Garden State CLE
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Video Course Evaluation Form

Attorney Name_____

Atty ID number for Pennsylvania:_____

Name of Course You Just Watched_____

Please Circle the Appropriate Answer

Instructors:	Poor	Satisfactory	Good	Excellent
Materials:	Poor	Satisfactory	Good	Excellent
CLE Rating:	Poor	Satisfactory	Good	Excellent

Required: When you hear the bell sound, write down the secret word that appears on your screen on this form.

Word #1 was: _____ Word #2 was: _____

Word #3 was: _____ Word #4 was: _____

What did you like most about the seminar?

_____

_____

_____

What criticisms, if any, do you have?

_____

_____

I Certify that I watched, in its entirety, the above-listed CLE Course

Signature _____ Date _____

Garden State CLE presents:

Proof of Facts

Lesson Plan

Proof of facts in a New Jersey Courtroom

Table of Contents

1. Proving the Unknowable.

Mitchell v. United States, 526 US 314, 330 (1999)

The rule against adverse inferences is a vital instrument for teaching that the question in a criminal case is not whether the defendant committed the acts of which he is accused. The question is whether the Government has carried its burden to prove its allegations while respecting the defendant's individual rights.

Definition of a Fact:

1. Something that actually exists; reality; truth:
2. Something known to exist or to have happened:
3. A truth known by actual experience or observation; something known to be true.

Logically…..

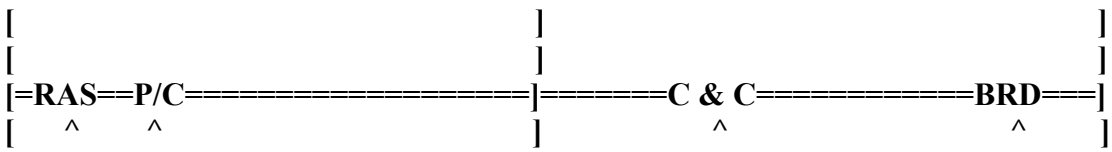
1. All facts are, by definition, objectively true.

2. Since, all facts are objectively true, a fact cannot be disproved.

3. In a courtroom, we do not deal with facts – we deal exclusively with beliefs.

4. It is important to remember that absolute certainty is not related to objective truth.

The Belief Scale



[POE]

0% **50%** **100%**

Percentage of Belief or Certainty

REASONABLE DOUBT

[State v. Medina, 147 NJ 43, 61 (1996)]

The prosecution must prove its case by more than a mere preponderance of the evidence, yet not necessarily to an absolute certainty.

The State has the burden of proving the defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases, where you were told that it is necessary to prove only that a fact is more likely true than not true. In criminal cases, the State's proof must be more powerful than that. It must be beyond a reasonable doubt.

A reasonable doubt is an honest and reasonable uncertainty in your minds about the guilt of the defendant after you have given full and impartial consideration to all of the evidence. A reasonable doubt may arise from the evidence itself or from a lack of evidence. It is a doubt that a reasonable person hearing the same evidence would have.

Proof beyond a reasonable doubt is proof, for example, that leaves you firmly convinced of the defendant's guilt. In this world, we know very few things with absolute certainty. In criminal cases the law does not require proof that overcomes

every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find [him/her] guilty. If, on the other hand, you are not firmly convinced of defendant's guilt, you must give defendant the benefit of the doubt and find [him/her] not guilty.

Clear and convincing Evidence

[In re Seaman, 133 NJ 67, 74 (1993)]

Clear-and-convincing evidence is that which produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established; evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the precise facts in issue.

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Probable Cause

[State v. Basil, 202 N.J. 570, 585 (2010)]

Probable cause to arrest a suspect exists when, under the totality of circumstances, an objectively reasonable police officer would have a well-grounded suspicion that a crime was committed by that person.

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NJRE 101(b) - Definitions. As used in these rules, the following terms shall have the meaning hereafter set forth unless the context otherwise indicates:

(1) "Burden of persuasion" means the obligation of a party to meet the requirements of a rule of law that the fact be proved either by a preponderance of the evidence or by clear and convincing evidence or beyond a reasonable doubt, as the case may be.

(2) "Burden of producing evidence" means the obligation of a party to introduce evidence when necessary to avoid the risk of a judgment or peremptory finding against that party on an issue of fact.

2. The Art of Advocacy

"What will tend to make the fact-finder believe (or disbelieve) the proofs?"

1. Always on Stage

- **a. Position and lines of sight**
- **b. Reactions to rulings & objections**
- **c. Confidence & Enthusiasm**
- **d. Emotions [Anger – Humor – Disgust]**
- **e. Body Language [Disbelief – Concern]**

2. Preparation for Trial

- **a. Witness confidence & knowledge**
- **b. Preparation for cross-examination**

3. Jury Selection (Where the case is won)

4. Opening Statement – Theme & Story

5. Presentation of Proofs

- **a. Logic, Story & Sequence**
- **b. Repetition & Corroboration**

6. Closing Statement

3. Screening out the Truth

1. NJRE 401 Relevant evidence" means evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action.

2. NJRE 402 Except as otherwise provided in these rules or by law, all relevant evidence is admissible.

3. NJRE 403 Except as otherwise provided by these rules or other law, relevant evidence may be excluded if its probative value is substantially outweighed by the risk of (a) undue prejudice, confusion of issues, or misleading the jury or (b) undue delay, waste of time, or needless presentation of cumulative evidence.

4. NJRE 611 (a) Mode and order of interrogation – Control by court. The court shall 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.

5. Apart from NJRE 403, the Main Exclusions of Evidence come from:

Hearsay Rules

Privileges

Constitutional Issues under 4th, 5th & 6th Amendments

4 Judicial Notice

NJRE 201

(a) Notice of law. Law which may be judicially noticed includes the decisional, constitutional and public statutory law, rules of court, and private legislative acts and resolutions of the United States, this state, and every other state, territory and jurisdiction of the United States as well as ordinances, regulations and determinations of all governmental subdivisions and agencies thereof. Judicial notice may also be taken of the law of foreign countries.

(b) Notice of facts. Facts which may be judicially noticed include (1) such specific facts and propositions of generalized knowledge as are so universally known that they cannot reasonably be the subject of dispute, (2) such facts as are so generally known or are of such common notoriety within the area pertinent to the event that they cannot reasonably be the subject of dispute, (3) specific facts and propositions of generalized knowledge which are capable of immediate determination by resort to sources whose accuracy cannot reasonably be questioned, and (4) records of the court in which the action is pending and of any other court of this state or federal court sitting for this state.

(c) When discretionary. A court may take judicial notice whether requested or not.

(d) When mandatory. A court shall take judicial notice if requested by a party on notice to all other parties and if supplied with the necessary information.

(e) Opportunity to be heard. Each party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) How taken. In determining the propriety of taking judicial notice of a matter or the tenor thereof, any source of relevant information may be consulted or used, whether or not furnished by a party, and the rules of evidence shall not apply except Rule 403 or a valid claim of privilege.

(g) Instructing the jury. In a civil action or proceeding, the judge shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the judge shall instruct the jury that it may, but is not required to, accept as established any fact which has been judicially noticed.

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NJRE 202 - Judicial notice in proceedings subsequent to trial

(a) Subsequent proceedings. The failure or refusal of the judge to take judicial notice of a matter or to instruct the trier of the fact with respect to it shall not preclude the judge from taking judicial notice of the matter in subsequent proceedings in the action.

(b) On appeal. The reviewing court in its discretion may take judicial notice of any matter specified in Rule 201, whether or not judicially noticed by the judge.

(c) Opportunity to be heard. A judge or a reviewing court taking judicial notice under paragraph (a) or (b) of this rule of a matter not previously noticed in the action may afford the parties the opportunity to present information relevant to the propriety of taking such judicial notice and to the tenor of the matter to be noticed.

State v. Silva, 394 NJ Super. 270, 275 (App. Div. 2007)

The purpose of judicial notice is to save time and promote judicial economy by precluding the necessity of proving facts that cannot seriously be disputed and are either generally or universally known.. Judicial notice cannot be used "to circumvent the rule against hearsay and thereby deprive a party of the right of cross-examination on a contested material issue of fact." Because judicial notice may not be used to deprive a party of cross-examination regarding a contested fact, the doctrine also cannot be used to take notice of the ultimate legal issue in dispute.

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State v. Sylvia, 424 NJ Super. 151, 154-155 (App. Div. 2012)

[As the testifying police officer] described the jug handle, the municipal court judge advised the parties that they could assume he was "familiar with that area, very familiar." Defendant did not object to the judge's implicit assertion of his intention to take notice of the area, and courts properly take judicial notice of geographical facts that "are capable of immediate determination by resort to sources whose accuracy cannot reasonably be questioned" or are "of such common notoriety within the area ... that they cannot reasonably be the subject of dispute."

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See also - N.J. Sports & Exposition Auth. v. McCrane, 119 N.J.Super. 457, 537 (Law Div. 1971) (taking judicial notice of the proximity of the Hackensack Meadowlands to highways and other states).

Courtroom Example

Example – In a DWI School Zone Case (NJSA 39:4-50(g)), the prosecutor attempts to have the municipal court judge take judicial notice that the municipality has enacted ordinance 51-12 which designates a particular portion of a local street where school children are required to cross the highway in the vicinity of a school as a school crossing.

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5. Stipulations

The parties have agreed to certain facts, the proof of which is not necessary because of the joint agreement. Accordingly, a fact-finder should treat these stipulated facts as undisputed.

But as with all evidence, undisputed facts submitted by way of stipulation can be accepted or rejected by the fact-finder in reaching a decision.

State v. Wesner, 372 NJ Super. 489, 493-494 (App. Div. 2004)

We are mindful that a criminal conviction must rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt. No matter how compelling the evidence, a judge may not direct a verdict against a defendant in a criminal case.

Here, the judge used a poor choice of words in instructing the jurors that they were "bound" by the stipulated facts. The instruction was incorrect and misleading. A stipulation of fact

is nothing more than evidence that is uncontroverted. However, a jury is free to reject any evidence, including that which is uncontroverted. Therefore, in a criminal case, the jury is not bound by stipulated facts.

Courtroom Example

Example – In a DWI School Zone Case (NJSA 39:4-50(g)), the municipal prosecutor and defense counsel are prepared to stipulate that certain yaw marks found in the middle of a school crossing were made by the defendant's vehicle on the date that the accident occurred.

6. Presumptions

a. Limitations on Presumptions in criminal & quasi-criminal cases

NJSA 2C:1-13(e)

When the code or other statute defining an offense establishes a presumption with respect to any fact which is an element of an offense, it has the meaning accorded it by the law of evidence.

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State v. McCandless, 190 N.J.Super. 75, 79 (App.Div.). The validity of a presumption in respect of an element of a criminal offense rests upon two criteria:

(1) there must be a rational connection in terms of logical probability between the proved fact and the presumed fact; and

(2) the presumption must not be accorded mandatory effect.

(i.e. it becomes a permissive inference)

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b. Rule 301. Effect of presumption

Except as otherwise provided in Rule 303 or by other law, a presumption discharges the burden of producing evidence as to a fact (the presumed fact) when another fact (the basic fact) has been established.

If evidence is introduced tending to disprove the presumed fact, the issue shall be submitted to the trier of fact for determination unless the evidence is such that reasonable persons would not differ as to the existence or nonexistence of the presumed fact. If no evidence tending to disprove the presumed fact is presented, the presumed fact shall be deemed established if the basic fact is found or otherwise established.

The burden of persuasion as to the proof or disproof of the presumed fact does not shift to the party against whom the presumption is directed unless otherwise required by law. Nothing in this rule shall preclude the judge from commenting on inferences that may be drawn from the evidence.

c. Rule 303. Presumptions against the accused in criminal cases

(a) Scope. Except as otherwise provided by law, in criminal cases presumptions against an accused, recognized at common law or created by statute, including statutory provisions that certain facts are prima facie evidence of other facts or of guilt, are governed by this rule. As used in this rule, the term "element of the offense" shall include any issue on which the prosecution bears the burden of persuasion beyond a reasonable doubt.

(b) Submission to jury. The judge may not direct the jury to find a presumed fact against the accused. If a presumed fact establishes an element of the offense, the judge may submit the question of the existence of the presumed fact to the jury upon proof of the basic fact but only if a reasonable juror on the evidence as a whole, including the evidence of the basic fact, could find the presumed fact beyond a reasonable doubt. If the presumed fact has a lesser effect, the question of its existence may be submitted to the jury provided the basic facts are supported by sufficient evidence or are otherwise established, unless the judge determines that reasonable jurors on the evidence as a whole could not find the existence of the presumed fact.

(c) Instructing the jury. Whenever the existence of a presumed fact against the accused is submitted to the jury, the judge may instruct the jury that it may regard the basic fact as sufficient evidence of the presumed fact but that it is not required to do so. In addition, if the presumed fact establishes guilt or is an element of the offense, the judge shall instruct the jury that its existence, on all of the evidence, must be proved beyond a reasonable doubt. The judge shall not use the word "presumed" or "presumption" in instructions to the jury.

d. Example of a typical presumption

NJSA 39:4-51(a)

39:4-51a. Consumption of alcoholic beverage by operator or passenger; prohibition; presumption; violations;

a. A person shall not consume an alcoholic beverage while operating a motor vehicle. A passenger in a motor vehicle shall not consume an alcoholic beverage while the motor vehicle is being operated. This subsection shall not apply to a passenger of a charter or special bus operated as defined under R.S.48:4-1 or a limousine service.

b. A person shall be presumed to have consumed an alcoholic beverage in violation of this section if an unsealed container of an alcoholic beverage is located in the passenger compartment of the motor vehicle, the contents of the alcoholic beverage have been partially consumed and the physical appearance or conduct of the operator of the motor vehicle or a passenger may be associated with the consumption of an alcoholic beverage.

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Basic Facts Are:

1. Unsealed container of an alcoholic beverage
2. Located in the Passenger Compartment of a Motor Vehicle
3. Contents Have Been Partially Consumed
4. Physical Appearance or Conduct of the Operator/Passenger May be Associated with the consumption of an Alcoholic Beverage.

The Presumed fact is: (fact-finder may draw a permissive inference that)

The operator/passenger consumed an alcoholic beverage while the vehicle was being operated.

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Courtroom Example

Example – In a DWI School Zone Case (NJSA 39:4-50(g)), the municipal prosecutor attempts to establish a permissive inference for the fact-finder that the defendant was drinking beer while operating his motor vehicle.

7. Direct vs. Circumstantial Evidence

Evidence may be either direct or circumstantial. Direct evidence means evidence that directly proves a fact, without an inference, and which in itself, if true, conclusively establishes that fact. On the other hand, circumstantial evidence means

evidence that proves a fact from which an inference of the existence of another fact may be drawn.

An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts established by the evidence.

It is not necessary that facts be proved by direct evidence. They may be proved by circumstantial evidence or by a combination of direct and circumstantial evidence.

Both direct and circumstantial evidence are acceptable as a means of proof. Indeed, in many cases, circumstantial evidence may be more certain, satisfying and persuasive than direct evidence.

[Typical examples: DNA, fingerprints, hair-fiber, fingernail scrapings, FSTs and motive]

A conviction may be based on circumstantial evidence alone or in combination with direct evidence, provided, of course, that it convinces you of a defendant's guilt beyond a reasonable doubt.

Conversely, if circumstantial evidence gives rise to a reasonable doubt in your minds as to the defendant's guilt then the defendant must be found not guilty.

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State v. Ebert, 377 NJ Super. 1, 12 (App. Div. 2005)

Finally, defendant argues that there was insufficient proof to support her conviction for reckless driving, since there was no indication of the speed at which she was traveling or that she had endangered people or property. Intoxication in combination with other evidence or standing alone *may* satisfy the recklessness element. We are satisfied that defendant's . 27% BAC, along with the fact she had driven to the parking lot of a restaurant on a major state highway, Route 46 in Denville, is sufficient to sustain her conviction for reckless driving.

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Courtroom Example

Example – The municipal prosecutor attempts to establish defendant's personal operation of a motor vehicle through a school zone crossing via circumstantial proofs.

8. Admissions and Confessions

NJRE 803(b)

The following statements are not excluded by the hearsay rule:

(b) Statement by party-opponent. A statement offered against a party which is:

(1) the party's own statement, made either in an individual or in a representative capacity, or

(2) a statement whose content the party has adopted by word or conduct or in whose truth the party has manifested belief, or

(3) a statement by a person authorized by the party to make a statement concerning the subject, or

(4) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or

(5) a statement made at the time the party and the declarant were participating in a plan to commit a crime or civil wrong and the statement was made in furtherance of that plan.

In a criminal proceeding, the admissibility of a defendant's statement which is offered against the defendant is subject to Rule 104(c).

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NJRE 104(c) - Preliminary hearing on admissibility of defendant's statements. Where by virtue of any rule of law a judge is required in a criminal action to make a preliminary determination as to the admissibility of a statement by the defendant, the judge shall hear and determine the question of its admissibility out of the presence of the jury. In such a hearing the rules of evidence shall apply and the burden of persuasion as to the admissibility of the statement is on the prosecution. If the judge admits the statement the jury shall not be informed of the finding that the statement is admissible but shall be instructed to disregard the statement if it finds that it is not credible. If the judge subsequently determines from all of the evidence that the statement is not admissible, the judge shall take appropriate action.

Courtroom Example

Example – The municipal prosecutor elicits testimony related to defendant's admissions at the scene.

9. Lay Opinion

NJRE 701 – Opinion Testimony of Lay Witnesses

If a witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences may be admitted if it (a) is rationally based on the perception of the witness and (b) will assist in understanding the

witness' testimony or in determining a fact in issue.

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Intoxication by alcohol:

State v. Pichadou, 34 N.J.Super. 177, 180 (App.Div.1955)

Holding that in prosecution for driving while intoxicated, it is not to be doubted that the average witness of ordinary intelligence, although lacking special skill, knowledge and experience but who has had the opportunity of observation, may testify whether a certain person was sober or intoxicated. Neither our statutory law nor any procedural rule requires the testimony of medical experts in the prosecution of offenses of this nature.

Other common lay opinions:

Injured (broken leg) or in pain
Crazy
Angry
Confused
Sick
Sleepy
Assistant Prosecutor

10. Expert Opinion

Rule 702. Testimony by experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify

thereto in the form of an opinion or otherwise.

Injured (broken leg)
U/I Marijuana
U/I drugs
Deputy First Assistant Prosecutor
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Rule 703. Bases of opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If 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.

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<u>Net Opinion</u>

An expert's opinion must be based on facts or data of the type identified by and found acceptable under. In applying these standards, our courts have recognized that "net opinions" are impermissible. In explaining the net-opinion rule, we have said that expert testimony should not be received if it appears the witness is not in possession of such facts as will enable [the expert] to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture. These principles require exclusion of expert testimony when based merely on unfounded speculation and unqualified possibilities.. In other words, to avoid

exclusion of an opinion, the expert must give the 'why and wherefore' that supports the opinion, 'rather than a mere conclusion.' An expert's opinion is not a net opinion, however, simply because the expert has failed to account for some particular condition or fact which the adversary considers relevant.

See Pomerantz Paper v. New Community Corp., 207 NJ 344 (2011)

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Ultimate issue

The Supreme Court has long held that expert testimony in drug cases is generally to be admitted, provided the trial court is satisfied the testimony will assist the jury in resolving a material dispute of fact. An expert is not permitted to directly express the opinion that a defendant is guilty of the crime charged, but may express an opinion which embraces an ultimate issue to be decided by the trier of fact.

An expert's opinion can be "expressed in terms of ultimate issues of fact, namely, whether drugs were possessed with the intent to distribute, but it cannot contain an explicit statement that the defendant is guilty of the crime charged under the statute.

See generally State v. Odom, 116 N.J. 65, 77 (1989)

11. Demonstrative vs. Real Evidence

Real Evidence – "It's the real thing"

Admissible, subject to a showing of relevance & authentication via chain of custody, individualized markings, etc.

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Rule 901. Requirement of authentication or identification

The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter is what its proponent claims.

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The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter is what its proponent claims. **A party introducing real evidence has the burden of laying a proper foundation for its admission. This foundation should include a showing of an uninterrupted chain of custody. The determination of whether the State sufficiently established the chain of custody is within the discretion of the trial court. Generally, evidence will be admitted if the court finds a reasonable probability that the evidence has not been changed in important respects or is in substantially the same condition as when the crime was committed. A defect in the chain of custody goes to the weight, not the admissibility, of the evidence introduced.**

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See State v. Morton, 155 N.J. 383, 446, 715 A.2d 228 (1998).

Common Examples:

Firearms/weapons	**Drugs**
Blood	**Books and records**

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Demonstrative Evidence Defined – A substitution for reality

Admissible subject to a showing of relevance & authentication in that the exhibit fairly and accurately depicts a substitution for reality at a time and place relevant to the issues in the case. Normal challenge is under NJRE 403.

Common Examples:

Photographs

Documents
Video
Maps
Models
Courtroom Demonstrations

1. Accident reconstruction
2. OJ Gloves - http://www.youtube.com/watch?v=S2YbY9eYmdM