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De Novo Review in Deferential Robes?: A Deconstruction of the Standard of Review of Evidentiary Errors in the Federal System

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DE NOVO REVIEW IN DEFERENTIAL ROBES?:
A DECONSTRUCTION OF THE STANDARD OF REVIEW OF EVIDENTIARY ERRORS IN THE FEDERAL SYSTEM

Peter Nicolas

CONTENTS

INTRODUCTION .......................................................................................... 531
I. RELEVANCY AND ITS LIMITS .................................................................. 540
II. THE RULE AGAINST HEARSAY AND ITS EXCEPTIONS ...................... 554
III. BEST EVIDENCE RULE ...................................................................... 577
IV. WITNESS PRIVILEGE, COMPETENCE, IMPEACHMENT, AND EXAMINATION ................................................................................ 580
V. EVIDENTIARY SUBSTITUTES: JUDICIAL NOTICE AND PRESUMPTIONS .................................................................................... 595
CONCLUSION ............................................................................................. 597

INTRODUCTION

In federal appellate practice, the standard of review is the name of the game. It is often "outcome determinative," in the sense that the difference between victory and defeat on appeal can turn on whether the standard by which the appellate court reviews the trial court's decision on an issue is plenary or deferential.1 Indeed, so important to the appellate process is the standard of review that the Federal Rules of Appellate Procedure require a statement of the standard of review in all parties' briefs.2

1. See Kearney v. Standard Ins. Co., 175 F.3d 1084, 1095 (9th Cir. 1999); United States v. Conley, 4 F.3d 1200, 1204-05 (3d Cir. 1993); Chaline v. KCOH, Inc., 693 F.2d 477, 480 & n.3 (5th Cir. 1982).
Traditionally, decisions by trial judges have been divided into three categories for purposes of appellate of review: questions of law, reviewable "de novo"; questions of fact, reviewable for "clear error"; and matters of discretion, reviewable for "abuse of discretion."\(^3\)

The first category, "de novo review[,] is review without deference," or review that is "independent and plenary."\(^4\) Under de novo review, the appellate court will thus "look at the matter anew, as though it had come to the courts for the first time."\(^5\)

The other two categories involve different degrees of deference to the trial court, with abuse of discretion usually thought to be the more deferential of the two.\(^6\) A finding of fact is said to be "'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."\(^7\) Under clear error review, the appellate court cannot reverse the trial court's determination merely because it would have found the facts differently had it been sitting as the trier of fact: "'[w]here there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous."\(^8\)

A district court vested with discretion on a matter "is not required by law to make a particular decision . . . . [but instead] is empowered to make a decision—of its choosing—that falls within a range of permissible decisions."\(^9\) Sometimes, the trial court's exercise of its discretion is based on a weighing of factors, in which case an abuse of discretion will be found

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3. Pierce v. Underwood, 487 U.S. 552, 558 (1988); see also Ornelas v. United States, 517 U.S. 690, 695 n.3 (1996) (indicating that clear error review is the standard under which appellate courts review a trial court's factual findings).
5. Id.; see also BLACK'S LAW DICTIONARY 435 (6th ed. 1990) (defining the term as "[a]new; afresh; a second time.").
6. See Haugh v. Jones & Laughlin Steel Corp., 949 F.2d 914, 916-17 (7th Cir. 1991). The court stated:

Abuse of discretion is conventionally regarded as a more deferential standard than clear error, though whether there is any real or consistent difference has been questioned. The alternative view is that both standards denote a range rather than a point, that the ranges overlap and maybe coincide, and that the actual degree of scrutiny in a particular case depends on the particulars of that case rather than on the label affixed to the standard of appellate review.

Id. (internal citations omitted).
9. Zervos, 252 F.3d at 168-69; accord Grant v. City of Long Beach, 315 F.3d 1081, 1091 (9th Cir. 2002) ("The abuse of discretion standard requires us to uphold a district court determination that falls within a broad range of permissible conclusions in the absence of an erroneous application of law.").
only if the trial court failed to consider the appropriate factors, considered improper factors, or made a "clear error of judgment" in weighing the correct factors. 10 The appellate court cannot under this standard of review merely substitute its own judgment for that of the trial court. 11 In general, an abuse of discretion will be found only if the trial court's decision is "arbitrary," "irrational," "capricious," "whimsical," "fanciful," or "unreasonable." 12 Furthermore, the trial court's exercise of its discretion will not be disturbed unless it can be said that "no reasonable person would adopt the district court's view." 13

The rationales for exercising different standards of review for questions of fact and law and for exercises of discretion turn on, inter alia, the relative expertise and institutional structure of trial and appellate courts, the nature of the questions involved, and public policy. 14 Thus, questions of law are reviewed de novo because an appellate court has more time for research and consideration of such issues than does a trial court, which must preside over "fast-paced trials," and also because appellate courts sit in multi-judge panels, permitting "reflective dialogue and collective judgment." 15 Findings of fact by a trial court are reviewed with deference

10. United States v. Schreane, 331 F.3d 548, 564 (6th Cir. 2003) (quoting Super Sulky, Inc. v. United States Trotting Ass'n, 174 F.3d 733, 740 (6th Cir. 1999)); accord United States v. Marshall, 307 F.3d 1267, 1269 (10th Cir. 2002) ("Evidentiary rulings are reviewed pursuant to an abuse of discretion standard, considering the whole record and reversing only if there is a firm and definite belief that the trial court made a clear error in judgment."); United States v. Soulard, 730 F.2d 1292, 1296 (9th Cir. 1984) ("To determine whether the District Court abused its discretion, this Court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.").

11. See, e.g., United States v. McMullen, 98 F.3d 1155, 1159 (9th Cir. 1996); United States v. Mason, 52 F.3d 1286, 1289 (4th Cir. 1995).


13. Stecyk, 295 F.3d at 412 (quoting Oddi v. Ford Motor Co., 234 F.3d 136, 146 (3d Cir. 2000)).

14. See Salve Regina Coll. v. Russell, 499 U.S. 225, 231-33 (1991) ("Those circumstances in which Congress or this Court has articulated a standard of deference for appellate review of district court determinations reflect an accommodation of the respective institutional advantages of trial and appellate courts."). Id. at 233.

15. Id. The Court stated:

Independent appellate review of legal issues best serves the dual goals of doctrinal coherence and economy of judicial administration. District judges preside alone over fast-paced trials: Of necessity they devote much of their energy and resources to hearing witnesses and reviewing evidence. Similarly, the logistical burdens of trial advocacy limit the extent to which trial counsel is able to supplement the district judge's legal research with memoranda and briefs. Thus, trial judges often must resolve complicated legal questions without benefit
because the trial judge is believed to have greater expertise in finding facts, has the ability to observe the testimony of witnesses live (and is thus better able to judge demeanor than an appellate court reviewing a cold record), and because allowing for plenary review of facts at the appellate level is thought to be a tremendous waste of private and judicial resources.\(^6\) The rationale for limiting review of a particular issue to abuse of discretion is a determination that the trial court is better positioned than the appeals court to decide the issue because it involves ""multifarious, fleeting, special, narrow facts that utterly resist generalization.""\(^7\)

So what standard of review applies when a trial court is said to have erred in admitting or excluding an item of evidence? Does a decision to admit or exclude evidence in applying the Federal Rules of Evidence involve a question of law, a question of fact, an exercise of discretion, or a combination of all of these?

In every federal circuit, one can find a panel decision stating in general terms that a decision to admit or exclude evidence by the trial court is reviewed only for "abuse of discretion," suggesting that the application of the Federal Rules of Evidence is committed to the sound discretion of the trial court.\(^8\) Does this mean, then, that trial courts have broad

\(\text{Id. at 231-32 (internal citations omitted) (quoting Dan T. Coenen, To Defer or Not to Defer: A Study of Federal Circuit Court Deference to District Court Rulings on State Law, 73 MINN. L. REV. 899, 923 (1989)).}\)

\(\text{16. Anderson, 470 U.S. at 574-75.}\)


\(\text{18. United States v. Gilbert, 181 F.3d 152, 160 (1st Cir. 1999) (""Our standard of review of a district court's admission or exclusion of evidence is abuse of discretion.""); Provost v. City of Newburgh, 262 F.3d 146, 163 (2d Cir. 2001) (""Decisions to admit or exclude evidence are reviewed for abuse of discretion . . . ."" (quoting United States v. Han, 230 F.3d 560, 564 (2d Cir. 2000))); United States v. Woods, 321 F.3d 361, 363 (3d Cir. 2003) (""We review the District Court's evidence ruling for abuse of discretion."")); United States v. Hayes, 322 F.3d 792, 799 (4th Cir. 2003) (""Decisions allowing the introduction of evidence are reviewed for abuse of discretion."")); United States v. Wilson, 322 F.3d 353, 359 (5th Cir. 2003) (""We review a district court's admission or exclusion of evidence for abuse of "")

of "extended reflection [or] extensive information."

Courts of appeals, on the other hand, are structurally suited to the collaborative juridical process that promotes decisional accuracy. With the record having been constructed below and settled for purposes of the appeal, appellate judges are able to devote their primary attention to legal issues. As questions of law become the focus of appellate review, it can be expected that the parties' briefs will be refined to bring to bear on the legal issues more information and more comprehensive analysis than was provided for the district judge. Perhaps most important, courts of appeals employ multijudge panels that permit reflective dialogue and collective judgment.
discretion in how they interpret the rules of evidence, such as the
determination whether the hearsay exception for statements for purposes of
medical diagnosis or treatment covers statements made to psychologists,\textsuperscript{19} or whether a federal physician-patient testimonial privilege exists?\textsuperscript{20} Either
these appellate panels cannot mean what they say, or "abuse of discretion"
review means something different than has been traditionally understood,
or the traditional tripartite standard of review (and the policies underlying
it) has been thrown out the window when it comes to review of decisions
admitting or excluding evidence.

A review of the cases demonstrates that the traditional tripartite
standard of review is alive and well when it comes to reviewing evidentiary
errors. Only the First Circuit explicitly delineates the tripartite standard of
review in this context.\textsuperscript{21} Yet many circuits, such as the Second Circuit,
have re-defined "abuse of discretion" review in this context as
incorporating a combination of de novo, clear error, and traditional abuse
of discretion review, holding that

A district court "abuses" or "exceeds" the discretion accorded to

\begin{quote}
of discretion.\textsuperscript{20}); Argentine v. United Steelworkers of Am., 287 F.3d 476, 486 (6th Cir.
2002) ("Generally, we review a district court's evidentiary decisions for abuse of
discretion . . . "); United States v. Van Dreel, 155 F.3d 902, 905 (7th Cir. 1998) ("We
review a district court's decision to admit evidence for abuse of discretion."); United States
v. Munoz, 324 F.3d 987, 992 (8th Cir. 2003) ("We review the district court's decision to
admit evidence for abuse of discretion."); United States v. Beckman, 298 F.3d 788, 792 (9th
Cir. 2002) ("We review the admission or exclusion of evidence under the familiar abuse of
discretion standard."); Christansen v. City of Tulsa, 332 F.3d 1270, 1283 (10th Cir. 2003)
("We review a district court's ruling on the admissibility of evidence for an abuse of
discretion."); Chrysler Int'l Corp. v. Chemaly, 280 F.3d 1358, 1362-63 (11th Cir. 2002) ("A
ruling admitting or excluding evidence is only reviewed for abuse of discretion."); United
States v. Burch, 156 F.3d 1315, 1322-23 (D.C. Cir. 1998) ("This court reviews a trial
judge's admission of evidence for abuse of discretion."
(quoting United States v. Smart, 98
F.3d 1379, 1386 (D.C. Cir. 1996))). The U.S. Court of Appeals for the Federal Circuit
applies the same standard of review as would the regional court that normally hears appeals
from the district that decided the case before the Federal Circuit. See, e.g., Atmel Corp. v.

\textsuperscript{19} See FED. R. EVID. 803(4).
\textsuperscript{20} See FED. R. EVID. 501.
\textsuperscript{21} Baker v. Dalkon Shield Claimants Trust, 156 F.3d 248, 251-52 (1st Cir. 1998). The
court stated:

It is commonly said that a trial judge's decision regarding the admissibility
of expert testimony will not be disturbed absent a clear abuse of discretion.
This formulation is adequate to our case which involves judgments of balancing and
degree as to relevance, prejudice and the like. It is useful to note, however, that
admissibility of evidence issues can also turn on abstract questions of law, where
review is de novo, or on findings by the judge of specific facts, where review is
for clear error.

\textit{Id.} (internal citations omitted).
it when (1) its decision rests on an error of law . . . or a clearly erroneous factual finding, or (2) its decision—though not necessarily the product of a legal error or a clearly erroneous factual finding—cannot be located within the range of permissible decisions.22

Many other decisions state in the context of reviewing claims of evidentiary error that an abuse of discretion occurs when the district court "bases its decision on an erroneous view of the law or a clearly erroneous assessment of the facts,"23 while several others hold that while "[r]ulings on the admissibility of evidence are reviewed for abuse of discretion,"24 a district court "'by definition abuses its discretion when it makes an error of law,'" with review of that error of law being de novo.25

Sometimes, a court recites in almost rote fashion that it reviews claims of evidentiary error for "abuse of discretion," but it is clear in context that they are reviewing those claims of evidentiary error that involve potential errors of law de novo, as evidenced by their bare assertions throughout the opinion of what the correct interpretation of a rule of evidence is, without any deference being given to the trial court's determination of that question of law, and with deference only coming into play when the appellate court

22. Parker v. Time Warner Entm't Co., 331 F.3d 13, 18 (2d Cir. 2003) (quoting Zervos, 252 F.3d at 168-69); see also United States v. Jenkins, 313 F.3d 549, 559 (10th Cir. 2002). In Jenkins, the court stated:

We review questions concerning the admission of evidence under an abuse of discretion standard. Under that standard, we will not disturb an evidentiary ruling absent a distinct showing that it was based on a clearly erroneous finding of fact or an erroneous conclusion of law or manifests a clear error in judgment.

Id.; accord Collins v. Kibort, 143 F.3d 331, 336-37 (7th Cir. 1998). The court in Collins v. Kibort stated:

Under an abuse of discretion standard of review, a reversal is warranted "only when the trial judge's decision is based on an erroneous conclusion of law or where the record contains no evidence on which he rationally could have based that decision, or where the supposed facts found are clearly erroneous."

Collins, 143 F.3d at 336-37 (quoting Wheeler v. Sims, 951 F.2d 796, 802 (7th Cir. 1992); Deitchman v. E.R. Squibb & Sons, Inc., 740 F.2d 556, 563-64 (6th Cir. 1984)).

23. United States v. Rahm, 993 F.2d 1405, 1410 (9th Cir. 1993); accord Cardinal Fastener & Specialty Co. v. Progress Bank, 67 Fed. Appx. 343, 345-46 (6th Cir. 2003) ("'An abuse of discretion exists when the district court applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly erroneous findings of fact.'" (quoting First Tech. Safety Sys., Inc. v. Depinet, 11 F.3d 641, 647 (6th Cir. 1993))); Westberry v. Gislaved Gummi AB, 178 F.3d 257, 261 (4th Cir. 1999); Palmquist v. Selvik, 111 F.3d 1332, 1339 (7th Cir. 1997).


25. Harcros Chems., Inc., 158 F.3d at 556 (quoting Koon, 518 U.S. at 100).
discusses the trial court's application of the rule (assuming the trial court interpreted the rule correctly) to a given fact scenario.26 Throughout this article, I rely on such cases—whose introductory language suggests a deferential standard of review, but whose application and reasoning suggests a de novo standard of review—to support my claim that certain types of evidentiary errors are reviewed de novo.27

Under this "peculiar lexicon," there are thus three prongs to this new "abuse of discretion" review that mirror the traditional tripartite law-fact-discretion standard of review.28 A claim that the trial court erred in admitting or excluding evidence based on an erroneous interpretation of a rule of evidence is reviewed under the de novo prong of the "abuse of discretion" standard. A claim that the trial court erred in admitting or excluding evidence based on an erroneous factual finding is reviewed under the clear error prong of the "abuse of discretion" standard. And a claim that the trial court erred in admitting or excluding evidence in exercising its discretionary authority is reviewed under the abuse of discretion prong of the "abuse of discretion" standard.

Why on earth, one might ask, would the appellate courts replace the traditional tripartite standard of review in this context with "abuse of discretion" review, only to re-define "abuse of discretion" review as wholly encompassing the traditional tripartite standard of review? Part of the story appears to be a misreading of the Supreme Court's decision in General Electric Co. v. Joiner, in which the Supreme Court held that the trial court's determination of the reliability of expert witness testimony is subject only to review for abuse of discretion.29 In Joiner, there is a sentence that reads "[a]ll evidentiary decisions are reviewed under an abuse-of-discretion standard."30 In context, it seems clear that this sentence refers to an argument attributed to one of the parties before the Court.31 Yet, it has been misinterpreted as being part of its holding by some appellate courts, thus causing them to feel bound to review all claims of evidentiary error under an abuse of discretion standard.32 At the same time,

26. E.g., United States v. Guevara, 277 F.3d 111, 127 (2d Cir. 2001); Huffman v. Caterpillar Tractor Co., 908 F.2d 1470, 1481-83 (10th Cir. 1990).
27. When such cases are invoked, they will have a parenthetical so indicating to avoid confusion.
30. Id. at 141.
31. See id.
32. Trepel v. Roadway Express, Inc., 194 F.3d 708, 716-17 (6th Cir. 1999). The court noted that in Joiner, "the Court was not dealing with an alleged hearsay rule violation, but
these appellate courts remain wed to the policies that underlie the traditional tripartite standard of review, and thus find it hard to believe that the Supreme Court would mean that a trial court has "discretion" over how to construe the text of a rule of evidence. They thus resolve their dilemma by re-interpreting the "abuse of discretion" standard to include de novo review of errors of law, with such errors deemed to be an "abuse of discretion." This solution is not altogether without precedent, for the United States Supreme Court itself, in another context, has held that the proper standard of review is "abuse of discretion," but then went on to incorporate de novo review of legal determinations underlying the exercise of that discretion into the standard.

A second reason may have to do with the ubiquitous nature of Rule 403 in evidence practice. That rule provides that evidence, even if relevant, can be excluded by the trial judge "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." It is clear that Rule 403 determinations are reviewed only for abuse of discretion in its classical sense. It is also clear that Rule 403 applies to virtually any evidence,
even if the evidence satisfies the hearsay rule, the best evidence rule, and every other rule of evidence.\textsuperscript{38} Thus, because the Rule 403 ground is often raised in tandem with every other objection, because the Rule 403 decision is reviewed only for abuse of discretion in its classical sense, and because, when a trial court \textit{excludes} evidence, only one of its grounds for excluding the evidence need be correct for an appellate court to affirm its exclusion of the evidence,\textsuperscript{39} in effect the evidentiary ruling in such instances is ultimately reviewed only for abuse of discretion.

Although the labels have thus changed, the name of the appellate game is still the same. For any given type of error in admitting or excluding evidence, one needs to determine whether review is discretionary or deferential. The purpose of the remainder of this Article is to parse each of the rules of evidence to determine which types of claimed errors are entitled to de novo review, which are entitled to clear error review, and which are entitled to traditional abuse of discretion review. By "type" of error, this Article does not mean to refer to such large categories as "hearsay," "best evidence," "relevance," "privilege," or the like. Rather, this Article will demonstrate that within each of the Federal Rules of Evidence, different types of error can be made, some subject to de novo review and others subject to clear error or abuse of discretion review. It is the goal of this Article to provide a roadmap for both courts and practitioners to determine the appropriate standard of review for any potential evidentiary error that may arise during the course of a trial under the reincarnated tripartite standard of review.

A few qualifications are in order before proceeding. The first is that the analysis in this Article presumes that an appropriate objection or offer of proof has been made in the trial court, as required by Rule 103(a).\textsuperscript{40} If

\textsuperscript{38} See infra notes 86, 108, 118, 126, 143, 419 and accompanying text.

\textsuperscript{39} Schafer v. Time, Inc., 142 F.3d 1361, 1373 n.20 (11th Cir. 1998); McAlinney v. Marion Merrell Dow, Inc., 992 F.2d 839, 843 (8th Cir. 1993); Davis v. Mutual Life Ins. Co. of N.Y., 6 F.3d 367, 385-86 (6th Cir. 1993).

\textsuperscript{40} FED. R. EVID. 103(a). Rule 103(a) states:

\begin{quote}
Error may not be predicated upon a ruling which admits or excludes evidence unless . . .
\end{quote}

(1) . . . In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) . . . In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

\textit{Id.}
not, review is at best\textsuperscript{41} for plain error,\textsuperscript{42} a very difficult standard to overcome\textsuperscript{43} that requires a showing that the error is not only obvious, but also prejudicial in that it must have affected the outcome of the trial court proceedings.\textsuperscript{44} The second qualification is to point out that, even assuming that review is de novo, and that the appellate court finds that the trial court has erred, this does not guarantee reversal. Rule 103(a) also requires that the trial court's ruling affected "a substantial right of the party,"\textsuperscript{45} a codification of the so-called "harmless error doctrine,"\textsuperscript{46} which allows for reversal only if it is determined that the jury's judgment was affected by the error.\textsuperscript{47} Yet assuming the error was properly preserved for appeal and cannot be deemed harmless, the distinctions that follow are critical in that they can literally make or break an appeal, making a thorough understanding of them crucial to practitioners and judges alike.

\section{Relevancy and Its Limits}

Rule 402 provides that "relevant evidence" is presumptively admissible, while evidence that is "not relevant" is inadmissible.\textsuperscript{48} The phrase "relevant evidence" is defined in Rule 401 as "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."\textsuperscript{49} This definition can be thought of as consisting of two prongs, a materiality prong and a probative worth prong, both of which

\textsuperscript{41} United States v. Olano, 507 U.S. 725, 734-36 (1993). Plain error review is discretionary, with that discretion to be exercised if the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." Id. (quoting United States v. Atkinson, 297 U.S. 157, 160 (1936)).

\textsuperscript{42} See FED. R. EVID. 103(d) ("Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.").

\textsuperscript{43} United States v. Swatzie, 228 F.3d 1278, 1282 (11th Cir. 2000); Unites States v. Simone, 931 F.2d 1186, 1192 (7th Cir. 1991).

\textsuperscript{44} Olano, 507 U.S. at 734-36.

\textsuperscript{45} FED. R. EVID. 103(a) ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected . . .").

\textsuperscript{46} Mason v. Southern Ill. Univ. at Carbondale, 233 F.3d 1036, 1042-43 (7th Cir. 2000); United States v. Moody, 923 F.2d 341, 352 (5th Cir. 1991).


\textsuperscript{48} FED. R. EVID. 402 ("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.").

\textsuperscript{49} FED. R. EVID. 401.
must be satisfied for a piece of evidence to be deemed “relevant.” The materiality prong is encompassed by the language in the rule referring to “any fact that is of consequence to the determination of the action,” which requires looking to the underlying substantive claim or offense to determine its elements and any defenses. The probative worth prong sets an extremely low standard, requiring that the evidence only have “any tendency” to make the existence of a material fact “more probable or less probable than it would be without the evidence.” Even if evidence is “relevant,” however, Rule 403 calls for its exclusion “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.”

The United States Supreme Court has held that review of the trial court's balancing of probative worth and prejudicial effect under Rule 403 is reviewed only for abuse of discretion, largely because the exercise of balancing these against one another involves consideration of multiple factors and is a highly fact-sensitive undertaking. With respect to the determination whether evidence is “relevant” under Rules 401 and 402, some appellate decisions hold that review is de novo, while others suggest that review is deferential. However, many of the cases holding that

50. Although the text of the rule no longer uses the common law term “materiality,” FED. R. EVID. 401 advisory committee’s note, the phrase is nonetheless convenient in distinguishing between the two different aspects of relevancy under the federal rules. See, e.g., CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE UNDER THE RULES: TEXT, CASES, AND PROBLEMS 62 (4th ed. 2000); MCCORMICK ON EVIDENCE § 185, at 383-41 (John W. Strong et al. eds., 4th ed. 1992).

51. FED. R. EVID. 401; JACK WEINSTEIN, WEINSTEIN’S FEDERAL EVIDENCE § 401.04[3][b], at 401-33 (Joseph M. McLaughlin ed., 2d ed. 2002); CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 4.2, at 228-29 (2d ed. 1999).

52. FED. R. EVID. 401; WEINSTEIN, supra note 51, § 401.04[2][c][i], at 401-22.1; MUELLER & KIRKPATRICK, supra note 51, § 4.2, at 170-71.

53. FED. R. EVID. 403.


55. United States v. Imran, 964 F.2d 1313, 1316 (2d Cir. 1992); Kelsay v. Consolidated Rail Corp., 749 F.2d 437, 443-44 (7th Cir. 1984); United States v. Lebovitz, 669 F.2d 894, 901 (3d Cir. 1982).


57. United States v. Vargas-Sandoval, No. 94-50260, 1994 WL 651930, at *1 (9th Cir. Nov. 18, 1994); United States v. Thompson, 37 F.3d 450, 452 (9th Cir. 1994); Bruno v. W.B. Saunders Co., 882 F.2d 760, 766 (3d Cir. 1989).

58. United States v. Tinoco, 304 F.3d 1088, 1120 (11th Cir. 2002); Duffy v. Wolle, 123 F.3d 1026, 1039 (8th Cir. 1997); United States v. Kallin, 50 F.3d 689, 693 (9th Cir.
review of the relevancy issue is deferential appear to be conflating the relevancy issue with the Rule 403 issue.\textsuperscript{59} Such conflation may be appropriate when the dispute involves the probative worth prong of the relevancy determination, as that determination is so closely tied to the Rule 403 balancing that parsing out the two issues and reviewing them under different standards may be infeasible as a practical matter. Yet when the dispute involves the materiality prong of the relevancy determination, the underlying substantive law governing the dispute is implicated, and the analysis of that issue is unrelated to Rule 403 balancing, making de novo review appropriate.\textsuperscript{60}

In conducting the Rule 403 balancing, the official commentary to the federal rules counsels that courts should consider the efficacy of giving a limited instruction in lieu of excluding the evidence altogether.\textsuperscript{61} Rule 105 provides that "[w]hen evidence which is admissible as to one party for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly."\textsuperscript{62} If a request for such an instruction is made and the trial court decides to admit the evidence at issue, it \textit{must} give a limiting instruction and has no discretion to do otherwise (with a failure to do so thus being an error of law subject to de novo review),\textsuperscript{63} although the form of such an instruction is reviewed only for abuse of discretion,\textsuperscript{64} including the timing of when it is given.\textsuperscript{65} If no

\textsuperscript{59} United States v. Lewis, 40 F.3d 1325, 1339 (1st Cir. 1994); United States v. Stull, 743 F.2d 439, 445 (6th Cir. 1984); United States v. Bouye, 688 F.2d 471, 476 (7th Cir. 1982).

\textsuperscript{60} Provident Life & Accident Ins. Co. v. O'Connor, 32 Fed. Appx. 821, 824 (9th Cir. 2002); Richardson v. Mo. Pac. R.R. Co., 186 F.3d 1273, 1276 (10th Cir. 1999); Shade v. Great Lakes Dredge & Dock Co., 154 F.3d 143, 151-55 (3d Cir. 1998); United States v. Moreno, 102 F.3d 994, 998-99 (9th Cir. 1996).

\textsuperscript{61} See FED. R. EVID. 403 advisory committee's note ("In reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction."); FED. R. EVID. 105 advisory committee's note. The advisory committee's note for Rule 105 stated:

\begin{quote}
A close relationship exists between this rule and Rule 403 \ldots. The present rule recognizes the practice of admitting evidence for a limited purpose and instructing the jury accordingly. The availability and effectiveness of this practice must be taken into consideration in reaching a decision whether to exclude for unfair prejudice under Rule 403.
\end{quote}

FED. R. EVID. 105 advisory committee's note.

\textsuperscript{62} FED. R. EVID. 105.

\textsuperscript{63} United States v. Werme, 939 F.2d 108, 114 (3d Cir. 1991); Lubbock Feed Lots, Inc. v. Iowa Beef Processors, Inc., 630 F.2d 250, 266 (5th Cir. 1980).

\textsuperscript{64} See United States v. Restreop, 884 F.2d 1294, 1297 (9th Cir. 1989); Hale v. Firestone Tire & Rubber Co., 820 F.2d 928, 935 (8th Cir. 1987).
request is made for such an instruction, the decision to give one when admitting such evidence is left to the discretion of the trial court. While normally the decision to use a Rule 105 limiting instruction in lieu of exclusion of the evidence is reviewed, as with other Rule 403 determinations, only for abuse of discretion, where the admission of such evidence implicates a criminal defendant’s Confrontation Clause rights, review is de novo.

Sometimes, the risk of prejudice to a party may arise because only a portion of a written or recorded statement is introduced to the jury. The so-called “rule of completeness,” codified in Rule 106, is designed to deal with this problem, and provides that “[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part of any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.” Appellate courts review de novo the interpretation of the scope of the rule, such as whether it allows for the admission of those parts of a writing or recording that would otherwise be inadmissible (because, for example, they are hearsay not within any exception), or whether the rule is applicable to oral statements. However, the trial court’s decision as to what portions of a writing or recording “ought in fairness” be introduced is a judgment call reviewed only for abuse of discretion on appeal.

While Rule 403 is written in general terms to cover any situation, certain types of evidence are offered with sufficient regularity so as to merit treatment with rules more specific and definitive than Rule 403, which are set forth in Rules 404 through 415.

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67. See United States v. Wright, 943 F.2d 748, 752 (7th Cir. 1991).
69. FED. R. EVID. 106 advisory committee’s note.
70. FED. R. EVID. 106.
71. United States v. Guevara, 277 F.3d 111, 127 (2d Cir. 2001); United States v. Collicott, 92 F.3d 973, 983 (9th Cir. 1996); United States v. Wilkerson, 84 F.3d 692, 696 (4th Cir. 1996); United States v. Woolbright, 831 F.2d 1390, 1395 (8th Cir. 1987).
72. Collicott, 92 F.3d at 983 & n.12; United States v. Mussaleen, 35 F.3d 692, 696 (2d Cir. 1994); United States v. Haddad, 10 F.3d 1252, 1258-59 (7th Cir. 1993).
74. See FED. R. EVID. 401 advisory committee’s note (“[S]ome situations recur with sufficient frequency to create patterns susceptible of treatment by specific rules. Rule 404 and those following it are of that variety; they also serve as illustrations of the application of the present rule as limited by the exclusionary principles of Rule 403.”).
Rule 404(a) provides that, subject to specified exceptions, "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion." The exceptions include "[e]vidence of a pertinent trait of character offered by an accused" and "evidence of a pertinent trait of character of the alleged victim." The determination whether a given trait is "pertinent"—like the determination whether evidence is "material"—implicates the underlying substantive law, and is thus reviewed de novo. Rule 404(b), while reiterating that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith," provides that such evidence may "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." For Rule 404(b) evidence to be used for "other purposes," it is only necessary that the trial court determine that there are sufficient facts to support a finding by the jury that the "other crimes, wrongs, or acts" occurred, a factual determination by the trial court reviewed on appeal only for clear error. Most courts hold that whether evidence falls within the scope of rule 404(b) is a question of law reviewed de novo. While some decisions hold that this determination is reviewed deferentially, many of these decisions appear to be mixing the standard of review on the Rule 404(b) question with that for Rule 403 balancing. In effect, this is the same sort of practical conflation discussed above with respect to Rules 401 and 403: Rule 404(b) sets forth certain types of uses of evidence of prior wrongs which are permissible, and a determination must be made whether the proffered evidence is relevant for any of those purposes, but Rule 403

75. FED. R. EVID. 404(a).
76. FED. R. EVID. 404(a)(1).
77. FED. R. EVID. 404(a)(2).
78. United States v. Diaz, 961 F.2d 1417, 1419 (9th Cir. 1992).
79. FED. R. EVID. 404(b).
80. Id.
82. United States v. Murphy, 241 F.3d 447, 450 (6th Cir. 2001) (citing United States v. Merriweather, 78 F.3d 1070, 1074 (6th Cir. 1996)).
83. United States v. Cruz, 326 F.3d 392, 394-95 (3d Cir. 2003); United States v. Taniguchi, 49 Fed. Appx. 506, 514-16 (6th Cir. 2002); United States v. Rrapi, 175 F.3d 742, 748 (9th Cir. 1999).
84. United States v. Ruiz-Estrada, 312 F.3d 398, 403 (8th Cir. 2002); United States v. Denberg, 212 F.3d 987, 992-94 (7th Cir. 2000); United States v. Queen, 132 F.3d 991, 993-97 (4th Cir. 1997).
85. See United States v. Givan, 320 F.3d 452, 460 (3d Cir. 2003) (noting that determination must be made under Rule 404(b) whether evidence is relevant and has a proper purpose).
balancing still occurs even with evidence that falls within the scope permitted by Rule 404.86 However, the issue under Rule 404(b), unlike that under Rule 401, is not just whether the evidence is relevant, but rather whether it is relevant for a non-forbidden purpose, making de novo review appropriate to make certain that the policies underlying Rule 404 are not undermined. Thus, combining the application of the Rules 404(b) and 403, the determination whether evidence falls within the scope of Rule 404(b) is reviewed de novo, but the trial court’s decision to admit evidence falling within the scope of Rule 404(b) is reviewed for abuse of discretion.87

Rule 405(a) provides that “[i]n all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion.”88 Before a witness can give reputation testimony, a foundation must first be laid that the witness is familiar with the person’s reputation in the relevant community; for the witness to give opinion testimony, a foundation must first be laid that the witness has an adequate familiarity with the person.89 The trial court’s factual finding that the witness has the requisite familiarity is one reviewed deferentially on appeal.90 Rule 405(a) goes on to provide that “[o]n cross-examination, inquiry is allowable into relevant specific instances of conduct.”91 The interpretation of this proviso is de novo, such as the determination whether an opinion witness can be asked questions in the form of “have you heard” on cross-examination.92 The trial court retains discretion to limit the cross-examination allowed under Rule 405(a), and its exercise of such discretion is reviewed for abuse of discretion,93 but if the limits placed on cross-examination by a criminal defendant are sufficiently severe, he might be able to make out a Confrontation Clause claim, which would be reviewed de novo on appeal.94 Rule 405(b) provides that “[i]n cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, 86. United States v. Long, 328 F.3d 655, 664 (D.C. Cir. 2003); United States v. Stevens, 303 F.3d 711, 716 (6th Cir. 2002); United States v. Senffner, 280 F.3d 755, 764-65 (7th Cir. 2002).

87. Cruz, 326 F.3d at 394-95; United States v. Gaitan-Acevedo, 148 F.3d 577, 587 (6th Cir. 1998).

88. FED. R. EVID. 405(a).

89. Michelson v. United States, 335 U.S. 469, 478 (1948); MUELLER & KIRKPATRICK, supra note 51, § 4.19, at 306-08.


91. FED. R. EVID. 405(a).


93. United States v. Boone, 279 F.3d 163, 174-75 (3d Cir. 2002); United States v. Smith, 26 F.3d 739, 755 (7th Cir. 1994).

94. See infra note 448 and accompanying text.
proof may also be made of specific instances of that person's conduct.\textsuperscript{95} Whether character is "an essential element" of a charge or defense implicates the underlying substantive law and is thus properly viewed as a question of law subject to de novo review.\textsuperscript{96}

Rule 406 provides that:

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.\textsuperscript{97}

Because factual matters such as the frequency, regularity, and uniformity of prior conduct predominate in the determination of whether the prior conduct of an individual or an organization rises to the level of habit or routine practice, review on appeal is deferential.\textsuperscript{98} However, appellate courts will sometimes hold as a matter of law that certain types of conduct could never be deemed to be evidence of "habit."\textsuperscript{99}

Rule 407 provides that:

When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction.\textsuperscript{100}

The interpretation of the scope of Rule 407 is a question of law reviewed de novo,\textsuperscript{101} such as whether the rule applies in diversity cases,\textsuperscript{102} what

\textsuperscript{95} FED. R. EVID. 405(b).
\textsuperscript{96} Schafer v. Time, Inc., 142 F.3d 1361, 1370-72 & n.12 (11th Cir. 1998).
\textsuperscript{97} FED. R. EVID. 406.
\textsuperscript{98} United States v. Angwin, 271 F.3d 786, 798 (9th Cir. 2001); United States v. Yazzie, 188 F.3d 1178, 1187-90 (10th Cir. 1999); United States v. Santa, 180 F.3d 20, 29 (2d Cir. 1999); Loughan v. Firestone Tire & Rubber Co., 749 F.2d 1519, 1524 (11th Cir. 1985).
\textsuperscript{99} See Camfield v. Oklahoma City, 248 F.3d 1214, 1232-33 (10th Cir. 2001); Weil v. Seltzer, 873 F.2d 1453, 1459-61 (D.C. Cir. 1989); United States v. Troutman, 814 F.2d 1428, 1454-55 (10th Cir. 1987).
\textsuperscript{100} FED. R. EVID. 407.
Standard of Review of Evidentiary Errors

qualifies as a "measure," whether the word "event" refers to the time of injury or the time of manufacture, and the like. Some courts indicate that they review Rule 407 decisions for "abuse of discretion," but in reading the decisions it is clear that where the question involves an interpretation of the rule, review is made under the de novo prong of the "abuse of discretion" standard. Rule 407 goes on to provide that it "does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment," but the trial court still retains discretion to exclude such evidence under Rule 403, and this decision is reviewed deferentially on appeal.

Rule 408 provides that:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible.

The interpretation of the scope of the rule is de novo, such as the meaning of the word "disputed" or whether the rule covers settlement offers made pursuant to statutory responsibilities. However, the trial court's factual findings in applying the rule are reviewed for clear error, such as the finding that a dispute existed or the finding that the parties were engaged in "compromise negotiations."

The rule goes on to provide that it "does

103. In re Consolidation Coal Co., 123 F.3d 126, 131, 136 (3d Cir. 1997).
104. Huffman v. Caterpillar Tractor Co., 908 F.2d 1470, 1481-83 (10th Cir. 1990).
105. See Kelly, 970 F.2d at 1275-78 (pre-1997 amendment case determining whether rule applies in strict liability cases).
107. FED. R. EVID. 407.
108. See Reese v. Mercury Marine Div. of Brunswick Corp., 793 F.2d 1416, 1429 (5th Cir. 1986).
109. FED. R. EVID. 408.
112. Affiliated Mfrs., Inc., 56 F.3d at 526, 528 (3d Cir. 1995).
not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution[.]"  

but as with Rule 407, the trial court may still exclude evidence offered for such other purposes under Rule 403, subject to review only for abuse of discretion.  

Closely related to Rule 408 is Rule 409, which provides that "[e]vidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury." The interpretation of the scope of the rule is de novo, such as the determination whether it applies in a trial on the issue of damages in light of its limitation that it bars evidence used to prove liability.  

As with Rules 407 and 408, even when evidence is not forbidden by Rule 409, the trial court may still exclude the evidence under Rule 403, and the decision to do so is reviewed deferentially.  

Rule 410 provides that, with certain exceptions, evidence of a withdrawn guilty plea, a plea of nolo contendere, or statements made in the course of plea proceedings or plea discussions related to such withdrawn guilty plea or plea of nolo contendere are not in any civil or criminal case admissible against the defendant who made the plea or participated in the plea discussions.  

Review of the trial court's interpretation of the rule is de novo, such as the determination whether the rule covers statements made to foreign prosecutors, or whether the rule applies in sentencing proceedings.  

Appellate courts usually review the finding by the trial court that the parties were engaged in "plea discussions" at the time the statement was made for clear error.  

Rule 411 provides that "[e]vidence that a person was or was not insured against liability is not admissible upon the issue whether the person

114. FED. R. EVID. 408.  
116. FED. R. EVID. 409.  
118. Savoie v. Otto Candies, Inc., 692 F.2d 363, 370 & n.7 (5th Cir. 1982).  
119. FED. R. EVID. 410.  
121. United States v. Medina-Estrada, 81 F.3d 981, 986 (10th Cir. 1996).  
122. United States v. Gonzalez, No. 96-3083, 1997 WL 7273, at *3 (10th Cir. Jan. 9, 1997); United States v. Aponte-Suarez, 905 F.2d 483, 491 (1st Cir. 1990); United States v. Guerrero, 847 F.2d 1363, 1367 (9th Cir. 1988). But see United States v. Young, 223 F.3d 905, 908 (8th Cir. 2000) (de novo review); United States v. Morgan, 91 F.3d 1193, 1195-96 & n.3 (8th Cir. 1996) (same).
acted negligently or otherwise wrongfully."123 Interpretation of the scope of the rule is properly de novo, such as the determination whether the phrase "insured against liability" includes being indemnified by the government.124 The rule goes on to provide that it "does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness[.]"125 and as with Rules 407, 408, and 409, the trial court's decision to admit such evidence for "another purpose" is subject to exclusion under Rule 403, and its decision to do so is reviewed deferentially.126

Rule 412(a) provides that, subject to certain exceptions, evidence offered to prove a victim's "sexual predisposition"127 or to prove that a victim "engaged in other sexual behavior"128 is not admissible in any "proceeding involving alleged sexual misconduct."129 Decisions interpreting the scope of the rule are de novo,130 such as the determination whether a particular case falls within the definition of a "proceeding involving alleged sexual misconduct,"131 or the meaning of the term "sexual predisposition."132 Rule 412(b)(1) provides that:

In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:
(A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence;
(B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of sexual misconduct offered by the accused to prove consent or by the prosecution; and
(C) evidence the exclusion of which would violate the

123. FED. R. EVID. 411.
124. Larez v. Holcomb, 16 F.3d 1513, 1520 & n.6 (9th Cir. 1994).
125. FED. R. EVID. 411.
126. Pinkham v. Burgess, 933 F.2d 1066, 1072 (1st Cir. 1991); Morrissey v. Welsh Co., 821 F.2d 1294, 1305-06 (8th Cir. 1987).
127. FED. R. EVID. 412.
128. Id.
129. Id.
132. See FED. R. EVID. 412(a) advisory committee's note.
The interpretation of the scope of these exceptions is a question of law reviewed de novo, and in the context of Rule 412(b)(1)(C), so is the independent, but related, Confrontation Clause claim. Rule 412(b)(2) provides a balancing test for admitting such evidence in civil cases that requires that the "probative value [of the evidence] substantially outweigh[ ] the danger of harm to any victim and of unfair prejudice to any party." The trial court's application of this balancing test, like its application of the Rule 403 balancing test, is reviewed for abuse of discretion on appeal.

Rule 413(a) provides that "[i]n a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant." Rule 414(a) provides a similar rule for the admission of evidence of prior offenses of child molestation in cases in which the defendant is accused of child molestation, and Rule 415(a) provides for the admission of such evidence in civil cases "predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation ..." Appellate courts exercise de novo review over the determination whether a particular offense falls within the definition of an "offense of sexual assault" in Rules 413 and 415 or the definition of an "offense of child molestation" in Rules 414 and 415. Whether Rule 403 balancing applies to evidence that fits within the scope of Rules 413 through 415 is a question of law reviewed de novo, but the trial court's application of Rule 403 balancing to evidence admissible under these rules is subject only to abuse of discretion review.

133. FED. R. EVID. 412(b)(1).
134. See United States v. White Buffalo, 84 F.3d 1052, 1054 (8th Cir. 1996).
136. FED. R. EVID. 412(b)(2).
137. Warren v. Prejean, 301 F.3d 893, 906 (8th Cir. 2002); Rodriguez-Hernandez v. Miranda-Velez, 132 F.3d 848, 855-56 (1st Cir. 1998); Judd v. Rodman, 105 F.3d 1339, 1341-43 (11th Cir. 1997).
138. FED. R. EVID. 413(a).
139. FED. R. EVID. 414(a).
140. FED. R. EVID. 415(a).
142. See United States v. McHorse, 179 F.3d 889, 897-98 (10th Cir. 1999) (de novo review of trial court's legal interpretation of Rule 414).
143. Johnson, 283 F.3d at 155; United States v. Guardia, 135 F.3d 1326, 1329 (10th Cir. 1998).
144. United States v. Fool Bull, No. 01-2944, 2002 WL 113839, at *1 (8th Cir. Jan. 30, 2002); United States v. Gabe, 237 F.3d 954, 959-60 (8th Cir. 2001); United States v. Mann,
A specialized form of relevance is conditional relevance. When a spoken statement is relied upon to prove that notice was given to a certain person, evidence that the statement was made is without probative value unless that person heard the statement being made.\textsuperscript{145} Thus, the relevance of the evidence that the statement was made is conditioned on there being evidence that the person heard the statement being made. Rule 104(b) addresses this situation, providing that "[w]hen the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition."\textsuperscript{146} Under this rule, the judge plays only a screening role, admitting the conditionally relevant evidence so long as she determines that a jury could reasonably find that the condition was fulfilled.\textsuperscript{147} The trial court's determination that there is sufficient evidence to support a finding of the fulfillment of a condition under Rule 104(b) is reviewed deferentially on appeal.\textsuperscript{148} Under Rule 104(a), however, evidentiary issues other than conditional relevance are for the judge alone to decide: "[p]reliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b)."\textsuperscript{149} Like Rule 104(b) determinations, the factual findings made by the trial court for evidentiary issues falling within the scope of Rule 104(a) are reviewed for clear error on appeal.\textsuperscript{150}

\textsuperscript{145} See FED. R. EVID. 104(b) advisory committee's note.

\textsuperscript{146} FED. R. EVID. 104(b).

\textsuperscript{147} See FED. R. EVID. 104(b) advisory committee's note.


\textsuperscript{149} FED. R. EVID. 104(a). The rule continues: "In making its determination it is not bound by the rules of evidence except those with respect to privileges." Id. Whether hearings on preliminary matters should be conducted outside the jury’s presence is governed by Rule 104(c), which provides that "[h]earings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests." FED. R. EVID. 104(c). The trial court's determination that the "interests of justice require" that a hearing be held outside the jury’s presence is reviewed for abuse of discretion. United States v. Nichols, 169 F.3d 1255, 1263 (10th Cir. 1999) (quoting FED. R. EVID. 104(c)); United States v. Peele, 574 F.2d 489, 491 (9th Cir. 1978).

\textsuperscript{150} Re/Max Intern., Inc. v. Realty One, Inc., 173 F.3d 995, 1012 (6th Cir. 1999); Asplundh Mfg. Div. v. Benton Harbor Eng’g, 57 F.3d 1190, 1208 (3d Cir. 1995); United States v. Maldonado-Rivera, 922 F.2d 934, 959 (2d Cir. 1990); United States v. Cardall, 885 F.2d 656, 668 (10th Cir. 1989); United States v. Wilson, 798 F.2d 509, 512 (1st Cir. 1986).
However, whether something is governed by Rule 104(a) or instead by Rule 104(b) is a question of law reviewed de novo.\textsuperscript{151}

An example of conditional relevance is the requirement that evidence be authenticated or identified; an item of evidence, such as the written contract in a contract dispute, is irrelevant unless the contract is in fact the contract at issue and not a forgery.\textsuperscript{152} Rule 901(a) governs authentication, and provides that "[t]he 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."\textsuperscript{153} The decisions rather uniformly hold that the trial court's factual determination that the foundation evidence provided is sufficient to support a finding by the jury of authenticity is reviewed deferentially on appeal.\textsuperscript{154} However, if the trial court misconstrues the rule, such as interpreting it to require that the judge himself be convinced that the item is authentic (as opposed to simply making the determination that a reasonable jury could so find), that would be an error of law reviewed de novo.\textsuperscript{155} Rule 901(b) sets forth a series of examples by which evidence can be authenticated, but makes clear that the list is intended to be "[b]y way of illustration only, and not by way of limitation . . . ."\textsuperscript{156} Thus, were a trial court to exclude evidence on the ground that it was not authenticated in accordance with any of the examples set forth in Rule 901(b), that would be an error in interpreting the rule subject to de novo review.\textsuperscript{157}

Rule 902 sets forth a list of documents that are "self-authenticating," meaning that evidence of authenticity is \textit{not} required as a condition precedent to the admissibility of such documents.\textsuperscript{158} For example, Rule

\textsuperscript{151} \textit{Huddleston}, 485 U.S. at 686-92 (interpreting \textsc{Fed. R. Evid.} 404(b)).
\textsuperscript{152} See \textsc{Fed. R. Evid.} 901(a) advisory committee's note ("Authentication and identification represent a special aspect of relevancy . . . . Thus a telephone conversation may be irrelevant because on an unrelated topic or because the speaker is not identified. The latter aspect is the one here involved.").
\textsuperscript{153} \textsc{Fed. R. Evid.} 901(a).
\textsuperscript{154} United States v. Patterson, 277 F.3d 709, 713 (4th Cir. 2002); United States v. Tropeano, 252 F.3d 653, 661 (2d Cir. 2001); United States v. Siddiqui, 235 F.3d 1318, 1322 (11th Cir. 2000); United States v. Pluta, 176 F.3d 43, 49 (2d Cir. 1999); United States v. Alicia-Cardoza, 132 F.3d 1, 4 (1st Cir. 1997); United States v. Holmquist, 36 F.3d 154, 167-68 (1st Cir. 1994); United States v. Brewer, 630 F.2d 795, 801-02 (10th Cir. 1980).
\textsuperscript{155} See Ricketts v. City of Hartford, 74 F.3d 1397, 1410-11 (2d Cir. 1996).
\textsuperscript{156} \textsc{Fed. R. Evid.} 901(b).
\textsuperscript{157} Traction Wholesale Ctr. Co. v. NLRB, 216 F.3d 92, 105 (D.C. Cir. 2000); First State Bank of Denton v. Md. Cas. Co., 918 F.2d 38, 40-41 (5th Cir. 1990); United States v. Ochoa-Victoria, Nos. 87-5232, 87-5233, 1988 WL 74747, at *2-3 (9th Cir. July 6, 1988); \textit{In re} Bobby Boggs, Inc., 819 F.2d 574, 580-81 (5th Cir. 1987); United States v. Alessi, 638 F.2d 466, 480 (2d Cir. 1980).
\textsuperscript{158} \textsc{Fed. R. Evid.} 902.
902(6) provides that "[p]rinted materials purporting to be newspapers or periodicals" are self-authenticating.\textsuperscript{159} The trial court's findings with respect to the factual predicates for invoking any of the provisions contained in Rule 902 are reviewed deferentially on appeal.\textsuperscript{160} However, the interpretation of the text of Rule 902, such as an interpretation of the self-authenticating effect of such evidence in terms of admissibility,\textsuperscript{161} is subject to de novo review on appeal.\textsuperscript{162}

Finally, Rule 903 provides that "[t]he testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing."\textsuperscript{163} The trial court's determination as to the content of the law governing the validity of the writing would be a question of law subject to de novo review.\textsuperscript{164}

\begin{itemize}
\item \textsuperscript{159} FED. R. EVID. 902(6).
\item \textsuperscript{160} United States v. Harrison, No. 97-4178, 1999 WL 26921, at *6 (4th Cir. Jan. 25, 1999) (trial court's finding that document admitted under Rule 902(1) bears "a seal 'purporting to be' that of the United States or a political subdivision thereof . . . .").
\item \textsuperscript{161} United States v. Bisbee, 245 F.3d 1001, 1006-07 (8th Cir. 2001) ("Bisbee argues that this rule creates only a rebuttable presumption of admissibility that he has rebutted . . . . Bisbee mischaracterizes the rule . . . . That Bisbee presented evidence tending to contradict the facts . . . . does not render the properly admitted evidence inadmissible."); United States v. Carriger, 592 F.2d 312, 316-17 (6th Cir. 1979) ("[R]ule 902 dispenses with a requirement of extrinsic evidence for admissibility. By requiring proof of the underlying transaction as a condition for admission the district court denied the defendant the benefit of the rule.").
\item \textsuperscript{162} United States v. Mateo-Mendez, 215 F.3d 1039, 1041-42 (9th Cir. 2000) ("The de novo standard applies when issues of law predominate in the district court's evidentiary analysis, and the abuse-of-discretion standard applies when the inquiry is 'essentially factual.'"); Whitted v. Gen. Motors Corp., 58 F.3d 1200, 1204 (7th Cir. 1995) ("The owner's manual is not a trade inscription and admitting the manual because it had a trade inscription on its cover does not comport with the rule. Therefore, Rule 902(7) does not apply here."); United States v. Dancy, 861 F.2d 77, 79 (5th Cir. 1988) ("[R]ule 902(4) does not contemplate that 'official records' must be filed or recorded in a public office to be self-authenticating.").
\item \textsuperscript{163} FED. R. EVID. 903.
\item \textsuperscript{164} Cf. infra notes 392-393, 398-399, 523-525 and accompanying text. The likelihood, however, that this question will ever arise, is virtually non-existent. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 9.31, at 1048 (3d ed. 2003). Mueller and Kirkpatrick stated:
\begin{quote}
The primary instance in which attestation continues to be required as a condition of validity is wills . . . . Wills are not probated in federal court, so it is highly unlikely that FRE 903 will ever require deferral to state law in the single instance where production of attesting witnesses is most commonly required.
\end{quote}
\end{itemize}
II. THE RULE AGAINST HEARSAY AND ITS EXCEPTIONS

The rule against hearsay provides that "[h]earsay 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." Hearsay is defined as "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." This definition raises two interpretative questions: what is a "statement," and, when is a statement offered "to prove the truth of the matter asserted?" The first of these is answered by Rule 801(a), which defines a statement as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." The second of these is answered in the official commentary to Rule 801(c), which provides that "[i]f the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay." This would include situations in which the evidence is offered to impeach a witness, when the statement is a so-called "verbal act," or when the evidence is offered to show the effect a statement had on another person, such as to prove notice or the like.

Consider a trial in which an attorney claims that the evidence he seeks to offer into evidence is not subject to exclusion under the hearsay rule because it is being offered for some reason other than to prove the truth of the matter asserted, such as to impeach a witness or to show the effect on the person who heard it. Suppose the trial judge nonetheless excludes the evidence on the ground that it is hearsay. By what standard should a court of appeals review this determination? This involves an interpretation of the meaning of the text of the hearsay rule, to wit, what it means for something to be "offered to prove the truth of the matter asserted," and thus is a question of law that should be reviewed de novo. Some appellate decisions explicitly state that they apply de novo review on this issue, while others implicitly appear to be applying de novo review. Still others state that

165. FED. R. EVID. 802.
166. FED. R. EVID. 801(c).
167. FED. R. EVID. 801(a).
168. FED. R. EVID. 801(c) advisory committee's note.
169. See MUELLER & KIRKPATRICK, supra note 51, §§ 8.16-8.18, at 821-25.
171. E.g., Lyons P'ship v. Morris Costumes, Inc., 243 F.3d 789, 804 (4th Cir. 2001); Shafii v. PLC British Airways, 22 F.3d 59, 64-65 (2d Cir. 1994); Keisling v. SER-Jobs for Progress, Inc., 19 F.3d 755, 762 (1st Cir. 1994).
they are applying "abuse of discretion" review, but it is clear from the opinions that they are applying the de novo prong of the "abuse of discretion" standard.\textsuperscript{172}

Consider instead a trial in which the dispute centers on whether or not something falls within the definition of the word "statement." In most cases, the parties are unlikely to dispute this issue, yet in the case of nonverbal conduct, a determination must be made whether the conduct was "intended by the person as an assertion."\textsuperscript{173} This finding of intent is clearly a factual finding, as the official commentary to Rule 801(a) notes,\textsuperscript{174} thus making it appropriate to be reviewed only for clear error.\textsuperscript{175} Yet consider instead the question whether the word "conduct" includes non-affirmative conduct, such as silence (in the sense of an absence of complaints). This raises a question of law as to the meaning of the term "conduct," subject to de novo review.\textsuperscript{176}

Of course, even if a statement falls within the definition of "hearsay," it may nonetheless be admissible. Rule 801(d) provides that eight types of statements that fall within the formal definition of hearsay are nonetheless "not hearsay."\textsuperscript{177} Rule 803 sets forth a list of twenty-three unrestricted exceptions to the hearsay rule,\textsuperscript{178} and Rule 804 sets forth a list of five restricted exceptions to the hearsay rule, which apply only if the declarant is "unavailable" to testify as a witness.\textsuperscript{179} Finally, Rule 807 provides a "catchall" hearsay exception for statements that do not fall within any of the recognized exceptions but that have equivalent guarantees of trustworthiness.\textsuperscript{180} Thus, the parties may agree that a statement is

\textsuperscript{172} United States v. Harris, 281 F.3d 667, 671 (7th Cir. 2002); Guider v. Patriot News, 33 Fed. Appx. 627, 629-30 (3d Cir. 2002); Trepel v. Roadway Exp., Inc., 194 F.3d 708, 716-17 (6th Cir. 1999).
\textsuperscript{173} FED. R. EVID. 801(a)(2) (emphasis added).
\textsuperscript{174} FED. R. EVID. 801(a) advisory committee's note ("When evidence of conduct is offered on the theory that it is not a statement, and hence not hearsay, a preliminary determination will be required to determine whether an assertion is intended.... The determination involves no greater difficulty than many other preliminary questions of fact.").
\textsuperscript{175} The author was not able to find any cases stating a standard of review on this issue.
\textsuperscript{177} FED. R. EVID. 801(d).
\textsuperscript{178} FED. R. EVID. 803. They are so named because they apply without requiring a showing that the declarant is unavailable; the rationale is that long-standing experience has shown these categories of statements, although hearsay, are reliable. WEINSTEIN, supra note 51, § 803.02, at 803-12 to 13.
\textsuperscript{179} FED. R. EVID. 804.
\textsuperscript{180} FED. R. EVID. 807.
“hearsay,” but disagree over whether the statement falls within one of these various exceptions to the hearsay rule.\textsuperscript{181} Whether on appeal the scope of review is de novo or only for clear error will depend on whether the challenge is one to the trial court’s factual findings made in the course of determining whether the foundational prerequisites for invoking the exception are satisfied, or if instead the challenge is to the trial court’s interpretation of the text of the exception. As shall be demonstrated for each of the hearsay exceptions, a slight re-phrasing of the question presented on appeal can turn an inquiry from a review of a factual finding to a review of a legal determination, thus changing the scope of review and perhaps the outcome of the appeal.

Rule 801(d)(1) defines three types of prior statements by a witness as “not hearsay,” all of which apply only if “[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement . . . .”\textsuperscript{182} The first type of prior statement by a witness is one that is “inconsistent with the declarant’s testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition . . . .”\textsuperscript{183} In applying this exception, several interpretive questions arise, including what falls within the scope of the phrase “other proceeding,” what does it mean to be “inconsistent,” and what does it mean to be “subject to cross-examination concerning the statement?” The first is a pure question of law involving the interpretation of the text of the exception that appellate courts appear to review de novo.\textsuperscript{184} The second, depending on the way in which it is phrased, might be a question of law or a finding of fact. If the issue is whether the word “inconsistent” means that the statements must be “diametrically opposed” or whether a claim of feigned memory loss or an evasive answer at trial can be deemed “inconsistent” with a prior statement, that is a legal issue involving an interpretation of the text of the exception subject to de novo review.\textsuperscript{185} Yet with those parameters in mind, if the question is whether the district court erred in finding or failing to find the two statements to be “inconsistent” with one another based on its determination that the witness was or was not

\textsuperscript{181} Although technically, statements covered by Rule 801(d) are “not hearsay,” in substance, they are indistinguishable from exceptions.
\textsuperscript{182} FED. R. EVID. 801(d)(1).
\textsuperscript{183} FED. R. EVID. 801(d)(1)(A).
\textsuperscript{185} See, e.g., United States v. Matlock, 109 F.3d 1313, 1319 (8th Cir. 1997); United States v. Williams, 737 F.2d 594, 608 (7th Cir. 1984).
feigning memory loss or evading the question, that is a factual finding subject to deferential review.\textsuperscript{186} The third interpretive question, depending on how phrased, likewise might be viewed as a question of law or a finding of fact. If the question is, for example, whether the requirement that the person who made the statement be "subject to cross-examination concerning the statement" means that the witness need only be subject to questioning or must also remember the events underlying the statement, that is a question of law reviewed de novo, yet with the requirement defined, the finding by the trial court that the standard was satisfied is a factual finding reviewed deferentially.\textsuperscript{187}

The second type of prior statement by a witness is one that is "consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive."\textsuperscript{188} The application of this exception raises several interpretative questions, including what qualifies as a charge of "fabrication or improper influence or motive" and what is meant by "consistent"? This exception has been interpreted to allow the admission only of prior consistent statements made before the alleged motive to fabricate arose,\textsuperscript{189} a question of law reviewed de novo.\textsuperscript{190} However, with that legal standard in mind, the determinations of when the motive to lie arose and when the prior statement was made in relation to when the motive to lie arose are factual findings subject to review only for clear error.\textsuperscript{191} Moreover, the determination that an express or implied charge of fabrication or improper motive has been made is likewise a factual finding subject to deferential review.\textsuperscript{192} As to the second interpretative question, the interpretation of the

\textsuperscript{186} E.g., Williams, 737 F.2d at 608. The court in Williams stated:
As long as people speak in nonmathematical languages such as English, however, it will be difficult to determine precisely whether two statements are inconsistent . . . . In view of the multitude of factors, a district court's ruling under 801(d)(1)(A) will be disturbed only if an abuse of discretion. Id.; Matlock, 109 F.3d at 1319; United States v. Distler, 671 F.2d 954, 958 (6th Cir. 1981); United States v. Rogers, 549 F.2d 490, 496 (8th Cir. 1976).

\textsuperscript{187} United States v. Owens, 484 U.S. 554, 561-64 (1988) (considering issue in context of Rule 801(d)(1)(C)); United States v. Owens, 789 F.2d 750, 756 (9th Cir. 1986), rev'd, 484 U.S. 554 (1988); DiCaro, 772 F.2d at 1322-25. Note that this element likewise applies to the other two types of prior statements by a witness discussed below. See infra notes 188-196 and accompanying text.

\textsuperscript{188} FED. R. EVID. 801(d)(1)(B).


\textsuperscript{190} United States v. Tome, 3 F.3d 342, 349 (10th Cir. 1993), rev'd on other grounds, 513 U.S. 150 (1995).

\textsuperscript{191} E.g., United States v. Toney, 161 F.3d 404, 408 (6th Cir. 1998) (clear error standard); United States v. Vest, 842 F.2d 1319, 1329 (1st Cir. 1988) (same).

\textsuperscript{192} E.g., United States v. Washington, 106 F.3d 983, 1000 (D.C. Cir. 1997) (abuse of
scope of the word "consistent" as not requiring that the two statements be "identical in every detail" is a question of law reviewed de novo, while the finding that the statements were or were not consistent is a factual finding subject to deferential review.

The third type of prior statement by a witness is "one of identification of a person made after perceiving the person." If a question arises as to this exception's scope, such as what it means to "perceive" a person (in other words, does it include only seeing, or does it also include hearing or smelling a person?), that is a question of law reviewed de novo. Rule 801(d)(2) defines five types of "admissions" by an opposing party as "not hearsay," all of which apply only if the statement is offered against a party. The first type of admission is "the party's own statement, in either an individual or a representative capacity." The trial court need not itself find that the person actually made the statement, but only that a reasonable jury could so find, a determination reviewed deferentially on appeal. The interpretation of the scope of the exception is reviewed de novo, such as whether it applies if the party opponent is deceased at the time of trial.

The second type of admission is "a statement of which the party has manifested an adoption or belief in its truth." As with individual admissions, the trial court need not itself find that the person actually adopted the statement, but only that a reasonable jury could so find, which often will involve a finding that there is sufficient evidence for a jury to find that the statement was heard, understood, and acceded to by the party, a factual finding subject to deferential review on appeal.

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193. Vest, 842 F.2d at 1329.
194. Cf. supra note 186.
196. Owens, 789 F.2d at 755; see also MUELLER & KIRKPATRICK, supra note 164, § 8.26, at 765.
197. FED. R. EVID. 801(d)(2).
199. See, e.g., United States v. White, No. 93-10095, 1994 WL 162068, at *2 (9th Cir. Apr. 29, 1994).
200. See supra notes 146-151 and accompanying text.
201. Savarese v. Agriss, 883 F.2d 1194, 1200-01 (3d Cir. 1989); see also United States v. Erickson, 75 F.3d 470, 479 (9th Cir. 1996) (de novo review of construction of Rule 801(d)(2)(A)).
203. United States v. Monks, 774 F.2d 945, 950 (9th Cir. 1985).
204. See United States v. Allen, 10 F.3d 405, 413 (7th Cir. 1993) (abuse of discretion);
Alternatively, adoption may be manifested by silence, if "the person would, under the circumstances, protest the statement made in his presence if untrue," a factual finding likewise reviewed deferentially. The third type of admission is "a statement by a person authorized by the party to make a statement concerning the subject." The finding that the person was so "authorized" is a factual determination by the trial judge subject to deferential appellate review. Closely related to this is the fourth type of admission, "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." Generally, the application of this rule involves factual findings by the trial judge reviewed deferentially, such as the finding that an agency relationship exists, or the finding that the matter spoken of was within the scope of the agency or employment. Yet a misconstruction of the exception is reviewed de novo, such as an interpretation by the trial court of the phrase "agent or servant" as being limited to those who have "speaking authority" (a vestige of the common law rule not incorporated into the codified rule), or a determination by the trial court that the statement cannot be admitted under this rule if the agent has died.

The fifth type of admission is "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." Factual pre-requisites to the application of this exception include findings that (1) a conspiracy existed; (2) that the party was a member of the conspiracy when the statement was made; and (3) the statement was made during the course

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205. FED. R. EVID. 801(d)(2)(B) advisory committee's note.

206. United States v. Schaff, 948 F.2d 501, 505 (9th Cir. 1991); Monks, 774 F.2d at 950.

207. FED. R. EVID. 801(d)(2)(C).


209. FED. R. EVID. 801(d)(2)(D).


211. E.g., Commonwealth of Kentucky v. Louis Trauth Dairy, Inc., No. 96-6654, 1998 WL 1999717, at *7 (6th Cir. Apr. 16, 1998); Hoptowit v. Ray, 682 F.2d 1237, 1262 (9th Cir. 1982).

212. See City of Tuscaloosa v. Harcros Chems., Inc., 158 F.3d 548, 558 n.10 (11th Cir. 1998).

213. See White v. Honeywell, Inc., 141 F.3d 1270, 1276-77 (8th Cir. 1998).

of and in furtherance of the conspiracy, and such factual findings by the
trial judge are reviewed deferentially on appeal.\textsuperscript{215}

The first two unrestricted hearsay exceptions are (1) present sense
impressions, which provides an exception for "[a] statement describing or
explaining an event or condition made while the declarant was perceiving
the event or condition, or immediately thereafter," and (2) excited
utterances, which provides an exception for "[a] statement relating to a
startling event or condition made while the declarant was under the stress
of excitement caused by the event or condition."\textsuperscript{216} For the present sense
impression exception to apply, the trial court must determine that the
statement was made contemporaneously with (or just after) the event or
condition being described.\textsuperscript{217} For the excited utterance exception to apply,
the trial court must find that: (1) a startling event or condition occurred; (2)
that the declarant made the statement while under the stress of excitement
caused by the event or condition; and (3) that the statement relates to the
startling event or condition.\textsuperscript{218} The factual findings by the trial court with
regard to whether an event or condition occurred, the lapse of time between
an event or condition and the making of the statement, and (in the case of
the excited utterance exception) whether the declarant was "under the stress
of excitement" when the statement was made are reviewed deferentially on
appeal.\textsuperscript{219} Yet courts distinguish between the factual and legal conclusions
of a trial court under these two exceptions, applying deferential review to
the former but de novo review to the latter.\textsuperscript{220} Thus, an interpretation of the
exception as allowing the statement itself to serve as sufficient proof to

\begin{itemize}
  \item \textsuperscript{215} United States v. Sepulveda, 15 F.3d 1161, 1180 (1st Cir. 1993) (clear error);
  United States v. SKW Metals & Alloys, Inc., 195 F.3d 83, 88 (2d Cir. 1999) (same);
  United States v. Vega, 285 F.3d 256, 264 (3d Cir. 2002) (same);
  United States v. Shores, 33 F.3d 438, 442 (4th Cir. 1994) (same);
  United States v. Green, 180 F.3d 216, 222 (5th Cir. 1999) (same);
  United States v. Maliszewski, 161 F.3d 992, 1007 (6th Cir. 1998) (same);
  United States v. Westmoreland, 312 F.3d 302, 309 (7th Cir. 2002) (same);
  United States v. Arias, 252 F.3d 973, 976-77 (8th Cir. 2001) (abuse of discretion);
  United States v. Bowman, 215 F.3d 951, 960 (9th Cir. 2000) (clear error);
  United States v. Lopez-Gutierrez, 83 F.3d 1235, 1242 (10th Cir. 1996) (same);
  United States v. Miles, 290 F.3d 1341, 1351 (11th Cir. 2002) (same);
  \textsuperscript{216} FED. R. EVID. 803(1).
  \textsuperscript{217} FED. R. EVID. 803(2).
  \textsuperscript{218} FED. R. EVID. 803(1) advisory committee's note.
  \textsuperscript{219} United States v. Wesela, 223 F.3d 656, 663 (7th Cir. 2000).
  \textsuperscript{220} United States v. Joy, 192 F.3d 761, 766 (7th Cir. 1999) (abuse of discretion);
  United States v. Martin, 59 F.3d 767, 769 (8th Cir. 1995) (same);
  \textsuperscript{221} United States v. Jones, 299 F.3d 103, 112 (2d Cir. 2002);
  United States v. King, No. 99-2363, 2000 WL 1028228, at *2 (10th Cir. July 26, 2000);
\end{itemize}
establish the occurrence of the startling event without need to resort to independent corroborating evidence is a question of law reviewed de novo.\textsuperscript{222} And while deferring to the trial court’s factual determination whether or not a person was still “under the stress of excitement” when the statement was made, appellate courts may, as a matter of law, delineate appropriate factors to consider in making such a finding, such as the age of the declarant.\textsuperscript{223} One could also imagine a situation in which the court is asked to determine whether something falls within the definitions of the word “event or condition,” in which case de novo review would likewise be appropriate.

The third unrestricted hearsay exception provides an exception for A statement of the declarant’s then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), \textit{but not including a statement of memory or belief to prove the fact remembered or believed} unless it relates to the execution, revocation, identification, or terms of declarant’s will.\textsuperscript{224}

Successful invocation of this exception requires that the district judge find that it is reasonably likely that the statement reflects the person’s “true then-existing state of mind” based on a determination that there was no time for reflection and, thus, misrepresentation—a factual finding reviewed deferentially on appeal.\textsuperscript{225} However, when a ruling by the trial court involves an interpretation of the scope of the rule, review is de novo, such as the meaning of the proviso excluding from the scope of the exception “a statement of memory or belief to prove the fact remembered or believed.”\textsuperscript{226}

The fourth unrestricted hearsay exception is that for “[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.”\textsuperscript{227} The factual
findings by the trial court that such a statement was made by the declarant with the intent ("for the purposes") of promoting diagnosis or treatment, as well as the finding that such information is "reasonably pertinent to diagnosis or treatment," are factual determinations reviewed deferentially. However, the interpretation of the rule as including statements made to social workers or to psychiatrists and psychologists is a question of law subject to de novo review.

The fifth unrestricted hearsay exception is that for a memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly.

The trial court's factual findings that the witness once had knowledge about the facts contained in the document, that the witness now has insufficient memory to testify about the matters in the document, and that the document was recorded at a time when the matters were fresh in the witness' mind and that it correctly reflects the witness' knowledge of the matters are reviewed deferentially on appeal. However, there is de novo review of interpretations of the scope of the exception, such as an interpretation of it as per se excluding law enforcement reports, or an interpretation of it as requiring that the writing be made contemporaneously with the event.

The sixth unrestricted exception is for records of a regularly conducted business activity. The factual findings by the trial court of

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228. E.g., United States v. Yazzie, No. 00-10517, 2002 WL 465160, at *4 (9th Cir. Mar. 15, 2002); United States v. Sumner, 204 F.3d 1182, 1185 (8th Cir. 2000).
229. Davignon v. Clemmey, 322 F.3d 1, 8 & n.3 (1st Cir. 2003).
231. FED. R. EVID. 803(5). The exception continues: "If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party." Id.
232. E.g., United States v. Smith, 197 F.3d 225, 231 (6th Cir. 1999); United States v. Patterson, 678 F.2d 774, 778-79 (9th Cir. 1982).
233. United States v. Pena-Gutierrez, 222 F.3d 1080, 1086-87 & n.3 (9th Cir. 2000); United States v. Picciandra, 788 F.2d 39, 44 (1st Cir. 1986).
234. Smith, 197 F.3d at 231.
235. See FED. R. EVID. 803(6). Rule 803(6) provides an exception for:
A memorandum, report, record, or data compilation, in any form, of acts, events conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by
each of the foundational elements for invoking the exception are reviewed deferentially. However, interpretations of the scope of the rule are reviewed de novo, such as an interpretation of it as covering only documents made by the business and not those received by it, or an interpretation of it as not covering law enforcement reports. Closely related is the seventh unrestricted exception, which provides an exception for evidence of the absence of an entry in records of regularly kept activity. Here, too, the trial court's factual findings on the foundational requirements for invoking the exception are reviewed deferentially.

The eighth unrestricted exception is that for "[p]ublic records and reports," which provides an exception for

Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

*Id.*

236. *E.g.*, United States v. Petrie, 302 F.3d 1280, 1288 (11th Cir. 2002); *Harcros Chems., Inc.*, 158 F.3d at 556; Hargett v. Nat'l Westminster Bank, 78 F.3d 836, 841-42 (2d Cir. 1996); United States v. LaValley, 957 F.2d 1309, 1314 (6th Cir. 1992).


240. *See Fed. R. Evid. 803(7).* Rule 803(7) provides an exception for:

Evidence that a matter is not included in the memoranda, reports, records, or data compilations in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

*Id.* (emphasis added).

trustworthiness.\textsuperscript{242}

The trial court's factual findings with respect to the foundational prerequisites for invoking this exception, such as trustworthiness and first-hand observation by the person making the report, are reviewed deferentially,\textsuperscript{243} although if the trial court were to determine trustworthiness based on an improper factor, that would be an error of law subject to de novo review.\textsuperscript{244} One of the foundational prerequisites—that the matter is observed pursuant to a "duty imposed by law"\textsuperscript{245} or an investigation is "made pursuant to authority granted by law"\textsuperscript{246}—seems to be reviewed de novo, which makes sense given that this involves more a question of law than a finding of fact.\textsuperscript{247} Furthermore, the interpretation of the scope of the rule, such as what sorts of individuals fall within the scope of the phrase "other law enforcement personnel,"\textsuperscript{248} is a question of law that should be reviewed de novo.\textsuperscript{249} In addition, interpreting this exception as preempting the use of any other exception to admit law enforcement reports is a question of law subject to de novo review.\textsuperscript{250}

Closely related to the eighth unrestricted exception is the tenth unrestricted exception, which excepts from the hearsay rule a certification or testimony offered

[t]o prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, . . . that a diligent search failed to disclose the record, report, statement, data compilation, or entry.\textsuperscript{251}

Factual findings by the trial court in applying this exception, such as a finding that a "diligent search"\textsuperscript{252} was undertaken, are subject to deferential

\textsuperscript{242.} \textit{FED. R. EVID.} 803(8).
\textsuperscript{244.} \textit{In re Japanese Electronics}, 723 F.2d at 265-66.
\textsuperscript{245.} \textit{FED. R. EVID.} 803(8).
\textsuperscript{246.} \textit{Id.}
\textsuperscript{247.} \textit{See Central Gulf Lines, Inc.}, 974 F.2d at 626 n.11 (citing 22 C.F.R. § 211.9(c)(1)(ii) (1992)); Perrin v. Anderson, 784 F.2d 1040, 1046 (10th Cir. 1986) (citing \textit{OKLA. STAT. ANN. tit. 47, § 2-103} (1965)).
\textsuperscript{248.} \textit{FED. R. EVID.} 803(8).
\textsuperscript{249.} \textit{Id.}
\textsuperscript{250.} \textit{See supra} note 239.
\textsuperscript{251.} \textit{FED. R. EVID.} 803(10).
\textsuperscript{252.} \textit{Id.}
The ninth unrestricted exception is that for "[r]ecords of vital statistics," which provides an exception for "[r]ecords or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law." As with the exception for public records generally, the finding that the report was made pursuant to the requirements of law is the sort of question for which de novo review is appropriate.

The eleventh unrestricted exception is that for "[r]ecords of religious organizations," which provides an exception for "[s]tatements of birth, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization." The interpretation of the scope of this exception, such as an interpretation of the phrase "similar facts of personal or family history" is a question of law reviewed de novo.

The twelfth unrestricted exception is that for Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

As with the public records and vital statistics exceptions, de novo review would be appropriate on the question whether the particular type of individual is "authorized . . . by law" to perform the act certified.

The thirteenth unrestricted exception is that for "[s]tatements of fact concerning personal or family history contained in family Bibles,

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254. FED. R. EVID. 803(9).
255. See supra note 247 and accompanying text. But see United States v. Palomares-Munoz, No. 00-50216, 2001 WL 219951, at *1 (9th Cir. Mar. 5, 2001) (using phrase "abuse its discretion").
256. FED. R. EVID. 803(11).
257. Id.
258. E.g., Ruberto v. Comm'r of Internal Revenue, 774 F.2d 61, 63 (2d Cir. 1985); Hall v. Comm'r of Internal Revenue, 729 F.2d 632, 634-35 (9th Cir. 1984).
259. FED. R. EVID. 803(12).
260. Id.
261. See supra note 247 and accompanying text.
genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like." 262 Since the Advisory Committee notes to this exception cross-reference the definition of "personal or family history" used in the exception for records of religious organizations, 263 the interpretation of the scope of that phrase here should likewise be reviewed de novo. 264 For similar reasons, what qualifies as a "like" 265 family record would involve an interpretation of the text of the exception subject to de novo review. 266

The fourteenth unrestricted exception is that for

The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office. 267

The interpretation of the scope of this exception is de novo, such as the determination whether it includes "judgments" that fix property rights 268 or the determination whether it would allow for the admission of "testimony" as to the contents of such a document (as opposed to just a copy of the document itself). 269 The determination whether "an applicable statute authorizes the recording of documents of that kind in that office" 270 is a question of law reviewable de novo. 271

The fifteenth unrestricted exception is that for

A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property

263. Fed. R. Evid. 803(13) advisory committee's note (1974) ("The Committee approved this Rule in the form submitted by the Court, intending that the phrase 'Statements of fact concerning personal or family history' be read to include the specific types of such statements enumerated in Rule 803(11). ").
264. See supra note 258 and accompanying text.
268. Greycas, Inc. v. Proud, 826 F.2d 1560, 1567 (7th Cir. 1987).
269. United States v. Ruffin, 575 F.2d 346, 357 (2d Cir. 1978).
271. See Fed. R. Evid. 803(14) advisory committee's note (Proposed Rule 1972) ("[W]hat may appear in the rule, at first glance, as endowing the record with an effect independently of local law and inviting difficulties of an Erie nature... is not present, since the local law in fact governs under the example... ").
since the document was made have been inconsistent with the
truth of the statement or the purport of the document.\textsuperscript{272}
The prerequisites to invoking this exception are findings "that the
document is authenticated and trustworthy, that it affects an interest in
property, and that the dealings with the property since the document was
made have been consistent with the truth of the statement."\textsuperscript{273} Such factual
findings by the trial court are reviewed deferentially on appeal.\textsuperscript{274}

The sixteenth unrestricted exception is that for "[s]tatements in a
document in existence twenty years or more the authenticity of which is
established."\textsuperscript{275} A special provision provides for establishing the
authenticity of such a document by showing that it "(A) is in such condition
as to create no suspicion concerning its authenticity, (B) was in a place
where it, if authentic, would likely be, and (C) has been in existence 20
years or more at the time it is offered."\textsuperscript{276} On appeal, the factual findings in
establishing the prerequisites under the special provision for authentication
are reviewed deferentially.\textsuperscript{277} However, the interpretation of the scope of
the hearsay exception is reviewed de novo,\textsuperscript{278} such as the question whether
the word "documents" includes electronic documents.\textsuperscript{279}

The seventeenth unrestricted exception is that for "[m]arket
quotations, tabulations, lists, directories, or other published compilations,
generally used and relied upon by the public or by persons in particular
occupations."\textsuperscript{280} The finding that the document is "generally used and
relied upon"\textsuperscript{281} is a factual finding reviewed deferentially on appeal.\textsuperscript{282}

The eighteenth unrestricted exception is that for "learned treatises,"
which under certain circumstances involving testimony by expert witnesses
provides an exception for "statements contained in published treatises,
periodicals, or pamphlets on a subject of history, medicine, or other science
or art, established as a reliable authority by the testimony or admission of

\textsuperscript{272.} \textit{FED. R. EVID. 803(15).}
\textsuperscript{273.} \textit{Silverstein v. Chase, 260 F.3d 142, 149 (2d Cir. 2001).}
\textsuperscript{274.} \textit{Silverstein v. Chase, No. 02-7863, 2003 WL 1611396, at *1 (2d Cir. Mar. 28, 2003).}
\textsuperscript{275.} \textit{FED. R. EVID. 803(16).}
\textsuperscript{276.} \textit{FED. R. EVID. 901(b)(8).}
\textsuperscript{277.} \textit{Kalamazoo River Study Group v. Menasha Corp., 228 F.3d 648, 661 (6th Cir. 2000); United States v. Stelmokas, 100 F.3d 302, 312 (3d Cir. 1996).}
\textsuperscript{278.} \textit{Kalamazoo River, 228 F.3d at 661.}
\textsuperscript{279.} \textit{See MUELLER & KIRKPATRICK, supra note 164, § 8.58, at 885-86.}
\textsuperscript{280.} \textit{FED. R. EVID. 803(17).}
\textsuperscript{281.} \textit{Id.}
\textsuperscript{282.} \textit{United States v. Meo, No. 92-10197, 1994 WL 12340, at *6-7 (9th Cir. Jan. 18, 1994); United States v. Cassiere, 4 F.3d 1006, 1018-19 (1st Cir. 1993).}
the witness or by other expert testimony or by judicial notice." The factual finding by the trial court establishing the prerequisite for invoking the exception, to wit, that it is a reliable authority, is reviewed deferentially. Yet the interpretation of the scope of the rule is de novo, such as the determination whether a videotape or the prior inconsistent testimony of another expert in another trial can qualify as a "treatise[]." The exception ends with a proviso that "[i]f admitted, the statements may be read into evidence but may not be received as exhibits." The question whether charts and diagrams are implicitly excluded from the proviso (on the ground that reading them into evidence would be a daunting task) is properly viewed as a question of law subject to de novo review.

The nineteenth unrestricted exception is that for "[r]eputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history." This rule has been interpreted as requiring that a foundation be established that the witness is "familiar with the 'community' in which the reputation has been formed, and that the basis of the reputation is one that is likely to be reliable," a finding reviewed deferentially on appeal. Yet the construction of the rule is reviewed de novo, such as an interpretation of the word "community" as including the person's place of work, or an interpretation of what qualifies as "personal or family history." The twentieth unrestricted exception is that for "[r]eputation in a community, arising before the controversy, as to boundaries of or customs.

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283. FED. R. EVID. 803(18).
285. Costantino, 203 F.3d at 170-71.
287. FED. R. EVID. 803(18).
288. Id.
290. FED. R. EVID. 803(19).
293. FED. R. EVID. 803(19).
294. Blackburn, 179 F.3d at 99.
295. E.g., United States v. Jean-Baptiste, 166 F.3d 102, 110 (2d Cir. 1999) (place of birth); Virgin Islands v. Joseph, 765 F.2d 394, 398 n.5 (3d Cir. 1985) (date of birth); cf. supra note 258 and accompanying text.
affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.”

The trial court’s factual findings in determining whether the foundational prerequisites for invoking this exception are reviewed deferentially, such as the finding that an event is one of “general history important to the community . . .”

The twenty-first unrestricted exception is that for “[r]eputation of a person’s character among associates or in the community.” Cross-reference should be made here to Rule 405(a), as this rule merely states that evidence admissible under that rule is not excluded by the hearsay rule, and so the focus on appeal is on review of the application of Rule 405(a), discussed above.

The twenty-second unrestricted exception is that for Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused.

The interpretation of the text of this rule is reviewed de novo, such as whether the word “judgment” includes foreign judgments, or whether the exception is applicable if the evidence is offered for a reason other than to prove a fact essential to sustain the judgment, or whether the exception implicitly bars judgments not mentioned in it from being admitted pursuant to some other exception to the hearsay rule or for a non-hearsay purpose.

The final unrestricted hearsay exception is that for “[j]udgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of

296. FED. R. EVID. 803(20).
297. Id.; Church of God in Christ, Inc. v. Graham, 54 F.3d 522, 528 (8th Cir. 1995).
298. FED. R. EVID. 803(21).
299. FED. R. EVID. 803(21) advisory committee’s note (Proposed Rule 1972); FED. R. EVID. 405(a).
300. See supra notes 88-94 and accompanying text.
301. FED. R. EVID. 803(22). The exception continues: “The pendency of an appeal may be shown but does not affect admissibility.” Id.
302. FED. R. EVID. 803(22).
305. Olsen v. Correiro, 189 F.3d 52, 58, 62-63 (1st Cir. 1999); Hancock v. Dodson, 958 F.2d 1367, 1371-72 (6th Cir. 1992).
reputation." The interpretation of the text of the exception is reviewed de novo, such as the determination that it implicitly bars the use of other hearsay exceptions to admit judgments that do not fit within this exception or the previous one.

Rule 804(b) sets forth a list of five restricted exceptions to the hearsay rule, which apply only if the declarant is "unavailable" to testify as a witness. The definition of "'[u]navailability as a witness'" is set forth in Rule 804(a), which provides that the phrase

[I]ncludes situations in which the declarant—
(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
(3) testifies to a lack of memory of the subject matter of the declarant's statement; or
(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

Because Rule 804(a) provides a foundational prerequisite to invoking any of the Rule 804(b) restricted exceptions, whenever any of those exceptions are invoked, the question arises by what standard should an appellate court review a determination by the trial court that a declarant is "unavailable" within the meaning of Rule 804(a)? As a general rule, interpretations of what satisfies the definition of "unavailability" are reviewed de novo, while findings of fact made in the course of applying the definition reviewed deferentially. Thus, the question whether 804(a)(1) applies to the privilege against self-incrimination is a question of law reviewed de novo on appeal. The finding by a trial court that a witness refuses to testify under 804(a)(2) despite a court order to do so is reviewed

306. FED. R. EVID. 803(23).
308. FED. R. EVID. 804(b).
309. FED. R. EVID. 804(a).
Standard of Review of Evidentiary Errors

deferentially on appeal,311 but if the trial court fails to comply with the requirements of 804(a)(2), such as invoking it without having first ordered the person to testify, that is an error of law reviewed under the de novo prong of the “abuse of discretion” standard.312 Reviewed deferentially on appeal as factual findings are the determinations by the trial court that the declarant suffers from a lack of memory under Rule 804(a)(3),313 that the declarant is unable to testify due to physical or mental illness under Rule 804(a)(4),314 and the determination under Rule 804(a)(5) that the proponent “has been unable to procure [a declarant’s] attendance . . . by process or other reasonable means.”315

At the end of the definition of “unavailability” is a proviso that “[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.”316 The finding under this proviso that the declarant’s inability to testify is due to the procurement or wrongdoing of the proponent of the statement is a factual finding reviewed deferentially.317 However, the interpretation of the phrase “procurement or wrongdoing” is reviewed de novo, such as an interpretation of it as including the government’s decision not to confer immunity on a witness,318 or as preventing a party who claims the Fifth Amendment privilege from bringing in his own hearsay statements under any of the restricted hearsay

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312. Gregory v. Shelby County, 220 F.3d 433, 448-49 (6th Cir. 2000); United States v. Oliver, 626 F.2d 254, 261 (2d Cir. 1980); see generally United States v. Faison, 679 F.2d 292, 295 n.2 (3d Cir. 1982) (stating that abuse of discretion review “involves mixed questions of law and of fact. As to the factual findings, the appropriate standard for review is the clearly erroneous test.”).

313. Wildermuth, 1999 WL 623465, at *4 (abuse of discretion); Miller, 1988 WL 76090, at *3 (clear error); United States v. Amaya, 533 F.2d 188, 190-91 (5th Cir. 1976) (abuse of discretion).


316. FED. R. EVID. 804(a).


exceptions.319

The first restricted hearsay exception is that for
Testimony given as a witness at another hearing of the same or a
different proceeding, or in a deposition taken in compliance with
law in the course of the same or another proceeding, if the party
against whom the testimony is now offered, or, in a civil action or
proceeding, a predecessor in interest, had an opportunity and
similar motive to develop the testimony by direct, cross, or
redirect examination.320

The interpretation of the text of the rule, such as an interpretation of the
word “hearing” as including grand jury proceedings, is a question of law
reviewed de novo.321 Similarly, the interpretation of the word
“opportunity” as including situations in which an individual’s attorney
makes a tactical decision not to exercise the opportunity is likewise a
question of law reviewed de novo.322 Whether there was a “similar motive
to develop the testimony”323 is often a fact-specific inquiry subject to
deferential appellate review,324 although with respect to particular types of
prior proceedings, appellate courts sometimes hold as a matter of law that a
similar motive does or does not exist to develop testimony.325

The second restricted exception is for “a prosecution for homicide or
in a civil action or proceeding, a statement made by a declarant while
believing that the declarant’s death was imminent, concerning the cause or
circumstances of what the declarant believed to be impending death.”326

The finding by the trial court that the statement was made while the
declarant believed that her death was imminent is reviewed
deferentially,327 however as guidance, an appellate court may set forth the parameters for
exercising such discretion, such as by indicating that the rule does not
require that the victim “make an explicit statement that he or she believes

319. United States v. Kimball, 15 F.3d 54, 55-56 (5th Cir. 1994) (stating that it is
applying “abuse of discretion” review but seemingly reviewing de novo); United States v.
320. FED. R. EVID. 804(b)(1).
321. United States v. Omar, 104 F.3d 519, 522 (1st Cir. 1997).
322. United States v. Quincy, No. 86-5286, 1988 WL 79237, at *3 (9th Cir. July 26,
1988) (describing it as an “abuse of discretion”).
323. FED. R. EVID. 804(b)(1).
324. E.g., United States v. Bartelho, 129 F.3d 663, 671-72 (1st Cir. 1997).
325. United States v. Foster, 128 F.3d 949, 954-56 (6th Cir. 1997) (government has
same motive to develop testimony in grand jury proceeding as it does at trial); United States
v. Miller, 904 F.2d 65, 68 (D.C. Cir. 1990) (same).
326. FED. R. EVID. 804(b)(2).
327. United States v. Taylor, 59 Fed. Appx. 960, 962-64 (9th Cir. 2003) (abuse of
discretion).
death is imminent” but that this state of mind may instead be determined from the nature and extent of the wounds.\textsuperscript{328}

The third restricted hearsay exception is for

A statement which was at the time of its making so far contrary to the declarant’s pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant’s position would not have made the statement unless believing it to be true.\textsuperscript{329}

The determination by the trial court that the statement was against the declarant’s interest is reviewed deferentially on appeal by some courts\textsuperscript{330} and de novo by others.\textsuperscript{331} It would seem as though the question whether the statement “tended to subject the declarant to civil or criminal liability” or “to render invalid a claim by the declarant” are properly viewed as questions of law reviewable de novo,\textsuperscript{332} while the question whether the statement was for some non-legal reason against the person’s interest would be a factual determination reviewed deferentially. The exception has a proviso that “[a] statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.”\textsuperscript{333} The finding of trustworthiness is uniformly reviewed deferentially on appeal,\textsuperscript{334} but an error in interpreting the proviso is reviewed de novo, such as a misinterpretation of it as requiring that there be corroboration of the content of the statement (as opposed to mere corroboration that the statement was made),\textsuperscript{335} or a misinterpretation of the proviso as applying only in criminal cases.\textsuperscript{336}

The fourth restricted hearsay exception is for statements of personal or family history, which applies to:

(A) A statement concerning the declarant’s own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or

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\textsuperscript{328} Id. at 963.
\textsuperscript{329} FED. R. EVID. 804(b)(3).
\textsuperscript{330} United States v. Alvarez, 266 F.3d 587, 592-93 (6th Cir. 2001); United States v. Rhodes, 713 F.2d 463, 473 (9th Cir. 1983).
\textsuperscript{331} United States v. Costa, 31 F.3d 1073, 1077 (11th Cir. 1994).
\textsuperscript{332} Cf. supra notes 245-247 and accompanying text.
\textsuperscript{333} FED. R. EVID. 804(b)(3).
\textsuperscript{334} Am. Auto. Accessories, Inc. v. Fishman, 175 F.3d 534, 541 (7th Cir. 1999); United States v. Price, 134 F.3d 340, 348 (6th Cir. 1998); United States v. Briscoe, 742 F.2d 842, 846-47 (5th Cir. 1984); Rhodes, 713 F.2d at 473.
\textsuperscript{335} Price, 134 F.3d at 347-48.
\textsuperscript{336} Am. Automotive Accessories, Inc., 175 F.3d at 541.
Syracuse Law Review

marriage, ancestry or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other’s family as to be likely to have accurate information concerning the matter declared.\footnote{337}

The interpretation of the text of the rule is reviewed de novo, such as the determination whether alienage or citizenship is a fact of personal or family history,\footnote{338} or the interpretation of the word “fact” as limiting the scope of the rule to, say, the date of a marriage and not the motive or purpose for getting married.\footnote{339}

The fifth restricted hearsay exception is that for “[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.”\footnote{340} The factual findings by the trial court that these prerequisites are satisfied is reviewed deferentially.\footnote{341} However, the interpretation of the text of the rule, such as what is meant by the word “wrongdoing,” is reviewed de novo.\footnote{342}

Rule 807, the catchall exception, provides that

A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.\footnote{343}

\footnotetext{337}{FED. R. EVID. 804(b)(4).}
\footnotetext{338}{Olafson, 213 F.3d at 441; United States v. Castillo-Reyes, No. 98-50058, 1998 WL 789417, at *1 (9th Cir. Nov. 6, 1998).}
\footnotetext{339}{United States v. Carvalho, 742 F.2d 146, 151 (4th Cir. 1984).}
\footnotetext{340}{FED. R. EVID. 804(b)(6).}
\footnotetext{341}{United States v. Scott, 284 F.3d 758, 762 (7th Cir. 2002); United States v. Price, 265 F.3d 1097, 1102-03 (10th Cir. 2001).}
\footnotetext{342}{Scott, 284 F.3d at 763-64 (implicit de novo review).}
\footnotetext{343}{FED. R. EVID. 807. The rule continues: However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to...}
The trial court’s findings in applying the rule are reviewed deferentially on appeal. However, the interpretation of the text of the rule is reviewed de novo, such as an interpretation of the phrase “not specifically covered” as requiring that the residual exception not be used for hearsay that is close to, but does not fit precisely into, a recognized hearsay exception, or an interpretation of the exception as containing a per se bar on certain types of evidence being admitted under it.

Two other rules are found in the hearsay article of the Federal Rules of Evidence. The first is Rule 805, which provides that “[h]earsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.” The interpretation of this rule is reviewed de novo, such as interpreting “exception to the hearsay rule” as including statements defined as “not hearsay” by Rule 801(d). However, the application of it to particular hearsay exceptions is governed by the same standards of review that govern review of evidence admitted or excluded under those exceptions.

The other rule is Rule 806, which provides that

When a hearsay statement, or a statement defined in Rule 801(d)(2)(C), (D), or (E) has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness.
Interpretations of the rule are reviewed de novo, such as an interpretation of the rule as implicitly creating an exception to Rule 608(b), or an interpretation of the rule as not applying when a statement has been offered for a non-hearsay purpose. Rule 806 does not mandate that evidence that fits the rule is necessarily admissible to impeach, however, and the decision whether to admit such evidence is an exercise of discretion reviewed deferentially.

In criminal cases, claims that evidence is inadmissible hearsay often overlap with claims that admission of the evidence would violate the defendant’s Confrontation Clause rights, as both the hearsay rule and the Confrontation Clause were designed to protect similar values. However, although the two claims overlap, they are not identical: admission of evidence may violate the Confrontation Clause but not the hearsay rule, and vice-versa. Because claims that the admission of a hearsay statement violated a criminal defendant’s Confrontation Clause rights are reviewed de novo, a party facing an uphill battle in challenging the admission of evidence under the hearsay rule based on a deferential standard of review might be able to increase his chances of having the decision overturned by characterizing it as a Confrontation Clause claim. Indeed, such re-characterization may well bear fruit given that the Supreme Court has recently cast doubt on the constitutionality of admitting various types of hearsay statements against the accused in criminal cases by redefining the relationship between the Confrontation Clause and exceptions to the hearsay rule. However, care must be taken to specifically raise both the hearsay and Confrontation Clause claims, as

the declarant’s hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

Id.

354. United States v. McNair, Nos. 01-1626, 01-1635, 2002 WL 31060479, at *1 (2d Cir. Sept. 17, 2002) (stating that its review is for abuse of discretion, but then applying what appears to be de novo review); United States v. Zagari, 111 F.3d 307, 317-18 (2d Cir. 1997).
358. United States v. Orellana-Blanco, 294 F.3d 1143, 1148 (9th Cir. 2002); United States v. Westmoreland, 240 F.3d 618, 626 (7th Cir. 2001).
raising one does not preserve the other.\textsuperscript{360}

III. BEST EVIDENCE RULE

The so-called best evidence rule is set forth in Rule 1002, and provides that "[t]o 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."\textsuperscript{361} Whether evidence is offered "[t]o prove the content of a writing, recording, or photograph"\textsuperscript{362} or for some other purpose, like the question of whether evidence is offered for a hearsay or non-hearsay purpose, is a question of law subject to de novo review.\textsuperscript{363} The definitions of the terms "[w]ritings" and "recordings,"\textsuperscript{364} "[p]hotographs,"\textsuperscript{365} and "original,"\textsuperscript{366} are set forth in Rule 1001. Whether something satisfies the definitions of the words "writings," "recordings," or "photographs" is a question of law reviewed de novo.\textsuperscript{367} Likewise, the definition of the word "original" is a question of law reviewed de novo on appeal.\textsuperscript{368}

\begin{itemize}
\item \textsuperscript{360} E.g., Scott, 284 F.3d at 762.
\item \textsuperscript{361} FED. R. EVID. 1002.
\item \textsuperscript{362} Id. (emphasis added).
\item \textsuperscript{363} Jackson v. Crews, 873 F.2d 1105, 1110 (8th Cir. 1989) (not stating standard of review); R & R Assoc. v. Visual Scene, Inc., 726 F.2d 36, 38 (1st Cir. 1984) (same).
\item \textsuperscript{364} FED. R. EVID. 1001(1) ("'Writings' and 'recordings' consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.").
\item \textsuperscript{365} FED. R. EVID. 1001(2) ("'Photographs' include still photographs, X-ray films, video tapes, and motion pictures.").
\item \textsuperscript{366} FED. R. EVID. 1001(3). Rule 1001(3) states: An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative of any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original."
\item \textsuperscript{367} Id.
\item \textsuperscript{368} See United States v. Anderson, Nos. 88-1469, 88-1510, 1990 WL 14634, at *4 (6th Cir. Feb. 20, 1990) (forged receipt made using a photocopier was an "original" although produced with a photocopier); United States v. Rangel, 585 F.2d 344, 346 (8th Cir. 1978) (same, and also holding that a carbon copy of a credit card receipt is an "original").
\end{itemize}
Rule 1003 provides that "[a] duplicate is admissible to the same extent as an original, unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." The definition of the term "duplicate" is set forth in Rule 1001, and its interpretation is a question of law reviewed de novo. However, appellate courts review deferentially the trial court's decision not to admit a duplicate because "a genuine question is raised as to the authenticity of the original" or because in the circumstances it would be "unfair.

Rule 1004 provides that
The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if—
(1) ... All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or
(2) ... No original can be obtained by any available judicial process or procedure; or
(3) ... At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or
(4) ... The writing, recording, or photograph is not closely related to a controlling issue.
The interpretation of the text of this rule is a question of law reviewed de novo, such as a determination that, once one of the conditions apply, there are no degrees of preference among different types of secondary evidence.

370. Fed. R. Evid. 1001(4) ("A 'duplicate' is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent technique which accurately reproduces the original.").
371. See United States v. Mulinelli-Navas, 111 F.3d 983, 989-90 (1st Cir. 1997) (microform copy of a check is a duplicate); United States v. Stockton, 968 F.2d 715, 719 (8th Cir. 1992) (photograph of a writing is a duplicate); United States v. Perry, 925 F.2d 1077, 1082 (8th Cir. 1991) (photographic image of a videotape recording is a duplicate); United States v. Carroll, 860 F.2d 500, 507 (1st Cir. 1988) (print of a microfilm copy of a check is a "duplicate").
and that any secondary evidence can be admitted to prove the point.\footnote{See United States v. Standing Soldier, 538 F.2d 196, 203 n.8 (8th Cir. 1976).} However, the findings that the trial court must make as prerequisites to Rule 1004's application are usually factual findings subject to review only for clear error, such as the finding by the trial court under Rule 1004(1) that the documents were lost or destroyed and whether the same occurred in bad faith,\footnote{Cartier v. Jackson, 59 F.3d 1046, 1048 (10th Cir. 1995); Estate of Gryder v. Comm'r of Internal Revenue, 705 F.2d 336, 338 (8th Cir. 1983); Wright v. Farmers Co-Op, 681 F.2d 549, 553 (8th Cir. 1982).} as well as the finding that no original can be obtained by available process or procedure.\footnote{United States v. Ratliff, 623 F.2d 1293, 1296-97 & n.8 (8th Cir. 1980).} Whether something is "collateral" or not is difficult to define with much precision, and thus is a determination within the trial court's discretion.\footnote{See FED. R. EVID. 1005(4) advisory committee's note (noting that the situations in which this rule apply are "difficult to define with precision," suggesting, like Rule 403, that it is a matter of balancing for the trial court to conduct).}

Rule 1005 provides that

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with rule 902 or testified to be correct by a witness who has compared it with the original.\footnote{FED. R. EVID. 1006. The rule continues: "The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court." Id.}

An interpretation of the scope of the rule, such as what qualifies as an "official record" within the meaning of Rule 1005, is properly viewed as a question of law reviewed de novo.\footnote{Cf supra note 253 and accompanying text.} Rule 1005 goes on to provide that "[i]f a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given."\footnote{FED. R. EVID. 1005.} The determination whether reasonable diligence was exercised sufficient to invoke the proviso is a factual finding, which should be reviewed deferentially on appellate review.\footnote{See Amoco Prod. Co., 619 F.2d at 1390 (original deed returned to parties after recording is not a public record within meaning of Rule 1005).}

Rule 1006 provides that "[t]he contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation."\footnote{FED. R. EVID. 1006. The rule continues: "The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court." Id.}
The rule is written in permissive terms ("may"), and the trial court's decision whether to allow the admission of summaries is reviewed only for abuse of discretion. Yet a decision to exclude a summary based on an interpretation of the rule, such as an interpretation of the rule as requiring that the underlying documents summarized be themselves admissible into evidence, is a question of law subject to de novo review.

Rule 1007 provides that "[c]ontents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party's written admission, without accounting for the nonproduction of the original." This rule's text is so straightforward that no appellate decisions have even discussed the rule, let alone a standard of review. As with the other rules, to the extent a question is raised as to the interpretation of this rule, review would be de novo.

Rule 1008 provides that:

When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of rule 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

The interpretation of this rule—which is merely a specialized application of Rule 104—is a question of law reviewed de novo, such as whether a particular issue is one that is to be decided by the judge or instead one to be left to the jury to decide.

IV. WITNESS PRIVILEGE, COMPETENCE, IMPEACHMENT, AND EXAMINATION

Rule 501 provides that "the privilege of a witness... shall be governed by the principles of the common law as they may be interpreted

385. See United States v. Johnson, 594 F.2d 1253, 1255-56 (9th Cir. 1979).
386. FED. R. EVID. 1007.
387. FED. R. EVID. 1008.
388. See Seiler, 808 F.2d at 1318-21; see also supra note 151 and accompanying text.
by the courts of the United States in the light of reason and experience.\textsuperscript{389} The determination of the existence and scope of a federal evidentiary privilege under Rule 501 is a question of law reviewed de novo,\textsuperscript{390} although the application of such a recognized privilege to a particular factual scenario is subject to deferential review.\textsuperscript{391} Thus, for example, the existence and scope of a federal marital confidence privilege is a question of law subject to de novo review, but the factual determination that the prerequisites to invoking such a privilege exist—a valid marriage and a communication made in confidence—would be reviewed for clear error.

Rule 501 goes on to provide that, "in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State or political subdivision thereof shall be determined in accordance with State law."\textsuperscript{392} When the trial court construes state privilege law in accordance with this proviso, review is de novo.\textsuperscript{393} Presumably, however, factual findings in applying state privilege law, like those in applying federal privilege law, are reviewed deferentially. The Senate recognized, but did not resolve, what to do in a situation in which there was both a federal and a state law claim in the same case.\textsuperscript{394} The interpretation of the rule to determine what should be done in this situation is a question of law subject to de novo review.\textsuperscript{395}

Rule 601 provides that "[e]very person is competent to be a witness except as otherwise provided in these rules."\textsuperscript{396} Trial courts frequently will make a finding as to the competency of a witness, particularly where

\begin{itemize}
\item \textsuperscript{389} \textit{FED. R. EVID. 501.}
\item \textsuperscript{390} Virmani \textit{v. Novant Health Inc.,} 259 F.3d 284, 286-87 (4th Cir. 2001); United States \textit{v. Hayes,} 227 F.3d 578, 581 (6th Cir. 2000); Reed \textit{v. Baxter,} 134 F.3d 351, 355 (6th Cir. 1998); United States \textit{v. Blackman,} 72 F.3d 1418, 1423 (9th Cir. 1995); United States \textit{v. Deffenbaugh Indus. Inc.,} 957 F.2d 749, 751 (10th Cir. 1992); \textit{In re Bevill,} Bresler \& Schulman Asset Mgmt. Corp., 805 F.2d 120, 124 (3d Cir. 1986).
\item \textsuperscript{391} Texaco P.R., Inc. \textit{v. Dep't of Consumer Affairs,} 60 F.3d 867, 883-84 (1st Cir. 1995); \textit{In re Bevill,} 805 F.2d at 124.
\item \textsuperscript{392} \textit{FED. R. EVID. 501.}
\item \textsuperscript{394} S. REP. No. 93-1277, at 12 n.17 (1974) (noting that such a situation "might require use of two bodies of privilege law," and suggesting that "[i]f the rule proposed here results in two conflicting bodies of privilege law applying to the same piece of evidence in the same case, it is contemplated that the rule favoring reception of the evidence should be applied.").
\item \textsuperscript{395} \textit{See Pearson v. Miller,} 211 F.3d 57, 66 (3d Cir. 2000) (not stating standard of review but appears to be de novo); Von Bulow \textit{v. Von Bulow,} 811 F.2d 136, 141 (2d Cir. 1987) (same).
\item \textsuperscript{396} \textit{FED. R. EVID. 601.}
\end{itemize}
questions arise as to the witness’s capacity to perceive, remember, communicate, and testify honestly, and these determinations are reviewed deferentially on appeal. 397 Rule 601 goes on to provide that, “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.” 398 When the trial court determines the content of state law to apply this proviso, review of this question of law is de novo. 399

Rule 602 provides that “[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.” 400 The trial court’s determination that evidence sufficient to support a finding of personal knowledge has been introduced is reviewed deferentially on appeal. 401 The trial court errs as a matter of law, however, if it fails to require that a foundation be laid that a witness has personal knowledge of a matter to which he is testifying. 402

Rule 603 provides that “[b]efore 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’

397. United States v. Blankenship, 923 F.2d 1110, 1116-17 (5th Cir. 1991); United States v. Devin, 918 F.2d 280, 291-92 (1st Cir. 1990); United States v. Moreno, 899 F.2d 465, 469-70 (6th Cir. 1990); United States v. Saenz, 747 F.2d 930, 936 (5th Cir. 1984); United States v. Odom, 736 F.2d 104, 112-13 (4th Cir. 1984); Bickford v. John E. Mitchell Co., 595 F.2d 540, 544 (10th Cir. 1979); United States v. Van Meerbeke, 548 F.2d 415, 417 n.3 (2d Cir. 1976). This is perhaps more properly viewed as an application of Rule 602 and 603 than 601. Cf. Mueller & Kirkpatrick, supra note 164, § 6.2, at 421-22.


399. Higgenbottom v. Noreen, 586 F.2d 719, 722 (9th Cir. 1978) (finding as a matter of law that Oregon law provides trial courts with a great deal of discretion, and then reviewing the trial court’s decision in accordance with such a deferential standard).

400. Fed. R. Evid. 602. The rule continues: “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.” Id.


402. Davis, 792 F.2d at 1304-05. The court stated:
We do not suggest that the trial court has discretion either to do away with the foundation requirement of Rule 602 or to allow testimony that is shown to be without adequate basis in personal knowledge. . . . But we believe that the trial court has some discretion in evaluating such an initial showing . . . .

Id.
conscience and impress the witness’ mind with the duty to do so.”

Rule 604 provides that “[a]n interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation.” This is simply a specialized application of Rules 702 and 603, and thus the appropriate standard of review is that which is applied to decisions made under those rules.

Rule 605 provides that “[t]he judge presiding at the trial may not testify in that trial as a witness.” Although the standard of review is typically unstated, it appears to be de novo, which makes sense given that it would be rather odd to give deference to the trial court judge on this issue. Because this rule does not require an objection to be made in the trial court to preserve this error for appeal, a failure to object at trial does not reduce the level of review to that of plain error review.

Rule 606 addresses limitations on the competence of jurors to testify. Rule 606(a) provides that “a member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is

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403. FED. R. EVID. 603.
404. United States v. Hawkins, 76 F.3d 545, 551 (4th Cir. 1996); Ferguson v. Comm'r of Internal Revenue, 921 F.2d 588, 589-90 (5th Cir. 1991); Gordon v. Idaho, 778 F.2d 1397, 1400-01 (9th Cir. 1985). It is an abuse of discretion to either allow a witness to testify who has not given an oath or affirmation to testify truthfully, or to prevent a witness from testifying without considering an alternative to using the words “swear” or “affirm” that would be consistent with the witness’ religious beliefs. Hawkins, 76 F.3d at 551; Ferguson, 921 F.2d at 589-90; Gordon, 778 F.2d at 1400-01.
405. FED. R. EVID. 604.
406. See United States v. Pluta, 176 F.3d 43, 51-52 (2d Cir. 1999); see also supra notes 403-404 and accompanying text; infra notes 475-484 and accompanying text.
407. FED. R. EVID. 605.
408. See United States v. Maceo, 947 F.2d 1191, 1200 (5th Cir. 1991). One court has indicated that its review is for abuse of discretion, United States v. Stine, No. 94-17129, 1995 WL 661223, at * 3 (9th Cir. Nov. 8 1995), but the gist of the holding would seem to be that a judge who testifies as a witness at trial by definition abuses his discretion. See id.
409. See FED. R. EVID. 605 (“No objection need be made in order to preserve the point.”); see also FED. R. EVID. 605 advisory committee’s note. The advisory committee’s note stated:
The rule provides an “automatic” objection. To require an actual objection would confront the opponent with a choice between not objecting, with the result of allowing the testimony, and objecting, with the probable result of excluding the testimony but at the price of continuing the trial before a judge likely to feel that his integrity had been attacked by the objector.
FED. R. EVID. 605 advisory committee’s note.
410. United States v. Paiva, 892 F.2d 148, 158 n.8 (1st Cir. 1989).
411. FED. R. EVID. 606.
Rule 606(b) further provides that

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. 13

The interpretation of the rule is de novo, such as the determination whether the rule allows the judge to ask the jurors whether an extraneous communication or outside influence actually altered their verdict (as opposed to just whether such a communication or influence occurred), 14 the interpretation of the phrase "extraneous prejudicial information," 15 or the distinction between an "outside" versus an "internal" influence. 16 As with many other rules of evidence, the courts use the phrase "abuse of discretion" to describe the standard of review, but in context it is clear that they are applying the de novo prong of the "abuse of discretion" standard. 17

Rule 607 provides that "[t]he credibility of a witness may be attacked by any party, including the party calling the witness." 18 The trial court nonetheless has discretion under Rule 403 to exclude such impeachment when it appears to be done as a mere subterfuge to get inadmissible evidence before the jury, and such a call is, like all other Rule 403 determinations, reviewed for abuse of discretion. 19

412. FED. R. EVID. 606(a). The rule continues: "If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury." Id.

413. FED. R. EVID. 606(b). The rule continues: "Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes." Id.


417. United States v. Blumeyer, 62 F.3d 1013, 1015 n.1 (8th Cir. 1995) ("To the extent that the District Court used testimony barred by Rule 606(b) to make its findings of fact, the court abused its discretion.").

418. FED. R. EVID. 607.

419. Whitehurst v. Wright, 592 F.2d 834, 839-40 (5th Cir. 1979); United States v. Morlang, 531 F.2d 183, 189-90 (4th Cir. 1975).
Rule 608(a) provides that
The credibility of a witness may be attacked or supported by
evidence in the form of opinion or reputation, but subject to these
limitations: (1) the evidence may refer only to character for
truthfulness or untruthfulness, and (2) evidence of truthful
character is admissible only after the character of the witness for
truthfulness has been attacked by opinion or reputation evidence
or otherwise.\(^\text{420}\)

The interpretation of the meaning of the text of this rule is reviewed de
novo.\(^\text{421}\)

Rule 608(b) provides that
Specific instances of the conduct of a witness, for the purpose of
attacking or supporting the witness' credibility, other than
conviction of crime as provided in rule 609, may not be proved by
extrinsic evidence. They may, however, in the discretion of the
court, if probative of truthfulness or untruthfulness, be inquired
into on cross-examination of the witness (1) concerning the
witness' character for truthfulness or untruthfulness, or (2)
concerning the character for truthfulness or untruthfulness of
another witness as to which character the witness being cross-
examined has testified.\(^\text{422}\)

In accordance with the text of this rule, the trial court's decision to admit
evidence that satisfies the prerequisites of this rule is reviewed deferentially
on appeal.\(^\text{423}\) The interpretation of the text of the rule, such as whether a
given type of prior act is probative of truthfulness or untruthfulness, or
whether the rule covers conduct for which the person has not been
convicted, is a question of law reviewed de novo.\(^\text{424}\) Likewise, the question
whether another rule of evidence implicitly modifies Rule 608(b)'s scope is
a question of law reviewed de novo.\(^\text{425}\)

Rule 609 addresses the use of prior criminal convictions to impeach a

\(^{420}\) FED. R. EVID. 608(a).

\(^{421}\) United States v. Brown, No. 93-30279, 1994 WL 587394, at *3 (9th Cir. Oct. 26,
1994).

\(^{422}\) FED. R. EVID. 608(b). The rule continues: "The giving of testimony, whether by an
accused or by any other witness, does not operate as a waiver of the accused's or the
witness' privilege against self-incrimination when examined with respect to matters which
relate only to credibility." Id.

\(^{423}\) United States v. Scott, 74 F.3d 175, 177 (9th Cir. 1996).

\(^{424}\) See United States v. Geston, 299 F.3d 1130, 1137 (9th Cir. 2002) (stating that it is
for abuse of discretion); United States v. Smith, 80 F.3d 1188, 1193 (7th Cir. 1996) (not
stating that it is de novo).

\(^{425}\) United States v. Saada, 212 F.3d 210, 219-20 (3d Cir. 2000).
Rule 609(a) provides that

For the purpose of attacking the credibility of a witness,
(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and
(2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.\textsuperscript{427}

The balancing under Rule 609(a)(1), like Rule 403 balancing, is reviewed deferentially on appeal.\textsuperscript{428} The interpretation of the text of the rule is de novo, such as the determination that a crime qualifies as one that "involved dishonesty or false statement,"\textsuperscript{429} or an interpretation of Rule 609(a)(2) as not allowing the trial court any discretion under Rule 403 to exclude such evidence.\textsuperscript{430}

Rule 609(b) provides that

Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.\textsuperscript{431}

The application of this rule is reviewed deferentially on appeal,\textsuperscript{432} but the

\textsuperscript{426} FED. R. EVID. 609.
\textsuperscript{427} FED. R. EVID. 609(a).
\textsuperscript{428} United States v. Johnson, 302 F.3d 139, 152 (3d Cir. 2002); United States v. Jimenez, 214 F.3d 1095, 1097-98 (9th Cir. 2000).
\textsuperscript{430} SEC v. Sargent, 229 F.3d 68, 79-80 (1st Cir. 2000).
\textsuperscript{431} FED. R. EVID. 609(b). The rule continues:
However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.
\textit{Id.}
\textsuperscript{432} United States v. Bensimon, 172 F.3d 1121, 1125 (9th Cir. 1999).
interpretation of the text of the rule is de novo, such as the determination of
the appropriate end date for calculating the ten-year period (i.e., date of
indictment versus date trial begins versus date witness testifies). 433

Rule 609(c) provides that
Evidence of a conviction is not admissible under this rule if (1)
the conviction has been the subject of a pardon, annulment,
certificate of rehabilitation, or other equivalent procedure based
on a finding of the rehabilitation of the person convicted, and that
person has not been convicted of a subsequent crime which was
punishable by death or imprisonment in excess of one year, or (2)
the conviction has been the subject of a pardon, annulment, or
other equivalent procedure based on a finding of innocence. 434

The determination whether a particular state procedure qualifies as an
"equivalent procedure" is a question of law reviewed de novo on
appeal. 435

Rule 609(d) provides that
Evidence of juvenile adjudications is generally not admissible
under this rule. The court may, however, in a criminal case allow
evidence of a juvenile adjudication of a witness other than the
accused if conviction of the offense would be admissible to attack
the credibility of an adult and the court is satisfied that admission
in evidence is necessary for a fair determination of the issue of
guilt or innocence. 436

The decision to admit a juvenile adjudication based on a finding that it is
"necessary for a fair determination of the issue of guilt or innocence"437 is
reviewed deferentially on appeal. 438

Rule 610 provides that "[e]vidence of the beliefs or opinions of a
witness on matters of religion is not admissible for the purpose of showing
that by reason of their nature the witness' credibility is impaired or
enhanced." 439 However, inquiry into religious beliefs "for the purpose of
showing interest or bias because of them" is not barred by Rule 610. 440

The interpretation of the scope of the rule is de novo, such as the
determination whether evidence is probative of bias and thus not subject to

433. United States v. Lorenzo, 43 F.3d 1303, 1308 (9th Cir. 1995).
434. FED. R. EVID. 609(c).
435. United States v. Wood, 943 F.2d 1048, 1055 & n.9 (9th Cir. 1991); see also
Brown v. Frey, 889 F.2d 159, 171 (8th Cir. 1989) (no discretion on trial court's part to
second-guess a determination of rehabilitation made by the governor in a pardon).
436. FED. R. EVID. 609(d).
437. Id.
439. FED. R. EVID. 610.
440. FED. R. EVID. 610 advisory committee's note.
automatic exclusion under the rule.\textsuperscript{441}

Rule 611(a) provides that "[t]he court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment."\textsuperscript{442} The application of this rule is reviewed only for abuse of discretion on appeal, including the decisions by the trial court to allow rebuttal or surrebuttal testimony,\textsuperscript{443} to allow testimony in narrative form instead of in response to specific questions,\textsuperscript{444} and to control the method of interrogating witnesses.\textsuperscript{445}

Rule 611(b) provides that "[c]ross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination."\textsuperscript{446} As the text of this rule suggests, the trial court's application of this rule is reviewed deferentially on appeal.\textsuperscript{447} However, where the limitations placed on a criminal defendant's ability to cross-examine a witness are extremely severe, it may be possible to make out a Confrontation Clause claim, which would be reviewed de novo.\textsuperscript{448}

Rule 611(c) provides that

Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party,
interrogation may be by leading questions. 449

The decision by the trial court to allow the use of leading questions in any situation is reviewed for abuse of discretion. 450

Rule 612 provides that, except in certain criminal cases, 
[I]f a witness uses a writing to refresh memory for the purpose of testifying, either—
(1) while testifying, or
(2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,
an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. 451

The trial court's determination whether "it is necessary in the interests of justice" to require disclosure is reviewed deferentially on appeal. 452 However, if framed as a question whether Rule 612 acts to override existing privileges, such as the attorney-client privilege, that is a question of law properly reviewed de novo. 453

Rule 613(a) provides that "[i]n examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel." 454 Rule 613(b) provides that "[e]xtrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require." 455 The interpretation of what it means for a witness to be "afforded an opportunity to explain or deny" is a question of law subject to de novo review, 456 but there is deferential review of the trial court's

449. Fed. R. Evid. 611(c).
450. United States v. Stelivan, 125 F.3d 603, 608 (8th Cir. 1997); United States v. Ajmal, 67 F.3d 12, 16 (2d Cir. 1995); Morvant v. Constr. Aggregates Corp., 570 F.2d 626, 635 (6th Cir. 1978).
452. Burns v. Exxon Corp., 158 F.3d 336, 343 (5th Cir. 1998); McKenzie v. McCormick, 27 F.3d 1415, 1420-21 (9th Cir. 1994); United States v. Wong, 886 F.2d 252, 257 (9th Cir. 1989).
454. Fed. R. Evid. 613(a).
455. Fed. R. Evid. 613(b). The rule continues: "This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2)." Id.
456. See United States v. McLaughlin, 663 F.2d 949, 953 (9th Cir. 1981).
determination that the statements are inconsistent and its application of Rule 613(b). 458

Rule 614 provides that "[t]he court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called" and that "[t]he court may interrogate witnesses, whether called by itself or by a party." The questioning by judges pursuant to Rule 614 is reviewed on appeal for abuse of discretion. 460

Rule 615 provides that, subject to certain exceptions, "[a]t the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion." The interpretation of the text of the rule, such as the meaning of the word "witnesses," is a question of law reviewed de novo. 462 Rule 615 goes on to provide that it

[D]oes not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party’s cause, or (4) a person authorized by statute to be present. 463

The finding that a person is "essential to the presentation of the party’s cause" is reviewed deferentially on appeal, as is the finding as to who is a party, officer, or employee. 465 Presumably, whether someone is "authorized by statute to be present" is a question of law reviewable de novo on appeal. The trial court’s exclusion of someone that it has found falls within an exception is an error of law reviewed de novo, as is its

460. Stevenson v. D.C. Metro. Police Dep’t, 248 F.3d 1187, 1190 (D.C. Cir. 2001); United States v. Villarini, 238 F.3d 530, 536 (4th Cir. 2001); United States v. Martin, 189 F.3d 547, 553 (7th Cir. 1999); United States v. Albers, 93 F.3d 1469, 1485-86 (10th Cir. 1996).
463. Fed. R. Evid. 615.
464. United States v. Seschillie, 310 F.3d 1208, 1213 (9th Cir. 2002); Bruneau v. S. Kortright Cent. Sch. Dist., 163 F.3d 749, 762 (2d Cir. 1998); Opus 3 Ltd. v. Heritage Park, Inc., 91 F.3d 625, 628-29 (4th Cir. 1996).
465. Seschillie, 310 F.3d at 1213; Opus 3 Ltd., 91 F.3d at 628-29.
466. Opus 3 Ltd., 91 F.3d at 628-29.
failure to exclude a witness upon request when no exception has been invoked.\textsuperscript{467}

Rule 701 provides that

If the witness is not testifying as an expert, the witness’ testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.\textsuperscript{468}

As with so many of the rules of evidence, most appellate decisions indicate in broad terms that the decision to admit lay witness testimony under Rule 701 is committed to the trial court’s discretion.\textsuperscript{469} However, the subsections of the rule should be examined separately. Rule 701(a) is merely a restatement of Rule 602,\textsuperscript{470} and thus should be reviewed under the same deferential standard set forth for reviewing Rule 602.\textsuperscript{471} By contrast, appellate courts appear to review de novo whether testimony will be “helpful to a clear understanding of the witness’s testimony or the determination of a fact in issue” within the meaning of Rule 701(b),\textsuperscript{472} deciding as a matter of law that certain types of testimony are helpful or unhelpful, but leaving the decision to admit evidence deemed “helpful” to the trial court’s discretion.\textsuperscript{473} An interpretation of the scope of this rule, such as interpreting its helpfulness requirement as still applying to evidence

\textsuperscript{467} Seschillie, 310 F.3d at 1213 n.3; Opus 3 Ltd., 91 F.3d at 628-29; United States v. Royster, No. 94-5625, 1995 WL 447995, at *3 (4th Cir. July 31, 1995).

\textsuperscript{468} FED. R. EVID. 701.

\textsuperscript{469} E.g., United States v. Tom, 330 F.3d 83, 94 (1st Cir. 2003); United States v. Anderskow, 88 F.3d 245, 249 (3d Cir. 1996); United States v. Rivera, 22 F.3d 430, 434 (2d Cir. 1994); United States v. Barrett, 703 F.2d 1076, 1086 (9th Cir. 1983).

\textsuperscript{470} See FED. R. EVID. 701 advisory committee’s note (“Limitation (a) is the familiar requirement of first-hand knowledge or observation.”); United States v. Dotson, 799 F.2d 189, 192 & n.2 (5th Cir. 1986); Teen-Ed, Inc. v. Kimball Int’l., Inc., 620 F.2d 399, 403 (3d Cir. 1980).

\textsuperscript{471} See supra text accompanying notes 400-402.

\textsuperscript{472} FED. R. EVID. 701(b).

\textsuperscript{473} See Hester v. BIC Corp., 225 F.3d 178, 185 (2d Cir. 2000) (witness’ testimony as to defendant’s motivation in employment discrimination case not helpful); Gust v. Jones, 162 F.3d 587, 595 (10th Cir. 1998) (lay testimony about vehicle driving speed helpful); Anderskow, 88 F.3d at 250-51 (witness’ testimony that defendant “had to know” a particular fact not helpful); United States v. Jackman, 48 F.3d 1, 4-5 (1st Cir. 1995) (“opinion testimony identifying defendant from surveillance photographs” is helpful); United States v. Burgess, Nos. 90-6187, 90-6329, 90-6346, 1992 WL 393575, at *4 (6th Cir. Dec. 21, 1992) (testimony that in police officer’s opinion, individual was a co-conspirator not helpful); United States v. Dicker, 853 F.2d 1103, 1108-09 (3d Cir. 1988) (interpretation of coded conversations helpful, but interpretation of clear conversation not helpful).
not excluded by Rule 704, is likewise a question of law reviewed de novo.\textsuperscript{474}

Rule 702 provides that

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.\textsuperscript{475}

Rule 702 has been interpreted by the Supreme Court as containing a reliability standard.\textsuperscript{476} Of course, any such interpretation of the rule itself is a question of law reviewed de novo,\textsuperscript{477} however, the trial court's application of that reliability standard is reviewed only for abuse of discretion,\textsuperscript{478} including how it chooses to go about determining reliability (including, for example, the decision whether or not to hold a hearing).\textsuperscript{479} Some appellate decisions indicate that they review de novo whether the district court applied the \textit{Daubert} framework, reasoning that the trial court has discretion on \textit{how} to conduct its gatekeeping function, but no discretion not to perform it at all,\textsuperscript{480} but in effect this is simply saying that it is an abuse of discretion not to apply \textit{Daubert} at all. The finding by the trial court that a particular witness is "qualified" to be a witness based on his education and experience is reviewed deferentially on appeal.\textsuperscript{481} And although appellate decisions state that they review the determination that evidence will "assist" the trier of fact deferentially on appeal,\textsuperscript{482} they sometimes appear to hold as a matter of law that certain categories of

\textsuperscript{474} See Torres v. County of Oakland, 758 F.2d 147, 150-51 (6th Cir. 1985).

\textsuperscript{475} FED. R. EVID. 702.


\textsuperscript{477} Oddi v. Ford Motor Co., 234 F.3d 136, 146 (3d Cir. 2000).


\textsuperscript{479} Kumho Tire Co., 526 U.S. at 153.

\textsuperscript{480} See Dodge v. Cotter Corp., 328 F.3d 1212, 1223 (10th Cir. 2003); Chapman v. Maytag Corp., 297 F.3d 682, 686 (7th Cir. 2002).


\textsuperscript{482} United States v. Sebaggala, 256 F.3d 59, 65-66 (1st Cir. 2001) (abuse of discretion); United States v. Pettigrew, 77 F.3d 1500, 1514 (5th Cir. 1996) (same).
evidence will not satisfy the requirement that they "assist" the trier of fact,\textsuperscript{483} which is more consistent with the treatment of the analogous "helpfulness" requirement of Rule 701.\textsuperscript{484}

Rule 703 provides that

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted.\textsuperscript{485}

A trial court "abuses its discretion" under the de novo prong of the "abuse of discretion" standard when it errs in interpreting Rule 703, such as by excluding a witness' testimony simply because it is based on facts that are not in evidence.\textsuperscript{486} The determination whether facts or data are of the type "reasonably relied" upon by experts in the field is a factual finding reviewed deferentially on appeal.\textsuperscript{487} If a hypothetical question is to be used, review of the trial court's rulings on the permissible form of such a question is deferential on appeal.\textsuperscript{488} Rule 703 goes on to provide that "[f]acts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect."\textsuperscript{489} This standard is a modified form of Rule 403,\textsuperscript{490} similar to the alternative balancing tests used in Rules 412 and 609,\textsuperscript{491} and like those rules, calls for deferential review of the trial court's balancing on appeal.\textsuperscript{492}

Rule 704(a) provides that "[e]xcept as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by

\begin{itemize}
\item \textsuperscript{483} United States v. Hall, 165 F.3d 1095, 1104-07 (7th Cir. 1999).
\item \textsuperscript{484} See supra notes 472-474.
\item \textsuperscript{485} Fed. R. Evid. 703.
\item \textsuperscript{486} Sementilli v. Trinidad Corp., 155 F.3d 1130, 1134 (9th Cir. 1998); Ponder v. Warren Tool Corp., 834 F.2d 1553, 1557 (10th Cir. 1987).
\item \textsuperscript{487} United States v. Floyd, 281 F.3d 1346, 1349 (11th Cir. 2002) (abuse of discretion); United States v. McPhilomy, 270 F.3d 1302, 1314 (10th Cir. 2001) (same); De Saracho v. Custom Food Mach., Inc., 206 F.3d 874, 879 (9th Cir. 2000) (same).
\item \textsuperscript{488} Taylor v. Burlington N. R.R. Co., 787 F.2d 1309, 1317-18 (9th Cir. 1986).
\item \textsuperscript{489} Fed. R. Evid. 703.
\item \textsuperscript{490} Fed. R. Evid. 403.
\item \textsuperscript{491} See supra notes 136-137, 427-428 and accompanying text.
\item \textsuperscript{492} Fed. R. Evid. 703.
\end{itemize}
the trier of fact. However, the advisory committee's notes make clear that other rules—such as Rule 702's "helpfulness" requirement—are still applicable. If the trial court nevertheless interpreted the rule as requiring it to admit evidence on an ultimate issue notwithstanding other rules of exclusion such as Rule 702, or if it continued to apply the common law ultimate issue rule notwithstanding the plain text of Rule 704(a), that would likely be viewed as an error of law subject to de novo review.

Rule 704(b) contains a caveat to Rule 704(a), providing that no expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

Courts indicate that they review the application of Rule 704(b) for abuse of discretion, yet they seem to review de novo what the ultimate issue is for the purpose of determining whether a Rule 704(b) violation has occurred, and also appear to hold as a matter of law that the use of certain types of phrases or language by an expert does or does not constitute a violation of the rule. Moreover, the scope of the rule is a question of law reviewed de novo, such as whether it applies only to testimony by psychiatrists and other mental health experts, and whether it applies to statements from which a jury can infer intent or only to those which explicitly state that the person had such an intent.

Rule 705 provides that "[t]he expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination." The trial court's decision with respect to requiring

493. FED. R. EVID. 704(a).
494. See FED. R. EVID. 704(a) advisory committee's note.
496. FED. R. EVID. 704(b).
498. E.g., United States v. Dixon, 185 F.3d 393, 398-400 (5th Cir. 1999); United States v. Morales, 108 F.3d 1031, 1036-37 (9th Cir. 1997).
500. See Morales, 108 F.3d at 1035-36.
502. FED. R. EVID. 705.
disclosure on cross-examination is reviewed deferentially on appeal. Presumably, so too would be the decision by the court to "require" otherwise and thus require the expert to first testify to the underlying facts and data.

Rule 706(a) provides that the trial court "may" appoint an expert witness in addition to any that may be hired by the parties, and Rule 706(c) gives the trial court "discretion" to disclose to the jury that the expert was appointed by the court. Given this permissive language, the trial court's application of Rule 706 is, not surprisingly, reviewed only for abuse of discretion on appeal.

V. EVIDENTIARY SUBSTITUTES: JUDICIAL NOTICE AND PRESUMPTIONS

Rule 201 governs the procedures for taking judicial notice, although Rule 201(a) makes clear that the rule "governs only judicial notice of adjudicative facts," not review of legislative or other facts. The determination whether a given fact is "adjudicative," and thus within the scope of Rule 201, is a question of law subject to de novo review. If a fact is "adjudicative," Rule 201(b) provides the standard for taking judicial notice of it, requiring that it "not be subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

Appellate decisions sometimes appear to hold that certain types of evidence (e.g., geography, statements in documents filed in other courts) satisfy or do not satisfy the requirements of Rule 201(b) as a matter of law, although in

505. FED. R. EVID. 706(a), (c).
506. Quiet Tech, DC-8, Inc. v. Hurel-Dubois U.K. Ltd., 326 F.3d 1333, 1348-49 (11th Cir. 2003); Walker v. Am. Home Shield Long Term Disability Plan, 180 F.3d 1065, 1071 (9th Cir. 1999); Fugitt v. Jones, 549 F.2d 1001, 1006 (5th Cir. 1977).
507. FED. R. EVID. 201.
508. FED. R. EVID. 201(a).
510. FED. R. EVID. 201(b).
general, appellate decisions hold that the determination is subject to deferential review.\textsuperscript{512} Deferential review in the finding of facts would appear to be appropriate, as the determination whether something is “generally known” within the trial court’s territorial jurisdiction seems to be a fact-intensive inquiry, as does the determination whether the accuracy of something cannot reasonably be questioned. Although many appellate decisions use the phrase “abuse of discretion” review in this context,\textsuperscript{513} given that trial courts are textually denied “discretion” under Rule 201(d), which provides that if a party requests judicial notice and provides the necessary supporting information,\textsuperscript{514} the court is required to take judicial notice of that fact if it satisfies the requirements of Rule 201(b), the application cannot truly be a matter within the trial court’s discretion beyond discretion in finding the facts necessary to apply the standard set forth in Rule 201(b), suggesting that review here is under the clear error prong of the “abuse of discretion” standard.

Rule 201(e) provides that “[a] party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed.”\textsuperscript{515} The interpretation of the scope of Rule 201(e) is a question of law reviewed de novo, such as the question whether it applies whenever any party requests such an opportunity or only when the party opposing the taking of judicial notice requests it.\textsuperscript{516} Rule 201(f) provides that “[j]udicial notice may be taken at any stage of the proceeding,”\textsuperscript{517} while Rule 201(g) provides that “[i]n a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.”\textsuperscript{518} The interpretation of the scope of these provisions is de novo as well, such as a determination whether Rule 201(g) implicitly limits Rule 201(f)’s application in criminal cases.\textsuperscript{519}

\textsuperscript{512} York v. AT&T, 95 F.3d 948, 958 (10th Cir. 1996); Ritter v. Hughes Aircraft Co., 58 F.3d 454, 458-59 (9th Cir. 1995); Chapel, 41 F.3d at 1342; Transorient Navigators Co. v. M/S Southwind, 788 F.2d 288, 293 (5th Cir. 1986).

\textsuperscript{513} York, 95 F.3d at 958; Ritter, 58 F.3d at 458-59; Chapel, 41 F.3d at 1342; Transorient Navigators, 788 F.2d at 293.

\textsuperscript{514} FED. R. EVID. 201(d) (“A court shall take judicial notice if requested by a party and supplied with the necessary information.”).

\textsuperscript{515} FED. R. EVID. 201(e). The rule continues: “In the absence of prior notification, the request may be made after judicial notice has been taken.” \textit{Id}.

\textsuperscript{516} Am. Stores Co. v. Comm’r of Internal Revenue, 170 F.3d 1267, 1270-71 (10th Cir. 1999).

\textsuperscript{517} FED. R. EVID. 201(f).

\textsuperscript{518} FED. R. EVID. 201(g).

\textsuperscript{519} United States v. Jones, 580 F.2d 219, 222-24 (6th Cir. 1978).
Rule 301 sets forth a default rule for the effect that presumptions have in civil cases, providing that

In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of non-persuasion, which remains throughout the trial upon the party on whom it was originally cast.520

The determination whether Congress or the rules have "otherwise provided" is a question of law reviewed de novo.521 So too is the determination of the effect of a presumption once the opposing party has met its burden of production under Rule 301 (i.e., whether it disappears completely, or continues to have some residual evidentiary effect).522

Rule 302 qualifies Rule 301, providing that "[i]n civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law applies the rule of decision is determined in accordance with State law."523 Appellate review as to the existence of a state law presumption and the effect thereof, like the similar determinations under other rules that cross-reference state law,524 is a question of law reviewed de novo.525

CONCLUSION

There is a great deal of confusion amongst attorneys who litigate in federal court as to the appropriate standard by which the federal courts of appeal review claims of error in admitting or excluding evidence. Their confusion is understandable, given that so many appellate decisions state

520. FED. R. EVID. 301.
522. Nunley v. City of Los Angeles, 52 F.3d 792, 796-97 (9th Cir. 1995); Pennzoil Co. v. FERC, 789 F.2d 1128, 1136-37 n.24 (5th Cir. 1986); In re Yoder Co., 758 F.2d 1114, 1118-1120 (6th Cir. 1985).
523. FED. R. EVID. 302.
524. Cf. supra notes 392-393, 398-399 and accompanying text.
that review of such errors is only for "abuse of discretion," a standard which in its classical sense is widely understood to be extremely difficult to overcome.

Yet this Article has demonstrated that although many decisions say that review is only for abuse of discretion, they do not actually mean it. Ultimately, applying the federal rules of evidence involves the three traditional categories of decision-making—law, fact, and discretion—and ultimately, these three different categories of decision-making are reviewed, respectively, de novo, for clear error, and for abuse of discretion. It is the author's hope that by delineating how the tripartite standard of review applies to each of the federal rules of evidence, practitioners will be better prepared to argue for the correct standard of review on appeal and that, in time, appellate decisions will state with greater clarity the true standards by which claims of error in admitting or excluding evidence are reviewed.