

COLORADO RULES OF EVIDENCE

Summary Trial Guide

★— GENERAL PROVISIONS

- 101 **Scope:** These rules govern proceedings in all courts in Colorado to the extent and with the exceptions stated in Rule 1101.
- 102 **Purpose/Construction:** To secure fairness, eliminate expense and delay, promote growth of law of evidence for ascertaining truth.
- 103 (a) **Error not to be predicated on evidentiary ruling unless substantial right affected** and (1) if ruling admits evidence, a timely, specific objection was made, or (2) if ruling excludes evidence, offer of proof was made or was apparent from the context. Once definitive ruling on the record is made, party need not renew objection or offer of proof to claim error on appeal. (b) Court may add to record to show character and form of evidence, objections made, and ruling. (c) **Court to conduct trial so that inadmissible evidence is not heard by jury.** (d) Plain error affecting substantial rights may be noticed even if not brought to the attention of the court.
- 104 (a) **Preliminary questions** (qualifications, privileges, admissibility) are for the court and court is not bound by rules of evidence, except for privileges. (b) Court may admit evidence conditionally. (c) **Hearing on confession must be outside jury's presence.** (d) Accused may testify on preliminary matter without cross-exam on other issues. (e) This rule does not limit right of party to introduce evidence relevant to weight or credibility.
- 105 **When evidence is admitted for limited purpose**, upon request, court shall restrict evidence to proper scope and so instruct the jury.
- 106 **When writing or recording (or part) introduced**, adverse party may at that time require related part to be admitted if fairness requires.

★— JUDICIAL NOTICE

- 201 **Judicial Notice:** (a) Rule applies only to adjudicative facts. (b) Facts must not be subject to dispute (must be either (1) generally known in jurisdiction, or (2) readily determined from accurate sources). (c) Court may take notice, requested or not. (d) Court must take notice if requested and given proper information. (e) Upon request, party is to be heard on propriety of taking judicial notice. (f) May be taken at any stage. (g) In civil cases, court to instruct that judicially noticed fact is *conclusive*; in criminal cases, court shall instruct jury that it may, but is not required to accept it as *conclusive*.

★— PRESUMPTIONS

- 301 In civil cases: Presumption affects burden of going forward with evidence, but does not shift burden of proof. [Note: There is no Rule 302]

★— RELEVANCY AND CHARACTER

- 401 "Relevant evidence" is evidence tending to make a fact of consequence more probable or less probable.
- 402 All relevant evidence is admissible, except as otherwise provided by law. Irrelevant evidence is not admissible.
- 403 Although relevant, evidence may be excluded if probative value is substantially outweighed by danger of unfair prejudice, confusion, misleading jury, or considerations of delay, waste of time, or needless cumulative evidence.
- 404 (a) Character evidence is not admissible to prove person acted in conformity except:
(1) **Character of accused.** In a criminal case, pertinent trait is admissible if offered first by accused, or by prosecution to rebut same or if evidence of victim's character for aggressiveness or violence is offered by accused and admitted under Rule 404(a)(2), evidence of same character trait of accused if offered by prosecution.
(2) **Character of alleged victim.** In a criminal case, if offered first by accused, or prosecution to rebut same; or peaceful character by prosecutor in homicide case to rebut evidence that victim was first aggressor.
(3) **Character of witness.** As provided in Rules 607, 608, and 13-90-101.
- (b) Evidence of other crimes or acts: Inadmissible to prove person acted in conformity but may be admissible for other purposes, such as proof of motive, opportunity, intent, plan, knowledge, identity, absence of mistake or accident. Upon request, prosecution to provide advance notice of such evidence.
- 405 (a) Character may be proved by reputation or opinion, when admissible. Relevant specific acts may be inquired into on cross-exam.
(b) **Specific Instances of Conduct:** Except as limited by §§ 16-10-301 and 18-3-407, in cases in which character or character trait of a person is an *essential* element of a charge, claim or defense, proof may also be made by specific instances of that person's conduct.
- 406 **Habit or routine practice** is admissible to prove conduct of person or organization, with or without corroboration or eyewitness.
- 407 **Subsequent remedial measures taken after event which if taken previously would have made event less likely** are not admissible to prove negligence or culpable conduct (may be admitted to prove ownership, control, or feasibility, if controverted, or for impeachment).
- 408 **Evidence of furnishing, offering, or accepting a valuable consideration to compromise a disputed claim** as well as statements or conduct in negotiations, are inadmissible to prove liability or amount (except when offered in criminal case and is related to claim by public office or agency in exercise of regulatory, investigative, or enforcement authority. May be admitted for another purpose (bias, prejudice, and other examples given in rule).
- 409 **Evidence of furnishing or offering to pay medical, hospital or similar expenses for injury** is not admissible to prove liability for injury.
- 410 **Except as provided by statute, withdrawn guilty plea; nolo plea; or plea offer, and statements made in connection with such,** are not admissible in civil or criminal case. Any subsequent, inconsistent amendment to Colorado Rules of Criminal Procedure shall supersede this rule.
- 411 **Liability insurance** is not admissible to prove negligence. May be offered for another purpose, such as to prove agency, ownership, bias, etc.
- 412 [Ed. Note: Federal Rule 412 is the Federal "Rape Shield Statute". There is no Colorado Rule 412. C.R.S. §18-3-407 is the "Rape Shield Statute"]

★— PRIVILEGES

- 501 **Privileges:** Except as otherwise required by the U.S. or Colorado Constitutions, statutes, Colorado Supreme Court Rules or common law as interpreted by Colorado courts, 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 writing; or (4) prevent another from being a witness or disclosing any matter or object.

★— WITNESSES AND CREDIBILITY

- 601 **Competency:** Everyone is competent to be a witness, except as otherwise provided by these rules or any Colorado statute.
- 602 **Personal knowledge:** Witness may not testify unless personal knowledge shown (experts excepted).
- 603 **Oath or affirmation:** Required of every witness before testifying.
- 604 **Interpreter:** Subject to rules relating to qualifications as an expert; oath or affirmation required.
- 605 **Presiding judge** is not competent to testify as witness.
- 606 (a) Juror may not testify at trial. (b) Upon inquiry into verdict, juror may testify only to extraneous information or influence, or mistake on verdict form.
- 607 **Impeachment:** Credibility of witness may be attacked by any party, including party calling witness.
- 608 (a) **Credibility of witness** may be supported or attacked by character evidence (*reputation or opinion*) but (1) evidence may refer only to character for untruthfulness or truthfulness and (2) evidence of truthful character is admissible only after character for truthfulness is attacked.
(b) **Specific instances of conduct** to attack or support the witness' character for truthfulness may not be proved by extrinsic evidence (except convictions), but may be inquired into on cross-exam if probative of truthfulness of the witness or another witness whose character was testified to by the witness being cross-examined (court's discretion). Self-incrimination privilege not waived when testifying only to matters that relate only to character for truthfulness.
- 609 [Ed. Note: There is no Rule 609. See C.R.S. §13-90-101 for use of felony convictions for impeachment purposes.]
- 610 **Evidence of religious beliefs** is not admissible to impeach or enhance credibility.
- 611 (a) **Court controls mode and order of presentation of evidence** so as to ascertain truth, conserve time, and protect witnesses from harassment or undue embarrassment. (b) **Cross-examination** should be limited to subject matter of direct exam and credibility, but court has discretion. (c) **Leading questions** should be permitted only on cross-examination, or if witness is hostile or adverse.

- 612 If witness uses writing to refresh memory, either while testifying or before testifying, the court has discretion to have the writing produced at the hearing for the adverse party, to inspect and cross-examine the witness thereon, and to introduce portions that relate to the witness' testimony. If in a criminal case prosecutor does not produce writing, judge may strike testimony or declare mistrial.
- 613 Impeachment by prior statement of witness: Must inform witness of time and occasion, place, and person to whom made. Examiner may refer to and read the statement as part of foundation. If witness denies or does not remember, extrinsic evidence is admissible. If witness admits statement, extrinsic evidence is inadmissible. Denial or failure of memory is prerequisite for extrinsic evidence.
- 614 Court may, on own motion, call and interrogate witness; all parties may cross-examine, and object to calling.
- 615 Court shall exclude witnesses from courtroom upon request or on own motion, except (1) natural person party, (2) designated representative of party which is not a natural person; or (3) person essential to presentation.

★ **OPINIONS AND EXPERT TESTIMONY**

- 701 Lay witness opinion: Limited to opinions based on (a) perception, (b) helpful to clear understanding, and (c) not based on scientific, technical or other specialized knowledge within scope of Rule 702. (Ed. Note: distance, speed, intoxication, etc.)
- 702 Expert opinion: If scientific or specialized knowledge will assist trier of fact in understanding the evidence, expert (i.e., witness qualified by knowledge, skill, experience, training or education) may testify in form of opinion or otherwise.
- 703 Expert's opinion may be based on facts perceived, or made known at or before hearing. If based on data reasonably relied on by experts in the field, the data need not be admissible in evidence for opinion to be admitted. Facts and data otherwise inadmissible not to be disclosed to jury by proponent of opinion unless court determines probative value substantially outweighs prejudicial effect.
- 704 Opinion on ultimate issue: Permitted if otherwise admissible.
- 705 Disclosure of data underlying expert opinion: Expert may give opinion without first testifying to underlying facts, unless court requires otherwise; expert may be required to disclose underlying data on cross-examination.
- 706 Court appointed experts: (a) Court may appoint expert on his or party's motion. The appointed expert shall advise parties of findings, his deposition may be taken by either party, he may be called by either party, and may be cross-examined by each party, including calling party. (b) Appointed expert is entitled to compensation. (c) Court may advise jury that court appointed the expert. (d) Nothing in this rule limits parties in calling own experts.

★ **HEARSAY**

- 801 Hearsay definitions: (Ed. Note: See *Crawford v. Washington*, 124 S.Ct. 1354 (2004) for "testimonial" hearsay in a criminal case.)
- (a) "Statement" is (1) an oral or written assertion, or (2) nonverbal conduct if intended as an assertion.
- (b) "Declarant" is a person who makes statement.
- (c) "Hearsay" defined: A statement, other than by declarant while testifying at the trial, offered to prove truth of matter asserted.
- (d) Statement is not hearsay if—
- (1) Declarant is trial witness, subject to cross-exam, and statement is
- (A) inconsistent with his testimony; or
- (B) consistent with his testimony and offered to rebut charge of recent fabrication, improper influence or motive; or
- (C) one of identification of a person after perceiving that person; or
- (2) Admission by party-opponent, i.e., statement offered against a party and is (A) party's own statement, or (B) party's adopted statement, or (C) an authorized statement, or (D) statement by party's agent concerning matter during, and within scope of employment, or (E) by a co-conspirator during and in furtherance of the conspiracy. Contents of statement may be considered but alone are insufficient to establish declarant's authority under (C), or agency under (D), or the conspiracy or participation therein under (E).
- 802 Hearsay is not admissible except as provided by these rules or by Colorado civil or criminal procedural court rules or by a Colorado statute.
- 803 Hearsay exceptions (availability of declarant immaterial):
- (1) Spontaneous Present Sense Impression (spontaneous statement describing or explaining event made while perceiving event).
- (2) Excited Utterance (statement related to startling event or condition made while declarant under stress of the startling event).
- (3) Then Existing Mental, Emotional or Physical Condition (intent, plan, motive, design, mental feeling, pain, health - Not "memory" or "belief").
- (4) Statement for Purpose of Medical Diagnosis or Treatment (medical history, past or present symptoms, pain and general cause, if reasonably pertinent to diagnosis or treatment).
- (5) Recorded Recollection (about matter of which witness once had knowledge but now has insufficient memory to testify, and witness (A) can identify the memo or record; (B) recalls the making of it at or near time, either by witness or another; and (C) can testify to its accuracy. Memo or record may be read into evidence but not itself received unless opponent offers).
- (6) Business Records (includes all businesses, professions, and callings. Requirements: (1) record; (2) made at or near time; (3) information from person with knowledge; (4) kept in course of regularly conducted business; (5) regular practice to record; and (6) all shown by custodian or other qualified witness, or by certification that complies with Rules 902(11) or 902(12), or a statute permitting certification. Source of information must not indicate lack of trustworthiness).
- (7) Absence of Entry in Business Records (to prove nonoccurrence, if matter was type regularly preserved).
- (8) Public Records and Reports. Unless circumstances indicate lack of trustworthiness, public records setting forth (A) activities of office, or (B) matters observed pursuant to duty to report (excluding, in criminal cases, observations by police), or (C) in civil cases, and against government in criminal cases, factual findings from investigation pursuant to authority granted by law.
- (9) Records of Vital Statistics (births, deaths, marriages, if report made to public office pursuant to law).
- (10) Absence of Public Record or Entry (may be proved by certificate in accord with Rule 902, or testimony of diligent search).
- (11) Records of Religious Organizations (births, marriages, divorces, deaths, legitimacy, ancestry, personal or family history).
- (12) Marriage, Baptismal, and Similar Certificates (certificate must have been issued near time of act).
- (13) Family Records (family Bible; charts; engravings on rings; tombstone; inscription on family portraits; etc.).
- (14) Record of Documents Affecting Interest in Property (must be recorded in public office; proves contents, execution and delivery).
- (15) Statements in Documents Affecting Interest in Property (unless later dealings with property have been inconsistent).
- (16) Statements in Ancient Documents (twenty years or more old, with authenticity established).
- (17) Market Reports, Commercial Publications (list, directories, or other published compilations generally relied upon).
- (18) Learned Treatises (authority established by expert, or judicial notice; may be read into evidence and received as exhibits as court permits).
- (19) Reputation Concerning Personal or Family History (birth, marriage, divorce, death, legitimacy, relationship, etc.)
- (20) Reputation Concerning Boundaries or General History (reputation must arise before controversy).
- (21) Reputation as to Character (among person's associates or in the community).
- (22) Judgment of Previous Conviction for crime punishable by death/confinement in excess of 1 year, after guilty finding or guilty or nolo plea, to prove fact essential to conviction. In criminal case Government may use third party conviction only to impeach.
- (23) Judgment as to Personal, Family, or General History, or Boundaries (if same would be provable by evidence of reputation).
- (24) [Transferred to Rule 807]
- 804 Hearsay Exceptions (declarant must be unavailable):
- (a) "Unavailable" means (1) exempted by privilege; (2) refuses to testify; (3) lacks memory; (4) dead or ill; (5) absent despite process.
- (b) Hearsay Exceptions if declarant unavailable:
- (1) Former Testimony (if party against whom offered had opportunity and similar motive to examine or cross-examine).
- (2) [There is no paragraph (b)(2).]

- 805 Hearsay within hearsay is not excluded if each part of the combined statement is a valid exception.
- 806 When hearsay statement, or statement under 801(d)(2)(C), (D), or (E), is admitted, credibility of declarant may be attacked (and then supported) as if declarant were a witness. No requirement to afford opportunity to explain or deny inconsistent statement. If hearsay admitted against party, that party may call hearsay declarant and examine declarant on the statement as if on cross.
- 807 Residual Hearsay Exception (requires equivalent trustworthiness; must be (A) material; (B) more probative than any other reasonably available evidence; and (C) be in the interest of justice. Advance notice required, with name and address of declarant).

★ **AUTHENTICATION AND IDENTIFICATION**

- 901 (a) Authentication: Satisfied by evidence sufficient to support finding that matter is what proponent claims.
- (b) Illustrations: (not limited to these)
- (1) Testimony that evidence is what is claimed.
 - (2) Handwriting: Non-expert opinion as to genuineness, based on familiarity not acquired for purposes of litigation.
 - (3) Comparison by trier of fact or expert with authenticated specimen.
 - (4) Distinctive characteristics (appearance, contents, substance, pattern, etc.) in conjunction with circumstances.
 - (5) Voice Identification: By hearing voice at any time under circumstances connecting it with alleged speaker.
 - (6) Telephone Conversation: Call made to assigned number for person or business, if (A) in the case of a person, circumstances, including self-identification, show person answering is person called, or (B) if to business number, the conversation related to business usually transacted over phone.
 - (7) Public Records: Evidence that it was authorized to be recorded, was in fact recorded, and is from a public office.
 - (8) Ancient Document: (A), no suspicion as to authenticity; (B), from place it likely would be; and (C), 20 years or more old.
 - (9) Process or System: Evidence describing process and showing it produces accurate result.
 - (10) Method Provided by Statute or Rule: Any method prescribed by Colorado Rules of Procedure or Colorado statute.
- 902 Self-authentication (extrinsic evidence not required):
- (1) Domestic Public Document Under Seal (seal and an attesting signature).
 - (2) Domestic Public Document Not Under Seal (signed by official without seal, and certified by official with seal).
 - (3) Foreign Public Documents (attested to by officials in accordance with foreign law, with final certification).
 - (4) Certified Copies of Public Records (when authorized to be recorded and actually recorded in public office, and certified as correct by authorized person, by certificate in accord with (1), (2), (3) above, or applicable federal or Colorado statute or rule).
 - (5) Official Publications (books, pamphlets, etc., issued by public authority).
 - (6) Newspapers and Periodicals.
 - (7) Trade Inscriptions, etc. (inscriptions, tags, labels affixed in course of business indicating ownership, control, or origin).
 - (8) Acknowledged Documents (with certificate of acknowledgment by notary or other authorized official).
 - (9) Commercial Paper and Related Documents (to the extent provided by general commercial law).
 - (10) Presumptions Under Legislative Acts (signature or document which federal or Colorado statute declares *prima facie* genuine).
 - (11) Certified domestic records of regularly conducted activity (original or duplicate that would be admissible under Rule 803(6) if accompanied by written declaration of qualified person certifying the record in manner stated in rule; party must provide written notice and advance inspection).
 - (12) Certified foreign records of regularly conducted activity (in civil case, original or duplicate that would be admissible under Rule 803(6) if accompanied by written declaration of qualified person certifying the record in manner stated in rule; declaration must subject declarant to criminal penalty if falsely made; party must provide written notice and advance inspection).
- 903 Testimony of subscribing witness is not necessary unless required by laws which govern the validity of the writing.

★ **CONTENTS OF WRITINGS, RECORDINGS AND PHOTOGRAPHS**

- 1001 Definitions:
- (1) "Writings" and "recordings" include letters, words, or numbers, or their equivalent, set down in handwriting, printing, photography, magnetic impulse, electronic recording, etc.
 - (2) "Photographs" include still photos, x-ray film, video tapes, and motion pictures.
 - (3) "Original" includes counterpart intended to have same effect; negative and print of photo; and data print-out from computer.
 - (4) "Duplicate" includes counterpart of same impression as original by photographic, electronic, mechanical, or chemical reproduction, etc.
- 1002 (Best Evidence Rule). Original of writing, recording, or photo, is required to prove contents, unless otherwise provided by these rules or by federal or Colorado statute.
- 1003 Duplicate is admissible the same as original unless:
- (1) Genuine question as to authenticity of original, or
 - (2) Unfair under the circumstances.
- 1004 Original not required and other evidence of contents of writing is admissible when
- (1) Original lost or destroyed (unless proponent lost or destroyed in bad faith); or
 - (2) Original cannot be obtained by judicial process; or
 - (3) Original under control of opponent, opponent put on notice, by pleading or otherwise, and does not produce; or
 - (4) Collateral matter (not closely related to a controlling issue).
- 1005 Contents of official public records authorized to be recorded and actually on file, may be proved by self-authenticated copy (Rule 902).
- 1006 Summaries of voluminous documents may be presented in form of chart, summary, or calculation; originals or duplicates shall be available for copying and examination, and the court may order that they be produced in court.
- 1007 Contents of writings, recordings, photographs may be proved against a party by that party's testimony, deposition or written admission without accounting for original.
- 1008 Functions of court and jury with regard to evidence of contents of writing, recording, or photograph:
- Judge: Determines existence of preliminary facts if admissibility depends on preliminary facts (see Rule 104).
- Jury: Determines if writing ever existed; if another exhibit is the original; and if the evidence correctly reflects the contents.
- ★ **MISCELLANEOUS RULES**
- 1101 (a) These rules apply to all courts in the State of Colorado.
- (b) These rules apply generally to civil, criminal, and contempt proceedings, except where the court may act summarily.
- (c) Privilege Rules apply at all trial stages.
- (d) Rules (except privilege rules) do not apply to preliminary fact questions; grand jury; extradition; preliminary examination in criminal cases; sentencing; granting and revoking probation; issuance of arrest or search warrants; bail proceedings.
- (e) Rules Applicable in Part. Rules apply in special statutory proceedings to the extent that matters of evidence are not provided for in the statute.
- 1102 [Reserved]
- 1103 These rules may be known and cited as the Colorado Rules of Evidence, or CRE.