

**EVIDENCE****RELEVANCE**

- **FRE 402** – Must be relevant.
- **FRE 401 -- Relevant** = evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
  - **FRE 104(b) -- Relevancy conditioned on fact.** When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.
  - **SPECIAL RULES**
    - **FRE 406** – Habit evidence relevant to prove conformity, see char ev
    - **FRE 407** – Sub Remedial Measures not admissible to prove negligence, etc.
    - **FRE 408** – Offers to settle/compromise not admissible to impugn, but to show bias
    - **FRE 409** – Payment of medical expenses inadmissible to prove liability for those injuries
    - **FRE 410** – Withdrawn guilty pleas, pleas of nolo contendere, etc inadmissible for the most part
    - **FRE 411** – Evidence of insurance inadmissible
- **FRE 403** – [Balancing]
- **FRE 105** – [Limiting Instruction]

**AUTHENTICATION**

- **FRE 901** – (a) Authentication is a condition precedent to admissibility – must be “evidence sufficient to support a finding that the matter in question is what the proponent claims” (b) [Examples]
  - **FRE 902** – Self-authenticating evidence – public documents under seal, etc.

**PERSONAL KNOWLEDGE - FRE 602: [Always Required]****HEARSAY**

- **FRE 801(c)** – [1] a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence [2] to prove the truth of the matter asserted.
  - [1] **OUT OF COURT - Out of this court**, i.e. other court statements still hearsay
  - [2] **“STATEMENT”**
    - **801(a): (1) ORAL STATEMENTS** – Always apply., (2) **WRITTEN STATEMENTS** – Always apply., (3) **NONVERBAL CONDUCT INTENDED AS ASSERTION** – Apply., (4) **CONDUCT NOT INTENDED AS ASSERTION** –*Sea Captain* FRE = No, Common Law = Probably (5) **VERBAL EXPRESSIONS WITH SECONDARY IMPLICATION** - FRE = No, *Zenni* etc Common Law = Yes. *Tatham, Dullard*, etc.
  - [3] **THE MATTER ASSERTED - Matter asserted in the statement offered into evidence**
    - **Categories:** (1) State of Mind, (2) Effect of Listener, (3) “Verbal Acts”
    - **Implied Assertions** irrelevant
- **FRE 805** – [Multiple Hearsay] Hearsay within hearsay creates chain, each chain link must have exception.

**EXCEPTIONS**

- **801 (d)(1) PRIOR STATEMENTS BY WITNESSES**
  - **FRE 801(d)(1) --** The declarant testifies at the trial or hearing and is subject to cross-examination *concerning the statement, and* the statement is
    - **(A) inconsistent with the declarant's** testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or
    - **(B) consistent with the declarant's testimony** and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or
    - **(C) one of identification** of a person made after perceiving the person;
- **801 (d)(2) Admission by party-opponent.** Against a party and is:
  - **(A) the party's own statement, in either an individual or a representative capacity or**
  - **(B) a statement of which the party has manifested an adoption or belief in its truth, or**
  - **(C) a statement by a person authorized by the party to make a statement concerning the subject, or**
  - **(D) [Agent or employee]**
  - **(E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.**
  - **[Newpara]** The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or

the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

- **803 – AVAILABILITY OF DECLARANT IMMATERIAL**
  - (1) Present sense impression.
  - (2) Excited utterance.
  - (3) Then existing mental, emotional, or physical condition.
    - **Hillmon DOCTRINE:** Future statements admissible, past inadmissible.
  - (4) Statements for purposes of medical diagnosis or treatment.
    - **Exception:** Domestic violence and similar situations.
  - (5) Recorded recollection.
    - “Past Recollection Recorded” – Allows record to be inserted into evidence to prove matter asserted. For example, a document coming into evidence and someone testifying to its validity.
    - “Present Recollection Revived” Trial Strategy – Using evidence to remember and subsequently testify.
  - (6) Records of regularly conducted activity.
  - (7) Absence of entry in records kept in accordance with the provisions of paragraph (6).
  - (8) Public records and reports.
  - **FRE 803(21) -- Reputation as to character.**
- **804 – DECLARANT UNAVAILABLE**
  - (a) Definition of unavailability.
    - **FRE 104(a) – JUDGE DETERMINES AS PRELIMINARY ISSUE**
  - (b) EXCEPTIONS
    - (1) Former testimony.
    - (2) Statement under belief of impending death.
    - (3) Statement against interest. A statement that:
      - (A) [Made only if believed if true]
      - (B) [If in crim to expose liability, with corroborating circumstances]
    - (4) Statement of personal or family history.
    - (6) Forfeiture by wrongdoing.
- **FRE 807 - RESIDUAL EXCEPTION.**

#### CONFRONTATION CLAUSE

- **SITUATION:** (1) OOC statement (2) Incriminating a D (3) Where the declarant is unavailable and (4) **proffered to prove the truth of the matter asserted.**
- **Crawford:** “[I]n all **criminal** prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him.”
  - “Testimony”
    - **Non-Testimony via Emergency Exception** – 911 calls, etc.
    - **Forfeiture Exception**
    - **Dying Declaration Exception** – Mentioned but not fleshed out
  - **NO RESTRICTION ON NON-TESTIMONIAL HEARSAY.** *Davis v. Washington*

#### LIMITS ON JURY INSTRUCTIONS

- **BRUTON RULE** - Where (1) Two Ds, (2) One confesses and implicates other, (3) the confessing party doesn’t take the stand, (4) and the evidence can thus only be used against one and not the other, (5) Juries cannot be trusted with a jury instruction alone.

#### CHARACTER EVIDENCE

- **FRE 404. Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes**
  - (a) **Character evidence generally** Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
    - (1) Character of accused -
    - (2) Character of alleged victim
  - (b) Other crimes, wrongs, or acts.
- **FRE 405. Methods of Proving Character.**
  - (a) **Reputation or opinion.** [Always OK]
  - (b) **Specific instances of conduct.** [Only if part of claim, defense, etc]
    - **INEXPLICABLY INTERTWINED** evidence always admissible
    - **104 preponderance of the evidence standard req’d**
- **FRE 406. Habit; Routine Practice.**

- **SEXUAL ASSAULT LIMITATION**
  - **FRE 412 – Rape Shield**
- **PRIOR SEX ACTS BY D**
  - **FRE 413 – [Similar Crimes in Sex Assault Cases ALWAYS ADMISSIBLE WHERE RELEVANT, with small limits]**
  - **FRE 414 – [Similar crimes in child molestation cases ALWAYS ADMISSIBLE WHERE RELEVANT, with small limits]**
  - **FRE 415 – [Similar acts [sex assault or child molestation] in civil cases ALWAYS ADMISSIBLE WHERE RELEVANT, see limits]**

#### IMPEACHMENT AND REHABILITATION

- **UNTRUTHFULNESS**
  - **404(a)(3)** allows **impeachment via the character of the witness**
  - **FRE 607** – Anyone can impeach anyone (no vouching for called witness)
  - **FRE 608 – Evidence of Character and Conduct of Witness - Translation:** No extrinsic evidence of truthfulness, period. Opinion evidence for truthfulness okay, but door has to be opened. Past events okay at discretion of the court in cross.
  - **FRE 609 – Impeachment [of Witness, inc. D as W] by Evidence of Conviction of Crime**
  - **FRE 610 --** Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.
  - **PRIOR INCONSISTENT STATEMENTS (IMPEACHING TESTIMONY)**
  - **FRE 613 – Prior Inconsistent Statements**
    - (a) **Examining witness concerning prior statement.**
    - (b) **Extrinsic evidence of prior inconsistent statement of witness.** Not admissible w/o allow to rebut
  - **FRE 801(d)(1)** – [Not hearsay if prior statement by witness AND if prior statement under oath subject to cross, etc.]

#### BIAS AND INCAPACITY

- Allows *both* **testimony** and **extrinsic evidence**.
- **No specific rules.** Generally a court-mandated sort of rule.
  - **Mental incapacity and similar issues** held carefully due to prejudicial effect

#### SPECIFIC CONTRADICTION/COLLATERAL EVIDENCE

- **Collateral Evidence Rule** – Party cannot impeach testimony regarding *collateral* matter with extrinsic evidence.

#### REHABILITATION

- **FRE 608** – [Same applications – (a) Op/Rep testimony allowed for *truthfulness*, (b) Extrinsic of *truthfulness* other than commission of a crime **NOT** allowed]

#### LAY WITNESSES

- **Rule 701 - Opinion Testimony by Lay Witnesses** – Allowed, no subverting of *Daubert*
- **Rule 704 - Opinion on Ultimate Issue** – Allowed unless expert on mental ultimate issue

#### EXPERT WITNESSES

- **Rule 702 - Testimony by Experts -**
  - *Daubert*- 702 does not utilize *Frye*, basis upon **relevance and reliability of scientific method/methodology**
  - *Kumho* – **All expert testimony counts**, including “technical” experts, etc.
  - *Joinder* - Abuse of discretion standard applies.
- **Rule 703 - Bases of Opinion Testimony by Experts -**
- **Rule 705 - Disclosure of Facts or Data Underlying Expert Opinion**

## OVERVIEW

- **Function of Evidence Law:** Determining what evidence is admissible in trial process
  - **What evidence rules do:** Determine admissibility, practical guidance, discuss borderline issues, etc.
  - **Assumption that it is possible to re-create past events**
  - **3 IMPORTANT FEATURES**
    - **Exclusionary rather than Inclusionary** – Set of barriers to admissibility
      - **THINK OF AS MANY REASONS YOU CAN EXCLUDE EVIDENCE**
    - **Barriers not self-executing** – Litigant must raise them in defense, etc.
    - **Evidence can be admissible in different ways** – May be inadmissible for Prop X, but may be admissible for Prop Y.
  - **Reasons for Evidence Rules:** (1) Harassment of witnesses (cross of sexually abused victims, etc) (2) Pragmatic concerns (efficiency, cost of trials, etc) (3) Promote reliability of evidence (4) Distrust or concern about jury (5) Advancement of specific goals (attorney-client privilege, illegal searches, etc)
- **In Practice**

Real World → Lawyers → Investigation (Viability of lawsuit) → Complaint/Indictment → (More Investigation) → Discovery → Negotiation → Hearings → Trial → (Appeal)

  - Motions *in Limine* – Threshold evidentiary motion
  - **Judges have wide discretion** – high power, varying proclivities
    - **FRE 104(a)** – Court decides admissibility, virtually unrestricted power UNLESS privileged
    - **FRE 103(a)** – Reversible error for admissibility or exclusion *highly* limited, only if substantial right affected and (1) timely objective made and (2) substance of evidence known to court.
  - **Offer of Proof** – Non-jury statement of proof made on record before excluded

## RELEVANCE

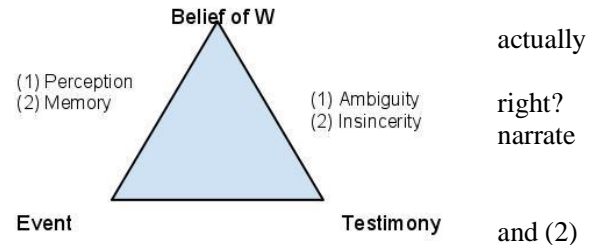
- **FRE 402** – [1] All relevant evidence is admissible except for constitution, act of congress, these rules, or other rules by Supreme Court. [2] Evidence that is not relevant is not admissible.
- **FRE 401** -- “**Relevant evidence**” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
  - **Probability** – “More [or less] probable than it would be without the evidence”
    - Anything more would be unworkable -- **.00000001%**
  - **Relational** – Must be tied to some matter of consequence.
    - **No dispute necessary to be matter of consequence.**
  - **Special Relevance Rules**
    - **FRE 406** – Habit evidence relevant to prove conformity, see char ev
    - **FRE 407** – Sub Remedial Measures not admissible to prove negligence, etc.
    - **FRE 408** – Offers to settle/compromise not admissible to impugn, but to show bias
    - **FRE 409** – Payment of medical expenses inadmissible to prove liability for those injuries
    - **FRE 410** – Withdrawn guilty pleas, pleas of *nolo contendere*, etc inadmissible for the most part
    - **FRE 411** – Evidence of insurance inadmissible
- **Probative Value and Prejudice**
  - **FRE 403** -- Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence [alt better evidence exists].
    - **Old Chief interpretation:** Balancing *PLUS* alternatives *MINUS* prejudice of other ev. Alt unadopted: Balancing alone w/o alt consideration.
    - **Issues: (1) Accuracy baggage** (prejudice, confusion, misleading) and (2) **Inefficiency baggage** (delay, time waste, cumulative evidence [alt better evidence]).
    - “**Substantially**” – Discretionary, thumb on side of admissibility
    - **Abuse of discretion standard.** Hard to overturn.
    - Often 401 + 403 are tied together (“Irrelevant and prejudicial”)
  - **FRE 105** - When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.
    - **FRE 404** – [**Propensity Evidence**] (a) Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except: (1) [when door opened by accused] or (2) [peacefulness to prove aggressor] or (3) [character of witness]. (b) Evidence of other crimes inadmissible except to prove motive, etc.

- **Balancing of value versus harm**
  - **Surprise** is explicitly not accounted for – continuance more appropriate
  - **Alternative evidence** also factors into admissibility
- **Old Chief Issue**
  - **Prejudice** – Series of bad character inferences, etc of high worry
    - **Storytelling vs. Abstract Requirements**
  - **Juror expectations and prosecutorial discretion** – Countervailing interest of prosecutor to present full details of case and meet juror demands of proof.
- **Conditional Relevance**
  - **FRE 104(b)** -- **Relevancy conditioned on fact.** When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.
    - **Issue hinges on probability of fact finder belief.** Judge must not determine if condition is *actually* true, but merely if jury *could* find it so
    - **May be irrelevant distinction.** “Relevance” alone could be considered, given that even conditional evidence is arguably relevant.
- **AUTHENTICATION**
  - Proponent **must** prove evidence is what the proponent claims it is (“Laying the foundation”)
    - **ALL** evidence must be authenticated. **Basically conditional relevance.**
    - **AUTHENTICATION RELEVANCE** – Must show it is *what it claims to be*, meaning the proffered relevance matters.
  - **FRE 901** – (a) Authentication is a condition precedent to admissibility – must be “evidence sufficient to support a finding that the matter in question is what the proponent claims”
    - **(b) Illustrations** – (1) Testimony of witnesses with knowledge (2) Non-expert opinion on handwriting (3) Comparison by trier or expert witness (4) Distinctive characteristics and the like (6) Telephone conversations if (A) Self-authentication or (B) business line with business related transactions (7) Public record [if from public office] (8) Ancient documents (A) is such condition to create no question (B) in place where, if authentic, it would normally be, (C) has been in existence 20 years or more. (9) Process or system [PC data, x-rays, etc] (10) Methods provided by statute or rule.
    - **Chain of Custody** – Where witnesses “chain up” together to prove something [ex: found on situs of crime] is what it was at the time.
      - **Missing Link Issue** -- Defective links go to validity but not admissibility.
        - **BUT** some witnesses may be too valuable, invalidate evidence.
    - **FRE 902** – Self-authenticating evidence – public documents under seal, etc.
    - **Person who takes the photo irrelevant.**
- **Ex:** Where D proffered evidence showing belief someone had been beaten to death, Ps could match with evidence refuting that truth. *Knapp v. State*. Evidence of barrel replacement post-murder relevant despite distant connection to proof of shooting. *US v. Dominguez*. Proof of intoxication to prove recklessness on wild horse relevant. *State v. Larson*. Admission of evidence of former Panamanian general’s involvement with CIA probative, but too confusing. *US v. Noriega*. Allegedly confused people who did not pay taxes could not offer alleged legal argument they were confused about. *US v. Flitcraft*. Judge was allowed to exclude videotape of log loading without audio because of lack of scientific nature of tape. *Abernathy v. Superior Hardwoods*. Photos of deceased allowable despite gruesome nature to prove trajectory of bullet etc. *US v. McRae*. Name of past conviction would lead to series of bad character judgments, so despite juror expectations admission incorrect. **Old Chief**. | Alleged talking to defendant despite lack of certainty as to identity admissible, belief of identity possible for jury. *State v. McNeely*.



**HEARSAY****GENERALLY**

- **WHO (DECLARANT) – WHAT (STATEMENT) – WHY (MATTER ASSERTED)**
- **FRE 801(c)** – [1] a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence [2] to prove the truth of the matter asserted.
  - **Idea:** Factual disputes should be based on live, sworn testimony, not secondhand accounts of out-of-court statements. Juries better able to determine truth that way.
  - **Functions to “validate” evidence:** (1) Oath (2) Factfinder being able to see demeanor and (3) Ability to cross-examine.
  - **General Factors:** (1) Speaker availability, (2) Speaker as a party or not, (3) Statement not made under oath, (4) Statement not subject to cross-examination
    - **Hearer being present a condition to admissibility** outside normal system
  - **Issues**
    - (1) **Perception.** Witness perceive what was happening?
    - (2) **Memory.** Did the witness remember
    - (3) **Narration/Ambiguity.** Did the witness to convey properly?
    - (4) **Sincerity.** Is the witness lying?
    - **SPEAKER -> HEARER:** (1) Ambiguity  
Insincerity
    - **HEARER -> COURT:** (1) Erroneous Memory (2) Faulty Perception

○ [1] **OUT OF COURT**

- **Out of this court**, i.e. other court statements still hearsay

○ [2] **“STATEMENT”**▪ **801(a)**

- (1) **ORAL STATEMENTS** – Always apply.
- (2) **WRITTEN STATEMENTS** – Always apply.
- (3) **NONVERBAL CONDUCT INTENDED AS ASSERTION** – Apply.
- (4) **CONDUCT NOT INTENDED AS ASSERTION** – Sea Captain
  - **FRE = No,**
  - **Common Law = Probably**
  - Less worry about insincerity due to possible reliability of monitor-less actions.
- (5) **VERBAL EXPRESSIONS WITH SECONDARY IMPLICATION**
  - **FRE = No, Zenni** etc
  - **Common Law = Yes.** *Tatham, Dullard*, etc.

○ [3] **THE MATTER ASSERTED**

- **Matter asserted in the statement offered into evidence**

▪ **GENERAL CATEGORIES**

- (1) State of Mind
- (2) Effect of Listener
- (3) “Verbal Acts”

- **FRE 801(a)** -- A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

○ **IMPLIED ASSERTIONS**

- Statements to *infer some statement* – i.e. that somewhere is cold, etc.
- **FRE doesn't care.** Only statements to prove fact are prohibited.

• **MULTIPLE HEARSAY**

- **FRE 805** – Hearsay within hearsay creates chain, each chain link must have exception.

- **Ex:** Ignoring Walter Raleigh's alleged treason, allowing basic out-of-court statements without pulling in witness. *Trial of Sir Walter Raleigh*. Statement regarding status of light on tractor was hearsay, but not prejudicial. *Leake v. Hagert*. Kids chanting “Barney” wasn't hearsay, didn't prove the costume was in fact barney, just proved confusion. *Lyons Partnership v. Morris Costumes*. Testifying to a convo between a dealer and an agent went to prove D knew ID of caller, not to content of discussion. *US v. Parry*. Statement that D was being taken to leader by kidnappers admissible, went to state of mind and scenario not content. *Subramaniam v. Public Prosecutor*. Rumors of relationship admissible, went to state of mind knowing rumors existed, not to the truth of statements themselves. *Southerland v. Sycamore Comm. School Dist.* Statement doctor

would have to “stop writing RXes like that” not hearsay to admit he was possibly prescribing medication w/o license. *US v. Johnson*. Letter and two mailgrams to show notice of hearing admissible, content irrelevant. *US v. Jefferson*. Telephone calls from unknown people asking for CC nums admissible, content not involved just fact of call. *US v. Saavedra*. Indication of possession of corn not hearsay. *Hanson v. Johnson*. Testimony regarding sent check to cancel insurance policy not hearsay. *Creaghe v. Iowa Home Mutual Cas. Co.* “It’s going to be \$10k” not hearsay, no truth claim made. *US v. Montana*. | **Implied Assertions:** Calls to place bets to prove premises used for bets attempted to show belief by Ds admissible, FRE doesn’t care. *US v. Zenni*. Implied assertions made by note worrying about cops outside hearsay, counter to Zenni. *State v. Dullard*.

## EXCEPTIONS TO THE RULE

- **Why?** (1) Too much judicial power otherwise to except hearsay, (2) Predictability
- **801 (d)(1) PRIOR STATEMENTS BY WITNESSES**
  - **FRE 801(d)(1)** -- The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is
    - **(A)** inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or
      - **“Inconsistent”** – Any difference. Alt: Failure to remember also counts. Split: Refusal to answer questioning at all (may also invalidate primary part of (d)(1).
      - **Encourages “lock-in” depositions.**
    - **(B)** consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or
      - **Helps establish credibility after dealmaking, etc.**
    - **(C)** one of identification of a person made after perceiving the person;
      - **Buffered by constitutional rules of identification.** Lineup restrictions, etc.
      - **Applies to on-site ID even when forgotten later.** Even inconsistencies, etc. Not intended, but something of a convenient feature.
      - **Timing and manner of identification not defined.**
  - **“Cross concerning the statement”** – Means generally cross re: fact that statement was made. SCOTUS in *Owens* defined as (1) Presence (2) Openly answering (3) On stand
  - **WITNESS MANNER IRRELEVANT.** If exception applies, proffered fact irrelevant.
  - **Prior Consistent Statements** are substantive evidence, admissible. Formerly not substantive evidence, only allowed to show validity of current testimony.
  - **Debate:** Whether the original testimony should be under cross. **Current law:** not required, **Proposed amendments of past:** required original statements to be subject to cross.
  - **Idea:** That cross is available, jury can determine validity based on present testimony
- **801 (d)(2) Admission by party-opponent.** The statement is offered against a party and is **[NO NEED FOR PERSONAL KNOWLEDGE]**
  - **(A) the party's own statement, in either an individual or a representative capacity or**
    - **PERSONAL KNOWLEDGE IRRELEVANT.**
      - **FRE 602 (Personal knowledge req) does not apply, ever.**
    - **Do not have to be against interest.** May naturally be such, but not required.
      - **NOT THE STATEMENT AGAINST INTEREST RULE.**
    - **CONTENT IRRELEVANT.**
    - **Must be introduced by other party.** Cannot make “self-serving declarations”
    - **Government doesn’t make statements.**
    - **(i) MULTIPLE HEARSAY**
      - **Must be of fact.** Admission can be “Y said X is a fact” to admit X is a fact, or statement can be made “X is a fact” implying Y said so.
    - **(ii) COMPLETENESS**
      - **RULE OF COMPLETENESS** – Where part of some evidence is admitted, the party-opponent has the right to match it with further detail
  - **(B) a statement of which the party has manifested an adoption or belief in its truth, or**
    - **An admission may be made by adopting or acquiescing in the statement of another.** The idea is that the party-opponent would contest the evidence if untrue.
    - **Silence** included in conversation or in context where response basically demanded. **Silence not included** for respond-or-accept form letters, etc.
  - **(C) a statement by a person authorized by the party to make a statement concerning the subject, or**
    - **Admissions made by a party specifically authorized.**
      - **Realtors, Publicists, Lawyers, etc.**

- **Some states limit to admissions made “for” the party**, meaning that ostensibly admissions against interest don’t count.
    - **Can include private/”inside” statements.** Depends on jurisdiction.
    - **Allowed in common law.**
  - **(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**
    - **Usual test of agency:** Made by the agent for the principal within the scope of employment?
    - **COMMON LAW DISALLOWED.**
  - **(E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.**
    - **Generally:** (1) Conspiracy (2) Declarant was a member (3) Party made against was a member (4) Statement was made during conspiracy and (5) Intended to further the conspiracy.
      - **After arrests, conspiracy usually considered dead.**
      - **MUST BE MADE ACROSS COURTROOM.** No D1 v. D2.
    - **Agency during conspiracy.** Limited to period of conspiracy.
    - **Issue of convenience.** Useful to prove existence/scope of conspiracy.
    - **NO REQUIREMENT OF CONSPIRACY CHARGED.**
    - **DOES NOT REQUIRE STATEMENT TO BE MADE TO CONSPIRATOR.**
      - **Idle Chatter doesn’t count.** Furtherance can be strict.
  - **[Newpara]** The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).
- **Function of adversary system.** Admissions more or less obviate hearsay, cross worries not present since both parties present at trial.
- **PROCEDURE OF HEARSAY EXCEPTIONS**
  - **Who Determines?**
    - **ALL EXCEPTIONS MUST BE DETERMINED UNDER FRE 104(a) BY COURT.**
    - **FRE 105** – Limiting instruction. Also possible.
  - **Standard** – Preponderance of the Evidence (Civil)
  - **DETERMINING THE EXISTENCE OF A PREREQUISITE**
    - **OLD:** *Glasser/Nixon* – Must have independent corroborating evidence
    - **NEW:** *Bourjaj* – Can look at statement to determine **BUT NOT INDEPENDENTLY SUFFICIENT.**
  - **TIMING** discretionary.
- **803 – AVAILABILITY OF DECLARANT IMMATERIAL**
  - **(1) Present sense impression.** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.
    - **TRIGGER:** An event. **CONTENT:** Description or Explanation. **TIMING:** Loose, but not too much.
      - **BOOTSTRAPPING ALLOWED.** Statement alone can be used to prove pers knowledge.
    - **Lack of a worry about sincerity and memory**
    - **Substantial contemporaneity of event and statement prevent misrepresentation.**
    - **Slight lapse okay**, but goes to weight of evidence.
    - **Participation** irrelevant.
    - **Subject matter** relates only to event or condition seen.
    - **Possibly questionable.** Present statements can obviously be wrong.
    - **Restricted subject matter, wide period.**
  - **(2) Excited utterance.** 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.
    - **TRIGGER:** Startling event causing stress. **CONTENT:** Related info. **TIMING:** Almost immediate to the stress.
      - **SUBJECTIVE.** Stress itself probably tailored to person.
    - **Res gestae** – Old term for some sort of “verbal act” out of the thing done.
    - **Lack of a worry about sincerity and memory**
    - **Circumstances precluding conscious fabrication.**
    - **Length of excitement** relevant.
    - **Subject matter** more loose, “relevance” only required.
    - **Wide subject matter, limited time period.**
  - **(3) Then existing mental, emotional, or physical condition.** 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.



- **TRIGGER:** Existing state of mind. **CONTENT:** [Description or explanation] of then state of mind.
  - TIMING:** Generally immediate to state of mind
    - **DISTINCTION:** Statements of state of mind generally not going to TOMA (“It’s Barney”) vs. 803(3) internal reflections (“I believe it’s Barney”).
  - **STATE OF MIND MUST BE RELEVANT.**
  - **Statement not used to prove truth of matter asserted.** Thus, this is merely a codification of an already existing non-hearsay finding.
  - **INWARD VERSION OF 803(1).**
    - **Only way to learn.**
  - **Exclusion of memory or belief preserves hearsay rule generally.**
  - **CAN IMPLICATE THIRD PARTIES.** No restrictions. *Houlihan/Hillmon*
  - **Hillmon DOCTRINE SPLIT**
    - **FUTURE STATEMENTS ADMISSIBLE.** “I will go to the store” admissible to prove he eventually did so. **EVEN IF IMPLICATES 3<sup>RD</sup> PARTIES.**
    - **PAST STATEMENTS INADMISSIBLE.** “I went to the store” inadmissible because it tries to prove matter asserted.
- **(4) Statements for purposes of medical diagnosis or treatment.** Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.
  - **Crash fact vs. Red Light detail** – Limitation on what is admitted.
  - **UNLIMITED CHAIN.** Can be given from nurse to doc to surgeon etc.
    - **Intentional but worrisome.**
  - **NO TIME REQUIREMENT.**
  - **ALT:** 803(1) if third party (PSI of harm/event)
  - **Must be reasonably pertinent for diagnosis,** not just stated for testimony.
    - **Issue:** Diagnosing *against*. Open question.
    - **Psychiatrists** an issue, as they could hypothetically use anything.
      - **Child sex abuse interviews count.** Relevant to protect kid, nature of abuse, etc.
    - **Expert witnesses can use to diagnose,** but *Daubert* patrols boundaries
      - **Allowed anyway, 703 allows experts to use otherwise inadmissible evidence.** When used in conjunction with a lim. instruction
  - **Exception:** Domestic violence and similar situations.
- **(5) Recorded recollection.** A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.
  - **“Past Recollection Recorded”** – Allows record to be inserted into evidence to prove matter asserted. For example, a document coming into evidence and someone testifying to its validity.
    - **WITNESS READS,** doesn’t come in without adverse party action.
    - **Req:** (1) W had knowledge, (2) W forgot, (3) W created memorandum while W had knowledge, (4) Memorandum accurate, (5) May be read into evidence *but not admitted without opp party.*
    - **Alt:** 801(d)(1)(a) inconsistent testimony – **“forgetting” = inconsistent**
  - **“Present Recollection Revived”** – Using some evidence to remember and subsequently testify.
    - **Trial strategy.** But **612** governs writings.
- **(6) Records of regularly conducted activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, [1] **made at or near the time by, or from information transmitted [2] by, a person with knowledge, [3] if kept in the course of a regularly conducted business activity,** and if it was the [4] **regular practice of that business activity** to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, **unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.** The term “business” as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.
  - **Foundation**
    - **Modern:** Where above met, admissible. **Amendment avoids req of foundation witnesses**
    - **Common Law:** Required each link in the chain to verify. Highly criticized.
  - **“Business”**

- **Report of Conf. Comm:** Definition defined widely, to include schools, churches, etc.
- **Pretty much anything.** Drug trade records, etc.
- **“Records”**
  - **NORMAL COURSE OF BUSINESS v. LITIGATION PREP**
  - **CANNOT BE OF OUTSIDER INFO**
  - **RAW [DIGITAL] DATA NOT COMMUNICATION = NOT HEARSAY**
    - **Computers != Declarant**
  - **TIMING** – As near to contemporaneous as possible
  - **Personal diaries, etc okay.** So long as meets requirements, no need for publicity per se.
  - **Law firm records** obviously do not count if in prep for litigation
  - **Palmer** (no admission of accident reports period) -> **Lewis** (Depends on *motivation*)
- **Sources of Proffered Information**
  - **If any party not acting in normal course, chain is broken**
    - **Motive** again acts as a key factor
- **TRUSTWORTHINESS BARRIER**
  - **Judge gets the power.** Gets to patrol boundary alone.
  - **806** allowed to impugn out-of-court declarant – AUTOMATICALLY RELEVANT
- **LAYING THE FOUNDATION**
  - **(1) TESTIMONY.** Having a custodian or other qualified witness testimony.
  - **(2) STIPULATION.** Common, easy, judge-proof.
  - **(3) SELF-AUTHENTICATION.** FRE 902(11). No need for cert, auth, etc.
- **(7) Absence of entry in records kept in accordance with the provisions of paragraph (6).** Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.
  - **NOT AN ASSERTION -> NOT HEARSAY**
  - **Mostly used to refute split decisions.**
- **(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 [unless offered by D], 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.
  - **Conflicts with 803(6).** Most public agencies qualify as “businesses”.
  - **Virtually any data applies.** Reports, records, etc.
  - **Definition of “PUBLIC OFFICES OR AGENCIES”** difficult with some entities
  - **(A) ACTIVITIES OF AGENCY**
    - Generally always admissible, little issue. Court transcripts, etc.
  - **(B) MATTERS OBSERVED WITH DUTY TO REPORT EXCLUDING CRIM**
    - **Everyday reports, etc -> THINGS PEOPLE SEE**
    - **803(6) CANNOT BE USED TO CIRCUMVENT.** Drug testing, etc may be routine, but still subject to fundamental no-police-eval limitation.
      - **Unique.** Generally rules are “or”, but doing otherwise here would render it a nullity.
    - **“Excluding Crim”** essentially an adumbration of the confrontation clause
    - **APPROACHES TO ROUTINENESS WITH LEO**
      - **BROWN-OATES-FORTE : ALLOWS ROUTINE NON-PROSECUTION RELATED DATA.** License plate scanning, property receipts, etc – *Palmer* motivation a factor.
      - **OATES:** No routineness exemption given pendency of litigation
  - **(C) FACTUAL FINDINGS PURSUANT TO AUTHORITY GRANTED BY LAW**
    - **“Factual Findings”**
      - Probably something like “Evaluative Reports”
      - Debate over the degree of opinion, but “report” in preface likely indicates some level of opinion so long as it is tied to fact.
    - **Factors:** (1) Timeliness of investigation, (2) Special skill or expertise of official, (3) Whether a hearing was held and the level at which conducted, and (4) *Palmer* motivation.
    - **Counterbalanced by Court finding re:** lack of trustworthiness
  - **FOUNDATION** must be established by custodian.

- **PERSONAL KNOWLEDGE** presumed, but given expert nature, **OUTSIDER INFO** probably allowed pending it is trustworthy and survives cross.
        - **CONFONTATION CLAUSE** nonetheless patrols and dismantles what otherwise might apply here.
        - **[9-23 omitted]**
        - **FRE 803(21) -- Reputation as to character.** Reputation of a person's character among associates or in the community.
          - **See generally the section on character evidence.**
  - **Ex:** Statement inconsistent with present testimony re: machinery admissible. *Albert v. McKay & Co.* Testimony identifying witness admissible under 801(d)(1)(c), idea of better memory at time. *US v. Owens.* Personal belief not required in admission of fact. *Salvitti v. Throppe.* Statement need not be against interest if made by party-opponent. *US v. McGee.* Multiple hearsay issue was admissible, even if implied that someone said so. *Reed v. McCord.* Silence acquiesced to hearsay. *US v. Fortes.* Letter that asked for response if in error was still hearsay, silence as to letter was not acquiescence. *Southern Stone v. Singer.* Lawyer made acceptance of evidence when related to litigation. *Hanson v. Waller.* Agent's statements after wolf bite were within scope and thus admissible. *Mahlandt v. Wild Canid Survival & Research Center.* Internal company e-mail where verified by reliance and belief created agency admission. *Sea-Land Service v. Lozen Int'l.* Factfinder can use 801(d)(2)(e) statements in conspiracy to prove conspiracy alone, no independent quantum of evidence required. *Bourjay v. US.* ||| Quick statement by cop that a person handed him her purse sufficiently described present condition despite slight delay, spoke on first opportunity. *US v. Obayagbona.* Recanting excitedly info on phone was excited and present, but did not meet personal knowledge requirement. *Bemis v. Edwards.* When arrested person made statements, statements properly excluded where they were calmly and not excitedly said. *US v. Elem.* Statements of belief of cooperation should have been admitted. *US v. Harris.* Letter indicating future state of mind admissible to prove he eventually did something. *Mutual Life Ins. Co. v. Hillmon.* "I was poisoned" faced backward not forward and thus was inadmissible. *Shepard v. US.* No strange speaker-based limitation on belief exemption. *Houlihan.* Statements regarding details of harm given to doc inadmissible. *Rock v. Huffco Gas & Oil.* Statements to social worker not testimonial, admissible. *State v. Moses.* Admitting writing of itemized stuff was allowable to refresh memory. *Fisher v. Swartz.* Lists used to refresh memory OK. *US v. Ricardi.* | Payroll records indicating witnesses were not where they said they were admissible, killing off common law requirement of every link in the chain being present. *State v. Acquisto.* Personal but business-used diary of casino take-ins admissible as business record, personal-ish nature of diary did not invalidate systematic, business-like, truth-telling nature of diary. *Keogh v. Commissioner of Internal Revenue.* Drug trade records sufficient to be business records. *US v. Gibson.* Statement to other employees post-accident denied, obviously made for litigation. *Palmer v. Hoffman.* Inspection and personal injury report admitted despite being post-injury, no motive to fabricate (?) *Lewis v. Baker.* Statements to social worker regarding nature of being a liar was part of routine check-up by doctors unrelated to litigation and without motive to corrupt, thus admissible. | Absence of evidence that other M&Ms did not have needles in them admissible to prove likely falsehood. *US v. Gentry.* | "Factual findings" for evaluative report pursuant to public records exception is not limited to facts, can set forth opinions, trustworthiness limitation and cross available to impugn. *Beech Aircraft v. Rainey.* 803(6) cannot be used to circumvent 803(8) such that "routine" criminal testing could be used against criminal defendants. *US v. Oates.* Property receipt of gun taken into custody BEFORE current crime met 803(8)(b) requirement despite being used against criminal defendant, given reliability and lack of need to be used against defendant. *US v. Brown.* 803(8)(b) does not prevent automatic license plate scanning system from being used against defendants. *US v. Orozco.* Blood and DNA evidence collected in ministerial way not prepared exclusively for trial by investigator with no interest allowable under 803(8)(c), fulfill both requirement of 803(8) and general business records exemption. *State v. Forte.* Lab reports re cocaine were testimonial and prepared for litigation, clearly inadmissible against defendant. *Hinojos-Mendoza v. People.*
- **804 – DECLARANT UNAVAILABLE**
  - **(a) Definition of unavailability.** "Unavailability as a witness" includes situations in which the declarant-- (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or (3) testifies to a lack of memory of the subject matter of the declarant's statement; or (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means. A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.
    - **(5) Requires both reasonable attempt at procuring witness AND likely deposition**
    - **FRE 104(a) – JUDGE DETERMINES AS PRELIMINARY ISSUE**
  - **(b) Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
    - **(1) Former testimony.** Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding,

if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

- **Common Law:** Did not limit admissibility, though it did require identity of issues
- **Predecessor in interest (CIVIL ONLY)**
  - **SIMILAR MOTIVE MUST BE SHOWN.**
  - **APPROACHES:** Anyone, Privity, similarity of issues, etc.
  - **Intentionally undefined.** Some focus on strictness, other courts are more relaxed, etc.
- **Opportunity and Similar Motive to Develop Testimony**
  - **Generally means cross, etc. UNHINDERED opportunity needed.**
  - **Required no matter what.** Even going from grand jury to trial.
    - **No “fairness exception”**
  - “In the former suit a party having a like motive to cross-examine about the same matters as the present party would have, was accorded an adequate opportunity for such examination, the testimony may be received against the present party”. *Lloyd*.
- **BREAK DOWN STATEMENT-BY-STATEMENT.**
- **REASONING:** High reliability, especially if a video made of testimony.
- **ALTERNATIVE ROUTES:** 803(d)(1)(A) prior inconsistent statement, 801(d)(2) former testimony of opp. party, possibly impeachment.
- **(2) Statement under belief of impending death.** In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.
  - **MUST BELIEVE GOING TO DIE.** Without such belief, no admissibility
    - “Grim reaper on the backswing”
  - **MUST BE RELATING TO CAUSE OR CIRCUMSTANCES**
  - **MUST BE IN A HOMICIDE OR CIVIL CASE**
  - **Proving Issues**
    - **Context of statement and circumstances matter.**
  - **Common Law:** By victim near death in criminal homicide. FRE now expands to civil.
- **(3) Statement against interest.** A statement that:
  - **(A)** a reasonable person in the declarant’s position would have **made only if the person believed it to be true** because, when made, it was so contrary to the declarant’s proprietary or pecuniary interest or had so great a tendency to invalidate the declarant’s claim against someone else or to expose the declarant to civil or criminal liability; and
  - **(B)** is supported by **corroborating circumstances** that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.
  - **CONTEXT AND CONTENT RELEVANT** to against interest.
    - **Chippendales example.** Offering death-penalty-or-not created non-against-interest scenario.
  - **EXCEPTION created to avoid blatant lies and escape**
  - **USE TO PROVE A THIRD PARTY’S STATEMENT AGAINST PARTY**
    - Never use for party admissions, use 801(d)(2)(A).
  - **Evolved from worry about reliability.**
  - **ALTS:** Party admissions (801(d)(2)(A)).
  - **Common Law:** Required interest against be pecuniary or proprietary but defined broadly.
- **(4) Statement of personal or family history.** **(A)** A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or **(B)** a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.
- **(6) Forfeiture by wrongdoing.** A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness. [**Also present via 804(a)**]
  - **Requires subjective intent,** meaning murder for other reasons doesn’t qualify
    - **Abuse cases** still would allow some testimony in – dying decs, other exceptions, etc.  
**PRESUMPTION THAT ABUSER INTENDS TO REMOVE AS W**
  - **Preponderance of the evidence** governs based on 104(a)
- **Ex:** Govt allowed to present redacted portions of grand jury testimony without the rest, because D invoked 5<sup>th</sup> he invalidated his ability to present rest. *US v. Bollin*. Expert witness in other unrelated trial not proven to be unavailable, no reasonable

efforts made to acquire. *Kirk v. Raymark Indus.* Expert witness (now deceased) testimony allowed, D in previous case had similar reason to cross so no worry. *Clay v. Johns-Manville Sales Corp.* Proof of a similar motive between cross examiners required to introduce grand jury testimony into trial where witnesses pled 5<sup>th</sup>. *US v. Salerno.* Statement that someone poisoned her was too far away from time of death to be admissible. *Shepard v. US.* In a prosecution for bank robbery, death of someone who claimed other party was not guilty inapplicable, not conviction for homicide. *US v. Sacasas.* Where victim identified assailant and victim was dying, and testimony would have been admitted if victim was alive and testified, dying declaration admissible. *State v. Lewis.* Request for forgiveness regarding theft of championship belts was a statement against interest, admissible where declarant essentially fled country. *US v. Duran Samaniego.* Plea by co-conspirator not admissible given lack of self-inculpation and general untrustworthiness, not to mention lack of corroboration. *US v. Jackson.* | Subjective intent to make witness unavailable is required to trigger 804(6). *Giles v. California.*

## WITNESS AND DECLARANT CAN BE IMPEACHED VIA 806

### RESIDUAL EXCEPTION

- **FRE 807 - RESIDUAL EXCEPTION.** 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.
  - **[Generally requires:** Not covered by 803/804, equivalent guarantees of trustworthiness, relevant, more probable than other evidence, general purpose of rules met, notice objection made]
- **Ex:** 807 allowed to admit an investigator's testimony regarding business records where the prior document controlling party died. Dissent vigorously argues that 807 should not be a catch-all exception where enumerated hearsay exceptions cannot otherwise be met. *US v. Laster.*



## CONFRONTATION CLAUSE

### HISTORY

- **Ohio v. Roberts** required “indicia of reliability”, proven by either a (1) hearsay exception or (2) particularized guarantee of trustworthiness. Hearsay requirement was stringent, linked to historical hearsay exceptions only.
  - **Merged hearsay and confrontation clause.** Somewhat difficult to separate.

### CRAWFORD RULE GENERALLY

- **SITUATION:** (1) OOC statement (2) Incriminating a D (3) Where the declarant is unavailable and (4) **proffered to prove the truth of the matter asserted.**
- “[I]n all **criminal** prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him.”
  - **Criminal Limitation** – Does not apply to civil cases.
  - **Witnesses**
    - Those who bear testimony
  - **Major Exception:** (1) Witness unavailable, and (2) Opportunity to cross by opposing D when made.
  - **“Testimony”**
    - **Split:** In the eyes of the declarant? The police? A neutral third party?
      - **ARE:** Affidavits, Confessions, Statements to Cops, Ex Parte in Preliminary Hearing, **Reports by investigators like coroners and scientists**
      - **NOT:** Casual remarks to acquaintances, Business records, statements in furtherance of a conspiracy, *potentially* dying declarations.
      - **Issues:** Statements to civilians, undercover cops, informants. *Courts usually draw the line at police in-fact.*
    - **“Statements that were made under circumstances which would lean an objective witness reasonably to believe that the statement would be available for use at a later trial”**
    - “A solemn declaration or affirmation made for the purpose of establishing or proving some fact” (i.e. pretty much anything out of court)
    - **Purposive Split of Nontestimony**
      - “when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to **enable police assistance to meet an ongoing emergency**”
        - **Ex:** 911 calls, emergencies while bleeding out
    - **Forfeiture Exception** -- Exception where party the testimony is used against is the reason why the person is unavailable – intimidation, etc.
      - **Giles v. California** requires *subjective* intent – not incidental.
    - **Dying Declaration Exception** – Mentioned but not fleshed out
    - **FUTURE ISSUE:** Sotomayor’s use of reliability as a justification for allowing testimony. *Potentially implies destruction of doctrine back to Roberts test.*
  - **NO RESTRICTION ON NON-TESTIMONIAL HEARSAY.** *Davis v. Washington*
  - **Reliability and nebulous “necessity” irrelevant.**
- **Core issue:** Testimonial statements made outside a court where the party against which the evidence is used is not allowed to cross-examine or confront the witness.
  - **Exception:** Necessity via emergency where the statements are nontestimonial.
- **CONTEXT** is usually the use of accomplices or co-conspirators, where there is some post-arrest confession, plea of guilty, or the like.
  - **Hearsay exception usually gotten via statements against interest.** Conspiratorial exception doesn’t work because its post arrest. Also *possibly* residual hearsay exception.
- **Ex:** Where petitioner convicted in part based on a woman’s testimony where she was recorded and never cross-examined, and where this testimony was not applicable under hearsay as not a statement against interest and thus relied on the particularized indicia of reliability scenario, confrontation clause violated. *Crawford v. Washington*. Statements made on 911 call were not testimonial given emergency, that during investigation was testimonial. *Davis v. Washington*. Statements that substance was cocaine were still testimonial, even given alleged routineness. *Melendez-Diaz v. Massachusetts*. Despite questions in evidence, shot victim’s statements to cops were not testimonial. *Michigan v. Bryant*.

## LIMITS ON JURY INSTRUCTIONS

- **BRUTON RULE**
  - **Where** (1) Two Ds, (2) One confesses and implicates other, (3) the confessing party doesn't take the stand, (4) and the evidence can thus only be used against one and not the other, (5) Juries cannot be trusted with a jury instruction alone.
  - **Alternatives:** Redaction, Two juries, Two trials, go without. Same case prohibited.
  - **HISTORY**
    - **Delli Paoli** – Bruton in reverse. Presumes jury can be trusted. Overruled.
    - **Jackson** – Constitutional right to trial judge review of confessions to screen for obvious coercion, presumes jury may not be able to tell.
    - **Bruton** reverses *Delli Paoli* due to *Jackson*, though dissent argues difference
- **Codefendant admissions cannot be used against other Ds.**
  - **Limiting instructions insufficient.**
- **REDACTIONS**
  - **Grey** – No “blanks” like \_\_\_\_\_
  - **Richardson** allows where only inferences can be drawn
  - **Worry about presumptions.** Jury likely unable to remove inferences.
- **Ex:** Given substantial risk, limiting instructions insufficient to make jury mentally cabin evidence. *Bruton v. US*. Given risk, redactions still inferred some participation by codefendant and thus could not be used. *Gray v. Maryland*

## PERSONAL KNOWLEDGE

- **Always required** except for limited exceptions in hearsay rule.
- **FRE 602:** A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.

### CHARACTER EVIDENCE

#### OF DEFENDANT

Attack on <u>character</u> of <u>Defendant</u> by <u>op/rep testimony</u>	Allowable by D of D, P of D (after D of D), P of D (after D of V).
Attack on <u>character</u> of <u>Defendant</u> by <u>Specific Instances</u>	Allowable by D of D, P of D (after D of D), P of D (after D of V), <i>so long as the trait is relevant to a specific claim, defense, etc.</i>

#### OF VICTIM

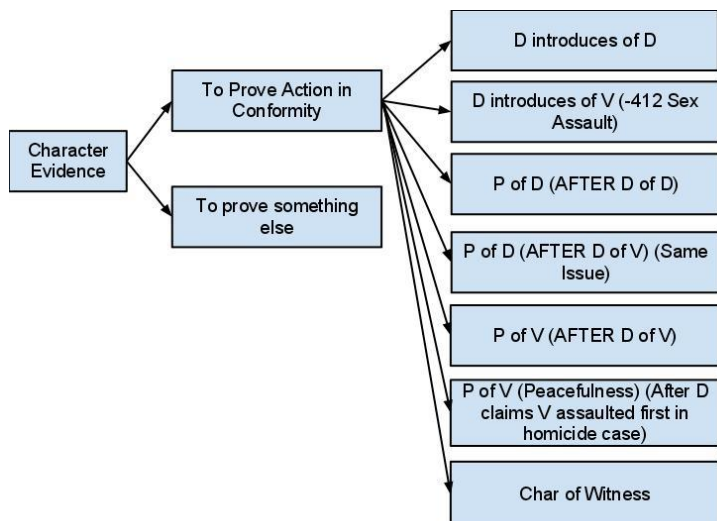
Character of <u>Victim</u>	Allowable by D of V (-412 Rape shield) or of P of V (after D of V), and P of V (Peacefulness). Op/Rep always allowable, Specific instances must be part of element/etc (and thus highly unlikely)
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#### OF WITNESS

Attack on <u>character</u> by <u>op/rep test.</u>	404(a)(3) [Not admissible to prove conformity <i>unless</i> ] 608(a) [Only allowable for <b>truthfulness or untruthfulness</b> , and admissible promoting only allowable after attack]	Extrinsic testimony allowable, only method to prove.
Attack on <u>character</u> by <u>specific instances of misconduct</u>	404(a)(3) [Not admissible to prove conformity <i>unless</i> ] 608(b) [Not allowed <i>unless</i> in discretion of court during cross and concerns D or W]	Extrinsic never allowed, only cross-examination (“take it as they tell it” rule).
Attack on <u>character</u> by <u>prior convictions</u>	404(a)(3) [Not admissible to prove conformity <i>unless</i> ] 609 [Admitted if punishable over one year, probative outweighs prejudice, AND dishonest statements auto-admit]	Extrinsic allowed.
Bias, Motive, and Incapacity	401 [Must be relevant], 402 [Cannot be irrelevant], 403 [Prejudice balancing]	Extrinsic allowed.
Prior Inconsistent Statements	613 [no disclosure of prior statement prior to questioning <i>unless extrinsic</i> ], 801(d)(1)(a) [PIS admissible not hearsay if under oath and subject to cross]	Extrinsic only allowed if W denies having made statement.
Specific Contradiction	401 [Must be relevant], 402 [Cannot be irrelevant], 403 [Prejudice balancing]	Extrinsic evidence collateral evidence rule applies -- must <i>not</i> be related to a collateral matter.

#### BASIC RULE

- **Generally:** Inadmissible unless D brings up in criminal case or if issue is brought up by party.
  - **Limited to specific trait or character.** Thus, doesn't open the door 100%.
  - **Can generally be proven by testimony,** as specific instances are rarely brought up.
  - **Relevance** still boundary, cannot refute things like criminal intent, etc.
- **FRE 404. Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes**
  - **(a) Character evidence generally** Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:



- **(1) Character of accused** - In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404 (a)(2), evidence of the same trait of character of the accused offered by the prosecution;
- **(2) Character of alleged victim** - In a criminal case, and subject to the limitations imposed by Rule 412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;
- **(3) Character of witness** - Evidence of the character of a witness, as provided in rules 607, 608, and 609
- **ALL D-DOOR-OPENINGS REQUIRE DELIBERATE SOLICITATION.** Evidence randomly testifying doesn't count.

- **D only opens door to limited info about specific trait.**

- **(b) Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for **other purposes**, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide **reasonable notice in advance of trial**, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.
  - **Requires:** Evidence preferred as either part of the charge or alleged conduct, part of an “other” act, or “inexplicably intertwined”. Must be offered for a non-propensity purpose. Proven per preponderance and 403 shouldn't require exclusion/limitation via 105.

- **FRE 405. Methods of Proving Character.**

- **(a) Reputation or opinion.** In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

- “Did you know” for opinion, “have you heard” for reputation.
- **ALL IMPLICIT MENTIONS OF FACTS MUST HAVE GOOD FAITH BASIS IN FACT.**
- **Generally begs for implied hearsay.**

- **FRE 803(21) -- Reputation as to character.** Reputation of a person's character among associates or in the community.

- **(b) Specific instances of conduct.** In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

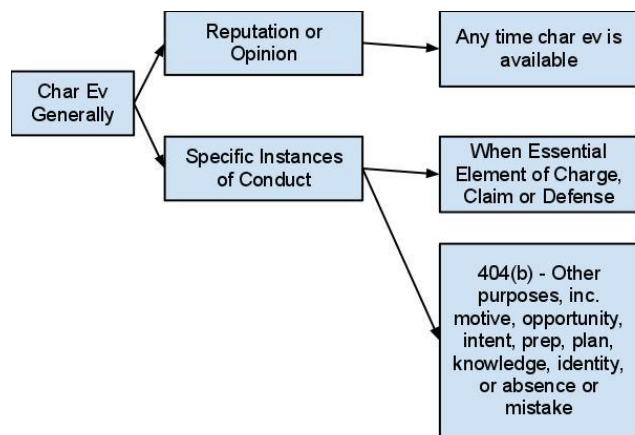
- **(1) Permissible Purposes**
  - **INEXPLICABLY INTERTWINED** evidence always admissible
  - Generally admitted on the basis of proving **something other than character.**
  - **Acquittals, crimes, arrests, ANYTHING. ANY ACT.**
  - **Limited applicability** in order to prevent mini-trials
- **(2) Requisite Proof**
  - **104 preponderance of the evidence standard**
  - **Thus, jury can re-find an acquittal where the preponderance standard meets the burden but a reasonable doubt standard was found before**

- **FRE 406. Habit; Routine Practice.** Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

- **SEXUAL ASSAULT LIMITATION**

- **FRE 412 – Rape Shield**

- **(a) Evidence generally inadmissible.** The following evidence is not admissible in any civil or criminal proceeding **involving alleged sexual misconduct** except as provided in subdivisions (b) and (c):
  - **(1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.**
    - **Inc:** Dreams, behavior. NOT false claims.
  - **(2) Evidence offered to prove any alleged victim's sexual predisposition.**



- **Inc:** Lifestyle, mode of dress, etc.
  - **(b) Exceptions.**
    - **(1)** In a **criminal** case, the following evidence is **admissible**, if otherwise admissible under these rules:
      - **(A)** evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;
        - **Sex with accused counts**
      - **(B)** evidence of specific instances of sexual behavior by the alleged victim **with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution**; and
      - **(C)** evidence the exclusion of which would violate the constitutional rights of the defendant.
        - **Confrontation Clause** kicks in, possibly to impeach W with a motive to fabricate/state of mind.
    - **(2)** In a **civil** case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.
      - **Requires BOTH (a) to be fulfilled and balancing**, so virtually impossible to fulfill
  - **(c) Procedure to determine admissibility.**
    - **(1)** A party intending to offer evidence under subdivision (b) must --
      - **(A) file a written motion** at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and
      - **(B) serve the motion** on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.
    - **(2)** Before admitting evidence under this rule the court must **conduct a hearing** in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.
- **Special Prior Sex Acts Provisos**
    - **FRE 413** – [Similar Crimes in Sex Assault Cases ALWAYS ADMISSIBLE WHERE RELEVANT, with small limits]
    - **FRE 414** – [Similar crimes in child molestation cases ALWAYS ADMISSIBLE WHERE RELEVANT, with small limits]
    - **FRE 415** – [Similar acts [sex assault or child molestation] in civil cases ALWAYS ADMISSIBLE WHERE RELEVANT, see limits]
    - **FRE 403 APPLIES OVER ALL**, but prejudicial effect intended so should be allowed to occur
    - **412 still kicks in**, so D can't use this to avoid
    - **Proven the same as 404 evidence** (*preponderance of the evidence*)
  - **Generally**
    - **Victim info** generally prohibited without small exceptions
    - **D info** more admissible, but many argue specific rules are useless, given 404(b)
  - **Ex:** Evidence that defendant owned and kept a bunch of guns was unreasonably used to try to impugn his reputation in order to unfairly prove character. *People v. Zackowitz*. Evidence of “intemperate” behavior of switchman was important to prove negligence of the employer in hiring the person. *Cleghorn v. NY Central & Hudson River RR*. Since plaintiff alleged damage to his reputation, his reputation was open for evidence. *Larson v. Klapprodt*. D opened door by having witnesses testify to his own character, and thus P could refute with evidence of prior crimes to impugn. *Michaelson v. US*. D opened door regarding being a man that “never bother anybody”. *Government of the Virgin Islands v. Roldan*. No abuse of discretion where question was properly objected (as P asked about character when witness tripped in that direction) and retrial was denied. *US v. Krapp*. Good character evidence inadmissible just to prove lack of intent. *US v. Setien*. | Evidence of stolen(?) credit cards went to intent, not character, as to theft of silver dollar. *US v. Beechum*. Personal use of marijuana went to possible proof of motive as to conspiracy, admissible. *US v. Boyd*. Testimony showing that D violated YMCA rules by getting behind desk and that a cop found (stolen?) checks in D's possession, became material. *US v. Dejohn*. Evidence of burglary of garage store relevant despite character nature given that it was highly likely tools stolen there were used to break into post office. *Lewis v. US*. The fact that a party was arrested with the same co-conspirator previously with similar counterfeit checks was probative towards his knowledge of illicit purpose. *US v. Crocker*. Previous crimes that established MO with wig and glasses relevant. *US v. Dossey*. Telephone recording where D bragged to being a drug dealer was NOT relevant to proving identity of unknown seller. *US v. Wright*. | Rule 104(b) governs the admissibility of prior conduct



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evidence to be used against defendant. *Huddleston v. US*. | Evidence of prosecutrix's alleged lack of chastity useless, as D wasn't claiming lack of consent. *Graham v. State*. Testimony regarding D+V sex okay, V+world sex inadmissible. *US v. Saunders*. Where testimony that was blocked regarding prior relationships could have gone to motive and impugn P's testimony, it should have been admitted. *Olden v. Kentucky*. | Differences in prior uncharged child sex instance with present case minor, should have been admitted over 403. *US v. Lecompte*. Rule 415 and 414 are generally unnecessary given 404(b). *US v. Cunningham*

## IMPEACHMENT AND REHABILITATION

### GENERALLY

- **Self-Contradiction:** W contradicting own testimony. **Partiality:** W is partial to family member, etc. **Character** of witness as liar, etc. **Defect on observation capacity.** **Specific contradiction** via other evidence.
- **MULTIPLE HATS.** D can be both W and D, so 404 series AND 608/609 can kick in.
- **TWO METHODS OF IMPEACHMENT**
  - **IMPEACHMENT OF W:** By showing failure of perception, memory, narration; showing W is untruthful or has a bad reputation or misconduct, or is operating with a bias.
  - **IMPEACHMENT OF TESTIMONY:** Prior inconsistent statements, W testimony contradicts other evidence in case (“specific contradiction”)
- **METHODS TO PROVE CHARACTER**
  - **Reputation and Opinion Evidence** (608(a))
  - **Acts and Misconduct Not Including Convictions** (608(b))
  - **Criminal Acts** (609)

### UNTRUTHFULNESS

- **404(a)(3)** allows **impeachment via the character of the witness**
- **FRE 607** – Anyone can impeach anyone (no vouching for called witness)
- **FRE 608 – Evidence of Character and Conduct of Witness**
  - (a) **Opinion and reputation evidence of character.** The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.
  - (b) **Specific instances of conduct.** [2] Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, **may not be proved by extrinsic evidence.** [1] They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) **concerning the witness' character** for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of **another witness** as to which character the witness being cross-examined has testified.
  - The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness.
  - **Translation:** No extrinsic evidence of truthfulness, period. Opinion evidence for truthfulness okay, but door has to be opened. Past events okay at discretion of the court in cross.
- **FRE 609 – Impeachment [of Witness, inc. D as W] by Evidence of Conviction of Crime**
  - (a) **General rule.** For the purpose of attacking the character for truthfulness of a witness,
    - (1) evidence that a witness [1] **other than an accused has been convicted of a crime** shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and [2] **evidence that an accused has been convicted of such a crime** shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and
      - **Note:** Basically creates standard lower than 403 for accused, more relevant **Highly controversial due to ease of getting in prejudicial crap**
    - (2) evidence that any witness has been convicted of a crime **shall be admitted regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.**
      - **SHALL BE ADMITTED = MANDATORY**
      - **Crimen Falsi crimes only.** Requires that **some element of crime involved dishonesty.** Ex: Burglary, false testimony, etc.
  - (b) **Time limit.** Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, 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. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.
    - **Presumption, not rule.**

- **(c) Effect of pardon, annulment, or certificate of rehabilitation.** Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime that was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.
- **(d) Juvenile adjudications.** Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.
- **(e) Pendency of appeal.** The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.
- **D MUST TESTIFY TO PRESERVE OBJECTION OF CRIM ACTS FOR APPEAL**
  - *Luce* – D must be a W and actually testify to appeal judicial ruling of admissibility
  - *Ohler* – No presumptive strike in raising allowed – if raised, no objection.
- **FRE 610 --** Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.
- **Ex:** Witnesses may be asked to directly opine on someone's truthfulness, cross acts as safety barrier. *US v. Lollar*. Bribery does not bear on truthfulness. *US v. Rosa*. Evidence of discharging a gun in a street had no bearing on truthfulness and issue of drug introduction. *US v. Ling*. Where intent was not an issue, evidence of offering to lie for leniency wasn't at issue. *US v. White*. Specific instances of falsehood via testimony was not admissible., *US v. Aponte*. | Prior convictions must be admitted where propensity for falsity shown. *US v. Wong*. Shoplifting alone doesn't rise to level of falsity. *US v. Amechi*. Admission of holding shank not admissible through 608, only went to show propensity for violence. *US v. Sanders*. Burglary and bank robbery showed falsity. *US v. Oaxaca*. Prior conviction of drug possession admitted (??). *US v. Hernandez*. | D must actually testify as to prior crime in order to preserve objection to 609 evidence for appeal. *Luce v. US*. D that raises prior criminal info cannot preemptively introduce and then appeal. *Ohler v. US*.

#### PRIOR INCONSISTENT STATEMENTS (IMPEACHING TESTIMONY)

- **Concerns impeachment of testimony** – prior statements to prove TOMA governed merely by hearsay, generally admissible
- **FRE 613 – Prior Inconsistent Statements**
  - **(a) Examining witness concerning prior statement.** In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.
    - **Allows surprise.**
  - **(b) Extrinsic evidence of prior inconsistent statement of witness.** Extrinsic evidence of a prior inconsistent statement by a witness is **not admissible unless** the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).
- **FRE 801(d)(1) – [Not hearsay if prior statement by witness AND if prior statement under oath subject to cross, etc.]**
  - **CAN ATTACK HEARSAY DECLARANT.** No requirement to afford explanation.
- **Cannot be used to subvert hearsay – NO CALLING JUST TO IMPEACH.**
  - **But independent admissibility = admissibility.**
- **OLD:** *Queen's Case* required showing witness prior. FRE no longer requires beforehand, no timing proviso, but must disclose upon request. Explanation allowable if extrinsic evidence proffered.
- **Ex:** Failure to identify in prior trial admissible to show inconsistency, was a “statement” per rule. No timing requirement, can impeach before calling witness. *US v. Lebel*. GJ testimony inconsistency with plainly bullshit main testimony allowed, trial judge could properly admit only to impeach and not for other purposes. *US v. Dennis*. Where a second trial occurred and the Gov't knew that a witness would forget things, there was no need to impeach her testimony with a prior recorded statement, and the use of such statement was clearly trying to avoid hearsay limits. *US v. Ince*. Where witness quickly turned on prosecution and pros offered to voir dire and the like, no harm when pros impugned after witness turned. *US v. Webster*. Webster-esque tactic allowed where party calls hostile witness to lay foundation for otherwise inadmissible testimony. *People v. Freeman*.

#### BIAS AND INCAPACITY

- **Allows both testimony and extrinsic evidence.**
- **No specific rules.** Generally a court-mandated sort of rule.
  - **Mental incapacity and similar issues** held carefully due to prejudicial effect

- **Ex:** Evidence of potential membership in Aryan Brotherhood, where membership would involve lying, highly relevant. *US v. Abel*. Information of past use of drug Prozac irrelevant to testimony for the most part. *US v. Sasso*. While use of drugs highly relevant to perception and the like, no evidence of use during time so no harm in not allowing presentation of evidence. *Henderson v. Detella*.

**SPECIFIC CONTRADICTION/COLLATERAL EVIDENCE**

- **Collateral Evidence Rule** – Party cannot impeach testimony regarding *collateral* matter with extrinsic evidence.
  - **“Collateral”** – Classic test is “whether the fact in question could be proven for any purpose *other* than contradicting the witness”. If so, not collateral and may be admitted.
  - **Cross** always allowed, this just focuses on *extrinsic* evidence
- **Ex:** Whether or not polygraph taken by guard could have been proven without need for impeachment, thus not collateral and admissible to impeach. *Simmons v. Pinkerton’s*. Impeachment by own statements did not involve collateral evidence rule, as witness dug own grave with his testimony. *US v. Copelin*.

**REHABILITATION**

- **Generally:** Proponent of W may bolster W **when and only when W has been attacked**.

<b>Bias or Motive</b>	<b>No rule</b> , but must be tailored to respond. No general truthfulness ev. Attack must be <i>relevant to the alleged motive</i> . Prior consistent statements may be relevant if tailored to motive.
<b>Incapacity</b>	<b>No rule</b> , but must be tailored to respond. No general truthfulness ev.
<b>Specific Contradiction</b>	<b>No rule</b> , but must be tailored to respond. No general truthfulness ev.
<b>Prior Inconsistent Statements</b>	<b>Maybe</b> prior consistent statements. Mostly just accept-and-move-on.
<b>Truthfulness</b>	<ul style="list-style-type: none"> <li>• <b>FRE 608</b> – [Same applications – (a) The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence <b>or otherwise*</b>., (b) [Extrinsic of <i>truthfulness</i> other than commission of a crime <b>NOT</b> allowed]                     <ul style="list-style-type: none"> <li>○ <b>“Or Otherwise”</b> – Probably insinuations, but limited.</li> </ul> </li> <li>• <b>Use of PIS, etc may constitute attack on truthfulness</b></li> <li>• <b>Vigorous cross, attacks on credibility of specific statements do not</b></li> </ul>

**PRIOR CONSISTENT STATEMENTS**

- **Generally:** Admissible if non-TOMA. Admissible if TOMA if fulfills 801(d)(1). PCS post-motive generally frowned on, but may be allowable.
- **MUST BE RELEVANT TO RESPOND TO WHATEVER ATTACK**
- **801(d)(1) -- Prior statement by witness.** The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive . . .
  - **DOES NOT GOVERN FOR NON-TOMA ISSUES.** Pure credibility = no 801.
- **Must be PRIOR TO MOTIVE FOR FABRICATION.**
- **Ex:** Implication that W falsely implicated D for a plea deal was sufficient attack to allow rehab. *US v. Lindemann*. | Presentation of prior inconsistent statements attack on truthfulness, allowed rehab. *Beard v. Mitchell*. Vigorous cross with self-inconsistency was not an attack on truthfulness. *US v. Danehy*. Pointing out testimonial inconsistencies and arguing incredibility not attack on truthfulness. *US v. Drury*. Specific instances of conduct to prove truthfulness not allowed per FRE 608. *US v. Murray*. | Prior consistent statements must be made *prior to the motive for fabrication*, adopting common law rule. Dissent argues potential relevance, 801(d)(1) is only about hearsay. *Tome v. US*. Pure credibility -> Non TOMA -> No 801. *US v. Simonelli*.

## EXPERT AND LAY WITNESSES

### LAY WITNESSES

- **Rule 701 - Opinion Testimony by Lay Witnesses** - If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are **(a)** rationally based on the perception of the witness, and **(b)** helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and **(c)** not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.
  - **PERCEPTION REQUIRED.** Generally, this means personal participation or witnessing.
  - **Opinion and inferences generally allowable**, insofar as they are based upon personal knowledge or perception.
  - **May require introduction just in case court determines witness is an expert.**
- **Rule 704 - Opinion on Ultimate Issue**
  - **(a)** Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is **not objectionable because it embraces an ultimate issue** to be decided by the trier of fact.
    - **403 also prevents abuse/problems.**
  - **(b)** No **expert witness testifying with respect to the mental state** or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.
- **Ex:** Paramedic had ample time on 911 call to ascertain if D was faking grief, could testify. *US v. Meling*. Eyewitness testimony could have testified that gun did not go off accidentally. *Government of Virgin Islands v. Knight*. Perception that driver charged with negligence was in total control relevant, could be testified to. *Robinson v. Bump*. LEO could not testify to info later gained through court just to interpret, given that LEO was not an expert witness. *US v. Peoples*. Testimony of otherwise lay witness regarding methods of drug points not expert testimony, but questionable. *US v. Ayla-Pizarro*.

### EXPERT WITNESSES (*Daubert/Kumho/Joiner*)

- **High deference**, with low review. Lots of emphasis on court factfinding.
- **Rule 702 - Testimony by Experts** - If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if
  - **(1)** the testimony is based upon sufficient facts or data,
    - **Rule 703 - Bases of Opinion Testimony by Experts** - The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.
      - **Methods:** (1) Firsthand observations, like by a physician, (2) Presentation at trial, examining testimony, (3) Presentation of data to expert outside of the court
    - **Rule 705 - Disclosure of Facts or Data Underlying Expert Opinion** - The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the **court requires otherwise**. The expert may in any event be required to disclose the underlying facts or data on cross-examination.
  - **(2)** the testimony is the product of reliable principles and methods, and **(3)** the witness has applied the principles and methods reliably to the facts of the case.
    - **Factors:** (1) Can it be tested/disproven? (2) Methodology of testing (peer review, etc) (3) Actual/potential rate of error (4) Acceptability in scientific community. *Also* independent research or litigation-specificity, degree of accounting for alternate explanations, degree of carefulness, field reliability, etc.
  - **Daubert- 702** does not utilize *Frye*, basis upon **relevance and reliability of scientific method/methodology**
    - **“Assist the Trier” = Relevance**
    - **Trial judge acts as gatekeeper**
    - **Reliability**, not the correctness of the conclusion.
  - **Kumho** – All expert testimony counts, including “technical” experts, etc.
  - **Joiner** - Abuse of discretion standard applies.
- **Reliability**
  - **FRE 706** – Court may appoint experts, agreed on by parties.
- **Ex:** Opinion as to whether or not State Farm was a “good neighbor” was just interp of warranty, not expert testimony, unwarranted. *Hatch v. State Farm Fire & Casualty Co.* Where expert used assistant to find results, confrontation clause not violated where expert only testified. *State v. Lewis*. FRE 706 should be applied sparingly, situation not met. *LeBlanc v. PNS Stores Inc.*