**NICHOLAS G. SAADY**

**LL.M. 2020**

***FULL OUTLINE FOR:***

**EVIDENCE**

**CAPRA – FALL 2019**

Table of Contents

Background 5

Relevance 6

TEST FOR RELEVANCE [401] 6

ADMISSIBILITY OF RELEVANT EVIDENCE [402] 6

THE BALANCING TEST [403] 7

ISSUES ARISING FROM CASES RELATING TO 403 10

PRELIMINARY HEARINGS ON EVIDENCE [104] 14

CONDITIONAL RELEVANCE [104(b)] 14

LIMITING INSTRUCTIONS [105] 14

Special Relevance Rules 15

SUBSEQUENT REMEDIAL MEASURES [407] 15

OFFERS OF COMPROMISE [408] 17

OFFERS TO PAY MEDICAL EXPENSES [409] 19

PLEAS, DISCUSSIONS AND RELATED STATEMENTS [410] 19

Character Evidence 21

TYPES OF CHARACTER EVIDENCE 21

OVERARCHING EXCLUSIONARY RULE [404(a)(1)] 21

OVERVIEW OF WHEN CHARACTER EVIDENCE IS ADMISSIBLE 21

1 – EXCEPTION WHERE CHARACTER IS IN ISSUE 21

2 – EXCEPTION FOR IMPEACHMENT 22

3/4 – CRIMINAL EXCEPTIONS (D or V) 22

NOT FOR CHARACTER PURPOSE [404(b)] 25

PROPER PURPOSES [404(b)] 27

NOTICE FOR 404(b) 31

HABIT [406] 31

RAPE SHIELD RULE [412] 32

OTHER SEXUAL ASSAULT RULES [413-415] 34

Opinions 35

LAY OPINIONS 35

EXPERT OPINIONS – PRELIMINARY REQUIREMENTS (mainly relate to (a)) 37

EXPERT OPINIONS – 702 REQUIREMENTS 38

BASIS FOR EXPERT’S TESTIMONY [703] 43

Hearsay 45

BACKGROUND 45

THRESHOLD HEARSAY ISSUES 46

IS THE EVIDENCE HEARSAY? 47

PURPOSE OTHER THAN FOR TRUTH [801(c)(2)] 48

PRIOR STATEMENTS OF TESTIFYING WITNESSES [801(d)(1)] 49

OPPOSING PARTY STATEMENTS [801(d)(2)] 51

UNAVAILABLE WITNESSES 56

EXCEPTIONS NOT REQUIRING UNAVAILABILITY [803] 61

PRESENT SENSE IMPRESSIONS [803(1)] 61

EXCITED UTTERANCES [803(2)] 62

STATE OF MIND EXCEPTION [803(3)] 64

STATEMENT FOR MEDICAL DIAGNOSIS OR TREATMENT [803(4)] 68

RECORDED RECOLLECTION [803(5)] 70

RECORDS OF REGULARLY CONDUCTED ACTIVITY (BUSINESS RECORDS) [803(6)] 71

ABSENCE OF A RECORD OF A REGULARLY CONDUCTED ACTIVITY [803(7)] 73

PUBLIC RECORDS [803(8)] 73

ABSENCE OF A PUBLIC RECORD [803(10)] 75

ANCIENT DOCUMENTS [803(16)] 75

STATEMENTS IN LEARNED TREATISES, PERIODICALS, OR PAMPHLETS [803(18)] 76

RESIDUAL EXCEPTION [807] 77

CONFRONTATION CLAUSE 79

RIGHT TO FACE TO FACE XX 80

CONFRONTATION ISSUES IN HEARSAY RULES 81

Competency Rules 87

WITNESS COMPETENCY [601] 87

WITNESS OATH OR AFFIRMATION [603] 87

JUROR COMPETENCY AS A WITNESS [606(b)] 87

EXCLUDING WITNESSES / SEQUESTRATION [615] 89

MODE AND ORDER OF EXAMINING WITNESSES [611] 89

Impeachment of witnesses 91

WHO CAN IMPEACH? [607] 91

WAYS TO IMPEACH 91

1 – Impeachment Using Character for Truthfulness 92

WITNESSES’ CHARACTER FOR TRUTHFULNESS [608] 92

IMPEACHMENT BY CONVICTION [609] 94

2 – Impeachment using PIS 98

PRIOR INCONSISTENT STATEMENTS [613] 98

CONTRADICTION [613] 99

BIAS OR MOTIVE TO FALSIFY 99

INCAPACITY AND OTHER IMPEACHMENT 100

HEARSAY DECLARANTS 100

3 – Rehabilitation 101

Privileges 102

PRELIMINARY MATTERS 102

ATTORNEY/CLIENT PRIVILEGE 102

EXCEPTIONS: WAIVER 105

Spousal Privileges 109

SPOUSAL PRIVILEGE AGAINST ADVERSE TESTIMONY 109

SPOUSAL CONFIDENTIAL COMMUNICATIONS PRIVILEGE 110

Miscellaneous Privileges 111

5th AMENDMENT PRIVILEGE 111

MENTAL HEALTH PROFESSIONAL PRIVILEGE 111

STATE SECRETS PRIVILEGE 111

EXECUTIVE PRIVILEGE 112

CLERGY-PENITENT PRIVILEGE 112

REPORTER/SOURCES 112

Privileges not recognized 113

SECRET SERVICE/PRESIDENT 113

CORPORATE SELF ANALYSIS 113

PARENT/CHILD 113

Authenticating proffered evidence 114

Best Evidence Rule 117

Glossary of terms 118

Associated principles 118

Exam 118

Background

### Evidence Act of 1975 – codified the common law rules

* + 1975 to 1993 – no Advisory Committee – chaotic and disagreement about rules
	+ 2011 – rules were restyled
* Process for creation of rules
	+ Congress delegated power to SCOTUS
		- CJ sends letter to Congress to recommend changes – then Congress has a specific time to enact or reject (if they do nothing then rule becomes law – i.e. made law through Congressional inaction – good because Congress does not need to enact each specific change)
	+ SCOTUS formed Judicial Conference which comprises CJ and all Chiefs of the Circuits
	+ JC formed Rules/Standing Committee to do its work on various rules
	+ R/S Committee formed Advisory Committee
* Reasons for restyling rules
	+ They were in bad style (e.g. “shall” was throughout rules – dispute about a ‘may’ or ‘must’)
	+ Passive voice – added complexity and length, and caused confusion about who was to make decisions based on rules / who they applied to
	+ Hard to read / aesthetically unpleasing
	+ Legalese (e.g. herewith)
	+ Inconsistency
* Purposes of evidence law:
	+ Promote efficiency in litigation
	+ Prevent unfair prejudice to parties
	+ Prevent unreliability of evidence
	+ Reflect social policy – risk of unconstrained advocacy if no rules
	+ Preventing prejudicial and irrational decision-making
* Currently, fewer cases go to trial – diminishes utility of evidence rules
	+ Higher costs associated with litigation – particularly with expansion of discovery
	+ Alternative methods of dispute resolution – particularly arbitration (although often no appeal rights and can be expensive)
	+ Judges coercing settlement
	+ Delays associated with litigation
	+ Mandatory minimums for criminal trials
* Evidence rules are necessary even pre-trial to:
	+ Assess strength of case
	+ Determine summary judgment motions (as all evidence rules apply)
	+ Determine pre-trial rulings (e.g. about admissibility)
* Difference between direct and circumstantial
	+ Direct – squarely establishes a fact
		- Issue will be with the reliability of the direct account
	+ Circumstantial – dependent on drawing inferences
* Rules of evidence are purpose driven
	+ Admissibility depends on purpose for which evidence is being offered
		- May be inadmissible for one purpose, but inadmissible for another – then limiting instruction needed
* NOTE: each State has different rules (e.g. NY rules of evidence are common law – chaotic)

Relevance

* **R 401-415** are rules of relevance

# TEST FOR RELEVANCE [401]

## THE TEST

1. Evidence tends to make a fact more or less probable than it would be without the evidence [**401(a)**]

#### IE: tendency to prove a proposition

##### So first identify the fact that it attempts to prove and then assess [***US v Foster***]

#### NOTE: does not need to be sufficient [***Douglas v Eaton***] – only needs to tend

### That fact is of consequence in determining the action [**401(a)**]

#### IE: fact or proposition is in dispute

##### Note operation of stipulations / concessions here

#### NOTE: question of “in consequence” is clearly resolved by looking at applicable substantive law [***Phillips v Western Co. of North America***]

##### EG: where applicable law requires proof of certain point and evidence goes to that point

## COMMENTS

* Establishes two conditions for relevance, which favor admissibility (low threshold) [***McVeigh***]
* Evidence is either *relevant or not* under 401 (although for 403 the degree of relevance / PV is important) [***US v Foster***]
* Evidence which is essentially background in nature can scarcely be said to involve disputed matter, yet it is universally offered and admitted as an aid to understanding
	+ EG: charts, photographs, views of real estate, murder weapons

### Non-introduction of evidence can also be relevant

### Can draw a *negative inference* from failure to adduce evidence (e.g. the fact will be the failure to adduce)

* + Particularly so where evidence is hidden or destroyed (e.g. spoliation) – often where there is a targeted destruction of evidence

## POLICY

* Promotes efficiency and order in trials by limiting to only relevant evidence
* Prevents confusion and unfairness resulting from irrelevant evidence

# ADMISSIBILITY OF RELEVANT EVIDENCE [402]

## THE TEST

* Relevant evidence (i.e. satisfies 401) is admissible [**402**]
* Except if any of the following provides otherwise:
	+ US Constitution
	+ a federal statute
	+ these rules
	+ other rules prescribed by the Supreme Court

## COMMENTS

* State rules of evidence are not applicable in Federal Court [***Lowry***]
* Federal prosecutors are bound by their own state’s rules of professional responsibility [***McDale***]
	+ Although breach will not render evidence irrelevant

# THE BALANCING TEST [403]

## THE TEST

### When assessing under 403, consider totality of the evidence

### Generally, the more evidence on a point, the less important one piece will be

1. Evidence must be excluded if its PV is **substantially outweighed** by one or more of:
	* Unfair prejudice

##### Not merely harm (wouldn’t be relevant if it didn’t harm one side)

##### Must prove it would lead jury to make an emotional or irrational decision, or use it in a manner not permitted by rules [***Ballou v Henri Studios***]

##### EG: remote evidence – often excluded as minimal PV is substantially outweighed by the confusion and delay that would result from introducing it to the jury [***US v Ellzey***]

##### NOTE: any unfair prejudice must be particularized [***McQueeney***]

##### Otherwise, all evidence could be excluded on unspecified fear of prejudice

* + Confusion of the issues
	+ Misleading the jury
	+ Undue delay
	+ Wasting time
	+ Needlessly presenting cumulative evidence (i.e. proven point and prove again for no reason)

### NOTE: if probative value and prejudice are equal, evidence must be admitted [***US v Mende***]

## COMMENTS

### Presumption in favor of admitting relevant evidence (high standard of substantially outweighing)

#### 403 is an extraordinary remedy to be used sparingly [***US v Mende***]

* + Cardozo = reverberating sound of improper risk must drown out probative nature
* In bench trials, can only really argue undue delay
	+ No risk of confusion or unfair prejudice because judge is impartial and knowledgeable
* 403 is the most important rule of evidence
	+ Almost all questions of relevance become 403 questions because 401 is so permissive

## POLICY

### Exclusion totally rejects offeror’s probative evidence, while admission may be accompanied by safeguards such as a limiting instruction [***US v Powers***]

## EVIDENTIARY ALTERNATIVES

### Assess PV by reference to alternatives (e.g. other means of proof) – if there is an alternative that is less prejudicial then must use the alternative and exclude under 403 [***Old Chief***]

* + EA CANNOT reduce the probative value of that evidence [***Torres***]

##### Only need slightly less PV and then it is not an evidentiary alternative

* + Key issue = evidence used for multiple purposes – where this is so, hard to establish that alternative has same PV unless also used for same multiple purposes

### Linked with stipulations, as a stipulation of a fact can be an EA

### NOTE: need to be careful of prejudicial aspects of an EA

#### EG: details of felony in ***OC*** and content of book in ***Torres***

###### Old Chief

#### FACTS

##### OC charged with possessing a firearm with a prior felony conviction

##### Offered to stipulate the conviction, but P rejected – P wanted to detail the felony

##### P introduced the judgment record for the prior conviction, and a jury convicted OC

##### Trial court held P was entitled to introduce probative evidence to prove the prior offense regardless of the stipulation offer

#### HELD

##### Stipulation of a felony offense was a valid EA and had to be accepted because it was otherwise unfairly prejudicial (details of the offense would have inflamed the jury)

###### Torres

#### FACTS

##### Border patrol agent saw a man shoot at him and miss

##### He then recorded vague details of suspect’s appearance

##### Then looked in a mugshot book and ID’s Torres

##### P wants to admit mugshot book into evidence

#### HELD

##### Whole book was inadmissible as it included Torres’ prior offences

##### There was an alternative to admit the book, but cover up certain parts that were prejudicial (suggested D was a criminal), or to include a stipulation that D was identified in mug shot book

## STIPULATIONS / CONCESSIONS

### Stipulations are agreements between the parties to allow a fact into evidence without proof

### MUST be accepted where it has equivalent PV but is less prejudicial [***Old Chief***]

#### Where it does not, parties can reject stipulations [***Old Chief***]

##### Almost always allowed to reject, as evidence often used for multiple purposes

##### But often must accept stipulation where strict liability offence (e.g. felony possession – only need to stipulate committed a felony, not what felony it was)

### Highly strategic – often used to absolve evidentiary issues such as to:

* + Rob a party of the weight of their evidence
		- EG: concede that person is a “qualified expert” – where they are best qualified expert in the world – to prevent persuading judge/jury further because he is more qualified than the average “qualified expert”. Hard to get party to accept concession where this occurs
	+ Rob a party of their ability to use evidence for another purpose
		- EG: accepting that possessed child porn, therefore robs ability to see the age of the children involved or the nature of the acts performed
	+ Limits persuasive aspect of the evidence as the Judge often just reads a stipulation to jury
		- EG: Judge stating a fact rather than showing graphic video to jury

## OBJECTING ON 403 GROUNDS

### Can be done by either:

### Making an *in limine* motionbefore trial

* + - Gives party opportunity for an evidentiary ruling prior to trial starting
			* Without presence of jury, but recorded in judge’s presence
			* Allows party to assess their case – can lead parties to settle as they know the evidence for their case
			* Often used for flaming gun evidence – e.g. evidence of man pushing another man down stairs 30 years ago in trial for pushing wife down stairs, would want an *in limine* to know if that evidence will go in

### Object before or when the question is answered

### You need to object to get a less lenient standard of review (see below)

## 403 STANDARDS OF APPELLATE REVIEW

### OBJECTION = must prove there was an abuse of discretion [***McQueeney***]

* + Must be so wrong that no reasonable judge could have come to that decision
	+ i.e. very difficult to prove – appellate courts are extremely deferential to lower courts
	+ Examples:
		- When judge improperly balances the evidence (e.g. McQueen – judge thought prejudice just meant “prejudicial,” as opposed to “unduly prejudicial”)
		- When judge makes an assessment about credibility of evidence – this is an abuse of discretion as it usurps jury’s role of determining credibility
			* Judge is to assume evidence is true when conducting 403 analysis and only answer whether it has PV

### NO OBJECTION = If opposing party does NOT make a “timely and specific objection” to the introduction of a piece of evidence in question, then standard is plain error

* + To be granted a reversal under plain error review, mistake must be *obvious and unjust*
	+ Even more deferential to trial judge – extremely rare to prove

# ISSUES ARISING FROM CASES RELATING TO 403

## PROOF OF INJURY VIDEOS (“DAY IN THE LIFE OF”)

### Two key considerations

#### Probative value = showing effect of injuries on the P

#### Prejudicial effect = arising from the selectivity and typicality of the video

### Viewed as prejudicial, but their often high PV means they are often admissible

#### Examine video very closely to determine if any prejudicial content in it (e.g. only film 5 mins of the day where walking upstairs with prosthetics – must not embellish or unfairly illustrate)

### Adducing party may reduce unfairness by:

#### Taking entire tape of the video and presenting it to the other party, who can adduce any part of it if it wants to

#### Not using film techniques nor music in the vide

#### Obtaining a limiting instruction [**105**]

#### Bifurcating trial (separate liability and damages) – very rare

### NOTE: **R 106** allows a party to introduce the rest of a writing or recorded statement if the other party only introduces a part of it (if in fairness it ought to be considered at the same time)

## GORY VICTIM VIDEOS / PICTURES

### In criminal, have high probative value so often allowed BUT must not overdo it

#### Injuries shown after autopsy takes place are not admissible, as they were not caused by D, so unfairly inflame and confuse the jury [***Terry***]

#### Can be used for an expert to explain injuries, but must make it clear which injuries were caused as part of autopsy (e.g. head cut off as part of autopsy) [***US v Sarracino***]

#### D will often stipulate/concede that the victim is dead to prevent adducing this evidence

### In civil, used to prove extent of injuries, award higher damages and provide context

#### More limited admission – must ensure that does not distract or inflame the jury

## ALTERNATIVE PERPETRATOR EVIDENCE

### Must show a sufficient and legitimate nexus between the crime and alternative perpetrator for evidence to be admitted [***McVeigh***]

#### NEED some act directly connecting the alternative perpetrator with crime [***State v Woods***]

##### More than just an opportunity or motive

### Courts’ considerations:

#### While not explicitly, often weigh up strength of P’s case when determining admissibility of alleged AP evidence

##### Role of the D then transforms into a quasi-investigator/prosecutor

#### Wary of conducting a trial within a trial by admitting AP evidence

#### D’s constitutional right to an effective defense [**6th Amendment**]

###### US v McVeigh

#### FACTS

##### McVeigh was accused of Oklahoma city bombing

##### A cult, Elohim City, was being investigated by FBI and it was uncovered that they were also planning terror attacks

##### D wanted to introduce evidence to show Elohim City as AP

#### HELD

##### Unfairly prejudicial and would confuse the jury – largely based on speculation that EC may have committed crime – it was too generalized and speculative to be admitted

##### Would have also led to a trial within a trial – invite jury to blame absent, unrepresented parties – D then becomes a quasi-prosecutor

###### Holmes v South Carolina

#### FACTS

##### Strong forensic evidence to connect D with the crime

##### Alternative perpetrator acknowledged that D was innocent and admitted to crime

##### AP’s evidence was disallowed

#### HELD

##### AP evidence admissible

##### Breach of constitutional right to present a complete defense – was highly probative evidence as it was not too remote and strongly connected to the offence by a positive act of the AP (i.e. admission)

## EXPRESSIVE MATERIAL

### General usage materials (e.g. songs on playlist) are usually inadmissible because they are so general

### UNLESS there is something specifically different about them

#### EG: singing song lyrics in a different way which is relevant to issue in case

## READING MATERIAL / PERSONAL LIBRARIES

### Depends on the circumstances of the case

### Material must directly relate to the issues in the case and not raise unfairly prejudicial inferences

#### EG: child porn is relevant in child sexual assault cases, as it corroborates adult incest fantasy and children as the object of sexual appetite BUT gay porn would not have the same relevance in child sexual assault cases

### IF admitted, must examine every bit of the material to ensure there is no unfair prejudice in it

###### Guam v Shymanovitz

#### FACTS

##### D was charged with sexually assaulting minors

#### Sexually explicit gay mags were find at D’s house – P wanted to introduce

#### HELD

##### Inadmissible as both irrelevant and unfairly prejudicial

##### 401 – mere possession of the material made it no more or less likely that he would have committed crime, just showed his interest in gay mags – no propensity to engage in sexual conduct of any kind

##### 403 – unfair prejudice outweighed minimal PV – would have caused jury to infer D was gay and this was generally seen to be extremely prejudicial as jury could also infer he deviated from sexual norms in other ways

###### US v Curtin

#### FACTS

#### Curtin was charged with child sex offences

##### Had child porn (with adults) on his PDA – 140 stories of it – 5 were admitted into evidence

#### HELD

#### Overruled *Shymanovitz* holding that reading material can never be admitted

#### Porn shed light on his subjective intent, corroborated his fantasy of adult males having sex with children and was therefore relevant

##### Content of the stories was not unfairly prejudicial

##### BUT court noted that must examine every bit of the material to ensure there is no unfair prejudice in it – some of the stories were inadmissible

## GUILTY PLEAS

* Guilty plea of a co-accused is extremely unfairly prejudicial to prove co-accused’s guilt as it strongly risks jury using this to prove D’s guilt
	+ Especially so where there are clauses in plea agreement which bolster the co-accused’s credibility (e.g. to take polygraph)
	+ Complicated where the co-accused is called to give evidence at trial
		- Assisted by an instruction that only to use evidence to determine credibility and not guilt
	+ Government often allowed to introduce guilty plea agreement as background (informing jury of the result) and show there was no prosecutorial misconduct and anticipate impeachment
		- BUT often accompanied by limiting instruction

## SIMILAR CIRCUMSTANCES

* For such evidence to be admitted, past incident or accident must be substantially similar to the case [***Nachtsheim***]

#### ‘Substantial similarity’ is undefined – judge enjoys great discretion in this area [***Fusco***]

#### Greater similarity, then greater PV

##### Court likely to admit evidence when extent of issue is so grave that it suggests the D should have been on notice of risk of injury/harm

* + Party opposing admission seeks to show dissimilarity

### Evidence of no prior accidents may also be adduced as long as adequate foundation (i.e. substantially similar setting to the accident in dispute) [***Pandit v Am Honda***]

* Often used in products liability cases to show causation or to show D’s knowledge of dangers

#### D knew of danger, its existence and cause

### Like for alternative perpetrators, courts are wary of conducting a trial within a trial by admitting similar circumstances evidence

###### Nachtsheim v Beech Aircraft

#### FACTS

##### There was an initial accident, then another accident subject of the proceedings

##### Causation was in dispute for the initial accident

#### HELD

##### Not enough similarity between accidents for evidence of the first to be adduced – jury would have been confronted with another distinct accident – would confuse and cause a trial within a trial (as causation was disputed for initial accident)

###### Example case

#### Drug called Viox which P is taking and claims it causes heart attacks

#### Wants to introduce other heart attacks in people taking Viox, but unfairly prejudicial b/c:

##### Lots of differences in the cases / people

##### Also disputes about causation – lead to a trial within a trial

## DEMONSTRATIVE EVIDENCE

### Party seeks to recreate/reproduce event – draw inferences of causation from the demonstration or reproduction

#### Danger / prejudice lies in potential for jury to use it as proof of a fact

### If you want to introduce demonstrative evidence, must conduct test under conditions that are as identical as reasonably possible to those existing at time of the accident [***Fusco; Gilbert***]

### STRATEGY = proponent should seek to control variables in favor of opposing party to assist admission

#### EG: if 50mph winds then make sure 60mph wind / do it at same time

###### Fusco v General Motors Corp.

#### FACTS

##### P driving car, and ball joint disengages

##### P claims it caused her to spin and hit pole

##### D’s evidence was that car just stops, not that it causes spinning

##### D wanted to adduce evidence showing dead stop

#### HELD

##### Too many differences – insufficiently probative to prove causation and high prejudicial effect because jury would overvalue the evidence

* + - * Driver different – regular driver v professional driver
			* Weather different – crash in wet conditions, but reproduction in dry
			* Driver fully anticipated that ball joint would disengage because they had to push a button for it to occur

##### Also attempted to be illustrative aid (see below) – not effective – all could see was that car stopped, not the actual ball joint disengaging

###### Gulf of Mexico

#### FACTS

##### Boat loaded with cocaine

##### Police officer testifies that he put spotlight on boat and saw the two Ds

##### Says they jumped off the boat and then swam to shore

##### Ds said that they got drunk and went swimming

##### Issue was quality of identification

##### D argued light was too weak to see their faces

##### P wanted to bring light into courtroom to show jury power of the light

#### HELD

##### Admitted to show power of the light – similar enough and jury would be focusing just like the officer was focusing on seeing Ds (i.e. he was expecting to identify them)

##### BUT disallowed P’s request to shine light on Ds in the corner

###### Example Case

#### FACTS

##### Found 5000 pounds of marijuana on deck of the boat

##### Deckman charged – claimed he did not know – thought it was furniture

##### Knowledge issue

##### Government said furniture smells different from 5000 pounds of M

##### Wanted to demonstrate smell of M to the jury by demonstrating to jury

##### Not much marijuana left – only had one bale of it left

#### HELD

##### Inadmissible – substantial dissimilarity – the passage of time would have reduced smell and only one bale was left

###### Example Case 2

#### FACTS

##### P was hit by truck while walking in a street in Brooklyn

##### D wants to play audio recording of truck backing up and making beep

#### HELD

##### Microphone placed on the truck, so held to not be a fair demonstrative

##### Also jury would be listening for the beep, rather than it being unexpected as it was for the person walking, so unfair even if microphone was not on truck

###### Example Case 3

#### FACTS

##### Wife murdered and father said two year old son got out of crib and shot wife

##### Went to wake up mother and pulled trigger

##### P brings boy into the room with a gun – not murder weapon but another gun, without safety on and boy cannot pull the trigger

##### D says improper demonstrative – different situation

#### HELD

##### Admissible

## ILLUSTRATIVE AIDS

### Evidence used to help the jury understand something (e.g. illustrating general scientific principles)

### If you want to introduce illustrative aid, must conduct the demonstration under circumstances very different to those involved in the accident [***Fusco; Gilbert***] (i.e. opposite of demonstrative)

### NOTE: when jury go off to deliberate, IA cannot be provided to them because it is not evidence, it is simply an aid

#### BUT they would get demonstrative evidence

###### Gilbert

#### FACTS

##### Video to show effect of car crash on baby seat

##### Put fake baby on a toboggan

#### HELD

##### Admitted as aid – extremely different circumstances, only used to inform of effect

# PRELIMINARY HEARINGS ON EVIDENCE [104]

### Evidentiary issues raised before hearing are determined under **104**

#### EG: piece of evidence, existence of privilege or witness’ qualifications

### Judge not bound by rules of evidence in making this determination, except privilege [**104(a); *Bourjaily***]

#### EG: may consider any evidence, even hearsay

### MUST conduct preliminary hearing where it involves [**104(c)**]:

#### Admissibility of a confession

#### Criminal case where D is a witness and requests it

#### Justice requires

### In criminal case, if D testifies at a preliminary hearing, they do not become subject to XX on other issues in the case [**104(d)**]

# CONDITIONAL RELEVANCE [104(b)]

### When relevance of evidence depends on whether a fact exists, court may admit it on the condition that proof of that underlying fact will be later introduced [**104(b)**]

### Proponent must provide enough evidence that the conditional fact exists

### Judge should admit evidence if proponent has already produced the other materials or promises to produce them later

# LIMITING INSTRUCTIONS [105]

* Enables judges to give instructions to the jury about how to use evidence
	+ Limits the risk of evidence being used for improper purpose
* NOTE: Ordinarily do not get a second go at adducing similar evidence – up to judge’s discretion – will consider factors such as delay caused by second attempt
* NOTE: bifurcation of a trial is often used to remedy risk of jury confusion / misuse of evidence (splits issues of liability and damages)

Special Relevance Rules

* Rules 404 to 412 provide categorical prohibitions on admitting relevant evidence based on public policy grounds

# SUBSEQUENT REMEDIAL MEASURES [407]

1. SRM = measures taken after injury/harm, that would have made earlier injury/harm less likely to occur [***Chase v General Motors***]

#### EG: repairs to defective conditions [***Stanley v Amoco***] and design changes [***Cann v Ford***]

#### EG: firing an employee whose negligence caused injury/harm [***Nolan v Memphis City Schools***]

#### NOT reports/writings about condition – might lead to SRM but not themselves SRM [***Prentiss***]

##### Suggestions for SRM in reports/writings must be redacted before admission [***Brazos***]

1. CANNOT use evidence of SRM to prove [**407**]:

#### Negligence;

#### Culpable conduct;

#### Defect in a product or its design; or

#### Need for a warning or instruction

### EXCEPT if admitted for another purpose such as [**407**]:

#### Impeachment

#### IF any are disputed – proving ownership, control, or feasibility of precautionary measures

##### If not disputed, irrelevant under 401 b/c “ownership, control or feasibility” would not be in issue [***Cameron v Otto Block***]

##### NOTE: D may often stipulate the above to prevent engagement of an exception and exclude evidence of SRM (i.e. then not in issue)

### If admissible, passes 403 test

#### Often used where SRM is used for impeachment (see below)

#### Rarely used to exclude where D disputes one of the exclusions (i.e. opens the door)

## IMPEACHMENT

### Arises when W says a product is safe but then takes SRM, and other party uses this to impeach W

#### RARELY allow admission of evidence to impeach just for contradiction – limited PV is substantially outweighed by prejudice of SRM [***Flaminio v Honda; Minter v Prime Equip Co.***]

#### USUALLY ONLY where D makes extravagant claims of safety – because PV of strong contradiction substantially outweighs prejudice of SRM [***Wood v Morbark; Muzyka v Remington***]

##### STRATEGY = tell D not to make extravagant claims of safety to ensure protection of 407 – just testify to safety of product in normal circumstances (i.e. do not say “safest in the world”)

## OWNERSHIP AND CONTROL

### Where party undertakes a SRM but rejects that they own or control a product / the stimulus for the injury/harm

## FEASIBILITY

### Used to prove that a SRM was feasible but not taken

### Feasibility = within state of human knowledge at the time and not unreasonably expensive

### D will always stipulate/concede that a subsequent remedial measure was feasible

#### Rarely an issue in the cases

###### Cameron v Otto Bock Ortho

#### FACTS

##### Doctors did not fit a prosthetic limb properly

##### P argued the manufacturer did not give proper instructions as to fitting prosthetic

##### Post-accident, manufacturer sent letter sent by the D to customers specifying proper torque measures for fitting the prosthetic

##### Introduced to show control and feasibility

#### HELD

##### Inadmissible – neither control (Otto accepted that it provided advice to the prosthetists who assembled its products) or feasibility (prepared to stipulate that it was feasible) were in issue, so not relevant evidence – only issue was causation

## THIRD PARTY SRMs

### SRM taken by a third party are not covered by 407 because they do not trigger underlying social policy and cannot be used to admit the fault of a party (although damning) [***Diehl v Blaw-Knox***]

#### So not excluded by 407 – must still get in on other grounds

### NOTE: rule does not specify SRM taken by D but rather *any* SRM – so courts are reading rule according to social policy, not literal wording

## TIMING

### Where an earlier version of a product causes harm, 407 does not prevent adducing the new version because it existed *before* the injury/harm

#### BUT may still argue that unfairly prejudicial under 403

### POLICY = encourages companies to recall defective products

## POLICY OF SRM RULE

### For

#### Prevent situations where parties do not remedy issues to avoid admission of that remedial action as evidence

#### SRM are often of marginal relevance in proving cases and therefore just distract the jury from assessing the case at the relevant time

### Against

#### Provides a gift to corporations in trials – they would be taking the action anyway to prevent future liability, which would be worse

### NOTE: purpose driven rule – must use for purpose other than to prove liability

# OFFERS OF COMPROMISE [408]

## CONDUCT COVERED

### Conduct covered:

#### Furnishing, promising or offering a valuable consideration in compromise or attempting to compromise a claim [**408(a)(1)**]

#### Accepting, promising to accept or offering to accept a valuable consideration in compromising or attempting to compromise the claim [**408(a)(1)**]

#### Conduct or statement made during compromise negotiations about the claim [**408(a)(2)**]

### MUST be conduct after a “claim” – any infringement OR difference of opinion b/w parties [***Nintendo***]

#### So, 408 even applies to pre-litigation discussions (POLICY = promote settlements prior to lit.)

### Conduct can be in related litigation – even if compromise is with a different party [***Nintendo***]

## RULE

* Inadmissible to:

#### Prove or disprove validity/amount of a claim [**408(a)**]:

#### Impeach by prior inconsistent statement or contradiction [**408(a)**]

### NOTE: prevents admission of conduct, statements and settlements after a civil dispute commences

## TWO EXCEPTIONS TO THE RULE

### When [**408(a)(2)**]:

#### Criminal case

#### Evidence is of conduct or statements made during negotiations

#### Compromise negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority

##### IE: where D negotiates/talks to GOV officers (i.e. from a public office)

##### STRATEGY = do not talk to any GOV officials

#### NOTE: DOES NOT apply to the offer or acceptance of compromise itself – these are not probative of guilt and would chill settlements if admissible

### When evidence of above conduct is being used for another purpose, such as [**408(b)**]:

#### Proving a W’s bias or prejudice

##### Compromise where expert agreed to give testimony for a party in exchange for releasing their employer from third party liability [***McShain***]

#### Negating a contention of undue delay in presenting the claim

#### Proving an effort to obstruct a criminal investigation or prosecution

#### Prove party made fraudulent statements during settlement negotiations

#### Prove party was on notice that their conduct was wrongful (e.g. settlement of a similar personal liability suit would be admissible to prove notice)

##### Prior settlement of brutality claim against police was admissible to prove City was on notice of aggressive behavior of police [***Spell v McDaniel***]

##### Prior settlement of claim with FTC was admissible to prove D was on notice that his conduct was wrongful [***US v Austin***]

### If evidence satisfies 1 of the 2 exceptions, must still satisfy 403

### EG: where individual was unrepresented when they made a statement to a GOV official

## WAIVER

### 408 cannot be waived unilaterally – both must waive [***Pierce***]

#### IE: cannot adduce evidence of an offer you made

#### POLICY = prevent improper offers being made to show party is being reasonable or accommodating; and prevent lawyers being called to give evidence about offers

###### Alpex Computer Corp. v Nintendo

* + FACTS
		- Alleged breach of patent 555
		- Nintendo settled with a number of alleged infringers prior to trial
		- Nintendo also brought actions against others, which were settled
		- Nintendo also had other actions on foot
		- Evidence of the above wanted to be adduced on the basis that R 408 was not engaged because they were related litigation
	+ HELD
		- 408 applies to all settlements – commences operation when there is a dispute and also applies to any related litigation

###### Pierce v Tripler & Co

* + FACTS
		- Employee got laid off and then commenced Age Discrimination action
		- Employer calls P’s lawyer and says will re-employ him on condition that he settles the action
		- Employer tries to bring up the offer to bolster their defense to the action – prove they were acting reasonably, mitigate damages and suggest he was never terminated
	+ HELD
		- 408 applies – inadmissible
			* Promotes improper settlement offers (i.e. one side would low ball the other, knowing they would not accept, just to adduce in trial)
			* Also prevents lawyers from being called as witnesses and then having to withdraw from acting

# OFFERS TO PAY MEDICAL EXPENSES [409]

## RULE

* CANNOT adduce evidence of furnishing/promising to pay/offering to pay medical hospital or similar expenses resulting from any injury to prove liability [**409**]

#### REGARDLESS of whether any dispute over obligation to pay has arisen

## COMMENTS

### Excludes any offer, promise, or actual payment EVEN FOR non-medical treatment related to injury

### DOES NOT exclude opinions or admissions of liability made in connection with offer to pay expenses

#### EG: if D says, I’m sorry I ran you over, it’s my fault, let me pay your medical expenses – then the apology and admission are ADMISSIBLE but offer to pay is INADMISSIBLE

## POLICY

### Encourage early payment of medical bills

# PLEAS, DISCUSSIONS AND RELATED STATEMENTS [410]

## RULE

* In civil or criminal case, evidence of following is inadmissible against D who made the plea or participated in plea discussion [**410(a)**]:

#### Withdrawn guilty plea [**410(a)(1)**]

#### *Nolo contendere* plea [**410(a)(2)**]

##### Where D does not accept or deny responsibility for the charges but agrees to accept punishment – then resp. cannot be used against D in another cause of action

#### Statement made in a proceeding about a withdrawn guilty or nolo contendere plea under FRCP 11 or comparable state procedure [**410(a)(3)**]

#### Statement made during plea discussions w/attorney for prosecuting authority ONLY IF discussions did not result in guilty plea or resulted in withdrawn guilty plea [**410(a)(4)**]

## THREE EXCEPTIONS TO THE RULE

#### Statement in **410(a)(3) OR (4)** isadmissible if another statement made during same plea discussions is introduced AND in fairness statements should be considered together [**410(b)(1)**]

##### IE: it is fair for proffered statement to be considered with introduced statement – no misleading

#### Statement in **410(a)(3) OR (4)** isadmissible if it is a criminal proceeding for perjury or false statement AND D made the statement under oath AND on the record AND with counsel present [**410(b)(2)**]

##### IE: exception for perjury or false statement if made formally

#### If there is a breach of a plea agreement – can introduce all statements and the plea itself

##### By breaching, waive protection of 410

## COMMENTS

* ONLY protects formal plea discussions / negotiations [***Robertson***]
	+ Does not generally protect statements made to police (e.g. statement of a D on the street after committed the offence charged)
	+ UNLESS statements are made to law enforcement officials with power to negotiate (e.g. statement made to PO with authority from P to negotiate plea is admissible – see ***US v Sitton***)
* CANNOT be used for an impeachment purpose [***US v Lawson***]

## EFFECT OF MEZZANATO

* Criminal Ds can waive the protection of 410, but must knowingly and voluntarily do it [***Mezzanato***]

### NOTE: most plea agreements now include clauses which provide that any statement made in negotiations is admissible – courts have upheld these clauses [***Burch***]

#### This has severely limited current significance of 410 in criminal cases – P has subverted its effect through these clauses

## NO PROTECTION FOR P

* Prosecution are NOT protected by 410

#### Only protects evidence used against the D

* + BUT if used against P it is often excluded under 403 – PV is low, unfair prejudice is high

## POLICY

* Get Ds to be forthcoming in plea negotiations [***US v Udeagu***]

###### Mezzanato

* + FACTS
		- D goes into discussions about a proffer
		- D enters into an agreement to plea and allowing this to be used in subsequent proceedings
		- Agreement was adduced in later proceedings
		- D argued that 410 should not be waivable given policy of the Rule to encourage efficient plea bargaining
		- P argued that disallowing would dis-incentivize the negotiation – if P could not use it and the D can lie, then no point for P to even bother
	+ HELD
		- Admissible – purpose is to encourage P to get to the table with D
			* In practice, now there is no real bargain – P just always makes the D sign a *Mezzanato* agreement – especially after affirmed in ***Burch***

Character Evidence

# TYPES OF CHARACTER EVIDENCE

* Types of character evidence
	+ Opinion – what a person believes about another person
		- Least persuasive – issues about its truthfulness
	+ Reputation – how the person is known in the community
		- Persuasive, but very rare now
	+ Specific/bad acts – things person did in the past which allow inferences to be drawn about their character
		- Most persuasive
		- BUT most dangerous – it is very time consuming to introduce, might inflame the jury and distract jury from issues in dispute

##### NOTE: bad act evidence can be any act, need not be one for which D has been charged or convicted

* POLICIES behind exclusions of character evidence
	+ Character is not all that relevant to their actions (i.e. not probative as to actions)
	+ Prevent any jury prejudice – may decide on basis of personality
		- “Try evidence, not people”
		- Although it can work both ways (i.e. D could adduce evidence of being a good person and this may sway jury, while P could adduce evidence of them being bad which may also sway jury)

# OVERARCHING EXCLUSIONARY RULE [404(a)(1)]

* In civil AND criminal cases, evidence of a person’s character/character trait is never admissible to prove person acted in accordance with that character/trait on a particular occasion [**404(a)(1)**]

# OVERVIEW OF WHEN CHARACTER EVIDENCE IS ADMISSIBLE

1. Character is in issue (i.e. element of proof) [**405(b)**]
2. Impeachment (only for credibility of W) [**404(a)(3); 607-609**]
3. Criminal – D introduces to prove own good character (P can rebut) [**404(a)(2)(A)**]
4. Criminal – D introduces about V (P can rebut about D and V) [**404(a)(2)(B)/(C)**]
5. Relevant for a not-for-character purpose [**404(b)**]
6. Habit (specific reaction) [**406**]
7. Proving D’s sexual propensities in sex offense trials [**413-415**]

# 1 – EXCEPTION WHERE CHARACTER IS IN ISSUE

### Can introduce character evidence where character “is in issue” (i.e. element of proof) [**405**]

#### This is where substantive law requires evidence of character to be adduced

##### Rare – most law is based on conduct not character – really only in civil

##### EG: defamation of character in ***Schafer v Time Inc***

### Allows proof of character by OPINION, REPUTATION AND SPECIFIC/BAD ACTS [**405**]

### Unlike for other character evidence, which is only by opinion and reputation

### Character evidence must still satisfy **403**

# 2 – EXCEPTION FOR IMPEACHMENT

## RULE

### See p.91

## COMMENTS

* Evidence is not really character evidence – it is impeachment evidence

#### Character evidence is DIFFERENT FROM impeachment of a W’s character because it has nothing to do with the underlying issues in the case (i.e. just used to attack W credibility)

### BEFORE XX on these grounds occurs, should be a preliminary hearing where judge is able to rule on propriety of the XX [***Bruguier***]

* Common example = “Did you know” questions (e.g. W says non-violent, but did you know he hit his father? Answer yes makes them seem stupid, and no makes them unreliable as they don’t know him)

## POLICY

### XX is impeachment evidence, not character evidence – used to test knowledge and credibility of W

###

# 3/4 – CRIMINAL EXCEPTIONS (D or V)

### Character evidence must be relevant to the charge at issue [**401; 402; 403**]

#### EG: if on trial for murder, can introduce evidence that D is peaceful, but not that he is honest

### Must be reputation or opinion evidence [**405(a)**]

#### NOTE: bad act only introduced for *another purpose* OR *character is in issue* OR *impeach*

#### EG: can say that reputation of D was as a “law abiding citizen” or that my opinion is that D is a “law abiding citizen” BUT NOT D is such a law abiding citizen “he has never ran a red light”

#### EG: reputation and my opinion of D as “peaceful” BUT NOT that D is so peaceful that he did not want to kill a fly in my house

1. D can adduce evidence about their own character AND P may adduce evidence to rebut it [**404(a)(2)(A)**]

#### IE: P never allowed to first introduce character evidence (D must “open the door") [***Michelson***]

* + P’s evidence MUST relate to D’s particular character trait in issue
		- D can control very sharply by narrowing the character trait (i.e. framing it narrowly)
1. D can adduce evidence about VICTIM AND P may adduce evidence to rebut it [**404(a)(2)(B)**]
	* P CAN ALSO attack the SAME character trait of the D [**404(B)(ii)**; ***Michelson***]

##### D must be very careful not to unintentionally open the door – can even occur if a W is under stress and blurts out something

* + AUTOMATIC in homicide cases where D alleges V was first aggressor – opens door for P to offer evidence of V’s peacefulness and attack D as being violent [**404(a)(2)(C)**]
1. Evidence must still satisfy **403**
	* Excluded where too remote, slightly unreliable or unconnected

#### Excluded where too general or amorphous OR too specific (would be unfairly prejudicial b/c jury would draw similarities to offending charged)

## COMMENTS

### D always controls the door with introducing character evidence of themselves and V

### Common types of character traits are:

#### “Honesty” in bribery and stolen goods cases [***Gupta***] BUT NOT in assault [***Arizona v Elmer***] and drug possession cases [***Spector v State***]

#### “Law abiding” and “lawfulness” [***Gupta***]

#### NOT “integrity” in bribery [***Gupta***]

## POLICY OF CRIMINAL EXCEPTIONS

### D’s character = D might not have any other evidence and their liberty is at stake – outweighs any prejudice to jury being swayed by character evidence (esp. as jury assumes badly against D’s character from fact of the charges)

### V’s character = prevent any imbalance between the evidenced traits of D and V

#### Impose penalty for attacking V’s character

###### Michelson v US

#### FACTS

##### M accused of bribing a federal revenue agent

##### D called a W to give evidence of M’s good reputation for honesty and truthfulness

##### P cross-examined the W by asking whether W knew that M was arrested for receiving stolen goods

#### HELD

##### Admissible – D threw open the door by asking about M’s good character, so in good faith P was allowed to rebut it – price M must pay for attempting to prove his good name

##### Would be unfair to allow D benefit of good reputation evidence but not allow P to test it

##### Noted that if the event was too remote, then may have excluded it under 403

###### US v Williams

#### FACTS

##### Car theft case – D was alleged middleman

##### P calls a W who is going to say that D’s nickname is “Fast Eddie”

#### HELD

##### Inadmissible – propensity that D is a car thief and likes fast cars, because of nickname – there was no alternative purpose for evidence, classic impermissible propensity ev.

###### Example Case for Probativeness

* + FACTS
		- Carjacking case
		- D says there was a misunderstanding
		- P wanted to adduce bad act evidence of D selling a car previously and winding back odometer
		- P argued that mental state was similar, as it was a “car-related” offence
	+ HELD
		- Not enough similarity, so inadmissible – sale offence was fraud, the other was violent

###### Example Case 2 for Probativeness

* + FACTS
		- Charged with molesting child
		- Wants to call witnesses to say he is good with children
	+ HELD
		- Inadmissible – does not prove what he is like on the inside, so not probative

###### Gupta

* + FACTS
		- Goldman worker gave secrets to another man and was charged for doing so
		- Calls witnesses to testify that he is an honest person AND a man of integrity
		- Government objects to the witnesses talking about his integrity
	+ HELD
		- Judge agreed with Government
		- Integrity is too amorphous to be a character trait and it is not pertinent to the offence of trading secrets that Gupta was charged with

###### Diaz

* + FACTS
		- Diaz charged with intent to distribute
		- D called witness to say that he was “prone to large scale drug dealing”
	+ HELD
		- Inadmissible – it was too specific to be a character trait – should have asked if he was law-abiding

###### US v Bruguier

* + FACTS
		- D’s mother in law testified to him being a good father and never abusive or violent towards children
		- P asked “Did you know” questions about whether she knew he was found neglectful by DoSS and for 2 years children were supervised by Child Protection Services
		- D argued this was impermissible
	+ HELD
		- Admissible – proper XX to explore W’s basis for holding her opinion – there was a good faith basis
		- ALTHOUGH where such “did you know” questions are asked, they should be vetted in preliminary proceedings in absence of the jury so the judge can rule on their propriety prior

# NOT FOR CHARACTER PURPOSE [404(b)]

* Applies to criminal and civil cases

## RULES

1. Can introduce evidence of a crime, wrong or other act (i.e. bad act) for a purpose other than for character (i.e. proper purpose) [**404(b); *Caldwell***]
	* “Wrongs” include acts or omissions, while “crimes” and “other acts” mean exactly that
	* Timing may be relevant – depends on purpose for which the evidence is being used

##### EG: for Motive and Knowledge, bad act needs to be before offending charged, BUT for Identity or Intent timing does not matter (it could be before or after)

* + **404(b)(2)** sets out examples of proper purposes, which include:

##### Motive = why D committed an act

##### Opportunity = D had opportunity or not to commit act

##### Intent = commonality of intent from past act to present act

##### Preparation / Plan = preparatory acts

##### Knowledge = where D’s knowledge is in dispute

##### Identity = very similar / unique past act to present

##### Filling a gap / context [***Steinberg; Delpit***]

1. Prove that reasonable juror could be satisfied that crime, wrong or other act occurred on a preponderance of the evidence [**104(b); *Huddleston; Gomez***]
	* Must examine all evidence in the case to determine whether it can be satisfied [***Huddle.***]
	* MAY introduce evidence of acquittals as no need to be satisfied BRD [***US v Carney***] BUT prior arrests unlikely b/c does not mean D committed offense on PoE [***US v Robinson***]
		+ **403** issues with such evidence (see 5.) – diff. standards raise propensity to confuse jury
	* POLICY = low standard warranted because of the other protections for D – such as the 403 exclusion, ability to XX and introduce counter evidence [***Huddleston***]
	* NOTE: different standard than when XX a W in relation to character (which is good faith basis)
2. Proper purpose MUST be relevant [***Gomez; Caldwell***]

#### IE: need to connect the bad acts and the acts charged

##### Strong similarity and close timing suggest bad acts are relevant [***Gomez; Foster***]

#### Stipulations provide D with ability to control intro of bad acts (i.e. prevent dispute)

1. Proper purpose MUST be completely divorced from any propensity purpose [***Gomez; Miller***]

#### Key Q = how does bad act make a relevant fact/act more/less probable (MUST be through a proper purpose, NOT through just propensity)

* + Must be “propensity-free” chain of reasoning (i.e. something other than committing act) [***G***]

##### Need specific reason, other than propensity, why evidence is probative of an issue [***Mil.***]

1. Evidence must still satisfy **403** (BUT cannot consider propensity in assessing PV) [***Gomez; Caldwell***]
	* Key considerations:

##### Timing – period between the bad act and current charged offence

##### What is in active dispute – e.g. if not disputing identity then low PV of bad act evidence introduced to prove identity

##### Stipulations / concessions made (little PV if stipulated – linked to what is in dispute)

#### Prejudice can arise from:

##### Possibility of jury finding propensity to commit act (i.e. using for character purpose)

##### EG: where similarity between bad act and offense (will use for propensity)

##### Heinous bad acts – jury so affected by bad act that they seek to punish D by convicting them of the latter offence (accentuated where act, not a conviction is introduced)

#### If admitted, consider whether **105** limiting instruction is required [***Gomez***]

## COMMENTS

* Reverse 404(b) evidence (i.e. of a good act of the D) is also inadmissible if all it does is suggest D did not commit offense because of propensity not to in the past

#### EG: D charged with drug smuggling cannot introduce evidence of all previous times they entered the country without drugs – inadmissible propensity

* Most 404(b) cases are criminal, although can arise in some civil, such as:

#### Discrimination – D wants to show other acts of discrimination that are not part of the present case 🡪 show intent to discriminate

#### Excessive force – claiming damages for psychological and emotional harm, and D wants to show an alternative explanation / break causation

###### US v Gomez

* + FACTS
		- Gomez charged with being involved in cocaine distribution ring
		- Phone wiretap revealed key player was “Guero” who was thought to be G
		- G said Guero was Reyes, his brother in law who lived in same house
		- P wanted to introduce cocaine found in G’s bedroom at the time of his arrest

#### HELD

##### Inadmissible – connection between cocaine possession and involvement in conspiracy rests on pure propensity – no other reason for admitting

##### Inquiry starts with proper purpose, then relevance, then look at sufficiency (i.e. preponderance of evidence), then propensity free chain of reasoning, then must satisfy 403, then maybe limiting instruction needed

###### Huddleston v US

* + FACTS
		- H charged with selling stolen goods and possessing stolen property
		- Issue was whether he knew goods were stolen
		- P wanted to introduce evidence of H trying to sell thousands of TVs to another man, which P alleged were stolen
		- Dispute over satisfaction needed to use this evidence of selling stolen goods

#### HELD

##### Must assess totality of the evidence

##### Admissible – given the quantity and D’s inability to produce any documentary evidence to support sale, jury could have been satisfied on PoE that TVs were stolen

# PROPER PURPOSES [404(b)]

## MOTIVE

* Bad act evidence which provides explanatory power in proving why D committed an act / offence

###### Santiago

* + FACTS
		- D shot an innocent stranger
		- P wanted to introduce evidence of affiliation with gang to show his motive was to gain entry to gang (rite of initiation)

#### HELD

##### Admissible – evidence showed the motive for committing the offense

###### Potter

* + FACTS
		- Doctor charged with unlawfully distributing medicine
		- P wanted to introduce evidence of him having repeated oral sex with patients to prove motive and lack of good faith

#### HELD

##### Admissible – evidence showed the motive for giving them the improper prescriptions

## OPPORTUNITY

* Very rarely arises
* To prove D did or did not have an opportunity to commit an offence OR did not commit an offence in the past despite having the opportunity

## INTENT

* Often arises when intent / mental state is in dispute
* MUST be a commonality of intent / mental state between bad act and impugned act [***Beecham***]

#### NEED not be identical

#### Easier to prove if “specific” intent, rather than “general” intent [***Miller***]

#### EG: not sufficiently common intent for drug use to distribution – same for drug distribution to manufacturing

### OFTEN stipulate/concede intent to prevent bad acts from being introduced

#### Although other side is not obliged to accept stipulation (they often do not, because stipulation deprives bad act evidence of its other purposes), it is often considered by the court in conducting **403** analysis

### NOTE: linked with knowledge – both are the most likely to be connected to a propensity inference so BE CAREFUL

#### Especially of “pattern evidence” which can be very prejudicial

###### Beecham [Intent]

* + FACTS
		- Mailman was suspected of stealing mail
		- He was set up by being asked to deliver 50 coins on his route
		- They were not delivered, and 50 coins were found in his mail bag
		- Says he had intent to return them
		- But 4 credit cards in his wallet – in names of people on his mail
		- Sought to adduce the cards
	+ HELD
		- Admissible – the deceitful intent was similar and probative of his intent to steal the coins – pattern of theft

###### Miller [Drug case]

* + FACTS
		- Miller charged with drug possession and pistol possession
		- P wanted to introduce evidence of possession of same pistol 2 months earlier
		- P also wanted to introduce evidence of prior drug dealing conviction 8yrs earlier

#### HELD

##### Pistol evidence was admissible – relevant to intent, not propensity, because of close proximity, was a specific intent, and same gun

##### Drug evidence was inadmissible – only way for jury to find that he committed new drug offense was because he committed the old, this was a pure propensity

##### ALSO argued that because drugs were packaged in same way (i.e. crack in plastic bags) in both offenses then this was probative of intent, but court ruled this was “pattern evidence” which was pure propensity – also not identity evidence because it was a generic way of storing drugs

###### Jones [Drug case]

* + FACTS
		- Charged with intent to distribute drugs
		- P sought to introduce prior distribution offenses

#### HELD

* + - Admissible – proved exact same intent

###### Example Case

* + FACTS
		- D charged with using a small amount of cocaine
		- D also charged with distribution and P wanted to intro this as a prior bad act
	+ HELD
		- Not enough similarity – two different mental states relating to use and distribution of cocaine – requires different character and states of mind to commit the offences
			* Same with manufacturing and distribution – two different mental states

###### Hearst

* + FACTS
		- D charged with involvement in robbery
		- P wanted to introduce evidence of D’s involvement in theft and kidnapping one month after the robbery – as relevant to intent and knowledge, and to rebut that D was acting under duress

#### HELD

* + - Admissible – highly probative of intent to commit the other similar offense and to negate duress

###### Crowder [Stipulations]

* + FACTS
		- D offered to stipulate “the person who sold drugs had intent”
		- P rejected this

#### HELD

* + - Valid - 404(b) does not preclude P from introducing prior bad acts to prove an element of a crime, despite D’s offer to stipulate, because prior bad acts showed both intent and knowledge (whereas stipulation did not)

## PLAN / PREPARATION

* Evidence showing D had a plan prior to committing offence [***Carroll***]
	+ EG: theft as a precursor to a robbery
	+ Needs to be distinct and closely related to crime charged, otherwise likely to just be propensity evidence

#### Really only admissible when a plan is an element of offense (i.e. need to prove premeditation or conspiracy) or for rebutting a defense (such as rebutting provocation and insanity)

* A number of acts during person’s life are not evidence of a plan, but rather show bad character and are inadmissible [***Carroll***]
* NOTE: often linked with identity evidence

###### Carroll

* + FACTS
		- D charged w/robbery
		- P wanted to intro evidence that D was convicted of bank robbery 10 yrs ago to show evidence of a plan

#### HELD

##### Inadmissible – evidence showed a propensity over a period of time, it was not a plan – the modus operandi was too generic and remote to be admissible plan evidence

## KNOWLEDGE

* Where D alleges a lack of knowledge, evidence of prior acts may be adduced to prove they had that knowledge

#### IE: knowledge of the D is in dispute

#### Often where D alleges they made a mistake, or did something inadvertently

##### Particularly where evidence shows a series of events that are similar, but extremely low chance of having occurred by accident (“Doctrine of Chances”)

* + EG: where they claim that accidently strangled someone but didn’t know strength, but evidence of having done it and injured people 4 times before

### NOTE: linked with intent

###### Martinez

* + FACTS
		- Man in the car while his friend picks up his girlfriend from airport
		- She had drugs in her backpack
		- They are pulled over and arrested
		- He said he did not know
		- P sought to introduce evidence of prior involvement with drugs to prove he had awareness of how drugs were imported
	+ HELD
		- Admissible – directly related to the offending and established knowledge

###### Lyle

* + FACTS
		- Stopped car – cocaine inside one of door panels
		- He says he didn’t know
		- He got out on bail for that crime, and while on bail he had cocaine in his hotel room – used to rebut his knowledge for the first charge
	+ HELD
		- Problematic because the knowledge occurred after the original charge
		- But still admitted

###### Woods

* + FACTS
		- Mother charged with killing baby
		- She argued that it was an accident
		- Evidence of her killing other babies was sought to be introduced

#### HELD

* + - Admissible to prove knowledge

## IDENTITY

* MUST be similar / specific / unique enough to make it reliable to tie D to the crime charged [***Carroll***]
	+ Must not be generic nor common (*Carroll* was a case where prior act was too generic)

##### EG: tall and short guy commit 3 robberies using a gun with a hammer on it of which there are only 250 in USA, so prior bad acts are admissible

##### EG: crimes committed in a unique manner – serial killer signature or methodology

##### EG: where D has unique connection to location, victim or crime

### Courts are increasingly accepting of identity evidence

#### DC believes they are getting too lenient – should only admit identity evidence if it shows something that is not necessary to the crime, but is a weird personal preference /obsession (e.g. serial killer’s trademark)

## FILLING A GAP / CONTEXT

* Where bad act evidence is required to fill a gap in P’s case and prevent jury from speculating about evidence
* BUT often note the operation of **403**, as such evidence may be prejudicial

###### Steinberg

* + FACTS
		- Father murdered daughter, and left her in house with mother for many hours, but mother did nothing
		- Evidence of prior assault of mother by father

#### HELD

##### Admissible – to prevent jury speculating about mother’s role and explain why she did nothing

###### US v Delpit

#### FACTS

##### Evidence of various phone calls during which man is called “Monster”

##### P wanted to intro evidence of D being called Monster previously

#### HELD

##### Admissible for context – allowed jury to identify who was “Monster” and to understand what was going on

# NOTICE FOR 404(b)

* NO NOTICE for civil cases (as discovery often uncovers bad act evidence)
* When D asks, P must give notice to D before trial if intending to adduce bad act evidence and explain the general nature of the bad act evidence [**404(b)(2)**]
	+ D must ask – often by boilerplate – trap for the unwary
	+ No time limits – flexible
	+ Prevents any unfair surprise and allows *in limine* hearings if necessary

### No right for P to request notice of any bad act evidence from D

* NOTE: new notice rule comes into effect Dec 2020
	+ Codifies ***Gomez*** – must particularize proper purpose without any impermissible purpose and reasoning for this
	+ No need for D to ask for notice
	+ No need to specify general nature of the bad act evidence – must provide “fair opportunity” for D to meet it and particularize proper purpose (as above)

# HABIT [406]

## RULES

### Must prove habit or practice exists as a fact on PoE [***Perrin v Anderson***]

1. Must prove meets the definition of a “habit or routine practice” [***Angwin***]

#### Habit = a specific, semi-automatic and consistent reaction in a situation [***Angwin***]

##### EG: always puts a seatbelt on

##### NOT something general like going to church every Sunday

##### More specific and repeated over time – more likely to be habit, and higher PV [***Jones v Southern Railroad***]

##### More thought and planning required, less likely it will be a habit [***Becker***]

##### Other side will often counter habit with evidence of acting contrary to the habit

#### Routine practice = organization’s regular practice – need not be formal, but better if it is

##### Courts admit practice more liberally [***Rosenberg***]

##### Often arises in negligence cases (e.g. failure to warn cases – where doctor relies on their routine practice of providing patient with a brochure and explanation)

1. Habit / practice must be tied specifically to the conduct in question in the case
2. Then, evidence of a person’s habit OR organization’s routine practice may be admitted to prove that on a particular occasion the person/organization acted in accordance with it [**406**]

#### Habit / practice evidence need not becorroborated NOR be seen by an eyewitness [**406**]

##### Changes the common law (where both were required)

* NOTE: if fail on habit grounds, then may be able to get admitted as character evidence (see above)
* NOTE: different from character – which is a personality trait = general inference from specific

#### EG: infer cautious or risk averse person because they always wear a seatbelt

* NOTE: 405 limitations on proving character are inapplicable to habit [***Perrin v Anderson***]

## POLICIES

* Habit rule = more probative of a person’s conduct in a situation
* Routine practice = usually act in accordance with policies and procedures

###### Angwin

#### FACTS

##### Van with undocumented people who entered the RV he was driving

##### Habit of taking the least confrontational approach – from military background – so did not tell them to leave

#### HELD

##### Not a habit, so inadmissible

##### It was a life philosophy/disposition, not a reflexive or consistent habit

###### Perrin v Anderson

#### FACTS

##### Police confront Perrin

##### Perrin reacts violently to them and they then shot and killed Perrin

##### P wanted to introduce evidence that P reacted violently toward them on previous occasions when they confronted him to establish habit of acting like that towards police and Perrin was first aggressor

#### HELD

##### Admissible as habit – sufficiently consistent and reactive to be a habit

# RAPE SHIELD RULE [412]

## RULE

### In any proceeding involving sexual misconduct, cannot introduce evidence of:

#### V engaging in other sexual behavior [**412(a)(1)**] NOR

##### Extremely broad – covers all types of sexual behavior such as mental activities (e.g. watching porn) and sexual harassment [***Wolak v Spucci***]

##### NOT false SA claims – although might be inadmissible under 402/403 [***Crow Eagle***]

#### V’s sexual predisposition [**412(a)(2)**]

### NOTE: “sexual misconduct” is not defined, but defined extremely broadly

## CIVIL EXCEPTION

### May admit evidence of V’s sexual behavior/predisposition if [**412(b)(2)**]:

#### V places their sexual behavior/predisposition in “controversy” AND

#### PV of the evidence *substantially* outweighs danger of harm to ANY VICTIM and unfair prejudice to ANY PARTY

##### Presumptively excluded – different from 403 standard

##### Means that such evidence is often not admitted in civil cases – threshold too high

## CRIMINAL EXCEPTIONS (ONLY “SEXUAL BEHAVIOR”)

### May admit evidence of specific instances of V’s sexual behavior if it’s offered to prove someone other than D was the source of semen, injury, or other physical evidence [**412(b)(1)(A)**]

### May admit evidence of specific instances of V’s sexual behavior if sexual behavior was with D AND EITHER (a) offered by D to prove consent OR (b) offered by P [**412(b)(1)(B)**]

## CRIMINAL EXCEPTION (“SEXUAL BEHAVIOR” or “SEXUAL PREDISPOSITION)

### May admit any evidence whose exclusion would violate D’s constitutional rights [**412(b)(1)(C)**]

#### Main consideration is D’s right to make effective defense (i.e. consider how probative the evidence is to prove D’s innocence) [***Holmes***]

### NOTE: per subheadings above, **(b)(1)(A) and (B)** are limited to evidence about “sexual behaviour” and do not include “sexual predisposition” evidence – only **(b)(1)(C)** allows such evidence

## POLICIES

### Victim protection – Congress decided 404(b) was not protective enough for victims

### Unfair prejudice of jurors to the victim’s sexual behaviors

### Do not want to discourage rape claims, especially as rape is already under-prosecuted

###### Judd v Rodman

#### FACTS

##### Three pieces of evidence subject to appeal

* + - * Unprotected sex with other men at same time as Rodman
			* When they met, Judd was a stripper and still doing that to this day
			* Judd has breast augmentation surgery

##### Sex evidence was admissible – goes to alternative perpetrator

##### Stripper evidence admissible – goes to damages, working despite contracting herpes

##### Breast evidence was admissible

#### HELD

##### All evidence was admissible

###### Bear Stops

#### FACTS

##### D claimed he did not sexually assault a boy

##### P showed boy was exhibiting kinds of behaviors indicating sexual abuse – not permitted to say caused by D

##### D wanted to introduce evidence other sexual assaults by other people on the boy

##### Introduced evidence through his mother, so would not traumatize the victim

#### HELD

##### Evidence of mother was allowed under constitution (although not 412) – strong to prove D’s innocence with little impact on P’s case and no trauma to victim

###### Olden

#### FACTS

##### Meet woman at a party, they drive away together and then have sex in car

##### He drives her home where there was another man who she told she was raped

##### Issue is consent

##### D wanted to adduce evidence that woman and man at the house were in a sexual relationship – tried to establish motive to lie

#### HELD

##### Evidence was admissible

##### Strong evidence of innocence, as it could be used to impeach victim as a witness

##### Also, it would not hurt P’s case and was of limited scope so it would not have caused harm to V (e.g. she would only have been asked whether she had a sexual relationship)

# OTHER SEXUAL ASSAULT RULES [413-415]

### NOTE: the below rules allow prior bad acts of sexual assault to be admitted for ANY PURPOSE or ANY RELEVANT INFERENCE, even though they are propensity evidence (i.e. contradict 404(b))

#### EG: used to prove D has a deviant personality

## CRIMINAL – ACCUSATION OF SEXUAL ASSAULT

### In criminal case, where D is accused of sexual assault, evidence of D committing any other sexual assault is admissible for a relevant purpose [**413(a)**]

#### Sexual assault is given the meaning under **413(d)** (see section – very broad!)

#### Must give notice to D under **413(b)**

#### Does not affect or limit admission under any other rule [**413(c)**]

## ACCUSATION OF CHILD MOLESTATION

### In criminal case, where D is accused of child molestation, evidence of D committing any other child molestation is admissible for a relevant purpose [**414(a)**]

#### Same sub-rules as above for sexual assault in **414(b)-(d)**

## CIVIL – ACCUSATION OF SEXUAL ASSAULT or CHILD MOLESTATION

### In civil case involving relief based on D’s sexual assault or child molestation, evidence that D committed any other sexual assault or child molestation is admissible and is to be considered as it would be under 413 and 414 [**415(a)**]

## OTHER REQUIREMENTS

### Jury (reasonable person) must be satisfied on a PoE that act occurred

#### NO need to be charged or convicted

### Evidence still needs to pass through 403 – this is constitutional safeguard for Ds [***LeMay***]

#### VERY rare for 413-415 evidence to be excluded under 403

#### Balance PV of misconduct INCLUDING propensity (as this is permissibly prejudicial)

#### v. Unfair prejudice that may arise EXCLUDING using the evidence for propensity purpose

##### Often prejudice only results from passion or bias (i.e. jury appalled)

##### May also be excluded where prior act is extremely dissimilar or remote in time (with no intervening sexual misconduct)

### If admitted, no need for limiting instructions, because jurors can use evidence as they want

## POLICIES

### If you committed prior sex offenses, more likely you did it again

### More liberal admissibility because sex/rape cases are different and reprehensible

Opinions

# LAY OPINIONS

### Opinions drawn from the standpoint of an average person

## FOUR REQUIREMENTS OF THE RULE

* Opinion must be:

#### Based on their personal knowledge of the matter they are testifying about [**602**]

##### Evidence to prove this is often the same as evidence to prove 2) below

#### Rationally based on their perception (i.e. what they saw / heard) [**701(a)**]

##### W must identify the objective basis for their opinion [***Rea; Whitworth***]

##### Speculating without a basis in fact is unacceptable [***Santos***]

##### W can draw reasonable inferences from what they saw, but they cannot be too speculative [***Santos***]

##### W can testify to their perception of another’s intent (e.g. was “trying to kill”) [***Bogan***]

#### Helpful to clearly understand W’s testimony OR determine a fact in issue [**701(b)**]

##### EG: W can identify a person using objective evidence when they have more knowledge or a better perspective than jurors (e.g. where photo is from 20 years ago and they knew person 20 years ago, but jury obviously did not) [***US v Earls; US v White***]

##### If jury is in as good or better position, then lay opinion is NOT helpful [***Rea***]

##### Easily proven where impossible or difficult to reproduce what W saw OR difficult to understand certain facts without W’s testimony [***Yazzie***]

##### CANNOT summarize what they heard [***US v Meises***] – especially where W is a person of authority (e.g. police) as this influences jury

#### Not based on scientific, technical or other specialized knowledge under 702 [**701(c)**]

##### See section below on lay and expert Ws

##### NOTE: any expert opinion requires testing for admissibility under 702 standards (see below) [***US v Figueroa-Lopez***]

## OPINION ON ULTIMATE ISSUE

* Lay W can give opinion on an ultimate issue [**704(a)**]

#### CANNOT take the next step to legal conclusion (e.g. person was calm, NOT had malice aforethought) [***Kostelecky v NL Acme***]

##### Prohibited because it does nothing more than tell jury how it should find

#### ALTHOUGH some terms with colloquial meanings (e.g. discrimination) are typically allowed by judges, with a limiting instruction to the jury

## LAY AND EXPERT WITNESSES

### W can give both expert and lay *testimony* in a case [***US v Figueroa-Lopez***]

#### ARTIFICIAL to call someone as a lay witness or expert witness, because a witness can be a hybrid as they can give both lay/expert testimony

### Key difference [***Brown***]:

#### Lay results from process of reasoning familiar in everyday life

#### Expert results from a process of reasoning only mastered by specialists in the field (i.e. scientific, technical, specialized)

### Although fine line between expert and lay – must assess experience/knowledge v. their opinion

#### Owner of a business can testify to values or projected profits of business as a lay person b/c of their knowledge of the business [***Lightning Lube***]

#### Person may testify to appearance of a substance as a lay person b/c it’s based on their personal knowledge, but cannot describe how it was manufactured or dealt [***Westbrook***]

* Types of admissible lay evidence include impressions about:

#### Appearance

#### Emotional state

#### Intoxication

#### Vehicle speed

* Issues occur when an expert gives both lay and expert evidence
	+ Motivations to disguise expert as lay witness
		- Criminal – no need to disclose lay witnesses (to protect witnesses)
			* Whereas for experts, need to give notice and disclose summary of their evidence
		- Civil – less stringent discovery obligations for lay witnesses and little notice
			* Whereas for experts, there are more substantial disclosure obligations – need to file a detailed expert report (e.g. discloses fees, methodology)
	+ Defense are often not prepared to attack experts
* NOTE: when an expert gives lay evidence, the only way to cure the danger of the jury taking this to be expert evidence is through a **105** limiting instruction
	+ It is unethical for party to have an expert give extensive lay evidence

###### Meises

#### FACTS

##### D charged with drug conspiracy

##### P called the lead enforcement officer who provided an overview of the P’s case

##### Some was based on his own knowledge, some was not

#### HELD

##### Inadmissible – officer was not an eyewitness to all so could not give an overview

##### Usurped the jury’s function and improperly endorsed the P’s witnesses that followed his overview testimony and their case as he was police (influenced jury)

###### Yazzie

* + FACTS
		- D charged with sexual abuse of a minor
		- D called witnesses to testify to minor’s psychical appearance and behavior at time of the incident BUT were not allowed to speculate as to her age
	+ HELD
		- Admissible – jurors unable to assess what minor looked like at the time without Ws’ testimony
		- Judge erred in not allowing them to state their opinions about her age – the description of her was no substitute for a clear and unequivocal statement of their opinions about her age
			* Appropriate for lay witnesses to express opinions about someone’s age

# EXPERT OPINIONS – PRELIMINARY REQUIREMENTS (mainly relate to (a))

## QUALIFICATION OF EXPERTS

* Can be expert based on scientific, technical, or other specialized knowledge [**702**]

#### Rule does not rank academic training over demonstrated practical experience [***US v Roach***]

* Differentiate between scientific/technical and other specialized “knowledge”

#### “Scientific” is derived from the methods and procedures of science [***Daubert***]

#### “Knowledge” connotes more than subjective belief or unsupported speculation [***Daubert***]

### To satisfy 702, experts based on “knowledge” must generally [**702; Committee Note to 2000 Amendments to 702; *Berry; Satcher v Honda***]:

#### Explain how their firsthand familiarity or experience leads to their conclusion [for 702(a)];

#### Why the facts/data they used provide a sufficient basis for their opinion [for (b)]

#### Why their familiarity/experience provides a sufficient basis for their opinion [for (c)]

#### How they reliably applied that familiarity/experience to the facts [for (d)]

##### EG: in ***Berry****,* a PO with no training nor significant practical expertise in disciplining POs was not allowed to opine that alleged failure of Police Department to discipline its POs led to PO shooting a person

##### EG: in ***Satcher***, a PO without scientific or engineering expertise, but 9 years in police motor squad and saw hundreds of motorcycle accidents, allowed to testify about motorcycle crash guards being effective in reducing injuries

### NOTE: all types of experts receive the same degree of scrutiny in relation to the reliability of their opinion [***Watkins v Telsmith***] (although method of scrutiny will differ, as above)

## RELEVANCE OF EXPERT’S QUALIFICATIONS

* Expertise must be relevant to disputed issue or facts they are opining on [***Berry; McCullock; Osburn***]

#### EG: in *Osburn* toxicology expert was not allowed to testify that D violated EPA requirements

#### EG: in *McCullock* industrial engineer was not allowed to testify about adequacy of D’s warnings in workplace as he was not expert in warning label design

### BUT while court should not lightly permit testimony from expert outside their specialty, must not require expertise so specialized that it disqualifies anyone who is not in specialized industry [***Stagl***]

#### IE: no super-specialization as it would exclude most objective experts

#### EG: in *Stagl* a mechanical engineer allowed to testify about safety of baggage carousel despite not having specialized expertise in airline terminal or baggage carousel design

## HELPFULNESS OF EXPERT’S OPINION

* Key Q = will the expert opinion HELP the jury? [***Daubert***]
	+ Helpfulness standard is not particularly high
	+ Commonly ‘yes’ in drug cases – jurors not expected to know ins and outs of drug trade
* MUST NOT be within a reasonable juror’s common knowledge b/c this is not helpful [***Scott v Sears; First National v Reliance Elec Co; Dang Vang v Vang***]

#### EG: in *Peters v Five Star Marine,* expert not helpful to testify that offloading a ship in bad weather was hazardous

#### EG: in *US v Gibbs,* expert PO was helpful to testify about meaning of certain drug trade words in conversations as they were not within jurors’ common knowledge

#### EG: in *Libby,* expert was unhelpful to testify about 17 ways memory can fail, as jurors knew how memory could fail (query about situations in which can fail – e.g. stress)

### CANNOT evaluate the credibility of a W, even when evaluations are based on their expertise [***Nimely***]

* NOTE: if expert is allowed to testify unhelpfully, error is likely to be harmless b/c admission is simply telling a jury something they already know (i.e. would not have changed decision)
	+ EXCEPT where expert gives an opinion about a witness’ credibility [***Nimely***]
		- EG: in *Nimely* expert gave impermissible opinion that PO’s officers generally don’t lie

# EXPERT OPINIONS – 702 REQUIREMENTS

### 702 embodies a liberal standard of admissibility for expert opinions [***Nimely v City of NY***] although if any factor is not satisfied renders opinion unreliable and inadmissible [***In Re Paoli***]

### Four requirements:

#### Expert’s **scientific, technical, or other specialized knowledge** will **help** the trier of fact to:

##### Understand the evidence OR

##### Determine a fact in issue [**702(a)**]

#### Testimony is based on **sufficient facts OR data** [**702(b)**]

#### Testimony is product of **reliable principles and methods** [**702(c)**]

#### Expert **reliably applied** the principles and methods to the facts of the case [**702(d)**]

### Judge must be satisfied on PoE that above 4 requirements satisfied [***Bourjaily; GE v Joiner***]

#### Must assess the reliability of the opinion, NOT the findings / assessments

#### Recognizes the role of the judge as a gatekeeper

##### Daubert hearings often take place before trial commences (often motion for summary judgment follows if key expert is inadmissible)

* NOTE: usually determined at a pre-trial “Daubert” hearing

### NOTE: more subjective or controversial an expert’s method, more likely it will be unreliable

* NOTE: can have two competing experts held to be reliable under Daubert – might be competing, reliable methodologies in the same field of expertise AND may also reach different conclusions

#### Court cannot exclude if they reach different conclusions (as rule does not permit court to exclude b/c court believes one set of facts over the other)

### NOTE: on appeal of expert ruling, the standard of review is abuse of discretion

## SUBSECTION (a): THE DAUBERT TEST

1. Daubert is the controlling test which applies to all types of experts [***Kumho***]
2. Key Q: is expert using the same degree of intellectual rigor as they would use in practice?

### No single factor is dispositive of expert testimony’s reliability [***Heller v Shaw***]

### NOTE: factors apply flexibly to different types of experts – key purpose is to ensure “intellectual rigor” [***Kumho***]

#### EG: peer review and error rates might be inapplicable for ‘experience’ experts

## Daubert Test

* Judge must determine:
	+ (1) whether the procedure or methodology in question can be and has been tested

##### Objective test as to its verifiability and testability

##### Consider other factors and types of tests below (esp. red flags such as diff diagnosis)

* + (2) whether it has been subjected to peer review and publication
		- Methodology, not the result, must be peer reviewed
		- Greater peer review, greater the reliability
		- Sometimes there are reasons for not publishing methodologies – often arises in relation to police methodologies (to avoid crims finding out)
	+ (3) its known or potential error rate
		- Linked with 4 – focus on how test is conducted
		- False negatives and false positives are equally problematic + indicative of error [***Ferri***]
	+ (4) the existence and maintenance of standards controlling its operation
		- Linked with 3 – focus on how test is conducted
		- Methodology must be conducted in almost identical way each time
		- Inadmissible if there are no standards in place or the rate of error is indeterminate or there is a known way of beating the test
			* Polygraphs often excluded– demonstrable ways to beat one
	+ (5) whether it has attracted widespread acceptance within a relevant scientific community

##### Whether generally accepted as reliable in the scientific community [***Frye***]

##### Requires evidence to be given from scientific community about reliability of the methodology – if substantially more are in favor then it is reliable [***Frye***]

##### Scientific community is the community at large, not just in the jurisdiction – debatable about how broad it goes

## SUBSECTION (a): OTHER FACTORS TO CONSIDER

* As ***Daubert*** and ***Kumho*** recognized no factor was exclusivenor dispositive, there are others:

#### Anticipation of litigation

##### Whether research was conducted in anticipation of / for litigation then higher bar to satisfy for reliability (need to be very precise about methodology and it needs to be appropriately reviewed) [***Daubert***]

#### Alternative causation [***Westberry v Gislaved; Claar v Burlington***]

##### Expert must examine and rule out / account for alternative methods of causation

##### Cannot simply identify one cause without considering other possible causes, as this would render their opinion unreliable for not considering alternatives

##### Often achieved through differential diagnosis (see below)

#### Differential diagnosis opinions

##### Where expert identifies the cause of a medical problem by eliminating likely causes until the most probable is isolated

##### Reliable different diagnosis provides a valid foundation for expert opinion [***Westberry***] – as Daubert does not require perfection

##### Temporal connection to other factors is very important

##### EG: in *Joiner,* expert identified the cause of P’s sinus problems by eliminating other causes and identifying talc exposure as most probable cause – b/c of close temporal connection b/w exposure to talc at work and onset of problems, and b/c of condition improving after P did not go to work for periods

#### Confirmation bias

##### Be aware that domain irrelevant information given to experts can skew results

* + - * EG: ballistics expert told that a bullet shot was shot into White House and given one gun to match. WH was domain irrelevant info, all that they needed to be told was that it hit a building. Also problematic that only given a single gun.

## SUBSECTION (b): SUFFICIENT FACTS OR DATA (IE. SUFFICIENT BASIS)

### Must have proper underlying facts / data for the opinion [**702(b)**]

#### Not just basing themselves on a theory or speculation [***Three Mile Island***]

#### EG: in *In Re Three Mile Island Litigation* it was impermissible for expert to introduce a speculative model of plume movements because it involved pure speculation about movement of the plumes and was intended as a “tool for visualization” but not to “simulate flows at the time of the accident”

#### EG: in *Smith v BMW,* expert speculatively entered data into a computer program to reach his opinion about a car’s velocity, so opinion excluded

### Does not need personal knowledge of the underlying facts

* + Expert may give an opinion related to the facts of a case after reviewing various studies
		- B/c they are not altering the studies, but just giving an opinion based on them as facts
		- BUT must explain the basis for their opinion (i.e. how UF = their opinion)

## SUBSECTION (c): RELIABILITY OF PRINCIPLES/METHODOLOGY

### Answered according to the *Daubert* inquiry

## SUBSECTION (d): RELIABLE APPLICATION

### Must reliably apply principles/methodology to produce the expert opinion [***Joiner; Kumho***]

* Analytical steps and gaps in applying
	+ In applying, they must take a step and not a leap of faith over the gap [***Joiner***]

##### IE: cannot unjustifiably extrapolate from an accepted premise to unfounded conclusion [***Joiner***]

##### Courts can conclude that too great analytical gap between data and opinion proffered, so it must be excluded [***Joiner***]

#### Expert can jump over gap using “weight of the evidence” – whereby they draw an inference from the weight of evidence before them to conclude in a certain way – even though there is no single report/study to support the conclusion [***Milward***]

* + EG: In ***Kennedy*** a P received collagen treatments and was diagnosed with Lupus because of Ziodern in the treatments. Expert opined that auto-immune diseases were caused by Ziodern. Court said it was inadmissible for expert to simply state that as Lupus was AI disease then it was caused by Ziodern, but it was admissible if the expert explained precisely how Ziodern caused the AI diseases and then explained that Lupus was caused in the same way – this closed the analytical gap as to causation between Ziodern and AI diseases.
	+ EG: Hypothetical cell phone case – expert used tower signals to identify that a phone of the D was in a room of a building at a certain time. Court held this was not specific enough to close the evidentiary gap, as D could have been in any part of the building at the time.

## TYPES OF EXPERT EVIDENCE

* Human studies
	+ Often where a control group is exposed to a substance
	+ Preferred over animal studies if they are available and reliable [***Joiner***]
* Animal studies
	+ Often mice/rat studies – as effect of substances on them is almost identical to that on humans
	+ Facts in study must be similar in the case; test must be reliably conducted; replicable; and no human studies available [***Joiner***]

#### Critical variable is the dose and exposure to a substance

##### EG: greater similarity between dose and exposure to them will provide greater PV – less similarity means lower reliability

##### However, often a higher dose is used by scientists to get quicker results

##### NOTE: most studies are scientific, not for legal purposes, so there will be little ability to control variables related to the litigation

* Forensic expert testimony

#### Subjectivity of forensic testing alone does not preclude reliability (need additional unreliability factor) SO must weigh other Daubert factors to determine reliability [***Baines***]

* + Forensic experts are not allowed to overstate their opinions [***Glynn***]
		- Must only give their opinion to the extent that the forensic technology allows (e.g can testify that hair identification technology allow make to give an opinion that hair matches D and a pool of other people)
		- CANNOT use phrase “to a reasonable degree of scientific or [other discipline] certainty”

#### Acceptable types of forensic evidence

##### Fingerprinting is accepted although unverifiable (especially for latent fingerprinting) because it is generally accepted and has a very low rate of error (1 in 310) [***Baines***]

* + - * Almost always relevant – although weight is a question for the jury BRD
			* Problems because of issues in lifting prints from objects, contamination of subject areas, and inaccuracies in matching prints

##### Handwriting is generally allowed – reliable enough

#### Sometimes acceptable types of forensic evidence

##### Ballistics does not have enough scientific rigor to be accepted as reliable (e.g. b/c of damage to bullet casings and repeated markings on bullets used for ID) [***Monteiro; Glynn***]

##### BUT can testify that bullet matching makes it more likely than not that was fired from D’s gun (but cannot add “at least” more likely) [***Glynn***]

##### DNA

* + - * Reliable if there is a correct sample and is rarely excluded
			* Problems arise if there is a mixed DNA sample, in extracting DNA from items, and from concept of DNA transfer (some people transfer more than other)

#### Unacceptable types of forensic evidence

##### Bite marks are inadmissible, as human skin in mouth is malleable – therefore unreliable

* Statistics and probability theories
	+ All variables need to be appropriately controlled [***Smith***]
	+ Key difference between reliability and sufficiency (see ***Smith*** below)
		- Often reliable, but often not sufficient (i.e. cannot determine liability on stats alone)
	+ Arises in discrimination cases (e.g. hiring and promotions) and high PV in market share cases
		- Especially where there is no other way to identify products in the market
		- In such cases, there is no other evidence available which would diminish the probative value of the statistics

###### US v Baines [forensic testimony]

#### FACTS

##### D charged with various drug and firearm charges

##### P wanted to use fingerprint evidence – latent prints recovered matched Baines’ (argued to be more unreliable than known fingerprints)

##### Difference between known prints and latent prints is that known are made voluntarily such as when arrested, while latent are partial prints found at a crime scene which are often invisible to naked eye

##### D argued process of matching latent print was unreliable b/c so subjective

#### HELD

##### Admissible

##### First Daubert – technique has been used extensively and experts go through training

##### Second – little information about peer review and publication, so indecisive

##### Third – very low error and mistake rate – strongest factor

##### Fourth – standards rely on the subjective judgment of the analyst – but subjectivity along does not preclude reliability – still, this factor weighs against admissibility

##### Fifth – overwhelming acceptance within community – very strong factor

###### Smith v Rapid Transit [stats and probability]

#### FACTS

##### P was injured after being hit by a bus

##### Bus was alleged to be RT bus

##### P offers expert evidence about probability of it being a RT bus, and no other evidence – expert said 60% chance it was RT bus

##### D offers no evidence and asked for directed verdict

##### P opposed, said should get directed verdict because evidence proved it more likely than not that bus was RT bus and this was only evidence – so no need to put it before the jury

#### HELD

##### Inadmissible – the evidence was not sufficient to establish any liability

##### Drew inference that P adduced no other evidence because it would have established bus was not RT bus

##### Probative value of the evidence is diminished by failure to adduce other evidence

#  BASIS FOR EXPERT’S TESTIMONY [703]

* 703 has two key parts: the first regulates admissibility (albeit in a much narrower manner than 702) and the second regulates disclosure

## REQUIREMENTS

1. Expert may base opinion on INADMISSIBLE facts / data that they personally were made aware of, or observed IF experts in their field would reasonably rely on them to form an opinion [**703**]

##### If would not be reasonably relied on, opinion is unreliable and inadmissible

##### Very low standard – no need for personal knowledge – rare to challenge basis

* + - * But expert cannot ‘go off the reservation’
	+ NOTE: facts / data need not be true (e.g. rely on false statements to assess mental state)

### If expert relies on inadmissible facts / data, they may ONLY disclosed to jury if PV (in helping jury evaluate opinion) substantially outweighs prejudicial effect (in jury using for improper purpose) [**703**]

#### UNLESS other side challenges expert’s opinion for an insufficient basis, then it’s open season

##### Can introduce whatever information to defend expert’s credibility (even if it would have been excluded under 703 balancing test)

##### POLICY = there is no conduit problem here as challenge is occurring

#### MAY ALSO admit with a limiting instruction [***Engrebetsen***] or permit expert to provide a general reference to underlying facts / data (e.g. relied on reports from local law enforcement)

#### NOTE: above balancing test only applies to inadmissible f / d

## EXAMPLES

### Personal knowledge of underlying facts, observations of prior evidence, reading testimony, hypothetical q’s, medical records (although NOT self-reported)

## POLICIES

### Favors exclusion to prevent experts becoming conduit for admitting inadmissible ev.

### BUT danger that jury give less credibility to expert because they do not know total basis for opinion – a tradeoff to prevent conduits

### NOTE: 703 is narrower than 702 – 703 only looks at reasonable reliance whereas 702 looks at methodology, reliability, adequacy of basis, qualifications of expert and helpfulness

###### Thomas v Metz

#### FACTS

##### Two experts were called

##### Each relied on discovery depositions of a W in coming to their opinions

##### Also relied on medical evidence from hospital records and physicians’ notes

#### HELD

##### Admissible – depositions were only one of several sources relied upon – reasonable for experts to rely in part on those depositions

###### Alfa Corp v Oao Alfa Bank

#### FACTS

##### Expert called to testify to translation of Russian names into English

##### Argued inadmissible because expert relied on internet sources such as Wikipedia

#### HELD

##### Admissible – internet sources were not inherently unreliable and the expert also used other sources to make the translations (accepted systems of translation)

## EXPERT OPINION ON ULTIMATE ISSUE

* Expert W can give opinion on an ultimate issue [**704(a)**]

#### CANNOT take the next step to legal conclusion (e.g. person was calm, NOT had malice aforethought) [***Perkins; McKay***]

##### Cannot provide just a bare legal conclusion as this usurp jury’s role

##### Usually inadmissible if terms opined on by expert have a separate, distinct and specialized meaning in the law than in common vernacular [***Perkins***]

##### BUT not if legal meaning of term is similar or identical to colloquial meaning such as “he was driving recklessly” [***Sheffey***]

* + EG: Capstone evidence – where an expert gives a long analysis and then caps it off with their opinion – but CANNOT make a definite legal conclusion

##### EG: toxicologist gives detailed analysis of toxicology results and then gives oipinion about likely cause of death

### EXCEPTION in criminal cases, expert cannot opine on whether D had mental state / condition which constitutes an element of the crime charged [**704(b)**]

#### BUT often get around this by framing hypothetical q’s or q’s in general terms [***Thigpen***]

##### Very thin line to draw – cases go each way

##### EG: in sexual assault case, where D has disorder which causes him to watch porn but also fear of rejection, expert could opine on whether given D’s psychology, he would act on his intent

##### EG: in relation to stopping smoking, expert can opine that given D’s poor impulse control, it was unlikely that he would stop

#### POLICY = mental state is for the jury

###### West

* + FACTS
		- Expert opined that (1) D had schizophrenia at present, but (2) at the time of the offence notwithstanding his condition West "understood the wrongfulness of his actions at the time of the alleged crime”
		- D claimed insanity – directly contradicted second part of expert opinion
		- Court allowed both types of evidence
	+ HELD
		- 7th Cir reversed – bar on the second part of opinion, as it related to whether West committed to offence
		- Better line of questioning was to ask about type of behaviors typical of a schizophrenic and potentially, whether D exhibited them at the time (i.e. needs to be general evidence about schizophrenic people / their behavior)

## COURT APPOINTED EXPERTS

* Court may appoint experts[**706**] – Justice Breyer advocates for this in *Joiner* and *Kumho*
	+ Rarely appointed – only really in cases where D is a testifying expert
		- Hard to find independent experts with inclination to give evidence
		- Parties pay them, often disproportionately
		- Hard not to sway the jury – jury likely to give their evidence additional weight because they are court appointed (even though no need to disclose they are a court expert, it is often hard to prevent juries from finding out)
* NOTE: some courts use special masters or tutors on technical matters to help them determine the nature of the evidence

#### Raises issues that parties have minimal ability to test their evidence

Hearsay

# BACKGROUND

## STRUCTURE

* 801(a)-(c) = Definitions of hearsay
* 801(d)(1) = Prior statements of testifying witnesses
* 801(d)(2) = Party-opponent statements
* 803 = made pursuant to circumstantial guarantees of reliability that substitute for in-court guarantees
* 804 = better than nothing if Dec unavailable
* 807 = residual
* NOTE: the above are all hearsay, but they are exceptions/exclusions to the rule – no practical difference between an exclusion or exemption to hearsay rule
* NOTE: 803-807 relate to conduct/statements made in reliable circumstances, whereas 801(d) contains just blanket exclusions – this is why they are separated in the structure

## PROBLEMS WITH TESTIMONY / THE HEARSAY PROBLEMS

* Main problems are:

#### Sincerity – people may not be truthful / may lie

#### Ambiguity – people speak ambiguously – statement may have multiple meanings

#### Perception

#### Memory

* Checks on the above problems:
	+ Testimony on oath, and punishment for lying (i.e. perjury)
	+ Cross-examination
	+ Jury assessment of demeanor
* BUT problems arise because checks are not available for hearsay – as the maker of the statement (i.e. declarant) is not present – therefore, need for hearsay rule arises

## METHODOLOGY FOR ADMISSIBILITY OF HEARSAY

* Hearsay? 🡪 Exceptions/Exclusions 🡪 (CRIM) Confrontation Clause 🡪 Exclusionary rule (403)

## KEY CONSIDERATIONS

### PURPOSE is critical – what is the evidence being offered to prove?

#### EG: saying “I’m alive” is not being offered for truth, but to prove a person was in fact alive, then no need to cross-ex as the statement is proof itself of life

### Is evidence being offered to prove truth or impeach?

### Should there be opportunity to XX the witness (i.e. is credibility relevant)?

## APPLICATION OF HEARSAY RULES

### Apply in bench trials too

### DO NOT apply in sentencing, suppression, competency hearings

# THRESHOLD HEARSAY ISSUES

* NOTE: hearsay is not cured by a person giving evidence at trial about what they previously said (must still be admissible through an exception)

#### EG: saying I told my friend that 3 times last year is inadmissible hearsay unless w/in exception

## STANDARD OF PROOF

* Standard is preponderance of the evidence – determined by judge

## PERSONAL KNOWLEDGE REQUIREMENT FOR HEARSAY

* Hearsay statement must be supported by underlying personal knowledge of facts [**602; *Shepherd v US***]

#### Suspicion and mere conjecture is insufficient

### EXCEPT for party opponent statements under 801(d)(2)

#### Party has no right to complain that their own statement was made without personal knowledge (should not have made it)

## UNIDENTIFIED DECLARANTS

* Problem arises when W gives evidence of hearsay from an unidentified Dec because of the personal knowledge requirement [***Meder***]

### BUT can infer personal knowledge from circumstances in which Dec made statement [***Miller v Keating***]

#### Also often still admissible because propensity to lie about UD’s hearsay is cured by XX, giving under oath, demeanor

## COMPLETENESS OF STATEMENTS [106]

* If party admits introduces part of a writing or recorded statement, other party may introduce any other part that in fairness ought to be considered at the same time [**106**]

#### Prevents introduction of misleading part of a writing/recorded statement

#### Also, statements are more reliable and often more probative with complete inclusion

### Assessment of whether it is misleading depends on what the part is being used for, and depends on the nature of the charge

#### Very rare

#### EG: D goes to station and is questioned. In 1st hour he denies, but then in 2nd hour he confesses. P just admits the confession. This is not misleading, because Ds often change their stories.

### Applies to any “writing” or “recorded statement” including videos (e.g. day in the life of) [**106**]

## COMPOSITE HEARSAY

### It is often the case that a certain event or occurrence may raise different types of hearsay evidence which may fit under different potential exclusions

#### Need to identify each piece of hearsay evidence and potential exclusions that apply

## IMPEACHMENT

* Hearsay may still be used to impeach a witness

#### EG: in *Livingston*, a prior inconsistent statement made to a postal investigator was admissible to impeach the credibility of the W, but not as proof of a fact (i.e. did not fall within prior inconsistent statement exception)

### Where hearsay is used to impeach a W and NOT for truth, judge should provide a limiting instruction to the jury to only use it to assess credibility of W [***Adamson v Cathel***]

### BUT party cannot simply call a W to impeach them

# IS THE EVIDENCE HEARSAY?

## OVERARCHING EXCLUSION

### Hearsay is inadmissible unless provided otherwise by the Evidence Rules, other rules prescribed by SCOTUS, OR a Federal Statute [**802**]

## WHAT IS HEARSAY (2 REQUIREMENTS)?

#### Statement that Dec does not make while testifying at current trial / hearing [**801(c)(1)**]

##### Statement = Dec oral assertion, written assertion OR nonverbal conduct that they *intended* as an assertion (see below) [**801(a)**]

##### Machines do not make statements, so not covered (no need to XX) [***Wallace***]

##### BUT if human involvement (e.g. dropping pin on Google map) = statement

##### Same for animals (cannot XX)

##### EG: parrot reciting a person’s prior statement is not hearsay

##### Declarant = person who made the statement or committed conduct [**801(b)**]

#### That statement is offered to prove truth of the matter asserted in the statement [**801(c)(2)**]

## INTENTION TEST

* Objective test of Dec’s intent – must consider PURPOSE and the context / circumstances [**801(a)**]
	+ KEY Q: would a reasonable person making Dec’s statement / performing conduct have intended to convey the implied implication that proponent is offering for its truth (i.e. purpose)?

##### If yes, then it is hearsay, and only admissible if within an exception

##### If no, then NOT hearsay and usually admissible

* + NOTE: *conduct* (i.e. not statement) is rarely intended and therefore rarely hearsay – often need further information or context to prove the intention of person’s conduct

## COMMENTS ON INTENTION TEST

### How does the issue of intention arise?

#### Where proponent introduces evidence of a person’s statement or conduct to prove truth of an IMPLIED implication from it (NOT truth of express implication – which would be hearsay)

##### EG: strong as an ox is not used for express implication that person was actually strong as an ox, but the implied implication that person was generally ‘strong’

### EG: adduce evidence of person nodding when asked whether they had been paid by D and evidence of a dealer pointing to D as the person who supplied them. Inadmissible – implied assertion from the conduct of nodding and pointing.

### ***US v Summers*** – D says to POs “how did you find us so fast?” Inadmissible – hearsay because not used for express implication that D was interested in methods of law enforcement BUT for implied implication of D’s guilt and wonderment at ability of PO to apprehend them so quickly

### ***US v Weeks*** – victims of kidnapping heard D being called Gato. P wanted to adduce evidence of a witness hearing other people calling D Gato. Admissible. Not hearsay because the Decs did not intend to convey the implied assertion that that was D’s nickname, but rather only the express implication of the topics they were talking about

### ***US v Berrios*** – P had proof that a person named Pablo was a dealer. Issue was identifying if D was Pablo. P called a W who testified that she was introduced by a person to D as “This is Pablo”. Inadmissible. Hearsay – Dec intended to convey implied implication that Pablo was D’s nickname. BUT court noted if Dec said “Watch out for Pablo, he’s dangerous” this would be inadmissible because the intention was not to introduce D as Pablo but to say that Pablo is dangerous (which is similar to *Weeks* above)

## POLICIES

### Limiting hearsay to express statements would reduce its scope and render it unworkable for its purpose (b/c would get all implied statements in) – but also need intention

### If implied implication is intended, then basically equivalent of an express statement

# PURPOSE OTHER THAN FOR TRUTH [801(c)(2)]

## BACKGROUND

### Where statement is NOT offered to prove truth of the matter asserted in it, then it is not hearsay

#### Words will often have an effect which is independent from its truth (i.e. “magic words”)

##### Not concerned about the truth or credibility of statement made by the Dec, but just that it was made and that it affected the listener / world at large

* + EG: strict liability crimes, where ‘saying something’ is offence (e.g. bomb possession in TSA line)
	+ EG: threatening to kill a judge – whether they are joking is irrelevant

### NOTE: must prove precisely why not being offered for truth – do not just say it

## PURPOSE EXCEPTIONS

1. Effect = where statement is being offered for effect on listener [***McLure***]
	* Do not need Dec – can XX listener about their subjective belief of that statement, then it is for the jury to decide whether they believe the witness or not
	* **403** is important – risk jury may misuse the evidence and take it for its truth, rather than for alternative purpose (i.e. prove a fact occurred, rather than for having an effect on listener)

##### Assess PV of the evidence being used for the non-hearsay purpose v. any unfair prejudice of jury using it as proof of truth of statement

1. Legal significance = where statement is offered for legal purpose

#### Words spoken in relation to contracts, agency relationship, wills, leases and conspiracies are all non-hearsay when used to prove existence of legal relationship NOT for truth [***Belucci; Creaghe v Iowa Home Mutual***]

##### IE. statements creating substantive rights and liabilities

##### EG: statements creating an oral contract between parties

1. Possession / custody = statement offered to prove the possession or custody of an item
	* EG: Police dossier with secret information about an individual. Copy was found in D’s house. Admissible to prove D’s consciousness of guilt b/c he obtained secret police info about himself, not truth of the content of the dossier
2. Explain police action = statement used to fill in gaps about police investigation for jury [***Freeman***]
	* Admissible where police investigation is challenged (needed to explain)
	* **403** is important – need to balance the PV and prejudicial effect
		+ EG: tip off saying that terrorist activity at a certain address, then raid at 3am and find drugs at the address – the evidence has PV in proving why police investigated but outweighed by prejudicial effect of terrorist allegation

### Criminal action = where the statement constitutes a criminal action, NOT offered for truth

#### EG: threat made against Federal court judges [***US v Jones***]

###### Freeman

#### FACTS

##### D purchases counterfeit money

##### Police told by a man that another man is printing counterfeit money, and will sell it to a person at D’s address. So Police sat all day in car outside premises

#### HELD

##### PV in explaining police investigation had a higher PV with lower prejudicial effect because D was not named in the same

###### McLure

* + FACTS
		- Charged with killing wife after friend told him that she was sleeping with other men
	+ HELD
		- Admissible – offered as its effect as a motive for offence

# PRIOR STATEMENTS OF TESTIFYING WITNESSES [801(d)(1)]

* Exception for some prior statements is provided for in 801(d)(1)(A), (B) and (C)

## PRIOR INCONSISTENT RULE [801(d)(1)(A)]

1. Witness is giving evidence at trial
2. Witness’ prior inconsistent statement can be used as proof of a fact ONLY IF it was given *under perjury at a trial, hearing, or other proceeding OR in a deposition*

#### Must be made under oath at a formal proceeding – b/c this provides overwhelming proof that the W actually made the prior inconsistent statement [***Livingston***]

##### EG: situations in which official verbatim records are kept – either by stenography, electronic means, or under legal authority

#### Generally, NOT statements made to investigating officials or POs [***Ragghianti; Martin***]

##### EG: not a postal officer going to a woman’s house and writing a statement based on her responses, as in *Livingston*

#### Prior statement need not be diametrically opposed to current statement to be inconsistent – may simply be evasive answers, inability to recall or silence [***Dennis; Williams***]

## COMMENTS

### Very narrow exception – applies to limited set of “wobbly” witnesses

#### EG: where W says something in court which is contradictory to previous statement out of court

### POLICY = PIS often used to impeach a witness, but this would be subject to limiting instruction to not use it as proof of the fact, SO this exception cures that problem and allows it to be used for a fact

#### If only used for impeachment, then does not count towards discharging burden of proof

### NOTE: majority of prior inconsistent statements are only able to be used for impeachment because (1)(A) is so narrow [see **613** on contradiction]

## PRIOR CONSISTENT RULE [801(d)(1)(B)]

1. Witness is giving evidence at trial

### Statement is consistent with Dec’s testimony AND

#### Offered to rebut express or implied charge that Dec recently fabricated it or acted from a recent improper influence or motive in testifying [**801(d)(1)(B)(i)**]

#### OR

#### Offered to rehabilitate Dec’s credibility as a W when attacked on any ground [**801(d)(1)(B)(ii)**]

##### IE: MUST be an express or implied attack on W’s credibility

##### NOTE: no real difference between (i) and (ii) – (i) is covered by (ii), but was inserted to preserve Tome’s extension to any ground of attack (as only (i) previously existed)

### Statement MUST be responsive to the attack on W’s credibility (i.e. on the same ground) [***Tome***]

#### Often used to negate allegations of motive – where PCS negates an alleged motive (see below)

##### EG: D charged with hit and run, car involved, his defense is car was stolen on that morning and he was not driving car. Credibility is attacked that recent fabrication based on motive. Try to admit police report. Admissible as a PCS to negate motive.

### Statement MUST be made before the fabrication, influence or motive came into being for it to be admissible [***Tome***]

#### Sometimes difficult to ascertain when it came into being – courts trusted to make this finding

### NOTE: 3rd party – W’s PCS can be introduced by 3P W to rehabilitate them, if W is testifying [***Hebeka***]

#### Presence in court (and being subject to XX) is a requirement for all Ws under 801(d)(1) because otherwise they cannot be attacked to engage the rule

## COMMENTS

### Often arises in three instances:

#### Other evidence is not properly offered (i.e. to clarify) – biggest situation

#### Rebut bad memory

#### Rebut a prior inconsistent statement

##### NOT a numbers game (i.e. one to another) but simply allows W to explain a prior inconsistent by using a prior consistent

### Courts generally skeptical of PCS – cannot be used simply to bolster evidence of witness

#### No reason to suggest W is truthful at present occasion because said same thing before

#### EG: attack witness on basis that he misheard something, then the prior consistent statement is irrelevant because accusation is that they misheard initial statement

## PRIOR IDENTIFICATION STATEMENT RULE [801(d)(1)(C)]

### There is a prior statement which identifies a person

### Dec is giving evidence at trial and is subject to XX about that prior statement [**801(d)(1)(C)**]

#### Extent or quality of XX relating to prior identification statement is not required, only adequate XX – just testify and voluntarily answer questions [***Owens***]

##### EG: Where Dec testifies to current belief, but cannot recall reasons for belief, then still admissible

#### W who fails or refuses to testify is not subject to XX so their prior ID statement is inadmissible as hearsay [***Torrez-Ortega***]

### No need for the W to, at trial (i.e. in court), subsequently identify the same person they identified at the time of the prior statement [***US v Blackman***]

#### If they do, given little weight because memory is considered better at prior time and appearances change so the ID at trial might be inaccurate

##### BUT failing to identify provides fertile ground for XX

## COMMENTS

### POLICY – out of court IDs are generally more reliable than in-court because witnesses’ memories fade and appearances of people can change over time

### Cure for any unfairness from this rule is attacking credibility of W during XX and then jury deciding whether the prior identification statement is to be believed

#### If they cannot remember, often hard for jury to believe their prior identification

###### Owens

#### FACTS

##### Owens accused of being perpetrator of assault with pipe

##### Issue for Owens is victim W cannot remember much about being attacked, only identifying Owens and then reporting to police

##### Owens says not subject to XX and therefore PI evidence is inadmissible

#### HELD

##### Admissible – satisfies 801(d)(1)(C) as there was XX

##### Subject to XX does not mean excellent XX – only need adequate – the fact question was asked is XX and any answer allows an assessment of a W’s credibility

##### W only needed to voluntarily answer questions, and this was adequate

# OPPOSING PARTY STATEMENTS [801(d)(2)]

## POLICY

* No need to check reliability – if you made the statement, then you are responsible for it, and it is for adversarial process to give opportunity to explain or challenge

#### Not concerned about circumstances of making statement – just that it was made

* NOTE: difference between opposing party statements and admissions:

#### Admissions do not require unavailability of the maker to be admitted; and are often made by a party to another party, while statements are made by an opposing party to a 3P

## PRELIMINARY REQUIREMENTS

### Applicable standard for all judgments below is preponderance of the evidence

1. No need for maker to have personal knowledge under 602 (given policies above) [***Mahlandt***]
2. Statement itself CANNOT establish [**801(d)(2)**]:
	* Dec’s authority under 801(d)(2)(C)
	* Existence nor scope of relationship under (D) NOR
	* Existence nor participation in conspiracy under (E)

## INDIVIDUALS OR REPS

* Statement was made by opposing party in an individual or representative capacity [**801(d)(2)(A)**]

#### Co-defendant is not an opposing party (but could be co-conspirator – see below) [***Harwood***]

### POLICY = where W makes a statement, must live with it (i.e. no cure for “flapping lips”)

#### EG: D made statement that child was bitten by wolf. But he then said he didn’t actually see it happen. Challenged because he said he didn’t have personal knowledge, so should not be admitted. Admitted – he could have been examined about statement

## ADOPTED OR BELIEVED TRUE

* Statement was one the opposing party adopted or believed to be true [**801(d)(2)(B)**]

#### Test = would reasonable person consider the statement to have been adopted [***Carr; Hoosier***]

##### Consider all circumstances and probable human reaction to the statement

##### Easily satisfied where person builds on or accepts the statement [***Johnson***]

##### Mere failure to respond (e.g. to letter or text) is unlikely to be adoption unless contains something one is expected to respond to [***Southern Stone v Singer***]

##### Adoption can be through words, conduct or silence (i.e. express or implied) [***Robinson***]

##### If silence, must prove W heard and understood the statement (i.e. cannot adopt what do not hear) [***Carr v Deeds; Hoosier***]

##### More incriminating the statement, more likely silence will be adoption (as it would be responded to if incriminating)

### NOTE: issues arise when adoption is unclear (e.g. in cases involving electronic communications)

#### EG: when a person likes a FB post, it is ambiguous whether they adopted. Courts generally assume adoption, as they could have used another reaction but did not – reasonable person would consider adoption.

## EXPRESS AUTHORIZATION

* Statement made by a person whom the opposing party authorized to make a statement on the subject [**801(d)(2)(C)**]

#### Party must expressly appoint another person to speak on their behalf – need to adduce evidence of authorization

#### Very rare – people with express authority rarely speak out of step

## AGENTS AND EMPLOYEES

* Statement made by the opposing party’s agent or employee on a matter within the scope of that relationship and while it existed [**801(d)(2)(D)**]

##### Must show:

##### Agent / employee was engaged at time of statement

##### Personal party / friend is NOT an agent and independent contractors are unlikely to be [***Bonds***] (do not want them to speak on your behalf)

##### NOT required to show that person made statement on the job (i.e. can be made at home, or even to a congressional committee)

##### SO if worried about making statements outside work (e.g. where they know about criminal activity) then dismiss agent / employee

##### Statement was within scope of their engagement

##### Need to look at nature of their role (e.g. job description)

##### EG: janitor of a corporation cannot apologize for company’s illegal antitrust activity

### Issues arise when agent / employee is unidentifiable (e.g. don’t know person’s name, or their employer) BUT circumstances often enable proof (on preponderance of evidence) that person was agent / employee

#### EG: where P falls on ice in gated community and rings number of housing estate for help. A worker arrived and said he was sorry he should have done a better job of clearing, but P didn’t get name. Found to be an agent just b/c he was the man who was sent to him straight after he called number.

#### EG: P wanted to introduce minutes of statements made at meeting which recorded incriminating statements. Held that no need to prove authority because only an employee would have recorded minutes

### NOTE: expansion of the rule in (C) – plaintiff friendly rule

## CO-CONSPIRATORS

* Statement was made by the opposing party’s co-conspirator during and in furtherance of the conspiracy [**801(d)(2)(E)**]

## Requirements

### Co-conspirator makes a statement to anyone [***Ciresi***]

#### Risk of entering a conspiracy is that conspirators are given authority to speak on your behalf

### Either a criminal OR civil (e.g. a joint venture) conspiracy [***El-Mezain***]

### No need to be charged with conspiracy [***Stratton***]

### Declarant is a co-conspirator with the opposing party (i.e. members of SAME conspiracy) [***Ciresi***]

##### Consider all evidence, INCLUDING statement itself UNLESS statement is only evidence of conspiracy (i.e. unreliable to prove itself) [***Bourjaily; US v Tellier***]

##### Must be single conspiracy – not separate [***Ciresi***]

##### Look at existence of a common goal, and overlap between participants

##### Standard is PoE [***Bourjaily; Silverman***]

##### Must find a reasonable suspicion of conspiracy

##### Evidence of innocuous conduct/statements unlikely to be sufficient

##### Even if acquitted of being in a conspiracy in criminal action, may still find a conspiracy b/c of different standards [***Peralta***]

### Statement made in furtherance of conspiracy [***Ciresi***]

##### Test of subjective furtherance NOT test of objective furtherance [***Ciresi***]

##### EG: undercovers making statements (actually undermining the conspiracy, but intended to further it when made)

##### Needs to promote an object of the conspiracy [***Ciresi; Piper***]

##### Must look at the PURPOSE of maker

##### Includes statements to maintain trust / cohesiveness, establish mode of operation, and recording actions (e.g. in a doc) relating to a conspiracy [***Halderman***]

##### Difficulty arises when statements argued to be “idle chatter” – still often held to be in furth.

##### Even if they are historical statements (i.e. telling a story about burying a person to co-conspirators is in furtherance b/c it is keeping them in line)

### Statement made while conspiracy was ongoing [***Ciresi***]

##### Includes statements made before person joined the conspiracy (as substantive law attributes all prior acts of the conspiracy to person)

##### Conspiracy ends when the central criminal goal is achieved [***Tse***]

##### EG: in bank robbery, when proceeds are divided

##### EG: in murder, when murder occurs

##### Excludes statements made after withdrawal from conspiracy

##### Burden on D to prove withdrawal [***Graham***]

##### Withdrawal means cutting off all ties to conspiracy – either by notifying conspirators about withdrawal OR confessing [***Ciresi***]

##### Going to prison is not withdrawal [***Perisco***]

##### Mere cessation of activity in furtherance of conspiracy before central goal is achieved is not withdrawal [***Ciresi***]

##### NOTE: some conspiracies such as mafia organizations never end

###### Housier

#### FACTS

##### Gf made statement about all crimes that D had committed to 3P, he was silent

#### HELD

##### Adoption through silence – if disagreed he would have objected

###### Bonds

#### FACTS

##### D charged with using steroids

##### Urine sample came back and showed steroid usage – dispute about whether urine was actually D’s

##### His manager took it to the lab for testing and said it was D’s – disputed

##### Manager refused to testify, so needed to admit agent’s hearsay statement

##### Scope of authority was not an issue

##### D argued he was just a friend, not an agent

#### HELD

##### Inadmissible – he was not an agent, but simply a friend

###### Ciresi

#### FACTS

##### C was an attorney who was charged with bribery and extortion

##### Two men talking in a room about bribery, and convo was recorded. One of the men was C’s co-conspirator

##### One says that C set up a bribery transaction, although C was not there and did not authorize statement

#### HELD

##### Admissible – his co-conspirator was one of the men talking and conversation was in furtherance of an ongoing conspiracy

###### US v El-Mezain

#### FACTS

##### Ds charged with funneling money to Hamas (terrorist organization)

##### P seeks to adduce statements of members of conspiracy

##### BUT at time there was no offence because Hamas was not a declared terrorist organization – so not an illegal conspiracy

#### HELD

##### Admissible – no need to be criminal – can be simply a joint venture

###### Example case

#### FACTS

##### Co-conspirators out on porch talking

##### Say that conspiracy is just not what it used to be – now actually have to ask Billy to kill people and then pay Billy too

#### HELD

##### Admissible – idle chatter – does not further the conspiracy – they were just reminiscing about the past

###### US v Halderman

#### FACTS

##### Watergate conspiracy

##### Conspirators would meet in WH at a round table

##### H would go around and ask each member what they did each week

##### H would check off each item on a to do list

##### P argued that to do list was in furtherance

#### HELD

##### Admissible – recording actions in relation to the conspiracy is in furtherance of it

###### Example case

#### FACTS

##### Conspirators want to bomb a mall in Dallas

##### Need a bomb expert – conversation where they suggest D as a good candidate

##### He later joins the conspiracy and P want to adduce evidence of conversation

##### D argues inadmissible because he had not yet entered conspiracy

#### HELD

##### Admissible – looked at substantive law and conspiracy train theory, which attributes all acts of the conspiracy prior to joining to D – so statement was part of conspiracy

###### Example case 2

#### FACTS

##### Bank robbery

##### Agree to divide proceeds at a hotel – when leaving hotel, one says that teller saw him, so co-c says need to go back and kill teller

##### Argued to be a separate conspiracy and therefore not part of conspiracy

#### HELD

##### Admissible – central criminal goal had not ended

###### Bourjaily

#### FACTS

##### Lenardo is a drug dealer setting up transaction

##### L says to seller that his friend V will be at the deal with the money to pay

##### There is no evidence of co-conspiracy, except for V being parked in the back of the mall with money where a person throws cocaine through window

##### V says he was just at the wrong place at the wrong time

##### P wants to introduce the statement

##### D argues that cannot use the statement itself to prove conspiracy

#### HELD

##### Admissible – judge is not bound by admissibility rules when considering a statement, so allowed to consider the prior statement in determining existence of a conspiracy

###### Silverman

#### FACTS

##### Sister is a drug dealer

##### D argued to be a co-conspirator with his sister

##### In meeting with associates, she says she is going to see D who is her supplier and will bring drugs back

##### Only other evidence of conspiracy is that Mark picked her up and dropped her off at airport

##### P wants to admit statement from meeting

#### HELD

##### Inadmissible – many reasons why she would see her brother and nothing suspicious about picking up and dropping off – not enough to prove conspiracy on preponderance of the evidence

# UNAVAILABLE WITNESSES

### Statements are reliable because of the situation in which they were made

## UNAVAILABILITY CRITERIA [804(a)]

### W is unavailable if:

#### exempted from testifying about the Dec’s statement because a privilege applies and W refuses to testify [**804(a)(1)**];

##### EG: W invokes a privilege such as the 5th Amendment

#### refuses to testify about the subject matter despite a court order to do so [**804(a)(2)**];

##### EG: son refusing to testify in father’s trial

##### This will normally result in contempt proceedings

#### testifies to not remembering the subject matter [**804(a)(3)**];

##### Needs to be a *voir dire* where they testify to lack of memory and this is accepted by the judge

#### cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness [**804(a)(4)**]; or

##### Raises discretionary administrative issues – e.g. ruling on unavailability may depend on the duration of the illness/infirmity – may call the W later during the hearing

#### absent from the trial or hearing and the statement’s proponent has not been able, by process or other reasonable means, to procure [**804(a)(5)**]:

##### declarant’s attendance, for hearsay exception under 804(b)(1)/[(6)](https://www.law.cornell.edu/rules/fre/rule_804#rule_804_b_6) [**804(a)(5)(A)**]; or

##### declarant’s attendance or testimony, for hearsay exception under 804(b)(2), [(3)](https://www.law.cornell.edu/rules/fre/rule_804#rule_804_b_3), or [(4)](https://www.law.cornell.edu/rules/fre/rule_804#rule_804_b_4) [**804(a)(5)(B)**]

##### Need to undertake due diligence

##### Standard = how hard you would try to locate W if did not have their statement

## COMMENTS

### Burden on producing party to prove unavailability [***Pelton & Rich***]

### DOES NOT apply if statement’s proponent procured or wrongfully caused declarant’s unavailability as a W to prevent declarant from attending or testifying [**804(a)**]

#### EG: purchasing a holiday for a witness so they are unavailable

### CAN STILL impeach an unavailable witness [**806**] (e.g. producing evidence that they were a dealer)

#### So trying to keep them off the stand often does not accomplish much

### NOTE: often a hearing into the legal “unavailability” of witness before trial

## PRIOR TESTIMONY EXCEPTION [804(b)(1)]

### Unavailable W’s testimony was given at a trial, hearing, or lawful deposition [**804(b)(1)**]

#### Does not matter whether given during current proceeding or different one [**804(b)(1)(A)**]

### Opposing party OR in civil, their predecessor in interest was party in that previous proceeding [**804(b)(1)(B)**]

#### PII given broad meaning – only need to have sufficient community of interest or a like motive [***Lloyd v American Export Lines***]

### Opposing party OR their PII had an opportunity *and* similar motive to develop it by direct, cross or redirect examination [**804(b)(1)(B)**]

#### Key Q = was motive to develop at prior time similar to motive that would exist if W was available for examination at present proceeding? [***Bailey***]

##### IE: Would same kinds of questions be asked of the W if they were present?

##### Look at issues and context in which the opportunity for examination previously arose

##### Also look at the W’s purpose at present and prior (i.e. PV of their evidence)

##### Hard to prove dissimilar motive – often need to prove other examiner did not do adequate job

#### Irrelevant whether tested by direct, cross or redirect

#### Grand jury testimony never used against D because they do not have opportunity to test BUT may be used against P where it is exculpatory [***DiNapoli/Salerno (2C)*** says it cannot be, while ***McFall (9C)*** says that it can be]

###### Bailey

#### FACTS

##### D charged with robbing jewelry store

##### Woman he was with gave evidence in one set of proceedings and said was with D in a hotel all day (i.e. alibi)

##### Separate proceedings were divorce proceedings between D and wife

##### Wife wanted to adduce evidence of woman

#### HELD

##### Inadmissible – D did not have a similar motive in the separate proceedings – first evidence was just to prove presence, the second was to prove what they were doing in hotel room – different purposes of XX

###### Duenas

#### FACTS

##### PO took oral confession from D. PO was called to stand. PO gave evidence of D confessing to selling stolen goods to buy drugs at a suppression hearing

##### D argued that oral confession was obtained improperly and involuntarily

##### At prosecution hearing, PO was no longer available. D argued not admissible – D’s motive to XX was different at suppression hearing to the prosecution hearing

#### HELD

##### Inadmissible – different motives – one was to oppose guilt, the other was to prevent suppression orders

###### Salerno

#### FACTS

##### S was head of crime family. Contractors were W. All paid commissions to the mafia. P wanted to call contractors as W. P gave them immunity from P in relation to evidence. 2 of the 50 said they did not make payment. 48 of the 50 said they made payment. Grand jury successful

##### Then at trial, P called the same Ws but did not give the 2 immunity. S wanted to call the two and asked judge to grant immunity. S wanted to admit their prior testimony against P at trial.

#### HELD

##### Inadmissible – motive was different b/c different burdens of proof in grand jury + trial

##### Often arises when a P witness flips in earlier proceedings, and then unavailable, then D wants to adduce evidence against P

##### 9th Circuit differs from Salerno and says that there is no difference between testifying at grand jury and trial – similar motives because the similar burden of proof – need not have an IDENTICAL motive

## DYING DECLARATIONS EXCEPTION [804(b)(2)]

### In homicide OR civil case, may admit statement that declarant made when [**804(b)(2)**]:

#### Dec believed their death was imminent AND

##### Must be conscious of their impending death, with no hope of recovery [***Shepard***]

##### May be inferred from the circumstances surrounding the statement [***Nieves***]

##### When determining admissibility under 104, Judge may use inadmissible evidence to determine Dec’s state of mind

##### IE: focus on state of mind

##### Do not actually have to die – but makes it more difficult to prove they believed they were going to die if they survive

#### Declaration was about cause OR circumstances of their death

#### Personal knowledge – can be inferred from circumstances

##### EG: evidence of a prior scuffle prior to being shot in the back is enough to infer personal knowledge of statement that D shot be in the back

### NOTE: Court is NOT determining whether statement is reliable (this is for jury) – just looking at whether it falls within exception

###### Nieves

#### FACTS

##### V being brought into hospital. V says Angel stabbed me and I do not want to die. Wounds were not serious, but V died in 45 mins

#### HELD

##### Inadmissible – P did not prove that she had a comprehension she was going to die

###### Example Case

#### FACTS

##### D charged with murdering sister w/terminal illness. Sister was cared for by an aid. Sister told aid that she was going to feel better because D gave her pills. Pills were arsenic and she died

#### HELD

##### Inadmissible – sister did not have swift and certain belief of doom – thought pills would help

###### Example Case 2

#### FACTS

##### V run over by semi. V said to someone, I know that I’m going to die. V said that I am the one that killed the teller in Little Rock. D in Little Rock was charged with that crime – wanted to adduce the dying declaration

#### HELD

##### Inadmissible – declaration was not about cause/circumstances of the V’s death

## DECLARATION AGAINST INTEREST [804(b)(3)]

### Statement that:

#### Reasonable person in Dec’s position would have made only if they believed it to be true b/c it:

#### Was so contrary to Dec’s proprietary or pecuniary interest (NOTE: this is the focus) OR

#### Had so great a tendency to invalidate Dec’s claim against someone else OR

#### Expose Dec to civil or criminal liability

#### If offered in CRIMINAL case as a statement exposing Dec to criminal liability, is supported by corroborating circumstances that clearly indicate its trustworthiness

## 1) Tends to be against interest [804(b)(3)(A)]

### Reasonable person would TEND to see risk of harm to proprietary or pecuniary interest caused by making the statement [**804(b)(3)(A)**]

#### Broad – only needs to “tend” [***Satterfield***]

#### MUST be risk of loss of money (pecuniary) OR liberty (proprietary) – not loss of life [***Linde v Arab Bank***]

#### Must look at the circumstances and context in which the statement was made to determine tendency to disserve [***Williamson***]

##### Statements made to a trusted person (e.g. friend/mother) tend to disserve – they have propensity to tell others, so it is made against interest

##### Statements made to PO in custody unlikely to tend to disserve – because often serve their own interest

##### EG: ***Williamson*** *–* man caught with 19kgs drugs said Williamson was his supplier, but statement could not be admitted because man was trying to lessen his culpability (was not truly ‘self-inculpatory’)

##### EG: ***Katsoudrakis*** – W says that K told him to burn down a diner and he repeats this to a PO while in custody. Held sufficiently disserving because it was proof of a conspiracy, so K was further incriminating himself

##### EG: statement of 3P that he killed a prison guard that D was on trial for killing. Seems disserving, but 3P was on a life sentence, so not disserving.

#### EXCEPTION – where declaration is made to a lawyer (covered by privilege)

## 2) Corroborating circumstances [804(b)(3)(B)]

### ONLY in criminal

### Proponent must also show corroborating circumstances indicative of trustworthiness [**804(b)(3)(B)**]

#### No clear rule about degree of corroboration required

##### Some courts have strict requirement, others looser (citing D’s right to due process and effective defense)

#### Circumstances to determine trustworthiness [***Bumpass***]:

##### Independent corroborative evidence

##### NOTE: dispute b/w circuits about whether independent evidence or just circumstances around statement should be considered

##### Circumstances in which statement was made

##### Timing – further away, less likely to corroborate

##### Motive in making the statement / any reason to lie

##### To whom the statement was made

##### Whether the statement was repeated

#### EG: where statement made to PO to shift blame for drug possession to supplier/owner of drugs, or statement made after PO offered leniency for information = not against interest

### NOTE: rule arises where non-litigants make statements about parties (e.g. bought drugs off D)

#### Rule attempts to ensure reliability of such a statement

## STATEMENT OF PERSONAL or FAMILY HISTORY [804(b)(4)]

### Statement about Dec’s birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood or marriage, or similar facts of personal or family history EVEN IF no way of acquiring personal knowledge of it [**804(b)(4)(A)**]

### Statement about another person concerning that person’s birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood or marriage, or similar facts of personal or family history ONLY IF [**804(b)(4)(B)**]

#### Dec was related by blood, adoption, marriage or so intimately associated with a person’s family to make Dec’s information likely to be accurate

## STATEMENT ABOUT WRONGFULLY CAUSING UNAVAILABILITY [804(b)(6)]

### Statement offered against party that “wrongfully caused” OR “acquiesced in wrongfully causing” Dec’s unavailability as a witness, AND intended that result [**804(b)(6)**]

### Three requirements [***Gray; Dinkins***]:

#### Proponent engaged or acquiesced in wrongdoing relating to unavailability of W

##### Only a *wrongful* cause requirement – need not be illegal [***Leal-Del Carmen***]

##### Includes actions of co-conspirators re: W which are reasonably foreseeable and in furtherance of the conspiracy (proponent acquiesces despite not taking part) [***Dinkins***]

#### Wrongdoing was intended to render W unavailable

##### NOT enough to just show intentionally harming or killing, must also show acted to keep W from testifying [***Cherry***]

##### Where multiple reasons for wrongdoing, only one reason needs to be the intention to render W unavailable

##### Standard = preponderance of the evidence [**104(a)**]

#### Wrongdoing did render W unavailable

### Difficulty arises in domestic violence prosecutions

#### EG: wife makes statement after being assaulted. Wife called to testify, and refuses to testify. P wants to adduce prior statements. Inadmissible because assault did not occur with intent to prevent from testifying, but was for other reasons

### Applies to P and to civil parties

#### EG: ***Leal-Del Carmen*** – P deported witness who made a statement favorable to D in a people smuggling case but kept its favorable witnesses in USA – held that P wrongfully caused b/c they kept the favorable Ws but deported only the unfavorable

### POLICY = prevent abhorrent behaviour which impairs the justice system

#### Doesn’t really fit with other 804(b) categories, as interests of justice rather than circumstances in which it was made make it reliable

EXCEPTIONS NOT REQUIRING UNAVAILABILITY [803]

* NOTE: for all, still need to satisfy the personal knowledge requirement
* 803 categories are exempt from hearsay rule – seen as reliable because of circumstances in which they are made – no need to be tested in court

# PRESENT SENSE IMPRESSIONS [803(1)]

## RULE

### Statement made while or immediately after Dec perceived an event or condition, describing or explaining that event or condition

## REQUIREMENTS

#### Must prove on POE (i.e. verify) that there was an event through corroborating evidence [***Blakey***]

##### Cannot solely rely on the statement (i.e. cannot prove itself)

##### CRITICAL to ensuring reliability, otherwise can say anything and get admitted

##### Degree of verification varies on a case by case basis – look at all circumstances

#### Must prove that Dec saw or perceived the event (i.e. personal knowledge) [***Meder v Everest***]

#### Immediacy – must be made at the time or immediately thereafter (DC says less than 1 min after)

#### Dec cannot have time for reflection [***Hilyer v Howat***]

##### EG: 911 call where Dec is describing an event as it occurs NOT information provided to PO 30 mins after an accident occurred

#### If time between the event and statement is uncertain, then must exclude [***US v Cruz***]

##### EG: statement made by dead PO to colleagues about source of cocaine sample where it was unclear how much time passed between seizure and statement

#### Must describe what is being presently impressed (i.e. seeing or hearing the event) [**803(1)**]

##### Cannot simply be related to (which is the case for an excited utterance – see below)

##### EG: employee saying “I warned them about the ketchup an hour ago” to a man who just slipped on ketchup is not admissible as a PSI

## POLICY

### Immediacy guarantees reliability – it takes time to lie (need opportunity to reflect)

## CASES

###### Watson

#### FACTS

##### Two women speaking on phone

##### Murder case

##### Woman speaking to another woman who was the victim

##### Doorbell rang during call

##### Heard walking and then a short conversation with a man

##### She said it’s a super at the door

##### Time of death is 5 mins after call

##### Super is Watson and he is the D

##### Not an excited utterance because no startlement, so argued to be present sense of impression

#### HELD

##### Inadmissible – unable to verify what she said – no way of corroboration of the statement

###### US v Blakey

#### FACTS

##### Extortionists in a restaurant and put store owner in back room

##### Man eating at the restaurant

##### Man eating hears a scuffle in the back room and verifies extortionists coming out of room happy

##### Owner said they just cost me $5k

#### HELD

##### Owner’s present sense impression was sufficiently verified by the person eating

# EXCITED UTTERANCES [803(2)]

## RULE

### Statement relating to a startling event OR condition, made while Dec was under the stress of excitement that it caused

## REQUIREMENTS

### Must be a startling event OR condition proven on a PoE [***Boyce***]

#### Objective standard (i.e. objectively startling)

##### Also consider circumstantial evidence such as the appearance, behavior and condition of the Dec

##### EG: physical crimes / injuries, unexpected or rare events, or even statement from accountant that tax liability is far greater than initially thought

#### Can be planned – planning can often make it more startling (e.g. winning lottery)

### Dec must have personal knowledge of the event OR condition [***Boyce***]

#### IE: must be at the scene

### Dec must be under the influence of the startling event for ENTIRE TIME between event and statement

#### Need continuous state of startlement – no time to sit and contemplate [***Marrowbone***]

##### Relevant factors:

##### Temporality – if there is a big gap then unlikely to still be under influence

##### Nature of the starling event or condition

##### EG: statement made after being raped in likely to create greater period of startlement than after witnessing a robbery

##### Level of involvement in event or condition

##### EG: influence of being involved in car crash for longer than if just a W, and getting shot is more influential than just seeing a shooting

##### Nature of the declarant

##### EG: children expected to be under influence for longer than others

##### Chain of events leading to event

##### EG: easier to prove startlement when evidence is that person was calm, and then not

##### Consciousness of the Dec

##### Written or oral statement – harder to prove with written because time to sit and contemplate when writing

##### But can be admissible (e.g. text message during school shooting)

### Statement must relate to the startling event or condition [***Boyce; David***]

#### Does not need to describe the event, just needs to relate

##### EG: where a person slips on ketchup and bystander says I told the manager about ketchup on floor an hour ago is admissible, but I slipped on ketchup this one time is inadmissible because does not relate to present instance

## POLICY

### Fact of excitement is the guarantee of reliability – startlement stills the reflective capacity

#### Strongly challenged – social science does not prove this is the case

## CASES

###### Boyce

#### FACTS

##### B was charged with being a felon in possession of a firearm

##### B challenged admission of a 911 call made by his partner, in which she stated that B had a gun

#### HELD

##### Admissible – statements were made while under the stress of a domestic battery, and were related to that startling event

###### David

#### FACTS

##### David in supermarket. Slips and falls. Other shopper is startled and says she slipped on ketchup and told employee to clean it up an hour ago.

#### HELD

##### Admissible – four requirements met

###### Napier

#### FACTS

##### Woman who is running in park. She gets assaulted by a person. She has head injury in hospital. Perpetrator is at large. While recovering she lives with sister

##### She looks at paper and sees Napier who has won fishing contest, and starts crying and says “he killed me”

#### HELD

##### Admissible – reading paper and seeing Napier was a startling event

# STATE OF MIND EXCEPTION [803(3)]

## REQUIREMENTS

### Dec’s SoM or conduct is in issue (e.g. whether they acted in a way / did something) – if not in issue, excluded under 403 b/c low PV and high PE

#### EG: prove element of offence as in ***Adkins***

#### EG: element of offence of extortion is that V was scared of D. Evidence that V said “I am afraid of D”, then clear evidence of the element

#### EG: for ***Hillmon****,* where one party asserts Dec acted in a certain way or had a particular SoM (e.g. going over to clean guns at house)

#### EG: where victim was simply sitting in a chair, cannot introduce evidence that V feared D – no dispute about V’s actions – high PE and low PV of such evidence

### Statement must be about Dec’s THEN-EXISTING state of mind (e.g. motive, intent, or plan) or emotional, sensory, or physical condition (e.g. pain, or bodily health) [**803(3)**]

#### NOTE: no real difference between SoM and e/e/p condition – very similar

### Statement must be present or future looking [**803(3); *Shepherd***]

#### IE. cannot use a state of mind statement to prove how someone acted before that

##### IE: cannot be a backwards looking statement (e.g. “I went to the shop” does not fall within exception because it is backward looking – but “I’m going to the shop” does because it is immediate and shows intent)

#### UNLESS the statement of memory or belief is used to prove a fact remembered or believed about the validity or terms of Dec’s will [**803(3)**]

### Statement used for 1 of 3 permissible purposes:

### To prove the fact of Dec’s state of mind (NOT for truth of the content of the statement)

##### EG: “My back hurts” is used for fact of that feeling NOT that there was an actual back problem leading to liability

#### To prove how Dec acted [***Hillmon***]

##### ALWAYS consider **403** when weighing the evidence of state of mind

##### Examples of when **803(3)** exception works and **403** does not exclude:

##### To prove Dec’s intention to travel or move to a location as in ***Hillmon***

##### To prove a course of conduct of the Dec as in ***Stager***

##### To prove or disprove events that are alleged to have occurred

##### To disprove D’s claim that they acted in self-defense (e.g. where Dec was scared of the person) [***US v Brown***]

##### To disprove suicide or accidental death (e.g. where Dec was fearful the person was going to kill them) [***US v Brown***]

#### To prove how another person acted (AKA *Hillmon 2*)

##### Majority approach = inadmissible because it is complete hearsay about what other person did and the underlying policy is inapplicable [***Larry***]

##### Minority approach (2nd Circuit) = admissible if proponent adduces evidence of corroborating circumstances indicating trustworthiness of statement [***James***]

### Conduct **403** analysis (also see above)

#### 803(3) statements will often have high PV, but must be weighed against the main, PE that jury will consider the statement for its truth

#### Where statement is not clean and contains context (e.g. stated reason for feeling as in ***Adkins***) use limiting instruction (if PE curable by instruction) OR exclude under 403 (if PE SO PV)

##### Consider all other evidence to determine the PV of the additional context

##### Be careful of cumulative context (e.g. shooting at husband then attempting to poison and then making Adkins statement the day after) because cumulative events are likely to have high PE and little further PV to give context to feeling

## POLICIES

### Person best knows their own state of mind / feelings and has no time to lie about it

#### Very questionable – person has plenty of time to think and plan their feelings

### Hillmon = you can prove conduct through feelings (i.e. people act in accordance with their SoM)

## CASES

###### Lawal

#### FACTS

##### D coming into USA with suitcase with false compartment with diamonds inside

##### Gets caught and says: “I am so angry, I’ve been set up”

#### HELD

##### Admissible – regardless of the time he had to think about it and to fabricate, the Rule allows its admission because it is not concerned with propensity to lie

###### Adkins v Brett

#### FACTS

##### Tort of interference with marital relations was an offence

##### Must prove P was totally alienated of affection and that D intended to interfere with relations

##### P testified to having conversation with his wife and she said: “I hate you because I met Brett who is better than you in every way”

##### P offered statement as to her state of mind

##### Brett argued that should only admit the feeling of “I hate you” and redact rest

#### HELD

##### Admissible subject to limiting instruction – undertook 403 analysis and found that any danger of prejudice of admitting reasons for her feeling of hatred could be cured by instruction

###### Hillmon

#### FACTS

##### Insurance case

##### Collecting life insurance of husband – he died on a camping trip in Colorado

##### Insurance company said this was an insurance scam and that he didn’t die in fire but they used another person Walters who died

##### Evidence of a letter from Walters to his wife saying that he was going on trip with Hillmon in Colorado – offered to show Walters’ state of mind

#### HELD

##### Admissible – letters show the intention of Walters and therefore it is acceptable to use state of mind evidence to show action

###### Stager

#### FACTS

##### Wife shot husband through head in their bed but said did so accidently

##### They were robbed before, so he slept with gun under his pillow

##### She would take gun from under his pillow every night and then returned it before he woke

##### One night she put it back and he flicked it (had no safety on) and shot him in head

##### P has statement from him on cassette with title “read this if I die” – said he was scared she was going to kill him, and she had another lover

##### P wanted to show that it was implausible that he would sleep next to her with a gun under his pillow if she was going to kill him

#### HELD

##### Admissible – showed his state of mind and passed 403 test (DC says very close – he thinks PV is minimal and PE is high)

###### Example Case 1

#### FACTS

##### Brother sitting in chair in home and shot in the back of the head

##### D is accused and concedes he had a bad relationship with brother and that he did not like him AND he did not care he was dead BUT did not kill him

##### P wants to adduce statement that he thinks brother trying to kill him

#### HELD

##### Inadmissible – no dispute about the victim’s conduct (he was just sitting in a chair)

###### Example Case 2

#### FACTS

##### D charged with murdering V. They were business associates. D says “I did shoot V but not with intent to murder”, as V just invited me over on Friday night to cement relationship and we were cleaning gun collection together. But then tragic accident.

##### P responds with statement of V two days prior saying “I am really afraid D is going to kill me because drug deal we did went sour”

##### P wanted to adduce to show fear and prove V would not have gone over to clean guns

#### HELD

##### Admissible – probative to rebut D’s account

###### Larry

#### FACTS

##### Larry tells a friend that he is going to a parking lot to meet man called Angelo

##### P wants to adduce statement to prove that they met in parking lot

#### HELD

##### Admissible to say that he went to parking lot BUT rest is inadmissible as it is complete hearsay

##### Different from Hillmon because being used to show both the Dec’s conduct and another person’s (Angelo) conduct – problematic because speaking about another person’s state of mind

##### NOTE: position is very different in the 2nd Circuit per *James* below

###### People v James

#### FACTS

##### MTA employee wanted to get promoted

##### Took a test – got a perfect score along with others

##### Grand jury empanelled to investigate

##### Alleged that Charles leaked the exam at a party held night before

##### Impugned statement = “Answers were leaked at Charles’ party, and James was at it”

##### James called and asked if at party on that night, said no

##### James tried for lying to grand jury

##### Corroborating evidence of a statement where James was told that his friend was going to the party, and James took test again and only got 78

#### HELD

##### Admissible – statement was corroborated

###### Shepherd

#### FACTS

##### Shepherd accused of killing wife by poisoning her

##### Statement from wife to maid: “I feel really sick now, Dr Shep has poisoned me”

##### Went to SCOTUS – all previous courts held admissible

##### Not admissible as a dying declaration b/c she did not die until 4 days later

##### P argues it should be admitted under state of mind exception (NOTE: you can do this on appeal – it does not matter which exception it falls in, because the jury is not told this, the evidence is simply admitted – so to save a retrial the appellate court will consider on another basis)

#### HELD

##### Argued on two bases, but was inadmissible for two reasons:

##### When argued to prove Shepherd’s conduct, it was inadmissible because it was backward looking

##### When argued to prove wife’s fearful state of mind, it was inadmissible under 403 because it was backwards looking AND had low PV (did not prove that he committed the offence) and high prejudice

##### Also because it was on appeal, no possibility of giving limiting instruction

# STATEMENT FOR MEDICAL DIAGNOSIS OR TREATMENT [803(4)]

## REQUIREMENTS

### Statement made to anyone providing medical diagnosis / treatment (need not be a Dr) [***Davignon***]

#### EG: statement made to a social worker about child abuse and MH problems arising from that

#### CAN be statements made to litigation doctors (e.g. where Dr is seen for purpose of litigation)

##### Because rule does not draw any distinction between types of doctors

##### BUT will be able to XX the Dr and jury will likely discount hearsay

### Statement describes [**803(4)**]:

#### Medical history

#### Past or present symptoms or sensations

#### Inception of symptoms or sensations

#### General cause of symptoms or sensations

### NOTE: CAN be in relation to treatment of third party (e.g. statement from GF about BF in ***Cook***)

#### Must scrutinize the motive of the Dec at the time – case by case assessment

#### EG: statement made by parent on behalf of third party child for purposes of treatment relating to that child’s abuse by parent unlikely to be admissible

#### EG: statement by sister to social worker that P was a pathological liar was pertinent to the P’s psychological treatment [***Wilson v Zapata***]

### Statement is reasonably pertinent to medical treatment or diagnosis [**803(4); *Rock***]

#### IE: is information necessary to the provision of the treatment?

##### Doctor’s evidence often required to determine this Q (i.e. Dr would you want to know about this info before providing treatment?) [e.g. in ***Rock***]

##### EG: person is being diagnosed for depression and is given information about wife being scared of her husband attacking her, then this is pertinent

#### NOTE: attributing fault (e.g. *John* punched me), suggesting causation (e.g. my back hurts b/c I slipped on ice at a poorly maintained bus stop) or adding description (e.g. hit by *speeding* car) in such statements is generally inadmissible – additional info is not pertinent [***Ortega***]

##### IN SUCH A CASE, just the offending additional information is excluded, not the whole statement (e.g. hit by car)

##### BUT sometimes it is pertinent to ID a perpetrator – enables more fulsome treatment

##### EG: ID in domestic child sex abuse cases – allows assessment of mental health which is often deeply affected by ID of perpetrator and prevents child being sent back home with perpetrator [***Yazzie***]

##### EG: ID in spousal abuse cases – same rationale as child abuse

##### EG: ID in adult sex abuse cases – goes to treatment of STDs

### NOTES:

#### If there is a medical record or report which does not include a statement from the Dec, then it is usually admissible as a business record under 803(6)

##### EG: patient taken to hospital after car crash and they do a toxicology report. Admissible as a business record

#### Unlikely to include WebMD search – although be careful

##### BUT it may include emailing a doctor

#### Be careful with psychiatrists – everything could be relevant SO need to scrutinize reliability

##### Ensure that it is not fantastic

## POLICY

### Statements made to medical experts are often reliable because of the context (i.e. patient has motive to tell the truth to ensure proper treatment / diagnosis)

### Often arises where a person speaks to their doctor about the reasons for their injuries or condition

#### Easy case is a medical history given to a doctor for diagnosis OR treatment

#### Also arises often in child sexual assault / domestic violence / sexual assault cases

## CASES

###### Cook

#### FACTS

##### P falls off from a balcony and sues landlord for having poorly maintained bannister

##### Landlord alleges that he was playing around with friend on balcony and was thrown over

##### Statement from girlfriend to paramedics saying that ‘he was playing around with friend and got thrown over’

##### Dr called and gave evidence that he would not care (in providing treatment) about whether P was thrown or fell because it was so high (injuries the same)

#### HELD

##### Inadmissible – Dr’s evidence led to conclusion that statement was not pertinent

##### Although court held it didn’t matter that statement was made about a third party (i.e. BF) – rule was not so limited

###### Rock

#### FACTS

##### P said to doctor that on boat, fell through rusty grate and then twisted ankle on oil

##### Doc asked during the trial if wanted to know about oil as reason for twisting ankle – said he didn’t care it was not pertinent

#### HELD

##### Inadmissible – not pertinent (DC says this is very debatable conclusion – relies on Doc)

###### Ortega

#### FACTS

##### O was running sex ring

##### One of the women was brought to hospital and said Ortega forced her to smoke crack

#### HELD

##### Smoking crack and being forced to do it (changed the treatment – i.e. treat an addict differently to another) was admissible, but not that she was forced by Ortega, as this was not pertinent to treatment

# RECORDED RECOLLECTION [803(5)]

### Used where W has an imperfect memory about a matter that occurred in the past, and the record is used as evidence of that matter

#### Often occurs when a PO files a report about a confession, cannot remember, then provided with record to refresh their memory

## REQUIREMENTS

### Person who made the record must be available to testify

#### This does make it a good fit for 803 exclusions – as others do not care about availability

### Record was about a matter W once knew about (but now cannot recall well enough to testify fully and accurately) [**803(5)(a)**]

#### Need to prove they actually had awareness of the record and that it was accurate at the time of making it

#### Do not need total memory loss, as the record can simply be used to fill gaps

### Record was made or adopted by W when the matter was fresh in W’s memory [**803(5)(b)**]

### Flexible standard – usually easy to prove, unless record prepared for litigation

#### W need not have drafted whole document, as sufficient for them to have reviewed or to have analyzed the document for accuracy

### Record must accurately reflect W’s knowledge [**803(5)(c)**]

#### If W states record does not accurately reflect memory, then it is inadmissible

## PROCEDURAL REQUIREMENT

### If admitted, record may be read into evidence but only received as an exhibit if offered by an adverse party (i.e. parties must agree) [**803(5)**]

#### Prevents record being given more weight than other trial testimony – as jury does not get the transcript of the trial testimony

##### NOTE: jury not given transcript because of danger of them focusing on a specific part of the transcript and not considering all of the evidence

## ENGAGEMENT OF 612

### When record is used to refresh recollection, opposing party can inspect and cross-examine the W about the record, and introduce into evidence any other portion of the record [**612(2)**]

## POLICY

### Reliability ensured by XX W about their failure to remember the record, or inconsistencies between record and recollection

# RECORDS OF REGULARLY CONDUCTED ACTIVITY (BUSINESS RECORDS) [803(6)]

## REQUIREMENTS

### Record of an act, event, condition, opinion, or diagnosis [**803(6)**]

#### Can be made by a company (through employees) or individual

### Made at or near the relevant time by (1) someone with knowledge OR (2) from information transmitted by someone with knowledge [**803(6)(A)**]

#### IE: record keeper does not need personal knowledge of what they are recording

#### Duty to report problem arises here (see below)

### Record kept in course of a regularly conducted activity of a business, organization, occupation, or calling [**803(6)(B)**]

#### Looking for whether it was typical / routine for records of that activity to be kept

#### DOES NOT need to be for profit

#### DOES NOT need to be a business or company (i.e. can be individual)

##### EG: includes prison fights log book, medical records, personal activity when proving truth of event but NOT self-serving info, one off records of events

### Regular to record the regularly conducted activity (i.e. no one-offs, or sporadic recording) [**803(6)(C)**]

#### EG: organization has record-keeping system set up for the activity

#### NOT self-serving reports created in anticipation of litigation (see below)

### Above conditions are proven by testimony of custodian or another qualified witness OR by a certification that complies with 902(11) or (12) or a statute permitting certification [**803(6)(D)**]

#### Only needs to be a person with knowledge of process/procedure for creating + maintaining the records AND can testify about the above conditions [***Franco; US v Lauersen***]

##### IE: does not need to be the person who made the record but needs to know process

### Opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness [**803(6)(E)**]

#### See areas below

## FOUR POTENTIAL AREAS OF UNTRUSTWORTHINESS

### Information/reports from outsiders given to the record keeper (duty to report problem) – b/c Outsider has no duty, as not within the business structure

#### Likely inadmissible unless outsider had a duty to report

##### Multiple hearsay problem – need to worry about whether info itself is reliable and whether each level of transmission of information is reliable

##### EG: bare statement of a bystander which is recorded is unlikely to be trustworthy without additional verification

#### Solutions to the problem:

##### Prove outsider had a duty to report accurately

##### Verification of the source or the information (e.g. ***Vigneau***)

##### EG: prove reliable transmission of the evidence kept in the records

##### EG: ID verification problems are easily proven where a person shows ID (e.g. for gun sales or for specific types of medicines) or GOV regulations require ID – but need to be careful, because some IDs are fake

##### Do not offer it for the truth of the record

##### EG: ***Cestnik*** – money laundering prosecution. P introduced evidence that D used certain aliases and Western Union records showing money sent using those aliases. NOT used to prove D made the transfers, but as circumstantial evidence linking those false names to the transfers (i.e. for identity purpose).

### Bad motivations = when records are produced in anticipation of litigation (especially by persons engaged by the proponent) and favor the proponent, then unlikely to be admitted

#### Bias / improper motives make it unreliable

#### EG: report of investigators into an accident, that were engaged by a defendant company, as in ***Palmer v Hoffman*** (accident reports are by nature anticipatory)

##### BUT pre-accident reports are admissible (because no prospect of litigation) AND post-accident reports which disserve the preparer are admissible [***Yates***]

### Opinions = where opinions are contained in records

#### Burden is on the opponent to prove unreliability of the opinion – use the rules relating to the admissibility of expert evidence (see notes above on **701-703**)

##### EG: patient hospitalized and doctor treated him and filed a report. Doctor diagnosed with mesothelioma. D wanted to say this was untrustworthy as could not diagnose mesothelioma in such a short time. Inadmissible – fails Daubert test – takes much longer to diagnose mesothelioma, so unreliable

### Electronic records – generally immaterial that record is electronic than on paper, just needs to meet requirements above [***U-Haul v Lumbermens***]

#### BUT alteration or corruption of electronically stored evidence poses issues (need some initial indication that it might not be trustworthy)

#### ONLY need to show the path of production of the electronic evidence – do not need to get into software part – although sometimes may need to / desirable

## POLICY

### Routine and the regularity manufacture reliability

### Organizations and people have an incentive to keep accurate records

## CASES

###### Palmer v Hoffman

#### FACTS

##### Train accident – after accident the company sends out investigators

##### Investigators find no problem in their report

##### Report is offered as a business record

#### HELD

##### Inadmissible – bad motivations indicate a lack of trustworthiness [803(6)(E)]

###### Vigneau

#### FACTS

##### V was accused of drug dealing, receiving numerous Western Union transfers that stated his alleged address, phone and name “Patrick Vigneau”

##### WU had no method of verifying recipient (e.g. requiring photo ID)

##### P proffered it as a fact to prove PV was the recipient, but did not prove that the form was filled by PV or that he was the person actually receiving the money

#### HELD

##### Inadmissible – failure to verify – can only admit record to prove recipient picked up the cash not that sender was the one who signed the form (i.e. could be forged)

# ABSENCE OF A RECORD OF A REGULARLY CONDUCTED ACTIVITY [803(7)]

## REQUIREMENTS

### If proving a matter did not occur or exist, may adduce evidence that the matter is not included in a record described in 803(6) if:

#### a record was regularly kept for a matter of that kind AND

#### opponent does not show that the possible source of the information or other circumstances indicate a lack of trustworthiness

### NOTE: often done by simply admitting a record under 803(6) and then showing it does not contain information about the relevant matter

###### Example Case

#### FACTS

##### D has a car from Hertz lot and charged with stealing it. D alleged he rented it

##### P asked for rental agreement

##### D said he never had it

##### P wanted to call a W who would testify there was no record of him having rented the car in the Hertz records kept

#### HELD

##### Admissible – records regularly kept and nothing to show untrustworthy

# PUBLIC RECORDS [803(8)]

## REQUIREMENTS

### Record or statement of a public office [**803(8)**]

#### Often proven by seal authenticating the document under **902**

### Record or statement must set out either:

#### Public office’s activities [**803(8)(a)(i)**] OR

#### Matter observed while under a legal duty to report [**803(8)(a)(ii)**] OR

##### NOT INCLUDING, in a criminal case, a matter observed by law enforcement personnel [***Oates***] EXCEPT where law enforcement report is prepared WITHOUT any *anticipation of litigation* AND risk of manipulation + untrustworthiness is minimal [***Grady; Dowdell***]

##### AKA the ***Oates*** *v* ***Grady*** problem

##### EG: in ***Grady,*** admitted police report was only recording firearm serial numbers (as routinely occurred), did not contain comments or conclusions (i.e. was bare facts), and was prepared separately from any investigation into Ds (as they had not been identified yet)

##### EG: in ***US v Caraballo***, the admitted I-213 form was just used to catalogue the entry of aliens into USA and was routine, non-adversarial and contained no opinions/conclusions

##### NOTE: if not produced in anticipation, then not testimonial either so no CC issue arises (see below under CC)

##### NOTE: if inadmissible under 803(8) cannot be admissible under 803(6) because it will be untrustworthy as created in anticipation of litigation

##### NOTE: effect is not that the report is inadmissible, but that law enforcement authoring official must be present to give the evidence/report (i.e. report cannot be admitted without the author)

#### In a civil case or against the government in a criminal case, factual findings from a legally authorized investigation [**803(8)(a)(iii)**]

##### Evaluative conclusions and opinions are considered “factual findings” [***Beech***]

##### BUT must test them to ensure they are trustworthy using expert opinion rules (see above on **701-703**) [***Beech Aircraft***] otherwise won’t satisfy 803(8)(b)

##### Also, report cannot be just a bare legal conclusion as unhelpful to jury [***Hines v Brandon Steel***], cannot be a prelim report as it would not contain “findings” [***Smith v Isuzu***] and cannot be revoked or superseded [***Nachtsteim v Beech***]

### Opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness [**803(8)(b)**]

#### Heavy burden to prove untrustworthiness (public records presumed trustworthy)

##### Where raw data, unlikely to be held untrustworthy

#### Same areas of untrustworthiness (as for 803(6)) apply:

##### Outside information – where GOV relies on information from non-GOV sources which is unreliable or unreasonable to rely upon under 703 [***Moss v Ole South***]

##### IE: allowed to make conclusion based on information reasonably relied upon

##### EG: unreasonable to rely on bystanders’ eye-witness information about causation of an airplane crash they saw in the sky

##### Bad motivations – where public body or official drafting the report is subject to some sort of bias which makes it untrustworthy

##### EG: P allegedly injured by PO. Allegation goes to a review board which comprised all POs. Report of review board found that no improper conduct occurred. Held untrustworthy, as board was totally comprised of POs.

##### Opinions – where an opinion is proffered by an unqualified expert or the opinion has a totally irrational or unfounded basis – use rules in 701-703

#### Additional factors:

##### Whether a hearing or lengthy investigation was conducted before report produced

##### Time between investigation and event

##### Time between when investigation occurred and the production of the report

## POLICY

### Presumed to be trustworthy because made by public authorities who have motivations / exist to keep accurate data

### If no exception, onerous for GOV to admit everything under 803(6) – would have to certify each time

#### Also no requirement for activity to be regular under 803(8)

## CASES

###### Beech Aircraft v Rainey

#### FACTS

##### Crash of a military plane, men died and surviving spouses brought product liability suit against the manufacturer and company which serviced the plane

##### P introduced portions of an investigatory report pointing to pilot error – admitted

##### Appeal reversed because 803(8)(C) did not allow evaluative conclusions or opinions

#### HELD

##### Admissible – no proof that conclusions were unreliable or untrustworthy (i.e. if trustworthy, it is admissible for records to contain opinions)

# ABSENCE OF A PUBLIC RECORD [803(10)]

### NOTE: can prove absence by:

#### Introducing public record under 803(8) which shows the absence (see above)

#### Testimony from public official under 803(10) (see below)

#### Certificate from public official under 803(10) (see below)

## REQUIREMENTS

### Admit testimony OR certification under 902 that a diligent search failed to disclose a public record / statement to prove [**803(8)(A)**]:

#### record or statement does not exist [**803(8)(A)(i)**]

#### OR

#### a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind [**803(8)(A)(ii)**]

### If substantial doubt about diligence of search, then inadmissible [***US v Yakobov***]

#### Certificate should at least detail method of search and safeguards to prevent error to satisfy diligence requirement [***Wilson***]

### ONLY criminal, P who intends to offer a certification must give written notice of that intent at least 14 days before trial, and D must not object in writing within 7 days of receiving notice [**803(10)(B)**]

#### Unless the court sets a different time for the notice or the objection

#### IF D objects, then have to provide testimony, not certification

#### NOTE: this absolves CC problems that arise – because the certificate is testimonial

##### IF D does not make objection within time, waives CC right [***Melendez-Diaz***]

##### BUT if D does, have to get public official to testify

## POLICY

### Public records would contain the information – any prejudice cured by XX of the searcher

# ANCIENT DOCUMENTS [803(16)]

## REQUIREMENTS

### Statement in document that was prepared before January 1, 1998 [**803(16)**]

#### Document is "prepared" when the statement proffered was recorded in that document [**Committee Note to 803**]

##### So, amendments made in 2010 to a pre-1998 document will not affect its pre-1998 content, it will only exclude the 2010 additions

##### EG: if hardcopy document is prepared in 1995, and a party seeks to admit a scanned copy of it, the date of prep is 1995 even though the scan was made long after that

### Authenticity of the document is established (unlike 803(18) which requires proof that *authoritative* *publication*) [**803(16)**]

## POLICIES

### Necessity – hard to obtain old documents or evidence generally

### Limited to pre-1998 due to the risk that it will be used as a vehicle to admit vast amounts of unreliable electronically stored information (ESI)

### Older documents are presumably more reliable because less likely to have been doctored to win a lawsuit [***Kraft v US***]

#### Shit policy

# STATEMENTS IN LEARNED TREATISES, PERIODICALS, OR PAMPHLETS [803(18)]

## REQUIREMENTS

### Expert is giving testimony

#### POLICY = need to have expert giving evidence because otherwise it might be hard for jury to understand the content of the document

#### Often used to impeach opponent’s expert (e.g. use a section of a treatise to prove an aspect of their testimony to be wrong)

### Statement contained in a treatise, periodical, or pamphlet [**803(18)**]

#### NOT limited to these three – can be any publication which satisfies requirements below

#### CAN be a video – as a reference to any kind of written material or any other medium includes electronically stored information [**101(b)(6)**]

### Prove the publication (i.e. t/p/p) is a reliable authority [**803(18)(B)**]

#### Through expert’s testimony OR another expert’s testimony OR by judicial notice

### Statement is called to attention of an expert on XX or relied on by expert on DX

## RESULT

### If admitted, statement ONLY read into evidence NOT received as exhibit (i.e. entire publication not read) [**803(18)**]

# RESIDUAL EXCEPTION [807]

## REQUIREMENTS

1. Hearsay statement is supported by sufficient guarantees of trustworthiness [**807(a)(1)**]
	* Consider totality of circumstances in which it was made and corroborative evidence [**807(a)(1)**]

#### Circumstantial factors:

##### Nature of relationship between Dec and person to whom statement was made (e.g. confiding in trusted person such as parent suggests reliable)

##### Capacity of Dec at time of statement

##### Dec’s credibility

##### Dec’s motive to lie

##### Dec recanted or repudiated statement after making it

##### Dec made other consistent or inconsistent statements

##### Dec had personal knowledge of event/condition described

##### Memory impaired due to time lapse between event and statement

##### Statement is clear or vague

##### Statement made under formal circumstances

##### Statement made in anticipation of litigation

##### Statement given voluntarily or in exchange for immunity

##### Whether statement was disserving or not

#### Admitted or admissible corroborative evidence

##### Corroborative evidence must be admissible – but primary evidence and corroborative evidence will often cross-corroborate each other – so this is rarely an issue

##### EG: a statement that is made by an unavailable Dec, and is then corroborated by its inclusion in a number of newspaper articles, both will cross-corroborate, so both admissible

##### NOTE: in crim, no corroboration allowed because must be admissible on its own terms to satisfy confrontation clause

#### ALSO identify other 803/804 exceptions which are relevant and see if the circumstances prove similar trustworthiness

##### Refer to policies of the 803/804 exceptions

##### Near misses – argue that closeness to 803/804 exceptions makes it reliable

##### Stronger where ‘near miss’ on multiple exceptions

### More probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts [**807(a)(2)**]

#### Generally, if Dec is available then their evidence will be more probative [***Larez***]

##### UNLESS reason for them not giving evidence (e.g. child in sexual assault case) or unreasonable to get them (e.g. thousands of consumers defrauded)

#### Alternative evidence must “more probative” NOT “more credible” [***Welsh***]

#### Consider the importance of the evidence, the resources of the proponent and the amount in controversy [***Hal Rooch***]

### Admitting statement will best serve the purposes of these rules and the interests of justice [**807(a)(4)**]

### Notice requirement satisfied

### NOTE: 807 is a rule of necessity – only use it as a last resort – but always argue it (esp. in exam)

## NOTICE REQUIREMENT

### Statement only admissible if, before trial / hearing, proponent gives adverse party reasonable notice of the intent to offer the statement, its substance and Dec’s name [**807(b)**]

#### Must be provided in writing before trial / hearing OR any form during trial / hearing if the court, for good cause, excuses lack of earlier notice [**807(b)**]

### NOTE: therefore, it is hard to adduce under 807 during a trial – need court excusal

## POLICY

### Committee was worried that reliable/trustworthy statements would not be included b/c the hearsay rule is fairly stringent, so they created this exception, based on *trustworthiness*

### Ensures judges do not try to admit hearsay under the other exceptions – as there was experience in blurring the boundaries of other exceptions (e.g. excited utterances) to get reliable / necessary hearsay in

###### Larez

#### FACTS

##### Trial of police officers and city of LA for breaching civil rights during an unauthorized search of Latino man

##### Gates was interviewed by media outside court during trial and then various, varying newspaper statements were quoted to him in newspaper articles the next day

##### Statements were admitted

#### HELD

##### Inadmissible – newspaper statements were not the best evidence that could have been obtained through reasonable efforts to prove what Gates said – could have easily called the relevant reporters

# CONFRONTATION CLAUSE

* Criminal D has right to an adequate opportunity to XX adverse witnesses [**6th A; *Douglas v Alabama***]

#### XX only needs to be adequate – need not be perfect [***Owens***]

## REQUIREMENTS

### Criminal case

### MUST be hearsay [***Street***]

### Dec MUST NOT be giving evidence at trial [***Crawford; Bryant***]

#### If Dec is giving evidence and subject to XX, then CC issue does not arise (XX cures CC issue)

### MUST be testimonial

#### Testimonial = where primary motivation for making statement AT THE TIME was for use in a criminal trial [***Crawford; Clark; Melendez-Diaz***]

##### Objective test – would reasonable person in Dec’s shoes had PM? [***Bryant***]

##### Where there is a convo – must consider both sides’ statements, actions and motivations [***Bryant***]

##### EG: in *Clark* considered both the motivations of the teachers in asking questions and the motivations of the children speaking

##### NOT testimonial where a person does not understand or know about the crim justice system (e.g. child under 3yrs) as they cannot have the primary motivation [***Clark***]

##### Relevant factors

##### Whether statement was made to PO – critical [***Clark***]

##### Where no law enforcement involved VERY UNLIKELY to be for use in trial

##### Ongoing emergency situation is important, but not determinative

##### Where there is, unlikely to be prepared for trial

##### Formality of the circumstances where the statement is made

##### Less formal, less testimonial

##### Location in which statement is made

##### At a crime scene might suggest emergency, while afterwards at police station would suggest for use in trial

##### Medical condition of the Dec

##### If just wounded or about to die, then statement likely to be for assistance or treatment, not for use in trial

#### Affidavits / certificates relating to reports and records are almost always testimonial (because prepared for trial) so raise CC issue [***Melendez-Diaz***]

##### Requires certifier to appear in court for XX (onerous rule) – used as a tactic by opposing party

##### NOTE: where original conductor of a test / drafter of record is unavailable, then can redo test and call conductor, or get another person to testify to how usually conducted

## RESULT

* Either the witness is presented for XX (i.e. gives D right to XX), or the evidence is inadmissible

## POLICY

### Prevent witnesses from being deposed and then their evidence admitted without XX (i.e. out-of-court substitute for in-court testimony)

### NOTE: CC problem goes to SCOTUS often where state courts have overly broad interpretations or applications of their state hearsay rules

#### EG: where there is ridiculous use of the excited utterance exception, then CC is used to argue for exclusion of evidence, as in ***Hammond***

# RIGHT TO FACE TO FACE XX

## RULES

### D has a constitutional right to face to face confrontation [***Coy v Iowa***]

#### NOT a right to virtual face to face

### BUT legitimate state interest may outweigh individual right to face to face [***Craig***]

#### NOT just convenience

#### Often need expert evidence to prove legitimate interest

#### EG: state interest in protecting victims from trauma as in *Craig*

## COMMENTS

### Be careful with measures used to balance right to F2F with state interest

#### Problems may arise from “badge of guilt” such as where cone placed over head because jury may then think D is guilty

#### MUST be reasonable given the situation / state interest (balance the state interest and the right to face to face) – e.g. measures used in *Craig* were reasonable

### For self-represented Ds

#### Where there is a legit state interest which prohibits face to face, court appoints counsel for the D, who will XX the W while the D goes into another room and watches via video

### Very hard to use videoconferencing – right is not virtual – so need to prove state interest

#### EG: where star witness is pregnant and cannot travel, cannot just use video – because there are other alternatives such as delaying the trial or getting D to go to where the W is so that there is face to face (and jury would see via videoconference)

##### NOTE: can make the D move to location of the W to ensure face to face – right is for the D, not the jury

# CONFRONTATION ISSUES IN HEARSAY RULES

## NOT HEARSAY [801(a-c)]

### NO CC ISSUE – not hearsay – CC does not bar using statements for purposes other than truth [***Cr; Street***]

## PRIOR STATEMENTS OF TESTIFYING WITNESSES [801(d)(1)]

### NO CC ISSUE – evidence admitted under that section is subject to XX

## OPPOSING PARTY STATEMENTS [801(d)(2)(A-B)]

### VERY UNLIKELY TESTIMONIAL – made by D so no need to confront D

## OPPOSING PARTY STATEMENTS [801(d)(2)(C-D)]

### UNLIKELY TESTIMONIAL – agents / employees etc. are unlikely to be aware of upcoming litigation but could be

#### ALSO might be a situation where employee is making a statement on behalf of their employer (e.g. dobbing in) where primary motivation is for use in criminal trial

## OPPOSING PARTY STATEMENTS [801(d)(2)(E)]

### VERY UNLIKELY TESTIMONIAL – primary motivation is furtherance of conspiracy not for use in trial

## PRIOR TESTIMONY [804(b)(1)]

### NO CC ISSUE – the W was subject to prior XX by D [***California v Green***]

## DYING DECLARATIONS [804(b)(2)]

### UNLIKELY TESTIMONIAL – depend on the circumstances BUT even if they are testimonial they are admissible

#### Held to be exception to protection of CC clause b/c of common law history in cases such as cases such as ***Mattox*** and ***Houser***, respected by dicta (footnote 6) in ***Crawford*** and later affirmed by SCOTUS in ***Giles v California***

#### After ***Crawford***, lower courts have just admitted testimonial declarations as exceptions to CC

## DECLARATIONS AGAINST INTEREST [804(b)(3)]

### NEVER TESTIMONIAL – primary motivation is the disserving purpose, not for use in a criminal trial (Dec likely would not say it, if Dec knew it was going to be used in a trial)

## FORFEITURE [804(b)(6)]

### NO CC ISSUE – if it is proven D intended on BoP to keep W from giving evidence (same as for (b)(6) intent requirement) then also forfeit right under CC [***Giles***]

## PRESENT SENSE OF IMPRESSION [803(1)]

### UNLIKELY TESTIMONIAL – no time to consider or be motivated by use in criminal trial – even where statement is directly made to PO (although it could be)

#### EG: the gun used is over there, primary motivation is to have gun picked up removed

#### EG: describing a crime as it occurs or just occurred, primary motivation is to stop the crime

#### EG: POs making statements to each other on walkie talkies about running through a crime scene, primary motivation is to co-ordinate an effort to investigate a crime (not to generate evidence for a criminal trial)

## EXCITED UTTERANCES [803(2)]

### NEVER TESTIMONIAL – motivation is for the emergency, not for use in trial

#### Thing that makes it admissible makes it non-testimonial

## STATE OF MIND [803(3)]

### UNLIKELY TESTIMONIAL – people do not express state of mind for purposes of a criminal trial, generally informal situations (e.g. unlikely to express to a PO, which is where CC is generally engaged)

#### BUT consider why the statement was made and how formally it was made/recorded – “if I die, prosecute my wife” – likely testimonial, especially if recorded by lawyer

##### EG: ***Kimes***. A lady owned a building, and met a man who lived with her. Deed was signed over to man. Lady went missing. Investigation revealed before disappearance she said to her friend that “I do not like that guy, he is creepy and I want him out of my house” and “I never want to leave this house”. Man argued that it was testimonial. Held it was not – no thought about criminal trial.

##### EG: ***Stager hypothetical.*** Cassette says “This is to police for use in a criminal trial. I fear my wife is going to kill me”. This is tricky. Could be not testimonial because it was not given directly to law enforcement (stronger argument). But also, could be argued to be testimonial because of the way it has been phrased (weaker argument).

## MEDICAL TREATMENT OR DIAGNOSIS [803(4)]

### NEVER TESTIMONIAL – motivation is for medical treatment or diagnosis

#### Again, the thing that makes it admissible makes it non-testimonial

## PAST RECOLLECTION [803(5)]

### NO CC ISSUE – person must take the stand and is subject to XX

#### EG: D makes a confession and PO records it. It is offered as past recollection, then D is called and XX. So, no CC issue

## REGULARLY RECORDED ACTIVITY [803(6)] (CONSIDER RECORD + CERT. SEPARATELY)

### NEVER TESTIMONIAL – prepared as records, not for use in criminal trial [mentioned in ***Crawford***]

#### EG: P wants to admit manifest of a United flight to a country without extradition treaty with USA, on which D was travelling. P wanted to show attempted flight and consciousness of guilt. Offered as business record and admissible. D argued testimonial, but court held that was not testimonial and was for purpose of keeping records. D also argued that time for assessment of primary motivation was time of transmission, but court held relevant time was the making of the record.

#### EG: patient taken to hospital after car crash and they do a toxicology report. Admissible as a business record, but not testimonial as the purpose was to assess and treat the patient.

### BUT the certification of record may raise issues

#### Where it is just a plain certification then no CC problem because they just authenticate an underlying document

#### BUT where a certification is used to prove a fact (e.g. summarize parts of a report and then used a fact of that) then it is testimonial and CC problem arises

## PUBLIC RECORDS [803(8)]

### UNLIKELY TESTIMONIAL

#### Big issue is PO reports – use the line between Grady and Oates – it also determines whether testimonial or not (b/c it looks at the PO’s motivation for preparing)

#### Issue is autopsy / forensic reports – hard to determine, must scrutinize facts

##### If prepared by an outside agency, not PO, then unlikely to be primarily motivated for use in crim trial – and vice versa

##### If just used to determine cause of death and not to investigate crime, then unlikely to be primarily motivated

## ABSENCE OF PUBLIC RECORD [803(10)]

### UNLIKELY TESTIMONIAL

#### Issues arise from how absence of public record is proven

##### If just adduce the records = unlikely testimonial

##### If record checker checks the records and gives evidence about absence = testimonial but doesn’t violate CC as person available for XX

##### If record checker files affidavit / certificate saying they looked for the record but it was absent = testimonial b/c prepared for trial AND violates CC as not available for XX

##### Checker needs to be called pursuant to the process in **801(10)** – if D does not object within 7 days after notice, then waive CC right

## ANCIENT DOCUMENTS [803(16)]

### UNLIKELY TESTIMONIAL – elapse of time makes it hard to prove primary motivation

## LEARNED PUBLICATIONS [803(18)]

### NEVER TESTIMONIAL – prepared for education not trial

## RESIDUAL [807]

### Dramatically altered by Crawford – changed application of exception in two categories of cases:

#### Grand jury testimony: it is testimonial and therefore no longer admissible

#### Confessions in multiple defendant trials: confession of one co-accused cannot be used against the other where they are being jointly tried and confessor is not subject to XX (often do not give evidence in trial) [***Bruton*** doctrine]

##### POLICY = limiting instruction insufficient to protect CC right of co-accused who did not confess (but can be used against confessing co-accused because no right to confront themselves)

### Solutions to Bruton problem

#### Separate trials for each co-D

##### Rarely used because it is resource intensive for P and gives unfair advantage to second tried because they see the case against first tried

#### Separate juries for each co-D (same evidence but one jury for each D)

##### Rarely used because it is extremely difficult to manage evidence and ensure that

#### Redaction of confession can be sufficient where:

##### There is a change of the D’s name to a neutral pronoun (e.g. A and “another man” were in the car, as opposed to A and B)

##### This works EVEN IF D puts themselves in a situation with the confessing co-accused so it makes the redaction ineffective (e.g. confession about drive by shooting, and D gives evidence they were in the car, no Bruton problem b/c positive act of D)

##### There is more than two co-accused and the name of the relevant D is excluded from the confession [***Marsh***]

##### This works EVEN IF D puts themselves in a situation (as above)

##### CANNOT just redact the name of one co-accused in the confession and fill it with a blank [***Gray***] – because jury will easily infer

#### Bench trial

##### Judges trusted to follow limiting instruction

###### Crawford

#### FACTS

##### D accused of stabbing man who he thought tried to rape his wife

##### Wife made a statement to PO which was recorded and played to the jury

##### Wife was never called to give evidence

##### D asserted that that violated his right to confrontation

#### HELD

##### Violated right to confrontation

###### Street

#### FACTS

##### Strett and Peele both charged with committing murder

##### Both confessed – Peele implicated Street in the confession

##### They were being tried separately

##### Street challenges his confession – alleged he was pressured to confess by PO

##### Street alleges confession was copied from Peele’s

##### Peele’s confession was offered not for truth of content of the confession, but just to show that confessions were different and not copied

#### HELD

##### Admissible – not offered for the truth of confession, was offered to prove that it was not copied so no CC issue (no need to XX)

###### Bryant

#### FACTS

##### Court admitted statements that the victim made to PO’s who discovered him mortally wounded in a parking lot

##### Lower courts held this to be testimonial because made to POs and violated CC

#### HELD

##### Admissible – primary purpose of the discussion and the statement was to enable police assistance to meet an ongoing emergency

##### Victim identified and described the shooter and shooter’s location to enable police investigation, not for trial

###### Clark

#### FACTS

##### D was the pimp of a woman, who had two children

##### D sent her to DC, and the children stayed with D in Ohio

##### D abused the children while she was gone

##### Children made statements about the abuse and that it was performed by D to preschool teachers

##### D said the introduction of this evidence by P violated his CC right as the statements made to the teachers were testimonial

#### HELD

##### Not testimonial – objective test – on one hand the teachers wanted to protect the children and ensure they were safe, and on the other, the children were too young to have primary motivation for use in criminal trial – convo was also spontaneous and informal as it occurred in the lunchroom

###### Melendez-Diaz

#### FACTS

##### MD was arrested while making a cocaine sale in a parking lot in Massachusetts

##### At trial, P introduced affidavits of lab technician who tested the bags alleged to have been distributed by MD and identified them as cocaine

##### MD argued introduction of certificates violated CC

#### HELD

##### Testimonial and violated CC – plainly prepared for purposes of trial – needed to call lab technician who certified

##### Affidavits fell within "core class of testimonial statements" covered by CC

###### Williams

#### FACTS

##### Forensic analyst gave expert evidence based on a DNA report that another forensic analyst wrote

##### P argued that assuming report was testimonial, then solved CC problem by calling an expert to evaluate the report written by the analyst to verify reliability of

#### HELD

##### NO rule of law arising because 4-1-4

##### Most limited agreement as per ***Marks*** toestablish the principle BUT there was only agreement on result so no rule of law arising

##### Thomas concurrence (1)

##### The report needed greater formality to be admissible – it was not certified and therefore it was not testimonial

##### Alito plurality (4)

##### Report was not testimonial because it was not primarily motivated for use in crim trial *of the D*, because they did not know about the results that would come at time of testing

##### Establishes the targeted individual test – testimony must be primarily motivated by use in the *specific D’s trial*

##### Kagan dissent (4)

##### Holds that it was not testimonial

#### NOTE: REMAINING DISPUTE

##### Whether the testimony needs to be targeted to the criminal trial of the particular D

##### Kagan and Thomas say it doesn’t need to be, but Alito says it does

##### Unresolved, Circuits applying different interpretations

##### GENERALLY:

##### Formal forensic reports are testimonial (even Thomas agrees with this)

##### Informal are not – need to call the author (although debate – only Thomas is worried about formality)

###### Example 807/CC case

#### FACTS

##### D target of grand jury

##### W testified to bad things not produced at trial but unavailable to give evidence

##### Grand jury testimony cannot be admitted under hearsay exception but viewed as reliable because given under oath so admitted under 807

#### HELD

##### Inadmissible – Crawford changes the situation and excludes evidence because it is testimonial

###### Example 807/CC cases

#### FACTS

##### Hells angels holding pledge drive, and as part of this hold ceremony where they shoot into a well at a person

##### Hit person and dies

##### Two men tried for murder

##### W gives evidence in trial against one, but unavailable for trial of the other co-accused

##### Testimony admitted under 807

#### HELD

##### Inadmissible – after Crawford, the evidence is testimonial and need to confront W

###### Bruton

#### FACTS

##### Bruton and Evans charged with crime and tried together

##### Evans makes a confession to police which is offered in the trial

##### Offered for its truth ONLY against Evans (not against B to avoid CC problem)

##### Evans does not testify so no XX

##### P says just give limiting instruction so it can only be used against Evans not B

#### HELD

##### Inadmissible – limiting instruction did not succinctly protect B’s CC right

###### Marsh

#### FACTS

##### Three people involved in crime but only A and C tried together

##### A made a confession referring only to him and B (who was not being tried)

##### Confession adduced at trial under 807 but was redacted to remove all references to C

#### HELD

##### Admissible – redaction was sufficient and only needed limiting instruction as jury would speculate whether C was present (unlike if it were two Ds, where it is obvious who the redacted person is)

##### ANOTHER issue arose as Marsh gave evidence which put herself in situation with A. Court held this did not rule out the evidence as it was a positive act of the A

###### Coy v Iowa

#### FACTS

##### Involved sexual assault of a minor

##### Minor gave evidence, with a black screen placed over the accused head so minor did not have to see him

#### HELD

##### Inadmissible – this evidence violated the CC as it required face to face visibility OVERTURNED in ***Craig*** which held that so long as state interest > indiv right to face-to-face, no CC issue arises

##### This is a qualified right that has been expanded to apply to terrorism prosecutions too

###### Craig

#### FACTS

##### Sexual assault case

##### Minor testifying that assaulted by D – P presented expert testimony that if girl would testify in D’s presence then she would be traumatized

##### MA state procedure required D to be escorted to another room where he could confer with defense counsel – he would see her but she would not see him

#### HELD

##### OVERTURNED ***Coy*** – constitutional right is balanced against legitimate interest of the state in protecting the W from trauma

Competency Rules

# WITNESS COMPETENCY [601]

### Every person is competent to be a W unless Federal Rules provide otherwise [**601**]

#### Presumption of competence – exclusion is very rare (leave it to jury to determine credibility)

### IN CIVIL cases, state law governs W competency regarding a claim or defense for which state law supplies the rule of decision [**601**]

# WITNESS OATH OR AFFIRMATION [603]

### Before testifying, W must give an oath or affirmation to testify truthfully in a form designed to impress that duty on W’s conscience [**603**]

#### IE: W must meaningfully affirm they understand the weight of their testimony and assure Court they will tell the truth

### MUST inform W of consequences of perjury BUT no prescribed form of the oath / affirmation

#### If they do not understand consequences of perjury, they are not permitted to testify

##### EG: cleverly worded oath like “I won’t lie to stay of jail” will not be enough, as opens possibility W could lie for other reasons – must alert to perjury

#### BUT if someone has a religious or other legitimate objection to swearing or affirming, judge needs to permit them to do it in their own way

# JUROR COMPETENCY AS A WITNESS [606(b)]

## RULE

### Juror CANNOT, in an inquiry into validity of a verdict or indictment, testify about [**606(b)(1)**]:

#### Any statement made or incident that occurred during jury’s deliberations

##### Includes their internal emotions or mindset [***Ruggiero***] and juror explaining their personal life experiences to other jurors (e.g. how to use computers or understanding of law enforcement) [***Warger; Budziak***]

#### Effect of anything on that juror’s or another juror’s vote

#### Any juror’s mental processes concerning the verdict or indictment

### NOR can court receive affidavit or other evidence of a juror’s statement on these matters [**606(b)(1)**]

### NOTE: prohibition on testimony above also applies to any inquiry into the voir dire for selecting jurors (e.g. to prove they lied on voir dire) [***Warger***]

## EXCEPTIONS

### Juror CAN testify about whether [**606(b)(2)**]:

#### Extraneous prejudicial info was improperly brought to the jury’s attention [**606(b)(2)(a)**]

##### Fact of influence is admissible, but NOT the impact of that influence on juror

##### Can be proven via affidavit

##### EG: reading newspaper account of trial, searching on internet

#### An outside influence was improperly brought to bear on any juror [**606(b)(2)(b)**]

##### EG: if juror was bribed, threatened, or read material they were not supposed to read

#### A mistake was made in entering the verdict on the verdict form [**606(b)(2)(c)**]

##### Clerical error in entering verdict on form, jurors can be asked on what they meant

##### EG: comma instead of decimal in damages award

##### DOES NOT cover jurors failing to listen or misunderstanding instructions

### NOTE: can only testify about the FACT of external matter, NOT its IMPACT on a juror [**606(b)(1)**]

### Racism exception

#### Juror can testify about a juror making a clear statement indicating that juror relied on racial stereotypes or animus to convict a D in a criminal case [***Pena-Rodriguez***]

##### Statement must be about the D (e.g. racist statement made by one juror to another, even if they are of same race as the D, is not subject to *Pena* exception)

##### Consistent with 6th Amendment right to fair trial in criminal cases

#### NOTE: lower courts held since *Pena* that only clearly racist comments are covered by *Pena* and it does not extend to anything else (e.g. sexism or disability or age)

## COMMENTS

### Applies in both civil and criminal cases

### Jurors deemed incompetent to testify about all “internal” matters

#### EG: what occurs inside the deliberation room, such as:

##### Threats among jurors, intoxication, inattention

##### Voting for conviction because extended deliberation would shorten vacation [***Murphy***]

##### Unfair inferences drawn from evidence or failure by D to give evidence

### Jurors deemed competent to testify about all “external” matters

#### BUT cannot testify about the effect of that external matter on any juror [**606(b)(1); *Simpson***]

#### EG: threats by outsiders, outside research and unauthorized experiments (see below)

### NOTE: lawyers need permission to interview or speak to jurors after a verdict (to prevent juror harassment) BUT jurors can voluntarily speak to lawyers after verdict

## POLICY

### Jurors deemed incompetent to testify about deliberations to protect sanctity of jury deliberations

#### Promotes full / vigorous discussion by assuring jurors that after being discharged they will not be summoned to recount deliberations, nor otherwise harassed by litigants [***Pena***]

### Prevent a slippery slope where everything would be questioned and would never be finality nor stability to verdicts [***Pena-Rodriguez***]

## EXAMPLES

### ***Tanner*** – juror wants to testify that other jurors were partying whole time, hung over and falling asleep during trial. Not allowed to testify – no outside influence, extraneous info or mistake

### ***Castello*** – juror conducted a ballistics experiment during a weekend recess and reported his results to the other jurors. Not allowed to testify – after instructed not to, conducted experiment during trial (like googling something related to the trial)

### ***Warger*** – during juror empanelment woman was asked if any family in law enforcement. She said “no”. She was selected as juror. Evidence that in jury deliberations she told jurors about experiences of husband and son in law enforcement. Party argued that should be verdict should be invalidated because juror was a liar and this affected the deliberations. Not allowed to testify – it was still an internal matter, as everything she said occurred inside deliberations room

### ***Pena-Rodriguez*** – in deliberations, a juror expressed a racist comment about the D (he was a Spanish man so committed the offence). Clearly not allowed to testify by 606(b). SCOTUS held that there should be an exclusion for racist statements made by jurors, to uphold 6th Amendment.

### Other examples:

#### Juror wants to testify that damages figure drawn out of a hat. Not allowed – all internal

#### Juror threatens another juror: “I’ll kill you if you don’t acquit”. Not allowed – the influence was internal not external

#### Juror wants to testify that she misunderstood death penalty instructions. Not allowed – not a clerical error

#### Death penalty case. Juror told that going to hell if commit D to death penalty. Juror was shaken and rung pastor who said that it was fine to commit D to death. Allowed to testify because improper external influence

# EXCLUDING WITNESSES / SEQUESTRATION [615]

### Where party requests OR where court decides appropriate, court MUST order a W to be excluded (i.e. sequestered) from court so they cannot hear other witnesses’ testimony [**615**]

#### POLICY – prevent W fabricating, colluding or tailoring their evidence

### **615** permits judge to make orders regarding W conduct outside court room to prevent collusion or tailoring between Ws

#### EG: preventing them from talking on internet or phone, or reading a transcript of another W’s evidence

#### Reflects the notion that judges have inherent authority to ensure integrity of proceedings

#### NOTE: debate within courts about whether judge needs to make specific orders about conduct, or just needs to exclude under 615 and this automatically applies to outside conduct

### CANNOT exclude:

#### a party to the proceedings who is a natural person [**615(a)**]

#### an officer or employee of a party that is not a natural person, after being designated as the party’s representative by its attorney [**615(b)**]

#### a person whose presence a party shows to be essential to presenting the party’s claim or defense [**615(c)**]

##### EG: experts

#### a person authorized by statute to be present [**615(d)**]

##### EG: victims of crimes

# MODE AND ORDER OF EXAMINING WITNESSES [611]

## TRIAL CONTROL

### Court exercises control over mode AND order of Ws to [**611(a)**]:

#### Ensure proceedings are effective for determining the truth

#### Avoid wasting time

#### Protect witnesses from harassment or undue embarrassment

### NOTE: extremely broad – gives judge discretion to craft innovative solutions to issues in the case (e.g. dealing with interchange between experts)

### Common usages:

#### To redact or alter parts of statements which are inadmissible (e.g. resolving Bruton issues)

#### To require jurors to submit qs in writing to judge for Ws – qs must be necessary to help jurors understand difficult factual issues (not open slather)

## SCOPE OF XX

### XX CANNOT go beyond subject matter of DX and matters affecting W’s credibility (i.e. impeach) [**611(b)**]

#### IE: must be related to what is asked on DX or to impeach

### EXCEPTION – court MAY allow inquiry into additional matters on XX as if on DX [**611(b)**]

#### Often used by judges to prevent unnecessary argument/squabbling between parties about whether related or not AND undue inconvenience to a W having to be called twice

### POLICY – proposing party has right to control the case they want to put

#### Different to English and Australian systems

### NOTE: if party wants to bring up unrelated line of testimony, must call the W on direct

#### Ridiculous – WTF so inefficient!

## LEADING QUESTIONS

### Court should allow leading questions [**611(c)**]:

#### On XX

#### When a party calls a hostile W OR adverse party OR a W identified with the adverse party

##### EG: to ask about a matter they could not on XX b/c beyond scope of DX

### CANNOT allow leading questions on DX, UNLESS necessary to develop W testimony [**611(c)**]

#### EG: preliminary information about the W’s DOB, employment and experience

### Leading = “if the question contains or suggests the answer, it is leading” [Judge Posner]

#### Often allowed to include info about subject matter of the question (e.g. what did the P say to you when you spoke to them – this presumes a conversation occurred – but allowed)

#### BUT very difficult to ascertain whether leading or not – line is unclear

### CONSEQUENCE OF LEADING – rephrasing the question, which often does not cure the problem during trial as the W already hears the leading statement

#### BUT lawyers can be subject to sanction if continually do this, and judge will often direct jury to listen to W testimony not lawyers’ testimony (i.e. leading)

### POLICY – limitation on only allowing leading questions for XX or adverse Ws is to prevent putting a puppet witness on the stand

Impeachment of witnesses

### Only time at trial when allowed to evaluate people – but limits on it are provided by 608 and 609

# WHO CAN IMPEACH? [607]

### Any party may attack W’s credibility [**607**]

#### Including the party that called the W [**607**]

### CANNOT call a W simply to impeach them (i.e. must have good faith reason to call W) [**607**]

#### CANNOT call witness hoping they’ll tell the truth if you know they aren’t planning to

##### IE: must believe they will testify truthfully

##### May protect against this by:

##### Motion before W takes the stand to have them read in as a voir dire W

##### If prior statement satisfies a hearsay exception and is admissible, can call witness to admit the statement as SUBSTANTIVE evidence, not just for impeachment (e.g. prior inconsistent under 801(d)(1)(A))

#### POLICY – prevents calling witnesses to just bolster credibility or your case

### CAN impeach hearsay Decs ONLY IF you could impeach them if they were called as a W [see **806**]

#### Dec is in effect a W – fair to test credibility like any other W

# WAYS TO IMPEACH

### Attack their character for truthfulness to prove they are lying on the stand

### Introduce a prior inconsistent statement (i.e. statements which conflict with current testimony)

### Introduce evidence that contradicts their testimony (i.e. demonstrate falsity)

### Prove bias (i.e. motive of W to lie)

### Attack capacity (i.e. W incapable of giving accurate account, e.g. because memory impaired)

1 – Impeachment Using Character for Truthfulness

# WITNESSES’ CHARACTER FOR TRUTHFULNESS [608]

## PRELIMINARY QUESTION

### Is the evidence of a conviction?

#### If YES, go straight to 609 which is for convictions

#### If NO, go through 608 below

### NOTE: CANNOT adduce ANY evidence of underlying acts for the conviction under 608

## DIFFERENCE BETWEEN 608(a) and (b)

### 608(a) (calling a witness) allows party to call a second W to attack the credibility of first W

#### Rarely done – not very powerful – no reason to trust the second W

### 608(b) (introducing evidence) allows party to introduce bad act evidence to attack credibility of W

#### More often used – more effective to use evidence of specific acts than another W’s testimony

### NOTE: 608(a) is restrictive and rarely used, whereas rest of 608/609 are broader and better for Impeach.

## CALLING ANOTHER W TO ATTACK/SUPPORT CHARACTER

### W’s character for truthfulness must be attacked [**608(a)**]

### Call another W to give testimony about their OPINION about W’s character OR W’s REPUTATION for having a character for truthfulness or untruthfulness [**608(a)**]

### CANNOT ask about specific/bad acts (i.e. limited to reputation and opinion)

## EXCLUSION OF SPECIFIC/BAD ACT EVIDENCE

### CANNOT use extrinsic evidence of W’s specific/bad acts to attack NOR support W’s character for truthfulness [**608(b)**]

#### EXCEPT when inquiring into a bad act on XX – cannot use extrinsic evidence (see below)

#### EXCEPT where evidence offered for different purpose (see below)

## EXCEPTION – INQUIRING INTO BAD ACTS

### With Court’s permission, XXer can ask a W about a bad act which is probative of character for truthfulness of that W OR another W whose character that W had testified about (e.g. H Dec) [**608(b)**]:

### Bad act need not be criminal [***Bagaric***]

### Must have GOOD FAITH BELIEF that bad act occurred before asking W about it [***Leake***]

#### Just need some indication that it is true

##### EG: P wanted to ask W about them being involved in fraud, after arresting another person where they implicated W. Admissible as GF basis. Also, Crawford does not apply because the question is not evidence so no CC issue.

#### POLICY – prevents a fishing expedition and unfairness

### Conduct **403** analysis to determine if admissible

#### Probative factors:

##### Whether act involved lying (higher PV)

##### Importance of the credibility in context

##### Availability of other forms of impeachment

#### Prejudice factors:

##### Similarity of bad act to crime charged

##### Nature of the bad act (some more prejudicial such as abusing women)

#### EG: drug use, prostitution and litigiousness (***Hemphill***) typically excluded to impeach character for truthfulness as low PV

### CRITICAL = if XXer is going to ask a W about their truthfulness, CAN ONLY ask the question (i.e. cannot introduce extrinsic evidence) AND must accept the answer of W [***Cohen***]

#### So questioning about credibility will have little PV unless answered affirmatively – otherwise just sits there because question itself is NOT evidence (only answer is evidence)

## EXCEPTION – BAD ACTS FOR ANOTHER IMPEACHMENT PURPOSE

### Extrinsic evidence offered for a different purpose is admissible (e.g. not for character such as motive, intent or bias)

#### NOT limited to 404(b) categories – e.g. commonly used to show W bias

#### IE: 608(b) ONLY allows questioning about bad acts for character for truthfulness purpose

### BUT still need to do **403 analysis** here even though 608(b) does not apply

#### EG: ***Abel***– D charged w/killing prison guard. P asked D’s witness if D was a member of Aryan Brotherhood, denies it. P wants to admit extrinsic evidence to disprove denial b/c constitution of AB requires Brothers to lie. P said it went to bias of the W because he is also a member. Admissible – 608(b) preclusion does not extend to bias

#### Factors relevant to 403 analysis:

##### Dishonest nature of the act

##### Remoteness / timing of the act

##### Impeachment on other grounds

##### Importance of W’s credibility to case as a whole

##### Inflammatory nature of the act (goes to prejudice)

##### Similarity of bad act to issues in the case (goes to prejudice – if too similar, won’t be admitted – e.g. bad act of extortion where person is being tried for extortion)

##### Relationship of offering party to witness

#### Typical bad acts adduced:

##### Faking an insanity defense

##### Using aliases

##### False credit card apps

##### Failure to report political contributions

##### False excuse for absence from work

##### Lying about marital status on marriage license

##### Forgery, bribery, suppression of evidence, cheating, and embezzlement

##### Crimes of dishonesty/false statements

# IMPEACHMENT BY CONVICTION [609]

### Prior convictions are usually introduced under 609, but can also come in under other rules/circumstances (e.g. 404(b) or in civil case, to assess damages)

## INTRODUCTORY RULES

### GOV always bears burden of proving evidence and satisfying relevant balancing test [***Caldwell***]

### Conviction MUST BE used for attacking W’s character for truthfulness [**609(a)**]

### When conviction is admitted, MOST that a jury hears is what crime, judgment and date [***Osazuwa***]

#### IE: do not hear other details such as the underlying acts (UA also cannot be admitted under 608, as above)

### Unlike 608, can introduce extrinsic evidence to prove a conviction actually happened if it’s denied

### Even convictions that are subject to a pending appeal may be admitted under 609 [**609(e)**]

## PRELIMINARY QUESTIONS UNDER 609

### Has more than 10 years elapsed since release from imprisonment for conviction and trial?

#### If YES, go to 609(b)

#### If NO, go to next question below

### Do the elements of the crime convicted require proof of a dishonest act OR false statement?

#### If YES, go to 609(a)(2)

#### If NO, go to 609(a)(1)

#### NOTE: significance of falling under A1 and A2 is application of the balancing test

## 609(a)(2) – DISHONEST ACT AND FALSE STATEMENT

### MUST admit convictions of any W or D for crimes that have elements requiring proof of dishonest act OR false statement [**609(a)(2)**]

#### No discretion – do not use 403 [***Hayes***]

#### Not limited to felonies – also includes misdemeanors

### Determining the dishonest act/false statement element [***Hayes; Brackeen***]

#### Generally crimes which involve deceit, untruthfulness or falsification b/c they will affect accused’s propensity to truthfully testify – narrowly construe D / FS [***Hayes; Brackeen***]

##### EG: fraud, perjury, lying under oath, embezzlement, false statement, bribery

##### NOT: robbery, theft, driving under influence, assault, prostitution, counterfeiting

#### CANNOT go behind the elements and look at the facts leading to the crime convicted

##### IE: not where the ultimate criminal act is dishonest

##### Especially because underlying acts cannot be admitted under 609

##### EG: telling wife that walking backward is safe, but there is a cliff there and she falls and dies, murder is still not dishonest under 609

##### EG: even if preparatory work or act of an assault or robbery involves some sort of dishonesty, not dishonest under 609 as elements do not require dishonesty

#### EXCEPT for stealth based offences (e.g. obstruction of justice as in ***Jefferson***), as they are seen as inherently dishonest

### POLICY – high burden of proving these crimes leads to reliability in admitting them cannot be convicted of perjury unless convicted BRD, SO admissible against every W in every case

## 609(a)(1) – OTHER FELONIES

### For crimes involving >1 year imprisonment or death in convicting jurisdiction (i.e. must be felony) in:

#### Civil case = must be admitted subject to 403 [**609(a)(1)(A)**]

#### Crim case where W is not a D = must be admitted subject to 403 [**609(a)(1)(A)**]

#### Crim case where W is D = must be admitted if its PV outweighs its PE to that D [**609(a)(1)(B)**]

##### Mild presumption against admission

##### Relevant factors to **403** analysis [***Caldwell***]:

##### Kind of crime involved – consider impeachment value of conviction (crimes implying dishonesty have high PV) and its similarity to charged crime (greater similarity, greater PE as in ***Caldwell***)

##### When the conviction occurred

##### Importance of D’s testimony in the case – if greater importance and reliance on D, unlikely to admit b/c do not want to deter D from testifying (but if other evidence will prove what D was going to testify, then ok)

##### Importance of credibility of D – if D’s credibility is central issue, then should admit PC

##### Whether D is being impeached in other ways (e.g. PIS)

##### EG: ***Rakeem*** – charged with armed bank robbery. P wanted to introduce evidence of prior BR conviction. Held to be 609(a)(1)(A) crime. Judge held excluded because bank robbery is not inherently dishonest – PE outweighed its PV so inadmissible

### NOTE: EVEN IF excluded under 609/403, may still be admissible under 404(b) if there is a proper purpose for the evidence as in ***Brackeen***

## 609(b) – CONVICTIONS 10 YEARS OR OLDER

### Applies if time released from confinement for conviction to date of trial is 10 years or more [**609(b)**]

### Conviction ONLY admissible if:

#### Its PV, supported by specific facts and circumstances, substantially outweighs its PE [**609(b)(1)**]

##### Unlikely – presumption of exclusion – because of elapse of time, they have minimal PV [***Singer***]

##### EG: ***Hypo*** – D being tried for drug crime. 15 years ago convicted of lying to PO. Admitted because credibility is important. Found PE substantially outweighed PV. Reversed – applied the wrong test – it was the wrong way around

#### AND proponent gives adverse party reasonable written notice of intent to use it so party has a fair opportunity to contest its use [**609(b)(2)**]

### NOTE: must also have a good faith reason for extending time for trial to hit 10 years

#### Prevents manipulating the clock by using delaying tactics

## PARDON, ANNULMENT OR CERTIFICATE OF REHAB

### Conviction inadmissible if:

#### Subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on person’s rehabilitation AND they have not been convicted of a later crime punishable by death or <1yr imprisonment [**609(c)(1)**] OR

#### Subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence [**609(c)(2)**]

## LIMITING INSTRUCTIONS [105]

### When adduced, judge should ALWAYS instruct jury that prior conviction is just for credibility of W’s character for truthfulness

## IN LIMINE TO EXCLUDE CONVICTIONS

### Often attempt to get *in limine* ruling about admissibility of prior convictions

#### Judge can refuse it until they hear the W’s evidence during trial (i.e. postpone ruling)

#### Severe consequences of D losing – cannot appeal because ruling is not a final order that determines the case

##### Policy – prevent continuous appeals which would clog system and cause delays in trials, and because D might still get acquitted despite the ruling

### BUT an interlocutory order is appealable in two instances:

#### Where P wants to appeal an in limine ruling

##### Because they cannot appeal due to double jeopardy

#### Where there is an argument about whether a document is privileged

##### Because once it is out then there is no point in reversing on appeal

## REQUIREMENTS TO PRESERVE RIGHT TO APPEAL *IN LIMINES*

### To preserve the right to appeal an *in limine* decision on convictions, must have the W take the stand and be impeached using prior convictions during trial [***Luce v US***]

### MUST be impeached using the conviction by the OPPOSING party (i.e. cannot bring in the prior conviction in your own case AKA cannot appeal issue you created) [***Ohler***]

### MUST renew the objection to the conviction – if still admitted, may appeal the ruling

### UNLESS initial *in limine* is determinative [**103(b)**] – this can be ambiguous, so counsel will often ask the judge to confirm whether definitive or not

### POLICY – ensures Ds do not take advantage of the rule by not giving evidence and then seeking to appeal on basis of prior convictions

## CASES

###### Caldwell

### FACTS

#### D on trial for felony possession of a weapon

#### Trial court permitted P to introduce evidence of D’s prior conviction for possession of a weapon by a convicted felon

#### P argued (and the trial court agreed) that prior conviction was admissible to prove knowledge and intent under 404(b) AND to impeach under 609

### HELD

#### Inadmissible under 404 because did not prove anything about D’s intent or knowledge in the case as he argued he never possessed the gun

#### Inadmissible under 609(a)(1)(B) balancing test – PE outweighed

###### Brackeen

#### FACTS

##### D on trial for bank robberies

##### P wants to admit prior bank robbery convictions

##### Not a 609(a)(2) crime but 609(a)(1)

#### HELD

##### Inadmissible – PE was too high

##### BUT could admit as character evidence to show intent (see 404(b))

###### Hemphill

#### FACTS

##### Tort case

##### D wants to impeach with evidence she has 5 suits pending (i.e. accident prone)

#### HELD

##### Inadmissible – the cases haven’t been resolved, so not very probative and very prejudicial, so fails the 403 test

###### Luce v US

#### FACTS

##### Court ruled D’s prior convictions were admissible after in limine hearing

##### D did not testify in his trial

##### Appealed on the basis that he would have given evidence if convictions not admitted

#### HELD

##### No error – no surety that he would have testified – needed to have taken the stand, but did not

##### Cannot challenge on hypothetical in limine, W needs to testify and object

###### Ohler

#### FACTS

##### Court ruled D’s prior convictions were admissible

##### D did not testify in his trial

##### On direct, D testifies about prior convictions and admits to them

##### Convicted – then sought to appeal

#### HELD

##### No error – own lawyer created the issue (i.e. opened the door) as a matter of trial strategy so lost right to appeal

##### Cannot just assume that P would have brought up prior convictions

2 – Impeachment using PIS

# PRIOR INCONSISTENT STATEMENTS [613]

### Purpose = attack credibility of W – NOT prove truth of their story (which would be hearsay)

#### This extends to attacking the credibility of a hearsay Dec, as they are technically a W too

### NOTE: if prior statement made under oath, can use for its truth under 801(d)(1)(a) BUT if not under oath, can only use to impeach under 613

## RULES

### Have a prior inconsistent statement of the same W (i.e. W’s own statement) [**613(b)**]

### Inconsistency may be determined from the circumstances [***Rogers***]

#### Meaning of “inconsistent”

##### Direct contradiction (easy example)

##### Failure to speak (i.e. PI silence) often also inconsistent – determined by the importance of the matter which they are silent about

##### Lack of memory is not necessarily inconsistent statement – judge needs to assess circumstances to determine legitimacy of lack of memory [***Owens; Rogers***]

### Can use extrinsic evidence to prove prior statements, so long as W is given opportunity to explain or deny the statement AND an adverse party is given an opportunity to examine W about it [**613(b)**]

#### Still subject to **403** analysis

#### Often used in response to a W’s denial that something was inconsistent

#### CANNOT use extrinsic evidence to prove prior bad acts (incl. statements) when offered for character for inconsistency (but can for truthfulness under 608)

### 613 does not apply to opposing party statements under 801(d)(2) [**613(b)**]

## SHOWING THE STATEMENT

### When examining a W about their prior statement, a party need not show it or disclose its contents to the W [**613(a)**]

### BUT party must, on request, show it or disclose its contents to an adverse party’s attorney [**613(a)**]

## LIMITING INSTRUCTION

### When admitted, judge must instruct jury that PIS is only admitted to attack credibility of W [**105**]

## CASES

### *Pierre* – police officer claims D refused to make a controlled delivery when asked. D wants to impeach with notes, which make no mention of this. Held: failure to mention can be considered inconsistent if reasonable person would have included it or spoke

### Diet coke – not coke – cannot introduce extrinsic evidence

### *Doyle* – silence after being given Miranda not deemed inconsistent. Would violate due process to tell you silence can’t be used against you and then do so.

### Memory example – if at trial, suspiciously say “I can’t remember” when you remembered and spoke in the past, can impeach with prior inconsistent statements.

# CONTRADICTION [613]

## RULES

### If W testifies to something that is factually untrue then can use other testimony OR extrinsic evidence to impeach (i.e. contradict) subject to **403** [***Beauchamp***]:

#### If contradiction is collateral (i.e. not about important aspect of case), then extrinsic evidence inadmissible

#### If contradiction is non-collateral, extrinsic evidence may be admitted

## EXAMPLES

### Lincoln: witness testifies he could see as it was “moon bright.” Lincoln introduces Almanac—which shows there was no moon that night—to contradict.

### Case involving injury from smoking cigarettes. Plaintiff says smoked cigarettes because reminded him of dad’s blue eyes and had blue tips. D wanted to introduce evidence that dad did not have blue eyes. Allowed – it was important to W’s credibility.

### *James* – Witnesses say D looks like robber, but hairstyle is different. When arrested, D said he had changed his hairstyle.

#### If D testifies he’s never changed hairstyles, impeach with inconsistent statements.

#### If friend testifies he’s always had the same hairstyle, impeach by contradiction.

### *Beauchamp* – P witness testifies and asks where she lives. She says 423 Maple. P says she does not live there. W denied. P wanted to introduce extrinsic evidence. Judge did not allow because the issue was not central to the case – it was collateral and not probative.

# BIAS OR MOTIVE TO FALSIFY

### Bias AKA motive to falsify is extremely broad and covers any reason W might not give evidence truthfully and accurately

## RULES

### Can impeach with bias through testimony OR extrinsic evidence subject to **403** (usually high PV)

### Bias must be formed before statement was made

#### EG: W testifies to something that occurred in store v. storeowner, impeached by “isn’t it true you have grudge v. store b/c they fired you” – in this case, highly probative to introduce evidence to prove this before firing

## EXAMPLES

### Common examples:

#### Payment to testify / corruption

#### W has a personal relationship with, or predisposition in favor of, party

##### Parents protecting kids

#### Financial interest or liberty interest at stake

##### Protect interest in a separate civil case when testifying in criminal

##### Witnesses who have entered plea with GOV

### Expert witness: on XX, can inquire into how much money they are being paid for their services.

### Relationships: *Abel* – allowed to inquire into, and prove up, membership in Aryan Brotherhood as gives rise to motive to falsify to protect fellow “brother.”

### *Olden* **–** not being able to inquire into motive to falsify by “rape shield law” violates right to effective defense

### *Davis v Alaska* – D’s right to effective defense means he must be able to inquire into juvenile crimes (though prohibited by statute) if gives rise to motive to falsify

# INCAPACITY AND OTHER IMPEACHMENT

## RULES

### Subject to 403, can inquire into a W’s memory or grasp on reality, if so severe as to make them incapable of giving accurate account

#### Must be *severe*

#### EG: “Have you had electroshock therapy?” is legitimate BUT “Have you seen a shrink?” is likely not

### BUT religious beliefs cannot be used to show credibility impaired [**610**]

#### Often arises in relation to fringe or less mainstream religions

#### EG: argue that W is biased because a member of same cult as D

#### POLICY – all religions have distinct and unusual beliefs

# HEARSAY DECLARANTS

## RULE

### Dec’s credibility may be attacked, and then supported, by any evidence admissible for impeachment if Dec testified as a W [**806**]

#### IE: if could impeach Dec under Rules above, then may impeach them under 806

#### INCLUDING impeaching with evidence of Dec’s inconsistent statement OR conduct, regardless of when it occurred or whether Dec had an opportunity to explain or deny [**806**]

##### IE: absolves the requirement under 613 to give W opportunity to explain/deny

#### Also applies to party-opponent statements under 801(d)(2)

### POLICY = should be able to test their credibility like any other W

3 – Rehabilitation

## RULES

### Evidence of truthful character admissible only if character for truthfulness has been attacked [**608(a)**]

#### IE: only admissible if character has been attacked on XX, and must meet the attack

## EXAMPLES

### W impeached with prior inconsistent statement on XX, then may introduce a PCS on RX to meet the attack and rehab

### ***Pierre*** – after impeached, P can respond by showing that when report typed up, included the omitted section. Responds to the attack by explaining the inconsistency

### NOTE: may also use 801(d)(1)(B) prior consistent statements

#### PCS are NOT ordinarily admissible to bear on credibility (seen as an impermissible bolster) BUT can introduce them after (ONLY AFTER) W’s character for truthfulness has been attacked – have to both WAIT FOR and DIRECTLY RESPOND TO the attack

Privileges

### Generally, encompasses the exclusion of relevant and reliable information because of social policy

#### Privileges are contrary to the search for truth, but for good reason (i.e. policy)

### FRE 501 gives Fed Courts the power to establish new, and reconsider the continued validity of Fed CL privileges [***Trammel***]

#### Not settled how new privileges are created, but suggested in ***Jaffee*** that must look at:

##### Whether any or all of 50 states have the privilege (but not determinative – as doctor-patient priv. is not recognized by Fed although recognized by all 50 states)

##### Whether privilege was included in the original draft of 501

#### Also consider whether need for privilege outweighs cost of losing reliable evidence

# PRELIMINARY MATTERS

### Applicable privileges depend on type of jurisdiction:

#### Diversity = state rules of privilege apply [**501; *Erie***]

#### Federal Q = apply 501 – CL privileges

##### Common law governs privileges unless any of the following provide otherwise [**501**]:

##### US CON

##### Federal statute

##### Rules prescribed by SCOTUS

### Party asserting privilege bears burden of proving it [***Upjohn; County of Erie***]

# ATTORNEY/CLIENT PRIVILEGE

## (1): LAWYER MUST BE SOUGHT FOR LEGAL ADVICE

### Test = “a” primary motive/purpose of communication must be legal advice [***Woodruff; Kellogg Brown***]

#### Lawyer has burden of establishing what they are hired to do, and then must assess whether a (NOT the only) primary motive was legal

#### Money does not need to be exchanged to engage privilege

#### NOTE: communication can have more than one purpose (hence, why “a” primary motive)

### EXTENDS to business, philosophical and political discussion – not just legal topics [***County of Erie***]

### IF MIXTURE b/w business/political advice and legal advice, then likely to be privileged [***In re Grand Jury Subpoena***]

#### KEY Q: was A primary purpose of the communication legal?

#### COURTS DO NOT blue pencil advice

#### Where conducting a factual investigation, likely for primary motive of discovering legal issues so it is likely to be covered

### NOT non-legal matters such as:

#### Attorney acting as a conduit for info/docs (e.g. just a messenger or delivery person)

#### Date or time of a trial or meeting

#### Illegal advice (e.g. how to kill someone)

#### Basic preparation of a tax return

#### Minutes of a board of directors meeting not drafted by lawyer (even if lawyer present)

#### General emails on business matters (even if lawyer copied, not for legal advice)

#### Business docs prepared and sent to attorney to keep them apprised of business development, and not as a request for legal advice

#### Communicating part of personal friendship or animus, not in course of legal advice

### POLICY = prevent clients engaging lawyers to protect information as privileged [***Re Feldberg***]

## (2): MUST BE A COMMUNICATION BETWEEN A LAWYER AND A CLIENT

### Must be verbal or written communication from client to lawyer [***Kaczynski***]

#### Physical documents are generally not privileged unless something communicative about it

##### EG: emailing a newspaper article to lawyer – the email itself would be covered but the newspaper article is unlikely to be

#### Physical action / activity of the client is not communicative

##### EG: client beating up their lawyer

#### Pre-existing reports turned over to a lawyer are NOT privileged

##### Otherwise, everything would be privileged – lawyers normally receive all reports

##### EG: company has a product which allegedly causes injuries. Sends out engineering team to determine if problem with it. Team finds a problem. Lawsuits arise and company turns over report to lawyer. HELD report is not privileged because it existed before legal engagement

### If lawyer obtains information from anyone APART from client, then that information is NOT protected by the privilege (privilege only covers client/attorney comms.)

#### EXCEPT where protected by work product

## Corporate Privilege

### EXTENDS to all agents/employees of corporation communicating with lawyers for purposes of providing legal advice to corporation

#### EG: ***Upjohn*** – corporate counsel investigating possible misconduct. Lawyers speaks with low level agents who participated in bribery – agents tell lawyer what happened. P says this is not privileged, as it does not extend to all agents in the organization, only the most senior “control group”. HELD control group test is too narrow. Corporate privilege extends to all agents/employees communicating with lawyers for purposes of legal advice

### BUT can call an agent as a W and ask them about underlying facts b/c privilege only protects disclosure of communications to lawyers NOT facts [***Upjohn***]

#### EG: “what did you do” or “what happened” because underlying facts not privileged

#### BUT problem is that the agent can simply remain silent (i.e. claim 5th Amendment rights)

## Upjohn Warnings

### BUT no *personal* attorney/client privilege between the agent of a company and company’s lawyer

#### ONLY AC privilege between the lawyer and company

##### SO there can be conflict between interests of agent and company BECAUSE only the company has the privilege – whatever the agent says can be used against them

##### Lawyer MUST give the agent Upjohn / corporate Miranda warning

### EVEN IF lawyer is acting for two different clients in conflict, then still subject to privilege – just a breach of the lawyer’s obligations (i.e. conflict of interest rules)

## Non-Lawyer Agents

### EXTENDS to non-lawyer agents of lawyer where their presence (i.e. hearing the communications) is NECESSARY to legal representation

#### Need a lawyer’s determination that necessary to engage – agent maximizes lawyer’s effectiveness

#### IF found not necessary, then all communications on which they were copied are admissible

##### EG: ***Kovel*** – tax problems, and goes to lawyer. Lawyer engages accountant to do work. Kovel starts communicating with accountant, only sometimes in presence of lawyer. P argues no privilege. HELD still engaged by lawyer and necessary for lawyer’s advice

##### BUT if Kovel went to accountant and then Kovel engaged the lawyer, first discussion IS NOT privileged – because not engaged by the lawyer

##### EG: ***Calvin Klein*** – Lawyer engages a PR firm for course of litigation. PR firm sits in on strategy sessions and cc’ed on all emails. HELD communications were not privileged.

### POLICY = keep non-lawyer agents out of all the legal work and prevents using lawyers to make communications with non-lawyers privileged

## (3): MUST BE REASONABLE ANTICIPATION OF CONFIDENTIALITY

### At time of communication, reasonably anticipate that it would be kept confidential and remain confidential [***Harris; Garner***]

#### Generally, must be private setting with only people WITHIN privilege present (e.g. agents/non-L)

#### Examples of where waived:

##### Statement made in a very public place (e.g. restaurant or bus)

##### Email accessible to people other than the client (even if it is their family members – b/c not just between client and the lawyer)

##### Conduct and tone (e.g. screaming in public)

##### Where reasonable anticipation that being monitored, or recorded (e.g. statement when you call that you are being recorded)

##### Submission of tax forms for large amounts of cash – no expectation of privacy [***Shargel***]

#### EG: People in a restaurant. Client walks up to the lawyer and said he killed someone. Not priv. because 20 people around who could hear the conversation – no reasonable expectation.

#### EG: ***Harris*** – woman on one side of ballroom. Confesses over the phone to lawyer. PO who was professional lip-reader hear conversation and confession. Held that could reasonable anticipate that be overheard in the room. No privilege.

## COMMON INTEREST RULE

### Can pool information and it will not lose privilege IF AGREE PRIOR it will remain privileged [***McPartlin***]

#### IE: become one attorney/client unit through the common interest

#### Prudent for lawyers to write an agreement that is signed and identifies scope of the privilege

### IF all parties do not agree, then no common interest

#### EG: 3 clients who are criminal Ds. D1 and D2 agree to pool information, but D3 does not. Invite D3 to a meeting between D1 and D2 to entice them to join. HELD no privilege because no common interest (D3 broke interest)

### IF common interest is broken (i.e. parties decide to sue each other) then privilege is not protected

#### BUT cannot release the information to anyone AS IT REMAINS the privilege of the other side

##### SO a third party will never be able to obtain information unless it is waived by the other protected common interest holder

## MISCELLANOUS RULES

### Identity of the client is not protected (i.e. no reasonable anticipation of conf.) [***Shargel***]

#### Generally, regardless of whether the lawyer practices only in a specific area of law (e.g. drug conspiracy cases or sexual assault), time spent with the lawyer (e.g. 30 hours) or amount charged (e.g. $15,000)

##### Does not matter what these facts might suggest

### Privilege survives the death of the client [***Swidler***]

#### EG: ***Swidler*** – Foster was an employee of Swidler. Briefcase had records which might implicate Clinton in crime. He gave briefcase to Swidler. Swidler invoked the privilege. P said it ends when the client dies. HELD privilege applies after death to protect confidentiality of the communication.

### Cannot invoke attorney/client privilege in congressional investigation [**Position of Congress**]

#### Although never been decided in a court

#### Attorney/client privilege at CL is trumped by the statutory authority they have to investigate

##### Flawed because technically attorney/client privilege is statutory by virtue of 501

## POLICY OF THE A/C PRIVILEGE

### Ensure candor in communications between lawyers/clients [***Upjohn***]

#### Prevent “chilling effect” on such communications and promote public interests such as observance of the law and administration of justice

### Prevent lawyers having to testify

## CASES

###### County of Erie

#### FACTS

##### County had an ordinance which stated that whoever arrested had to be strip searched. The people strip searched sued

##### Email exchange between county attorney and head of county about litigation

##### Went into a philosophical and political discussion

#### HELD

##### Privileged – part of legal advice was the discussion

###### Example Case 1

#### FACTS

##### Sports agent. Investigated by grand jury for illegally signing players to a contract.

##### Lawyer produces box of documents

##### Lawyer gives evidence that was just engaged to copy and deliver box

#### HELD

##### No privilege because NOT legal advice, just admin work

# EXCEPTIONS: WAIVER

### Arises where something happens after the communication which might affect privilege

### NOTE: the term waiver actually encompasses more than its traditional definition at law, and is really more appropriately considered forfeiture

#### Generally, where privilege holder’s conduct makes it unfair to allow a subsequent assertion of privilege [***Jacobs; Yerardi***]

## REQUIREMENTS

### ONLY waivable by:

### Client OR

### Current corporate management for a company (i.e. not resigned) [***Weintraub***] OR

### Attorney acting on client’s behalf (through implicit or explicit authorization)

##### EG: ***Cassas*** – child called the family lawyer and told him that he killed his parents. Lawyer turned child in to police. HELD no waiver b/c lawyer acted w/o authorization

### MUST be knowing and voluntary disclosure

#### NOTE: DOES NOT apply when there is a mistaken / negligent disclosure

#### ONLY involuntary when subpoenaed or ordered by a court

#### Typical situations:

##### Transaction (e.g. merger) where need full disclosure of company details incl. advice

##### Underwriter requirements – they will want to see privileged requirements

##### GOV investigation where cooperating with GOV

##### When advice of counsel defense is made (i.e. where client acts in an unlawful way, but they were acting on advice of their counsel who advised that it was lawful)

##### When client sues an attorney for malpractice (unfair to prohibit attorney from using documents / advice)

#### Does not matter if disclosure is a requirement or pressured decision – it is a business decision

##### IE: even if have to make difficult choice (e.g. turn over document as requirement to merger), still voluntary

### Is the disclosure intentional (i.e. knowing and voluntary) OR inadvertent / unintentional?

#### If disclosure is intentional, extends to ALL disclosed / undisclosed communications on same subject matter, which in fairness ought to be considered together [**502(a); *Bilzerian***]

##### Often critical – because the privileged subject matter is generally central to the case

##### POLICIES

##### Prevents parties using selective evidence to mislead their adversary [***United Mine Workers of America***]

##### Ensure that parties are very careful about handling privileged docs

##### EG: ***Bilzerian*** – transaction. Went to lawyer to ask about structuring transaction and determining whether legal. Said that the lawyer told him it was legal. But then claimed privilege over all other information. HELD scope of waiver extended to everything related to the legality of the transaction. Cannot let B mislead the court.

#### If disclosure is inadvertent / unintentional, NO waiver if holder took reasonable steps to prevent disclosure AND promptly took reasonable steps to rectify error after discovering it (e.g. give notice and ask for return) [**502(b)**]

##### Inadvertent = where party did not *intend* to produce a doc/info [***Whitecap***]

##### NEVER results in subject matter waiver – even if fail to take reasonable steps (party just gets to keep the disclosed material)

##### DOES NOT require producing party to review documents again post-production, unless there are indications of inadvertent disclosure [***Whitecap***]

##### Considerations for reasonable steps to prevent [***Lois Sportswear; Garvey; Whitecap***]

##### Extent of precautions taken

##### Scope of discovery

##### Time constraints for review of documents

##### Experience and training of the persons conducting the review

##### Number of documents reviewed

##### Analytical software or tools used to screen

##### Considerations for reasonable steps to rectify [***Whitecap***]:

##### Extent of disclosure

##### Time taken to rectify

##### Need for any investigation

##### Complexity of any issues raised by the disclosure

##### NOTE: rarely used – parties will generally get court to make order under **502(d)**

##### Especially b/c court order is enforceable against 3Ps

##### EG: where there is a disclosure because of a lawyer’s negligence in e-discovery (common)

##### EG: ***Lipin*** – client broke into premises and photocopied smoking gun docs. Their lawyer then used the docs. HELD no waiver as willful theft, not inadvertent disclosure

##### EG: Lawyer in common interest. Lawyer prepares a document containing privileged info. Sends doc to lawyer who is part of common interest. Accidently sends it to lawyer on other side with similar name because of AutoFill. Called Chambers to inform immediately of disclosure. Held to be both reasonable steps to prevent and rectify.

## CLAW-BACK AGREEMENTS

### Where parties agree to give back accidently disclosed docs – used to limit effect of mistaken disclosure [**502(e)**]

#### BUT does not apply to third parties if they obtain disclosed docs/info [**502(e)**]

##### So most parties will seek court 502(d) order (see below)

## COURT ORDER TO PREVENT WAIVER

### Court may order that privilege (and work product) is not waived by disclosure connected with the litigation before it [**502(d)**]

#### Court can make the order itself, or on one party’s request [***Rajala***]

#### IF court orders that certain action does not constitute a waiver, then it is not waiver for ALL other state and federal matters (i.e. cannot re-litigate whether it was a waiver) and applies to 3Ps [**502(d)]**

##### States must uphold 502(d) orders of Fed courts, even though many have their own versions of 502 [***Whitaker Chalk***]

##### Key advantage over claw-back agreements

#### No criteria listed – totally up to the judge’s discretion

#### Often will get this order presumptively while undertaking review – because mistakes are likely to occur

#### Critical in cases where not worried about disclosing to adversary, but do not want to risk subject matter waiver (as parties in other litigation may then use the info against you)

##### IE: allows intentionally exchange of confidential information without risking waiver

### POLICY = predictable protection for parties – allows parties to intentionally disclose

#### Important to reduce costs relating to undertaking perfect review of docs

## SELECTIVE WAIVER

### CANNOT have selective waiver – not even DOJ [***Westinghouse***]

#### This is where parties agree to the scope of the waiver

#### EG: ***Westinghouse*** – W was doing work in Philippines during bad period. DOJ investigating W and gives up a report about its activities in Philippines. On return, get confidentiality agreement saying that they will keep it confidential. W is being sued. Plaintiffs argued that knowing and voluntary waiver of the reports. W argues only waived in relation to the DOJ, not the Ps. HELD admissible – no such thing as selective waiver

### POLICY = cannot let parties determine the extent of the waiver – cannot use it strategically to use for positive purpose then prevent it for negative purpose

#### Also, not required to encourage co-operation with GOV, because already incentivized by punishment for failure to co-operate

## CRIME-FRAUD EXCEPTION

### If client communicates with lawyer, and their purpose at the time is criminal, then privilege over those communications is waived [***ABC Corp***]

#### Burden on party seeking information to prove the exception applies (presumption of priv.)

#### Focus is on the intent of the client (not the lawyer)

##### So even if lawyer is not complicit, privilege still waived

#### Seeking advice about PAST crimes is privileged but advice about future IS NOT

##### EG: ***ABC Corp*** – party built a power plant in Algeria. Debt owed in relation to plant. Party hires a lawyer to recover the debt. Advice remains privileged b/c purpose of engaging lawyer was to recover debt, not any criminal purpose

##### EG: where client tells lawyer that they destroyed documents, and think there are legal problems and want advice, then advice is privileged

##### EG: where client asks lawyer which docs the other side would request, then deletes these docs after receiving advice, then C/F exception applies to waive privilege

### POLICY = seeks to prevent lawyers encouraging or being complicit in crime

### NOTE: Judge will hold video recorded hearing and determine on PoE whether c/f occurred

#### Judge will consider the communications and other circumstantial evidence

## WORK PRODUCT DOCTRINE

### Operates in addition to A/C privilege to protect documents/information

### Means an adverse party may not discover or compel disclosure of written or oral materials prepared by/for an attorney in the course of legal representation

#### Except where they prove "substantial need" and "undue hardship” [**FRCP 26(b)(3)**]

### FINAL NOTE: when privileged information is disclosed to the adversary, the damage is often done

#### So clients need to do a cost benefit analysis of how bad it would be if information was used other than for admissibility and then determine effort to be placed in any privilege review

#### In any case, get a 502(d) order for protection

###### Coburn v Whitecap

#### FACTS

##### Breach of contract claim – there was production of 40,000 pages of documents, two of which totaling 16 pages were inadvertently produced

##### Whitecap asked for these documents to be returned, but Coburn refused

##### Eventually gave back most, but did not for one email

#### HELD

##### Doc to be returned – given scope of review, very limited range of docs mistakenly disclosed, protocols adopted, and short time taken to rectify – satisfied 502(d)

Spousal Privileges

### General trend chipping away at these two privileges

### Main difference between two:

#### Adverse testimony is broader – covers acts and communications, even if in presence of 3Ps

#### Communications is narrower – covers private communications b/w spouses (i.e. no acts), and not involving 3Ps

### NOTE: States have their own versions of each privilege (or none at all)

# SPOUSAL PRIVILEGE AGAINST ADVERSE TESTIMONY

### Privilege against forcing a spouse to give ANY adverse testimony against their spouse [***Trammel***]

## REQUIREMENTS

#### Criminal case (does not apply in civil)

#### Not admissible hearsay

##### DOES NOT apply to hearsay statements made by a spouse, which fall w/in an exception

##### Any statement made to 3P is not covered by privilege (b/c it only protects spouse)

##### EG: husband charged w/murder of neighbour. Wife was waiting for him on porch and saw him kill neighbour in front yard with metal pole. Wife runs inside and calls her mom, saying “Bill just killed neighbour”. HELD admissible as excited utterance and privilege does not apply b/c statement made to mother who is not covered by privilege

##### BUT if she didn’t see him kill the neighbor then inadmissible because does not satisfy personal knowledge requirement

#### Married at the time of trial [***Trammel***]

#### Not available if:

#### Marriage is proven to be a sham

#### Divorced

#### Irreconcilably separated (see below – often need court order)

##### Courts ONLY look at the legal status and DO NOT look into the non-legal status of relationship to determine if marriage exists [***Carter***]

##### EG: ***Carter*** – tax fraud case. Couple still married but had not lived together for 28 years and he had been with another woman. HELD cannot invoke the privilege in the circumstances.

#### Testifying spouse does not want to testify (can testify if they want, as priv. belongs to them)

#### Spouses are not jointly participating in a crime (i.e. there is joint participant exception to priv.)

##### NOTE: Circuits are split

##### 2nd Circuit says exception does not exist – says still protected b/c marital harmony policy regardless of crime

##### 10th Circuit says exception exists – because in a conspiracy not a relationship and inconsistent with policy about preserving marital harmony

##### EG: ***Koecher*** – allegation that husband was Czech spy and wife was helping him. Argued to be conspiracy not relationship. HELD (2nd Cir) = marital harmony clear, so protected

#### Crime charged does not involve a child of either spouse (i.e. child abuse except.) [***Allery; Trammel***]

### NOTE: even if spouse testifies, they CANNOT testify about confidential communications

## POLICY

### Preserving sanctity of marriage at time of the trial (ensures marital harmony) [***Trammel***]

# SPOUSAL CONFIDENTIAL COMMUNICATIONS PRIVILEGE

### Prevents one spouse disclosing communications with other spouse that were made during course of their marriage

## REQUIREMENTS

#### Civil or criminal case

#### Adverse testimony privilege (above) does not apply or is waived

#### Must be married at time of communication – irrelevant whether married at trial [***Roberson***]

#### If separated, marriage must be irreconcilable at time of comm. – look at [***Murphy***]:

##### Duration of separation

##### Stability of marriage

##### Filing of a divorce action

##### Conduct / statements regarding status of marriage

##### NOTE: dispute between circuits about when marriage ends – harder to prove lack of marriage here than for adverse testimony because requires historical analysis of marriage at time of communication

#####

#### Speaking spouse does not want communications disclosed (speaker holds privilege) [***Trammel***]

##### This is why spousal hearsay is inadmissible here

##### NOTE: where spouse wants to give adverse testimony, they can testify about acts and non-confidential communications BUT CANNOT testify about confidential communications during marriage (b/c of this privilege which is held by speaking spouse)

#### Relates to communications OR actions that are communicative (e.g. holding up three fingers when responding to spousal question “How many did you kill?”) [***Neal; Lofton***]

##### NOT pure actions (even if only in presence of spouse)

##### SO SPOUSE CAN testify about acts that they observed b/c not within privilege

##### EG: in ***Lofton*** – wife testified about her observations of spouse’s act of using cocaine

##### EG: in ***Brock*** – wife testified about watching husband using a gun – chose not to invoke adverse testimony, and it was a confidential act, not communication

##### EG: ***Neal*** – N was charged with bank robbery. Wife hated him and wanted to testify that he came home, threw gun/money on bed and told her “I robbed a bank”. HELD she can testify to his action but NOT the statement “I robbed a bank”

#### Speaker reasonably expected communication to remain confidential at time made [***Hamilton***]

##### Where electronic communications, and spouse informed that they will not remain public because of a new policy, then need to delete old communications – inaction = waiver [***Ham.***]

##### IE: public disclosure will destroy the privilege

#### Speaker must not have a criminal purpose for the communication (i.e. crime-fraud exception)

##### EG: no privilege where husband asks wife to wash his bloody clothes after murder

#### Crime charged does not involve a child of either spouse (i.e. child abuse except.) [***Allery; Trammel***]

## POLICY

### Preserving the marital relationship at time communication was made by preserving privacy and encouraging communication in marriage

Miscellaneous Privileges

# 5th AMENDMENT PRIVILEGE

### Privilege against testifying to prevent self-incrimination

### A person (NOT a corporation) is compelled to testify

### What says person might be used against them in criminal proceeding

### NO problem if P gives immunity from prosecution

### POLICY = avoid “cruel tri-lemma” of three choices: refuse, perjure, testify – all can = imprisonment

### NOTE: “required records” exception – must testify about the failure to keep records that the GOV mandates be kept (e.g. car odometer)

# MENTAL HEALTH PROFESSIONAL PRIVILEGE

### Protects confidential communications made to licensed psychotherapists and social-workers [***Jaffee***]

#### Absolute privilege (gives certainty to parties that comms. will be protected)

#### Must reasonably anticipate that communication will remain confidential

##### SO where professional warns a patient that a threat or other criminal action will be reported or disclosed, and then they state a threat, then this threat is not protected by privilege b/c no anticipation it will remain confidential

#### BUT no dangerous patient exception (i.e. where there is disclosure of imminent danger to their client or others, it is still privileged)

##### Because by time of trial, the danger will have passed or the crime will have occurred

### POLICY = encourage clients to freely and frankly communicate with psychotherapists [***Jaffee***]

#### Unclear whether needed, as clients likely to still speak to psychotherapists

### NOTE: *Jaffee* was first time 501 was used to create new Federal CL privilege

### NOTE: unsure whether extends to Fed doctor-patient privilege, despite it being recognized in state

#### Policy is that mental health treatment is totally reliant on words/communications whereas other treatment is not – may be a difference

# STATE SECRETS PRIVILEGE

### Covers state secrets [***Sterling v Tenet; Reynolds***]

#### Absolute privilege

### ONLY asserted by GOV, by formal claim from head of department controlling matter [***Reynolds***]

### Head must explain precisely how secret would harm national security / interests [***Sterling***]

#### Discretionary decision for judge – does not require judge to review all materials because doing so likely to desire to keep info confidential in national interests

##### Often just rely on Head’s explanation

### Where SS is central to the case, that case will likely be dismissed on merits (no issues of fact) [***Sterling***]

#### Applies even if access to information is necessary to sustain a civil claim or criminal conviction [***Bareford v General Dynamics***] or mount a defense [***Zuckerbraun***]

#### DOES NOT matter whether State action was illegal

### Examples:

#### Action by widows of men killed in military aircraft crash. Report was conducted by Air Force into the crash. Report contained state secrets. Privilege covered it.

#### Contract breach action regarding faulty stealth bomber. Privilege would protect design of bomber because that design is a state secret

# EXECUTIVE PRIVILEGE

### Privilege over communications on high-ranking matters of executive policy

#### BUT qualified privilege (not absolute)

##### SO IF shown that substantial need for disclosure then privilege will not apply

##### EG: grand jury investigation creates a substantial need which overrides Executive Privilege [***Nixon***]

### Executive must still attend and then claim priv. – cannot just not show up at trial because of it

### POLICY = to promote confidentiality in executive decision-making

# CLERGY-PENITENT PRIVILEGE

### Clergy OR penitent can invoke privilege re: communications when penitent seeks spiritual advice

#### Limited to spiritual / therapeutic advice

##### EG: Minister giving business advice to a member of clergy is not

#### Covers fringe religions (e.g. scientology)

### BUT crime-fraud exception developing after 9/11 where Muslim clergy are advising on future acts which may be criminal (NOT past acts)

### NEVER invoked in a civil case

### POLICIES

#### Valuable for persons to seek solace and spiritual guidance

#### Absence of privilege would force clergy to disclose when disclosure is contrary to their religious beliefs

# REPORTER/SOURCES

### Only some Fed and State courts have held that it exists, although have not agreed on scope

#### Qualified privilege – does not apply where legitimate GOV interest in disclosure

### BUT NO privilege in criminal investigations – any right outweighed by GOV interest in criminal investigation [***Miller***]

### SCOTUS denied it – was argued on basis of 1st A right to shield sources, but SCOTUS held it would only be to protect marketability / businesses of journalists which is improper policy [***Branzburg; McKevitt***]

#### SCOTUS suggested that rather than privileging information, courts should check that a subpoena directed to media is reasonable in the circumstances [***McKevitt***]

Privileges not recognized

# SECRET SERVICE/PRESIDENT

### Privilege for SS agents to not have to testify about criminal acts of President

#### Rejected – would encourage criminality and prevent anyone from hearing matters about President’s conduct

# CORPORATE SELF ANALYSIS

### AKA privilege of self-analysis

### Privilege over investigations or internal reports (e.g. for misconduct) – to encourage corporations to conduct such investigations

#### EG: Carnival Cruise sends corporate official to investigate reports of sexual attacks. Report concludes should reduce contact between crew and passengers. In suit, victims want the report. Carnival argues for “corporate self-analysis privilege”, so that they won’t be discouraged from doing investigations. 9th Circuit rejected – no such privilege

### NOTE: can protect such reports/investigations by getting lawyer to conduct them (then covered by lawyer client privilege)

# PARENT/CHILD

### Rejected because no need to preserve relationship – exists regardless of communications

#### BUT argued to be necessary to protect relationships

Authenticating proffered evidence

### Arises where there is a dispute about whether evidence is what the proponent says it is

#### SO proponent must authenticate the evidence to show it is what they say it is

## KEY RULE

### Must provide enough authentication for reasonable juror to believe evidence is what proponent claims it to be [**901(a); *Safavian***]

#### Discretionary decision for judge – lower, reasonable juror standard [**104**]

#### Does not need to prove it is *exactly* what proponent claims

#### Circumstantial evidence can be enough [***McGlory***]

### NOTE: court may admit proposed evidence on the condition that its proof be introduced later [**104(b)**]

## SUGGESTED METHODS OF AUTHENTICATION

### Examples (NOT complete list) of evidence that requires authentication and how to do so [**901(b)**]:

#### Testimony that an item is what it is claimed to be [**901(b)(1)**]

#### A nonexpert’s opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation [**901(b)(2)**]

##### **NOTE**: often arises – anyone (not just handwriting expert) can authenticate

#### A comparison with an authenticated specimen by expert witness or trier of fact [**901(b)(3)**]

#### The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances [**901(b)(4)**]

##### **NOTE**: this is circumstantial evidence to authenticate

#### An opinion identifying a person’s voice — whether heard firsthand or electronically — based on hearing the voice under circumstances connecting it with alleged speaker [**901(b)(5)**]

#### For a telephone conversation, evidence that a call was made to the number assigned at the time to [**901(b)(6)**]:

##### **(A)** a particular person, if circumstances, including self-identification, show that the person answering was the one called; or

##### **(B)** a particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone.

##### **NOTE**: often arises – can be anyone that is familiar with voice

#### Evidence that a public record is [**901(b)(7)**]:

##### **(A)** a doc was recorded or filed in a public office as authorized by law; or

##### **(B)** a purported public record or statement is from the office where items of this kind are kept.

#### For a document or data compilation, evidence that it [**901(b)(8)**]:

##### **(A)** is in a condition that creates no suspicion about its authenticity;

##### **(B)** was in a place where, if authentic, it would likely be; and

##### **(C)** is at least 20 years old when offered

#### Evidence describing a process or system and showing it produces an accurate result [**901(b)(9)**]

#### Any method of authentication or identification allowed by a federal statute or a rule prescribed by SCOTUS [**901(b)(10)**]

## SELF-AUTHENTICATING DOCUMENTS

### Do not need to authenticate the following [**902**]:

#### **US public documents which are sealed and signed by officers of US governments, their political subdivisions** or a department / agency [**902(1)**]

#### **US public documents which is signed by TWO officers of “…”** [**902(2)**]

#### **Foreign public documents** signed or attested by a person who is authorized by a foreign country’s law to do so – must be accompanied by final certification [**902(3)**]

#### Certified copy of public records recorded/filed in a public office and certified by an authorized custodian [**902(4)**]

#### Official publications of a public authority [**902(5)**]

#### Newspapers and periodicals [**902(6)**]

### NOTE: more from 902(7) to end of 902

## EXAMPLES AND COMMON ISSUES

### Emails

#### First use from/to and then circumstantial evidence (e.g. person was in office at time email sent, or text in body of email which is unique to the sender, or way of the person writing such as “Regards)

### Website page

#### Using internet archive and calling person who did search of archive

#### Calling a person to say they saw a page at a given time and what page said

##### Under FRE, now do not need to call people from internet archive – can just file an affidavit stating they did a search of internet and found page

### Text messages

#### Usually from/to is not enough, but little more is needed such as:

##### Use of certain words / emojis / terms of endearment

##### Other content of the email – particular way of writing

### Social media

#### Timing issues about when photos were taken (e.g. felon gun possession need to authenticate date to ensure possession after felon)

#### Also ownership issues such as that in ***Vayner*** where needed to authenticate whether the Facebook page was actually D’s Facebook page

### Altering evidence / deep fake issue

#### To be an issue, it usually requires some evidence to suggest impropriety from opposing party (e.g. reason why social media was hacked, or reason why photo would be photoshopped)

### Handwriting

#### Authenticate by handwriting expert or anyone familiar with writing

#### If typed, fact that is what found in his trash might tie it to him

### D claims voice or tape not his, or that it’s altered

#### Authenticate by witness recognition of voice

#### Have officer who made tape testify as to how it was made or didn’t leave possession

#### NOTE: enhancing sound (e.g. in crowded room when many people speaking) raises *Daubert*

### D claims powder found on him not that tested in lab

#### Authenticate by showing *chain of custody*

### D claims wasn’t him in chatroom

#### Authenticate by IP identification, if used screen-name elsewhere

#### Possibility of hacking goes to weight

### D claims photo altered

#### Can rely on experts to show no alteration, or call photographer to testify

#### NOTE: enhancement of grainy photo may raise *Daubert* issues

###### US v Grant

#### FACTS

##### D is arrested in car and search of car revealed a rectangular box sealed by duct tape containing cocaine in spare wheel cavity

##### D denies box was in his car

##### P needed to authenticate that box came from car

##### 4 month gap in chain of custody

#### HELD

##### Chain of custody issue – authenticated by weighing the box – was same weight – also circumstantial guarantee because unlikely to keep a box in spare wheel cavity

Best Evidence Rule

### Original document rule – essentially that if you want to prove **content** of doc, then must produce the original or duplicate (or fall w/in exception)

#### Does not mean you must produce “best evidence” despite rule being titled as such

## DEFINITIONS

### Writing = letters, words, numbers, or their equivalent set down in any form [**1001(a)**]

### Recording = letters, words, numbers, or their equivalent recorded in any manner [**1001(b)**]

### Photograph = photographic image or its equivalent stored in any form [**1001(c)**]

### Original writing or recording = writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it [**1001(d)**]

#### For ESI = any printout — or other output readable by sight — if it accurately reflects the information [**1001(d)**]

#### For photo = includes the negative or a print from it [**1001(d)**]

### Duplicate = counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original [**1001(e)**]

## ORIGINAL DOCUMENTS RULE

### When content of writing OR recording OR photograph is disputed, must produce original to prove its contents [**1002**]

#### EXCEPT where either original (in which case, can use other evidence to prove content):

##### lost or destroyed BUT NOT by proponent acting in bad faith [**1004(a)**]

##### EG: burnt in house fire as in *DeMarco*

##### cannot be obtained by any available judicial process [**1004(b)**]

##### party against whom the original would be offered had control of it; was put on notice that it would be subject of proof at trial; and failed to produce it [**1004(c)**]

##### its subject matter (i.e. writing) is not closely related to a controlling issue [**1004(d)**]

#### ALSO note duplicate rule below

## DUPLICATES

### Admissible to the same extent as the original [**1003**]

#### UNLESS a genuine question is raised about original’s authenticity OR circumstances make it unfair to admit duplicate [**1003**]

## EXAMPLES

### ***DeMarco*** – dispute over employment contract. No original or duplicate available, but P had good reason since he lost it when house burned down. Allowed to testify about contents of document.

### ***Michael Jackson case*** – P claims MJ copied his song. Doesn’t have original, or duplicate, or good reason, but offers to play the song for the jury. Not allowed.

Glossary of terms

* Proffer
	+ A summary of evidence intended to be adduced in trial

### Preliminary injunction

#### US term for interlocutory injunction

### Suppression hearing

#### Hearing of a motion to suppress – which seeks to keep certain statements or evidence from being introduced as evidence in trial (e.g. because obtained through an illegal search or seizures, or without a warrant)

Associated principles

* Judge has inherent authority to control their tribunal
* D’s constitutional right to make an effective defense is often relevant in evidentiary rulings

#### Where D’s evidence is strong to prove innocence, but the reason for excluding it is weak, evidence should be admitted

### Miranda hearings are often conducted pre-trial to determine whether person was provided with their Miranda rights, which are derived from 5th Amendment and are being told:

#### Right to remain silent

#### Anything you say can and will be used against you

#### Right to an attorney

#### If you cannot afford an attorney, one will be appointed for you

### Consequences of Miranda violations:

#### Any statement or confession made is presumed to be involuntary, and can't be used against the person in any criminal case

#### Any evidence discovered as a result of that statement or confession will likely also be thrown out of the case

Exam

* 3 hours

#### 6 essay questions – answered in 2 or 3 paragraphs (about 80 points)

#### 60 multiple choice questions, 80 points – varied points (most 1, but asterisked are 2 points)

### 1 ½ hours on each – do the essay questions first

### Tips for multiple choice

#### Best evidence qs – must compare the strength of each argument – often all will be right

#### Be careful that the tests are stated correctly in answer options

### Tips for essays

#### Do not always argue both sides – just acknowledge other side – unless very close call, then argue both sides

### Tips for rule change question

#### Will be a rule we spent a lot of time on

#### Clearly set out answer

#### Look at policies

#### Problematic language or inconsistencies

#### Language in, or not in, other rules

**NICHOLAS G. SAADY**

**LL.M. 2020**

***SHORT OUTLINE FOR:***

**EVIDENCE**

**CAPRA – FALL 2019**

**RELEVANCE**

Test [401/402]

1. Tendency to make a fact more or less probable
2. Fact is in dispute

Exclusion [403]

1. Consider totality of evidence on point
2. Probative value is substantially outweighed by risk of:
	1. *Unfair* prejudice
	2. Misleading the jury
	3. Confusion
	4. Delay
	5. Cumulative evidence
3. Related issues
	1. Evidentiary alternatives = cannot reduce the PV of the evidence
	2. Stipulations = must be accepted if same PV but less prejudicial
	3. Proof of injury = no prejudicial content or prejudicial presentation of photos / videos
	4. Gory victim = clear which injuries were before and after
	5. Similar circumstances = must be substantially similar
	6. Alternative perpetrator = sufficient and legitimate nexus between crime and AP evidence
	7. Demonstratives = must be under conditions as identical as reasonably possible
	8. Illustrative aids = must be under conditions very different (NOT given to jury)

NOTE: presumption in favor of admitting – extraordinary remedy [***Mende***]

SRM [407]

1. Measure after harm/injury which made harm/injury less likely
2. NOT admissible unless used for impeachment OR if disputed, prove ownership, control or feasibility of RM

Offers of Compromise [408]

1. Conduct relating to compromising claim in present or related litigation (AFTER claim arises – low threshold)
2. ONLY admissible IF:
	1. Criminal case / evidence is of conduct or statements / negotiations involved public office/officials
	2. Used for another purpose (e.g. bias / negating delay / proving fraud)
3. Passes 403

Medical expenses [409]

1. Evidence of offering or promising to pay / paying medical expenses and related expenses is NEVER admissible

Guilty pleas [410]

1. Withdrawn guilty and nolo contendere pleas inadmissible AS WELL AS statements made in plea proceedings and negotiations
2. UNLESS
	1. Another statement from plea proceedings / negotiations intro’d and fair to consider statements together
	2. Criminal proceeding for perjury / false statement AND D made statement under oath on record w/counsel
	3. Breach of plea agreement

NOTE: *Mezzanato* – now often waived by D through clauses in plea agreements – must be knowing and voluntary – v common

Preliminary hearings [104]

1. Determine admissibility of evidence
2. Judge not bound by rules of evidence
3. Compulsory for admissibility of confession / D is W and requests / justice requires

Conditional Relevance [104(b)]

1. Admit on condition that proof of underlying fact is later introduced

Rule of Completeness [106]

1. Can introduce another part of a writing / recorded statement that in fairness ought to be considered at time same

**CHARACTER**

Overarching rule [404(a)(1)]

1. Civil AND criminal evidence of character or character trait is never admissible to prove they acted in acc. with it

Exception 1 – Character in issue [404(a)(1)]

1. Character is element of proof (really only civil – e.g. defamation)
2. Can use any type of character evidence
3. Passes 403

Exception 2 – Impeachment [608/609]

* If W’s character attacked, can call another W to testify about character ONLY using opinion/reputation
* For a W – can either:
	1. Ask about bad act (need not be crim) of that W or another W they testified about IF good faith belief that it occurred AND passes 403
	2. Extrinsic evidence of bad act if admissible for proper purpose (per 404(b), plus bias) AND passes 403

NOTE: can also impeach with conviction under 609 OR impeach with extrinsic evidence to contradict / PIS / bias under 613

Exceptions 3/4 – Attacking D and V

1. Character evidence relevant to charge
2. ONLY reputation or opinion
3. D adduces evidence about character THEN P may rebut on same ground

OR

D adduces evidence about V and P may rebut on same ground for BOTH D and V

1. Passes 403

Exception 5 – Not for character purpose [404(b)]

1. Evidence of crime, wrong or other act introduced for another purpose
	1. INCLUDES Motive / Opportunity / Intent / Plan / Knowledge / Identity / Context
2. Passes 403 (cannot consider propensity to determine PV)
	1. Reasonable juror satisfied crime/wrong/other occurred on PoE
	2. Purpose is relevant
	3. Purpose is divorced from propensity purpose
3. For crim, notice before trial

Exception 6 – Habit [406]

1. Habit / practice exists as fact on PoE
2. Meets definition
	1. Habit = specific, semi-auto and consistent reaction
	2. Practice = organization’s regular practice over time
3. H/P relevant to the conduct in issue
4. May be admitted to prove on particular occasion person/org acted in accordance with it

**SEXUAL OFFENSES**

Rape Shield [412]

1. In sexual misconduct proceedings (broad), cannot introduce evidence of V’s sexual behavior or predisposition
2. EXCEPT:
	1. Civil – V places sexual b/p in controversy AND PV substantially outweighs harm to ANY V and unfair prejudice to ANY party
	2. Crim – sexual behavior – offered to prove someone other than D was source of semen/injury
	3. Crim – sexual behavior – sex was with D AND offered by D to prove consent OR P for any purpose
	4. Crim – sexual b/p – violate D’s constitutional rights

Other rules [413-415]

1. Jury satisfied on PoE that act occurred (need not be charged / convicted)
2. THEN:
	1. Crim – where D is accused of sexual assault OR child molestation, may admit for any purpose
	2. Civil – where claim involves relief relating to sexual assault OR child molestation, admit for any purpose
3. Passes 403 (constitutional safeguard)

**OPINION**

Lay [701]

1. Rationally based on perception / based on personal knowledge
2. Helpful to understand or determine fact in issue
3. Not based on expert knowledge (otherwise use 702)

NOTE: may be on ultimate issue, but cannot state legal conclusion

Expert [702]

1. Liberal standard of admissibility [***Nimely***]
2. Four requirements in 702:
	1. Expert’s scientific/tech/other knowledge will help jury understand evidence OR determine fact in issue
	2. Testimony based on sufficient facts/data
	3. Testimony product of reliable principles/methods
	4. Expert reliably applied principles/methods to case
3. Judge satisfied on PoE – acts as gatekeeper [***Bourjaily; Joiner***]
4. Subsection (a)
	1. Expert appropriately qualified – scientific/technical OR knowledge
	2. Relevant expertise to disputed issue / facts
	3. Helpful to jury – not within common knowledge
	4. ***Daubert*** – controlling test [***Kumho***] – same degree of intellectual rigor as in practice
		1. Whether procedure / methodology has been, and can be, tested
		2. P / M subjected to peer review and publication
		3. Known or potential error rate of P / M
		4. Existence / maintenance of standards controlling operation of P / M
		5. P / M attracted widespread acceptance w/in relevant scientific community [***Frye***]
	5. ***Daubert*** and ***Kuhmo*** allow consideration of other factors under 702(a), such as:
		1. Anticipation of litigation = higher bar for reliability [***Daubert***]
		2. Alternative causation = must rule out alternatives [***Westberry; Burlington***]
			1. Differential diagnosis = acceptable b/c ruling out alternatives [***Westberry***]
		3. Confirmation bias / domain irrelevant info = skew results = unreliability
		4. Forensics = controversial – subjectivity alone does not make unreliable (see types on p.40)
			1. Cannot overstate opinion [***Glynn***]
5. Subsection (b)
	1. Proper underlying facts / data (i.e. not speculating) [***Three Mile Island***]
	2. Do not need personal knowledge – may rely on other reports / studies
	3. Linked w/ 703 – reasonable for expert to rely on such facts / data THEN need not be inadmissible
		1. Also note inadmissible facts / data only disclosed to jury if satisfy 703 balancing test
6. Subsection (c)
	1. Requirement satisfied per Daubert above
7. Subsection (d)
	1. Reliably apply P / M to produce opinion [***Joiner; Kumho***]
		1. Analytical gaps – take a step not a leap of faith over gap [***Joiner***]

**HEARSAY EXCLUSIONS**

Overarching rule [801/802]

* Oral/written statement OR conduct not made during testimony at current trial AND offered to prove truth of matter asserted [**801(c)**] is excluded under **802**

Not hearsay

1. Not an intended assertion (express nor implied) – would reas. person have intended to covey implied assertion?
	1. IE: what was the PURPOSE of the Dec in making statement / doing conduct?

Not offered for truth

1. MUST pass 403
2. Effect on the listener (e.g. human reaction to a statement – only concerned about reaction)
3. Legal significance (e.g. implied contract)
4. Possession / custody of an item (e.g. content of item does not matter)
5. Explain police again / context (e.g. prevent jury from speculating)
6. Statement /conduct constitutes crime (e.g. bomb threat in TSA line)

**HEARSAY EXCLUSIONS – 801(d)(1) Priors + 801(d)(2) Opp. P.**

Prior inconsistent [801(d)(1)(A)]

1. W giving evidence
2. Prior statement given under risk of perjury at trial, hearing or other proceedings (i.e. under oath at formal proceeding)

Prior consistent [801(d)(1)(B)]

1. W giving evidence
2. Statement consistent with current testimony
3. Offered to rebut attack or rehabilitate on any ground
4. Statement responsive to that attack
5. Statement made before existence of any improper motive

Prior ID statement [801(d)(1)(C)]

1. W made prior ID statement
2. W giving evidence and subject to XX
3. May admit – no need to again ID person at trial

Opposing party statements [801(d)(2)]

1. Made in individual or representative capacity
2. Adopted or believed to be true – reasonable person consider it to be adopted / believed?
3. Expressly authorized agents
4. Agents and employees
	1. Engaged at time of statement
	2. Statement w/in scope of their engagement
5. Co-conspirators
	1. Criminal or civil conspiracy – no need for charges
	2. Proven conspiracy in which both are members
	3. Statement made in furtherance of that conspiracy
	4. Statement made while conspiracy was ongoing

**HEARSAY EXCLUSIONS – 804 Requiring Unavailability**

Prior testimony [804(b)(1)]

1. At trial, hearing or lawful deposition
2. Opposing party (crim) OR predecessor in interest (civil) was a party to the above
3. Opportunity and similar motive to develop by DX/XX/RD – would different questions have been asked?

Dying declaration [804(b)(2)]

1. Dec believed death was imminent – conscious of death, with no hope of recovery – swift/certain belief of doom
2. Statement about cause / circumstances of death
3. Personal knowledge – often inferred from circumstances

Against interest [804(b)(3)]

1. Tends to be against one of the following interests:
	1. Pecuniary (money) or proprietary (liberty)
	2. Invalidate Dec’s claim against someone
	3. Expose to civil / crim liability
2. In crim, supported by corroborating circumstances indicating trustworthiness

Forfeiture [804(b)(6)]

1. Proponent engaged in wrongdoing relating to W
2. Wrongdoing intended to render W unavailable
3. Did render W unavailable

**HEARSAY EXCLUSIONS – 803**

Present sense impression [803(1)]

1. Event occurred on PoE
2. Dec perceived the event
3. Dec made a statement at time or immediately after
4. Statement described the present impression

Excited utterances [803(2)]

1. Objectively startling event or condition occurred on PoE
2. Dec was at the scene
3. Dec was in continuous state of startlement from event to statement
4. Statement related to startling event or condition

State of Mind Statements [803(3)]

1. Dec’s state of mind OR conduct is in issue
2. Statement is about Dec’s SoM at the time
3. Statement is present or future looking
4. Statement offered to prove Dec’s SoM OR how Dec acted (i.e. Hillmon) OR how 3P acted (i.e. Hillmon II)
5. Satisfies 403
	1. Be careful if it contains context or cumulative info, and of jury using it for truth

Medical Diagnosis and Treatment [803(4)]

1. Statement made to ANY person providing medical diagnosis / treatment
2. Statement about Dec’s OR 3P’s medical history or symptoms / sensations
3. Reasonably pertinent to treatment / diagnosis of Dec
	1. Be careful of pertinence of attributing fault, IDing perpetrator, suggesting causation and adding description

Recorded Recollection [803(5)]

1. Record maker available to testify
2. Record about matter the maker once knew about
3. Record was made or adopted by maker when matter was fresh in their memory
4. Record accurately reflects maker’s knowledge

NOTE: needs consent to be received as Exhibit AND **612** allows opposing party to XX and introduce other parts of record

Record of Regularly Conducted Activity [803(6)]

1. Record of act/event/condition/opinion/diagnosis
2. Made at / near relevant time by person w/knowledge OR from info from person w/knowledge
3. Kept in course of regularly conducted activity of organization
4. Activity was actually regularly recorded
5. Custodian / qualified W / certification of the above conditions
6. Opponent does not show source of info OR circumstances of prep indicate untrustworthiness
	1. Duty to report problem (i.e. info from outsiders)
	2. Bad motivations (e.g. anticipation of lit) UNLESS disserving of preparer
	3. Unreliable opinions (look at Daubert)

Absence of Record of Regularly Conducted Activity [803(7)]

1. Record under 803(6)
2. Seeking to prove matter did not occur or exist
3. May use evidence that matter is not included in 803(6) record if:
	1. Regularly recorded matters of that kind AND
	2. Opponent does not show source OR circumstances of prep indicate untrustworthiness

Public Record [803(8)]

1. Record OR statement of a public office
2. Sets out either:
	1. Office’s activities OR
	2. Matter observed while under duty to report (NOT police report in crim unless prepared without anticipation of litigation) OR
	3. In civil or crim against GOV, factual findings from legally authorized investigation
3. Opponent does not show source of info OR other circumstances indicate untrustworthiness
	1. Duty to report problem (i.e. info from non GOV sources)
	2. Bad motivations (e.g. bias of a public body / political aims) UNLESS disserving of preparer
	3. Unreliable opinions (look at Daubert)
	4. Additional – hearing before report, time b/w event and investigation, time b/w invesitgation Duty to report problem (i.e. info from outsiders)

Ancient Documents [803(16)]

1. Statement in document was recorded in the document prior to Jan 1, 1998
2. Prove authenticity of document

Learned publications [803(16)]

1. Expert giving testimony
2. Statement is relied upon by expert in DX OR called to attention of expert on XX
3. Statement in publication (such as treatise, periodical, video or pamphlet)
4. Prove publication is reliable authority

NOTE: if admitted, only the statement is read into evidence, publication does not become an Exhibit

Residual [807]

1. Statement supported by sufficient guarantees of trustworthiness
	1. Circumstantial factors
	2. Corroborative evidence (must be admissible or admitted)
	3. Closeness to other hearsay exceptions (i.e. near misses)
2. More probative on point than any other evidence obtained through reasonable efforts
3. Admission serves purposes of Rules and interests of justice
4. Reasonable notice to adverse party before trial in writing OR with court’s permission during trial (content req’s)

Confrontation Clause

1. Criminal case
2. Hearsay
3. Dec not giving evidence
4. Testimonial – primary motivation is for use in crim trial (objective test, consider both sides’ conduct / motivations)
5. D has right to adequate opportunity to XX Dec OR evidence is inadmissible

**IMPEACHMENT**

Character for truthfulness [608]

* MUST be used to attack character for truthfulness
1. If W’s character attacked, can call another W to testify about character ONLY using opinion/reputation
2. For a W – can either:
3. Ask about bad act (need not be crim) of that W or another W IF GF belief that it occurred AND passes 403
4. Extrinsic evidence of bad act if admissible for proper purpose (per 404(b), plus bias) AND passes 403

Prior convictions [609]

* MUST be used to attack character for truthfulness AND cannot disclose underlying facts of conviction
1. Conviction elements required proof of dishonest act / false statement = must be admitted [**609(a)(2)**]
2. More than 1yr prison:
	1. Civil case = must be admitted subject to 403 [**609(a)(1)(A)**]
	2. Crim case where W is not D = must be admitted subject to 403 [**609(a)(1)(A)**]
	3. Crim case where D is the W = must be admitted if its PV outweighs its PE to that D (mild p. against) [**(a)(1)(B)**]
3. More than 10 years = only admissible if PV substantially outweighs PE (presumed excluded) AND notice given [**609(b)**]

Prior inconsistent statement [613]

1. May be used to impeach even if not made under oath as required for 804(d)(1)
2. It is inconsistent – can be silence or lack of memory
3. Can use extrinsic evidence, if W given opportunity to explain / deny AND opposing also given opp. to examine W on it
	1. Contradiction (untrue statement) or bias (motive to lie prior to statement being made) or incapacity (severe)
4. Passes 403 – often has high PV

Rehabilitation [613]

1. When W is impeached (i.e. character attacked), may meet the attack and rehab the W (e.g. PCS to rehab a PIS)

**PRIVILEGES**

Attorney / Client [501]

1. Lawyer sought for legal advice = “a” primary motive for communication
	1. Where mixed with business/political, still privileged
2. Communication between lawyer and client (no one else covered)
	1. Extends to corporate agents/employees – BUT can give evidence about underlying facts
		1. NOT a personal privilege – provide Upjohn warning
	2. Extends to non-lawyer agents which are necessary to advice (only comms. after engaged by lawyer)
	3. Info / comms between lawyer and anyone else not privileged
3. Reasonable anticipation of confidentiality
	1. Common interest – ALL parties agree to keep confidential (one A/C unit) – if broken, still privileged
4. No waiver / forfeiture
	1. Conduct by client / corporate management / agent lawyer
	2. Intentional = subject matter waiver
	3. Unintentional = no waiver if reasonable steps to prevent disclosure AND reas. steps to rectify error
	4. NOTE: use clawback agreements (502(e)) or 502(d) court order which apply to third parties and all courts
5. Crime / fraud = client’s purpose at time of comms. was not criminal (although past crimes are ok)

Spousal adverse testimony [501]

1. Criminal case
2. Not hearsay – b/c only protects the Dec, not the W
3. Married at time of trial
4. Testifying spouse does not testify
5. Not jointly participating in crime (Circuit split on this)
6. Not involving crime relating to a child of either spouse

NOTE: spouse cannot testify about confidential communications if below conf. comms. privilege applies

Spousal confidential communications [501]

1. Civil or criminal case AND Adverse testimony privilege (above) does not apply or waived
2. Married at time of communication
3. Speaking spouse does not want communication disclosed
4. Only protects communications OR communicative actions NOT pure actions
5. Speaking spouse expected communication to remain confidential at time
6. Speaking spouse did not have criminal purpose for communication
7. Not involving crime relating to a child of either spouse