SECOND EDITION

THE GLANNON GUIDE TO EVIDENCE

Learning Evidence Through
Multiple-Choice Questions and Analysis

Michael Avery, *Suffolk University*

A powerful combination of well-written explanations, multiple-choice questions, analyses, and exam-taking tips, *THE GLANNON GUIDE TO EVIDENCE: Learning Evidence Through Multiple-Choice Questions and Analysis* prepares you to take any type of exam that might be offered in an Evidence course. Written by one of the nation's leading Bar lecturers, it also provides an invaluable review of the core concepts tested in Evidence on both the multi-state and essay sections of the Bar exam.

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ISBN 978-1-4548-9220-5

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Wolters Kluwer

Published by Wolters Kluwer in New York.

Wolters Kluwer Legal & Regulatory U.S. serves customers worldwide with CCH, Aspen Publishers, and Kluwer Law International products. (www.WKLegaledu.com)

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PO Box 990
Frederick, MD 21705

Printed in the United States of America.

1 2 3 4 5 6 7 8 9 0

ISBN 978-1-4548-9220-5

Library of Congress Cataloging-in-Publication Data

Names: Avery, Michael, 1944- author.
Title: The Glannon guide to evidence : learning evidence through multiple-choice questions and analysis / Michael Avery, Professor Emeritus, Suffolk University School of Law.
Description: Second edition. | New York : Wolters Kluwer, [2018] | Series: Glannon guide series | Includes index.
Identifiers: LCCN 2018038447 | ISBN 9781454892205
Subjects: LCSH: Evidence (Law) — United States — Problems, exercises, etc. | LCGFT: Study guides.
Classification: LCC KF8935.Z9 A93 2018 | DDC 347.73/6076 — dc23
LC record available at https://lccn.loc.gov/2018038447

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Contents

Introduction

This book provides a short, clear, and straightforward explanation of the Federal Rules of Evidence. The text illustrates the rules by analyzing multiple-choice questions—practical problems like those you will encounter in practice and those that your professors use in drafting exams. Some of the questions are based on real issues that arose in the civil and criminal cases that I tried. More significantly, the contextual approach in this book is based on my observations of the common mistakes people make about evidence law during four decades of trying cases and three decades of teaching evidence.

The three most important areas in evidence law are: (1) the rule against hearsay (Chapter 8); (2) character evidence (Chapter 4); and (3) impeaching witnesses (Chapter 6). Most of the evidence problems you will encounter in practice fall into one of those three areas, as do most of the questions on the bar exam and, probably, most of the questions on your law school exam. To prepare you for those challenges, this book spends more time on those issues than on all other issues combined. That is not to say you should ignore the other issues. You will need to know all the rules at one time or another. The chapters of this book correspond to each of the ten substantive articles of the Federal Rules of Evidence.

In order for an item of evidence to be admissible, it must be able to overcome all potential objections. You should think of the rules of evidence as a series of hurdles on a track. You must have a legal argument that gets you over each hurdle in order to run the track and get an item of evidence admitted. If you fail to master all the rules, you may trip over a hurdle and a crucial piece of evidence might be excluded. But not all the hurdles are raised for each item of evidence offered. The ones you will encounter most often are hearsay, character, and impeachment. It makes sense to spend most of your time on those topics.

Other than in academic discussions, you will rarely encounter the rules of evidence in the abstract. For example, you must learn and understand the elements of what makes something hearsay. But you will rarely be asked to enumerate the elements of hearsay outside of a classroom. You will be asked a more concrete question. A lawyer will ask a witness on the stand to relate what someone said outside the courtroom, the other lawyer will object to the

question, and the lawyers will argue about whether the answer the witness would give to this specific question constitutes hearsay. We make decisions about the rules of evidence in response to the offer of a specific item of evidence in the context of a specific case.

You should thoughtfully read the rules and the explanations of what the rules mean. You should concentrate your studying, however, on the application of the rules to specific factual situations. That is what you need to master. This book is organized to assist you in doing just that. Each chapter or section begins with the definition and explanation of a given rule of evidence. The text that follows contains multiple-choice questions, in which the rules are applied to factual scenarios that commonly arise in the trial of cases. Each question is followed by an analysis in which I tell you the correct answer and explain why the others are wrong.

The questions in each chapter primarily relate to the rules under discussion in that chapter. From time to time, however, I include potential answers that refer to basic understandings from other chapters. As I've said, an item of evidence must satisfy all of the rules in order to be admissible. References to foundational material from different chapters will provide you with opportunities to review your overall knowledge of evidence law as you go along.

When you come to a multiple-choice question, cover up the analysis without looking at it. You should read the facts of the question carefully. Take note of what type of case is on trial, the procedural posture of the case (for example, whether the lawyer is conducting direct or cross-examination), and what the evidence in question is offered to prove. Then read the answers and select the best one. Spend some time thinking about it. You should be able to articulate a reason for rejecting each answer that you believe is wrong, and to explain why your selection of the best answer is correct. Then read the analysis and see how you did.

You can only increase your knowledge of Evidence (or any other subject) by becoming aware of what you don't know. If you skip the process of doing your own analysis and jump ahead to read my explanation of the answers, you will not discover gaps in your understanding. Such gaps are inevitable when you are learning anything new, so you shouldn't feel bad about them. You must, however, become aware of them so that you can fill them in. This book is designed to help you do that.

Acknowledgments

First I want to thank my friend and colleague Joe Glannon for encouraging me to contribute to his wonderful Glannon Guide series. Professor Glannon has been an inspiration to several generations of Suffolk Law students, to the countless number of students across the country who have used his books, and to his colleagues. It is an honor to be associated with him in this venture.

Second, I would like to thank very much the Suffolk law students who worked with me on this project as research assistants: Elyse Hershon, Danielle Simonetti, AlexaRae Wright, and Jessica K. Myer. They tested out the multiple-choice questions for me and reviewed the text for accuracy and clarity. Their many suggestions for changes were invaluable. Any errors or confusion that remain are my fault alone.

I also wish to thank the law professors who carefully reviewed the manuscript for Aspen. Their critiques and suggestions were extremely helpful. Again, any errors that remain are mine alone.

Finally I am indebted to the many students who have been in my Evidence classes over the years for their intelligent and enthusiastic participation. Many of the multiple-choice problems in this book have appeared in Microsoft PowerPoint presentations over the years and the students' critical responses to them have been exceedingly helpful.

Michael Avery

August 2018

The Glannon Guide to Evidence

1

General Provisions

CHAPTER OVERVIEW

The Federal Rules of Evidence were first adopted in 1975 and have been amended several times since then. For the most part, the Advisory Committee on the Federal Rules of Evidence recommends rules, the Supreme Court approves them, and then Congress enacts them. Congress may enact rules on its own, without going through the Advisory Committee and the Supreme Court. Most states have adopted the Federal Rules of Evidence as their state rules of evidence, often with modifications to one or more rules. The state where you practice may have some rules that are significantly different from the Federal Rules, and you will have to know them when you practice in state court or when state rules govern an action in federal court.

A. Scope and Applicability of the Rules

The Federal Rules govern trials and proceedings in the federal courts, including bankruptcy and admiralty matters and proceedings before federal magistrates, with some exceptions. The rules do not apply to the determination of preliminary facts necessary to decisions by the court on the admissibility of evidence under Rule 104(a), grand jury proceedings, proceedings for extradition or rendition, preliminary examinations in criminal cases, sentencing, granting or revoking probation, issuance of warrants for arrest, criminal summonses,

search warrants, and proceedings with respect to release on bail or otherwise. As a result, for example, hearsay may be admitted in such proceedings. The rules with respect to privilege, however, apply to all proceedings.

B. Rulings on Evidence

Under Rule 103(a), the appellate courts will not reverse a trial court's erroneous rulings with respect to the admission or exclusion of evidence unless a substantial right of a party is affected. Whether substantial rights were affected is determined under the harmless error standard. An error is harmless where the reviewing court is confident that it did not affect the judgment. In order to preserve an evidentiary issue for appeal the party must object to the evidence at trial. If the trial judge sustains an objection, the evidence will not be admitted; if the judge overrules the objection, the evidence is admitted.

Where the trial judge admits evidence, in order to preserve the issue for appeal the opponent must make a timely objection or motion to strike, stating the specific ground of the objection unless the specific ground was apparent from the context. If a party fails to object or to make a motion to strike, evidence will be admitted and may be used by the jury for any purpose for which it is logically relevant, unless the judge on her own instructs the jury to consider the evidence only for a limited purpose.[1] Where the trial judge excludes evidence, in order to preserve the issue for appeal the proponent must make an offer of proof, unless the substance of the evidence was apparent from the context in which questions were asked.

Counsel must make an offer of proof outside the hearing of the jury. If the evidence consists of testimony by a witness, the witness may be examined outside the jury's presence, or counsel may represent to the judge what the expected testimony would have been. If the evidence in question is an exhibit, it may be marked for identification and it becomes part of the appellate record, but the trial jury does not see it.

Requests for rulings admitting or excluding evidence may be made before trial, by means of a motion in limine. Once the court makes a definitive ruling on the motion, a party does not have to renew its objection or offer of proof at trial in order to preserve the issue for appeal.

Appellate courts may take notice of "plain error" with respect to evidentiary matters where substantial rights of a party were affected, although the party failed to bring the error to the attention of the trial court. An appellate court may find plain error where the mistake was clear and obvious and prejudiced the substantial rights of a party. It is exceedingly rare for the appellate courts to find plain error in civil cases.

1. See the discussion of Rule 105, *infra*.

C. Preliminary Questions

The trial judge decides preliminary questions of fact that must be resolved in order to rule on the admissibility of evidence. Under Rule 104(a) the judge is not constrained by the rules of evidence, except with regard to privileges, with respect to the material the judge may consider in order to decide preliminary questions.

> **Rule 104. Preliminary Questions**
> (a) **In General.** The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.

The proponent of an item of evidence has the burden of convincing the court by a preponderance of the evidence that a necessary factual foundation for admissibility exists. Let's consider some examples to see how Rule 104(a) works in practice. Suppose a party in a personal injury case wishes to call an expert witness whose testimony relies upon certain scientific principles. Under Rule 702 the trial judge must find that the scientific principles are reliable before permitting the expert to testify.[2] Under Rule 104(a) the materials the judge looks at to determine reliability do not have to be admissible in evidence. So the court might take into account affidavits from other experts, articles in scientific journals, and representations by counsel, although such materials would be inadmissible in evidence. If the court determines by a preponderance of the evidence that the scientific principles are reliable, the court will allow the expert to testify.

Similarly, suppose a police officer is asked to testify to the statement of an eyewitness to a shooting, made to the officer during his investigation. The statement would be hearsay, but admissible under the hearsay exception for an excited utterance if the person made the statement while under the stress of a startling event.[3] The trial judge must decide whether the person was under the stress of witnessing the shooting when he made the statement in question. In making that determination, the judge may take into account information from a variety of sources (for example, affidavits of other witnesses), whether or not that information would be admissible in evidence.

Where the facts that establish the foundation for admissibility of an item of evidence are themselves admissible in evidence, a witness may testify to them in the presence of the jury in order to lay the foundation. If the material offered in support or opposition is inadmissible in evidence, the court reviews such material outside the presence of the jury. Once the judge has admitted something in evidence it is up to the jury to determine how much weight to give it.

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2. Expert witnesses and scientific evidence are discussed in Chapter 7.
3. Hearsay and the exceptions to the hearsay rule are discussed in Chapter 8.

Rule 104(b) deals with a different type of preliminary question—one involving evidence that is conditionally relevant.

> **Rule 104. Preliminary Questions**
> **(b) Relevance That Depends on a Fact.** When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.

This provision controls the situation where an item of evidence will be relevant only if a certain fact is proven. For example, ordinarily the state of mind of a homicide victim is not relevant.[4] Suppose the victim told her neighbor that she was going to take her children and move into a shelter because she feared that her husband would kill her. Her statement is hearsay and not admissible under the state of mind exception. However, if the husband was aware of her intention to leave with the children, it could provide him with a motive to kill her, and thus be relevant. The relevance of the victim's state of mind in this example depends upon the existence of a fact, namely, whether her husband knew of her intention to leave. The court would admit the victim's statement to her neighbor only upon the introduction of evidence sufficient to support a finding that the husband knew of her intention.

What does evidence "sufficient to support a finding" mean? It means evidence that would be sufficient to convince a reasonable jury of the fact by a preponderance of the evidence. The trial judge does not decide whether the fact existed. The judge decides only whether there is enough evidence in the record from which a jury could decide that the fact existed. If there is, the judge will admit the evidence in question and advise the jury it may consider the evidence only if the jury finds, by a preponderance of the evidence, that the necessary fact existed. In our example, if the judge concluded there was sufficient evidence to support the necessary finding, the judge would admit the victim's statement to the neighbor, and tell the jury it could take the statement into account only if the jury decided by a preponderance of the evidence that the husband knew of his wife's intention to leave.

QUESTION 1. The defendant is on trial for assault and battery against his girlfriend. The two of them live together. When a police officer arrived at their home on the night in question, the girlfriend told the officer that the defendant had hit and choked her, torn her dress, threw her on the ground and kicked her repeatedly. At the trial, however, she testified that she had fallen down the stairs and the defendant had not struck her. The prosecutor calls the officer as a witness to testify to the victim's earlier statements and argues they are admissible under the excited utterance

4. The state of mind of homicide victims is discussed in greater detail in Chapter 8.

exception to the hearsay rule. The defendant objects. The prosecutor then offers to give the judge a copy of the police report, which includes statements by neighbors who witnessed the officer's interview of the victim in front of her home on the night in question. The neighbors said that she was crying, shaking, and bleeding while talking with the officer. The prosecutor also offers to show the court photos he says were taken by one of the neighbors, showing the victim talking to the officer with tears on her face and blood on her torn dress. The defendant objects to the court reviewing the police report and the photos. The court should:

A. Admit the evidence of the victim's statements to the officer, and advise the jury it may take the statements into account only if the jury finds the victim was under the stress of a startling event when she made them, based on the jury's review of the police report and the photos.
B. Decline to review the police report and the photos, because the report is hearsay and the photos have not been properly authenticated.
C. Review the police report and the photos without showing them to the jury, and admit the victim's statement to the officer if the judge is convinced by a preponderance of the evidence that the victim was under the stress of a startling event when she spoke to the officer.
D. Review the police report and the photos and show them to the jury, and admit the victim's statement to the officer if the judge is convinced by a preponderance of the evidence that the victim was under the stress of a startling event when she spoke to the officer.

ANALYSIS. The victim's statement is admissible under an exception to the hearsay rule if she made it while under the stress of a startling event. Under Rule 104(a) the judge determines questions of the admissibility of evidence and determines any preliminary factual questions that have to be resolved to decide the issue of admissibility. This problem should be decided under Rule 104(a) because it involves the *admissibility* of evidence, not the *conditional relevance* of evidence. There is no need to establish any given facts for the victim's statement to be relevant. Thus **A** is incorrect, because it describes the procedure for determining issues of conditional relevance. Choice **B** is incorrect because the judge is not bound by the rules of evidence with respect to what she may consider to determine the preliminary facts with respect to admissibility. That means that the judge may consider the hearsay police report and the photos that have not been authenticated[5] to determine whether the victim was under the stress of a startling event when she spoke to the officer. The judge should

5. The topic of authentication is discussed in Chapter 9.

not, however, allow the jury to see or hear any inadmissible evidence. Thus the correct answer is **C** and **D** is incorrect.

D. Limited Admissibility

Often an item of evidence is admissible on one issue in a case, but not on others; for one purpose, but not for others; or against one party, but not against others. In such circumstances, Rule 105 provides that the judge, if requested to do so by a party, must give a limiting instruction to the jury, specifying the use to which the evidence may be put. A judge may also decide to give a limiting instruction on her own, but it is rare for judges to do so.

> **Rule 105. Limiting Evidence That Is Not Admissible Against Other Parties or for Other Purposes**
> If the court admits evidence that is admissible against a party or for a purpose—but not against another party or for another purpose—the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly.

The burden is on the party objecting to the evidence to request a limiting instruction. If the party does not make such a request and the court does not give a limiting instruction, then the evidence is admissible for any and all purposes for which it is logically relevant.

For example, Rule 609 provides that under certain circumstances previous criminal convictions may be used to impeach the credibility of a witness.[6] Under Rule 609 a conviction is admissible only for the light it sheds on whether the witness might testify falsely, not for any other purpose. Suppose that a defendant is charged in a criminal case with bank robbery, and he has a previous conviction for manslaughter, a felony. If the defendant testifies and the court permits the prosecutor to introduce the defendant's manslaughter conviction to impeach him, defense counsel can request a limiting instruction. The court would then advise the jury that the conviction may be considered only insofar as it reflects on the credibility of the defendant as a witness, and that the jury may not use it for any other purpose, such as drawing inferences about the likelihood that the defendant committed the bank robbery.[7]

Here is a second example. Plaintiff has sued Defendant 1 and Defendant 2 civilly for assault and battery. Plaintiff alleged that the two defendants beat him up because they did not like him. When he was arrested, Defendant 1 admitted to a police officer that he and Defendant 2 jumped the plaintiff on a

6. Impeachment of witnesses through the use of criminal convictions is discussed in Chapter 6.

7. If the prosecutor wanted to use the conviction for another purpose he would have to explicitly articulate a theory of admissibility under another rule. *See* Chapter 4.

dark street at night and beat him. At the trial, plaintiff calls the police officer to testify about Defendant 1's statement. Both Defendant 1 and Defendant 2 object. The plaintiff may introduce the statement against Defendant 1, under an exemption to the hearsay rule for statements by a party introduced by the opposing party.[8] Defendant 2 did not make the statement, however, and thus plaintiff may not introduce it against him under the hearsay rule. The court should overrule Defendant 1's objection, sustain Defendant 2's objection, and admit the statement with a limiting instruction that the jury may use it only in the case against Defendant 1, but may not consider it with respect to the liability of Defendant 2.

Under some circumstances, the judge may conclude that jurors will not be able to comply with a limiting instruction. In other words, the mental gymnastics required to use a piece of evidence for one purpose and put it out of mind for other purposes will be too difficult. Under these circumstances, the judge will have to determine whether the evidence should be excluded altogether in order to protect the rights of the party objecting to it. We will discuss this issue in Chapter 4 when we take up the exclusion of relevant evidence because the risk of unfair prejudice exceeds the probative value of the evidence.[9]

QUESTION 2. A Driver for the ABC Company crashed his truck into the plaintiff's car. Plaintiff sued the Driver and the ABC Company. During discovery, plaintiff obtained evidence that the Driver had three previous accidents, all his fault, while working for ABC. Plaintiff went to trial against both defendants and, in addition to the respondeat superior claim against ABC, also alleged a theory of negligent retention against the Company. At trial plaintiff sought to introduce the evidence of the three previous accidents. Defendants objected. The court should:

A. Admit the evidence against both parties.
B. Admit the evidence against neither party.
C. Admit the evidence against the company on the negligent retention claim only, with a limiting instruction that it cannot be used for any other purpose.
D. Admit the evidence against the company only on the respondeat superior claim, with a limiting instruction that it cannot be used for any other purpose.

8. The admissibility of statements by a party opponent is discussed in Chapter 8.

9. For example, the confession in the previous example by one defendant could not be introduced in a criminal case where the two defendants were tried jointly. The Supreme Court has ruled that the risk that the jury would use Defendant 1's confession against Defendant 2 is unacceptably high and violates Defendant 2's constitutional right to confront the witnesses against him. *See Bruton v. United States*, 391 U.S. 123 (1968). The Confrontation Clause is discussed in Chapter 8.

ANALYSIS. The rule against using prior acts to prove character and thus how a person acted in a given instance would bar using the prior accidents to prove that the Driver was negligent in this instance.[10] **A** is therefore incorrect. The evidence of the accidents is admissible on the negligent retention claim to show that the Company had knowledge of the Driver's previous accidents. Thus **B** is incorrect. The evidence is only admissible against the Company and only on the negligent retention claim to show such knowledge. Plaintiff will have to introduce other evidence to prove that the Driver was negligent in this instance. **C** is the correct answer and **D** is incorrect.

E. Rule of Completeness

A party may introduce only a portion of a writing or a recording. If the opponent believes there is a danger the jury may be misled by taking something out of context, Rule 106 provides a remedy.

> **Rule 106. Remainder of or Related Writings or Recorded Statements**
> If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time.

The rule permits the opponent to request permission from the court to introduce any other part of the writing or recording, or any other writing or recording, immediately. In other words, the opponent will not have to wait until it is his or her turn to introduce evidence in order to put the matter in context. The rule does not require that the writing or recording in question be admitted in its entirety, but only that such portions be admitted that "ought in fairness" to be considered contemporaneously with the fragment initially offered. The rule by its terms is not applicable to oral statements, but many federal judges do apply it to oral statements.

QUESTION 3. The Closer. Plaintiff 1 and Plaintiff 2 sued the defendant for personal injuries sustained in an automobile accident. The plaintiffs alleged that the defendant ran a red light and collided with the vehicle in which they were riding. The defendant claimed that he had the green light at the intersection and that it was the car in which plaintiffs were riding that ran a red light. Two months after the accident, Plaintiff 1 gave a recorded statement to an investigator in which he described his injuries and admitted that there was a possibility that the plaintiffs' car had the red light. The defendant offers the portion of the statement containing

10. We discuss the rules regarding character evidence and prior acts evidence in Chapter 4.

Plaintiff 1's admission in evidence. Plaintiff 1 and Plaintiff 2 object. The court should:

A. Admit the statement against both plaintiffs under the Rule of Completeness.
B. Admit the statement against both plaintiffs under the excited utterance exception to the hearsay rule.
C. Admit the statement against both plaintiffs if the jury finds that the recorded statement was authentic and Plaintiff 1 was not under duress when he gave the statement.
D. Admit the statement against Plaintiff 1, sustain Plaintiff 2's objection to the statement, and give the jury a limiting instruction.

ANALYSIS. We will discuss hearsay in much greater detail in Chapter 8, but you have learned so far that there is an exception to the hearsay rule for statements made while one is under the stress of a startling event. An automobile accident may qualify as a startling event, but here the statement was made two months later. Thus Plaintiff 1's statement is not admissible under the excited utterance exception and **B** is incorrect. It is the trial judge's function to determine the admissibility of evidence, including whether a recording is authentic and, when pertinent, whether the person who made the statement was under duress. Thus **C** is incorrect. The Rule of Completeness permits a party to request that additional portions of a recorded statement be admitted when the opposing party has offered only a portion of the statement and there is a risk the jury will be misled by taking something out of context. It does not allow a statement to be introduced against additional parties when it is only admissible against one party. Thus **A** is incorrect. In this problem the defendant may introduce the statement against Plaintiff 1 under the exemption from the hearsay rule for statements by a party opponent. Plaintiff 2 did not make the statement, however, and therefore the statement is not admissible against Plaintiff 2. Given that, the judge should admit the statement with a limiting instruction that the jury may only consider it with respect to Plaintiff 1. Thus **D** is the correct answer.

Avery's Picks

1. Question 1 **C**
2. Question 2 **C**
3. Question 3 **D**

2

Judicial Notice

CHAPTER OVERVIEW

Judicial notice is a method of establishing adjudicative facts at trial without the necessity of calling witnesses or introducing other evidence. When a fact cannot reasonably be disputed, the trial judge takes judicial notice of it and no further proof is necessary to establish the fact.

A. When the Court May Take Judicial Notice of a Fact

Judicial notice is controlled by Rule 201.

> **Rule 201. Judicial Notice of Adjudicative Facts**
>
> (a) **Scope.** This rule governs judicial notice of an adjudicative fact only, not a legislative fact.
>
> (b) **Kinds of Facts That May Be Judicially Noticed.** The court may judicially notice a fact that is not subject to reasonable dispute because it:
>
> (1) is generally known within the trial court's territorial jurisdiction; or
>
> (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

The rule concerns judicial notice of adjudicative facts, that is, the facts in the case before the court. For example, whether the street where an accident occurred was a one-way street is an adjudicative fact. It does not govern judicial notice of legislative facts, such as those that appellate courts may assume to

be true for the purpose of making policy decisions. For example, in interpreting the breadth of a fair housing ordinance, assessing the negative social effects of housing discrimination involves legislative facts.

There are two circumstances under which a judge may take judicial notice of an adjudicative fact. First, the court may take judicial notice of facts that are not capable of dispute because they are generally known within the jurisdiction of the trial court. For example, a judge in Boston could take judicial notice of the fact that the Boston Red Sox play baseball in Fenway Park, that a given street in the City of Boston is one-way, or that Cambridge and Boston are on opposite sides of the Charles River. Sometimes facts are generally known everywhere; for example, that water boils at 212 degrees Fahrenheit and freezes at 32 degrees. Second, the court may take judicial notice of facts that are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. For example, after consulting the text *Gray's Anatomy*, a court could take judicial notice that the tibia is the larger of two bones below the knee in human beings, and that it connects the knee with the ankle bones. After consulting the *Farmer's Almanac*, the court could take judicial notice of the time of sunset or high tide on a given day.

The court may not take judicial notice of facts that might reasonably be disputed. For example, it would be inappropriate to take judicial notice of whether the fracture of an ankle can give rise to varicose veins and shortness of breath, whether a terrazzo floor becomes dangerously slippery when wet, or the extent to which angina pectoris tends to shorten life.

The court has discretion to take judicial notice of facts, whether or not the parties request it to do so. If a party requests the court to take judicial notice of a fact and supplies the court with the necessary information, it is mandatory that the court take judicial notice of the fact. The court may take judicial notice of facts at any stage of the proceeding. It is not necessary for a party to give the opposing party advance notice that it will request the court to take judicial notice, but the opposing party must be given an opportunity to be heard on the issue. The Advisory Committee Note to Rule 201 states that once judicial notice has been taken, no contrary proof is admissible.

B. The Effect of Judicial Notice

Rule 201 provides that the effect of a court taking judicial notice is different in civil and criminal cases.

> **Rule 201. Judicial Notice of Adjudicative Facts**
> (f) **Instructing the Jury.** In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.

In a civil case, the judge instructs the jury that it must find the facts that the court has judicially noticed to be conclusively proven. In a criminal case, however, the judge instructs the jury only that it may accept judicially noticed facts as conclusively proven, but it is not required to do so. The reason for the difference is the constitutional right of the defendant in a criminal case to have the facts determined by the jury.

QUESTION 1. In a trial in Boston, plaintiff seeks to prove that the Arno River flows through Florence, Italy. The trial judge may:

A. Take judicial notice of the fact because it is generally known in the jurisdiction of the trial court.
B. Take judicial notice of the fact if the fact can readily be ascertained by resort to a source the accuracy of which cannot reasonably be questioned.
C. Take judicial notice of the fact if the judge has been to Florence and seen the Arno River.
D. Not take judicial notice of the fact.

ANALYSIS. Let's begin with choice **C.** It is not appropriate for a judge to take judicial notice of a fact merely because the judge personally knows the fact to be true. The question is not what the judge knows, but what is generally known and indisputable. Thus **C** is incorrect. Choice **A** is incorrect because it is not generally known in Boston that the Arno River flows through Florence, Italy. It is, however, indisputable that the Arno River flows through Florence, and this can be ascertained by looking at any reliable world atlas. Thus **B** is the correct answer and **D** is incorrect.

QUESTION 2. Assuming the fact in question is relevant to the case, which of the following facts is inappropriate for judicial notice:

A. That the Boston Red Sox are the best team in major league baseball.
B. That the Declaration of Independence was signed in 1776.
C. That a normal body temperature reading for a human being is 98.6 degrees Farenheit.
D. That Ecuador is located in South America.

ANALYSIS. Historical facts may be so familiar that they are generally known in the jurisdiction of the trial court. In any event, they may be ascertained through recourse to authoritative sources. Thus **B** may be judicially noticed. Well-established scientific or medical facts may be ascertained through recourse to authoritative sources. Thus **C** may be judicially noticed. Controversial statements about science or medicine, for example, the specific benefits of medical marijuana, require proof. Geographical facts can be established through

reliable sources, and **D** may be judicially noticed. Statements that are controversial, or that reflect values or judgment, require proof. Thus, **A** may not be judicially noticed.

QUESTION 3. The Closer. The defendant is on trial for negligent homicide. The state alleges that the defendant drove the wrong way on Tremont Street, a well-travelled one-way street in downtown Boston, and struck a messenger who was pedaling the proper direction on his bicycle. Before trial the prosecutor asks the court to take judicial notice that Tremont is a one-way street from East to West. The defendant objects. The court should:

A. Decline to take judicial notice because the prosecutor's request was pre-trial, rather than during the trial.
B. Decline to take judicial notice because the state should be required to prove the fact through witnesses, given its crucial importance in the case.
C. Take judicial notice that Tremont Street is one-way from East to West, and advise the jury that it is bound by the court's ruling.
D. Take judicial notice that Tremont Street is one-way from East to West, and advise the jury that it may accept the court's ruling as conclusive, but that it is not required to do so.

ANALYSIS. The court may take judicial notice of facts at any point in the proceedings. If the court takes judicial notice of a fact on a pretrial motion, it will inform the jury at some appropriate point during the trial of its ruling. Thus **A** is incorrect. There is nothing in Rule 201 that limits judicial notice to facts of minor importance, and there is no impediment to taking judicial notice of a fact that bears directly on the guilt of the defendant. It is well known in the City of Boston that Tremont Street is a one-way street that runs East to West, and the fact is an appropriate one for judicial notice. Thus **B** is incorrect. In a criminal case the judge may not require the jury to find as conclusive a fact that the court has judicially noticed. The defendant is entitled to have the jury find the facts, even where the judge has concluded that a fact cannot reasonably be disputed. Thus **C** is incorrect and the correct answer is **D**.

Avery's Picks

1. Question 1 **B**
2. Question 2 **A**
3. Question 3 **D**

3

Burden of Proof and Presumptions

CHAPTER OVERVIEW

Presumptions can be a confusing topic, made more so by commentators who like to rehearse the historic debates among leading professors about the appropriate effect of presumptions on the burdens placed on each side at trial. Here we set forth a simple and straightforward understanding of Rule 301, which governs presumptions in federal trials where federal law supplies the rule of decision. Rule 301 governs all such cases unless there is a specific statute that supplies the rules for a particular presumption. In order to understand presumptions, we must begin with the burden of proof.

A. Burden of Proof

The expression "burden of proof" encompasses two distinct burdens that are imposed on the parties to a trial: the burden of production, and the burden of persuasion. The burden of production refers to the burden on a party of going forward with evidence on an issue. For example, at the outset of a civil case, the burden of production is on the plaintiff to produce evidence sufficient to support a finding in his favor on each element of the claim. If the plaintiff fails to do so, the court will grant a directed verdict for the defendant. The burden

of production may shift to the opposing party during a trial, imposing on that party the requirement of coming forward with evidence in order to avoid a directed verdict.

The burden of persuasion refers to which party has the burden of convincing the jury of its version of events under the appropriate standard after all the evidence is in. As a general rule, the burden of persuasion does not shift between the parties during the course of a trial, but remains on the party who had it initially.

Discrimination in employment litigation is an example of an area in which the burden of production shifts. The plaintiff has the initial burden of production to introduce evidence sufficient to support a finding of discrimination, typically evidence that: (1) the plaintiff is a member of a protected class; (2) the plaintiff was qualified for the position in question; (3) the plaintiff suffered an adverse employment action, for example, was fired or not hired or promoted; and (4) the employer filled the position with a person of similar qualifications who was not a member of the protected class. Once the plaintiff has introduced such evidence, the burden of production shifts to the employer to introduce evidence that there was a lawful explanation for the adverse treatment of the plaintiff. If the employer fails to meet its burden of production, the plaintiff is entitled to judgment. If the employer does introduce evidence of a non-discriminatory reason for its actions with respect to the plaintiff, it has met its burden of production. In that event, the fact finder must decide based on all the evidence in the case whether the employer subjected the plaintiff to an adverse employment action as a result of intentional discrimination. On that ultimate issue, the plaintiff has the burden of persuasion.

There are three different standards for the burden of persuasion, depending on what sort of case is being tried. In most civil cases the rule is the preponderance of the evidence standard. The party with the burden of persuasion must convince the finder of fact by a preponderance of the evidence that it is entitled to a verdict. If based on all the evidence the finder of fact is uncertain who has the stronger case, or believes the opponent has the stronger case, the party with the burden of persuasion will lose. In some civil cases the standard is clear and convincing evidence, which requires evidence sufficient to demonstrate a high degree of probability that the proposition to be proved is true. In criminal cases the government must convince the finder of fact beyond a reasonable doubt of each element of the charged offense to justify a verdict of guilty.

In civil cases, the plaintiff has the burden of production and the burden of persuasion with respect to the elements of the plaintiff's claim. The defendant has the burden of production with respect to affirmative defenses. In civil cases, substantive law determines which party has the burden of persuasion with respect to affirmative defenses. In criminal cases, the prosecution has the burden of production and the burden of persuasion with respect to the elements of the crime. The defendant has the burden of production with respect

to affirmative defenses, and may have the burden of persuasion with respect to them as well.[1]

B. Presumptions

Presumptions establish that once the finder of fact has determined that a basic fact exists, the finder of fact may presume that a second fact exists (the presumed fact). For example, if the jury has determined that a letter has been mailed, it may presume that it has been received. If the jury finds that a person has been missing and there has been no word of his whereabouts for more than seven years, it may presume that he is dead. Unless the rules respecting a particular presumption are set out in other statutes or rules, Rule 301 governs presumptions in civil actions where federal law provides the rule of decision.

> **Rule 301. Presumptions in Civil Cases Generally**
> In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.

Rule 302 provides that where state law provides the rule of decision with respect to a claim or defense, state law provides the effect to be given to presumptions. In civil actions filed in federal court due to diversity of citizenship between the parties, state law will control the effect the court will give to presumptions.

Under Rule 301, where there is a presumption, once the proponent has introduced evidence of a basic fact, the burden of production shifts to the opponent to introduce evidence to contest the presumed fact. If the opponent does not introduce such evidence, the court will instruct the jury that if it finds the basic fact to be proven, it may presume that the second fact has been established. For example, if the plaintiff introduces evidence that a letter has been mailed, and the defendant does not introduce any evidence to contradict the fact of receipt, the judge will instruct the jury that if it finds the letter was mailed, it may presume that it was received.

If the opponent meets its burden of production and offers evidence to controvert the existence of the presumed fact, then the presumption has no legal effect in the case. It "disappears" as a legal matter.[2] There is some controversy among the lower federal courts and the commentators about what it means to say that the presumption disappears. Some say that once evidence

1. The law of the jurisdiction where the case is tried determines which party has the burden of persuasion. The general rules articulated in the text may vary with respect to specific claims, and the rules in a given state may vary from the federal rules.

2. This is often referred to as the "bursting bubble" theory of presumptions. The idea is that the presumption is like a soap bubble floating in the air, but once it is pricked by evidence that the presumed fact does not exist, it disappears.

contesting the presumed fact is admitted the presumption completely disappears and the trial judge should say nothing to the jury about the presumption. Others say that the judge has discretion to give some effect to the presumption by treating it as a permissive inference and advising the jury that if it believes that the basic fact has been proven, it may "infer" (rather than "presume") that the second fact existed. The latter position has strong support in the language of the Conference Committee, which reported out the final language of Rule 301 after there were different versions drafted by the Advisory Committee, the House of Representatives, and the Senate. The Conference Committee stated:

> If the adverse party offers no evidence contradicting the presumed fact, the court will instruct the jury that if it finds the basic facts, it may presume the existence of the presumed fact. If the adverse party does offer evidence contradicting the presumed fact, the court cannot instruct the jury that it may *presume* the existence of the presumed fact from proof of the basic facts. The court may, however, instruct the jury that it may infer the existence of the presumed fact from proof of the basic facts.[3]

The debate may not be of great moment with respect to those presumptions that are based on common sense and logic, for example, whether a letter that has been mailed has been received, or whether a person missing for seven years has died. On those issues jurors will probably treat proof of the basic fact as a strong indication that the second fact existed, whether or not the judge instructs them that the inference is permissible.

Rule 301 clearly establishes that a presumption shifts only the burden of production, and the burden of persuasion as to any issue remains on the party on whom it was originally placed.

QUESTION 1. The plaintiff in Connecticut ordered merchandise from a manufacturer in California. The plaintiff received the merchandise in damaged condition. The goods passed through the hands of two common carriers before delivery to the plaintiff. Plaintiff sued the manufacturer and both carriers. The manufacturer introduced evidence that the merchandise was in good condition when it placed it in the hands of the first carrier, and the plaintiff testified that when she received the merchandise it was damaged. There is a common law presumption that when merchandise in good condition was placed in the hands of connecting carriers and delivered to the recipient in damaged condition, the last carrier caused the damage. Assume that all relevant jurisdictions have adopted Rule 301 and that it governs the case. Which of the following statements is true?

3. Notes of Conference Committee, House Report No. 93–1597.

A. The judge should instruct the jury that it must presume that the last carrier damaged the goods.
B. If the last carrier introduces evidence that the merchandise was damaged when it received it from the first carrier, the judge is not allowed to instruct the jury that it may presume that the damage was caused by the last carrier.
C. If the last carrier introduces no evidence that the merchandise was damaged when it received the goods from the first carrier, the judge should instruct the jury that it may presume the damage was caused by the last carrier.
D. The presumption shifts the burden of persuasion to the last carrier to prove that it did not damage the merchandise.

ANALYSIS. Let's begin with **D**. Rule 301 states explicitly that presumptions only affect the burden of production, not the burden of persuasion. In this case the plaintiff has the burden of persuasion and must persuade the jury by a preponderance of the evidence that a particular defendant damaged the goods in order to find that defendant liable. Thus **D** is incorrect. Choice **A** would give the presumption legal effect regardless of whether or not the last carrier defendant offers any evidence rebutting the fact that it caused the damage to the merchandise. That would create an irrebuttable presumption that the last carrier is always liable for damage to merchandise. The common law presumption here, however, is rebuttable and thus **A** is incorrect.

The statement in **C** is missing a very important step. Even though the opponent offers no evidence to contradict the presumed fact, the jury may presume the existence of the presumed fact only where it has found that the basic fact existed. Merely introducing evidence of the basic facts is not enough to give rise to the presumption—the jury must be convinced by a preponderance of the evidence that the basic facts existed. In this problem in order to presume that the last carrier caused the damage, the jury must find that the merchandise was in good condition when the manufacturer delivered it to the first carrier and damaged when the plaintiff received it. If the last carrier introduces no evidence that the goods were damaged when it received them, the judge would instruct the jury: "If you find, by a preponderance of the evidence, that the merchandise was in good condition when the manufacturer delivered it to the first carrier and was damaged when delivered to the plaintiff, you may presume that the damage was caused by the last carrier." Thus **C** is incorrect.

Choice **B** is a correct statement of the law. If the last carrier offers evidence that the goods were damaged when it received them it has met its burden of production by contradicting the presumed fact (that it caused the damage). Under those circumstances the presumption loses its effect and the judge is not permitted to instruct the jury that it may presume the last carrier caused the damage.

QUESTION 2. Defendant rented an apartment from Landlord on a month-to-month basis. Under the law in their state, the lease renewed automatically unless the tenant gave the landlord written notice that he wanted to terminate the rental. Landlord died and Defendant stopped paying rent and moved out the first of the next month. Landlord's Estate sued Defendant for the ongoing rent. Defendant claimed that he mailed a notice of termination to Landlord a month in advance of when he moved out. The Estate offered no evidence as to whether the Landlord received the notice, but called a witness who testified that Defendant admitted to her that he had never sent a notice of termination. Defendant has requested the court to advise the jury that if it finds by a preponderance of the evidence that Defendant mailed a notice, it may presume that the Landlord received it. Should the court give the requested instruction to the jury?

A. Yes.
B. No.

ANALYSIS. The plaintiff has not offered any evidence on the existence of the presumed fact, whether the Landlord received the notice. It has contested only the basic fact, whether the Defendant mailed the notice. If the jury concludes by a preponderance of the evidence, despite the testimony of the Estate's witness, that the Defendant did mail the notice, then Defendant is entitled to the benefit of the presumption that the Landlord received the notice. The correct answer is **A**.

C. Irrebuttable Presumptions

"Irrebuttable" or "conclusive" presumptions are actually substantive rules of law. They may be common law rules, or may be enacted by statute. For example, a statute may provide that there is an irrebuttable presumption that a child under the age of seven acts with due care. In other words, there is a substantive rule that a child under age seven cannot be found to be negligent. Or a jurisdiction may recognize the rule that a child under the age of eighteen is conclusively presumed to be incapable of consenting to sexual relations. In that jurisdiction a defendant charged with the rape of a child under the age of eighteen would not be permitted to raise consent as a defense. Irrebuttable or conclusive presumptions do not operate like the rebuttable presumptions we discussed under Rule 301. They do not shift the burden of production from one party to another. They simply remove certain issues from evidence and proof and substitute definitive rules in their place.

D. Presumptions in Criminal Cases

Rule 301 governs presumptions in civil cases only. The Federal Rules have no provisions that control the use of presumptions in criminal cases. Presumptions are rare and given limited effect in criminal cases because they may be deemed to unconstitutionally interfere with the right of a criminal defendant to have the facts determined by a jury. The use of presumptions in criminal cases is controlled by constitutional law and criminal procedure and is outside the scope of the present text.

QUESTION 3. The Closer. The committee of the legislature charged with family law matters is considering how to protect children born to parents who are married and living together from claims that another man is actually their biological father. The committee is of the view that any litigation of the question of biological fatherhood for such children is so painfully intrusive and destabilizing of family relations that it causes irreparable harm to the children. Assume that the state in question has adopted Rule 301 and that the committee has asked you, its counsel, to draft an appropriate statute. Which of the following will provide the sort of statute that the committee is looking for?

A. A Rule 301 presumption that if a child is born to a woman who is married at the time of the child's birth, her husband is presumed to be the father of the child.

B. An irrebuttable presumption that the husband of a woman who has a child during their marriage is the father of the child.

ANALYSIS. First, we are not discussing the wisdom of what the legislature is trying to do. You may agree or disagree with its goals. The issue here is what sort of presumption will be most effective in achieving those goals. The question the committee has put to its counsel is how to most securely limit the ability to litigate of a man claiming to be the father of a child born to a woman while she is married to another man.

Suppose the plaintiff seeking to prove his paternity has had sufficient access to a child to obtain DNA evidence that creates a very high probability that he is the child's father. If the legislature had adopted the Rule 301 presumption described in **A**, how could he use that evidence? For the presumption in **A** the basic fact is that the child was born to the mother while she was married to her husband. The presumed fact is that the husband is the child's father, and the burden of production is on the plaintiff to introduce evidence to contest the presumed fact. The DNA evidence would do so, and under Rule 301 the plaintiff would be allowed to introduce such evidence. With that, the presumption would disappear from the case as a legal matter, and the finder of

fact would have to determine paternity from all the evidence in the case. The presumption in **A** would provide very little protection from litigation of the paternity issue.

On the other hand, the irrebuttable presumption in **B** would prohibit the plaintiff from introducing any evidence that he is the biological father of the child. Setting issues of the constitutionality of the statute aside, the suit would be dismissed soon after it was filed.[4] Choice **B** is the answer that better achieves the goal of the legislature.

Avery's Picks

1. Question 1 **B**
2. Question 2 **A**
3. Question 3 **B**

4. If you are interested in the constitutional issues, which have to do with the constitutional rights of parents, see *Michael H. v. Gerald D.,* 491 U.S. 110 (1989).

4

Relevance and Its Limits

CHAPTER OVERVIEW

The first question you should ask yourself about a proposed piece of evidence is whether it is relevant. All evidence must at the very least be relevant in order to be admissible. Not all relevant evidence is admissible, because it may be excluded under one of the other rules. But if evidence is not relevant, it is inadmissible. The Rules provide the definition of relevance.

A. Definition of Relevance

Rule 401. Test for Relevant Evidence
Evidence is relevant if:
(**a**) it has any tendency to make a fact more or less probable than it would be without the evidence; and
(**b**) the fact is of consequence in determining the action.

Notice that there are two requirements that must be met for evidence to be considered relevant. Under (**a**), evidence must have a tendency to make a fact more or less probable than it would be without that evidence in order to be relevant. Under (**b**), the fact to be proved must be "of consequence" in deciding the case in order to be relevant. Both requirements must be met for evidence to be relevant.

The inquiry under (**a**) is a question of logic and of fact. The standard is a generous one. Rule 401 does not require that evidence make a fact *more probable than not* in order to be relevant, it merely requires that the evidence *has any tendency* to make the fact *more or less probable than it would be without the evidence*. The issue under (**b**) is a question of substantive law. We look to the underlying law that applies to the case (e.g., torts, contracts, criminal law) to determine what facts are of consequence to the claim being litigated.

As an example, let's consider an automobile accident case, where plaintiff claims he was injured when defendant's car ran into him when he was in the crosswalk. Plaintiff offers evidence from a police officer who investigated the accident. The officer would testify that she observed a substantial amount of fresh blood in the crosswalk when she arrived at the scene a few moments after the accident. Are the observations of the officer relevant? Take the question under part (**b**) first. Is whether the plaintiff was in the crosswalk when he was struck "of consequence in determining the action?" Yes, in most jurisdictions if not all, the substantive law provides that drivers of vehicles owe a duty of care to a pedestrian in a crosswalk. The question under part (**a**) is whether the fact that the officer observed fresh blood in the crosswalk makes it more likely than it would be in the absence of such evidence that the plaintiff was in the crosswalk when he was struck. Common sense tells us that the answer is yes. Because we have answered both questions in the affirmative, the evidence of the officer's observations regarding the blood is relevant.

Let's consider an example in which a criminal defendant's evidence is challenged on relevance grounds. Suppose the defendant is charged with first degree murder (premeditated murder) and offers a witness to testify that he drank most of a bottle of vodka and a bottle of wine in the two hours before he killed the victim. The prosecution objects on relevance grounds. Under section (**a**) the question is whether evidence that the defendant drank the vodka and the wine has any tendency to prove that he was so intoxicated that he did not have the ability to premeditate killing the victim. One might find as a matter

of fact and logic that the large quantity of liquor could so dull the senses that the defendant was unable to form a plan to commit murder. The question under section (**b**) is whether voluntary intoxication is a legally permissible factor to take into account in determining whether the defendant engaged in premeditation. The state's criminal law would determine that issue. Some states allow voluntary intoxication to be taken into account in determining whether a defendant possessed the requisite mental state to commit first degree murder and some do not. If state law provided that voluntary intoxication could not be taken into account, the defendant's intoxication would not be of consequence in determining the action, and thus would not be relevant. Evidence has to satisfy the requirements of both sections (**a**) and (**b**) to be relevant.

In considering issues under section (**a**) you should be careful not to confuse the standard for determining the relevance of a piece of evidence with the standard for deciding the case. To be relevant, a piece of evidence does not have to establish liability by a preponderance of the evidence in a civil case, or guilt beyond a reasonable doubt in a criminal case. Those are the standards that are applied to the whole body of evidence that a party introduces, to determine if all the evidence taken together is sufficient to justify a verdict. Rule 401 is about a narrower issue—whether a single piece of evidence is qualified on relevance grounds to be a part of the case. Professor McCormick famously put it this way, "A brick is not a wall." To be relevant, an item of evidence does not have to construct a whole wall; it simply has to be one of the bricks out of which a wall can be made.

Evidence that is not relevant is inadmissible. The mere fact that evidence is relevant, however, does not guarantee that it is admissible. Relevance is merely one hurdle that evidence must overcome. As we will see, several rules provide for the exclusion of relevant evidence on a variety of grounds.

QUESTION 1. Defendant is charged with murder. The perpetrator slit the victim's throat and the pathologist has testified that in her expert opinion, based on the nature of the wound and other factors, the perpetrator was probably right-handed. The prosecutor offers to call a witness who knows the defendant well and who would testify that defendant is right-handed. Is the evidence relevant?

A. No, because the majority of people are right-handed and thus the evidence cannot prove that the defendant was the killer.
B. No, because the killer might have wielded the knife with his right hand, even if he was left-handed.
C. No, because it doesn't matter what hand the killer used – slitting someone's throat is still murder.
D. Yes.

ANALYSIS. Imagine that you are a member of the jury in this case. After you hear the pathologist's testimony, the first thing that will cross your mind is probably the question of whether the defendant is right-handed. Why? Because if he is, that puts him in the universe of people who are more likely to have been the killer. Conversely, if he is left-handed, it is less likely that he is the person who killed the victim. That is all the evidence has to show in order to make it more likely that the defendant was the killer than it would be in the absence of evidence about which is his master hand. Because the question of who killed the victim is of consequence in determining whether the defendant is guilty of murder, this evidence is relevant.

Of course it is true, as answer **A** suggests, that millions of people are right-handed. And it is also true, as **B** indicates, that the killer may not have used his master hand to attack the victim. But those arguments demonstrate that this evidence alone will not be enough to justify a conviction. Of course the fact that the defendant is right-handed alone does not prove his guilt beyond a reasonable doubt. It does not have to, however, in order to be relevant. Answer **C** suggests that we can somehow leap to the final question of guilt or innocence without establishing facts that add up to our conclusion. That is not how cases are built. They are built like walls out of individual bricks, as Professor McCormick suggested, and we determine whether an item of evidence is relevant by asking whether it constitutes a brick that might eventually form part of a wall. The correct answer here is **D**, because knowing whether the defendant is right-handed makes it more likely that he is the killer than if we didn't know that, and if there is enough other evidence of guilt, it may help build a successful case against him.

QUESTION 2. The pathologist's evidence in a murder case has shown that the victim was killed in a manner that was likely to get the victim's blood onto the body and/or clothing of the killer. The crime lab has tested the jacket that defendant was wearing when he was arrested shortly after the killing and has found traces of blood on it. The lab is not able to say, however, whether the blood is that of the victim, or even whether the blood is human blood. Is evidence from a scientist at the lab that there was blood on the defendant's jacket relevant?

A. Yes.
B. No, because unless the blood can be shown to be that of the victim, it does not prove anything.
C. No, because unless the blood is human blood, it does not prove anything.
D. No, because there is no evidence as to how this blood got onto the jacket.

ANALYSIS. The prosecution offers the blood evidence to prove that the defendant was the killer. Whether the defendant was the killer may not fully answer the question of whether he is guilty of murder, but it is clearly "of consequence."

The logical question is whether the evidence of blood on defendant's jacket has any tendency to make it more probable that he was the killer than it would be without that evidence. That we do not know how this blood got onto the defendant's jacket, whether it is the victim's blood, or whether it is even human blood, are all good arguments why this evidence, standing alone, would not be sufficient to conclude beyond a reasonable doubt that the defendant was the killer. That, however, is the standard for determining guilt, not the standard for determining relevance.

Does the presence of blood make it more likely that defendant was the killer than it would be if he had no blood on his clothing? It may be helpful in answering this question to imagine you are an investigator of this crime. Does the fact that the defendant has some kind of blood on his jacket make you want to investigate him further, to find out if there is other evidence that points toward his guilt? Of course it does. The blood on the jacket, at a minimum, puts him in the universe of people that, according to the pathologist, are more likely to have killed the victim than people with no blood on their clothing. The correct answer is **A**, the evidence is relevant.

QUESTION 3. Defendant is charged with the murder of a victim who was stabbed to death. The pathologist has testified that the wounds were inflicted with a serrated knife. The police searched the defendant's home and found the following items: a paring knife, a chef's knife, and a receipt dated the day before the murder for the purchase of a serrated bread knife. No serrated knives were found in the home. Which of these items are relevant?

A. All of them, because they demonstrate the defendant's interest in knives and a knife was used to stab the victim.
B. The receipt for the bread knife.
C. None of them, because there is no evidence that either the knives found in the home or the bread knife that was purchased were actually used to commit the murder.

ANALYSIS. The prosecution offers these items to prove that the defendant was the killer, which is of consequence in determining whether he is guilty of murder. Evidence that a defendant had an instrument that could have been used to kill the victim makes it more likely that he was the killer than it would be in the absence of such evidence. Possession of common items such as kitchen knives of a type other than the type used on the victim, however, does

not make it more likely that the defendant was the killer, thus **A** is incorrect. Choice **C** is incorrect because the evidence does not have to definitively prove that the knife was used in the murder in order to make the evidence regarding the serrated knife relevant. The fact that the defendant purchased a serrated knife shortly before a murder committed with a serrated knife, and no longer has the serrated knife in his home, does make it more likely that he was the killer than if we had no such evidence. This is true even though there is no other evidence linking the knife the defendant purchased to the murder. Thus **B** is the correct answer.

1. Rule with Respect to Evidence of Similar Events

In accident cases and products liability cases, a plaintiff may seek to prove that a place or a product were unreasonably dangerous by showing that other accidents occurred at that place or while people were using that product. In such cases the law requires that the plaintiff demonstrate that the other accidents occurred under substantially similar conditions in order for them to be relevant and admissible.

QUESTION 4. Plaintiff's decedent suffered fatal injuries when his car went off the road and over a cliff at a curve in a hilly roadway, on a sunny afternoon in July. His estate is suing the highway department for negligence in the design of the road, arguing that it was unreasonably dangerous. Plaintiff's attorney wants to offer evidence at trial that five other drivers died at the same curve when their cars went off the road and over the cliff on snowy days during the previous December and January, in order to prove that the location was unreasonably dangerous. Is the evidence of the other accidents relevant?

A. Yes, the fact that a lot of people have been killed in the same spot makes it more likely that the road is unsafe than if only one person had died there.

B. No, because what happened on other occasions can never prove what happened on a particular occasion.

C. No, because the conditions under which the other accidents occurred were not substantially similar to the conditions under which this accident occurred.

ANALYSIS. Plaintiff wants to offer evidence of other accidents to prove that the road was unreasonably dangerous. Whether the road was unreasonably dangerous is a fact of consequence in determining the liability of the defendant in this tort suit.

The logical question is whether the existence of other accidents makes it more likely that an unsafe road caused this accident than if we knew of no

other accidents. We must begin by recognizing that many factors may cause a motor vehicle accident, including, for example, speed, driver inattention, automobile equipment failure, actions by other drivers, and weather conditions, in addition to whether the road was safely designed. In order to determine with confidence whether unsafe road design caused the other accidents, we have to know something about the circumstances under which they occurred. If those accidents were caused by other factors, they may not tell us anything about whether the road itself was safely designed. For that reason, **A** is incorrect—the mere existence of the other accidents is not sufficient to prove that the road was unsafe. Choice **B** says that evidence of other accidents can never be relevant, but that is not the case. Sometimes the existence of other accidents does tell us something about the nature of the place where a particular accident occurred.

The correct answer is **C.** Evidence of other accidents is relevant to prove a dangerous condition caused the present accident if, and only if, those accidents occurred under substantially similar conditions to the present accident. If there are multiple accidents in the same place under substantially similar conditions, it is more probable that a danger inherent in the place itself was a contributing cause of the accidents than if there was only one accident.

B. Exclusion of Relevant Evidence on Grounds of Unfair Prejudice, Confusion, and Misleading the Jury

Evidence must be relevant to be admissible, but not all relevant evidence is admissible. Rule 403 describes some of the circumstances under which the trial judge may exclude relevant evidence.

> **Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons**
> The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

The rule gives the trial judge discretion to exclude relevant evidence if its probative value is *substantially outweighed* by one of the factors mentioned. The rule is tilted toward admissibility. The burden of showing that relevant evidence should be excluded is on the opponent. In practice, a judge has considerable discretion under the rule to exclude evidence in whole or in part, to limit or change the method of presentation, or to condition the admissibility of the evidence on specific factors. This gives a judge the ability to maximize

the extent to which the jury receives necessary information, while limiting the risk of unfair prejudice or the unnecessary consumption of time.

Undue delay, wasting time, and needlessly presenting cumulative evidence are straightforward considerations of judicial economy and we need not discuss them at any length. Here is an example from a case the author tried several years ago. In a murder case, the defendant pleaded not guilty by reason of insanity, claiming that before the killing he had suffered from hallucinations. He had come to believe creatures that tormented him inhabited a tree outside his window, and he made a videotape of the tree to prove to his friends that the creatures were there. To prove the defendant was hallucinating, his counsel offered to play the ninety-minute video, which in reality simply showed a tree with nothing in it. The judge admitted the tape, but allowed defense to show it to the jury for only five minutes. Rule 403 gives a judge discretion to limit a party's time for presentation, exhibits, or witnesses for the sake of the efficient use of the court's time.

By far the most common reason parties invoke Rule 403 is the claim that the risk of unfair prejudice substantially outweighs the probative value of an item of evidence. It is essential to understand what "unfair prejudice" means in the context of Rule 403. Here is a simple definition: *evidence is unfairly prejudicial if it invites the jury to make a decision on an improper ground.*

A common example of evidence that may be unfairly prejudicial is something that elicits a strong emotional response by jurors, creating a danger they will render a verdict based on sympathy or anger, rather than the facts of the case. In a murder case, for example, colored photographs of a bloody crime scene or close-ups of the injuries to the victim may have a powerful emotional influence on the jury. There is a danger jurors will become so upset that they will not afford the defendant the full benefit of the reasonable doubt standard before concluding he is guilty. On the other hand, such evidence may be highly probative in demonstrating how the crime took place, or showing precisely what caused the death of the victim. If the defendant objects to the evidence, the judge must determine whether the risk of unfair prejudice, the emotional impact it will have on the jury, substantially outweighs the legitimate significance of the evidence in proving the prosecution's case. In making this determination, the judge should take into account whether giving the jury a limiting instruction, cautioning them to view the evidence dispassionately, can control the risk of prejudice.

Another common example of the use of Rule 403 is when an item of evidence may be admissible for one purpose, but not another, and the risk that the jury will use the evidence for the improper purpose is so great that limiting instructions by the judge may not control it. Again, the evidence invites a decision on an improper ground. The judge must decide whether the risk the jury will use the evidence for an improper purpose substantially outweighs the probative value of the evidence for the legitimate purpose for which a party has offered it.

A common mistake that students and young lawyers make is to believe that evidence is unfairly prejudicial merely because it is powerful. We do not consider evidence to be unfairly prejudicial, however, merely because it damages the opposing party's case, or because it "strikes a hard blow," as Justice Souter once put it. As long as the purpose for which the jury will use the evidence is a proper one, evidence is not unfairly prejudicial no matter how powerful it may be.

Balancing the risk of unfair prejudice against probative value requires the parties to articulate *specifically* both what the value of the evidence is in proving the proponent's case and how the evidence may cause the jury to return a verdict on an improper ground. In assessing probative value, the judge should consider how central the fact to be proved is to the claim or defense it is offered to support, weigh the significance of this evidence in the context of all the available evidence in the case, and take into account whether there are alternate means of proving the fact in question. In measuring the risk of prejudice, the judge should determine precisely how the jurors might use the evidence improperly, assess how tempting, compelling, or inflammatory the improper use is, and consider how effective a limiting instruction would be in controlling the risk of prejudice. Trial judges have wide discretion in making these determinations, and appellate courts seldom reverse rulings trial judges make under Rule 403.

QUESTION 5. In a freakish coincidence, the deceased was accidentally shot by a hunter at the same moment a contract killer drilled him. The gangster claims that his shot was not fatal, and that the victim was killed by the hunter's bullet. At the trial of the gangster, the prosecution offers in evidence colored photographs of the victim's internal organs taken during the autopsy. The pathologist would use the photos to trace the path of both bullets through the victim's body in order to support her conclusion that the fatal wound was inflicted by the gangster's bullet. The defendant objects to the photos on the ground that the risk of unfair prejudice outweighs probative value. How should the court rule?

A. Sustain the objection because the jurors will be so inflamed by emotion when subjected to the gory autopsy photos that they could not dispassionately weigh the evidence in the case.
B. Overrule the objection because there is no risk of unfair prejudice.
C. Overrule the objection because the risk of unfair prejudice does not substantially outweigh the probative value of the evidence.
D. There isn't enough information to answer the question.

ANALYSIS. There is no doubt that autopsy photographs in color, showing the human body in an altered state, have the potential to be inflammatory and to unfairly influence a jury's verdict. There is a risk of unfair prejudice,

thus **B** is incorrect. At the same time, such photographs are often necessary to illustrate or explain the cause or manner of death. Trial judges frequently admit autopsy photographs where the proponent can show a legitimate need for them, and appellate courts almost never reverse such rulings. In this case, the judge would have to determine how necessary the photos are to explaining and supporting the pathologist's conclusions. If the hunter's bullet only passed through the victim's leg, and the gangster's shot went through his heart, the photos may not be very important. However, if both shots were through the torso, it may be difficult to follow or credit the pathologist's testimony without the pictures. Whether **A** or **C** is the correct answer will depend upon such factors. The question does not supply that information, and so the correct answer is **D**. If the judge admits the photos, she should give a limiting instruction cautioning the jurors not to be swayed by any emotion they might engender.

QUESTION 6. Plaintiff's decedent was killed in an automobile accident when his car was struck by a truck that defendant was driving. Defendant was also injured and his blood was drawn at the emergency room shortly after the accident. Analysis of the blood demonstrated a blood alcohol level of 0.24%, which is three times the level at which a driver is presumptively considered to be intoxicated in the state where the accident occurred. At the wrongful death trial, plaintiff offers evidence of the defendant's blood alcohol level as measured in the hospital. Defendant objects on the ground that the risk of unfair prejudice exceeds the probative value of the evidence. How should the court rule?

A. Overrule the objection because the risk of unfair prejudice does not substantially outweigh the probative value of the evidence.
B. Overrule the objection because there is no risk of unfair prejudice.
C. Sustain the defense objection because many people have such strong feelings about drunk driving that the jury is likely to rule against the defendant regardless of what the other evidence shows about who caused the accident.

ANALYSIS. The evidence of severe intoxication on the part of the truck driver is likely to be highly probative in determining who caused the accident. It would not be correct, however, to say there is no risk of unfair prejudice posed by this evidence. The jurors could feel so strongly about drunk driving that they might return a verdict against the defendant to punish him, even though they were not convinced by a preponderance of the evidence that his intoxication caused the accident. Nonetheless, unless it could be shown that there was no possibility that the defendant's intoxication caused the accident, a judge would be very unlikely to find that the risk of unfair prejudice outweighed the probative value of the evidence. Choice **A** is the correct answer.

QUESTION 7. Plaintiff is a twelve-year-old girl who sustained permanent brain injuries when struck by an automobile when she was crossing the street. The brain injuries have seriously impaired her ability to walk and to talk. In the suit against the driver of the car, plaintiff's counsel proposes to call the girl to the stand. She would be able to walk from her seat to the witness stand only very awkwardly, with great difficulty, and slowly. She would be able to answer only very simple questions concerning her name, age, and the special school she attends, and would speak with great hesitation and in an unnatural voice that is difficult to understand. She has no memory of the accident itself. Defendant objects on the ground that the unfair prejudice her appearance would cause substantially outweighs the probative value of her testimony. How should the court rule?

A. Exclude the plaintiff as a witness because her disabilities are likely to cause the jurors to return a verdict based on sympathy for her, rather than the facts of the case, and the probative value of her evidence is low because everything she could say could be proved through other witnesses or exhibits.

B. Overrule the defense objection because any unfair prejudice caused by the plaintiff's appearance would not substantially outweigh its probative value.

C. Overrule the defense objection because the plaintiff's appearance would not cause any unfair prejudice.

ANALYSIS. We need to begin by determining the probative value of plaintiff's appearance and testimony and whether there is any risk of unfair prejudice. Plaintiff's testimony can provide no evidence regarding the liability issues in the case, but her appearance as a witness is very significant with respect to the extent of her damages. Plaintiff could call expert witnesses and introduce medical reports to describe her condition, but they would not provide a complete substitute for seeing firsthand the difficulties that plaintiff has in walking and speaking. Observing the plaintiff is crucially important in assessing the extent of her injuries, and the probative value of this evidence is high.

There is some risk of unfair prejudice, and therefore **C** is incorrect. Arguably the jurors might be so emotionally affected by the plaintiff's plight that they would want to provide for her, even if there was little evidence of negligence on the part of the defendant driver. The risk that the jury may effectively lower the bar on the burden of proof is one of the common risks of evidence that has a significant emotional impact. The question is whether the risk substantially outweighs the probative value of the evidence.

Trial judges have great discretion when it comes to balancing the risk of unfair prejudice against probative value under Rule 403. There are many cases where it is possible to imagine one judge ruling one way and another judge the opposite way on the same set of facts. But in this example, the vast majority of

judges would find **B** to be the correct answer. In personal injury cases involving serious injuries there is always a risk that jurors may be motivated by sympathy toward the injured plaintiff. In this case there really is no substitute for allowing jurors to see firsthand the extent of plaintiff's disability. Any risk of prejudice should be addressed by the routine instruction that judges give that the jury verdict should not be based on sympathy, but should be firmly grounded on the facts of the case.

Rule 403 also provides that the judge may exclude evidence if the risk that it will be misleading or confusing substantially outweighs its probative value. Evidence is misleading or confusing if it distracts jurors by requiring them to spend time on side issues that are not material to the dispute between the parties, or because the manner of presentation makes it unnecessarily difficult for jurors to see the point of the evidence. In determining whether to admit such evidence, the judge must decide whether the risk of misleading or confusing the jury substantially outweighs its probative value.

We will return to Rule 403 frequently throughout this book as we discuss the other rules of evidence. Rather than working through additional multiple-choice problems now, it makes more sense to explore additional examples of how the rule is applied in the context of those rules.

C. Exclusion of Relevant Evidence on Policy Grounds

There are several rules that exclude particular types of evidence on policy grounds, even though such evidence might be logically relevant. In the ordinary course, the court makes determinations on an ad hoc basis about whether a piece of evidence is relevant, whether it poses a risk of unfair prejudice that outweighs its probative value, and whether it should be admitted. The rules we are about to discuss, however, make these decisions for whole categories of evidence. These rules are similar to each other in terms of their structure. Typically they make a given type of evidence inadmissible for specific purposes, but indicate that such evidence may be admissible if offered for other purposes. We will discuss each rule in turn.

1. Subsequent Remedial Measures

Rule 407. Subsequent Remedial Measures
When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:

- negligence;
- culpable conduct;

- a defect in a product or its design; or
- a need for a warning or instruction.

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

Sometimes, after someone has suffered an injury, the party in control of the person, place, or thing that caused it will take steps to minimize the risk of such injuries in the future. Suppose, for example, that a child drowns in a neighbor's backyard swimming pool. After the drowning, the neighbor builds a high fence with a locked gate, so that outsiders cannot have access to the pool. The parents of the child who drowned sue the neighbor for negligence in maintaining the pool at the time their child died, and want to introduce evidence of the subsequent erection of the fence to prove that the neighbor's pool was unreasonably dangerous without such a fence. Rule 407 establishes that evidence that the neighbor built the fence after the drowning is not admissible to prove that the premises were dangerous without it.

Evidence of such measures may be relevant both to show that there was a less dangerous alternative to what the defendant had originally done, and to show that the defendant has admitted that greater safety was possible by choosing to take the remedial measure. Nonetheless the law excludes the evidence in order to encourage people to take remedial measures to limit the risk of future accidents.

Notice that the rule uses very broad language to describe what sort of evidence is prohibited: "subsequent remedial measures." The intent is to exclude evidence of any sort of action that would minimize the risk of injuries in the future. Examples include fences, repairs or replacement of equipment, adoption of new procedures, discharging employees who caused the injury, retraining employees, recall of products, and any other measure of a remedial nature. The rule applies to measures that were taken after the injury or harm that is the subject of the case on trial.

Evidence of subsequent remedial measures is excluded, however, only if offered to prove negligence, culpable conduct, a defect in a product or its design, or a need for a warning or an instruction. If the evidence is offered for any other purpose, it is admissible. Rule 407 gives the most common examples of such purposes, but the list is illustrative and not exhaustive. Evidence of a subsequent remedial measure is admissible to impeach the testimony of a witness who has stated something that is inconsistent with the remedial measure taken. The opposing party may also offer evidence of remedial measures to contradict a claim by a defendant that it did not own or control the person, place, or thing that caused the injury, or to contradict a claim that the measure in question is not feasible.

QUESTION 8. Plaintiff was injured while spreading sand on a cranberry bog in the winter when his hand was caught on a rotating rod that was used to break up the sand in a hopper pulled by a tractor. He sued the company that designed the hopper and the rod, claiming the design was unreasonably dangerous without a guard to prevent workers from getting their hands too near the rotating rod. The lead designer claimed at the trial that he had chosen the "safest" available design. Plaintiff offered to introduce evidence that following his injury, the designer had changed the design of the hopper to add a guard over the rod, and that this design had been available at the time of the original design of the machine on which he was injured. Is the evidence admissible?

A. Yes, to impeach the testimony of the designer.
B. No, because the evidence of what the company may have done after the plaintiff's accident is not relevant to whether it was negligent in causing the injury to the plaintiff.
C. No, because it is evidence of a remedial measure taken subsequent to the injury to the plaintiff.
D. Yes, to prove that it was feasible to build the machine with a guard.

ANALYSIS. Evidence that a machine was redesigned after an injury to include a guard is precisely the sort of evidence contemplated by Rule 407. The evidence is relevant on the question of whether the original design was reasonably safe, and therefore **B** is not correct. The evidence should be excluded if offered to prove that the original design was not reasonably safe, and in that event, **C** would be the correct answer.

The evidence is admissible if offered for another purpose, however. May it be offered here, as **D** suggests, in order to prove that installing a guard was feasible? Not in this case, because the defendant has not contested feasibility. If the defendant had argued, for example, that adding a guard would make the machine too expensive to produce, or that adding a guard would interfere with the proper functioning of the machine, then plaintiff could introduce the fact that the defendant had redesigned the machine with a guard to prove that it was possible to do so. Evidence of subsequent remedial measures is admissible to prove feasibility, or to prove that the defendant owned or controlled the person, place, or thing that caused the injury, only when the defendant contests those issues. Here it did not, and **D** is incorrect.

The correct answer in this case is **A**. The designer has testified that he originally chose the "safest" available design. Yet after the accident he switched to a different design that had been available previously, one with a guard. That change is inconsistent with and impeaches his testimony that the original design was the safest one.

If a trial judge permits evidence of a subsequent remedial measure to impeach a defense witness, or to prove ownership, control, or feasibility if the

defendant contests such matters, the judge should give a limiting instruction. The court should explain to the jury that the evidence cannot be used to prove negligence, and that the jury can only use the evidence for the specific purpose for which it is admitted.

2. *Evidence of Settlement Discussions*

> **Rule 408. Compromise Offers and Negotiations**
>
> (a) Prohibited Uses. Evidence of the following is not admissible—on behalf of any party—either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:
>
> (1) furnishing, promising, or offering—or accepting, promising to accept, or offering to accept—a valuable consideration in compromising or attempting to compromise the claim; and
>
> (2) conduct or a statement made during compromise negotiations about the claim—except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.
>
> (b) Exceptions. The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

If every case filed in court had to go to trial to be resolved, the judicial system would come to a screeching halt. Most cases are settled. The rules of evidence encourage settlements by making evidence of compromises, settlement offers, and statements made during negotiations generally inadmissible. Such evidence cannot be admitted to prove the validity or amount of a disputed claim, or to impeach a witness with a prior inconsistent statement or a contradiction. As with Rule 407, such evidence is admissible for purposes other than the proscribed ones.

First, notice that the rule only comes into play when there is a "disputed claim." This means that one party is making a claim, and the opposing party is contesting it in some manner. The contest can be either about liability or damages (the amount of the claim). A case does not have to be filed in court in order for there to be a claim. But Rule 408 covers only statements made by one who is aware that an opposing party is making or denying some type of claim. Imagine that a driver jumps out of his car after an auto accident and runs to the other car shouting, "The accident was my fault, so I'll pay all your damages." The people in the other car haven't done anything yet to suggest they will make a claim; hence Rule 408 does not bar the statement. In the event of a later lawsuit by the folks in the second car, they would be able to offer the first driver's admission of fault against him at the trial. If *A* has loaned *B* money and *B* has not paid it back, *A* has a claim for the money. If *B* acknowledges that he owes *A* the amount in question but has not paid it, there is no dispute about the claim.

Once there is some kind of disputed claim, Rule 408 renders inadmissible a broad swath of evidence. The rule covers completed settlements, offers to settle, and conduct or statements made during negotiations. It covers statements both by a party proposing a settlement, and by a party who indicates it would be willing to accept a settlement. Such evidence is inadmissible to prove the validity or amount of the claim, and to impeach or contradict a trial witness's testimony with inconsistent or contrary statements made during negotiations.

QUESTION 9. Plaintiff has sued Defendant over an auto accident that resulted in damage to the vehicles but not in personal injury. In Plaintiff's lawsuit against Defendant, Plaintiff would testify that as soon as he got out of his car, Defendant said to Plaintiff: "Would you take a check for $5000 to settle all this?"

Defendant's objection to this testimony should be:

A. Sustained, because the statement was made in the course of attempting to settle a claim.
B. Sustained, because Defendant's offer to pay for Plaintiff's damages does not conclusively prove that Defendant believed himself to be at fault for the accident.
C. Overruled, admissible to show Defendant's consciousness of his own negligence.

ANALYSIS. In order for Rule 408 to apply, there must be a claim. Offers made to compromise a claim are inadmissible to prove fault. Here, however, there was no claim. The Defendant spontaneously offered money before the Plaintiff had even made a claim. Thus, **A** is incorrect. **B** suggests there may be reasons other than consciousness of liability for Defendant to have made the offer. That may be true, but his offer to settle makes it more likely that he believed he was at fault than if he made no such offer. Conclusive proof is not required for relevance. Thus **B** is incorrect and the correct answer is **C**.

QUESTION 10. Defendant's car collided with two pedestrians in the street, causing each of them physical injuries. Plaintiff 1 settled his claim against the defendant before trial for $100,000. Plaintiff 2 offered to accept a settlement of $40,000, but the defendant refused to offer any more than $10,000. At the settlement conference, plaintiff 2 admitted that he was crossing the street outside the crosswalk, but produced a video of the accident from a surveillance camera that showed that defendant's car entered the intersection against a red light. At the trial of plaintiff 2 against the defendant, which of the following evidence is admissible?