Delaware Uniform Rules of Evidence

Article I. General Provisions

Rule 101. Scope; Definitions.

(a) Scope. These Rules apply to proceedings in the courts of this State. The specific courts and proceedings to which the Rules apply, along with exceptions, are set out in Rule 1101.

(b) Definitions. In these Rules:

(1) "civil case" means a civil action or proceeding;

(2) "criminal case" includes a criminal proceeding;

(3) "public office" includes a public agency;

(4) "record" includes a memorandum, report, or data compilation;

(5) a "rule prescribed by the Supreme Court" means a rule adopted by the Delaware Supreme Court under its constitutional or statutory authority; and

(6) a reference to any kind of written material or any other medium includes electronically stored information.

Comment

This rule largely follows F.R.E. 101, except that it refers to the courts of this State rather than the United States.

D.R.E. 101 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. The pre-2017 "Comment" to D.R.E. 101 was revised only as necessary to reflect the 2017 amendments and the current language of F.R.E. 101. There is no intent to change any result in ruling on evidence admissibility.

Rule 102. Purpose and Construction.

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

Comment

This rule tracks F.R.E. 102.

D.R.E. 102 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. There is no intent to change any result in ruling on evidence admissibility.

Rule 103. Rulings on Evidence.

(a) Preserving a Claim of Error. A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:

(1) if the ruling admits evidence, a party, on the record:

(A) timely objects or moves to strike; and

(B) states the specific ground, unless it was apparent from the context; or

(2) if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.

(b) Not Needing to Renew an Objection or Offer of Proof. Once the court rules definitively on the record — either before or at trial — a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

(c) Court's Statement About the Ruling; Directing an Offer of Proof. The court may make any statement about the character or form of the evidence, the objection made, and the ruling. The court may direct that an offer of proof be made in question and answer form.

(d) Preventing the Jury from Hearing Inadmissible Evidence. To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.

(e) Taking Notice of Plain Error. A court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved.

Comment

D.R.E. 103 tracks F.R.E. 103.

D.R.E. 103 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. The pre-2017 "Comment" to D.R.E. 103 was revised only as necessary to reflect the 2017 amendments. There is no intent to change any result in ruling on evidence admissibility.

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.

(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, in its discretion, may

admit the proposed evidence on the condition that the proof be introduced later.

(c) Conducting a Hearing So That the Jury Cannot Hear It. The court must conduct any hearing on a preliminary question so that the jury cannot hear it if:

(1) the hearing involves the admissibility of a confession;

(2) a defendant in a criminal case is a witness and so requests; or

(3) justice so requires.

(d) Cross-Examining a Defendant in a Criminal Case. By testifying on a preliminary question, a defendant in a criminal case does not become subject to cross-examination on other issues in the case.

(e) Evidence Relevant to Weight and Credibility. This Rule does not limit a party's right to introduce before the jury evidence that is relevant to the weight or credibility of other evidence.

Comment

See Rule 1101 and Rule 601.

Rule 104(a) tracks F.R.E. 104(a). It applies to preliminary hearings (called preliminary examination in F.R.E) in criminal cases as well as to civil cases. See Rule 1101(b) as to applicability of these rules to preliminary hearings in criminal cases.

Rule 104(b) largely tracks F.R.E. 104(b), except for the addition of the words "in its discretion" in the second sentence.

Rule 104(c) tracks F.R.E. 104(c).

Rule 104(d) tracks F.R.E. 104(d). The Committee recognized that the rule, as drafted, does not address itself to the question of subsequent use of testimony given by an accused at a preliminary hearing. The Committee decided to leave the resolution of this problem to developing case law. See Harris v. New York, 401 U.S. 222, 91 S. Ct. 643, 28 L.Ed.2d 1 (1971); Walder v. United States, 347 U.S. 62, 74 S. Ct. 354, 98 L. Ed. 503 (1954); Simmons v. United States, 390 U.S. 377, 88 S. Ct. 967, 19 L.Ed.2d 1247 (1968); McCormick, § 178, pp. 416-418.

Rule 104(e) tracks F.R.E. 104(e).

See Rule 801(d)(2)(E) as to statements made by co-conspirators.

For prior Delaware cases illustrating the law covered by Rule 104(a), see Kelluem v. State, Del. Supr., 396 A.2d 166 (1978); State v. Brown, Del. Oyer & Term., 36 A. 458 (1896).

D.R.E. 104 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. The pre-2017 "Comment" to D.R.E. 104 was revised only as necessary to reflect the 2017 amendments. There is no intent to change any result in ruling on evidence admissibility.

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.

Comment

This rule tracks F.R.E. 105. The present procedure in Delaware is for the court to give a jury instruction when evidence is admitted for a limited purpose and to again give a jury instruction when the jury is charged. The instruction is given only upon request of a party, however. The Committee approved this practice. A close relationship exists between this rule and Rule 403.

The Committee agreed that the rule should not be read to indicate that a limiting instruction in every case will cure any potential prejudice that might be encountered by the admission of the evidence. E.g., Bruton v. United States, 389 U.S. 818, 88 S. Ct. 126, 19 L. Ed. 2d 70 (1967). Such a decision is for the court to make under Rule 403 or applicable statutory or constitutional provisions. But see Harrington v. California, 395 U.S. 250, 89 S. Ct. 1726, 23 L. Ed. 2d 284 (1969), holding that not all violations of Bruton are reversible error. The Committee agreed that a violation of the rule of law set forth in Bruton should be avoided if possible and the evidence should not be admitted even though its admission might not be reversible error.

D.R.E. 105 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. There is no intent to change any result in ruling on evidence admissibility.

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.

Comment

This rule tracks F.R.E. 106. It is similar to Federal Rule of Civil Procedure 32(a)(6) and Delaware Court of Chancery Rule 32(a)(4) and Delaware Superior Court Civil Rule 32(a)(4). The Committee rejected the substitution of a "relevance" test for a "fairness" test for what must also be introduced if part of a writing or statement is introduced.

For prior Delaware case illustrating the law covered by this rule, see Lowber v. State, Del. Supr., 100 A. 322 (1917).

D.R.E. 106 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. The pre-2017 "Comment" to D.R.E. 106 was revised only as necessary to reflect the 2017 amendments and the current language of the Federal Rules of Civil Procedure. There is no intent to change any result in ruling on evidence admissibility.

ARTICLE II. JUDICIAL NOTICE

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.

(c) Taking Notice. The court:

(1) may take judicial notice on its own; or

(2) must take judicial notice if a party requests it and the court is supplied with the necessary information.

(d) Timing. The court may take judicial notice at any stage of the proceeding.

(e) Opportunity to Be Heard. On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to

be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

(f) Instructing the Jury. Upon request, the court must instruct the jury to accept the noticed fact as conclusive.

Comment

This rule largely tracks F.R.E. 201 except for 201(f) (see discussion below). This article is limited to adjudicative facts. In the interests of uniformity, the Committee rejected a proposal that this rule be expanded to cover legislative facts. See Davis, "Judicial Notice," reprinted in Weinstein, pp. 201-22; McCormick §§ 328, 331; F.R.E. Advisory Committee's note to article II.

The Committee recognized that courts sometimes judicially recognize legislative facts without giving the parties an opportunity to comment on the facts proposed to be judicially noticed. While recognizing that this may sometimes be unfair, the Committee did not think it should address this problem at this time.

Rule 201(f) largely tracks F.R.E. 201(f) except that the words "upon request" were added at the beginning and the last sentence of F.R.E. 201(f) was deleted.

The purpose of the changes from the F.R.E. is to make clear that a request for a jury instruction is required before reversible error is normally present and to eliminate any distinction between criminal and civil cases.

Article IV, § 19 of the Delaware Constitution states: "Judges shall not charge juries with respect to matters of fact, but may state the questions of fact in issue and declare the law."

The Committee agreed that once a fact is judicially noticed, no evidence to rebut that fact shall be permitted, but an objection to the taking of judicial notice of a fact should be considered by the judge before he agrees to take judicial notice.

See Barks v. Herzberg, 58 Del. 162, 206 A.2d 507 (Supr. 1965), holding that if a judge inquires into facts outside the record he should do so only with full notice to counsel with opportunity to comment.

For prior Delaware cases illustrating the law covered by Rule 201(b), see: Judicial notice not taken: Wolf v. Keagy, Del. Super., 136 A. 520 (1927); Charles Tire Co. v. Owens, Del. Super., 186 A. 737 (1936); Bigger v. Unemployment Comp. Comm'n, Del. Super., 46 A.2d 137 (1946); Weinberg

v. Hartman, Del. Super., 65 A.2d 805 (1949); Jackson v. Hearn Bros., Del. Supr., 212 A.2d 726 (1965); Hutchins v. State, Del. Supr., 153 A.2d 204 (1959); Fahey v. Sayer, Del. Supr., 106 A.2d 513 (1954); Hunter v. Quality Homes, Del. Super., 68 A.2d 620 (1949); LeGates v. Ennis, Del. Super., 180 A. 325 (1935); Downs v. Commissioners of Town of Smyrna, Del. Super., 45 A. 717 (1899); In re Fusco, Del. Orph., 127 A.2d 468 (1956); State v. Tootle, Del. Gen. Sess., 128 A. 484 (1837). See also McGraw v. Corrin, Del. Supr., 303 A.2d 641 (1973); Opinion of the Justices, Del. Supr., 216 A.2d 668 (1966).

D.R.E. 201 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. The pre-2017 "Comment" to D.R.E. 201 was revised only as necessary to reflect the 2017 amendments. There is no intent to change any result in ruling on evidence admissibility.

Rule 202. Judicial Notice of Law.

(a) Judicial Notice of Laws. Every court in this State must take judicial notice of the United States Constitution, case law relating thereto, and the Constitution, common law, case law and statutes of this State.

(1) Every court in this State may take judicial notice of the common law, case law and statutes of the United States and every state, territory and jurisdiction of the United States.

(2) Reasonable notice of a request for judicial notice must be given to the adverse parties.

(b) Information of the Court. The court may inform itself of the laws identified in paragraph (a) of this Rule in any manner that it deems proper. The court may call upon counsel to aid it in obtaining this information.

(c) Ruling Reviewable. The determination of the laws identified in paragraph (a) of this Rule must be made by the court and not by the jury. The determination is reviewable on appeal.

(d) Private Acts, Regulations, Ordinances, Court Records.

(1) The court may, without request by a party, take judicial notice of

(A) the private acts and resolutions of the Congress of the United States and of the General Assembly of this State, and of every other state, territory and jurisdiction of the United States;

(B) the duly enacted ordinances and duly published regulations and determinations of governmental subdivisions or agencies of the United States, of this State and of every other state, territory and jurisdiction of the United States; and

(C) the records of the court in which the action is pending and of any other court of this State or federal court sitting in or for this State.

(2) In the following circumstances, judicial notice must be taken of each matter specified in this rule:

(A) a party requests it;

(B) the requesting party furnishes the court sufficient information to enable the court properly to comply with the request; and

(C) the requesting party has given each adverse party notice of the request in the pleadings or at least 20 days before the trial. The court, however, may permit the requesting party to give notice at any time in the interest of justice.

(e) Notice, Information, Ruling on Laws of Foreign Country. A party who intends to raise an issue concerning the law of a foreign country must give notice in the pleadings or other reasonable written notice. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under these Rules. The court's determination is treated as a ruling on a question of law.

Comment

This rule is new and does not appear in the F.R.E. or U.R.E. The material has been covered in the past by 10 Del. C. §§ 4305, 4307, 4308, 4312, 4313 and 4314, which should now be repealed since the provisions of those sections are covered by these rules. It is intended that this rule shall expand and make easier the introduction of evidence of the Constitution, statutes, common law and case law of this State, of the United States and of other states, countries and jurisdictions.

It is the intention of this rule to encourage the admissibility of evidence of law rather than to discourage it. The only limitation imposed is that notice of the law of other jurisdictions sought to be relied upon should be given to all parties at a reasonable time.

This rule provides that the courts of this State shall take judicial notice, with or without request, of the statutory, common and case law of this State and the constitutional law of the United States. Judicial notice of the law of the United States and other jurisdictions of the United States may also be taken. It is based on 10 Del. C. § 4313(a) and the Uniform Judicial Notice of Foreign Law Act.

Rule 202(d) is based on old U.R.E. 9(2) and New Jersey Evidence Rule 9(2)(3).

Rule 202(e) is based on Delaware Court of Chancery Rule 44.1 and Delaware Superior Court Civil Rule 44.1.

See Rule 902 for other methods of introducing documentary evidence.

D.R.E. 202 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. The pre-2017 "Comment" to D.R.E. 202 was revised only as necessary to reflect the 2017 amendments. There is no intent to change any result in ruling on evidence admissibility.

ARTICLE III. PRESUMPTIONS IN CIVIL CASES

Rule 301. Presumptions in Civil Cases Generally.

(a) Effect. In a civil case, unless a statute or these Rules provide otherwise, the party against whom a presumption is directed has the burden of proving that the nonexistence of the presumed fact is more probable than the existence of the presumed fact.

(b) Inconsistent Presumptions. If presumptions are inconsistent, the presumption founded upon weightier policy considerations applies. If policy considerations are of equal weight, then neither presumption applies.

Comment

Pre-2017 Rule 301(a) was based on U.R.E. 301(a), except the word "civil" was added in the first line.

The Committee rejected F.R.E. 301. F.R.E. 301 was adopted by Congress as a substitute for the proposal of the United States Supreme Court Advisory Committee. The Federal Rule as adopted by Congress embraces the "bursting bubble" rule. See Usery v. Turner, 428 U.S. 1, 96 S. Ct. 2882, 49 L. Ed. 2d 752 (1976).

The rule adopted is similar to the rule proposed by the United States Supreme Court Advisory Committee.

The Committee was aware of the holding in Bennett v. Andree, Del. Super., 264 A.2d 353, aff'd, Del. Supr., 270 A.2d 173 (1970) and believes that its holding is not in conflict with the rule set forth herein.

Pre-2017 Rule 301(b) tracked U.R.E. 301(b).

For prior Delaware case illustrating the law covered by this rule, see Hill v. McKay, Del. Super., 113 A. 804 (1921).

D.R.E. 301 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. The pre-2017 "Comment" to D.R.E. 301 was revised only as necessary to reflect the 2017 amendments. There is no intent to change any result in ruling on evidence admissibility.

Rule 302. Applicability of State Law in Civil Actions and Proceedings.

[Omitted]

Comment

The Committee did not adopt F.R.E. 302 since it covers federal-state diversity, a problem not believed to be of sufficient importance to be addressed by these rules.

Rule 303. Effect of Presumptions in Criminal Cases.

Presumptions in criminal cases shall be as set forth in 11 *Del. C.* § 306.

Comment

This rule is new. It does not follow either the Federal Rules which have no Rule 303 nor U.R.E. 303.

The Committee believed that the provisions of U.R.E. 303 are covered adequately by 11 Del. C. § 306.

Rule 304. Res ipsa loquitur.

(a) Definitions.

(1) Res ipsa loquitur is a rule of circumstantial evidence that permits, but does not require, the trier of fact to infer negligence based on the occurrence of an accident under the circumstances set forth in paragraph (b) of this rule. Res ipsa loquitur does not affect the burden of proof.

(2) As used in this rule, "plaintiff" includes any party who invokes the doctrine, and "defendant" includes any party against whom the doctrine operates.

(b) Applicability. Res ipsa loquitur may apply when all of the following circumstances exist:

(1) The accident must be one that in the ordinary course of events does not happen if those who have management and control use proper care;
(2) The facts warrant an inference of negligence of such force as to call for an explanation or rebuttal from the defendant;
(3) The thing or instrumentality that caused the injury must have been under the management or control (not necessarily exclusive) of the defendant or his servants at the time the negligence likely occurred; and
(4) Where the injured person participated in the events leading up to the accident, the evidence must exclude his own conduct as a responsible cause.

(c) When Applicability Determined; Effect.

(1) Whether or not res ipsa loquitur applies should be determined at the close of the plaintiff's case.

(2) When res ipsa loquitur applies, the defendant is not entitled to a directed verdict unless evidence has been produced that will destroy or so completely contradict the inference of negligence on the defendant's part that the jury could not reasonably accept it. The defendant is not entitled to a directed verdict merely because the defendant has introduced evidence in explanation and that evidence has not been rebutted.

Comment

This rule is not contained in F.R.E. or U.R.E. It does restate and codify the existing Delaware law.

This rule restates existing Delaware case law. The res ipsa loquitur doctrine is merely a rule of circumstantial evidence. Delaware Coach Co. v. Reynolds, Del. Supr., 71 A.2d 69 (1950); Skipper v. Royal Crown Bottling Co., Del. Supr., 192 A.2d 910 (1963); Hopkins v. Chesapeake Utils. Corp., Del. Super., 290 A.2d 4 (1972). The doctrine does not give rise to a presumption, but is only an inference of negligence. Delaware Coach Co. v. Reynolds, supra; Scott v. Diamond State Tel. Co., Del. Supr., 239 A.2d 703 (1968); Vattilana v. George & Lynch, Inc., Del. Super., 154 A.2d 565, 567 (1959). The pleading of specific acts of negligence does not preclude reliance on the doctrine. Vattilana v. George & Lynch, Inc., supra; Hopkins v. Chesapeake Utils. Corp., supra. Before the doctrine will apply, 5 elements must be present:

(1) The circumstances must show that the accident would not ordinarily have occurred if those who had management and control of the instrumentality had used proper care. Delaware Coach Co. v. Reynolds, supra; Skipper v. Royal Crown Bottling Co., supra; National Fire Ins. Co. v. Pennsylvania R.R., Del. Super., 220 A.2d 217, 220 (1966); Vattilana v. George & Lynch, Inc., supra;

Hopkins v. Chesapeake Utils. Corp., supra; Dillon v. GMC, Del. Super., 315 A.2d 732 (1974), aff'd, Del. Supr., 367 A.2d 1020 (1976); Phillips v. Delaware Power & Light Co., Del. Super., 202 A.2d 131 (1964). Expert testimony may be required to show the degree of care required. Hornbeck v. Homeopathic Hosp., Del. Super., 197 A.2d 461, 463 (1964).

(2) The instrumentality causing the accident must have been under the control of defendant. Skipper v. Royal Crown Bottling Co., supra; Vattilana v. George & Lynch, Inc., supra; Slovin v. Gauger, Del. Super., 193 A.2d 452 (1963). Exclusive control is not required, however. Delaware Coach Co. v. Reynolds, supra; Phillips v. Delaware Power & Light Co., supra; Ciociola v. Delaware Coca-Cola Bottling Co., Del. Supr., 172 A.2d 252, 259 (1961); Skipper v. Royal Crown Bottling Co., supra.

(3) The doctrine applies only where direct evidence of negligence is absent and unavailable. Vattilana v. George & Lynch, Inc., supra; Slovin v. Gauger, supra; Dillon v. GMC, supra; Scott v. Diamond State Tel. Co., supra; Ciociola v. Delaware Coca-Cola Bottling Co., supra.

(4) The accident must not be the fault of plaintiff. Dillon v. GMC, supra; Hopkins v. Chesapeake Utils. Corp., supra; National Fire Ins. Co. v. Pennsylvania R.R., supra.

(5) There must be a causal connection between defendant's act or omission and the accident. Vattilana v. George & Lynch, supra; Skipper v. Royal Crown Bottling Co., supra; Wilson v. Derrickson, Del. Supr., 175 A.2d 400 (1961); Ciociola v. Delaware Coca-Cola Bottling Co., supra; National Fire Ins. Co. v. Pennsylvania R.R., supra; Dillon v. GMC, supra.

The applicability of the doctrine should be determined at the close of plaintiff's evidence. Delaware Coach Co. v. Reynolds, supra; Dillon v. GMC, supra. The jury or judge may find against the plaintiff even though the doctrine is present. Hornbeck v. Homeopathic Hosp., supra; Scott v. Diamond State Tel. Co., supra. The law of the place where the injury occurred determines whether res ipsa loquitur will be applied. Hopkins v. Chesapeake Utils. Corp., supra.

The doctrine has also been applied in Williams v. General Baking Co., Del. Super., 98 A.2d 779 (1953); Dickens v. Horn & Hardart Baking Co., Del. Super., 209 A.2d 169 (1965). See also 6 Schwartz, Trial of Accident Cases, §§ 6169, 6171, 6173.

This comment is based on Schwartz, Res Ipsa Loquitur in Delaware, 4 Del. Law Forum 3 (1978).

D.R.E. 304 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. There is no intent to change any result in ruling on evidence admissibility.

ARTICLE IV. RELEVANCY AND ITS LIMITS

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.

Comment

This rule tracks F.R.E. 401.

D.R.E. 401 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. There is no intent to change any result in ruling on evidence admissibility.

Rule 402. General Admissibility of Relevant Evidence.

Relevant evidence is admissible unless any of the following provides otherwise:

- a statute;
- these Rules; or
- other rules applicable in the Courts of this State.

Irrelevant evidence is not admissible.

Comment

This rule generally tracks F.R.E. 402. The Committee did not believe it was necessary to include a reference to the United States or Delaware Constitutions since evidence not admissible because of some constitutional defect is obviously inadmissible.

D.R.E. 402 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. The pre-2017 "Comment" to D.R.E. 402 was revised only as necessary to reflect the 2017 amendments. There is no intent to change any result in ruling on evidence admissibility.

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.

Comment

This rule tracks F.R.E. 403.

In Concord Towers, Inc. v. Long, Del. Supr., 348 A.2d 325 (1975), the Delaware Supreme Court ruled that whether the existence of surprise is reversible error depends on whether the surprise is prejudicial.

It is not intended that this rule will change that rule of law. See also Bennett v. State, Del. Supr., 164 A.2d 442 (Supr.1960) and Hoey v. Hawkins, Del. Supr., 332 A.2d 403 (1975).

D.R.E. 403 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. There is no intent to change any result in ruling on evidence admissibility.

Rule 404. Character Evidence; Crimes or Other Acts.

(a) Character Evidence.

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

(2) Exceptions for a Defendant or Victim in a Criminal Case. The following exceptions apply in a criminal case:

(A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;

(B) except as otherwise provided by statute, a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may:

(i) offer evidence to rebut it; and

(ii) offer evidence of the defendant's same trait; and

(C) in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

(3) Exceptions for a Witness. Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

(b) Crimes, Wrongs, or Other Acts.

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

Comment

D.R.E. 404(a) tracks F.R.E. 404(a) except that the additional words "except as otherwise provided by statute" were added at the beginning of D.R.E. 404(a)(2)(B). These additional words were deemed necessary to make clear that D.R.E. 404(a)(2)(B) does not change the rule enacted by the Delaware General Assembly as 11 Del. C. §§ 3508 and 3509 (enacted by 60 Del. Laws, c. 257, § 1, effective July 11, 1975) relating to the sexual conduct of the complaining witness in prosecutions for rape or rape related offenses.

D.R.E. 404(a)(1) was amended in 2001 to track F.R.E. 404(a)(1) in effect on December 31, 2000. Prior to the 2001 amendment, D.R.E. 404(a)(1) prohibited the use of evidence relating to the character of the accused to show a propensity to act unless the accused offered evidence of good character. In that case, the prosecution has always been allowed to offer evidence of bad character.

D.R.E. 404(a)(2)(B) enumerates a second situation in which the prosecution would be permitted to offer evidence of the character of the accused as reflecting on the accused's propensity to commit the charged act. Specifically, the 2001 amendment permits the prosecution to offer propensity evidence against the accused if the accused has offered evidence which was admitted under D.R.E. 404(a)(2) as to the propensity of an alleged victim to commit certain acts. Prior to the 2017 stylistic amendments, this provision was contained within D.R.E. 404(a)(1).

D.R.E. 404(b) tracks F.R.E. 404(b) in effect on December 31, 2000, except the provisions of F.R.E. 404(b) pertaining to pretrial notice of the prosecution's intent to introduce such evidence have been omitted. A party who intends to introduce evidence pursuant to D.R.E. 404(a) or 404(b) should first seek a ruling from the trial judge as to the admissibility of the evidence.

See D.R.E. 412 and 608(a)(2) relating to relevance of rape victim's past behavior.

For cases clarifying how D.R.E. 404(b) should be applied, see Renzi v. State, Del. Supr., 320 A.2d 711 (1974); Getz v. State, Del. Supr., 538 A.2d 726 (1988); DeShields v. State, Del. Supr., 706 A.2d 502 (1998).

D.R.E. 404 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. The pre-2017 "Comment" to D.R.E. 404 was revised only as necessary to reflect the 2017 amendments. There is no intent to change any result in ruling on evidence admissibility.

Rule 405. Methods of Proving Character.

(a) By Reputation or Opinion. When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct.

(b) By Specific Instances of Conduct. When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct.

Comment

D.R.E. 405 tracks F.R.E. 405. The words "or by testimony in the form of an opinion" were originally omitted from D.R.E. 405(a) but were added in 2001 to conform D.R.E. 405(a) with existing Delaware practice.

For prior Delaware cases illustrating the law covered by D.R.E. 405(a), see Spain v. Rossiter, Del. Super., 120 A. 746 (1923) and State v. Naylor, Del. Super., 90 A. 880 (1914).

For prior Delaware case illustrating the law covered by D.R.E. 405(b), see Robinson v. Burton, Del. Super., 5 Del. 335 (1851).

D.R.E. 405 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. There is no intent to change any result in ruling on evidence admissibility.

Rule 406. Habit; Routine Practice.

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

Comment

This rule tracks F.R.E. 406.

The Committee believes that although this rule permits the admissibility of habit, evidence of habit should be admitted only after careful consideration by the court of whether the conduct is in fact a habit. See the examples set forth in the United States Supreme Court Advisory Committee's note to F.R.E. 406(a).

The Committee rejected U.R.E. Rule 406(b) (not contained in F.R.E.). The Committee believed, as did Congress, that the method of proof of habit and routine practice should be left to the courts on a case-by-case basis and therefore U.R.E. 406(b) should not be adopted.

For prior Delaware case illustrating the law covered by this rule, see Wilmington City Ry. v. White, Del. Supr., 66 A. 1009 (1907).

D.R.E. 406 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. There is no intent to change any result in ruling on evidence admissibility.

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.

Comment

D.R.E. 407 tracks F.R.E. 407.

D.R.E. 407 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. The pre-2017 "Comment" to D.R.E. 407 was revised only as necessary to reflect the 2017 amendments. There is no intent to change any result in ruling on evidence admissibility.

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 order to compromise the claim; and

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

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

Comment

This rule generally tracks F.R.E. 408.

This rule modifies existing Delaware case law. See Hudson v. Williams, Del. Super., 72 A. 985 (1908).

D.R.E. 408 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. The pre-2017 "Comment" to D.R.E. 408 was revised only as necessary to reflect the 2017 amendments. There is no intent to change any result in ruling on evidence admissibility.

Rule 409. Offers to Pay Medical and Similar Expenses.

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

Comment

This rule tracks F.R.E. 409.

Section 4317 of Title 10, relating to admissibility of evidence of accommodation payments for personal injury, is not affected by the adoption of this rule.

D.R.E. 409 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. There is no intent to change any result in ruling on evidence admissibility.

Rule 410. Pleas, Plea Discussions, and Related Statements.

Except as otherwise provided in this rule, evidence of a plea of guilty later withdrawn with court permission, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, a plea of nolo contendere or an offer to plead guilty or nolo contendere to the crime charged or any other crime, is admissible in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

Comment

D.R.E. 410 differs in format and scope from F.R.E. 410. First, D.R.E. 410 applies only "against the person who made the plea or offer," whereas F.R.E. 410 applies "against the defendant who made the plea or participated in the plea discussions." Second, under F.R.E. 410(a)(4) statements made in the course of plea discussions with anyone but "an attorney for the prosecuting authority" fall outside the federal exclusionary rule. Finally, F.R.E. 410(b)(1) expressly permits the admission of a statement when part of the statement already has been admitted. The Permanent Advisory Committee on the Delaware Uniform Rules of Evidence considered such a provision unnecessary in D.R.E. 410. The admission of partial statements is addressed by D.R.E. 106.

The pre-2017 "Comment" to D.R.E. 410 was revised only as necessary to reflect the current language of F.R.E. 410. There is no intent to change any result in ruling on evidence admissibility.

Rule 411. Liability Insurance.

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

Comment

This rule tracks F.R.E. 411.

This rule is consistent with existing Delaware law. See Connor v. Lyness, Del. Supr., 284 A.2d 473 (1971), overruled on other grounds, Sammons v. Ridgeway, Del. Supr., 293 A.2d 547 (1972).

D.R.E. 411 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. There is no intent to change any result in ruling on evidence admissibility.

Rule 412. Rape Cases; Relevance of Victim's Past Behavior [Omitted].

Omitted.

Comment

Rule 412, adopted by Congress in 1978 (Pub. L. 95-540), was not recommended for adoption in Delaware because this area of law is adequately covered by 11 Del. C. §§ 3508 and 3509. See Rules 404(a)(2) and 608(a).

The pre-2017 "Comment" to D.R.E. 412 was revised only as necessary to reflect the 2017 amendments. There is no intent to change any result in ruling on evidence admissibility.

Rule 413. Evidence of Similar Crimes in Sexual Assault Cases [Omitted].

Omitted.

Comment

F.R.E. 413, 414, and 415 were adopted by Congress in 1994 (P.L. 103-322, Title XXXII, Subtitle I, § 320935(a), 108 Stat. 2136) over the objection of the Judicial Conference Advisory Committee on Evidence Rules, the Standing Committee on Rules of Practice and Procedure, and the Federal Judicial Conference. The Permanent Advisory Committee on the Delaware Uniform Rules of Evidence recommended in 2001 that the Delaware

Supreme Court not adopt provisions similar to F.R.E. 413, 414, and 415 for several reasons: (1) such propensity evidence is too prejudicial; (2) if such propensity evidence is permitted, the potential for a trial within a trial becomes likely; (3) the empirical data on the relevance of such evidence is conflicting; (4) F.R.E. 413, 414, and 415 were enacted over the objection of the relevant federal rule-making committees; (5) the Delaware Supreme Court's decision in Getz v. State, Del. Supr., 538 A.2d 726 (1988), held that such propensity evidence may conflict with the defendant's right to a presumption of innocence; and (6) the consensus of the Committee was that F.R.E. 413, 414, and 415 were unnecessary in Delaware because the prosecution of accused persons under the existing D.R.E. and relevant statutes, such as 11 Del. C. §§ 3507, and 3513, generally produces fair results.

Rule 414. Evidence of Similar Crimes in Child Molestation Cases [Omitted].

Omitted.

Comment

See Comment to D.R.E. 413.

Rule 415. Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation [Omitted].

Omitted.

Comment

See Comment to D.R.E. 413.

ARTICLE V. PRIVILEGES

Rule 501. Privileges Recognized Only as Provided.

Except as otherwise provided by Constitution or statute, court decision, these rules or other rules of court, no person has a privilege to:

(1) Refuse to be a witness;

(2) Refuse to disclose any matter;

(3) Refuse to produce any object or record; or

(4) Prevent another from being a witness or disclosing any matter or producing any object or record.

Comment

This rule tracks U.R.E. 501 and draft of F.R.E. 501 except that the words "court decision, these rules or other rules of court" were substituted for the words "these or other rules promulgated by the Supreme Court of this State."

F.R.E. as adopted by Congress does not include any rules in article V except for a different Rule 501 and a different Rule 502. With limited exceptions, these rules, in effect, leave the rules of evidence as to privilege in federal courts as they existed prior to the adoption of the F.R.E. The draft of article V of the F.R.E. as prepared by the United States Supreme Court Advisory Committee and submitted to Congress contained 13 rules which were similar to article V of the U.R.E. and the rules adopted herein. These proposed but not adopted rules are referred to in these comments as "draft rules." The rationale of Congress in rejecting article V, as presented to it, was that federal law should not supersede the law of the states in the area of privilege. The Committee did not believe this rationale was pertinent as to a state and therefore article V, modeled on the U.R.E. article V, is recommended for adoption in Delaware. The article, as adopted, is consistent (except for minor refinements) with existing Delaware law.

This rule allows for the continuation of privileges or exceptions to privileges specifically provided by the Constitution, by rule or decision of court or by statutes, such as 16 Del. C. § 909 or 12 Del. C. § 3914 [repealed].

D.R.E. 501 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. The pre-2017 "Comment" to D.R.E. 501 was revised only as necessary to reflect the 2017 amendments and the current language of the Federal Rules of Evidence. There is no intent to change any result in ruling on evidence admissibility.

Rule 502. Lawyer-Client Privilege.

(a) Definitions. As used in this rule:

(1) A "client" is a person, public officer or corporation, association or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer. For the purposes of this Rule, "client" shall include, without limitation, officers, directors, and employees of (a) any business entity that is organized under the laws of this State, and (b) any business entity organized under the laws of any nation other than the United States that owns or controls a business entity that is organized under the laws of this State.

(2) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance

of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(3) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or nation. For purposes of this Rule, "lawyer" shall include persons who are employed or engaged by a business entity, to serve as "in house" counsel to that entity and/or to any of its wholly owned or controlled affiliates.

(4) Omitted.

(5) A "representative of the lawyer" is one employed, or reasonably believed by the client to be employed, by the lawyer to assist the lawyer in the rendition of professional legal services.

(b) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (1) between the client or the client's representative and the client's lawyer or the lawyer's representative, (2) between the lawyer and the lawyer's representative, (3) by the client or the client's representative or the client's lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another in a matter of common interest, (4) between representatives of the client or between the client and a representative of the client, or (5) among lawyers and their representatives representing the same client.

(c) Who may claim the privilege. The privilege under this rule may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client or the successor, trustee or similar representative of a deceased client or the successor, trustee or similar representative of a corporation, association or other organization, whether or not in existence. A person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.

(d) Exceptions. There is no privilege under this rule:

(1) Furtherance of crime or fraud. If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

(2) Claimants through same deceased client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;

(3) Breach of duty by a lawyer or client. As to a communication relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer;

(4) Accusations against a lawyer. As to a communication necessary for a lawyer to defend in a legal proceeding an accusation that the lawyer assisted the client in criminal or fraudulent conduct;

(5) Document attested by a lawyer. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

(6) Joint clients. As to a communication relevant to a matter of common interest between or among 2 or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients.

(7) Public officer or agency. [Omitted].

Comment

See comment to D.R.E. 501.

The subsections of D.R.E. 502(a) were reordered in 2001 to track U.R.E. 502(a). U.R.E. 502 was based on a draft of F.R.E. 503.

U.R.E. 502(a) (4) was not adopted in Delaware. It was believed that a definition of a representative of a client should be left to case law.

D.R.E. 502(b) tracks U.R.E. 502(b) except that the word "therein" and the words "party in a pending action and concerning" were deleted and the word "in" was inserted in lieu thereof in D.R.E. 502(b)(3). The purpose of this change was to make D.R.E. 502(b)(3) comply with the original draft of the F.R.E. prepared by the Supreme Court Advisory Committee and to make it clear that D.R.E. 502(b)(3) applies even if no litigation is actually pending.

D.R.E. 502(c) tracks U.R.E. 502(c).

D.R.E. 502(d)(1), (2), (3), (4), (5), and (6) track U.R.E. 502(d)(1), (2), (3), (4) (5), and (6). U.R.E. 502(d)(7) was not adopted. The 1980 Committee believed that the Delaware Freedom of Information Act (29 Del. C., Chapter 100) adequately covers the area of privilege as it relates to public officers of agencies. The 1980 Committee also believed that U.R.E. 502(d)(7) would impose too great a burden upon a governmental agency.

For prior Delaware cases illustrating the law covered by this D.R.E., see State Hwy. v. 62,662.47 Acres of Land, Del. Super., 193 A.2d 799 (1963); Texaco, Inc. v. Phoenix Steel Corp., Del. Ch., 264 A.2d 523 (1970); Wallace v. Wilmington & N.R. Co., Del. Super., 8 Houst. 529, 18 A. 818 (1889); Riggs Nat'l Bank v. Zimmer, Del. Ch., 355 A.2d 709 (1976); Phillips v. Delaware Power & Light Co., Del. Super., 194 A.2d 690 (1963); Valente v. Pepsico, 68 F.R.D. 361 (D. Del. 1975); Graham v. Allis-Chalmers Mfg. Co., Del. Supr., 188 A.2d 125 (1963); Wise v. Western Union Tel. Co., Del. Super., 178 A. 640 (1935); State v. Brown, Del. Oyer & Term., 36 A. 458 (1896).

D.R.E. 502 was amended in 2017 to clarify that the attorney-client privilege extends to foreign parent entities of Delaware subsidiaries and covers in-house counsel of foreign entities and controlled affiliates.

Rule 503. Mental Health Provider, Physician, and Psychotherapist-Patient Privilege.

(a) Definitions. As used in this rule:

(1) A communication is "confidential" if not intended to be disclosed to third persons, except persons present to further the interest of the patient in the consultation, examination or interview, persons reasonably necessary for the transmission of the communication or persons who are participating in the diagnosis and treatment under the direction of the mental health provider, physician or psychotherapist, including members of the patient's family.

(2) A "mental health provider" is (A) a licensed professional counselor of mental health or licensed associate counselor as authorized under 24 Del. C. §§ 3001-19, or (B) a licensed clinical social worker as authorized under 24 Del. C. §§ 3901-13.

(3) A "patient" is a person who consults or is examined or interviewed by a physician or psychotherapist for treatment or diagnosis.

(4) A "physician" is a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be.

(5) A "psychotherapist" is (A) a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be, while engaged in the diagnosis or treatment of a mental or emotional condition, including alcohol or drug addiction, or (B) a person licensed or certified as a psychologist under the laws of any state or nation, while similarly engaged.

(b) General rule of privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications

made for the purpose of diagnosis or treatment of the patient's physical, mental or emotional condition, including alcohol or drug addiction, among the patient, the patient's mental health provider, physician or psychotherapist, and persons who are participating in the diagnosis or treatment under the direction of the mental health provider, physician or psychotherapist, including members of the patient's family.

(c) Who may claim the privilege. The privilege may be claimed by the patient, the patient's guardian or conservator, or the personal representative of a deceased patient. The person who was the mental health provider, physician or psychotherapist at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the patient.

(d) Exceptions.

(1) Proceedings for hospitalization. There is no privilege under this rule for a communication relevant to an issue in proceedings to hospitalize the patient for mental illness, if the mental health provider, physician or psychotherapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization.

(2) Examination by order of court. There is no privilege under this rule for a communication made in the course of a court-ordered investigation or examination of the physical, mental or emotional condition of the patient, whether a party or a witness, with respect to the particular purpose for which the examination is ordered unless the court orders otherwise.

(3) Condition an element of claim or defense. There is no privilege under this rule for a communication relevant to an issue of the physical, mental or emotional condition of the patient in any proceeding in which the patient relies upon the condition as an element of the patient's claim or defense or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense.

(4) Commission of crime or fraud. There is no privilege under this rule for a communication if the services of the mental health provider, physician or psychotherapist were sought or obtained to enable or aid anyone to commit or plan to commit what the patient knew, or reasonably should have known, was a crime or fraud or mental or physical injury to the patient or another individual.

(5) Danger to self or others. There is no privilege under this rule for a communication in which the patient has expressed an intent to engage in conduct likely to result in imminent death or serious physical injury to the patient or another individual.

(6) Breach of duty. There is no privilege under this rule for a communication relevant to a breach of duty by the mental health provider, physician or psychotherapist.

(7) Appointment of guardian; child abuse cases. There is no privilege under this rule for a communication relevant to a proceeding brought under 12 Del. C. § 3901 or 16 Del. C., Chapter 9.

Comment

D.R.E. 503 is based on U.R.E. 503, which is based on a draft of F.R.E. 504. See comment to D.R.E. 501. The 2001 amendments to D.R.E. 503 added subsections (a)(2), (d)(4), (d)(5), and (d)(6) and added "mental health provider" throughout the rule where required. Also, the subsections of D.R.E. 503(a) were reordered to track the corresponding provisions of U.R.E. 503(a).

D.R.E. 503(a)(3) tracks U.R.E. 503(a)(3) except that the words "for treatment or diagnosis" were added at the end. These words were added to make clear that only communications rendered during treatment or diagnosis are privileged.

D.R.E. 503(a)(1), (2), (4) and (5) track U.R.E. 503(a)(1), (2), (4) and (5), except that the definition of "mental health provider" is limited to licensed mental health providers recognized by relevant Delaware statutes already granting a confidential communication privilege.

It is intended that D.R.E. 503(a)(1) include assistants who work under the direct supervision of a mental health provider, physician or psychotherapist such as nurses, paramedics, etc.

D.R.E. 503(b) and (c) track tracks U.R.E. 503(b) and (c) and use the words "mental health provider, physician, or psychotherapist" as defined in D.R.E. 503(a).

D.R.E. 503(d)(1) tracks U.R.E. 503(d)(1) and uses the words "mental health provider, physician, or psychotherapist" as defined in D.R.E. 503(a).

D.R.E. 503(d)(2), (3), (4), (5), and (6) track U.R.E. 503(d)(2), (3), (4), (5), and (7). The alternative word "physical" was adopted.

The purpose of D.R.E. 503(d)(7), which does not appear in the F.R.E. or U.R.E., is to make clear that a person alleged to be in need of a guardian or

other representative because of advanced age, mental infirmity or physical incapacity cannot assert the privilege in the proceedings in which the guardian is sought and that the privilege is not generally available in child abuse cases.

The Delaware Code contains many statutes that may establish a qualified privilege or call for waiver of a privilege. Consult the index to the Delaware Code for the many statutory provisions that may provide for a qualified confidential communication privilege or waive a privilege already provided for by statute.

RULE 504. Spousal Privilege.

(a) Definitions. In this rule:

(1) "Confidential communication" means a communication that an individual made privately to the individual's spouse that was not intended for disclosure to any other person.

(2) "Spouse" means a present or former spouse.

(b) Competence to testify. An individual may testify for or against a spouse in any proceeding.

(c) General rule of privilege. An individual has a privilege to refuse to testify and to prevent the individual's spouse from testifying as to any confidential communication between the individual and the spouse during their marriage.

(d) Who may claim the privilege. An individual may claim the privilege on the individual's own behalf. An individual is presumed to have authority to claim the privilege on the spouse's behalf.

(e) Exceptions. There is no privilege under this rule in the following types of proceedings:

(1) A proceeding that charges one spouse with a wrong against the person or property of the other spouse.

(2) A proceeding that charges one spouse with a wrong against the person or property of a child of either spouse.

(3) A proceeding that charges one spouse with a wrong against the person or property of a person residing in the household of either spouse.

(4) A proceeding that charges one spouse with a wrong against the person or property of a third person committed in the course of committing a crime against the other spouse, a child of the either spouse, a person residing in the household of either spouse, or the third person.

(5) A proceeding brought under Title 13 of the Delaware Code, or Chapter 9 of Title 10 of the Delaware Code.

(6) Any proceeding when the interests of the spouses are adverse.

Comment

This rule is based on U.R.E. 504 which is based on draft of F.R.E. 505. See comment to Rule 501.

Rule 504(a) tracks U.R.E. 504(a), but was amended in 2017 to clarify that "spouse" includes a former spouse.

Rule 504(b) provides that an individual may testify for or against a spouse in civil as well as criminal cases. This rule removes the common law disability against 1 spouse testifying against the other. Such testimony is permitted unless the testimony involves a confidential and a privilege is asserted as to it.

Rule 504(c) generally tracks U.R.E. 504(b).

Rule 504(d) provides that an individual may claim the privilege on their own behalf and is presumed to have authority to claim the privilege on behalf of their spouse.

Rule 504(e) generally tracks U.R.E. 504(d) except that "wrong" appears instead of "crime" and Rule 504(d)(5) excludes the privilege in proceedings under Title 9 and Chapter 9 of Title 10 of the Delaware Code.

For prior Delaware cases illustrating the law covered by this rule, see Mole v. State, Del. Supr., 396 A.2d 153 (1978); State v. Thompson, Del. Super., 136 A.2d 336 (1957); Duonnolo v. State, Del. Supr., 397 A.2d 126 (1978).

D.R.E. 504 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. The pre-2017 "Comment" to D.R.E. 504 was revised only as necessary to reflect the 2017 amendments. There is no intent to change any result in ruling on evidence admissibility.

Rule 505. Religious Privilege.

(a) Definitions. As used in this rule:

(1) "Cleric means" a minister, priest, rabbi, accredited Christian Science practitioner or other similar functionary of a religious organization, or a person that an individual who consulted that person for spiritual advice reasonably believed to be a cleric.

(2) "Confidential communication" means a communication made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

(b) General rule of privilege. An individual has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication between the individual and the cleric while the cleric is serving as the individual's spiritual adviser.

(c) Who may claim the privilege. The individual may claim the privilege on the individual's own behalf. The cleric is presumed to have authority to claim the privilege on the individual's behalf. If the individual is incompetent or deceased, then an authorized personal representative may claim the privilege on the individual's behalf.

Comment

This rule is based on U.R.E. 505 which was based on draft of F.R.E. 506. See comment to Rule 501.

Rule 505(a) and (b) generally tracks U.R.E. 505(a) and (b).

Rule 505(c) tracks U.R.E. 505(c) except that the last sentence is based on the draft of F.R.E. 506(c) instead of U.R.E. 505(c).

Section 4316 of Title 10 [repealed], relating to exemption of minister of religion from testifying, should be repealed since it is superseded by this rule.

D.R.E. 505 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. The pre-2017 "Comment" to D.R.E. 505 was revised only as necessary to reflect the 2017 amendments. There is no intent to change any result in ruling on evidence admissibility.

Rule 506. Political Vote.

(a) General rule of privilege. Every person has a privilege to refuse to disclose how the individual voted during a political election conducted by secret ballot.

(b) Exceptions. This privilege does not apply if the court finds that the individual voted illegally or compels disclosure pursuant to the election laws of this State.

Comment

This generally rule tracks U.R.E. 506 which is based on draft of F.R.E. 507. See comment to Rule 501.

D.R.E. 506 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. The pre-2017 "Comment" to D.R.E. 506 was revised only as necessary to reflect the 2017 amendments. There is no intent to change any result in ruling on evidence admissibility.

Rule 507. Trade Secrets.

(a) General rule of privilege. A person has a privilege to refuse to disclose and to prevent other persons from disclosing a trade secret owned by the person.

(b) Who may claim the privilege. A person may assert the privilege on the person's behalf. A person's agent, or employee is presumed to have authority to assert the privilege on the person's behalf.

(c) Exception. A person may not assert the privilege if it would tend to conceal fraud or otherwise work injustice. If disclosure is directed the Court shall take such protective measures as the interests of the holder of the privilege, the interests of the parties and the interests of justice require.

Comment

This rule is based on U.R.E. 507 which is based on a draft of F.R.E. 508. See comment to Rule 501.

D.R.E. 507 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. The pre-2017 "Comment" to D.R.E. 507 was revised only as necessary to reflect the 2017 amendments. There is no intent to change any result in ruling on evidence admissibility.

Rule 508. Secrets of State and Other Official Information; Governmental Privileges.

(a) Claim of privilege. If the law of the United States creates a governmental privilege that the courts of this State must recognize under the Constitution of the United States, the privilege may be claimed as provided by the law of the United States.

(b) Recognition of privilege. A governmental privilege existing at common law, or created by the Constitution, statute or court rule of this State, shall be recognized.
(c) Effect of sustaining claim. If a claim of governmental privilege is sustained and it appears that a party is thereby deprived of material evidence, the court shall make any further orders the interests of justice require, including striking the testimony of a witness, declaring a mistrial, finding upon an issue as to which the evidence is relevant or dismissing the action.

Comment

Rule 508(a) and (c) tracks U.R.E. 508 which is based on draft of F.R.E. 509. See comment to Rule 501.

Rule 508(b) is new. The Committee believed that U.R.E. 508(b), which would abolish all governmental privileges except as created by the Constitution or statutes, is undesirable.

For prior Delaware cases illustrating this area of law, see Morris v. Avallone, Del. Super., 272 A.2d 344 (1970); Smith v. Smith, 18 Del. 365 (1899).

For a statute relating to this area of law, see 29 Del. C., Chapter 100 (Freedom of Information Act).

Rule 509. Identity of Informer.

(a) Rule of privilege. The United States or a state or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of a law to a law-enforcement officer or member of a legislative committee or its staff conducting an investigation.
(b) Who may claim. The privilege may be claimed by an appropriate representative of the public entity to which the information was furnished.
(c) Exceptions.
(1) Voluntary disclosure; informer a witness. No privilege exists under this rule if the identity of the informer or his interest in the subject matter of his communication has been disclosed to those who would have cause to resent the communication by a holder of the privilege or by the informer's own action, or if the informer appears as a witness for the government.

(2) Testimony on relevant issue. If it appears in a criminal case that an informer may be able to give testimony which would materially aid the defense, or in a civil case which would be relevant to a fair determination of a material issue on the merits of a case in which a public entity is a party, and the informed public entity invokes the privilege, the court shall give the public entity an opportunity to show in camera facts relevant to determining whether the informer can, in fact, supply that testimony. The showing will ordinarily be in the form of affidavits, but the court may direct that testimony be taken if it finds that the matter cannot be resolved satisfactorily upon affidavit. If the court finds there is a reasonable probability that the informer can give the testimony, and the public entity elects not to disclose his identity, in criminal cases the court on motion of the defendant or on its own motion shall grant appropriate relief, which may include 1 or more of the following: Requiring the prosecuting attorney to comply, granting the defendant additional time or a continuance, relieving the defendant from making disclosures otherwise required of him, prohibiting the prosecuting attorney from introducing specified evidence, and dismissing charges. In civil cases, the court may make any order the interests of justice require. Evidence submitted to the court shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the informed public entity. All counsel and parties are permitted to be present at every stage of proceedings under this subdivision except a showing in camera at which no counsel or party shall have the right to be present.

Comment

Except for Rule 509(c)(2) this rule tracks U.R.E. 509 which is based on draft of F.R.E. 510. See comment to Rule 501.

In Rule 509(c)(2) the words "have the right" were substituted for the words "be permitted" in the last line to indicate that the presence of counsel or parties at an in camera hearing is discretionary with the court. The first sentence was also rewritten to conform this rule to State v. Flowers, Del. Super., 316 A.2d 564 (1973).

Proceedings before a grand jury are deemed to be covered by this rule.

For prior Delaware cases illustrating the law covered by this rule, see Preston v. State, Del. Supr., 338 A.2d 562 (1975); Riley v. State, Del. Supr., 249 A.2d 863 (1969), cert. denied, 395 U.S. 947, 89 S. Ct. 2016, 23 L. Ed. 2d 465 (1969).

This rule follows the rule set forth in State v. Flowers, Del. Super., 316 A.2d 564 (1973).

Rule 510. Waiver of privilege or work product; limitations on waiver.

The following provisions apply, in the circumstances set out, to disclosure of information or communications that are privileged under these rules or that are subject to work-product protection.

(a) Waiver by intentional disclosure. A person waives a privilege conferred by these rules or work-product protection if such person or such person's predecessor while holder of the privilege or while entitled to work-product protection intentionally discloses or consents to disclosure of any significant part of the privileged or protected communication or information. This rule does not apply if the disclosure itself is privileged or protected.

(b) Disclosure; scope of a waiver. When the disclosure waives a privilege conferred by these rules or work-product protection, the waiver extends to an undisclosed communication or information only if:

(1) the waiver is intentional;

(2) the disclosed and undisclosed communications or information concern the same subject matter; and

(3) they ought in fairness to be considered together.

(c) Inadvertent disclosure. A disclosure does not operate as a waiver if:

(1) the disclosure is inadvertent;

(2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and

(3) the holder promptly took reasonable steps to rectify the error, including following any applicable court procedures to notify the opposing party or to retrieve or request destruction of the information disclosed.

(d) Disclosure Made in a Non-Delaware Proceeding. Notwithstanding anything in these rules to the contrary, a disclosure made in a non-Delaware proceeding does not operate as a waiver if the disclosure is not a waiver under the law of the jurisdiction where the disclosure occurred.

(e) Disclosure to a Law Enforcement Agency. Notwithstanding anything in these rules to the contrary, a disclosure made to a law enforcement agency pursuant to a confidentiality agreement does not operate as a waiver of an existing privilege.

(f) Controlling Effect of a Court Order. Notwithstanding anything in these rules to the contrary, a court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court – in which event the disclosure is also not a waiver in any other proceeding.
(g) Controlling Effect of a Party Agreement. An agreement on the effect of disclosure in a proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.
(h) Definition. In this rule:

(1) "work-product protection" means the protection that applicable law provides for documents and tangible things (or their intangible equivalents) prepared in anticipation of litigation or for trial.

Comment

The revisions to D.R.E. 510 are based on F.R.E. 502, which rule has been the subject of almost 200 law review articles. At least 30 articles are comprehensive discussions of the rule and post-enactment judicial use of the rule. This proliferation of learned journal commentary on inadvertent disclosure of privileged communications parallels the exponential increase in e-discovery requests and responses in major cases. F.R.E. 502 takes a "middle ground" position on inadvertent disclosure, requiring an inquiry into the means taken by counsel to identify and protect privileged communications, unless the parties agree on a different protocol for dealing with inadvertent disclosure. The revised D.R.E. 510 contains similar protection against the admission or use of inadvertently disclosed privileged or protected communications to ensure the integrity of the litigation process in Delaware.

D.R.E. 510 conforms to the federal rule in terms of handling inadvertent disclosure. A leading case interpreting F.R.E. 502 is *Rhoads Industries, Inc. v. Building Materials Corp.*, 254 F.R.D. 216 (E.D. Pa. 2008). At least one Delaware decision deals with claims of waiver of attorney-client privilege through inadvertent disclosure and contains the following discussion:

An inadvertent disclosure of privileged communications will not necessarily operate to waive the attorney-client privilege. In order to determine whether the inadvertently disclosed documents have lost their privileged status, the Court must consider the following factors: (1) the reasonableness of the precautions taken to prevent inadvertent disclosure; (2) the time taken to rectify the error; (3) the scope of discovery and extent of disclosure; and (4)

the overall fairness, judged against the care or negligence with which the privilege is guarded.

In re Kent County Adequate Public Facilities Ordinances Litigation, 2008 Del. Ch. LEXIS 48, at *24 (Apr. 19, 2008) (Noble, V.C.) (citations omitted). The factors set forth in these decisions are not explicitly codified in D.R.E. 510, as they constitute non-determinative guidelines that may vary from case to case.

As in F.R.E. 502, new D.R.E. 510 also clarifies that when a voluntary disclosure constitutes a waiver of attorney-client privilege as to a communication or information, the scope of the waiver is generally limited to the privileged communication or information disclosed. The rule does not disturb existing Delaware law regarding the scope of waiver of work-product protection by voluntary disclosure. *See Rollins Properties, Inc. v. CRS Sirrine*, Inc., 1989 WL 158471 (Del. Super. Dec. 13, 1989).

The rule governs only certain waivers by disclosure and is not intended to alter existing law with respect to waiver of privilege or work product protection by other means. *See, e.g., Baxter Int'l, Inc. v. Rhone-Poulenc Rorer, Inc.*, 2004 WL 2158051 (Del. Ch. Sept. 17, 2004) (discussing "at issue" exception to attorney-client privilege as form of waiver "where the issue was lack of good faith" (citation omitted)).

Subsection 510(e) codifies the ruling by Chancellor Chandler in *Saito v. McKesson HBOC, Inc.*, Civ. A. 18553, 2002 WL 31657622 (Del. Ch. Nov. 13, 2002). Saito involved the question of whether the defendant waived its work-product protection as to the documents at issue by sharing them with the SEC in an investigation.

Subsection 510(f) contains the introductory clause, "[n]otwithstanding anything in these rules to the contrary," in part so that a court may allow the parties in a matter to agree to quick-peek arrangements without pre-production privilege review. Otherwise, the parties to such an arrangement may be deemed to have waived a privilege pursuant to subsection 510(a).

Rule 511. Privileged Matter Disclosed Under Compulsion or Without Opportunity to Claim Privilege.

A claim of privilege is not defeated by a disclosure which was (1) compelled erroneously or (2) made without opportunity to claim the privilege.

Comment

This rule tracks U.R.E. 511 which is based on draft of F.R.E. 512. See comment to Rule 501.

Rule 511(2) should be interpreted as meaning that the disclosure was made without the party seeking the privilege having the opportunity to make a timely objection. An example of this is if the disclosure was blurted out by a witness during examination, or was made outside the presence of the privileged person. Failure to recognize the legal existence of the privilege is not deemed to be a lack of opportunity and therefore a failure to recognize and timely object may result in waiver of the privilege.

Rule 512. Comment Upon or Inference from Claim of Privilege; Instruction.

(a) Comment or inference not permitted. The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.
(b) Claiming privilege without knowledge of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.
(c) Jury instruction. Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom.

Comment

This rule tracks U.R.E. 512 which is based on the draft of F.R.E. 513. See comment to Rule 501.

Rule 513. Reporter's Privilege.

A reporter may not decline to testify except as provided by statute.

Comment

There is no similar rule in U.R.E. or F.R.E. Thus the rule is needed because of 10 Del. C. §§ 4320-4326, the Delaware Reporters Privilege Act.

Article VI. Witnesses

Rule 601. Competency to Testify in General.

Every person is competent to be a witness unless these rules provide otherwise.

Comment

The rule tracks U.R.E. 601 and the first sentence of F.R.E. 601. The remainder of F.R.E. 601 was deemed to be inapplicable to a state. This rule is the same as the first sentence of F.R.E. 601.

This rule supersedes the Delaware Dead Man's Statute, 10 Del. C. § 4302, which should now be repealed.

See Rule 104(a) as to preliminary questions as to qualification of witness.

This rule modifies existing Delaware case law. See State v. Timmons, Del. Gen. Sess., 2 Del. 528 (1833).

For prior Delaware cases illustrating the law covered by this rule, see Connor v. Lyness, Del. Supr., 284 A.2d 473 (1971); Armstrong v. Timmons, Del. Super., 3 Del. 342 (1841).

D.R.E. 601 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. There is no intent to change any result in ruling on evidence admissibility.

Rule 602. Need for Personal Knowledge.

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

Comment

This rule tracks F.R.E. 602.

D.R.E. 602 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. There is no intent to change any result in ruling on evidence admissibility.

Rule 603. Oath or Affirmation to Testify Truthfully.

Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience.

Comment

This rule tracks F.R.E. 603.

See 10 Del. C. §§ 5321-5324 for the usual forms of oaths.

This rule provides additional leeway to the court to prescribe a form of oath which may not be covered by, or be consistent with, 10 Del. C. §§ 5321-5324.

D.R.E. 603 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. There is no intent to change any result in ruling on evidence admissibility.

Rule 604. Interpreter.

An interpreter must be qualified and must give an oath or affirmation to make a true translation.

Comment

D.R.E. 604 tracks F.R.E. 604.

Delaware has implemented a certification procedure for court interpreters providing services in Delaware and has adopted a Code of Professional Responsibility for court interpreters. *See* Administrative Directive No. 107, Del. Supr., Veasey, C.J. (Apr. 4, 1996).

D.R.E. 604 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. There is no intent to change any result in ruling on evidence admissibility.

Rule 605. Judge's Competency as a Witness.

The presiding judge may not testify as a witness at the trial. A party need not object to preserve the issue.

Comment

This rule tracks F.R.E. 605.

Article IV, § 19 of the Delaware Constitution prohibits judges from charging juries with respect to matters of fact (commenting on the facts). Porter v. State, Del. Supr., 243 A.2d 699 (1968).

This rule modifies existing Delaware case law. See Delaware Lodge No. 1 v. Allmon, Del. Super., 39 A. 1098 (1897); State v. Brown, Del. Gen. Sess., 40 A. 938 (1898).

D.R.E. 605 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. There is no intent to change any result in ruling on evidence admissibility.

Rule 606. Juror's Competency as a Witness.

(a) At the Trial. A juror may not testify as a witness before the other jurors at the trial. If a juror is called to testify, the court must give a party an opportunity to object outside the jury's presence.

(b) During an Inquiry into the Validity of a Verdict or Indictment.

(1) Prohibited Testimony or Other Evidence. During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

(2) Exceptions. A juror may testify about whether:

(A) extraneous prejudicial information was improperly brought to the jury's attention;

(B) an outside influence was improperly brought to bear on any juror; or

(C) a clerical mistake was made in entering the verdict on the verdict form.

Comment

This rule tracks F.R.E. 606.

Rule 606(b) modifies existing Delaware case law. See Watson v. State, Del. Supr., 184 A.2d 780 (1962).

The 2014 amendment to D.R.E. 606(b) adopts the exception in F.R.E. 606(b)(2)(C), which permits juror testimony in the event "a mistake was made in entering the verdict on the verdict form." The addition of "clerical" in D.R.E. 606(b)(2)(C) is intended to preclude any juror from impeaching his or her verdict by asserting that the entry of the verdict was contrary to the juror's original intention.

D.R.E. 606 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. There is no intent to change any result in ruling on evidence admissibility.

Rule 607. Who May Impeach a Witness.

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

Comment

This rule tracks F.R.E. 607. This rule modifies existing Delaware case law. See Concord Towers, Inc. v. Long, Del. Supr., 348 A.2d 325 (1975).

D.R.E. 607 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. There is no intent to change any result in ruling on evidence admissibility.

Rule 608. A Witness's Character for Truthfulness or Untruthfulness.

(a) Reputation or Opinion Evidence. Except as otherwise provided by statute, a witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

(b) Specific Instances of Conduct. Except for a criminal conviction under Rule 609 or evidence of bias under Rule 616, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:

(1) the witness; or

(2) another witness whose character the witness being cross-examined has testified about.

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

Comment

D.R.E. 608(a) differs from F.R.E. 608. The words "Except as otherwise provided by statute appear at the beginning of D.R.E. 608(a). Sections 3508

and 3509 of Title 11 relate to the evidence as to the sexual conduct of the complaining witness in prosecutions for rape or rape-related offenses. The references in F.R.E. 608 to opinion evidence were originally omitted from D.R.E. 608(a) but were added in 2001 to conform this rule to existing Delaware practice. See D.R.E. 405.

For prior Delaware cases illustrating the areas of law covered by D.R.E. 608(a), see Woods v. State, Del. Supr., 315 A.2d 589 (1973) (guidelines in rape cases) and State v. Cox, Del. Gen. Sess., 181 A. 654 (1935).

A witness's bias is never a collateral issue within the meaning of D.R.E. 608(b), and extrinsic evidence is admissible to establish that the witness has a motive to testify falsely. Weber v. State, Del. Supr., 457 A.2d 674 (1983). See D.R.E. 616.

A party who intends to introduce evidence on cross-examination pursuant to D.R.E. 608(b) should first seek a ruling from the trial judge as to the admissibility of the evidence.

D.R.E. 608(b) modified prior Delaware case law. See Williams v. State, Del. Supr., 301 A.2d 88 (1973) and Steigler v. State, Del. Supr., 277 A.2d 662 (1971).

See D.R.E. 404(a)(2) and 412.

D.R.E. 608 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. The pre-2017 "Comment" to D.R.E. 608 was revised only as necessary to reflect the 2017 amendments. There is no intent to change any result in ruling on evidence admissibility.

Rule 609. Impeachment by Evidence of a Criminal Conviction.

(a) General rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime must be admitted but only if the crime (1) constituted a felony under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect or (2) involved dishonesty or false statement, regardless of the punishment.
(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of

the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old, as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use it so that the party has a fair opportunity to contest its use.

(c) Effect of pardon, annulment or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent felony, or (2) the conviction has been the subject of a pardon, annulment or other equivalent procedure based on a finding of innocence.

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

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

Comment

The Permanent Advisory Committee on the Delaware Uniform Rules of Evidence recommended retaining D.R.E. 609 as it existed in 2001, with one minor word change in D.R.E. 609(c), and not adopt F.R.E. 609 in effect on December 31, 2000. The Committee recommended rejecting F.R.E. 609 because it applies a different test of admissibility for felony impeachment between a defendant-witness and a witness. The Committee believed that this rule should be the same for all witnesses. A question as to the admissibility of a felony conviction under DRE 609(a)(1) should first be presented to the trial judge out of the presence of the jury to permit the judge to apply the rule's required balancing analysis.

D.R.E. 609(b) tracks F.R.E. 609(b).

D.R.E. 609(c) tracks F.R.E. 609(c) except it substitutes the word "felony" for the words "crime which was punishable by death or imprisonment in excess of one year."

D.R.E. 609(d) and (e) track F.R.E. 609(d) and (e).

For cases illustrating the law covered by D.R.E. 609, see Archie v. State, Del. Supr., 721 A.2d 924 (1998); Wilson v. Sico, Del. Supr., 713 A.2d 923 (1998); Tucker v. State, Del. Supr., 692 A.2d 416 (1996) (Table), Webb v. State, Del. Supr., 663 A.2d 452 (1995); Gregory v. State, Del. Supr., 616 A.2d 1198 (1992).

D.R.E. 609 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. There is no intent to change any result in ruling on evidence admissibility.

Rule 610. Religious Beliefs or Opinions.

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

Comment

This rule tracks F.R.E. 610. This rule modifies existing Delaware case law. See State v. Townsend, Del. Super., 2 Del. 543 (1837).

D.R.E. 610 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. There is no intent to change any result in ruling on evidence admissibility.

Rule 611. Mode and Order of Examining Witnesses and Presenting Evidence.

(a) Control by the Court; Purposes. The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:

(1) make those procedures effective for determining the truth;

(2) avoid wasting time; and

(3) protect witnesses from harassment or undue embarrassment.

(b) Scope of Cross-Examination. Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility. The court may allow inquiry into additional matters as if on direct examination.

(c) Leading Questions. Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. Ordinarily, the court should allow leading questions:

(1) on cross-examination; and

(2) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

Comment

This rule tracks F.R.E. 611.

For prior Delaware cases illustrating the areas of law covered by Rule 611(a), see Wallace v. State, Del. Supr., 211 A.2d 845 (1965); Bove v. State, Del. Supr., 134 A. 630 (1926).

For prior Delaware cases illustrating the areas of law covered by Rule 611(b), see Steigler v. State, Del. Supr., 277 A.2d 662 (1971); Watson v. State, Del. Supr., 184 A.2d 780 (1962); Zutz v. State, Del. Supr., 160 A.2d 727 (1960); State v. Cox, 37 Del. 238, 181 A. 654 (1935).

D.R.E. 611 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. There is no intent to change any result in ruling on evidence admissibility.

Rule 612. Writing or Object Used To Refresh a Witness's Memory.

(a) While Testifying. If, while testifying, a witness uses a writing or object to refresh his memory, an adverse party is entitled to have the writing or object produced at the trial, hearing or deposition in which the witness is testifying.

(b) Before Testifying. If, before testifying, a witness uses a writing or object to refresh his memory for the purpose of testifying and the court in its discretion determines that the interests of justice so require, an adverse party is entitled to have the writing or object produced, if practicable, at the trial, hearing or deposition in which the witness is testifying.

(c) Terms and Conditions of Production and Use. A party entitled to have a writing or object produced under this rule is entitled to inspect it, to cross-examine the witness about it and to introduce in evidence any portions that relate to the witness's testimony. If production of the writing or object at the trial, hearing or deposition is impracticable, the court may order it made available for inspection. If the producing party claims that the writing or object contains matters not related to the subject matter of the testimony, the

court must examine the writing or object in camera, delete any unrelated portion and order that the rest be delivered to the adverse party. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing or object is not produced, made available for inspection or delivered pursuant to order under this rule, the court may issue any order justice requires. But if the prosecution does not comply in a criminal case, the court must strike the witness's testimony or — if justice so requires — declare a mistrial.

Comment

This rule tracks U.R.E. 612 which differs in form but not in substance from F.R.E. 612. The Committee believed that the Uniform Rule was clearer.

For prior Delaware case illustrating the law covered by this rule, see Terry & Sons v. American Fruit Growers, Inc., Del. Super., 139 A. 259 (1925).

D.R.E. 612 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. There is no intent to change any result in ruling on evidence admissibility.

Rule 613. Witness's Prior Statement.

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

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

(c) Exception. If a witness does not clearly admit that the witness has made the prior inconsistent statement, extrinsic evidence of the statement is admissible.

Comment

Rule 613(a) tracks F.R.E. 613(a).

Rule 613(b) tracks F.R.E. 613(b).

Rule 613(c) does not appear in the F.R.E. or U.R.E. It follows the Florida Rules of Evidence except the word "clearly" was substituted for the word "distinctly."

The purpose of Rule 613(c) is to allow extrinsic evidence to be introduced if a witness hedges and neither admits nor denies a prior inconsistent statement.

For prior case illustrating the areas of law covered by Rule 613(a), see Jenkins v. State, Del. Supr., 305 A.2d 610 (1973).

D.R.E. 613 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. There is no intent to change any result in ruling on evidence admissibility.

Rule 614. Court's Calling or Examining a Witness.

(a) Calling. The court may call a witness on its own or at a party's request. Each party is entitled to cross-examine the witness.
(b) Examining. The court may examine a witness regardless of who calls the witness.
(c) Objections. A party may object to the court's calling or examining a witness either at that time or at the next opportunity when the jury is not present.

Comment

This rule tracks F.R.E. 614.

The Committee believed that Rule 614(a) should be used sparingly in jury trials. If a judge proposes to call a witness in a jury trial he should advise counsel out of the presence of the jury and give counsel opportunity to object. The Committee recognized that this rule may be helpful in nonjury trials, especially if a party is appearing pro se. In all cases, however, the parties should be given an opportunity to object to the calling of a witness by the court before the witness is called.

D.R.E. 614 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. There is no intent to change any result in ruling on evidence admissibility.

Rule 615. Excluding Witnesses.

At a party's request, the court may order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:
(a) a party who is a natural person;
(b) an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney or;
(c) a person whose presence a party shows to be essential to presenting the party's claim or defense.

Comment

This rule tracks F.R.E. 615 except that "may" was substituted for "must" in the first line. It was believed that the court should be given latitude as to whether witnesses should be sequestered. It was recognized that in most cases a request for sequestration will be granted but that it is sometimes desirable not to sequester a particular witness, especially an expert witness.

F.R.E. 615(d) has not been included in D.R.E. 615.

For prior cases illustrating the areas of law covered by this rule, see Fountain v. State, Del. Supr., 382 A.2d 230 (1977); Derrickson v. State, Del. Supr., 321 A.2d 497 (1974).

D.R.E. 615 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. The pre-2017 "Comment" to D.R.E. 615 was revised only as necessary to reflect the current language of F.R.E. 615. There is no intent to change any result in ruling on evidence admissibility.

Rule 616. Bias of a Witness

A witness's credibility may be attacked with evidence of the witness's bias, prejudice or interest for or against any party to the case.

Comment

D.R.E. 616 tracks U.R.E. 616.

D.R.E. 616 codifies the principle that the bias of a witness is subject to exploration at trial Weber v. State, Del. Supr., 457 A.2d 674 (1983). For a definition of bias, see United States v. Abel, 469 U.S. 45 (1984). For other Delaware cases illustrating how this rule should be applied, see Garden v.

Sutton, Del. Supr., 683 A.2d 1041 (1996) and Snowden v. State, Del. Supr., 672 A.2d 1017 (1996).

A party who intends to introduce evidence pursuant to D.R.E. 616 should first seek a ruling from the trial judge as to the admissibility of the evidence.

D.R.E. 616 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. There is no intent to change any result in ruling on evidence admissibility.

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

Rule 701. Opinion Testimony by Lay Witnesses.

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:
(a) rationally based on the witness's perception;
(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Comment

D.R.E. 701 tracks F.R.E. 701 in effect on December 31, 2000.

D.R.E. 701 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. There is no intent to change any result in ruling on evidence admissibility.

Rule 702. Testimony by Expert Witnesses.

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
(b) the testimony is based on sufficient facts or data;
(c) the testimony is the product of reliable principles and methods; and
(d) the expert has reliably applied the principles and methods to the facts of the case.

Comment

D.R.E. 702 was amended in 2001 to track F.R.E. 702 in effect on December 31, 2000.

D.R.E. 702 is consistent with the United States Supreme Court's decisions in Kumho Tire Co., Ltd v. Carmichael, 526 U.S. 137 (1999) and Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993). See also M.G. Bancorporation, Inc. v. LeBeau, Del. Supr., 737 A.2d 513 (1999) (adopting Kumho Tire and Daubert as the correct interpretation of D.R.E. 702), Nelson v. State, Del. Supr., 628 A.2d 69 (1993).

D.R.E. 702 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. There is no intent to change any result in ruling on evidence admissibility.

Rule 703. Bases of an Expert's Opinion Testimony .

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

Comment

D.R.E. 703 tracks F.R.E. 703 in effect on December 31, 2000, except the words "Upon objection" have been inserted at the beginning of the last sentence of D.R.E. 703. These words were added to ensure that any party who wants to exclude expert basis information from the jury must raise the issue by objection.

See D.R.E. 602.

D.R.E. 703 is consistent with Gibbons v. Schenley Indus., Inc., Del. Ch., 339 A.2d 460 (1975) and Storey v. Castner, Del. Supr., 314 A.2d 187 (1973).

D.R.E. 703 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. There is no intent to change any result in ruling on evidence admissibility.

Rule 704. Opinion on Ultimate Issue.

Testimony in the form of an opinion otherwise admissible is not objectionable merely because it embraces an ultimate issue to be decided by the trier of fact.

Comment

D.R.E. 704 tracks F.R.E. 704(a) except for the addition of the word "merely."

The 1980 Committee added the word "merely" to make it clear that this rule must be read in connection with D.R.E. 701. Thus, testimony on the ultimate issue is not allowed unless admissible under D.R.E. 701.

In 2001, the Permanent Advisory Committee on the Delaware Uniform Rules of Evidence considered adopting F.R.E. 704(b) in effect on December 31, 2000. That provision prohibits an expert from stating an opinion about whether a defendant possessed the requisite state of mind or condition constituting an element of the crime charged or of a defense thereto. The Committee found F.R.E. 704(b) inconsistent with D.R.E. 704 and, therefore, recommended against adopting a similar provision.

This rule may be inconsistent with Wagner v. Shanks, Del. Supr., 194 A.2d 701 (1963) and Matthews v. State, Del. Supr., 276 A.2d 265 (1971). It is consistent, however, with Szewczyk v. Doubet, Del. Supr., 354 A.2d 426 (1976) and Itek Corp. v. Chicago Aerial Indus., Inc., Del. Super., 274 A.2d 141 (1971).

D.R.E. 704 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. There is no intent to change any result in ruling on evidence admissibility.

Rule 705. Disclosing the Facts or Data Underlying an Expert's Opinion.

(a) Disclosure of Facts and Data Underlying an Expert Opinion. Unless the court orders otherwise, an expert may state an opinion — and give the reasons for it — without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

(b) Objection. An adverse party may object to the testimony of an expert on the ground that the expert does not have a sufficient basis for expressing an opinion. The adverse party may, before the witness gives an opinion, be allowed to conduct a voir dire examination directed to the underlying facts or data on which the opinion is based.

Comment

D.R.E. 705(a) tracks F.R.E. 705 in effect on December 31, 2000.

D.R.E. 705(b) was adopted in 1980 and is not contained in F.R.E. 705 or U.R.E. 705.

D.R.E. 705 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. There is no intent to change any result in ruling on evidence admissibility.

Rule 706. Court-Appointed Expert Witnesses.

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

(b) Expert's Role. The court must inform the expert of the expert's duties. The court may do so in writing and have a copy filed with the clerk or may do so orally at a conference in which the parties have an opportunity to participate. The expert:

(1) must advise the parties of any findings the expert makes;

(2) may be deposed by any party;

(3) may be called to testify by the court or any party; and

(4) may be cross-examined by any party, including the party that called the expert.

(c) Compensation. The expert is entitled to a reasonable compensation, as set by the court. The compensation is payable as follows:

(1) in a criminal case or in a civil case involving just compensation under the Fifth Amendment, from any funds that are provided by law; and

(2) in any other civil case, by the parties in the proportion and at the time that the court directs — and the compensation is then charged like other costs.

(d) Disclosing the Appointment to the Jury. The court may authorize disclosure to the jury that the court appointed the expert.

(e) Parties' Choice of Their Own Experts. This rule does not limit a party in calling its own experts.

Comment

The Committee omitted a previous rule dealing with court appointed expert because it more properly belongs in the Rules of Civil or Criminal Procedure and should not be included in the Rules of Evidence. See Federal Rules of Criminal Procedure, Rule 28.

D.R.E. 706 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. There is no intent to change any result in ruling on evidence admissibility.

ARTICLE VIII. HEARSAY

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay.

(a) Statement. "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

(b) Declarant. "Declarant" means the person who made the statement.

(c) Hearsay. "Hearsay" means a statement that:

(1) the declarant does not make while testifying at the current trial or hearing; and

(2) a party offers in evidence to prove the truth of the matter asserted in the statement.

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

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

(A) is inconsistent with the declarant's testimony, or

(B) in civil cases, is consistent with the declarant's testimony and is offered:

(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; or

(C) in criminal cases, is consistent with declarant's testimony and is permitted under 11 *Del. C.* § 3507; or

(D) identifies a person.

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

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

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

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

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

(E) was made by the party's coconspirator during and in furtherance of the conspiracy; provided that the conspiracy has first been established by the preponderance of the evidence to the satisfaction of the court

Comment

D.R.E. 801(a), (b) and (c) track F.R.E. 801(a), (b) and (c).

D.R.E. 801(d) tracks F.R.E. except for Rule 801(d)(1)(A) and (C) and 801(d)(2)(E).

D.R.E. 801(d)(1)(A) and (C) track F.R.E. 801(d)(1) except the words "and was given under oath subject to the penalty of perjury at a trial, hearing or other proceeding or in a deposition" are deleted as they appear at the end of F.R.E. 801(d)(1)(A). This wording is consistent with the original draft of F.R.E. 801(d)(1) before amendment by Congress. U.R.E. 801(d)(1) is consistent with the adopted language for civil (but not criminal) cases. The words "perceived earlier" as they appear at the end of F.R.E. 801(d)(1)(C) were deleted as being unnecessary. The 2014 amendment to D.R.E. 801(d)(1) reflects that the Delaware Supreme Court has detached 11 Del. C. § 3507 from its interpretation of D.R.E. 801(d). *See Richardson v. State*, 43 A.3d 906 (Del. 2012).

D.R.E. 801(d)(2)(E) tracks F.R.E. 801(d)(2)(E) except for the proviso added at the end of D.R.E. 801(d)(2)(E). The additional wording was deemed necessary to protect the rights of an alleged co-conspirator.

In 2017, D.R.E. 801(d)(1)(B) was amended to incorporate a change to F.R.E. 801(d)(1)(B) that permitted the admission of a testifying witness' prior consistent statements as substantive evidence. This amendment is limited to civil cases.

D.R.E. 801(d)(2)(E) must be applied in a manner consistent with Bruton v. United States, 391 U.S. 123 (1968).

This rule modifies D.R.E. 104(a) and (b) as to the establishment of a conspiracy.

Evidence which would otherwise be hearsay, if offered for a limited purpose or if part of the res gestae, may be received in evidence. See D.R.E. 104 and 803 and Kreisher v. State, Del. Supr., 303 A.2d 651 (1973).

For prior Delaware cases illustrating the law covered by this rule, see Heldmyer v. Cleaver, Del. Super., 104 A. 635 (1918); Cooper v. Baker, Del. Super., 139 A. 254 (1927); Husband H. v. Wife H., Del. Supr., 358 A.2d 724 (1976); State v. Boleslowski, Del. Oyer & Term., 178 A. 431 (1934); State v. Hamilton, Del. Gen. Sess., 67 A. 836 (1907); Perry v. Grier, Del. Super., 40 A. 1130 (1894); Cerchio v. Mullins, Del. Super., 138 A. 277 (1922); Klair v. Philadelphia B. & W.R.R., Del. Super., 78 A. 1085 (1920); Hollis v. Vandergrift, Del. Super., 10 Del. 521 (1878); Geylin v. DeVilleroi, Del. Super., 7 Del. 311 (1859); State v. Frantz, Del. Gen. Sess., 121 A. 652 (1922); Duonnolo v. State, Del. Supr., 397 A.2d 126 (1978).

The parol evidence rule is not set forth in the rules of evidence because it is a rule of substantive law, not a rule of evidence. See Brandywine Shoppe, Inc. v. State Farm Fire & Cas. Co., Del. Super., 307 A.2d 806 (1973).

D.R.E. 801 was also amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. Those amendments are intended to be stylistic only. There is no intent to change any result in ruling on evidence admissibility.

Rule 802. The Rule Against Hearsay.

Hearsay is not admissible except as provided by law or by these Rules.

Comment

This rule tracks U.R.E. 802 rather than F.R.E. 802 which was deemed to be inapplicable to a state.

D.R.E. 802 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. There is no intent to change any result in ruling on evidence admissibility.

Rule 803. Exceptions to the Rule Against Hearsay Regardless of Whether the Declarant Is Available as a Witness.

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

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

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

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

(4) Statement Made for Medical Diagnosis or Treatment. A statement that:

(A)is made for — and is reasonably pertinent to — medical diagnosis or treatment; and

(B)describes medical history, past or present symptoms or sensations; their inception; or their general cause.

(5) Recorded Recollection. A record that:

(A)is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;

(B)was made or adopted by the witness when the matter was fresh in the witness's memory; and

(C)accurately reflects the witness's knowledge.

If admitted, the memorandum or record may be read into evidence or may be received as an exhibit in the court's discretion.

(6) Records of a Regularly Conducted Activity. A memorandum, report, record or data compilation, in any form of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by — or from information transmitted by — someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the memorandum, report, record or data compilation was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

(7) Absence of a Record of a Regularly Conducted Activity. Evidence that a matter is not included in a record described in paragraph (6) if:

(A) the evidence is admitted to prove that the matter did not occur or exist;

(B) a record was regularly kept for a matter of that kind unless the sources of information or other circumstances indicate lack of trustworthiness; and

(C) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

(8) Public Records. Records, reports, statements or data compilations, in any form, of a public office or agency setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law. But the following are not within this exception to the hearsay rule:

(A) Investigative reports by police and other law-enforcement personnel;

(B) investigative reports prepared by or for a government, a public office or an agency when offered by it in a case in which it is a party;

(C) factual findings offered by the government in criminal cases;

(D) factual findings resulting from special investigation of a particular complaint, case or incident;

(E) any matter as to which the sources of information or other circumstances indicate lack of trustworthiness.

(9) Public Records of Vital Statistics. A record of a birth, death, or marriage, if reported to a public office in accordance with a legal duty.

(10) Absence of Public Record or Entry; Use of Public Record or Entry for Testimonial Purposes.

(A) Testimony —or a certification under Rule 902 — that a diligent search failed to disclose a public record or statement if the testimony or certification is admitted to prove that: (i) the record or statement does not exist; or (ii) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind.

(B) In a criminal case, a prosecutor who intends to offer a certification provides written notice of that intent at least 14 days before trial, and the defendant does not object in writing within 7 days — unless the court sets a different time for notice or the objection.

(11) Records of Religious Organizations Concerning Personal or Family History. A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Certificates of Marriage, Baptism, and Similar Ceremonies. A statement of fact contained in a certificate:

(A) made by a person who is authorized by a religious organization or by law to perform the act certified;

(B) attesting that the person performed a marriage or similar ceremony or administered a sacrament; and

(C) purporting to have been issued at the time of the act or within a reasonable time after it.

(13) Family Records. A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.

(14) Records of Documents That Affect an Interest in Property. The record of a document that purports to establish or affect an interest in property if:

(A) the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;

(B) the record is kept in a public office; and

(C) a statute authorizes recording documents of that kind in that office.

(15) Statements in Documents That Affect an Interest in Property. A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose — unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.

(16) Statements in Ancient Documents. A statement in a document that is at least 20 years old and whose authenticity is established.

(17) Market Reports and Similar Commercial Publications. Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.

(18) Statements in Learned Treatises, Periodicals, or Pamphlets. A statement contained in a treatise, periodical, or pamphlet if:

(A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and

(B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit.

(19) Reputation Concerning Personal or Family History. A reputation among a person's family by blood, adoption, or marriage — or among a

person's associates or in the community — concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.

(20) Reputation Concerning Boundaries or General History. A reputation in a community — arising before the controversy — concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.

(21) Reputation Concerning Character. A reputation among a person's associates or in the community concerning the person's character.

(22) Judgment of a Previous Conviction. Evidence of a final judgment of conviction if:

(A) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;

(B) the conviction was for a felony under the law pursuant to which the person was convicted;

(C) the evidence is admitted to prove any fact essential to the judgment; and

(D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.

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

(23) Judgments Involving Personal, Family, or General History or a Boundary. A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:

(A) was essential to the judgment; and

(B) could be proved by evidence of reputation.

(24) [Other exceptions.] [Transferred to Rule 807.]

(25) Business Records in Justice of the Peace Court Civil Cases. In a civil case before a Justice of the Peace, a bill, estimate, receipt or statement of account which appears to have been made in the regular course of business may be admitted into evidence by the Court, if the Justice of the Peace is satisfied that the document is reliable.

Comment

D.R.E. 803(1), (2), (3), (4), (6), (7), (9), (10), (11), (12), (13), (14), (15), (16), (17), (18), (19), (20), (21), (23) and (24) track the corresponding federal rules. D.R.E. 803(5), (8) and (22) do not.

D.R.E. 803(5) tracks F.R.E. 803(5) except that the last sentence was revised in 1980. The revision was made to enable the court to decide whether recorded recollection once admitted as evidence may be received as an exhibit or merely

read. It is intended by this change to permit, in the court's discretion, the admission of a recorded recollection as an exhibit regardless of who offered it. The court should weigh whether the admission as an exhibit would unduly influence the jury. D.R.E. 803(5) should be read more broadly than its literal language. A recorded statement should qualify for admission even if it was recorded by another party if it appears that the statement does in fact reflect the prior knowledge of the witness.

D.R.E. 803(6) was amended in 2001, tracking a similar amendment to F.R. E. 803(6) in effect on December 31, 2000, to permit satisfying the foundational requirements for the admissibility of a business record through certification as an alternative to the expense and inconvenience of producing a time-consuming foundational witness. This amendment is consistent with existing Superior Court practice. This amendment should be interpreted with reference to D.R.E. 902(11) and 902(12) providing for the self-authentication of domestic and foreign records under the certification procedures provided for in D.R.E. 803(6).

D.R.E. 803(6) does not make admissible records created for the litigation such as the report of a medical doctor retained to examine a party at the request of the opposing party. Likewise, a toxicologist's report on the presence of drugs would not be admissible because of D.R.E. 803(8). *But see* 10 Del. C. § 4330-32; 21 Del. C. § 4177(h).

See Rule of Civil Procedure 33(c) relating to discovery of business records.

D.R.E. 803(8) tracks U.R.E. 803(8), which was believed to be preferable over F.R.E. 803(8).

New D.R.E. 803(10) tracks Justice Scalia's dicta in *Melendez-Dias v. Massachusetts*, 557 U.S. 305 (2009). Justice Scalia stated that drug chemistry reports could be admitted if the prosecution first notified the accused of its intent to use drug chemistry reports in its case in chief, and the accused did not demand that the drug chemist appear and testify in court. Melendez-Dias, 557 U.S. at 325-26.

The provisions of D.R.E. 803(18) are not intended to change the provisions of 18 Del. C. § 6807 relating to the evidence to be considered by a medical malpractice review panel.

D.R.E. 803(21) deals only with hearsay issues concerning reputation and opinion. See D.R.E. 404, 405 and 608 for substantive issues.

D.R.E. 803(22) tracks F.R.E. 803(22) except that the words "a felony under the law pursuant to which the person was convicted" were substituted for the words "the conviction was for a crime punishable by death or by imprisonment for more than a year." See D.R.E. 609(a) for similar treatment.

Nothing in D.R.E. 803(22) should prohibit the admission of evidence of a plea of guilty to any crime where such plea constitutes an admission under D.R.E. 801(d)(2). Boyd & Reed v. Hammond, Del. Supr., 187 A.2d 413 (1963).

D.R.E.803(24) was transferred to D.R.E. 807, which was adopted in 2001, tracking a similar change to the federal rules.

For prior Delaware cases illustrating the law covered by this rule, see Carpenter v. Greene, Del. Supr., 396 A.2d 150 (1977); Halko v. State, Del. Super., 204 A.2d 628 (1964); Garrod v. Good, Del. Supr., 203 A.2d 112 (1964); Cloud v. State, Del. Supr., 154 A.2d 680 (1959); Curren v. State, Del. Supr., 122 A.2d 126 (1956); State v. Long, Del. Oyer & Term., 123 A. 350 (1923); In Re Kemp's Will, Del. Super., 186 A. 890 (1935); Derrickson v. State, Del. Supr., 321 A.2d 497 (1974); Rice v. Simmons, Del. Super., 2 Del. 309 (1837); Wilkins v. Wilmington, Del. Super., 42 A. 418 (1895); State v. Boleslowski, Del. Oyer & Term., 178 A. 431 (1934); Grossman v. Delaware Elec. Power, Del. Super., 155 A. 806 (1929); Johnson v. State, Del. Supr., 253 A.2d 206 (1969); Millman v. Millman, Del. Supr., 359 A.2d 158 (1976); State v. Henson, Del. Super., 319 A.2d 43 (1974); Watts v. Delaware Coach Co., Del. Super., 58 A.2d 689 (1948); Ayers v. Quillen & Sons, Del. Supr., 188 A.2d 510 (1963); State v. Tucker, Del. Gen. Sess., 139 A. 253 (1927); Hooven v. Hooven, Del. Super., 130 A. 495 (1925); Kreisher v. State, Del. Supr., 303 A.2d 651 (1973).

D.R.E. 803 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. The pre-2017 "Comment" to D.R.E. 803 was revised only as necessary to reflect the 2017 amendments and the current language of F.R.E. 803. There is no intent to change any result in ruling on evidence admissibility.

Rule 804. Exceptions to the Rule Against Hearsay- When the Declarant is Unavailable as a Witness.

(a) Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant:

(1) Is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;

(2) Refuses to testify about the subject matter despite a court order to do so;

(3) Testifies to not remembering the subject matter;

(4) Cannot be present or testify at the trial or hearing because of death or a then -existing infirmity, physical illness, or mental illness; or

(5) Is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means to procure the declarant's attendance.

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

(b) Hearsay exceptions.

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

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

(2) Statement under belief of impending death. A statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be the declarant's impending death.

(3) Statement against interest. A statement which was, at the time of its making, so far contrary to the declarant's pecuniary or propriety interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the declarant believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statement of personal or family history. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption or marriage, ancestry or other similar fact

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

(5) Other exceptions.

[Omitted].

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

Comment

D.R.E. 804(a) tracks F.R.E. 804(a)(1), (2), (3) and (4). D.R.E. 804(a)(5) was modified in 1980 to track the draft of F.R.E. 804(a)(5) as proposed by the United States Supreme Court Advisory Committee instead of F.R.E. 804(a)(5) as adopted by Congress. D.R.E. 804(a)(5) as adopted omits the words "or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony" which were added by Congress to the original draft of U.R.E.

D.R.E. 804(b)(1) tracks F.R.E. 804(b)(1).

D.R.E. 804(b)(2) was revised in 1980 so as to track the draft of F.R.E. 804(b)(2) as proposed by the United States Supreme Court Advisory Committee instead of F.R.E. 804(b)(2) as adopted by Congress. The words "In a prosecution for homicide or in a civil action or proceeding" at the beginning of F.R.E. 804(b)(2) were omitted. D.R.E. 804(b)(2) as adopted therefore applies to all criminal and civil proceedings.

D.R.E. 804(b)(3) as adopted in 1980 tracks F.R.E. 804(b)(3). The Committee decided against adopting the language of U.R.E. 804(b)(3). In applying D.R.E. 804(b)(3), care should be taken not to violate the rule in Bruton v. United States, 389 U.S. 818, 88 S. Ct. 126, 19 L. Ed. 2d 70 (1967).

D.R.E. 804(b)(4) tracks F.R.E. 804(b)(4). D.R.E. 804(b)(4) as adopted in 1980 modified the case law in Pote v. Farren, Del. Super., 129 A. 238 (1924), which held that the declaration be made after the controversy arose. It does not change the rest of the ruling.

D.R.E. 804(b)(5) was omitted since the Committee found in 1980 that it was the same as D.R.E. 807 (formerly D.R.E. 803(24)).

D.R.E. 804(b)(6) tracks F.R.E. 804(b)(6)

For prior Delaware cases illustrating the law covered by this rule, see Barnes v. State, Del. Supr., 352 A.2d 409 (1975); Rogers v. Rogers, Del. Super., 66 A. 374 (1907); State v. Virden, Del. Gen. Sess., 118 A. 597 (1922); Gardner v. State, Del. Gen. Sess., 47 A.2d 310 (1946); Gibson v. Gillespie, Del. Super., 152 A. 589 (1928); Hall v. Dougherty, Del. Super., 10 Del. 435 (1878); Stille v. Layton, Del. Super., 2 Del. 149 (1837); Ward v. State, Del. Supr., 395 A.2d 367 (1978); State v. Trusty, Del. Oyer & Term., 40 A. 766 (1898); State v. Oliver, Del. Oyer & Term., 7 Del. 585 (1855).

D.R.E. 804 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. There is no intent to change any result in ruling on evidence admissibility.

Rule 805. Hearsay Within Hearsay.

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

Comment

This rule tracks F.R.E. 805.

D.R.E. 805 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. There is no intent to change any result in ruling on evidence admissibility.

Rule 806. Attacking and Supporting the Declarant's Credibility.

When a hearsay statement — or a statement described in Rule 801(d)(2)(C), (D), or (E) — has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

Comment

This rule tracks F.R.E. 806.

D.R.E. 806 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. There is no intent to change any result in ruling on evidence admissibility.

Rule 807. Residual Exception.

(a) In General. Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:

(1) the statement has equivalent circumstantial guarantees of trustworthiness;

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

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

(4) admitting it will best serve the purposes of these Rules and the interests of justice.

(b) Notice. The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

Comment

This Rule was transferred from former D.R.E. 803(24) in 2001 and tracks F.R.E. 807 in effect on December 31, 2000. *See Demby v. State*, Del. Supr., 695 A.2d 1152 (1997).

D.R.E. 807 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. There is no intent to change any result in ruling on evidence admissibility.

ARTICLE IX. AUTHENTICATION AND IDENTIFICATION

Rule 901. Authenticating or Identifying Evidence.

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

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

(1) Testimony of a Witness with Knowledge. Testimony that an item is what it is claimed to be.

(2) Nonexpert Opinion About Handwriting. A nonexpert's opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation.

(3) Comparison by an Expert Witness or the Trier of Fact. A comparison with an authenticated specimen by an expert witness or the trier of fact.

(4) Distinctive Characteristics and the Like. The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.

(5) Opinion About a Voice. An opinion identifying a person's voice — whether heard firsthand or through mechanical or electronic transmission or recording — based on hearing the voice at any time under circumstances that connect it with the alleged speaker.

(6) Evidence About a Telephone Conversation. For a telephone conversation, evidence that a call was made to the number assigned at the time to:

(A) a particular person, if circumstances, including self-identification, show that the person answering was the one called; or

(B) a particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone.

(7) Evidence About Public Records. Evidence that:

(A) a document was recorded or filed in a public office as authorized by law; or

(B) a purported public record or statement is from the office where items of this kind are kept.

(8) Evidence About Ancient Documents or Data Compilations. For a document or data compilation, evidence that it:

(A) is in a condition that creates no suspicion about its authenticity;

(B) was in a place where, if authentic, it would likely be; and

(C) is at least 20 years old when offered.

(9) Evidence About a Process or System. Evidence describing a process or system and showing that it produces an accurate result.

(10) Methods Provided by a Statute or Rule. Any method of authentication or identification allowed by a statute or the Constitution of this State.

Comment

The mere authentication of evidence under this rule does not necessarily mean the evidence is admissible under other rules.

D.R.E. 901 tracks F.R.E. 901 in effect on December 31, 2000, except that D.R.E. 901(b)(10) tracks U.R.E. 901(b)(10) because F.R.E. 901(b)(10) was inappropriate for state use.

D.R.E. 901(b)(3) is not limited just to handwriting.

It is not intended that D.R.E. 901 abolish the necessity of showing the chain of custody of exhibits in criminal proceedings. *But see* 10 Del. C. §§ 4330-32; 21 Del. C. § 4177(h).

D.R.E. 901 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. There is no intent to change any result in ruling on evidence admissibility.

Rule 902. Evidence That Is Self-Authenticating.

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

(1) Domestic Public Documents That Are Sealed and Signed. A document that bears:

(A) a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; and

(B) a signature purporting to be an execution or attestation.

(2) Domestic Public Documents That Are Not Sealed but Are Signed and Certified. A document that bears no seal if:

(A) it bears the signature of an officer or employee of an entity named in Rule 902(1)(A); and

(B) another public officer who has a seal and official duties within that same entity certifies under seal — or its equivalent — that the signer has the official capacity and that the signature is genuine.

(3) Foreign Public Documents. A document that purports to be signed or attested by a person who is authorized by a foreign country's law to do so. The document must be accompanied by a final certification that certifies the genuineness of the signature and official position of the signer or attester — or of any foreign official whose certificate of genuineness relates to the

signature or attestation or is in a chain of certificates of genuineness relating to the signature or attestation. The certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States. If all parties have been given a reasonable opportunity to investigate the document's authenticity and accuracy, the court may, for good cause, either:

(A) order that it be treated as presumptively authentic without final certification; or

(B) allow it to be evidenced by an attested summary with or without final certification.

(4) Certified Copies of Public Records. A copy of an official record — or a copy of a document that was recorded or filed in a public office as authorized by law — if the copy is certified as correct by:

(A) the custodian or another person authorized to make the certification; or

(B) a certificate that complies with Rule 902(1), (2), or (3) or complying with any law of the United States or of this State.

(5) Official Publications. A book, pamphlet, or other publication purporting to be issued by a public authority.

(6) Newspapers and Periodicals. Printed material purporting to be a newspaper or periodical.

(7) Trade Inscriptions and the Like. An inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control.

(8) Acknowledged Documents. A document accompanied by a certificate of acknowledgment that is lawfully executed by a notary public or another officer who is authorized to take acknowledgments.

(9) Commercial Paper and Related Documents. Commercial paper, a signature on it, and related documents, to the extent allowed by general commercial law.

(10) Presumptions Under Law. A signature, document, or anything else that a federal statute or law of this State declares to be presumptively or prima facie genuine or authentic.

(11) Certified Domestic Records of a Regularly Conducted Activity. The original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)-(C), as shown by a certification of the custodian or another qualified person that complies with a federal statute or a law of this State. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record — and must make

the record and certification available for inspection — so that the party has a fair opportunity to challenge them.

(12) Certified Foreign Records of a Regularly Conducted Activity. In a civil case, the original or a copy of a foreign record that meets the requirements of Rule 902(11), modified as follows: the certification, rather than complying with a federal statute or a law of this State, must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the country where the certification is signed. The proponent must also meet the notice requirements of Rule 902(11).

Comment

D.R.E. 902(1), (2), (3), 4(A), (5), (6), (7), (8)and (9) track F.R.E. Rule 902(1), (2), (3), 4(A), (5), (6), (7), (8) and (9). D.R.E. 902(4)(B) tracks F.R.E. 902(4)(B) except that it omits the reference to a rule prescribed by the Supreme Court and includes a reference to State law.

D.R.E. 902(10) tracks F.R.E. 902(10) except that it includes a reference to State law.

D.R.E. 902(11) and (12) track F.R.E. 902(11) and (12) except that they omit the reference to Supreme Court rules and include a reference to State law.

D.R.E. 902 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. The pre-2017 "Comment" to D.R.E. 902 was revised only as necessary to reflect the 2017 amendments and the current language of F.R.E. 902. There is no intent to change any result in ruling on evidence admissibility.

Rule 903. Subscribing Witness's Testimony.

A subscribing witness's testimony is necessary to authenticate a writing only if required by the law of the jurisdiction that governs its validity.

Comment

This rule tracks F.R.E. 903.

D.R.E. 903 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. There is no intent to change any result in ruling on evidence admissibility.

ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

Rule 1001. Definitions That Apply to This Article.

In this article:
(a) A "writing" consists of letters, words, sounds, numbers, or their equivalent set down in any form.
(b) A "recording" consists of letters, words, sounds, numbers, or their equivalent recorded in any manner.
(c) A "photograph" means a photographic image or its equivalent stored in any form.
(d) An "original" of a writing or recording means the writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it. For electronically stored information, "original" means any printout — or other output readable by sight — if it accurately reflects the information. An "original" of a photograph includes the negative or a print from it.
(e) A "duplicate" means a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.

Comment

This rule tracks F.R.E. 1001 except that in D.R.E. 1001(a) the word "sounds" was added as it was in U.R.E. 1001(5).

For prior Delaware cases illustrating the law covered by this D.R.E., see Ewart v. Morrell, Del. Super., 5 Del. 126 (1848); Heldmyer v. Cleaver, Del. Super., 104 A. 635 (1918); Bartholomew v. Edwards, Del. Super., 6 Del. 247 (1856); Jefferson v. Conoway, Del. Supr., 5 Del. 16 (1848).

D.R.E. 1001 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. The pre-2017 "Comment" to D.R.E. 1001 was revised only as necessary to reflect the 2017 amendments. There is no intent to change any result in ruling on evidence admissibility.

Rule 1002. Requirement of Original.

An original writing, recording, or photograph is required in order to prove its content unless these Rules or a statute provides otherwise.

Comment

This rule tracks F.R.E. 1002 except that its reference to statutory law is broader and not limited to federal statutory law.

For prior Delaware cases illustrating the law covered by this rule, see State v. Bower, Del. Gen. Sess., 40 A. 939 (1898); Smith v. State, Del. Supr., 352

A.2d 765 (1976) (holding that the best evidence rule does not apply to evidence of the absence of a writing or its contents).

D.R.E. 1002 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. The pre-2017 "Comment" to D.R.E. 1002 was revised only as necessary to reflect the 2017 amendments. There is no intent to change any result in ruling on evidence admissibility.

Rule 1003. Admissibility of Duplicates.

A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate.

Comment

This rule tracks F.R.E. 1003.

It is not intended that this rule will dispense with requirements for explaining the reasons a duplicate is being tendered in lieu of an original in any situation where the absence of the original might suggest that it is no longer effective or has been destroyed with an intent to revoke. The distinction between admission into evidence and admission to probate of wills is not abrogated by the rule. (This comment tracks comment to U.R.E. 1003.)

D.R.E. 1003 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. There is no intent to change any result in ruling on evidence admissibility.

Rule 1004. Admissibility of Other Evidence of Content.

An original is not required and other evidence of the content of a writing, recording, or photograph is admissible if:
(a) all the originals are lost or destroyed, and not by the proponent acting in bad faith;
(b) an original cannot be obtained by any available judicial process;
(c) the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or
(d) the writing, recording, or photograph is not closely related to a controlling issue.

Comment

This rule tracks F.R.E. 1004.

D.R.E. 1004 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. There is no intent to change any result in ruling on evidence admissibility.

Rule 1005. Copies of Public Records to Prove Content.

The proponent may use a copy to prove the content of an official record — or of a document that was recorded or filed in a public office as authorized by law — if these conditions are met: the record or document is otherwise admissible; and the copy is certified as correct in accordance with Rule 902(4) or is testified to be correct by a witness who has compared it with the original. If no such copy can be obtained by reasonable diligence, then the proponent may use other evidence to prove the content.

Comment

This rule tracks F.R.E. 1005.

Sections 4305 [repealed], 4306 [repealed], 4307 [repealed], 4308 [repealed] and 4314 [repealed] of Title 10 should be repealed since the contents thereof are covered by the Evidence Rules.

See Rule 202 for judicial notice of law.

D.R.E. 1005 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. There is no intent to change any result in ruling on evidence admissibility.

Rule 1006. Summaries to Prove Content.

The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time or place. And the court may order the proponent to produce them in court.

Comment

This rule tracks F.R.E. 1006.

D.R.E. 1006 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. There is no intent to change any result in ruling on evidence admissibility.

Rule 1007. Testimony or Statement of a Party to Prove Content.

The proponent may prove the content of a writing, recording, or photograph by the testimony, deposition, or written statement of the party against whom the evidence is offered. The proponent need not account for the original.

Comment

This rule tracks F.R.E. 1007.

D.R.E. 1007 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. There is no intent to change any result in ruling on evidence admissibility.

Rule 1008. Functions of Court and Jury.

Ordinarily, the court determines whether the proponent has fulfilled the factual conditions for admitting other evidence of the content of a writing, recording, or photograph under Rule 1004 or 1005. But in a jury trial, the jury determines — in accordance with Rule 104(b) — any issue about whether:
(a) an asserted writing, recording, or photograph ever existed;
(b) another one produced at the trial or hearing is the original; or
(c) other evidence of content accurately reflects the content.

Comment

This rule tracks F.R.E. 1008.

D.R.E. 1008 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. There is no intent to change any result in ruling on evidence admissibility.

Article XI. MISCELLANEOUS RULES

Rule 1101. Applicability of Rules and Definitions.

(a) Rules applicable. Except as otherwise provided in paragraph (b) and (c) of this Rule, these Rules apply to all actions and proceedings in all the courts of this State.

(b) Rules inapplicable. The Rules – except for those on privilege – do not apply to the following:

(1) the court's determination under Rule 104(a), on a preliminary question of fact governing admissibility;
(2) grand jury proceedings;
(3) in preliminary hearings in criminal cases; and
(4) miscellaneous proceedings such as:

- extradition or rendition;
- issuing an arrest warrant, criminal summons or search warrant;
- sentencing;
- granting or revoking probation;
- detention hearing in criminal hearings;
- considering whether to release on bail or otherwise; and
- contempt proceedings in which the court may act summarily.

(c) Definition. As used throughout these Rules, the term "writing" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

Comment

D.R.E. 1101 is applicable to all the courts of this State.

Prior D.R.E. 1101(c), now D.R.E. 1101(b)(3), was added to make it clear that the procedures now being followed in preliminary hearings in criminal cases are not changed by these Rules. See Superior Court Criminal Rule 5.1 and Schramm v. State, Del. Supr., 366 A.2d 1185 (1976).

Prior D.R.E. 1101(d), now D.R.E. 1101(c), which was added in 2001, includes a definition of "writing," which tracks the definition of "record" found in U.R.E. 101(3). The definition was added to this rule because the Delaware Rules of Evidence do not contain a definitions rule similar to U.R.E. 101, and the Permanent Advisory Committee on the Delaware Uniform Rules of Evidence wanted to define the word "writing," as it is used throughout all of the rules, to accommodate modern technological innovations in communications and record keeping.

D.R.E. 1101 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. The pre-2017 "Comment" to D.R.E. 1101 was revised only as necessary to reflect the 2017 amendments. There is no intent to change any result in ruling on evidence admissibility.

Rule 1102. Title.

These Rules shall be known as the Delaware Uniform Rules of Evidence and may be cited: D.R.E.
Comment
This rule tracks U.R.E. 1102 and F.R.E. 1103. F.R.E. 1102 is deemed to be inappropriate to a state.
Rule 1103. Effective Date.
These Rules shall take effect on July 1, 1980. These Rules apply to actions, cases and proceedings brought after the rules take effect. These Rules also apply to further procedures in actions, cases and proceedings then pending, except to the extent that application of these Rules would not be feasible, or would work injustice, in which event former evidentiary principles apply.
Comment
This rule (which does not exist in F.R.E. or U.R.E.) is based on the federal enacting legislation Pub. L. 93-595, 88 Stat. 1926. F.R.E. 1103 is the same as Rule 1102.