EVIDENCE OUTLINE

(1) RELEVANCE
   a. Most basic concept of evidence
   b. Only relevant evidence is admissible, but there is no absolute test
   c. Three basic questions:
      i. Is the evidence relevant? If yes,
      ii. Does a specific exclusionary rule keep the evidence out? If no,
      iii. Should evidence be inadmissible because (FRE 403) its probative
            value is substantially outweighed by countervailing factors?

(2) (FRE 403) JUDGES HAVE DISCRETION TO EXCLUDE seeming relevant
    evidence b/c it is prejudicial, cumulative, or time-consuming
   a. FRE 403: probative value < other factors?
      i. No set degree of probative value
   b. FRE 403 → no clear-cut answer to whether evidence is admissible → give
      reasons/factors why it should or should not be admitted

(3) SLOPPY DRAFTING OF FRE

(4) GRAY AREAS IN LAW OF EVIDENCE
   a. Why? Rules are oversimplified; simplicity disguises nuances.

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CHAPTER 2: The Process of Proof: How Trials are Structured

THE PROCESS OF PROOF: HOW TRIALS ARE STRUCTURED

- Process of proof
  - The Federal Rules of Evidence (FRE):
    - Intro
      - Enacted 1975, amended by statute, SCOTUS
      - Majority of states have adopted rules of evidence based on FRE
      - Most FRE → admissibility by excluding
    - Why have FRE?
      - Protect Δ’s constitutional right (adversary system)
      - **Accuracy** (what really happened)
      - Rationality
        - Prejudicial impact of prior bad acts
        - Res ipsa (comment on the evidence)
        - FRE 204: judicial notice (not in this course)
      - Efficiency (cumulative witnesses)
      - Acceptability (ppl have faith in system)
      - Non-evidentiary factors
        - Privilege
        - Etc.
  - Jury trials
    - Remember when communication with jury:
      - Be sensitive to how jury is educated about its task
        - Judge’s instructions, what’s a battery?
• Jargon in information, jury instr
• Be sensitive to things other than evidence that are influential to the jury
  • Demeanor of witness
  • Q’s attorneys ask
  • Inadmissible evidence
  • Q’s attys don’t ask (draw a negative inference)
  • Δ shackled
  • Counsel-client relationship/interaction
  • VOIR DIRE
  • OPENING STATEMENTS
  • Objections
  • Like/dislike Δ
  • Attorney skill and effectiveness
  • Jury instructions
  • Jurors’ own perceptions, experience, common sense
    ➢ Not supposed to bring specialized knowledge
• Be sensitive to how you as an attorney communicate to the jury
  ➢ Making objections
    ▪ Perfect the record
    ▪ Always state specific ground for an objection to preserve the issue for appeal
    – don’t rely on it being clear from context; make an offer of proof making clear what evidence would be, on the record

CHAPTER 3: Relevance, Probative Value, and the Rule 403 Dangers

RELEVANCE, PROBATIVE VALUE, AND THE RULE 403 DANGERS
✓ Relevance
  ➢ The most fundamental concept
  ➢ FRE 402: All relevant evidence is admissible unless excluded by other FRE; irrelevant evidence is not admissible
    ▪ The rest of the rules ~ exclusionary provisions
    ▪ Q: why is piece of evidence relevant? Focus on inferential process
  ➢ FRE 401: “Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
    ▪ In other words: relevant evidence tends to make a fact of consequence (FOC) more or less probative
  ▪ Evidence must be probative
    • Common sense, common experience reaction (does underlying generalization comport with…?)
    • Need only help a little bit (more likely with than without – not more likely than not)
    • Rules favor admission (minimal standard)
    • Probative value must be substantially outweighed by exclusionary reason
  ▪ Evidence must make probative a fact of consequence
• Goes to a provable proposition
• FOC = substantive law – elements of crime
  ♦ Sometimes uncertain so must argue/decide
  ♦ **Knapp v. State** illustrates: The old man’s true cause of death was relevant to the credibility to Δ’s belief (generalization: rumors tend to have basis in reality → so if cause of death was natural, rumor probably never existed to be heard by Δ and justify self-defense claim)

  ▶ Probative value and FRE 403
    ➢ **FRE 403**: Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.
    ➢ **In other words**: may exclude if probative value substantially outweighed by risk of inaccuracy (prejudice, confusion, misleading) or efficiency (delay, needless cumulative)
    ➢ 2 general categories of excluding evidence:
      ▶ Inaccuracy
        • Unfair prejudice
          ♦ ACN: undue tendency to suggest decision on improper basis, esp. an emotional one.
          ♦ Bad person prejudice
            ➢ Risk that jury may ignore a reasonable doubt and convict Δ b/c jury thinks Δ is a bad person
          ♦ Good person prejudice
            ➢ Ignore standard of proof and decide for/against individual b/c think person is a good/bad person
          ♦ Evidence is relevant for more than one purpose but admissible for only one?
            ➢ Jury may consider for improper purpose
          ♦ In weighing risk of unfair prejudice, consider:
            ➢ (in)effectiveness of limiting instruction
            ➢ availability of other means of proof
        • misleading the jury
          ♦ e.g. jury may mis(over)estimate the probative value of evidence, like prior acts of violence
        • confusion of the issues
          ♦ jury expects to hear helpful, not marginally relevant, evidence
      ▶ us v. Hitt (176) (9th Cir. 1992): Where the evidence is of very slight (if any) probative value, it’s an abuse of discretion to admit it if there’s even a modest likelihood of unfair prejudice or a small risk of misleading the jury. → photo of 1 relevant gun with dozen others around it not admissible
        • *This is a rare case of reversal on 403 grounds b/c 403 is an imprecise balancing test* → appellate courts substantially defer to discretion of trial judge
    ➢ Efficiency
- Seldom enough alone to keep evidence out (except perhaps cumulative evidence)
- If 403 objection is limited to efficiency factors, should *never* be basis for reversal on appeal (jury having more info than necessary → not ground for reversal unless prejudicial/misleading)
- Can almost always combine with confusion of the issue (except for needless presentation of cumulative evidence)
- Consider time to present evidence AND time to rebut the evidence

- Making a 403 objection:
  - Language of the rule ("prejudicial" etc.)
  - State with precision the grounds for keeping evidence out on the basis of 403 (preserve for appeal)
- Designed to be a guide for situations without specific rule
  - A few jurisdictions incl. unfair surprise (not FRE, CA); granting continuance = better remedy

- **Old Chief v. US (1997):** the 403 probative value of an item of evidence (vs. its 401 relevance) may be calculated by comparing evidentiary alternatives – reversed and remanded b/c court let PA enter evidence of Δ’s prior felony conviction for assault despite Δ’s offer to stipulate to felon status
  - Consistent with ACN to 401, 403
  - Prosecution still has broad discretion to structure case as it sees fit – narrative richness, full context
  - Dicta: don’t have to accept stipulations in other contexts because of need for narrative richness
  - Holding generally restricted to felon status, where stipulation gives govt everything it needs
    - Even then, error usu harmless if overwhelming evidence of Δ’s guilt
- Context
  - Before Old Chief, many cases kept out evidence that wasn’t really on main issue of case on 403 grounds; after Old Chief, courts let in for narrative richness w/o ever going into substantive 403 evaluation

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**CHAPTER 4: Laying the Foundation for Proof**

**LAYING THE FOUNDATION FOR PROOF**

- You must lay a foundation:
  - Show evidence is relevant
  - Show witness is qualified to testify
  - Show physical object is what it purports to be
  - Show document is authentic
  - Show signature on document is authentic

- Two concerns with laying foundation:
  - What kind of evidence do you have to present in order to satisfy foundation?
  - What standard does the judge use in deciding whether evidentiary foundation has been satisfied?
  - Evidence sufficient to support a finding
• If a reasonable person could find x, satisfied
• Directed verdict std
  - *Preponderance of the evidence*
  • More likely than not
  • Judge decides Y/N whether foundational fact has been satisfied

❖ Laying the foundation for witnesses
  ➢ CL qualifications abolished by **FRE 601**: every person is competent to be a
    witness except as otherwise provided in rules; in civil state claims, state law
    applies.
  ➢ 2 impt requirements for witnesses in FRE:
    □ Oath or affirmation
      • **FRE 603**: Before testifying, every witness shall be required to declare that
        the witness will testify truthfully, by oath or affirmation administered in a
        form calculated to awaken the witness’ conscience and impress the
        witness’ mind with the duty to do so.
    □ First-hand knowledge of matters witness testifies to
      • **FRE 602**: A witness may not testify to a matter unless evidence is
        introduced sufficient to support a finding that the witness has personal
        knowledge of the matter; may but need not come from witness’ own
        testimony (subj to 703, expert testimony)
    • **Directed verdict std**: evidence sufficient to support finding that witness
      has first-hand
      • This is a pretty minimal requirement
        ◆ Sometimes no point to object to clear violation of this, as prison guard
          testifying to his own injury, b/c info will get in and counsel may look
          bad for obstructionism

❖ Authentication and identification of exhibits
  ➢ Must lay foundation for objects, too: **FRE 901**
    □ Examples in 901(b) are examples, not exclusive
    □ Process of authentication is common-sense, not rule-driven process
    □ Std = directed verdict (court doesn’t decide Y/N)
  ➢ **FRE 901(a)**: The requirement of authentication or identification required for
    admissibility is satisfied by **evidence sufficient to support a finding** that the matter
    in question is what its proponent claims.
  ➢ **FRE 901(b)**: Examples of auth/ID satisfying rule
  ➢ ACN: requirement of showing authenticity or identity = relevancy dependent
    upon fulfillment of condition fact → **FRE 104(b)**
  ➢ EXAMPLES:
    □ Photographs
      • Two ways to authenticate photos:
        ◆ Witness says it’s a fair and accurate representation of the thing I saw
        ◆ I recognize this as a photo I took
      • Demonstrative evidence
        ◆ Must be helpful to jury (not the real thing) – 403 concerns → don’t
          waste time with photo if unhelpful
    • Real evidence
♦ If witness recognizes from distinctive characteristics and can see/say why witness knows it wasn’t tampered with, don’t need chain of custody (but still is safe, convincing)

- **Signatures**
  - Judge acts as fact-finder on signatures
  - Authenticate by comparison with known sample, person who saw it signed, person who recognizes signature

- **Documents**
  - Can authenticate from contents
  - Reply-letter doctrine: reply letter doesn’t require showing signature is true
  - *Some documents self-authenticate*

- **Telephone calls ~ reply-letter doctrine**
  - Bob says it’s Bob – you must also recognize voice, or authenticate through content
  - I call Angelo’s Pizza, they say “Angelo’s” = enough

- **Recordings**
  - Relax re need to show mechanics of recording device were working, but still impt to authenticate that it’s a fair and accurate representation of what actually happened

- **FRE 104 preliminary fact-finding**
  - FRE 104 governs preliminary/foundational facts: PRELIMINARY QUESTIONS
    - **FRE 104(a):** Questions of admissibility generally. Preliminary questions concerning:
      - Qualifications of person to be a witness
      - Existence of privilege
      - Admissibility of evidence
      Shall be determined by the court, subject to (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.
      - Preliminary Q’s concerning admissibility of evidence shall be determined by the court (Y/N), subject to (b)
    - **FRE 104(b):** Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.
      - *When preliminary fact is critical to the very relevance of the evidence, directed verdict std*
    - **FRE 104(c):** Hearing of jury. Conducted outside hearing of jury when confession, accused is a witness and requests, or interests of justice require.
    - **FRE 104(d):** Testimony by accused. Δ not subject to X by testifying to preliminary matter.
    - **FRE 104(e):** Weight and credibility. Rule does not limit right of party to introduce evidence relevant to weight or credibility.
  - FRE 104 establishes two standards for deciding preliminary questions of fact not addressed in specific FRE (e.g. 901, 602) and a few SCOTUS cases:
    - 104(a): Ct decides prelim Q itself by preponderance of the evidence (even tho rule doesn’t specify std)
- When prelim fact is not critical to relevance of evidence
- Judge’s decision is final
  - 104(b): Ct screens prelim Q under sufficiency-of-evidence standard and gives Q to jury
- When prelim fact is critical to relevance of evidence

<table>
<thead>
<tr>
<th>Preliminary fact</th>
<th>Judge role</th>
<th>Standard</th>
<th>Jury role</th>
<th>Policy</th>
<th>Examples ***</th>
</tr>
</thead>
<tbody>
<tr>
<td>Not critical to relevance of evidence</td>
<td>Decide whether preliminary fact exists</td>
<td>Preponderance of the evidence</td>
<td>Weigh preliminary fact*</td>
<td>- Want judge to be gatekeeper - Don’t unnecessarily complicate jury’s role - No (direct) interference in jury’s role dealing with evidence</td>
<td>Unavailability for hearsay Involuntary confession Most preliminary facts</td>
</tr>
<tr>
<td>Critical to relevance (evidence would be irrelevant w/o existence)</td>
<td>Decide whether sufficient evidence to support finding that preliminary fact exists</td>
<td>Sufficient evidence (directed verdict std) in light of evidence presented in the case</td>
<td>Decide whether preliminary fact exists and if so, weigh **</td>
<td>- No need for gatekeeper (if jury finds doesn’t exist, will ignore) - Instruction won’t complicate jury decision-making - A strong judge would interfere with the jury’s fact-finding</td>
<td>Authentication First-hand knowledge ∆’s culpable involvement in case Most other preliminary facts are 104(a).</td>
</tr>
</tbody>
</table>

* Older case law provide second bite at the apple thru jury instruction after judge admits; problem: confusing to jury, judge may not decide as carefully
** Nothing about jury instruction, but no harm in doing so
*** Dying declaration: condition of admissibility = victim in imminent fear of death when statement was made = 104(a) preliminary fact; but ∆ can also introduce evidence before jury that person wasn’t in imminent fear b/c affects probative value of the evidence. Similarly, voluntary confession = 104(a) fact – still relevant even if involuntary. Once judge admits, ∆ can still present evidence of coercion → jury not second-guessing preliminary fact, but instead evaluating for probative value.

- Courts are reluctant to admit evidence out of order, but have discretion to do so under 104(b) – specific authorization – and 104(a) as well

.Interface with table:

<table>
<thead>
<tr>
<th>Std</th>
<th>104(a)</th>
<th>104(b)</th>
<th>401</th>
</tr>
</thead>
<tbody>
<tr>
<td>Preponderance of evidence</td>
<td>Evidence sufficient</td>
<td>Any tendency to make a</td>
<td></td>
</tr>
<tr>
<td>Hurdle to admission</td>
<td>Evidence to support a finding</td>
<td>Fact more or less true</td>
<td></td>
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<td>---------------------</td>
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<tr>
<td>Highest</td>
<td>Highest</td>
<td>Lowest</td>
<td></td>
</tr>
<tr>
<td>Preliminary Q’s of admissibility</td>
<td>Conditional relevance</td>
<td>Relevance (but all facts are conditionally relevant)</td>
<td></td>
</tr>
</tbody>
</table>

- 401 or 104(b)?
  - No answer – glitch in drafting of FRE. All relevant evidence is conditionally relevant → one std for relevance in 401, another for relevance in 104b. Absolutely nothing in rules to tell you whether you should be talking about 104b or 401.
  - ∨ advocacy tool – argue for higher (keep evidence out)/lower (get evidence in) standard
  - Rarely a practical difference
    ♦ Can almost always provide info to meet 104(b)
    ♦ Only difference when evidence has such low probative value it meets 401 but not 104(b) → can make 403 argument to keep out
    ♦ Suggested amendments make 104(b) deal only with probative value conditional upon further evidence to remove conflict

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CHAPTER 9: The Best Evidence Rule

**THE BEST EVIDENCE RULE**

- A cluster of rules (FRE 1001-08) imposing additional burden on proponent of “writings,” “recordings,” and “photographs” to create a preference for originals.
  - When offered to prove truth of content, original is probably more trustworthy than a copy.
  - Excused if absence of original is explained or justified
    - Original concern: prevent fraud
    - Modern justification:
      • Importance of precise writing in legal relations
      • Fallibility of human memory of terms/Minimize erroneous judgment
      • Hazards of inaccurate/incomplete duplication
- The Best Evidence Rules
  - **FRE 1001:** Definitions. Writings/recordings, photos, original, duplicate.
    - “Original” = writing or recording itself or any counterpart intended to have same effect by person executing or issuing it; = photo negative or print from it; = printout or output of data stored, if shown to reflect data accurately.
  - **FRE 1002:** Original required unless otherwise provided.
  - **FRE 1003:** Duplicate admissible unless
    - A genuine question is raised as to the authenticity of the original, OR
    - It would be unfair to admit the duplicate
  - **FRE 1004:** Original not required if:
    - Originals lost or destroyed (except in bad faith)
    - Original not obtainable by any judicial process or procedure
    - Nothing further than failure of judicial procedure required to show
- Original in possession of opponent
  - Party possessing original can ward off duplicate by producing original
- Writing/recording/photo is not closely related to a controlling issue (collateral matter)
  - Sometimes no good purpose served by producing original, e.g. newspaper in action for price of publishing Δ’s advertisement; streetcar transfer of π claiming status as a passenger

- **FRE 1005:** Content of public records may be proved by copy certified or testified to by witness who has compared with original
  - Only rule recognizing degrees of secondary evidence

- **FRE 1006:** Summaries. Voluminous records which cannot be conveniently examined can be presented as chart, summary, or calculation; originals or duplicates shall be made available for examination, copying, and for appearance in court if ordered.
  - Must have orig available if relying on contents → can’t avoid BER by relying on summaries

- **FRE 1007:** Testimony or Written Admission of Party. Contents of writings, recordings, or photos may be proved by the testimony or deposition of the party against whom offered or by that party’s written admission, without accounting for the nonproduction of the original.

**Notes about the Best Evidence Rules**

- **FRE 1002:** When is a writing offered to prove its own content?
  - The content of the writing is the event
  - The writing is the record of an event
  - Remember, facts about the writing are not its contents, e.g. fact of FDIC insurance can be testified to without need for orig policy b/c policy contents are not needed

- Apply only to writings, broadly defined (the “best” evidence need not be presented in all situations)
- Should never be a bar to proof for the honest litigant
- Unnecessary?
  - Presumably parties would want to present strongest case possible and would authenticate document to give it more force and probative value, even without BER requirements?
- Not very onerous burden

**FRE 1008:** Functions of Court and Jury/Standard of relevance. When the admissibility depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine under 104 (these decisions = administering the rules). [104(a) Y/N] However, when issue is raised
  - Whether original ever existed
  - Whether thing produced at trial is the original
  - Whether the thing produced accurately reflects the original
- Here trier of fact decides as factual issue = JURY Q.
- For these issues, a minor problem: is the standard for admissibility 401 relevance or 104(b) conditional relevance?
Other Best Evidence Rule notes

- The fact that there is a writing doesn’t mean the Best Evidence Rule applies, unless contents of writing itself are what writing is offered to prove.
- Case law uniformly takes position that BER does not apply to “did you get a ticket”, even though you need to look at ticket’s contents to know what it is.
- Existence of writing doesn’t preclude using witness’ firsthand knowledge instead.
  - Existence of writing doesn’t mean you have to use it.
  - If you rely on notes from mtg (rather than memory) must comply with BER.
  - Transcript of tape recording is secondary evidence of tape recording → to use transcript, need good excuse for not having recording; can use transcript as demonstrative aid with tape recording, so long as accurate representation.
  - In case of written leases and contracts, BER applies (even though just evidence of an agreement) b/c written is more accurate
    - Contracts, deeds, formal documents → BER applies, need original
    - In almost all courts, don’t need original tape-recording of deposition if party wants to rely on oral testimony instead
      - Testify from present memory = OK
      - Testify from what W remembers typing = reporting what’s in document = relying on contents = BER applies.

Seiler v. Lucasfilm, Ltd. (706):

- Ct: ¶’s claim depends on content of originals → no reconstructions admitted.
- Drawings included in Best Evidence Rule.
- Trial judge ruled originals were lost or destroyed in bad faith → reconstructions not admitted so jury never gets question of whether they were accurate.
  - Judge serves as gatekeeper to keep underlying BER policy → make strong determination as to whether lost/destroyed in bad faith to decide admissibility.

1008 is simply an elaboration of normal 104a and 104b preliminary fact-finding – judge plays ~ minimal role, gatekeeper (104). 1008: judge plays gatekeeping role except for three exceptions listed which are relevance q’s.

CHAPTER 5: The Character and Propensity Rules

THE CHARACTER AND PROPENSITY RULES

- Character evidence
  - Introduction
    - Case law suggests character is an attribute of an individual, typically with some moral connotation
    - 2+ ways in which a person’s character may be relevant in a lawsuit:
      - Character evidence to show action in conformity with character (most typical)
      - Character as an essential element of a claim or defense (e.g. hospital was negligent in hiring careless doctor)(occasionally)
CHARACTER EVIDENCE OFFERED TO SHOW ACTION IN CONFORMITY WITH CHARACTER

- **FRE 404(a):** Evidence of a person’s character is not admissible for purpose of proving action in conformity in particular occasion except:
  - (1) [Character of accused] Evidence of pertinent character trait offered by accused or by prosecution to rebut same (or to rebut evidence admitted under 404(b))
    - Most courts never allow for civil cases
  - (2) [Character of victim] Evidence of pertinent trait offered by accused, or prosecutor in rebuttal, or evidence of V’s peacefulness to rebut evidence that V was first aggressor (homicide only – not even attempted homicide)
    - Most courts never allow for civil cases
  - (3) [Character of witness] 607, 608, 609
    - Essentially cross-reference to IMPEACHMENT RULES

- **FRE 404 (b):** Evidence of other crimes wrongs, or acts not admissible to prove character of person in order to show action in conformity
  - BUT admissible for other purposes e.g. to show motive, opportunity, intent, preparation, plan, knowledge, ID, or absence of mistake or accident (with notice/excuse)

  Character evidence is generally prohibited
  - Takes time to litigate
  - Some bad person prejudice is inevitable
  - Strength of inference from character to action in conformity is weak
  - Morally, try claim/charge, not what kind of person Δ is

  Criminal Δ can open the door
  - to their own character (404(a)(1))
  - but prosecutor still cannot introduce specific acts
  - *specific acts can only be discussed on cross-x – prosecutor can test witness’s familiarity with Δ (relevant to impeaching the witness)*
    - Still subject to 403 test (probative value > prejudice and other factors?)
  - and prosecutor must stick to same relevant character trait
  - to the victim’s character (404(a)(2))
    - Δ still cannot introduce specific acts
    - But reputation evidence is admissible
    - Self-defense claim is sufficient to open the door for the prosecution

  Civil suits generally prohibit character evidence
  - Minority of jurisdictions allow Δ to introduce character evidence (his own character) if charged with tort that may carry criminal liability
  - Pending FRE amendment would eliminate this minority rule

CHARACTER EVIDENCE IS ADMISSIBLE...

- When character is an essential element
  - Suit against hospital for negligence in hiring quack Dr → Dr’s character for carelessness is EE
  - Negligent entrustment (Δ negligent in entrusting some goods that were on loan from ¶ to someone who was careless negligent person)
- Defamation action – if alleged defamatory stmt is broad genl stmt, “person is liar and a cheat” – that’s stmt about person’s character → truth is defense, so truth of person’s character is an essential element
- This is infrequent

FRE 405: Methods of proving character:
- (a) Reputation or opinion: OK in all cases where evidence of character is admissible; on cross, inquiry into relevant specific instances of conduct is OK
- (b) Specific instances of conduct: when character of person is an essential element of a charge, claim, or defense

<table>
<thead>
<tr>
<th>Type of character evidence</th>
<th>Admissible?</th>
<th>Purpose for which evidence offered</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reputation</td>
<td>CL, FRE</td>
<td>Other [reputation]</td>
</tr>
<tr>
<td>Opinion</td>
<td>FRE</td>
<td>Essential element</td>
</tr>
<tr>
<td>Specific acts</td>
<td>No (all 3 admissible to prove essential element)</td>
<td>Action in conformity</td>
</tr>
</tbody>
</table>

SPECIFIC ACTS EVIDENCE (2nd sentence of 404(b))
- Not admissible to show action in conformity with character, but admissible to show other purposes:
  - Possible admissible purposes (not exhaustive):
    - Motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident
  - This applies across the board – criminal, civil.
  - To bring evidence in, must satisfy minimum 104(b) standard that Δ actually committed act; then, still a weak 403 argument, but highly favors admitting the evidence

MCCORMACK ON EVIDENCE – CITES CASES
- List of times when specific acts are admissible is not exclusive
  - Huddleston properly held that preliminary fact of [whether Δ was culpably involved in prior bad act] is a 104(b) conditional relevance or relevance question.
    - If Δ wasn’t the person engaged
  - Old Chief dictum about prosecutor’s right to narrative richness → lots of very prejudicial specific acts evidence is frequently admitted against criminal Δs.

Bad acts evidence
- Sexual assault and child molestation evidence
  - 413 & 414 say evidence of similar crimes IS admissible → create exception to 404(b) to show action in conformity with character
    - Almost all rules say evidence MAY BE admissible.
    - 413-15 trump some other rules of evidence but 403 applies
    - Not all states have adopted; most academics oppose
  - FRE 413: Evidence of similar crimes in sexual assault cases
    - (a) evidence of Δ’s commission of another offense(s) of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant
• (b) govt shall disclose the evidence to the Δ
• (c) this rule shall not be construed to limit the admission of consideration of evidence under any other rule
• (d) offense of sexual assault = federal or state crime that involves contact w/o consent; deriving sexual pleasure or gratification from infliction of death, bodily injury, or physical pain on another person; or conspiracy to engage in above (or a few other statutory defns)
  ♦ Congressional Record: 413 purpose = liberalize sexual assault evidence
  ♦ Different jurisdictions give varying weight to 403 arguments
  ♦ Courts are more likely to let stranger sexual relations in than date rape etc.

- **FRE 414:** Evidence of similar crimes in child molestation cases
  • (a) same
  • (b) same
  • (c) same
  • (d) defines child (<14) and offense, ~413

- **FRE 415:** applies to civil cases (damages)
  - Analyzing steps:
    - Determine preliminary fact question
    - Is this character evidence? If so,
      - Do Rules 413-15 permit it to bypass character evidence ban?

  - Rape shield provisions
    - Almost all jurisdictions have enacted rape shields that keep out instances of past sexual acts
      - Not a particularly strong federal rule b/c rape is a state crime – but most states have enacted similar rules of evidence to this is very relevant
      - Reason: Until recently, many courts quite liberal in permitting rape and other sex crime Δs to introduce evidence of V’s sexual history when Δ claimed V had consented
        ♦ Most commonly, reputation evidence
        ♦ Some jurisdictions also admitted specific acts
        ♦ ➔ Rape shield laws
        ♦ Without rape shield laws: practically, difficult to win on 401 relevance (male judges); even if relevant, should probably stay out as character evidence ➔ 412 means we don’t have to answer the sometimes elusive character question
          ➔ Even without 412, might stay out on 403 grounds (bad person prejudice against V)

- **FRE 412:** Relevance of alleged V’s past sexual behavior or alleged sexual predisposition
  • (a) Inadmissible in civil or criminal case:
    ♦ (1) V engaged in other sexual behavior
Incl. actual physical contact or that imply sexual intercourse or sexual contact; incl. activities of the mind such as fantasies or dreams

Some exceptions to admit

(2) V’s sexual predisposition

- Has sexual connotation for fact finder, e.g. dress, speech, lifestyle
- No exceptions to admit

(b) Exceptions

(1) admissible in criminal case:

- Specific instances of V’s sexual behavior to prove person other than Δ was source
- Specific instances of sex behavior by V with respect to Δ by Δ to prove consent, or by the prosecution
- Constl rights of Δ
  - Due process
  - Right to confront and cross-examine
  - B/c 412 exceptions are so narrow, Δ’s often argue constl right to get evidence in – and usually lose

Criminal Δs the constitutional right to present exculpatory evidence that would violate some nonconstitutional evidence rule:

- Chambers v. Mississippi (1973): Due process allows Δ to present W in his own defense when excluding would deprive Δ of fair trial – trumps hearsay, etc.
  - Δ elicited confession from W, then PA established W had repudiated Δ should have been permitted to undermine his own W’s credibility on repudiation, call other witnesses who heard it
- Davis v. Alaska (1974): Confrontation clause Δ has constitutional right to cross-examine witnesses in manner that violates state evidentiary rules – trumps confidentiality of juvenile adjudications, e.g.
  - Right of confrontation is paramount even to risk of serious damage to State’s case
  - Δ could bring out W’s juvenile crime to show bias
- Olden v. Kentucky (1988): Speculation as to the effect of jurors’ racial biases cannot justify exclusion of cross-examination with such strong potential to demonstrate the falsity of V’s testimony.
  - V accused Δ of rape, kidnapping, Δ claimed consent; wanted to introduce evidence of extramarital affair between V, who’s white, and Russell, who’s black, now living together (V lied about it in court and Δ couldn’t question); Δ wanted to introduce evidence of V and Russell living together to show V’s motive to lie to explain being dropped off by another man.

(2) admissible in civil case:
If probative value substantially > danger of harm to V and unfair prejudice to any party; V’s rep admissible only if placed in controversy by V
   • In sexual harassment cases, some evidence of V’s sexual behavior and/or predisposition in the workplace may be relevant, but non-workplace conduct will usually be irrelevant
   • Courts should presumptively issue protective orders barring discovery unless showing that the evidence sought would be relevant and cannot otherwise be obtained
• (c) Ct holds in camera hearing to determine admissibility
  ♦ reverse 403 test: burden on proponent to demonstrate admissibility
  ♦ Probative value must substantially outweigh dangers, incl. harm to V
• 412 makes a difference in V’s reputation for promiscuity – others, 404 will keep out; rep → only 403 (favors admissibility) would keep out w/o 412
  ♦ 412 BALANCING TEST = reverse 403 test (burden on proponent of evidence to show need for it)
    • Probative value must substantially outweigh harm
    • Requires court take non-evidentiary factor into account: danger of harm to V (in addition to prejudice) → harder balancing test to meet than 403, in theory
• FRE 412 & Δ’s constitutional rights:
  ♦ States have a general right to regulate their own procedures (incl. evidence rules)
  ♦ State procedures are sometimes trumped by Δ’s constitutional rights, even when procedure has laudatory goals
❖ Habit and routine practice
  ➢ No prohibition on using specific acts to show a person’s habit to show action in conformity, or to show ordinary custom/business practice of an organization to suggest action in conformity on particular occasion.
  ➢ FRE 406 removes CL limitations on habit/custom evidence
    • Different than using specific acts to show character:
      • More probative
      • Tend to be morally neutral
      • May be essential to prove things
    • Character: Generalized description of one’s disposition, or of one’s disposition in respect to a general trait, such as honesty, temperance, or peacefulness.
      • Driving
      • Violence
      • Bad/good person prejudice
    • Habit: More specific – Describes one’s regular response to a repeated specific situation; going down stairs 2 steps at a time, giving hand-signal for left turn, alighting from rail cars when they are moving → semi-automatic
      • Regularity, specificity, moral neutrality
Rising at 6:00 am every day
• Regularized routine
• E.g., Δ generally drunk on weekend nights admissible to show habit → drunk → neg driving, but close call
  ♦ But evidence of intemperate habits is generally excluded when offered as proof of drunkenness in accident cases
  ♦ Courts tend to admit evidence of a person’s drinking propensities that tend to be specific and routine
  • 406 does not require corroboration of habit or absence of eyewitnesses for admissibility
  • 406 announces evidence is relevant; read in conjunction with 402, rejects older conditions of admissibility e.g. lack of eyewitnesses

CHAPTER 6: The Other Relevance Rules

THE OTHER RELEVANCE RULES
❖ Make evidence inadmissible to prove fault or liability, but permit such evidence for other purposes
❖ FRE 407: Subsequent remedial measures
  • Actions taken by Δ after an event to reduce the likelihood of an event’s occurrence
    • E.g. sending memo to employees urging them to observe safety regulations; altering produce design; repairing or altering property condition; disciplining or firing an individual whose alleged negligence was responsible for an accident; sending a recall notice; changing rules or regs; posting warning signs
    • Not necessary to have made injury or harm less likely to occur
    • Does not apply to investigations
    • Language does not require “event” be the subject of the current lawsuit (academic) – but courts have found 407 does not preclude admissibility of remedial action taken subsequent to others’ injuries but before ¶’s incident
  ➢ Prohibited to infer admission of fault
    • Usually 403 → admit w/ limiting instruction
  ➢ Relatively low probative value
  ➢ Rationale:
    • The conduct is not in fact an admission
    • Social policy → encourage people to take steps to increase safety
  ➢ Permissible uses of evidence include:
    • Ownership, control, feasibility of precautionary measures (all 3 – only if controverted); or impeachment
    • Impeachment: e.g. inconsistent statements (made by same individual)
  ➢ Impermissible uses of evidence:
    • Negligence, culpable conduct, defect in product or design, need for warning/instruction
When evidence is relevant to prove contested issue other than culpability/negligence/defect/need for warning, 403 \(\rightarrow\) evidence is almost always admissible

**FRE 408:** Compromise and offers of compromise
- Inadmissible to prove liability for or invalidity of a claim or its amount
- Evidence of conduct/statements in compromise negotiations not admissible
- OK for other purposes:
  - Proving bias or prejudice of a witness
  - Disproving contention of undue delay
  - Proving effort to obstruct criminal investigation or prosecution’

**FRE 409:** Medical expenses
- Evidence of offer to pay medical, hospital, or similar expenses occasioned by injury not admissible to prove liability for the injury
  - To be precluded, must be part of act of offering to pay
  - *Statements of fault accompanying offer to pay are NOT precluded*
  - Words accompanying act of giving $$ can be part of the act (i.e. part of what’s precluded)

**FRE 411:** Liability insurance
- Insurance or lack inadmissible to prove person acted negligently or otherwise wrongfully
  - Incl. contrib. neg or other fault of ¶, not just Δ
  - Permissible for purposes such as proof of agency, ownership, or control, or W’s bias or prejudice
  - Rationale:
    - ♦ Tenuous inference
    - ♦ Strong risk knowledge will influence jury
  - What is a similar expense? Almost no case law

**FRE 410:** Pleas
- In civil or criminal proceeding, not admissible against Δ who made plea or was participant in plea discussions:
  - Guilty plea later withdrawn
  - Plea of nolo contendere (no contest)
  - Statements under FRCP Rule 11 or st equivalent
  - Statement made in course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or result in plea later withdrawn
    - ♦ *Statements to police are admissible; to be prosecuting authority, must be acting as PA agent and have some authority*
    - ♦ US v. Mezzanatto (1995): Δ may waive with regard to impeachment use of statements made in the process of plea negotiations
- Admissible:
  - In any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously
• In criminal proceeding for perjury or false statement if Δ’s statement made under oath

Similar happenings (no specific federal rule)

- Typical uses: cause of injury, K terms, invalidity of a claim, value of property
  - Human evidence e.g. person tends to heat refrigerant carelessly → 404-406 (character evidence determination)
  - Nonhuman events e.g. other people falling down staircase to show dangerousness; refrigerant exploded in other situations when heated carelessly → if W’s have first-hand knowledge, → 401-403 question only
- Offered to show institutional policy or practice
  - Similar happenings virtually required in civil rights cases against police force for police brutality
- When probative value depends on degree of similarity, high degree required
- Evidence of non-similar happenings
  - Court likely to require similar conditions, significant number of nonhappenings

Curative admissibility (fighting fire with fire)

- Permits party to introduce normally inadmissible evidence in response to opposing party’s introduction (or attempt) of inadmissible evidence
- Most jurisdictions recognize some version of doctrine (no federal rule).
- 2 key factors:
  - Prejudicial nature of the evidence
  - Whether opponent made a timely objection
- → likely to apply only when timely objection is unlikely to correct the unfairness of presenting or suggesting that evidence to the jury

CHAPTER 8: The Hearsay Rule

THE HEARSAY RULE

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

What is hearsay – introduction

FRE 801 defines hearsay

- FRE 801 defines hearsay
  - FRE 801 (a): A statement is:
    1. (1) oral or written assertion, or
    2. (2) nonverbal conduct of a person, if it intended by the person as an assertion
  - FRE 801 (b): Declarant = person who makes a statement
  - FRE 801 (c): Hearsay defn, above
  - FRE 801 (d): Exemptions (statements that are not hearsay):
    1. (1) Prior statement by witness (declarant)
      - (a) Inconsistent with declarant’s testimony and given under oath
(b) Consistent and given to rebut charge of recent fabrication or improper influence or motive
   - Prior statement must have been made before motive to fabricate arose, Tome v. US

ID of person made after perceiving
   - Read relatively narrowly b/c (a) and (b) are

• (2) admission by party-opponent: offered against a party and is
  - Party’s own statement (indiv or rep)
  - Party has adopted/ believes truth

FRE 802: Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or be act of Congress

FRE 803: Hearsay exceptions: not excluded even though the declarant is available as a witness:

   ▪ Present sense impression
     - Made while declarant perceiving event/condition, or immediately thereafter
     - TIMING: must be made during or immediately after event (matter of minutes – courts are strict)
     - CONTENTS OF DECLARATION: describe or explain

   ▪ Excited utterance
     - Statement relating to startling event or condition made while declarant was under stress of excitement caused by event or condition
     - TIMING: person still under influence of surprising event
     - CONTENTS OF DECLARATION: relate to (broader connotation than present sense impression)

   ▪ Then existing mental, emotional, or physical condition (STATE OF MIND)
     - Such as intent, plan, motive, design, mental feeling, pain, bodily health
     - NOT including memory or belief to prove fact remembered or believed, except for wills

   ▪ Statements for purposes of medical diagnosis of treatment
     - Incl. inception or general character of the cause or external source insofar as reasonably pertinent to diagnosis or treatment

   ▪ Recorded recollection
     - Memo or record shown to be made or adopted when fresh in W’s memory; if admitted, may be read into evidence but not received as an exhibit unless offered by adverse party

   ▪ Records of regularly conducted activity
     - Made by a person with knowledge (or transmitted by) in course of regular practice of business activity, shown by custodian or other qualified witness or certification

   ▪ Absence of entry in records kept in accordance with the provisions of (6)
• To prove nonoccurrence if record regularly made and preserved, unless
sources of information or other circumstances indicate lack of
trustworthiness

- **Public records and reports**
  • Must set forth:
    ♦ Activities of office/agency
    ♦ Matters observed pursuant to duty imposed by law w/ duty to report
      ➢ In criminal cases, NOT matters observed by law enforcement
        personnel
    ♦ In civil, and against the Govt in criminal, factual findings resulting
      from an investigation made pursuant to authority granted by law,
      unless the sources of information or other circs indicate lack of
      trustworthiness

- **Records of vital statistics**
  • If made by public office pursuant to law

- **Absence of public record or entry**
  • Diligent search failed to disclose

- **Records of religious organizations**
  • Statements of births, marriages, divorces, deaths, legitimacy, ancestry,
    relationship by blood or marriage, or other similar facts of personal or
    family history, contained in a regularly kept record of a religious
    organization

- **Marriage, baptismal, and similar certificates**
  • Statements of fact contained in a certificate that the maker performed a
    marriage or other ceremony or administered a sacrament, made by a
    clergyman, public official, or other person authorized by the rules or
    practices of a religious organization or by law to perform the act certified,
    and purporting to have been issued at the time of the act or within a
    reasonable time thereafter

- **Family records**
  • Personal/family history contained in family Bibles, genealogies, charts,
    engravings on rings, inscriptions on family portraits, engravings on urns,
    crypts or tombstones, or the like

- **Records of documents affecting an interest in property**
  • Record of public office per statute

- **Statements in documents affecting an interest in property**
  • Unless dealings with the property since the document was made have been
    inconsistent with the truth of the statement or the purport of the document

- **Statements in ancient documents**
  • 20+ years, established authenticity

- **Market reports, commercial publications**
  • Generally used and relied upon by the public or by persons in particular
    occupations

- **Learned treatises**
  • Published, established as reliable authority by testimony/admission of
    witness or by other expert testimony or by judicial notice
• If admitted, read into evidence but not received as exhibit
  ▪ **Reputation concerning personal or family history**
    • Reputation among family/community members
  ▪ **Reputation concerning boundaries or general history**
    • Reputation in community arising before controversy; reputation as to general history important to the community in which located
  ▪ **Reputation as to character**
    • Among associates or in community
  ▪ **Judgment of previous conviction**
    • Of accused only (unless for impeachment); pendency of appeal does not affect admissibility
  ▪ **Judgment as to personal, family, or general history, or boundaries**
    • Essential to judgment if same would be provable by reputation evidence
  ➢ **FRE 804(a):** Not excluded *if declarant is unavailable as a witness b/c of (1) privilege, (2) refuses to testify despite court order; (3) testifies to lack of memory; (4) unable to be present/to testify b/c of death or then existing physical or mental illness or infirmity; OR (5) is absent and proponent cannot procure by process or other reasonable means
  ➢ **FRE 804(b):** Not excluded by hearsay rule if declarant unavailable as witness:
    • **Former testimony** at other hearing of same or different proceeding, or in depo, if the party against whom the testimony is now offered had opportunity and similar motive to develop the testimony by direct, cross, or redirect examination
      • In civil cases, if predecessor in interest had opportunity and similar motive to develop the testimony by direct, cross, or redirect examination
    • **Crawford** case (most recent): testimonial evidence:
      ♦ Declarant must be unavailable at time evidence is offered
      ♦ Declarant must have been subject to previous cross-examination
    • **Ohio v. Roberts** case:
    • **White** case: hearsay declarant must be unavailable only for former testimony
  ➢ **Dying declaration** in *homicide prosecution or civil action only*, concerning cause or circumstances of believed impending death
    • CL: only in homicide
    • FRE: homicide and civil (wrongful death)
  ➢ **Statement against interest** so strong that reasonable person in declarant’s position would not have made statement unless believing it to be true

<table>
<thead>
<tr>
<th>Admissions</th>
<th>Statements against interest</th>
</tr>
</thead>
<tbody>
<tr>
<td>Exemption</td>
<td>Exception</td>
</tr>
<tr>
<td>Anything used against party to action (need not appear to be against interest at time made)</td>
<td>Only for certain types of interests:</td>
</tr>
<tr>
<td></td>
<td>- pecuniary/proprietary</td>
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<td>- civil/crim liability</td>
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<td>- invalidates declarant’s claim against another</td>
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<tr>
<td>No unavailability requirement</td>
<td>Declarant must be unavailable</td>
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</tbody>
</table>
Statement tending to expose declarant to criminal liability offered to exculpate accused not admissible w/o corroborating circumstances \(\rightarrow\) trustworthiness

- **Statement of personal or family history**
  - (A) statement concerning declarant’s own, even w/o means of acquiring personal knowledge
  - (B) statement concerning, and death, of another person, if declarant related by blood, adoption, marriage, or so intimately associated with the other’s family as to be likely to have accurate information concerning matter
- [transferred to FRE 807]
- **Forfeiture by wrongdoing/Waiver by misconduct**
  - Statement offered against a party that has engaged/acquiesced in wrongdoing intended to (and did) procure declarant’s unavailability
  - Codifies US v. Mastrangelo (1982): \(\Delta\)’s right of confrontation may be waived by \(\Delta\)’s misconduct
    - Statement must be made by declarant who was a W/potential W against a party
    - Statement must be offered against that party
    - Party must have engaged or acquiesced in wrongdoing that was intended to, and did, procure unavailability of declarant as W or potential W
- **FRE 807**: Residual Exception. A statement not specifically covered by 803 or 804 but w/ equivalent circumstantial guarantees of trustworthiness is not excluded by hearsay rule IF court determines
  - (A) statement is offered as evidence of a material fact
  - (B) statement is more probative on point it’s offered than any other evidence proponent can procure through reasonable efforts, AND
    - More probative \(\leftrightarrow\) circumstances indicate declarant has reliable testimonial qualities, or contents of statement are corroborated
  - (C) admission best serves interests of justice and general purposes of rules
    - Proponent must give fair notice
  - COURT APPROACHES
    - Some liberal \(\rightarrow\) freely admit hearsay
    - Some strict \(\rightarrow\) disfavor admission
- **Rationale**
  - 3 traditional reasons:
    - Not under oath \(\rightarrow\) not as trustworthy as in-court, sworn statements
    - Cannot observe demeanor of witness
    - No opportunity to cross-examine declarant (most important)
- **Nonverbal conduct**
  - If actor intends to communicate belief (accuracy of which conduct is offered to prove) through conduct, that’s hearsay
    - Sincerity, perception, memory
  - If actor does not intend to communicate belief \(\rightarrow\) evidence not defined as hearsay
• Admissible to prove truth of that belief even though perception, memory still involved
  ➢ Actor’s intent = preliminary Q of fact for judge to decide pursuant to 104(a). Burden is on opponent of evidence

❖ Utterances with unstated beliefs
  ➢ CL: *Wright v. Tatham*: implied assertions of letters were hearsay – require reliance on out-of-court declarant
  ➢ FRE 801 rejects by drawing analogy to nonassertive verbal conduct ➔ assertive verbal conduct offered as a basis for inferring something other than the matter asserted is NOT hearsay (exclusion). Similarly, nonassertive verbal conduct is not hearsay
  ➢ the law: When declarant not intending to communicate an unstated belief, then the sincerity danger may be minimal and the utterance is analogous to nonassertive conduct.

❖ Hearsay:
  ➢ Pointing/nodding
  ➢ “at least I never stole from my boss”
  ➢ “the driver must be drunk”
  ➢ “J ought to confess”
  ➢ “there’s ketchup on the floor”

❖ NOT hearsay:
  ➢ Stepping on boat
  ➢ Flight
  ➢ Wright v. Tatham letters to show competence
  ➢ Pushing/”get out of here”

❖ Right in the middle; argue by analogy!
  ➢ “beware of dog”

❖ Different kinds of out-of-court statements
  ➢ Ordinary hearsay
  ➢ Out of court statements with no hearsay dangers
    ▪ E.g. “there’s ketchup on the floor” to prove notice
  ➢ Assertive nonverbal conduct (pointing, handing yesterday’s shirt) ➔ truth intended to assert ➔ H
  ➢ Assertive nonverbal conduct, no hearsay dangers
    ▪ E.g. police raising hand to stop car in intersection
  ➢ Nonassertive nonverbal conduct
    ▪ CL: Hearsay
    ▪ FRE: H only if intended as assertion
  ➢ Utterances intended to assert unstated beliefs
    ▪ Argue by analogy
  ➢ One-leg problem (prove person’s sincere belief but reality is unimportant) ➔ Hearsay is not a bar, 803(3): state of mind

❖ Exemptions and exceptions
  ➢ Prior statements
    ▪ Hearsay ➔ inadmissible but 3 exemptions (801(d)(1)):
Inconsistent and under oath  
Consistent and rebuts charge of recent fab  
ID of person made after perceiving

- Admissions
  - Must be an authorized person
  - Designated expert witness is not enough; can adopt after seeing report
  - Personal knowledge not required
  - Organization can adopt individual agent’s admission
    - Not vice versa
    - Can you rely on the contents of a document to prove its relevance (bootstrapping)?
      - Bourjaily case: can rely on in part (104(a) → Judge can consider matters not in evidence) but not exclusively

- Spontaneous declarations
- State of mind declarations
- Statements for diagnosis or treatment
- Past recollection recorded
  - Can do anything to jog person’s memory
  - Requires witness is available (on stand) but unavailable (can’t remember)
  - Multiple person involvement is OK (like in-class dramatization)
  - Need original declarant on witness stand

- Business records
  - Overlaps with past recollection recording – can usually use either
    - Needn’t be original declarant on witness stand
  - Requirements:
    - Recorded at/near time of event
    - In ordinary course of business
    - Regular practice to make the record
    - Record-maker has business duty to create
    - Circumstantial guaranties of trustworthiness
  - Certified document can set forward facts for business record exception – needn’t have person on stand
  - Courts reticent to allow self-serving documents prepared for litigation,
    - Palmer v. Hoffman

- Judgments
  - Can use judgment as some evidence of facts essential for the judgment; not issue preclusion of fact. Using fact of judgment as some evidence of facts necessary for Judge

- Unavailability (FRE 804)
  - Hearsay declarant must be unavailable to qualify for admission
    - CL: different exceptions had different unavailability requirements
    - FRE simplified → same unavailability requirements for all, ~ uniformly adopted
  - Court must accept asserted claim of privilege
Some courts won’t allow criminal Δ to benefit from hearsay exception when claiming 5th amendment

- Reasonable efforts must be made to procure W’s presence
  - More than mere subpoena power, Barber v. Page
- Affidavit stating W does not remember is not enough – must appear in court and testify to same
- If W claims on stand not to remember, judge faces 104(a) question whether believes witness is truthful for contempt, but qualifies for H exception either way: either unavailable b/c no memory, or persistent refusal to testify
  - Former testimony
    - OPPORTUNITY, MOTIVE TO CROSS-EXAMINE
      - Must take advantage of opportunity – or explain why not, different motive, in record – or will likely lose out on objection later
      - Predecessor in interest must share motive (civil only)
        - Majority: having like interest in developing testimony
        - Minority: formal privity/predecessor property notion
  - Other FRE 804 exceptions
  - Waiver by misconduct
  - Residual exceptions
  - (confrontation)
  - (reflections)
  - Absence of entry exceptions:
    - admit

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CHAPTER 7: The Impeachment and Rehabilitation of Witnesses

IMPEACHMENT & REHABILITATION OF WITNESSES

- IMPEACHMENT
  - Introduction
    - Traditional method: showing witness’s bad character for truthfulness
    - FRE 608: Evidence of character & conduct of witness
      - (a) Opinion and reputation evidence. Credibility of a W may be attacked/supported by opinion or reputation evidence, but:
        - (1) only character for (un)truthfulness [NOT general moral character]
        - (2) admissible only after character for truthfulness has been attacked
          - Attacks include opinion/reputation evidence that witness is untruthful; evidence of misconduct (incl. conviction of crime), corruption
          - Evidence of bias or interest does NOT qualify as attack
          - ~ CL: cannot bolster credibility unless impeached
      - EXTRINSIC EVIDENCE
        - (b) Specific instances conduct of a W, to attack/support W’s credibility (other than conviction, FRE 609) may NOT be proved by extrinsic evidence. At discretion of court, can cross-examine
(1) concerning W’s character for (un)truthfulness
(2) concerning (un)truth of another witness as to which character the W under cross-exam has testified
  ➢ Giving testimony doesn’t waive privilege against self-incrimination when only with re: credibility
  ➢ Cross-examination can be direct exam (can impeach your own witness, FRE 607; at CL, could only impeach opponent’s witnesses)
  ➢ Court may exclude on 403 grounds (time > probative value)

NO EXTRINSIC EVIDENCE

No specific time limit, but can analogize to 10-year limitation in 609

Impeachment with character evidence
  ▪ Cannot ask about findings, arrests about something – hearsay (did someone say you did this); CAN ask whether W engaged in conduct (but few lawyers object)
  ▪ Can use extrinsic evidence to show bias

FRE 609: Impeachment by evidence of prior convictions
  • Traditional method of impeaching witnesses
    ♦ Not particularly probative of truthfulness
    ♦ Felons once not qualified to testify
  • Hearsay sense: FRE 609
  • Judgment sense: 803
  (a) For purpose of attacking W’s credibility,
    • (1) evidence that W (not accused) was convicted of crime shall be admitted if crime was punishable by 1+ yr/death, subject to 403; evidence that accused was convicted of such shall be admitted if court determines probative value outweighs prejudicial effect to accused
    • (2) Evidence that any W has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of punishment
  (b) Time limit: 10 years since date of conviction or release of W (later of two, unless court determines in interests of justice, probative value of conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. Notice required
  (c) Pardon, annulment, or certificate of rehabilitation based on finding of rehabilitation ➔ conviction not admissible if person has not been convicted of subsequent 1+ yr crime OR based on finding of innocence
  (d) Juvenile adjudications generally not admissible but court may in criminal case allow evidence of juvenile adjudication of W other than accused if it would be admissible for adult and necessary for fair determination of guilt or innocence
    • Judge has discretion
  (e) Pendency of appeal does not render evidence of conviction inadmissible; appeal = admissible

BALANCING TESTS:
  • 609(a)(1) conviction (not a falsity crime)
    ♦ For all non-Δ witnesses, 403 balancing test
For Δ on witness stand, reverse 403 (probative value must outweigh prejudice to Δ)

Prior statements
- Out of court statements, if offered to prove truth, are hearsay even if witness is on the stand
- Prior statement admissible for (in)consistency [not truth]
  - **FRE 613**: Prior statement of a witness
    - (a) in examining W re prior statement, written or not, prior statement need not be shown to W at time (but show to opposing counsel)
      - Rejects Queen’s Case CL rule requiring show inconsistent statement to W b/c useless impediment to cross-examination
    - (b) Extrinsic evidence of W’s prior inconsistent statement not admissible unless W has opportunity to explain/deny and opposite party can interrogate, or interests of justice require
      - Does not apply to admissions of a party-opponent, 801(d)(2) exemption (not hearsay).

- Limits foundation requirement from CL
- CL: Some courts won’t allow if failed to address on cross-examination (foundation)
- **Significant departure from CL**: Several collusive witnesses can be examined before disclosure of a joint prior inconsistent statement
- Inconsistent statements about collateral matters
  - 403 may require exclusion if probative value so low
    - CL requires b/c no extrinsic evidence of inconsistent statement about collateral matter
    - Some federal courts have adopted this rule
    - Under FRE, Q is 403 concern, not whether statements are collateral in CL sense

- In sum:
  - Prior inconsistent statements may be admissible for nonH purpose of impeaching credibility of W
  - Normally, no extrinsic evidence of prior inconsistent statement unless W has opportunity to explain, opposing counsel can question witness
  - Some federal courts prohibit extrinsic evidence if impeaching party does not call the statement to the witness’s attention, but FRE liberalizes this CL requirement

Prior consistent statements:
- At CL, not admissible for truth; just to rehabilitate credibility of witness as rebuttal
- FRE 801(d)(1)(b) exempts from hearsay W’s statement that is consistent with declarant’s testimony and offered to rebut charge of recent fabrication → admissible for truth
  - Narrowly interpreted
- Extrinsic evidence OK but seldom necessary
Other impeachment techniques
- Bias (no federal rule)
  - **US v. Abel**, can use extrinsic evidence to show
  - Limits on extrinsic evidence:
    - Witness must first have opportunity to explain/deny prior statement offered as evidence of bias (some courts)
    - Possible 403 objection
    - Even in jurisdictions that don’t allow extrinsic evidence on collateral matters, bias is closely related enough that under 401 and 403, inconsistent statement about bias should be allowed
- Mental or sensory incapacity
  - 401-03 govern, extrinsic evidence OK (courts: not like moral incapacity or character trait)
  - Character evidence rules DO NOT apply here
- Contradiction
  - 401-03 govern, extrinsic evidence may be admitted unless not sufficiently probative.
  - Relevant to cast doubt on credibility of a witness
  - Most applications of FRE 403 lead to same result as CL prohibition against extrinsic evidence to contradict on a collateral matter

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**CHAPTER 10: Lay Opinions and Expert Witnesses**

**LAY OPINIONS AND EXPERT WITNESSES**

- Lay opinions
  - CL: Witness must offer factual basis not opinion testimony
  - **FRE 701** is more flexible: can give opinion if based on facts and it’s helpful to jury
    - Whether admitted/excluded depends on context
- Expert witnesses
  - **FRE 702**: can give opinion
    - Must based upon sufficient facts, product of reliable principles and methods, AND W has applied them reliably to facts of case
    - **Frye**: general acceptance test (FRE made no mention of)
      - Courts split on what FRE did to Frye:
        - Still law
        - 402 ➔ all relevant evidence is admissible if helpful ➔ Frye doesn’t comply so gone
    - **Daubert**: No more Frye. Trial judges must act as gatekeepers to exclude unreliable expert testimony
      - Has expert’s theory been tested?
      - Subject to peer review and publication?
      - Rate of error?
      - Existence and maintenance of stds and controls
      - Generally accepted in scientific community
THE TWO KEY QUESTIONS:
- Assist trier of fact?
- Reliable? (more than just relevant)

**Kumho:** Gatekeeper function applies to all expert testimony, not just scientific
- makes Daubert test restrictive

THREE FACTORS
- Flexibility (no rigid test – trial judge’s discretion)
- Gatekeeping (judicial activism)
- Deference to trial judge’s decision (no oversight)

**FRE 702:** Admissibility of expert testimony = 104(a) Q for judge

**FRE 703:** Facts or data underlying expert testimony, if reasonably relied on by experts in field, need not be admissible
- Major departure from CL
- This is an exception to all rules we’ve studied

**FRE 705:** Expert may testify to opinion, instances, without first requiring underlying facts (but practically, want to have jury know basis for expert opinion)
- May be required to disclose the underlying facts or data on cross-examination

703 and 705 in conflict: jury hear facts (705); based on inadmissible evidence (703)

- 703 amended in 2000 → inadmissible evidence shall not be admitted to jury unless judge determines the probative value substantially outweighs prejudicial effect → THEN, give limiting instruction

Opinions on ultimate issue
- Many jurisdictions do not allow
- FRE 704: OK.
  - (b) → expert can’t state opinion whether Δ in criminal case did/not have requisite mental state (response to assassination attempt on Reagan)
- Impt: what’s helpful to jury?