States Department of Labor pursuant to statutory authority, or pursuant to executive order.

### § 18.1102 [Reserved]

### § 18.1103 Title.

These rules may be known as the United States Department of Labor Rules of Evidence and cited as 29 CFR 18.____ (1989).

### § 18.1104 Effective date.

These rules are effective thirty days after date of publication with respect to formal adversarial adjudications as specified in §18.1101 except that with respect to hearings held following an investigation conducted by the United States Department of Labor, these rules shall be effective only where the investigation commenced thirty days after publication.

## APPENDIX TO SUBPART B OF PART 18—REPORTER'S NOTES

### Reporter's Introductory Note

The Rules of Evidence for the United States Department of Labor modify the Federal Rules of Evidence for application in formal adversarial adjudications conducted by the United States Department of Labor. The civil nonjury nature of the hearings and the broad underlying values and goals of the administrative process are given recognition in these rules.

### REPORTER'S NOTE TO §18.102

In all formal adversarial adjudications of the United States Department of Labor governed by these rules, and in particular such adjudications in which a party appears without the benefit of counsel, the judge is required to construe these rules and to exercise discretion as provided in the rules, see, e.g., §18.403, to secure fairness in administration and elimination of unjustifiable expense and delay to the end that the truth may be ascertained and the proceedings justly determined, §18.102. The judge shall also exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment, §18.611(a).

### REPORTER'S NOTE TO §18.103

Section 18.103(a) provides that error is not harmless, i.e., a substantial right is affected, unless on review it is determined that it is more probably true than not true that the error did not materially contribute to the decision or order of the court. The more probably true than not true test is the most liberal harmless error standard. See *Haddad* v. *Lockheed California Corp.*, 720 F.2d 1454, 1458–59 (9th Cir. 1983):

The purpose of a harmless error standard is to enable an appellate court to gauge the probability that the trier of fact was affected by the error. See R. Traynor, [The Riddle of Harmless Error] at 29–30. Perhaps the most important factor to consider in fashioning such a standard is the nature of the particular fact-finding process to which the standard is to be applied. Accordingly, a crucial first step in determining how we should gauge the probability that an error was harmless is recognizing the distinction between civil and criminal trials. See *Kotteakos* v. *United States*, 328 U.S. 750, 763, 66 S.Ct. 1239, 1247, 90 L.Ed. 1557 (1946); *Valle-Valdez*, 544 F.2d at 914–15. This distinction has two facets, each of which reflects the differing burdens of proof in civil and criminal cases. First, the lower burden of proof in civil cases implies a larger margin of error. The danger of the harmless error doctrine is that an appellate court may usurp the jury's function, by merely deleting improper evidence from the record and assessing the sufficiency of the evidence to support the verdict below. See *Kotteakos*, 328 U.S. at 764–65, 66 S.Ct. at 1247–48; R. Traynor, *supra*, at 18–22. This danger has less practical importance where, as in most civil cases, the jury verdict merely rests on a more probable than not standard of proof.

The second facet of the distinction between errors in civil and criminal trials involves the differing degrees of certainty owed to civil and criminal litigants. Whereas a criminal defendant must be found guilty beyond a reasonable doubt, a civil litigant merely has a right to a jury verdict that more probably than not corresponds to the truth.

The term *materially contribute* was chosen as the most appropriate in preference to *substantially swayed*, *Kotteakos* v. *United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed 1557 (1946) or *material effect*. *Holloway* v. *Arkansas*, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978). The word *contribute* was employed in *Schneble* v. *Florida*, 405 U.S. 427, 92 S.Ct. 1056, 31 L.Ed.2d 340 (1972) and *United States* v. *Hastings*, 461 U.S. 499, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983).

Error will not be considered in determining whether a substantial right of a party was affected if the evidence was admitted in error following a properly made objection, §18.103(a)(1), and the judge explicitly states that he or she does not rely on such evidence in support of the decision or order. The judge must explicitly decline to rely upon the improperly admitted evidence. The alternative

of simply assuming nonreliance unless the judge explicitly states reliance, goes too far toward emasculating the benefits flowing from rules of evidence.

The question addressed in *Richardson* v. *Perales*, 402 U.S. 389, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971) of whether *substantial evidence* as specified in §556(d) of the Administrative Procedure Act requires that there be a residuum of legally admissible evidence to support an agency determination is of no concern with respect to these rules; only properly admitted evidence is to be considered in determining whether the *substantial evidence* requirement has been satisfied.

REPORTER'S NOTE TO §18.104

As to the standard on review with respect to questions of admissibility generally, section 18.104(a), *see In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238, 265–66 (3d Cir. 1983) (''The scope of review of the trial court's trustworthiness determination depends on the basis for the ruling. When the trial court makes §18.104(a) findings of historical fact about the manner in which a report containing findings was compiled we review by the clearly erroneous standard of Fed.R.Civ.P. 52. But a determination of untrustworthiness, if predicated on factors properly extraneous to such a determination, would be an error of law * * * * There is no discretion to rely on improper factors. Such an error of law might, of course, in a given instance be harmless within the meaning of Fed.R.Civ.P. 61. In weighing factors which we consider proper, the trial court exercises discretion and we review for abuse of discretion. Giving undue weight to trustworthiness factors of slight relevance while disregarding factors more significant, for example, might be an abuse of discretion.''). Accord, *United States* v. *Wilson*, 798 F.2d 509 (lst Cir. 1986).

As to the standard on review with respect to relevancy, conditional relevancy and the exercise of discretion, see, e.g., *United States* v. *Abel*, 469 U.S. 45, 54, 105 S.Ct. 465, 470, 83 L.Ed.2d 450 (1984) (''A district court is accorded a wide discretion in determining the admissibility of evidence under the Federal Rules. Assessing the probative value of common membership in any particular group, and weighing any factors counselling against admissibility is a matter first for the district court's sound judgment under Rules 401 and 403 and ultimately, if the evidence is admitted, for the trier of fact.''); *Alford* v. *United States*, 282 U.S. 687, 694, 51 S.Ct. 218, 220, 75 L.Ed 624 (1931) (''The extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court. It may exercise a reasonable judgment in determining when the subject is exhausted.''); *Hill* v. *Bache Halsey Stuart Shields Inc.*, 790 F.2d 817, 825 (10th Cir. 1986) (''We recognize that a trial court has broad discretion to determine whether evidence is relevant, and its decision will not be reversed on appeal absent a showing of clear abuse of that discretion. *Beacham* v. *Lee-Norse*, 714 F.2d 1010, 1014 (10th Cir. 1983). The same standard of review applies to a trial court's determination, under Fed.R.Evid. 403, that the probative value of the evidence is outweighed by its potential to prejudice or confuse the jury, or to lead to undue delay. *Id.*'').

REPORTER'S NOTE TO §18.201

A.P.A. section 556(e) provides that ''when an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.'' No definition of ''official notice'' is provided. An administrative agency may take official notice of any adjudicative fact that could be judicially noticed by a court. In addition ''the rule is now clearly emerging that an administrative agency may take official notice of any generally recognized technical or scientific facts within the agency's specialized knowledge, subject always to the proviso that the parties must be given adequate advance notice of the facts which the agency proposes to note, and given adequate opportunity to show the inaccuracy of the facts or the fallacy of the conclusions which the agency proposes tentatively to accept without proof. To satisfy this requirement, it is necessary that a statement of the facts noticed must be incorporated into the record. The source material on which the agency relies should, on request, be made available to the parties for their examination.'' 1 Cooper, State Administrative Law 412–13 (1965). Accord, Uniform Law Commissioners' Model State Administrative Procedure Act section 10(4) (1961) (''Notice may be taken of judicially cognizable facts. In addition, notice may be taken of generally recognized technical or scientific facts within the agency's specialized knowledge. Parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material noticed, including any staff memoranda or data, and they shall be afforded an opportunity to contest the material so noticed. The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence.''); Schwartz, Administrative Law §7.16 at 375 (2d ed. 1984) (''Clearly an agency may take notice of the same kinds of fact of which a court takes judicial notice. It has, however, been recognized that the differences between agencies and courts * * * may justify a broader approach. Under it, an agency may be permitted to take 'official notice' not only of facts that are obvious and notorious to the average man but also of those that are obvious and

notorious to an expert in the given field.'' ''A commission that regulates gas companies may take notice of the fact that a well-managed gas company loses no more than 7 percent of its gas through leakage, condensation, expansion, or contraction, where its regulation of gas companies, over the years has made the amount of 'unaccounted for gas' without negligence obvious and notorious to it as the expert in gas regulation. A workers' compensation commission may similarly reject a claim that an inguinal hernia was traumatic in origin where the employee gave no indication of pain and continued work for a month after the alleged accident. The agency had dealt with numerous hernia cases and was as expert in diagnosing them as any doctor would be. Its experience taught it that where a hernia was traumatic in origin, there was immediate discomfort, outward evidences of pain observable to fellow employees, and at least temporary suspension from work. The agency could notice this fact based upon its knowledge as an expert and reject uncontradicted opinion testimony that its own expertise renders unpersuasive.''). Compare Uniform Law Commissioners' Model State Administrative Procedure Act section 4–212(f) (1981) (''Official notice may be taken of (i) any fact that could be judicially noticed in the courts of this State, (ii) the record of other proceedings before the agency, (iii) technical or scientific matters within the agency's specialized knowledge, and (iv) codes or standards that have been adopted by an agency of the United States, of this State or of another state, or by a nationally recognized organization or association. Parties must be notified before or during the hearing, or before the issuance of any initial or final order that is based in whole or in part on facts or materials noticed, of the specific facts or material noticed and the source thereof, including any staff memoranda and data, and be afforded an opportunity to contest and rebut the facts or materials so noticed.''). Contra Davis, Official Notice, 62 Harv. L. Rev. 537, 539 (1949) (''To limit official notice to facts which are beyond the realm of dispute would virtually emasculate the administrative process. The problem of official notice should not be one of drawing lines between disputable and indisputable facts. Nor should it even be one of weighing the importance of basing decisions upon all available information against the importance of providing full and fair hearings in the sense of permitting parties to meet all materials that influence decision. The problem is the intensely practical one of devising a procedure which will provide both informed decisions and fair hearings without undue inconvenience or expense.'').

Section 18.201 adopts the philosophy of Federal Rule of Evidence 201. The Advisory Committee's Note to Fed.R.Evid. 201 (b) states:

With respect to judicial notice of adjudicative facts, the tradition has been one of caution in requiring that the matter be beyond reasonable controversy. This tradition of circumspection appears to be soundly based, and no reason to depart from it is apparent. As Professor Davis says:

''The reason we use trial-type procedure, I think, is that we make the practical judgment, on the basis of experience, that taking evidence, subject to cross-examination and rebuttal, is the best way to resolve controversies involving disputes of adjudicative facts, that is, facts pertaining to the parties. The reason we require a determination on the record is that we think fair procedure in resolving disputes of adjudicative facts calls for giving each party a chance to meet in the appropriate fashion the facts that come to the tribunal's attention, and the appropriate fashion for meeting disputed adjudicative facts includes rebuttal evidence, cross-examination, usually confrontation, and argument (either written or oral or both). The key to a fair trial is opportunity to use the appropriate weapons (rebuttal evidence, cross-examination, and argument) to meet adverse materials that come to the tribunal's attention.'' A System of Judicial Notice Based on Fairness and Convenience, in Perspectives of Law 69, 93 (1964).

The rule proceeds upon the theory that these considerations call for dispensing with traditional methods of proof only in clear cases. Compare Professor Davis' conclusion that judicial notice should be a matter of convenience, subject to requirements of procedural fairness. *Id.*, 94. Section 18.201 of the Federal Rules of Evidence incorporated the Morgan position on judicial notice. The contrary position, expressed by Wigmore and Thayer, and advocated by Davis, was rejected. See McNaughton, Judicial Notice-Excerpts Relating to the Morgan-Wigmore Controversy, 14 Vand. L. Rev. 779 (1961) (''They do not differ with respect to the application of the doctrine to 'law'. Nor do they reveal a difference with respect to so-called 'jury notice.' Their difference relates to judicial notice of 'facts.' Here Wigmore, following Thayer, insists that judicial notice is solely to save time where dispute is unlikely and that a matter judicially noticed is therefore only 'prima facie,' or rebuttable, if the opponent elects to dispute it. It is expressed in Thayer and implicit in Wigmore that (perhaps because the matter is rebuttable) judicial notice may be applied not only to indisputable matters but also to matters of lesser certainty. Morgan on the other hand defines judicial notice more narrowly, and his consequences follow from his definition. He limits judicial notice of fact to matters patently indisputable. And his position is that matters judicially noticed are not rebuttable. He asserts that it is wasteful to permit patently indisputable matters to be litigated by way

of formal proof and furthermore that it would be absurd to permit a party to woo a jury to an obviously erroneous finding contrary to the noticed fact. Also, he objects to the Wigmorean conception on the ground that it is really a 'presumption' of sorts attempting to pass under a misleading name. It is, according to Morgan, a presumption with no recognized rules as to how the presumption works, what activates it, and who has the burden of doing how much to rebut it.'').

Accordingly, notice that items (ii) and (iv) of the Uniform Law Commissioners' Model State Administrative Procedure Act quoted above are not included as separate items in §18.201. However codes and standards, (iv), to the extent not subject to reasonable question fall within §18.201(b)(2). To the extent such codes and standards do not so fall, proof should be required. Official notice of records of other proceedings before the agency would ''permit an agency to notice facts contained in its files, such as the revenue statistics contained in the reports submitted to it by a regulated company.'' Schwartz, *supra* at 377. Once again, to the extent such information is not capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, §18.201(b)(2), proof should be required.

REPORTER'S NOTE TO §18.301

Section 18.301 does not prevent an administrative agency by either rule, regulation, or common law development from allocating burdens of production and burdens of persuasion in an otherwise permissible manner. See *N.L.R.B.* v. *Transportation Management Corp.*, 462 U.S. 400, 403 n.7, 103 S.Ct. 2469, 2475 n.7, 76 L.Ed.2d 667 (1983) (''Respondent contends that Federal Rule of Evidence 301 requires that the burden of persuasion rest on the General Counsel. Rule 301 provides:

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

The Rule merely defines the term 'presumption.' It in no way restricts the authority of a court or an agency to change the customary burdens of persuasion in a manner that otherwise would be permissible. Indeed, were respondent correct, we could not have assigned to the defendant the burden of persuasion on one issue in *Mt. Healthy City Board of Education* v. *Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977).'').

REPORTER'S NOTE TO §18.302

The Advisory Committee's Note to Federal Rule of Evidence 302, 56 F.R.D. 118, 211 states:

A series of Supreme Court decisions in diversity cases leaves no doubt of the relevance of *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), to questions of burden of proof. These decisions are *Cities Service Oil Co.* v. *Dunlap*, 308 U.S. 208, 60 S.Ct. 201, 84 L.Ed. 196 (1939), *Palmer* v. *Hoffman*, 318 U.S. 477, 87 L.Ed. 645 (1943), and *Dick* v. *New York Life Ins. Co.*, 359 U.S. 437, 79 S.Ct. 921, 3 L.Ed.2d 935 (1959). They involved burden of proof, respectively, as to status as bona fide purchaser, contributory negligence, and nonaccidental death (suicide) of an insured. In each instance the state rule was held to be applicable. It does not follow, however, that all presumptions in diversity cases are governed by state law. In each case cited, the burden of proof question had to do with a substantive element of the claim or defense. Application of the state law is called for only when the presumption operates upon such an element. Accordingly the rule does not apply state law when the presumption operates upon a lesser aspect of the case, i.e. ''tactical'' presumptions.

The situations in which the state law is applied have been tagged for convenience in the preceding discussion as ''diversity cases.'' The designation is not a completely accurate one since *Erie* applies to any claim or issue having its source in state law, regardless of the basis of federal jurisdiction, and does not apply to a federal claim or issue, even though jurisdiction is based on diversity.

Vestal, *Erie R. R.* v. *Tompkins: A Projection*, 48 Iowa L.Rev. 248, 257 (1963); Hart and Wechsler, *The Federal Courts and the Federal System*, 697 (1953); 1A Moore Federal Practice p. 0.305[3] (2d ed. 1965); Wright, Federal Courts, 217–218 (1963). Hence the rule employs, as appropriately descriptive, the phrase ''as to which state law supplies the rule of decision.'' See A.L.I. Study of the Division of Jurisdiction Between State and Federal Courts, 2344(c), p. 40, P.F.D. No. 1 (1965).

It is anticipated that §18.302 will very rarely come into play.

REPORTER'S NOTE TO §18.403

Rule 403 of the Federal Rules of Evidence provides for the exclusion of relevant evidence on the grounds of unfair prejudice. Since all effective evidence is prejudicial in the sense of being damaging to the party against whom it is offered, prejudice which calls for exclusion is given a more specialized meaning: An undue tendency to suggest decision on an improper basis, commonly but not necessarily an emotional one, such as

bias, sympathy, hatred, contempt, retribution or horror. Unfair prejudice is not, however, a proper ground for the exclusive of relevant evidence under these rules. Judges have shown over the years the ability to resist deciding matters on such an improper basis. Accord *Gulf States Utilities Co.* v. *Ecodyne Corp.*, 635 F.2d 517, 519 (5th Cir. 1981). (''The exclusion of this evidence under Rule 403's weighing of probative value against prejudice was improper. This portion of Rule 403 has no logical application to bench trials. Excluding relevant evidence in a bench trial because it is cumulative or a waste of time is clearly a proper exercise of the judge's power, but excluding relevant evidence on the basis of 'unfair prejudice' is a useless procedure. Rule 403 assumes a trial judge is able to discern and weigh the improper inferences that a jury might draw from certain evidence, and then balance those improprieties against probative value and necessity. Certainly, in a bench trial, the same judge can also exclude those improper inferences from his mind in reaching a decision.'')

While §18.403, like Rule 403 of the Federal Rules of Evidence, does speak in terms of both confusion of the issues and misleading of the trier of fact, the distinction between such terms is unclear in the literature and in the cases. McCormick, Evidence section 185 at 546 (3d ed. 1984), refers to the probability that certain proof and the answering evidence that it provokes might unduly distract the trier of fact from the main issues. 2 Wigmore, Evidence section 443 at 528–29 (Chadbourn rev. 1979), describes the concept as follows:

In attempting to dispute or explain away the evidence thus offered, new issues will arise as to the occurrence of the instances and the similarity of conditions, new witnesses will be needed whose cross-examination and impeachment may lead to further issues; and that thus the trial will be unduly prolonged, and the multiplicity of minor issues will be such that the jury will lose sight of the main issue, and the whole evidence will be only a mass of confused data from which it will be difficult to extract the kernel of controversy.

Both commentators are clearly describing the notion of confusion of the issues. The notion of confusion of the issues of course applies as well to a reviewing body considering a record in such condition. While a trier of fact or reviewing body confused in the foregoing manner can also be said to have been misled, it is suggested that the concept of misleading refers primarily to the possibility of the trier of fact overvaluing the probative value of a particular item of evidence for any reason other than the emotional reaction associated with unfair prejudice. To illustrate, evidence of the results of a lie detector, even where an attempt is made to explain fully the significance of the results, is likely to be overvalued by the trier of fact. Similarly, the test of *Frye* v. *United States*, 293 F.1013, 1014 (D.C. Cir. 1923), imposing the requirement with respect to the admissibility of scientific evidence that the particular technique be shown to have gained ''general acceptance in the particular field in which it belongs,'' is an attempt to prevent decision makers from being unduly swayed by unreliable scientific evidence. Demonstrative evidence in the form of a photograph, map, model, drawing or chart which varies substantially from the fact of consequence sought to be illustrated similarly may mislead. Finally, any trier of fact may be misled by the sheer amount of time spent upon a question into believing the issue to be of major importance and accordingly into attaching too much significance to it in its determination of the factual issues involved. While clearly of less import where the judge is the trier of fact and with respect to the state of the record on review, the danger of confusion of the issues or misleading the judge as trier of fact, together with such risks on review, are each of sufficient moment especially when considered in connection with needless consumption of time to warrant inclusion in §18.403.

Occasionally evidence is excluded not because distracting side issues will be created but rather because an unsuitable amount of time would be consumed in clarifying the situation. Concerns associated with the proper use of trial time also arise where the evidence being offered is relevant to a fact as to which substantial other evidence has already been introduced, including evidence bearing on the question of credibility, where the evidence itself possesses only minimal probative value, such as evidence admitted as background, or where evidence is thought by the court to be collateral. In recognition of the legitimate concern of the court with expenditures of time, §18.403 provides for exclusion of evidence where its incremental probative value is substantially outweighed by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Roughly speaking undue delay can be argued to refer to delay caused by the failure of the party to be able to produce the given evidence at the appropriate time at trial but only at some later time. Waste of time may be taken to refer to the fact that the evidence possesses inadequate incremental probative value in light of the time its total exploration will consume. Cumulative refers to multiple sources of different evidence establishing the same fact of consequence as well as multiple same sources, such as ten witnesses all testifying to the same speed of the car or the same character of a witness.

REPORTER'S NOTE TO §18.501

The Conference Report to Federal Rule of Evidence 501, 1975 U.S. Code Cong. & Ad. News 7098, 7100 states:

Rule 501 deals with the privilege of a witness not to testify. Both the House and Senate bills provide that federal privilege law applies in criminal cases. In civil actions and proceedings, the House bill provides that state privilege law applies ''to an element of a claim or defense as to which State law supplies the rule of decision.'' The Senate bill provides that ''in civil actions and proceedings arising under 28 U.S.C. 1332 or 28 U.S.C. 1335, or between citizens of different States and removed under 28 U.S.C. 1441(b) the privilege of a witness, person, government, State or political subdivision thereof is determined in accordance with State law unless with respect to the particular claim or defense, Federal law supplies the rule of decision.''

The wording of the House and Senate bills differs in the treatment of civil actions and proceedings. The rule in the House bill applies to evidence that relates to ''an element of a claim or defense.'' If an item of proof tends to support or defeat a claim or defense, or an element of a claim or defense, and if state law supplies the rule of decision for that claim or defense, then state privilege law applies to that item of proof.

Under the provision in the House bill, therefore, state privilege law will usually apply in diversity cases. There may be diversity cases, however, where a claim or defense is based upon federal law. In such instances, federal privilege law will apply to evidence relevant to the federal claim or defense. See *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U.S. 173 (1942).

In nondiversity jurisdiction civil cases, federal privilege law will generally apply. In those situations where a federal court adopts or incorporates state law to fill interstices or gaps in federal statutory phrases, the court generally will apply federal privilege law.

As Justice Jackson has said:

A federal court sitting in a nondiversity case such as this does not sit as a local tribunal. In some cases it may see fit for special reasons to give the law of a particular state highly persuasive or even controlling effect, but in the last analysis its decision turns upon the law of the United States, not that of any state.

*D'Oench, Duhme & Co.* v. *Federal Deposit Insurance Corp.*, 315 U.S. 447, 471 (1942) (Jackson, J., concurring). When a federal court chooses to absorb state law, it is applying the state law as a matter of federal common law. Thus, state law does not supply the rule of decision (even though the federal court may apply a rule derived from state decisions), and state privilege law would not apply. See C.A. Wright, Federal Courts 251–252 (2d ed. 1970); *Holmberg* v. *Armbrecht*, 327 U.S. 392 (1946); *DeSylva* v. *Ballentine*, 351 U.S. 570, 581 (1956); 9 Wright & Miller, Federal Rules and Procedures §2408.

In civil actions and proceedings, where the rule of decision as to a claim or defense or as to an element of a claim or defense is supplied by state law, the House provision requires that state privilege law apply.

The Conference adopts the House provision.

It is anticipated that the proviso in §18.501 will very rarely come into play.

REPORTER'S NOTE TO §18.601

The Conference Report to Federal Rule of Evidence 601, 1975 U.S. Code Cong. & Ad. News 7051, 7059 states:

Rule 601 deals with competency of witnesses. Both the House and Senate bills provide that federal competency law applies in criminal cases. In civil actions and proceedings, the House bill provides that state competency law applies ''to an element of a claim or defense as to which State law supplies the rule of decision.'' The Senate bill provides that ''in civil actions and proceedings arising under 28 U.S.C. 1332 or 28 U.S.C. 1335, or between citizens of different States and removed under 28 U.S.C. 1441(b) the competency of a witness, person, government, State or political subdivision thereof is determined in accordance with State law, unless with respect to the particular claim or defense, Federal law supplies the rule of decision.''

The wording of the House and Senate bills differs in the treatment of civil actions and proceedings. The rule in the House bill applies to evidence that relates to ''an element of a claim or defense.'' If an item of proof tends to support or defeat a claim or defense, or an element of a claim or defense, and if state law supplies the rule of decision for that claim or defense, then state competency law applies to that item of proof.

For reasons similar to those underlying its action on Rule 501, the Conference adopts the House provision.

It is anticipated that the proviso to §18.601 will very rarely come into play.

REPORTER'S NOTE TO §18.609

Consistent with the position taken in §18.403, unfair prejudice is not felt to be a proper reason of the exclusion of relevant evidence in a hearing where the judge is the trier of fact. Sections 18.609 (a) and (b) provide for the use of every prior conviction punishable by death or imprisonment in excess of one year under the law under which the witness was convicted and every prior conviction involving dishonesty or false statement, regardless of punishment, provided not more than ten years has elapsed

since the date of the conviction or the release of the witness from the confinement imposed for that conviction, whichever is the later date. Convictions more than ten years old are felt to be too stale to be admitted to impeach the credibility of a witness testifying in any hearing to which these rules apply.

REPORTER'S NOTE TO §18.801

Rule 801(d)(1)(A) of the Federal Rules of Evidence has been revised in §18.801(d)(1)(A) to permit the substantive admissibility of all prior inconsistent statements. The added protection of certainty of making and circumstances conducive to trustworthiness provided by the restriction that the prior inconsistent statement be ''given under oath subject to the penalty of perjury at a trial, hearing, in other proceeding, or in a deposition'' were added by Congress to Federal Rule of Evidence 801(d)(1)(A) for the benefit of the criminal defendant. See Graham, *Employing Inconsistent Statements for Impeachment and as Substantive Evidence: A Critical Review and Proposed Amendments of Federal Rules of Evidence 801(d)(1)(A),* 613 and 607, 75 Mich L. Rev. 565 (1977).

REPORTER'S NOTE TO §18.802

An ''administrative file'' is admissible as such to the extent so provided by rule or regulation of the administrative agency prescribed pursuant to statutory authority, or pursuant to executive order, or by Act of Congress. If a program provides for the creation of an ''administrative file'' and for the submission of an ''administrative file'' to the judge presiding at a formal adversarial adjudication governed by these rules, see section 18.1101, the ''administrative file'' would fall outside the bar of the hearsay rule. Similarly, such ''administrative file'' is self-authenticating, section 18.902(10).

REPORTER'S NOTE TO §18.803

Section 18.803(24) provides that the ''equivalent circumstantial guarantees of trustworthiness'' required to satisfy the ''other [reliable] hearsay'' exception is that possessed solely by the ''aforementioned hearsay exceptions,'' i.e., §§18.803(1)–18.803(24). The hearsay exceptions which follow, i.e., §§18.803(25)–18.803(30), rely too greatly upon necessity and convenience to serve as a basis to judge ''equivalent circumstantial guarantees of trustworthiness.''

Section 18.803(25) provides a hearsay exception for the self-authenticating aspect of documents and other items as provided in §18.902. Out of court statements admitted under §18.902 for the purpose of establishing that the document or other item offered into evidence is as purported to be are received in evidence to establish the truth of the matter stated, §§18.801(a)–(c). Section 18.802 provides that ''hearsay is not admissible except as provided by these rules * * *'' Section 18.902 thus operates as a hearsay exception on the limited question of authenticity. Section 18.902 does not, however, purport to create a hearsay exception for matters asserted to be true in the self-authenticated exhibit itself. As a matter of drafting consistency, it is preferable to have a specific hearsay exception in §18.803 for statements of self-authentication under §18.902 than to have a hearsay exception exist in these rules not bearing an 18.800 number.

Sections 18.803(26) and 18.803(27) are derived from Rules 4(e) and (f) of the Arizona Uniform Rules of Procedure for Arbitration. Section 18.803(26)(f) is derived from Illinois Supreme Court Rule 90(c)(4).

Sections 18.803(27) and 18.803(28) maintain the common law distinction between a treating physician, i.e., medical treatment, and an examining or nontreating physician, i.e., medical diagnosis. A treating physician provides or acts with a view toward providing medical treatment. An examining physician is one hired with a view toward testifying on behalf of a party and not toward treating a patient. As such, written reports of the examining physician are not felt to be sufficiently trustworthy to be given the preferred treatment of §18.803(27). Thus a report of a physician made for the purpose of medical treatment, i.e., treating physician, is admissible if the requirements of §18.803(27) are satisfied. A report of physician prepared with a view toward litigation, i.e., examining physician, satisfying the requirements of §18.802(28) is also admissible. The reports of a given physician may, of course, fall within either or both categories. Reports of any medical surveillance test the purpose of which is to detect actual or potential impairment of health or functional capacity and autopsy reports fall within §18.803(28).

Section 18.803(28) is derived from Rule 1613(b)(1) of the California Rules of Court. A summary of litigation experience of the expert is required to assist the evaluation of credibility.

Section 18.803(29) is derived from Rule 1613(b)(2) of the California Rules of Court.

Section 18.803(30) is derived from Rule 1613(b)(3) of the California Rules of Court.

Sections 18.803(26)–18.803(30) each provide that the adverse party may call the declarant of the hearsay statement, if available, as a witness and examine the witness as if under cross-examination. The proviso relating to the calling of witnesses is derived from Rule 1305(b) of the Pennsylvania Rules of Court Procedure Governing Compulsory Arbitration. See also §§18.902(12)–18.902(16) *infra.*

These rules take no position with respect to which party must initially bear the cost of lay witness and expert witness fees nor as

to the ultimate disposition of such fees. Ordinarily, however, it is anticipated that the adverse party calling the witness should initially pay statutory witness fees, mileage, etc., and reasonable compensation to an expert witness in whatever sum and at such time as the judge may allow. Such witness fees, mileage, etc., and reasonable expert witness compensation should thereafter be charged to the same extent and in like manner as other such costs.

REPORTER'S NOTE TO §18.902

Section 18.902(11) is modeled upon Uniform Rule of Evidence 902(11). The requirement of a final certification with respect to a foreign record has been deleted as unnecessary in accordance with the position adopted in 18 U.S.C. 3505 which governs the self-authentication of a foreign record offered in a federal criminal proceeding. The ''Comment'' to Uniform Rule of Evidence 902(11) states:

Subsection 11 is new and embodies a revised version of the recently enacted federal statute dealing with foreign records of regularly conducted activity, 18 U.S.C. 3505. Under the federal statute, authentication by certification is limited to foreign business records and to use in criminal proceedings. This subsection broadens the federal provision so that it includes domestic as well as foreign records and is applicable in civil as well as criminal cases. Domestic records are presumably no less trustworthy and the certification of such records can more easily be challenged if the opponent of the evidence chooses to do so. As to the federal statute's limitation to criminal matters, ordinarily the rules are more strictly applied in such cases, and the rationale of trustworthiness is equally applicable in civil matters. Moreover, the absence of confrontation concerns in civil actions militates in favor of extending the rule to the civil side as well.

The rule requires that the certified record be made available for inspection by the adverse party sufficiently in advance of the offer to permit the opponent a fair opportunity to challenge it. A fair opportunity to challenge the offer may require that the proponent furnish the opponent with a copy of the record in advance of its introduction and that the opponent have an opportunity to examine, not only the record offered, but any other records or documents from which the offered record was procured or to which the offered record relates. That is a matter not addressed by the rule but left to the discretion of the trial judge.

Sections 18.902 (12) and (13) are derived from Rule 4 (e) and (f) of the Arizona Uniform Rules of Procedure for Arbitration. Section 18.902(12)(f) is derived from Illinois Supreme Court Rule 90(c)(4).

Section 18.902(14) is derived from Rule 1613(b)(1) of the California Rules of Court. A summary of litigation experience of the expert is required to assist the evaluation of credibility.

With respect to §§18.902(13) and 18.902(14) as applied to a treating or examining physician, see Reporter's Note to §§18.803(27) and 18.803(28) *supra*.

Section 18.902(15) is derived from Rule 1613(b)(2) of the California Rules of Court.

Section 18.902(16) is derived from Rule 1613(b)(3) of the California Rules of Court.

Sections 18.902 (12)–(16) each provide that the adverse party may call the declarant of the hearsay statement, if available, as a witness and examine the witness as if under cross-examination. The proviso relating to the calling of witnesses is derived from Rule 1305(b) of the Pennsylvania Rules of Civil Procedure Governing Compulsory Arbitration.

These rules take no position with respect to which party must initially bear the cost of lay witness and expert witness fees nor as to the ultimate disposition of such fees. Ordinarily, however, it is anticipated that the adverse party calling the witness should initially pay statutory witness fees, mileage, etc., and reasonable compensation to an expert witness in whatever sum and at such time as the judge may allow. Such witness fees, mileage, etc., and reasonable expert witness compensation should thereafter be charged to the same extent and in like manner as other such costs. See also §§18.803 (25)–(30) *supra*.

REPORTER'S NOTE TO §18.1001

Section 18.1001(3) excludes prints made from X-ray film from the definition of an original. A print made from X-ray film is not felt to be equivalent to the X-ray film itself when employed for purposes of medical treatment or diagnosis.

REPORTER'S NOTE TO §18.1101

Section 23(a) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 922, provides as follows:

In making an investigation or inquiry or conducting a hearing the deputy commissioner or Board shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter; but may make such investigation or inquiry or conduct such hearing in such manner as to best ascertain the rights of the parties. Declarations of a deceased employee concerning the injury in respect of which the investigation or inquiry is being made or the hearing conducted shall be received in evidence and shall, if corroborated by other evidence, be sufficient to establish the injury.

Other acts such as the Defense Base Act, 42 U.S.C. 1651, adopt section 23(a) of the Longshore and Harbor Workers' Compensation Act by reference. In addition 20 CFR

725.455(b) provides as follows with respect to the Black Lung Benefits Act, 30 U.S.C. 901:

*Evidence.* The administrative law judge shall at the hearing inquire fully into all matters at issue, and shall not be bound by common law or statutory rules of evidence, or by technical or formal rules of procedure, except as provided by 5 U.S.C. 554 and this subpart. The administrative law judge shall receive into evidence the testimony of the witnesses and parties, the evidence submitted to the Office of Administrative Law Judges by the deputy commissioner under §725.421, and such additional evidence as may be submitted in accordance with the provisions of this subpart. The administrative law judge may entertain the objections of any party to the evidence submitted under this section.

Section 18.1101(c) provides that these rules do not apply to the extent inconsistent with, in conflict with, or to the extent a matter is otherwise specifically provided for by an Act of Congress or by a rule or regulation of specific application prescribed by the United States Department of Labor pursuant to statutory authority. Whether section 23(a) and §725.455(b) are in fact incompatible with these rules, while unlikely for various reasons including their lack of specificity, is nevertheless arguable.

Without regard to section 23(a) and §725.455(b), various other considerations support the conclusion to exclude hearings under Longshore, Black Lung, and related acts from coverage of these rules at this time. Longshore, Black Lung, and related acts involve entitlements. Claimants in such hearings benefit from proceeding pursuant to the most liberal evidence rules that are consistent with the orderly administration of justice and the ascertainment of truth. Claimants in such hearings on occasion appear *pro se*. While the modifications made by these rules are clearly designed to further liberalize the already liberal Federal Rules of Evidence, it is nevertheless unclear at this time whether even conformity with minimal requirements with respect to the introduction of evidence would present a significant barrier to the successful prosecution of meritorious claims. Rather than speculate as to the impact adoption of these rules would have upon such entitlement programs, it was decided to exclude hearings involving such entitlement programs from coverage of these rules. It is anticipated that application of these rules to hearings involving such entitlement programs will be reconsidered in the future following careful study. Notice that the inapplicability of these rules in such hearings at this time is specifically stated in §18.1101(b)(2) to be without prejudice to the continuation of current practice with respect to application of rules of evidence in such hearings.

[55 FR 13229, Apr. 9, 1990; 55 FR 24227, June 15, 1990]

# PART 19—RIGHT TO FINANCIAL PRIVACY ACT

Sec.
19.1 Definitions.
19.2 Purpose.
19.3 Authorization.
19.4 Contents of request.
19.5 Certification.

AUTHORITY: Sec. 1108, Right to Financial Privacy Act of 1978, 92 Stat. 3697 *et seq.*, 12 U.S.C. 3401 *et seq.*, (5 U.S.C. 301); and Reorganization Plan No. 6 of 1950.

SOURCE: 52 FR 48420, Dec. 22, 1987, unless otherwise noted.

## §19.1 Definitions.

For purposes of this regulation, the term:

(a) *Financial institution* means any office of a bank, savings bank, card issuer as defined in section 103 of the Consumer Credit Protection Act (15 U.S.C. 1602(n)), industrial loan company, trust company, savings and loan, building and loan, or homestead association (including cooperative banks), credit union, consumer financial institution, located in any State or territory of the United States, the District of Columbia, Puerto Rico, Guam, American Samoa, or the Virgin Islands.

(b) *Financial record* means an original of, a copy of, or information known to have been derived from, any record held by a financial institution pertaining to a customer's relationship with the financial institution.

(c) *Person* means an individual or a partnership of five or fewer individuals.

(d) *Customer* means any persons or authorized representative of that person who utilized or is utilizing any service of a financial institution, or for whom a financial institution is acting or has acted as a fiduciary, in relation to an account maintained in the person's name.

(e) *Law enforcement inquiry* means a lawful investigation or official proceeding inquiring into a violation of or failure to comply with any criminal or