

## RELEVANCY AND ITS COUNTERWEIGHTS

**Rule 401: Relevant evidence means evidence having any tendency to make consequential fact more or less probable than it would be without the evidence.** Ask:

- What is it trying to prove?
- Does it help establish that fact? Need not prove anything by itself, need not be conclusive. A brick is not a wall.
- Is the proposition even provable? Maybe not properly pleaded/allowed by substantive law
- CA code § 210 says it must have tendency to prove/disprove a disputed fact of consequence

*Knapp v. State*: Knapp said he killed Marshall in self-defense and had heard Marshall was violent and had killed old man. Prosecution introduced evid. that old man drank himself to death. Although the issue was whether he heard M killed old man, evid. of old man's death by alcohol was admissible because it showed improbability that he would have heard otherwise. The determination of relevancy rests on whether a particular item of evidence would reasonably tend to help resolve the issue at trial.

*Sherrod v. Berry*: Cop killed robbery suspect saying he reached into coat as though for a weapon. Evidence that he was in fact unarmed was not admissible b/c not relevant to what officer thought – improper, irrelevant and prejudicial. Counter arg: goes to reasonable fear of whether he was armed.

**Rule 402: All relevant evidence is admissible; evidence not relevant is inadmissible.**

**Rule 403: Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.**

**TEST: (1) what is proper purpose for which evid is introduced? (2) what is the forbidden purpose? (3) what are the alternatives?**

- As to criminal D, “unfair prejudice” speaks of capacity to lure factfinder into declaring guilt on a ground different from proof specific to the offense charged (*Old Chief*) – jury might use as character evidence
- Must be determined in view of availability of other means of proof and other facts appropriate for making decision of this kind (*Old Chief*)
- Arg. for introduction is we want to sustain willingness to convict - evidence may give jury the story they expect; there will be no gaps in story; narrative richness; will prevent them from negative inference as to why prosecution is leaving out certain details (*Parr*); multiple utility - evidence might have another use
- Evidence must be considered based on probative value if it was believed (*Ballou*) – judge can't weigh credibility
- CA code § 352 does not explicitly forbid unnecessarily cumulative evidence
- If 50-50, judge must admit it: can exclude only if “substantially” outweighed by prejudice

**Old Chief**: Charged with felon in possession of a weapon, had previous felony assault conviction. He offered to exclude name and nature of prior in exchange for just saying he had a prior felony. Prosecution is entitled to prove its case by its own evidence, to give a narrative picture and to fulfill jury's expectations. But, proving past criminal status does not interfere with the narrative so when proof of convict status is at issue a general admission of prior crime is enough. Alternative relevant evidence may be admitted instead if it carries same or greater probative value but lower risk of prejudice.

*Parr*: Allowed to introduce porn film. The government should have the right to present a picture to the jury. To substitute for a picture a naked admission might rob the evidence of its legitimate weight.

Deathbed video in unlawful death suit: (1) substantive law allows recovery for support but not for grief; (2) proper purpose to show support provided dying relative; (3) forbidden use are damages for grief; (4) alternatives are other family videos/ways of showing close family relationship should be excluded. Same for gruesome autopsy photos, porn movie.

*Ballou*: Ballou hit by a car, other side wanted to introduce evidence he was drunk. Nurse testified at pretrial, saying Ballou has definitely not been drunk a few hours before the crash. Court said that when doing 403 test we must give evidence weight it would have if it was believed. Test would go to contributory negligence and is highly probative. Tests are scientific and therefore not clearly prejudicial.

**Rule 105: If evidence admissible as to one party/for one purpose but not as to another party, the court shall restrict the evidence to its proper scope and instruct the jury accordingly.**

**Rule 106: When writing or recorded statement is introduced by a party an adverse party may require the introduction of any other part or other writing which ought in fairness to be considered contemporaneously with it.**

- Can't insist on the whole thing if not necessary

**Rule 104(a): Preliminary Qs of qualification of witness, existence of privilege or admissibility of evidence shall be determined by court. Judge not bound by rules of evidence (except w/privilege).**

- If foundation is a question of law (legally set standard) it is for judge to decide fact exists by preponderance of the evidence
- Judge can decide facts whose relevancy is not disputed, e.g. whether *Miranda* rights were read
- If judge can't decide whether foundation is fulfilled (e.g. it's 50-50) he may exclude the evidence b/c person relying on exception has BOP of laying foundation
  - Policy: if you want to exclude evidence this is better; otherwise under 104(b) issue it goes to jury. Jury may disregard hearsay technicalities, may use for improper purpose
- Hearsay may be used to determine foundation Qs
- But, weight and credibility are always for jury (104(e))

**Rule 104(b): If relevancy is conditional on Q of fact, court shall admit it subject to introduction of evidence sufficient to support finding of fulfillment of the condition (loser).**

- Qs of conditional relevancy based on determinations of fact are for the jury – if the fact to be determined will also determine the question of relevancy
  - e.g. there was car accident and car was seen speeding on Turk street. D says it was not his car – this is conditional relevancy and jury decides (if not his car then not relevant)
  - e.g. was ransom note written by D
- But judge must conclude jury could reasonably find the conditional fact (*Huddleston*); judge must consider in light of all evidence presented to jury (*Huddleston*)
- Policy: in case of speeding car if jury decides it was not D's car they won't be prejudiced

**Rule 104(e): Party can always give jury evidence of weight and credibility of evidence.**

- Torture hypo: judge decides confession comes in under 104(a) but D says he was tortured; jury can still decide that once it's in

## CHARACTER EVIDENCE

**Rule 404(a): Evidence of character or trait of character not admissible to show conformity therewith except**

- (1) Of Accused: Character evid. offered by accused (mercy rule), or by prosecution to rebut it, or if accused showed trait of the victim, evid. of same trait in accused**
- (2) Of Victim: Character of victim offered by accused or by prosecution to rebut the same, or evidence of peacefulness of homicide victim to rebut allegation that they were first aggressor**
- (3) Character evidence of witness may be admissible to reflect on credibility by showing prior reputation for veracity or prior felony (can be rebutted): see 607. 608. 609**

- BUT must be reputation or opinion evidence per 405(a), not specific acts (unless essential element under 405(b)); ON CROSS you may look into specific acts per 405(a)
- Minority view: may be invoked in civil cases where central issue is “in nature criminal” e.g. police beating (*Perrin*)
- policy: to avoid false evidence of guilt and confusion

D is charged with murder in connection with barfight; says V was first attacker and he acted in self-defense.

Admissible: reputation of V for violence (404(a)(2)); V attacked D 3 weeks earlier (404(b) motive/intent); D had heard V shot someone in fit of rage (to show reasonable fear, not conformity with character trait); D’s rep for violence if he has introduced evidence of V’s same rep (404(a)(1))

Not admissible: V previously shot someone (404(b)) to show conduct in conformity (unless self-defense)

**Rule 404(b): Evidence of other crimes, wrongs or acts not admissible to prove character in conformity therewith. BUT it can be used to show KIPPOMIA: knowledge, identity, preparation, plan, opportunity, motive, intent, or absence of mistake or accident. But prosecution must give notice.**

- **TEST: (1) does it show character? (2) is it showing conduct in conformity with it? (3) is there some other purpose? (4) balance KIPPOMIA w/forbidden purpose that it be used to show character (5) look at strength of evidence**
- Not limited to KIPPOMIA, as long as not using to show character
- Must show something in genuine controversy – e.g. intent must be an issue
- 104(b) question: Strength:
  - Federal rule very permissive: similar acts evidence is relevant if jury can reasonably conclude the act occurred (*Huddleston*; same in CA; *Platero*); need not even result in conviction – could be acquittal but jury might still reasonably believe he did prior act (*Dowling*). Judge must consider in light of all evidence presented to jury (*Huddleston*)
  - In some Js must be clear and convincing evidence they committed prior (*Tucker*; Nevada)
- Balancing factors: strength of evidence establishing similar acts, similarities between crimes, time elapsed, need for evidence, alternative proof, danger of jury hostility. Holistic balancing approach can consider (4) and (5) together; high potential for prejudice plus weak evidence could keep it out
- Policy: risk of inferential error that jury will assume guilt; nullification error that jury will punish D without following the law; surprise/waste/confusing: no need to relay all life incidents, D is only prepared to defend charges against him

KNOWLEDGE: *Cleghorn*; Pot grower charged with growing and says he has never seen weed, used to show he knows what it looks like

IDENTITY: Earmark crimes can be used to show identity (MO) of accused but identity alone is not a ticket to admission; identity of consciousness of guilt (Oswald shooting cop during escape)

PREPARATION: stealing blueprints of bank; stealing car to rob bank

PLAN: Stealing key from safe shows opportunity/plan/prep to rob safe later; common plan or scheme (overlaps w/ intent)

OPPORTUNITY: unusual skills for breaking into safes; being seen in room where you had no permission

MOTIVE: involuntary compulsions, unusual sexual propensities, expensive drug habit, pyromania, indecent exposure or existence of larger plan/scheme, conspiracy; must be something unusual – not just greed; killing someone’s cat (hostility towards them); Murderer also shown to have shot cop: motive to obstruct justice; Previous spousal abuse particular attitude towards particular person

INTENT: other embezzlements to show intent to appropriate money (but present crime charged must req. specific intent); not if only way is showing character (*Beasley*); killing co-robber to show motive to cover up

ABSENCE OF MISTAKE OR ACCIDENT: To show act was not inadvertent/accidental; previous crime towards someone

TO COMPLETE STORY OF CRIME: crime may include other crimes, and witness must paint narrative picture of events surrounding the crime (à la *Old Chief*).

DAMAGES: e.g. someone claiming their reputation was harmed in defamation suit.

Guy living in felons' halfway house was supposed to be back at 6 but is AWOL after leaving at 3; accused of robbery; ok to show motive (robbed so he could run away); identity (consciousness of guilt). Leave out specifics of his prior per 403.

*Cleghorn*: P injured in accident caused by negligence of switchman; sues employer of switchman. Evidence of switchman's intemperance ok to show that his employer knew of it and to get exemplary damages. Not being used to show conduct.

*Carillo*: Charged with distribution of coke and heroin; moved to exclude evid. of 2 extrinsic acts of selling heroin. Extrinsic acts may be used to show identity if they bear high degree of similarity so as to earmark them as handiwork of accused. Here the prior acts were not sufficiently similar or unique.

*Beasley*: Scientist charged w/distributing Dilaudid, said he used it for plant experiments. Evidence that he had lied to get drugs before and sold it relevant to show he acquired it with same intent, but too prejudicial to admit. But, not similar enough to show pattern b/c different drugs, different times, different motives.

*Cunningham*: Nurse charged with stealing Demerol and withholding from patients. Evidence of prior conduct to show she was addicted to Demerol and had motive to steal admissible. Evidence of suspension of nurse license admissible to show contextual framework for jury to understand issue. MOTIVE.

*Tucker*: Tucker woke up to find Evans dead on his sofa. In 1957 he had awoken to find Kaylor dead in dining room but was never indicted. Not admissible – prosecution must first establish by plain, clear and convincing evidence that D committed the offense.

*Huddleston*: Indicted for buying and selling stolen goods; said he didn't know they were stolen. Court admitted evidence of prior similar transactions to show knowledge without finding prior acts had occurred. Rehnquist said court need not find that acts occurred; similar acts evidence is relevant if sufficient to support a finding by the jury that D committed the acts. Court must look at totality of evidence.

**Rule 405(a): If character evidence is admissible proof may be made by testimony as to reputation or testimony in form of opinion. On cross you may inquire into relevant specific instances of conduct.**

- *Michelson*: D introduced reputation evidence of good reputation. Prosecutor asked the rep. witness if they knew he had been arrested for stolen goods. Evidence admissible. Where D puts his reputation at issue the other side may examine witness as to extent of their knowledge of D's reputation. You're impeaching the character witness, not showing D is a bad person
- Accused need not take the stand
- Limits on cross: prosecutor can't produce extrinsic evidence; must take witness' answer; must have good faith basis for what he brings up (can't say did you hear he lied on the stand yesterday)
- Policy: more efficient to limit it to opinion/reputation; sums up everything in one sentence
- Hearsay may be used because not for truth, but to show reputation/opinion
- Same for truthfulness of witnesses under 608(a) and (b)

**Rule 405(b): If character or trait is essential element of the charge, claim or defense, proof may also be made of specific instances of conduct.**

- e.g. if someone is accused of being an unfit parent; defense to defamation suit (he really is a liar!)

**Rule 406: Evidence of person's habit or organization's routine practice is relevant to show that conduct on a particular occasion was in conformity with it.**

- Character is a general trait; habit is a regular response to a repeated situation – may become “semi-automatic,” e.g. running down the steps 2 at a time, doctors advising patients of risks, business routine of stamping mail, drinker getting drunk at specific bar every Friday (usually businesses, though)
- Judge is fact-finder and can use whatever evidence he wants; no need for corroboration or eyewitness
- Can use specific acts

*Perrin*: P's son was in auto accident. Cops later showed up at home and said son was erratic, kicked them, and cops shot him in self-defense. Cops testified previous violent encounters with son and that he was uncontrollable and violent. Court said not admissible under 404(a) b/c circumstantial character evidence admissible only through reputation and opinion evidence. But, habit is relevant to prove conduct in conformity with it and he had repeated reaction to cops.

*Halloran*: Mechanic sued chemical co. for injury from explosion of refrigerant when servicing car. Evidence that P had previously ignored label warnings by using immersion coil to heat can was admissible to show conformity and hence negligence on particular occasion. Deliberate repetitive practice by someone in total control of the circs is highly probative if you can show he did it frequently enough.

So, specific acts not allowed unless (1) KIPPOMIA; (2) cross of char. witness; (3) ultimate issue; (4) habit; (5) sex

**Rule 412(a): (1) Evidence of victim engaging in other sexual behavior or (2) Evidence to prove victim's sexual predisposition not admissible in any civil or criminal proceeding involving alleged sexual misconduct**

**Rule 412(b) EXCEPTIONS:**

**(1) In criminal cases:**

- a. **Specific instances of victim's sexual behavior to show someone else was source of semen, injury or other physical evidence** (vaginal abrasion in Kobe case)
- b. **Specific instances of sexual behavior by victim with the accused offered by accused to show consent or by prosecution**
- c. **Evidence the exclusion of which would violate D's constitutional rights** (6<sup>th</sup> Amend. right to confront; applicable to states as 14<sup>th</sup> Amend. DP right to cross-examine; but must be strong evidence (*Olden*))

**(2) In civil cases, evidence to show behavior or predisposition of victim if probative value substantially outweighs danger of harm to any victim and unfair prejudice to any party. Victim's reputation admissible only if victim has placed it in controversy.** (favors exclusion)

**Rule 412(c) If offering evidence under (b) party must file written motion in advance w/reasons for evidence and serve all parties and notify victim; must be in camera hearing and victim must have right to be heard**

- o Policy: so victims aren't deterred from suing due to fear of humiliation at trial; so victims are encouraged to report; to protect against jury prejudice
- o varies state to state; federal rule relatively strict
- o Hypo: if P is caught having sex by D and D threatens to tell on P and P threatens to say D abused her, evidence P was having sex may be admissible to show motive for lying and under 412(b)(1)(c) b/c violated constitutional right to defend and confront.
- o *Platero*: evidence must go to jury if conditional on determination of fact (Park disagrees; says judge should still exclude b/c prejudicial)
- o does this mean it can always get in as KIPPOMIA anyway?

*State v. Cassidy*: D accused of rape and said V consented, then became hysterical and said she wanted to die. D tried to introduce evidence that she had been hysterical after sex with another man. Court said no – evidence of sex with someone other than defendant not admissible. Furthermore, one similar instance not sufficient to prove a pattern of conduct.

*Olden*: D, black man, accused of rape and said V consented. D attempted to elicit testimony from V that she was involved with R (another black man). D said V invited him to have sex but accused D of rape when R found out. Court said that confrontation clause allows D to cross-examine a witness on a relevant matter. This tended to show (1) possible motive for V to lie and (2) R's bias as a witness was therefore central to case. If you can show bias, denial of cross is unconstitutional. Speculation as to jury's racial bias cannot justify exclusion. Harassing or marginally relevant cross examination, however, is not a right.

*Platero*: D, security guard, pulled over V and co-worker, threatened to arrest him for DUI, told him to start walking and that he was going to arrest V. D then drove V elsewhere and raped her. When he returned V to car V told R she had been raped. D said sex was consensual and V fabricated story b/c she was protecting rapport with R from husband. Relevancy is motive for lying; if affair happened it's admissible. Court said D has shown enough evidence of relationship btwn. V and R for jury to make the call – conditional relevancy per 104(b).

**Rule 413(a): Criminal D accused of sexual assault, evidence of D's commission of another sexual assault is admissible.**

**Rule 413(b): But gov must disclose this evidence to D in advance**

- this is an exception to the rule against character evidence
- must have reached high level of seriousness, need not have resulted in conviction (but acquittal evidence admissible), need not bear any special similarity (no earmark)
- We presume admissibility but Rule 403 still applies; lack of similarity in crimes and strength of evidence may go to probative value (*Johnson*)
- Policy: criticism that it's inconsistent w/rape shield laws – Park says they have different purpose. Criticism that it's inconsistent with character evidence rule, Park says rape is a compulsion crime.

**Rule 414: Criminal D accused of child molestation, evidence of other c.m. act admissible**

**Rule 414(b): But gov must disclose this evidence to D in advance**

**Rule 415(a): In civil case predicated on commission of sexual assault or child molestation evidence of commission of another offense of sexual assault or child molestation is admissible**

**Rule 415(b): But party must disclose this in advance**

*Johnson*: High school student claims harassment. Tries to introduce evid. that guidance counselor had slung another teacher over shoulder and touched her improperly. Although it may be "offense of sexual assault" under 413(d), where past act is not substantially similar or proveable with specificity there is no presumption of probativeness. Court does 403 balancing, says lack of evidence of intentionality, differences in the alleged crimes and isolated nature of incident support exclusion of the evidence.

Paula Jones hypo: Discovery of Clinton's affair w/Lewinsky not admissible in harassment suit b/c must be a serious sex crime (see 413). You could try to say he had plan of abusing power over female employees under 404(b) KIPPOMIA.

### **EVIDENCE AFFECTED BY EXTRINSIC POLICIES**

- Seemingly relevant evidence can be excluded as a means of encouraging certain types of conduct. Subsequent remedial measures, offers to compromise, payment of medical expenses, settlement, liability insurance, guilty pleas/statements in plea bargain.

**Rule 407: Evidence of SUBSEQUENT REMEDIAL MEASURES not admissible to prove negligence, culpable conduct, defect in product or design or need for warning or instruction. Exceptions: if offered for another purpose such as proving ownership, control, feasibility of measures (if controverted) or witness impeachment.**

- policy is extrinsic: not to discourage people from taking measures; they have low probative value of fault and are highly prejudicial
- similar past acts ok to show condition was dangerous or D had knowledge; past contracts to show interpretation
- examples: firing employee, changing manual, adding safety procedures. You could introduce evidence of fence at construction site to show control but not neg/defect/culpa (forbidden purpose). If post-remedial measure is only photo you have of premises you can try to get it in to show jury what it looked like (judge can tell them not to use it for negligence/culpa/defect). Alternate: photos redacted, drawings shown
- impeachment is ok but Park says often you can argue they didn't understand the Q, they were describing state of affairs now and not then and so it's not valuable for impeachment. Extreme statements ("I would

never do this,” “It would be impossible to change,” “It’s the best ever devised” *Muzyka*) but not to show what you believed was practicable at time of event (*Tuer*)

- responsibility/control: putting fence around hole after s/one fell in to show control of prop.
- timing: improvements made beforehand can probably come in
- feasibility: narrow view is feasibility is only controverted by saying something’s impossible physically, economically (we could never afford it, not just it’s a bad idea) or technologically (we would go out of business if we had to make widgets that way) and not merely by weighing advisability (*Tuer*). Broader view is that it’s controverted if D had thought about feasibility and decided it wouldn’t work or be useful (*Anderson*).
- attempted concealment (destroying evidence), e.g. repainting scratched fender to hide accident
- subsequent accidents admissible only to show condition existed, not to prove causation or notice.

*Simon*: Woman sued town saying she slipped and fell on sidewalk. She offered evidence of prior similar accidents at same location. Court said evidence of other similar accidents may be relevant to show defect, notice (prior only) or causation. Did 403 balancing test, says highly probative and not too prejudicial, therefore admissible.

*Anderson*: Woman raped in high-crime hotel sues b/c no chains or peepholes. Motel manager testified these would not have done anything but later they put in chains and peepholes. Court said this was controverting feasibility and admitted evidence (bad rule).

*Tuer*: Hospital did not administer Heparin b/c patient was going into surgery, and he dies of cardiac arrest. They now administer it until patients go into operating room. Hospital never said it would be unsafe but that given the risk they decided it was bad idea at the time – it was about advisability not feasibility. Furthermore, impeachment value too low to let it in. Not admissible.

**Rule 408: Evidence of furnishing or accepting consideration in COMPROMISING A CLAIM or attempting to is not admissible to prove liability for or invalidity of claim or its amount. Conduct or statements made in compromise negotiations likewise not admissible. Exceptions: offered for another purpose such as bias or prejudice of a witness, negating contention of undue delay or proving effort to obstruct an investigation.**

- policy: we want to encourage settlement; may be irrelevant b/c misleading; people settle for many reasons
- but can be used for other purposes: bias: If A and C are injured by B and A settles and testifies for B you can use to show bias; can be offered to impeach if they lied about a fact in their offer (*Davidson*)
- litigation must be threatened or on the horizon – not just business negotiations
- lawyers writing letters should say they are stated without prejudice/not impeachment material
- the whole letter or whole statement is inadmissible (Cf. offer to pay medical bills)
- note: if introduced without objection can be considered a party admission

*Davidson*: P gored by steer when D overturned truck. D introduced letter from P saying he had been 10 feet from animal and demanding payment in full. P said it was a “settlement” letter. Court said letter was not offer to compromise or settlement but an attempt to inform D of facts of incident and furthermore showed he didn’t want to compromise one bit.

**Rule 409: Evidence of furnishing or OFFERING TO PAY MEDICAL/HOSPITAL/SIMILAR EXPENSES not admissible to prove liability for injury.**

- Unlike 408 there need not be an actual claim, you need not ask for anything in return
- statements made along with offer to pay are not excluded (unlike 408). “Sorry, it’s my fault, let me pay you,” the first part would be admissible as an admission

**Rule 410: PLEAS OF GUILTY which were later withdrawn, pleas of nolo contendere, statements made under FRCP 11 and statements made in plea discussions with prosecuting attorneys (unless resulting in guilty plea which is not withdrawn) are not admissible in any civil or criminal proceeding against D who made the plea/had discussion. **UNLESS** (i) another statement in same plea discussion was already admitted and fairness dictates contemporaneous admission or (ii) in perjury proceeding if statement was made under oath.**

- admissible: guilty plea, statement in connection with guilty plea (I am the one who robbed her), even in traffic court (*Ando*) but probably not if you check a guilty box on an out-of-state speeding ticket (Park).
- *Mezzanatto*: prosecution may ask D to waive these rights by agreeing statements can be used to impeach him

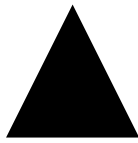
*Ando*: N pleaded guilty to failing to make a proper turn or signal in traffic court. He had been in accident w/cop and at civil trial he denied not signaling. Court held that traffic court guilty plea can be admissible to show guilt (not federal rule)

**Rule 411: Evidence that a person WAS OR WAS NOT INSURED AGAINST LIABILITY is not admissible on issue of whether they acted negligently or wrongfully. Exceptions: other purpose such as agency, ownership, control, bias, prejudice.**

- But, if D's insurance investigator testifies that P admitted to speeding, you may be able to ask if he was insurance rep. not to show insurance by to show bias. Balancing test, alternative (aren't you an investigator for D?)

## THE HEARSAY RULE

B (belief of actor/utteror) –risk ambiguity (it's not what they were actually saying) and insincerity



A (action or utterance)      C (conclusion to which B points) –risk bad memory or perception

**Rule 802: hearsay is not admissible except as provided by the rules or other rules provided by SC or Congress**

**Rule 801(a): Statement includes: (1) oral statements; (2) writings; (3) nonverbal conduct intended as an assertion**

**Rule 801(b): A declarant is a person who makes a statement**

**Rule 801(c): Hearsay is a statement, other than one made by the declarant while testifying at the trial or the hearing, offered in evidence to prove the truth of the matter asserted (assertion-centered definition)**

- Declarant-centered definition: Hearsay is out-of-court words or conduct (assertive and nonassertive) offered to prove truth of matter OR to prove that declarant believed matter to be true. Hearsay if it depends for value on credibility of the declarant, based on testimonial qualities of sincerity, narrative ability, memory and perception.
  - i.e. requires trier of fact to treat OCD as if he or she were in court giving the testimony
  - differences: (1) Assertion-centered lets more things in if you can use them for s/t other than truth of matter asserted; (2) Declarant-centered counts non-assertive conduct reflecting state of mind as hearsay
- Policy:
  - problems with hearsay: ambiguity (articulateness of OCD), insincerity, faulty perception, erroneous memory.
  - no opportunity to cross-examine and test these dangers
  - evidence was not given under oath
- A witness' conclusions based on out-of-court statements are inadmissible hearsay (*Brown*)
- Nonhuman evidence: conclusions based on reading an electronic device are not hearsay (*City of Webster*)
- Silence is usually not considered an assertion and normally scrutinized only for relevance (*Silver*; but not in all courts and sometimes \*can\* be assertive)
- Conduct as assertion: pointing to suspect in a lineup; must be intended to be assertion or substitute for words; person trying to show it was assertion has BOP.
- Nonassertive conduct or implied assertions are not hearsay b/c there is no risk of insincerity (*Zenni*; *Knapp*).
- An indirect statement – letter asking cousin for advice – is not hearsay; a direct statement that cousin is smart \*is\* hearsay

- under declarant-centered definition nonassertive conduct and indirect statements are still hearsay b/c the dangers are still there and you must make inferential leap. Statement of act depending on credibility (memory/perception/sincerity/narrative ability) of someone not testifying (*Wright v. Tatham*; *Kearley*; committing suicide to show culpability; sea-captain embarking on ship to show seaworthiness)

*Zenni*: Agents were in D's home after arrest and answered his phone, tried to say callers' directions for placing bets could prove that premises were used for betting operations. Court said the statements were not intended as assertions of the inferred fact (that premises was used for betting) and were therefore not hearsay. They were nonassertive verbal conduct showing state of mind.

*Wright v. Tatham*: A left his stuff to X and a relative contested will, saying A was mentally incompetent. Evidence of letters several people wrote to A about business/social matters were not admissible to show declarants' belief that A was capable of making decisions and competent b/c would not be admissible as opinion testimony at trial. It makes leap from A to B to C in hearsay triangle (declarant-centered def). Also *Kearley* – it's hearsay if you have to make an inference.

*Knapp*: Suicide is tantamount to confession for crime.

*Silver*: P claimed temperature on RR was too low and sued for ensuing injury, D testified that no other passengers had complained to them. In this case passengers were in same situation as p and had opportunity to complain. Evid. of lack of complaints should have been admitted b/c silence is not hearsay.

*City of Webster*: D convicted of speeding, cop's testimony that timer clocked him at above the speed limit is not hearsay and is admissible – it's not an utterance, just what the witness observed.

**Rule 602: A witness may not testify to a matter unless evidence is introduced that she has personal knowledge of the matter.**

- A witness' conclusions based on out-of-court statements (even if they testify that they have personal knowledge, you can say the knowledge is based on inadmissible hearsay (*Brown*))

*Brown*: IRS agent testimony that 90-95% of statements prepared by D contained overstated deductions was hearsay b/c her conclusions were based on testimony of OCDs.

**Rule 805: Hearsay within hearsay admissible only if each statement falls into an exception**

## NOT HEARSAY

### **(A) What is it being offered to prove?**

- If truth of matter, then hearsay (even if declarant is also testifying in court)
- NOT if for **effect on hearer/hearer's SOM**
  - knowledge/notice/warning (*Vinyard; Johnson*)
  - motive justifying later conduct – e.g. reasonableness of cop's conduct (“there was thumping out there” to show reason cop went searching behind OJ's house (though will not pass 403 bar)) but not when cop's motivation is not an issue (*Hernandez*);
  - to show reasonable fear in self-defense case or duress defense (*Subramaniam*)
  - Bill wearing blue necktie Monica gave him on day of her testimony;
  - phone number on paper to show 2 people knew each other
- NOT if **circumstantial evidence of declarant's SOM** (distinguish from a direct assertion as to SOM, which is hearsay)
  - wife saying “my husband is a liar and a thief” as evidence she disliked him when he later sues for her wrongful death;
  - customer confusion (*Fun-damental Too*)

- “I am the Prince of Denmark” if sanity is at issue
- But, under declarant-centered definition this is often hearsay if requires inferential leap – e.g. “Joan robbed the bank” still contains hearsay dangers and would be excluded under this definition. However, b/c of 803(3) this difference has little effect.
  - the only time there is a difference is when you have prior statement by witness affecting credibility, or statement about the past or nonverbal conduct
- But also, “I hate Fred” is direct evidence of SOM (must be used for its truth), so it’s hearsay and can only come in under 803(3)
- Circumstantial evidence of use of premises – e.g. drug ledger used not as evidence of particular deal but of use of premises for drugs; molested child describing molestor’s house to show she had once seen it; courts generally ok this.
- NOT if for **legally operative language** (promise, guaranty (*Ries*), marriage vows, words of offer or acceptance (Ks), gift, sale, bailment, slander, libel, “This is a loan”)
- NOT if to **impeach**: prior statements of witness affecting her credibility
  - he says light was green in court but had previously said it was red, but can’t use someone else’s ODS to impeach
  - different than 801(d)(1)(A); need not meet its requirements

**(2) If not offered for truth of matter, you must still weigh it under 403.**

- judge usually gives limiting instructions or may redact a statement (especially in criminal case to get rid of identifying characteristics or danger of swaying jury)

*Subramanian*: Charged with carrying weapons, tried to introduce terrorists’ threats that he carry them or they kill him. Court said not offered for their truth but just to show SOM - that D believed them. Admissible.

*Vinyard*: P slipped and fell, introduced evidence that people had complained that surface was slippery. Here the statements proved the D’s knowledge which was a material issue.

*Johnson*: Hospital sued for negligence in hiring a Dr. when it could have found records showing he was incompetent and not hired him. Records admissible not to show incompetence but notice - existence of the information.

*Ries*: P and D did business together. When D flaked, P stopped shipping them stuff. D then made oral agreement to guarantee payment for orders. Evidence of these statements by D’s VP were admissible to prove that they created guarantee and were legally operative language.

*Fun-Damental Too*: P sued D for copying its toilet flushing toy and selling it cheaper. P introduced evidence that customers had complained that some retailers were selling P’s product (which was really D’s) for cheaper. Was admissible not to show that they were actually selling it cheaper, but to show the customer’s confusion – state of mind.

*Hernandez*: D convicted for coke deal. Prosecution wants to intro evidence that customs had identified him as a drug smuggler. Prosecution tried to say it showed their state of mind and motivation for investigation; court didn’t buy it and said SOM not at issue and evidence is hearsay. It was used to show guilt and under 802 is inadmissible.

*Jaramilo-Suarez*: Drug ledgers admissible as circumstantial evidence that show character and use of place where ledgers were found (but would not be ok to show truth unless proper foundation laid and limiting instructions were given)

*Rhodes*: D accused of espionage by conspiring with Russians, memo by Russian agent saying his sources knew who D was and that he was recruited as spy was admitted. You could say it’s hearsay within hearsay. But you could say it can come in under 807 because the memo was so top secret there is little risk of insincerity. You can say it is used to show the house was used for spying purposes. You could say it shows state of mind of memo writer that he would be interested in approaching D. You can say it shows they knew each other. But judge should then redact it.

**Rule 801(d)(1): PRIOR STATEMENT BY WITNESS: Declarant testifies at trial and is subject to cross-examination and previous statement is (A) given under oath at trial/depo/etc. and inconsistent with current testimony; (B) consistent with testimony and offered to rebut charge of declarant's fabrication, improper influence or motive (need not be under oath) or (C) one of identification of a person after perceiving them, then statement is NOT hearsay.**

- Previous identification of someone at a lineup applies under (C) (rationale: more accurate and less fear). even if someone can't recall basis for identification (*Owens*)
- Can't just corroborate your own testimony – must be challenged
- prior consistent statements: admissible to rebut a charge of recent fabrication or improper influence/motive only if made before alleged motive existed (*Tome*)
- Because it's not hearsay it can be used as substantive proof of matters asserted

**Owens**: D charged with murdering prison guard. Guard said he remembered ID-ing D as assailant in FBI interview. This is an admissible prior statement of identification, and he is available for cross so it's constitutional.

**Rule 801(d)(2): PARTY ADMISSION: Statement by party to litigation inconsistent with position party currently takes is NOT hearsay if offered against party and**

- Policy: admissibility is result of adversary system (whatever you say can be used against you); no guarantee of trustworthiness required – if you say it you are stuck with it
- no need for personal knowledge (*Reed; Mahlandt*); can be mere opinion
- need not be to third persons – can be statement by agent to principal or party's books or records not intended to be disclosed to third person
- preliminary determination made by judge and not jury (*Carlson*)
- still subject to 401 and 403, but generous treatment of this rule justifies finding of low prejudicial value (*Mahlandt*)
- Because it's not hearsay it can be used as substantive proof of matters asserted

**(A) is party's own statement**

- e.g. guilty plea (if accepted), but not *nolo contendere*
- or conduct, e.g. attempts to conceal or destroy evidence, disappearing or changing your name to show guilt

**(B) a statement party had adopted/manifested belief in its truth**

- admission may be made by adopting or acquiescing in statement of another
  - but must be voluntary, party must have knowledge of what other person said
- silence adopts another's statement if person would have protested under the circumstances (e.g. *Hoosier*; shrugging shoulders in response to "you owe me money;") but not if under arrest
- BUT someone telling you sidewalk is dangerous and you saying "I didn't know" is NOT admission (but could get in as notice/effect on hearer)
- not admissible if you are under arrest; not admissible if you are being harassed; throwing away letters is NOT admission; in public/social situation NOT admission; NOT admission if you're being yelled at and are scared, e.g. after accident; NOT admission if ambiguous (*Carlson*)

**(C) statement by person authorized by party to speak on the subject**

- e.g. officers and directors of company; PR agents
- not an expert preparing a report (*Sabel*)
- contents of statement alone not enough to establish relationship
- must be during scope of employment

**(D) statement by party's agent concerning matter w/in scope of agency**

- Cf. *Big Mack*
- e.g. employee; to be an agent must have some control from supervisor, some fiduciary duty (*Sabel*)
- contents of statement alone not enough to establish relationship
- must be during scope of employment

**(E) statement by co-conspirator during the course and in furtherance of the conspiracy.** Foundation:

(1) there is a conspiracy: TBD by court per 104(a); must first be shown by preponderance of evidence (fed rules) and hearsay may be considered; in CA under § 1220-27 need only be sufficient evidence (but the statement itself can never be considered); other evidence to prove conspiracy might be identity of speaker, context of statement or evidence corroborating the statement – no bootstrapping.

(2) declarant and person against whom info us used are part of it: Senate thinks joint venturer can be considered a co-conspirator

(3) the statement is in furtherance and in course of conspiracy: not just idle chatter – *Doerr*; conspiracy can't be over and new one started; when new conspirator joins he takes the conspiracy as he finds it

policy: (1) agency rationale - like a business which has agency rule in part so they can operate more efficiently, a conspiracy should be the same (counter: why do we care that they run smoothly?); (2) trustworthiness, because criminal conspirators have incentive to be accurate (counter: no, they may still lie/exaggerate, e.g. how much weed they have); (3) necessity: it's hard to garner evidence to prosecute conspiracies; (4) result of adversary system (counter: maybe true for personal admissions, but why co-conspirators?)

*Reed*: P died when D's employee operated derrick that killed him. D admitted to coroner that the clamp was out of place at the time although he didn't know that. Admission need not be based on first hand knowledge to be admissible.

*Hoosier*: D convicted of robbery. Witness testified that 3 weeks after robbery he saw D and his gf; gf said "you should see the money we have in the hotel room" and referred to sacks of money. D said nothing. Failing to protest a statement when such protest would be forthcoming if statement were untrue constitutes admission. "Probable human behavior" would have been for him to deny this. Evidence admissible.

*Carlson*: Carlson was confronted by cops about needle marks and admitted he had a "few tracks" from working on a car. GF said "you liar, you got them from shooting up." He hung his head and shook it back and forth. Court said trial judge must determine whether there was intent to adopt the statement under 104(a) b/c it may corrupt jury to hear it. Here evidence was not admissible b/c ambiguous; judge erred.

*Mahlandt*: Wolf bit kid. Minutes of meeting of center's board discussing legal aspects of incident not admissible b/c D was not board member. Note that D had left for wolf center's president saying wolf had bitten kid and later verbal statement of same were admissible – no personal knowledge required. Furthermore 403 does not warrant exclusion of these statements because policy is for "generous treatment" of this avenue to admissibility.

*Big Mack Trucking*: P was killed when colleague's unattended truck crushed him. Witnesses heard colleague say brakes defective, but colleague himself didn't testify. Colleague's statements were inadmissible hearsay because he had no agency: his employer did not authorize him to make them on its behalf.

*Sabel*: P developed priapism and wanted to introduce tapes of drug company brainstorming about how to warn doctors and discussing expert advice re: priapism. Court said expert advisors were not agents of the co. but independent contractors, esp. because there was no power to bind.

*Doerr*: D charged with prostitution conspiracy. Statements to 3<sup>rd</sup> party about a curtain indicating that prostitution is going on and statement that "I can't believe you don't know what's going on" were inadmissible because not attempts to induce them into the conspiracy and not in furtherance of conspiracy's end.

*Bourjaily*: D accused of conspiracy to sell drugs. Court says the evidence is admissible b/c 104(a) allows bootstrapping. Bad law - rule later changed.

## **HEARSAY EXCEPTIONS**

Policy: (1) some necessity (e.g. death/unavailability); (2) circumstantial guarantees of trustworthiness

**RULE 805: HEARSAY WITHIN HEARSAY: Not excluded if each part conforms to a hearsay exception**

- e.g. business records within business records; statement to doctor within hospital report; excited utterance within police report

**RULE 806: ATTACKING DECLARANT'S CRED: If hearsay had been admitted the declarant's credibility can be attacked by any evidence which would be admissible had declarant testified. Statement or conduct inconsistent with declarant's hearsay statement does not require opportunity for declarant to deny/explain. Declarant may be called as witness and examined as if under cross.**

**Rule 804(a): DEFINITION OF UNAVAILABILITY:**

- **Death**
- **Physical or mental incapacity**
- **Absence (or whereabouts unknown despite diligent efforts to locate)**
- **Inability or refusal to testify (privilege/refusal/no memory)**

**RULE 804(b)(6): FORFEITURE: If a party engages in wrongdoing (e.g. murder) to procure unavailability of OCD and succeeds, OCD's statements are EXCLUDED from hearsay rule.**

**Rule 804(b)(2): DYING DECLARATION: If \*declarant is unavailable, a statement made by him \* while believing death was imminent \*concerning the cause or circumstances of what D believed to be impending death is EXCLUDED from hearsay rule (in civil or homicide cases only).**

- policy: necessity (this is only way to hear from them) and trustworthiness (no reason to lie or want to die doing so)
- must show knowledge of imminence (602); can be proven through hearsay ("you're dying") and is judge's call per 104(a); if 50-50 he should exclude
- 602: must be some basis for believing they had personal knowledge of cause of death (who poisoned them), not just a random guess

*Soles*: Evidence that kid said "Oh daddy! X shot me! I have got to die!" admissible; the trial judge alone must determine preliminary Q of whether it was made under impending sense of death (note: boy didn't have personal knowledge but the issue wasn't raised!)

**Rule 804(b)(1): FORMER TESTIMONY: If \*declarant is unavailable, testimony given at another hearing (same of different proceeding) or lawfully taken deposition if \*party against whom offered or predecessor in interest (restrictive fed. rules approach) had \*opportunity and \*similar motive to develop the testimony by direct/cross/re-direct examination is EXCLUDED from hearsay rule.**

- need not be evidence against same exact party as long as it's same motive in cross-examination (*Travelers Fire Ins*); Cf. traditional rule which required complete same identity of parties (some courts still follow)
- predecessor in interest is assignor of K, decedent's heir, etc., prob. not business partner though *Lloyd* stretched definition (Park against stretching it)
- identity of issues: need not be exact same ones but must be substantially the same – same subject matter to assure same scope of cross-examination
- does not usually apply to previous grand jury testimony on either side
- policy: if witness has been cross-examined then primary concern of hearsay rule is not an issue; rule prevents miscarriage of justice; but witness must be unavailable as otherwise would be better to get to observe their demeanor and lawyers like to question own witnesses

*Travelers Fire Insurance*: Brothers JB and JC sue insurance co for money to burnt property. D wanted to introduce Ws' testimony in previous trial against JB for arson, saying he was guilty. Court said issue is same (did he burn down house?) and brothers had same motive or interest in cross-exam. Admissible.

*Salerno*: D charged with RICO violations. 2 associates had testified before grand jury and given exculpatory statements but at trial they refused to testify. Court said that in grand jury hearing prosecution is not motivated to

show all its cards, may not be held to same standard of proof, and may not yet know all the issues. Therefore, they did not necessarily have the same motive to develop the testimony. Inadmissible. Rare when pros. has same motive.

**Rule 804(b)(3): STATEMENT AGAINST INTEREST: If \*declarant unavailable, statement which at time of making \*was so against pecuniary or proprietary interest, \* or tended to subject him to criminal or civil liability, or render invalid a claim of his, \*so much that a reasonable person in his situation would not have made the statement unless true is admissible is EXCLUDED from hearsay rule. A statement tending to expose OCD to criminal liability and offered to exculpate the accused not admissible unless \*corroborating circs. indicate its trustworthiness.**

- Policy: necessity (unavailable); trustworthiness (b/c against important interests)
- Diff. from party admissions: (1) Can be made by anybody - need not be party or agent; (2) unavailability required; (3) requires personal knowledge; (4) must be “against interest” (not just inconsistent)
- BOP on proponent
- Someone else’s confession can be used to exonerate criminal D but corroborating circs. needed (some other evidence they did it)
- Statement should not be self-serving or show motivation to fabricate – e.g. OCD had been offered lenient treatment (*Williamson*) vs. no reason to help incriminate people at a card game (*Barrett*)
  - sometimes just talking about others/admitting association is enough
- Conflict: neutral, contextual statements treated w/latitude and confession carries neutral statements with it (*Barrett*) vs. statements should be looked at individually and neutral ones don’t come in; they must all be against interest (*Williamson*)
- CA rule § 1230 also allows if hatred/ridicule/social disgrace would ensue from making the statement

Shoplifter confesses after being told he won’t be prosecuted: maybe admissible b.c it’s a crime and b/c it is so against their interest to say it that they wouldn’t if it were not true. BUT, you can argue not b/c they are relying on statement that they won’t be prosecuted.

*McKelvey*: P sues insurance co. to collect proceeds on policy against embezzlement, wants to use written confessions of then-unavailable employees saying they took the money. Statements were against their pecuniary interests b/c subjected them to liability. Statements admissible.

**Barrett**: D convicted of theft, tried to intro evidence that W had said to someone else that D was not involved. W knew circs of the crime, and D said this showed that he was inculcating himself and was therefore making statement against interest. Court remands to decide if sufficiently corroborates. Can look at statements in aggregate.

**Williamson**: Sheriff found coke in OCD’s trunk; OCD said he was delivering it for D. It was statement against interest b/c OCD was incriminating himself. (note: (1) won’t get in under conspiracy b/c not in furtherance since he’s telling cops; (2) you could also say he was shifting blame in order to not incriminate himself!) Majority wanted to remand-for inquiry as to whether truly inculcating. Must look at each part of statement.

**Rule 803(1): PRESENT SENSE IMPRESSION: statement \*describing or explaining event or condition made \*while declarant was perceiving event or condition or immediately thereafter**

- policy: trustworthiness - no time lapse negates likelihood of deliberate or conscious misrepresentation (only “slight lapse” allowable)
- usually limited to description or explanation of event itself (narrow subject matter)
- CA rule narrower, says contemporaneous statement can be offered to explain conduct of declarant if made while declarant was engaging in such conduct

*Lira*: Lira sued for personal injury, testified that doctor examined her and said “Who’s the butcher who did this?” Court said it was inadmissible hearsay b/c must be a reflex to be sense impression. Under literal reading of federal rules this would be a present sense impression.

*State v. Jones*: State trooper sexually assaulted motorist then fled scene with motorist's bf in pursuit. trooper allegedly heard consecutive radio transmissions: "look at smokey the bear southbound with no lights on" and "look at that little car trying to catch up with him." Evidence was admissible b/c trooper's description sufficient to show statements were made contemporaneously and through personal knowledge ("look at")

**Rule 803(2): EXCITED UTTERANCE: statement \*relating to \*startling event or condition made \*while OCD was under stress of excitement caused by the event or condition**

- policy: excitement stills capacity of reflection and produces utterances free of fabrication
- different than present sense impression b/c (1) more time allowed to pass – length of time allowed depends on nature of excitement and (2) broader subject matter – statement need only "relate" to startling event but (3) requires excitement
- if utterance is only proof of event itself trend is to admit it (Federal) though some state courts say you cannot bootstrap (*Truck Insurance*); furthermore under 104(a) the judge can look at anything he wants, including statement itself, to reach conclusion that foundation is established
- you can always argue not probative b/c OCD's senses are overwhelmed and he exaggerates or can't discern truth
- event must be objectively startling (not "oh my god there's an SUV parked outside")
- CA rule says statement must purport to narrate/describe/explain act

*Truck Insurance*: Husband came home and said had hit his head on bulldozer and was in pain so had to come home. He died. Employer said there must be evidence of the act itself separate from the hearsay statement. Minority trend (not necessarily good law). Note that could have been used under 803(1) to show present sense impression of head hurting; or excited utterance if you can show still under stress of event.

**Rule 803(3): MENTAL, EMOTIONAL OR PHYSICAL CONDITION: statement of OCD's then existing state of mind, emotion, sensation, or physical condition (intent, plan, motive, design, mental feeling, pain, bodily health) not including a statement of memory or belief to prove the fact remembered or believed (unless it relates to will)**

- Specialized form of 803(1); adds nothing but used by lawyers b/c more precise
- Direct assertion of SOM is hearsay but is excepted here; circumstantial evidence of SOM is not hearsay (unless under declarant-centered definition, in which case it is hearsay)
- **does memory or belief mean any statement about the past?**
- examples: I intend to send x money; testator saying she loves beneficiary to show intent to give her money
- policy: necessity (can only prove SOM by knowing what they say); trustworthiness (reduced danger of memory problem)
- May also be used to show intent to do subsequent conduct/probability that he committed subsequent act
  - Third parties: adv. notes say only to show declarant's intent, House Comm. says not that of others; *Hillmon* contradicts the latter but is used by courts (*Pheaster*); you can always redact statement to show only OCD's intent.
- If D claims self-defense, statement deceased was first attacker admissible
- If D claims V committed suicide, statement contrary to suicidal intent admitted
- If D says death was accidental shooting, V's fear of D or of guns relevant to rebut defense
- If defense is identity, statements showing D was stalking/out to get V much less likely to come in to show intent to do harm; danger of being used for truth of matter asserted
- Statements accusing someone often used to show SOM and not truth if D opens door.

OJ: Prosecution says Nicole enraged OJ at dance recital and OJ says no, we were close. Statements that he was stalking her could be circumstantial evidence showing she feared him and would be more likely to rebuff him; BUT could also show she is less likely to start a fight with him.

*Adkins*: P sues D for stealing his wife. Statements that wife preferred D, had hung out with him and hated P were admissible to show her SOM. Park says her opinion ("I hate P") is admissible as SOM. Statement that she dined

with D not admissible to show that it happened but to show her SOM, to show she likes him. Evidence competent to show one point but not another is still admissible if you give limiting instructions.

*Hillmon*: P tried to collect on H's life insurance policy when body was found dead at creek. Insurance co. wanted to show body was instead W's, and introduced evidence that W intended to leave with H for Colorado. Statement of future plans admissible to show intent ("Hillmon doctrine").

*Shepard*: D charged with poisoning wife. On deathbed wife said "my husband has poisoned me." Court did not allow. As SOM evidence, it would rebut that she was suicidal (suicidal person would not be afraid of being poisoned), but 403 analysis leaves too much room for prejudicial use (to prove he killed her). Furthermore evidence pointed backwards to past act and not future intent.

*Pheaster*: Kid was kidnapped. Made statements that he was going to the parking lot to meet Angelo in the parking lot and that he was going to meet Angelo that night to buy weed. Statements showing intent to perform an act admissible for inference that it was performed (Hillmon doctrine) even if the act's accomplishment requires others' participation.

*Zippo*: Z sued D for copying its lighter. To prove public confusion Z introduced survey. Court said surveys are admissible as long as they relate to the belief/opinion/SOM of those polled. Her it showed belief that lighter was a Zippo (you can also say it's not hearsay b/c not offered for its truth). Note: surveys must be representative and reliable (not confusing to jury – 403 problem).

**RULE 803(4): STATEMENTS FOR MEDICAL DIAGNOSIS OR TREATMENT: describing medical history, past or present symptoms, pain, sensation or character of cause or source thereof insofar as pertinent to diagnosis or treatment.**

- policy: patient motivation to be truthful with doctors
- adds to present sense impression b/c covers past symptoms
- may be made to hospital attendant, ambulance drivers, even made by mother for child
- may be made only for purposes of doctor testifying (b/c under 703 he must give basis for opinion anyway)
- BUT not if statement regarding causation for injury enters realm of fault (you can redact these parts out)
- motive must be consistent with obtaining treatment; must be of kind reasonably relied on by DRs
- tender years exception for statements by child re: identity of abuser

**RULE 803(5): PAST RECOLLECTION RECORDED: memorandum or record \*concerning matter about which witness once had knowledge but \*now has insufficient recollection to enable witness to testify shown to have been \*made/adopted when matter was fresh in witness' memory and to \*reflect that knowledge correctly. If admitted, doc may be read into evidence but may not be received as exhibit unless offered by adverse party.**

- policy: necessity (person who made documents on stand and can be cross-examined) and trustworthiness (record made when memory was fresh)
- police report would be ok here b/c not substituting for live witness

**PRESENT RECOLLECTION REVIVED: Anything can be used to refresh memory regardless of who made it, when or how (no criteria); document itself does not come into evidence**

- rationale: the stimulus itself is not evidence; evidence is witness' refreshed testimony – therefore this is not a hearsay exception; preferred b/c not hearsay at all so best to try letting in this way first
- RULE 611: judge may exercise reasonable control in limiting what is used to refresh recollection
- RULE 612: opposing counsel may view the document and may cross-interrogate based on it
- document is still hearsay and not admissible into evidence except by opposing counsel (e.g. to impeach)

*Baker*: D accused of murder and wanted to use memo of cop saying the victim had said it was not D. Court says counsel should have been able to use the document to refresh memory AS PRESENT RECOLLECTION REVIVED.

**RULE 803(6): RECORDS OF REGULARLY CONDUCTED ACTIVITY: \*memo, report, record, or data compilation \*made by a person with knowledge \*while fresh in their memory if kept \*in course of regularly conducted business activity, and \*if it was in regular practice of business activity to make the memo. Must be shown by \*testimony of custodian or other qualified witness \*unless circs. indicate lack of trustworthiness.**

- Policy: trustworthiness (businesses motivated to keep good records); regularity may breed precision
- Record need not be made by person testifying (unlike PRR) and out of court affidavit is ok
- Business duty rule excludes third party statements in a business record if not under “business duty” (*Johnson*) UNLESS they fit some other hearsay exception (b/c hearsay w/in hearsay)
- Other portions of records might come in under Rule 106, but only if important (e.g. assignment of fault not central to medical diagnosis)
- Computer records considered trustworthy unless other party puts forth evidence to question reliability (*Hahnemann*)
- Trustworthiness caveat: records can be excluded if biased, sometimes if obviously prepared for litigation (e.g. badly-done Lexis search; e.g. insurance co’s report (but usually ok if P wants to use D’s insurance records))
- Docs prepared by cops against criminal Ds may not be admissible b/c legislative intent from public records rule carries over (*Oates*); Park the textualist hates this but says you can also make a trustworthiness argument to exclude

**Johnson**: D accused of killing V in auto accident, tried to introduce accident report made by officer including witness statements. Evidence is not admissible because report contains third-party hearsay statements made by people not under business duty.

*Vigneau*: D convicted of drug conspiracy, gov. attempted to introduce Western Union “to send money” forms to show D was the one sending money. Name was written onto forms by D who was third party not under business duty; therefore name should not have been admitted.

*Duncan*: D staged auto crashed to commit insurance fraud. Record of the defrauded insurance companies compiled from records of the hospitals admissible. They were hearsay within hearsay – business records within business records (note: both should have been authenticated; court ignored this)

*Williams*: P was hit by D’s bike and introduced part of hospital record to show treatment. D introduced rest of record containing statements exculpating D. Court said how the hospital occurred was not germane to diagnosis or treatment. Park says they were wrong as statement was an admission, and furthermore Rule 106 could apply.

Cop using computer record of crime rates changing when x moved to neighborhood to show culpability. Not admissible b/c probativeness=not trustworthy (too many other factors at play) and prejudicial=seems scientific and can mislead (403/702 analysis). Furthermore source of info may be third-party witnesses, thus making it excludable under business duty rule. Finally the fact that they were victims may present trustworthiness problems.

*Palmer*: P injured by train. After accident, RR employee prepared report. Court said it was not in ordinary course of business but for litigation. Narrow interpretation; nowadays we’d say safety is part of RR’s business.

*Lewis*: RR prepared accident reports regularly. Injured employee sues and seeks to admit accident reports made by person who did not personally witness the accident. Report made immediately after brake tests and company made hundreds of these over the years – thus it was reliable (cf. *Palmer* where employee was involved in accident and had motive to fabricate)

*Yates*: P injured in accident sought to introduce records of insurance companies relaying doctor examinations of him prepared for his workman’s comp claim. Doctor’s records prepared for litigation admissible if prepared in regular course of business and if they indicate trustworthiness. Records prepared by D’s insurance company admissible, but not records by P’s insurance b/c he had motive to fabricate.

**Rule 803(7): ABSENCE OF RECORDS:** Evidence that a matter is not included in memoranda kept under 803(6) may prove the nonoccurrence or nonexistence of a matter if matter was of a kind of which memo was regularly made and preserved, unless lack of trustworthiness.

**RULE 803(8): PUBLIC RECORDS:** Records in any form of public offices or agencies setting forth (A) the activities of the office or agency; or (B) matters observed pursuant to legal duty to report (excluding observations of cops and law enforcement personnel in criminal cases); or (C) in civil actions or criminal suits against gov., factual findings resulting from investigation made pursuant to legal authority, unless circs. indicate lack of trustworthiness.

- (A)=business stuff (receipts, payroll docs); (B)=weather reports, gov. maps, police reports (not criminal cases); (C)=findings by coast guard examiner about plane safety, agency findings about discrimination
- no need to be routine/in ordinary course of business; (C) does not require finding to be made by person under business duty (so you can bring in interviews, etc. that were basis of your finding)
- opinions/conclusions ok if based on facts (*Beech Aircraft*) (e.g. findings of fault requiring inference and use of judgment)
- you may get around police officer exception: routine, non-evaluative reports that don't involve judgment (*Grady*) – e.g. traffic ticket, license number, breathalyzer calibration certification
- police officer exception policy: right to confront witnesses

***Beech Aircraft*:** Aircraft crash. Report containing factual findings of gov body was admissible; including factually-based opinions and conclusions which were not “facts” themselves (e.g. findings of fault)

***Oates*:** D convicted for drugs. Report and worksheet of US Customs chemist not allowed under 803(8) because of criminal D, therefore not admissible under 803(7) as business records either. Legislative intent carries over. BUT this is dicta – therefore police reports might still come in under present sense impression/past recollection recorded.

*Grady*: Documents showing firearms with certain serial numbers admitted b/c routine and not about crime.

Hypo: D accused of murder; evidence of parking ticket he got on street on which murder occurred

- 803(6) routine business records of cops to give tickets; BUT you can say leg. intent carries over and does not allow such things in criminal cases (*Oates*)
- 803(8)(B) Although cop records not allowed, can say this is routine objective record – no judgment required by officer
- 803(5) recorded recollection: if can show fresh in memory, accurate. Must put cop on stand, so no risk of *Oates*/leg. intent objection (b/c you say he can be cross-examined)
- 803(10) present sense impression: if written while cop looking at car (could have him or other cop testify that it's standard procedure)

**Rule 803(9): RECORDS OF VITAL STATISTICS: births, deaths, marriages.**

**Rule 803(10): ABSENCE OF PUBLIC RECORDS.**

**Rule 807: RESIDUAL EXCEPTION: Requires circumstantial guarantees of trustworthiness if (A) evidence of material fact; (B) more probative on the point than any other evidence; (C) general purposes of rules and interests of justice best served by admission. Must give other side fair opportunity to meet it.**

- NEAR MISS THEORY: *expressio exclusio*: If it's already covered by another rule it can't come in this way (*Dent*) (not relevant b/c of *Crawford* unless cases not criminal or offered against prosecution)
  - exceptions: if it nearly misses 2 exceptions you can say Congress didn't intend 2 to apply; you can say Congress didn't contemplate the exact situation; you can elements leading to reliability (guy whose pants catch on fire when driving) and are not similar to elements adding to reliability in the rule.
- Subject to Sixth Amendment

- Args for trustworthiness (negate 4 hearsay dangers – memory, perception, insincerity, ambiguity): inherently plausible, ambiguity danger is low, memorable, corroborating evidence
- Args for necessity: it's a material fact, more probative than any other evidence, in interests of justice to let in

*Turbyfill*: P tried to start car but it caught on fire and killed him. Other employee observed, wrote it down, and later died. Court says it's trustworthy b/c he was alone in room and admits the evidence. Loose approach - Park does not like b/c it would not come in under business record (not routine) and thus fails near miss theory.

*Dent*: Salesman had sold car to a woman who was with Tucker. Tucker found driving it with loaded weapon. Salesman testified at grand jury and testimony was read at trial b/c he had left country. This would not come in under former testimony b/c D did not have opp. to cross-examine. Not admissible b/c (1) not trustworthy and (2) "near miss theory:" it was already contemplated by Congress under former testimony rule.

## SIXTH AMENDMENT – CONFRONTATION CLAUSE (criminal cases)

- **Testimonial evidence not admissible absent showing of (1) unavailability and (2) prior opportunity for cross-examination** (*Crawford*). Trustworthiness won't do anything for you.
- **"Testimonial"** = statements made under circs. that would lead an objective witness to reasonably believe it would be used in trial, e.g. *ex parte* in-court testimony, affidavits, custodial exams, prior testimony with no chance to cross-examine, police interrogations, confessions, maybe 911 to report a crime you witness BUT NOT a 911 call (if you're getting help for yourself - *Moscat*) or bragging to friend.
- Applies only to criminal cases
- **Non-testimonial evidence must show (1) unavailability and (2) trustworthiness (presumed if a firmly rooted hearsay exception)** (*Roberts*)

Examples: Accomplice confesses and incriminates D but unavailable: not admiss; child victim of rape testifies to cops but does not want to be put on stand - inadmissible

**Ohio v. Roberts**: Roberts had forged I's check and had his credit cards. At preliminary hearing I's daughter said she let R use her apartment but denied giving him check or cards. She was AWOL at trial. CC requires showing (1) unavailability and (2) indicia of reliability (inferred when evidence falls under firmly rooted exception). If not, must show particularized guarantees of trustworthiness. Testimony was admissible, because R's counsel had questioned her vigorously; prosecution found to have carried burden of demonstrating her unavailability. Did not violate Confrontation Clause (Sixth Amendment).

**Crawford**: D stabbed s/one who tried to rape his wife. Tape-recorded statements by wife describing stabbing challenged under Sixth Amendment. Testimonial evidence not admissible unless (1) unavailability and (2) prior opportunity for cross-examination. (so basically, this is saying there is no residual exception for previous testimony/statements that are testimonial)

*Chambers v. Mississippi*: D charged with murder, s/one else confessed but later repudiated it and refused to admit it at trial. D was unable to cross-examine him because he was party calling witness and bound by what he might say, but there were indicia of reliability (confession had been spontaneous, corroborated, against his interest and he was present to explain this). SC said confession could not be excluded (narrow decision).

*Green v. Georgia*: G was tried for rape and prohibited from introducing statement that Moore had told someone G did not do it but he did. Court said testimony was spontaneous, reliable b/c spoken to a friend, against interest, and had been used to convict Moore. Court reversed exclusion of testimony on DP grounds.

## IMPEACHMENT AND CROSS-EXAMINATION

**RULE 611(a)**: Court exercises reasonable control over mode and order of interrogating witnesses so (1) effective for ascertainment of truth; (2) avoid waste of time; (3) protect from harassment and embarrassment.

**Rule 611(b): Cross should be limited to subject matter of direct examination and matters affecting credibility of the witness. Court may use discretion to permit inquiry into additional matters.**

**Rule 611(c): Leading questions should not be used on direct examination unless necessary to develop testimony. Permitted on cross, for hostile witness, adverse party or adverse party's witness.**

- Use of questions gives chance to object and keep out prejudicial evidence; no leading Qs so you don't get story of attorney but story of witness but ok on cross because she's given her story

**RULE 615: Court may order witnesses excluded so they don't hear testimony of other witnesses unless (1) they are a party; (2) officer or employee of party designated as its rep (3) person essential to presentation of a party's cause; (4) authorized by statute.**

**RULE 607: The credibility of a witness may be attacked by any party, including the party calling the witness.**

- You can impeach your own witness; you're not stuck with them
- Hearsay can be used b/c not for truth of matter asserted but to impeach (this may be contradictory if you must use for truth in order to impeach; 403 takes care of this). Must give limiting instruction that used only to impeach and not for truth.
- Voir dire – if you can show s/one putting on witness just to impeach they can't do that (*Hogan*) – can't merely impeach to elicit otherwise inadmissible hearsay
- 801(d)(1)(A): Prior statement made under oath can be used for truth of what it asserts

### **Methods of impeachment:**

- **contradiction** (another witness testifies opposite of what yours said - *Oswalt*); but must be relevant: cannot impeach on collateral matters using extrinsic evidence
- **self-contradiction** (prior inconsistent statements);
- **sensory capacity or lack of knowledge** (extrinsic evidence ok; was not wearing glasses); **mental health** (extrinsic evidence ok; *Lindstrom*)
- **credibility:**
  - **character for truthfulness**
    - crimes under 609 (can ask or use record);
    - dishonest acts (no extrinsic evidence);
    - poor reputation for truthfulness;
    - opinion evidence as to lack of credibility (requires personal knowledge))
  - **bias or interest** (extrinsic evidence ok); e.g. employee biased against employer (*Abel*), compensation for testimony, making a deal with prosecutors
  - **prior inconsistent statements** (extrinsic evid. ok if foundation laid and not collateral)
  - once credibility is attacked, witness can be rehabilitated by
    - evidence showing impeachment evidence is not true
    - explanation of prior inconsistent statement or misconduct (no extrinsic evid)
    - showing good character for truthfulness (**no extrinsic**)
    - prior consistent statements to counter evidence of bias/interest, inconsistent statements, bad character, poor memory, prior IDs

**Collateral rule: A witness cannot be impeached \*by contradiction or prior inconsistent statements? \*by extrinsic evidence (e.g. another witness) on matters \*collateral to the principal issues being tried (Oswalt)**

- Can't show witness was at poker game and not baseball game (sole purpose is contradiction)
- But CAN show bias (witness was on date with D's brother – motive to fabricate) or perception (was drinking in a bar)
- Policy = avoid confusion, prevent unfairness of witness unprepared to talk about outside matters.
- Not in federal rules but followed in many states as handy rule of thumb for following 403. So you could try to get around this by doing 403 balancing.
- Doesn't apply if witness is impeached by her own statements – not extrinsic (*Copelin*) but you can't use this to get in a record of a drug test

*Abel*: Charged with bank robbery. Cohort testified against him and impeached D's witness by saying he belonged to perjurious prison gang and must be lying. Court did 403 balancing and kept it in – it is relevant to show BIAS of the witness and motive to lie (could also come in under 404(b)).

*Hogan*: MJ smuggler. Prosecution called pilot, who they knew would be hostile, and asked him about previous implications of Hogan, which he claimed were made under torture. They then brought in 4 DEA agents to impeach him. You may not call a witness you know is hostile for sole purpose of eliciting otherwise inadmissible impeachment testimony.

*Oswalt*: D charged with robbery; alibi said he was in CA during that time – had been there every day for past several months. Prosecution uses rebuttal witness to show D had been in WA a couple of times during past few months but not on date of crime – which court said was “sole issue.” Collateral evidence not admissible if ONLY role of contradictory fact is to impeach the witness.

*Copelin*: D says he has never seen coke except on TV and is asked about positive tests for cocaine. Evidence was admissible but limiting instruction should have been given not to use for truth of matter asserted (forbidden use) but to attack credibility (permitted use). Judge should do 403 balancing and leave out (Park).

**Rule 608(a): OPINION AND REP EVIDENCE OF CHARACTER: Credibility of a witness may be attacked or supported in form of opinion or reputation but (1) may refer only to character for truthfulness or untruthfulness; (2) truthful char. evidence admissible only after character has been attacked.**

- Evidence of generalities about character but not specific stuff – can't base on expense reports submitted by D to show he is untruthful
- Opinion requires personal knowledge
- Under (2), character must be first attacked – not if attacked on ground of bias. Truthfulness/rebuttal evidence may be in form of reputation or opinion but not specific acts.
- 403 test to weigh effect on truthfulness (permitted) vs. use as character evidence (forbidden)

**RULE 608(b): SPECIFIC INSTANCES OF CONDUCT for purpose of attacking or supporting witness' character for truthfulness (other than crimes under 609) may not be proved by extrinsic evidence. But if probative of truthfulness/untruthfulness of (1) the witness or (2) another witness about whose character the witness has testified, may be inquired into on cross.**

- Policy: no extrinsic evidence to avoid waste of time and confusion and mini-trials on collateral matters
- But subject to 403/judge's discretion: criminal D may say it's too prejudicial
- NOT extrinsic evidence if extracted from mouth of witness being impeached; IS extrinsic if from another witness, documentary proof if you must call another witness to establish foundation but NOT is witness herself can lay foundation
- You could try to refresh memory with a document showing s/o previously cheated
- You can't say “the record says you cheated” because you are essentially putting in the record (assuming facts not in evidence)
- Sometimes questions alone are not extrinsic evidence (*Drake*) – e.g. “isn't it true you committed plagiarism?” Counter: it's hearsay (you only know because of record) or assertive (should be rephrased)
- A document showing party admission might be ok (p 516 #4) if you admit having made it b/c you have laid foundation (some jurisdictions) but NOT if they deny making statement (no foundation)
- You can ask Qs about specific conduct but you have to take the answer.
- psychiatric record/mental health evidence might be inquired into on cross if you show judge it is probative of truthfulness/untruthfulness (*Lindstrom*); you can also say you are using it to attack perception or ability to narrate/recall, etc. (and extrinsic evidence is ok)
- Can get around extrinsic evidence rule if being used to show bias (evidence witness had sabotaged his computer at work the day he quit to show bias when he later testified against the company).
- Same goes for character evidence in general (e.g. offered by criminal D) under 405(a).

*Owens*: Accused of murdering third wife and says he accidentally shot her. Evidence of three previous crimes were not big enough to come in under 609. But evidence he lied about them ok under 608. However one of them was assault on previous wife and should be redacted or omitted (alternatives) to avoid jury using as evidence he is inclined towards domestic violence (forbidden use).

*Drake*: D convicted of fraud based on loan irregularities and said he had no clue about that stuff as he had been a psych major. Gov. tried to introduce college transcript saying he had been dismissed for lying in a disciplinary investigation. Questions cannot simply assume facts not in evidence – e.g. his transcript. He objected on wrong grounds.

*Lindstrom*: Witness against D had psychiatric history of manipulation, vendetta, trying to pay someone to kill lover's wife. Psychiatric evidence may be used to impeach by cross-examination.

**RULE 609(a): CONVICTION OF CRIME: For purpose of attacking credibility of witness, (1) evidence that witness other than accused has been convicted of a crime if crime punishable by death or more than a year in prison is admissible subject to 403; evidence that accused has been convicted of same admitted if probative outweighs prejudicial effect to accused AND (2) evidence that any witness convicted of crime is admissible if it involved dishonesty or false statement, regardless of punishment.**

(b) unless more than 10 years have elapsed since conviction or release unless court determines it's in interest of justice. Must give sufficient notice.

(c) unless conviction subject to pardon/rehabilitation/annulment

(d) usually n/a to juvies unless witness other than accused

- Criminal accused is considered to have put his character as a witness at issue by taking the stand
- 609(a)(1): 403 balancing: Park says prior convictions do not add anything – high probability criminal D will lie if guilty and tell truth if innocent; not changed by prior convictions
  - For criminal accused it's more in favor of exclusion than 403 – if prejudice simply outweighs probative value (e.g. if it's 50-50) judge must exclude; unlike “substantially” standard of 403; presumption of admissibility if not criminal D (regular 403)
  - Balancing factors: similarity of crimes (e.g. prior drug deal in drug case too prejudicial); remoteness (7 years ago and no other crimes, cuts against); how much crime reflects on credibility (murder to collect insurance vs. duel); importance of D's testimony (if important to hear from D then you need to be careful; if he can establish alibi or evid. is circumstantial then may not be so crucial); centrality of credibility issue (e.g. strict liability vs. swearing contest, if credibility is important you want to let it in)
- Limiting instruction must be given
- CA alternative: all felonies that are crimes of moral turpitude admissible (*People v. Castro*) – much more permissible
- 609(a)(2) does not require balancing test (*Wong*)
- Crime of dishonesty: Narrow approach (Park likes) supported by leg. history says these are *crimen falsi* involving deceit, untruthfulness or falsification – e.g. perjury, false statement, fraud, embezzlement, false pretense. NOT larceny, drug violations, bank robbery, shoplifting (*Brackeen*). Factual approach (Park dislikes) involves seeing if crime was committed deceitfully (e.g. you lied in order to shoplift). Loosest approach is that certain crimes are dishonest, e.g. larceny.
- Can try to get around rule by saying it shows bias: e.g. someone made a deal with prosecution to testify in exchange for leniency
- Must put witness on stand to preserve right to appeal use of criminal prior (*Luce*); if you have criminal D admit crime to “remove the sting” then you lose right to appeal (*Ohler*)
- Other side can rebut with evidence of truthfulness

*Sanders*: D accused of assault in prison. Evidence of identical prior assaults inadmissible b/c high potential for prejudice.

*Wong*: Evidence of prior fraud convictions admissible; court does not do balancing test under 609(a)(2)

*Brackeen*: A bank robbery is not a crime of dishonesty

*Luce*: Defense counsel made *in limine* motion to exclude prior drug offenses in drug trial and was denied. He decided to keep witness off stand. You lose your right to appeal from incorrect ruling on *in limine* motion if you keep your witness off the stand – must put him on stand and have him impeached to preserve right to appeal.

**RULE 610: Religious beliefs not admissible to show credibility**

- If a lot of people believe it it's a religion, but if one person it's delusion (can cross-examine witness on belief he is reincarnated as Jean Harlow)

**RULE 613(a): If EXAMINING A WITNESS CONCERNING PRIOR STATEMENT the statements need not be shown to the witness at the time but on request shall be shown to opposing counsel.**

**RULE 613(b): EXTRINSIC EVIDENCE OF PRIOR INCONSISTENT STATEMENT BY A WITNESS is not admissible unless witness is afforded opportunity to explain or deny and opposite party is afforded opportunity to interrogate, or interests of justice. N/A to party admissions under 801(d)(2).**

- Foundation: times, places, persons and whether there were statements made (but judges have discretion to ignore whether it's been laid)
- Prior inconsistent statement may not be proven by extrinsic evidence when offered solely for collateral impeachment
- Extrinsic evidence need not be shown to the witness before it is admitted or even when witness is on stand – just at some point you must give them chance to explain
- You can “pin them down” with a writing of theirs (but \*some\* foundation must still be laid – witness admitting she wrote/signed it)
- These statements are hearsay; limiting instruction required saying offered solely to impeach, not for truth (unless made under oath, then can come in under 801(d)).
- Prior consistent statements: admissible to rebut a charge of recent fabrication or improper influence/motive only if made before alleged motive existed (*Tome*); these are not hearsay because of 801(d)(1)(B).

*Coles v. Harsch*: P said D stole his wife. Witness testified that D behaved properly with wife. Witness later asked if he remembered talking to P about a picnic. When he said no, P introduced all this stuff the witness had said to try to impeach him. Court said before a witness can be impeached with prior inconsistent statements they must be related to him.

*Tome v. US*: D charged with sexually abusing daughter; says abuse was fabricated so mother could have custody. To rebut this, evidence of 6 statements by daughter implicating D were introduced. SC held that out-of-court statements consistent with a witness' testimony are admissible to rebut a charge of recent fabrication or improper influence/motive only if made before alleged motive existed. See also 801(d)(1)(B).

**RULE 806: When hearsay statement or admission has been entered into evidence credibility of declarant may be attacked, and if attacked supported, by any evidence that would be admissible if declarant had testified as a witness. If party calls hearsay declarant as a witness, may examine her as if under cross.**

- If declarant is unavailable you cannot prove bad conduct by extrinsic evidence but the person testifying to the hearsay may be questioned about declarant's misconduct on cross (*Saada*) or you can call him to testify (e.g., and ask if he lied on his resume)
- Can impeach with opinion and reputation evidence under 608(a), prior convictions under 609 or prior inconsistent statements under 613.
- Policy: picks up slack of inability to cross-examine

*Saada*: Saada staged flooding to collect insurance. Statement of Yaccarino – former judge – admitted as excited utterance to show accidental flooding. He then dies and gov. sought to impeach his cred. with evidence of decisions ordering disbarment for unethical conduct. You cannot use prior evidence of bad acts to impeach hearsay declarant under 806, because they would not be admissible under 608(a).

## CONFIDENTIALITY AND CONFIDENTIAL COMMUNICATION

**RULE 501: Privilege is governed by the common law as interpreted by the courts in the light of reason and experience, and by State law in elements of civil cases based on State law claims.**

- all privileges may be waived by disclosing the privileged info (discloser waives), contract, by calling the other party to the stand, if medical patient puts condition at issue (e.g. suing for injuries)

**Attorney-client privilege: Must be \*confidential \*communication \*between attorney and client or client's agents \*for law-related purposes.**

- (1) If client takes reasonable steps toward confidentiality it's still privileged (McCormick), if unaware of eavesdropper it's privileged (CA § 952 and most courts) but not if they are overheard in the hallway.
- (2) Can't use as subterfuge for otherwise discoverable evidence (e.g. cover letter with your records attached - cover letter applies but not the documents); "communication" might include actions, signs or other ways of relaying info to attorney – anything that would lead jury to infer what client said (e.g. showing a scar or hidden defect)
- (3) Covered under *Upjohn*: Employees speaking with attorneys at direction of management re: conduct within scope of employment; attorney authorized by management to give such advice and using it to (a) evaluate if corporate conduct is binding; (b) assess conduct's legal consequences; (c) formulate legal responses to actions.
- (4) To be law-related statement must be a part of the purpose of client in seeking counsel/relevant to client's legal problem; ordinary notice functions of counsel do not apply (*Woodruff*); advice to friend or even attorney giving corporate business advice not covered
- Can be asserted by client or by attorney on client's behalf
- May also apply to agents of attorneys – e.g. doctor hired for pre-litigation examination (*SF v. Superior*); hired polygraph administrator
- policy: encourages people to confide in lawyers (Bentham says this just helps guilty); not telling lawyer everything might hinder his ability to settle; privilege used for stuff that's not litigation and not having it would keep people from calling up lawyer to follow the law; BUT problematic because not all lawyers follow rules, unfair to indigent litigants.

*Woodruff*: Court held PD was required to reveal whether he had advised client of time and place of trial; this was simply notice function and not covered by privilege.

**Upjohn**: GC conducting investigation into sketchy payments made to foreign governments sent out questionnaires which IRS later tried to get. SC held these materials were privileged even though not made by members of "control group." Factors weighing in favor of privilege, though not dispositive, include: (1) confidential ("this is privileged" stated in letter); (2) employees acting under direction of supervisor; (3) statement that the materials are legal advice/for legal purposes/litigation-related; (4) in scope of employment.

*SF v. Superior Court*: Doctor gave patient psychiatric and neurological exam for litigation; court held that doctor was agent of the attorney and privilege therefore applied.

*Clark v. State*: D killed wife and called lawyer who said "get rid of the weapon and sit tight til I arrive." Operator overheard. Old rule: eavesdroppers can testify. Appellate court held it was not for lawful consultation and privilege was excepted by crime-fraud exception.

**Crime-fraud exception: Privilege does not apply to communication when client (a) consults lawyer for purpose of obtaining assistance to engage in a crime or fraud or aiding third person to do so; (b) regardless of client's purpose, if he uses lawyer's advice to engage in or assist a crime or fraud (Restatement § 82)**

- Client need not know the act is a crime or fraud; irrelevant if legal service sought is itself lawful (e.g. drafting a document)
- Includes identification of client's confederates for proposed conspiracy

- Applies to an attempt or even if client does not carry out the illegal plan
- Applies regardless of fact that lawyer is unaware of client's intent
- Applies to communications about ways a client may continue breaking the law (e.g. info on how to continue possessing stolen goods)
- Intent: exception applies if lawyer has bad intentions (*Clark*) even if you switch to a new lawyer who does not have bad intentions; applies even if lawyer unaware of your bad intentions
- Does not apply if lawyer has bad intentions but client has good intentions.
- CA § 956: No privilege if lawyer's advice sought to aid anyone to commit or plan to commit crime or fraud.
- Showing: Once privilege successfully invoked, person seeking access to the communication must show a reasonable basis for concluding the elements of the exception exist. Any relevant evidence, even non-privileged, can be used as long as you have a good faith basis (*Zolin*). Once judge finds there would be enough evidence to conclude that exception applies, he can use discretion to order in camera hearing (*Zolin*).
- CA § 915: Those attempting to rely on exception must prove it some other way than the privileged communications themselves (some circumstantial evidence)
- policy: no social interest in protecting this but compelling interest in preventing it

*Zolin*: Parties claiming the crime-fraud exception can use any relevant evidence, even non-privileged, as long as they have a good faith basis. Once judge finds there would be enough evidence to conclude that exception applies, he can use discretion to order in camera hearing.

*Swidler & Berlin*: Privilege applies even after death, to protect your family or loved ones or post-death reputation.

	LAWYER: BAD INTENTIONS	LAWYER GOOD INTENTIONS
CLIENT: BAD INTENTIONS	<b>NO PRIVILEGE</b> <ul style="list-style-type: none"> <li>▪ <i>Clark</i></li> <li>▪ Drug retainer – to help their future operations (both are bad guys)</li> </ul>	<b>NO PRIVILEGE</b> <ul style="list-style-type: none"> <li>▪ Client switches from lawyer A to B (second example p. 594)</li> </ul>
CLIENT: GOOD INTENTIONS	<b>PRIVILEGE</b>	<b>PRIVILEGE</b>

**Therapist-Patient: \*Confidential communications between a licensed therapist and patient in the course of treatment are protected (*Jaffee*)**

- *Jaffee* applied this to licensed social workers but most states have rejected; but CA has very broad definition
- Does not apply to custody evaluations (not part of therapeutic rapport)
- Does not apply to open physical conditions (e.g. cut on hand) because not confidential
- CA includes “information obtained in an examination as confidential communication”
- A routine blood test is probably not covered unless it would lead to inference of something patient said (e.g. that he was afraid he has AIDS)
- Third party presence destroys confidentiality (e.g. 12 step meeting) unless you can show they are agent necessary to facilitate the therapy
- Does not apply if patient is dangerous or threatens future danger (e.g. I want to kill her!)
- Confession of past crime to exonerate person being tried would not come in under literal reading of *Jaffee*, but if something like a DP case court might invoke fairness and let it in.
- Policy: we want to encourage people to be cured of propensity to do bad things, we need this privilege now that litigation is rampant, privilege helps not just the guilty but those who feel guilty

**Marital: Privilege against adverse spousal testimony prevents spouses from testifying against each other about things they have heard or observed**

- applies to the witness-spouse, who can choose to testify or not but can't be forced to (*Trammel*)
- can only be asserted while still married (not if divorced or dead) but applies to matters before marriage
- policy: prevents dilemma of testifying against spouse or being in contempt; saves marital strain
- CA protects spouses from testifying against e.o.; from being called as witnesses against e.o

### **Marital: Privilege covering confidential communications between spouses**

- survives the marriage
- can be non-verbal if leads to inference of what was being communicated (e.g. showing keys to a locker with 2 pounds of cocaine in it)
- in many states does not cover observations (e.g. seeing your husband put 5K in a safe)
- n/a if third parties present
- CA protects communications made in confidence
- policy: encourages people to talk to spouses (proposal to get rid of this rule)

### **Exceptions in CA (and typical)**

- suits between spouses
- crimes against children or other spouses
- crimes against third persons (some states)
- crime or fraud
- marriage to witness does not preclude them from testifying about things before the marriage

*Trammel*: Wife caught in heroin ring with husband cooperated with gov. for leniency and testified against him. Court says adverse spousal testimony privilege lies with witness spouse, who may choose or refuse to testify.

### **OPINION, EXPERTISE, AND EXPERTS; SCIENTIFIC EVIDENCE**

**RULE 701: OPINION BY LAY WITNESSES limited to opinions or inferences (a) rationally based on perception of witness (b) helpful to a clear understanding of witness' testimony or determination of a fact at issue and (c) not based on scientific, technical or other specialized knowledge.**

- Rule of preferences: if testimony is in form of opinion and there is a better alternative (more specific/detailed) we prefer it, but if not we tolerate the opinion as long as it's useful.
- Usually allowed: matters of taste and smell, speed of a car, drunkenness/intoxication, sometimes insanity/irrational conduct, another's emotions, owner testifying as to value of business, substance appeared to be narcotic (as long as you show familiarity with narcotics)
- Saying "D was careless" is probably not allowed
- Personal knowledge required – foundation must be laid in line of questioning
- policy: to keep people from putting on experts masquerading as laypersons, opinions arrived at by lay witnesses can just as easily be concluded by jury

*Commonwealth v. Holden*: cannot testify that a wink was attempt to set up alibi – can't be mind reader. But you can say "it was a wink."

*Govt. of Virgin Islands*: D charged with murder. Witness said D's gunshot has been accidental. Court allowed testimony.

**RULE 703: FACTS OR DATA UPON WHICH EXPERT BASES OPINION or inference may be those perceived by or made known to expert at or before the hearing. Need not be admissible in evidence if of type reasonably relied on by experts in field. Inadmissible facts or data should not be disclosed to jury unless 403.**

- Sources of expert testimony: firsthand observation, hypos or trial presentation or out of court presentation.
- Improper hypo objections: omits material facts, uses facts not in evidence. refers to irrelevant/prejudicial facts, requires another's opinion (*Ingram*) (but modern trend is more lenient – towards allowing).
- Cannot give opinion on credibility of another witness (*Scop*)
- Many courts cautious of police testimony b/c risk jury will believe it (*Odom*; *Scop*)
- Use of another expert's report (or testimony) is ok in federal court (*Brown*; Cf. *Ingram*) if customary to rely on such reports
  - You can attack reliability (we don't know basis for other's conclusion)

- You can attack as testimonial under Crawford (if they could have foreseen it would be used in prosecution)
- You cannot send expert Y to court in lieu of expert X and have Y say “this is what X thinks.” Y must have own opinion.
- A report prepared specifically for litigation is not necessarily of the type reasonably relied on (*Tran*)
- You can attack qualification of other expert (*Tran*)

Allows hearsay if of type reasonably relied upon; but quoting it to the jury is subject to 403 and there’s a presumption against it because of danger of being used for truth. Court should give limiting instruction if admitting.

- probative value/proper purpose: assisting expert to evaluate opinion (to assess if he was diligent/thorough/logical)
- prejudicial value/forbidden purpose: misuse for substantive purposes (truth of matter asserted)
- alternative: declarant testifies under cross or expert testifies without hearsay portion

3 options: (1) They rely on it but don’t repeat the hearsay (problem: how does jury weight it?)

(2) They repeat the hearsay (problem: experts will be used to evade hearsay rule)

(3) Limiting instruction (problem: can be mind-boggling and not followed)

Hypo: Patty Hearst wants to use psychiatric expert and not have to take the stand (telling her story through their mouth). Probably not ok because:

- probative: may be true facts of kind reasonably relied on
- prejudice: motive to lie to the shrink
- alternative: D can testify and be cross-examined and shrink can then testify as to whatever he wants

Hypo: You ask jury to assume the plaintiff was in excellent prior health

- If no evidence about his prior health you should not put it in (sneaking it in under 703 may be allowed but is misleading)
- If there was contrary evidence it is totally misleading and should be stricken
- If it is contested (one side says yes and one says no) then it’s ok; other side can rebut with its own hypo

*Ingram*: Lawyer asked interminable hypo with facts not in record and facts based on second witness’ opinion. Court said a hypo may include only facts in evidence or those the jury can logically infer. Furthermore an expert opinion can’t be predicated on opinions of other witnesses (old rule when hypos were necessary)

*Brown*: Caught with coke in suitcase frame on way to Bermuda. DEA agent said value was huge based on statement made to her by another agent. Court allowed it under 703 because it is reasonable to rely on opinion of another DEA agent. D wanted to intro DEA price list but they wouldn’t let her; could have said it was 803(8)(C) finding in public record used against gov. or admission of an agent, but counter is 403 argument that it’s confusing/waste of time/duplicative.

*US v Tran*: D accused of unlawfully prescribing drugs. Gov presented expert who said that it was his opinion that his findings and findings of another doctor (who was not present) were the same. Court said you can say you relied on the other doctor’s report but you cannot say the two are essentially the same w/o calling the other doctor as witness and putting his report into evidence (old rule – no hearsay). Report generated for litigation is not of the type reasonably relied on.

*Gardeley*: D charged with crimes and gets gang enhancements. Expert testified based on interviews of the Ds as well as a third party not there. Court allowed the testimony because it was of type reasonably relied on and could help jury in understanding basis of expert opinion. **Crawford problem?**

**RULE 704: OPINION ON ULTIMATE ISSUE: (a) Testimony in the form of opinion or inference is not objectionable because it embraces an ultimate issue to be decided by trier of fact; but (b) in criminal case expert may not state opinion or inference as to whether defendant did or did not have mental state/condition constituting an element of the crime charged or a defense – such ultimate issues for trier of fact alone.**

- Name of defendants and precise language of statute should be avoided; lay terms preferred (*Odom*)

- Expert opinions cannot embody legal conclusions (e.g. use statutory language) (*Scop*) (policy: this is jury's realm; they should be applying reasonable doubt standard and we don't know if expert did; experts are not legal experts and could mislead)
- Courts reluctant to accept this especially in criminal cases where risk of violating D's rights is substantial
- You can still object on 403 grounds if misleading or confusing – e.g. it assumes the conclusion
- Hypos still preferred; can also describe a general situation without legal terms and then pose hypo.
- (b): shrink can say “x is schizophrenic,” but not “he can't tell right from wrong.” You can describe qualities of mental disease but can't specifically comment on the element of the crime (*Kristiansen*)

**State v Odom**: D charges with possession of crack with intent to distribute, said it was for his personal use. Narcotics expert (who had never seen D before) testified that based on his years of experience he believed Odom possessed the coke “with intent to distribute.” Court said experts should use hypo based only on facts in evidence; must use lay terms whenever possible. Old C/L approach.

*Scop*: S tried for mail fraud. Prosecution brings SEC investigator who said that Ds “had engaged in manipulative and fraudulent scheme” drawing directly on language of statutes. Court said 704 still does not allow experts to give opinions embodying legal conclusions. Furthermore experts cannot assess credibility, thus statement that one of the other witnesses had told the truth was impermissible assessment of trustworthiness.

*Kristiansen*: D committed crime and claimed that he had mental defect (defense). Court said the mental health expert could not offer an opinion as to whether D's disease could affect ability to appreciate his actions. Also the expert could not ask if D was “legally accountable” for his actions.

**RULE 705: Expert may give opinion without first testifying to underlying facts or data, unless court says otherwise. Expert may in any event be required to disclose underlying facts or data on cross.**

- eliminates necessity for hypo but still allows it; puts burden on cross to elicit missing data

**RULE 706: Court may appoint expert witness selected by it or the parties; they are entitled to reasonable compensation.**

- policy: concern with shopping for experts; increasingly used b/c of huge disagreements in psychology and general medical causation litigation

**RULE 702: TESTIMONY BY EXPERTS: If scientific technical or other specialized knowledge will assist trier of fact to understand evidence or determine a fact at issue, witness qualified as an expert by knowledge/skill/experience/education/training may testify thereto in form of opinion or otherwise if (1) testimony based on sufficient facts or data; (2) testimony is product of reliable principles and methods and (3) witness has applied principles and methods reliably.**

- Favors use of non-opinion testimony
- Test: whether a layperson would be able to determine the issue without an expert
- C/L approach was to put facts in evidence first and specify basis on which opinion rests (usually by hypo). Eliminated because risk of “losing the jury;” risk of quibbly appeals as to whether hypo slanted the facts; disliked by experts; misuse to sum up case
- policy against use of experts: aura of scientific authority to propositions jurors can grasp on their own; they are saxophones manipulated by lawyers to get results they want.

**RULE: All expert testimony is governed by 104(a): Judges have gatekeeping responsibility to determine whether the methodological basis for the opinion is reliable by a preponderance of the evidence** (BOP on proponent).

- expert must be qualified (courts increasingly require qualification in specific area on which testifying)
- relevancy/fit test: testimony must actually help answer the question at issue
- reliability and validity requirement: Factors include (1) whether expert's technique is testable; (2) whether it has been subject to peer review and publication; (3) the known or potential rate of error; (4) existence and

maintenance of standards and controls; (5) whether technique or theory has been generally accepted in the scientific community

- *Daubert* factors neither exclusive or dispositive; other factors include whether it's his own research or prepared for litigation; whether too huge analytical gap/extrapolated (based on *ipse dixit*); obvious alternative explanations; if being as careful as he would be in his regular professional work; whether field is known to reach reliable results for type of opinion expert would give
- rejection of testimony is exception rather than rule (policy: cross-examination, contrary evidence and careful instruction on BOP will attack shaky evidence anyway)
- Applies to non-scientific testimony – engineers, historians, real estate appraisers (*Kumho Tire*)
- Factors applied depend on whether nature of expertise is amenable to that factor (e.g. testing)
- Leeway to trial judge in determining both reliability and how to assess it (which factors to use; *Kumho*)– abuse of discretion standard (*GE*) (Faigman says this is for specific facts, but that courts need not defer for general Qs like does smoking cause lung cancer; Park disagrees)
- *Frye* “general acceptance” test used in many states is more deferential to scientists.
- If comports with common sense (a lay witness might reach this conclusion) then more likely to be admissible (field test for drunkenness (count back from 70, stand on one leg) vs. horizontal gaze test which is widely accepted by cops has scientific aura and lay-knowledge may not be able to override)
- error rate: officer’s experience alone (I have administered 100 such test) should not suffice because danger of false positives, no control group, investigative bias.
- Statistical Data: 50% may be no better than coin toss but 90% is good enough – all evidence has error rate (30% for eyewitnesses)

	ACCEPTED	NOT ACCEPTED
<b>VALID</b>	Yes	e.g. too novel (DNA when first coming out) or too obscure (new test for poison not out there enough)  Frye: no Daubert: yes
<b>NOT VALID</b>	e.g. handwriting identification, microscopic hair identification, bullet lead analysis, latent fingerprint identification  Frye: yes Daubert: no	No

*Frye*: used by many states – tests “general acceptance in particular field.” generally defers to scientists.

- critique: too conservative (may take a while for field to catch up); too liberal (if you define field narrowly it comes in – astrology accepted among astrologers; if you expand – psychologists vs. parapsychologists – it’s different); judges may ask wrong Q (should ask exactly for what is this theory accepted?)

**Daubert**: P sued for birth defects caused by Bendectin ingestion. D’s witness reviewed over 30 studies and said it was not dangerous; Ps introduced 8 experts who conducted their own studies and reanalyzed previously published studies. Court set forth factors (above) to show relevance and reliability.

*General Electric*: Offered testimony linking PCBs and lung cancers. Court held standard of review is abuse of discretion for all expert testimony including *Daubert* determination.

**Kumho Tire**: P sued manufacturer of allegedly defective tire and used expert in tire failure analysis. *Daubert* applies to all testimony based on technical or “other specialized” knowledge; district court has broad latitude when deciding how to determine reliability (which factors to use).

Hypo: O.J. case detective says it was a “rage killing.”

- No publication, rate of error or observational studies available
- Can ask about officer’s own experience (how many rage killings he’s seen), what kind of studies were used in academy (where they were taught this), if there are field studies.

### **Forensic document examiners**

- accepted by some courts but not *Saelee* (high watermark against)
- some courts instruct jury that it’s not scientific field and there are errors; may prohibit witness from reaching ultimate conclusion (e.g. it was a forgery) or using certain words (“laboratory”).
- Determining if something was a tracing can be distinguished from *Saelee* which was about disguised handwriting attribution.
- Rule 901(b)(3) says you can authenticate things by comparison to other specimens known to be reliable, but expert testimony must be reliable itself: must first pass through gates of 702.

*Saelee*: D fedexed opium-filled butterfinger bars. Expert looked at hand-printed fedex slips to determine whether D filled them out. Court held expert did not satisfy *Daubert* b/c (1) lack of evidence on success rate; (2) no testing of underlying theory; (3) no research on probability theory; (4) lack of peer review; (5) lack of controlling standards; (6) acceptance by other forensic document examiners does not help. Furthermore D had motivation to disguise handwriting. Rule 901(b)(3) says you can authenticate things by comparison to other specimens known to be reliable, but expert testimony must be reliable itself: must first pass through gates of 702.

### **Polygraph Evidence**

- Most courts prohibit admitting results unless all parties stipulate admissibility (before or after test takes place)
  - reasons: dubious scientific premise of control question test; methodological problems with lab studies; no measure of outcome; error rates; countermeasures
  - But it is up to individual Js to reach result – Cf. *Piccinonna* and *Scheffer*
- Even if allowed, can object based on lack of notice, qualifications, opportunity to have your own exam, test poorly administered, Qs were irrelevant/improper/not covered in advance (*Piccinonna*)
  - Some Qs so specific (e.g. did you have a 10-year affair) that you could deny doing something even if you did it (because you had 9-year affair)
- Still used as interrogation method (may provide leads or lead to confession if they’re found to be lying)
- Control question test: Asks 3 types of questions: (1) neutral (non-confrontational baseline Qs); (2) relevant (accusatory and directed specifically at what’s under investigation); (3) control (about same general issue but designed to be one about which subject will lie).
  - theory: innocent suspects will react more strongly to control questions than relevant ones; guilty will react to relevant Qs
  - Park thinks sensitivity (catching liars) is pretty good unless they’re trained in countermeasures; specificity is poor. The tests have a higher rate of false positives, so if used to show someone was lying it is more prejudicial.
- Can be assessed by lab studies – controlled experiment where one group does X and another doesn’t. Both say “I didn’t do x.”
  - sensitivity problem: those who did X won’t get upset about relevant Q because they were authorized to do it but may get upset about control Qs
  - **specificity problem**: innocent people won’t be as nervous because no risk of going to jail
  - prison studies with more realistic motivation has higher sensitivity
- Can be assessed by field studies – people actually being questioned by police
  - problem: no way of knowing truth unless you have a confession by suspect or someone else, but level of false confession can be high (esp. when s/o has flunked a polygraph), those who don’t confess aren’t counted.
- Predictive value problem high because tests are so inconclusive.

- Under *Daubert* you would ask what were the tests done? error rates? what were results? methodological problems?
- Cannot be used as substitute for testimony; cannot be used to bolster credibility until it's been attacked (*Piccinonna*); can be used to attack other side (*Piccinonna*) (minority view)
  - critique: under 608 this shows one specific instance and not general character for truthfulness

*Porter*: Although polygraph evidence may satisfy *Daubert*, its probative value is very low and there is substantial risk of prejudice. Affirmed *per se* rule that polygraph evidence is not admissible in CT courts.

*Piccinonna*: D appealed perjury conviction saying gov. had failed to stipulate his polygraph tests, which he passed. Court said polygraph tests allowed (1) if parties stipulate; (2) even if no stipulation if to impeach or corroborate witness testimony (minority view); (3) procedural safeguards must be used. Court applied *Frye* and said not accurate to say it lacks "general acceptance."

*Scheffer*: Military judge excluded polygraph evidence under military rule 707 which says it's inadmissible. D said violation of constitutional right. SC upheld conviction because (1) validity of test is in doubt; (2) rule protects jury's core function; (3) admission of test could cause wasteful collateral litigation. It is constitutional to exclude polygraph evidence.

### **PROBABILISTIC EVIDENCE:**

- **Sensitivity** = ability to detect a condition/probability it will give result consistent with reality (e.g. metal detector turned up high will detect weapons) (e.g. won't believe liars but will catch them)
  - 100-sensitivity = false neg. rate; you want a low rate of false negatives (when drunk person labeled not drunk)
- **Specificity** = ability to detect absence of condition/probability it will say you are not drunk if you are in fact not drunk (e.g. won't incriminate truth-tellers)
  - 100-specificity = false pos. rate; you want a low rate of false positives – when sober person is said to be drunk
- **Predictive Value**: If 1,000 people take a drunk test and 99% of them are sober, there are 10 drunk and 990 sober people.
  - If test is 50% sensitive and 90% specific
    - of the 10 drunk people, 5 will be found drunk and 5 sober (sensitivity)
    - of the 990 sober people, 891 will be found sober and 99 drunk (specificity)
    - 5 of the 104 found to be drunk will actually be drunk = 5% predictive value positive
    - 891 of the 896 found sober will be sober = 99% predictive value negative
- **Source probability error**: Chance that someone picked at random would have a characteristic does not mean that's the same chance it was someone other than suspect
  - ignores other factors such as how many people in area
- **Bayes' Theorem**: prior odds x likelihood ratio (likelihood you will test positive if positive/likelihood you will test positive if negative) (or, true positive/false positive). (or denominator of random match prob. – e.g. 1000 for 1/1000 chance). Simple approach: What is the prior chance x will occur and how does this data we have change things?
  - could apply to identity, hand print, drug test, etc.
  - e.g. if prior prob. of guilt = 25% and palmprint matching D's palm would match palm of 1/1000 people, then posterior prob of guilt – 99.7% (huh). if palmprint=1/100, then posterior prob. = 97%
  - used all the time by experts
  - Finkelstein & Fairley article: "chart method" of presenting evidence to jury will help them use it (hasn't caught on)
  - problem: first number (chance of guilt) may be based on jurors' invention of statistic to explain their subjective belief. They don't know how to quantify this – some think you "start" at 50% chance of guilt!
  - problem: dwarfing soft variables: jury overlooks nonquantifiable issues b/c mesmerized by stats (Tribe)

- Random match probability: chance that a person picked at random will have this characteristic (e.g. 1/1000 people would match this blood test)
  - prosecutor's fallacy: equating this with chance D is innocent (chance innocent = 1/1000). If 10,000 people in area who could have characteristic, there would be 10 matches.
  - defense fallacy: using facts above, saying chance it was him is 1/10. Ignores other evidence against D, which should be incorporated with the match.
  - lab error may also be a factor
- Source Probability: Probability that suspect is source of evidence
  - affected by random match prob, # people who might be source, their relation to suspect, circumstances surrounding trace evidence
- Guilt Probability: probability that suspect is guilty.
  - affected by genetic matching evidence and all other evid (e.g. eyewitness testimony)
- Subgroup: if description of offender says he is Native American you would use that subgroup; otherwise you would use population as a whole.

100 people tested with 90% sensitive; 90% specific test

20 actually drunk	80 actually sober
18 true pos 2 false neg	72 true neg 8 false pos

likelihood ratio = 18/8 or 9/4

### **Problems with probabilistic evidence**

- foundation: can't pull probabilities out of thin air (Collins)
- independent variables must be truly independent if using product rule
  - otherwise, must use chance 2 characteristics occur together = e.g. multiply probability of having beard by pro. of having mustache IF you have a beard
- equating random match probability with chance D is innocent = prosecutor's fallacy; determining how many people could possibly share the characteristic and equating that with chance of guilt – ignores other evidence = defense fallacy.
- lab error
- jury will get 2 statistics and average them
- latent fingerprint/handprint only partial, don't know random match prob., may be smudged, etc.
- policy: numbers can be misleading; juries and not mathematicians should decide; may interfere with reasonable doubt standard, dwarfing soft variables; jury determining prior odds (source probability error); in general you should at least be able to use random match probability.
  - alternatives: deal with it on cross; if judge allows misleading prob. evidence you can ask how many people/what percent of population share this characteristic; allow blood test but don't use numbers ("It is consistent with conclusion x").

Hypo: Demeanor test measures lying by gaze aversion. Someone looks you in eye and says "I did not have sex with that woman."

- Sensitivity challenge: some people are good liars and can school themselves to avoid
- Specificity challenge: may detect someone who is just embarrassed.

Hypo: Camera gets shot of convenience store robber's ear. Crease in earlobe = 1 person in 100; width of ear = 1 in 10; lobe length = 1 in 200. Witness multiplies 100x200x10 and says ear is 1 in 2 million.

- *Daubert* objection on foundation. If witness says he has collected 10,000 ear swatches you ask if there was significance testing? margin of error? representative samples?
- There could be link in characteristics; they aren't necessarily independent variables!
- Assuming they are independent and there is no foundation problem, there are still problems:

- source probability error: inferential leap that 1 ear in 2 million means that there is 1 in 2 million chance it is someone other than D ignores other factors such as how many people live in area – there could be more than 1 possible person with that ear

**Collins:** Witnesses saw AA with mustache and blond pony-tailed woman escaping in a car from crime scene. prosecutor multiplied probability of each trait using the product rule and came out with 1 in 12 million chance it was not them. Problems: (1) no foundation – numbers picked out of thin air; (2) cannot use product rule without adjustment if variables are not independent; (3) prosecutor’s fallacy of equating distinctiveness of your characteristic with chance you are innocent. The numbers are misleading; juries and not mathematicians should decide.

**Mountain:** D argues that it was error to allow evidence that assailant’s sperm contained A blood and that D also had type A blood. Court said when identity is at issue, proof that D and perpetrator share physical characteristics is not inadmissible simply because they are shared by large segment of the population. Limiting instructions will curb risk of prejudice.

**Kammer:** Paternity case with blood test. Paternity index = 460. Multiplies prior odds by (1/460) – uses Bayes’ Theorem. Court said evidence is admissible and constitutional.

### DNA EVIDENCE

- Match: means x cannot be excluded as source of the trace, NOT that he is the source or we can determine probability that he is. Random match probability is only theoretical.
- **Castro:** DNA results were inconclusive. Lab declared match but results fell outside mathematical standards for confident declaration of a match. Court could not use the evidence, though in the end he confessed.
- Challenges/problems:
  - not following own protocol (**Castro**) or lab protocol (sloppy technicians)
    - human error tests are not blind and therefore problematic
  - poor performance on proficiency testing
  - use of wrong subgroup
  - info presented misleadingly
    - fact finders more likely to convict when you give source prob. statements
  - innocent explanation for why D left trace
  - other relevant evidence
  - confusing random match probability with source probability or guilt probability
- Kohler says you must give jury lab error rate
  - Berger rebuts (pro-prosecution): proficiency tests change, employees change, error rates may change daily, a particular lab may be better than average lab, not required for other types of evidence (e.g. business records)
  - Park says jury should get match probability and chance of lab error and determine for themselves what a particular lab did.

### WRITINGS

**RULE 1001: Definitions of “writing,” “recording,” “photograph,” original and duplicate**

**RULE 1002: BEST EVIDENCE RULE: To prove the content of a writing, recording or photograph the original is required (except duplicates or excuse). Hierarchy: original → duplicate → excuse.**

- policy: preventing fraud; preventing mistake; policy for duplicate
- not always required to use the best evidence – you can put in s/t like description of a dented car or you can use hearsay rather than having to put witness on the stand.
- other ways to get something in:
  - expert testimony (Rule 703) allows use of materials that may not be admissible in evidence; but does not automatically let it in: describing the content of the document in detail might be held too prejudicial by judge

- An witness may testify as to what was said in an oral statement despite existence of a stenographic report (Meyers). you can distinguish between an oral statement and a tape of it by saying you aren't trying to prove the content of the tapes – it's different evidence. Same as using a contract or videotape of a burglary. Testimony → conclusion is no problem, but testimony → content → conclusion is a problem. If however you're using the tape to describe the burglar then it's a problem because you're talking about content of the tape
- You can always say evidence is confusing or waste of time (e.g. putting in witnesses to describe a transcript you have put in)
- e.g. oral testimony for contents of the writing (“He wrote a letter”)
- If original has been altered you can say it is no longer the original
- Other objections: hearsay; authentication (these are independent bases of objection)
- Rule 1005: Contents of an official record may be proved by copy certified in accordance with 902 or testified to be correct by a witness.
- Rule 1006: Voluminous writings, recordings or photos may be presented in form of a chart, summary or calculation. Originals should be made available upon request.
- RULE 1007: Content may be proved by testimony or depo of party against whom offered or by their written admission
- 104(a) issue unless there is a question as to whether it's a fake or ever existed, in which case the jury decides (Rule 1008)

**RULE 1003: A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circs it would be unfair to admit the duplicate**

- a xerox copy of an x-ray may not be as good: you can argue that it would be unfair
- genuine challenge to authenticity means duplicate can't get in

**RULE 1004: EXCUSES: Original not required and other evidence is admissible if:**

- (1) All originals have been lost or destroyed (unless in bad faith)
- (2) No original can be obtained
- (3) The original is in possession of opponent, who was put on notice but did not produce the item
- (4) It is collateral or not related to a controlling issue
  - once you have an excuse there are no degrees of secondary evidence – e.g. you could put in a photograph pf the film (Cf. *Enskat*)

Hypo: Your client testifies that he talked to Buzzy, May 1 and then got an email from him May 2.

- Objection: hearsay! But Buzzy is opposing party, therefore it's a party admission
- Best evidence: the document itself was not submitted. To cure you must produce document or give sufficient reason why you can't (doesn't have to be strong, e.g. “I lost it.”)
- Authentication: must show this actually came from Buzzy; name in address line not sufficient b/c spammers do stuff like disguise under others' names.

*Sirico v. Cotto*: Best evidence rule precludes oral testimony by radiologist about content of x-rays when x-rays not produced by proponent and proponent offered no excuse for lack of production.

*Case note p. 688*: Police recorded incriminating conversation between prisoners; re-recorded tape on a disk and destroyed tape. Court held that disk should have been excluded b/c not the best evidence.

*Herzig*: Holding best evidence rule does not preclude oral testimony about partnership earnings/transactions even if they are re-recorded in company books. Proponent was attempting to describe the underlying events and not what was in the books.

*Meyers*: D accused of encouraging s/o to lie under oath. Oral testimony about what was said under oath was admissible despite existence of stenographic transcript because he observed it and is not relying on contents of the transcript.

*Enskat*: D charged with exhibiting obscene film. Court held it was error to allow testimony by police of what they say when they saw the film. Court held best evidence applies and they should produce the film or an excuse. Furthermore photos of what was in the film were not acceptable substitutes.

**Authentication: Showing that the thing is actually what it purports to be**

- **Rule 901: To authenticate a document or tangible exhibit the party need only show that a reasonable jury could find the thing to be what it claims (104(b) question)**
  - testimony of witness with knowledge saying it is what it claims to be
  - nonexpert opinion as to genuineness of handwriting
  - comparison with authenticated specimens
  - voice identification by opinion based on hearing it at another time
  - phone call: evidence that call was made to a particular number at particular time (A) if person, circling indicating self-identification (that person was actually the person called); (B) for business, call was made to a place of business and conversation related to business
  - public record: evidence it is from the public office where it was filed
- Higher standard applies to something like chain of custody for drugs
- Fingerprints:
  - 901(b)(7): You can call the custodian to certify that it is identical to what's in their records
  - 901(b)(4): You can present circumstantial evidence through request and receive under (e.g. we called up Denver PD, asked them to send records, and they sent them).
  - 902(4): You can have it certified rather than just rubber-stamp it.
- **Rule 902: Self-authenticating items (extrinsic evid. of authenticity not required):**
  - domestic public documents under seal, or not under seal if public officer certifies that signer has capacity and signature is genuine; foreign public docs; certified copies of public records; official publications, books or pamphlets; newspapers and periodicals; trade inscriptions; acknowledged docs; certified domestic records of regularly conducted activity if accompanied by written declaration of custodian or qualified person;
- **Rule 903: testimony of subscribing witness not required to authenticate a writing unless required by laws of jurisdiction whose laws govern validity of the writing**

Hypo: Tenant wants to sue, claiming excess rent payments. Wants to introduce lease as evidence. How to authenticate?

- During discovery, you submit a request for admission – that they say they signed it
- At trial, you can call LL and ask if it's his signature
- If he saw LL sign it, he can testify to that
- He can introduce circumstantial evidence under 901(b)(4): appearance and content = it's same lease I slipped under his door; circumstances = it showed up under my door and he then cashed my checks.
- He could say he has become familiar with LL's handwriting

*Dockins*: Trying to show D was arrested under another name and have police record from Denver PD saying the fingerprints belong to person X. There is no one there to authenticate the prints.

*Green Giant*: Holding that a can of peas was not authenticated by its label. Rule 902(7) makes these things self-authenticating.

*Denton*: P bank as executor of will sued to recover on insurance and the company said he set the fire himself. Phone conversation between police dispatcher and his residence introduced by insurance company: they called, someone answered and said "Mr. Mills is not home."

- Rule 901 is not exhaustive – all you have to do is produce enough evidence to allow a reasonable jury to find that it's what it purports to be