Note on analysis

Fall 2013

Erin Murphy – Evidence – Attack Outline

* Stop
* What question are you trying to answer?
* Testimonial or physical evidence?
  + Hearsay?
    - Is it not a statement?
    - Is it being offered for nonhearsay purpose? (ElVIS)
    - Is it an OPS or PS?
* Relevant to answering that question?
  + Standard?
* Probative/prejudicial?
  + Standard?
  + Limiting instruction?

1. **INTRODUCTION AND TRIAL MECHANICS**
   1. **Policy**
      1. Accuracy, Efficiency, Fairness
      2. **FRE 102 – Purpose and Construction**. These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination
   2. **Trial Mechanics**
      1. **Discretion**
         1. FRE 104(a) – The court must decide any ***preliminary question*** about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.
         2. FRE 103 – Rulings on Evidence.
            1. When objection is preserved (admitted: timely, and stating grounds, or excluded: offering proof of substance) 🡪 Abuse of Discretion

Preserving includes objecting *on the correct grounds*

* + - * 1. When objection is not preserved 🡪 Plain Error
    1. **Order of Proof**
       1. FRE 611 – Control by the Court.
          1. Judge should exercise control to enhance truth function, avoid wasted time, and witness harassment/embarrassment

*Peacock* – Judge orders testimony in chronological order; *Elgabri* – Π can’t call Δ on direct; *Wilford* – No endless surrebuttal

* + - * 1. Scope of Cross – Not beyond ***subject matter of direct*** and ***credibility***

Court can allow inquiry into additional matters

* + - * 1. Leading Questions – Allowed on cross, not direct

Leading allowed on direct if

W is hostile, unwilling, or biased

W is a child or has communication problems

W whose recollection is exhausted – *i.e.* refreshing recollection

Undisputed preliminary matters

Leading not allowed on cross when exam is in form not fact

*E.g.*, cross of party by his own counsel

* + - 1. FRE 106 – Rule of Completeness
         1. If a party introduces a ***writing or recording***, adverse party can require introduction, ***at that time***, of any other evidence that in fairness should be considered at the same time

To apply, the portion of ***the statement itself*** must be misleading

* + - * 1. *Beech Aircraft*: Π wrote letter describing theory of crash and indicating decedent was tired and tried to cancel flight, and that the plane made evasive maneuvers during the flight

Δ lawyer asked only about the two indications, on cross Π could discuss his theory of the letter under 106 for completeness

* + 1. **FRE 615 – Sequestering Witnesses**
       1. At party’s request, the court ***must*** order witnesses excluded so they can’t hear other witness testimony
          1. Can’t exclude (a) party who is a natural person, (b) officer/employee of a party who isn’t a natural person, (c) any person whose presence is essential to a claim/defense, (d) person authorized to be present by statute
          2. Policy: Discouraging fabrication, intimidation, avoiding W changing testimony to conform to others, privacy, distracting the jury
    2. **FRE 614 – Questioning by Judge**
       1. (a) Court can call/examine witnesses, both parties can cross
       2. (b) Court can examine any witness called
       3. (c) Party can object to court calling/questioning
       4. NOTE: Reversible error if judge reveals his views/opinion – concern is opinion towards witnesses, not towards attorneys
       5. *Tilghman* – Can’t question witness in critical capacity in a close case
    3. **Questions by Jury**
       1. Jurors can’t ask questions orally – Submit to judge, allow opportunity for objection, then judge/attorney can ask it
       2. Specific procedure depends on jurisdiction

1. **WITNESS COMPETENCE**
   1. **Analysis**
      1. Witnesses are ***assumed competent*** to testify (FRE 601)
         1. Issues are most often about weight/credibility (for jury), not competence
      2. If they have ***personal knowledge*** of the facts they are testifying about (FRE 602)
         1. Assumes capacity to recall the facts; can prove with W’s testimony alone
      3. And they are ***willing, and do, take an oath*** (FRE 603)
         1. Understand duty to be truthful (“awaken the conscience”) – exact words are less important, but can’t attempt to manipulate/circumvent the oath (1st Am.) (*Ward*)
      4. Judge can allow limited questioning to determine competence (*Allen J.*)
         1. But *in camera* hearing is not necessary
      5. NOTE: Competence is a ***sufficiency standard*** under FRE 104 preliminary question
         1. *i.e.* Must be so no reasonable juror would believe witness has PK/competence
      6. NOTE: 5th/6th Am. trump FRE and state procedural rules
         1. *Per se* restrictions that interfere with Δ’s right to testify = unconstitutional (*Rock*)
         2. Cannot restrict subject matter of post-hypnosis testimony
         3. Most likely cannot restrict testimony of other defense witnesses post-hypnosis because this interferes with Δ’s right to tell their story
   2. **FRE 601 – Competence**
      1. Every person is competent to be a witness unless rules provide otherwise
      2. In a civil case, state law governs competency when state law supplies rule of decision
      3. **Dead Man Statutes** – Prohibits testifying re certain transactions when opposing party is dead 🡪 exception is if party is called by opposing party (executor)
         1. Revisions: Testimony with corroboration; allowing testimony to prevent injustice; allowing writings, etc. of deceased usually excluded as hearsay
   3. **Cases – Competence**
      1. *Lightly* – Must conduct *in camera* hearing re witness who was in mental hospital
      2. *Rosen* – Witness previously convicted of perjury still is competent
   4. **FRE 602 – Need for Personal Knowledge**
      1. Witness may only testify to matters they have PK about
      2. Evidence must be introduced to prove PK, evidence can be W’s own testimony
      3. Does not apply to expert testimony under FRE 703
      4. Preliminary question of PK is a sufficiency standard
      5. NOTE: Hearsay knocks out “X told me Y,” PK knocks out “Y happened” if W heard from X
   5. **Cases – Personal Knowledge**
      1. *Hickey* – Witness who admits to drug addiction and some faults in memory still has sufficient PK 🡪 went to veracity, not PK
   6. **FRE 301 – Oath or Affirmation to Testify Truthfully**
      1. Before testifying, witness must give oath/affirmation to be truthful
      2. Must impress the duty to be truthful on the witness’s conscience
   7. **Cases – Oath or Affirmation**
      1. *Ward* – Reversible error to not allow “fully integrated honesty” rather than “truth”
      2. *Allen J.* – Mentally handicapped W is competent unless their handicap is such that they cannot understand simple questions or the difference between truth and lies
         1. Issue is credibility, not competence
   8. **Competence and the Constitution** – *Rock* – AK rule prohibiting Δ-testimony after hypnosis was unconstitutional interference w/ 5th/6th Am. – must be case-by-case and most often cross is more appropriate for teasing out veracity issues
2. **RELEVANCE**
   1. **Analysis**
      1. Evidence is relevant if it has ***any tendency*** (*i.e.* rationally probative) to make a fact more/less probable, and the fact is of consequence in determining the action (401)
      2. Relevant evidence is admissible absent contrary rule, irrelevant evidence is not (402)
      3. When relevance depends on whether a fact exists, proof must be introduce to support the existence of the fact (104(b))
         1. Judge finds ***sufficient evidence*** a reasonable juror would conclude the fact exists
      4. Court ***may exclude*** relevant evidence if its probative value is ***substantially outweighed*** by danger of unfair prejudice, confusing issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence (403)
         1. Δ can stipulate facts proving pre-existing felon status to avoid prosecution proving specific prior felony (prejudicial – improper character evidence), but ***cannot*** stipulate to facts tending to prove Δ’s present offense (*Old Chief*)
      5. On timely request, the court ***must*** restrict evidence to its proper scope and instruct the jury accordingly (105 – Limiting instruction)
   2. **FRE 401 – Relevant Evidence**
      1. Evidence is relevant if (a) it has ***any tendency*** to make a fact more/less probable; and (b) the fact is of consequence in determining the action
      2. Evidence need only be ***rationally probative***, needn’t be in dispute, relevant ≠ sufficient to prove an element
      3. **FRE 402** – Relevant evidence is admissible unless Constitution, statute, FRE or other rules prescribed by SCUSA say otherwise. Irrelevant evidence is inadmissible
   3. **Cases – Relevance**
      1. *Dominguez* – Admissible evidence that Δ owned a gun. Fact that Δ had a reason to own it (customs officer) made it less probative, not irrelevant
      2. *Bandera* – Admissible evidence of W’s experiences to demonstrate supervisor’s liability and pattern of tolerating harassment
      3. *Knapp* – Admissible evidence that someone died of disease to demonstrate that the Marshal didn’t beat him to death (Δ claimed) to undercut Δ’s claim of self-defense
      4. *Larson* – Admissible evidence Δ was too drunk to drive a car which made it likely Δ was criminally negligent in riding a horse resulting in kid’s death
   4. **Conditional Relevance**
      1. **FRE 104(b) – Relevance that Depends on a Fact.**
         1. When relevance depends on whether a fact exists, proof must be introduced to support a finding the fact exists
         2. Evidence can be admitted on the condition the proof be introduced later
            1. Judge must find ***sufficient evidence*** that a reasonable juror would conclude the necessary fact exists
      2. *McNeely* – W testifies a man in jail confessed to a murder. Admissible over preliminary question that Δ was the man that confessed
      3. Bell argues this is all just FRE 403 prejudice analysis
   5. **Probative Value and Prejudice**
      1. **FRE 403 – Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons.**
         1. The court ***may exclude*** relevant evidence if its probative value is ***substantially outweighed*** by a danger of
            1. Unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence
            2. Δ may stipulate to facts proving pre-existing felon status making specific proof of pre-existing felon status unfairly prejudicial (*Old Chief*)

Δ *cannot* stipulate to facts tending to prove Δ’s presently charged offense

* + 1. **FRE 105 – Limiting Scope**
       1. If court admits evidence admissible for a purpose, but not for another purpose
       2. The court, on timely request, ***must*** restrict the evidence to its proper scope and instruct the jury accordingly
    2. **Cases**
       1. *Noriega* – Excluded evidence re specifics about $ from US to Δ to explain unexplained wealth 🡪 prejudicial, would shift focus to geo-political intrigue
       2. *Flitcraft* – Excluded specific articles Δ read convincing him his income was $ for time, and not “income” for tax (lacked scienter) – allowed direct testimony
          1. Note: If it would confuse the jury, shouldn’t that be evidence against scienter?
       3. *Superior Hardwoods* – Excluded video taken to demonstrate Π would have been warned by noise during log-unloading procedure as prejudicial because it was misleading – placement of the microphone, etc.
       4. *McRae* – Admitted graphic photos of accidental shooting over objection because relevant to determine if it was an accident and were not ***flagrantly intended to provoke emotion***
       5. *Old Chief*
          1. Δ wanted to stipulate to qualifying offense under gun possession statute
          2. Prior offense of violent assault = relevant, but less probative after stipulation
          3. Holding

Unfairly prejudicial as inadmissible character evidence (FRE 404(b))

Previous crime creates insinuation that Δ is violent and thus more likely to have committed *this* violent crime

Government has right to “tell their story” but that story had nothing to do with Δ’s prior crime – narrative issue didn’t apply to Δ’s legal status

* + - * 1. Dissent suggests FRE 105 limiting instruction

1. **PHYSICAL EVIDENCE**
   1. **Analysis**
      1. Evidence real or demonstrative?
         1. Note: Best Evidence Rule – Should produce original doc., narrow scope
      2. **Real Evidence – Directly connected to this event**
         1. Requires foundation and authentication (FRE 901)
            1. Evidence sufficient to support finding the item is what proponent claims it is
            2. Sufficiency standard, procedure depends on type of evidence (*Long* – rational basis to authenticate it is what they claim, can use circumstantial evidence; *Bruther* – proof of limited access)
            3. Some evidence is self-authenticating (FRE 902 – e.g., signed/sealed, notarized, etc. public documents, certified records of regular activity, etc. – Certification should be from authorized person/custodian of documents)
         2. Chain of custody goes to weight not admissibility (*Casto*)
            1. Unless chain is so broken the evidence is irrelevant (*Grant* – only need *some likelihood* the substance tested was the substance seized)
         3. Witness testimony is necessary to authenticate a writing only if required by jurisdiction (FRE 903)
      3. **Demonstrative Evidence – Illustrations, diagrams, examples, photos, etc.**
         1. FRE 1006 – Summaries to prove content. Can use a summary/chart/calculation to prove content of voluminous data that can’t be conveniently examined in court. Must make originals available to opposing party and court can order production.
         2. Consider: Fair and accurate representation? Relevant? Helpful? Does it supplant jury’s fact finding role? Purely illustrative?
         3. Is the item sufficiently explanatory/illustrative of testimony to be helpful?
         4. Photos – Authenticate (***fair and accurate***?), sits between real and demonstrative (formalistic vs. functional – not the scene, but can’t possible bring scene to court)
            1. Photo a gloss on evidence, or actual evidence you can draw conclusions from?
         5. **Authentication**: Photographer testifies to date/time and any manipulation; and/or witness testifies to subject matter then confirms fairness and accuracy
   2. **Generally**
      1. **Procedure**
         1. Mark/identify the piece of evidence
         2. Show opposing counsel
         3. Authenticate/lay foundation
         4. Move into evidence
         5. Publish to jury
   3. **FRE 901 – Authentication**
      1. Proponent must produce evidence sufficient to support finding the item is what proponent claims it is
      2. Examples: Testimony with PK, non-expert opinion re handwriting, comparison by an expert of authenticated specimen, opinion about a voice, evidence re phone convo (must ID persons/business on the line), evidence re public records, evidence re ancient docs (20y/o+, not suspicious), evidence a process/system produces accurate results
   4. **FRE 902 – Self-Authenticating Evidence**
      1. Domestic public documents that are sealed and signed
      2. Domestic public documents that are not sealed but are signed and certified
         1. Certification certifies that the original signature is genuine and by an official
      3. Foreign public documents
      4. Certified copies of public records if certified as correct by
         1. The custodian or other authorized person or one that complies with (1)-(3)
      5. Official publication – issued by a public authority
      6. Newspaper/periodical
      7. Trade inscriptions and the like
      8. Acknowledged (notarized) documents
      9. Commercial paper and related
      10. Presumptions under federal statute
      11. Certified domestic/foreign records of a regularly conducted activity
   5. **Cases – Real Evidence**
      1. *Long* – To authenticate a document, the proponent need only prove a rational basis for the claim the document is what proponent asserts, can use circumstantial evidence
         1. K offered to prove Δ was fooled into thinking his conduct was legal
         2. Issue was not whether K was valid, but whether it was the K fiancé had seen/read
      2. *Bruther* – Standard for authentication is sufficiency
         1. Argument Π couldn’t authenticate that a bulb offered was the one that injured him
         2. Evidence showed it came from somewhere with limited access, correct brand/size
      3. *Casto* – Break in chain of custody goes to weight not admissibility
         1. Tech didn’t testify and was one of the people in the chain
      4. *Grant* – Must be some likelihood the substance tested was the one seized
         1. Otherwise goes to weight, not admissibility
         2. ~14d break in COC before drugs show up in crime lab
   6. **Demonstrative Evidence**
      1. **Consider**
         1. Is it admitted? 🡪 presented or in the record?
         2. Does it go to jury or simply remain in the record?
         3. Is it substantive evidence if the jury gets it?
      2. **Cases**
         1. *Weeks* – Prosecution used demonstrative “model” of gun used in crime
            1. Foundation: looked similar to gun used; holding: demonstrative not admitted
            2. Admonished, but not reversible error when lawyer pulled trigger for jurors
         2. *Humphrey* – Prosecution used coin bags stuffed with foam to demonstrate size of bags stolen – Foundation: representative in size; holding: probably admitted
         3. *Langolis* – Admitted with limiting instruction (re inaccuracies) a model fence similar to the fence at issue
         4. *Wood* – Summary charts may be used as “pedagogical devices,” not admitted unless under FRE 1006, either way must be supported by data
         5. *Bannister* – Admitted “day-in-the-life” and accident demonstration videos as long as generally accurate even though not precise recreations
         6. *Denton* – Prosecution not allowed to introduce detailed CGI video of gov’s version of the facts – cobbled together from conflicting witness testimony
2. **HEARSAY**
   1. **Analysis**
      1. Is it being offered for the truth of the matter asserted? – **Nonhearsay**
         1. Declarant said it 🡪 D believed it 🡪 It was true 🡪 Hearsay
         2. If not 🡪 nonhearsay and no Confrontation issues!
            1. Do we only care that the statement was made? 🡪 nonhearsay
         3. ElVIS (Effect on listener, Verbal act, Implied assertion, Declarant state of mind)
            1. **Verbal act**: Declarant says something that legally makes it so

“Cancel my insurance policy”

* + - * 1. **D’s state of mind**: Only need to know D’s thoughts, not that what D thought was actually true

“That’s Barney!”

* + - * 1. **Effect on listener**: D says something and we simply want to know what the listener did in response and are not concerned about the truth of D’s statement

“Do it or I’ll kill you!” 🡪 L does it

* + - * 1. **Implied assertion**: Actions/statements demonstrating D believes the existence of a condition to be proven (but not literally what D asserts)

*i.e.* We only care *why* they said/did, not *what* they said/did

Note: Must be communication *by a person* (*i.e.* not a drug dog’s bark)

Captain boards ship w/ family 🡪 ship is seaworthy (implied assertion)

*Tatham*/*Dullard* take the view that this is hearsay

* + - 1. Remember! FRE 105 Limiting instruction is first option!
      2. Hearsay within hearsay must have each part of combined statements fall within an exception (FRE 805)
    1. Is there a Confrontation issue?
       1. Threshold: (1) testimonial, (2) D unavailable, (3) in criminal trial, (4) against Δ, (5) for truth of the matter
          1. **NOT** if declarant testifies and subject to cross, offered for non-hearsay, prior testimony (FRE 804), dying declaration, or Δ forfeits by wrongdoing
          2. Witness need only be available, can be unable to remember anything (*Owens*)
       2. Non-testimonial statements have primary purpose to enable police assistance to meet an ongoing emergency (*Crawford*; *Davis*)
       3. Testimonial statements have primary purpose to establish or prove past events potentially relevant to later criminal prosecution (*Crawford*; *Davis*)
          1. Statements that begin as non-testimonial can evolve into testimonial (*Davis*)

Testimonial aspects of a statement can be redacted

* + - * 1. Error in admitting a statement must be proven harmless beyond reasonable doubt
      1. Note: *Bryant* brings the mind of the interrogator into the inquiry – objectively evaluate the statements and actions of the parties in light of the circumstances surrounding the interrogation
         1. Depends in part whether the evidence would be admissible under hearsay exception
         2. Resurrects some *Roberts* reliability reasoning
      2. Laboratory Results
         1. Crime lab results are testimonial/subject to Confrontation (*Melendez-Diaz*)
         2. Testimony of surrogate technician doesn’t satisfy Confrontation (*Bullcoming*)
         3. Consider

Legitimate alternative purpose – *e.g.*, medical purpose

Witness has *at least some* PK of *this* analysis and how it was run

Witness offering independent opinion about underlying testimonial reports not admitted into evidence (*Williams*)

Reports arguably non-testimonial (Thomas definition)

Machine print out 🡪 raw data involving little interpretation/ambiguity

* + 1. If no Confrontation issue, is it **not hearsay**? – Admissible for truth of the matter
       1. **Opposing party statement** (FRE 801(d)(2))
          1. Statement offered *against* a party, needn’t be against *interest*, no PK required
          2. Preliminary questions are decided by preponderance (FRE 104)
          3. (A) Statement by individual or representative

PK is sticky – “I heard X” vs. “X” 🡪 “I heard” creates double hearsay

* + - * 1. (B) Statement party adopted to be true

Hear/understand 🡪 can adopt by silence (*Fortes*)

Standard is probable human behavior

* + - * 1. (C) Authorized admission

Admissible if statement is within scope of agency while relationship exists

* + - * 1. (D) Employee admission

Statement made by agent/employee on/related to a matter within the scope of agency or employment

* + - * 1. (E) Made by co-conspirator in furtherance of the conspiracy

FRE 104 – Sufficiency to find existence of conspiracy, statement can help but statement alone is insufficient

*Bruton* – Confrontation prohibits introduction of non-testifying co-Δ’s confession that inculpates Δ in joint trial – Limiting instruction doesn’t cure

*Richardson* – Admissible if redacted to eliminate Δ’s name, and any reference to Δ

*Gray* – Using “me and \*blank\*“ doesn’t cure *Bruton*

Open issue: Whether co-Δ’s statement must be testimonial to apply

*i.e.* non-testimonial co-Δ statement to girlfriend implicating Δ

* + - 1. **Prior statement** (FRE 801(d)(1))
         1. D is testifying and the prior statement is

(A) Inconsistent and was given under penalty of perjury (trial/hearing/depo)

Not made under oath 🡪 only impeachment, else ok for truth

(B) Consistent and to rebut charge of fabrication/improper influence

Post influence 🡪 only nonhearsay; pre-influence 🡪 truth of the matter if for rebutting charge of improper influence/fabrication

(C) Identification of someone D perceived earlier

No reliability inquiry – prior ID? 🡪 admissible, test veracity on cross

* + - * 1. NOTE: D must be available for cross, statement can come out from another W
    1. If no Confrontation issue, does it fall into a **hearsay exception**?
       1. Statements where we don’t care if declarant is available
          1. PR-I-M-E-R-I-B – Public Records, Impressions, state of Mind, Excited utterance, Recorded recollection, Injury report, Business record
          2. Present Sense Impression (FRE 803(1)) – Statement describing/explaining event/condition made *while or immediately after* D perceived it

Time lapse must be very short (<~15min), limited to description/explanation of the event

PK required, can be proven by statement alone (*Bemis*)

FRE 104 preponderance for preliminary question (*Bemis*)

Note: Unlikely Confrontation concern because non-testimonial

* + - * 1. Excited Utterance (FRE 803(2)) – Statement relating to startling event/condition made while under stress of the excitement it caused

Exciting influence must remain, statement only needs to “relate” to the startling event

PK required, can be proven by statement alone (*Bemis*)

FRE 104 preponderance for preliminary question (*Bemis*)

Note: Unlikely Confrontation concern because non-testimonial

* + - * 1. Mental State (FRE 803(3)) – Statement of declarant’s then-existing state of mind, emotional, sensory, or physical condition – not including statement to prove the fact remembered or believes unless relating to a will

Consider: Motive, intent, plans (future), or feeling, pain, bodily health

*Hillmon* – Statements to show person’s state of mind expressing intent to engage in future conduct are admissible

Forward looking, contemporaneous to event, can give circumstantial evidence of third party’s future conduct (*Houlihan*) (split on corroboration requirement)

NO backward looking conduct

* + - * 1. Injury Report – Statement for Medical Diagnosis/Treatment (FRE 803(4))

(A) Made for – and reasonably pertinent to – medical diagnosis/treatment and (B) describes medical history, past/present symptoms, inception, or cause

Statements as to fault usually do not qualify

Except in domestic violence situations – arguably pertinent to diagnosis and to prevent recurring injury/mental health issues (*Moses*)

Note: Child statements to social worker are almost always considered non-testimonial for Confrontation

Note: Statement does not need to be about *declarant’s* injury, needn’t be to a *medical doctor*

* + - * 1. Recorded Recollection (FRE 803(5)) – A record that

(A) Is on a matter the witness once knew, but can’t recall now, (B) was made/adopted *when the matter was fresh* in witness’s memory, and (C) accurately reflects witness’s knowledge

If recollection recorded 🡪 read into evidence, not admitted unless opposing party wants

If recollection refreshed (FRE 612) 🡪 not put in evidence at all unless opposing party wants (refreshing thing must be produced for opposing party and witness can be examined about it)

* + - * 1. Business Records (FRE 803(6)) – A record of an act, condition, opinion, or diagnosis if:

Regularly maintained, record of regular activity, made promptly, based on PK, supported by testimony (custodian, qualified witness, or 902(11) certification), not unreliable (*e.g.*, not regular and made for litigation, or regular report written by someone with interest)

Business Duty Rule – If source, recorder, and all in the chain are acting in regular course of business, multiple hearsay excused (*Wilson*)

Business can be illegal, record can be a personal business record

Unlikely to qualify as testimonial

FRE 803(7) – Absence of a record of regularly conducted activity if

(A) admitted to prove the matter didn’t occur/exist, (B) record of that kind is regularly kept, and (C) not untrustworthy

* + - * 1. Public Records (FRE 803(8)) – Record if it sets out

Office activities – Narrow, ministerial stuff like time cards

Matter observed under duty to report

Narrow – like duty to report rainfall

In criminal case – no statements of law enforcement

Factual findings of a legally authorized investigation

Only in civil case, or against government in criminal case

Factually based *conclusions/opinions* in report are not excluded

No indication of lack of trustworthiness

* + - 1. Statements only admissible if declarant is unavailable
         1. Witness is unavailable if

Exempted by privilege

Δ cannot exempt himself through asserting 5th Am. (*Bollin*)

Refuses to testify despite court order

Testifies to lack of memory

Is unable because of death, physical, or mental illness

Is absent and the proponent of the statement cannot procure attendance by process or other means

Proponent must make efforts beyond bare assertion that witness is beyond subpoena power (call, pay, attempt to locate, etc.) (*Raymark*)

* + - * 1. Not unavailable if absence is due to procurement/wrongdoing of the proponent of the statement for purpose of preventing the testimony

For dying declaration, statement against interest, or statement of personal/family history, if declarant’s testimony *could have been* received, then witness is not unavailable

* + - * 1. Prior Testimony

Prior proceeding must have oath and cross

If this proceeding is criminal – same person as this case has to have cross examined the witness, and have the same motive and opportunity

Open question whether prosecutor has same motive/opportunity to question a witness during grand jury testimony as at trial (*Salerno*)

If this is civil – must have same party or predecessor in interest with the same motive and opportunity to cross

Can be both different Π/Δ, need similarity across issues and motivation to question (*Johns-Manville*)

* + - * 1. Dying Declaration

Declaration when declarant has a settled, hopeless expectation of death

Statement requires PK

Only admissible in homicide and civil cases

Only admissible if about the cause/circumstances of declarant’s death

Irrelevant if D actually dies so long as elements are met

Exception to Confrontation

* + - * 1. Statement Against Interest

Can come from *any* declarant

Statement must be

So contrary to declarant’s proprietary/pecuniary interest

So great a tendency to invalidate declarant’s claim against someone

Or to expose declarant to civil or criminal liability

And is corroborated

For criminal cases if it exposes declarant to criminal liability

D is acknowledging subjectively that they are opened to liability

Confrontation 🡪 Usually non-testimonial

Policy (Corroboration)

Prevent rope-a-dope 🡪 run a trial, then have buddy confess, then during his trial, he recants and points to evidence in trial #1

Same the other way 🡪 Arrested Δ inculpates everyone

NOTE: Statements exculpating/inculpating 3rd parties generally do not qualify because they have no effect on D unless statement itself provides information D could only know if D was involved

Watch out for SAI around time of death

* + - * 1. Forfeiture by Wrongdoing

Statement offered against a party that

Wrongfully caused – or acquiesced in wrongfully causing – declarant’s unavailability as a witness

And did so intending that result

Exception to Confrontation

FRE and Confrontation require intent to prevent testimony

State rules can be broader

Domestic Violence (*Giles*)

Acts of DV are often intended to dissuade V from seeking outside help

Includes preventing V from testifying to police for prosecution

When abuse results in murder, evidence may support finding the crime expressed intent to isolate V and prevent testimony

* + - 1. Residual exception? (FRE 807)
         1. Hearsay may not be excluded even if not covered by an exception if

Statement is trustworthy, offered to prove a material fact, is more probative than any other evidence obtainable through reasonable efforts, **and** admitting serves the rules/interest of justice

Requires reasonable notice of intent to use, info re D to opposing party

* + - * 1. Two theories (*Laster*)

Majority: Close enough, good enough

Minority: Near miss, inadmissible

* + - 1. Due process?
         1. DPC allows some evidence *offered by criminal Δ* that would otherwise be excluded – BUT rule excluding evidence must be arbitrary/disproportionately against evidence otherwise favorable to Δ

*E.g.*, voucher rule – Δ cannot impeach his own witness

Case where Δ calls witness, but Δ calls because W is unreliable and undermines Π 🡪 voucher doesn’t allow impeaching W by Δ

* + - * 1. Excluding evidence critical to Δ’s defense and additionally not allowing Δ to cross-examine his own witness denies Δ a fair trial under DPC (*Chambers*)

Strong circumstantial evidence of reliability helps (*Chambers*)

Only in the most extreme cases (*Fortini*)

* + 1. Rule against hearsay – FRE 802 – Hearsay is inadmissible unless otherwise by statute, the rules, or other rules prescribed by SCUSA
  1. **Non-Hearsay**
     1. **FRE 801 – Exclusions from Hearsay**
        1. (c) Hearsay means a statement that (a) the declarant doesn’t make while testifying at the current trial/hearing and (b) a party offers in evidence to prove the truth of the matter asserted in the statement
        2. Cmt: If the significance of the statement lies ***solely in the fact that it was made***, no issue is raised as to the truth of anything asserted and the statement ***is not hearsay***
           1. Declarant said it 🡪 believed it 🡪 it is true 🡪 hearsay
           2. Declarant said it 🡪 witness believed it 🡪 witness thought it was true 🡪 nonhearsay
     2. *Southerland*
        1. Rumors Π and Smith were in a relationship
        2. Hearsay: People said it 🡪 believed it 🡪 they were in a relationship
        3. Here, non-hearsay: People said it 🡪 Δ heard about it 🡪 knew and did nothing
     3. **Effect on the Listener**
        1. *Subramaniam* – Δ prosecuted as enemy combatant, testifies terrorists said they’d kill him if he didn’t carry ammunition
           1. Hearsay: Said it 🡪 believed it 🡪 would have killed him
           2. Here, non-hearsay: Said it 🡪 Δ believed it 🡪 Δ acted under duress
        2. *Jefferson* – Letter indicating Δ must go to a hearing on a date
           1. Hearsay: Letter said it 🡪 hearing was actually held on that day
           2. Here, non-hearsay: Letter said it 🡪 Δ received it 🡪 Δ had notice

Note: other evidence would have to prove hearing date

* + - 1. *Johnson* – Testimony that doc said Δ would have to stop writing bad prescriptions
         1. Hearsay: Said it 🡪 believed scripts were bad 🡪 scripts were bad
         2. Non-hearsay: Said it 🡪 Δ knows he said it 🡪 Δ on notice something is wrong
    1. **Declarant’s State of Mind**
       1. *Lyons v. Morris* – Children yelling “It’s Barney” responding to costume
          1. Hearsay: Children yell 🡪 Believe it’s Barney 🡪 It’s Barney
          2. Non-hearsay: Children yell 🡪 costume resembles Barney 🡪 it is confusing
       2. *Parry* – Δ tells mother he’s working with undercover officers
          1. Hearsay: Said it 🡪 Believed it 🡪 was working with agent
          2. Non-hearsay: Said it 🡪 Had ID’d the cop 🡪 Knew it was a cop
    2. **Verbal Acts**
       1. Performative utterances: Declarant says it which legally makes it so
       2. *Saavedra* – Testimony that someone called witness and claimed to be a cop
          1. Non-hearsay: Someone said it 🡪 someone committed fraud
       3. *Hanson* – Testimony that declarant indicated a parcel of corn was someone’s
          1. Non-hearsay: Declarant said it 🡪 verbal K that it was his
       4. *Creaghe* – Declarant statement that he wanted insurance policy cancelled was non-hearsay because the statement was sufficient to cancel the policy
       5. *Montana* – Testimony that Δ2 told Δ1 to tell his father testimony costs $10k
          1. Statement “your father promised me $” was a demand – only issue is fidelity of the statement by the witness
    3. **Implied Assertions**
       1. FRE 801(a) – Statement. Statement means a person’s oral assertion, written assertion, or **nonverbal conduct, if the person intended it as an assertion**
          1. Therefore verbal acts *not intended as a statement* are nonhearsay
       2. *Zenni* – Police answer phones at Δ’s place, caller says “Put $2 on X horse”
          1. Caller did not say “I want you, Mr. Bookie, to place $2 on X horse”
          2. First is implied assertion that Δ is a Bookie, second is an actual one
       3. *Dullard* – Police find note warning Δ that cops are outside
          1. Reflects minority view outlined in *Tatham*
  1. **Not-Hearsay**
     1. **Declarant’s Prior Statement**
        1. FRE 801(d)(1) – Declarant’s prior statement. D testifies and is subject to cross about a prior statement and the statement (A) is inconsistent and was given under penalty of perjury, (B) is consistent and offered to rebut a charge of fabrication/improper influence, or (C) identifies a person D perceived earlier
        2. *Albert v. McKay* – W testifies a machine was running when V went to look at it. Impeached w/ prior statement the machine wasn’t running.
           1. Holding: Impeaching statement can’t be used for truth of the matter because wasn’t under oath
        3. *Owens* – V IDs Δ in hospital, maybe unreliable because admitted he hadn’t seen attacker and indication it may have been prompted
           1. Holding: ID admissible, veracity can be challenged on cross
        4. *Tome* – Holding that post improper influence statements may be admissible as nonhearsay if relevant, pre improper influence are allowed to the truth of the matter if for rebutting an express/implied charge of fabrication
     2. **Opposing Party Statement**
        1. FRE 801(d)(2) – Opposing party’s statement. Offered against an opposing party and: (A) made by party or representative, (B) adopted, (C) made by an authorized person, (D) made by employee within scope of employment, (E) made by co-conspirator in furtherance of conspiracy
           1. Statement alone can’t establish authority in (C), existence/scope of relationship in (D), or existence of conspiracy in (E)
        2. By Individual or Representative
           1. *Phelps* – Holding Δ cannot admit his own statement for self-serving purpose, must be admitted *against* the party
           2. *Salvitti* – Holding that representative’s statement needn’t be based on PK
           3. *Reed* – Holding that Δ’s prior statement is admissible even without PK
        3. Adopted Admission
           1. *Fortes* – Holding that Δ’s lack of response to conspirator’s statement that she helped with a robbery sufficed to show adoption

Heard, understood, and adopted by silence

Evaluated in terms of probably human behavior

* + - * 1. *Southern Stone* – Π counsel sends Δ a letter describing facts ending in “please advise if this is incorrect”

Holding: Not adopted admission because activities described defunct company Δ no longer cared about

* + - 1. Authorized (C) and Employee (D) Admissions
         1. *Hanson* – Lawyer’s statement to Δ that Δ was not negligent

Admissible if within the scope of agency (management of litigation) while relationship existed

* + - * 1. *Mahlandt* – Statement of board are admissible against the company as (C) authorized, but inadmissible as against any employee individually
        2. *Sea-Land* – Email from E1 to E2 is forwarded outside company

E2 forward is a (D), E1 is either (D) or adopted by E2 (B)

Both (D) must be within the scope of employment

* + - 1. Co-Conspirator Statement
         1. *Bruton*

Statement by coconspirator, not in furtherance of conspiracy, implicating Δ and co-Δ in crime

Admissible against co-Δ (A), but not against Δ (E)

Holding: Because of risk of prejudice to Δ, co-Δ’s confession in joint trial violates Δ’s 6th Am. Confrontation rights

Note: If co-Δ testifies, no Confrontation problem, but must fit an exception of non/not-hearsay

* + - * 1. *Gray*

Statement by co-Δ, read by cop using “deleted” for Δ’s name followed by “after co-Δ told you this, you arrested Δ, right? 🡪 yes”

Followed with limiting instruction

Holding: Redaction with an obvious indication towards Δ falls under *Bruton*

*Richardson* – Redaction that eliminates Δ’s name and reference to Δ is ok

Dissent: Concern about changing the substance of co-Δ’s statement by editing things

* 1. **Confrontation**
     1. *Crawford*
        1. Core testimonial circumstances
           1. Accuser makes formal statement to officers
           2. *Ex parte* in court testimony or equivalent (grand jury)
           3. Affidavits
           4. Custodial interrogation
           5. Prior testimony where Δ didn’t cross examine
           6. Statements made under circumstances that would lead an objective witness to believe the statement would be available for use at later trial
        2. Testimonial statements are subject to confrontation
           1. Dying declarations and forfeiture by wrongdoing are not within Confrontation
     2. *Davis* - Call to 911 operator is considered non-testimonial during the time when 911 operator is getting information to hand to police to thwart ongoing crime
     3. *Hammond* – Statements to police in the aftermath of domestic violence are testimonial
     4. *Bryant* – V makes statements to police after being shot. Statements made at a gas station, V dies on the way to hospital.
        1. Holding: Statements were non-testimonial
     5. **Laboratory Results**
        1. *Melendez-Diaz* – Affidavits from laboratory affirming that substance tested was cocaine are “core testimonial documents” subject to Confrontation
        2. *Bullcoming* – Testimony of technician not involved in testing Δ’s DUI blood sample when tech was on unpaid leave didn’t satisfy Confrontation
        3. *Williams* – Testimony by expert giving opinion on lab results not otherwise admitted into evidence is admissible and doesn’t require Confrontation of lab technicians
  2. **Due Process**
     1. *Chambers* – Holding that excluding Δ’s proffered evidence due to the voucher rule which would have exculpated Δ was a violation og DPC
        1. Statements bore persuasive assurances of trustworthiness and would have qualified as opposing party statements but for the voucher rule
     2. *Fortini* – Holding that excluding evidence that V attacked 4 people prior to Δ killing him (arguing self-defense) does not violate DPC even though excluding the evidence (state of mind) was error just not critical to Δ’s defense
  3. **Hearsay Exceptions – Declarant Available or Unavailable**
     1. **Present Sense Impression and Excited Utterance**
        1. FRE 803(1) – Present Sense Impression. A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it
        2. FRE 803(2) – Excited Utterance. A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused
        3. *Obayagbona* – Statements made by undercover officer on tape during “arrest” are not PSI due to time lapse, held EU because agent was excited about the “win” and stimulus was still present
        4. *Bemis* – Excluded evidence from 911 call tending to prove Π was beaten by police because of indications that caller was not speaking from PK to qualify as PSI 🡪 if someone was telling him, could be EU/PSI relating PSI but insufficient evidence
        5. *Elem* – Excluded statement by Δ indicating to police that a gun wasn’t his and he wasn’t brandishing it 🡪 substantive (no PSI), and insufficient evidence to show EU
     2. **Then-Existing Mental, Emotional, or Physical Condition**
        1. FRE 803(3) – Statement of the declarant’s then-existing state of mind, or emotional, sensory, or physical condition, but not including a statement of memory or belief to prove the fact remembered unless relating to a will
           1. *Hillmon* – Forward looking statements to show a person’s state of mind expressing a (contemporaneous) intention to engage in future conduct are admissible

“I intend to leave on a trip with Δ tomorrow” 🡪 admissible

* + - 1. *Harris*
         1. “I believe the government is trying to set me up” 🡪 hearsay within exception
         2. “The government is trying to set me up” 🡪 nonhearsay – circumstantial
      2. *Shepard* – inadmissible statement of army wife to nurse indicating “Shepard poisoned me” 🡪 hearsay because not getting at what her state of mind is, but rather the truth of the fact remembered
      3. *Houlihan* – V leaving apartment tells sister “I’m meeting with Billy Herd”
         1. Holding: Statement admissible to prove V’s intention to meet with Δ
    1. **Statement for Medical Diagnosis or Treatment – Injury Report**
       1. FRE 803(4) – Statement that (A) is made for – and is reasonably pertinent to – medical diagnosis or treatment and (B) describes medical history, past/present symptoms or sensations, inception or cause
       2. *Huffco* – Excluded statements to doctors about the cause of a twisted ankle injury in workman’s comp. case 🡪 docs testified it was irrelevant to their diagnosis
       3. *Moses* – Statements by V and kids to doctors/social workers about domestic violence
          1. Holding: statements to police are testimonial, to ER docs and social workers are non-testimonial until V informed that they are going to be told to police
          2. All qualify under exception as relevant to diagnosis and prevention of recurring injury
    2. **Recorded Recollection**
       1. FRE 803(5) – Recorded Recollection. A record that
          1. (A) is on a matter the witness once knew, but now can’t recall, (B) was made or adopted by witness when matter was fresh in her mind, and (C) accurately reflects witness’s knowledge
       2. FRE 612 – Writing used to refresh witness’s memory
          1. (b) Adverse party can have the writing produced at a hearing, inspect it, cross-examine the witness about it, and introduce it into evidence if desired
          2. (c) Failure to produce or deliver can result in striking witness testimony or mistrial
       3. *Fisher* – Witness allowed to testify through reading carbon copy of itemized work receipt
       4. *Riccardi* – Witness recollection refreshed by allowing her to read a list of items from the indictment
    3. **Business Records**
       1. FRE 803(6) – Records of regularly conducted activity. A record of an act, event, condition, opinion, or diagnosis if: (A) made at or near the time by – or from – someone with PK, (B) regularly conducted activity, (C) regularly recorded, (D) shown by testimony (custodian, or qualified witness or 902(11) certification), (E) not untrustworthy
       2. *Acquisto* – Custodian of records qualified to lay foundation for payroll record
       3. *Keosh* – Personal ledger of shady employee recording nightly tips was a business record 🡪 regularly recorded, some corroborating evidence
       4. *Gibson* – ledger outlining drug transactions is a business record
       5. *Palmer* – Excluded post-accident report by company engineers
       6. *Lewis* – Allowed personal injury and inspection report reasoning that persons writing reports had no stake in litigation
       7. *Wilson* – Record where sister told social worker Π is a liar. Report is a business record, but sister’s statement is *maybe* a statement for medical treatment
          1. Statement is vague/conclusory 🡪 harmless error not excluding statement
       8. *Gentry* – M&Ms employee testimony indicating *lack* of record of reports with people complaining of tacks in their candy admissible for Δ’s falsifying police report charges
    4. **Public Records**
       1. FRE 803(8) – Public records. A record or statement of a public office if:
          1. (A) is sets out:

(i) the office’s activities;

(ii) a matter observed while under a legal duty to report, but not including in a criminal case, a matter observed by law enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation and

* + - * 1. (B) No indication of a lack of trustworthiness
  1. **Hearsay Exceptions – Declarant Unavailable**
     1. **Availability**
        1. FRE 804(a) Definition of unavailable – when the declarant
           1. (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant’s statement or
           2. (2) persists in refusing to testify concerning the subject matter of the declarant’s statement despite an order of the court to do so
           3. (3) testifies to a lack of memory of the subject matter of the declarant’s statement
           4. (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity or
           5. (5) is absent from the hearing and the proponent of his statement has been unable to procure the declarant’s attendance by process or other means
           6. A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying
        2. Under (b)(2), (3), or (4) in theory you could have had them testify or something 🡪 then not admitted – *i.e.* make a colorable argument that the person proffering the data could have allowed actual opportunity to cross-examine
        3. *Bolin* – Holding Δ can’t contend he himself is unavailable due to asserting 5th Am. priv. in order to bring in his former grand jury testimony
        4. *Raymark Industries* – Holding Π can’t admit Δ’s expert’s prior testimony without engaging in reasonable efforts to acquire live testimony 🡪 Π simply asserted witness was out of state and thus beyond subpoena
     2. **Prior Testimony**
        1. FRE 804(b)(1) – Former Testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination
        2. *Johns-Manville Sales* – Holding that prior testimony of expert (former employee of Δ) who testified at a prior proceeding between different parties on a similar asbestos case was admissible against Δ
        3. *Salerno* – Remanded case to determine whether a prosecutor has motive/opportunity to cross-examine a witness during exploratory grand jury testimony
     3. **Dying Declaration**
        1. FRE 804(b)(2) – Statement under Belief of Impending Death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant’s death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death
        2. *Shepard* – Inadmissible when wife accuses husband of poisoning her then dies later when evidence showed she didn’t think she was about to die
        3. *Sacasas* – Inadmissible when dying declaration regards exculpatory statement for Δ having nothing to do with D’s death and unrelated to a homicide
     4. **Statement Against Interest**
        1. FRE 804(b)(3) – Statement Against Interest. A statement that (A) a reasonable person in the declarant’s position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant’s proprietary or pecuniary interest or had so great a tendency to invalidate the declarant’s claim against someone else or to expose the declarant to civil or criminal liability and (B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability
        2. *Duran Samaniego* – Roberto Duran’s brother apologizes for stealing his boxing title belts, later flees to Panama and can’t be found
           1. Held: Admissible as statement against interest 🡪 would expose brother to criminal liability, not criminal case so no corroboration, unavailable
        3. *Jackson* – Statement at plea allocution tending to exculpate Δ is inadmissible
           1. Held: Unavailable (5th Am.), not prior testimony (motive/opportunity to cross), not statement against interest (exculpation did not inculpate declarant)
     5. **Forfeiture by Wrongdoing**
        1. FRE 804(b)(6) – Statement offered against a party that wrongfully caused the declarant’s unavailability. A statement offered against a party that wrongfully caused – or acquiesced in wrongfully causing – the declarant’s unavailability as a witness, and did so intending that result
        2. *Giles* – Δ claims self-defense in murdering ex-girlfriend – statements by GF 3wks prior to police in response to domestic violence call
           1. Held: Statements are testimonial – to qualify for exception under Confrontation clause, act must have intent to silence her testimony as a witness in subsequent proceeding
  2. **Residual Exception**
     1. **FRE 807 – Residual Exception**
        1. (a) Hearsay statement may not be excluded even if not covered by an exception if:
           1. (1) Statement has circumstantial guarantees of trustworthiness
           2. (2) Offered as evidence of a material fact
           3. (3) More probative than any other evidence the proponent can obtain through *reasonable efforts* **and**
           4. (4) Admitting it would best serve the rules/interest of justice
        2. (b) Proponent must give reasonable notice of intent to offer statement, its particulars including D’s name/address to give fair opportunity to deal with it
     2. *Laster* – Government evidence of a company selling meth precursor to Δ, owner/operator died before trial failing the business record exception
        1. Held: Falls within residual exception 🡪 admissible
        2. Dissent: Two theories – close enough, good enough; near miss is inadmissible
           1. Argument that close enough undermines the rules

1. **CHARACTER EVIDENCE**
   1. **Analysis**
      1. Character evidence is inadmissible to show acts in conformity (FRE 404(a)(1))
         1. If “character is in issue” (*e.g.*, element of crime, claim, defense)
            1. Character is admissible if the trait is pertinent (*e.g.*, fitness as a parent, notice to employer that employee is an alcoholic, defamation, door opened by Δ, etc)
         2. Exceptions (FRE 404(a)(2))
            1. In a **Criminal Case**: if **the defendant**

Offers evidence of **Δ’s trait** 🡪 prosecutor can offer evidence to rebut

Offers evidence of **V’s trait** 🡪 prosecutor can rebut and offer evidence of Δ’s same trait

* + - * 1. In a **Homicide Case**:

Prosecutor can offer evidence of V’s peacefulness to rebut Δ’s claim that V was **first aggressor** (Note: This does not open Δ up at the same time)

* + - 1. Evidence of a **witness’s character** falls under the 600 rules!
    1. Modes of proving character (FRE 405)
       1. When character **is not in issue** 🡪 reputation or opinion testimony only
          1. On cross court may allow inquiry into relevant specific instances of conduct
       2. When character **is in issue** – an essential element of a charge/claim/defense
          1. Can be proven by relevant specific instances of a person’s conduct
       3. **Questions about specific conduct**
          1. May not be proven by extrinsic evidence even if W is lying his face off
          2. Must be asked in good faith – specific evidence to support the questions
    2. Crimes/wrongs/other acts are admissible to show MIMICK subject to notice (404(b))
       1. **M**otive/opportunity, **I**ntent, absence of **M**istake, **I**dentity (M/O), **C**ommon scheme/plan, **K**nowledge (MIMICK)
       2. Subject to 403 balancing, 104(b) sufficiency standard for preliminary question re “other act” (*Huddleston*), 105 limiting instructions, extrinsic evidence ok!
    3. Evidence of **habit**/organization’s **routine practice** may be admitted to prove actions in accordance without corroboration or eyewitness
       1. Look for non-moral, automatic, ritualized behavior 🡪 sampling/uniformity
    4. **Sex Offenses – V’s Behavior**
       1. Evidence to prove V’s sexual behavior/predisposition are inadmissible (412(a))
       2. 412(b)(1): May be admissible in criminal case (A) to show different source of injury/evidence, (B) instances of specific behavior towards Δ to prove consent, or (C) if exclusion violates Δ’s constitutional rights (eviscerate Δ’s defense/evidence of bias – *Olden*)
       3. 412(b)(2): In civil cases, court may admit if probative value substantially outweighs harm to V & unfair prejudice to any party.
          1. Reputation only admissible if V puts it in issue
       4. All requires 14d notice
    5. When Δ is accused of **sexual assault** (**413(a)**), or **child molestation** (**414(a)**), court may admit evidence that Δ committed any other assault/molestation
       1. In a civil case (**415(a)**) based on sexual assault/child molestation, court may admit evidence that party committed any other assault/molestation
       2. All requires 15d notice unless good cause delay
  1. **Generally**
     1. **FRE 404(a) – Character Evidence**
        1. (1) Evidence of character/traits is inadmissible to prove acts in conformity
        2. (2) Exceptions for Δ or V in criminal case
           1. (A) Δ may offer evidence of Δ’s pertinent trait and prosecutor can rebut
           2. (B) Δ may offer evidence of V’s pertinent trait and prosecutor can rebut

And offer evidence of Δ’s same trait

* + - * 1. (C) In a homicide case, prosecutor can offer evidence of V’s peacefulness to rebut evidence V was first aggressor
      1. (3) Evidence of a witness’s character may be admitted under 607-609
      2. Note: “Character in issue” – element of the crime, claim or defense
    1. **FRE 405 – Methods of Proving Character**
       1. (a) Reputation/Opinion. When admissible, character can be proven by testimony about the person’s reputation or by opinion testimony. On cross of character witness, court may allow inquiry into relevant specific instances of conduct
       2. (B) Specific Instances of Conduct. When character is an essential element of the charge, claim, or defense – can prove by relevant specific instances of conduct
       3. Note: No extrinsic evidence to prove relevant specific acts of conduct
    2. **FRE 803(21)** – Reputation of declarant is not excluded as hearsay regardless of whether the declarant is available
    3. **FRE 701 – Opinion Testimony By Lay Witness**
       1. Testimony limited to one (a) rationally based on W’s perception, (b) helpful to understanding W’s testimony or determining a fact in issue, (c) not based on scientific/technical data
    4. **Cases**
       1. *Zackowitz* – Altercation results in shooting, issue whether self-defense
          1. Inadmissible that Δ had a cache of weapons
       2. *Cleghorn* – Evidence that employee regularly drank on the job was admissible to show notice to employer (but not that employee was drunk at time of accident)
       3. *Berryhill* – Evidence of involvement in homicide admissible for child custody
       4. *Larson* – Evidence that Π is an alcoholic admissible in slander case to prove truth of statements and to mitigate damages
       5. *Michelson* – Prosecutor can ask Δ’s character witnesses if they’d heard he was arrested for stolen goods on a specific date with instruction it is not evidence of guilt – dissent argues form of question suggests specific facts occurred
       6. *Roland* – Δ asked W whether she thought Δ gave people trouble – opened the door to allowing prosecutor to ask about prior conviction for murder
       7. *Krapp* – Inadmissible, but not overturned, case where prosecutor asked W if she was aware Δ’s husband committed tax fraud with Δ’s knowledge
          1. Good faith was inspector’s statement that Δ indicated something was up with husband’s tax return – arguably extreme case
  1. **Prior Crimes and Wrongs**
     1. **FRE 404(b) – Crimes, Wrongs, or Other Acts**
        1. (1) Evidence of crime/wrong/other act is inadmissible to prove acts in conformity
        2. (2) May be admissible for another purpose: **M**otive/opportunity, **I**ntent, absence of **M**istake, **I**dentity (M/O), **C**ommon scheme/plan, **K**nowledge (MIMICK)
           1. On request by Δ in criminal case, must provide reasonable notice and nature of the evidence before trial or during trial if good causes excuses notice
        3. Subject to 403 balancing, 104(b) sufficiency standard for preliminary question re “other act” (*Huddleston*), 105 limiting instructions, extrinsic evidence ok!
     2. **Cases**
        1. *Beechum* – Δ has coin stolen from mail, found also with stolen Sears cards
           1. Cards admissible to show intent to keep the coin
           2. 403 – close in time, not cumulative, not unduly prejudicial, no better evidence
        2. *Boyd* – Admissible evidence that Δ uses drugs to show motive to sell MJ
        3. *DeJohn* – Admissible evidence that guard found Δ behind desk (opportunity), and police arrested Δ previously with stolen checks (knowledge they were stolen)
        4. *Lewis* – Admissible evidence Δ participated in earlier burglary to get items used in later robbery (common scheme/plan)
        5. *Crocker* – Admissible Δ’s prior arrest with co-Δ when co-Δ had bad checks to show knowledge that this time co-Δ had Δ drive him to banks to pass bad checks
        6. *Dossey* – Admissible that Δ engaged in later robbery wearing same disguise as robbery she’s on trial for to show identity/MO
        7. *Wright* – Inadmissible evidence of later phone conversation where Δ bragged about being a drug dealer for showing identity/intent re selling drugs to undercovers earlier 🡪 Convo doesn’t help ID Δ and intent wasn’t an issue
        8. *Huddleston* – DC does not have to find that government proves the “other act” by preponderance before allowing
           1. 404(b) requires proper purpose, relevancy enforced through 104(b) preliminary question, 403 balancing, 105 limiting instruction
  2. **Habit**
     1. **FRE 406 – Habit; Routine Practice**. Evidence of habit or organization’s routine practice may be admitted to prove acts in accordance regardless of corroboration or eye-witness testimony
        1. Consider: Automatic, ritualized behavior 🡪 sampling/uniformity
        2. Non-moral issues
     2. **Cases**
        1. *Loughan* – Admissible evidence that company employee drinks daily on the job as proof of habit for defense in products liability case (previous jobs/complaints)
        2. *Burchet* – Inadmissible evidence Δ drank/smoked weed
           1. Offense required proof of intoxication, blood test was negative for alcohol
           2. Evidence showed significant break in routine here – trying to shoehorn proof
  3. **Sex Crimes**
     1. **FRE 412 – Sex Offense Cases: V’s Sexual Behavior/Predisposition**
        1. (a)(1) Evidence to prove V engaged in other sexual behavior or (2) to prove V’s sexual predisposition are inadmissible
        2. (b) Exceptions
           1. (1) Criminal cases – The court may admit

(A) Evidence of specific instances of V’s sexual behavior to prove someone else is the source of semen/injury/other evidence

(B) Evidence of specific instances of V’s sexual behavior WRT the person accused, if offered by Δ to prove consent or offered by prosecutor

(C) Evidence whose exclusion would violate Δ’s constitutional rights

* + - * 1. (2) Civil cases. Court may admit evidence of V’s sexual behavior or predisposition if probative value substantially outweighs harm to V and unfair prejudice to any party. Reputation only admissible if V puts it in issue
      1. Offering under exception requires 14d notice. If case isn’t about sexual misconduct, 3rd party witness’ activities aren’t within 412 – must arguably be a V
    1. When Δ is accused of **sexual assault** (**413(a)**), or **child molestation** (**414(a)**), court may admit evidence that Δ committed any other assault/molestation
       1. In a civil case (**415(a)**) based on sexual assault/child molestation, court may admit evidence that party committed any other assault/molestation
       2. All requires 15d notice unless good cause delay
    2. **Cases**
       1. *Olden* – SCUSA holding V’s extra-marital living arrangement with boyfriend of different race admissible under 412(b)(1)(C) – exclusion would eviscerate their main defense 🡪 she made up the rape to preserve her relationship w/ boyfriend
       2. *Pablo* – Holding evidence that V was seen undressed with other men earlier inadmissible under (A) on evidence her injuries couldn’t have resulted, and evidence of earlier advances to co-Δ inadmissible under (C) because consent once doesn’t render non-consent later consensual
       3. *Smith* – Allowing Δ to question V about whether she previously lied to keep \*a secret\* to protect her career – when secret was earlier false rape accusation
          1. Dissent: evidence of false complaints of rape is not within 412 or falls under 412(b)(1)(C)
       4. *LeCompte* – Admissible evidence Δ molested another niece in a similar way
          1. Reasoning 403 must be applied to allow 414 to have its intended effect

1. **IMPEACHMENT**
   1. **Analysis**
      1. Any party may attack W’s credibility (FRE 607)
      2. Evidence of W’s religious beliefs are off limits for credibility (honest/dishonest character), ok for bias/interest (FRE 610)
      3. **Character for (un)truthfulness (FRE 608)**
         1. Any party may attack any W’s character for (un)truthfulness with **reputation or opinion testimony**. Evidence of truthfulness only admissible after attacked
         2. May ask about specific acts probative of character for (un)truthfulness **on cross** of the W or another W whose character the witness being crossed has testified about
         3. **No extrinsic evidence allowed**
         4. Testimony must be probative of (un)truthfulness! Not remote in time!
            1. Note: Can be any act that seems “dishonest” even in a remote sense
         5. **Impeachment by evidence of criminal conviction (FRE 609)**
            1. For felonies, must be admitted (subject to balancing)

Subject to 403 (civil or criminal case if W isn’t Δ)

If probative value outweighs prejudice (criminal case and W=Δ)

* + - * 1. Must admit crimes where an element requires proving dishonesty

*Crimen falsi* (fraud, counterfeiting, forgery) – **no balancing!**

Not *crimen falsi* (shoplifting, contraband, assault, burglary, bank robbery)

* + - * 1. If over 10y/o, probative value must substantially outweigh prejudicial effect and requires written notice
      1. **To preserve claim of error**
         1. Δ must testify (*Luce* – Can’t just appeal *in limine* ruling)
         2. Δ must be impeached (*Ohler* – Δ can’t “remove the sting” on direct)
         3. Note: If evidence is actually introduced, Δ can object and appeal no prob.
    1. **W’s Prior Statement (FRE 613)**
       1. No need to disclose prior statement to W, but must show opposing counsel
       2. Extrinsic evidence admissible if you confront the W about it & opposing counsel can examine W (doesn’t apply to OPS or inconsistent conduct)
       3. If PIS is under oath, at a hearing – **substantive**, else **impeachment only**
       4. *Morlang* – Gov. can’t use evidence for impeachment to present testimony that would otherwise be inadmissible 🡪 call up sacrificial lamb who gov. knows will stonewall/lie so they can be impeached
          1. Gov. must have actual knowledge that W will stonewall/lie (*Webster*)
    2. **Bias** – Motive to lie, or slant testimony – Payment, desire to curry favor, romantic involvement, self-interest. **Specific acts and extrinsic evidence allowed**
       1. Careful: Evidence must be admissible (*i.e.* watch out for hearsay)
    3. **Incapacity** – Demonstrating a limitation in memory/perception of W
       1. **Extrinsic evidence allowed**
       2. Admissible: Delusions, use of drugs at the time of the observation, inability to see (or similar, relevant, physical limitation)
       3. Inadmissible: General depression and use of Prozac, general use of drugs
    4. **Specific Contradiction** – Use as last resort
       1. Collateral Evidence Rule – No extrinsic impeachment by contradiction on collateral matters – Note: can always ask witness (intrinsic) about collateral issues

|  |  |  |  |
| --- | --- | --- | --- |
|  | **Form** | **Rules** | **Rehabilitation**  NO BOLSTERING! |
| Character for truthfulness (608 & 609) | Rep/opinion on direct  Specific acts on cross, either re: W or one offered rep/op about | No extrinsic proof of specific acts | Rep/opinion for honesty  Intrinsic evidence re capacity/bias  Non-substantive PCS |
| Prior convictions, through document or W | Felonies with balancing, all *crimen falsi*, subject to 10y rule  Extrinsic proof ok | Rep/op for honesty |
| Prior Inconsistency (801 & 613) | Prior inconsistent statement, through document or W | Extrinsic ok  Must confront W  Substantive evidence only if meets 801(d)(1)(A)  *Morlang* rule against prosecutors | *Maybe* rep/op for honesty (lying or liar?)  Post-motive PCS (if PIS is bias attack) |
| Bias | W testimony, cross, or other admissible evidence | Extrinsic ok  Specific acts ok | **No** rep/op for honesty - irrelevant  Specific acts/extrinsic evidence ok if relevant to refute bias  Pre-motive substantive PCS  Non-substantive PCS/consistency |
| Capacity | W testimony, cross, or other admissible evidence | Extrinsic ok  Specific acts ok  Careful about character | **No** rep/op for honesty  Capacity |
| Specific Contradiction | Cross about specific contradiction | Collateral evidence rule | *Maybe* rep/op for honesty (lying or liar?)  *Maybe* non-substantive PCS  Specific corroboration |

* 1. **Character for Truthfulness/Untruthfulness**
     1. **FRE 608 – Character for Truthfulness/Untruthfulness**
        1. (a) W’s credibility may be attacked/supported by reputation or opinion testimony about W’s character for (un)truthfulness. Evidence for truthfulness is only admissible after W’s character has been attacked
        2. (b) Except criminal convictions, extrinsic evidence is inadmissible to prove specific instances for attacking/supporting W’s character for (un)truthfulness. But court may, on cross, allow inquiry if they are probative of character for (un)truthfulness of (1) the witness or (2) another witness whose character the witness is being crossed has testified about
        3. Must be probative of veracity, not character generally, not remote in time
     2. **FRE 609 – Impeachment by evidence of criminal conviction**
        1. (a)(1) For felonies, (A) must be admitted subject to 403 in a civil case, or criminal case where W isn’t a Δ and (B) must be admitted in a criminal case where W is a Δ if probative value outweighs prejudicial effect
        2. (a)(2) For a crime where an element requires proving dishonest act/false statement
           1. Yes: Fraud, counterfeiting, forgery; No: Shoplifting, contraband, assault, burglary, bank robbery
        3. (b) If over 10y/o, admissible only if (1) probative value substantially outweighs prejudicial effect and (2) written notice is given
        4. (c) Inadmissible if (1) conviction is subject of pardon, annulment, certificate of rehabilitation, or equivalent, and person hasn’t been convicted of a felony, or (2) conviction is overturned based on finding of innocence
        5. (e) Still admissible even if case is on appeal
     3. **To preserve claim of error**
        1. Δ must testify (*Luce* – Can’t just appeal *in limine* ruling)
        2. Δ must be impeached (*Ohler* – Δ can’t “remove the sting” on direct)
     4. **Cases**
        1. *Lollar* – After Δ testifies, gov. can call W to ask whether he would believe Δ if he testified under oath
        2. *Rosa* – Involvement in bribery is not probative of W(Δ)’s truthfulness, but fraud and oath of loyalty to crime family is probative
        3. *Ling* – Extrinsic evidence (testimony of another W) to prove specific bad acts (that Δ had previously fired a gun claiming he hadn’t on cross) inadmissible
        4. *White* – Inadmissible testimony from W’s prior attorney that W offered to fabricate testimony for leniency (note: W was not Δ so his intent was not in issue (404(b)), only character for truthfulness – though this might show bias)
        5. *Aponte* – Inadmissible sworn statement by gov. W as extrinsic evidence
        6. *Wong* – No 403 balancing for conviction of crime of dishonesty (*crimen falsi*)
        7. *Sanders* – Assault w/ deadly weapon and possession of shank not probative of truthfulness 🡪 inadmissible
        8. *Oaxaca* – Held prior burglary/bank robbery admissible as reflecting on honesty
        9. *Hernandez* – Holding prior drug possession when Δ charged with kidnapping is admissible with limiting instruction

|  |  |  |
| --- | --- | --- |
|  | **404(a)/405** | **608** |
| What traits are covered? | Any pertinent trait  This is about figuring out about what that person was up to | Character for (un)truthfulness  Because this is about W’s truthfulness and nothing else |
| Who can initiate? | Criminal Δ (+ Gov re: first aggressor) | Any party – the door is opened because W takes the stand |
| Who does the rule apply to? | Criminal Δ and victims (regardless of whether they testify) | Any and all witnesses  Must be testifying witness (including hearsay declarants)  Also covers not hearsay when it is in the categories involving 3rd parties |
| What is the manner of proof? | Once the door is open:  Reputation or opinion, specific acts on cross, but no extrinsic proof | Reputation or opinion, specific acts on cross, even if no explicit “door opening”, but no extrinsic proof |

* 1. **Prior Inconsistent Statements**
     1. **FRE 613 – Witness’s Prior Statement**
        1. (a) No need to show/disclose prior statement to W, but must to opposing counsel
        2. (b) Extrinsic evidence of PIS admissible only if W is given opportunity to explain/deny (confronted) the statement & adverse party can examine W about it
           1. Does not apply to OPS (802(d)(2))
           2. Does not apply to inconsistent conduct
        3. Hearsay declarant does not need to be confronted, but can’t impeach w/ extrinsic
        4. If they take the sting, then you still impeach, no need to confront
     2. *Morlang* – Court can’t permit gov. to use evidence for impeachment to present testimony which would otherwise be inadmissible
        1. Spot the issue: Gov. puts up W as sacrificial lamb 🡪 bad faith, knowing they will impeach W with specific evidence (*Ince*)
        2. Prosecutor must have actual knowledge W will stonewall or lie for *Morlang* to kick in on impeachment (*Webster*)
     3. **Cases**
        1. *Lebel* – Order irrelevant. Δ can call W to impeach W1 re prior trial where W1 didn’t ID Δ
        2. *Dennis* – Sufficiently inconsistent. W claims no memory 🡪 grand jury testimony admissible as PIS
        3. *Ince* – Signed, unsworn statement by Δ’s friend that he’d confessed to her
           1. Trial 1: W on stand, stonewalls, impeached by testimony from officer
           2. Trial 2: Same thing, but *Morlang* kicks in because prosecutor knew she would stonewall and statement is otherwise inadmissible
  2. **Bias**
     1. Motive to lie, or slant testimony – payment, desire to curry favor, romantic involvement, self interest
     2. Extrinsic evidence allowed
     3. *Abel* – Δ has W2 impeach W1 with statement that W1 told W2 he was going to lie during his testimony (Admissible: *Hillmon*, state of mind)
        1. Prosecution calls back W1 & testifies that W1/2 and Δ are in a gang that promise to lie, kill, cheat for each other
        2. Permissible – W2 has motivation to slant his testimony for Δ
        3. Impermissible – Specific act (gang oath) proven by extrinsic evidence, showing character for untruthfulness
  3. **Incapacity**
     1. Extrinsic evidence allowed
     2. Admissible: Delusions, use of drugs at the time of the observation, inability to see (or similar, relevant, physical limitation)
     3. Inadmissible: General depression and use of Prozac (*Sasso*), general use of drugs (*Henderson*)
  4. **Specific Contradiction**
     1. Use this as last resort
     2. Collateral Evidence Rule – No extrinsic impeachment by contradiction on collateral matters – Note: can always ask witness (intrinsic) about collateral issues
     3. Note: PIS vs. Specific contradiction
        1. PIS is a statement, contradiction doesn’t have to be
        2. PIS is a prior statement by the witness, contradiction is something external to W
        3. PIS can be proven extrinsically, contradiction can be only if not collateral
     4. **Cases**
        1. *Pinkertons* – Admitted testimony that W lied to Δ’s investigator about taking and passing a polygraph test
           1. Character for truthfulness – specific act inquired on cross (intrinsic)
           2. No collateral evidence rule because statement was intrinsic (by W)
        2. *Copelin* – Δ testified he’d never seen drugs, admitted testing positive for cocaine on cross 🡪 admissible because questioning was intrinsic (though collateral)

1. **REHABILITATION**
   1. **Analysis**
      1. Rule #1 – **No bolstering** – Only can rehabilitate after being attacked
         1. Can only rehabilitate for what W was attacked on
      2. **Character for Truthfulness**
         1. Generally respond with reputation/opinion for honesty
         2. Intrinsic evidence regarding capacity/lack of bias
         3. Non-substantive use of PCS
      3. **Character for Truthfulness** – Attack by prior conviction
         1. Respond with reputation/opinion for honesty
      4. **PIS** – Respond with PCS (substantive if pre-motive and PIS is an attack re bias)
         1. Reputation/opinion for honesty *only if* attack is on general character (lying/liar)
      5. **Bias** – Respond with specific acts/extrinsic evidence to refute bias
         1. Pre-motive substantive PCS, or post-motive non-substantive to show consistency
         2. No reputation/opinion for honesty!
      6. **Capacity** – Respond with evidence proving capacity
         1. No reputation/opinion for honesty!
         2. Respond with non-substantive PCS if relevant
      7. **Specific Corroboration**
         1. Reputation/opinion for honesty *only if* attack is on general character (lying/liar)
         2. Respond with non-substantive PCS if relevant
   2. **Character for Truthfulness**
      1. Allowed for: General attack on reputation or truthfulness, response to prior conviction, evidence of misconduct, or corruption
         1. Ask: Is W lying? Or is W a liar? 🡪 allowed if suggesting W is a liar
         2. Does the attack suggest dishonesty? Or more case-specific 🡪 bias/mistake/incapacity?
      2. Sometimes allowed after: Inconsistency or specific contradiction if the attack reads onto W’s character generally
      3. Not allowed after: Attack based on bias or incapacity
      4. **FRE 608** – Can be shown by opinion/reputation testimony after being attacked. No extrinsic evidence. Specific instances okay on cross
      5. **Cases**
         1. *Beard v. Mitchell* – W allowed to testify that W2 had reputation for truthfulness after prosecutor introduced PIS to attack W2
            1. Note: Must be inconsistency that suggests general shadiness/untrustworthiness
         2. *Danehy* – Δ subject to vigorous cross pointing out inconsistencies in testimony.
            1. Held: Can’t testify re character for truthfulness
            2. Can’t use 404 because CFT was not generally pertinent (*i.e.* not a fraud case)
            3. 404 here is just for bolstering – the inconsistencies were more to point out bias 🡪 Δ would lie to stay out of jail
         3. *Drury* – Δ subject to vigorous cross. Held: attack points out inconsistencies that undermined Δ’s credibility 🡪 not an attack on reputation for truth
         4. *Murray* – Δ cross of W attacking character. Gov. calls cop to rehabilitate asking about specific incidents where W was helpful
            1. Held: Specific instances are inadmissible response to character attack
   3. **Prior Consistent Statements**
      1. Pre-motive to fabricate consistent statements are admissible for the truth of the matter asserted to rebut a charge of fabrication (FRE 801(d)(1)(B); *Tome*)
      2. Post-motive to fabricate consistent statements must have non-hearsay use
         1. Corroboration for specific contradiction
         2. Rehabilitation for consistency after impeachment by PIS
         3. Consider: PCS are admissible if relevant to the attack on W
   4. **Disinterest**
      1. *Lindemann* – W cooperating with gov. in other cases, Δ attacks W suggesting bias because he’s ratting out Δ to get a better deal
         1. Gov. allowed to rehabilitate with evidence that Δ is part of a larger investigation of 30 people, 15 horses, and most plead guilty (Δ isn’t a big fish, W had no reason to lie here)
      2. Note: Rehabilitation with specific instances/extrinsic evidence is acceptable
   5. **Capacity** – No rep/op for honest, evidence to show capacity admissible
   6. **Specific Corroboration**
2. **FORBIDDEN INFERENCES**
   1. **Subsequent Remedial Measures**
      1. **Analysis – (FRE 407)**
         1. Subsequent remedial measures are inadmissible **to prove fault**
         2. May be admissible for impeachment
         3. If disputed, admissible to prove ownership, control, or feasibility
         4. Rule doesn’t apply to subsequent measures by non-party to suit (*Blaw-Knox*)
      2. **FRE 407 – Subsequent Remedial Measures**
         1. When measures are taken that would have made an earlier injury/harm less likely to occur, evidence of subsequent measures is not admissible to prove
            1. Negligence, culpable conduct, defect in product/design, or need for warning
         2. But the court may admit evidence for another purpose – impeachment, or –if disputed – proving ownership, control, or feasibility
      3. Admissible to show control (if in issue) (*Clausen* – replace slippery walk-way with stairs – control of walk-way in dispute)
      4. Inadmissible to show feasibility (if not in issue) (*Asbestos* – placed warning sign on product sometime after Π’s exposure)
      5. Inapplicable if measured conducted by non-party (*Blaw-Knox* – Non-party made subsequent modifications which were feasible when the machine was made)
   2. **Compromise Offers and Negotiation**
      1. **Analysis – (FRE 408)**
         1. Statements made during negotiation are inadmissible for any party **to prove/disprove validity, amount of disputed claim, or for impeachment**
         2. Two types of statements
            1. Statements proposing amount/type of settlement/compromise
            2. Statements made about the claim during the negotiation (*i.e.* culpability)

In subsequent **criminal case**, statements related to a claim by a public office in exercise of its authority re consideration/compromise are inadmissible, but statements *about the claim* are *admissible*

* + - 1. Exceptions: Prove bias, negate undue delay contention, proving effort to obstruct criminal investigation
      2. Misc.
         1. Offer can be informal, not in response to suit, not resulting in settlement
         2. Can’t strategically present info during negotiation to insulate from introduction at trial (but conduct specifically for negotiation is inadmissible)
         3. Settlement offers are admissible for claims unrelated to the subject of the offer
         4. Offer is admissible if the offer itself provides an affirmative defense
    1. **FRE 408 – Compromise Offers and Negotiations**
       1. Evidence of settlement offers and negotiations, including conduct or statements made during negotiations, is inadmissible – on behalf of any party – either to prove/disprove validity/amount of a disputed claim, or to impeach by PIS or contradiction
          1. Statements about the claim made in settlement negotiations for a regulatory matter can be admitted in later criminal case on a related issue (not statements as to amount/type of settlement)
       2. Exceptions. Admissible to show bias, prejudice, negate contention of undue delay, to prove effort to obstruct a criminal investigation/prosecution
    2. *Davis* – Excluded casual statement to “split the $29k” Δ had embezzled as an offer of settlement – noting offer to buy off witness would be outside the rule
    3. *Ramada* – Excluded architect report Π commissioned to investigate defects Δ was alleging to provide basis for settlement negotiations (note: if otherwise discoverable then report would be outside the rule)
    4. *Carney* – Letter from university offering to settle discrimination claim which gave rise to a retaliation claim was admissible for the retaliation claim
    5. *Polo* – Statements during settlement negotiation that gave rise to affirmative defense of estoppel were admissible because the defense focused on issues separate from the elements of the claim
  1. **Pleas, Plea Discussions, and Related Statements**
     1. **Analysis – (FRE 410)**
        1. In a civil/criminal case, evidence of the following are inadmissible to show guilt:
           1. Guilty plea later withdrawn
           2. *Nolo contendere* plea
           3. Statements made during a proceeding for either plea (plea/plea colloquy)
           4. Statements made during plea discussions if discussions didn’t result in a guilty plea or resulted in later-withdrawn guilty plea

Statements made during discussions resulting in *nolo* plea are admissible!

* + - 1. Except: If another statement is admitted and context/completeness requires admission; during perjury proceeding and statement was made under oath, on the record, and with counsel present
      2. FRE 410 can be waived by K (*Mezzanatto* – concurrence wouldn’t allow for case in chief, dissent wouldn’t allow for CIC or impeachment)
    1. **FRE 410 – Pleas, Plea Discussions, and Related Statements**
       1. In a civil or criminal case, following is inadmissible:
          1. Guilty plea later withdrawn, or *nolo contendere* plea
          2. Statement made during proceeding of either plea (plea/plea colloquy)
          3. Statement made during plea discussions if discussions didn’t result in guilty plea or resulted in later-withdrawn guilty plea

Statements made during *nolo* plea negotiation are admissible!

* + - 1. Exceptions: If another statement is admitted and context/completeness requires admission; during perjury proceeding and statement was made under oath, on the record, and with counsel present
    1. *US v. Mezzanatto* (1995)
       1. Issue: Can Δ waive 410 exclusion?
       2. Held: Δ can waive evidence rules, waive-able even against subsequent objection
       3. Concurring: Ok for impeachment, not ok for case in chief
  1. **Medical Expenses**
     1. Offers to pay medical/hospital/similar expenses resulting from injury is inadmissible **to prove liability for the injury** (FRE 409)
     2. 409 does **not** extend to conduct/statements not part of the act of offering to pay medical expenses (*i.e.* statements proving culpability, etc.)
  2. **Liability Insurance**
     1. Evidence that a person was/wasn’t insured against liability is inadmissible **to prove whether the person acted negligently or otherwise wrongfully** (FRE 411)
        1. Admissible to show bias, prejudice, proving agency, ownership, or control
     2. *Charter* – Evidence to impeach and impeachment witness showing the witness represents Δ's malpractice carrier was admissible to show bias
     3. *Higgins* – Evidence that Δ had liability insurance inadmissible when Π’s sue re lip created during highway re-paving
        1. Π theory that jury will be biased as taxpayers because Δ was the city
        2. Modern conception – Exclude to avoid jury finding liability on the theory that it really isn’t Δ’s $

1. **EXPERTS/OPINION EVIDENCE**
   1. **Lay Witness Opinion Testimony**
      1. **Analysis – (FRE 701)**
         1. Based on first-hand observation
         2. Helpful to the jury
         3. Not the product of specialized expertise
      2. **FRE 701 – Opinion testimony by lay witnesses**
         1. If a witness isn’t testifying as an expert, opinions are ok if:
            1. Rationally based on W’s perception
            2. Helpful to clearly understanding W’s testimony or determining a fact in issue
            3. And not based on scientific, technical, or other specialized knowledge within the scope of FRE 702
      3. *Meling* – 911 operator and paramedic testimony admissible to show Δ was feigning grief 🡪 based on their experience dealing with emergency situations
      4. *Knight* – Eyewitness to pistol-whipping admissible to show gun discharge was accidental, cop testimony of same inadmissible because he wasn’t present
      5. *Peoples* – Officer testimony translating slang from recorded conversation between two Δs inadmissible as lay opinion – not based on personal perception
      6. *Ayala-Pizzaro* – Officer testimony about local drug check point operation and drug packaging admissible as particularized knowledge garnered while on the job
   2. **Expert Witness Testimony**
      1. **Generally**
         1. FRE 702 – A W who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if
            1. Expert’s knowledge will help trier of fact understand the evidence or to determine a fact in issue
            2. Testimony is based on sufficient facts or data
            3. Testimony is the product of reliable principles and methods and
            4. Expert has reliably applied the principles and methods to the facts of the case
         2. FRE 704 – Opinion on an ultimate issue
            1. (a) In general an opinion on an ultimate issue is not objectionable, but (b) in a criminal case, an expert can’t state an opinion about whether Δ did or didn’t have a mental state or condition constituting an element of the crime/defense
      2. Experts can give opinion without disclosing facts relied on
         1. FRE 705 – Unless ordered or otherwise, expert may state opinion/reasoning without first disclosing underlying facts/data – may be disclosed on cross
      3. Experts can base their opinion on any facts/data from the case or inadmissible facts/data as long as experts in the field would reasonably rely on those facts/data
         1. If inadmissible, probative value must substantially outweigh prejudicial effect to be shown to the jury
         2. FRE 703 – Expert opinion can be based on facts/data in the case, or inadmissible facts/data if normally relied on by experts in the field. If inadmissible, proponent may disclose only if probative value substantially outweighs prejudicial effect
      4. FRE 706 – Provides mechanism for the court to appoint an independent expert
         1. *LeBlanc* – 706 is only applicable in rare circumstances as an alternative to the adversary process
2. **SCIENTIFIC EVIDENCE**
   1. **Statistical Testimony**
      1. **Generally**
         1. “Odds” of something means the probability divided by the opposite probability 🡪
         2. Conditional probability – the probability of X given that Y has occurred 🡪 P(X|Y)
            1. Independent variables do not affect each other’s conditional probability 🡪 P(X|Y) = P(X) – *i.e.* the probability of X occurring knowing that Y has occurred is still just the probability of X occurring
         3. Product Rule
            1. Independent probabilities can be multiplied to express a “joint probability” 🡪 P(X) \* P(Y) = P(X & Y)
            2. Dependent probabilities, instead, behave as follows 🡪 P(X & Y) = P(X) \* P(Y|X)
         4. Baysian function 🡪
            1. Or
      2. **Definitions**
         1. Random Match Probability – What is the likelihood that someone else could randomly have the exact same characteristics?
         2. Source Probability – What is the likelihood that Δ is actually the source of the evidence in the case?
         3. Guilt Probability – What is the likelihood that Δ is guilty of the crime?
         4. Prosecutor’s Fallacy – Idea that RMP = Guilt Probability
            1. P(match|innocence) ≠ P(innocence|match)
      3. **Analysis**
         1. Statistical data requires adequate foundation (*Collins*)
            1. The traits themselves must be independent to apply product rule
            2. W’s testimony as to the traits must be accurate
            3. The traits must actually describe the guilty person
         2. Concerns about statistical data usurping the fact finding function of the jury
            1. Prior odds of guilt must be determined by the jury (*Spann*)
      4. **Cases**
         1. *People v. Collins* (Cal. 1968)
            1. Calculation that there was “approximately” a 1 in 12mil chance of

W seeing a black man w/ beard and mustache, drive off in a yellow car, with a white woman /blond ponytail

* + - 1. *Spann* – Human Leukocyte Antigen (HLA) paternity test, expert takes result (99%) and assumes prior odds of paternity at 50% (Δ/V accusation evenly weighed) to get 96.55% chance he’s the father after applying Baye’s
         1. Held: Prior odds must be calculated by the jury
  1. **Scientific Experts**
     1. **Analysis**
        1. *Frye* – When an expert renders an opinion on a *new or novel* technique, the technique must be generally accepted before admitting the evidence
        2. Consider (*Daubert*)
           1. Whether the theory has been tested
           2. Whether it has been published/subject to peer review
           3. What the potential error rate is & whether there are SOPs
           4. “General Acceptance”
        3. Review under abuse of discretion
        4. Fit Inquiry (*Joiner*)
           1. Were studies conducted according to the scientific method?
           2. Is there a basis for the conclusion the expert came to based on that info?
        5. *Daubert* applies to both scientific data and opinion testimony (*Kumho*)
     2. **Cases**
        1. *Daubert v. Merrell Dow* (1993)
           1. Bendectin product liability case claiming it causes birth defects
           2. Δ expert testified re 30 published studies covering 130k+ patients w/ no link
           3. Π had experts w/ *in vitro*/*in vivo* animal data claiming to show a link
           4. Lays out factors
        2. *General Electric v. Joiner* (1997)
           1. Π electrician claims his lung cancer was caused by PCB exposure at work
           2. Testimony based on conjecture unsupported by data

Animal study on baby rats w/ IP injection of large PCB dose develop different kind of lung cancer

Study showing higher than expected lung cancer when exposed to PCB in capacitor plant, but non-significant

Monsanto PCB production plant, non-statistically significant increase

Study about exposure to mineral oil, not PCB

Study confounded by exposure to other toxins

* + - 1. *Kunho Tire v. Carmichael* (1999)
         1. Expert claiming tire was defective but facts showing Π abused the tire
         2. Issue: Distinction between scientific and expert opinion testimony?
         3. Expert was qualified, but conclusions had indicia of unreliability

1. **PRIVILEGES**
   1. **Spousal Privilege**
      1. **Confidential Communication**
         1. Information disclosed privately between husband and wife in the confidence of the marital relationship
         2. Requires both spouses to consent to disclosure
         3. Survives the marriage
         4. Broken with knowing presence of another or negligence
         5. Exceptions
            1. Legal proceeding between spouses
            2. Crime-fraud, or crimes against the children or the spouse
            3. Commitment or competency proceedings
            4. Joint business owners
      2. **Testimonial Privilege** (*Trammel*)
         1. Evidence of criminal acts and of communications made in the presence of third parties (*i.e.* non-confidential)
         2. Privilege can be invoked by the witness-spouse alone and can’t be compelled or foreclosed by the other spouse
         3. Privilege does not survive the marriage
      3. **Note:** Common law marriage can count as a marriage
   2. **AC Privilege**
      1. **Elements**
         1. Confidential
         2. Communication
         3. Between lawyer and client
         4. In the course of professional legal services
      2. **Exceptions**
         1. Testamentary Exception – Disclosures for interpreting a will
         2. Fiduciary Exception – When the beneficiary of the disclosure is really the principal and the agent has a common law duty to disclose
            1. US Gov. can modify the common-law trustee relationship with Indians (*Jicarilla Apache Nation*)
         3. Crime-Fraud Exception – ACpriv ceases to operate when the desired advice refers *not to prior wrongdoing*, but to *future wrongdoing* (*Zolin*) – Does not extend to advice for the commission of a crime or fraud
            1. *In camera* review to determine presence of privilege may be triggered on good faith showing
      3. **Corporate Clients**
         1. Employees acting at the direction of their superiors (or acting within the scope of corporate duties) may be considered clients of corporate in-house counsel (*UpJohn*)
   3. **Work Product Privilege**
      1. Documents prepared in contemplation of litigation
      2. Unless there is a showing of substantial need and inability to procure the same info without undue hardship

Fall 2013

Erin Murphy – Evidence – Memorize Outline

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1. **TRIAL MECHANICS**
   1. FRE 104(a) – Court decides any ***preliminary question*** about whether
      1. A witness is qualified, privilege exists, evidence is admissible
      2. And in deciding, ***is not bound by evidence rules***, except for ***privilege***
      3. Standard is **preponderance of the evidence**
   2. FRE 103 – When objection is preserved (admitted: timely, stating *correct* grounds; excluded: offering proof of substance) 🡪 Abuse of discretion; otherwise Plain error
   3. FRE 611
      1. Scope of cross is ***subject matter of direct*** and ***credibility*** unless judge allows additional matters
      2. Leading questions allowed on cross (unless cross in form not fact) or on direct if hostile, child, communication problems, exhausted recollection (refresh, then ask non-leading), or on undisputed matters
   4. FRE 106 – Rule of Completeness. Party introduces ***writing or recording*** in which ***the evidence itself*** is misleading, adverse party can require introduction, ***at that time***, of any other evidence that should be considered at the same time
   5. FRE 615 – At party’s request, court ***must*** sequester a witness unless it is
      1. A party to the suit (natural person or representative of non-natural person
      2. Person whose presence is essential to a claim/defense
      3. Person authorized to be present by statute
      4. Concern: Discouraging fabrication, intimidation, witness coordination, privacy, distracting the jury (looking to W to see reaction)
   6. FRE 614 – Court can call/examine witnesses, both parties can cross, parties can object
      1. Reversible error if judge reveals views/opinion re witness (no concern re attorney)
      2. *Tilghman* – No questions re critical aspects of a close case
   7. Jurors can’t ask oral questions, but can submit to be asked after opportunity for objection
2. **WITNESS COMPETENCE**
   1. Witnesses are ***assumed competent*** to testify (FRE 601)
      1. Issues are most often about weight/credibility (for jury), not competence
   2. If they have ***personal knowledge*** of the facts they are testifying about (FRE 602)
      1. Assumes capacity to recall the facts; can prove with W’s testimony alone
   3. And they are ***willing, and do, take an oath*** (FRE 603)
      1. Understand duty to be truthful (“awaken the conscience”) – exact words are less important, but can’t attempt to manipulate/circumvent the oath (1st Am.) (*Ward*)
   4. Judge can allow limited questioning to determine competence (*Allen J.*)
      1. But *in camera* hearing is not necessary
   5. NOTE: Competence is a ***sufficiency standard*** under FRE 104 preliminary question
      1. *i.e.* Must be so no reasonable juror would believe witness has PK/competence
   6. NOTE: 5th/6th Am. trump FRE and state procedural rules
      1. *Per se* restrictions that interfere with Δ’s right to testify = unconstitutional (*Rock*)
      2. Cannot restrict subject matter of post-hypnosis testimony
      3. Most likely cannot restrict testimony of other defense witnesses post-hypnosis because this interferes with Δ’s right to tell their story
3. **RELEVANCE**
   1. Evidence is relevant if it has ***any tendency*** (*i.e.* rationally probative) to make a fact more/less probable, and the fact is of consequence in determining the action (FRE 401)
   2. Relevant evidence = admissible unless Constitution, statute, FRE or other SCUSA rule say otherwise, irrelevant evidence = inadmissible (FRE 402)
   3. **Conditional Relevance** – When relevance depends on whether a fact exists, ***sufficient evidence*** that a reasonable juror would conclude the fact exists must be introduced to support the fact (FRE 104(b))
      1. Bell argues this is just FRE 403 prejudice analysis
   4. Court ***may exclude*** relevant evidence if its probative value is ***substantially outweighed*** by danger of unfair prejudice, confusing issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence (FRE 403)
      1. Δ can stipulate to facts proving pre-existing felon status to avoid prosecution proving specific prior felony (prejudicial – improper character evidence), but *cannot* stipulate to facts tending to prove Δ’s presently charged offense (*Old Chief*)
   5. On timely request, the court ***must*** restrict evidence to its proper scope and instruct the jury accordingly (FRE 105 – Limiting Instruction)
4. **PHYSICAL EVIDENCE**
   1. Evidence is real or demonstrative?
      1. Best Evidence Rule – Should produce original doc., keep narrow scope
   2. **Real Evidence – Directly Connected to *This* Event**
      1. Requires foundation and authentication (FRE 901)
         1. Evidence ***sufficient*** to support finding the item is what proponent claims it is
         2. Procedure depends on the type of evidence
         3. Self-Authenticating evidence (FRE 902 – signed/sealed, notarized, etc. public documents, certified records of regular activity – certification by authorized person/custodian of documents)
      2. Break in chain of custody goes to weight, not admissibility (*Casto*)
         1. Unless chain is so broken evidence is irrelevant (*Grant* – need *some likelihood* substance tested was the substance seized)
      3. Witness testimony is necessary to authenticate writing only if required by jurisdiction (FRE 903)
   3. **Demonstrative Evidence – Illustrations, Diagrams, Examples, Photos, Etc.**
      1. Summaries/charts/calculations can be used to prove content of voluminous data that can’t be conveniently examined in court. Originals available to opposing party, court can order their production also (FRE 1006)
      2. Consider: Fair/accurate representation? Relevant? Helpful? Does it supplant jury’s fact-finding role? Purely illustrative?
      3. **Photos** – Authenticate (***fair and accurate?***), sits between real/demonstrative (formalistic vs. functional – not scene of crime, but can’t bring scene to court)
         1. Is photo a gloss on evidence, or actual evidence jury can draw conclusions from?
      4. **Authentication**: Photographer testifies to date/time and any manipulation, and/or witness testifies to subject matter then confirms fairness and accuracy
5. **HEARSAY**
   1. **Generally**
      1. **Rule Against Hearsay**
         1. Declarant said it 🡪 D believed it 🡪 it was true 🡪 hearsay
         2. Out of court statement offered for the truth of the matter asserted
         3. If not offered for the truth of the matter asserted 🡪 nonhearsay
            1. No Confrontation issues
         4. FRE 802 – Hearsay is inadmissible unless otherwise by statute, the rules, or other rules prescribed by SCUSA
            1. FRE 805 – Hearsay within hearsay must have each part of combined statements fall within an exception
      2. **Remember!** FRE 105 Limiting instruction is always the first option!
   2. **Nonhearsay – ElVIS** (Effect on listener, Verbal act, Implied assertion, State of mind)
      1. **Effect on listener**: Concern is what listener did in response to D’s statement, irrelevant whether what D says is true
         1. “Do it or I’ll kill you!” 🡪 L does it
      2. **Verbal act**: D says something that legally makes it so whether they mean it or not
         1. “Cancel my insurance policy”
      3. **Implied assertion**: Acts/statements demonstrating D believes the existence of a condition to be proven (but not literally what D asserts)
         1. Concern is *why* they say/do it, not *what* they say/do
         2. Must be communication by a *person* (*i.e.* no drug dog barking)
         3. Captain boards ship w/family 🡪 ship is seaworthy (implied assertion)
            1. *Tatham*/*Dullard* would hold this as hearsay
      4. **D’s State of mind**: Only need to know D’s thoughts, not that what D thought is true
         1. “That’s Barney!”
   3. **Confrontation**
      1. **Elements**
         1. Testimonial
            1. Non-testimonial statements have primary purpose to enable police to meet an ongoing emergency (*Crawford*; *Davis*)
            2. Testimonial statements have primary purpose to establish/prove past facts for later criminal prosecution (*Crawford*; *Davis*)

Statement beginning as non-testimonial can evolve to testimonial (*Davis*)

Can redact testimonial statements

*Bryant* brings mind of interrogator into inquiry – objectively evaluate statements/actions of parties in light of surrounding circumstances

* + - 1. D unavailable to testify
      2. In a criminal case
      3. Submitted against Δ
      4. For the truth of the matter asserted
    1. **Does not apply if**
       1. D testifies and is subject to cross, offered for non-hearsay, prior testimony under FRE 804, dying declaration, or Δ forfeits by wrongdoing
    2. **If admitted in error** – Must be proven harmless beyond a reasonable doubt
    3. **Laboratory Results**
       1. Crime lab results are testimonial/subject to Confrontation (*Melendez-Diaz*)
       2. Testimony of surrogate technician does not satisfy Confrontation (*Bullcoming*)
       3. Sotomayor’s Exceptions
          1. Legitimate alternative purpose – *e.g.*, medical purpose
          2. Witness has *at least some* PK of *this* analysis and how it was run
          3. Witness offering independent opinion about underlying testimonial reports not admitted into evidence (*Williams*) (Reports are non-testimonial (Thomas))
          4. Machine print out 🡪 Raw data involving little/no interpretation/ambiguity
  1. **Not Hearsay – Opposing Party Statement or Prior Statement**
     1. **Opposing Party Statement (FRE 801(d)(2))**
        1. Basics
           1. Statement offered *against* a party
           2. Not necessarily against interest, no PK required
           3. Preliminary question decided by preponderance (FRE 104)
        2. (A) Statement by individual or representative
           1. CAREFUL! “I heard X” 🡪 double hearsay vs. “X” 🡪 not hearsay
        3. (B) Statement party adopted to be true
           1. Can adopt by silence if heard and understood (*Fortes*)
           2. Standard is probable human behavior
        4. (C) Authorized admission
           1. Admissible if within the scope of agency while relationship exists
        5. (D) Employee admission
           1. Made by employee on/related to a matter within the scope of employment
        6. (E) Made by co-conspirator in furtherance of conspiracy
           1. Sufficiency to find conspiracy (FRE 104)

Statement can help, but statement alone is insufficient

* + - * 1. *Bruton* – Confrontation prohibits introducing non-testifying co-Δ’s confession inculpating Δ in joint trial (limiting instruction doesn’t cure)

*Richardson* – Admissible if Δ’s name and reference to Δ is redacted

*Gray* – “Me and \*blank\*” does not cure *Bruton* problem

Open issue: Whether co-Δ’s statement must be testimonial to apply

*i.e.* Non-testimonial statement by co-Δ to girlfriend implicating Δ

* + 1. **Prior Statement (FRE 801(d)(1))**
       1. D is testifying and prior statement is
          1. (A) Inconsistent and was given under penalty of perjury (trial/hearing/depo)

If not made under oath 🡪 impeachment only, otherwise ok for truth

* + - * 1. (B) Consistent and to rebut charge of fabrication/improper influence

Post-influence 🡪 only nonhearsay; pre-influence 🡪 truth

* + - * 1. (C) Identification of someone D perceived earlier

No reliability inquiry 🡪 prior ID is admissible, veracity tested on cross

* + - 1. NOTE: D just needs to testify, statement can be admitted by another W
  1. **Hearsay Exceptions – Declarant Available or Unavailable – PR-I-M-E-R-I-B**
     1. **P**ublic **R**ecord, **I**mpression, state of **M**ind, **E**xcited utterance, **R**ecorded recollection, **I**njury report, **B**usiness record
     2. **Present Sense Impression(FRE 803(1))** – Statement describing/explaining event/condition made *while or immediately after* D perceived it
        1. Time lapse < ~15min, PK required but can be proven by statement only (*Bemis*)
           1. FRE 104 preponderance for preliminary questions
           2. Unlikely Confrontation concern 🡪 non-testimonial
     3. **Excited Utterance (FRE 803(2))** – Statement relating to startling event/condition *made while under stress of the excitement* it caused
        1. Statement need only “relate” to startling event
        2. PK required proven by statement only (*Bemis*)
           1. FRE 104 preponderance for preliminary question, unlikely Confrontation
     4. **State of Mind (FRE 803(3))** – Statement of D’s then-existing state of mind, emotional, sensory, or physical condition – **not** including statement to prove the fact remembered/believed unless relating to a will
        1. Consider: Motive, intent, plans (future), or feeling, pain, bodily health
        2. *Hillmon* – Statement to show person’s intent to engage in future conduct
           1. Admissible if – forward looking, contemporaneous to event
           2. Can give circumstantial evidence of 3rd party’s future conduct (*Houlihan*)
           3. **NO** backward looking conduct
     5. **Injury Report (FRE 803(4))** – Statement for medical diagnosis/treatment
        1. (A) Made for – and reasonably pertinent to – medical diagnosis/treatment and (B) describes medical history, past/present symptoms, inception, or cause
        2. Statement of fault **usually** does not qualify
           1. Domestic violence – arguably pertinent to diagnosis and to prevent recurring injury/mental health issues (*Moses*)
           2. Child statements to social worker are almost universally considered non-testimonial for Confrontation
        3. Statement *doesn’t* need to be about *declarant’s* injury, doesn’t need to be to a *medical doctor*
     6. **Recorded Recollection (FRE 803(5))** – A record that
        1. (A) Is on a matter the witness once knew, but can’t recall now, (B) was made/adopted *when the matter was fresh* in witness’s memory, and (C) accurately reflects witness’s knowledge
           1. If recorded recollection 🡪 *read* into evidence, only admitted if opposing party wants to
           2. If refreshing recollection (FRE 612) 🡪 not put in evidence at all unless opposing party wants (refreshing thing must be produced for opposing party and witness can be examined about it)
     7. **Business Records (FRE 803(6))** – A record of an act/condition/opinion/diagnosis if
        1. Regularly maintained, record of regular activity, made promptly, based on PK, supported by testimony (custodian, qualified witness, or 902(11) certification), not unreliable (*e.g.*, not regular and made for litigation, or regular report written by someone with interest in the matter)
        2. Business Duty Rule – If source, recorder, and all in the chain are acting in regular course of business, multiple hearsay is excused (*Wilson*)
        3. Business can be illegal, record can be a personal business record
        4. Unlikely to be testimonial for Confrontation
        5. FRE 803(7) – Absence of a record of regularly conducted activity if
           1. (A) Admitted to prove the matter didn’t occur/exist, (B) record of that kind is regularly kept, and (C) not untrustworthy
     8. **Public Records (FRE 803(8))** – Record if it sets out
        1. Office Activities (narrow 🡪 ministerial things like time cards)
        2. Matter observed under duty to report (narrow 🡪 report of rainfall statistics)
           1. In criminal case – no statements of law enforcement (also applies to BR)
        3. Factual findings of a legally authorized investigation
           1. Only in civil case, or against government in criminal case (applies to BR)
           2. Factually based *conclusions/opinions* in report are not excluded
        4. No indication of lack of trustworthiness
  2. **Hearsay Exceptions – Declarant Unavailable**
     1. **Witness is Unavailable (804(a))**
        1. Exempted by privilege
           1. Δ cannot exempt himself by asserting 5th Am. (*Bollin*)
        2. Refuses to testify despite court order
        3. Testifies to lack of memory
        4. Is unable because of death, physical, or mental illness
        5. Is absent and the proponent of the statement cannot procure attendance by process or other means
           1. Must make efforts beyond bare assertion that witness is beyond subpoena power (call, pay, attempt to locate, etc.) (*Raymark*)
        6. NOTE: For dying declaration, statement against interest, or statement of personal/family history, if D’s testimony *could have been* received, then D is not unavailable
     2. **Prior Testimony (FRE 804(b)(1))**
        1. Prior proceeding must have oath/cross
        2. If this proceeding is criminal – Same person as this case must have cross examined witness and have same motive/opportunity to question
           1. Open question whether prosecutor has same motive/opportunity to question during grand jury testimony as at trial (*Salerno*)
        3. If this proceeding is civil – Must have same party or predecessor in interest with same motive/opportunity to cross
           1. Can be different Π/Δ, but need similarity of issues and motivation to question (*Johns-Manville*)
     3. **Dying Declaration (FRE 804(b)(2))**
        1. D has settled, hopeless expectation of death
        2. Requires PK
        3. Only admissible in homicide and civil cases
        4. Only admissible if about the cause/circumstances of declarant’s death
        5. Irrelevant if D dies as long as elements are met
        6. Exception to Confrontation
     4. **Statement Against Interest (FRE 804(b)(3))**
        1. Can come from *any* declarant
        2. Statement must be
           1. So contrary to D’s proprietary/pecuniary interest
           2. So great a tendency to invalidate D’s claim against someone
           3. Or to expose D to civil or criminal liability
        3. And is corroborated – For criminal cases if exposes D to criminal liability
        4. D is acknowledging subjectively that D is opened to liability
        5. Usually non-testimonial for Confrontation
        6. Policy (Corroboration)
           1. Prevent rope-a-dope 🡪 Run trial, have buddy confess, then during his trial, recants and points to evidence in trial #1
           2. Same the other way 🡪 Arrested Δ inculpates everyone
        7. Note: Statement exculpating/inculpating 3rd parties generally don’t qualify because they have no effect on D unless the statement provides info D could only know if D was involved – CAREFUL with SAI around time of death
     5. **Forfeiture by Wrongdoing (FRE 804(b)(6))**
        1. Statement offered against a party that
           1. Wrongfully cause – or acquiesced in wrongfully causing – D’s unavailability as a witness
           2. And did so intending that result
        2. Exception to Confrontation
        3. FRE and Confrontation require intent to prevent testimony
           1. State rules can (and often are) broader)
        4. Domestic Violence (*Giles*)
           1. Acts of DV are often intended to dissuade V from seeking outside help
           2. Includes preventing V from testifying to police for future prosecution
           3. When abuse results in murder, evidence may support finding the crime expressed intent to isolate V and prevent testimony
  3. **Residual Exception**
     1. Hearsay may not be excluded even if not covered by an exception if
        1. Statement is trustworthy, offered to prove a material fact, if more probative than any other evidence obtainable through reasonable efforts, **and** admitting serves the rules/interest of justice
        2. Requires reasonable notice of intent to use, info re D to opposing party
     2. Two theories (*Laster*)
        1. Majority – “close enough, good enough;” Minority – “near miss, inadmissible”
  4. **Due Process**
     1. DPC allows some evidence *offered by criminal-Δ* that would otherwise be excluded
        1. BUT the rule excluding evidence is arbitrary/disproportionately against evidence otherwise favorable to Δ
        2. *E.g.*, Voucher rule – Δ can’t impeach his own witness
           1. Δ calls witness, but calls because W is unreliable and undermines prosecution 🡪 voucher prevents Δ from impeaching W
     2. Excluding evidence critical to Δ’s defense and additionally not allowing Δ to cross-examine his own witness denies Δ a fair trial under DPC (*Chambers*)
        1. Strong circumstantial evidence of reliability is helpful (*Chambers*)
        2. Only in the most extreme cases (*Fortini*)

1. **CHARACTER EVIDENCE**
   1. Character evidence is inadmissible to show acts in conformity (FRE 404(a)(1))
      1. If “character is in issue” (*e.g.*, element of the crime, claim, defense)
         1. Character is admissible if the trait is pertinent (*e.g.*, fitness as a parent, notice to employer that employee is an alcoholic, defamation, door opened by Δ, etc.)
      2. Exceptions (FRE 404(a)(2))
         1. In a **criminal case**, if **the defendant**
            1. Offers evidence of **Δ’s trait** 🡪 prosecutor can offer evidence to rebut
            2. Offers evidence of **V’s trait** 🡪 prosecutor can rebut and offer evidence of Δ’s same trait
         2. In a **homicide case**
            1. Prosecutor can offer evidence of V’s peacefulness to rebut Δ’s claim that V was **first aggressor** (Note: This does not open Δ up at the same time)
         3. Evidence of a **witness’s** character falls under the 600 rules!
   2. Modes of proving character (FRE 405)
      1. When character **is not in issue** 🡪 reputation or opinion testimony only
         1. On cross court may allow inquiry into relevant specific instances of conduct
      2. When character **is in issue** – an essential element of a charge/claim/defense
         1. Can be proven by relevant specific instances of a person’s conduct
      3. **Questions about specific conduct**
         1. May not be proven by extrinsic evidence even if W is lying his face off
         2. Must be asked in good faith – specific evidence to support the questions
   3. Hearsay – Character evidence must comply w/ hearsay rules – hearsay exception for *general rep/op* testimony **but not** specific statements re Δ/W/etc.
   4. Crimes/wrongs/other acts are admissible to show MIMICK subject to notice (FRE404(b))
      1. **M**otive/opportunity, **I**ntent, absence of **M**istake, **I**dentity (M/O), **C**ommon scheme/plan, **K**nowledge (MIMICK)
      2. Subject to 403 balancing, 104(b) sufficiency for preliminary questions re “other act” (*Huddleston*), 105 limiting instructions, rock the extrinsic evidence!
   5. Evidence of **habit**/organization’s **routine practice** may be admitted to prove actions in accordance without corroboration or eyewitness
      1. Look for non-moral, automatic, ritualized behavior 🡪 sampling/uniformity
   6. **Sex Offenses – V’s Behavior**
      1. Evidence to prove V’s sexual behavior/predisposition are inadmissible (412(a))
      2. 412(b)(1): May be admissible in criminal case (A) to show different source of injury/evidence, (B) instances of specific behavior towards Δ to prove consent, or (C) if exclusion violated Δ’s constitutional rights (eviscerate Δ’s defense/evidence of bias – *Olden*)
      3. 412(b)(2): In civil cases, court may admit if probative value substantially outweighs harm to V & unfair prejudice to any party
         1. Reputation only admissible if V puts it in issue – all requires 14d notice
   7. When Δ is accused of **sexual assault (413(a))**, or **child molestation (414(a))**, court *may* admit evidence that Δ committed any other assault/molestation (subject to 403)
      1. In a civil case (415(a)) based on sexual assault/child molestation, court *may* admit evidence that party committed any other assault/molestation
      2. All requires 15d notice unless good cause delay
2. **IMPEACHMENT**
   1. Any party may attack W’s credibility (FRE 607)
   2. Evidence of W’s religious beliefs are off limits for credibility (honest/dishonest character), but are fair game for bias/interest (FRE 610)
   3. **Character for (un)truthfulness (FRE 608)**
      1. Any party may attack any W’s character for (un)truthfulness with **reputation or opinion testimony**. Evidence of truthfulness only admissible after attacked
      2. May ask about specific acts probative of character for (un)truthfulness **on cross** of the W or another W whose character the witness being crossed has testified about
      3. **No extrinsic evidence allowed**
      4. Testimony must be probative of (un)truthfulness and not remote in time!
         1. Note: Can be any act that *seems* “dishonest” even in a remote sense
      5. **Impeachment by evidence of criminal conviction (FRE 609)**
         1. For felonies, must be admitted (subject to balancing)
            1. Subject to 403 (civil or criminal case if W isn’t Δ)
            2. If probative value outweighs prejudice (criminal case and W is Δ)
         2. **Must admit** crimes where an element requires proving dishonesty
            1. *Crimen falsi* (fraud, counterfeiting, forgery) – **no balancing!**
            2. Not *crimen falsi* (shoplifting, contraband, assault, burglary, bank robbery)
         3. If over 10y/o, probative value must substantially outweigh prejudicial effect and requires written notice
      6. **To preserve claim of error**
         1. Δ must testify (*Luce* – Can’t just appeal *in limine* ruling)
         2. Δ must be impeached (*Ohler* – Δ can’t “remove the sting” on direct)
         3. Note: If evidence is actually introduced against Δ, Δ can object and appeal

|  |  |  |
| --- | --- | --- |
|  | **404(a)/405** | **608** |
| What traits are covered? | Any pertinent trait  This is about figuring out about what that person was up to | Character for (un)truthfulness  Because this is about W’s truthfulness and nothing else |
| Who can initiate? | Criminal Δ (+ Gov re: first aggressor) | Any party – the door is opened because W takes the stand |
| Who does the rule apply to? | Criminal Δ and victims (regardless of whether they testify) | Any and all witnesses  Must be testifying witness (including hearsay declarants)  Also covers not hearsay when it is in the categories involving 3rd parties |
| What is the manner of proof? | Once the door is open:  Reputation or opinion, specific acts on cross, but no extrinsic proof | Reputation or opinion, specific acts on cross, even if no explicit “door opening”, but no extrinsic proof |

* 1. **W’s Prior Statement (FRE 613)**
     1. No need to disclose prior statement to W, but must show opposing counsel
     2. Extrinsic evidence admissible if you confront the W about it & opposing counsel can examine W (doesn’t apply to OPS or inconsistent *conduct*)
     3. If PIS is under oath, at a hearing – **substantive**, else **impeachment only**
        1. Note: Substantive evidence doesn’t count under *Morlang*
     4. *Morlang* – Gov. can’t use evidence for impeachment to present testimony that would otherwise be inadmissible 🡪 call up sacrificial lamb who gov. knows will stonewall/lie so they can be impeached
        1. Gov. must have actual knowledge that W will stonewall/lie (*Webster*)
  2. **Bias** – Motive to lie, or slant testimony – Payment, desire to curry favor, romantic involvement, self-interest. **Specific acts and extrinsic evidence allowed!**
     1. Careful: Evidence must be admissible (watch out for hearsay)
  3. **Incapacity** – Demonstrating a limitation in memory/perception of W
     1. **Extrinsic evidence allowed**
     2. Admissible: Delusions, use of drugs at the time of the observation, inability to see (or similar, relevant, physical limitation)
     3. Inadmissible: General depression and use of Prozac, general use of drugs
  4. **Specific Contradiction** – This is a last resort
     1. Collateral Evidence Rule – No extrinsic impeachment by contradiction on collateral matters – Note: can always ask W (intrinsic) about collateral issues

|  |  |  |  |
| --- | --- | --- | --- |
|  | **Form** | **Rules** | **Rehabilitation**  NO BOLSTERING! |
| Character for truthfulness (608 & 609) | Rep/opinion on direct  Specific acts on cross, either re: W or one offered rep/op about | No extrinsic proof of specific acts | Rep/opinion for honesty  Intrinsic evidence re capacity/bias  Non-substantive PCS |
| Prior convictions, through document or W | Felonies with balancing, all *crimen falsi*, subject to 10y rule  Extrinsic proof ok | Rep/op for honesty |
| Prior Inconsistency (801 & 613) | Prior inconsistent statement, through document or W | Extrinsic ok  Must confront W  Substantive evidence only if meets 801(d)(1)(A)  *Morlang* rule against prosecutors | *Maybe* rep/op for honesty (lying or liar?)  Post-motive PCS (if PIS is bias attack) |
| Bias | W testimony, cross, or other admissible evidence | Extrinsic ok  Specific acts ok | **No** rep/op for honesty - irrelevant  Specific acts/extrinsic evidence ok if relevant to refute bias  Pre-motive substantive PCS  Non-substantive PCS/consistency |
| Capacity | W testimony, cross, or other admissible evidence | Extrinsic ok  Specific acts ok  Careful about character | **No** rep/op for honesty  Capacity |
| Specific Contradiction | Cross about specific contradiction | Collateral evidence rule | *Maybe* rep/op for honesty (lying or liar?)  *Maybe* non-substantive PCS  Specific corroboration |

1. **REHABILITATION**
   1. Rule #1 – **No Bolstering** – Only can rehabilitate after being attacked
      1. Can only rehabilitate for what W was attacked on
   2. **Character for Truthfulness**
      1. Generally respond with reputation/opinion for honesty
      2. Intrinsic evidence regarding capacity/lack of bias
      3. Non-substantive use of PCS
      4. Specific instances on cross (608)
   3. **Character for Truthfulness – Attack by Prior Conviction**
      1. Respond with reputation/opinion for honesty
   4. **PIS** – Respond with PCS (substantive if pre-motive and PIS is an attack re bias)
      1. Reputation/opinion for honesty *only if* attack is on general character (lying/liar?)
   5. **Bias** – Respond with specific acts/extrinsic evidence to refute bias
      1. Pre-motive substantive PCS, or post-motive non-substantive to show consistency
      2. No reputation/opinion for honesty!
   6. **Capacity** – Respond with evidence proving capacity
      1. No reputation/opinion for honesty!
      2. Respond with non-substantive PCS if relevant
   7. **Specific Corroboration**
      1. Reputation/opinion for honesty *only if* attack is on general character (lying/liar?)
      2. Respond with non-substantive PCS if relevant
2. **FORBIDDEN INFERENCES**
   1. **Subsequent Remedial Measures (FRE 407)**
      1. Subsequent remedial measures are inadmissible **to prove fault**
      2. May be admissible for impeachment
      3. If disputed, admissible to prove ownership, control, or feasibility
      4. Rule doesn’t apply to subsequent measures by non-party to suit (*Blaw-Knox*)
   2. **Compromise Offers and Negotiation (FRE 408)**
      1. Statements made during negotiation are inadmissible for any party **to prove/disprove validity, amount of disputed claim, or for impeachment**
      2. Two types of statements
         1. Statements proposing amount/type of settlement/compromise
         2. Statements made about the claim during the negotiation (*i.e.* culpability, etc.)
            1. In subsequent **criminal case**, statements related to a claim by a public office in exercise of its authority re consideration/compromise are inadmissible, but statements *about the claim are admissible*
      3. Exceptions: Prove bias, negate undue delay contention, proving effort to obstruct criminal investigation
      4. Misc.
         1. Offer can be informal, not in response to suit, not resulting in settlement
         2. Can’t strategically present otherwise admissible info during negotiation to insulate from introduction at trial (but conduct specifically for negotiation is inadmissible under the rule)
         3. Settlement offers are admissible for claims unrelated to the subject of the offer
         4. Offer is admissible if the offer itself provides an affirmative defense
   3. **Pleas, Plea Discussions, and Related Statements (FRE 410)**
      1. In a civil/criminal case, evidence of the following are inadmissible to show guilt
         1. Guilty plea later withdrawn
         2. *Nolo contendere* plea
         3. Statements made during a proceeding for either plea (plea/plea colloquy)
         4. Statements made during plea discussions if discussions didn’t result in a guilty plea or resulted in later-withdrawn guilty plea
            1. Statements made during discussions resulting in *nolo* plea are admissible!
      2. Except: If another statement is admitted and context/completeness requires admission; during perjury proceeding and statement was made under oath, on the record, and with counsel present
      3. 410 can be waived by K (*Mezzanatto* – Concurrence wouldn’t allow for case in chief, dissent wouldn’t allow for CIC or impeachment)
   4. **Medical Expenses (FRE 409)**
      1. Offers to pay medical/hospital/similar expenses resulting from injury is inadmissible **to prove liability for the injury**
      2. 409 **does not** extend to conduct/statements not part of the act of offering to pay medical expenses (*i.e.* statements proving culpability, etc.)
   5. **Liability Insurance (FRE 411)**
      1. Evidence that a person was/wasn’t insured against liability is inadmissible **to prove whether the person acted negligently or otherwise wrongfully**
         1. Admissible to show bias, prejudice, proving agency, ownership, or control
3. **EXPERTS/OPINION EVIDENCE**
   1. **Lay Witness Opinion Testimony (FRE 701)**
      1. Based on first-hand observation
      2. Helpful to the jury
      3. Not the product of specialized expertise
         1. Focus: Must derive from everyday life/experience of the witness
   2. **Expert Witness Testimony**
      1. **FRE 702** – W who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if
         1. Knowledge will help trier of fact to understand evidence/facts
         2. Based on sufficient facts/data, product of reliable principles/methods
         3. Expert has reliably applied the principles/methods to the facts
      2. **FRE 704** – Opinion on an ultimate issue is not objectionable unless in a criminal case – expert can’t state opinion about whether Δ had a mental state or condition constituting an element of the crime
      3. **FRE 705** – Expert may state opinion/reasoning without first disclosing underlying facts/data – May be ordered otherwise or exposed on cross
      4. **FRE 703** – Expert can base opinion on any facts/data from the case or inadmissible facts/data as long as experts in the field would reasonably rely on those facts/data
         1. If inadmissible, probative value must substantially outweigh prejudicial effect to be shown to the jury
      5. **FRE 706** – Provides mechanism for court to appoint an independent expert
         1. *LeBlanc* – Should be used very rarely as an alternate to the adversary process
4. **SCIENTIFIC EVIDENCE**
   1. **Statistical Data**
      1. Independent variables do not affect their conditional probability – P(X|Y) = P(X)
         1. *i.e.* The probability of X occurring knowing that Y occurred is still just the probability that X will occur independent of Y
      2. Product Rule
         1. Independent probabilities are multiplied – P(X) x P(Y) = P(X&Y)
         2. Dependent probabilities are not – P(X&Y) = P(X) x P(Y|X)
      3. Baye’s Theorem –
         1. Odds:
      4. **Random Match Probability** – Likelihood a random person has the same trait
      5. **Source Probability** – Likelihood Δ is the source of the evidence here
      6. **Guilt Probability** – Likelihood that Δ is guilty of the crime
      7. **Prosecutor’s Fallacy** – Idea that RMP = Guilt Probability
         1. BUT, P(match|innocence) ≠ P(innocence|match)
      8. Note: Statistical data requires foundation (*Collins*) – Traits must be independent, W’s testimony must be accurate, the traits must describe the guilty person
         1. Prior odds of guilt is the province of the jury
   2. **Scientific Experts**
      1. *Frye* – When expert renders an opinion on a *new or novel technique*, the technique must be *generally accepted* before admitting the evidence
      2. *Daubert*
         1. Whether the theory has been tested
         2. Whether it has been published/subject to peer review
         3. What the potential error rate is & whether there are SOPs
         4. “General Acceptance”
      3. Review for abuse of discretion (*Joiner*)
      4. Fit Inquiry (*Joiner*)
         1. Were the studies conducted in accordance with the method?
         2. Is there a basis for the expert’s conclusion based on that info?
      5. *Daubert* applies to both scientific data and expert opinion testimony (*Kumho*)
5. **PRIVILEGES**
   1. **Spousal Privilege**
      1. **Confidential Communication** – Confidential disclosures between husband/wife
         1. Requires both to consent for disclosure, survives the marriage
         2. Broken with knowing presence of another or negligence
         3. Exceptions – Legal proceeding between spouses, crime-fraud, or crimes against children/spouse, commitment/competency proceedings, joint business owners
      2. **Testimonial Privilege** (*Trammel*) – Any non-confidential communication between husband/wife (essentially whether spouse can be called at all)
         1. Waived by the witness-spouse alone and can’t be compelled/foreclosed by other spouse, does not survive the marriage
   2. **ACpriv**
      1. **Elements** – Confidential, communication, between AC, rendering legal services
         1. Presence of parties involved in rendering legal services (paralegal, secretary) does not break privilege
      2. **Exceptions** – Testamentary, Fiduciary, Crime-Fraud (advice for future crime/fraud – *in camera* review of material triggered on good faith showing)
      3. **Corporate Clients** – Employees acting within scope of corporate duties are clients of in-house counsel (*UpJohn*)
   3. **WPpriv**
      1. Documents prepared in contemplation of litigation
      2. Unless showing of substantial need and inability to procure the same info without undue hardship