

CHAPTER 5  
RULES OF EVIDENCE

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ARTICLE IV  
RELEVANCE AND ITS LIMITS

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**Rule 5.404 Character evidence; crimes or other acts.**

*a. Character evidence.*

(1) *Prohibited ~~acts~~uses.* Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

(2) *Exceptions for a defendant or victim in a criminal case. The following exceptions apply in a criminal case:*

*(A) ~~In criminal cases.~~*

*(i) ~~(A)~~ A defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it.*

*(ii) ~~(B)~~ Subject to the limitations in rule 5.412, a defendant may offer evidence of the victim's pertinent trait, and if the evidence is admitted, the prosecutor may ~~offer evidence to rebut it.:~~*

*(i) Offer evidence to rebut it; and*

*(ii) Offer evidence of the defendant's same trait.*

*(iii) ~~(C)~~ When the victim is unavailable to testify due to death or physical or mental incapacity, the prosecutor may offer evidence of the victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.*

*(B) ~~In civil cases.~~*

*(i) ~~Evidence of an alleged victim's character for violence may be offered on the issue of self-defense by a party accused of assaultive conduct against the victim.~~*

*(ii) ~~If evidence of a victim's character for violence is admitted, any party may offer evidence of the victim's peaceful character to rebut it.~~*

(3) *Exceptions for a witness.* Evidence of a witness's character may be admitted under rules 5.607, 5.608, and 5.609.

*b. ~~Other Crimes~~crimes, wrongs, or ~~other~~acts.*

(1) *Prohibited ~~use~~uses.* Evidence of any other crime, wrong, or ~~other~~ act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) *Permitted uses.* This evidence may be admissible for another purpose such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

(3) Notice in a Criminal Case. In a criminal case, the prosecutor must:

(A) Provide reasonable notice of any such evidence that the prosecutor intends to offer at trial, so that the defendant has a fair opportunity to meet it;

(B) Articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose; and

(C) Do so in writing before trial—or in any form during trial if the court, for good cause, excuses lack of pretrial notice.

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#### **Rule 5.408 Compromise offers and negotiations.**

*a. Prohibited uses.* Evidence of the following is not admissible—on behalf of any party—either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:

(1) Furnishing, promising, or offering—or accepting, promising to accept, or offering to accept—a valuable consideration in compromising or attempting to compromise the claim ~~that was disputed on either validity or amount;~~ and

(2) Conduct or a statement made during compromise negotiations about the claim.

*b. Exceptions.* The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

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#### **Rule 5.412 ~~Sexual abuse~~Sex-offense cases; the victim's past sexual behavior or predisposition.**

*a. Prohibited uses.* The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual ~~abuse~~misconduct:

(1) ~~Reputation or opinion evidence~~Evidence offered to prove that a victim

engaged in other sexual behavior; or

(2) Evidence ~~offered to prove~~ a victim's ~~other sexual behavior other than reputation or opinion evidence~~ predisposition.

*b. Exceptions.*

(1) *Criminal cases.* The court may admit the following evidence in a criminal case:

(A) Evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence; ;

(B) Evidence of specific instances of a victim's sexual behavior with respect to the person accused of sexual ~~abuse~~ misconduct, if offered by the defendant ~~offers it~~ to prove consent or if offered by the prosecutor; and

(C) Evidence whose exclusion would violate the defendant's constitutional rights.

(2) *Civil cases.* ~~Rule 5.412(b) does not apply in civil cases~~ In a civil case, the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy.

*c. Procedure to determine admissibility.*

(1) *Motion.* If ~~the defendant in a criminal sexual abuse case~~ a party intends to offer evidence under rule 5.412(b), the ~~defendant party~~ must:

(A) File a motion ~~to offer~~ that specifically describes the evidence ~~at least 14 days before trial unless the court determines that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence, or that the evidence relates to an issue that has newly arisen in the case, and the court sets a different time~~ and states the purpose for which it is to be offered; and

(B) ~~Serve the motion on all parties and on the victim, or when appropriate, the victim's guardian or representative~~ Do so at least 14 days before trial unless the court, for good cause, sets a different time; and

(C) ~~File with~~ Serve the motion ~~an offer of proof that specifically describes the evidence and states the purpose for which the evidence is to be offered~~ on all parties; and

(D) Notify the victim or, when appropriate, the victim's guardian or representative.

~~(2) *Hearing.* If the court determines that the offer of proof contains evidence described in rule 5.412(b), the court must conduct a hearing in camera to determine if such evidence is admissible. Before admitting evidence under this rule, the court must conduct an in camera hearing and give the victim and parties a right to attend and be heard. Unless the court orders otherwise, the motion, related materials, and the record of the hearing must be and remain sealed.~~

~~(A) At the hearing the parties may call witnesses, including the victim, and offer relevant evidence.~~

~~(B) Notwithstanding rule 5.104(b), if the relevance of the evidence depends on the fulfillment of a condition of fact, the court, during a hearing in camera, must accept evidence on whether the condition of fact is fulfilled.~~

~~(C) If the court determines that the evidence is relevant and that the probative value outweighs the danger of unfair prejudice, the evidence will be admissible at trial to the extent the court specifies, including the evidence on which the victim may be examined or cross-examined.~~

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## **ARTICLE VII**

### **OPINIONS AND EXPERT TESTIMONY**

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**Rule 5.703 Bases of an expert's opinion testimony.** An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

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**Rule 5.706 Court-appointed expert witnesses.**

*a. Appointment process.* On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.

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**ARTICLE VIII**

HEARSAY

**Rule 5.801 Definitions that apply to this Article; exclusions from hearsay.**

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*d. Statements that are not hearsay.* A statement that meets the following conditions is not hearsay:

(1) *A declarant-witness's prior statement.* The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) Is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

(B) Is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(C) Identifies a person as someone the declarant perceived earlier.

(2) *An opposing party's statement.* The statement is offered against an opposing party and:

(A) Was made by the party in an individual or representative capacity;

(B) Is one the party manifested that it adopted or believed to be true;

(C) Was made by a person whom the party authorized to make a statement on the subject;

(D) Was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) Was made by the party's coconspirator during and in furtherance of the conspiracy. ~~Prior to admission of hearsay evidence under rule 5.801(d)(2)(E), the trial court must make a preliminary finding, by a preponderance of evidence,~~

~~that there was a conspiracy, that both the declarant and the party against whom the statement is offered were members of the conspiracy, and that the statements were made in the course and in furtherance of the conspiracy.~~

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

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**Rule 5.803 Exceptions to the rule against hearsay—regardless of whether the declarant is available as a witness.** The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

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(16) *Statements in ancient documents.* A statement in a document that ~~is at least 30 years old~~ was prepared before January 1, 1998, and whose authenticity is established.

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**Rule 5.804 Exceptions to the rule against hearsay—when the declarant is unavailable as a witness.**

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

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(3) *Statement against interest.* A statement that:

(A) A reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

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

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**Rule 5.807 Residual exception.**

*a. In general.* Under the following ~~circumstances~~conditions, a hearsay statement is not excluded by the rule against hearsay even if the statement is not ~~specifically covered by~~admissible under a hearsay exception in rule 5.803 or 5.804:

(1) The statement ~~has—equivalent—circumstantial—guarantees—of trustworthiness;~~is supported by sufficient guarantees of trustworthiness—after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement; and

~~(2) It is offered as evidence of a material fact;~~

~~(3)~~(2) It is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; ~~and~~

~~(4) Admitting it will best serve the purposes of these rules and the interests of justice.~~

*b. Notice.* The statement is admissible only if, ~~before the trial or hearing,~~ the proponent gives an adverse party reasonable notice of the intent to offer the statement ~~and its particulars, including the declarant’s name and address,~~ including its substance and the declarant’s name—so that the party has a fair opportunity to meet it. The notice must be provided in writing before the trial or hearing—or in any form during the trial or hearing if the court, for good cause, excuses a lack of earlier notice.

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**ARTICLE IX**

**AUTHENTICATION AND IDENTIFICATION**

**Rule 5.901 Authenticating or identifying evidence.**

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

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

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(8) *Evidence about ancient documents or data compilations.* For a document or data compilation, evidence that it:

- (A) Is in a condition that creates no suspicion about its authenticity;
- (B) Was in a place where, if authentic, it would likely be; and
- (C) Is at least 3020 years old when offered.

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**Rule 5.902 Evidence that is self-authenticating.** The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity to be admitted:

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(13) Certified records generated by an electronic process or system. A record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person that complies with the certification requirements of rule 5.902(11) or (12). The proponent must also meet the notice requirements of rule 5.902(11).

(14) Certified data copied from an electronic device, storage medium, or file. Data copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person that complies with the certification requirements of rule 5.902(11) or (12). The proponent also must meet the notice requirements of rule 5.902(11).