Evidence – Outline

Prof. Barrett – Fall 2008

Chapter 1 – General Principles of Relevance

(pp. 18-30)

Unfair Prejudice (pp. 38-61; 75-89)

Effect of Stipulations

Chapter 2 – The Specialized Relevance Rules

Rules 407-411

1) These concern evidence of rather low probative power
2) Most spring from unfair prejudice concerns; but others such as 409 more policy-based
3) Rule 410 bars certain pleas for ALL PURPOSES
4) The others prohibit CERTAIN USES of the evidence they govern
5) (CHARTS ON PP. 91-93)
   a) TEXT OF RULES (91)
   b) RATIONALES (92)
   c) ROUTE OF ADMISSIBILITY (93)

A. Subsequent Remedial Measures – Focus on FRE 407

Notes on Rule 407 – Subsequent Remedial Measures:

1) THIRD PARTY REPAIRS
   a) Rule 407, does it exclude evidence of subsequent remedies carried out by someone other than the defendant in the litigation?
   b) 407’s being written in passive voice seems to apply to repairs made by any party
   c) Public policy of rule gives no grounds for excluding evidence of 3rd party repairs
      i) 3rd parties might be dissuaded from making repairs because evidence of repairs might be offered against someone else
      ii) Most courts follow the latter reasoning and admit the evidence
d) BUT, IS IT TOO LITTLE PROBATIVE FORCE TO GET PAST RULE 403?
   i) Can another party’s later repair be relevant to D’s negligence?
   ii) Tough Q b/c probative value of most subsequent remedies is that they amount to an admission by D that its previous conduct was unsafe

2) STRICT LIABILITY
   a) 1997 Amendment, made it clear that Rule 407 applies in strict liability (defective product) lawsuits
   b) Previous disagreement stemmed from differing interpretations of PP of the rule
      i) ONE INTERPRETATION – 407 shouldn’t apply in defective product cases
         (1) Typical D a small business, faces few such suits, concerned about losing THIS lawsuit and will not make a repair if evidence of that repair may be admitted in the present case - so 407 advance PP of encouraging repair
         (2) MOST product makers operate on large scale and can anticipate many future lawsuits without a current fix
            (a) Will make repairs even if they’ll lose current lawsuit, in long-term economic interest
            (b) Protection of Rule 407 in barring evidence of repair comes as a windfall
      ii) ANOTHER INTERPRETATION – 407 should apply in defective product cases
         (1) Even large-scale product makers might be deterred from making repairs if evidence of such repairs could be used against them
         (2) No evidence concerning whether 407 would deter manufacturers’ voluntary change to improve products; not demonstrably inapplicable to manufacturers upon whom strict liability is imposed

3) IF CONTROVERTED = applies to ownership, control, and feasibility

B. Compromise Offers and Payment of Medical Expenses

Focus on FRE 408 & 409

Bankcard America, Inc. v. Universal Bancard Systems, Inc.

Rule: RULE 408:
1) FRE 408 forbids the admission of statements made during settlement negotiations to prove the liability or lack of liability. The rule does not require exclusion when the evidence is offered for another purpose, such as proving the bias or prejudice of a witness. Because settlement talks might be chilled if such discussions could later be used as admissions of liability at trial; the rule’s purpose is to encourage settlements
   a) Rule is not an absolute ban on all evidence regarding settlement negotiations; it permits evidence offered for a purpose other than establishing liability
b) It would be an abuse of Rule 408 to allow one party during compromise negotiations to lead his opponent to believe that he will not enforce applicable time limitations and then object when the opponent attempts to prove the waiver of time limitations.

c) Rule 408’s spirit and purpose:
   i) To encourage settlements – which will not happen if one party seduces the other into violating the K and then, when a settlement is not reached ultimately, accuses the other party of K violation – to use 408 to block evidence that the violation of the K was invited would be unfair.

NOTES on Rule 408

1) CLAIM
   a) Rule 408 does not protect offers to compromise made before a “claim” of some sort has been made.

2) DISPUTED AS TO VALIDITY OR AMOUNT
   a) Underlying policy considerations do not come into play when the effort is to induce a creditor to settle an admittedly due amount for a lesser sum – rule requires claim to be disputed as to either validity or amount.

3) OPERATION IN CRIMINAL CASES
   a) Plea discussions and plea agreements in criminal cases are treated in Rule 410; not 408.
   b) 408 addresses the admission at criminal trials of conduct and statements made in civil compromise talks – not admissible except in one fairly narrow circumstance.
   c) Narrow circumstance where Rule 408 poses no bar to admission: when those “negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.” – (AC says – statement to gov agents, must expect admission)

4) MAY EVIDENCE OF COMPROMISE AND OF STATEMENTS BE USED TO IMPEACH? (NO AND YES)
   a) NO
      i) As amended, Rule 408 (a) bars evidence of compromise attempts when offered to … impeach through a prior inconsistent statement or contradiction”
      ii) Without such a bar, rule offers little meaningful protection.
      iii) Otherwise, artless statements may be used to impeach denial of wrongdoing, parties will be reluctant to negotiate, purpose of rule thus frustrated.
   b) YES
      i) Rule 408 (b) permits evidence of compromise negotiations and of conduct and statements made in such negotiations when offered to “prove a witness’ bias or prejudice” –
      ii) Evidence of witness’ interest in the outcome of a case tends to show motive to lie – hence that witness is lying (more in Chap 4)
      iii) Narrow circumstances
Comparing Rules 408 (Compromise) and 409 (Medical Expenses)

1) CONDUCT AND STATEMENTS IN COMPROMISE NEGOTIATIONS
   a) Difference in scope of 408 and 409
   b) 408 generally excludes evidence of conduct or statements made during compromise negotiations when offered to prove liability for a claim
   c) 409 extends no such protection to statements surrounding offers to pay medical expenses; rule only excludes the offer
   d) Rationales may explain why 408 requires so much more protection than 409:
      i) RELEVANCE-based rationale
         (1) Humane impulses statement vs. a similar statement more potentially probative of negligence, a genuine admission of fault – (isn’t same reasoning applicable in 408 context, though?)
      ii) PUBLIC POLICY-based rationale
         (1) 408 aims in part to encourage settlement; 409 aims in part to encourage offers to assist
         (2) Difference may be that 408 situations with claims, involvement of lawyers more likely, knowledge of risk of careless statements more likely
         (3) So in 408 situations, absent greater protections of rule, lawyers likely would advise clients to keep quiet instead of negotiating

2) COMPROMISES WITH THIRD PARTIES
   a) BOTH rules bar evidence that one of the parties in the suit settled with a third party if that evidence is offered to prove liability for or invalidity of the claim
   b) BUT evidence of such settlements may be admissible to show a witness’ bias

C. Liability Insurance

FRE 411


Williams appeals from a jury verdict finding for her (D was negligent) – awarding $3000 in damages. Williams filed an action for personal injury resulting from a 1997 auto accident.

Rule 411: Evidence that a person was or was not insured against liability is not admissible upon the issue of whether he acted negligently or otherwise wrongfully.

It is a narrow exception for providing for the exclusion of otherwise admissible and relevant evidence. It does not bar evidence offered for purpose such as “proof of agency, ownership, or control, or bias or prejudice of a witness.”

Rule 411 in this case, Court sees that it clearly did not bar P’s explanation as to why she hired an attorney. (defense counsel knew plaintiff would testify that her motivation for hiring an attorney was a negative encounter with defendant’s insurance adjuster). Rule 403 – trial court did not consider or balance the risk of unfair prejudice to D’s case with the probative value of plaintiff’s explanation. Probative value wins here – P
suffered prejudice in not being able to provide explanation. Trial court could have taken voir
dire of P’s testimony and limited prejudice to D by restricting import of P’s
testimony and given a 105 limiting instruction.


1) BLINDFOLDING MAY FAIL IN THREE SITUATIONS
   a) Topic may be introduced at trial because attorney is able to argue persuasively
      that it is being offered for a legally acceptable purpose
      i) (courts rely on limiting instruction, difficult for jury)
   b) A witness mentions Evidence Rules-prohibited subject in front of a jury
      i) Objection may draw more attention, difficult to unring the bell
   c) Jurors’ pre-trial experiences, relevant attitudes, or beliefs provide them with a
      foundation of potentially relevant information that makes the forbidden topic
      likely to come to mind

2) JURORS DISCUSSING INSURANCE
   a) It happens
   b) The surprise was that instead of, as feared, jurors’ seeing a deep pocket and
      finding for P regardless of D’s liability…
   c) …Jurors focused on P’s insurance to see if P had likely already been compensated
      through insurance

3) Proposes an alternate jury instruction regarding insurance – admonishing jurors to
   avoid speculation and calling their attention to the unknowables

4) Blindfolding more ideal for cases in which jurors are unlikely to have expectations
   about information

D. Pleas in Criminal Cases

Focus on FRE 410
- Legislative history is complex
- Keep in mind that Rule 410 and Fed R Crim P 11(e)(6) used to be identical

FROM p. 91:
Rule 410 bars (against the defendant) guilty pleas later withdrawn, no lo
contendere plea, statements in plea proceedings, and statements in plea talks with
prosecutor.
ADMISSIBLE to complete a partial account of plea discussions or in perjury
prosecution if statement under oath, on record, and in counsel’s presence.

Notes on Rule 410 – Pleas, Plea Discussions, and Related Statements
BREADTH OF EXCLUSION
   410 differs from other specialized relevance rules because the evidence it
addresses is always barred except where specifically permitted.

MAY EVIDENCE OF STATEMENTS BE USED TO IMPEACH?
No, evidence of statements made during plea negotiations may not be used to impeach the defendant should she testify differently at trial. Legislative history makes this clear. Rationale for change: if this evidence could come in, defendants may be less likely to enter plea negotiations altogether. Prosecutors still have the ability to make the defendant sign a statement that defendant must agree that evidence can be used to impeach before beginning plea negotiations. NO reason to assume Congress meant 410 to be non-waivable.

EXPLAINING RULE 410’S ABSOLUTE PROTECTION
   Rule 410’s unusually broad protection may be to strongly encourage plea bargaining. Essential to efficient case management and winning cooperation in prosecuting cohorts.
   Criminal defendants are particularly risk averse. Rule may express a common understanding that criminal defendants are the system’s most vulnerable litigants

PLEA NEGOTIATIONS WITH THE PROSECUTOR
   Protection of Rule 410’s fourth paragraph reaches only statements made in the course of plea discussions. If D unilaterally offers info without first establishing that he is seeking a concession, a court may determine that no “plea discussions” had begun.
   Fourth paragraph also limited to discussions with prosecutors. Defendants speak at their peril to police officers who merely appear to have the authority to negotiate pleas.
   Some courts have seen it as unfair for defendants to be trapped by Rule 410’s formal categories, and interpreted 410 more generously – if D subjectively and objectively thought she was in plea negotiations.

EVIDENCE OFFERED AGAINST THE PROSECUTOR
   By its terms, Rule 410 does not prevent the defendant from presenting evidence that the prosecutor agreed to drop a charge during plea discussions.
   BUT, some courts will keep evidence out because admitting such evidence would discourage prosecutors from negotiating pleas and frustrate the purpose of the rule.

Specialized Relevance Rules: Wrap-up
1) Advisory Committee predicted 5 unappealing consequences to having 403 cover everything the specialized rules do, anticipating criticism:
   a)Replacing specific exclusionary rules with multiple ad hoc decisions of the trial judge would vastly expand judicial discretion (potentially breeding arbitrary and biased decision-making).
   b) Loss of specific exclusionary rules would mean a loss of predictability
      i) Frustrating substantive purpose of 407-410, promoting settlement and negotiation
   c) Trial prep more complex, litigants trying to anticipate all possible judge discretionary outcomes
   d) Court business would slow (pretrial procedures, in limine motions)
e) Finally, criminal defendants have rights that would likely be left unprotected by ad hoc rulemaking, may create need for different rule for civil and criminal litigation.

Chapter 3 – Character Evidence

A. The Character-Propensity Rule

FRE 404

The Propensity Box

Evidence that a person has a particular character trait generally is not admissible to show that the person has acted in conformity with that trait at a particular time. Rule at CL and 404 (404 picked up on longstanding common law ban). Cannot intro that defendant had a propensity to act in a particular way to prove that he acted in that way on the night of the shooting.

(FOLLOWING BOLDED AREA V IMPORTANT)

Problem with such evidence NOT RELEVANCE, but risk of unfair prejudice. (not even really about probative value)

Forms of unfair prejudice:
- Jury will give excessive weight to evidence allowing it to bear too strongly on the current charge
- Preventive Conviction
  - Proof of character justifying condemnation regardless of guilt in crime
  - Offense in character evidence deserves punishment

With 403, a trial judge weighs risk of harms against probative value. Rule 404 reflects judgment of Congress that AS A MATTER OF LAW, probative value of propensity evidence is substantially outweighed by risk it poses of unfair prejudice, juror confusion, and waste of time.

DIAGRAMMING PROPENSITY BAN

Evidence of D’s other weapons -> To prove his vicious and dangerous character -> To Prove Action in conformity therewith -> To Prove he killed with premeditation.

404 Bars step 3 in this chain of inferences: evidence not admissible to show a person’s character to prove action in conformity therewith on a specific occasion.

ROUTES AROUND THE PROPENSITY BOX

Evidence of D’s other weapons -> To Prove he was at the crime scene -> To Prove he was the shooter
CLOSE-UP OF RULE 404(b)
1) Evidence MAY be admissible for purpose such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident
   a) DECEPTIVELY SIMPLE
   b) May apply to any acts other than those directly at issue in the case
   c) Restating 404 (a) is superfluous
   d) List of “other possible purposes” is unnecessary
   e) 404 (b) DOES NOT require trial judges to admit evidence or other acts whenever such evidence does not violate the propensity evidence ban – MAY be admissible for other purposes
   f) Permitted purposes in 404 (B) are NOT EXCEPTIONS to 404 (a) (genuine exceptions on p. 151 flowchart)
      -For example, if proof of identity were an exception to the rule, the prosecutor’s proposed chain of inferences going through the propensity box would be permissible
1) 404 (b) does not only apply in criminal cases; nor only to defendants

WHERE WE GO FROM HERE
The propensity box drives ways counsel tries to get around it. The propensity ban drives the entire dynamic of the character evidence rules.

Diagram – Character Evidence (see p. 151)

B. CHARACTER EVIDENCE

1. Proof of Knowledge

2. Proof of Motive

   Propensity reasoning – conductor’s prior acts of not stopping properly make it less likely for him to stop properly at the stop at issue.

   Non-propensity argument – Would show MOTIVE – that conductor was in a hurry – that there was some reason he wasn’t stopping for long enough to let anyone out – the WHY he wouldn’t stop (would have to be specific to that day)

3. Proof of Identity
United States v. Trenkler – 61 F.3d 45 (1st Cir. 1995)

A bomb exploded at Roslindale home of Shay Sr.; killing one Boston police officer and severely injuring another. The two officers, members of the Bomb squad, had been dispatched to home to investigate a suspicious object in his driveway. Shay had noticed loud noise from beneath floor board of his car – subsequently; suspicious object resting near crest of driveway.

Trenkler and Shay Jr. charged with bombing. Two defendants tried separately. Gov’s case against Trenkler? – that Trenkler built the Roslindale bomb. Basing identity as bomb-builder off unique similarities in design, choice of components; and overall MODUS OPERANDI.

Before trial: Gov filed motion in limine to admit the ‘similarity’ evidence; district court eventually ruled it admissible for relevance wrt identity, skill, knowledge, and intent.

Similarities and differences between the Quincy bomb and the Roslindale bomb. Experts for both sides. Gov expert: many similar traits and characteristics => signature of a single bomb-maker; no doubt. Trenkler expert: too many dissimilarities; lack of sufficient distinguishing qualities to identify bombs as handiwork of a specific individual. EXIS database comparison – queries match bomb characteristics; narrowed field from ATF database from 40000 to 7 people.

Jury: guilty on all counts of indictment; concurrent life imprisonment terms; appeal.

RULE: 404(b)

Proscription of propensity toward criminal behavior evidence is not absolute: can be used if it bears on a material issue such as motive, knowledge, or identity.

First Circuit test: (1) district court must determine if evidence has some “special relevance” independent of tendency to show criminal propensity; and (2) once special relevance on material issue established; court must conduct 403 analysis

Review for abuse of discretion.

ANALYSIS:

The two acts are sufficiently idiosyncratic to - balance of evidence sufficiently towards admission to satisfy first step of Rule 404(b) analysis. District Court did not abuse discretion in admitting evidence HERE, IN THE MIDDLE, WITH SUBSTANTIAL EVIDENCE ON EITHER SIDE AND CONFLICTING EXPERT OPINIONS, (WEIGHT, NOT ADMISSIBILITY).

403 – Probative value of Quincy bomb evidence was not substantially outweighed by risk of unfair prejudice. District limited jury’s consideration of Quincy bomb, Quincy bomb not unduly inflammatory. Evidence was very important to government’s case. Evidence could have been more compelling, but was substantial.

DISSENT:
EXIS-derived evidence – potential problem – why did investigator only choose 10 characteristics; ignoring certain specifics? EXIS evidence is misleading because is focuses jury on trees instead of the forest. The central and most important ingredient in the explosive is fundamentally different.

**United States v. Stevens – 935 F.2d 1380 (3d Cir. 1991)**

Jane Smith and Tony McCormack were sitting in a bus shelter; a man came up and drew a gun – demanded man’s wallet and frisked him; patted down woman and sexually assaulted her. Gunman then told them to leave bus shelter and run across an adjacent field – 2 ran to nearest building and called military police; who took them to the station.

McCormack and Smith identified Smith in a lineup separately – and McCormack identified Stevens in a photo beforehand.

Stevens tried in January 1990; deadlocked; mistrial; retrial on same charges convicted Stevens for robbery and sexual assault.

STEVEN: Wanted to bring in testimony of Tyrone Mitchell; victim of a similar crime 3 days after crime here – degree of similarity between the crimes becomes the question? (SIMILARITIES ON PAGE 172). Fruits of robbery showing up in same area is probative that the same individual committed both offenses.

REVERSE 404(b) : doesn’t come up often, but has been written about at length. Relevance becomes an issue.

DISTRICT COURT:
Government defends district court’s exclusion by asserting that a D may avail himself of Rule 404(b) in only 3 constrained circumstances that did not apply to the instant case:

REVIEW:
District court imposed too stringent a standard of similarity on Stevens; and that Government has unnecessarily compartmentalized the permissible uses of “reverse 404(b)” evidence.

A DEFENDANT MAY INTRO REVERSE 404B EVIDENCE SO LONG AS ITS PROBATIVE VALUE UNDER RULE 401 IS NOT SUBSTANTIALLY OUTWEIGHED BY RULE 403 CONSIDERATIONS.

(admissibility depends on straightforward balancing of probative value against considerations like undue waste of time and confusion of the issues).

TEST that the evidence Stevens wants to introduce satisfies the 401 relevancy standard, then turn to the countervailing 403 considerations. Potential waste of time or misleading jury here is minimal. No appreciable risk that evidence presentation would have degenerated into an irrelevant mini-trial. The thrust of the challenge to introduction was 401-based; not 403-based.
CONCLUSION: Probative value of Mitchell robbery was not substantially outweighed by the prospect of undue delay or confusion of the issues. Stevens was entitled to have the jury consider the evidence. Given the apparent closeness of the evidence, decline to affirm on harmless error grounds; reverse judgment – remand for new trial.

Afterthought on U.S. v. Stevens:

The court did not raise the possibility of unfair prejudice to the government. When the defendant offers reverse 404-b evidence of the sort at issue in Stevens, these forms of unfair prejudice pose no danger to the Government.

404 = flat ban on propensity reasoning -

4. Narrative Integrity (Res Gestae)

Absence of mistake – tends to be something you’ve done in the past that negates lack of intent

5. Absence of Accident

6. Doctrine of Chances

Most intellectually tricky of the ways to evade the propensity ban.

One side – a guilty person is likely to be guilty again – disparity of chances that an innocent person would strike again versus a guilty person. This is Rothstein’s idea; thinks the approach since Brides in the Bathtub is flawed.

Way it gets is: not focusing on accused subjectively, but more what are the chances in the world the likelihood of certain chains of events. Trouble is – number limits – child ER trips example – accident prone child – what are the chances that these are all accidents – what’s the magic number or type of accident? When does it not fit with common experience?

HOW UNUSUAL IS IT? HOW OUTSIDE OF COURSE OF COMMON EXPERIENCE IS IT?

Distinction from absence of mistake: Usually negating intent – I made a mistake

Doctrine of Chances

Rule 404(b) lists “proof of … absence of mistake or accident” as one of the “other purposes” for which evidence of other acts can be used.

Smith trial, Justice’s insight was the sheer improbability that Smith’s three wives could all die in their tubs without foul play – has become known as the doctrine of chances = seen as around-the-box.
Imwinkelried: Jury engaged in character reasoning must address subjective bad character. Jury assessing doctrine of chances must decide if the uncharged incidents are so numerous that it is objectively improbable that so many accidents would befall the accused.

Rothstein: the force of the doctrine of chances also draws from the perceived likelihood of guilty contrivance.

DOES THE DOCTRINE OF CHANCE TRULY EVADE THE PROPENSITY BOX?

C. The Huddleston Standard


Huddleston was charged with selling stolen goods in interstate commerce and another count of possessing stolen property in interstate commerce. The counts related to two portions of a shipment of stolen Memorex videotapes petitioner was alleged to have possessed and sold, knowing they were stolen.

Days after tapes disappeared from an Overnight Express lot in IL, Huddleston contacted a manager of a Magic Rent-to-Own in MI to sell tapes – he assured her they were not stolen; she arranged to buy 5000 of over 32,000.

Huddleston convicted by trial court of the possession count; appeals court initially reversed, concluding that Government failed to prove by clear and convincing evidence that similar act evidence (tvs) were stolen; thus evidence was inadmissible. On rehearing, Court affirmed the conviction.

Dispute: Whether Huddleston knew the tapes were stolen. Supreme Court to resolve conflict on: Courts of Appeals conflict, whether the trial court must make a preliminary finding before “similar act” and other Rule 404(b) evidence is submitted to the jury.

Huddleston says: jury ought not to be exposed to similar acts evidence until trial court has heard the evidence and made a 104(a) determination that defendant committed the similar act.

Evidence in question: Sales of goods, stolen appliances and potentially stolen tvs.

Rule 404 (b): Applies in civil and criminal cases; generally prohibits the introduction of evidence of extrinsic acts that might adversely reflect on the actor’s character; unless that evidence bears on a relevant issue in the case such as motive; opportunity; or knowledge.

Threshold inquiry a court must make before admitting “similar acts” evidence: whether the evidence is probative of a material issue other than character.

Rule 104(a):

Trial court does not weigh credibility nor makes a finding that Government has proved conditional fact by a preponderance of the evidence.
Instead, court examines all the evidence and decides whether the jury could reasonably find the conditional fact by a preponderance of the evidence. (emphasis on all evidence; sum may be greater than parts).

Petitioner: Argues grave potential for improper prejudice of similar acts evidence – that a preliminary finding is necessary to protect D from unfair prejudice.

Court: Huddleston’s position is inconsistent with the FRE structure and with the plain language of 404 (b).

Text offers no intimation that evidence requires a preliminary showing. If offered for a proper purpose, evidence needs to meet 402 and 403 admissibility requirements.

Idea of judicial oversight petitioner wants is belied by the Advisory Committee and Congress notes on 404(b).

Conclusion: Evidence should be admitted if there is sufficient evidence to support a finding by the jury that the defendant committed the similar act.

Jury could have reasonably concluded that the televisions were stolen; trial court properly allowed evidence to go before the jury; affirmed.

Protection against unfair prejudice that the Defendant seeks emanates not from a requirement of a preliminary finding by a trial court; but by 4 reqs:

1) 404(b) that evidence be offered for a proper purpose
2) Relevancy requirement of 402 enforced through 104(b)
3) 403 assessment of whether probative value of similar acts is substantially outweighed by its potential of unfair prejudice
4) 105 limiting instruction to jury if similar acts evidence is admitted

D. Propensity Evidence in Sexual Assault Cases

Focus of FRE 413. 414, and 415

Beginning our discussion of true exceptions to the propensity evidence ban. These three rules were enacted as part of the Violent Crime Control and Law Enforcement Act of 1994 – permits prosecutors and civil plaintiffs to offer evidence of the defendant’s other acts of sexual assault or child molestation “on any matter to which it is relevant.”

History we consider: Lannan = IN Supreme Court rejects common law rule permitting type of evidence now allowed by 413-415. Kirsch = NH Supreme Court rebuffed prosecution’s arguments that evidence of the D’s other acts of sexual molestation did not violate 404(a)’s propensity ban. Guardia = considers application of the rules; which came into effect in 1995.

Is it an improvement to save prosecutors the effort of having to justify evidence of sexual offenses?

Rape Shield

(from 9/16/08)
**Rule 412**

Sharp contrast to Rules 413-415. Rape shield: closes off sexual past of the victim.

People v. Abbot – Notorious example of the attitude pre-rape shield state. Famous line “Messalina and Lucretia” – woman in rape case is not to be believed if she’s sexually experiences. Case as a credibility contest – the woman as less worthy of belief if sexually active and man claims consent.

SIBLEY – Different treatment of man. Defendant denies improper relations with complainant. Bad character of the man for chastity does not affect his character for truthfulness (as is the case for woman.)

The standard was unjust and outrageous. Anatomy of a Murder Clip: Suggestion: the woman’s divorce makes her less credible; particularly since it was not allowed in her church. 2 elements: 1) looseness; 2) religion.

Argument: you were the kind of woman who lied to your husband and might have cheated on your husband.

RULE 412 = NOT an ABSOLUTE bar. It does not close ff all inquiry into the background of the complainant.

It applies to both civil and criminal proceedings. Proceeding must involve alleged sexual misconduct (does not JUST apply to complainant in case).

“Any alleged victim,” Say plaintiff in sexual harassment case wants to bring in other witnesses. Contrast: Rule 403 only applies to PARTIES as opposed to “ANY ALLEGED VICTIM.”

EXCEPTIONS:

412 (B)(1): Criminal cases

If otherwise inadmissible under these rules. Evidence does NOT get in automatically under this exception; but 412(a) simply does not apply.

Example: Woman says she was raped; Defendant is entitled to show that the evidence is of someone else’s rape of the woman.

Also – to prove consent – an ongoing sexual relationship in the past – NOT relevant to consent if man knows she has had sex with OTHERS.

Catchall criminal exception: constitutional rights of the defendant.

Olden v. Kentucky

The exception was not in place when this case was decided.

Civil case (B)(2):

Standard a lot easier in a civil case. Ban can be overcome by satisfying a balancing test. PRESUMPTION – is that evidence in INADMISSIBLE. Baseline assumption is the REVERSE of 403 calculus = the probative value must substantially outweigh the risk of harm to the victim or unfair prejudice to the party – even BROADER than unfair prejudic under 403.
DISTINCTION between sexual behavior (=specific acts) versus REPUTATION.

Advisory Committee Notes:
On definition of “sexual behavior” = use of contraceptives, etc. – Implications of sexual activity. “Behavior” = broadly construed; can include fantasies etc.
“Sexual predisposition” – designed to exclude evidence that may have sexual connotation to a factfinder (“dressing like a slut”).
(C.) Particular procedures for evidence introduced – Special notice must be given for 412(B) exception evidence.

Application
Olden v. Kentucky
Woman claims rape; is evidence of her affair with Russell admissible? Defendant says: motive – sex was consensual; she’s lying to protect her relationship with Russell. Trial court excluded the evidence of the relationship.
U.S. Supreme Court – reverses – defendant’s Sixth Amendment Confrontation Clause rights violated – Right to cross-examine witnesses against him. HERE: could not expose bias of witness appropriately through cross-examination
Constitution TRUMPS common law and statutory evidence rules. Point seems obvious, but we can lose sight of it.
RULE 412 (C.) – CATCHALL EXCEPTION – even if rape shield would keep evidence out – you cannot violate constitutional rights of defendant in a criminal case
Stands for a broader principle – consider other constitutional provisions (beyond 6th Amendment even) → Constitution trumps the evidence code (obviously not as big in civil cases

Back to 404
Exceptions INTERNAL to 404, the run-of-the-mill cases. 404(a) – general propensity ban – (a0(1) – Exceptions to ban = NOT the routes around the box; in those cases 40 doesn’t apply (M.O., etc.)
True exceptions: Explicit PCI Travel. Proponent of evidence specifically introduces character evidence to make a character argument.
CRIMINAL CASE – pertinent trait offered by accused.
404(a)(2) – Character of alleged victim (SUBJECT to rape shield limitations)
Character evidence in a criminal case = mostly a tool for defendant; sometimes will raise a reasonable doubt – Character witness can have a powerful effect on a jury (think John Connolly, Billy Graham). Strategic calculus once accused opens the door.

Michaelson (J. Jackson)
Famous because Jackson explains the Rules of Evidence so well. FRE have largely codified type of law Michaelson describes. Good example of how the rules work and why we have them

(a)(1);
(a)(2) – “Accused” = criminally accused – if underlying conduct of a quasi-criminal nature; sometimes bending rules to apply to civil (jurisdictional variation).

3 ways defendant can open the door:
1) Opinion or reputation to show a pertinent trait of his character
   Prosecution may then bring in opinion or reputation to rebut; and on cross-examination, inquire (without extrinsic evidence) of specific acts
2) Defendant – pertinent character trait of alleged victim.
   Prosecution may rebut with opinion or reputation evidence regarding same trait of victim – the specific allegation. Also, tending to show that accused possessed the SAME character trait (glass houses)
3) Without character evidence, defendant might open door to its use by defending against a charge by suggesting that the alleged victim was the first aggressor – prosecution may introduce evidence to show the character trait of peacefulness in the alleged victim.

Note: Accused has control of his own fate

405

Evidence of Habit

Chapter 4 – Impeachment and Character for Truthfulness

A. Modes of Impeachment

A lawyer impeaches a witness by casting doubt on the witness’s accuracy or trustworthiness. Impeachment can take several forms with varying difficulty of evidentiary analysis.

That’s an Error vs. That’s a Lie

Distinguishing between allegations of mistake and of mendacity.

A lawyer can call a witness mistaken by casting doubt on her powers of:
   -Perception (eyesight, hearing, lighting at crime scene)
   -Memory (passage of time; witness’ age)
   -Narrative Accuracy (suggesting witness misspoke)

Character evidence rules impose no constraint on those modes of calling a witness mistaken. A lawyer typically may ask a witness about her perception, memory, or narrative skills and may offer other evidence besides her testimony on these issues as long as the evidence is relevant under Rule 401 and can survive a Rule 403 weighing test.
You’re Lying vs. You’re a Liar

Non-Character Impeachment:
A lawyer’s suggestion that a witness is lying NOW may say little about the witness’ general tendency to tell the truth – 3 forms:
1) CONTRADICTION BY CONFLICTING EVIDENCE
   -(Red light was green) – Such contradiction can expose lies and mistakes of perception, memory, and narration.
2) CONTRADICTION BY PAST INCONSISTENT STATEMENT
   -Theory of this form: the witness has said different things at different times about the color of the light and therefore shouldn’t be believed ON THIS POINT.
3) EVIDENCE OF BIAS
   -Bias – describes the relationship between a party and a witness which might lead the witness to slant his testimony in favor of or against a party. Close kin of motive (treated under 404(b)). Like motive, bias typically describes a non-character reason for acting.

Character-Based Impeachment:
Sometimes a lawyer seeks to cast doubt on a witness’ words by showing that he is, by trait, a liar and lied in conformity with that trait. Seems prohibited by 404(a). BUT RULE 404(a)(3) specifically permits propensity evidence concerning “the character of a witness” as provided in 607-609

Impeachment Evidence Flowchart (p. 249)
3 non-character forms of impeachment – Typically evidence of contradiction or bias doesn’t attack a witness’ character for truthfulness. So lines of inference typically don’t go through a propensity box; evidence admissible if otherwise so (402, 403).

B. Impeachment by Opinion, Reputation, and Cross-Examination about Past Lies

Focus on FRE 404(a)(3) & 608

Gerald Whitmore was convicted by a jury on firearm and drug charges. He appeals the firearm conviction on the ground that the district court committed reversible error in preventing him a trial from attacking the credibility of the arresting officer.
At trial, Soto provided, almost exclusively, the evidence connecting Whitmore to the gun.
Whitmore attempted to attack Soto’s credibility; trial court kept all out:
-3 defense witnesses regarding Soto’s “character for truthfulness” under 608(a)
-Cross-examining on: suspension of driver’s license; failure to report suspension of license to supervisors; failure to pay child support (all under 608(b)).

Analysis:
CHARACTER WITNESSES
Cherkis and Edmonds’ testimony on Soto’s alleged reputation for truthfulness was “too remote” in time from trial.

Cooper (defense counsel – leaving aside issue of ‘court community’ existence or non-existence) – district court found the foundation for his testimony weak because it relied on Cooper’s conversations with only a few other counsel – subset of proposed community.

District court did not abuse discretion.

**CROSS-EXAMINATION OF SOTO**

Trial court precluded cross-ex on the matters on the grounds that there was “no basis” for the cross-examination b/c Whitmore’s only basis for them was inadmissible hearsay.

Court says: Counsel needed only a reasonable basis for asking questions; questioner must have some facts that support a genuine belief.

Copy of Soto’s driving record was sufficient basis (D counsel still bound by witnesses’ answers – 608(b) prevents extrinsic evidence on cross).

District court abused discretion.

**ERROR NOT HARMLESS**

Government claims: proposed cross only had “marginal evidentiary value.”

Rulings, if erroneous, were harmless b/c of corroborating officers in arrest and Whitmore’s “incredible defense theory.”

Government does not win these args b/c only evidence of other officer connecting Whitmore to the gun was Whitmore holding the right side of his jacket as he ran.

**Conclusion**

Cumulative effect of prohibiting proposed lines of cross-ex was to deprive D of any genuine opportunity to challenge the credibility of the only witness who testified that he possessed the gun in question.

Cannot conclude that error was harmless; remand for new trial.

**Character and Credibility: Study Guide (Part I)**

**Fundamentals**

Evidence of a person’s character, if offered to prove action inconformity therewith, is generally barred. Six exceptions to general rule of exclusion.

Exceptions:

413
414
415
404(a)(1) – Character of accused
404(a)(2) – Character of victim
404(a)(3) – Character of witness

404(a)(3) concerns us now.

Under 404(a)(3), character evidence may be admitted as provided in Rules 607, 608, and 609. In general 608 and 609 say that once a witness has offered testimony, the opposing lawyer may use character evidence to support her credibility.

All character evidence, to be relevant, must bear on a “pertinent trait of character”. Language of 404(a)(1) and (a)(2).

608 and 609 constrain when and how a party may offer evidence about a witness’ character for truthfulness. There are two ways in which these rules permit more liberal proof of character than a1 and a2.

1) 608 and 609 apply in criminal AND CIVIL cases
2) EITHER party may initiate an attack on a witness’ character for truthfulness (only criminal D under a1 and a2 – accused must put own or victim’s character at issue first).

The Impeachment Evidence Flowchart

Important ordering principle imposed by 608(a): A party may SUPPORT a witness’ character for truthfulness only after the other party has attacked that character.

Rule 608(a)

Rule 608(a) permits a litigant to offer evidence of a witness’ “character for truthfulness or untruthfulness” in the form of OPINION or REPUTATION.

Evidence MUST pertain to character for this specific quality.

Rule 608(b)

Rule 608(b) permits a party to ask on cross-ex about “specific instances of the conduct of a witness.” Rule 608 (b)(1) and (b)(2) address two separate contexts:

1) during cross-ex of the principal witness
2) during cross-ex of a character witness who has offered testimony about the principal witness’ character for truthfulness or untruthfulness.

Allows more liberal use of specific instances of conduct than does 405(a) – which governs form of 404(a)1 and 2. – ONLY cross-ex of character witness. (THINK ABOUT THIS DIFFERENCE MORE)

Limitations on FRE 608(b)(1)

This rule must have limits – generalized attack, embarrassment concerns.

Explicit limitations:

-Instance of conduct must be “Probative of truthfulness or untruthfulness”
-Specific instance of conduct “May not be proved by extrinsic evidence”
Implicit limitations:
- “discretion of the court” = Rule 403 weighing test
- Good faith/reasonable basis/ genuine belief in instance of conduct principle
- 611(a)(3) limitation: Trial judge must “exercise reasonable control…to…protect witnesses from harassment or undue embarrassment” (part of judge’s discretion analysis)

ALSO
Rule 608(b) is not a back door for admission of evidence not admissible under Rule 609.

**B. Impeachment with Past Convictions**

**Focus on FRE 609**

1. **The Theory and History of Rule 609**


It is extremely unlikely that any person testifies dishonestly because of a trait of dishonesty manifested by dishonest behavior in other, very different circumstances.

By ordinary probability and contrary to the Rules of Evidence, a person who has previously committed a certain type of crime is more likely to have committed another like it than one who has not.

Line of reasoning – may accord with logic and experience, but is utterly repugnant to basic premises of the trial process. Discrediting the exculpatory testimony of the one felon on trial may convict him on evidence that offers no basis whatsoever for selecting him over thousands of others with similar records.

**Rule 609 and Defendant Testimony: Historical Prelude**

Rule 609 – Permits opposing counsel to impeach witnesses with evidence of their past crimes – Rule has a long and eye-opening history.

Older provision of the common law barred all convicted felons from taking the witness stand. Theory was that convicted felon had no credibility as a witness.

In the mid- nineteenth century, this rule was abolished in most American jurisdictions – replaced with a new rule permitting felons to testify, but allowing opposing party to impeach them with evidence of their past crimes.

The new rule brought the new problem – since evidence of the past crimes can come in, we presume and limit such that the jury may only use the evidence to establish D as a liar, not a thief or whatever crime.

Judge Ames attacked the new laws, which legislators wanted to help criminal defendants, instead exposed them to damaging cross-examination with evidence of their past wrongdoings. Two unpleasant alternatives:
1) If Defendant does not testify, jury will convict – presuming D’s guilt because he does not explain himself.
2) If D takes stand: on cross, past convictions will be offered to impeach them.

Today: Rule 609(a)(1) give criminal defendants stronger protection as witnesses than other witnesses – extra-protective weighing test.

Train- evaluating Ames’ thoughts later: the first confirmed from hearing jurors talk to each other; upshot = a law that purported to grant defendants a new right to testify at trial instead deprived them of a right to any meaningful trial – left to seek the best plea bargain possible.

Eisenberg & Hans, Effect of Prior Criminal Record on Decision to Testify and on Trial Outcomes

Study on the relations between the existence of a prior criminal record, and defendants’ testifying at a trial, between testifying at trial and juries’ learning about a criminal record, and between juries’ learning about a criminal record and their decisions to convict or acquit.

Not testifying in one’s own defense may influence trial outcomes notwithstanding the Fifth Amendment’s protections against self-incrimination.

Juries’ knowledge of prior criminal history is significantly associated with conviction in weak cases and not significantly associated with conviction in strong cases.

One could view the prior record as “making up” for evidentiary deficiencies or the prior record as evidence tending to suggest guilt. Under either view, the prior record makes a difference.

The criminal record effect could be even stronger than we have found here. Record for similar offenses creates the most bias. The enhance conviction probability that prior record evidence supplies in close cases may well contribute to erroneous convictions.

2. Rule 609 in Force

Facts: Defendant charged with one count of kidnapping; one of transporting a stolen motor vehicle.

Issue: Defendant moves to suppress Government’s proposed introduction of certain past convictions as impeachment evidence if the defendant takes the stand.

Rule: 609
Placed upon the Government the burden of persuading the Court that the convictions are admissible.
609(a)(1): Convictions must be punishable by death or imprisonment in excess of one year.

AND

Court must determine that the probative value of admitting the evidence of these convictions outweighs the prejudicial effect to the defendant.

Balancing Tests under 609(a):

J. Burger, 5-Factor Test from Gordon:

1) Nature of the crime
2) Time of the conviction and witness’ subsequent history
3) Similarity between the past crime and the charged crime
4) Importance of the Defendant’s testimony
5) Centrality of the credibility issue

TIME LIMIT in 609(b):

When a conviction is offered as impeachment evidence and it is over 10 years old, it is not admissible unless “The Court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.”

Also requires that the Government give advance notice of its intention to use such evidence.

Analysis:

609(b): The special provisions do not apply; reconfinement pursuant to parole violation is confinement imposed for the original conviction.

Balancing Tests under 609(a):

J. Burger, 5-Factor Test from Gordon:

1) Nature of the crime
   Violent acts against individuals – generally little or no bearing on honesty or veracity – Nature of these four convictions is a factor against admitting them for impeachment purposes.
   Probative value not as high as it could be since crime not one of dishonesty. Still a range within non-dishonest felonies.
2) Time of the conviction and witness’ subsequent history
   -D’s continued conflict with the law, even while on parole, is a factor supporting admission of the convictions.
3) Similarity between the past crime and the charged crime
   Admitted only to impeach the credibility of the defendant as a witness; will jury engage in impermissible assumption even with a limiting instruction?
   Court of the opinion here that there’s a strong argument to keep the kidnapping charge from the jury’s knowledge.
4) Importance of the Defendant’s testimony
   May be of some importance, favoring nonadmission
5) Centrality of the credibility issue

Counterbalances factor 4, credibility may be a central issue in the case, a factor favoring admission

Conclusion:

The probative value of the kidnapping conviction does not outweigh the prejudicial effect knowledge would have on the jury.

Admission of the other 3 should sufficiently serve the purpose of impeaching the D’s credibility – adding the fourth would be overkill at the risk of introducing prejudicial error; kidnapping conviction inadmissible under 609(a).

Other 4; Government has established that the probative value for impeachment purposes outweighs the prejudicial effect introduction of such evidence would have on the jury.

Character and Credibility: Study Guide Part 2

Rule 609 permits a litigant to impeach a witness with evidence that the witness has been convicted previously of a crime.

Evidence may take form of a court document reflecting the conviction. Inquiries into the underlying details of the crime generally not permitted – but some judges permit the witness to explain the circumstances of the crime or the conviction.

NOTE: Judges will rigorously enforce the very specific time standards of Rule 609(a)(1) and Rule 609(b).

Rule 609(a)(1)

Written in terms of the available penalty, not the penalty actually assessed. NOTE: the evidence is admissible against a witness other than the accused in a criminal case only if it survives a Rule 403 weighing test – evidence offered against the accused in a criminal case must survive a stricter weighing test: admitted only if its probative value outweighs its potential to cause unfair prejudice to the defendant.

Balancing Tests under 609(a):
J. Burger, 5-Factor Test from Gordon:
1) Nature of the crime
2) Time of the conviction and witness’ subsequent history
3) Similarity between the past crime and the charged crime
4) Importance of the Defendant’s testimony
5) Centrality of the credibility issue

The fourth standard means that the more critical the defendant’s testimony is to his case, the more hesitant the court should be to admit the impeaching evidence,

Trial judges have discretion under Rule 403 to admit evidence of a past conviction while withholding from the jurors the nature of that conviction. Jurors in such cases learn only of a witness’ “felony” conviction or her conviction of a “crime punishable by imprisonment in excess of one year” and the date of conviction.
In general, trial courts permit jurors to learn of the nature of the past crime. Court held, a “conviction-only” method ignores the teaching of Gordon that different crimes have different probative powers in showing untruthful characters.

**Rule 609(a)(2) – CRIMES OF DISHONESTY**

Carves out a class of convictions as particularly probative of untruthful character and declares that they “shall be admitted regardless of punishment”. Alone in the evidentiary universe, evidence admitted under this Rule escapes Rule 403 balancing and any other weighing test.

Rule applies when “it can be readily determined that establishing the elements of the crime required proof or admission of an act of dishonestly or false statement by the witness.”

CRIMEN FALSI – ultimate criminal act was one of deceit. AC Notes suggest that bank robbery and bank larceny do not qualify. “Dishonesty” in a narrow or broad view.

Aim: to ban mini-trials.
(e.g. – perjury, embezzlement)

Although evidence of dishonesty or false statement generally must be admitted without a discretionary weighing test, such evidence is subject to the constraints imposed by Rules 609 (b)(c)(d).

**HARDER CALLS:** - Sometimes carried out/committed in a dishonest way or through dishonest means. Court can decide that a particular crime is one of dishonesty. Simple theft NOT a crimen falsi on its face. BUT theft can be carried out in a dishonest way.

Risk of spinning off into mini-trials. Fight over whether theft conviction was one of dishonesty – prosecutor will intro evidence from the other trial.

609 amended to try to curtail ability of courts to try to look into past convictions (“if it can readily be determined”) = DOES NOT LIMIT category to crimen falsi.

Outside crimes of dishonesty: assault, prostitution, murder (not typically).

**Rule 609(b)**

When the conviction is more than 10 years old, it will be excluded “unless the court determines…that the probative value of the conviction…substantially outweighs its prejudicial effect.”

Reverse 403-weighing test. Stricter than either in 609(a)(1). In effect, the Rule establishes a rebuttable presumption that evidence of old convictions is not admissible. Also requires notice on opponent if you want to intro evidence under this rule.

The “whichever is the later date” – general 10 year – conviction or release, whichever is later…unless court determines (= safety valve). Admissible in special circumstance – v. specific facts and circumstances, particularly probative – pretty rare for this test to be met.
Implications of manner of calculation: Say convicted 30 years ago, served 25 years, now 5 years later – still within limit – ALWAYS ask yourself when the release was.

When do you start counting backwards from? Day trial starts? Day you try to introduce the evidence? Arguments: D always wants later date (not indictment or trial beginning – rather intro of evidence – can say that point is the one that matters the most ). Flip side – could lead to gaming for when particular witnesses are called. Fuzzy area of the law; no clear majority position – consider policy arguments.

Rule 609(d)

Juvenile adjudications are never admissible in civil cases or to impeach the testimony of criminal defendants. Even when used against other witnesses in a criminal case, they must survive the strictest standard of any prescribed in these rules.

Small safety valve in a criminal case: Admissible for a witness other than the accused only if “the offense would be admissible to attack the credibility if an adult and the court is satisfied that admission is necessary for a fair determination of the issue of guilt or innocence.”

Does not simply refer to a case that took place before the witness was 18 – juvenile adjudication = legal term of art.

Rule 609(e)

Just b/c a conviction is being appealed; does NOT take it out of the operation of the rule.

Various Standards of Admission

Set out here, most permissive to most restrictive:

1) Rule 609 (a)(2)
2) Rule 609(a)(1)
3) Rule 609(a)(1): The accused
4) Rule 609(b)
5) Rule 609(d)

The method behind reflects discrete 403-style weighing tests. Reflects judgments about the varying risk of unfair prejudice posed by evidence of past convictions.

1) 609(a)(1) – More serious crimes suggest greater readiness to lie under oath
2) 609(a)(2) – Crimes involving deceit are especially probative of one’s propensity to lie and therefore are automatically admissible
3) 609(b) – More recent crimes are more probative of one’s present character
4) 609© - Person’s successful rehabilitation diminishes probativeness of past crimes; later “finding of innocence” reduces probativeness to near zero
   a. Pardon, rehabilitating – rationale for admitting the conviction dissipates = changed character so idea of acting in conformity with lying character, wind taken out of the sails. Pardon NOT ENOUGH to get you there –
need finding of rehabilitation. Pardon/annulment must be based on a finding of innocence or another identified in the rules.

5) 609(d) – If witness was a juvenile at time of past offense, there’s a greater chance that her character has substantially altered and improved in the interim.

**Rule 609 – Case Notes on Appellate Review**

Puts criminal defendants in a particularly vulnerable position. D may justly worry that jury will use evidence of past convictions offered only to impeach as evidence that D is not merely a liar, but also a thief etc.

Rule-writers, aware of this risk of unfair prejudice, made Rule 609 especially protective of criminal defendants. If trial judge disregards, D may normally appeal.

Supreme Court: D may not appeal from trial judge’s ruling unless 2 conditions met: (1) D must have testified at trial; and (2) Prosecutor must have introduced evidence of the contested conviction.

**Luce v. United States – 469 U.S. 38 (1984).**

Defendant did not testify; thus impossible for a reviewing court to measure how badly the challenged evidence would have harmed the defendant’s case.

Any possible harm flowing from an district court’s in limine motion permitting impeachment by a prior conviction is wholly speculative.

Brennan – careful weighing of probative value and prejudicial effect that Rule 609(a) requires can only be evaluated adequately on appeal in the specific factual context of a trial as it has unfolded.

**Ohler v. United States – 529 U.S. 753 (2000).**

Offering evidence of the past conviction herself, the defendant has waived any right to complain about its admission.

(Souter, Stevens, Ginsburg, Breyer dissent) – will unfairly prejudice defendants (add more)

Postscript – Ohler does not bar state courts from allowing appeals by Ds who preemptively offer evidence of their past convictions after a judge’s pretrial ruling that such evidence would be admissible to impeach them.

**Wissler & Saks, On Inefficacy of Limiting Instructions (testing Uviller’s suspicions)**

Testing the concerns that cautionary instructions may not enable the jury “to restrict the impact” of prior conviction evidence “to the issue of credibility”.

Key findings: Credibility judgments of mock jurors were unaffected by prior conviction condition. D’s credibility did not vary by prior record condition, but conviction rates did vary as a function of the existence and type of prior record. Appears that mock jurors used the prior conviction evidence to help them judge the likelihood that the D committed the crime charged. Key – here, prior conviction evidence does not have its impact on verdicts by way of an intervening impact on perceptions of credibility.


**D. Rehabilitation**

Character and Credibility – Study Guide – Part III

**Rehabilitating the Credibility of a Witness**

Rehabilitation concerns a party’s attempts to support a witness’ character for truthfulness. Rule 608(a)(2) makes clear that one party may rehabilitate its own witness’ character for truthfulness ONLY AFTER the other party has attacked the witness’ character for truthfulness. What qualifies?

Rules 608 and 609 provide some forms of attack – One party has:

1) Offered opinion or reputation testimony of the witness’ bad character for truthfulness (Rule 608(a))
2) Elicited on cross-examination evidence of specific acts of the witness that are probative of untruthful character (Rule 608(b))
3) Offered evidence of a past conviction of a witness under Rule 609

Then other party may use techniques permitted by 608 to rehabilitate witness’ character for truthfulness.

There are at least 3 ways to attack a witness’ character for truthfulness of witness’ testimony: evidence of bias; contradiction by past inconsistent statement; contradiction by conflicting evidence.

Evidence that contradicts a witness’ specific testimony MAY call into question witness’ general character for truthfulness. AC Notes clarify: If contradicted testimony may be explained as a mistake of perception etc, NOT an attack on character for truthfulness.

The truthfulness of a witness’ testimony in this proceeding may be corroborated by non-character evidence without regard to the constraints imposed by Rule 608.

Litigant need not wait for the opposing party to attack the first witness’ testimony or her character for truthfulness. B/c evidence offered to prove color of traffic light – NOT character for truthfulness – it is not constrained by the character evidence rules. However, the evidence may be excluded under 403 as cumulative (time-wasting) or under rules we haven’t yet studied.

**E. Use of Extrinsic Evidence**

Character and Credibility: Study Guide – Part IV

**Extrinsic Evidence**

Common law principle; extrinsic evidence will not be admitted on a collateral matter. Exactly what constitutes “extrinsic evidence” and a “collateral matter” depends
somewhat on the circumstances – two specific contexts to focus on, for understanding the relevant rules of admissibility.

**In the Context of Character Evidence**

2 points in the rules governing character evidence at which the litigant reaches a dead end.

1) 405 (a) – litigant may ask a character witness on cross-ex whether that witness has heard of a specific act committed by person about whom witness is testifying; lawyer may present no extrinsic evidence regardless of answer.

2) Rule 608(b) – litigant may cross-examine a witness about specific instances of conduct that bear on character for truthfulness. Rule explicitly states that such conduct “other than conviction of a crime as provided in Rule 609; may not be proved by extrinsic evidence” Stuck with witness’ answer.

Extrinsic = “more than” or “outside of” what can be gotten on cross-examination. Extrinsic evidence that tends to prove BOTH a collateral matter AND SOMETHING ELSE may well be admissible.

ABEL – evidence of bias is not character evidence governed by Rule 608, so a witness’ bias is not deemed collateral. Evidence is admissible if it is admissible for one purpose and not another.

PISARI – No further recourse, ATF agent’s testimony was extrinsic evidence.

**IMPORTANT POINT:** Rule 608(b)’s bar against extrinsic evidence applies only to evidence offered to show the witness’ general character for truthfulness. The rule places no restriction on extrinsic evidence offered to show that the witness lied about non-character matters in this case.

**In the Context of Contradicting Specific Testimony**

If a matter is not collateral, extrinsic evidence is allowed. Common law: a litigant could offer extrinsic evidence on a particular subject to contradict a witness only if that subject had “such a connection with the issue [in dispute], that [the litigant] would be allowed to give it in evidence’ independent of its value in contradicting the witness.

CL mechanical rule has given way to a more flexible; fact-based 403 approach. Advisory Committee recently endorsed the modern approach: 2003 Amendment to Rule 608(b) leaves the admissibility of extrinsic evidence offered for [non-character based] grounds of impeachment (such as contradiction, prior inconsistent statement, bias and mental capacity) to Rules 402 and 403.

**Unit Summary**

- May be impeached for…
- Any principal witness may be questioned on cross about any specific act that call into question that witness’ character for truthfulness
- Qs about specific acts cannot be asked on direct (same 405)
- Any opinion or rep witness can be questioned on cross about specific acts about witness to test strength of opinion on witness’ rep
- Witness may only be Q-ed about the specific acts as general rule; 608, Q-er stuck with answer – 608 extrinsic evidence bar
- 609 an important exception
- When basis for impeaching is a prior conviction, 609 and extrinsic evidence
- Honest character of any witness can be proven only if his honesty is first attacked

Next – Hearsay; 360-74 – the basic hearsay rules.

Chapter 7 – The Rule Against Hearsay

B. Defining Hearsay

1. The Basic Rule

Focus on FRE 801(a)-(c.) & 802

Introduction

What is hearsay- sometimes what a witness heard someone say isn’t hearsay at all.

Hearsay rule is about the RELIABILITY of the evidence the jury hears.

Four testimonial capacities (that we worry may fail) – can understand them through risks or their failure

1) Perception
   a. Risk of witness’ misperception – witness’ view might have been obstructed – cross-ex is useful in testing perception b/c often the witness will not perceive the misperception

2) Memory
   a. Risk of faulty memory – witness may have perceived correctly at the time, but is she remembering correctly? Cross can test memory – jury can see how sure you are based on your demeanor

3) Narration
   a. Can speak in a way where you understand what you mean – cross ex can force speaker to speak more precisely when precision matters – or fix something if you meant to say something else (That’s what I meant to say = faulty narration)

4) Sincerity
   a. Risk of lying on the stand – Hearsay rule is MOST concerned with this capacity – Cross-ex is supposed to be one of the greatest engines in smoking this out – and jury can see witness’ demeanor –
Think about how the hearsay rules mitigate these risks. If declarant not on the stand or made statement while not on the stand -

Accuracy-testing Courtroom Tools (gives confidence in accuracy of testimony):
1) The oath
2) Demeanor evidence
3) Cross-examination (opposing lawyers probe for deficiencies in 4 capacities)
4) (not really number 4, but also witness may be less likely to lie in court before eyes of public and opposing parties; plus dignity of courtroom may make lying seem unseemly)

Why Bar Hearsay
Say witness B.C. testifies “A.B. told me that she saw John pull the trigger.”

In this case, the probative powers of the oath, demeanor evidence, and cross-ex reach only as far as the reliability of BC’s testimony about what AB said. To get to truth of AB’s assertion (thus to conclusion that John pulled the trigger), we must rely on AB’s untested testimonial capacities.

Defining Hearsay (see 801(a)(b)(c); 802)
HEARSAY is an out-of-court statement offered by a litigant to prove what the declarant asserted.

How rule-writers could have clarified 801(c.):
“Hearsay is a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence by a litigant to prove the truth of the matter asserted by the declarant (NOT by the litigant).

Two 801(c.) Questions:
1) Is the litigant offering the statement to prove (the truth of) what it says or was meant to say?
2) Did the declarant assert – that is, did she mean to communicate – that fact?

IMP – BOTH answers must be YES for a statement to be hearsay

Non-Hearsay Uses of Out-of-Court Statements
Answering the first question requires us to know why a litigant is offering the out-of-court statement. Important thing is whether litigant offers statement to prove what is says or was meant to say. If not, no hearsay.

Of several common non-hearsay purposes for evidence of an out-of-court statement, here are three:
1) To prove the impact of the statement on someone who heard it
2) To prove a legal right or duty that was triggered by – or an offense that was caused by – uttering the statement, and
3) To impeach the declarant’s later, in-court testimony.
**Words Offered to Prove Their Effect on the Listener**

BC testifies that AB told him: “Watch out for Joey – he’s looking for you, and he has a gun.”

Hearsay if offered to prove Joey was looking for him and had a gun. Not hearsay if to prove that D had reason to fear Joey (affirmative defense of self-defense).

Rule does not exclude words offered to prove their effect on the listener because the evidentiary significance of the statement does not depend on the soundness of the declarant’s testimonial capacities.

**Legally Operative Words (Verbal Acts)**

Simply uttering certain words, a declarant can trigger a legal right or duty or commit an offense.

Such statements operate independently of the speaker’s belief or intended meaning. The soundness of her testimonial capacities therefore doesn’t matter, so there is no reason to exclude her words as hearsay.

**Inconsistent Statements Offered to Impeach**

Theory: NOT to show that the out-of-court statement is true; but that the witness said different things at different times about this fact; therefore testimony about it cannot be trusted.

Under this theory, truth of out-of-court statement is irrelevant; only offered to impeach; not hearsay.

**The Hearsay Flowchart (p. 369)**

Common feature to three above categories of non-hearsay: In offering an out-of-court statement for these purposes, the proponent does not rely on the belief of the declarant when she declared. – What matters is that the words were spoken; declarant’s testimonial capacities are irrelevant.

Ask: Does the lawyer’s purpose in offering this statement depend on the truth of the declarant’s belief?

Risk still exists that the out-of-court statement may be used by jury for the forbidden hearsay purpose of proving their truth => Rule 105 limiting instruction - chance that jurors will not or cannot obey instruction leads to 403 weighing.

**Hearsay – 801’s subsections**

Something can be a statement even if in written or non-verbal form. Statements must be made by persons; not machines/animals. Statements must be offered for the truth of the matter asserted. Declarant’s presence in court does not prevent hearsay.

**802 – General non-admissibility of hearsay**
Statement for 801(c.)

Somewhat of a term of art – assertion if intended by the person as an assertion – action or utterance NOT hearsay unless it intentionally asserts some proposition that it’s capable of truth or falsity

Non-verbal conduct: ship captain. Captain didn’t intentionally communicate – thus not a statement for purposes of 801 – conduct is out of hearsay definition – risk of insincerity is absent

Same principle of intentionality applies to utterances. In contrast to def of non-verbal conduct, written assertion doesn’t include the “if intended by the declarant to be one” – nonetheless, courts have applied same standard of intention. Zenni – placing bets = verbal utterance – if offered to prove gamblers thought they were calling a gambling est – not hearsay b/c the point of their assertion was not intentionally comm. that they were calling a gambling establishment - Verbal utterances tend to assert SOME proposition – along with whatever they intentionally assert – they also communicate a lot of other beliefs.

INDIRECT ASSERTIONS – pay attention to inferential steps – someone planning a retirement home is thinking about the long term = step in inferential chain – only if true that she was planning home, meeting with architect about it, that it gets to what you want to show = OFFERED FOR ITS TRUTH IF ANY STEP DEPENDS ON TRUTH

INTENT OF THE SPEAKER THAT COUNTS. What listener knows or doesn’t know can help shed light on what speaker’s intent was.

NATURE OF AN ASSERTION

801(a)

Statement = assertion, etc. (get def.)
An assertion in an intentional communication. Fact is intentionally communicated.

Intention

Problem of intentionality.
Sometimes easier with non-verbal conduct.

Verbal Utterances

What matters is whether or not the declarant intended to make a point, and if so; what the point was.

INTENT is key.

One principle to be aware of : Do not let the form of the utterance confuse you. Questions can be assertive. Answer in the form of a question can be an assertion: example: point is DUH.
Go beyond the utterance itself and its form to the POINT. Have to be careful not to interpret words just literally for hearsay analysis.

“I could eat a horse” Point = I’m hungry. Can’t avoid hearsay by truth of whether declarant could in fact eat a horse.

Like the intent test for non-verbal conduct; takes a common sense approach. What did declarant most likely intend to communicate?

EXAMPLE:

“Is Nick home?” – Offered as evidence to see if declarant believed that Nick was at the house. Are you asserting to the person who answers the door that Nick lives there? More likely simply that you don’t know whether or not Nick is home. Person is information-gathering.

Add some intrigue – Nick’s been evading door-knocker – then intentionally communicates, “you and I both know he’s here.”

LEADING CASE FOR INTENDED ASSERTIONS:

United States v. Zenni

Prosecution of bookie – Prosecution wants to intro – when police with lawful warrant searched the place; cops answered the phone, each time the person on the other end of the phone answered- put amount of money on horse name.

Want the evidence in b/c don’t know who called, probably. Best evidence is what police can relate about what caller said. Clearly caller acting on the belief that the person on the other end of the line is a bookmaker. Is it an intentional assertion of that fact?

In normal course, like the “Is Nick home?” example – like calling Papa John’s and ordering pizza, assume person on the other end of the line KNOWS it’s a pizza place.

Simply calling with bets – court held the phone calls were NOT assertions and therefore NOT hearsay statements under 801.

p. 214 Supplement – Description of assertions

Can be doubtful cases in which we’re not really sure – resolve in favor of admissibility = resolve in favor of it not being a statement.

Response to the concern of whether there’s communicative intent there or not. Advisory Committee recognizes risk, and assumes risk. AC: assumes its comments are directed toward NON-VERBAL conduct (context of ship captain case; that’s where the debate was).

C. Statements of Party Opponents

RULE 801(d)(2)(A) poses no obstacle to confessions made freely. Says: a party’s own words are “not hearsay” when offered against her at trial. Think as: statements of party opponents, although hearsay, are nonetheless admissible against their maker.

Statutory magic: takes hearsay, and says it’s not barred. – Statements of party opponents one of the biggest; most important categories here.
Video Clip: - Court Tv, trial of babysitter – Intro evidence that nanny found baby irritating for motive to abuse baby – Trooper – is it a hearsay statement offered for its truth – Assertion – the nanny THOUGHT the baby was fussy – might be tempted to think this isn’t being offered for truth b/c we don’t care if baby WAS fussy. But it IS an assertion b/c it matters whether the nanny THOUGHT the baby was fussy. Asserting that SHE THOUGHT those facts – thus meets def of hearsay statement.

Exception: 801(d)(2) – statement of a party opponent. CLARIFY: VVVVVVVV IMP. – Statement DOES NOT have to be against the speaker’s interests.

RATIONALE?
3 possibilities:
1) As a general matter, a statement that harms the speaker’s interests is more likely to be truthful than is ordinary hearsay.
   -Does not explain how rule admits statements by party opponent NOT made against speaker’s interests
   -Greater reliability of against-interest statements offers at least some justification
2) Inability to cross-examine hearsay declarants is a principal justification for the hearsay rule – since party is the declarant, she can simply take the stand to say circumstances of statement/what she knows
   -Problems for criminal Ds, who face strong disincentives to testify at trial (609; exception in civil and criminal actions – exception extends to statements made by spokespeersons, agents, or coconspirators)
3) Statement may come in because a party said it – part of adversarial system – this is war = strongest rationale (although not a perfect explanation)

1. The Party’s Own Words
Focus on FRE 801(d)(2)(A)

Problem 7.11 – Billables

Attorney sues airline after injuries from rough landing, saying she cannot work to full capacity. Airline wants to introduce records signed by P billing clients for an average of 104 hours/week during the 6 weeks after the flight.

If offered to prove her work capacity not diminished, are they admissible over P’s hearsay objection?

Hearsay? – statement – offered to prove truth of the matter asserted, hours worked shows that capacity less likely to be diminished -

Answer: Written statement – no requirement that P admit anything – written statement by party opponent, the records should be admissible as Rule 801(d)(2)(A) exception.

Even if associate has motive to pad hours – might be unreliable; it’s still her assertion that she worked those hours.
Problem 7.12 – Take My Blood

OJ Simpson defense attempts to introduce testimony with LA detective on the witness stand regarding D’s willingness to submit to DNA testing.

Statement is offered by the PARTY –NOT the party opponent – should not qualify as an exception under 801(d)(2)(A). The party attempts to offer his own out-of-court statement.

Is it hearsay? – Intentionally communicating willingness to give up blood making it less likely that he thinks it will match. Confidence in innocence. OJ thus asserts his innocence.

Another spin: simply giving consent, not intending to communicate belief in innocence.

The rationale is adversarial.

2. Adoptive Admissions

Focus on FRE 801(d)(2)(B)

a statement of which the party has manifested an adoption or belief in its truth…

Not necessarily a statement out of the party’s own mouth – someone else’s words that the party has adopted on own

4 preconditions:
1) Declarant had to have heard and understood the statement
2) Declarant was at liberty to respond
3) Circumstances had to naturally call for a response
4) Declarant had to fail to respond or respond in a way that doesn’t rebut, deny, demur

3. Statements of Agents

Focus on FRE 801(d)(2)(C.)& (D)

(C) a statement by a person authorized by the party to make a statement concerning the subject, or

(D) a statement by the party’s agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or
Mahlandt v. Wild Canid Survival & Research Center, Inc. - 588 F.2d 626 (8th Cir. 1978)

3/23/1973; 3-year-old Daniel Mahlandt sent across the street to pick up his brother. His path took him along a walkway adjacent to the Poos’ residence. Next to the walkway was a 5-foot chain link fence; Sophie the wolf was on a 6-foot chain.

Sophie home b/c Director of Education for the Wild Canid Survival Center was taking her to schools to give programs about wolves’ nature – Sophie known to be good-natured and stable. Wolf’s face was near Daniel’s face; neighbor heard child’s screams; didn’t know what wolf was doing; Clarke brought Daniel into his house. Wolf wailed; sign of compassion to get attention.

Poos left note on President’s door: - Call me; Sophie bit a child that came into our backyard. Supposedly discussed it with Sexton in person later.

Issue:
1) Should door note have been admitted?
2) Should P’s proof of conversation have been allowed?
3) Should minutes from Center’s meeting have been admitted?

Trial jury: brought in verdict for the defense – was the idea that the laceration matched fence marks more than they did wolf marks.

Trial judge: kept these 3 items out on grounds of lack of personal knowledge of the facts; thus the first two admissions were based on hearsay – 3rd admission was subject to same objection of hearsay and unreliability due to lack of personal knowledge.

Are the statements admissible? D argues Rule 801(d)(2) – does not provide for admission of in-house statements; only for admissions of third parties.

Advisory Committee discusses wrt 801(d)(2)(C.) – this is not a (C.) situation b/c Poos not authorized or directed to make a statement .BUT – rationale does not apply to this “(D)” situation.

Once agency, and the making of the statement while the relationship continues, are established, the statement is exempt so long as it relates to a matter within the scope of agency.”

Trial judge found evidence to be not reliable.

Advisory Committee on 801(d)(2) – Applying spirit of AC Notes; trial judge was wrong to exclude evidence of Poos’ statements as against himself or Wild Canid.

“In house” applies to 801(d)(2)(C.) regarding the MINUTES.

Judgment: But there was no servant, or agency, relationship which justified admitting the evidence of the board minutes as against Mr. Poos – None of the conditions of 801(d)(2) cover the claim that minutes of a corporate board meeting can be used against non-attending; non-participating employee.

DC judgment reversed, remanded to district for a new trial.
4. Coconspirator’s Statements

Focus on FRE 801(d)(2)(E) & 104(a)

*Bourjaily* initially settled several nagging evidentiary disputes and reserved another for future decision. All concerning coconspirator exception to the hearsay rule – specifically how to decide if preconditions are met:

1) That a conspiracy existed at the time the OOC statement was made
2) That the conspiracy included both the declarant and the party against whom the statement is offered; and
3) That the declarant spoke during the course of and in furtherance of the conspiracy

Supreme Court: trial judge should decide these preliminary questions under Rule 104(a). Justices ruled the proper standard of proof is preponderance of the evidence. And they ruled that the contested hearsay statement itself could be evidence of the existence of the conspiracy and other preliminary facts. They did not decide whether the contested hearsay statement could serve as the only evidence of these preliminary facts.

Rule 801(d)(2)’s last sentence seems to resolve this; “The contents of the statement shall be considered but are not alone sufficient to establish…the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered.” - added 1997

More general question to consider: Underlying – whether contested evidence EVER may be evidence of its own admissibility (arguably a live issue in some contexts).


Bourjaily – Afterthoughts

The Theory of the Coconspirator Exception

J. Blackmun in Bourjaily dissent considered the common law rationale behind the coconspirator exception: - exemption based upon agency principles; the underlying concept that a conspiracy is a common undertaking where the conspirators are all agents of each other and where the acts and statements of one can be attributed to all.

Through agency relationship, there is a vicarious admission of D. AC Notes’ response: dismisses agency theory of conspiracy as “at best a fiction.” – Is there another rationale?

The Existence of a “Conspiracy”

Application of the coconspirator exception does not depend on whether the government has formally charged conspiracy.

Senate Committee – rule meant to carry forward the universally accepted doctrine that a joint venturer is considered as a coconspirator for the purposes of the rule even
though no conspiracy has been charged. Joint venturer = one who knew of venturer and intended to associate with it.

Exception almost never applies to a confession knowingly made to the police and implicating one’s associates. (almost never “furthers” the conspiracy).

**Distinguishing 104(a) Questions from 104(b) Questions**

Court in BOURJAILY did not have to explicate a distinction between Rule 104(a) and (b) questions in the case because D and the Government agreed – but the distinction is important and perplexing.

What we know: Court in 104(a) and 104(b) both address how we should resolve questions on which the admissibility of the evidence depends. Bourjaily: Court determined that Rule 104(a) requires that the trial judge decide whether the preliminary conditions of the coconspirator exception were proved – standard = preponderance of the evidence.

Huddleston set the standard of 104(b) as whether a jury could reasonably find the conditional fact by a preponderance of the evidence.

Two important facts about the dual standard of proof:

1) Preponderance standard of Rule 104(a) is higher than the sufficient-evidence standard of Rule 104(b).
2) Cuts in the opposite direction – Rule 104(a) and the Court’s interpretation of that rule in Bourjaily make clear that the evidence used to prove facts under that rule need not itself be admissible.

- Rule 104(b) – only admissible evidence may be used to prove contested preliminary facts. – Rule requires “the introduction of evidence sufficient to support a finding of the fulfillment of the condition.”

MOST important Q: - How can we distinguish 104(a) questions from 104(b) questions? (= How do we know which preliminary questions the judge should decide by a preponderance of the evidence under 104(a) and which to jury under 104(b)?

Rule 104(a) suggests ALL to be resolved by court “subject to b” = effect seems B for matters of conditional relevance; and A for everything else.

Bourjaily had no conditional relevance Q, as did Huddleston. Difficulty with hearsay is not irrelevance, but its reliability. In Bourjaily, since preliminary questions imposed by the coconspirator exception are not matters on which the relevance of Lonardo’s statements depended, they had to be judge-resolved under 104(a).

**Rationalizing the Distinction: Judge’s and Jury’s Separate Spheres**

In the 104(b) contest, the judge’s ruling poses a hurdle to be overcome by the proponent before evidence may pass to a jury for its consideration.

Both 104(a) and 104(b) questions are in some sense for the jury. Under Rule 104(b), jury either finds or does not find a conditional fact. Jury will often second-guess a judge’s resolution of a 104 question. (jury unlikely to do this on a technical question, but
these will often involves matters of obvious importance to the jury – like when judge
must find expert qualified by preponderance of the evidence to give an opinion in the
field.

Can we justify the rationale for the different tasks 104(a) and 104(b) seem to
impose on judge and jury?

Week 6

Inconsistent Statements
Two primary ways prior inconsistent statements come n:
1) To impeach
   a. NON-HEARSAY purpose = witness blows hot and cold
2) For their truth
   a. Sometimes more helpful and effective – say – defendant is lying on the
      stand now; she was telling the truth before

RULE 613 – Procedure

Rule 613
Tries to restore the element of surprise (witness has less opportunity to lie). Rule
– balances fairness to witness with need to expose inconsistency with springing. Must
disclose copy of statement. 613(b) – describes fairness/right to expose balance with
regard to Extrinsic Evidence. Can introduce extrinsic evidence before you ask witness
about it – common law departure. Target witness must have the opportunity at some point
– timing at your option – just not necessarily before evidence comes in).

Prior Inconsistent Statements
Witness blows hot and cold.

When you offer instead for truth, you introduce it for a substantive purpose, this
use governed by Rule 801.

United States v. Ince
Ince convicted; appealed. Angela Neumann, witness, had told investigators ahead
of time that Ince had admitted to shooting and no longer had the gun. Became turncoat
witness on the stand.
Clear here that go using evidence to be probative – b/c

Probative value of Neumann’s testimony to the government? What did prosecutor
hope to get out of testimony on direct? To get her to say what hse said about the
delacrant. Unlikely if she wouldn’t recall before. Prosecutor would hope for – on cross,
impeaching credibility

Ince – elaborates the M doctrine. Prior statement not admissible for its truth –
hearsay rule prohibits – but it was permissibly used to impeach – the risk here that the
doctrine addresses is that the prosecutor will play games to exploit possibility that jury will use evidence for its inadmissible purpose. Neumann only called in second round to try to get impeachment in.

Distinction: procedural posture, prosecutor already knew witness was going to be unhelpful. P gave self opp. to get prior inconsistent statement in – so court proposes 403 test –

**Fletcher v. Weir**

Weir testified at trial – revealed exculpatory evidence not until trial – would think natural for Weir to reveal this at time of arrest. Can state use post-arrest silence to impeach?

State’s arg: you were silent until trial – state ruled post-arrest silence could be used. Miranda Q, state is using the silence. If Weir had received Miranda warnings at time, then silence could NOT be used at trial- fundamentally unfair in light of implicit assurances of the warning.

Since no Miranda warnings, state can introduce evidence of silence without violating the 5th/due process.

ALL FW addresses is the IMPEACHMENT use; NOT the SUBSTANTIVE use – substantive left an open question

Doyle “insolubly ambiguous”

If no interrogation, no Miranda necessary – no 5th Amendment obligation (how this arose) – con crim pro

**Using Prior Statements for Their Truth**

801(d)(1): Threshold requirement applied to all 3 uses.

Subject to Cross-Ex requirement: the hearsay declarant need not have been subject to cross at the time statement was made; rather NOW at the trial.

Matters for grand jury testimony. Can get testimony from there if witness if on the stand now. Cross-ex must be about statement itself, not the underlying events/subject of the statement.

**Prior Consistent Statements**

801(d)(1)

CONSISTENT – statement need not have been made under oath during a proceeding, unlike the inconsistent statement

Way the argument runs: you’ve been telling the same story – reason you’re claiming I had reason to lie did not change my story
Prior Consistent Statements
Tome – before motive to fabricate arose

Pre-Trial Identifications
Another 801 exception. Again, common theme, declarant is on the stand.

Threshold requirement that the witness must be subject to cross-ex - WHY pre-trial identifications so worthy?
OFTEN MORE reliable than identifications made in court – NOT like other testimony – ID pre-trial made closer to the event; closer to trial events have hardened to extent that witness unlikely to recant identification.
   Memory for faces fades particularly quickly – the person who identified pre-trial is the declarant – although others can relate content of statement, too – cop who heard the statement, not hearsay.

What if NOT an eyewitness identification – an earwitness – recognition of voice – YES – you can perceive through any of your senses
Say you identify a car leaving scene of bank robbery? NOT under exception because not a person.

Weichell
Composite sketch as evidence. Is it hearsay? The court ducks this question. Introducing this as substantive evidence? The assertion? That the sketch is the D; is the person who committed the crime. Double hearsay? Yes, b/c it’s based on what someone said he looked like. Then an adoption by the witness f the statement of the sketch artist as his own.
   At this time, MA moving away from CL to new regime. Majority – hard to see why composite sketch can’t count as a pre-trial identification; let it in. Can have 403 apply – just b/c statement satisfies a hearsay exception doesn’t mean it gets in.
   This case illustrates why we have the exception in the first place – memory of the face much better closer to the event b/c he only saw the man for a second. (assumption behind the exception)

Owens
Case that explores the threshold requirement that the declarant be subject to cross-examination concerning the statement.
   2 visits to hospital – first time he couldn’t remember, second time he could – he remembered attack itself but could not remember seeing his assailant.
   Issue: Is what he could give in court, does it satisfy cross-ex requirement?
   For 6th purposes, he was subject to cross-ex. But for purposes of Rule 801?
Court:
One argument D makes: b/c satisfies 804 def of unavailability, gives as one reason lack of memory of subject matter of declarant’s statement (Here: ID of attacker) – does unavailable for 804 mean the same thing as subject to cross for 801 purposes? Court says no – 801 doesn’t impose a mirror image requirement – simply must be subject to cross-ex concerning the statement –
When memory loss makes impossible ID in court, exception allows it to come in. Scalia – rare moment relying on legislative history.

If he couldn’t remember making the statement, then it wouldn’t qualify. Good solution could be – only identifying part coming in –

The 804 Exceptions – Begins Study of TRUE (as opposed to definitional) Hearsay Exceptions

Threshold requirement – that the declarant be unavailable –

Rule leaves open the possibility of other ways witness may be unavailable – but this safety valve not often used.

Declarant not unavailable if person wanting to offer statement – FORFEITURE of the hearsay exception – if you satisfy the threshold requirement, then need specific exception from 801(b)(1) – another

United States v. DiNapoli

Grand jury = not trial – inquisitorial in nature. Probable cause standard for indictment. Often, proceedings are secret. Transcript typically not available; proceedings closed, informal. Potential D/person of interest is not there.

Hearing. - Suspected of lying. Everybody thinks grand jury witnesses are lying. At trial, they claim 5th Amendment

Who wanted to call them as witnesses? – DiNapoli. The Ds want them, presumably, to say they had nothing to do with scheme – they invoke 5th –

Gov. position: not same motive to develop testimony at grand jury as at trial.

D: same position of wanting to convict,

Court takes more nuanced, middle option (albeit closer to the government’s side). In assessing similarity of motive- substantially similar interest -

In order for witness to be unavailable, they have to invoke it.

Government will almost always be able to show that it did not have a similar motive at the grand jury stage.

Bottom line: factors to evaluate when looking for similarity of motive

Lloyd v. American

(different from DiNapoli bottom line)

Rule: former testimony must have been developed or a predecessor in interest must have had motive
Predecessor – doesn’t have to be party

Holding: P in I – doesn’t have term of art meaning we’ve seen previously –

Dissent argues you need relationship of privity for P in I – Majority rejects this narrow def; says it’s very flexible – what we look for need not be privity, but similarity of interest.

Statutory interpretation question – see the court trying to take a view that will allow more rather than less evidence to be admitted.

**Wednesday 10/15**

**Review**

Rationale: speaking carefully. Consistent theme – defining interest only in terms of property, freedom and money. Interpretation of 804 from Williamson v. United States – court needs to look at a statement against interest ASSERTION BY ASSERTION. Dying declarations – Shepard v. US – famous Cardozo opinion – for exception to apply: not enough to fear, expect, be sure she’ll died – must have a settled hopeless expectation that death was at hand – consciousness of a swift and certain doom in the declarant’s mind – certain and imminent.

**Forfeiture by Wrongdoing – 804(b)(6)**

Statement offered against a party – when declarant unavailable, party cannot complain when that party has engaged in wrongdoing that rendered the declarant unavailable – in effect, forfeits their hearsay objection. A category all its own.

Classic example is the Mafioso expecting someone to testify against him.

**p. 484 – United States v. Gray**

Black widow. Collecting her husbands’ life insurance policies. Issue: want to introduce statements of second husband. She says statement inadmissible b/c she didn’t intend to render declarant unavailable for THIS trial. (dying declaration not satified by statements in question). Prosecutor – Gray forfeited her unavailability.

Court says: Identifies 3 prereqs to avail self of this exception – by a preponderance: - potential irony of preponderance – in this case a murder, different standard

1) engaged or acquiesced in wrongdoing
2) intended to render declarant unavailable
3) did render declarant unavailable

Court takes fairly liberal approach to the intense standard – FN 9 – intent requirement – only need be in part to render declarant unavailable (meaning primary motivation may be insurance collecting, sticking it to husband, etc).
Court concludes that the statements are admissible using the preponderance standard with the 3 prerequisites = met. It was enough that she was motivated at least in part by desire to silence husband. Trial pending – helps a lot.

(we’ll consider later how this exception relates to Confrontation Clause).

**Rule 803**

Series of hearsay exceptions that apply regardless of whether the declarant is available. Distinction from Rule 804 – 804 – is we’ll rely on what’s second best b/c it’s that or nothing.

803- premised on that what’s out of court is better than what’s in court – based on a judgment for preference of the out of court testimony.

Hearsay risks – theory with 803 is that risks are minimized in the situations addressed –

Excited utterances theory = no time to lie.

(youtube video)

**Excited Utterances – 803(2)**

A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

Haven’t paused, reflected. Speak simultaneously with what you think and perceive. Risks of perception and narrative ambiguity may actually be particularly high. Perception may be off as well. But risk of insincerity reduced, so we’re less concerned with other hearsay risks. Almost always, the event that prompts the excited utterance will be prompted by someone other than the declarant.

**Present Sense Impression – 803(1)**

A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

Simultaneous to event or immediately thereafter – tighter time requirement.

Radio clip – Redneck car crash – can use PSI but not excited utterance – often either will apply, but not always

PSIs – considered reliable b/c there’s no time to lie. Narrative ambiguity and perception risks still exist. Not that there’s no hearsay risks, but they’re reduced.

**– Then-Existing Condition (aka ‘state of mind’ exception)**

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.
State of mind exception – more restrictive than excited utterance – only admits evidence to prove state of mind – cannot use to prove outside facts.

Rationale: memory risks are negligible. Aren’t perception risks b/c every person is the world’s foremost authority on what he or she is thinking.

Statement must refer or involve a then-existing condition – Statements about what you thought or felt last week – do not come in under the exception. – statement only need to be made contemporaneously with the pain, not with its cause.

Note that the requirement applies only to the statement itself – NOT HOW YOU USE IT.

Statements of physical condition – “my arm hurts; I have a headache” – Doesn’t cover self-diagnostic statements – you are the authority on what you feel, but not what is causing the feeling. (migraine probably still within exception - be reasonable)

Facts remembered or believed – admits for very limited purpose of state of mind - not for anything going on in the outside world – can’t use the statement to prove the fact – can intertwine closely.

Think back to the implied (I think) preceding a statement. Cannot admit “I think the light is red” to show that the light is red – b/c then the exception would swallow the rule. Important thing – the statement to crack someone’s skull – not designed to be a way to prove any facts in the outside world.

**Statements for Medical Diagnosis**

**Refreshing Memory and Recorded Recollections**

Fresh in the memory requirement –

At the very outside, confirming signature and that her wouldn’t sign something if it were false is sufficient to satisfy the requirement – far edge.

With theses requirements, declarant is testifying – even though for 803 availability is irrelevant, for this exception as a practical matter, declarant must be on the stand.

Important limitation: document cannot be introduced -

**Focus on FRE 803(5) & 612**


Jury found appellant, Arnold Johnson, guilty of capital murder of Frank Johnson. Punishment stage led to death sentence; mandatory appeal here. State presented 26 witnesses, the most incriminating of whom was Reginald Taylor.

Witness statement from surviving victim. Frank went to drop off weed in a towel, Little Arnold and a dude with a Tech 9 were at the garage. Little Arnold wanted more
money from Frank. Driving, Tech 9 guy shot Frank, Arnold said ‘shoot him in the head’. Went to Frank’s mother’s house, gave statement to police downtown.

UNCOOPERATIVE: during examination by State: Taylor said statement bore his signature; didn’t remember date, didn’t remember what he said. – State leads him to say that statement’s content was more fresh in his mind when given. DEFENSE COUNSEL OBJECTS.

Was sufficient foundation laid? Court says NO.

RULE:
(5) Recorded recollection: Includes 4 ELEMENTS to be met:
1) The witness must have had firsthand/personal knowledge of the event
2) The written statement must be a … memorandum made at or near the time of the event while the witness had a clear and accurate memory of it
3) The witness must lack a present recollection of the event (live testimony would be preferred if possible)
4) The witness must vouch for the accuracy of the written memorandum

In particular, for the fourth element, the witness may testify that she presently remember recording the fact correctly or remembers recognizing the writing as accurate when she read it at an earlier time. If present memory less effective, then habit/practice or to check for accuracy is sufficient. At the extreme, it is sufficient if the individual testifies to recognizing her signature on he statement and that she believes the statement is correct b/c she would not have signed it if she had not believed it to be true at the time.

ANALYSIS/HOLDING:
Here, given record, it is apparent that the State did not lay a proper predicate for the admissibility of Taylor’s statement under Rule 803(5). Taylor never guaranteed that his memory was correctly transcribed or that the factual assertions contained in the statement read into evidence was inadmissible hearsay.

Judgment of trial court reversed, case remanded for a new trial.

Case really shows the limitations of the Rule. State didn’t elicit testimony from the witness that the statement accurately reflected the information. (witness made it next to impossible for prosecutor to properly lay foundation in this case).

Business Records

Focus on FRE 803(6) & (7)
Twofold rationale:
-NECESSITY
  -Alternative to firsthand testimony when lots of individuals participate in relevant transactions or many relevant transactions
    – time consuming, difficult to round up, memory problems – transactions may be indistinct, employees may be short term – lots of evidence would be lost if we could only rely on firsthand testimony


-RELIABILITY
  -Lack of incentive to lie – records are routine and unremarkable
  -Have positive incentives to tell the truth
    -Jobs depend on it
    -Records could be checked
    -For a business, theory goes – makes these records reliable
    -Can point to reasons why potentially not trustworthy as reason to exclude
  -Can impeach the record

REQUIREMENTS FOR APPLICATION:
1) Source of the information must have firsthand knowledge of the information
   - Each link, including the source, must have regular business duty to acquire and report to business keeping the record
2) Record must be in a tangible form (mental does not count)
3) Record must be generated by a business – 803(6) defines business broadly – an illegal enterprise may count, a nonprofit may count
   -Limits – personal records do not qualify
4) Record must have been generated in the course of the business’ regular activity.
5) Record must be regularly kept – cannot be an aberration that it was written down.
6) Must be made at or near time event occurred (obvi less reliable if memory not as fresh)
7) Must be ---- - to show what’s included, not what’s excluded
8) Establishing the foundation – must have a custodian testify that the foundational requirements are satisfied
   -Do not need oral testimony for this; can be certified by affidavit

-TRUSTWORTHINESS CLAUSE
  -When the source, or method etc. indicate lack of trustworthiness, this exception may not apply.
    -Palmer v. Hoffman – FRE not in effect when decided – (predecessor statute)
      -Court held: RR’s business = railroading, not litigating. – Court says record was not part of RR’s regularly CONDUCTED (ha) business. Business had incentive to lie.
      -Dissent – motivation, the exception - you’re risking excluding a lot of business records with this exception.
    Read the AC Notes – (pp.244-245). -

(Target scotch tape rolls inventory example – only Archie sees the tape – rule requires source to have firsthand knowledge, and others have business duty to report)

  On the question of negligence – trial court submitted three questions to jury – failure to ring a bell, to blow a whistle, and to have a light burning in front of the train.
  Accident occurred 12/25/1940, engineer made statement 12/27 - RR offered to prove in the language of 28 USC S695 that the statement of the engineer was signed in the regular course of business. Objection to statement’s entry. Can the statement come in, or is it inadmissible hearsay?
Analysis:

IF statement were made in the regular course of business, it would satisfy the other provisions of the Act. Here, the statement is not made in the regular course of business– the RR business. An accident report is not typical of entries made systematically or as a matter of routine to record events or occurrences, to reflect transactions with others, or to provide internal controls. To hold this statement to meet the requirements would lead to precedent of admitting statements leading to forgetting the trustworthiness of the statement as the basis for the exception. Can’t open the door to this avoidance of cross-examination. The primary use of the accident reports – utility is in litigating, not in railroading

Other provisions require RR accident reports, but excludes them from litigation.

Holding: Cannot suppose that Congress modified or qualified by implication these longstanding statutes when it permitted records made in the regular course of business to be introduced. We cannot assume that Congress’ express prohibition of use of company reports on its accidents impliedly altered that policy when it came to reports by employees to their superiors – inference is the other way. – Affirmed.

United States v. Vigneau

Vigneau and Crandall in venture to acquire drugs from suppliers in SW to NE. Western Union money transfers. Evidence used to convict Vigneau of conspiracy and money laundering included physical evidence of Western Union money transfer records.

Vigneau’s strongest claim on appeal: that district court erred in introducing, without redaction and for all purposes, Western Union “To Send Money” forms, primarily in support of money laundering charges. – IS the NAME/ADDRESS/TELEPHONE of Vigneau on the forms inadmissible hearsay used to identify Vigneau as the sender? .

Analysis:

If there were independent evidence that Vigneau was the writer, then statements would be party opponent admissions under 801(d)(2) – government lacked this independent evidence. Government argues admissible under business records, 803(6).

Difficulty with the records here – not that the forms are business records, but that the exception does not embrace statements contained within a business record that were made by one who is not a part of the business if the embraced statements are offered for their truth. NO such standards of regularity or business checks automatically assure the truth of a statement to the business by a stranger to it, such as that made by the bystander to the police officer, etc. Outsider information. This gloss on the business records exception = the ‘hearsay within hearsay’ problem.

Other issue – 3 ‘Send Money” forms with ore circumstantial evidence. Court finds sufficient circumstantial evidence specific to these documents to allow the inference that the sender information was indeed an admission by Patrick Vigneau, curing the hearsay problem.
Conclusion:
Sender name, address, telephone should not have been admitted for their truth. No plausible claim of harmless error as to 18 of money laundering counts when government would have had difficulty tying Vigneau to any of 18 specific transactions without the hearsay statements themselves.

Cannot find the unqualified admission of the computer records harmless even as to these three transactions. While we are inclined to think a jury would likely have accepted the slips in the van as reflecting transactions by Patrick Vigneau – in addition, given limited familiarity with exhibits, we are somewhat uncomfortable with rescuing these three counts based on a line of argument never articulated by the government.

CLASS NOTES on Vigneau:
Money orders represent the proceeds of the NE sales – Gov wants to intro 21 of these “to send” orders.
Would have helped the Government to know the Vigneau was the writer based on independent evidence, b/c then statement of party opponent exception applies. Judge Boudin – interesting about analysis – assumes independent evidence requirement for the statement of a party opponent exception to apply. LOOKING at 801(d) – only applies to conspiracy and agency exceptions the independent evidence requirement – does not explicitly apply to subsection (a).
For 18 of the statements, no corroborating evidence. Other hearsay exception the case considers? BUSINESS RECORDS – meat of the case – whether the business records exception applies to the 18. – Problem – that Vigneau a stranger to the business of Western Union. No business duty to speak truthfully – break in the chain.

6. Public Records and Reports

Focus on FRE 803(8) & (10)
Few Good Men Clip – absence of the public record exception could get it in. Another way to get it in? Is it hearsay? Maybe not an intentional assertion – may be cleaner – is it hearsay to begin with? Review.

FN: There’s a similar 803(7) entry for absence of business records. Really piling on to absence of hearsay statement.

Many (8) may also satisfy Business Records, but can run into other difficulties, particularly in criminal cases (Confrontation rights of criminal D).
Rationale: rests on assumption that public officials will do their job, their duties.

(8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which
matters there was a duty to report, excluding, however, in
criminal cases matters observed by police officers and other law
enforcement personnel, or (C) in civil actions and proceedings
and against the Government in criminal cases, factual findings
resulting from an investigation made pursuant to authority
granted by law, unless the sources of information or other
circumstances indicate lack of trustworthiness.

(10) **Absence of public record or entry.** To prove the absence
of a record, report, statement, or data compilation, in any form,
or the nonoccurrence or nonexistence of a matter of which a
record, report, statement, or data compilation, in any form, was
regularly made and preserved by a public office or agency,
evidence in the form of a certification in accordance with rule
902, or testimony, that diligent search failed to disclose the
record, report, statement, or data compilation, or entry.

**Beech Aircraft Corp. v. Rainey**

Does 803(8) extend to opinions and conclusions contained in such reports? Why
does the Court care? Why discomfort with idea of admitting opinions? Greater degree of
judgment required, think back to hearsay concerns – maybe more worthy of cross-exam.
Court: difficult to draw fact vs. opinion line. Also, unclear that “factual findings”
excludes opinions. Even if it does just mean facts, doesn’t necessarily mean the opinions
excluded. Analyzes text with statutory construction – legislative history conflicts – AC
Notes seem treated as the tie-breaker, more important than House and Senate
Committees.

The trustworthiness requirement kicks in when we’re more on the
opinion/conclusion/evaluation end of the spectrum. Not automatically excluded, but
safety valve demands necessity and trustworthiness analysis.

**Police Reports and Business Records -Cases**

Number of different routes – if statement can’t satisfy public concern, what does
that have to do with business records exception. BUT, special policy concern of
protecting rights of criminal defendants.

One argument – so what? Satisfying business records, can still keep it out if
there’s a Confrontation Clause problem. Flip side is D’s rights. Statutory construction:
more specific versus the more general controls.

**United States v. Oates**

2nd Circuit. More narrow, less likely to allow records in through what it sees as
business records backdoor. Idea that allowing such reports in causes a near certain
collision with criminal defendant’s Confrontation Clause rights.
United States v. Hayes – 861 F.2d 1225 (10th Cir. 1988)
Oates is unnecessarily narrow in its approach to admissibility of these types of records.

Finds way to incorporate principles of both decisions – “routine and non-adversarial matters.”

G. Residual Exception

Focus on FRE 807
A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Dallas County v. Commercial Union Assurance Co. – 286 F.2d 388 (5th Cir. 1961)
Can the insurers use the newspaper article – how can they get it it?
Court invokes a residual exception. Idea – in the truly unusual case, rules admit on the outside chance that statement is so trustworthy – need equivalent circumstantial guarantees of trustworthiness.

Dallas County Afterthoughts
Judge may have invoked residual exception as opposed to ancient documents due to lurking double hearsay problem – no way to show person who wrote the article had personal knowledge.
United States v. Laster – 258 F.3d 525 (6th Cir. 2001), cert. denied

Problem Laster addresses: records don’t qualify as business records due to the having nobody to satisfy the foundational requirement – lacking custodian. Majority: says near miss on business records, but finds requisite necessity and trustworthiness.

Dissent: then what’s the point of the rule? 2 provisions – should the specific control the general? 803(6) should control, b/c it’s the most closely applicable. Shouldn’t let the more general residual exception undercut the business records exception. The near miss

IF the residual exception doesn’t cover picking up the near misses, then what does it cover? Unresolved issue – either p.o.v. undercuts an exception.

Chapter 8 – Confrontation and Compulsory Process
VI. (Only applies to criminal prosecutions, remember).
In all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against him.

Interpretation? Court has never interpreted it so broadly as to keep out any and all hearsay. (think of fraud investigation where you need the paper trail). Don’t want witness to mean every hearsay declarant. WHAT IS THE UNDERLYING PRINCIPLE?
Would witness be one who speaks in a testimonial capacity?

A. The Confrontation Clause and Hearsay

NECESSITY
Prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement he wishes to use against the defendant.

RELIABILITY
Hearsay must be within a “firmly rooted” hearsay exception or demonstrate “particularized guarantees of truthfulness.”

Statements against interest exception and the catchall exceptions are the ones we’ve seen so far that aren’t firmly rooted. Ohio v. Roberts let in a lot of evidence without provoking Confrontation Clause problems.

COY & CRAIG (still good law)

- The Confrontation Clause guarantees the defendant a face-to-face confrontation with his accuser (be willing to say to defendant’s face what you have to say against him = procedural guarantee of trustworthiness)

(this was the general rule – above – Coy and Craig deal with difficulties with child witnesses = emotional trauma by face to face requirement) – Carve out a qualification
-Unless a child witness would suffer serious emotional distress such that [she could not] reasonably communicate if required to testify face to face.

(Scalia vehemently dissents from these exceptions) –

OHIO v. ROBERTS – (criticized; overruled)

**Mattox v. United States – 156 U.S. 237 (1895).**

Mattox was convicted of murder. Witnesses from previous trial had died – Mattox claimed his Confrontation Clause rights were infringed by permitting sworn testimony from first trial to be read against him in the second trial.

Court: object of the Confrontation Clause is to prevent depositions or ex parte affidavits, as sometimes used in civil cases to use against criminal defendant in lieu of personal examination and cross-examination.

The Rules definitely still merit consideration, even if the witness is dead, but policy concerns of necessity and this specific case factual scenario still exist. Need just prosecution of the accused and also, respect for the public safety on the other hand. Some things directly contrary to the letter of the law come in for other reasons.

**Confrontation Clause and Hearsay - Case Notes**

*Mattox Era*

Reliability test. Permits introduction of hearsay statements if particular guarantees of trustworthiness or within a firmly rooted exception.

**Crawford Era**

Primary concern of the 6th as far as hearsay is determining whether declarant functioned as a witness – Did declarant BEAR TESTIMONY – known as the testimonial approach to the 6th?

Roberts too broad b/c applied 6th to hearsay far from the core of the 6th’s concern. Too narrow b/c it did not.

BOTTOM LINE: 6th applies only to testimonial hearsay; leaving open what it meant for a statement to be testimonial.

One approach: testimonial = in formal testimonial materials (narrowest, J. Thomas approach). Definition gives us brighter line approach –

**Crawford v. Washington – 541 U.S. 36 (2004).**
The Confrontation Clause prohibits the admission against the accused of any out-of-court “testimonial” statement.

Crawford stabbed a man who allegedly tried to rape his wife. Crawford claims self-defense. Piece of evidence he claims to shore up the self-defense defense. Sylvia also gives a statement to the police – saying she didn’t think Lee had something in his hand. Similar statements except for crucial point. And Sylvia gives statement after Mirandized – as part of post-arrest investigation.

Statements against interest? Williamson – Sylvia opened herself up to accomplice liability – but also could see it as somewhat shifting blame – unclear that a federal court would call her statement against interest. And in that case plain old hearsay doctrine would keep it out. Washington State is free to interpret its statement against interest rule differently from federal courts in Williams.

Privileges – spousal privilege = one spouse can prevent another spouse from testifying against him. Sylvia is unavailable for court for this reason.

How might this be fair under Ohio v. Roberts? – (not a firmly rooted hearsay exception) - necessity satisfied, so the question is whether the statement bears particularized guarantees of trustworthiness.

  - Court here about Ohio v. Roberts – Scalia – procedural guarantee – 6th is not about substantive . Where does the testimonial requirement come from?
  - A “witness” is one who “bears testimony”.

Framers’ concern was TESTIMONIAL STATEMENTS (- not hearsay statements made outside the scope of testimonial statements

  - Roberts asks the wrong question by focusing on the substantive instead of the procedural.

Criticism of Roberts as underinclusive and overinclusive (582, under V)

Too broad = same mode of analysis whether or not hearsay consists of ex parte testimony.

Too narrow = admits statements that do consist of ex parte testimony based upon a mere finding of reliability.

CENTRAL Q post-Crawford: Whether the statement is testimonial or non? If non, then 6th Amendment not implicated to exclude the statement.

  - Crawford court refused to define “testimonial.”

REHNQUIST/O’CONNOR:

  - Difficult to apply test – big departure (we see the struggle of the lower courts in the follow up). Crawford obviously doesn’t give a bright line test.
Crawford Afterthoughts – New Constitutional Landscape + “Interrogation”

911 calls as testimonial or not?


Davis: 911 call – tenor of the conversation at first – dangerous situation in progress, the disturbance – call continues after he runs –

Hammon – after disturbance occurred, Hammon gives report to officers on what had happened. Statement all in past tense.

911 calls – both gather evidence and give emergency assistance. How to handle it? Both situations here differ from Crawford – Crawford at the station, Mirandized, in a formal police interview. Crawford satisfies it no matter what – these case present grey areas.

Davis: Statements were NOT testimonial. An objective evaluation of the purpose. From whose perspective? Court takes the approach, the primary purpose is the law enforcement official. TEST: Would an objective observer have understood the primary purpose of the interrogation itself an evidence-gathering function, etc? (BE READY FOR PROBLEMS FLESHING THIS OUT)

In Davis: emergency in progress, primary purpose of 911 operator there to resolve the emergency. To decide primary purpose: threat ongoing, level of emergency was high, identification of bf question primarily directed toward enabling police to get him to resolve emergency. (1 factor – level of emergency = high b/c threat was ongoing).

Application to Hammon: No emergency in progress (the same way as in Davis) – out of immediate danger – the police were there – bf/husband wasn’t actively trying to hit her – Conversation was also more formal. Thus, primary purpose of questioning was testimonial – to intro at trial could offend Confrontation Clause.

Court limits itself - Hammon only police interrogation; Davis only 911 calls. (leaves open, for example, potential of dying declaration exception as an exception to the 6th amendment).

Open Qs: dying declaration – if declarant intends to be testimonial w/ no interrogator; intent of interrogator not testimonial; 911 calls outside the domestic violence context.

Court looks to:
- Level of emergency
- Level of formality – (the more formal, the more likely testimonial)

J. Thomas – would be easier to require formality for testimonial requirement. (outvoted with the objective observer/primary purpose of interrogation)

**Davis v. Washington – Afterthoughts.**

Info
What about the nature of the prosecutions? Import of potential to vitiate domestic violence prosecutions?

Forfeiture – you can forfeit your right to C Clause protections by threatening witness to render her unavailable- (to construe this broadly helps save the dv prosecution?) Probably won’t always help prosecutors because the standard is difficult to satisfy.

911 Calls as threats/threat of false accusation – in DV context. Don’t want to suspend constitutional protections despite practical difficulties by classifying type of crime. Forfeiture part is a signal to prosecutors – we recognize the cost, hers a way to limit it somewhat.

DAVIS/HAMMON – takes narrower view of definition of testimonial statements. Non-testimonial in objectively indicating primary purpose of interrogation is police assistance in ongoing emergency. Testimonial when objectively circs indicate no ongoing emergency and primary purpose is to establish info to be used in a later prosecution.

911 context – Court – purpose of 911 operator, then the cop – not the victim. In assessing purpose of interrogator, need not concern ourselves with the objective purpose of the interrogator.

Out of court declarant – sending something in unsolicited? (leading into 8.1) – How to resolve testimonial versus nontestimonial nature? - her life is in danger – but she’s not seeking help to protect herself from the situation

2 Threshold Issues:
- Can you have a testimonial statement without interrogation?
  -Most courts say yes, not limited
  -Courts apply “statement is testimonial if reasonable person in position of the declarant would objectively foresee that his statement might be used in the investigation or prosecution of a crime.”

Path.
Is it hearsay?
Does an exception allow it to be introduced?
Does it violate D’s confrontation rights?

**Statements of Child Victims**
Almost invariably nontestimonial – depends on primary purpose of interrogation

**Certificates and Affidavits**
Business records – Crawford said not testimonial by nature. Testimonial nature of lab reports?
What of Nontestimonial Statements?
Davis spoke obscurely, but essentially abandoned Roberts. Eliminating Confrontation Clause protections of nontestimonial hearsay no matter the reliability. CC offers no protection against unreliable nontestimonial hearsay.

Giles v. California
Requires the defendant to act with a purpose of preventing declarant from testifying.

Originalism’s Limits
Which common law to pay attention to and which to ignore? Breyer found a prosecutor could satisfy the condition by showing that the defendant wrongfully caused the declarant’s absence.

Despite the apparent outcome of Giles, all 9 justices read in many domestic violence cases to evade the apparent outcome of Giles by attributing to the defendant’s history of abuse and ultimate murder the purpose of ridding the victim as a witness.

Forfeiture: maxim – one shouldn’t be able to take advantage of his own wrong.

Crawford, Davis, and Giles: Helping or Hurting Criminal Defendants?
Crawford: defense boon at first, providing extra protections for testimonial statements and retaining Roberts’ old protections in most nontestimonial hearsay situations. Hammon – clear advance for criminal defendants – police interview was testimonial. Giles – strongly pro-defendant.

3 reasons for doubting Crawford line as helpful for criminal Ds:
1) Court’s new primary purpose test cuts clearly for defendants only when there’s no ongoing emergency.
2) Likely application of primary-purpose test to child victims. Child’s statements almost certainly non-testimonial.
3) Judgments that damaging hearsay statements are non-testimonial leaves defendants with no way to keep them out, regardless of reliability.

(Irony in Justice Scalia’s role in stripping nontestimonial hearsay of constitutional scrutiny).

Forfeiture –
(has same rationale been attempted for child abuse as we read for domestic violence?)

Broad approach = If D did something such that the declarant is unavailable, then he has forfeited his Confrontation right (Jensen, if victim is murdered, etc)

Narrower approach: Defendant must act with the PURPOSE of preventing declarant from testifying. Prosecutor must show reason by a preponderance of the evidence.
GILES:
Scalia – relying on historical evidence.
Souter- concurring – makes sense in light of circularity
Breyer – dissent, broader interp of forfeitur – equitable maxim – you shouldn’t be able ot profit from your wrongdoing

NEED PURPOSE FOR FORFEITURE OF CONFRONTATION RIGHT

Chapter 9 – Lay Opinions and Expert Testimony

A. Lay Opinions

FRE 701
Premise of the rule: lay witnesses may give opinions.

3 limits:
1) Opinion must be rationally based on perception
2) Must be helpful to a clear understanding, etc.
3) Must not be based on specialized etc knowledge in 702’s purview

1) Opinion must be rationally based on perception
   Based on personal knowledge requirement (ALWAYS ALWAYS CONSIDER WHETHER WITNESS HAS PERSONAL KNOWLEDGE)
   Reason, not intuition. We want a reasoned opinion from a witness. Look for difference between pure speculation and rational opinion.

2) Helpfulness standard
   a. Not really helpful if within ken of jurors to draw that conclusion
3) Must not be based on specialized etc knowledge
   a. Prong – doesn’t want litigants to circumvent 702 requirements by smuggling in expert testimony under 701 – undercuts special protections

Lay Opinions: Intro

United States v. Ganier
Same prong – difference between expert and lay testimony. Government computer testimony specialist wants to testify as lay witness regarding e-mail searches. Can use forensic software to shoe the purge was done pursuant to very specific search terms – backing up Gov claim that he wanted to purge incriminating documents pursuant to the grand jury investigation.
   Gov. wants the witness’ testimony in on eve of trial (so couldn’t prep summary in compliance with FRCrP 16 in time). Is this forensic software expert testimony? Gov says no, Ganier says yes.
   Court: forensic tests of Drueck were specialized enough. This kind of software and functions beyond the ken of the layperson. Layperson couldn’t just look at the
printout and figure out what it meant. IMPLICIT IN JUDGMENT: - that this case doesn’t fall within AC Notes exception (p. 179 Supp.) – 701, lay witness may offer opinion based on particularized knowledge gained by virtue of position in a business.

AC Notes
Judge Whyte – “a” and “the”. The AC refers to testimony about one’s OWN business – like a homeowner’s particularized knowledge of the value of her own home. Does NOT qualify you to opine about other matters.

B. Expert Testimony
Person with specialized knowledge. (Can be gained from life = a plumber may qualify based on knowledge of plumbing systems). Must establish foundation to show witness is qualified. Whether an expert is qualified is a judge 104(a) determination.

Need an alternate plan in case there’s a question of whether your expert will be qualified.

1. FRE 702 (who is an expert)

Jinro America v. Secure Investments, Inc.
Korean business culture expert. Pelham called, particularly about avoidance of Korean currency laws. Case emphasizes that you must be an expert on the opinion rendered – he wasn’t a cultural expert, nor an expert on the business community – really a guy who’d absorbed cultural stereotypes. Court insists upon a tighter connection here.

Problem 9.6 – Drug Argot
AC Notes to 701 – whole reason for 3rd restriction had to do with drug argot cases. Definitely requires specialized knowledge – definitely SUBJECT of expert testimony, but does this guy have it?

350 wiretaps – amount of experience relevant – depends on what wiretaps he listened to – was he working in the same community? How many wiretaps were in that community? Consultant on wiretap status not as direct to the point.

Expert Testimony
Must assist trier of fact. Circumstances are broad.

2. 702 & 704 (Im)Proper Topics of Expert Testimony
Matters of Common Knowledge

Opinions on Law and Opinions on Ultimate Issues
704 – At CL, courts tried to limit all witnesses to rendering opinions but NOT opinions on the ultimate issue - but could render subsidiary opinion stopping short. That became complicated – 704(a) gets rid of it, but not entirely. 704(b).
In a criminal case, courts much more careful wrt expert witnesses – Like 704(b), “intent to kill” restrictions.

**Problem 9.10 – Making Meth?**

Two on a shopping trip buy meth ingredients. One says unaware of the other’s purchases; had alternate explanations for individual purchases. Forensic chemist concluded intent to manufacture methamphetamine.

Line crossed: 704(b) language, think. Possessed with intent statement = intent in criminal case. On the flip side, he is saying how meth is made. Could permissibly use the expert to say that these were the purchases, these ingredients can make meth. The INTENT part of the expert’s statement is the problem.

Example: would possession of these ingredients be consistent with the ability (possibly even intent to) to manufacture meth – One could do it.

Basically, corral your expert.

**Hygh v. Jacobs**

Cox to offer expert opinion on “deadly physical force” – the physical force between the cop and the man he’s arresting. Civil case for damages. ALWAYS remains the province of the judge to be the expert on the LAW.

**State v. Batangan**

D accused of molesting his daughter. Dr. Bond offered to give testimony on child sex abuse victims. Implicit testimony that victim was believable. The JURY decides credibility.

Can be problematic if the jury may not know how to make that determination – say the child victim of sexual abuse – Here – prosecutor could have put on an expert to give patterns of behavior in victims of child molestation.

In this case, Dr. Bond didn’t even meet the threshold of providing testimony that can assist the jury. Here: mis-fit btw expert and topic for which he was called in.

**Opinions on Eyewitness Identification**

**United States v. Hines**

Info – Same prob we’ve seen again. Fine to equip jury with info with which they can assess credibility – yet impermissible for expert to opine on credibility. Cross-racial identification case.

**3. Proper Bases of Opinion Testimony**

**FRE 703 and 705**

**Rule 703:**

The first sentence permits an expert to rely on, base her opinion on, three sorts of facts:
1) Facts perceived by the expert before the hearing = must be based on personal observation (FIRSTHAND KNOWLEDGE)
   a. Uncontroversial; expected of every witness

2) Those facts perceived by or made known to the expert...at the hearing – hypotheses (104(b) standard) at or before trial
   a. As he sits in the courtroom
      i. Say doctor sitting in on personal injury
      ii. Any info found out this way has com through FRE
   b. Info conveyed to expert during hearing via hypothetical questions
      i. Doc wasn’t sitting in, make use of facts that came into the record to form questions

3) Those facts made known to the expert before the hearing – hearsay.
   a. Most controversial – permits an expert to rely on inadmissible evidence
   b. Thus haven’t gone through the sieve of the FRE
   c. Allows expert to rely on evidence that may be otherwise inadmissible – in forming an opinion that will be admissible
   d. When this is the case, the rule imposes a limitation: such outside data is permissible so long as it is of a type reasonably relied upon by experts in the field
   e. Issues – if we don’t want the info in to influence jurors, doesn’t it indirectly affect the jurors? Also, when expert opinion based on inadmissible evidence, may be way to smuggle in foundation for opinion to jury
   f. Change from CL – this category not permitted at CL – was impractical to try to maintain
   g. THE TWO RISKS: (1) why do we trust experts with the evidence?; (2) risk that inadmissible evidence will get in front of the jury indirectly (2000 amendment mitigates this risk – shall not be disclosed to jury by proponent unless probative value substantially outweighs prejudicial effect – reverse 403 test, essentially)

h.

Learned Treatises and Medical Statements
Info

Problem 9.12 – Stashing Guns
Can the officer, properly an expert, have a proper basis for the testimony he gave?

703 Category 3 – from experience as police officer – gained information from talks he had with inmates. Evidence must be of a type reasonably relied upon by experts in the field. We want to see some evidence that experts in the field rely upon this type – 3 types here – experience in field, police training sessions, chats with inmates – the latter 2 categories more problematic. For training sessions, probably fair to assume reliance on training sessions.
2-part inquiry: Do other experts rely on this kind of evidence? And is such reliance reasonable (judgment call by court)?

**In re Melton: Case Note**

The authority granted by Rule 703 to present expert opinions based on inadmissible facts raises a host of questions and difficulties.

In this case, we have a civil commitment proceeding – the only basis for opinion that Melton is a danger to others is hearsay, particularly report of mother that he punched her in the face.

AC Notes to Rule 703: Physician base diagnoses in part on hospital records and statements by patients and relatives. A properly qualified expert is assumed to have the necessary skill to evaluate secondhand information and only give it such probative force as the circumstances warrant.

### 4. Assessing the Reliability of Expert Scientific Testimony

702; “if the testimony is based on sufficient facts or data, testimony is a believable product (methodology); witness has applied tests reliably.

Federal judge’ options for gatekeeping: Could go on credentials (might abdicate judge’s role too much); general acceptance in relevant community – FRYE (many states continue to follow) – risks limiting the ability of cutting edge science to get in; . With any of these standards, you can apply the tests more or less rigorously/permissively – or stricter to more lax idea of what constitutes general acceptance.

**The Doctrine**

**Frye v. United States**

The standard: a test must have “gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments made thusfar.

**Daubert v. Merrell Dow Pharmaceuticals, Inc.**

Issue: Standard for admitting scientific testimony in a federal trial.

Company expert doctor reviewed the literature on Bendectin and human birth defects – no study had found Bendectin to be a substance capable of causing human birth defects – moved for summary judgment.

Petitioners: 8 experts concluded from test tube and animal studies plus pharmacological studies of the chemical structure of Bendectin supported an ability to cause birth defects. Also, reanalysis of previously published epidemiological studies.
District court: granted summary judgment; standard was that expert opinion based on a scientific technique is inadmissible unless the technique is “generally accepted” as reliable in the relevant scientific community.

“General acceptance” standard/Frye test had been in place for 70 years, but was under increasing attack. The FRE, 702, did not establish general acceptance as an absolute prerequisite to admissibility. Rules did not assimilate the Frye test.

That FRE displace the Frye test does not mean that the Rules place not limits on the admissibility of purportedly scientific evidence – 702 requires “scientific” knowledge and the condition of helping the trier of fact (goes to relevance). 702 – valid scientific connection to the pertinent inquiry as a precondition to admissibility.

BOTTOM LINE: Trial judge must determine at the outset pursuant to Rule 104(a) whether the expert is proposing to testify to: (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.

Multi-factor: Can be tested = falsifiability; Technique has been subject to peer review; Court should consider rate of error; existence; - essentially, general acceptance is not the sine qua non - List is illustrative – AC Notes identify more – (p. 183).

Potential concerns: that abandonment of the “general acceptance” as the exclusive requirement for admission will result in a free-for-all confusing the jury with junk science. Resolution: safeguards such as burden of proof instruction, cross-ex, and contrary evidence are appropriate safeguards.

Also: recognition of a screening role for the judge that allows for the exclusion of “invalid” evidence will sanction a stifling and repressive scientific orthodoxy and will be inimical to the search for the truth.

HOLDING: “General acceptance” IS NOT a necessary precondition to the admissibility of scientific evidence under FRE, but Rules (esp 702) assign to trial judge the task of ensuring that an expert’s testimony rests on a reliable foundation and is relevant.

DISSENT: Problem with “general observations” offered, suffer from common flaw: they are not applied to deciding whether particular testimony was or was not admissible, and therefore not only general, but vague and abstract. The justices overreach.

Daubert v. Merrell Dow: Afterthoughts

Explication of 702:

Info from 702. 702 amendments did not codify Daubert exactly. Nothing in writing of 702; no apparent scientific vs. non-scientific testimony distinction.

Reason enough to apply more scrutiny - drawing a line. No real reason (Breyer). After Daubert – one argument – if not superhard, jury can follow. To counter, think of the Marisa Tomei scene.

Daubert, Joiner, and Kumho Tire = Daubert Trilogy

Potential problems in applying Daubert factors to non-scientific testimony – the factors don’t map on as quickly when you’re dealing with non-scientific evidence.
Kumho Tire and Daubert are controversial: following readings suggest that…

Did Daubert make expert scientific evidence admission hurdle higher or lower?

…Daubert was going to lower the hurdle, welcoming in more expert testimony. In fact, may have shown that judges are more likely to keep evidence out. Must see if your experts can survive Daubert factors- requires spinoff hearings; science panels.

Daubert v. Merrell Dow – 9th Cir. Opinion on remand

J. NOT happy with new responsibilities. Same result. Shows representative reaction to Daubert test.

Article on Breast Implant Expert Testimony Admissibility

Info

Daubert Criticism – S. Haack

Info

Experts – Review
1) Testimony must assist the trier of fact
2) Legal opinions offered do not assist trier of fact
3) 704 – lifts the ban on opinions on ultimate issues –tells courts to relax somewhat – 704 ought NOT be taken to mean that experts can opine on any issue – abolition of the ultimate issue rule
4) Still cannot have expert telling jury what result to reach
5) 703 – proper bases for expert testimony

Privilege – General Principles

All the proposed FRE that deal with specific rules of privilege failed to be enacted. All we have is 501 = v. broad.

A. Rule 501’s Origins and Application

FRE 501:

Gives the federal courts express, Congress-granted authority to develop a body of privilege law. Laws must be developed in light of reason and experience. Last sentence: nod to Rules of Decision Act – Privilege is determined in accordance with state law. State privilege law controls. Federal common law of privilege applied when fed courts dealing with matters of federal question jurisdiction.

Principle: the state is entitled to every man’s evidence – the need to protect and foster certain types of relationships; certain expressions of human dignity. Unless you have a privilege – which is narrow, not permitted to withhold evidence.
Privilege: balances social policy against principle that the State is entitled to every man’s evidence.

**Jaffe v. Redmond – 518 U.S. 1 (1996).**

Most recent case on bounds of authority under 501. How broad/active is federal courts’ authority to develop law of privilege?

Why desire for access to the 50 counseling sessions with the psychotherapist? She did testify at trial- gives an account on the stand that doesn’t support the plaintiff’s case. Strategically – as plaintiff’s lawyer – show that she maybe wasn’t so sure. Looking for way to impeach her or substantively admit testimony that will hurt her. She might have been telling therapist about guilt/doubts/remorse.

At the time, there was no recognized psychotherapist-client privilege. Court considers whether the context is one of the narrow situations in which we can make an incursion into this maxim.

Analysis: Social good to citizenry; experience of other courts – all 50 states recognize such a privilege; federal common law should recognize such a privilege – Supreme Court recognized it in rejected privilege rules.

Holding: Psychotherapist communications are privileged. Can a clinical social worker fall within this? Yes.

FN 19: Deals with potential future exceptions to psychotherapist-patient privilege – serious threat of harm, etc. Say psychotherapist knows that patient going to go home to kill child (review that 9th circuit case from torts, the CA stalker/killer, potential tort liabilities – duty to warn under local law, circumstances?).

Scope? More difficult in defining the WHO falls within the ambit of the privilege in psychotherapist/reporter versus lawyer or spouse. Social workers count here due to socioeconomic concern – limiting the privilege only to those who cost more money to see would cause an undesirable class disparity.

Should this privilege be recognized? Think about areas that do not qualify. No right to assert doctor-patient privilege. (AMA lobbies for it). Same with other kinds of relationships – parent-child, for example.

HARDLY ANY PRIVILEGE THAT IS ABSOLUTE – Q IS HOW ELASTIC ARE THE EXCEPTIONS

**Problem 11.1 – Relayed Threats**

Retired cop often makes threats during sessions with psychotherapists. CCMSI threats. District judge rule that Auster “knew, when he made the September 13 threat, that it would be forwarded to CCMSI.”
Once he knew therapists would relay info on, no reason to expect confidentiality. Not waived, in order for confidentiality, need expectation of confidentiality. Have to intend that the communication be confidential.

If the judge recognizes FN 19 issue?

One reason for disclosure would be to protect the targets. Couldn’t that just be accomplished by the duty to warn – info the therapists passed on.

Could say duty to warn was co-extensive. COURTS HAVE SPLIT: SOME SAY CO_EXTENSIVE; SOME SAY WE SHOULD RECONIZE EXCEPTION WITH THREAT OF SERIOUS HARM. Rationale somewhat different. Exception to confidentiality – driven by interest in protecting potential victim in a particular circumstance. Reason for privilege exception: broader.

**In re: Grand Jury Subpoena, Judith Miller – 397 F.3d 964 (D.C. Cir.), cert. denied 545 U.S. 1150 (2005).**

Most states recognize some type of common law reporter-source privilege. The press has been lobbying Congress for a legislative enactment forever.

IS there a common law reporter privilege – court could agree on result, but not rationale.

Judith Miller = JAIL. Probably unnecessary to pursue the legislative enactment.

WHY Judge Tatel wants to recognize CL privilege:

(Supreme Court has said there’s no constitutional privilege.) Tatel invokes Jaffe, looking at recognition in 49-50 states. This experience gives reason that it’s ok under 501. Also gives policy rationale. Tatel refused to give unqualified privilege – saw it as susceptible to balancing – (ignores the “qualified privilege is no privilege at all”). Is it more beneficial to disclose or protect?

Practical problems in administrability of privilege? Who does it extend to? Privileges facilitate certain types or relationships: WAS it newsworthy that Plame recommended Joe Wilson for the post? Could have been – balance this against interest in national security.

See kind of balancing, generally in context of privilege – Tatel sees interest in every man’s evidence outweighing the privilege. (with some privileges, matter of human dignity, autonomy, concerns – prob not as much sway in the press context – more social utility than dignity grounds).

**Liptak, NYTimes – Reporter Jailed After Refusing to Name Source**

Judith Miller sent to jail in 2005 by a federal judge that declared he was “defying the law” by refusing to name a confidential source. Miller’s argument? If journalists can’t be trusted to guarantee confidentiality, then journalists can’t function, and no free press. This civil contempt constituted the most serious government/press confrontation since the Pentagon Papers’ publication.
B. Witnesses’ Privileges vs. Defendants’ Need for Evidence

Problem 11.2 – Right Meets Privilege

Public right to every man’s evidence versus social utility of privilege.

Here: individual’s right to defend himself versus social utility of privilege. King’s DP right to a fair trial, compulsory process, is butting against a psychotherapist-patient privilege.

Best arg. to resolve in favor of criminal defendant’s interests

The privilege holder always waives the privilege – big Q here will be whether the mother could have waived her son’s privilege. Indicator – the appt of ad litem rep indicates she wasn’t really acting in her son’s interest.

Balancing the rights of King against those of B.R. – DP – No way adjudication can be fair without this evidence. CHAMBERS v. MS. Held that D’s DP right could overcome MS common law hearsay rules: the Constitution always takes precedence. Hearsay – say we can’t find an applicable exception (no penal interest exception – review this info). Court would consider reliability, whether truly necessary to fair trial.

Review

Confidentiality much broader than privilege that only applies to the ability to resist subpoena. Professional obligation = distinct from privilege, analytically.


The Priest Case

A few different issues.

The priest-penitent privilege. The CL recognized it, continues even in federal courts. Rooted in the Catholic Confession process. Interest: respect for freedom of religion.

Does the privilege apply in this context? Court analyzes on page 879 – court considers it relevant that not a formal confession – reason for the privilege not to attach?

Whether Fornes in giving information had the intent to keep it confidential – he also told legal aid lawyer, his mother, etc. Does not necessarily mean he didn’t intend convo with Towles to be confidential. You might divulge same info but not want anyone to know you talked to the priest about it.
Chambers v. MS – Constitution will overcome CL evidentiary rule if the exclusion of evidence would render the defendant’s trial fundamentally unfair. Evidence must be vital to the defense and sufficiently reliable.

Chapter 12 – The Lawyer-Client Privilege and the Privilege Against Self-Incrimination

Bentham – Rationale of Judicial Evidence
He’s skeptical of the attorney-client privilege. But which side has the better argument?

The AC privilege has had staying power. Controversial when government takes measures to incur upon AC privilege.

A. Scope of the Lawyer-Client Privilege

Common Elements of the Professional Privileges

1) The privilege is the client’s
2) The privilege only protects only those confidential communications made to facilitate the rendering of professional services
   - Must be providing legal service – Not always clear-cut – providing mixed legal/business advice – Courts look at whether the nature of the service was predominantly legal
   - Doesn’t require that the attorney actually be retained
3) The privilege protects only confidential communications
4) The privilege protects only confidential communications (excludes things like client identity)
   - Protects communication itself, not the underlying fact – can’t say – I shared that fact with my lawyer, so it’s subject to attorney-client privilege.

1. The Nature of Legal Services

Proposed FRE 503

2. Defining Confidentiality

Facts: Howell’s complaint alleges that between 1976 and 1979, when he was a child, defendant William Joffe sexually abused him. Phone call, click indicated attorney thought she’d ended the voicemail,

Issue: Can an inadvertent disclosure constitute waiver?

Rule: Potential tests: Subjective analysis test. Dalen test: (1) reasonableness of precautions taken to prevent the disclosure; (2) time taken to rectify the error; (3)
scope of the discovery; (4) the extent of the disclosure; (5) the overriding issue of fairness.
(court applies the majority view, but check your jurisdiction)

**Holding:** Balancing test used; the defendants’ inadvertent disclosure did not constitute waiver of the attorney-client privilege.

**For our purposes:** Illustrates the intersection of confidentiality and waiver
First, judge decides whether client intended the conversation to be confidential.

One significant thing about the balancing test (p. 905) is that the court could have taken a different approach (strict liability now applied in the minority of jurisdictions; the most lenient even smaller minority intent-based intentional relinquishment standard).

**Problem 12.2 – Dumpster Diving**
Dumpster diving for discarded memo from opponent. Federal Evidence principles control.

Probably the weight of the balancing factors will find the privilege to apply. Key; retention of the privilege requires the client to take reasonable measures: “ordinary care, not elaborate counter-offenses”

(in a strict liability jurisdiction, deception and theft will not equal disclosure)

**Proposed rule 502 (b) proposes a test v. similar to that in Howard – pending for approval before Congress right now; will likely become effective by early 2009 – aimed at DISCOVERY.** 502(b) wouldn’t apply in the dumpster diving scenario but adoption of the middle of the road protection (change from CL strict liability) –

**Privilege Mechanics**
**HOW does attorney’s screwing up waive the CLIENT'S privilege?**
General privilege principle; the holder is the only one with the authority to assert it. As a practical matter, means the attorney cannot assert the privilege over the client’s objection. Ethical obligation to assert the privilege on behalf of your client. If client waives, then attorney can’t assert.

Mechanics: Rests on one claiming it. 104(a) determination for the judge. Courts do not permit blanket claims of privilege – generally requires doc by doc basis; need specific facts for invocation for each document, sometimes for portions of documents –
If privilege claim sustained, generally no interlocutory review – must turn doc over to district court. Time to raise you issue would be on appeal of the final judgment. When a privilege claim is denied, you can raise claim with court of appeals. If a privilege claim is sustained, you think erroneously, can bring it up on
appeal from adverse judgment. A non-party can get interlocutory review, b/c non-party not entitled to appeal.

   Hickman v. Taylor from CivPro – can take hit of contempt a la Fortinbras to get immediate appeal.

WAIVER: May come about in two ways:
   1) Express consent
      a. Express consent by the client to the testimony of the person who would otherwise be bound by the privilege
   2) Voluntary disclosure of a substantial portion of the privileged communication
      a. You turn over a doc in response to a discovery request – doesn’t have to be a knowing and intentional relinquishment

WHO can waive the privilege?
   -On one hand, client holds it, has auth to assert it, can waive it.
   -Other hand, atty is the client’s agent and as such possesses some degree of implied authority to waive on behalf of client – if atty acts in scope of agency in act of disclosure, client can be bound.
   In the rare situation where info disclosed over client’s objection, client can appeal.

SCOPE OF WAIVER
   -Generally no limit of waiver – with regard to parties and substance of waiver
   1) Parties
      -Can’t waive privilege as to THIS PERSON – disclosure to one person, one agency = waiver – makes stakes of litigation very high for repeat players. Can’t selectively disclose, so recognize consequences of disclosure.
   2) Limiting the AMOUNT of comm. disclosed
      -Generally rule is waiver for one part of the communication means waiver of all related parts of the communication.

Disclosure held to be involuntary if it occurs through fraud, deception, or theft. Also involuntary if it is compelled by court order. Preserves privilege argument for appeal.

Voluntary disclosure – classic examples:
   -Testimony or documents subpoenaed, party turns them over
   -During live testimony, someone privy to comm. discloses without objection by holder of the privilege – you know witness is privy to some privileged communication
   -RULE 612: Rule permits writing to refresh a witness’ recollection – most courts have held that if you use stuff protected by work product, etc, then it is voluntarily disclosed – if you prep witness using protected documents, you’ve waived the privilege (other side can request the witness prep)

Inadvertent/Accidental Disclosure
(not the same as knowingly disclosing a document you don’t realize is privileged)
- Sending an e-mail to the wrong person, miss a doc to be taken out in doc review

- 3 approaches below

- Issue – can the attorney’s mistake bind the client? Some courts say client bound by mistakes so long as committed in course of representation (agency theory). Other courts: not fair to visit the mistakes of the lawyer on the client.


Issue: Discovery dispute over inadvertent disclosure of a privileged document. Question concerns the proper standard for determining whether inadvertent waiver of AC privilege has occurred.

Rule: 3 approaches:

1) Strict liability, traditional
2) Lenient intent-based standard = waiver cannot be inadvertent
3) In – between – balancing test based on the totality of the circumstances surrounding the disclosure
   a. Court uses ALLDREAD factors from the 5th Circuit:
      i. Reasonableness of precaution taken to prevent disclosure
      ii. Amount of time taken to remedy the error
      iii. Scope of the discovery
      iv. Extent of the disclosure
      v. Overriding issue of fairness

Alldread factors “serves the purpose of the AC privilege, the protection of communications which the client fully intended would remain confidential, yet at the same time will not relieve those claiming the privilege of the consequences of their carelessness if the circumstances surrounding the disclosure do not clearly demonstrate that continued protection is warranted.

Holding: Magistrate judge applying factors properly found the document at issue to be privileged.

Week 13

Presence of Third Parties

Those there to provide legal assistance to the lawyer a diff situation – test of reasonable necessity – may not destroy the applicability of the privilege.

Reasonable necessity test – can also apply on the client’s side. Imagine you bring an elderly relative to a meeting. Confidentiality? Is your presence reasonably necessary from the client’s perspective?
B. Crime-Fraud Exception

Problem 12.7 – Custody Dispute

A common rule: permits lawyers to reveal otherwise confidential communications “to the extent that the lawyer reasonably believes necessary…to prevent the client from committing a criminal or fraudulent act that the lawyer believes

Crime fraud claim: Says privilege will not apply when the services of lawyer were sought or obtained to enable or aid a crime or fraud.


The Crime-Fraud Exception

Applies when you’re talking about future conduct. DOES NOT APPLY TO CONFESSIONS OF PAST CRIMINAL CONDUCT (COMMON MISTAKE).

Think as: what if you pulled the trigger and you don’t know if it was self-defense or what – you as a lay person don’t know the legal requirements. Interest: in getting clients to tell lawyer more o put on best defense possible. Rule looks to FUTURE CRIMES.

ISSUE: Proving that some piece of communication is excepted –whether you can use the comm. itself to establish that the exception applies – or whether the applicability of the exception must be proven entirely with reference to independent evidence.

Rule 104(a) – whether privilege applies – burden lies with party who wants to invoke privilege to convince judge. With crime fraud – burden on person wanting exemption must prove prerequisites. CATCH: In making det, judge not bound by rules of evidence except those regarding privilege. So if judge can’t consider privileged comm., then judge can’t use the comm. itself – which is almost always the only thing that will show

SC: rejects reading – 104(a) does not impose a bar to considering contents of a privileged comm., at least when court is deciding whether crime-fraud exception applies.

Fed CL of privilege – must be a showing of factual basis adequate to support good faith belief by a reasonable person…that the crime fraud exception applies. After good faith showing, district court has discretion to decide whether in-camera review.

MIDDLE GROUND.

C. Government Lawyers

The interests of the corporation/office are what the lawyer has to take into account. Lawyers’ loyalties go to the entity, not to the individual. Particular problem in the Rowland case? Should there be unique exception?

Rowland

Argument for having privilege give way in a narrow circumstance. Here. US Atty – allegation – when you are the Government, AC privilege must give way when you’re being investigated.
Officer serves the public – lawyer for the governor must serve the public. Think about the nature of Government.

Gov – not necessarily correct when it calls. Chooses to accept the gifts – makes riskier move, then gets prosecuted – Reluctance to carve out an exception – to extend, recognize in new areas. BUT once old-line privilege exists, courts don’t like to carve them up.

Chapter 13 - Familial Privileges

A. The Marital Privilege

1. The Spousal Testimonial Privilege

Proposed FRE 505

Trammel v. United States – (p. 955)

Wife wants to testify against husband b/c she’s been cut a deal.

Nature of the spousal testimonial privilege? Generally regarded as broader – (in some senses broader, in others narrower). Privileges one spouse from testifying against another in a criminal proceeding. Trammel invokes it to bar wife’s testimony.

Rationale? CL rationales intertwined. Spouse incompetent to testify against his or her spouse. Another driven by idea that spouses were one – (status of women, not legally separate) – partly due to marriage as 2 people united in one person – tied up with CL competency rules and status of women. One other rationale? FOSTERS MARITAL HARMONY. (Most persuasive rationale today).

At CL, either spouse could assert the privilege – question is, who should hold the privilege – hands of testifying or non-testifying spouse? 501 – puts into fed cts authority for fed CL privilege. Court: (1) H/W as one no longer the case, if it were the only rationale the privilege would no longer stand; (2) Marital harmony – in this situation, cuts in favor or letting the testifying spouse hold the privilege – if testifying spouse isn’t willing to waive it, means marriage is worth saving? – Logic? Other side would say – too much power to prosecutors to drive a wedge. Other side yet again – this empowers the woman to cut a deal for herself – otherwise the husband is permitted to drag her down with him

Does this privilege add much to the marital confidences privilege? Interesting that it doesn’t turn at all on the NATURE of the communications, just the relationship.

Limits:

1) It only applies DURING marriage. As FEDERAL law, only applies in criminal proceedings.
2) Some domestic abuse exceptions – battered wife wants to assert privilege to avoid testifying; forced to assert it
Probs – clearly paternalistic; makes judgments about where interests of marital harmony lie – another example of domestic abuse taking law in diff direction than in other contexts

3)

2. The Marital Confidences Privilege

Protects Confidential Communications between spouses during the course of a marriage. BOTH spouses hold it (as opposed to just the patient/client/penitent). Note – absent marriage, there is no privilege. Relevant time to gauge is when the communication was made. Thus privilege survives divorce (with testifying, the time called to the stand is the relevant time). Reason? Privilege designed to encourage spouses to be open and frank with one another.

Privilege will apply in a lawsuit even if neither spouse is a party.
Privilege applies in both criminal and civil cases.

(No privilege applies in a dispute BETWEEN the spouses)

What about restriction just to marriage as opposed to other relationships?

Doesn’t exist between parent and child; never extends to a same-sex couple federally, even if married in own state; CL-marriages DO count. (federal Q jurisdiction = federal CL privilege)

Parent-Child Relationship

Excluded from privilege law

Authentication

Rules 901 and 902

Specific application of conditional relevancy. 104(b) = evidence is conditionally relevant if its relevance is conditioned upon the existence of some fact. That is what authentication is about. Want to ensure that the evidence is what the proponent says it is.

Is this gun really the weapon found at the scene of the crime? Under 104(b), judge plays a screening function – is evidence sufficient to support finding by a reasonable juror that the condition is satisfied. If so, judge admits the evidence. Jury still gets to weight the evidence – with authentication, judge does the same screening function.

What’s the point of the rule? HISTORY, for one. Helpful to codify doctrines specifically in 901. PRACTICAL – authentication comes up in every trial. Issues of conditional relevance can be hard to spot. Promotes uniformity.

902 gives list of self-authenticating documents. (Copy of NYTImes, for example).
If NOT self-authenticating, lay the foundation. Think about what foundation is necessary, and what witness can provide it.

Require Authentication: photographs, diagrams, tangible objects, etc.
CHAIN OF CUSTODY

Friday 12/5

Simms (p. 818)

On authentication. One side wants to introduce photographs. Objection to the authentication is: the photographer is not there to testify – to say that photos are what they purport to represent.

Court: essential point – you do not need the photographer – anyone who has personal knowledge is sufficient to authenticate the photograph.

We need proof sufficient

Problem 10.5 –

Old case from 1896. Business was taking pictures for Mr. Jenkins. The instrument were outside -. Prosecutor wants photos in over defense’s objections. If offered to prove position of man at time of the shooting. Photographer

Here we HAVE the photographer. That the photo was staged – problem? Not fatal. So much turns on what you claim the photograph to be. If you claim the photograph to be an accurate representation of what happened – personal knowledge.

Shooter’s VIEW from outside the house – how does Helm know? No personal knowledge of shooter’s p.o.v. b/c he was in the room. But if prosecutor offers photo to show one possible angle at which bullet could have come in through window, ok – but what does prosecutor gain from that. Thus more difficult to authenticate the p.o.v. photo.

Problem – Animation

Animation showed the theory based on forensic and physical evidence – To authenticate the computer animation? Being offered to prove the theory of the experts, not what actually happened – it’s a visual illustration of what the expert testimony is – modern version of the staged photo.

To authenticate? Ask the expert – have you seen this animation? is this an accurate representation of your theory?

Wagner v. State

Problem of the silent witness. Camera as a silent witness. Camera is rolling; no one’s behind it. Law has confronted need to find a way to authenticate.

Factors that courts consider: evidence establishing time/date of evidence, operating condition, capability, possibility of tapering, procedure employed testimony – someone identifying Smith on the videotape. WANT SOME TEST OF RELIABILITY – so reliability of processes by which the tape is made.

BEST EVIDENCE


To prove content of writing, recording, or photograph – etc etc. (drawings)
DOES NOT COVER: physical evidence – knives, guns, cocaine.

Sounds pretty broad as a rule - Only applies when you’re proving content of the writing.

1) Writing itself is at issue – dispute in case turns on what the writing has to say –
   will contest, copyright, written threat
2) Independent probative value – proponent of evidence tries to prove event by content of “writing” (“writing” = everything in 1002).
   a. Say bribery case, secret recorder on a person captures convo – person
      wearing it unavailable to testify – trying to prove what was said by playing
      the tape (if witness were there it is merely illustrative as opposed to the
      proof)
   b. Also doctrine more limited than it seems due to way originals and
      duplicates admitted – duplicate to same extent unless genuine question of
      original or (2 reqs from 1003, see)
   c. Definition of original (1001) is also quite broad