Presenting Evidence

Rule 45. Procedure for Introducing Exhibits

The following steps effectively introduce evidence:

Introduce the Item for Identification

1. Hand a copy of the exhibit to opposing counsel while asking permission to approach the bench. "I am handing the Clerk what has been marked as Exhibit ___. I have provided a copy to opposing counsel. I request permission to show Exhibit ___ to witness ____."
2. Show the exhibit to the witness. "Can you please identify Exhibit ___ for the Court?"
3. The witness identifies the exhibit.

Offer the Item into Evidence

1. Offer the exhibit into evidence. "Your Honor, we offer Exhibit ___ into evidence at this time. The authenticity of the exhibit has been stipulated."
2. Court: "Is there an objection?" If opposing counsel believes a proper foundation has not been laid, the attorney should be prepared to object at this time.
3. Opposing counsel: "No, Your Honor," or "Yes, Your Honor." If yes, the objection will be stated on the record. Court: "Is there any response to the objection?"
4. Court: "Exhibit ___ is/is not admitted."

The attorney may then proceed to ask questions. If admitted, Exhibit ___ becomes a part of the Court's official record and, therefore, is handed over to the Clerk. The exhibit should not be left with the witness or taken back to counsel table.

Attorneys do not present admitted evidence to the jury because they have exhibits in their case materials; thus, there is no publishing to the jury.

Rule 46. Use of Notes; No Electronic Devices

Attorneys may use notes when presenting their cases. Witnesses, however, are not permitted to use notes while testifying. Attorneys may consult with one another at counsel table verbally or through the use of notes. The use of laptops or other electronic devices is prohibited.

Federal Rules of Evidence – Mock Trial Version

In American trials, complex rules are used to govern the admission of proof (i.e., oral or physical evidence). These rules are designed to ensure that all parties receive a fair hearing and to exclude evidence deemed irrelevant, incompetent, untrustworthy, unduly prejudicial, or otherwise improper. If it appears that a rule of evidence is being violated, an attorney may raise an objection to the judge. The judge then decides whether the rule has been violated and whether the evidence must be excluded from the record of the trial. In the absence of a properly made objection, however, the judge will probably allow the evidence. The burden is on the mock trial team to know these Mock Trial Rules of Evidence and to be able to use them to protect their client and fairly limit the actions of opposing counsel and their witnesses.

For purposes of mock trial competition, the Rules of Evidence have been modified and simplified. They are based on the Federal Rules of Evidence. **The numbering of some rules does not match the Federal Rules of Evidence and some rule numbers or sections are skipped because those rules were not deemed applicable to mock trial procedure.**

prepared to point out specific rules (quoting, if necessary) and to argue persuasively for the interpretation and application of the rule they think is appropriate.

Article I. General Provisions

Rule 101. Scope

The 'Mock Trial Rules of Competition' and these 'Federal Rules of Evidence – Mock Trial Version' govern the Oregon High School Mock Trial Competition.

Rule 102. Purpose and Construction

These Rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.

Article II. Judicial Notice

Rule 201. Judicial Notice of Adjudicative Facts

1. This rule governs judicial notice of an adjudicative fact only, not a legislative fact.
2. The court may judicially notice a fact that is not subject to reasonable dispute because it is a matter of mathematical or scientific certainty. For example, the court could take judicial notice that 10 X 10 = 100 or that there are 5,280 feet in a mile.
3. The court must take judicial notice if a party requests it and the court is supplied with the necessary information.
4. The court may take judicial notice at any stage of the proceeding.
5. A party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed.
6. In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.

Article IV. Relevancy and Its Limits

Rule 401. Definition of "Relevant Evidence"

Evidence is relevant if:

1. it has any tendency to make a fact more or less probable than it would be without the evidence; and
2. the fact is of consequence in determining the action.

Rule 402. Relevant Evidence Generally Admissible: Irrelevant Evidence Inadmissible

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

Example: Questions and answers must relate to an issue in the case. The following is likely inadmissible in a traffic accident case: "Mrs. Smith, how many times have you been married?"

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

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Rule 404. Character Evidence; Crimes or Other Acts

Character Evidence

1. Prohibited Uses. Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.
2. Exceptions for a Defendant or Victim in a Criminal Case. The following exceptions apply in a criminal case:
    a. a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecution may offer evidence to rebut it;
    b. a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted the prosecution may:
        i. offer evidence to rebut it; and
        ii. offer evidence of the defendant's same trait; and
    c. in a homicide case, the prosecution may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.
3. Exceptions for a Witness. Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

Crimes, Wrongs, or Other Acts

1. Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
2. Permitted Uses. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

Rule 405. Methods of Proving Character

1. By Reputation or Opinion. When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct.
2. By Specific Instances of Conduct. When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct.

Rule 406. Habit, Routine Practice

Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.

Rule 407. Subsequent Remedial Measures

When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:

1. negligence;
2. culpable conduct;
3. a defect in a product or its design;
4. a need for a warning of instruction.

But the court may admit this evidence for another purpose, such as impeachment or – if disputed – proving ownership, control, or the feasibility of precautionary measures.

Rule 408. Compromise Offers and Negotiations

disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or contradiction:

a. furnishing, promising, or offering – or accepting, promising to accept, or offering to accept – a valuable consideration in compromising or attempting to compromise the claim; and
b. conduct or a statement made during compromise negotiations about the claim – except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.

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

Rule 409. Offers to Pay Medical and Similar Expenses

Evidence of furnishing, promising to pay, or offering to pay medical, hospital, or similar expenses resulting from an injury is not admissible to prove liability for the injury.

Rule 410. Pleas, Plea Discussions, and Related Statements

1. Prohibited Uses. In a civil or criminal case, evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions:
    a. a guilty plea that was later withdrawn;
    b. a nolo contendere plea;
    c. a statement made during a proceeding on either of those pleas under Federal Rule of Criminal Procedure 11 or a comparable state procedure; or
    d. a statement made during plea discussion with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea.
2. Exceptions. The court may admit a statement described in Rule 410 1.c. or d.:
    a. in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if in fairness the statements ought to be considered together; or
    b. in a criminal proceeding for perjury or false statement, if the defendant made the statement under oath, on the record, and with counsel present.

Rule 411. Liability Insurance (civil cases only)

Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, such as proving a witness's bias or proving agency, ownership, or control.

Article V. Privileges

Rule 501. General Rule

There are certain admissions and communications excluded from evidence on grounds of public policy. Among these are:

1. communications between husband and wife;
2. communications between attorney and client;
3. communications among grand jurors;
4. secrets of state; and
5. communications between psychiatrist and patient.

Article VI. Witnesses

Rule 601. General Rule of Competency

Every person is competent to be a witness.

Rule 602. Lack of Personal Knowledge

A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703. See Rule 3.

Example: Witness knows that Harry tends to drink a lot at parties and often gets drunk. Witness was not at the party and did not see Harry drink.

Attorney 1: "Do you think Harry was drunk at the party?"

Witness: "Harry gets drunk all the time, so yes he was probably drunk."

Attorney 2: "Objection, Your Honor. Lack of personal knowledge. Witness was not at the party and can't know if Harry was drunk or not."

Judge: "Sustained. The jury will disregard the witness's answer."

Rule 607. Who May Impeach

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

MVP Tip: An effective cross-examiner tries to show the jury that a witness should not be believed. This is best accomplished through a process called impeachment which may use one of the following tactics: (1) showing that the witness has contradicted a prior statement, particularly one made by the witness in an affidavit (see example below); (2) asking questions about prior conduct of the witness that makes the witness's truthfulness doubtful (see Rule 608); or (3) asking about evidence of certain types of criminal convictions (see Rule 609).

In order to impeach the witness by comparing information in the witness's affidavit to the witness's testimony, attorneys should use this procedure:

1. Introduce the witness's affidavit for identification (See Rule 39);
2. Repeat the statement the witness made on direct or cross-examination that contradicts the affidavit.

Attorney: "Now, Mrs. Burns, on direct examination you testified that you were out of town on the night in question, didn't you?"
Mrs. Burns: "Yes."

3. Ask the witness to read the portion of the affidavit that contradicts the testimony.

Attorney: "Mrs. Burns, will you read Line 18 of your affidavit?"
Witness: Reading from affidavit, "Harry and I decided to stay in town and go to the theater."

4. Dramatize the conflict in the statements. Remember the point of this line of questioning is to show the contradiction, not to determine whether Mrs. Burns was in town.

Attorney: So, Mrs. Burns, you testified you were out of town the night in question, didn't you?"
Witness: "Yes."
Attorney: "Yet, in your affidavit, you said you were in town, did you not?"
Witness: "Yes."

1. Reputation or Opinion Evidence. A witness's credibility may be attacked or supported by testimony about the witness's reputation for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

2. Specific Instances of Conduct. Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:
    a. the witness; or
    b. another witness whose character the witness being cross-examined has testified about.

By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.

Example:
Attorney 1 (on cross-examination): "Isn't it true that you once lost a job because you falsified expense reports?"

Witness: "Yes, but…"

Attorney 1: "Thank you."

Attorney 2 (on redirect): "Did you do anything to mitigate the falsified reports?"

Witness: "Yes, I paid back all of the money and entered a program for rehabilitation."

Attorney 2: "And how long ago was this?"

Witness: "25 years."

Attorney 2: "And have you successfully held jobs since then that required you to be truthful and to be trusted by your employer?"

Witness: "Yes."

Rule 609. Impeachment by Evidence of Conviction of Crime

1. In General. The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:
    a. for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:
        i. must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and
        ii. must be admitted in a criminal case in which the witness is a defendant if the probative value of the evidence outweighs its prejudicial effect to that defendant; and
    b. for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving – or the witness's admitting – a dishonest act or false statement.

2. Limit on Using the Evidence After 10 Years. This subdivision 2. applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the

substantially outweighs its prejudicial effect.

3. Effect of a Pardon, Annulment, or Certificate of Rehabilitation. Evidence of a conviction is not admissible if:
    a. the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding that the person has been rehabilitated, and the person has not been convicted of a later crime punishable by death or by imprisonment for more than one year; or
    b. the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

4. Juvenile Adjudications. Evidence of a juvenile adjudication is admissible under this rule only if:
    a. it is offered in a criminal case;
    b. the adjudication was of a witness other than the defendant;
    c. an adult's conviction for that offense would be admissible to attack the adult's credibility; and
    d. admitting the evidence is necessary to fairly determine guilt or innocence.

5. Pendency of an Appeal. A conviction that satisfies this rule is admissible even if an appeal is pending. Evidence of the pendency is also admissible.

Rule 610. Religious Beliefs or Opinions

Evidence of a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility.

Rule 611. Mode and Order of Interrogation and Presentation

1. Control by Court; Purposes. The Court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:
    a. make those procedures effecting for determining the truth;
    b. avoid wasting time; and
    c. protect witnesses from harassment or undue embarrassment.
2. Scope of cross-examination. The scope of cross-examination shall not be limited to the scope of the direct examination, but may inquire into any relevant facts or matters contained in the witness' statement, including all reasonable inferences that can be drawn from those facts and matters, and may inquire into any omissions from the witness statement that are otherwise material and admissible.

MVP Tip: Cross-examination follows the opposing attorney's direct examination of a witness. Attorneys conduct cross-examination to explore weaknesses in the opponent's case, test the witness's credibility, and establish some of the facts of the cross-examiner's case whenever possible. Cross-examination should:

- call for answers based on information given in witness statements or the fact pattern;
- use leading questions which are designed to get "yes" or "no" answers (see examples below);
- never give the witness a chance to unpleasantly surprise the attorney;
- include questions that show the witness is prejudiced or biased or has a personal interest in the outcome of the case;
- include questions that show an expert witness or even a lay witness who has testified to an opinion is not competent or qualified due to lack of training or experience.

Remember to stay relaxed and be ready to adapt your prepared cross questions to the actual testimony given on direct examination; always listen to the witness's answer; avoid giving the witness an opportunity to reemphasize the points made against your case on direct; don't harass or attempt to intimidate the witness; and do not quarrel with the witness. **Be brief and ask only questions to which you already know the answer.**

3. Leading questions. Leading questions should not be used on direct examination except as necessary to advance the witness's testimony. Ordinarily, the court should allow leading questions:
    a. on cross-examination; and
    b. when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

Example:
Attorney 1 (on cross-examination): "So, Mr. Smith, you took Ms. Jones to a movie that night, didn't you?"

4. Redirect/Recross. After cross-examination, additional questions may be asked by the direct examining attorney, but questions must be limited to matters raised by the attorney on cross-examination. Likewise, additional questions may be asked by the cross-examining attorney on recross, but such questions must be limited to matters raised on redirect examination and should avoid repetition. For both redirect and recross, attorneys are limited to two questions each.

MVP Tip: Following cross-examination, the counsel who called the witness may conduct redirect examination. Attorneys redirect to clarify new or unexpected issues or facts brought out in the immediately preceding cross-examination only; they may not bring up new issues. Attorneys may or may not want to redirect. If an attorney asks questions beyond the issues raised on cross, they may be objected to as "outside the scope of cross-examination." It is sometimes more beneficial not to conduct it for a particular witness. Attorneys should pay close attention to what is said during cross-examination to determine whether it is necessary to conduct redirect.

If the credibility or reputation for truthfulness of the witness is attacked on cross-examination, the direct examining attorney may wish to "save" the witness on redirect. If so, the questions should be limited to the damage the attorney thinks was done and should enhance the witness's truth-telling image in the eyes of the court. Work closely with your coaches on redirect and recross strategies. Remember that time will be running during both redirect and recross and may take away from the time you need for questioning other witnesses.

5. Permitted Motions. The only motion permissible is one requesting the judge to strike testimony following a successful objection to its admission.

Rule 612. Writing Used to Refresh a Witness' Memory

If a written statement is used to refresh the memory of a witness either while testifying or before testifying, the Court shall determine that the adverse party is entitled to have the writing produced for inspection. The adverse party may cross-examine the witness on the material and introduce into evidence those portions which relate to the testimony of the witness.

Rule 613. Witness's Prior Statement

1. Showing or Disclosing the Statement During Examination. When examining a witness about the witness's prior statement, a party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party's attorney.

2. Extrinsic Evidence of a Prior Inconsistent Statement. Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires. This subdivision 2. does not apply to an opposing party's statement under Rule 801 4.b.

Article VII. Opinions and Expert Testimony

Rule 701. Opinion Testimony by Lay Witness

If the witness is not testifying as an expert, testimony in the form of opinion is limited to one that is:

1. rationally based on the witness's perception;
2. helpful to clearly understand the witness's testimony or to determining a fact in issue; and
3. not based on scientific, technical, or other specialized knowledge with the scope of Rule 702.

Example:

Inadmissible Lay opinion testimony: "The doctor put my cast on incorrectly. That's why I have a limp now."

Admissible Lay Opinion Testimony: "He seemed to be driving pretty fast for a residential street."

Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify in the form of an opinion or otherwise. See Rule 40.

Rule 703. Bases of Opinion Testimony by Experts

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.

MVP Tip: Unlike lay witnesses who must base their opinions on what they actually see and hear, expert witnesses can base their opinions on what they have read in articles, texts, records they were asked to review by a lawyer, or other documents which may not actually be admitted into evidence at the trial. These records or documents ***may*** include statements made by other witnesses.

Rule 704. Opinion of Ultimate Issue

1. In General – Not Automatically Objectionable. An opinion is not objectionable just because it embraces an ultimate issue.
2. Exception. In a criminal case, an expert must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.

Article VIII. Hearsay

The following scenario will be used in all of the hearsay or hearsay exception examples below:

Mary is on trial for manslaughter. She allegedly drove after drinking, jumped a curb, and hit a pedestrian on the sidewalk. The pedestrian later died from his extensive injuries. Mary claims at trial that she was not driving – her boyfriend, Nate, was – and he swerved to miss a dog in the street. Several bystanders saw the accident and told the police that Mary was driving.

Rule 801. Definitions

The following definitions apply under this article:

1. Statement. "Statement" means a person's oral assertion, written assertion, or nonverbal conduct if the person intended it as an assertion.
2. Declarant. "Declarant" means the person who made the statement.
3. Hearsay. "Hearsay" means a statement that:
    a. the declarant does not make while testifying at the current trial or hearing; and
    b. a party offers in evidence to prove the truth to the matter asserted.
4. Statements that are not Hearsay. A statement that meets the following conditions is not hearsay:

about a prior statement, and the statement:

i. 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;
ii. 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 recent improper influence or motive in so testifying; or
iii. identifies a person as someone that declarant perceived earlier.

Example: Prior to Mary's criminal trial, the victim's family sued Mary for wrongful death and won. Nate was a witness in the civil trial and has now been called as a witness in Mary's criminal trial.

Prosecutor: "Nate, you say you were driving the vehicle before it hit the curb, correct?"

Nate: "Yes."

Prosecutor: "And you swerved and hit the curb because…?"

Nate: "I swerved to miss a dog."

Prosecutor (after properly introducing civil trial transcript for identification): "Nate, will you read Line 18 of this page?"

Nate: "Witness (Nate): 'I swerved to miss a giant pothole.'"

Mary's Attorney: "Objection! That statement is hearsay."

Prosecutor: "Your Honor, this is a prior statement made by the witness and is not hearsay."

Judge: "Objection is overruled. Witness's prior statement under oath is not hearsay and is admissible."

b. An Opposing Party's Statement. The statement is offered against an opposing party and:

i. was made by the party in an individual or a representative capacity;
ii. is one the party manifested that it adopted or believed to be true;
iii. was made by a person whom the party authorized to make a statement on the subject;
iv. was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or
v. was made by the party's coconspirator during and in furtherance of the conspiracy.
vi. The statement must be considered but does not by itself establish the declarant's authority under iii.; the existence or scope of the relationship under iv.; or the existence of the conspiracy or participation in it under v.

Example: Prosecutor is cross-examining Susan, Mary's friend.

Prosecutor: "Mary actually called you after the accident, didn't she?"

Susan: "Yes."

Prosecutor: "And Mary told you all about the accident didn't she?"

Susan: "She talked about the accident, yes."

Prosecutor: "And Mary told you during that call that she'd driven her car into a person, right?"'

Mary's Attorney: "Objection! Mary's statement to Susan is hearsay."

Prosecutor: "Your Honor, Mary's statement is an Opposing Party's statement."

Judge: "Objection overruled. Mary's statement is not hearsay and is admissible."

Prosecutor: "So, Mary told you she'd driven her car into a person, right?"

Susan: "Mary said, 'I can't believe I drove my car into a person.'"

Rule 802. Hearsay Rule

Hearsay is not admissible, except as provided by these rules.

Rule 803. Exceptions to the Rule Against Hearsay – Regardless of Availability

The following are not excluded by the hearsay rule, regardless of whether the declarant is available as a witness:

1. Present Sense Impression. A statement describing or explaining an event or condition made while or immediately after the declarant perceived it.

Example: Mary's attorney calls a bystander who was at the scene of the accident to testify.

Mary's Attorney: "Were you present when the accident occurred?"

Bystander: "Yes, I was across the street."

Mary's Attorney: "And what do you remember about the accident?"

Bystander: "I was across the street looking for an address. I had my back turned to the street and I heard an engine revving. Then, someone behind me said, 'That car is going really fast.'"

Prosecutor: "Objection! That statement is hearsay."

Mary's Attorney: "Your Honor, the statement is a present sense impression and is excepted from the hearsay rule."

Judge: "Objection overruled."

Mary's Attorney: "So you heard someone behind you say…"

Bystander: "That car is going really fast."

2. Excited Utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement that it caused.

Example: Mary's attorney continues to question the bystander.

Mary's Attorney: "So, then what happened?"

Bystander: "I started to turn toward the street and as I turned I heard a woman yell, 'Oh my God, that man's car is out of control!'"

Prosecutor: "Objection, Your Honor. Hearsay."

Mary's Attorney: "Your Honor, the woman's statement is an excited utterance. She made the statement while watching the car drive out of control and it is related to the event."

Judge: "Overruled. The statement is admissible."

3. Then-Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

Example: Mary's attorney continues to question the bystander.

Mary's Attorney: "Then what did you see?"

Bystander: "By the time I turned around, both people were out of the car. The man from the car staggered into a woman and she said, 'Oh my God, he reeks of alcohol!'"

Prosecutor: "Objection! Hearsay!"

Mary's Attorney: "Your Honor, the declarant's statement was a sensory condition. She smelled alcohol when my client's boyfriend fell into her and said so."

Judge: "The objection is overruled."

4. Statement Made for Medical Diagnosis or Treatment. Statements made for the purpose of medical diagnosis or treatment.
5. Recorded Recollection. A record that:
    a. is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;
    b. was made or adopted by the witness when the matter was fresh in the witness's memory; and
    c. accurately reflects the witness's knowledge.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

6. Records of Regularly Conducted Activity. A record of an act, event, condition, opinion, or diagnosis if:
    a. the record was made at or near the time by – or from information transmitted by – someone with knowledge;
    b. the record was kept in the course of regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
    c. making the record was a regular practice of the activity;
    d. all these conditions are shown by the testimony of the custodian or another qualified witness; and
    e. the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.
7. Absence of Regularly Conducted Activity. Evidence that a matter is not included in a record described in Rule 803.6. if:
    a. the evidence is admitted to prove that the matter did not occur or exist;
    b. a record was regularly kept for a matter of that kind; and
    c. the opponent does not show that the possible source of information or other circumstances indicate a lack of trustworthiness.
8. Public Records. A record or statement of a public office if:
    a. it sets out:
        i. the office's activities;
        ii. a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law enforcement personnel; or
        iii. in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and
    b. the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness.
9. Absence of a Public Record. Testimony that a diligent search failed to disclose a public record or statement if the testimony or certification is admitted to prove that:
    a. the record or statement does not exist; or

that kind.

10. Statements in Ancient Documents. A statement in a document that is at least 20 years old and whose authenticity is established.
11. Statements in Learned Treatises, Periodicals, or Pamphlets. A statement contained in a treatise, periodical, or pamphlet if:
    a. the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and
    b. the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.
12. Reputation Concerning Character. A reputation among a person's associates or in the community concerning a person's character.
13. Judgment of a Previous Conviction. Evidence of a final judgment of conviction if:
    a. the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;
    b. the conviction was for a crime punishable by death or by imprisonment for more than one year;
    c. the evidence is admitted to prove any fact essential to the judgment; and
    d. when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.

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

Rule 804. Hearsay Exceptions; Declarant Unavailable

1. Criteria for Being Unavailable. A declarant is unavailable as a witness if the declarant:
    a. is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;
    b. refuses to testify about the subject matter despite a court order to do so;
    c. testifies to not remembering the subject matter;
    d. cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or
    e. is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:
        i. the declarant's attendance, in the case of a hearsay exception under Rule 804.b.1 or 804.b.6; or
        ii. the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804.b.2, 804.b.3, or 804.b.4.

    But this subdivision A. does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

2. The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:
    a. Former Testimony. Testimony that:
        i. was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and
        ii. is now offered against a party who had – or in a civil case, whose predecessor in interest had – an opportunity and similar motive to develop it by direct, cross-, or redirect examination.
    b. Statement Under the Belief of Imminent Death. In a prosecution for a homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.
    c. State Against Interest. A statement that:
        i. 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

someone else or to expose the declarant to civil or criminal liability; and
    ii. 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.
d. Statement of Personal or Family History
    i. the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption, or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or
    ii. another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.
e. Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability. A statement offered against a party that wrongfully caused – or acquiesced in wrongfully causing – the declarant's unavailability as a witness and did so intending that result.

Rule 805. Hearsay Within Hearsay

Hearsay included within hearsay is not excluded by the rule against hearsay if each part of the combined statement conforms with an exception to the rule.