Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation

4. Rules that Deal with Credibility Evidence: Who To Believe:

   Rule 608. Evidence of Character and Conduct of Witness
   Rule 609. Impeachment by Evidence of Conviction of Crime

Part III. Conclusion

(Page Numbers Have Been Intentionally Omitted In Recognition of the Editing Process)
Teaching the "Portraits, Mosaics and Themes"
of The Federal Rules of Evidence

Part I. Background and Introduction

A. Turning a Constellation of Dots into an Understandable Matrix:

Although it was three decades ago, I still remember the insecurity associated with preparing my first several Federal Rules of Evidence classes. It was painfully obvious that while teaching the individual rules would be tough enough, teaching anything that approached a meaningful appreciation for the overarching philosophy, application, and interrelationship of those rules would be problematic at best. I was concerned that this limitation might compromise the value of my first classes, maybe even the entire course. Fortunately, those worries were significantly reduced by experienced colleagues who provided tremendous background information and invaluable practical teaching assistance. Their thoughts have remained with me over the years and eventually helped create the "portraits and mosaics regime" to the Federal Rules of Evidence which is the subject of this article.

The regime and this article were constructed to accomplish four things. First, for professors new to teaching evidence, the regime is a macro level philosophical overview of the statute. The regime introduces the Rules' most significant evidentiary concepts and how they interrelate. Second, this article can be used as a teaching outline for a new evidence professor's first several classes, as well as a learning guide for beginning students. The article includes references to the underlying authority and rationale for each rule and principle discussed. This information will help provide the background and confidence necessary for teaching those first few sessions. Third, for those of us who have been teaching evidence for a while, the article may provide a new thought or two on the Rules that can be incorporated into existing notes. Fourth, the portraits and mosaics regime can be a helpful tool in managing classroom time. As discussed throughout the article, evidence law has become increasingly complex over the past several decades. Amendments to the Rules caused by Supreme Court cases have made the time necessary to teach traditional subjects more precious. The portraits and mosaics regime allows professors to summarily cover some topics in the beginning of the course that can be quickly explained later in the semester. Experience demonstrates that as the course unfolds it will become increasing clear which topics require concerted effort in and out of the classroom, and which can be left to only student self-study.

1. Transition from the Common Law of Evidence to the Federal Rules of Evidence

The portraits and mosaics regime is a product of the 1970s, a period that marked transition from the common law of evidence to the Federal Rules of Evidence. Having tried cases in both systems, the pedagogical advantages of the new rules were unmistakable. They illuminated a pattern or process for trying cases and for teaching evidence that was not readily apparent under the common law.

Codification made the rules of evidence a visible and relatively concise universe of individual "
portraits" which addressed specific substantive or procedural issues. Taken a step further, codification provided a vehicle for teaching how the individual portraits could be linked to create "mosaics" which identified those related major substantive and procedural rules of evidence necessary for comprehensive understanding and application. Although the portraits and mosaics existed in the common law, the ability to identify and teach them was not as clear and would not have been as effective. Codification overcame those limitations.

For example, applying the portraits and mosaics regime to hearsay allows us to teach not only hearsay's definition, the reasons for excluding hearsay, and the exceptions or exemptions to the hearsay prohibition, but also how and when to procedurally raise hearsay issues, the consequences of failing to adequately or timely raise a hearsay issue, the tactical considerations surrounding limiting instructions, how hearsay might be affected by related issues such as best evidence or authentication requirements, and how to determine whether otherwise admissible hearsay should nevertheless be excluded because its trial use might do more harm to the fact-finding process than could be justified.

Over the past 30 years, the regime has been taught to law students, practitioners and judges. During a semester as a Fulbright Scholar on the Nis Faculty of Law, Nis, Serbia, as part of a litigation skills course, and under similar circumstances for ABA-CEELI in Moldova as a member of the Balti Faculty of Law, Balti, Moldova. In every context, application of the portraits and mosaics regime provided insight and understanding about the Rules of Evidence and about trying cases that would not otherwise have been possible.

The regime can be adjusted to fit any teaching purpose. It can be focused on a specific aspect of evidence practice or tailored to meet the needs of a distinct audience. Set out below is the version used to introduce and teach my traditional four-hour evidence course. Generally, the first two or three class meetings involve introducing the regime and discussing how it will be used throughout the semester and ultimately into practice.

This article is meant to be an annotated outline of my first several classes. Citation to authority is offered mainly as background information. The article is not intended to be a comprehensive examination of any topic, that would be inconsistent with the regime's purpose. My goal here is to provide the logic, explanations and format I have used in introducing evidence to my students.

Intermittently during the course, I will go back to the regime and either highlight where the particular aspect of evidence we are discussing fit into or expands upon the regime. Reconnecting in this way helps students more clearly understand each new rule and evidence theory as we come to it. The regime facilitates developing a unified as opposed to individualistic or disjointed appreciation for the Federal Rules and demonstrates how this interconnectivity can be used in court.
During our first meeting students are asked: “What the role should a code of evidence play in modern litigation.” We eventually come to five results. First, an omnibus reason. The Rules of Evidence facilitate juries being subjected to only appropriate and helpful proof. We briefly discuss the differences between the civil and common law systems and whether the Rules as currently written would be necessary if we tried cases to only professional judges instead of lay jurors. Second, evidence is the vehicle for telling the client's story and attacking the opponent's story. Being able to simply explain events in some organized, generally chronological way is the first challenge and the first accomplishment for most new trial lawyers. Third, we discuss the Rules of Evidence's impact on what is often the tipping point of a trial, who to believe, and which side is more likely to be telling the truth. A well-tried case generally presents two opposing and even believable views of the same events: was the traffic light red when defendant went through it and smashed into plaintiff's car as the complaint alleges, or was the light green as defendant's answer states. Did the prosecutrix consent to sex with the accused as he alleges, or was she forced into sex as the indictment states? We then discuss how the Federal Rules of Evidence expose a witness's credibility or mendacity, and how that result impacts the litigation. Fourth, in criminal cases, we discuss who the parties are in the sense of trying to determine which party is the most deserving of vindication – the accused or the victim. Here students see that testimony concerning the participants' pertinent character traits, an issue which has little to do with the actual events in question, may have a significant impact on the trial's outcome. Finally, in a time of television shows like CSI Miami, we examine the role science can play in litigation. The use of expert witnesses, opinion testimony, novel and innovative scientific approaches to solving factual questions, and how the Supreme Court has developed Article VII of the Federal Rules often provides tremendous insight into the evidentiary process.

The first reading assignment requires students to “examine” the Federal Rules of Evidence. Examine is defined here as becoming familiar with the general content and construction of the statute. This step also introduces students to the semantics of evidence. Experience has demonstrated that early familiarity with the language of evidence makes future substantive understanding of it easier. Having examined the rules and discussed their role in litigation, we look at the regime's four mosaics, discuss their “thematic” significance, and identify the individual “portraits” or rules in each. This first step allows students to see the portraits and mosaics regime as a roadmap through the evidentiary maze. Later, when students are participating in mock trial competitions, clinical placements or in house clinics, and ultimately when they are trying real cases as part of their own practice, the regime can be used as way of ensuring that all applicable rules of evidence are being properly and thoroughly applied.

Only 25 portraits and mosaics are considered in the regime. This small number minimizes the
intimidating nature of the Federal Rules which students initially see only as a large and complex federal statute. The small number also allows students to quickly appreciate why the Rules are divided into Articles, and how each of those Articles contains generally consistent and supporting evidentiary theories.

Although not immediately apparent to students, consistency and support occur horizontally and vertically throughout the Federal Rules of Evidence. For example, as discussed above, Article VIII contains exclusively hearsay rules. Those rules must be read together horizontally within Article VIII in order to understand what hearsay is and how it should be applied during trial. However, hearsay issues often raise best evidence and authentication issues demonstrating the importance of vertical integration and consistency.

Set out below is the general content and sequencing of the first several class meetings. As stated above, this article does not attempt to present a script of what might be said or even covered during those classes. Instead, the points raised here are an attempt to demonstrate the detail and approach used during those first sessions. Substance is confined to historical and philosophical perspectives, general definitions, major points, semantical familiarity, and ultimately demystifying the conceptual evidentiary picture. In many ways the first classes are like an opening statement - a menu of what is to come. A PowerPoint presentation facilitates these goals. The first slide contains the following generic numerical information. It is left undefined so that students will flush it out as the semester progresses. Subsequent slides summarize the information presented in class.

B. The Themes, Portraits and Mosaics of the Federal Rules of Evidence

Category A. IV, VI, VIII, IX, X - The Evidentiary Process
Category C. 102, 401, 601, 801, 902, 1002 – The Rules of Evidence Favor Admissibility
Category D. 403, 404, 405, 412-415 608, 609 – Proof of Character and Credibility

The semester begins by discussing the theme of each mosaic and why only four are being examined now. The next step involves identifying the individual portraits within each mosaic and then linking them horizontally and vertically. Experience demonstrates that beginning the course with an examination of this process facilitates students “getting” the Rules quickly and from the beginning.

Category A describes the “evidentiary process” which can been seen as the major criteria for admitting proof. Category B concerns the “evidentiary mechanics” of trying a case. These are rules litigators do not have the time or opportunity to look up during trial. Category C identifies those Federal Rules of Evidence which were specifically designed to increase the amount of evidence reaching lay finders of fact, a major conceptual change from the common law. Category D addresses character and credibility rules which are among the most complex and confusing areas for law students and practitioners.
Part II. Examining the Rules and the Mosaics they Create

Category A.
Articles IV, VI, VIII, IX, X
The Evidentiary Process

Early in the semester, a frequent student complaint is that while the individual Federal Rules of Evidence make sense, learning them seriatim does little to demonstrate how they are actually used in a courtroom. One of the portraits and mosaics regime's greatest values resides in addressing this student concern at the beginning of the course. Because the regime facilitates introducing all the major Rules of Evidence virtually simultaneously, the regime provides an overarching view of both the forest and the trees.

Category A demonstrates that the Rules of Evidence are divided into 11 generally consistent areas. After looking at each Article we focus on Articles IV, VI, VIII, IX, and X because when they are read together they define the basic process for admitting any item of proof—relevance, witness competence, the prohibition against hearsay, the requirements for authenticity and best evidence.

This first mosaic is really a logic drill. It introduces students to the substantive discipline of litigation: only proof which qualifies for admission under the Federal Rules of Evidence will reach the finders of fact. Students also see that although this mosaic conceptually applies to all offers of proof, not all aspects of the mosaic pragmatically will apply to every offer. For example, hearsay maybe not be an issue in every offer, but the possibility of a hearsay objection is a consideration every time counsel contemplate offering an item of evidence.

Article IV. Relevancy and its Limits

We begin with relevance because logically it is the first step trial lawyers use in determining what proof is going to be offered and admitted at trial. If the contemplated evidence does not have "any tendency" to affect a consequential aspect of the litigation there is no reason to admit it. Irrelevant proof would likely waste the jurors' time, or worse, distract or confuse them. Although counterintuitive on the first day of class, it is important for students to know that relevant, otherwise admissible proof may be excluded because it is too powerful, or because it violates important legal and social policies. In this first mosaic students learn that the balance between admissibility and exclusion is not linear, mathematical, logical or even strictly legal, but imprecise, subjective, and dependant on many considerations legal and otherwise.

Although it will be covered later, our early discussion of the relevancy standard demonstrates that it is easy to meet. Rule 401 is clear statutory preference for jurors to hear all admissible and helpful evidence because there is a correlation between the amount of information admitted and the accuracy of verdicts. It is also important for students to know that relevance must be established with each offer, that no item of evidence is inherently relevant. However, most
often relevance will be obvious and there will be no need for specific litigation establishing that point.

In many ways, relevance is the essence of the portraits and mosaics regime. It is never enough to say that because evidence is relevant it must be admitted. Admission is tied to satisfying all applicable rules of evidence. As soon as students grasp this logic, their view of the Federal Rules begins to take on the interrelationship properties the portraits and mosaics regime was designed to teach.

**Article VI. Witnesses**

Beginning evidence students tend to see the introduction of proof as being connected to a witness testifying on the stand. As a result, Article VI is the next logical place to explore. We begin with a general conversation about the term “competence” being used here to define witnesses not items of evidence. Again, as will be discussed later, the Rule is written broadly to encourage individuals with personal knowledge about the case coming forward and presenting their testimony.

The Federal Rules' treatment of competence eliminates many of the common law infirmities that prevented witnesses from testifying. Limitations based on age, credibility problems, mental and physical limitations, drug use and intoxication, and previous hypnosis for example are no longer justifiable reasons to categorically exclude witnesses.

The basic criteria for testifying under the Federal Rules requires a demonstrated intention to tell the truth and personal knowledge about the events in question. All other witness deficiencies the common law would have used to prevent the witness from testifying are now areas for opposing counsel to cross-examine the witness on. Discussing competence and impeachment at this point allows us to introduce the concept of how much weight admitted evidence will be accorded by the jury, and how counsel can affect that result. Students begin to see that although a witness may testify, opposing counsel's cross-examination and impeachment may render that witness's testimony of little, no value, or even make it damaging to the party presenting it.

Philosophically, broad based rules like those addressing relevance and witness competence place greater responsibilities on trial lawyers than the common law did. The proponent of evidence needs to know what price may have to be paid for calling a witness who has helpful testimony but can be effectively impeached.

Article VI provides several ways of attacking and supporting a witness. Among the most important concern attacking the witness's honesty, impeaching her with past relevant inconsistent statements, evidence of her bias or conflicts of interest. This line of reasoning leads to conversations about pretrial investigations, depositions, witness preparation and the
Article VIII. Hearsay

At what point in the traditional evidence course hearsay should be taught is a difficult question professors have long struggled with. Resolving that question became even more difficult when the Supreme Court decided Crawford v. Washington, and changed the established 25 year-old standard. Teaching hearsay at the beginning of the course answers many general questions students have about the Rules of Evidence and naturally about this most important category of rules. Unfortunately, it also has the tendency to create confusion because students are not yet familiar enough with the statute to understand hearsay's importance or application. Waiting until after the basic evidence principles have been taught solves that problem but creates others. For example, while discussing the precursor rules students will often ask questions having a hearsay component, only to be told that in order to avoid confusion we will discuss that question later in the semester when hearsay is covered. This serialized approach to evidence augers against students being able to put together the constellation of dots which is the Federal Rules of Evidence.

The portraits and mosaics regime attempts to solve this problem by briefly defining hearsay on the first day of class, and then linking it to other rules of evidence it will generally be used with. No attempt is made at this time to explain Rule 801 or the constitutional questions raised by Crawford. The idea of hearsay, a brief historical view of how and why it developed, an and overview of how it fits within the Federal Rules of Evidence defines class discussion.

Hearsay also provides a vehicle for delving into general historical evidentiary principles. For example, the common law favored trials composed of live witnesses testifying about events they had personal knowledge of. Any other type of evidence, when offered for its truth was presumptively unreliable as it was predicated upon what another person outside the courtroom previously said. Because that person was not in court testifying his truthfulness and demeanor could not be challenged, observed and measured by the jury. The result was exclusion of that testimony and information. Over the years, common law rules defining hearsay addressed its exclusionary tendencies and developed reliable exceptions to the prohibition. The Federal Rules of Evidence built on and extended that history. Codification lead to greater admissibility, consistency and predictability. Alternatively, it can be argued that the Supreme Court on occasion has worked against those results.

The Category A discussion of hearsay begins by scanning Article VIII. Rule 801's definitional concepts and exclusions from Rule 802 are identified next, followed by examining Rule 803 and its 23 exceptions to the hearsay prohibition. Our discussion here is limited to how the exceptions can be divided into four sets, then identifying each rule within each set. The discussion is brief. The first set covers exceptions (1)- (4) which concern evidence dealing with the declarant's state of mind, emotional or physical condition. The second set is composed of exceptions (5) through (18) which address the admissibility of writings, documents or proof of their absence. We focus on (6), Records of Regularly Conducted Activity (business documents), and (8) Public Records.
and Reports (government documents) because they are the most commonly encountered exceptions. Set three covers exceptions (19), (20) and (21) which deal with reputation evidence. This set is largely a conversation about Rule 803(21) and its connection to Rules 405 (character) and 608 (credibility). Again, the mosaic quality of the Rules and the need to apply them uniformly and together is highlighted. Set four concerns exceptions (22) and (23) which allow evidence of previous judgments concerning criminal convictions, family history or borders to be admitted. Exception (22)'s relationship with Rule 609 consumes most of the class discussion in that set.

Rule 804 contains the third set of exemptions/exceptions to the prohibition against hearsay. We spend a considerable amount of time discussing this rule because of its unique requirement for establishing the declarant's unavailability, and because of its forfeiture provisions. To make this point, students are asked to place Rules 803 and 804 side-by-side and then identify the differences. The conversation quickly turns to how different the foundations are for admitting each category of proof, the levels of reliability and potentials for abuse each category possesses, and the drafter's intention to distinguish and categorize each. When Rule 801(d) is added to the mix, the pragmatic need for exceptions to the hearsay rule becomes clear. Without the exceptions/exclusions, litigation as we know it would not be possible. Students can see that while testimony flowing from an exception or exclusion may not be as reliable as in-court testimony would be, if a proper foundation is established such testimony is reliable enough to be admitted.

The last hearsay provision discussed here is Rule 807's “residual exception.” This is an important conversation because it is the first time students have the opportunity to juxtapose the common law of evidence with the Federal Rules of Evidence. The class is asked to explore why Congress felt it would be “presumptuous to assume that all possible desirable exceptions to the hearsay rule have been catalogued.” Why would Congress make a special provision for hearsay and not for the other evidence topics? It is important for students to understand that when the Federal Rules were adopted they were intended to occupy the field of evidence and that the common law was there only to help interpret voids or uncertainties in the rules. Judges could not modify or ignore the rules.

Rule 807 is different. Congress intended it to facilitate growth in this most complex of all evidentiary areas. The rule provides trial judges with broad powers to effectuate this growth but with the caveat that the power is to be used sparingly and only in exceptional circumstances. This “catchall” mentality most often is used to admit hearsay statements when the circumstances surrounding them do not fit within any of the “enumerated exceptions” and yet the evidence has sufficient independent guarantees of trustworthiness to justify its admission.

At this point in the conversation students begin wondering how judges decide when to use Rule 807 or any other rule for that matter. They want to know if there is a calculus to this process beyond the rules' own words? I tell them there is a process but it is subjective. I ask them to define the term “judicial discretion” and apply it to admitting or excluding evidence. Because discretion and more importantly abuse of judicial discretion are concepts we will deal with all semester, this detour has always proven to be worthwhile.
When courts review a trial judge's decision concerning questions of fact and law, such as the
admissibility of a hearsay statement, they do so under an “abuse of discretion standard.” Generally the reviewing court will say that the trial judge abused her discretion if her findings of
fact are clearly erroneous or her conclusions of law are incorrect. Although we will come back
to some of this when we discussion Rule 103(a) in Category B, even if the judge made an error
relief will only be granted if there was harm. Harm usually means an error that materially
prejudiced the appellant's substantial rights.

The next logical question students ask is how does the judge arrive at her decision. This goes
back to our question about whether there is a calculous to this process. Again we find that there is
no mathematical or objective formula for resolving these questions, only the philosophy of
litigation which is linked to the Federal Rules of Evidence. The lawyer making the proffer has
the burden of sustaining it against an attack by opposing counsel. Both lawyers present their
positions on the issue. Citation to the controlling rule and judicial precedent linked to the
important facts of the case present the judge with two different formulas on how to proceed. The
judge's responsibility then is to evaluate both positions and decide which one is the most accurate
and best represents the law as applied to the case at bar. The judge is not free to decide any way
she wishes. She must do the math and select the correct answer.

**Article IX. Authentication and Identification**

To a great extent, hearsay, authentication and best evidence are introduced as a mosaic of their
own. In the beginning it is difficult for students to define where one begins and where the others
leave off. As the semester unfolds we will spend a great deal of time clarifying the distinctions,
but our goal here is simply to introduce the concepts and help students see how they will fit
together. Familiarity with the semantics of evidence remains important as well.

The connection between hearsay and authentication is an important one. Students come to see that
these requirements are often applied together in court and therefor need to be considered together
in class. Both are foundational evidentiary standards, both share a liberal standard favoring
admissibility, yet neither or only one may be in issue when a piece of evidence is offered.

We begin by looking at authentication as a generic term applied to the process of identifying an
item of evidence, insuring that the item of evidence is what it purports to be, is accurate or has an
historical connection to the case. At this early stage, the easiest way for students to visualize
authentication is by using examples. They are asked to contemplate being plaintiff's counsel in a
civil suit and in possession of a letter defendant sent to plaintiff confessing liability. Students are
then asked to consider how they would prove that the letter is authentic, that it was actually
written by defendant? Next, students are asked how in a murder case they would prove that
the handgun seized from the accused is the same handgun used to commit the crime and the same
handgun being offered in evidence? Similarly, in a drug trafficking case, how would the
prosecution establish that the white powdery substance seized from the accused is the same white
powdery substance tested in a forensic laboratory, determine to be a controlled substance, and
ultimately offered in court?
These examples help students appreciate how and why authentication protects juries from fabricated, fraudulent, or altered evidence. Students see that although the common law always required authenticity to be established, the Federal Rules made the process easier by creating less time consuming and witness intensive methods. Conversation then turns to how courts apply these standards in a way that minimizes the potential for fabrication. The early conclusion reached is that the greater the risk the higher the standard.

Before leaving authentication students are asked if they can articulate the distinctions between hearsay and authentication and when each would be used. At this point the conversation cannot be more than definitional and superficial, but it accomplishes the goal of distinguishing and imbedding these evidentiary concepts. Seeing the commonality of issues and more importantly the process that links them into mosaics is constantly reinforced.

**Article X. Contents of Writings, Recordings, and Photographs**

Perhaps the biggest disconnect between what a Federal Rule of Evidence says and what it actually does is contained in Article X provisions. Remembering that the reading assignment for our first two classes is simply to "examine" the statute, students are asked to look at Rules 1001 and 1002 and articulate what trial situations those two provisions address. This conversation is followed by the traditional Law School question: compare and contrast Articles VIII and IX with Article X. Silence follows – silence and students working hard to become invisible. Shortly thereafter they are informed that the question was designed to make them think about the interrelationship between hearsay, authentication and best evidence, and not to be concerned if they can't formulate and answer yet.

Classroom coverage of best evidence topics parallels the limited scope used with authentication. Students are reminded that best evidence, hearsay and authentication are really a mosaic within a mosaic and that they need to consider the applicability of all when any one is raised. Authentication and best evidence share a liberal standard favoring admission. As a practical matter, this is because computers, copy machines and other forms of digital data storage and retention have largely eliminated the common law's concern about the accuracy and consistency of documents. The best evidence rule was originally designed to place a heavy burden on establishing that copies were faithful to the original documents. Today, when computers can process endless digitally precise replicas of an original document the same concerns no longer exist. Alternatively, the digital revolution has increased the possibility for fraud and conscious manipulation of original content.

Considering both the beneficial and the adverse affects of the computer age, the drafters were prescient in formulating an easy to satisfy standard for admitting original documents, recordings or photographs. Similarly, the drafters made it difficult to even raise a best evidence objection at trial by requiring opposing counsel to specify what is wrong with the proof being offered. As with authentication, a couple of easy examples helps demonstrate what the rule actually does.

The first example concerns a criminal case where the accused has confessed to the charges. For
our discussion purposes, students are informed there are no constitutional issues present. The
policewoman who took the accused's statement is on the stand. After a proper foundation has
been laid the prosecutor asks her what the accused said during interrogation. Defense counsel
objects on best evidence grounds, contending that the accused's written confession is the best
evidence of what he said. The second example is from a civil suit where defendant is a
surgeon being sued for medical malpractice. The doctor's records from before and after the
operation contain the bases for his in-court testimony. After a proper foundation has been
established, defendant's lawyer asks his client to explain why the operation was not successful.
Plaintiff’s counsel objects on best evidence grounds contending that the doctor's records are the
best evidence of what occurred.

Class conversation now focuses on the semantical problem most students have with the best
evidence rule: it is not about requiring the best possible proof to be presented, whatever that
might be. Rather, the best evidence rule requires the proponent to introduce an original
document when the proponent places that document's contents in issue. If the proponent does
not refer to the document but only discusses the underlying events that the document concerns
then the contents of the document are not in question and the best evidence rule does not apply.
It then becomes apparent to students why the rule is used so sparingly: any objection must
include the basis for why an original document is required or an explanation as to why the
document being offered is unacceptable. Such arguments are rarely available because modern
pretrial discovery processes usually expose defective or fraudulent documents allowing counsel to
resolve such problems before trial. Further, when the document itself is required, Article X's
liberal admission philosophy makes duplicates and other forms of evidence admissible even if the
original document had been destroyed.

Category B.
Rules 611, 103, 104, 105 and 403.
The “Evidentiary Mechanics” of Trying a Case.

Some rules of evidence are so complex that even the most experienced trial lawyers and judges
must research their application before trial, or if the issue comes up during trial ask for a recess to
insure proper resolution. Frequent examples are hearsay issues, particularly in light of
crawford and giles, questions about privileges or character and credibility evidence issues.

Category B rules are different. Counsel generally will not have the luxury of taking a recess to
explore how and when an objection or offer of proof should be made, or under what
circumstances an evidentiary instruction should be requested or objected to. The rules in this
Category are about the constant and ongoing mechanics of trying a case. They are procedural and
directive in nature, and are usually applied with other more substantive rules. For example, a
Rule 403 objection is of no value unless it is tied to a particular quantum of evidence and the
Federal Rule of Evidence supporting its admission.
Rule 611. Mode and Order of Interrogation and Presentation.

Before going further into the discussion students are asked to think back on their civil procedure course. There they learned that the rules for how litigation is to proceed from complaint to final appeal must be followed irrespective of how good a party's proof may be. The process has independent value and requirements. If counsel fails to follow the rules the case may be dismissed. In many respects, Rule 611 occupies the same position with respect to how the litigation aspect of the case is to be conducted. Trial judges are responsible for the “mode and order of interrogating witnesses and presenting evidence.” This does not mean the judge is the functional equivalent of a basketball referee, calling fouls and counting baskets. The trial judge's role is much more complex. The Federal Rules of Evidence require the bench to insure that the presentation of evidence supports ascertaining the truth and avoids needless consumption of time. Similarly, the rule requires trial judges to protect witnesses from harassment and needless embarrassment.

Similarly, traditional common law trial practice required witnesses called by a party to testify in their own words. This means the proponent's lawyer cannot provide the answers to questions in the questions themselves. We refer to this as the requirement for non-leading questions on direct examination. Alternatively, opposing counsel is allowed to cross-examine witnesses using leading questions which generally supply the information counsel seeks the jury to believe. The cross-examiner does not expect favorable answers to her questions and as a result attempts to limits the witness's answers, and any potential damage, to only a yes or no responses. We call this leading question cross-examination. The witness's answers are generally useless to the cross-examiner, while the content, logic and pace of the cross-examiner's questions tell their own story.

Rule 103. Rulings on Evidence.

Taken together, Rules 103 and 611 play a larger mechanical role in trying cases than any of the other Federal Rules of Evidence. This is because they define responsibilities and practices for what happens in the courtroom. Philosophically, Rule 103 places greater confidence on trial lawyers than did the common law. Counsel alone are responsible for calling witness, presenting and objecting to evidence, and making motions. The rule protects counsel from judicial second guessing and holds counsel accountable for errors. Rule 611 defines the judge's responsibility for insuring that the process operates appropriately but does not allow the bench to interfere with counsel's trial tactics. Judges and counsel must be thoroughly familiar with these rules because there isn't time or opportunity during trial to research their requirements.

Rule 103 recognizes that few challenging events in life are perfectly resolved. Trials are among the most complicated of human endeavors and are rarely if ever error free. Litigation is complex, events happen quickly, correctly identifying and resolving each one is more aspirational than
realistic. This provision allows students to see that simply because an evidentiary error occurs does not mean that the injured party will be granted relief on appeal if the trial is ultimately resolved against him. In order to be successful on appeal, the aggrieved party must demonstrate not only that an error occurred, but that the error negatively affected his substantial rights. All other errors will be viewed as harmless.

Rule 103 provides that errors happen in one of two ways: the trial judge erroneously admits evidence or erroneously excludes evidence. However, the focus of this rule is not on what the trial judge does in resolving evidentiary issues, but on what counsel must do to rectify the error while still in the trial forum, and then preserve any resulting judicial error for appeal. If counsel is offering evidence and the trial judge erroneously excludes it, that error will only be preserved for appeal if the proponent makes an "offer of proof" establishing what the excluded evidence would have been. Without this offer of proof it would be impossible for appellate courts to know what impact the excluded evidence might have had on the trial process and whether that impact negatively affected the aggrieved party's substantial rights.

The rule provides similar obligations for counsel opposing the admission of evidence. Unless the opponent makes a timely and specific objection to the proffer any error the trial judge makes in admitting the evidence will be viewed by an appellate court as having been waived. Ideally objections occur before the damaging evidence is elicited. The objection should be specific enough so that opposing counsel can address it, the trial judge can rule on it, and the reviewing court can evaluate what occurred below.

At this point in the discussion it is not unusual for students to view trials as overly formalistic, insensitive to the client's best interests and the entire process being caught-up in its own self-importance. Someone will ask, what happens if counsel has failed to object or failed to make an offer of proof that would have preserved a harmful error for appellate intervention? Does that mean that an innocent man could go to jail because of some technicality? Students rail at the thought that trial errors may not result in appellate relief, particularly in criminal cases.

This question of course creates the perfect vehicle for discussing plain error and the realities of litigation Rule 103 was meant to deal with. Before going further summarizing what we have seen so far helps place 103(d) in perspective. We began this discussion realizing that trials are not perfect, that mistakes happen, that it is counsel's job to protect the record from mistakes, and if counsel fails to take the required procedural and substantive steps to eliminate or prevent the error, trial and appellate courts will generally not intervene. We noticed that there are two categories of errors, harmless and prejudicial, and that unless the error is prejudicial to a substantial right of a party appellate relief will be denied no matter how thoroughly counsel litigated the issue.

We can now focus on the student frustration that brought us to this point: what to do about a waived harmful error? Rule 103(d) provides the answer to this problem by adding another level of analysis to the equation and asking, "how bad is the waived error?" If the error calls into question the fairness of the judicial proceeding and the public reputation of the court, if counsel's
failures are tantamount to incompetent representation then allowing the trial result to stand cannot be tolerated. Under such circumstances the reviewing court is likely to find that plain error occurred and grant appellate relief. In many ways, Rule 103(d) is the drafters' way of protecting the client from his own attorney.

Rule 105. Limited Admissibility.

Rules 105 and 103 have a great deal in common. Both recognize counsel's responsibility for making tactical trial decisions. Both recognize that counsel can waive certain trial rights by failure to request them, and both recognize that responsibility for making these decisions rests entirely on counsel and not at all on the bench.

This provision is based on the idea that evidence can be admitted for several reasons, some appropriate and some inappropriate. If the jury is not instructed on how to use the evidence there is a great chance they will use it for an inappropriate reason. Rule 105 places responsibility upon counsel to request an instruction explaining how the jury should appropriately use such evidence. The rule provides that generally there is no obligation on the trial judge's part to ask counsel if an instruction is requested. Consistent with Rule 103, if counsel fails to request an instruction and none is given, counsel on appeal cannot claim that the bench should have given the instruction sua sponte.

A great deal of trial strategy and philosophy goes into using this rule. Instructions play a powerful role in how juries interpret and use evidence during their deliberations. However, this reality turns out to be a two-edged sword. If the evidence can be used for an appropriate or inappropriate purpose and no instruction is given the jury may use it for the wrong reason. The jury may also use it for the wrong reason even if an instruction is given. However, if counsel requests an instruction and the instruction tells the jury they are not to use the evidence for an inappropriate reason the instruction itself may highlight for the jury the importance of the inappropriate reason, the very evil counsel is trying to avoid? An example may be the best way to demonstrate the importance of jury instructions and counsel's responsibilities for determining whether or not to request them.

A little further into the portrait and mosaic regime discussion we will come to character and credibility evidence. At that time we will discuss how evidence of previous convictions may be used at trial. For our purposes here we can identify two major premises. Let's assume the accused has a previous conviction for the same crime he is on trial for. Evidence of that prior conviction is admissible if the accused takes the stand and testifies on the merits but only for the purpose of impeaching his credibility – that is, to show that a person who has committed a crime is less likely to tell the truth than someone who has not committed a crime. The conviction cannot be used for the purpose of showing that the accused is a bad man or has a propensity to commit crimes. If defense counsel does not request a limiting instruction there is a great chance that the jury will use the conviction for the prohibited purpose. However, if defense counsel asks for an instruction on how the conviction may be used the instruction may only reinforce the inappropriately use. Defense counsel may prefer not to request an instruction and deal with the
issue in closing argument or even during direct examination of his client. Rule 105 provides that if defense counsel chooses not to request an instruction and the accused is convicted, on review appellate defense counsel cannot argue that the accused is entitled to relief because defense counsel erroneous failed to request the instruction, or that the trial judge erred in not providing it \textit{sua sponte}.\footnote{156}

\textbf{Rule 104. Preliminary Questions.}

Initially, Rule 104 (a) and (b) appear to be simply common sense.\footnote{157} They divide decision making responsibilities between judges and jurors in the only way possible. Judges decide questions of law and juries decide questions of fact. Again, a couple of examples help illustrate the point.

If the question at trial is whether the accused's wife can testify against him or her testimony is protected by the spousal privilege, it would be inappropriate for jurors to hear the evidence and then decide whether the privilege applies.\footnote{158} They obviously do not have the legal expertise to resolve the question, and once they heard the testimony even if they excluded it, experience demonstrate they could not ignore it on findings.\footnote{159}

This provision is generally used in conjunction with Rules 103 and 105. Evidence admissibility and jury instruction questions can only be resolved by the trial judge. Rule 104 contemplates a timing component to this preliminary legal question litigation. As part of pretrial preparation, the lawyers should have identified all significant evidentiary issues that are likely to be raised during trial. The goal of Rule 104 is to resolve those preliminary questions before trial begins so that the jury's fact-finding process is not needlessly interrupted by sidebar or out-of-court hearings.\footnote{160} At this stage \textit{motions in limine} are briefly mentioned as the pretrial vehicle counsel will use to raise such issues.\footnote{161}

\textbf{Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.}

This provision is one of the most significant and most frequently cited Federal Rules of Evidence.\footnote{162} It can be used with virtually every other rule, but has no legal significance if used alone. It is important to tell students here that Rule 403 is a legal relevance standard and Rule 401 is a factual relevance standard. To be admissible evidence must satisfy both requirements.

Rule 403's most significant characteristic is that it can be used to exclude otherwise admissible evidence. However, it cannot be used to admit otherwise inadmissible evidence. For example, if a statement is inadmissible hearsay Rule 403 cannot be used to justify its admission. Alternatively, if the statement is admissible hearsay but its use would unfairly prejudice one of the parties Rule 403 can be used to suppress it.

On the first day of class this logic is counterintuitive and confusing. Mechanically going through the rule and recalling the evidentiary process we discussed in Category A helps students
understand. We start by looking at Rule 403. It provides that proof which is otherwise relevant, presented by a competent witness, is authentic, and does not violate either hearsay or best evidence requirements can still be excluded if its probative value is substantially outweighed by any of the following dangers: (1) unfair prejudice, (2) confusion of important issues, (3) misleading the jury, (4) undue delay, (5) wasteful of the court's time, or (6) presentation of needlessly cumulative evidence.\footnote{163} The first three of these criteria focus on concerns that affect the jury's ability to decide the case, and the last three, which overlap each other to some extent, focus on the trial process itself.

The most interesting aspect of Rule 403 concerns number (1) above, unfair prejudice. This aspect of the rule can be used to exclude evidence because it is too good, too relevant, too effective, or too prejudicial. Both the common law and the Federal Rules recognize that such proof is inadmissible because of its ability to insight the jury's passions which ultimately could cause them to decide the case on emotional rather than factual grounds.\footnote{164}

An example helps makes the point. Students are asked to consider a murder trial and the government's need to establish how death occurred. The pathologist who conducted the autopsy is testifying. After laying a proper foundation, the prosecution asks permission to use a videotape of the pathologist's examination to help the pathologist explain his results and as a consequence help the jury understand how the fatal blow was struck and how it caused death. Defense counsel objects to the government's use of the videotape because it would inflame the jury's passions.\footnote{165} Defense counsel suggests that black and white photos would make the same points without the emotional content and resulting dangers. The government's evidence is admissible for all the reasons discussed in Category A, but the trial judge might still exclude it and require a less emotional form of proof because the video-tape's admission will likely inflame the jurors' passions which would unfairly prejudice the accused.\footnote{166}

While it is important to avoid too much detail at this point, it should be stressed that the focus of Rule 403's ability to exclude otherwise admissible evidence resides in the word "unfairly," not in the word "prejudice." Students should see from the beginning that if evidence does not prejudice an opponent it is not relevant and thus inadmissible under Rule 401.\footnote{167} Rule 403 would play no role under those circumstances. The issue Rule 403 addresses is does otherwise admissible evidence prejudice the opponent so much that its admission would be unfair.\footnote{168} It is this balance between probative value and unfair prejudice that counsel and judges resolve on a case by case basis.\footnote{169} There is no silver bullet resolution and no mathematical formula. Although evidence is an upper level course at most law schools, and students have gone through the process of learning that unlike math, the law provides methods for resolving problems not precise formulas which produce answers, Rule 403 presents a significant challenge to their developing skills.

Because Rule 403 is both a powerful and ubiquitous, overstating its ability to exclude otherwise admissible evidence is always present.\footnote{170} The more salient point for students to see is that the rule was drafted with a presumption of admissibility built in, and that in close cases trial judges will generally admit the questioned proof.\footnote{171} This is so even in cases where the probative and prejudicial values are both very high.\footnote{172}
Category C.
Rules 102, 401, 403, 601, 702, 801, 901 1002.
An "Evidentiary Preference" for Greater Admissibility:

The federal drafters believed there is a correlation between the amount of admissible evidence reaching the jury and the accuracy of the jury's verdict.173 The more evidence admitted the more accurate the resolution. This philosophy is a significant departure from the common law which sought to protect jurors from marginally reliable or highly emotional proof.174 Common law judges believed jurors would either misuse such proof or be psychologically overwhelmed by it.175

The Category C mosaic is designed to accomplish three goals. First, highlight those rules which facilitate the drafter's intent. Second, expose the broad philosophical perspective federal courts use in evaluating evidentiary questions.176 Third, demonstrate that broadening the admissibility standards by allowing more evidence to be admitted ultimately results in placing greater responsibility on judges and counsel to ensure that only reliable and helpful proof reaches the jury, and placing greater confidence in jurors to properly use that evidence.177

Many of the rules discussed in Category C have previously been mentioned but in other contexts and for other purposes. For example, some were part of the overarching evidentiary process examined in Category A. Others were part of the mechanics of trying a case discussed in Category B. In Category C we explore how these same rules became the primary vehicles for expanding the amount of information reaching jurors.

Creating the ability to comprehend and then use the rules of evidence in multiple ways is part of the reason for studying the portraits and mosaics regime. The regime illuminates the thought processes trial lawyers and judges develop over years of trying cases. Being sensitive to these possibilities at the very beginning of the course makes ultimate understanding of the individual rules as we cover them much easier and more meaningful.

Rule 102. Purpose and Construction.

This provision is included in Category C because it suggests both a flexible and a liberal approach to using the rules of evidence.178 It is also the Federal Drafters' aspirational statement about how the rules should be applied.179 Two primary goals emerge from our initial look at the drafters' intent. First, the Federal Rules of Evidence were designed to assist in discovering the truth, and second the rules create a system and process for justly concluding legal proceedings.180

On its own, Rule 102 provides no basis for relief or attaining those goals. There is no argument that a certain piece of evidence must be admitted or excluded due solely to Rule 102.181 In light of our initial class conversations, all the requirements contained in Category A must be met before any appeal to truth and justice will be appropriate. Viewed in that context, Rule 102 is more of a make-weight than an independent basis for relief.182

However, courts have used Rule 102 in conjunction with other rules as a basis for dealing with
unique procedural problems. For example, on occasion a strict interpretation of an evidentiary provision may lead to an inappropriate result, or a procedure not contained in the rules is needed to deal with a situation not anticipated by the drafters. In both cases, Rule 102 provides the trial judge with flexibility to fashion an appropriate remedy. In effect Rule 102 is a tool for “construing” the rules of evidence, not ignoring or rewriting them. The rule can be effectively used by both the proponents and opponents, by defense counsel as well as by prosecutors and plaintiffs’ lawyers.

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

At this point in the conversation it is always interesting to see if students have become familiar enough with the general concepts discussed so far to answer some basic philosophical questions. For example, “if you were part of the committee drafting the Federal Rules of Evidence and you wanted to increase the amount of evidence reaching juries, what concept would you begin with? It is a great relief when students go directly to relevance.

Although in most situations the relevance of a piece of evidence will be clear and not challenged by opposing counsel, there are times when that will obviously not be the case. This dichotomy is a good place to introduce the differences between direct and circumstantial evidence. Direct evidence is rarely going to present a problem. The only question such evidence must answer is does it relate directly to an issue in dispute. If a witness to a murder prosecution says he saw the accused shoot the victim such evidence directly relates to an issue at trial and is clearly admissible. Inferences and questions of interpretation are not presented. However, if the proof relates to the kind of gun that was used in the crime and there is evidence the accused owns such a gun then the bench must determine whether proof of ownership makes a disputed fact more or less probable than it would be without the evidence.

In circumstances where relevance is challenged, opposing counsel's objection really asks the following philosophical questions: if the proof is not relevant, if it has no tendency to make a matter of consequence to the litigation more or less probable than that matter would be without the evidence, then why would we subject the jury to it? What possible benefit would there be? Such proof would only be detrimental to Rule 102’s policy considerations and probably violative of Rule 403’s prohibitions.

On the other hand, the proponent's philosophical rejoinder would be, if we unreasonably limit the amount of proof juries hear, or if we are so concerned that juries will not properly use such proof or that they will be emotionally overwhelmed by it, then the trial system created by the Federal Rules of Evidence will be unable to meet Rule 102's goals because it has been severely and artificially limited.

Rule 401 philosophically balances these two considerations by admitting “evidence having any tendency” to meaningfully affect a matter of consequence. “Any tendency” is a remarkably broad standard adopting a logical approach to relevance and as a result encouraging judges to admit more rather than less proof.
The Federal Drafters abandoned the word “materiality” in defining relevance because at common law the term had become over-used and subject to a wide variety of interpretations.\textsuperscript{191} In practice however, the differences between relevance and materiality are largely form not substance. An objection to relevance today includes the common law concept of materiality.\textsuperscript{192} Proof that would have been “material” at common law is “of consequence” to the determination of the case under the Federal Rules of Evidence. As a result, the common law question still remains, does “of consequence” mean an important issue or any issue? It appears the better answer is any issue.\textsuperscript{193}

Although not really consistent with the portraits and mosaics overview, class conversation occasionally invites a litigation skills type detour. If that component to our introductory conversation is to be added, Rule 401 is the perfect place because of relevance's centrality to litigation.

When relevance is challenged the trial judge has four basic choices to make concerning admission: (1) exclude the proof; (2) admit the proof; (3) admit the proof with a limiting instruction if requested by counsel;\textsuperscript{194} or (4) admit some of the evidence and exclude the rest. The trial judge makes this decision using a two step process. First she relies on the proponent to set out the logical and factual basis for admitting the challenged proof. To accomplish this objective the proponent must: (1) describe the challenged evidence; (2) define its linkage to the consequential issue at bar; and (3) make the connection between the challenged evidence and the fact to be proved. Step two requires the proponent to establish a legal foundation for admission.\textsuperscript{195} To accomplish this goal counsel should: (1) define how the challenged evidence complies with the substantive requirements of Rule 401, (2) link his position on Rule 401 compliance to the most recent supportive precedent in the jurisdiction, and (3) establish that the logical and precedential requirements when combined mandate admission.

At the end of our litigation skills discussion it becomes clear to students that the process just described is used when any pieces of evidence is challenged. Combining that process with the Category A mosaic is something we consistently do throughout the semester because it is an efficient way to make the connection between the theoretical study of evidence and the practical application of it. Although each rule has its own substantive and mosaic requirements, the basic litigation process and reasons for exploring them remain the same.

**Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion or Waste of Time.**

We discussed Rule 403 during our Category B analysis. The goal there was to highlight the provision's role in the broader trial process. We examine it now so students can see the crucial role it plays in expanding the amount of evidence reaching finders of fact. Another reason for discussing Rule 403 here is that it is mentioned so frequently in early reading assignments concerning other rules that without this conversation, students are likely not to understand the provision's role and this lack of knowledge often inhibits development in the early rules covered.

The first point to make is that although Rule 403 provides for the exclusion of relevant evidence when that evidence's probative value is substantially outweighed by the enumerated dangers and potential unfairness, exclusion is rare.\textsuperscript{196} The courts' application of the rule and the drafters'
intent for the rule cause it to have the opposite effect. Practice indicates that there is a presumption in favor of admissibility.

It is helpful if students see Rule 403 as an extraordinary remedy to be used only when the danger of abuse is truly overwhelming and there are no viable proof alternatives. The practicalities of excluding otherwise relevant evidence are also daunting. Opposing counsel has the burden of establishing why the evidence should not be admitted. At this point, she has already lost the substantive battle on admissibility and is now left with only an "it isn't fair" argument. This is hardly a strong position to argue from.

Similarly, because Rule 103(a)(1) requires opposing counsel's objection to be both timely and specific, a well defined danger or unfairness must be articulated. When the rule is enforced in this fashion it provides the proponent with an excellent opportunity to rebut opposing counsel's position. Further and more importantly, as previous mentioned, unless the danger or unfairness argued substantially outweighs the benefits of admission, trial judges are required by the rule to admit the proof. The term "substantially" has been consistently been interpreted in both state and federal courts as requiring admission in close cases.

Before leaving Rule 403 one final point about the rule's broad implications for admissibility must be made. This point also highlights the portrait and mosaic regime's value. Going back to our Category B discussions, admission of even the most controversial evidence may still be appropriate when Rule 105 is applied with Rule 403. Using both provisions together, the proponent requests that the bench give an instruction designed to identify the proper purpose for the evidence or provide a cautionary instruction against an inappropriate use of that evidence. The result is that the jury gets the benefit of hearing the proof while minimizing the possibility of wrongfully using it.

**Rule 601. General Rule of Competency**

Rule 601 and Rule 401 have much in common with respect to liberalizing the amount of evidence reaching finders of fact. As we previously discussed, Rule 401 creates a relatively easy standard to meet. Proof which has "any tendency" to affect a consequential fact results in most evidence being relevant. Rule 601 creates the same liberal standard for determining who can be a witness. It provides that "every person is competent to be a witness...."

At common law, various limits were placed on a witness's capacity to take the stand. Included in this list were spousal incapacities, extreme youth, extreme age, mental infirmities, senility, bias, conflicts of interests, religious affiliations or the lack there of, criminal or conspiratorial relationships, drug or alcohol addiction, and even official governmental positions. Rule 601 eliminates all of these disqualifications. It assumes that jurors will properly evaluate a witness's testimony in light of the witness's personal limitations. This result produces a concern for how much "weight" the jury will give a witness's testimony, not whether the testimony will be admitted.
Jurors alone have the responsibility to believe or disbelieve the evidence they hear. A witness with obvious financial interests in the outcome of a case is likely to have his testimony receive less weight from the jury than a witness who is not involved in or concerned about the litigation's financial ramifications.

As with Rule 401, the trial judge is given broad discretion in determining who is fit to testify at trial. Generally, this responsibility concerns the judge balancing three related rules of evidence. The first is Rule 403, which provides that the trial judge has an independent obligation to ensure that a witness’s testimony is not unfairly prejudicial. Second, Rule 603 prohibits a witness from testifying if that witness will not or cannot swear or affirm that she will tell the truth. Finally, those witnesses whose limitations are so severe that they prohibit the witness from having gained personal knowledge about the events in question should also be excluded.

Drug or alcohol abuse presents typical problems. A witness who may be an alcoholic but at the time of trial is sober and able to explain what he saw will nonetheless be permitted to testify. Similarly, a witness who was drunk at the time of the event but is sober at the time of trial will likely be permitted to testify. Alternatively, a witness who is intoxicated while on the stand irrespective of whether he was sober at the time of the event presents problems that affect more than the weight of his testimony. Such a witness may be unable to remember or relate the facts he personally observed, he may be impossible to meaningfully cross-examine, and allowing such a witness to testify constitutes an affront to the search for the truth.

Rule 702. Testimony By Experts

This provision introduces students to the idea that proof and witnesses can be divided into two categories. The first is testimony by laymen. Here ordinary witnesses testify about facts they have personal knowledge of. The easy example is a witness who observed the red car run a stop light just before plowed into the blue car. The second type is opinion testimony by expert witnesses. This proof includes a qualified expert's opinion, inferences and conclusions concerning how, for example, the accident occurred. Rule 702 allows experts to offer such testimony when their scientific or other specialized knowledge is required by the jury to assist them in unraveling difficult factual questions. The easy example associated with our fact pattern concerns medical experts explaining how plaintiff's injuries where caused by the red car running into the blue car.

Testimony by experts, like hearsay evidence we will consider next, are two major components of the Federal Drafters' intention to increase the amount of admissible evidence. Both rules are crucial to complex modern federal litigation and often have an outcome determinative impact on cases. Each of these rules has undergone recent significant modifications due to Supreme Court guidance. Interestingly, although both rules deal with very different substantive areas of the law, they are linked by similarly defined requirements for
The burden of establishing reliability rests with the evidence's proponent. Perhaps the best definition of and perspective on what is “reliable” scientific and opinion evidence comes from the legendary but now rejected polygraph evidence case, *Frye v. United States.*

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

The battle over how to define reliability and the general acceptance standard raged for seventy years. In many ways the old common law standard for admissibility, which was not specifically adopted by the Federal Rules of Evidence, controlled litigation and was viewed by many as a significant limitation on expert testimony, novel scientific evidence development, and the evolution of federal litigation.

*Frye* was abandoned in 1993 when the Supreme Court began reexamining the standards governing scientific evidence and expert opinion testimony. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.* and its progeny, the court replaced general acceptance with a five part test derived from the federal rules.

One of the most interesting aspects of *Daubert* can be found in Justice Blackmun's opinion discussing the "gatekeeper" role trial judges have in ruling on the admissibility of scientific evidence. Justice Blackmun defined this role as ensuring expert witness testimony will flow from scientific or other specialized knowledge and that the proof is at least minimally reliable.

While discussion of these complex standards, the modifications to Rule 702 and Rule 702 itself, is better left until later in the course, it is important for students to know that both the Federal Drafters and the Supreme Court have worked to increase the usability and admissibility of scientific evidence and expert opinion testimony. It is also important for students to know that although the Supreme Court has set out new standards, those changes are currently unsettled and likely to remain so well into the future.

**Rule 801. The Hearsay Rule and Hearsay Exceptions**

Hearsay and Article VIII traditionally occupy a large percentage of class time because of their complexity and pivotal role in litigation. Rule 801 is the most significant Federal hearsay provision because it provides common definitions for all Article VIII rules. This provision also contains important “exclusions” to the prohibition against hearsay testimony.
Our Category A hearsay discussion was largely exploratory. The goal there was to introduce this expansive topic in conceptual terms. Rule 801 deals with the common law assumption that hearsay was unreliable because: (1) the original statement was uttered by an out of court declarant, (2) who was not under oath at the time he made the statement, (3) there was no opportunity to cross-examine the declarant when the statement was originally made, and (4) this resulted in the jury being unable to evaluate the declarant's demeanor and credibility at the time he made the statement. Category C's focus is on how the Federal drafters used Rule 801 to increase the amount of evidence reaching finders of fact. Rule 801's definitions for what constitutes a statement, a declarant, and hearsay itself provided a centralized and easier to apply set of criteria than could be found in the common law. The rule states that when an out of court statement is offered at trial for a purpose other than to prove the truth of the matter asserted, Rule 801 excludes it from the definition of hearsay. Admissibility under those circumstances turns on other evidentiary considerations.

Section 801(d) further increased the amount of evidence reaching jurors by redefining what is considered to be hearsay. It made prior statements of witnesses and admissions by party opponents "exclusions" from and not just "exceptions" to the hearsay prohibition. Rule 801(d) provides that these statement "are not hearsay." While this change is a marked semantical difference from the common law, it created very little significant substantive change. Rule 801(d) categories must still qualify for admission as they did at common law. In many ways, Rule 801’s definitions are the interpretative link for applying the myriad of traditional and non-traditional common law hearsay exceptions codified in Rules 801(d), 803, 804, and 807. Taken together this hearsay mosaic facilitates admitting out of court statements thereby increasing the amount of proof available to juries.

Students should also note that codifying the rules of evidence, and hearsay in particular, facilitated the drafters' objective for admitting more proof and thereby increasing the accuracy of jury verdicts. Codification created an easy menu of and reference for understanding and using hearsay. It also helped educate the bar about the complexities of hearsay and how to effectively deal with them. This resulted in greater attorney and judge competence which produced improved consistency and predictability which ultimately led to more proof reaching finders-of-fact.

Although too complex and involved to cover in any detail here, a short discussion of the Supreme Court's recent changes to how hearsay evidence can be used in state and federal criminal cases when admitted against an accused is presented here. In *Crawford v. Washington* and its progeny, the Court applied a much stricter standard for admitting "testimonial evidence" than had been used for 25 years.

The *Crawford* series of cases raise enough interesting evidence and constitutional law questions to justify an entire course. However, for our purposes the issue is whether *Crawford* has, as many suggest, worked against the drafters' philosophy of providing more evidence to the finders of fact, or is the amount of evidence reaching jurors relatively the same, only more reliable?
This second result is possible because while *Crawford* prohibited “testimonial” hearsay statements from being admitted against an accused unless the declarant testified at the trial or was subjected to cross-examination at a previous hearing, the same amount of evidence is still generally available as prosecutors can obtain the declarant's presence at trial, or preserve it by deposition.
Rule 901. Requirement of Authentication and Identification

A constant theme of this paper has been that the portrait and mosaic regime facilitates students' ability to see the Federal Rules of Evidence as a mutually supportive procedural and substantive evidentiary matrix. In Category A we used the regime to show that hearsay and authentication issues often arise in the same fact-pattern. Not surprisingly, students initially have difficulty identifying this and then distinguishing between authentication and hearsay. As we will see next in Category C, the same will be said for best evidence. Similarly, it is not unusual for students to believe that once authentication has been resolved, hearsay or best evidence have also been settled. An easy way for students to distinguish these three substantive areas, consistent with our overview, is for them to see hearsay as requiring confrontation, authentication as requiring relevance, and best evidence as requiring original proof.

Our Category C discussion now focuses on how hearsay and authentication were used by the Federal Drafters as vehicles for increasing the amount of evidence reaching fact finders. Rule 901 is generally the first authentication provision counsel think of because it deals with physical evidence and written or oral communication. Rule 901 requires that the proponent's evidence be what the proponent claims it to be. In most instances this means that the proponent must establish a historical connection between the evidence being offered in court and the events in question. Rule 901 makes this process significantly easier than it was at common law by providing alternative means for admitting different types of evidence. From the outset, federal courts interpreted Rule 901 as liberalizing the authentication process.

The mosaic within the mosaic here demonstrates that other Rules must be considered in authenticating or identifying the evidence. For instance, when a lay witness is used to authenticate a piece of evidence, the proponent must establish that the witness will present relevant testimony, be competent to testify, and have personal knowledge about the issue in question. When an expert witness is used for this purpose, the proponent must additionally establish the witness's qualifications as an expert, and that the opinion evidence is reliable.

Rule 104(b) also plays a significant role. Without adding too much complexity at this introductory stage, students will see that the Federal Drafters intended authentication to be a jury question. Rule 901 requires that proponents present enough evidence to support admissibility. As a result, questions of authenticity fall under Rule 104(b)'s conditional relevancy standard. This means that first the trial judge has to decide if the proponent has offered enough proof for the jury to find that the evidence is what it is purported to be, and then the jury decides the factual question of whether to believe authenticity has been established.

A common example for discussing authentication and identification issues concerns admitting a piece of physical evidence. Rule 901 incorporates two common law techniques for accomplishing this. The first is generally used when the evidence is “readily identifiable.” For example, if the item sought to be admitted is a gun with an embedded serial number on the stock,
and that number was recorded at the crime scene, and can later be verified in court when the gun is offered into evidence, then the proponent has established that the proffered gun is the same one obtained from the crime scene.278

If the item is a sample of marijuana there are no readily identifiable characteristics which can be used to establish that the sample being offered in court is the same sample that was seized from the accused. The proponent here will use a chain of custody to prove that from the time the drugs were seized, through the period when they were analyzed at a laboratory, and ultimately offered in court that: (1) they are the same sample that was taken from the accused and (2) during the intervening period between seizure and proffer at trial, the sample was not changed or altered in any meaningful way.279

Rule 1002. Requirement of Original

As discussed in Category A, the best evidence rule requires that when the contents of a writing, recording, or photograph are in issue the proponent must produce the original unless another rule provides an exception.280 The value of Rule 1002 and Article X in general has been largely overcome by technology and the movement toward improved discovery.281 Today, endless exact copies of the evidence addressed in this provision can be digitally reproduced without error.282 Counsel and judges who are familiar with the rule and its contents rarely have reason to litigate it at trial. Rule 1002 and its exceptions are expansive in facilitating the drafter's intent for greater admissibility.283 Areas where litigation may occur are caused when the original and all duplicates have been destroyed and the proponent attempts to prove the contents of a writing with oral testimony or a handwritten copy.284

Because best evidence issues are so infrequently raised at trial not spend much time is spent on them here or during the semester. Post Crawford285 and Daubert286 evidence class is so crammed with significant developments and issues that some areas simply need to be shortened or excluded. While I still cover Article X, it is an abbreviated discussion. Included in that discussion are examples designed to help students see the rules parameters. Those examples are also set out in Category A and demonstrate that conceptually the place to start class conversation is by identifying when the requirement for an original document does not even apply.287 Interestingly, once students master that idea, the remainder of this rule and Article X are much easy to understand.

Category D.

Rules 403, 404, 405, 412-415, 608, 609

The “Tipping Point” Rules – Who to Believe?

Category D addresses character and credibility evidence. Viewed in its broadest sense, this area injects humanity into the calculus of litigation because it deals primarily with the participants' personalities and histories. Issues like truthfulness,288 honesty,289 past criminal conduct,290 sexual predisposition,291 propensities for sexual offenses,292 bias,293 community reputations and individual personal opinions about a witness's character among other are all in play here.
Character and credibility rules generally have little to do with the events causing trial. They have everything to do with the kind of person the parties or witnesses are, and ultimately what is any weight the fact finders will give their testimony. Sometimes this evidence is admissible even when the witness or participant does not testify. As discussed generally in Category A, these rules are often the tipping point in a close case. They provide the background information necessary for jurors to decide who is telling the truth and as a result who to find for.

Category D rules are among the most complex and confusing for law students, judges and practitioners. The seven mentioned above could easily be a law school course unto themselves. In more than 30 years of teaching at continuing legal education programs, these provisions have been among the most often requested. In part that is because even though character and credibility rules cover distinct areas of evidence law, the rules themselves often do not effectively convey their substantive meaning or practical application. Even more often they appear to overlap or contradict each other. Similarly, students and practitioners may confuse applications because the concepts and semantics involved in these rules are so similar.

An easy example involves distinguishing character evidence used to prove “truthfulness” from character evidence used to prove “honesty.” While the untrained ear may hear these two concepts as being the same, and the untrained mind may apply them interchangeably, they represent two entirely different areas of evidence law and possess significantly different criteria for admission and use.

Category D rules also have different and interesting legislative histories. Some were the subject of very heated congressional debate while others had virtually no congressional debate but were significantly criticized by other sources. The reasons are as varied as the rules themselves. Politics, social and cultural issues as well as legal and pedagogical ones played a large role determining ultimate composition.

The complexity and importance of character and credibility evidence poses a challenge for the portraits and mosaics regime. While these rules are crucial to our overview, their substantive depth and breadth presents significant time management issues. There simply is not enough class time to explore and interrelate them even in the limited fashion used with Categories A, B and C. Such detail here would be confusing and inappropriate.

To resolve this issue, character and credibility rules are presented as a “logic train.” The rules are discussed more categorically than individually. Class discussion links them in ways that emphasize the evidentiary areas they control, their commonalities and their differences. Not every aspect of the rules can be covered. General definitions, major applications, and the groupings themselves dominate class discussion. The focus here is on the Category D mosaic itself rather than on its individual portraits.

Category D’s goal is for students to see that a litigator’s job only begins with telling the story of what happened. She must also be prepared, when appropriate, to effectively personify the participants in a way that allows jurors to appreciate who they are, what they did, why they did it and ultimately who to believe. Character and credibility evidence may well be the Rosetta Stone for interpreting trial testimony.
1. Rule of General Applicability

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.

Before looking at the substantive rules students are reminded to incorporate our Category A, Rule 403 discussion here. Character and credibility issues are ripe with Rule 403 possibilities. Experienced litigators are always mindful that simply because a quantum of evidence qualifies for admission does not mean that it will reach the jury. Upon timely objection, the proponent will usually be required to establish that admitting this evidence will not violate any of Rule 403’s prohibitions. Because character and credibility evidence has such an inherent emotional component, the possibility for it to unfairly inflame the jury's passions is often present. The discussion of each rule below makes that point.

2. Rules that Deal with Character Evidence


The Federal Rules of Evidence often begin by explaining what cannot be done, then go on at length to provide how to do it. Such is the case with character evidence. As a general matter, it is not admissible in criminal or civil trials. This means parties are not permitted to prove that because an individual has a certain kind of personality or disposition he acted in conformity with that personality or disposition on a specific date or under specific circumstances. The common law is much more concerned with proving a party's or witness's actions than in establishing his character traits.

Rule 404(a) is different. It allows an accused to present evidence concerning a pertinent character trait of his or of the alleged victim's. Neither the accused nor the alleged victim need testify for this evidence to be admissible. However, only the accused may initiate it. The government may respond in kind after the accused has opened the door.

This provision becomes much clearer to students when presented with an example. The accused is charged with assault. He defends on self-defense. Whether he takes the stand or not, defense counsel may present reputation or opinion evidence indicating that the accused is a peaceful person and/or that the victim is a hostile person. After such evidence has been presented, the government can offer contrary proof, that the accused is a hostile person and that the victim is a peaceful person. The philosophy at play here and the one that defense counsel, for example, will argue to the jury is that, because the accused demonstrated that he is a peaceful person the jury should use that proof and find that on the day and time in question the accused acted in conformity with his pertinent character trait which means he did not assault the victim, and in fact acted only in self-defense.

Rule 405(a). Methods of Proving Character – Criminal Trials Only
The portraits and mosaics regime allows students to see that when Rule 404(a)(1) and (a)(2) evidence is introduced, Rule 405(a) requires such proof be in the form of reputation or opinion testimony. Interestingly, neither rule defines those terms.

Reputation evidence can be explained as information a witness knows about an individual's pertinent character trait from having heard community conversation about him. Opinion evidence is based on a witness's personal knowledge of the individual's pertinent character trait. In both circumstances the factual predicate for the attack must concern the accused or the alleged victim themselves. Information about family reputations for instances would be inadmissible.

Rule 405(a) also allows reputation and opinion character witnesses to be cross-examined with specific instances of conduct evidence. While not specified in the rule, practice requires that this cross-examination be conducted in a specific way. Reputation witnesses must be asked “have you heard questions,” and opinion witnesses asked “do you know questions.” Again, an example helps clarify. I ask student to look at the fact pattern we discussed in Rule 404(a) above. Based on that testimony, the defense character witness is cross-examined by the prosecutor. Assuming the prosecutor has a good faith belief in the basis for his question, he asks the defense opinion witness, do you know that the accused was recently arrested for assaulting his girlfriend? If a reputation witness testified, the prosecutor under the same circumstance would ask, “have you heard that the accused was arrested for assaulting his girlfriend?” These questions are designed to test the witness's knowledge of the accused's character.

3. Rules that Deal with Character Evidence in Sex Offenses

Rule 412. Sex offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Disposition.

Unlike the provisions addressed in Category C, Congress created Rule 412 to reduce the amount of admissible evidence, but only as it applies to testimony concerning rape and other sexual offense victims. The Privacy Protection for Rape Victims Act of 1978, was intend to encourage victims of sex related offenses to report such conduct by excluding character and other evidence used primarily to attack the victims' self-esteem and invade their privacy. The rule excludes evidence of the alleged victim's sexual character and predisposition as well as past sexual behavior. It applies in both criminal and civil cases involving all forms of alleged sexual misconduct. For Category D purposes, the regime's overview concentrates on the character evidence component of the provision, realizing that Rule 412 also addresses the victim's sexual activity background.

Rule 412's impact on sex offense litigation has been immense. At common law rape prosecutions were actually bifurcated proceedings. The government tried the accused for the charged sexual offense, and the defense tried the victim for lacking morality and encouraging both the charged sexual activity and promiscuity. Rule 412 ended that practice. Unless defense counsel can demonstrate that negative character evidence qualifies for admission under one of the exceptions contained in Rule 412(b), testimony about the alleged victim's sex life,
morality, life style, past sexual conduct or sexual habits is prohibited.321

Rule 412(b)(1) contains three exceptions to these general prohibitions: (1) evidence of specific instances of sexual behavior by the victim offered show that someone else was the source of semen, injury or other physical evidence;322 (2) evidence of past sexual activity between the accused and the victim in order to show consent;323 (3) evidence which if excluded would violate the accused's constitutional rights.324 Character evidence is not specifically mentioned in any of the enumerated exceptions, and is potentially admissible only if defense counsel can demonstrate that it is constitutionally required under Rule 412(b)(1)(C).325 This generally means the challenged proof is vital to the accused's affirmative defense.326

For example, the accused's reasonable mistake of fact defense is based on his knowledge of the victim's sexual reputation for promiscuity, her flirtatious behavior leading up to the charged offense, and information friends have told him about the victim's similar previous behavior before she had sex with them. All of this information is potentially inadmissible based on Rule 412(a), and can be admitted only if it falls within one of Rule 412(b)(1)'s exceptions. The tension between Rule 412 and the accused's constitutional rights to raise a defense is not capable of being formulaicly resolved and is well beyond the reach of our regime overview. Resolution requires balancing a sensitivity to the policy issues underlying Rule 412, and a case by case determination based on the available proof.327


Although it may be counterintuitive at first, one of the first things students learn about these provisions is that in many ways they are logical extensions of Rule 412 and the rape shield philosophy. Rules 413 to 415 were designed to increase the amount of character evidence admissible against an accused sexual offender just as Rule 412 was designed to limit the amount of such evidence admitted against the alleged victim of a sexual offense. When viewed together, these rules have the net effect of significantly facilitating the prosecution's case while severely limiting the defense's. This is the precise result Congress intended.328

Later in the semester we will spend a great deal of time discussing Rules 413 - 415 and juxtaposing them against their Rule 404(a) and (b), and Rule 405 character evidence counterparts, as well as against Rule 412, their substantive evidentiary law counterpart.329 However, at this point in our overview such coverage would be inappropriately complex.330 Our goal here is to familiarize students with the Violent Crime Control and Enforcement Act of 1994, and its liberalizing treatment of character evidence when used against those accused of criminal and civil sexual assault or child molestation.331

Congress created these rules to overcome the perceived limitations imposed by Rules 404(a)(b) and 405 in admitting evidence concerning an accused's past sexual acts and propensity for involvement in such conduct.332 Congresswoman Susan Molinari, the provisions' primary
sponsor, stated on the Congressional Record that federal courts “must liberally construe” these rules so that juries will be in a better position to accurately evaluate a criminal or civil defendant's responsibility based on his character, propensity, and past behavior.333

While Rules 413 and 414 accomplish that goal, they have very limited and specific applications. Rule 413 provides that when an accused is charged with a sexual assault, evidence of the accused's previous "sexual assault[s] is admissible, and may be considered for its bearing on any matter to which it is relevant." In child molestation cases, Rule 414 provides that evidence of previous “child molestation[s] is admissible, and may be considered "for its bearing on any matter to which it is relevant."334 In a civil context, Rule 415 accomplishes the same result. It is difficult to overestimate the impact these rules have had on sex and child molestation prosecutions.335 They have revamped the way character evidence and prior related sexual misconduct can be used in those cases.

An example easily makes the point. Consistent with Rule 414, when an accused is charged with child sexual molestation, prosecutors are now permitted to introduce evidence of the accused's previous similar acts, and then during closing argue to the jury that because the accused has been involved in previous acts of child molestation, he has the propensity to commit such crimes and that in fact, on the day and time in question, the accused, acting in conformity with his criminal propensities and past acts, committed the charges offense. Students should be reminded here that Rule 404(b) specifically prohibits using evidence of past acts to show a criminal propensity.336

As might be expected, these rules have been the subject of numerous constitutional challenges. To date all categorical challenges have been unsuccessful largely because appellate courts interpret Rule 403 as providing sufficient protection against abuse.337 When used in combination, Rules 413-415 and Rule 403 give the trial judge sufficient discretion to ensure that convictions are based on a factual record and not simply “bad man” emotional evidence.338 Some courts have stated that without Rule 403, the constitutionality of these rules would be in doubt.339

Students should come away from this discussion understanding that evidence concerning an accused's or victim's pertinent character traits is generally inadmissible. Rule 404(a) provides exceptions that apply to all criminal cases concerning the accused's or victim's pertinent character traits. Similarly Rule 412(b)(1)(c) provides the bases for admitting character evidence against a sexual assault victim when it is constitutionally required. Finally, Rules 412-415 allow prior sexual assault or child molestation acts to be used for establishing that the accused has a propensity to commit such acts.
4. Rules that Deal with Credibility Evidence: Who To Believe

Rule 608. Opinion and Reputation Evidence and Specific Instances of Conduct Evidence Concerning Truthfulness – Criminal and Civil Trials.

Students now have a significant appreciation for the thematic interrelationships between the individual rules of evidence and their systemic applications. Here in Category D, where proof of character and credibility are our focus, we now examine the essence of how hotly contested trials are decided, that is, which witnesses will the jury believe and how much weight will the jury give their testimony?

Experienced litigators know that simply proving the elements of their party's case will often not be enough to succeed at trial. This is largely because well-tried cases present two different but compelling views of the same events. Facialy, each side's story may have merit and each side's witnesses may appear to be credible. But in order to win at trial, the jury will have to decide which party's witness are the most believable. That a determination will invariably lead to which party succeeds.340

Rule 608 is an important vehicle in this equation.341 It provides that simply by testifying, a witness places her credibility in evidence.342 This rule contains the tools for challenging and establishing a witness's veracity. Subparagraph (a) provides that credibility can be tested by reputation or opinion character evidence,343 and subparagraph (b) provides that specific instance of conduct can be used for the same purpose.344

Using Rules 608(a) and (b) requires that both the proponent and the opponent adhere to specific timing requirements. While details of this process are beyond the scope of our discussion, it is important students at least hear the requirements now: (1) In order for Rule 608 to apply the witness must testify thereby placing her credibility in issue. (2) The party calling this witness cannot immediately after the witness testifies “bolsters” her testimony by calling another witness who will present laudable character for truthfulness proof. (3) Rule 608 requires that negative evidence concerning credibility must first be presented by opposing counsel. (4) Only after such an attack has been made, may the witness's proponent “rehabilitated” her credibility with positive character evidence.345

A couple of examples will help students understand the process. First, concerning Rule 608(a), after a proper foundation is established, an opinion witness may testify that in his opinion the witness who has previously testified is not believable, or a reputation witness may testify that the previous witness's testimony in her community for truthfulness in not good.346 Similarly, Rule 608(b) provides that after the witness testifies, opposing counsel may question her about previous specific acts reflecting negatively on her credibility.347 Both Rule 608(a) and (b) say that after the witness has been attacked, the proponent may rehabilitate his witness.348 This can be done by calling reputation and opinion witnesses to positively testify about credibility.349

Finally, it should be mentioned that Rule 403 often plays a major role in determining the
admissibility of credibility evidence. 350 While such proof is clearly relevant under Rule 401, its tendency to confuse, mislead or play to the jury's emotions may lead to unfair prejudice and the needless consumption of time. 351

**Rule 609. Impeachment by Evidence of Conviction of Crime**

Rule 609 concerns admitting evidence of a witness's past conviction as a way of impeaching that witness's credibility and thus her testimony. 352 It can only be used after a witness testifies and then only to show that a witness who has been convicted of a crime is less likely to tell the truth than a witness who has not been convicted. 353 The rule is applicable to both civil and criminal trials, and to all witnesses including the accused. 354 This is a highly controversial provision. 355 It has been significantly revised over the years in hopes of minimizing the conflict. 356 Part of this disagreement centers on the great possibility that once a jury learns that the accused has been convicted of a previous crime, they will most likely vote to convict. 357 Disagreement about the rule's efficacy also concerns applying its criminal basis to civil actions. 358

Two types of convictions are admissible: felonies irrespective of the crime as long as the prescribed punishment exceeds one year, 359 and crimen falsi convictions – those crimes where an element of the offense involves dishonesty or a false statement irrespective of the sentence. 360 Crimes that are more than ten years old measured from the date of conviction or the date of release from confinement, which ever is later, are generally inadmissible but may be admitted if the proponent establishes that admission serves the interests of justice, that the probative value of the conviction outweighs its prejudicial effect, and that the proponent provide the adverse party with notice that the issue will be contested. 361

Again, an example of how the rule can be used is helpful. In a criminal case the accused is charged with bank robbery. Evidence of his previous conviction for bank robbery will likely be admissible against him if he testifies. Alternatively, if the accused does not testify, thereby not placing his credibility in issue, the conviction could not be admitted on these facts. This choice about testifying and placing the accused's character in issue, or not, is a difficult one for defense counsel. Keeping his client off the stand to avoid impeachment may significantly weaken the defense's case. Placing his client on the stand and allowing the jury to hear that he has already been convicted of a bank robbery risks conviction based on the "bad man" theory – the jury will think, certainly someone who has previously robbed a bank is more likely to commit another bank robbery than someone who has not robbed a bank. 362

The class conversation at this point is likely to be animated and expansive. Rule 609 requires students to distinguish between the substantive facts of the case and the role credibility evidence plays in determining who the jury will believe and ultimately whether the accused will be convicted. It also acts as a wonderful summary for our portraits and mosaics regime discussion. When the rule was amended in 1990, the drafters incorporated a Rule 403 balancing test. The test has two standards, one for the accused and one for everyone else. As might be expected, the one for the accused makes admission more difficult than the one for everyone else. 363

In this way, Rule 609 has its own mosaic built in. It requires students to balance the substantive
requirements of Rule 609 against the substantive requirements of Rule 403 in determining whether this otherwise relevant evidence should reach the jury. If the evidence is admitted, defense counsel must then consider Rule 105 in determining whether the “benefits” of a limiting instruction would be appropriate. In effect the question becomes, does defense counsel want the judge to instruct the jurors that while they have heard evidence that the accused was convicted of a crime, even a crime just like the one he is currently charged with, the jury should only use that evidence for the purpose of determining credibility and not for interpreting the accused as a bad man or someone likely to commit the charged crime simply because he has previously been convicted of the same conduct.

Part III. Conclusion

Rule 609 is an excellent way to end the portraits and mosaic regime overview. This provision's controversial nature encourages students to consider both sides of the “fairness” debate, thus helping them develop an appreciation for how the rules of evidence often have an outcome determinative effect on the trial.

Rule 609 also requires students to deal with the complexities of Rule 403's balancing issues which have been built into the provision. Finally, students will have to integrate Rule 105's instructional issues into their evaluation of whether to call a witness whose testimony will be impeached with very damaging evidence that will likely spill over into other areas of the litigation.

The complexity and number of difficult legal and practical human decisions which must be made when Rule 609 is used highlight the overarching point of our portraits and mosaics regime introduction. The rules are meant to be considered and applied together. They contain thematically consistent mosaics which make identifying, understanding and properly utilizing the rules easier and more effective. Introducing these mosaics during the first week of class assists students in understanding how to use both the individual rules, the combined portraits they create, and the Federal Rules of Evidence in general.

1I wish to express my sincere gratitude to Dean Leticia Diaz and the Dwayne O. Andreas School of Law at Barry University for supporting this scholarship, as well as Ms. Melissa Sherman my research assistant for her invaluable help. Most importantly, I want to thank Professor Edward J. Imwinkelried, Edward L. Barrett Jr, Professor of Law, University of California, Davis who many years ago shared the original concept for this article.

2The logical place to begin gaining an appreciation for these topics resides in Edward H. Cleary, Preliminary Notes on Reading the Rules of Evidence, 57 Neb. L. Review 908 (1978). Professor Cleary was the reporter for the Advisory Committee that drafted the Federal Rules of Evidence. His original insights and interpretations remain a wonderful read today.

3After so many years it is a pleasure to thank Paul Giannelli, Albert J. Westerhead III and Richard W. Weatherhead Professor of Law, Case Western Reserve; Stephen A. Saltzburg, Wallace and Beverly Woodbury University Professor, George Washington University Law School; David A. Schlueter, Hardy Professor of Law, St. Mary's University School of Law; and Michael H. Graham, Professor of Law, University of Miami School of Law.


The following definitions apply under this article:
(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.
(b) Declarant. A "declarant" is a person who makes a statement.
(c) 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 not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

See Fed. R. Evid. 801(d), 803, 804 and 807.

See Fed. R. Evid. 103(a)(1) (objections to evidence) and 103(a)(2) (offers of proof).

See Fed. R. Evid. 103(a) (waiver without a timely objection) and 103(d) (plain error).

See Fed. R. Evid. 105 (requirement to request or be deemed to have waived).

See Fed. R. Evid. Article X, and Mark D. Robins, *Evidence at the Electronic Frontier: Introducing E-mail at Trial in Commercial Litigation*, 29 Rutgers Computer & Tech. L.J. 219, 245–46 (2003) (discussing that controversy occasionally arises under the best evidence rule when neither an original nor a duplicate is available and the proponent seeks to introduce other secondary evidence of the contents of the document, although courts in the past have not allowed witnesses to testify regarding their observations about the destroyed document or record). See also United States v. Wells, 262 F.3d 455, 459, 463 (5th Cir. 2001) (holding that the district court erred by allowing the government to admit oral testimony of a cooperating witness "concerning his memory of the contents of previously destroyed ledgers that purportedly contained information regarding amounts of drugs he and his friend . . . sold to [one of the defendants]", because the testimony was inadmissible hearsay).


See Fed. R. Evid. 403 (relevant evidence may be excluded if it is “unfairly prejudicial”) and Dolan, *Rule 403: The Prejudice Rule in Evidence*, 49 S.Cal. L. Rev. 220 (1976) (classic read on the judicial administration of trial processes designed to produce accurate decisions).


The regime can also be used to support many other techniques evidence professors use including case analysis, application of the rules through problem-solving, simulations involving posing, opposing, or resolving objecting, and various combinations of these methods. Calvin William Sharpe, *Evidence Teaching Wisdom: A Survey*, 26 Seattle U. L. Rev. 569, 569 (2003). It can be used to support professors who teach the rules by using demonstrative evidentiary techniques, see Paul Bergman, *Teaching Evidence the "Reel" Way*, 21 Quinnipiac L. Rev. 973, 975
(2003), or those who use their own personal “war stories” to illustrate how the rules actually work inside the courtroom, see Michael L. Seigel, The Effective Use of War Stories in Teaching Evidence, 50 St. Louis U. L.J. 1191, 1194 (2006). The regime also plays a role in establishing evidentiary foundations as Professor Imwinkelreid’s series of treatises on that topic demonstrates. See, e.g., Lee D. Schinasi, Michael H. Graham, Edward J. Imwinkelreid, Florida Evidentiary Foundations (3rd ed. 2002). Similarly, Professor Saltzburg’s Trial Book series focuses on establishing the combination of rules necessary for admitting virtually any piece of evidence. See, e.g., Lee D. Schinasi, Gerald Kogan, Margret Steinbeck, Stephen A. Saltzburg, Florida Evidence Trial Book (2000).

For example, in a continuing legal education context I have been asked to speak on the character and credibility rules more often than any other topic. The portraits and mosaics regime lends itself to not only teaching those specific rules, but also the rules necessary to place character and credibility evidence in a meaningful and practical context. Similarly, in a traditional law school setting, I’d use the regime to support how Professor Paul Rothstein writes about teaching his evidence course. Professor Rothstein writes that in week eight of his evidence course, he focuses on Article VI of the Federal Rules, specifically on attacks on general character for credibility by opinion evidence, reputation, evidence, convictions, or non-conviction bad acts under Rules 608 and 609. See Paul Rothstein, Teaching Evidence, 50 St. Louis U. L.J. 999, 1018 (2006). Again the regime allows students to see character and credibility evidence in a broader context helping them understand how the rules would actually be used at trial.

For many years I have used Ronald L. Carlson, Edward J. Imwinkelried, Edward J. Kionka & Kristine Strachan, Evidence: Teaching Materials for an Age of Science and Statutes (6th ed. 2007).

It is important that students early on appreciate the varied and overarching role evidence plays in all forms of litigation. For instance, the Rules of Evidence can be defined as a guide for ascertaining the truth. See David D. Blink, Ethics, Evidence, and the Modern Adversary Trial, 19 Geo. J. Legal Ethics 1, 5 (2006). The Rules are also “tools that enable lawyers to introduce information favorable to their client’s case while blocking or undercutting their opponent’s proof.” Id. Moreover, the role evidence plays can described as “guarding the jury from the overweening effect of certain kinds of evidence.” See Morris D. Bernstein, Judging Witness Credibility: A Talmudic Perspective, 5 Rutgers J.L. & Religion 4, n.17 (2003) (discussing the importance of the prophylactic function of the rules of evidence in a jury trial). Evidence can be studied for its impact on the role trial lawyers should play: “[T]he lawyer is the client's zealous advocate, and therefore must search for the 'best' evidence from the client's point of view and present it in the way most likely to advance the client's ends.” See Nancy Amoury Combs, Understanding Kaye Scholer: The Autonomous Citizen, the Managed Subject, and the Role of the Lawyer, 82 Cal. L. Rev. 663, 684 (1994). “If [a lawyer] is not sufficiently zealous, then the factfinder may not have adequate evidence upon which to base her decision.” Id. at 685.

The modern definition of evidence is very broad. A wonderful example for use in the first few classes is contained in California Evidence Code § 140. It defines evidence as: “testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact.” See also Simon A. Cole, Toward Evidence-Based Evidence: Supporting Forensic Knowledge Claims in the Post-Daubert Era, 43 TULSA L. REV. 263, 264 (2007) (“Evidence can be defined as the “the building blocks that contribute to the law's edifice of proof.” Professor Cole places evidence in a litigation context by saying that the law, as a truth-seeking institution, purports to discover the truth and evidence is the vehicle by which this discovery of proof and conclusions of fact are made).

Most students are unfamiliar with the continental legal system and trials
conducted before professional judges without juries. The literature is rich in comparisons and commentaries on the relative merits of the European systems compared with the common law system. Civil law systems do not employ the formal rules of evidence that govern the courtrooms of the United States. See Jacqueline Ross, Do Rules of Evidence Apply (Only) in the Courtroom? Deceptive Interrogation in the United States and Germany, 28 Oxford J. Legal Stud. 443, 443 (2008). Civil law systems are generally unencumbered by a body of evidentiary rules because such systems commit fact-finding to mixed panels of lay and professional judges and therefore have more trust that the fact-finders will properly use certain types of evidence, such as hearsay, without a rule-created shield. Id. at 444. Comparatively, American evidentiary rules are “an artifact of the adversarial process” which relies on lay juries who are thought to be untrustworthy to evaluate evidence accurately or dispassionately. Id. See Lind, Thilbaunt & Walker, Discovery and Presentation of Evidence in Adversary and Nonadversary Proceedings, 71 Mich. L. Rev. 1129 (1973).

23 There is no clear-cut best way for new litigators to organize the events of a case. However, besides a general chronological time-line, there are three other methods that new litigators may utilize depending on which one best suits the events of their case. See Ariana R. Levinson, Lawyering Skills, Principles and Methods Offer Insight as to Best Practices for Arbitration, 60 Baylor L. Rev. 1, 49-51 (2008). One method is historical reconstruction where “the lawyer identifies the determinative event . . . then asks, if the lawyer's theory of the case is correct, what would likely have happened before the determinative event, during the determinative event, and after the determinative event.” Id. at 49. Another method is thinking explicitly about inference chains. Id. at 50. This involves first identifying “a key conclusion that the lawyer hopes to convey to the decision-maker,” followed by identifying “a key piece of circumstantial evidence that would or does (depending on whether it has already been discovered) support the conclusion,” and then finally identifying “the inferences that lead from the evidence to the conclusion.” Id. A third method is framing the argument as an improbability. Id. at 51; also known as the “If ___, Would Not ___ Because ___” method, it involves first identifying “a fact, then a second fact in conflict with the first fact, and then the reason the second fact conflicts with the first.” Id.

24 Before we delve into those rules of evidence which concern credibility, it is important to weave Professor Wigmore's often cited guidance into class conversation: [cross-examination is the] "greatest legal engine ever invented for the discovery of truth" See California v. Green, 399 U.S. 149, 158 (1970) (quoting 5 Wigmore on Evidence § 1367, at 32 (Chadbourn rev. 1974).

25 In Nesson, The Evidence of the Event? On Judicial Proof and the Acceptability of Verdict, 989 Harv. L. Rev. 1357 (1985), Professor Nesson discusses litigation's role as a peaceful dispute resolution mechanism. He finds that without a trial or similar process, harmed and aggrieved citizens would have to use self-help or some other socially threatening or unacceptable vehicle for resolving their differences. Vital to this process is that citizens maintain confidence in the systems fair and efficient resolution processes and rules. Key among them is the Federal Rules of Evidence.

26 See Fed. R. Evid. 608 (character and specific instance of conduct evidence both admissible on credibility), and Fed. R. Evid. 609 (evidence of previous convictions admissible on credibility). See Elcock v. Kmart Corp, 233 F.3d 2000 (3d Cir. 2000) (discussing the interrelationship between Rules 608 and 609, and how they can be effectively applied at trial). An important component of credibility concerns a witness's potential bias in favor of or against one of the parties. Although “bias” is not specifically provided for in the Federal Rules of Evidence, courts have long admitted it using Rule 608 logic. See United States v. Skelton, 514 F.3d 433 (5th Cir. 2008) (defendant must be permitted to explore a government witness's alleged bias against him).
Federal Rule of Evidence 404(a)(1) permits an accused to introduce testimony of a relevant or "pertinent" character trait of himself or of the victim. Edward J. Imwinkelried, *Reshaping the "Grotesque" Doctrine of Character Evidence: The Reform Implications of the Most Recent Psychological Research*, 36 Sw. U. L. Rev. 741, 762 (2008). In 2000, the Rule was amended and now provides that if the defendant attacks the character of the victim, the prosecution may then attack the character of the accused for the same trait. *See* Christopher W. Behan, *When Turnabout is Fair Play: Character Evidence and Self-Defense in Homicide and Assault Cases*, 86 Or. L. Rev. 733, 737 (2007). A further amendment to the Rule in 2006 provides that rule is exclusively applicable to criminal cases. *Id. at* 738. *See*, United States v. Harris, 491 F.3d 440 (D.C. Cir. 2007) (distinguishing pertinent character trait evidence from testimony dealing with truthfulness).

Class discussion here often focuses on the value of character evidence in determining criminal responsibility when it is juxtaposed with substantive proof of the crime. In United States v. Long, 328 F.3d 655, 659 (D.C. Cir. 2003), the court affirmed appellant's convictions for child sexual abuse offenses where the issue on appeal centered on the admissibility of an FBI agent testifying as an expert "in the field of sexual exploitation of children, including 'the typology, identification, characteristics, and strategies of sexual offenders, in particular preferential sexual offenders,' as well as 'the characteristics and behavior of child victims of sexual abuse.'" Defense counsel objected contending this testimony would be improper character evidence under Rule 404(a). Recognizing that the agent's testimony had already been accepted by two other circuits and was not considered inadmissible profile evidence, the court held that it "was offered for a permissible purpose, namely to identify the behavior and actions of child molesters and explain their modus operandi...." *Id* at 668. This testimony was important to the government's explanation of what occurred in a complex case where the defendant was a Baptist minister indicted for sexually molesting six boys under his care who were all between 13 and 17 years-of-age.

*See* Saby Ghosray, *Untangling the CSI Effect in Criminal Jurisprudence: Circumstantial Evidence, Reasonable Doubt, and Jury Manipulation*, 41 New Eng. L. Rev. 533, 535 (2007) (discussing the CSI effect on juries and the concern that shows like CSI, in which prosecutors utilize highly sophisticated scientific techniques, are distorting the jury deliberation process by placing an undue burden on law enforcement agencies and prosecutors and developing a faulty expectation of forensic science required for convicting a defendant).

*Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579 (1993), and its progeny provide a wonderful summary for my evidence course. In Daubert the Supreme Court traces the development of common law standards for admitting expert testimony and scientific evidence. The Court explains how the Federal Drafters created a new standard in Rule 702, and how the law of evidence had to evolve in order to keep pace with technological and other changes. In rejecting Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), and its "general acceptance" test, the court interrelates several other Federal Rules of Evidence in reaching its new standard, a process which supports the portraits and mosaics regime.

*It* is often difficult to learn anything complex exclusively through verbal directions, and many students may initially be confused by the structure of Federal Rules of Evidence and the concepts conveyed merely by words alone. *See* Kevin C. McMunigal, *Using Graphics to Teach Evidence*, 50 St. Louis U. L.J. 1175, 1175 (2006). Presenting diverse ways to explain the rules and by early introduction to the semantics of the rules, students may have an easier time grasping the more difficult job of actually understanding and then applying the rules. Any original visual graphic or representation of the rules will likely facilitate the learning experience. *Id.*

*I also* teach Federal Civil Procedure. In the Preface to Professor Yeazell's excellent casebook, Stephen Yeazell, *Civil Procedure*, xxv (7th ed. 2008), he describes
the role civil procedure plays in both legal education and the practice of law. His insights can also be applied to evidence:

[Procedure is] an essential mechanism for presenting substantive questions and as a system that itself often raises fundamental issues regarding social values. I hope that students will begin to appreciate that lawyers move the system and that, to a large extent, clients’ fates depend on the wisdom, skill, and judgment of their lawyers. Moreover, although all would agree that cases should not be decided on the basis of “mere” technicalities, fierce debate quickly arises when one tries to distinguish rules that merely direct traffic from those that guard the boundaries of fairness.

See Edward J. Imwinkelried, The Organization of the Evidence Course: The “Preliminaries” to Helping Students Develop the Skill of Identifying Nonhearsay, 50 St. Louis U. L.J. 1047, 1056, 1058 (2006) (advocating that evidence professors teach authentication and best evidence prior to hearsay because “[a] student who has already learned the value of facial analysis in authentication should be able to more quickly discern its parallel importance under the hearsay doctrine,” and “[i]f the teacher exposes the student to the flow of best evidence analysis before turning to hearsay, the student should find it much easier to grasp the sequence of hearsay analysis” because “[the] overall flow of best evidence analysis is quite analogous to the sequence of hearsay analysis.”)

However, it has been constructed so that a new professor to evidence can follow it in some detail as a way of introducing the subject matter to students, and as a vehicle for providing that overarching view of evidence which hopefully will help create early on confidence and support for the classes to follow.

Certainly other Articles or Rules of Evidence could be introduced here or at any other stage of this overview. As employed here, the regime is intentionally limited to those principles which will be most helpful early on and is intended to be only a conceptual starting point, a strawman which can be easily changed and amended to satisfy each professor’s style and interests.

Similarly, my final review of the course is much like a closing argument. The portraits and mosaics regime is flushed out to contain virtually every Rule we have discussed during the semester and where it fits in the regime’s structure.

The Federal Rules of Evidence favor admissibility and reject the notion that to be admissible proof has to possess a “greater level of probative value than that which we might apply in everyday matters.” Robert P. Burns, Notes of the Future of Evidence Law, 74 Temp. L. Rev. 69, 79 (2001). Instead the Rules adopt a much lower standard of probative value and provide that the offered evidence simply must possess some tendency to make a fact at bar more or less probably then it would be without the proof. Id.

The legal basis for admitting character and credibility evidence is often difficult for law students to decipher. The validity of that basis has been explored in Charles H. Rose III, Should the Tail Wag the Dog? The Potential Effects of Recidivism Data on Character Evidence Rules, 36 N. M. L. Rev. 341, 342 (2006). Professor Rose’s insightful article illuminates empirical research on the value character and credibility evidence possesses as a vehicle for predicting and measuring recidivism. Professor Rose indicates that many of the assumptions made particularly as they apply to sexual offenses (see Rules 412-415) may have to be rethought.

Recent studies indicate that there is a strong statistical correlation between previous convictions for both property crimes and drug crimes and recidivating offenses that constitute the same type of misconduct. These studies expose the fact that the statistical correlation between previous convictions for sexual misconduct and recidivating offenses of the same type is low, calling into question the current evidentiary treatment of sexual offenses.

This process is similar to being blind folded and told to identify a large animal by starting at its feet and working your way up until you have enough information to make an educated guess about what type of creature it might be and what it could be used for.

Fed. R. Evid. 401. Definition of Relevant Evidence. Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Fed. R. Evid. 601. General Rule of Competency. Every person is competent to be a witness except as otherwise provided in these rules. 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 competency of a
witness shall be determined in accordance with State law.

Fed. R. Evid. 801(c). Definitions. "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."

Fed. R. Evid. 901(a). Requirement of Authentication or Identification (a) General provision. "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 proponent claims."

Fed. R. Evid. 1002. Requirement of Original. "To prove the content 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."

The starting point for all questions of admissibility, including the admissibility of other acts evidence, is relevance. See Jim Gash, Punitive Damages, Other Acts Evidence, and the Constitution, 2004 Utah L. Rev. 1191, 1211-12 (2004).

Fed. R. Evid. 402. "Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible. All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible."

Fed. R. Evid. 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

See Eileen A. Scallen, Evidence Law as Pragmatic Legal Rhetoric: Reconnecting Legal Scholarship, Teaching and Ethics, 21 Quinnipiac L. Rev. 813, 858 (2003) for Professor Scallen’s description of her first evidence class in which she emphasizes Rule 102, and asks her students whether the goal of Evidence law is to obtain the historical truth about an event and if so, "how can we justify the existence of privileges, which often exclude the most relevant and reliable evidence about past events?"

Although Rule 403 allows trial judges to consider intrinsic judicial administration policies, there is some debate over whether a judge may consider extrinsic social policies, that is, whether a judge can bar evidence on the basis that such evidence if admitted might deter socially desirable conduct. See Edward J. Imwinkelried, The Meaning of Probative Value and Prejudice in Federal Rule of Evidence 403: Can Rule 403 Be Used to Resurrect the Common Law of Evidence?, 41 Vand. L. Rev. 879, 890 (1988). Professor Imwinkelried argues that the prejudice prong of Rule 403 only permits a judge to exclude relevant evidence when such evidence "poses a risk to the integrity of fact finding process," and does not permit a judge to bar relevant evidence in order to uphold an extrinsic social policy such as encouraging plea bargaining. Id. at 884.

The drafters of 403 intentionally eliminated a distinction between mandatory exclusion and discretionary exclusion of relevant evidence, which resulted in giving trial judges a great deal of discretion when performing a 403 balancing test. See Michael J. Pavloski, Old Chief v. United States: Interpretation and Misapplication of Federal Rule of Evidence 403, 33 New Eng. L. Rev. 797, 801 (1999). When balancing between the probative value and the prejudicial effect of a piece of evidence, trial judges are vested with broad discretion in deciding whether to admit or exclude evidence and should “take special care to use it sparingly.” Id. at 803. Unfortunately, within the Rule, there are no specific guidelines for identifying or measuring the danger of unfair prejudice and “[h]ow courts use their discretion to exclude evidence under Rule 403 can neither be predicted nor effectively reviewed.” Victor A. Gold, Federal Rule of Evidence 403: Observations on the Nature of Unfairly Prejudicial Evidence, 58 Wash. L. Rev. 497, 498 (1983).

See Douglas v. Eaton Corp., 956 F.2d 1339 (6th Cir. 1992) (court holds that evidence may not be excluded if it has even the slightest probative worth. Court also distinguishes between relevance and sufficiency of evidence. To be admissible evidence need not be sufficient to prove the point in issue, only relevant to it.).

A very interesting application of this theory can be seen in United States v. Amado-Nunez, 357 F.3d 119, 121-122 (1st Cir. 2004). Appellant’s conviction there for transporting counterfeit tax stamps in interstate or foreign commerce was affirmed despite his contention that the government failed to present evidence proving that the stamps traveled in interstate or foreign commerce. In resolving the
issue against appellant the court took a very expansive view of relevance and proof the jury could consider by finding that:

"The vast array of "background" facts commonly considered by judges and juries is admissible. The court went on to say that "these "background" or "evaluative" facts cover the whole range of human experience from the rough meaning of common terms ("city") to science (a full moon illuminates a scene) to human psychology (a witness who is related to one of the parties might be biased). For example: When a witness says "car," everyone, judge and jury included, furnishes, from non-evidence sources within himself, the supplementing information that the "car" is an automobile, not a railroad car, that it is self-propelled, probably by an internal combustion engine, that it may be assumed to have four wheels with pneumatic rubber tires, and so on. The judicial process cannot construct every case from scratch, like Descartes creating a world based on the postulate Cogito, ergo sum. These items could not possibly be introduced into evidence, and no one suggests that they be." Connecting their expansive view to the role juries play the court opined that "fact-finders rely upon such background references or propositions all the time in deciding whether something did or did not happen; and this is permissible..." without resort to Rule 201 and judicial notice.

See also United States v. Amaya-Manzinares, 377 F.3d 39 (1st Cir. 2004) (whether circumstantial evidence is relevant must be determined by considering "how the world works").

Relevancy must be established with respect to every item of evidence. No evidence possesses inherent relevance. The trial judge has four basic choices with respect to ruling on relevance issues: (1) exclude the evidence; (2) admit the evidence; (3) admit the evidence subject to a limiting instruction; or (4) admit part of the evidence and exclude part of the evidence.

In deciding which ruling to make, trial judges should require counsel to do three things: (1) describe the evidence; (2) explain its nexus to the consequential issue at bar; and (3) indicate how the offered evidence will establish the fact in question.

For example, because Rule 402 states that "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court," Professor Imwinkelried reasons that there is a strong argument that this rule abolishes any common law exclusionary rule that has not been reduced to statute. Edward J. Imwinkelried, The Silence Speaks Volumes: A Brief Reflection of Whether it is Necessary or Even Desirable to Fill the Seeming Gaps in Article VI of the Federal Rules of Evidence, Governing the Admissibility of Evidence Logically Relevant to the Witness's Credibility, 1998 U. Ill. L. Rev. 1013, 1015 (1998).

Fed. R. Evid 601. General Rule of Competence. "Every person is competent to be a witness except as otherwise provided in these rules." See United States v. Phibbs, 999 F.2d 1052 (6th Cir. 1993) (eligibility to be a witness depends on the content of the proposed witness's testimony).

See Idaho v. Wright, 47 U.S. 805 (1990) (in child victim case the Supreme Court rejected a per se exclusionary rule approach to preventing juries for hearing child witness testimony simply because the witness was incompetent to testify).

Rule 601 provides that every person is competent to testify and as a result few potential witnesses are disqualified on competency grounds. Jane Dever Prince, Competency and Credibility: Double Trouble for Child Victims of Sexual Offenses, 9 Suffolk J. Trial & App. Advoc. 113, 116 (2004). Judges tend to exercise discretion in favor of allowing a witness to testify even if the witness is feeble or has been in a mental institution, if the witness possesses sufficient knowledge of the nature and consequence of the oath and an ability to community with the jury. Id.

See United State v. Thai, 29 F.3d 785 (2nd Cir. 1994) (court affirmed a RICO conviction finding no abuse of discretion in allowing a 6 year-old to testify).

See United States v. Bedonie, 913 F.2d 782 (10th Cir. 1990) (witness with numerous previous inconsistent statements found competent to testify; court
opined issue goes only to credibility which is an area reserved exclusively for the jury).

60See United States v. Davis, 918 D.2d 280 (1st Cir. 1990) (no error in allowing witness who had suffered a severe psychiatric event and been hospitalized for it from testifying).

61See United States v. Killiam, 524 F.2d 1268 (5th Cir. 1975) (no error in refusing to strike testimony of admitted drug abuser).

62See United States v. Kimberlin, 805 F.2d 210 (7th Cir. 1986) (no error when six government witnesses who had previously been hypnotized testified against the accused. Court refused to apply a "sweeping rule of inadmissibility").

63Fed. R. Evid 603. Oath or Affirmation. * 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". See United States v. Saget, 991 F.2d 702 (11th Cir. 1993) (this rule of evidence is satisfied if the witness recognizes a solemn duty to tell the truth).

64 Fed. R. Evid 602. Lack of Personal Knowledge.

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. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses. There are two important regime characteristics which should be considered here. The first is that a witness's basis of knowledge will always be a consideration for hearsay purposes. See Rule 801(c): "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." Second, as the rule itself states, expert witness and opinion testimony issues pursuant to Rule 703 may always be involved here. See Kacmarek v. Allied Chemical Corp, 836 F.2d 1055 (7th Cir. 1987) (error for witness to present testimony based on information gleaned from a hearsay statement), and Agfa-Gevaert, A.G. v. A.B. Dick Co., 879 F.2d 1518 (7th Cir. 1989) (inferential assessments about a product's quality are admissible as long as common drawn by experts in the area).

65Rule 601 does not require an examination of a witness to determine his or her competency; rather, counsel can raise the issue of credibility through cross-examination. Rule 601: General Rule of Competency, 12 Touro L. Rev. 477, 478 (1996). Prior to enactment of the Federal Rules of Evidence, the Supreme Court started to diverge from the common law by finding that the goal of getting to the truth will be better accomplished "by hearing the testimony of all persons of competent understanding" and recognized that the credit and weight of such testimony should be determined by the jury or by the court instead of simply rejecting the witnesses as incompetent. Id.

66Because the standard for admissibility under Rule 601 is extremely liberal, factors that relate to competency, such as the witness' ability to perceive, go to the weight of the testimony rather than its testimony. Fred Warren Bennett, How to Administer the "Big Hurt" in a Criminal Case: The Life and Items of Federal Rule of Evidence 806, 44 Cath. U. L. Rev. 1135, 1143 (1995). Therefore, the witness's ability to perceive may be impeached. Id. Rule 601 also governs the impeachment of a witness's memory, recollection, and ability to communicate. Id. at 1145, 1146.

67For instance, in a criminal trial, a defendant must decide whether she wants to testify, but once she does in fact testify "she is subject to cross-examination, including impeachment by prior convictions, and the decision to take the stand may prove damaging instead of helpful." Ohler v. United States, 529 U.S. 753, 757 (2000).

68See Anne Bowen Poulin, Credibility: A Fair Subject for Expert Testimony?, 59 Fla. L. Rev. 991, 996. Professor Poulin discusses how Rule 608(a) can be used to impeach a witness's credibility after that witness has testified. She indicates that opposing counsel can use Rule 608(a) to attack the witness's character for credibility with reputation or opinion evidence, and Rule 608(b) to conduct the same attack with evidence of specific instances of conduct. After the witness has been attacked her the proponent may attempt to rehabilitate her credibility with similar positive evidence. Id.


70See Fed. R. Evid 613. Prior Statements of Witness (when statements are not being offered for the truth), and Fed. R. Evid 80(b)(1). Former Testimony (when statements are being offered for the truth).
expected, this approach provides equal benefits for defense counsel and defense witnesses.

See Feldman, The Work Product Rule in Criminal Practice and Procedure, 50 U. Cin. L. Rev. 495 (1981). See Dan K. Webb and J. David Reich, Trial Strategy: Prior Statements, 780 PLI/Lit 935, 937 (2008) (authors discuss pretrial investigation value of government prepared witness-interview memoranda when they are used at trial: (1) prior statements can be used to refresh a witness’s recollection, (2) a prior inconsistent statements can be used to impeach a witness’s credibility, and (3) prior consistent statements can be used to rehabilitate a witness’s credibility. As would be expected, this approach provides equal benefits for defense counsel and defense’s investigators. Id.).

For example, Professor Paul Rothstein writes about his decision to change the point at which he introduces hearsay into his curriculum. He states that for years he taught hearsay and its exceptions first, after a general introduction to evidence. However, he now follows the Federal Rules order teaching hearsay much later in the course. Rothstein, supra note 18, at 1002.


See Imwinkelried, supra note 33, at 1050–51 (encouraging evidence professors to avoid the temptation to begin their course with hearsay and instead first teach “preliminaries” that will aid students in recognizing nonhearsay including the competency of prospective witnesses, the authentication of
evidence, logical relevance, notably non-character theories, and the best evidence rule).

76See Fed. R. Evid. Article IX. Authentication and Identification; and Article X. Contents of Writing, Recording, and Photographs.

77541 U.S. 36 (2004). See Paul W. Grimm and Jerome E. Deise, Jr., Hearsay, Confrontation, and Forfeiture by Wrongdoing: Crawford v. Washington, A Reassessment of the Confrontation Clause, 35 U. Balt. L.F. 5, 7 (2004) (discussing the plethora of questions raised by Crawford v. Washington including: “What does the phrase, ‘witnesses against him,’ as provided in the Sixth Amendment, actually mean? When is a statement a ‘testimonial’ statement and when is it ‘non-testimonial?’ Which statements implicate the Confrontation Clause? Are certain hearsay statements beyond the scope of the Confrontation Clause? Do the Constitutional rights of an accused ‘trump’ . . . the rules of evidence? Do the rules of evidence ever ‘trump’ the Constitutional rights of an accused, or does neither ‘trump’ the other? Under what circumstances must the defendant have the opportunity to confront and cross-examine a now ‘unavailable’ hearsay declarant before those statements can be admitted? Can a criminal defendant, by his conduct, ‘waive’ or ‘forfeit’ an objection to the admissibility of certain hearsay statements? Can he ‘waive’ or ‘forfeit’ his right to Confrontation?”).

78Great reads on these topics are contained in Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 Harv. L. Rev. 177 (1948), Tribe, Triangulating Hearsay, 87 Harv. L. Rev. 957 (1974), and Michael H. Graham, Evidence, An Introductory Problem Approach 74-76 (2002). All provide wonderful insights and explanatory applications for complex hearsay topics.

79In Crawford v. Washington, 541 U.S. 36, 43-56 (2004), the court provided a concise history of hearsay’s development in the United States from the time of the Founders until today. We do not read the historical sources to say opportunity to cross-examine was merely a sufficient, rather than a necessary, condition for admissibility of testimonial statements. They suggest that this requirement was dispositive, and not merely one of several ways to establish reliability. This is not to deny, as the Chief Justice notes, that “[t]here were always exceptions to the general rule of exclusion” of hearsay evidence…But there is scant evidence that exceptions were invoked to admit testimonial statements against the accused in a criminal case. Most of the hearsay exceptions covered statements that by their nature were not testimonial—for example, business records or statements in furtherance of a conspiracy. We do not infer from these that the Framers thought exceptions would apply even to prior testimony. (Footnotes excluded.) Id. 56


81See Barber v. Page, 390 U.S. 719, 725 (1968) (“The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine the occasion for the jury to weigh the demeanor of the witness.”)


The approach to hearsay in these rules is that of the common law, i.e., a general rule excluding hearsay, with exceptions under which evidence is not required to be excluded even though hearsay. The traditional hearsay exceptions are drawn upon for the exceptions, collected under two rules [Rule 803 and 804], one dealing with situations where availability of the declarant is regarded as immaterial and the other with those where unavailability is made a condition to the admission of the hearsay statement. [The rules also have] a provision for hearsay statements not within one of the specified exceptions “but
having comparable circumstantial guarantees of trustworthiness.” Rule [Rule 807]. This plan is submitted as calculated to encourage growth and development in this area of the law, while conserving the values and experience of the past as a guide to the future.

Exact definition of these concepts has proven difficult both at the common and under the Federal Rules of Evidence as discussed about. See also, McCormick, The Borderland of Hearsay, 39 Yale L. J. 489 (1930) (discussing these definitional differences).

83 The Supreme Court’s decisions in Crawford v. Washington, 546 U.S. 36 (2004) and Hammond and Davis v. Washington, 547 U.S. 813 (2006), have added both clarity and confusion to the law of hearsay. In Crawford, the Supreme Court addressed the Confrontation Clause of the Sixth Amendment and its application to Rule 804 is a way that added uncertainty to criminal litigation. Thomas J. Walsh, The Confrontation Clause after Crawford v. Washington: Clarifying the Meaning of Testimonial Statements in Criminal Trials, 85 U. Det. Mercy L. Rev. 163, 163 (2008). The Court held that the Confrontation Clause prohibits the admission of statements which are “testimonial” unless the witness was unavailable and there was a prior opportunity to cross-examine the witness. Id. Unfortunately, this holding led to a great deal of confusion as the Court did not provide guidance on what “testimonial” means. Id. However, in Hammond and Davis the court added clarification and analysis. Id. at 163–64. Specifically, Justice White’s concurrence in Crawford along with the Hammond and Davis cases provided a sense of direction to the lower courts of how future cases should cope with “testimonial” issues and the Confrontation Clause. Id. at 197.

84 This rule requires the declarant to be unavailable before its provisions can be used. Rule 804(a) provides five definitions of unavailability: (1) privilege from testifying; (2) refusing to testify; (3) declarant has a lack of memory; (4) declarant is physically or mentally infirm or deceased; and (5) proponent of statement has been unable to procure declarant’s availability.

85 See Garcia-Martinez v. City & Country of Denver, 392 F.3d 1187 (10th Cir. 2004) (no error to exclude deposition of plaintiff when his absence at trial was calculated and due to the procurement of wrongdoing). See also Fed. R. Evid 804(a).

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

Fed. R. Evid 804(b)(6).

Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

86 On December 1, 1997, Rules 803(24) and 804(b)(5) were combined to create Rule 807. The legislative history and judicial applications of the previous two rules were intended to directly apply to the new rule. See Daniel Capra, Advisory Committee Notes to the Federal Rules of Evidence That May Require Clarification, 182 F.R.D. 268, 278 (1999).

87 Professor Imwinkelried finds Rule 807, as well as Rules 301 and 501, useful for opening a discussion of the “common-law methodology.” Edward J. Imwinkelried, Using the Evidence Course as a Vehicle for Teaching Legisprudential Skills, 21 Quinnipiac L. Rev. 907, 912 (2003). He explains that these Rules compel, rather than merely permit, the courts to continue utilizing the common law. Id. Specifically, under Rule 807, when deciding whether to admit hearsay that does not fall within an enumerated exception, courts are required to consider common law applications. Id.

88 See Advisory Committee Note to Rule 803(24), the precursor to Rule 807: [The rule] does not contemplate an unfettered exercise of judicial discretion, but [it does] provide for treating new and presently unanticipated situations which demonstrate a trustworthiness with the spirit of the specifically stated exceptions. Within this framework, room is left for growth and development of the law of evidence in the hearsay area, consistently with the broad purposes expressed in Rule 102.

89 For an interesting discussion on the Federal Rules of Evidence Advisory Committee’s role in this process see Paul R. Rice, Advisory Committee on the Federal Rules of Evidence: Tending to the Past and Pretending for the Future?, 53 Hastings L.J. 817, 832 (2002). Professor Rice discusses how the Committee and the Supreme Court have worked to make it clear that judges no longer possess the common law powers over evidence they once did. Although trial and appellate court judges continue to interpret the rules so as to resolve conflicts in both meaning and application, they no longer have the common law authority “to amend bad or inadequate rules, create non-existent rules, resolve conflicts between rules, and ignore language that is inconsistent with the goals of a particular rule.” Id. at 833.
Congress intended for the catchall exceptions to be used in rare and exceptional circumstances; however, data suggests that the catchall exceptions are being used much more generally than the legislature intended. James E. Beaver, *The Residual Hearsay Exception Reconsidered*, 20 Fla. St. U. L. Rev. 787, 790–91 (1993). *See also* Steve Zeidman, *Who Needs an Evidence Code?: The New York Court of Appeals’s Radical Re-Evaluation of Hearsay*, 21 Cardozo L. Rev. 211, 239 (1999) (discussing the controversy surrounding the federal residual provision and stating that although the legislature intended for the rule to be used sparingly, the residual exception has overwhelmed the hearsay rule).


For example, computer-generated animations do not fit within any of the enumerated exceptions so they can only be entered into evidence through a hearsay catch-all rule. Dean A. Morande, *A Class of Their Own: Model Procedural Rules and Evidentiary Evaluation of Computer-Generated "Animations”*, 61 U. Miami L. Rev. 1069, 1108 (2007). As long as evidence that does not fit within one of the listed exceptions of the hearsay rule, Rule 807 provides that the evidence is admissible if it has the equivalent circumstantial guarantees of trustworthiness. Carole E. Powell, *Computer Generated Visual Evidence: Does Daubert Make a Difference?*, 12 Ga. Sta. U. L. Rev. 577, 586–587 (1996). This requires the court to determine whether the evidence is sufficiently reliable and not unfairly prejudicial and to consider the following factors: (1) whether the evidence is probative of a material fact, (2) whether the evidence is more probative than any other evidence that is reasonably attainable, (3) whether the purposes of the rules and the interests of justice are best served by allowing admission, and (4) whether the proponent of the evidence gave the opponent sufficient notice. *Id.* at 587.


*See* Eddy v. Waffle House, Inc., 482 F.3d 674, 682 (4th Cir. 2007) (affirming judgements for defendant in this civil rights case, the court concluded that excluding plaintiff’s hearsay statements did not constitute an abuse of discretion because the trial judge’s resolution was not “arbitrary and irrational.”).

*See* United States v. Duran Samaniego, 345 F.3d 1280, 1281(11th Cir. 2003) (“We review the district court's evidentiary ruling only for an abuse of discretion, and we will reverse only if [the movant] convinces us that an erroneous ruling resulted in a substantial prejudicial effect.”).

*See* Lataille v. Ponte, 754 F.2d 33, 37 (1st Cir. 1985) (“Our standard for determining whether the admission of such evidence is harmless error is whether we can say "with fair assurance...that the judgment was not substantially swayed by the error.... The centrality of the evidence, its prejudicial effect, whether it is cumulative, the use of the evidence by counsel, and the closeness of the case are all factors which bear on this determination.""

In this high-tech age, jurors are more likely to retain information when it is presented in visual forms such as graphs, pictures, or enlargements of documents. *See* Katrina Grider, *Goodbye Flip Charts, Hello Plasma Screens*, 68 Tex. B.J. 567, 567 (2005).

Computerized business records provide an example for how courts interrelate hearsay and authentication. A professor Romano suggests, some courts will initially consider whether such evidence has been properly authenticated under Rule 901. Leigh Voigt Romano, *Electronic Evidence and the Federal Rules*, 38 Loy. L.A. L. Rev. 1745, 1751 (2005). If the court determines that the evidence has been properly authenticated, the court will then determine whether the evidence is hearsay and if so whether it falls within an exception to Rule 402. *Id.* Computerized business records most likely qualify for admission under Rule 803(6)’s business records exception. *Id.* Other courts ignore the authentication analysis and go straight to the hearsay exception. *Id.* at 1751–52.

If a proponent offers a writing or any tangible object in evidence, that item must be supported by sufficient proof for the judge to conclude that the writing or tangible object is what it is claimed to be. Miguel A. Mendez, *Authentication and the Best and Secondary Evidence Rules*, 41 U.S.F. L. Rev. 1, 3 (2006). The authentication rule favors admissibility: as long as the judge concludes that a reasonable jury could find the writing or tangible object to be what the proponent says it is, then
the judge must let the issue of the writing or tangible object's authenticity go to the jury. *Id.* The opposing party may offer evidence to counter authenticity of the writing or object, but that evidence will generally be used by a jury to determine who to believe. *Id.* at 3–4. Moreover, the questioned evidence is admissible as long as the proponent can connect it with an issue in the case to demonstrate its relevance. *Id.* at 4.

100 *See* Fed. R. Evid. Rule 901(b)(2). “Nonexpert opinion on handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.” United States v. Samet, 446 F.3d 251 (2d Cir. 2006) (affirming racketeering convictions the court held that postal inspector could identify the handwriting in question because he had spent 80% of three years investigating the case, did not gain the knowledge in question for the purposes of prosecution, and his opinion was admissible pursuant to Rules 901(b)(2) and 701(lay opinion testimony).