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## The Ohio Rules of Evidence: Part IV

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# PUBLIC DEFENDER REPORTER

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## THE OHIO RULES OF EVIDENCE PART IV

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This is the fourth in a series of articles examining the Rules of Evidence as they apply in criminal cases.

### RULE 701: LAY OPINION TESTIMONY

Rule 701 governs the admissibility of lay opinion testimony. The rule provides that the opinion of a nonexpert is admissible if "(1) rationally based on the perception of the witness and (2) helpful to a clear understanding of his testimony or the determination of a fact in issue." According to the Staff Note, Rule 701 "is in accordance with Ohio law as it has developed prior to the adoption of the Rules of Evidence." Notwithstanding this statement, Rule 701 changes the formulation of the lay opinion rule.

The opinion rule is not designed to exclude testimony that is merely speculation or conjecture on the part of a witness. The firsthand knowledge rule serves that function. See Rule 602. Rule 701 incorporates the firsthand knowledge rule by requiring that an opinion be "rationally based on the perception of the witness." The opinion rule is designed to encourage witnesses to relate their knowledge in concrete rather than abstract terms, to relate primary sensory perceptions rather than inferences or conclusions drawn from those perceptions. See C. McCormick, *Evidence* 25 (2d ed. 1972).

According to the prior Ohio cases, the opinion rule required that "witnesses shall testify to facts and not opinions." *Railroad Co. v. Schultz*, 43 OS 270, 282, 1 NE 324, 331-32 (1885). The courts, however, recognized an exception: "[N]on-experts may, in cases where it is not practicable to place before the jury all the primary facts upon which they are founded, state their opinions from such facts. . . ." *Id.* This exception included opinions concerning "questions of identity as applied to persons, things, animals, or handwriting; and of the size,

color, and weight of objects; of time and distances; of the mental state or condition of another; of insanity and intoxication; of the affection of one for another; of the physical condition of another as to health or sickness. . . ; of values. . ." *Id.* at 281. See also *State v. Auerbach*, 108 OS 96, 98, 140 NE 507, 508 (1923) ("estimates of height, temperature, speed, time, light, weight, identity, dimension, size and distance.").

The exception was even broader than the above cases suggest because the courts also recognized that the decision to admit lay opinion testimony was entrusted to the discretion of the trial court. In *Auerbach* the Supreme Court remarked: "It rests within the sound discretion of the court whether the witness may express an opinion or not." *Id.* at 98.

Instead of adopting the fact-opinion dichotomy along with an ill-defined exception, Rule 701 adopts a different formula. The standard under the rule is whether a witness' opinion, based on firsthand knowledge, is helpful to a clear understanding of the witness' testimony or to the determination of the issues in the case. This formulation of the opinion rule was adopted because the traditional formulation was deficient in several respects. First, the application of the traditional rule turned an illusory fact-opinion dichotomy. This proved unworkable because "there is no distinction in kind between fact and opinion; the distinction is one of degree." E. Morgan, *Basic Problems of Evidence* 216 (1963). For example, a witness who testifies that a defendant had "slurred speech" and "staggered" when he walked, is using inferences as much as the witness who testifies that the defendant was "intoxicated;" the difference is "one of degree."

Second, witnesses frequently use inferences while testifying since it is the natural way to tell a

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story. In some cases, it is the only way to tell a story. A strict application of the opinion rule would stultify the presentation of testimony. As Judge Learned Hand commented:

Every judge of experience in the trial of causes has again and again seen the whole story garbled, because of insistence upon a form with which the witness cannot comply, since, like most men, he is unaware of the extent to which inference enters into his perceptions. He is telling the "facts" in the only way that he knows how, and the result of nagging and checking him is often to choke him altogether, which is, indeed, usually its purpose. *Central R.R. v. Monahan*, 11 F(2d) 212, 214 (2d Cir. 1926).

Third, the traditional rule is unnecessary. In most instances the adversary system has built-in mechanisms that mitigate the undesirable effects of opinion testimony. Because "the detailed account carries more conviction than the broad assertion, and a lawyer can be expected to display his witness to the best advantage," counsel will tend to elicit concrete rather than abstract testimony. Advisory Committee's Note, Fed. R. Evid. 701. Furthermore, opposing counsel can expose through cross-examination the weaknesses in opinion testimony. *Id.*

There are, however, limits on the types of opinions that may be admitted. As the Advisory Committee's Note to Federal Rule 701 points out, if "attempts are made to introduce meaningless assertions which amount to little more than choosing up sides, exclusion for lack of helpfulness is called for by the rule." See *Mynatt v. Drenik Beverage Distributing, Inc.*, 119 App 28, 188 NE(2d) 612 (1963) (opinion as to fault excluded). In this respect, several federal cases seem to have been decided wrongly; they have admitted opinions concerning the mens rea of criminal defendants. See *United States v. McClintic*, 570 F(2d) 685 (8th Cir. 1978); *United States v. Smith*, 550 F(2d) 277 (5th Cir. 1977); *but see United States v. Phillips*, 600 F(2d) 535, 538-39 (5th Cir. 1979).

## RULE 702: EXPERT TESTIMONY

### Subject Matter of Expert Testimony

Rule 703 provides that an expert witness may testify on a subject involving "scientific, technical, or other specialized knowledge" if his testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue." Wigmore's formulation of the test for expert testimony is consistent with Rule 702: "On *this subject* can a jury from *this person* receive appreciable help?" 7 J. Wigmore, *Evidence* § 1923, at 29 (Chadbourn rev. 1978). See also C. McCormick, *Evidence* 30 (2d ed. 1972).

The prior Ohio rule was stated in *McKay Machine Co. v. Rodman*, 11 OS(2d) 77, 228 NE(2d) 304 (1967): "In all proceedings involving matters of a scientific, mechanical, professional or other like nature, requiring special study, experience or observation not within the common knowledge of laymen, expert opinion testimony is admissible to aid the court or the jury in arriving at a correct

determination of the litigated issue." *Id.* (syllabus, para. 1). This test is similar to the test stated in Rule 702. The *McKay Machine Co.* opinion uses the term "aid" the jury; the rule uses the term "assist" the jury. *McKay Machine Co.* as well as other Ohio cases, however, also emphasizes that the subject matter of expert testimony must be beyond the "common knowledge of laymen." See *State v. Maupin*, 42 OS(2d) 473, 479, 330 NE(2d) 708, 713 (1975) ("beyond the common experience and knowledge of juries").

In one sense, focusing on the "common knowledge of laymen" does not differ from the standard of Rule 702. If a matter falls within the "common knowledge of laymen," the jury is presumed to be knowledgeable about the matter and therefore expert testimony would not "assist" the jury. Nevertheless, the emphasis of the rule points in another direction. Many subjects are not entirely beyond a lay juror's comprehension and yet expert testimony should be admitted under Rule 702 because it will assist the jury. Handwriting comparisons illustrate this point. Although the jurors may compare handwriting exemplars to determine common authorship, a questioned document examiner's testimony is superior and would be admissible under Rule 702.

The trial court has "broad discretion in the matter of the admission or exclusion of expert evidence, and his action is to be sustained unless manifestly erroneous." *Salem v. United States Lines Co.*, 370 US 31, 35 (1962). *Accord*, *Fowler v. Young*, 77 App 20, 31, 65 NE(2d) 399, 405 (1945).

### Qualifications of Expert Witnesses

Rule 702 provides that a witness may qualify as an expert by reason of "knowledge, skill, experience, training, or education." The Advisory Committee's Note to Federal Rule 702 contains the following comment: "[T]he expert is viewed, not in a narrow sense, but as a person qualified by 'knowledge, skill, experience, training or education.' Thus, within the scope of the rule are not only experts in the strictest sense, e.g., physicians, physicists, and architects, but also the large group sometimes called 'skilled' witnesses, such as bankers or landowners testifying to land values." Wigmore wrote that the witness' expertise "may have been attained, so far as legal rules go, in any way whatever; all the law requires is that it should have been attained." 2 J. Wigmore, *Evidence* § 556, at 751 (Chadbourn rev. 1979).

The Ohio cases have followed this approach. In *Alexander v. Mt. Carmel Medical Center*, 56 OS(2d) 155, 383 NE(2d) 564 (1978), the Supreme Court commented: "It is a general rule that the expert witness is not required to be the best witness on the subject. . . . The test is whether a particular witness offered as an expert will aid the trier of fact in the search for the truth." *Id.* at 159.

Determining whether a witness is qualified as an expert is a decision for the trial court. Rule 104(A) provides that "[p]reliminary questions concerning the qualifications of a person to be a witness. . .

shall be determined by the court. . . ." This is consistent with prior Ohio law. In *Turnpike Comm'n v. Ellis*, 164 OS 377, 131 NE(2d) 397 (1955), the Supreme Court stated, "The qualification or competency of a witness to testify as an expert or to give his opinion on a particular subject rests with the trial court, and, on appeal, its rulings with respect to such matters will ordinarily not be reversed unless there is a clear showing that the court abused its discretion." *Id.* (syllabus, para. 8).

### **RULE 703: BASES OF EXPERT TESTIMONY**

Rule 703 specifies the bases for expert opinion testimony. The rule provides that an expert may base an opinion on data either (1) personally observed by the expert or (2) admitted in evidence. Rule 703 must be read in conjunction with Rule 705, which requires an expert to disclose the underlying bases of his opinion before giving the opinion and makes the use of the hypothetical question optional.

#### **Personal Knowledge**

Rule 703 provides that an expert may base an opinion on his personal knowledge. Typical examples are the forensic chemist who analyzes and testifies about the nature of a controlled substance or the pathologist who testifies about the cause of death. The Ohio cases have long recognized that an expert may base an opinion on personal knowledge. See *State Auto Mutual Ins. Co. v. Chrysler Corp.*, 36 OS(2d) 151, 304 NE(2d) 891 (1973); *Shepherd v. Midland Mut. Life Ins. Co.*, 152 OS 6, 87 NE(2d) 156 (1949).

#### **Opinions Based on Admitted Evidence**

Rule 703 also provides that an expert may base an opinion on facts or data "admitted in evidence at the hearing." This is the second bases for expert opinions recognized by the rule. The first basis is the personal knowledge of the expert. If the expert has personal knowledge of all the underlying data upon which his opinion is based, there is no need to resort to this alternative basis.

The typical method of providing an expert, who does not have personal knowledge, with the relevant information upon which to base an opinion is the hypothetical question. Although a hypothetical question may still be used, its use is not required by the Rules of Evidence. Rule 705 explicitly provides that disclosure of the underlying basis of the opinion "may be in response to a hypothetical question or otherwise." The Staff Note to Rule 705 states: "Rule 705 does not require the use of the hypothetical question. . . . [The expert] could be advised of [facts] by counsel, he could hear them adduced, or they could be stated to him in a hypothetical question." Consequently, there are three ways in which an expert may be provided with assumed facts upon which to base an opinion.

First, an expert present during the testimony of other witnesses may base an opinion on that testimony. McCormick describes this method as follows:

In many jurisdictions, it seems permissible to have the expert witnesses in court during the taking of testimony, and then when the expert is himself called as a witness, to simplify the hypothetical question by asking the expert to assume the truth of the previous testimony, or some specified part of it and to state his opinion upon that assumption. C. McCormick, *Evidence* 32 (2d ed. 1972).

Second, the underlying data may be supplied through evidence that the expert reviewed prior to trial, provided the evidence is eventually admitted at trial. For example, a pathologist may base his opinion as to the cause of death upon an autopsy which he performed and a report of a toxicologist. The autopsy involves the personal knowledge of the pathologist and an opinion based on such knowledge is permitted. If the toxicologist's report is admitted as an official record or business record, see Rules 803(6) & (8), the pathologist could also base his opinion on that report. See *Kraner v. Coastal Tanker Lines, Inc.* 26 OS(2d) 59, 269 NE(2d) 43 (1971). In effect, the pathologist would be assuming the accuracy of the report.

Third, an expert may base an opinion on assumed facts that are presented to him in the form of a hypothetical question. In *Burens v. Industrial Comm'n*, 162 OS 549, 124 NE(2d) 724, (1955), the Supreme Court commented: "[E]xpert witnesses are not confined in their testimony to facts which are within their own personal knowledge but may state opinions which are based on assumed facts. . . . Ordinarily, such an opinion is elicited by a hypothetical question. . . ." *Id.* at 553. The Court in *Burens*, however, recognized an important limitation on the use of hypothetical questions. "The hypothesis upon which a expert witness is asked to state an opinion must be based upon facts within the witness' own personal knowledge or upon facts shown by other evidence." *Id.* (syllabus, para. 1). Thus, an expert opinion cannot be based on assumed facts unless evidence tending to establish the assumed facts has been admitted in evidence. See *Kraner v. Coastal Tank Lines, Inc.*, 26 OS(2d) 59, 269 NE(2d) 43 (1971); *Dillow v. Young*, 6 OS(2d) 221, 217 NE(2d) 868 (1966).

#### **Opinions Based on Hearsay**

Rule 703 does not permit an expert to base an opinion on hearsay evidence, unless the evidence falls within an exception to the hearsay rule and is admitted at trial. In contrast, Federal Rule 703 permits an expert to base an opinion on inadmissible and unadmitted hearsay evidence. According to the federal rule, "[i]f of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." Because this provision was not adopted in Ohio, the data upon which an expert bases an opinion must be admitted in evidence.

### **RULE 704: OPINION ON ULTIMATE ISSUE**

Rule 704 abolishes the ultimate issue rule. The ultimate issue prohibition was justified on the

ground that opinions on ultimate issues "invade the province of the jury" or "usurp the function of the jury." See *Trebotich v. Broglio*, 33 OS(2d) 57, 61, 294 NE(2d) 669, 672 (1973) ("clear invasion of the jury's province on the precise ultimate fact in issue.").

The ultimate issue rule was deficient for several reasons. First, difficult questions of application are involved in distinguishing "ultimate facts" from other "facts." See C. McCormick, *Evidence* § 12 (2d ed. 1972). Second, the witness can never usurp the function of the jury because the jury is not bound to accept a witness' opinion, including the opinion of an expert. See 7 J. Wignore, *Evidence* § 1920 (Chadbourn rev. 1978). Finally, the principal defect in the ultimate issue rule is that it established the wrong standard for the admissibility of opinion testimony. The issue should be whether the opinion, lay or expert, assists the jury and not whether the opinion relates to the ultimate issues in the case. In many instances, the jury needs an opinion on issues that could be classified as "ultimate." For example, in a forgery case the only contested issue may be whether the defendant forged a check. A handwriting expert, because of his training and experience, may be able to answer that question. In such a case, an opinion on the "ultimate issue" is both desirable and necessary. The expert, however, would not be permitted to testify that the defendant was "guilty;" he may testify on whether, based on his examination, he is of the opinion that known exemplars and the check were written by the same person. See *Bell v. Brewster*, 44 OS 690, 10 NE 679 (1887).

Abolition of the ultimate issue rule does not mean that all opinions on ultimate issues are now admissible. Rather, it means that the admissibility of such opinions is determined by the standards set forth in Rules 701 and 702. The Advisory Committee's Note to Federal Rule 704 contains the following comment on this subject:

The abolition of the ultimate issue rule does not lower the bars so as to admit all opinions. Under Rules 701 and 702, opinions must be helpful to the trier of fact, and Rule 403 provides for exclusion of evidence which wastes time. These provisions afford ample assurances against the admission of opinions which would merely tell the jury what result to reach, somewhat in the manner of the oath-helpers of an earlier day. They also stand ready to exclude opinions phrased in terms of inadequately explored legal criteria. Thus, the question, "Did T have capacity to make a will?" would be excluded, while the question, "Did T have sufficient mental capacity to know the nature and extent of his property and natural objects of his bounty and to formulate a rational scheme of distribution?" would be allowed.

#### **RULE 705: DISCLOSURE OF BASES OF EXPERT OPINIONS**

Rule 705 governs the disclosure of the data or facts upon which an expert's opinion is based. The rule provides that disclosure of the facts or data underlying an expert's opinion must precede the

opinion. The rule also makes the use of the hypothetical question in eliciting expert opinion testimony optional.

The purpose of the rule is to ensure that the jury is aware of the facts upon which the opinion rests. If the jury rejects those facts, it should also reject the opinion. See 2 J. Wignore, *Evidence* § 680 (Chadbourn rev. 1979). In addition, prior disclosure provides the opposing party with the opportunity to object on the ground that the opinion rests on an impermissible basis, such as hearsay evidence.

#### **RULE 801: HEARSAY DEFINITIONS**

Rule 801 defines hearsay. Rule 802 governs the admissibility of hearsay evidence. Under that rule hearsay is inadmissible in the absence of an exception. Rules 803 and 804 specify twenty-seven hearsay exceptions.

Subdivisions (A), (B), and (C) of Rule 801 set forth a traditional definition of hearsay. Hearsay is defined as a written or oral statement, including conduct intended to be an assertion, made by a declarant out-of-court and offered for the truth of the assertions contained in the statement. In contrast, subdivision (D) represents an important change in Ohio law. That rule provides that certain statements that would otherwise fall within the definition of subdivisions (A)-(C) are not hearsay and consequently not excludable as hearsay under Rule 802. Rule 801(D)(1) provides that certain prior inconsistent statements, prior consistent statements, and statements of identifications are not hearsay. Rule 801(D)(2) provides that admissions of a party-opponent are not hearsay.

The Rules of Evidence avoid the use of the term *res gestae* because that confusing phrase encompasses evidence which is not hearsay as well as evidence that is hearsay but may fall within one of the exceptions to the hearsay rule. See C. McCormick, *Evidence* § 288 (2d ed. 1972).

#### **Definition of "Statement"**

Rule 801(A) defines a "statement" as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion." Oral and written assertions clearly present the hearsay dangers—lack of cross-examination with respect to the declarant's perception, memory, narration, and sincerity.

Rule 801 also treats nonverbal conduct intended as an assertion (assertive conduct) as hearsay. McCormick provides the following commentary and illustration:

[I]t must be observed that the line of cleavage between conduct and statements is one that must be drawn in the light of substance, rather than form. No one would contend, if, in response to a question "Who did it?", one of the auditors held up his hand, that this gesture could be treated as different from an oral or written statement, in the application of the hearsay rule. Obviously, though described in terms of conduct, the actions are as much a part of the speaker's effort at expression as his words are. . . C. McCormick, *Evidence* 596 (2d ed. 1972).

The Advisory Committee's Note to Federal Rule 801 provides another illustration: "Some nonverbal conduct, such as the act of pointing to identify a suspect in a lineup, is clearly the equivalent of words, assertive in nature, and to be regarded as a statement."

Conduct that is not intended to be an assertion by the declarant is not encompassed by the definition of "statement" in Rule 801(A). Consequently, the hearsay rule is not a bar to the admissibility of evidence of nonassertive conduct. Nonassertive conduct is sometimes referred to as "implied assertions." The leading case is *Wright v. Doe D'Tatham*, 112 Eng. Rep. 488 (1837), which held implied assertions or nonassertive conduct hearsay. See C. McCormick, *Evidence* 597-600 (2d ed. 1972). Rule 801(A) rejects this position. Thus, flight from the scene of a crime is not hearsay under Rule 801 because such conduct is not intended to be an assertion. See *State v. Fields*, 35 App(2d) 140, 300 NE(2d) 207 (1973); *State v. Whitley*, 17 App(2d) 159, 245 NE(2d) 232 (1969).

#### **Statements Offered for the Truth of the Assertion**

Rule 801(C) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." This definition is consistent with the prior Ohio cases. In *Potter v. Baker*, 162 OS 488, 124 NE(2d) 140 (1955), the court held: "Testimony of a witness as to a statement or declaration by another person is hearsay testimony where that statement or declaration is offered or used only to prove the truth of the matters asserted therein." *Id.* (syllabus, para. 1).

If the relevance of an out-of-court statement is that the statement was made and not the truth of the assertion contained in the statement, the statement is not hearsay. In such a case, the hearsay dangers are not present. The declarant's perception, memory, narration, and sincerity are not critical because the relevance of the statement does not depend on the veracity of the declarant. See C. McCormick, *Evidence* § 249 (2d ed. 1972); 6 J. Wigmore, *Evidence* § 1766 (Chadbourn rev. 1976). A number of examples of statements not offered for the truth of the matter asserted have been recognized. Several are discussed below.

#### *Verbal Acts*

The "verbal acts" rule involves verbal conduct "to which the law attaches duties and liabilities." C. McCormick, *Evidence* 588 (2d ed. 1972). In other words, the uttering of certain words has independent legal significance under the substantive law. See 6 J. Wigmore, *Evidence* § 1770 (Chadbourn rev. 1976). For example, words constituting an attempted bribe are verbal acts. These statements are not offered to prove the truth of the assertion; they are offered in evidence only to show that the words were uttered. See also Staff Note ("Words constituting conduct are not hearsay, e.g., words of a contract, libel, slander, threats and the like.")

#### *Statements Offered to Show Effect on Hearer*

In many criminal cases a person's state of mind—his knowledge, belief, good faith, reasonableness—is an issue. See C. McCormick, *Evidence* 589-90 (2d ed. 1972); 6 J. Wigmore, *Evidence* § 1789 (Chadbourn rev. 1976). For example, if an accused claims self-defense, his reasonable fear of the victim becomes an issue. Consequently, statements made to the defendant informing him that the victim is a dangerous or violent person are relevant to show his subjective state of mind. These statements are not offered to show that the victim was, in fact, a dangerous or violent person, but only to show that such information was communicated to the defendant. See *McGaw v. State*, 123 OS 196, 174 NE 741 (1931); *State v. Roderick*, 77 OS 301, 82 NE 1082 (1907).

#### *Statements Offered to Show Circumstantially Declarant's State of Mind*

A person's mental state is often a consequential or material issue. If that person makes a statement that manifests his state of mind, the statement is relevant. Frequently, such statements are hearsay, but fall within the exception for presently existing state of mind. See Rule 803(3). In other cases, the statements only circumstantially show the declarant's state of mind. In these cases the statement is not offered to prove the truth of the assertion and thus does not implicate the hearsay rule. See C. McCormick, *Evidence* 590-93 (2d ed. 1972).

One of the more difficult examples involves statements by a defendant offered to establish insanity. Thus, if the defendant has stated "I am the Emperor of Africa," the statement is not offered to prove that the defendant is the Emperor of Africa. Instead, the statement is offered as evidence of the defendant's insane delusions. This analysis, however, is not free of criticism. See C. McCormick, *Evidence* 593 (2d ed. 1972); 6 J. Wigmore, *Evidence* § 1766, at 250 & n.l. (Chadbourn rev. 1976).

#### **Prior Inconsistent Statements**

Rule 801(D)(1)(a) provides that certain types of prior inconsistent statements are admissible as substantive evidence. The rule accomplishes this result by defining such statements as nonhearsay. The following conditions must be satisfied before a prior statement is admissible under the rule: (1) the declarant must testify, subject to cross-examination, at the trial or hearing; (2) the prior statement must be inconsistent with the witness' trial testimony; (3) the prior statement must have been given under oath; (4) the prior statement must have been "subject to cross-examination by the party against whom the statement is offered;" and (5) the prior statement must have been "subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition. . . ."

The rule represents a change in Ohio law. Under prior law, prior inconsistent statements were admissible only for impeachment; such statements were not offered for the truth of assertion con-

tained therein but only to show that the statement was made and is inconsistent with the witness' trial testimony. See *McKelvey Co. v. General Casualty Co.*, 166 OS 401, 405, 142 NE(2d) 854, 856 (1957); *State v. Duffey*, 134 OS 16, 24, 15 NE(2d) 535, 539 (1938).

Rule 801(D)(1)(a) differs from its federal counterpart. Federal Rule 801(d)(1)(A) does not require that the prior statement have been subject to cross-examination at the time it was made. Statements made at a prior trial, a preliminary hearing, Crim. R. 5(B), a deposition, Crim. R. 15, or any other proceeding at which testimony is taken under oath subject to penalty of perjury and cross-examination would qualify under Rule 801(D)(1)(a). In contrast to the federal rule, statements made before a grand jury would not qualify because such statements are not subject to cross-examination. Grand jury statements, however, are admissible if offered for impeachment and inconsistent with the witness' trial testimony. See Rule 613.

#### **Prior Consistent Statements**

Rule 801(D)(1)(b) provides that prior consistent statements of a witness are admissible as substantive evidence if "offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive." The rule represents a change in Ohio law. Under prior law, prior consistent statements were generally inadmissible even if offered only for rehabilitation. Such statements, however, were admissible if offered to rebut a charge of recent fabrication, *Miller v. Piqua Transfer & Storage Co.*, 57 Abs 325, 92 NE(2d) 452 (CP 1950), in which case the statement could be considered for rehabilitative purposes but not as substantive evidence.

In contrast to the rule on prior inconsistent statements, Rule 801(D)(1)(a), a prior consistent statement need not be given under oath subject to penalty of perjury and cross-examination.

#### **Statement of Identification**

Rule 801(D)(1)(C) provides that a witness' prior statement "of identification of a person soon after perceiving" that person is admissible as substantive evidence "if the circumstances demonstrate the reliability of the prior identification."

The rule apparently changes Ohio law. R.C. 2945.55 provides: "When identification of the defendant is an issue, a witness who has on a previous occasion identified such person may testify to such previous identification. Such identification may be proved by other witnesses." On its face, this statute would appear to permit the substantive use of prior identifications. In *State v. Lancaster*, 25 OS(2d) 83, 267 NE(2d) 291 (1971), however, the Supreme Court interpreted the statute as permitting the use of prior identifications only as corroborative, as opposed to substantive, evidence. *Id.* (syllabus, para. 5). Under the corroboration theory, the witness had to make an in-court identification prior to the admission of evidence of a prior iden-

tification. Under the rule, prior identifications are admissible as substantive evidence and thus an in-court identification is not a prerequisite to admissibility so long as the witness who has made the prior identification is "subject to cross-examination" at trial. See Staff Note; *United States v. Ingram*, 600 F(2d) 260, 261 (10th Cir. 1979); *United States v. Lewis*, 565 F(2d) 1248, 1250-52 (2d Cir. 1977), *cert. denied*, 435 US 973 (1978).

As the Staff Note indicates, the rule does not "obviate[ ] the constitutional requirements relating to lineups and the like. . ." The rule covers only the hearsay aspects of pretrial identifications. In criminal cases identification evidence also must satisfy Sixth Amendment and due process requirements. The Sixth Amendment requires the presence of counsel at some types of identification procedures. See *Moore v. Illinois*, 434 US 220 (1977) (preliminary hearings); *Kirby v. Illinois*, 406 US 682 (1972) (right to counsel attaches at commencement of judicial adversary proceedings); *State v. Lathan*, 30 OS(2d) 92, 282 NE(2d) 574 (1972).

Due process requires identification evidence to be reliable. See *Manson v. Brathwaite*, 432 US 98 (1977); *Neil v. Biggers*, 409 US 188 (1972); *State v. Madison*, 64 OS(2d) 322 (1980); *State v. Kaiser*, 56 OS(2d) 29, 381 NE(2d) 633 (1978).

#### **Admissions of a Party-Opponent**

Rule 801(D)(2) exempts admissions of a party-opponent from the scope of the hearsay rule. Rule 801(D)(2)(a) provides that statements of a party are admissible as substantive evidence if offered against that party. Numerous Ohio cases have recognized the admissibility of party admissions. See *generally* Note, Admissions "Against Interest" in Ohio, 15 Ohio St.L.J. 187 (1954).

The confession of a criminal defendant is an admission of a party-opponent. Some Ohio cases attempt to distinguish confessions and admissions, confessions being a complete acknowledgment of guilt whereas admissions are something less. See *State v. Klumpp*, 15 Ops(2d) 461, 175 NE(2d) 767 (App. 1960). The distinction is not important. Both confessions and admissions are admissible under Rule 801(D)(2)(a) and the U.S. Supreme Court has held the distinction irrelevant when a statement obtained from a defendant by the police is challenged on constitutional grounds. See *Miranda v. Arizona*, 384 US 436, 476-77 (1966).

Rule 801(D)(2)(a) governs only the hearsay aspects of admissions. It is not concerned with the constitutional requirements surrounding the obtaining of statements from defendants by the police. See *Miranda v. Arizona*, 384 US 436 (1966) (5th Amendment requirements); *Brewer v. Williams*, 430 US 387 (1977) (6th Amendment requirements). See *generally* C. McCormick, Evidence ch. 14 (2d ed. 1972); C. Whitebread, Criminal Procedure ch. 15 (1980).

A plea of guilty in a criminal case is an admission of a party-opponent and thus may be admissible in a subsequent case. See *Clinger v. Duncan*



166 OS 216, 141 NE(2d) 156 (1957); *Freas v. Sullivan*, 130 OS 486, 200 NE 639 (1936); *Clark v. Irvin*, 9 Ohio 131 (1839); *Wilcox v. Gregory*, 112 App 516, 176 NE(2d) 523 (1960). Rule 410, however, prohibits the admissibility of guilty pleas that are subsequently withdrawn, pleas of no contest, pleas of guilty in a violations bureau, offers to plead guilty and no contest, and statements made in connection with and relevant to such pleas and offers. Pleas of guilty not falling within the exclusion of Rule 410 are admissible as admissions. See also Rule 803(21) (admissibility of judgments of prior convictions).

### Adoptive Admissions

Rule 801(D)(2)(b) provides that statements about which a party "has manifested his adoption or belief in its truth" are admissible as substantive evidence if offered against that party. A party may expressly adopt the statement of a third person or he may acquiesce by failing to deny or correct the statement of a third person under circumstances in which it would be natural to deny or correct the truth of the statement (adoption by silence). See *State v. Swiger*, 5 OS(2d) 151, 159-60, 214 NE(2d) 417, 424 *cert. denied*, 385 US 874 (1966) (express adoption); *State v. Poole*, 50 App(2d) 204, 362 NE(2d) 678 (1976) (express adoption).

The Ohio cases have recognized the admission-by-silence rule. See *Hoover v. State*, 91 OS 41, 47, 109 NE 626, 628 (1914); *Murphy v. State*, 36 OS 628 (1881). In *Zeller v. State*, 123 OS 519, 176 NE 81 (1931), the Supreme Court stated: "The only theory upon which any confession by silence is admissible is that the statement of the third person, in the presence of the accused, is made under such circumstances that the silence of the accused gives rise to a natural and reasonable inference of assent thereto. . . ." *Id.* at 523. In many cases, however, the courts have found that the circumstances did not require a response. *E.g.*, *Zeller v. State*, *supra*; *Geiger v. State*, 70 OS 400, 71 NE 721 (1904); *Griffin v. Zipperwich and Lodge*, 28 OS 388, 409 (1876); *Walker v. State*, 37 App 540, 175 NE 29 (1930). In *Geiger v. State*, *supra*, the court commented on the admissibility of "a confession by silence": "We cannot refrain from the observation, that before a court admits this class of confessions, great caution should be exercised. . . . It is not every instance of silence in the hearing of accusation that renders it admissible, as admitting guilt." *Id.* at 413.

The application of the adoption-by-silence rule in criminal cases is limited by constitutional principles. In *State v. Stephens*, 24 OS(2d) 76, 263 NE(2d) 773 (1970), the Supreme Court commented on the admissibility of a defendant's silence following arrest: "In the first detention of a suspect it is not uncommon to react by refusing to discuss the charges until a lawyer can be retained. Desire for friendly counsel and advice can be a major motivation at that time in the mind of one completely innocent of the charges, as well as one who subsequently may admit his guilt. His privilege

[against self-incrimination] at that time is silence . . . he should not thereafter be penalized for his original refusal." *Id.* at 81. See also *State v. Perryman*, 49 OS(2d) 14, 358 NE(2d) 1040 (1976), *vacated on other grounds*, 438 US 911 (1978).

In *Doyle v. Ohio*, 426 US 610 (1976), the U.S. Supreme Court held that the examination of a defendant at trial concerning his post-arrest silence after receiving *Miranda* warnings violated due process. Consequently, a defendant's silence in face of an accusation by the police, an accomplice, or victim cannot be admitted in evidence if *Miranda* warnings were or should have been given.

### Coconspirator Admissions

Rule 801(D)(2)(e) provides that statements by a coconspirator of a party made during and in furtherance of the conspiracy are admissible as substantive evidence if offered against that party. The coconspirator rule applies if five conditions are established: (1) the existence of a conspiracy, (2) the defendant's participation in the conspiracy, (3) the declarant's participation in the conspiracy, (4) the statement was made during the course of the conspiracy, and (5) the statement was in furtherance of the conspiracy. In many cases in which conspiracy is charged, resort to this rule is unnecessary. If the statement involved the agreement (the actus reus of conspiracy), the statement may be admissible under the verbal acts doctrine. See 4 D. Louisell & C. Mueller, *Federal Evidence* 357-61 (1980).

A conspiracy commences when the agreement is reached and terminates when the objectives have been achieved or abandoned. See R.C. 2923.01(E). Once the conspiracy ends, statements of coconspirators are not admissible. See *Sharpe v. State*, 29 OS 263 (1876). Determining the time when the conspiracy terminates has proven to be a troublesome issue. Termination depends on the objectives of the conspiracy. The traditional view is that statements made after the objectives have been achieved, but while the conspirators are attempting to avoid detection (the concealment phase) are inadmissible. C. McCormick, *Evidence* 646 (2d ed. 1972). The Ohio Supreme Court has not always followed this rule. In *State v. Shelton*, 51 OS(2d) 68, 364 NE(2d) 1152 (1977), *vacated on other grounds*, 438 US 909 (1978), the Court held: "A declaration of a conspirator, made subsequent to the actual commission of the crime, may be admissible against any coconspirator if it was made while the conspirators were still concerned with the concealment of their criminal conduct or their identity." *Id.* (syllabus, para. 2). *Accord*, *State v. DeRighter*, 145 OS 552, 558-59, 62 NE(2d) 332, 335-336 (1945).

Concealment phase statements, however, are not admissible under Rule 801(D)(2)(e). The Advisory Committee's Note to Federal Rule 801 reads: "The rule is consistent with the position of the Supreme Court in denying admissibility to statements made after the objectives of the conspiracy have either failed or been achieved. *Krulewitch v.*



United States, 336 U.S. 440, 69 S.Ct. 716, 93 L.Ed. 790 (1949); *Wong Sun v. United States*, 371 U.S. 471, 490, 83 S.Ct. 407, 9 L.Ed.(2d) 441 (1963).” The federal rule, as stated in *Krulewitch* and *Wong Sun*, has consistently excluded concealment phase statements.

#### *Independent Evidence; Standard of Proof*

Federal Rule 801(d)(2)(E) has been the source of controversy. A number of issues have divided the federal courts: (1) whether the conspiracy may be established by the statement itself or only by independent proof; (2) whether the admissibility of co-conspirator statements is controlled by Federal Rule 104(a) or by Rule 104(b); and (3) the standard of proof. See 1 D. Louisell & C. Mueller, *Federal Evidence* 207-14 (1977); 1 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶104[05] (1980).

The first issue is resolved by the Rules of Evidence. The Ohio rule requires that the conspiracy, as well as the declarant's and defendant's participation, be established “upon independent proof of the conspiracy.”

Determining whether admissibility of coconspirator statements is governed by Rule 104(A) or Rule 104(B) and determining the standard of proof—prima facie case, preponderance of evidence, or some other standard—involves related issues. Rule 104(A) provides that the court shall determine questions concerning “the admissibility of evidence.” That provision, however, is subject to Rule 104(B), which provides: “When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to,

the introduction of evidence sufficient to support a finding of the fulfillment of the condition.” If Rule 104(B) governs, the prima facie case standard applies. The “introduction of evidence sufficient to support a finding of the fulfillment of the condition” is equivalent to requiring a prima facie case of conspiracy. See 1 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶104[05] (1980).

Prior to the adoption of the Rules of Evidence, the Ohio cases had used the prima facie case standard. See *State v. Thomas*, 61 OS(2d) 223, 232, 400 NE(2d) 401, 407 (1980); *State v. Weind*, 50 OS(2d) 224, 240, 364 NE(2d) 216, 235 (1977), *vacated on other grounds*, 438 US 911 (1978). It is questionable, however, whether the prima facie standard survived the adoption of the Rules of Evidence. The majority of federal courts that have considered the issue have held that Federal Rule 104(a) governs admissibility, *i.e.*, the court alone determines the existence of a conspiracy. See *United States v. Petersen*, 611 F(2d) 1313, 1330 (10th Cir. 1979); *United States v. Pappas*, 611 F(2d) 399, 405 (1st Cir. 1979); *United States v. James*, 590 F(2d) 575, 579-80 (5th Cir.), *cert. denied*, 442 US 917 (1979); *United States v. Enright*, 579 F(2d) 980, 985 (6th Cir. 1978).

The majority of federal courts have also endorsed the preponderance of evidence standard. See *United States v. Pappas*, 611 F(2d) 399, 404-05 (1st Cir. 1979); *United States v. Continental Group, Inc.*, 603 F(2d) 444, 457 (3d Cir. 1979), *cert. denied*, 444 US 1032 (1980); *United States v. James*, 590 F(2d) 575, 580-81 (5th Cir. 1979), *cert. denied*, 442 US 917 (1979); *United States v. Bell*, 573 F(2d) 1040 (8th Cir. 1978).