

# EVIDENCE OUTLINE

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## A. Relevancy

### 1) DEFINING RELEVANCE:

- a) **DEFN:**
  - i) **Relevant Evidence** = having tendency to make element of claim or defense more or less probable (tied to logic)
  - ii) **Rule 401:**
- b) **ROLES OF EV**
  - i) **Academic:** Rules of Ev Codified – goals of codifier
  - ii) **Practical:** Litigation – how to get evidence in or keep out
  - iii) **Jury Trials:** 1) protect jury from hearing for fear they'll mishandle 2) Bifurcated system of decision making, ask judge to keep out for prejudice.
- c) **ANALYSIS:**
  - i) Q1 – What is Ev Offered to Prove?
  - ii) Q2 – How Helpful is it in Proving – how tenuous is the logical connection?
    - (1) Determined by Relationship bt Ev and issues in the particular case
    - (2) How many assumptions required in btw
    - (3) Relevance is not inherent – determined by relationship btw Ev and issues in the particular case
  - iii) Q3 – Is the Fact Provable in this Case? Is there something that excludes, sub law or proc, ev that seems relevant irrelevant?
    - (1) Various Rules that carve away at admissibility of relevant evidence
      - (a) If substantive law doesn't permit NOT relevant (eg. Punitive damages)
      - (b) Procedural law can also bar (eg. Motion for Summary Judgment)
- d) **CASES:**
  - i) **Knapp v. State** – D convicted of murdering police officer, claims SD heard officer beat to death old man, Ev that old man died of natural causes relevant. Ct. finds proper to admit bc shows mistaken belief.
  - ii) **Sherrod v. Berry** – suspect killed by police, not relevant to admit evidence that suspect had not gun. Not relevant bc at issue is state of mind of police officer.
    - (1) Exact opposite of Knapp – Why? Credibility of officer is a lot higher than criminals. Society doesn't want to endanger police officers and does want to discourage people from hurting police officers

### 2) PROBATIVE VALUE vs. PREJUDICE

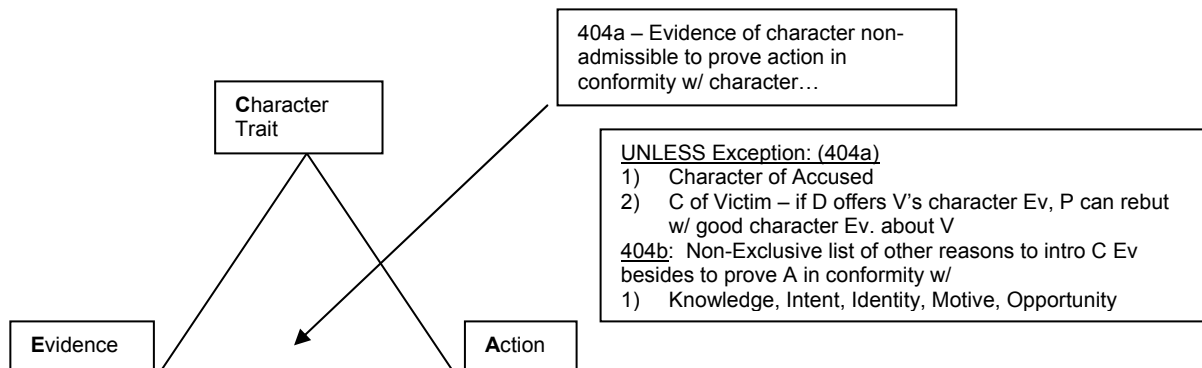
- a) **DEFN:**
  - i) **Rule 403:** Policy Rational for Excluding Relevant Evidence. Does prejudicial effect substantially outweigh probative value?
- b) **ANALYSIS:**
  - i) **Prejudice:** Evidence is still excluded if prejudicial to D → catalogue of cost factors - danger of unfair prejudice or confusion of issues, or misleading jury, etc. (Presumption that evidence be allowed in, burden on opponent of evidence to prove prejudice outweighs)
  - ii) **Probative Value** = motive, what connects them, how helpful it is, what does it prove, is the issue provable in the case
  - iii) **Admissible:** When you weigh all factors you exclude evidence when prejudice substantially outweighs the probative value of evidence
    - (1) Exclude evidence completely
    - (2) Alternate piece of evidence that proves the same fact, and have prosecutor rely only on alternate piece of evidence, and not on this more prejudicial evidence.
      - (a) Stipulation can be alternate evidence (see **Old Chief**)
      - (b) Could be alternate evidence
      - (c) Could be the prosecution intends to use both pieces of evidence
      - (d) Surgery – carve up evidence a bit, redact prejudicial bits

- (3) Admissible for Limited Purpose: 403 often comes into play when limiting evidence to consider for one purpose and not the other.
- (a) Will require jury to do mental gymnastics to only consider Ev for limited purpose?

c) **NOTES:**

- i) **Stipulations**: Generally stipulations will not be allowed bc prosecution has a rt to present evidence
- (1) Risk of jury confusion – juror expectation that they are going to see the whole case
  - (2) Deprives prosecution of full narrative richness of case.
    - (a) **CASE - Old Chief**: D prosecuted for possession of firearms w/ prior. Ct gives Ev of prior felony conviction, when D offered stipulate truth of prior felony.
  - (3) Strategy – When to give stipulations of priors:
    - (a) Liability is admitted completely, if criminal D pled guilty and the only issue became penalty, wouldn't be the same, judge would almost always be entitled to hear evidence regard the gravity of the crime to decide sentence
    - (b) Punitive damages – gravity of crime is always relevant
    - (c) Civil Cases – admitting liability is significant, will almost always keep out proof of liability.
  - (4) Stipulations don't defeat relevance – fact to which the Ev is directed need not be in dispute.
- ii) **Witness Credibility**
- (1) Judge is not to weigh the credibility of the witness outside the presence of the jury, cannot exclude based on credibility. Credibility is issue for jury not judge
    - (a) CASE – **Ballou**: Drunk driving accident, Contention P was drunk and contrib. neg. Judge excludes evidence of P's breathalyzer bc believes witness who said P was sober.

3) **CHARACTER, HABIT AND CUSTOM**



a) **RULE:**

- i) **405** – Types of Evidence you are Entitled to Use
  - (1) Testimony of Reputation – If Char. Ev admissible USE
  - (2) Specific Instances of Conduct – If Char. Ev **Essential Element** USE
- ii) **404** – Evidence of Character Inadmissible to prove Action in Conformity with that Character Trait.
  - (1) Admissible to prove Character Alone (eg. Libel, can offer character Ev to show P actually had character traits >> not libelous)
- iii) **404a EXCEPTIONS: (NOTE – Habit Ev 406)**
  - (1) Character of Accused (Only Criminal Cases – Or Criminal Type Cases, See )
    - (a) If D calls good character witness, P can call rebuttal witnesses. If D never calls, P can't call either
  - (2) Character of Victim (Only Crim. Cases)
    - (a) If D intro's character Ev against V, P can offer good character evidence about V. But P can't bring in negative character Ev about D.
    - (b) Character Ev must be relevant
      - (i) Eg. homicide case: character Ev about propensity for violence or peace is relevant, irrelevant that V was honest and good family man
- iv) **404b – Non-Exclusive List** of Other Reasons to Intro besides Action in Conformity:
  - (1) "Other Crimes, Wrongs or Acts..." can be used to show... (Doesn't have to be a conviction)

405 Doesn't Apply bc Relevancy doesn't depend on Conclusions about Char. Char. Relevant for other purposes

- (a) Intent: Least amount of similarity required, the more frequently a person does the same act, the more reasonable it becomes to conclude that the person had the same state of mind in performing subsequent acts.
  - (i) **Beasley** – Guy “dr. shopping” to get scripts to sell drugs on street. Ev of dr. shopping admissible to prove intent to sell. D goes about procuring drugs to sell on street in particular way by “dr. shopping.” >> Admissible to prove intent to sell on street.
- (b) Motive: Doesn't require high degree of similarity. Motivation that shows compulsion (Eg. firebug, or child molester)
  - (i) **Cunningham**: Nurse convicted for stealing Demerol. Prior drug addiction admissible to prove compulsion/motive to steal.
- (c) Identification: Must be so similar and unique to = fingerprint.
  - (i) **Carillo**: heroine sale to undercover officer. D claims mistaken ID. Can't admit earlier heroine sales bc action not unique enuf to = fingerprint
  - (ii) Similarity Q's dealt w/ under 104a not 104b – judge decides.
- (d) Opportunity: Shows had access to particular location where crime occurred
- (e) Knowledge: Absence of mistake or accident.
  - (i) **Huddleston**: Guy caught selling stolen TVs claims didn't know they were stolen. P seeks to intro prior instances of selling stolen goods. Admissible to show D knew goods were stolen. 104b – enuf evidence for jury to conclude D knew TV's were stolen.
- (f) Plan and Scheme: So Similar to suggest that these were not two different spontaneous acts, but rather have sufficiently similar circumstances, that similar plan motivated both.
  - (i) **Tucker v. State**: 2x guy “wakes up” and finds dead guy in his living room. Prior incident admissible to prove the fact that got away with it the first time shows he learned to do it again the same way. NV ct finds inadmissible bc higher “preponderance std” for submitting to jury and bc D not convicted of first instance found not relevant. BUT FR's much lower “enough evidence to support jury finding that the conditional fact was true” std. Judge could make decision that enuf evidence and allow jury to decide.
- v) **Sex Offenses EXCEPTIONS** - (413, 414, 415): Sexual Assaults, Molestation = crimes that show “lustful disposition”, admissible to show character and action in conformity
  - (1) Must give reasonable notice to def. if intent to raise.

b) **ANALYSIS:**

- i) **What is the Evidence Designed to Show?** If different things, have to analysis admissibility for each.
- ii) **Relevant?** 401
- iii) **Does 404 apply?** Which bars evidence of character to prove conduct in conformity w/ that character.
  - (1) If so, then admissible unless meets EXCEPTIONS under 404a (1-3) TRUE EXCEPTIONS
    - (a) If fits under EXCEPTIONS – must also comply w/ 405 – must be opinion of reputation
      - (i) If D opens the door, P can rebut and ask Q's about specific instances of conduct – BUT NO extrinsic evidence admissible
      - (ii) Also can bring rebuttal character W but no specific instances of conduct Q's
    - (2) 404b – Not introduced to prove conduct, can be admissible for some other purpose. Identity, intent,  motive, knowledge... Then piece of evidence admissible under this subdivision.
      - (a) 404b – limited to specific acts. Not opinion or reputation
  - iv) If 404 doesn't keep out, **403 Prejudice?**
    - (1) Even if challenged piece of evidence is admissible under 404a1-3, or 404b → can still be challenged as prejudice outweighs probative value, time consuming, jury confusion.
      - (a) Will jury misuse it as propensity evidence, will limiting instruction mitigate, will limiting instruction be likely to be followed?
    - (2) Mitigation – limiting instruction, alternative evidence, surgery

Courts Careful to Separate 404 from 403 Analysis

c) **NOTES:**

- i) **Policy**: Not concerned that Ev is irrelevant, concern is that it is TOO relevant = prejudicial and must be kept from jury.
- ii) **Character In Issue Cases**: Defamation, Negligent Hiring. Character Ev admissible bc not in for Truth, just in to prove Notice, or knowledge.

4) **SIMILAR HAPPENINGS / HABIT**

a) **ANALYSIS:**

- i) **Similar Happenings** = substantial similarity between operative circumstances and the case at bar + whether the Ev is probative of material issue in the case.

- (1) Eg. Prior slip and falls to prove notice
  - (2) Evidence will be kept out if not similar enuf
  - (3) 104a – judge decides bc risk that jury won't disregard issue if they find conditional fact not true, reasonably concerned that they would ignore the policy issues and just consider the Ev + time consuming.
  - (4) Must show "Substantially Similar" Circumstances.
- ii) **FR 406 - Habit** = Deliberate repetitive practice by one in complete control of the circumstance is good predictor of how party will engage in future under similar circumstances
- (1) Line between Character and Habit wavy (red flag)
    - (a) **Perrin v. Anderson**: Police go to D's house to interview him about a traffic accident, and D gets violent. Can't use 404a2 Character Ev of V bc only relates to criminal cases, and this is civil case. AND 405 says can only prove w/ opinion/reputation evidence not be specific acts of conduct. Therefore ct uses 406 habit evidence. V had habit of attacking police officer
    - (b) Could also be used if racial hatred.
- iii) **104a** – judge decides bc risk that jury won't disregard even if they decide they are not similar enough, and time consuming.
- iv) **412 – Bars Ev of V's Sexual History** to prove V's sexual predisposition
- (1) EXCEPTIONS: 1) Source: somebody else in the course of having sexual relationship w/ victim had done it. 1b) Prior Sexual Acts btw V and D. 1c) If keeping out would violate D's Constitutional Rights.
    - (a) **Olden v. KY**: Women claims to be raped by 2 black guys. D's claim V lying bc they dropped her off at home and she is trying to protect relationship w/ boyfriend. Want to intro sexual relationship w/ boyfriend to prove motive to lie. V lies about living w/ mother. Ct finds would violate D's 6th Amend rts to X and admits. Prototypic form of bias, motive to lie.
    - (b) **Platero**: Guy posing as cop rapes woman. D wants to intro relationship w/ other guy in car to prove she's lying about consent. Ct does not allow Ev.
    - (c) **Cassidy**: V goes home w/ D after bar, gets into bed w/ him then starts screaming about her husband dying in Vietnam and claims D raped her. D wants to intro another instance of her doing the exact same thing.
  - (2) CA Ev Code allows in to prove anything BUT consent.
  - (3) Inverse 403: Probative Value must substantially outweigh prejudice.
- b) **CASES: Where do these cases go?**
- i) **Simon v. Kennebunkport** – slip on fall on street, P wants to intro store owners testimony that similar slip and falls in same spot under similar rainy conditions, admissible bc evidence to prove notice, causation, and fact that P was not at fault for fall.
  - ii) **Halloran** – Mechanic working w/ Freon always heats coils, explosion. AC company wants to intro evidence that Mechanic in the habit of doing this. Admissible bc Deliberate repetitive practice shows in the habit of performing work in this negligent way.

## 5) SUBSEQUENT PRECAUTIONS

- a) **RULE**:
- i) **FR 407 – Subsequent Precautions** = Inadmissible. EXCEPT to prove ownership, control, impeachment
    - (1) Elements:
      - (a) After Injury
      - (b) Subsequent Precaution Taken
      - (c) Not Admissible to prove Negligence, Culpability
    - (d) EXCEPTIONS:
      - (i) Control: If control is an issue, can show that D always had it in his power to take those precautions.
      - (ii) Feasibility:
        1. Narrow Approach: Physically, Scientifically possible to do
        2. Broad Approach: Would it have been wise to do so, Did they think it was safe at the time to do so.
      - (iii) Impeachment: Narrow approach needs to be taken, or rule will get swallowed up.

## 6) OFFERS IN COMPROMISE

- a) **RULE**:
- i) **408**: Statement made in the course of settlement negotiations not admissible to prove liability / culpability
    - (1) Elements:

- (a) Offering OR Accepting offer in Compromise (During course of Settlement Negotiations)
    - (i) Regular business Conduct  $\neq$  OiC
    - (ii) Must be in anticipation of Litigation
    - (iii) Attempting to Whittle down acknowledged debt  $\neq$  OiC
  - (b) Attempting to Compromise Claim
  - (c) Which was disputed in validity or amount
  - (d) EXCEPTIONS: Can be offered to prove Bias, Prejudice, Negating Undue Delay, Proving Obstruction
- b) **NOTE:**
- i) If dispute is only to payment of settlement = Ktual issue, not about validity or amount. s

## B. Hearsay Rule

### 1) DEFINING HEARSAY

- a) **POLICY:**
  - i) **Cross-Examination:** Trying to avoid statements made out of court, where person not subject to X, cannot test credibility, perception, sincerity, memory, narrative ability
  - ii) **Advantages of Admitting:** Limits cumbersome of litigation, too many witnesses. Sometimes out of ct declarant is unavailable.
- b) **DEFN:**
  - i) **801c:** Statement + of other than person testifying + offered to prove truth of matter asserted.
  - ii) **Statements** = assertion or non-verbal conduct
    - (a) Statement made during trial  $\neq$  H
    - (b) Direction  $\neq$  Statement, Question  $\neq$  Statement
      - (i) CASE **Zenni**: Police go to search bookmakers house receive phone calls to make bet on fight. Direction of person on phone  $\neq$  Statement >> NOT H.
    - (c) Implied Assertion = intended to be assertion even if not expressed
      - (i) Eg. **Wright v. Tatum**: Sending letters to person claimed to be mentally incompetent  $\neq$  implied assertion – weren't intending to prove persons competence when wrote letters
        - 1. Contrasted w/: Capt bringing family on boat to prove safety of boat = implied assertion and H.
    - (d) Pointing at someone = Assertion = H
  - iii) **Truth of Matter Asserted:**
    - (1) What is the proponent seeking to introduce, what is the purpose (relevance)
    - (2) Offered to prove something other than truth of matter asserted  $\neq$  Hearsay. NOTICE, SoM, KNOWLEDGE
      - (a) CASE **Vineyard**: Witness testimony that they told Def sidewalk was slippery admissible to prove NOTICE, not to show defect.
      - (b) CASE **Fun-Damental v. Gemmy**: Two producers of toilet bank. Testimony of retailer that "you hurting my business selling product cheaper to competitors" – admissible to prove STATE of MIND that retailers confused, not to prove truth.
      - (c) CASE **US v. Hernandez**: DEA agent received tip that Def was drug dealer. Testimony inadmissible bc State of mind must be RELEVANT, Irrelevant what DEA's SoM was at the time of arrest.
      - (d) **Jamarillo-Suarez**: Pay/Owe Sheets = circumstantial Ev that apt being used for drug deals, not in for truth.
  - iv) **Declarant** = Person. (drug dog finding bag  $\neq$  H)

### c) ANALYSIS

#### i) IS IT HEARSAY?

##### (1) **Not For Truth:**

###### (a) State Of Mind

- (i) For effect on STATE of MIND of listener
- (ii) For reflection of STATE of MIND of speaker.
  - 1. **Zenni** – Caller believed # was place to make bets.
- (iii) Where state of mind is RELEVANT

###### (b) Knowledge

- (i) Eg. Molested child witness testify that child described charged house.

###### (c) Motive

###### (d) Notice

- (i) Think \*\*\*PREJUDICE – if not in for truth, jury might take Ev for truth

##### (2) **No Assertion**

###### (i) Direction

###### (ii) Question

###### (iii) Warning

- (iv) Implied Assertion that is relevant, and implied assertion does not trigger hearsay rule – implied assertion was intended.

- 1. Sea Captain's HYPO: (Wright v. Tatum – used by ct to reach decision) Conduct by capt to prove issue relevant in case, that vessel was sea-worthy.

##### (1) **Declarant Based Hearsay Rule:**

- (a) Distinguish assertion based hearsay rule – from declarant based rule, whenever out of ct statement depends on declarant's credibility = hearsay and needs an exception. Much more of a protection against hearsay dangers, and allows in substantially fewer statements than assertion based hearsay – that's why rejected. WE LOOK AT ASSERTION BASED RULE = "Truth of Matter Asserted"

- (i) Eg. Miami Wife lies to give murdering husband alibi. Under Assertion based admissible bc not in for truth, in for consciousness of guilt. Under Declarant based inadmissible bc declarant lying >> NOT credible.

- (b) Declarant = Person.

- (c) Not Hearsay if from animal, machine

##### (2) **Relevance** – If not for truth, is matter asserted relevant.

##### (3) **Prejudice** – Will jury consider for truth? Does need limiting instruction?

#### ii) IF YES, is there an EXCEPTION?

##### (1) **Dying Declarations** (804(b)(2)):

- (a) Cases: Civil Action Cases or Homicide Prosecution

- (b) Declarant Unavailable

- (c) Sense of Impending Death

- (d) Personal Knowledge

- (i) **Soles** – Judge to determine foundation Q about consciousness of death.

##### (2) **Present Sense Impression** (803(1)):

- (a) Statement must describe or explain an event or condition

- (b) Occurring contemporaneously.

- (c) Personal Knowledge

- (i) **Lira v. Albert Einstein** – "butcher" Dr. trained to deal with medical emergencies not cause him to be so stressed or under shock ≠ excited utterance. No PSI bc shouldn't allow to skirt medical opinion requirement that dr. be allowed to testify.

- (ii) **State v. Jones** – smokey bear case

##### (3) **Excited Utterance** (803(2)):

- (a) Startling Event

- (i) **FREV's** – 104a analysis do not need independent admissible evidence of startling event. Judge not bound by rules of Ev except w/ respect to privileges. ct entitled to consider inadmissible Ev, and even the statement itself for foundational fact. "Bootstrapping"

- (ii) **Truck Insurance** – Can't have Excited Utterance unless foundational evidence of startling event

- (b) Declarant still under stress from startling event (temporal aspect)

Must Also  
be Relevant

#### (4) Admissions

- (a) 801(d)(2)(A): Opposing Party held accountable for own admissions
    - (i) Party to Law Suit
  - (b) 801(d)(2)(B-E): Opposing Party to law suit held accountable for statements of another
    - (i) Adoptive Admissions – (801d2B)
      - 1. Same in criminal vs. civil cases, however analysis changes w/ Miranda Considerations
      - 2. Admission of Opposing party to Another's Accusation
        - a. Reasonable Person standard – would RP have remained silent
        - b. 104a - Silence / Conduct – Judge decides if adoptive, if jury decides they will consider accusation which would prejudice Def
          - i. **Carlson** – track marks case, judge decides shaking head is ambiguous reaction ≠ adoption of accusation.
          - ii. **Hoosier** – Girlfriend says they have “sacks of money” in hotel failure to deny = adoptive admission bc RP would deny if untrue.
          - iii. Silence ≠ Adoptive Admission if person in police custody
    - (ii) Authorized Admissions – (801d2C)
      - 1. Admission by
      - 2. Person acting w/in scope of employment (801d2C) OR
      - 3. Person authorized to speak for party (801d2D)
        - a. **Mahlandt (Wolf Case)** – Board authorized to speak for co. not employee; employee authorized to speak for co. if acting w/in scope of employment
    - (iii) CoConspirator – (801d2E): = Authorized admissions in criminal sense
      - 1. Admission
        - a. H statement cannot be only evidence there was a conspiracy – must be addnl Ev.
      - 2. Declarant was member of conspiracy (proponent of Ev must show by prepon of Ev)
      - 3. In furtherance of conspiracy (104a – judge determines)
        - a. **DiDomenico** –critique of rationale for exception
          - i. Separate conspiracy – could be conspiracy to cover up not conspiracy to sell
        - b. **Goldberg**: Statements must be made “in furtherance” of the conspiracy
          - i. Once you join conspiracy can be charged w/ statements made by co-conspirators prior to your joining – when you didn't authorize or adopt.
        - c. **Doer**: Idle chatter ≠ in furtherance
        - d. **Boujailly**: Problem is that “in furtherance” will sweep up exaggeration. (Al Capone eg.)
          - i. Can use co-conspiracy statements to cover up
          - ii. Statement should not be used to prove existence of conspiracy (801d2)
      - 4. 104a – Judge determines if conspiracy and whether statements made “in furtherance”
- (c) NOTE:
  - (i) Doesn't have to be based on personal knowledge and can be an opinion
  - (ii) No requirement that statement be against interest when made

#### (5) Former Testimony – 804(b)(1)

- (a) Parties are the same OR “predecessor in interest:
  - (i) **Wright** – Mutuality not problem if moving from criminal trial to civil trial if different party is proponent of the Ev. (Arson insurance co. case)
    - 1. Fed Rules narrower – If seeking to use prior testimony against criminal Def, must be same party. If seeking to use against civil party must be same party or in privity.
- (b) Issues are the same
- (c) Had opportunity to X-examine in 1st trial
- (d) Motives are the same
  - (i) **Salerno** – Grand Jury testimony, motives aren't the same.
    - 1. Adversarial Fairness: Court rejects adversarial fairness argument that if W testimony implicates at GJ (the way Gov't wants) gov't gives immunity and W testifies at trial. If W testimony exonerates in GJ (against gov't) – then gov't doesn't give immunity, W pleads 5th at trial and Def can't bring in GJ testimony. Takes strict textualist approach.
  - (ii) **Lloyd** – Privity defined broadly (like under CA rule) where similar interests sufficient if same motive to X.
- (e) Person is unavailable – necessity for testimony
  - (i) Lack of Memory
  - (ii) Refusal to Testify
  - (iii) Dead – Infirm
  - (iv) Unobtainable thru process or other reasonable means

Ask about  
Hypo 5 pp.216-  
17. SAI and  
Impeachment

(6) **Declarations Against Interest (DAI) – 804(b)(3)**

- (a) Declarant Unavailable *see supra*
- (b) Statement
- (c) At Time of Making
  - (i) Have to know at time of making statement that it is against interest. (Marijuana in the Jacket hypo – admitting ownership of jacket only against interest if knows about the marijuana)
- (d) Against Pecuniary or Proprietary Interest
  - (i) OR Subjected to Civil or Criminal Liability (FREv)
    - 1. **Barrett** – if statement shows inside knowledge of the crime = against interest and admissible. (Not all cts would allow not against interest to say I committed the crime, but not w/ that guy)
      - a. Need to take practical approach – statement giving detailed knowledge of criminal enterprise is sufficiently against interest. Corroboration of TW-ness, Sufficiently integral to statement?
    - 2. **CA Rules** - include social embarrassment (THINK RESIDUAL RULE – Though SC overruled)
- (e) Reasonable Person in Declarant's Position wouldn't make statement Unless True
  - (i) Motive to Falsify the Facts  $\neq$  DAI
    - 1. Motivation for favorable treatment (Police Immunity)
    - 2. Consequences of Making Statement
    - 3. Blameshifting
  - (ii) Relationship of Parties
    - 1. If made to friend or wife – not thinking they will go to police, not against interest.

(7) **State of Mind – 803(3):**

- (a) SoM as circumstantial evidence... not in for the truth,  $\neq$  H, but needs limiting instruction OR
  - (i) Affect on the Listener
    - 1. **Subrahimian** -
  - (ii) Affect of the Declarant
- (b) SoM exception to H. In for truth but exception to H rules.
  - (i) Memory or Belief NO H Exception – never admissible.
  - (ii) Relevant to Mental State: “I believe I am Napoleon”
  - (iii) Has to be Forward Looking:
    - 1. **Shepard** – wife’s statement “he poisoned me” inadmissible under SoM exception bc backward looking memory of events
  - (iv) SoM and Conduct in Conformity With
    - 1. **Hillmon** – offered to prove decedent had state of mind to go to particular place, and really went (life insurance claim case – Crooked Creek)
  - (v) SoM must be Relevant
  - (vi) Non-Direct Statement of SoM  $\neq$  H, + if can draw inference of SoM from statement is relevant. If does directly state SoM then H, but falls under SoM exception + relevant because of inference
    - 1. SoM 2 ways to get in:
      - a. SoM Exception = can go to prove intent to prove that person did something. (where subsequent conduct is relevant).
      - b. SoM Inference: can also be admissible bc not in for the truth (not in to prove that threat was actually made), but in bc inferentially shows SoM (fear). Relevant where conduct consistent w/ SoM is at issue (wouldn't have attacked D first)
  - (vii) Prejudice
    - 1. **Adkins** – alienation of affection case – statement of wife that she enjoys spending time w/ another named man = SoM of wife, but also goes to prove who alienated her affections >> Prejudicial. When admissible to prove one purpose, but also proves other facts for which it is admissible = prejudicial. Risk that jury might consider for forbidden use.
    - 2. **Pheaster** – statement of kidnap victim that intended to meet def in parking lot that night. Relevant because tend to show SoM and conduct in conformity w/ , but prejudicial to Def bc also implicates him and tells us what Def intended to do.

(8) **Prior Statements  $\neq$  H: (801d)**

- (v) Testimony at prior trial or hearing
- (vi) Subject to Cross Examination
- (a) 801(d)(1)(a) Prior Inconsistent Statements
  - (i) inconsistent w/ declarant's testimony
  - (ii) statement given under oath
- (b) 801(d)(1)(b) – Consistent to Rebut
  - (i) Statement Consistent w/ Declarant's testimony
  - (ii) Offered to Rebut – Express or Implied charge against Declarant of

- (iii) Recent Fabrication OR improper influence OR motive
- (c) 801(d)(1)(c) – ID of person at Time of Trial subj to X
  - (i) Made after perceiving
  - (ii) Still Fresh in Mind
    - 1. **Owens** – W makes ID while in hospital of D. But at trial W doesn't remember. Lack of memory ≠ unavailable. Sufficiently able to X.

(9) **Medical Diagnosis - 803(4)**

- (a) Statements made
  - (i) Not limited to statements by Dr., can be wife or mother
  - (ii) Declarant's motive must be consistent with receiving medical treatment / diagnosis
    - 1. Prep for Litigation
- (b) For purposes of Medical Diagnosis OR treatment
  - (i) Medical History
  - (ii) Past or Present Symptoms
  - (iii) Pain or sensations
  - (iv) The inception or general cause
- (c) if Reasonably Pertinent to diagnosis Treatment
  - (i) has to be helpful to the diagnosis
  - (ii) Statements must be reasonable relied upon by Dr. in making diagnosis.

(10) **Recollection Recorded – 803(5)**

- (a) Present Recollection Revived – can show W anything to revive memory, even something written by someone else, isn't shown to jury just to W
- (b) Past Recollection Recorded (803(5)): Doc admissible if...
  - (i) W testifies remembers having MADE or ADOPTED the writing
  - (ii) Document Correct when Made
  - (iii) Made close in time to event intending to be recollection
  - (iv) Event once had knowledge
  - (v) But now insufficient recollection

(11) **Business Records – 803(6)**

- (a) Memorandum, Rpt, Record, Datat
- (b) Made at or Near Time of Event
- (c) Person w/ Knowledge
- (d) Kept Regularly in Course of Business Activity
- (e) Regular Practice to Keep
- (f) Custodian Verifies TW-ness
  - (i) **Palmer v. Hoffman** – RR employees rpt about accident inadmissible bc prepared in *anticipation of litigation*, and rpt writer possibly at fault. NOT TW.
  - (ii) **Lewis v Baker** – RR investigator makes rpt, have some sort of *independence*, not personally responsible for accident >> TW and admissible. Different Motive than **Palmer**
  - (iii) **Yates** – Dr.s records produced in anticipation of trial, but records *prepared by other side* >> extra bit of TWness.
  - (iv) Is Source of Info TW? **Johnson v. Lutz** – info put in report comes from neighbor who has no legal duty to report correctly >> inadmissible.

(12) **Public Records – 803(8)**

- (a) Public Offices or Agencies
  - (i) Employee Info, hours of work, people coming in – anything relevant to daily workings of agency. Normal Activity
- (b) Record, Memo, etc.
- (c) Setting forth Activities of Office
- (d) Matters Observed Pursuant to Duty Imposed by Law
  - (i) Excluding in Criminal Cases – matters observed by Police
    - 1. **Johnson v. Ludds**- police rpts ≠ BRs, can't come in under PRs bc explicitly excluded, NEITHER SIDE can introduce as evidence
- (e) OR Civil Actions
  - (i) AND Proceedings against the GOV'T in Criminal Actions
    - 1. ONLY prohibition against GOV'T to use police records, Def can use against GOV't
- (f) Factual Findings
  - (i) Resulting from Investigation authorized by law
    - 1. **Beech v. Rainey** – Factual findings can include opinions construed from those findings.
      - a. Counter: Strict Textualist approach – says “factual” findings. Opinions ≠ facts. FR's drafters clearly knew could include opinions bc allow in under 803(6) BR's exception. PR's doesn't include means clearly meant to exclude. Opinions are harder to X-examine. More subjective and based on training or bias.

(ii) Can't do if source of info lacks TWness

- (g) CA PR Exception
  - (i) No Factual Findings
  - (ii) In any civil or criminal proceeding
  - (iii) Much thinner rule than FRs,

(13) **Limits on Freely Substituting**

(a) **BR vs. PR**

- (i) **Oates** – 803(8) designed to keep police records of investigations out, and wouldn't be proper to allow them in under BR's
  - 1. OR any other hearsay exception
    - a. **Except Past Recollection** – has independent basis of reliability that don't duplicate BR's indicators of reliability. If Police officer able to testify and subject to cross should allow records in to refresh.
- (ii) **Grady** – Non-adversarial parking ticket admissible to prove Def was in place of murder. Routine function not designed for this particular prosecution >> TW

(14) **Residual Hearsay Rule (807)**

(a) Statement NOT covered by 803 or 804

(i) **US v. Dent** – Grand Jury Testimony explicitly covered by 804 >> can't admit under 807

- 1. Near Miss Doctrine – must look to reliability factors
  - a. Conventional Hearsay Exception
  - b. Something slightly off from Hearsay + no compensating additional reliability exception. (20 vs. 19 yrs)
    - i. Broad reading would be – (conventional -)if slightly different and strikes me as the judge that its pretty reliable, then OK.
  - c. Extra Factors of Reliability: Factors that are almost same as conventional + additional reliability factors that Advisory Committee didn't look at.
    - i. 'Middle Ground – (conventional +) OK even if missing aspect of conventional if it has additional aspect of trustworthiness.
  - d. "Near Miss" Rule (Narrow Reading of Residual Exception)– should prohibit residual exception being used, whenever a hearsay exception even addressed an issue. 803 – addressed ancient documents, cut line at 20 not 19, and regardless of extra elements of extra trustworthiness we won't admit.

(b) w/ Equivalent Guarantees of Trustworthiness, IF

- (i) Material Fact
- (ii) More probative than any other Ev proponent can procure thru reasonable efforts
- (iii) General Purpose of these rules AND interests of justice will be served

(c) Notice – to adverse party in advance of trial.

iii) **ATTACKING CREDIBILITY**

(1) **FR 806**: When statement comes in as Hearsay Exception – credibility of declarant can be attacked and supported by any evidence that may be admissible against the declarant if they had testified + Adverse party can call declarant as a witness – entitled to examine as if under X-exam.

iv) **CONFRONTATION CLAUSE?**

(1) Hearsay Statement → Admissible under exception

(2) Def says should be excluded bc violated 6th Amend (**Roberts Framework**)

(a) **Necessity**: Witness is Unavailable OR Bringing W in would bring no X-exam value

(i) **Inadi** - Roberts – only applies to prior testimony. Shouldn't apply to co-conspirators exception bc witness testimony won't be more reliable, bc would deprive evidence of situational context. Candid statements more probative bc no atty interference.

(ii) **White**- Unlike co-conspirator exception, excited utterance and medical exception are more probative more valuable than if you required person to testify in ct.

- 1. Medical exception based on underlying premise that person won't lie to dr. for fear of misdiagnosis. Unlikely that molested child will understand dr and how lying could impact treatment.

(b) **Reliability**

(i) Particularized Guarantees of Trustworthiness "Indicia of Reliability"

- 1. **Bourjaily** - Reliability prong doesn't apply to co-conspirators, co-conspirator exception so firmly rooted don't need to look at other particularized
- 2. **Wright**- Have to look to circumstances of statement ALONE, not independent corroboration from other circumstances.
- 3. **Lily** – Declaration Against Interest Firmly Rooted – but Declarant in this case was blame shifting >> NOT TW.

(ii) Firmly Rooted H exception

- 1. Has exception been expanded beyond traditional rule?

- (3) Broad Approach → preclude any H Exceptions
  - (4) Narrow Approach → As long as W testifies in front of Def can relate out of ct statements
    - (a) Scalia / Thomas Proposal – would only exclude
      - (i) W must testify in front of Def
      - (ii) Any formalized testimonial material
  - (5) Only limits Prosecution not DEFS.
  - (6) **Chamber and Green**: Defs argue that exclusion of Ev violates due process (Flip of CC) Argument almost never wins, only when results SO UNFAIR.
- v) 104 ANALYSIS: Judge or jury decides?
  - vi) PREJUDICE (403): Do Benefits clearly outweigh costs?

## 2) EXCEPTIONS AND EXEMPTIONS

- a) Dying Declarations
- b) Spontaneous and Contemporaneous Exclamations
- c) Admissions
- d) Former Testimony
- e) Declarations Against Interest
- f) State of Mind
- g) Prior Identification
- h) Past Recollections Recorded
- i) Business and Public Records
  - i) Policy Rationale:
    - (1) Legal duty on party or Public Employee to record things accurately and
    - (2) Necessity – event happens so many times, person may not be able to remember every transaction >> Record more accurate of actual events.

## C. **Impeachment** and X-Examination

### 1) DEFINING IMPEACHMENT

- a) RULES
- b) NOTES:
  - i) **Ways to Impeach**
    - (1) Prior (before the trial) inconsistent statement of W
    - (2) By calling different W who says something to the contrary
    - (3) Introducing evidence of character of W – to undermine the credibility of a W
      - (a) A2-3 are limited to criminal cases
  - ii) **CL v. Fed Rules**
    - (1) Leading Questions:
      - (a) CL said cannot ask leading Q's, except under X – your own witness you have to examine on direct
      - (b) FRs – 611c: can't use leading Q on direct, except as may be necessary to develop W's testimony
        - (i) Eg. Child, witness whose forgetful, etc. if best way to get at evidence
        - (ii) Preliminary matters that are non-disputed.
        - (iii) Witness is hostile, adverse party or identified w/ an adverse party (611c)
    - (2) Vouching Rule:
      - (a) CL person calling W vouches for their credibility >> prevented from attacking credibility of own Witness
      - (b) FR's (607): Eliminated under FR's. You can call the W and attack their credibility

### 2) IMPEACHING OWN WITNESS

- a) ANALYSIS:
  - i) Prior Inconsistent in for the Truth - only if under oath
  - ii) In to impeach, other side gets limiting instruction + Hogan applies + can't get directed verdict
    - (1) Def should raise 104a – have hearing outside hearing of jury to decide to come in or not.
    - (2) 6th Amend CC Q's - **Lily**

b) **CASE:**

- i) **Hogan** – you can't call someone under the guise of impeaching, primarily to get in front of the jury impeachment evidence that would otherwise be excluded. Hogan ruled under the premise that Prosecutor was not surprised by W's testimony. If Prosecutor was surprised then they can impeach

3) **METHODS OF IMPEACHMENT**

a) **Contradiction**

- i) **On Cross** – Can impeach by Contradiction, don't have to bring in another W bc too time consuming  
ii) **Collateral Issue** = has no independent relevance in the case, other than it affects W's credibility  
iii) **Collateral Rule:** if has no other purpose but to undermine credibility, doesn't have some independent proof benefit then = Collateral and excluded. Can't impeach on a collateral issue. This rule is not codified in the FREs, but see FRE 403 (confusion of issues, waste of time, prejudice).  
(1) **Oswalt** – D for robbery claims alibi that he was in a different city on the day of the robbery. W is owner of restaurant who says he comes in everyday, says he never missed a day. P wants to bring in PO who will testify had conversation w/ D month prior in robbery city. TC doesn't admit saying collateral.  
(2) **Copelin** – D drug stung w/ marked bills, says he's the wrong guy, was playing dice w/ drug dealer and won the money from him. Says he's never seen drugs except on TV. P wants to bring in fact that he's tested positive for coke 3x. No Collateral rule bc not extrinsic. D on cross and evidence admissible as 404b Character Evidence.  
(3) **Simon posits:** Doesn't 403 – analysis of probative value and consumption of time sufficiently deal w/ this issue, don't need additional rule.  
(a) Eg. house burning down hypo – so dramatic.  
(b) W was in a bar before seeing event but lies and says coming from his mother's house – this has independent material value, apart from whether he lied or not – is about his perception

b) **Prior Bad Acts**

i) **RULES:**

- (1) **FRE 608(b) Evidence of Character and Conduct of Witness / Specific Instances of Conduct:**  
Specific instances of the conduct of a witness, for purpose of attacking or supporting the witness' credibility, other than conviction crime under FRE 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on x-examination of the witness:  
(a) Concerning the witness' character for truthfulness or untruthfulness; or  
(b) Concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being x-examined has testified.
- (2) **Extrinsic Evidence under FRE 608(b)**  
(a) If a witness denies the dishonest conduct, the x-examiner must "take the answer."  
(i) Some courts bar all extrinsic evidence (even documents authenticated by the witness on the stand).  
(ii) Other courts only bar evidence that requires another witness for testimony or authentication.  
(iii) In any event, counsel may offer the document to the witness to refresh his memory on the stand.  
(b) Extrinsic evidence that shows a witness engaged in a distinctively similar type of lying on multiple occasions is admissible (does not show character but that the witness has a common scheme or plan).  
(c) Extrinsic evidence also may not be used to show good character for truthfulness.

ii) **ANALYSIS:**

(1) **Rule 404:** Cannot produce evidence to show conformity with Acts.

(a) 404 A1 and A2 – limited to criminal cases 1) defendants 2) victims

(b) 404 A3 – one additional exception to rule banning character evidence. (Not limited to criminal cases)

(i) **607** – disbands voucher rule (subject to **Hogan**)

(ii) **608** – Heart of character evidence to show **credibility**.

1. 608 A – allows OPINION AND REPUTATION evidence of Character.

a. Can refer only to Truthfulness and UnTruthfulness.

b. Proponent of W, cannot introduce evidence that W has good character for truth/honesty, until character of truthfulness has been attacked. Designed to save time, if opposing side doesn't attack then no need to bring in character evidence.

2. 608 B – SPECIFIC INSTANCES OF CONDUCT relevant to TWness

a. Need not amount to a conviction – if opponent of W has specific instance,

i. **may not be proved by extrinsic evidence.**

b. Can ask Q's on Cross

i. Can use extrinsic evidence to refresh

ii. Have to accept the W's response – if you ask

iii. SPLIT on admissibility if W authenticates

c. Can only ask Q's only if have GF basis for attacking credibility. (Ct will often ask for GF basis).

d. Court has **discretion** to allow X-exam that first affect Truthfulness or Untruthfulness.

(iii) **609** – Evidence of **Conviction of Crimes**

1. a1 – CONVICTIONS OF CERTAIN PENALTY (Cts. Have more discretion – so push so crimes into A1 category)

2. Impeaching a W Other than the Def – Impeachment subject to **rule 403**.

a. Can intro evidence of any criminal conviction (mostly felonies).

3. A1 – Impeaching Defendant – with evidence of convictions of certain penalties

a. Not test of 403 – **but use 609 test** - Probative Value outweighs Prejudice

i. Difference from 403: 403 – Admit it unless undue prejudice has to substantially outweigh probative value

ii. 609a1: More protective of accuse – Don't admit unless probative value outweighs prejudice.

iii. Rationale: If you introduce prior conviction of W – Jury will only evaluate in terms of Credibility. But if used against Def jury may not only consider for credibility, might think "bad man" >> should be convicted.

b. Only applied to *convictions* bc of penalty they carry

i. Pending charge could show bias – motivation to please prosecutor subject to 403 only

(iv) A2 – applies to Convictions of a crime involving DISHONESTY:

1. Doesn't matter what the punishment of the crime is

2. BUT, No balancing required – if fits under A2, ct has no discretion to admit or not admit

a. No 403 even required, 403 doesn't override specific rule that allows things in.

Textual analysis: "shall be admitted" rather than "may be admitted"

3. What involves crime of Dishonesty?

a. Must look at elements of offense that underlie the conviction.

i. Eg. No basis for conclusion that possession of a fire arm involves dishonesty or false statement.

iii) **NOTES:**

(1) **Intersection of Rules:** 404 rules – evidence that might come in under 404a3 – to impeach credibility of W, especially if W is Def – might raise concerns about 404a1 – exclusion of character evidence against Def.

(2) **Factors to Consider in Weighing Probative v. Prejudice:**

(a) How crime bears on Truthfulness

(b) Impeachment value of prior crime.

(c) When prior conviction occurred and D's subsequent history.

(d) Similarity of past crime to current charge (has double effect: can impermissibly show propensity or bad character or properly show plan, intent, or modus operandi).

(e) Importance of D's testimony.

(f) Centrality of the credibility issue.

(g) Alternatives (such as not disclosing nature of prior crime).

(h) How Important is D's version of Events

(3) **Challenging In Limine Ruling When D Does Not Testify**

- (a) **Luce v. U.S.**: Supreme Court held that D may not appeal a trial court's in limine ruling that would allow prior-conviction evidence unless D actually testifies at trial.

(4) **Challenging In Limine Ruling When D Introduces the Evidence on Direct Exam**

- (a) **Ohler v. U.S.**: Supreme Court held that if D removes the sting of prior-conviction evidence (which the trial court ruled in limine would be admissible), he waives his right to appeal the admissibility of the evidence.

(5) **FRE 609(a)(2): Crimes Involving Dishonesty or False Statement**

- (a) Evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.
- (i) FRE 403 does not apply. Judge has no discretion not to admit.
1. **U.S. v. Wong**: Third Circuit held that intent of the Congress is clear that prior convictions involving dishonesty or false statement are always admissible, not subject to FRE 403.
- (b) Qualifying Crimes
- (i) Some courts limit this to *crimen falsi* (perjury, fraud, embezzlement, false statement, false pretense, etc.)
- (ii) Other courts will allow in evidence of theft or robbery.
- (iii) Some courts will look to the details of the crime to determine whether it was committed in a way that impugns credibility.
- (iv) **U.S. v. Brackeen**: Ninth Circuit, en banc, held that bank robbery is not a per se crime of "dishonesty" because Congress used the term narrowly to only apply to deceit. Included crimes: Perjury, Fraud, Forgery, Crimes of False statements

(6) **FRE 609(b): Stale Convictions**

- (a) Evidence of a conviction is not admissible under FRE 609 if more than 10 years have elapsed since the conviction or release from custody (whichever is later) unless the court determines, in the interest of justice, that the probative value substantially outweighs its prejudicial effect and the proponent gives advance notice of intent to use the evidence.

iv) **CASE:**

- (1) **Owens** – Military guy has dispute with his wife, and shoots her in the head as she flees in her car. P wants to intro Ev that D has prior assault on an ex-wife, and lied on application to be warrant officer. No 608 – bc no Ev that D ever conviction. 608b – specific acts of misconduct, can't impeach with extrinsic evidence, but can ask on cross and ct given discretion to admit. Lying on application admissible to Q while brandishing rpt. Prior assault on wife – too prejudicial bc on trial for murder of current wife.
- (2) **U.S. v. Sanders**: Fourth Circuit excluded evidence of a prisoner's prior assault and possession of a contraband shank in his trial for similar crimes under FRE 609(a) and 404(b) because of the similarity of the prior crimes to the current charges and little value of evidence in determining credibility.
- (3) **Drake** – W crossed about false claim of degree and references records. Defense objects "assuming facts not in evidence" (wrong objection), introducing extrinsic evidence/facts, may have been upheld

c) **Bias**

i) **RULES:**

- (1) **FR 806** governs character Ev. Bias ≠ Character Evidence. No FR explicitly governs bias >> admissible under ONLY the requirements of 403
- (2) **BUT** When Ev proves both Bias and Character Trait for being UnTW have to analyze under Char. Ev.
- (3) **OR** When Bias against non-party but admissible to prove UnTW must analyze under Char. Ev

ii) **CASE:**

- (1) **Abel** – E implicates D for robbery of savings and loan. Def wants to call rebuttal W, M. M to testify that they were all part of Aryan Bro. gang they would lie, cheat, steal and murder for each other. Gov't given permission to intro Ev of gang to prove bias of W. But naming gang is prejudicial so excluded.

## d) Prior Statements

### i) ANALYSIS:

#### (1) **Intro To Impeach – Prior Inconsistent:**

- (a) 613a: To X-examine W on prior inconsistent, don't need to tell W in advance. No need to show W if written or disclose contents. Just have to show opposing counsel.
- (b) 613b Prior Inconsistent: If you want to intro extrinsic evidence about prior inconsistent statement, must lay the foundation – enuf to give W chance to explain or deny prior inconsistent statement
  - (i) Foundation = opportunity to explain or deny; have to tell them about context of statement: when, where, and who was present. Designed to put person in position that they can realistically recall circumstances and come up w/ good explanation why statements are inconsistent.
    - 1. Extrinsic evidence can precede the foundation, so long as the W has not been excused – CA explicitly allows, Fed cts generally follow same. (for truth if lay appropriate foundation???)
    - 2. 613 - NO Collateral Ev rule. But several jx have independent relevance rule – same affect.
    - 3. **Hogan**
  - (ii) “I Don't Remember” ≠ Prior Inconsistent. Not Y answer turned to N
    - 1. UNLESS “I don't remember” designed to be purposely evasive, judge believes untruthful will treat as prior inconsistent.
  - (iii) Inferentially Inconsistent: Not technically inconsistent but inferentially so >> statement should come in

#### (2) **Intro For the Truth:**

- (a) 801d: Must be made under Oath

#### (3) **Prior Consistent:** Can come in 1) for the Truth or 2) to bolster claim / refute claims to fabricate, BUT H problems.

##### (a) **Prior to Motive To Lie**

- (b) Simon says: Far more useful to not worry about H problems but analyze under relevance and 403. If statement made after motive to lie, why are we hearing about it waste of time. Real issues are relevance and time consumption.

#### (4) **Relevance** – Always lurking in background

#### (5) **Hearsay** – Will come into play if a statement.

### ii) CASES:

#### (1) **Coles**: Prior Inconsistent case strict foundational requirement

- (2) **Tomes**: Child molestation case, father claims child lying bc desires to stay with mother. CL rule that you must show prior consistent was made before motive to lie. Can't intro for truth if statement made after motive to fabricate.

## b) In Limine Motions

### i) CASE:

- (1) **Luce**: Def must testify and then be impeached and then claim that ruling to admit prior conviction in. (Rule in CA)
- (2) **Ohler**: Take sting out by admitting on direct examination. Lose it to appeal that ct ruled incorrectly that robbery can come in against you. (Not rule in CA – no rule that runs counter but take the sting out is common tactic)

## D. Opinion, Expertise ad Experts

### 1) Lay Witnesses

#### a) RULE:

- i) **FR 701:** Lay opinion is admissible so long as the person has
  - (1) Personally perceived (***Knigh***)
  - (2) Info is helpful to trier of fact
  - (3) Not based upon Sci, Technical Info (Can't be way to skirt rules for expert testimony)

#### b) NOTES:

- i) **Tradeoff:** Difficult to X-examine opinions. But opinions save time bc difficult to break down details that lead to opinion
- ii) **Lay** testimony "results from a process of reasoning familiar in everyday life,"
- iii) **Expert** testimony "results from a process of reasoning which can be mastered only by specialists in the field."
- iv) **Expert's opinion - Any greater concern than w/ lay opinion?**
  - (1) Expert has more credibility.
  - (2) Not dependent on eye witness testimony – can always get another expert. (Not always the case w/ discovery)
  - (3) Kinds of opinions – expert opinion is always on subject matter that is far more complex – increases need of X exam. Issues may be more important, more subjective, and more complex. >> don't always exclude opinions of experts not testifying but these concerns do come to play

#### c) CASES:

- i) **Holden:** W allowed to testify about the significance of a wink. That D wanted W to lie for him. Dissent says impossible for W to distinguish btw and communicative wink and reflexive blink. And even if he could, couldn't read D's mind and figure out what he intended by wink >> should have been inadmissible lay opinion testimony.
- ii) **VA Islands v. Knight:** Eye W to shooting testimony that gun went off accidentally is admissible bc personally perceived. But police testimony that gun went off accidentally inadmissible bc doesn't qualify as expert and didn't personally perceive.

### 2) Expert Witnesses

#### a) RULES:

- i) **FR 702 – Experts:** Person can be an expert w/o formal education in subject area. W/o degrees. Can be expert simply bc you have worked in a field for a long time, received training, developed some kind of specialized skill or knowledge. Need not be scientific.
  - (1) May Testify in form of opinion or otherwise IF:
    - (a) Testimony based on sufficient facts/data
    - (b) Product of Reliable principles / methods (**See Junk Sci**)
    - (c) Applied Reliably to Facts of Case
  - (2) Limits in 2000 Amend
    - (a) Testimony based on sufficient facts or data
    - (b) Reliable principles
    - (c) Principles must be applied
- ii) **FR 703 – Evidence as Basis for Opinion:** Now expert can base opinion on facts not in evidence:
  - (1) the expert can base opinion on inadmissible facts.
  - (2) So long as those facts are reasonably relied on by experts in the particular field.
    - (a) Eg: Dr. can use un-ID'd X'rays, dr.s rpt prepared by a different dr. Because kinds of dr.s rpt which experts in that field, typically and reasonably rely on the expert is allowed to rely on it.
    - (b) At CL expert could only base opinion on facts that had been entered into evidence. So Jury could evaluate credibility of opinion.
  - (3) Amendments: Disclosure unadmissible evidence? Want the jury to know what type of info was relied upon in making opinion, but on the other hand, we don't want expert to be Hearsay courier. Amends provide mechanism for resolving
    - (a) Inverse 403: Don't disclose unless ct determines that the probative value in assisting jury determine credibility – outweighs prejudice (keep out unless probative value outweighs – inverse of 403)

- iii) **FR 704 – Ultimate Issues:** No longer permissible objection that Expert rendering ultimate opinion.
  - (1) Concern that ultimate opinion was term of art. Jury could interpret this incorrectly.
  - (2) BUT – can still object that 403 says opinion will be misleading and apt to cause juror confusion
  - (3) Expert should avoid using exact terms of statute
    - (a) **Scop** – Manipulation of Stock Price scheme - expert testifying using terms very closely to statute. Not words that would generally be used in ordinary opinion. While court framed in CL ultimate issue, could use 403 analysis to say using exact terms of statute will create juror confusion.
- iv) **704b - Mental State:** No expert witness can state an opinion that Def did or did not had the requisite mental state to commit the crime – NO testimony to mental condition
  - (1) **Odor** – Possession of crack cocaine and expert testifies that D had intent to sell. While intent might not confuse jurors >> wouldn't have **Scop** objection, but could say expert testifying about requisite mental state to commit the crime 704b objection
    - (a) However 704 enacted to deal w/ mental health problems.
- v) **705 – Disclosure of Data:** Need not provide underlying facts or data before states opinion,
  - (1) UNLESS ct requires otherwise. OR
  - (2) On X expert can be required to disclose data.
    - (a) Goal was to eliminate hypo Q. Problem has been difficult to root out hypo Q. Also difficult for X examiner.
      - (i) If Hypo Q used – should avoid using Defs name in Hypo, prejudicial (**Odor**)
    - (b) CL: Expert knows by his own experience w/ the facts of the case. OR the expert might know thru evidence in the case. Expert entitled to base opinion based on either situation. Before Experts opinion, need to lay foundation of what opinion is based on. Typical way was hypothetical Q.

b) **NOTES:**

i) **Relying on Hearsay**

- (1) **FR 703** – Inadmissible info can be used by expert, if type that reasonably relied upon by experts in the field in forming opinions
  - (a) Rationale: Allow expert to rely on H bc experts in the real world typically rely on H. And to Save time

c) **RELY'N on HEARSAY ANALYSIS:**

- i) Is expert is **Relying on H** as basis for opinion.
  - (1) Expert cannot simply parrot opinion given by someone else.
  - (2) Must actually rely, can't simply use other opinion as voucher of own opinion.
  - (3) H could be facts, data, opinions.
- ii) If relying - Is type of H that experts in that field **Reasonably Rely** on.
  - (1) **Gardeley** – not saying that the H declarant is reliable, free from bias.
  - (2) Not 6th Amend problem bc not coming in for truth of the matter
  - (3) Q IS: Would the typical expert rely on this H to make opinion on the matter.
    - (a) Would dr. rely on patients statements to make opinion on injury
    - (b) Would gang expert rely on gang members statements to form opinion about gang sociology.
- iii) Assuming expert relies, and appropriately relied – **Can Expert Disclose** that H ON DIRECT, that inadmissible H that she relied on when forming opinion. (Obviously on X can always disclose bc they can decide what they value more)
  - (1) Policy: 1) want jury to know experts basis so they can evaluate opinion 2) concerned about putting in front of jury inadmissible matter even when tied to limiting instruction – prejudice.
  - (2) No B&W answer:
    - (a) **Brunner** – expert could provide the inadmissible matter to the jury when explaining opinion. Rules 703/705.
    - (b) **Gardeley** – Same result, on direct expert can bring out basis. Generally comes in
    - (c) **FR 703 2000 Amend** – Express std w/ which to judge this issue. Presumption that evidence should not come in. UNLESS proponent shows that probative value in allowing jury to evaluate opinion substantially outweighs prejudice. (Inverse 403)
      - (i) Cts will frequently allow in inadmissible H and accompany w/ limiting instruction – Unless you have H parroting, never allow.

d) **Relying on Hearsay CASES:**

- i) **Tran:** Dr. writing illegal scripts. Another "expert" dr. testifies that no medical basis to give scripts. And says that 3d dr.s findings in case were the same. Ct. finds can only intro if statements reasonably relied upon. 1) forsenic
- ii) **Gardnerley** – Gang Expert relies on statements of gang members as to why the committed offense, to conclude offenses were related to gang activity so Defs could be subject to enhanced sentences. No 6th Amend violation bc not coming in for truth, coming in so jury can know basis of Experts opinion.

3) **Junk Science**

- a) **FR 703:** May Rely on inadmissible info is "reasonably relied" upon by experts in the field
- b) **FR 702:** Expert opinion may be given if Testimony based
  - i) on sufficient facts/data
  - ii) Product of Reliable principles / methods
  - iii) Applied Reliably to Facts of Case
- c) **Daubert** – what is an expert qualified to reasonably rely upon, what are reliable principle methods? (Drug causing Birth Defects, experts theories on causation deemed unreliable)
  - i) Opinions Reliable - Factors of Reliability:
    - (1) Published in peer review journal
    - (2) Can be tested
    - (3) Known or Potential Rate of Error
    - (4) Frye – "generally accepted" by other experts in the field
  - ii) Pros v. Cons: Puts in hands of experts to determine what is reliable BUT certain lag time between when good theory becomes accepted by other experts in field.
  - iii) Non-Scientific Theories: Also subject to Daubert. Daubert non-exclusive list of factors: Do other experts agree w/ conclusions, can conclusions be tested. (Tire Expert concludes defect in manufacture not drivers negligence even though acknowledged indicators of negligence at play)
  - iv) Jury Understanding: If issue not complex and jury can come to conclusion on their own – NO expert testimony is needed.

## **E. Confidentiality and Confidential Communications**

## **F. Writings**