

Evidence Part 1



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RELEVANCY – WHAT IS RELEVANT INFORMATION?



Fed. R. Evid. 401 – Definition of Relevant Evidence



- Evidence is relevant if it has a tendency to make a fact more or less probable than it would without the evidence; and the fact is of consequence in determining the action.
 - Sprint/United Mgmt. Co. v. Mendelsohn, 552 U.S. 379 (2008).
 - Relevance is not a *per se* rule, but is determined in the context of the facts and arguments in a particular case.
 - Whether discrimination by others supervisors is relevant in an ADEA case depends on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case.

Fed. R. Evid. 104(b) – Relevance Conditioned on Fact



- When the relevancy of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.
- Part of Judge's screening function.
- Arises where a single witness may not be able to lay the entire foundation required for a piece of evidence.

Fed. R. Evid. 403 – Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

- The court may exclude relevant evidence if its probative value is *substantially* outweighed by the danger of one or more of the following: unfair prejudice, confusion of the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.
 - Probability of guilt evidence – offered to show unlikely that another person another person with the same characteristics as accused committed the crime charged. People v. Collins, 438 P.3d 33 (1986).
 - Treating traits as independent undermines the validity of probability result and warrant exclusion as misleading and unfairly prejudiced.
 - United States v. Old Chief, 519 U.S. 172 (1997)
 - Risks of unfair prejudice outweighed the probative value of the record of conviction, where admission available.

Example 1



In Pothead's drug smuggling trial, the prosecution seeks to introduce the expert testimony of Dr. Mary Juana, who will testify that marijuana causes psychosis in laboratory mice.

What should the basis of Pothead's objection be?

Irrelevant under FRE 401. Dr. Juana's testimony will not assist the trier of fact, since the drug's dangers (or lack thereof) do not make any material fact at issue in the smuggling charge either more probable or less probable than it would be without the evidence.

Example 2



Gotti is on trial for masterminding the murder of a potential witness. The prosecution seeks to enter the witness' severed head into evidence.

Is the head “legally relevant?”

Probably not. Here, the probative value of the severed head is probably substantially outweighed by the danger of unfair prejudice under FRE 403. However, the court does have a great deal of discretion; such evidence is not per se inadmissible.

QUALIFICATIONS OF WITNESSES



Fed. R. Evid. 601 – General Rule of Competency



- Every person is competent to be a witness unless these rules provide otherwise. But, in a civil case, state law governs the witness's competency regarding a claim or defense for which state law supplies the rule of decision.
 - This eliminated exclusions that existed at common law:
 - Slaves;
 - Felons;
 - Married women could not testify as to illegitimacy of child conceived during marriage.
 - All are competent, if they:
 - Take an oath;
 - Have personal knowledge;
 - Possess the ability to recall (memory);
 - Are able to communicate.

Example 1



Mary witnesses a federal crime. When she is called as a witness to testify, the defense claims she is incompetent to testify and shows that she has lied on the stand repeatedly in the past, has been convicted for perjury, and has spent 10 years in therapy for pathological lying and hallucinations.

Can Mary testify?

Yes. As long as Mary takes the oath to testify truthfully and has relevant personal knowledge, her lying past won't bar her from testifying.

However, Mary's past can be used to impeach her credibility as a witness.

Example 2



Dan Defendant, on trial for murder, is found not guilty by reason of insanity. Dan is called as a witness in an unrelated trial to testify while he is still considered insane.

Does his insanity preclude him from testifying?

No. Insane people are not necessarily incompetent. Dan will be allowed to testify if he has personal knowledge and takes the oath. His mental condition will go only to the weight of his testimony, not its admissibility.

Fed. R. Evid. 605 – Judge's Competency of as a Witness



- The judge presiding may not testify as a witness at the trial. A party need not object to preserve the issue.

Fed. R. Evid. 606(a) – Juror's Competency of as a Witness



- (a) **At the trial.** A juror may not testify as a witness before the other jurors at the trial. If the juror is called to testify, the court must give a party an opportunity to object outside the jury's presence.

Fed. R. Evid. 602 – Need for Personal Knowledge



- A witness may testify to a matter only if evidence is introduced to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness' own testimony. This rule does not apply to a witness's expert testimony under Rule 703.
- What is personal knowledge?
 - Perceived with one of the five senses
 - Memory – ability to recall
- Testimony
 - Ability to communicate

Example 3



Barney is charged with breaking into a warehouse. No one witnessed the break-in, but it was captured on film by a surveillance camera. Officer Sipowitz testifies, “I watched the film and it clearly shows that Barney was the burglar.”

Objectionable?

Yes, because Officer Sipowitz has no personal knowledge of the burglary.

Example 4



In David's murder trial for killing Goliath, the prosecution seeks to enter the murder weapon, David's slingshot, into evidence. The prosecutor calls David's best friend, Sparky, to the stand, and asks if he recognizes the slingshot. Sparky responds, "Yep, that's David's. It's got notches in the handle for every giant he's killed. I'd know it anywhere."

Must the court admit the slingshot into evidence?

Yes. Once an item of physical evidence has been authenticated, it's admissible if relevant. Sparky's testimony here is sufficient to support a finding that the item is indeed David's slingshot.

Fed. R. Evid. 603 – Oath or Affirmation



- Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience.

Fed. R. Evid. 701 – Opinion Testimony by Lay Witnesses



- If the witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:
 - (a) rationally based on the witness's perception
 - (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
 - (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Example 5



Bart is found dead in his study by his maid, Hazel. Cardinell Syn is arrested and tried for murdering Bart by filtering sodium cyanide into the study. Hazel testifies for the prosecution:

“When I found him, there was a faint smell of almonds in the room.”

(The smell of sodium cyanide is often compared to the smell of almonds)

Defense counsel objects, claiming that Hazel is not competent to offer her opinion and that expert testimony is needed.

How should the judge rule?

Objection overruled. Lay opinion testimony is admissible for purposes of “sense impressions” within the everyday experience of ordinary people.

Example 6



Leigh, a lay witness, testifies as to Matt's physical condition. Matt testifies "He looked like he had Lou Gehrig's disease."

Is this admissible?

No. While lay opinion testimony on a person's general appearance is admissible, such observations must be common and everyday, such as young, old, or sick. In this case, Lou Gehrig's disease causes physical debilitation that resembles other diseases, so a lay person would not ordinarily be able to correctly label someone as having that condition.

DIRECT EXAMINATION



Fed. R. Evid. 611(c) – Mode and Order of Interrogation and Presentation

(c) Leading questions. Leading questions should not be used on the direct examination except as necessary to develop the witness's testimony. Ordinarily leading questions should be permitted on cross-examination and when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

What are the exceptions to the use of leading questions on direct?



1. Preliminary matters, such as name, age, date of birth
2. Matters that are not in controversy, such as matters that are not controverted by the pleadings.
3. Inconsequential matters
4. Introducing a new subject matter, i.e., “Let me next draw your attention to September 11, 2001 . . .”
5. Refreshing recollection

Witness: I just don't recall the date that the World Trade Center collapsed right now.

Counsel: Was it September 11, 2001?

What are the exceptions to the use of leading questions on direct? (cont'd)



6. A reluctant witness
7. A predisposed witness
8. An adverse witness
9. A witness with limited capacity to speak

Example 1



Macbeth is on trial for the murder of Duncan. Banquo is called as a prosecution witness and testifies that he saw Macbeth leaving the castle shortly after midnight. It has already been established that the murder occurred at midnight. The following exchange occurs:

Prosecutor: Did you see anything else suspicious?

Banquo: No, that's all I know.

Prosecutor: You're sure you didn't see anything else to suggest that something strange had happened?

Banquo: No.

Prosecutor: You didn't notice anything on Macbeth's hands?

Macbeth's hands were covered in blood, and Banquo said so in the police report. Defense objects.

Example 2



How should the judge rule?

Objection overruled. Although the defense has correctly stated the general rule, there are exceptions, and the situation here fits into one of those exceptions: leading questions are permissible on direct when they serve to jog the witness' memory about something he once knew, rather than to supply the answer to him.

Example 3

What if, on the same facts,
the prosecutor instead asked,
“Did you happen to notice whether Macbeth’s
hands were covered in blood?”

Objection sustained. This question has gone too far
because it suggests more than is necessary to jog
the witness’ memory.

Fed. R. Evid. 612 – Writing Used to Refresh a Witness's Memory



This rule gives an adverse party certain options when a witness uses a writing to refresh memory:

- (1) while testifying; or
- (2) before testifying, if the court decides that justice requires the party to have those options.

Fed. R. Evid. 612 – Writing Used to Refresh a Witness's Memory



- Unless 18 U.S.C. § 3500 provides otherwise in a criminal case, an advise party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record.



- If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal.
- If a writing is not produced or delivered pursuant to order under this rule, the court may issue any appropriate order. But, if the prosecution does not comply in a criminal case the court must strike the witness's testimony, or if justice so requires declare a mistrial.

Example 4

- The Use of Rule 612 in a Deposition
 - Paul deposed a franchisee in the franchisee's suit against a franchisor (our client) for the damages the franchisee allegedly suffered as a result of the franchisor's failure to provide sufficient goods for sale.
 - During the franchisee's deposition, he kept consulting a paper in his hand. Paul asked him if he was relying on the paper as an aid to refresh his memory, and he replied "yes."
 - Paul then asked him for the paper under Rule 612. After some back and forth between Paul and the franchisee's lawyer, Paul was finally given the notes, which had very damaging statements:



The content's of Paul's Notes included the following:

Statement 1: “not really their fault on this”

Statement 2: “this is double counting, but they won't figure that out”

The case settled the next day.

- (5) Recorded recollection. A record that:
 - (A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;
 - (B) was made or adopted by the witness when the matter was fresh in the witness's memory; and
 - (C) accurately reflects the witness's knowledge.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

CROSS EXAMINATION





(b) Scope of cross-examination. Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility. The court may allow inquiry into additional matters as if on direct examination.

(c) Leading questions. Leading questions should not be used on the direct examination except as necessary to develop the witness's testimony. Ordinarily, the court should allow leading questions:

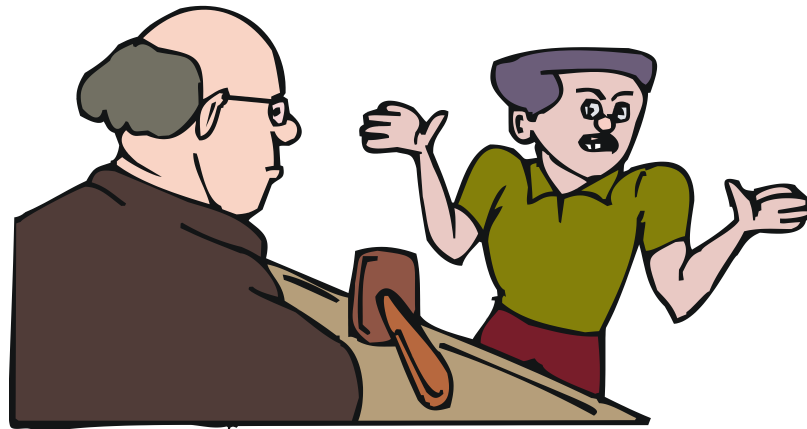
- (1) on cross-examination; and
- (2) when a party calls a hostile witness, an adverse party, or a witness identified with the adverse party.

Questions on Cross-Examination



- Leading v. Argumentative v. Lack of Foundation
 - Leading question
 - These questions suggests an answer
 - Argumentative question:
 - The sole purpose of the question is to contest a fact with a witness, not elicit information
 - Foundation:
 - Sample Question: “When did you stop beating your wife?”
 - This can only be asked during cross if you first lay foundation to show that the witness beat his wife.

WHAT IS THE MOST IMPORTANT RULE ON CROSS EXAMINATION?



**Never ask a question
that you don't know
the answer to!**

Example 1



At an insurance coverage trial in Delaware seeking coverage for environmental liabilities at a former pesticide formulation plant in California, the insurance companies were cross examining one of the client's site worker witnesses. The insurance companies were focusing on their "expected or intended" defense. In other words, if they could show that the policyholder actually expected the harm, there would be no coverage. To do this, the insurance companies tried to show that the waste practices at the plant were so bad, that everyone knew the site was contaminated, even in the 1950s and 1960s.

The insurance companies showed the site worker an aerial photo of the site from back then. The questioning went as follows:

Example 1, cont'd



Q: There is also what I think we are calling the south loading dock. Do you see that?

A: Yes.

Q: Right in front of that there's this large black object standing up and down there. Do you see that?

A: Yes.

Q: What is that?

A: Well, when you take an aerial photograph like this, any accumulated water photographs black. It could be water. There would be nothing else there other than that.

Q: You are not, I assume, an aerial photographer specialist, right?

A: Pardon?

Q: You say that the water photographs black. How do you know that?

A: Well, when I was in the service, I handled photography in the lab, and I had some indication of that.

Q: You looked at aerial photographs?

A: Yes.

Q: Oh, great. So you think that from your experience in aerial photo-graphy that this may be water?

A: I said it possibly could be.

How Do You Impeach a Witness?



- Contradiction
- By showing that the witness . . .
 - does not understand the oath
 - lacks personal knowledge
 - has an impaired memory
 - has no ability to communicate his thoughts

Note: These matters are never collateral and extrinsic evidence is admissible

- Bias

How Do You Impeach a Witness?



- Prejudice
- Interest
- Corruption
- Conviction of a crime
- Belief or opinion on religious matters
- Character for truthfulness or untruthfulness
- Specific instances of conduct
- Prior inconsistent statements

Fed. R. Evid. 609 – Impeachment by Evidence of a Criminal Conviction



- (a) In General.** The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:
- (1)** for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:
 - A.** *Must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and*
 - B.** *must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and*
 - (2)** for any crime *regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving—or the witness's admitting—a dishonest act or false statement.*

United States v. Brackeen, 969 F.2d 827 (9th Cir. 1992)

- Limited to “Crimen Falsi” – i.e. crimes that *are bad in themselves* and have some relationship to *deceit and lying*.
 - Unarmed robbery is not a crime of dishonesty or false statement under FRE 609.



(d) Juvenile adjudication. Evidence of juvenile adjudication is admissible under this rule only if:

- (1) it is offered in a criminal case;
- (2) The adjudication was of a witness other than the defendant;
- (3) an adult's conviction for that offense would be admissible to attack the adult's credibility; and
- (4) admitting the evidence is necessary to fairly determine guilt or innocence.



(e) Pendency of appeal. A conviction that satisfies this rule is admissible even if an appeal is pending. Evidence of the pendency is also admissible.

Example 2



Defendant is prosecuted in federal court for arson. At trial, Defendant testifies on his own behalf, urging that the fire at his warehouse was an accident.

On cross examination, may the prosecutor properly ask Defendant whether he was convicted eight years ago for misdemeanor income tax fraud?

Yes, because it was within 10 years and tax fraud is a crime of dishonesty.

Example 3



Defendant is prosecuted in federal court for arson. At trial, Defendant testifies on his own behalf, urging that the fire at his warehouse was an accident.

May the prosecutor properly ask Defendant whether he was released from prison nine years ago for his misdemeanor conviction for possession of marijuana?

No.

Example 4



Defendant is prosecuted in federal court for arson. At trial, Defendant testifies on his own behalf, urging that the fire at his warehouse was an accident.

May the prosecutor properly ask Defendant whether he was convicted two years ago for misdemeanor shoplifting?

Yes.

Example 5



Defendant is prosecuted in federal court for arson. At trial, Defendant testifies on his own behalf, urging that the fire at his warehouse was an accident.

May the prosecutor properly ask Defendant whether he was convicted five years ago for felony assault?

Maybe, if the court determines that the probative value of the evidence outweighs its prejudicial effect.

Fed. R. Evid. 610 – Religious Beliefs or Opinions



- Evidence of the witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility.

Fed. R. Evid. 608 – A Witness's Character for Truthfulness or Untruthfulness



- (a) Reputation or Opinion Evidence.** A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.



(b) Specific Instances of Conduct. Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:

- (1) the witness; or
- (2) another witness whose character the witness being cross-examined has testified about.

In other words . . .

- A party may impeach a witness (the “target” witness) by calling ***another witness*** to testify to the target witness’ bad character for veracity. Impeachment may be in the form of reputation or opinion, but specific acts are not allowed.

Example 6



Wally testifies for the prosecution that he saw Defendant running from the crime scene. During the defense, Defendant calls Rev. Al, who knows Wally, to testify that Wally has a lousy reputation for truthfulness among members of Rev. Al's congregation and that in Rev. Al's opinion, Wally is not a truthful person.

Is Rev. Al's testimony admissible to impeach Wally?

Yes.

Example 7



Wally testifies for the prosecution that he saw Defendant running from the crime scene. During the defense, Defendant calls Rev. Al, who knows Wally, to testify that Wally has a lousy reputation for truthfulness among members of Rev. Al's congregation and that in Rev. Al's opinion, Wally is not a truthful person.

What if Rev. Al followed up his opinion or reputation testimony and said, "I've reached this opinion because during the past year, Wally lied to me on six separate occasions."

Inadmissible.



- (a) Showing or Disclosing the Statement During Examination.** When examining a witness about the witness's prior statement, a party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party's attorney.



- (b) Extrinsic Evidence of a Prior Inconsistent Statement.** Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).

Example 8



In an auto accident case, Plaintiff testifies that she was wearing her seat belt. Defendant does not cross-examine her. During the defense, Defendant calls Joe the bartender, who testifies that Plaintiff told him, at Joe's bar a week after the accident, that she had **not** been wearing her seat belt.

Should Plaintiff's motion to strike be granted on the ground that Plaintiff was not given an immediate opportunity to explain or deny the inconsistency?

No. There is no need to give any chance to explain or deny because the witness was the opposing party.

Example 9



In an auto accident case, Plaintiff testifies that she was wearing her seat belt. Defendant does not cross-examine her. During the defense, Defendant calls Joe the bartender, who testifies that Plaintiff told him, at Joe's bar a week after the accident, that she had **not** been wearing her seat belt.

Is Plaintiff's statement admissible to (1) impeach Plaintiff **and** (2) as substantive evidence that she was not wearing her seat belt at the time of the accident.

Yes, the statement is admissible to impeach the Plaintiff and it's admissible as substantive evidence because it's an admission of a party opponent under 801(d)(1).

CHARACTER EVIDENCE





(a) Character Evidence.

(1) *Prohibited Uses.* Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

(2) *Exceptions for a Defendant or Victim in a Criminal Case.* The following exceptions apply in a criminal case:

(A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;

(B) subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may:

(i) offer evidence to rebut it; and

(ii) offer evidence of the defendant's same trait; and



- (C) in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that he victim was the first aggressor.
- (3) ***Exceptions for a Witness.*** Evidence of a witness's character may be admitted under Rules 607, 608, and 609

Fed. R. Evid. 412 – Sex-Offense Cases: The Victim's Sexual Behavior or Predisposition



- (a) Prohibited Uses.** The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct:
- (1)** evidence offered to prove that a victim engaged in other sexual behavior; or
 - (2)** evidence offered to prove a victim's sexual predisposition.



(b) Exceptions –

(1) ***Criminal*** Cases. The court may admit the following evidence in a criminal case:

- (A) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;
- (B) evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and
- (C) evidence whose exclusion would violate the defendant's constitutional rights.

- (2) **Civil Cases.** In a civil case, the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy.



- (a) By Reputation or Opinion.** When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct.



(b) Crimes, Wrongs, or Other Acts.

- (1) ***Prohibited Uses.*** Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
- (2) ***Permitted Uses; Notice in a Criminal Case.*** This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identify, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:

Fed. R. Evid. 404(b) – Other Crimes Evidence (Cont.)



- (A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and
- (B) do so before trial—or during trial if the court, for good cause, excuses lack of pretrial notice.

Fed.R.Evid. 404(b) – Other Crimes Evidence



- Motive – why someone behaved the way they did.
- Intent – intent at the time of the incident.
- Knowledge – negates claim of ignorance.
- Opportunity – negates claim of lack of opportunity to act.
- Common Scheme or plan – acts linked together with a common objective.
- *Huddleston v. U.S.*, 485 U.S. 681 (1988)
 - *Under Rule 104(b) court must decide whether the jury could reasonably find the conditional fact by a preponderance of the evidence.*

How to Prove Rule 404(b) Crimes



- By proving a conviction, *or*
- By producing evidence that a prior bad act occurred.



The prosecution must produce *sufficient evidence* for a *reasonable* jury to conclude that the defendant committed the prior act by a *preponderance of the evidence*.

Other Rule 404(b) Requirements



- *Pragmatic considerations* – the court must weigh the probative value versus any prejudicial effect.
- *Limiting instructions* – the court must instruct the jury about the limited purpose of Rule 404(b) evidence.
- *Pre-trial notice* – upon defendant's request, the prosecution must give pretrial notice of intent to introduce Rule 404(b) evidence.



- (b) By Specific Instances of Conduct.** When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct.

Examples in which specific instances of conduct are admissible:



- Libel

- Career criminal offender



Possession of firearm by
convicted felon



Example 1



Lizzie is accused of intentionally killing her mother with an ax; her defense is that it was an accident. The prosecution seeks to show that Lizzie threw a knife at her mother during a family quarrel one week before the mother's demise.

Is this evidence admissible on the theory that it shows Lizzie's propensity for violence?

No. The evidence is not admissible to show Lizzie's propensity for violence, but it could be used to show absence of mistake or accident under Rule 404(b).

Example 2



Defendant is charged with the murder of Officer Garcia. The prosecution seeks to prove that the Defendant was convicted and imprisoned five years ago for narcotics sales after an investigation and arrest made by Officer Garcia. Defendant objects on the ground of impermissible character evidence.

How should the court rule?

Objection overruled. The defendant's arrest by Officer Garcia shows the Defendant's motive to murder Officer Garcia.

Example 3



Defendant is charged with cocaine possession and intent to distribute. He defends on the ground that he was merely a possessor and user, not a seller. The prosecution seeks to prove that Defendant sold drugs a year ago in the vicinity of the arrest in the current case.

Admissible?

Yes. The defendant put his state of mind in issue, his intent.



- **HABIT**

- Regular response to a repeated, specific stimulus
- FRE 406 requires a frequency which is invariable and not volitional

Questions & Answers



Evidence Part II



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HEARSAY





- (c) Hearsay.** “Hearsay” means a statement that:
- (1) the declarant does not make while testifying at the current trial or hearing; and
 - (2) a party offers in evidence to prove the truth of the matter asserted in the statement.

For every statement, *always* ask . . .



1. Is the statement an out-of-court statement?
2. What is the purpose for which the statement is being offered?
3. If the statement is offered for a non-hearsay purpose, ask whether that purpose is relevant, and if so, is the purpose outweighed by the risk of unfair prejudice under Rule 403?
4. If the statement is an out-of-court statement offered for its truth, does it fall within a hearsay exception?

Example 1



Oswald is shot by Ruby, and survives. Oswald is subsequently tried for assassinating President Kennedy. Oswald testifies in his own defense, saying, “I’ve never been near the Texas Book Depository in Dallas.” Defense counsel then asks Oswald, “What did you tell police at the time of your arrest?” Oswald says, “I told them I’d never been anywhere near the Book Depository.”

Is Oswald’s answer admissible over a hearsay objection to prove he had never been inside the Depository?

No. Oswald’s answer is inadmissible hearsay. His statement is an out-of-court statement offered to prove the truth of the matter asserted. Note, however, that Oswald’s initial direct testimony is not hearsay. Also note that Oswald’s out-of-court statement is not immunized from hearsay problems by the fact that it’s the declarant quoting his own prior out-of-court statement.

Statements that are not hearsay

Some statements, when made, have legal consequences and, therefore, those statements are not hearsay

- Words of offer and acceptance
- Slander
- Words of donative intent
- Notices or warnings
- Prior inconsistent statements

Example 2

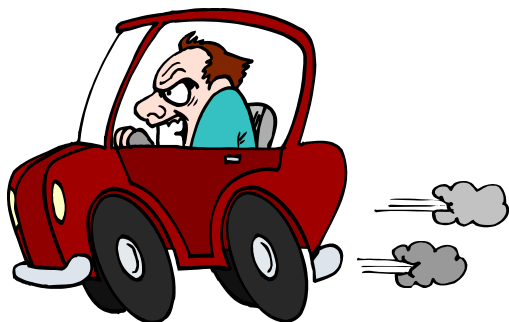


Gates sues Trump for breach of an oral contract. Gates calls a witness who proposes to testify, “I heard Trump say to Gates, ‘I accept your offer to sell Microsoft.’”

Hearsay?

No. This is an acceptance and the statement has independent legal significance.

Example 3

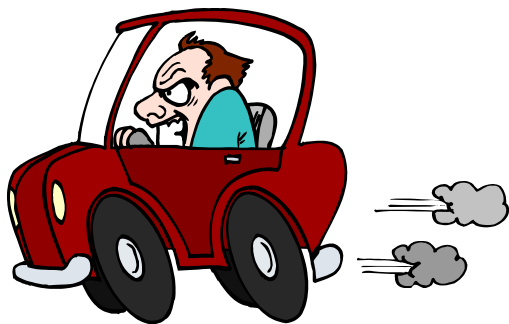


Phil's complaint alleges that Stan and the student newspaper libeled him in an article stating that Phil stole Stan's car.

If Phil introduces the newspaper article into evidence, should it be excluded as hearsay?

No. The article itself is the alleged act of defamation.

Example 4

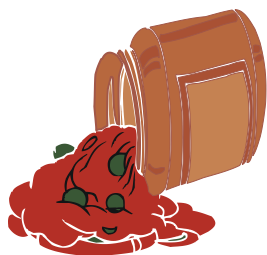


Phil's complaint alleges that Stan and the student newspaper libeled him in an article stating that Phil stole Stan's car.

To prove that Phil had permission to drive Stan's car, may Phil testify, over a hearsay objection, that "As Stan handed me the keys to his car, he said, 'You may drive my car to Buffalo for the weekend.'"

Yes. This is a grant of permission and has independent legal significance.

Example 5



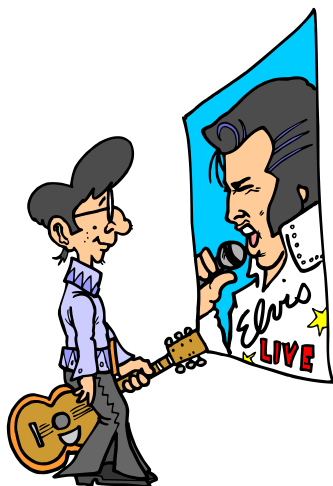
Plaintiff sues Supermarket. Plaintiff alleges that she slipped and fell on a broken jar of salsa in Aisle 3 and that Supermarket had prior notice of the dangerous condition. Plaintiff's witness takes the stand and proposes to testify, "Several minutes before Plaintiff entered Aisle 3, I heard another shopper tell Supermarket manager, 'There's a broken jar of salsa on the floor in Aisle 3.'"

Inadmissible hearsay?

It depends on the purpose. If the statement is being offered to prove there was a broken jar of salsa on Aisle 3, then the statement is inadmissible.

However, if the statement is offered to show that Supermarket had notice of the broken jar, then the statement is admissible because it shows the effect on the person who heard the statement.

Example 6



Hal is prosecuted for murder. His defense is insanity. A witness for Hal proposes to testify, “Two days before the killing, Homer said, ‘I am Elvis Presley. It’s good to be back.’”

Hearsay?

No. A statement that unintentionally reveals something about the speaker’s state of mind is not hearsay. Examples include statements showing insanity, lies that demonstrate consciousness of guilt, questions that demonstrate lack of knowledge.

Fed. R. Evid. 801(d) – Statements That Are Not Hearsay



(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

- (1) *A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:
 - (A)** is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding, or in a deposition;
 - (B)** is consistent with the declarant's testimony and is offered to rebut an express or implied charge the Declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or
 - (C)** identifies a person as someone the declarant perceived earlier.



- (2) An Opposing Party's Statement.** The statement is offered against an opposing party and:
- (A) was made by the party in an individual or representative capacity;
 - (B) is one the party manifested that it adopted or believed to be true;
 - (C) was made by a person whom the party authorized to make a statement on the subject;
 - (D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or
 - (E) was made by the party's coconspirator during and in furtherance of the conspiracy.

Fed. R. Evid. 801(d) – Statements That Are Not Hearsay, cont'd



The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

Example 7



Sid sues Tavern under a Dram-Shop Act, for injuries sustained when Cal ran over him while he was crossing the street. Sid claims that the Tavern let Cal drink too much. The Tavern calls Cal as a witness, and expects him to testify that he was sober when he left the Tavern. Instead, on direct Cal says he may have had a few too many at the Tavern.

Can the Tavern now introduce a statement from Cal's pre-trial deposition in which he claimed he left the bar sober, as substantive evidence that he was sober?

Yes. The Tavern can use the deposition to both impeach Cal under Fed. R. Evid. 607 *and* as substantive evidence under Fed. R. Evid. 801(d)(1)(A).

Example 8

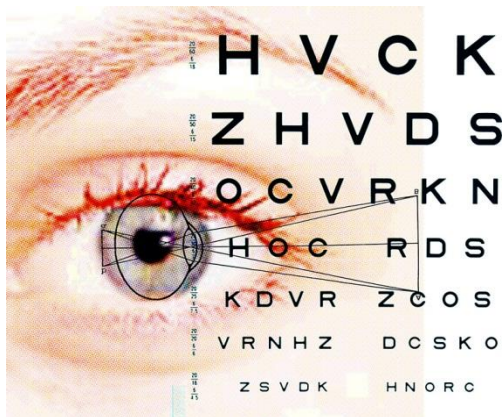


Athena is walking down a lonely street one night when Nero sneaks up behind her, yanks her purse of her shoulder, and runs away. Athena sees only Nero's back. The police catch Nero nearby shortly thereafter. They take him to the station and photograph him. His photo, along with that of five others who look something like him, is shown to Athena. She identifies Nero as the thief.

At Nero's trial, at which Athena is a prosecution witness, is the photo admissible as an identification?

Yes, even though Athena didn't have a chance to look at his face. Under Fed. R. Evid. 801(d)(1)(C), prior identification by a presently testifying witness is not hearsay, as long as the identification is made after the witness *perceived* the person.

Example 9



Will sues Al for battery, claiming that Al kicked sand in his face, permanently damaging his eyesight. At trial, Al offers into evidence Will's application for Bungling Brother's Clown College, submitted two weeks after the incident, to which Will attached a certificate from his optometrist. The certificate states that Will's eyesight is perfect.

Will the certificate be considered an admission?

Yes, an *adoptive admission*. Will adopted the statement in the certificate when he attached it to his application under Fed. R. Evid. 801(d)(2)(B).

Silence is a ‘tacit admission’



Silence is a ‘tacit admission’ when the following three conditions are met:

1. The declarant heard the accusatory statement;
2. The declarant was capable of denying the statement;
and
3. Under the same circumstances, a reasonable person would have denied the statement if it were not true.

Example 10



At the scene of a crime, a witness screams at the defendant, “You murderer!” The defendant says nothing.

Hearsay?

The defendant’s silence in response to the witness’s statement is a tacit admission and not hearsay.

HEARSAY EXCEPTIONS



The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

1. Present Sense impression.

A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.



2. Excited Utterance.

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





3. Then-Existing Mental, Emotional, or Physical Condition.

A statement of the declarant's then- existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.



- State of mind statements can be offered to prove:
 - Direct evidence of declarant’s state of mind itself, where state of mind is “in issue” and “material” (e.g. intent).
 - Declarant’s later conduct, on the theory that declarant probably followed through with what she said she intended to do.

Example 1



Wendy left all of her money to the local pet cemetery. During the probate of the will, Wendy's family challenges the will on the ground that Wendy was insane at the time of the will's execution. Pet cemetery offers testimony that a few days before the execution of the will, Wendy said to her Neighbor, "I do not love my family anymore."

Admissible over a hearsay objection?

Yes. The statement goes to show Wendy's present state of mind and her state of mind was in issue.

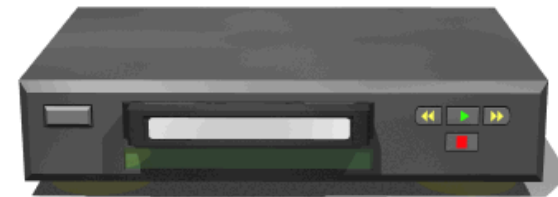
4. Statement Made for Medical Diagnosis or Treatment. A statement that:

- (A) is made for – and is reasonably pertinent to – medical diagnosis or treatment; and
- (B) describes medical history; past or present symptoms or sensations; their inception; or their general cause.





5. Recorded Recollection.



A record that:

- (A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;
- (B) was made or adopted by the witness when the matter was fresh in the witness's memory; and
- (C) accurately reflects the witness's knowledge.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

Elements of past recollection recorded are:

1. The declarant had personal knowledge about the matter to which he is asked to testify.
2. The declarant presently has insufficient recollection to testify fully and accurately.
3. The declarant set forth the matter in a written memorandum or record or adopted another person's written memorandum or record.
4. At the time the declarant made or adopted the written memorandum or record, the matter was fresh in his mind.
5. The declarant testifies that the written memorandum or record is accurate.



- 6. Records of a Regularly Conducted Activity.** A record of an act, event, condition, opinion, or diagnosis if:
- (A) the record was made at or near the time by – or from information transmitted by – someone with knowledge;
 - (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
 - (C) making the record was a regular practice of that activity;
 - (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(1) or (12) or with a statute permitting certification; and
 - (E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

Important points to the business records exception:



1. Applies to all kinds of business records, whether or not conducted for profit.
2. Custodian must explain how and why information was entered “at or near the time” of the events in question.
3. A person with knowledge who had a business duty to report provided the information.
4. The information relates to an activity that the business regularly conducts.
5. It is the regular activity of the business to prepare such records.
6. The business record is inadmissible if “the source of information or method or circumstance of preparation indicates lack of trustworthiness.”

- 7. Absence of a Record of a Regularly Conducted Activity.** Evidence that a matter is not included in a record described in paragraph (6).
- (A)** the evidence is admitted to prove that the matter did not occur or exist;
 - (B)** a record was regularly kept for a matter of that kind; and
 - (C)** neither the possible source of the information nor other circumstances indicate a lack of trustworthiness.

8. Public Records. A record or statement of a public office if:

(A) it sets out:

- (i) the office's activities;
- (ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or
- (iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) neither the source of information nor other circumstances indicate a lack of trustworthiness.

9. Public Records of Vital Statistics.

A record of a birth, death, or marriage, if reported to a public office in accordance with a legal duty.



10. Absence of a Public Record.

Testimony – or a certification under Rule 902 – that a diligent search failed to disclose a public record or statement if the testimony or certification is admitted to prove that:

- (A) the record or statement does not exist; or
- (B) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind.



- 11. Records of Religious Organizations Concerning Personal or Family History.**
- 12. Certificates of Marriage, Baptism, and Similar Ceremonies.**
- 13. Family Records.**
- 14. Records of Documents That Affects an Interest in Property.**



- 15. Statements in Documents That Affect an Interest in Property.**
- 16. Statements in Ancient Documents.**
- 17. Market Reports and Similar Commercial Publications.**

18. Statements in Learned Treatises, Periodicals, or Pamphlets.

A statement contained in a treatise, periodical, or pamphlet if:

- (A)** the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and
- (B)** the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit.

Important points to the learned treatise exception



- Must be acknowledged by an expert as reliable on cross or direct.
- Judicial notice.
- Relevant passages can be read but the treatise cannot be offered as an exhibit.

The Importance of Establishing That a Treatise is “Authoritative”



- On cross-examination of the defendant-insurers’ expert witness on the issue of whether London Market marine insurers were allowed to sell land-based coverage, the expert claimed that the insurers were not allowed to sell such coverage. His testimony contradicted articles published by leading insurance publications in London, stating that marine carriers did sell land-based insurance and that it was becoming a major percentage of their business.
- The judge blocked the use of the articles because the plaintiff had not established that the publications were considered to be “authoritative” sources of which someone in the London market could or should have been aware. Establishing that the publications were “authoritative” could have been done the day before when the Plaintiff’s expert was on the stand.



- 19. Reputation Concerning Personal or Family History.**
- 20. Reputation Concerning Boundaries or General History.**
- 21. Reputation Concerning Character.**



22. Judgment of a Previous Conviction.

23. Judgments Involving Personal, Family, or General History, or a Boundary.



- (a) Criteria for Being Unavailable.** A declarant is considered to be unavailable as a witness if the declarant:
- (1)** is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;
 - (2)** refuses to testify about the subject matter despite a court order to do so;
 - (3)** testifies to not remembering the subject matter;
 - (4)** cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or
 - (5)** is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:

Fed. R. Evid. 804(a) – Hearsay Exceptions; Declarant Unavailable



- (A)** the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or
- (B)** the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.



(b) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1) Former Testimony. Testimony that:

- (A)** was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and
- (B)** is now offered against a party who had – or, in a civil case, whose predecessor in interest had – an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

(b) (2) Statement Under the Belief of Imminent Death. In a prosecution for homicide or in a civil case, a statement that the declarant, while believing that the declarant's death to be imminent, made about its cause or circumstances.

Elements of 804(b)(2)



1. The declarant must believe that his death is certain. This can be proven through circumstantial evidence such as the type of wound that he had.
2. Unlike the common law, the federal rules do not require that the declarant be unavailable because he is dead; he need only be unavailable.
3. The dying declaration must be based upon personal knowledge.
4. The statement must relate to the cause or circumstances of what declarant believes to be his impending death.

Example 2



State v. Dagger Dan for murder of Victor. Victor was found by Officer Smith lying in the gutter in a pool of blood with a knife in his stomach. He told Smith, “It’s not looking too good for me. Dagger Dan did it, and I’m going to get him for this.” Victor died an hour later.

May Smith testify to Victor’s statement as a dying declaration.

No. Victor did not believe that his death was certain or impending.

- (b)(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.

Example 3



State v. Dunn for arson of Town Hall. Dunn calls Waldo to testify that while sitting in a bar one night recently, Waldo heard Sid Stranger say, “I’m the guy who torched Town Hall, but I’m sure glad they think it’s Doppler. Just to be safe, I’m leaving town tomorrow.” Doppler’s attorney demonstrates that Stranger has not been located despite diligent efforts to find him.

Admissible?

No, because the statement is offered by Doppler to prove his innocence. The statement would be admissible, however, with corroboration.

(b)(4) Statement of Personal or Family History. A statement about:

- (A)** the declarant's own birth, adoption, legitimacy, ancestry marriage, divorce, relationship by blood, adoption, or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or
- (B)** another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

(b)(6) Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability. A statement offered against a party that wrongfully caused – or acquiesced in wrongfully causing - the declarant's unavailability as a witness, and did so intending that result.

Example 4



Tony is on trial for loan sharking. The key government witness, Paulie, has been found dead in the river. All indications are that Tony is responsible for Paulie's demise. At the trial for loan sharking, Paulie's grand jury testimony and interview statements to the police are offered by the prosecution against Tony.

Admissible over a hearsay objection?

Yes, if the judge is persuaded by a *preponderance of the evidence* that Tony is responsible for Paulie's unavailability.

Fed. R. Evid. 805 – Hearsay Within Hearsay

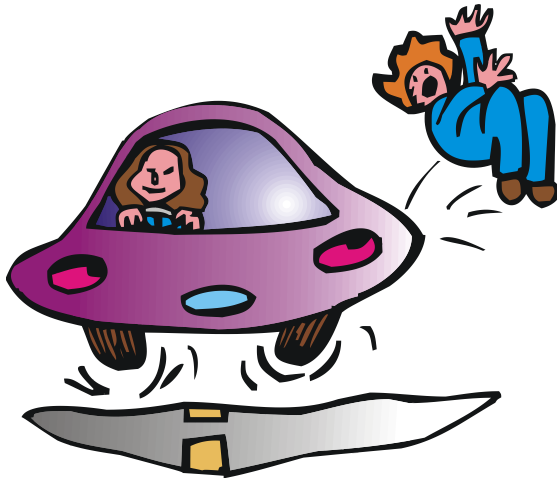


- Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule.



- When a hearsay statement - or a statement described in Rule 801(d)(2)(C), (D), or (E) - has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

Multiple Levels of Hearsay – Example 5



Pedestrian sues Hot Rod for damages for recklessly running him down. At trial, Pedestrian seeks to introduce the report of Officer Muldoon, who arrived at the scene ten minutes after the accident.

The report, which was prepared by Muldoon at the scene, states:

Multiple Levels of Hearsay – Example 6



“Upon arrival, I measured skid marks 50’ in length.”

Admissible, because the report comes within the business records exception.

Multiple Levels of Hearsay – Example 7



“Officer Mendez, who witnessed the accident, told me that Hot Rod was driving nearly 60 MPH.”

Admissible, because again, both officers’ statements are within the business records exception.

Multiple Levels of Hearsay – Example 8



“Bill Bystander told me,
‘I saw the accident and Hot Rod ran through the stop sign.’”

Inadmissible, because it is an out of court statement offered
for the truth of the matter asserted.

However, depending on how Bill said this, the statement
might be an excited utterance.



(a) In General. Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:

- (1) the statement has equivalent circumstantial guarantees of trustworthiness;
- (2) it is offered as evidence of a material fact;
- (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and
- (4) admitting it will best serve the purposes of these rules and the interests of justice.

- (b) **Notice.** The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

The Confrontation Clause – The Crawford Revolution



- Crawford v. Washington, 541 U.S. 36 (2004)
 - Testimonial statements are only admissible if the defendant had a prior opportunity to cross-examine the declarant
- Davis v. Washington; Hammon v. Indiana, 547 U.S. 813 (2006)
 - Statements are non-testimonial 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.
 - They are testimonial when the circumstances objectively indicate there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal presentation.

The Confrontation Clause – The Crawford Revolution , Contd.



- Giles v. California, 554 U.S. 353 (2008)
 - Forfeiture by wrongdoing applies only when there was an intentional act designed to prevent the witness from testifying.
- Melendez-Dias v. Massachusetts, 129 S.Ct. 2527 (2009)
 - Forensic laboratory report created as evidence in a criminal proceeding is testimonial for purposes of the Sixth Amendment.

The Confrontation Clause – The Crawford Revolution , Contd.

- Bullcoming v. New Mexico, 131 S.Ct. 2705 (2011)
 - A forensic laboratory report containing testimonial certification – made for the purpose of proving a particular fact – may not be introduced by the testimony of a scientist who did not sign the certification or perform or observe the test reported, as the accused has the right to be confronted with the analyst who made the certification.
- Michigan v. Bryant, 131 S.Ct. 1143 (2011)
 - *The statement given to police by a wounded crime victim identifying the person who shot him may be admitted as evidence at the trial if the victim dies before trial and thus does not appear. Because the primary purpose of the interrogation was to enable police to deal with an ongoing emergency, the statements resulting from that interrogation were not testimonial and could be admitted without violating the Confrontation Clause.*
 - According to *Bryant*, if, at the time of an interrogation there was no (longer) such ongoing emergency **AND** the primary purpose of the interrogation was to establish or prove past events potentially relevant to later criminal prosecution **THEN** statements made during that interrogation were testimonial. Moreover, according to the majority, in these non-emergency situations, "standard rules of hearsay, designed to identify some statements as reliable, will be relevant."

The Confrontation Clause – The Crawford Revolution , Contd.

- Williams v. Illinois, 132 S. Ct. 2221 (2012)
 - This involved a forensic analyst testifying based in part on a DNA profile performed by someone else, that DNA found inside a rape victim matched DNA taken from the defendant. The Supreme Court took cert. to answer *whether the prosecution could introduce an analyst's testimonial forensic report, or its substance through an expert witness* – a questions left open in Bullcoming.
 - Four Justices dissented (Kagan, Scalia, Ginsburg and Sotomayor) while Thomas wrote a separate opinion where he rejected the other four justices' reasoning.
 - Justice Thomas said that “there is no meaningful distinction between disclosing an out of court statement so a fact finder may evaluate the expert's opinion and disclosing the statement for its truth.” But, Thomas also determined that the forensic report of the DNA found inside the rape victim was not testimonial, because unlike Melendez v. Diaz and Bullcoming, it was not sufficiently “formal” to be testimonial.
 - Justice Thomas, rejected the plurality opinion of Justice Alito that the report was not testimonial because it did not accuse a target individual of a crime. Thus, Thomas's opinion control.
 - In conclusion, reports involving testing by one person and that are incriminating continue to be inadmissible without the author's testimony. But, statements made in a report involving multiple steps that are part of a lab's work product or in a subsidiary report used to generate a final report will generally not be testimonial because they are not sufficiently formal.

The Confrontation Clause – The Crawford Revolution , Contd.



- Example:
 - Rae Carruth was an NFL receiver for the Carolina Panthers who was convicted of killing his pregnant girlfriend, who was driving in a car with him. Carruth slowed down and another car pulled along side and shot the girlfriend. She called 911 and provided information about the attack. She also made additional statements at the scene and at the hospital to the police, and wrote notes about the incident for a nurse.
 - 1) Does the Confrontation Clause apply to the 911 call?
 - 2) Does it apply to the statements to the police officers?
 - 3) Does it apply to the notes?
 - 4) Does forfeiture by wrongdoing apply?

Questions & Answers



Evidence Part III



Frank C. Razzano

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- 7) **Authenticating other Items of Evidence**
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- 9) **Definitions**



JUDICIAL NOTICE





(b) Kinds of Facts That May Be Judicially Noticed.

The court may judicially notice a fact that is not subject to reasonable dispute because it:

- (1) Is generally known within the trial court's territorial jurisdiction; or
- (2) Can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

(c) Taking Notice. The court:

- (1) may take judicial notice on its own; or
- (2) must take judicial notice if a party requests it and the court is supplied with the necessary information.



- (d) Timing.** The court may take judicial notice at any stage of the proceeding.
- (e) Opportunity to Be Heard.** On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.
- (f) Instructing the Jury.** In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.

LAY AND EXPERT WITNESSES



Fed. R. Evid. 701 – Opinion Testimony by Lay Witnesses



- If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:
 - (a) rationally based on the witness's perception;
 - (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
 - (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Exceptions to the general rule that lay witnesses cannot offer opinion testimony

- Physical appearance (age, weight, height, sobriety)
- Recognition (looks, voice, handwriting)
- Emotional state (angry, distressed, happy)
- Speed, distance, temperature
- Value of one's own goods or services
- Visible signs of irrational behavior
- Odors

Example 1



John Smith is Amish – he doesn't believe in traveling by car and he rarely sees cars in his community. However, one day a red Porsche zooms through Smith's cornfield while he is working there, and the car crashes into a tree. Later at trial, Smith is called to testify about the accident. He says, "the car was going 80 miles per hour."

Is his testimony admissible?

No. Lay testimony is generally admissible on the speed of moving vehicles (i.e. very fast or very slow), or even in approximations in everyday experience (i.e. about 20 m.p.h.). However, estimates as to exact miles per hour for excessive speeds are not within the competency of lay persons generally, and definitely not within Smith's, who rarely sees cars.

The Problem of Dual Witnesses – *United States v. Lopez-Medina*, 461 F.3d 724 (6th Cir. 2006)



- In a prosecution for conspiracy to distribute cocaine, Lopez-Medina appealed on several grounds, one of which was that the district court abused its discretion in allowing two DEA agents to testify as both fact and expert witnesses.
- Because the district court erred when it failed to give a cautionary jury instruction and because no clear demarcation existed between the agents' fact testimony and their expert opinion testimony, the Sixth Circuit vacated Lopez-Medina's conviction and remanded the case for further proceedings.

Fed. R. Evid. 702 – Testimony by Expert Witnesses



A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 703 – Bases of an Expert's Opinion Testimony



An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

Factors to Consider in Determining Admissibility of Expert Evidence



- The potential error rate in using the technique;
- The existence and maintenance of standards governing its use;
- The presence of safeguards in the characteristics of the technique;
- Analogy to other scientific techniques whose results are admissible;
- The extent to which the technique has been accepted by scientists in the field involved;
- The nature and breadth of the inference adduced;

Factors to Consider in Determining Admissibility of Expert Evidence, cont'd

- The clarity and simplicity with which the technique can be described and its results explained;
- The extent to which the basic data is verifiable by the court and the jury;
- The availability of other experts to test and evaluate the technique;
- The probative significance of the evidence and the circumstances of the case; and
- The care with which the technique was employed in the case.



- (a) **In General—Not Automatically Objectionable.** An opinion is not objectionable just because it embraces an ultimate issue.
- (b) **Exception.** In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.

Example 2



Napoleon's nephew, Joseph, challenges Napoleon's will on the grounds of lack of testamentary capacity. A psychiatrist, Abel Elba, is called as a witness. He has been shown Napoleon's psychiatric reports for the last five years of his life (the will was written two years prior to Napoleon's death), and he has interviewed Napoleon's relatives and doctors. Napoleon's executor asks him, "Did Napoleon have the capacity to make a will?" Joseph objects.

Assuming Elba is basing his opinion on a proper source,
is the question permissible?

Example 3



No. Elba's expert opinion wouldn't be helpful to the trier of fact, as required under Fed. R. Evid. 702. The question of Napoleon's "testamentary capacity" would require a *legal* opinion, not a psychiatric opinion.

Had the question been "Did Napoleon have the mental capacity to understand the nature and extent of his property, to know the natural objects of his bounty, and to formulate a rational scheme of distribution?" it would probably be permissible because it would call for opinions that are in the domain of psychiatry.

Fed. R. Evid. 705 – Disclosing the Facts or Data Underlying an Expert's Opinion



Unless the court orders otherwise, an expert may state an opinion—and give the reasons for it—without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

Points to Consider When Cross Examining an Expert



1. Are the facts on which his opinion is based reliable?
 - a. Is the physical evidence contaminated, incomplete, misleading, or authentic?
 - b. Did people who provided information to the expert give reliable information?
 - c. Are documents authentic? Are the documents incomplete, hearsay, or unreliable?
2. Is the testing reliable?
 - a. Did the expert use the right test?
 - b. Was it administered correctly?
 - c. Was the test interpreted correctly?

Points to Consider When Cross Examining an Expert, cont'd



3. Does the opinion deserve any weight?
 - a. Does it defy common sense?
 - b. Does it fit with the facts?
 - c. Do other experts agree?
 - d. Is the opinion objective?
4. Is the science sound?
 - a. Is the science subjective?
 - b. Does it have methodology and procedures?
5. Is the expert qualified?

See James S. McKay, "What All Experts Have in Common: A Five-Step Analytic Approach to Dealing with Expert Testimony," *The Champion*, July 2006.

ACCREDITATION / CORROBORATION



How may a witness' credibility be accredited when it is attacked?



- Explanation evidence
- Introduction of the witness' character for truthfulness under Fed. R. Evid. 608(a)
- Corroboration
- Prior consistent statements



(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(1) A Declarant-Witness's Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement . . . **(B)** is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; ...

Question:

- If a witness has been impeached by evidence of prior inconsistent statements, may he be rehabilitated with evidence of prior ***consistent*** statements?
- Not usually. However, under Fed. R. Evid. 801(d)(1)(B), prior consistent statements can rehabilitate a witness if the witness was impeached through a charge of recent fabrication.

Example

- Defendant claims Plaintiff's witness is biased against him because they recently argued. On redirect, the witness can be rehabilitated with evidence of a prior consistent statement. Under *Tome v. United States*, 513 U.S. 150 (1995), the statement must have been made before the alleged argument.

Example



Charlotte is on trial for stabbing JP to death in his bathtub. JP's maid, Fifi, saw the whole thing and, to prove Charlotte killed JP, Fifi offers to testify, "I told Pierre, the butler, that I saw Charlotte stab JP."

Does that fact that Fifi is only reiterating her own out-of-court statement prevent the statement from being hearsay?

No, the statement is still hearsay. However, the statement might be admissible as a prior consistent statement if Fifi gives direct testimony at trial that she saw Charlotte stab JP, and the defense attacks her testimony as being a recent fabrication or a product of bias. The prosecution would be entitled under Fed. R. Evid. 801(d)(1)(B) to rehabilitate Fifi by showing that she told the same story to Pierre right after the event.

PRIVILEGES



Privileges – FRE and Common Law



1. Attorney Client Privilege

- FRE 502 was intended to provide uniformity in the law governing waiver of privilege when documents that have privileged content were disclosed in litigation. With four years of case law decided by the courts since the new rule went into effect, questions remain whether Rule 502 has been applied with relative consistency and in ways that allow litigants to reduce their costs.
- This will be an ongoing question in the future of evidence law.

2. Work Product Privilege

3. Marital privilege

1. *Spousal Testimonial Privilege*

1. The spousal testimonial privilege is sometimes known as the anti-marital fact privilege. "The modern justification for this privilege against adverse spousal testimony is its perceived role in fostering the harmony and sanctity of the marriage relationship." *Trammel v. United States*, 445 U.S. 40, 44 (1980)
2. Unlike the confidential communication privilege, the testimonial privilege applies only in criminal cases.
3. The testimonial privilege is determined as of the time of trial. If there is a valid marriage, the privilege applies and all testimony, including testimony concerning events that predated the marriage, is excluded.
4. In some jurisdictions, both spouses may assert the privilege. In others, only the witness-spouse holds the privilege.

2. *Spousal Communication Privilege*

1. The second spousal privilege concerns confidential communications. The purpose of this rule is to promote marital discourse, an instrumental rationale.
2. Unlike the testimonial privilege which applies only in criminal prosecutions, the confidential communication privilege applies in both civil and criminal cases.
3. It could be argued that only the communicating spouse should be able to assert the privilege. Nevertheless, the privilege often is held to extend to both spouses

4. Physician-patient privilege

1. No privilege under federal common law.

5. Psychotherapist–Patient privilege

1. Jaffee v. Redmond, 518 U.S. 1 (1996)

1. This privilege extends to psychotherapists, psychologists and licensed clinic social workers.

6. Fifth Amendment right

7. Priest-penitent privilege

PRESUMPTIONS



Fed. R. Evid. 301 – Presumptions in Civil Cases Generally

- In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.

Examples of Presumptions



- Civil actions
 - A letter correctly addressed and properly mailed is presumed received in the ordinary course of the mail.
 - Presumption of death after seven-year absence.
- Criminal cases
 - Mandatory presumptions are not permitted.
 - Permissive presumptions where the jury is told that it may be need not find the presumed fact based on all of the proof in the case.

AUTHENTICATION



Fed. R. Evid. 901 –Authenticating or Identifying Evidence



- (a) In General. To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.
- (b) Examples. The following are examples only—not a complete list—of evidence that satisfies the requirement:
 - (1) Testimony of a Witness with Knowledge.
 - (2) Nonexpert Opinion About Handwriting.
 - (3) Comparison by an Expert Witness or the Trier of Fact.
 - (4) Distinctive Characteristics and the Like.

In other words, you can authenticate a writing . . .



- through testimony of a person who prepared the writing;
- through testimony of a person who signed the writing;
- through testimony of a person who saw the writing being prepared or signed;
- by an admission of a party opponent
- by identification of the writing as part of the business records of the corporation
- by comparison by the trier of fact or an expert with known (authenticated) specimens. Fed. R. Evid. 901(b)(3).
- if the document or data compilation is in such a condition as to create no suspicion concerning its authenticity, was in a place where, if authentic, it would likely be, and has been in existence 20 years or more at the time it was offered.

The Study of Authentication



- The study of authentication is the study of how much is needed to satisfy the burden sufficiently to raise a kind of rebuttable permissive presumption of authenticity so as to get the document or item past the judge as a threshold matter and make it admissible before the jury.
 - *Orr v. Bank of America, NT & SA*, 285 F.3d 764 (9th Cir. 2002) (authentication, an aspect of relevance, is a condition precedent to admissibility of evidence, but once the trial judge determines that there is prima facie evidence of genuineness, the evidence is admitted and the trier-of-fact makes its own determination of the evidence's authenticity and weight)

Example 1



At trial, the plaintiff Winona offers evidence a letter that she said was mailed by an anonymous correspondent to Percy Strings, the defendant. Strings asserts that plaintiff has forged this letter and that he never received it, and therefore, Strings argues that it must be kept out of evidence as not authenticated. A line in the letter reads, “If I were you, I’d sell everything and buy stock in Barneys. They just discovered a young new designer who is sure to be in every magazine next month.” Winona then offers evidence that, one week after receiving the evidence, Strings sold all of his personal possessions and remortgaged his home to buy stock in Barneys, then a fledgling clothing boutique.

Has the letter been properly authenticated?

Yes. A letter can be authenticated by showing that the party who denies its authenticity *acted upon* information it contains. Such an action is an implied admission that the letter is authentic.

Example 2



The Maltese Falcon is a piece of evidence in a lawsuit. Although no one takes the stand to authenticate it, it is identified by scraping away its black exterior to show that it is solid gold, and that, on its base, there is the inscription “Property of Paramount,” just as the real falcon is known to bear.

Has the Falcon been properly authenticated even though no one took the stand to identify it?

Yes. The proponent of evidence can prove that an item of evidence is genuine by showing the item’s distinctive characteristics under FRE 901(b)(4). FRE 902(7), trade inscriptions and the like, may also apply.

Why is Authentication Important?



In re Asbestos Insurance Coverage

More than 70 law firms were involved in a case tried for nearly four years in the mid-1980s, the *In re Asbestos Insurance Coverage* litigation. After more than 1,000 depositions, it turned out that the appropriate evidentiary foundation had not been laid for the admissibility of many documents. With the court's approval, the parties conducted another 4 to 6 weeks of depositions, with about 5 depositions per day, to lay the evidentiary foundation.

Kirk Pasich

AUTHENTICATING OTHER ITEMS OF EVIDENCE



Fed. R. Evid. 901(b)(5) – Opinion About a Voice



- (b)(5) An opinion identifying a person's voice—whether heard firsthand or through mechanical or electronic transmission or recording—based on hearing the voice at any time under circumstances that connect it with the alleged speaker.

Fed. R. Evid. 901(b)(6) – Evidence About a Telephone Conversation



- (b)(6) For a telephone conversation, evidence that a call was made to the number assigned at the time to:
 - (A) a particular person, if circumstances, including self-identification, show that the person answering was the one called; or
 - (B) a particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone.

Fed. R. Evid. 901(b)(7) – Evidence About Public Records



- (b)(7) Evidence that:
 - (A) a document was recorded or filed in a public office as authorized by law; or
 - (B) a purported public record or statement is from the office where items of this kind are kept.

Fed. R. Evid. 901(b)(9) – Evidence About a Process or System



- (b)(9) Evidence describing a process or system and showing that it produces an accurate result.

Fed. R. Evid. 902 – Evidence That Is Self-Authenticating



- The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

BEST EVIDENCE RULE





The Best Evidence Rule only applies to writings when a party is trying to prove its contents, but even then, copies are acceptable.

Furthermore, even then, there are escapes from the rule, including the voluminous records exception, certified copies of public records, and collateral documents if the court determines that the document is unimportant to the issues in the case.

Questions to Ask When Dealing With a Best Evidence Issue



When does the best evidence rule apply?

What is an original?

What is a good excuse?

FED. R. EVID. 1001 – DEFINITIONS



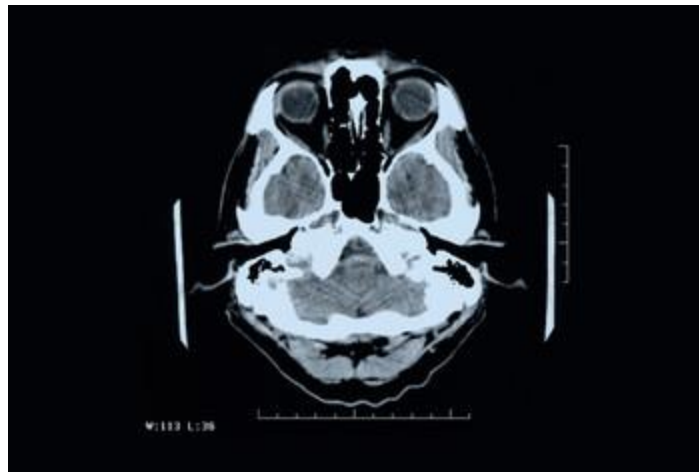
(1) Writings and recordings

- Consist of letters, words, or numbers, or their equivalent, set down in handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.



(2) Photographs

- Includes still photographs, X-ray films, video tapes, and motion pictures.



(3) Original

- An “original” of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An “original” of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an original.

(4) Duplicate

- A “duplicate” is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.



Fed. R. Evid. 1002 – Requirement of the Original



- To prove the content of a writing, recording, photograph, or other record is required, except as otherwise provided in these rules or by [rules adopted by the Supreme Court of this State or by] statute.

Example



Mrs. Paul ordered 100 pounds of shrimp from Gulf Shrimp Co. pursuant to a written purchase order. In her suit for breach of contract, Mrs. Paul takes the stand and testifies, “I didn’t get what I ordered. The purchase order called for 3” jumbo shrimp and they delivered 1” shrimp.”

Which of the following is a valid objection to Mrs. Paul’s testimony?

- A. The actual shrimp are the best evidence of what was delivered.
- B. The purchase order is the best evidence of what the contract required.



- A duplicate is admissible to the same extent as an original unless
 - (1) a genuine question is raised as to the authenticity or continuing effectiveness of the original or
 - (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

Fed. R. Evid. 1004 – Admissibility of Other Evidence of Contents



- The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if . . .



(1) Originals lost or destroyed

- All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) Original not obtainable

- No original can be obtained by any available judicial process or procedure; or



(3) Original in possession of opponent

- At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or

(4) Collateral matters

- The writing, recording, or photograph is not closely related to a controlling issue.

Fed. R. Evid. 1006 – Summaries to Prove Content



- The contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party's written admission, without accounting for the nonproduction of the original.

Example



The Supreme Court decides that any photograph depicting a belly button shall be obscene. The court applies the rule retroactively. Hef, the publisher of Playboy, is arrested on obscenity charges. The principal evidence is over 500 back issues of Playboy. Hef objects to the prosecutor's introduction of all the issues.

Does the Best Evidence rule require that each issue be offered in court?

No. Where the pictures or writings in question are voluminous, the proponent of the evidence can summarize their contents under FRE 1006. The judge may order that originals or duplicates be made available for examination in court. Note, however, that at least some of the issues would have to be offered as evidence.

Fed. R. Evid. 1008 – Functions of the Court and Jury



- In summary, authentication is a preliminary matter for the court, but issues relating to whether the writing ever existed or is the original, or whether other evidence of contents correctly reflects the contents is an issue for the jury.



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Alien Tort Statute

Limitations on the Jurisdiction and Reach of the Alien Tort Statute



By Frank Razzano and Jeremy D. Frey

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The Alien Tort Statute (ATS) provides "that district courts shall have original jurisdiction of any civil action by any alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. §1350.

¹ When Congress passed the ATS as part of the Judiciary Act of 1789, did it intend to give federal courts universal civil jurisdiction for a violation of the law of nations committed anywhere in the world regardless of whether there was any nexus to the U.S.?

¹ The ATS is also frequently referred to as the Alien Tort Claims Act.

A. International Law and the Principles of Jurisdiction

It is an established principle of international law that a nation has the power to make laws prescribing acts occurring within its territory, producing a detrimental effect within the state,² impairing the security of the state, undertaken by its own nationals,³ or victimizing its nationals outside its territory,⁴ subject to the limitations of a rule of reason.⁵ These categories are typically referred to as the territorial, nationality, protective, and passive personality principles of national jurisdiction. Generally, the exercise of jurisdiction over a person or matter is considered reasonable if: (1) the person or thing at issue is present in the state; (2) a natural person is domiciled, resident, or a national of the state; (3) a juridical person is organized under the state's laws; (4) a natural or juridical person consents to jurisdiction, regularly carries on business in the state, or formerly carried on activity in the state, but only with respect to such activity; (5) a natural or juridical person carried on activity outside the state having a substantial, direct, and foreseeable effect within the state, but only with respect to such activity; or (6) the subject of adjudication is owned, possessed, or used in the state.⁶

² The Case of the S.S. "Lotus" (France v. Turkey) 1927 P.C.I.-J (ser. A) No. 10 (Sept. 7). Under the objective territorial principle, a state may assert jurisdiction over an act committed abroad when it has an effect in its territory.

³ For example, Indian penal law applies to all Indian nationals. Indian Penal Code § 34 (3d ed. Raju 1965), while only certain of the criminal laws of the U.S. so apply. See, for example, 18 U.S.C. §2423.

⁴ *United States v. Fawaz Yunis*, 924 F.2d 1086 (D.C. Cir. 1991); Section 402, comment g; *United States v. Benitez*, 741 F.2d 1312, 316 (11th Cir. 1984).

⁵ Restatement of Foreign Relations Law of the United States (Third Restatement) Sections 402 and 403.

⁶ Section 421 (Third Restatement).

By contrast, an assertion of universal jurisdiction by a nation embraces no such limitations and contemplates a nation seeking to define, adjudicate, and punish conduct under its domestic law regardless of whether the offense took place in the nation, and without regard to where either the offender or the victim is located.⁷ Unlike other

forms of jurisdiction, universal jurisdiction is not cabined by any reasonableness restriction.⁸ In an international context, assertion of universal jurisdiction by a nation is an exercise of pure sovereign power, and can be viewed as unconstrained by the principle of comity among nations if applied to conduct not also regarded as universally prohibited.

⁷ Sections 404 and 423 (Third Restatement). See, *U.S. v. Yousef*, 327 F.3d 56, 103 (2d Cir. 2003) (court concluded that the "indefinite category of terrorism is not subject to universal jurisdiction").

⁸ *Id.*

B. Universal Criminal Jurisdiction

Historically, universal criminal jurisdiction was narrowly applied to crimes such as piracy, but today universal jurisdiction has been further extended to also include "slave trade, attacks on or high jacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism."⁹ The expansion of the scope of some nations' assertions of universal criminal jurisdiction has become politically volatile and affected relations among nations.¹⁰ The U.S. has been among the nations most opposed to attempted exercises of universal criminal jurisdiction. In fact, the U.S. has been so apprehensive of universal criminal jurisdiction that it is among a small minority of nations refusing to be signatories to the Rome Statute of the International Criminal Court, an international convention establishing a permanent international criminal tribunal with universal jurisdiction over designated crimes.¹¹ It has also evidenced opposition to the assertion of universal jurisdiction in its own domestic legislation.¹² One such demonstration of U.S. opposition came in a U.S. House bill, the "Universal Jurisdiction Rejection Act of 2003," which would have authorized the President to use all means necessary to secure the release from confinement of any person covered by the statute arising from an investigation or prosecution under universal jurisdiction.

⁹ Section 404 (Third Restatement).

¹⁰ The Princeton Project on Universal Jurisdiction stated in 2000 that the "imprudent or untimely exercise of universal jurisdiction could disrupt the quest for peace and national reconciliation in nations struggling to recover from violent conflict or oppression." In Principle 8, it suggested certain criteria be considered before universal jurisdiction is exercised, such as multilateral or bilateral treaty obligations, the place of the commission of the crime, the nationality of the alleged perpetrator and victim, the connection between the state and the perpetrator, victim or crime, the likelihood, good faith and effectiveness of the prosecution, the fairness and impartiality of the prosecution, the convenience to parties and witnesses and availability of evidence, and the interests of justice.

¹¹ Although the U.S. initially signed the Statute of Rome, it has stated it will not proceed with ratification. U.S. Renounces World Court Treaty, BBC News, May 6, 2002, available at <http://news.bbc.co.uk/2/hi/americas/1970312.stm>. As of March 2011, 114 states are parties to the Rome Statute, and 34 other nations have signed but not yet ratified the treaty. Among the states that have "unsigned" the treaty, or which have not signed or ratified the treaty, are the U.S., China, India, Israel, and the Sudan.

¹² For example, torture outside the U.S. is only made criminal if engaged in by U.S. nationals or where the alleged offender is present in the U.S. 18 U.S.C. § 2340a (1994). There is no assertion of universal jurisdiction under that statute. Moreover, the Senate declined to allow federal courts to interpret or apply international human rights law when it ratified the Convention on Civil and Political Rights. In *United States v. Davis*, 905 F.2d 245, 248-49 (9th Cir. 1990), the Ninth Circuit held that in order for a federal criminal statute to apply extraterritorially, there must be sufficient nexus between the defendant and the U.S.; otherwise, application would be arbitrary and in violation of due process.

U.S. sentiment against assertions of universal criminal jurisdiction has undoubtedly been spurred by recent foreign efforts to prosecute, arrest, and sue government officials, including those in Belgium involving American and Israeli officials under principles of universal jurisdiction. Such efforts resulted in the U.S. threatening to move NATO headquarters from Belgium.¹³ As a result, Belgium amended its universal jurisdiction statute in order to require that the accused be a Belgian citizen or resident, or that the act involved a Belgian victim.

¹³ Eric Langland, *Decade of Descent: The Eye-Shrinking Scope and Appreciation of Universal Jurisdiction*, 39 ABA Int'l L. News 4 (Summer, 2010).

Spain, like Belgium, has also asserted universal criminal jurisdiction over conduct without any nexus to Spain. Currently, there are two pending government investigations in Spain relating to alleged U. S. torture programs. In 2009, Spain amended its legislation to provide that Spanish courts have universal jurisdiction, but only where there is some connection to Spain, such as the perpetrator's presence in Spain, the victim being a Spanish national, or other demonstrated connection to Spanish national interests.¹⁴ In one of the pending investigations, the presiding Spanish judge ruled that despite the revised law, the burden was on the defendant to establish that jurisdiction is not proper, and not on the victim.¹⁵ In the other pending matter, involving the U.S. officials known as the "Bush Six,"¹⁶ the presiding Spanish judge has issued an order which set a deadline in March 2011 for the U.S. to answer

letters rogatory as to whether a U.S. prosecutor has been appointed to investigate the allegations.

¹⁴ Organic Law of Judiciary Power, *Orgánica del Poder Judicial* Article 23(4) and (5).

¹⁵ The Spanish Investigation into U.S. Torture, Center for Constitutional Rights, <http://ccrjustice.org/ourcases/current-cases/spanish-investigation-us-torture>

¹⁶ David Addington (former counsel and chief of staff for former Vice President Cheney); Jay S. Bybee (former asst. attorney. general.); Douglas Feith (former undersec'y of defense); Alberto Gonzales (former attorney general); William J. Haynes (former general counsel, Dept. of Defense) and John Yoo (former deputy attorney general).

The U.S. is not alone in its concern about unfettered universal criminal jurisdiction, as demonstrated by the approximately 45 other countries that have declined to submit to the jurisdiction of the International Criminal Court. Other international bodies have also expressed concern with the unfettered exercise of universal jurisdiction. For example, in *Case Concerning the Arrest Warrant of 11 April 2000* (D.R. Congo v. Belgium), 2002 I.C.J., the International Court of Justice was called upon to adjudicate a complaint by the Congo against Belgium. Belgium had issued an arrest warrant for the Congo's minister of foreign affairs after charging him with war crimes and crimes against humanity. Three of the judges on that court, including the U.S. judge, expressed the view that "the state contemplating bringing criminal charges based on universal jurisdiction must first offer to the national state of the prospective accused person the opportunity itself to act upon the charges concerned." President Guillaume (France) stated:

But at no time has it been envisaged that jurisdiction should be conferred upon the courts of every State in the world to prosecute such crimes, whoever their author and victims and irrespective of the place where the offender is to be found. To do this would, moreover, risk creating total judicial chaos. It would also be to encourage the arbitrary for the benefit of the powerful, purportedly acting for an ill-defined "international community." Contrary to what is advocated by certain publicists, such a development would represent not an advance in the law but a step backward.

Id. at ¶ 15.

C. Universal Jurisdiction and the ATS

Should the same concerns about universal criminal jurisdiction also apply to limit universal civil jurisdiction under the ATS? It seems reasonable that if universal criminal jurisdiction should be restricted, so too should universal civil jurisdiction. After all, the exercise of universal jurisdiction by private litigants in the context of civil suits for damages seems more likely to lead to friction among nations than criminal cases brought by a state itself, since private litigants have neither any concern for comity among nations, nor any interest in how the relations between states may be affected by civil court judgments. ¹⁷ Recently, the chief judge of the Second Circuit in *Kiobel v. Royal Dutch Petroleum Co.*, 2011 U.S. App. LEXIS 2200 *5, 79 U.S.L.W. 2125 (2d Cir. 2011), noted the intrusive nature of universal ATS jurisdiction:

¹⁷ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727-728 (2004) ("Since many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution.").

The dominant view [of ATS universal jurisdiction] elsewhere is well expressed by former South African president Thabo Mbeki, who, prior to our decision in *Khulumani v. Barclay National Bank Limited*, 504 F.3d 254 (2nd Circuit 2007), said: 'We consider it completely unacceptable that matters that are central to the future of our country should be adjudicated in foreign courts which have no responsibility for the well being of our nation' Later, President Mbeki decried the *Khulumani* decision as a form of 'judicial imperialism ... because it impl[ied] that U.S. courts are better placed to judge the pace and degree of South Africa's national reconciliation.'

1. The Supreme Court's *Sosa* Ruling and Universal ATS Jurisdiction

The U.S. Supreme Court has not yet had occasion to rule on the universal jurisdiction of the ATS, though its decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), demonstrated the Court's view that substantive limiting principles upon the reach of the ATS for violations of the law of nations are required:

...[F]ederal courts should not recognize claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the 18th-century paradigms familiar when [the ATS] was enacted.

Id. at 731-32. The Court, quoting *In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994), went on to state that violations of international law are only actionable where the "norm is specific, universal and obligatory." *Id.* at 732.

Sosa involved the kidnapping of Alvarez-Machain (Alvarez) from his home in Mexico by individuals acting on behalf of the Drug Enforcement Administration (DEA). Alvarez was held overnight in a Mexican motel and then brought by private plane to El Paso, Texas, where he was arrested by federal officers. After he was acquitted on criminal charges alleging that he had participated in the kidnapping and murder of a DEA agent, he sued both the U.S. and those involved in his kidnapping. The Supreme Court held that a claim under the Federal Tort Claims Act would not lie, and that his kidnapping claim was not sufficiently established under international law for purposes of the ATS. According to Justice David H. Souter's majority opinion, the ATS was intended by Congress to furnish jurisdiction only for a limited number of actions alleging violations of the law of nations, such as offenses against ambassadors, violations of safe conduct and piracy.

An analysis of the historical paradigms discussed in *Sosa* reveals that ATS requires violation of a specific, universal, and obligatory norm which will not embroil this nation in the affairs of other governments. The majority opinion in *Sosa* says as much in holding that neither the Universal Declaration of Human Rights nor the International Covenant on Civil and Political Rights created a customary international rule of law against arbitrary arrest upon which an ATS cause of action could be based. *Sosa*, 542 U.S. at 735. Any other result, Justice Souter noted, would permit an ATS claim for any arrest, anywhere in the world, unauthorized by the law of the jurisdiction in which it took place. *Id.* at 735-36.

2. The Lineage of the ATS

The historical context of the ATS, reviewed in *Sosa*, provides no support for the proposition that ATS jurisdiction for violation of the law of nations, as substantively limited by *Sosa*, was intended to be an exercise of universal civil jurisdiction without any nexus to the U.S. The Marbois Affair of May 1784 was a catalyst for the passage of the ATS, and involved the assault of the secretary of the French Legion by Mr. Marbois, a Frenchman. *Sosa*, 542 U.S. at 716-17. The assault, however, occurred in Philadelphia. *Respublica v. De Longchamps*, 1 Dall. 111 (O.T. Phila. 1784). The French minister to the U.S. lodged a protest and threatened to leave Pennsylvania if "full satisfaction" were not accorded. *Sosa*, 542 U.S. at 717, fn 11. The Marbois Affair was commented upon during the Constitutional Convention by Secretary John Jay, who complained that the government did not have "any judicial Powers" to address the matter since the tort involved foreign citizens, which threatened the new nation's conduct of foreign affairs. *Id.* at 717. The ATS was enacted to protect interests, which threatened U.S. foreign affairs and interests, and not to make federal courts international tribunals adjudicating torts with no nexus to the U.S.

Review of other cases in the period of the enactment of the ATS also provides no support for the proposition that the ATS was intended to be wholly extraterritorial, but demonstrates the opposite. *Moxon v. The Fanny*, 17 Cas. 942 (No. 9,895) (Pa. 1793), involved an ATS case in which the owners of a British ship sought damages for its seizure by a French privateer. Though the action was denied since it was found not to be a suit in "tort only," the British ship at issue had been seized in U.S. waters.

In *Bolchos v. Darrel*, 3 F. Cas. 810 (No. 1,607) (S.C. 1795), the court assumed ATS jurisdiction in a suit brought by a French privateer against the mortgagee of a British slave ship found in U.S. waters. Finally, a 1795 opinion of the attorney general addressed the availability of ATS, where American citizens had taken part in the French plunder of a British slave colony in Sierra Leone. These precedents, reviewed by the Supreme Court in *Sosa*, do not support the proposition that the ATS either reaches or is intended to confer subject matter jurisdiction over wholly extraterritorial torts.

The Supreme Court's citation in *Sosa* to *Filartiga v. Pena-Irala*, 630 F. 2d 876 (2d Cir. 1980), was not an open invitation to the lower federal courts to permit an exercise of universal jurisdiction under ATS. Indeed, Justice Souter's citation to *Filartiga* comes in the context of his remarks that "there are good reasons for a restrained conception of the discretion a federal court should exercise" in considering when and whether a cause of action lies under ATS. *Sosa*, 542 U.S. at 732.

Filartiga involved the kidnapping, torture, and death of Dolly Filartiga's brother by Pena-Irala, the inspector general of police in Asuncion, Paraguay. In July 1978, Pena sold his home in Paraguay and entered the U.S. under a visitor's visa, remaining beyond the term of the visa and living in Brooklyn, New York. When Dolly Filartiga arrived in the U. S. in 1978, she applied for permanent political asylum. She caused Pena to be served with a summons and ATS complaint at the Brooklyn Navy Yard where he was being held for deportation. In determining whether there was federal jurisdiction, the Second Circuit held:

Common law courts of general jurisdiction regularly adjudicate transitory tort claims between individuals over whom they exercise personal jurisdiction, wherever the tort occurred.

Id. at 885. Thus, as the Second Circuit itself recognized, the power of the court to adjudicate claims is circumscribed, at least, by the jurisdictional limits of an Article III court, i.e., that a court have both subject matter jurisdiction and personal jurisdiction over the defendant. A broad reading of *Filartiga* as embracing universal ATS jurisdiction is unwarranted by *Filartiga*'s facts and unsupported by both *Sosa* and the historical lineage of the ATS.

The Second Circuit itself has recently signaled it seems to be backing away from a broad reading of its 30-year old

opinion in *Filartiga*. In *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 149 (2d Cir. 2010) (as amended Dec. 21, 2010), *reh'g en banc denied*, 2011 U.S. App. LEXIS 2200, 79 U.S.L.W. 2125 (Feb. 4, 2011), the Second Circuit announced a new limiting principle on ATS cases and ruled that corporations may not be sued under ATS for violations of the law of nations. *Id.* at 149. Though it did not have to reach the issue, the Second Circuit pointedly noted the "lurking" issue of extraterritoriality present in the case. *Id.* at 177 fn 10.

3. The Text of the ATS and Universal ATS Jurisdiction

Universal ATS jurisdiction is also not supported by the ATS itself: When, as with the ATS, "a statute gives no clear indication of an extraterritorial application, it has none." *Morrison v. Nat'l Australia Bank Ltd.*, ___ U.S. ___, 130 S. Ct. 2869, 2878, 78 U.S.L.W. 4700 (2010). In *Morrison*, the Supreme Court held that Section 10(b) of the Securities Exchange Act of 1934 (1934 Act) only applies to transactions in securities listed on domestic exchanges and domestic transactions in other securities, since the statute did not contain any basis for extraterritorial application. *Morrison* was recently extended by the Second Circuit to the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 et seq., in *Norex Petroleum Ltd. v. Access Industries Inc.*, 622 F.3d 148 (2d Cir. 2010).

In *Norex*, the plaintiff alleged the defendants engaged in a civil RICO conspiracy to unlawfully take over portions of the Russian oil industry, and included allegations of certain acts occurring in the U.S. in furtherance of the unlawful scheme. The Second Circuit found, under *Morrison*, there could be no extraterritorial application of RICO, since such an application was not expressly provided in the statute. ¹⁸ *Id.* at 151. Even though there were acts alleged to have occurred in the U.S., they were insufficient to save the case since its gravamen was extraterritorial. *Id.* In light of both its language and legislative history, the ATS on this issue is indistinguishable from the 1934 Act and RICO. Under *Morrison*, allegations of wholly extraterritorial torts fail to state cognizable claims under the ATS.

¹⁸ *Norex* considered the issue, consistent with *Morrison*, not as matter of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), but as a merits matter under Rule 12(b)(6). *Id.* at 151.

Additionally, under the terms of the ATS itself, the ATS reaches only claims where the plaintiff is an "alien." While the statute does not define "alien," the term is defined in Black's Law Dictionary (7th Ed. 1999) as a "person who resides within the borders of a country but is not a citizen or subject of that country." Under this definition, only those who are citizens of other countries, but resident in the U.S., may bring claims under the ATS. In *Lizarbe v. Rondon*, 642 F. Supp. 2d 473 (D. Md. 2009), the district court rejected this argument under *Rasul v. Bush*, 542 U.S. 466 (2004), on grounds that the Supreme Court in *Rasul* allowed non-resident aliens to proceed with habeas corpus petitions. On this point, *Lizarbe* is unpersuasive and the district court's reliance on *Rasul* was misplaced. The *Rasul* opinion, in fact, begins by noting that "for more than two years [the plaintiffs] have been imprisoned in a territory over which the U.S. exercises exclusive jurisdiction and control." *Id.* at 483-484. Thus, *Rasul* based jurisdiction on the fact that the detainees were in the custody of the U.S. at Guantanamo Bay, a U.S. military installation. *Rasul* provides no support for the proposition that foreign citizens bringing tort claims under ATS need not even be resident in the U.S.

4. Other Limitations on ATS Cases

If the ATS does not reach or embrace wholly extraterritorial torts in violation of the law of nations without any nexus to the U.S., are there other applicable jurisdictional or prudential limitations on ATS causes of action? To be sure, the presence in the U.S. of an ATS plaintiff is alone insufficient to sustain an ATS case without personal jurisdiction over the defendant. An ATS plaintiff must prove either general or specific personal jurisdiction over the defendant. General jurisdiction arises where the defendant's contacts with the U.S. are "continuous and systematic" such that the defendant can be deemed to be present in the forum. *Helicopteros Nacionales de Colombia S.A. v. Hall*, 466 U.S. 408, 414 (1984). Specific jurisdiction arises where the defendant's acts in the forum give rise to the cause of action. *Mwani v. Bin Landen*, 417 F.3d 1, 11 (D.C. Cir. 2005).

There is a persuasive argument that the requirements of subject matter jurisdiction and personal jurisdiction over a qualifying violation of the law of nations or treaty alone are still not sufficient to open the federal courts to extraterritorial ATS claims. ATS jurisdiction should be exercised only when it is also reasonable to do so. ¹⁹ As the Supreme Court noted in *Sosa*, in determining whether a norm of international law is sufficiently definite to support a cause of action, a court must exercise an element of judgment about its practical consequences. Before an extraterritorial ATS cause of action is available to a litigant without a strong nexus to the U.S., the court should first consider whether under international law it is reasonable to exercise jurisdiction in the case, that is whether the plaintiff has exhausted remedies in the domestic legal system where the events occurred. *Sosa*, 542 U.S. at 733 n. 21. This additional prudential limitation reflects the reasonable hesitance of the Supreme Court to engage federal courts in cases without a strong nexus to the U.S., and reflects American apprehension about the wisdom of extending universal jurisdiction. Otherwise, American officials may find themselves either civil or criminal defendants in foreign nations for official acts which other nations contend violate international norms.

¹⁹ See footnote 6, *supra*.

In *Sosa*, the Supreme Court explicitly reserved the issue of whether a prudential exhaustion requirement in extraterritorial ATS cases should apply. Noting that the European Commission in *Sosa* had argued as *amicus curiae* that principles of international law require a foreign claimant for a foreign tort to exhaust remedies in a domestic court, or in *fora* such as international claims tribunals, the Supreme Court said that “[w]e would certainly consider this requirement in an appropriate case.” *Id.*

Permitting universal civil ATS jurisdiction without such an exhaustion rule thrusts federal courts into matters of foreign policy, including foreign wars, foreign civil unrest, foreign political disputes, and even foreign race discrimination, which is squarely at odds with ATS’ lineage of opening the federal courts to claims in order to *prevent* disruption in relations between nations. As noted by former U.S. Secretary of State Henry Kissinger, the unfettered exercise of universal jurisdiction could otherwise result in judicial tyranny.²⁰ Mooring the exercise of ATS jurisdiction to a prudential exhaustion requirement in extraterritorial cases not only makes good sense, it makes for good policy.

²⁰ Henry A. Kissinger, The Pitfalls of Universal Jurisdiction, *Foreign Affairs*, July/August, 2001.

Echoing these sentiments, Judge Kleinfeld in *Sarei v. Rio Tinto PLC*, 625 F.3d 561, 79 U.S.L.W. 1573 (9th Cir. 2010), in a dissenting opinion recently wrote:

I suspect that we lack subject matter jurisdiction on account of extraterritoriality. This case is entirely extra-territorial. The claims are by Papua New Guineans against a British-Australian company for wrongs committed in Papua New Guinea [N]othing done by Americans, or in America, is at issue... . There are statutes that do apply extraterritorially, such as the Torture Victim Protection Act and the Extraterritorial Torture Statute, but they say so, and the Alien Tort Statute does not

Id. at 563. Judge Kleinfeld found it implausible that the first Congress intended the ATS to enable federal courts to adjudicate war crimes committed abroad without any U.S. nexus. As he noted, “the point of the ATS was to keep us out of international disputes, not to inject us into them.” *Id.* at 564. He went on to note that the case “involved a delicate matter of a foreign war and a foreign peace, combined with an effective procedural device for taking very large sums of money from deep pocket defendants.” *Id.* at 566.

D. What is Next for ATS

In January 2011, the D.C. Circuit Court of Appeals heard oral argument in *John Doe VIII, et al. v. Exxon Mobil* (09-7125, 7127, 7134, 7135), which has presented the issue of the extraterritorial application of ATS. In this pending case, 15 citizens and residents of Indonesia alleged they were injured based on events occurring during a civil war in the Indonesian province of Aceh. They claim they suffered injuries at the hands of Indonesian military security, and at the direction of Exxon. Various plaintiffs are appealing dismissal of their ATS, torture, and commonlaw claims, which has raised issues as to the extraterritorial application of the ATS and the standing of these non-resident alien plaintiffs to seek remedies on their commonlaw claims. Hopefully, the D.C. Circuit will seize the opportunity presented by this case to clarify and define the limits on the reach of ATS and ATS universal jurisdiction. Regardless of the result in *John Doe VIII*, we can surely expect that sooner, rather than later, these matters will reach the Supreme Court.

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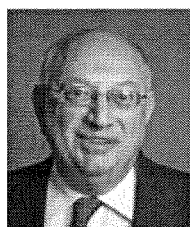
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Alien Tort Statute

The Alien Tort Statute: Supreme Court to Provide Much Needed Guidance



BY JEREMY D. FREY AND FRANK C. RAZZANO

The U.S. Supreme Court has granted certiorari in the Alien Tort Statute¹ case of *Kiobel v. Royal Dutch Petroleum Co.*² to resolve whether a corporation can be a defendant in an ATS case. The same day, the court also granted certiorari in *Mohamad v.*

¹ 28 U.S.C. § 1350 (District courts shall have “jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States”).

² 621 F.3d 111, 79 U.S.L.W. 1364 (2d Cir. 2010), cert. granted, 80 U.S.L.W. 3237 (U.S. Oct. 17, 2011) (No. 10-1491).

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*Rajoub*³ to decide a similar issue under the Torture Victim Protection Act⁴ of whether that statute permits civil actions against defendants which are not natural persons.

Currently the jurisprudence of these statutes is in chaos, particularly with respect to the ATS.⁵

The ATS

Under the ATS, there is no certainty about who can be a plaintiff, who can be a defendant, and precisely what torts provide a basis for an ATS cause of action. Additionally, lower federal courts have reached no consensus on other basic questions about the statute, including, for example, whether there can be aiding and abetting liability, and if so, what is the required mental state. It is unknown what if any nexus an ATS case must have to the United States, or whether it can be wholly extraterritorial or “foreign-cubed.”⁶ The ATS is a piece of unfinished business despite its ancient lineage in the Judiciary Act of 1789. It is, in short, an exotic in the jurisprudence of nations.

The ATS is “unlike any other in American law and of a kind apparently unknown to any other legal system in the world.”⁷ There is small wonder that determining the reach of the law is so elusive, since the ATS, with its scant text, provided jurisdiction for only one case in the first 170 years of its history.

In 1980, the Second Circuit issued its landmark ruling in *Filartiga v. Pena-Irala*,⁸ which re-imagined the

³ 634 F.3d 604, 79 U.S.L.W. 2266 (D.C. Cir. 2011), cert. granted, 80 U.S.L.W. 3237 (U.S. Oct. 17, 2011) (No. 11-88).

⁴ 28 U.S.C. § 1350 note (liability for an “individual who, under actual or apparent authority, or color of law, of any foreign nation—(1) subjects an individual to torture . . . or (2) subjects an individual to extrajudicial killing . . .”).

⁵ Razzano, F. and Frey, J., *More on the Alien Tort Statute: John Doe VIII and Flomo Rulings Add to the Chaos*, 80 U.S.L.W. 285.

⁶ Razzano, F. and Frey, J., *Limitations on the Jurisdiction and Reach of the Alien Tort Statute*, 79 U.S.L.W. 2311.

⁷ *Kiobel*, 621 F.3d at 115.

⁸ 630 F. 2d 876 (2d Cir. 1980).

ATS as a basis for federal courts to address human rights abuses occurring anywhere in the world. The legacy of *Filartiga* is a clouded jurisprudence that has occupied the lower federal courts in sweeping historical discourses and uncomfortable adventures in discerning international law norms.

While some applaud *Filartiga*'s warrant for internationalism, others find risible that the First Congress possibly intended to open the federal courts to tort claims against foreign governments, their proxies, and vendors for mistreatment of their own citizens in foreign lands. Many of these ATS suits arise out of violence occurring as a result of foreign political disputes and armed conflicts. As a result, the recent history of the ATS is a lurching and inconsistent search for limiting principles. *Kiobel* will be only the second time in the nation's history that the Supreme Court will offer substantial guidance on the ATS.⁹

Kiobel v. Royal Dutch Petroleum Co.

Kiobel involved ATS claims by Nigerian citizens against Dutch, British, and Nigerian corporate defendants alleging that the defendants aided and abetted violations of the law of nations by the Nigerian government in physically attacking and killing Nigerians who were resisting oil exploration in Nigeria. In a long scholarly opinion, the U.S. Court of Appeals for the Second Circuit held that customary international law governs the court's subject matter jurisdiction and that violations of the law of nations are within the scope of the ATS. 621 F.3d at 125-45. After reviewing international law and its various sources, the court found that corporate liability "is not recognized as a 'specific, universal and obligatory' norm," and therefore not a "rule of customary international law that we may apply under ATS." *Id.* at 145. The Second Circuit upheld the dismissal of the complaint for lack of subject matter jurisdiction. *Id.* at 149.

The Second Circuit's *Kiobel* opinion is a departure from contrary holdings by the Ninth, Eleventh, and D.C.

⁹ *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

Circuits.¹⁰ To resolve this circuit split, the Supreme Court granted certiorari to decide both whether the issue of corporate liability is a merits or subject matter jurisdiction issue, and also whether corporations can be proper ATS defendants at all.

Mohamad v. Rajoub

Rajoub involved TVPA claims brought by Azzam Rahim's sons and widow claiming that Rahim had been tortured and killed by the Palestinian Authority and the Palestine Liberation Organization in the West Bank in 1995. The defendants claimed that the TVPA permitted suit only against an individual, or natural person, and not against an organization. The court in *Rajoub* held that the use of "individual" in the statute refers only to a natural person, and an entity is not a proper defendant under the TVPA. In granting certiorari in *Rajoub*, the Supreme Court will resolve this issue, and likely also provide guidance on the relationship between causes of action under the ATS and the related TVPA.

For most, the Supreme Court's grant of certiorari in *Kiobel* and *Rajoub* cannot have come soon enough. The ATS and, to a lesser extent the TVPA, have become potent vehicles for tort suits brought by foreign citizens for injuries in foreign lands against foreign and domestic businesses, including banks, financial services businesses, the mining and extraction industry, government contractors and pharmaceutical companies, among others. The growth of such torts suits is warmly embraced by some as another example of American exceptionalism, while being criticized by others as interfering in the internal affairs of foreign nations and promoting "the use of our courts to extort settlements" from corporate defendants.¹¹

¹⁰ *Sarei v. Rio Tinto*, 80 U.S.L.W. 550 (9th Cir., Oct. 25, 2011); *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 78 U.S.L.W. 1089 (11th Cir. 2009); *John Doe VIII v. Exxon Mobil Corp.*, 80 U.S.L.W. 85 (D.C. Cir. July 8, 2011).

¹¹ *Kiobel*, 642 F.3d 268, 271-2 (2d Cir. 2011) (concurring opinion of Chief Justice Dennis Jacobs in denying rehearing en banc).

Claims Against Corporations Under Alien Tort Statute Increasing

According to the U.S. Chamber of Commerce Institute for Legal Reform, as of June 2010:

- Since its enactment in 1789, about 150 ATS cases have been brought against corporations, with about 80 percent of those filed in the past 15 years.
- Since 1994, about eight cases have been filed per year with ATS claims.
- Of the total 150 filed ATS cases, about 50 of them are pending at any given time in federal district and circuit courts.
- ATS cases against corporations have arisen from 60 different countries.
- ATS cases have targeted about 21 different industries—primarily the extractive industry, financial services, food and beverage, manufacturing, and communications/media.
- ATS cases primarily involve allegations focusing on acts by security agents, labor related issues, environmental claims, and suits against companies for providing support to allegedly repressive political regimes and foreign combatants.
- Settlements and judgments have reportedly ranged from \$1.5 million to \$80 million in recent years.

Sorting through the many issues that have been raised by the ATS and the TVPA has become burdensome to litigants and the lower federal courts alike. The task before the Supreme Court in *Kiobel* and *Rajoub* is no trivial undertaking. The justices are presented with a statute with few defining features, a seeming global embrace, and yet one with the most venerable pedigree dating to the nation's founding.

The need to cabin the ATS finds support in the First Congress's original purpose to avoid disruption of our foreign relations.¹² It is way too facile to argue that foreign policy implications do not inhere in ATS suits simply because the international law torts must involve universally condemned conduct. It's not much of a stretch

that the courts of many nations might find actionable under the same principles our recent incursion into Pakistan to kill the terrorist bin Laden based on executive authority.

The point is that interpreting the ATS to assert universal jurisdiction of the federal courts over international law torts—limited only by due process for defendants—invites foreign nations and their courts to return the favor. This is not just bad policy. It promotes disorder among the community of nations. Hopefully, the Supreme Court will seize the opportunity to bring much needed clarity and impose additional limiting principles on the reach and jurisdiction of the ATS and the TVPA.

¹² Razzano, F. and Frey, J., *Limitations on the Jurisdiction and Reach of the Alien Tort Statute*, 79 U.S.L.W. 2311.

The Supreme Court Limits the Reach of the Alien Tort Statute

By Frank C. Razzano, Jeremy D. Frey, and John C. Snodgrass

In *Kiobel v. Royal Dutch Petroleum Co.*,¹ the U.S. Supreme Court held that the presumption against extraterritoriality applies to claims under the Alien Tort Statute (“ATS”).² Consequently, there is no federal court jurisdiction under the ATS for torts in violation of the law of nations that occur in a foreign country. *Kiobel* signals a major retreat from the last 30 years of expansion of federal court jurisdiction to hear overseas human rights abuse cases.

The public response to *Kiobel* has been varied.³ Even though *Kiobel* was a 9-0 ruling, the New York Times opined that a cabal of the Court’s conservatives had dealt a major blow to global human rights.⁴ The U.S. Chamber of Commerce cheered the ruling essentially as tort reform.⁵ Still others have regarded it as a ruling against international forum shopping.⁶ Lower federal courts are undoubtedly relieved to hear that they will not have to write more lengthy discourses on the history of this ancient statute.⁷ Nearly a year before the question of the extraterritorial application of the ATS was first raised by the Supreme Court, the authors argued here that the ATS was not a grant of universal jurisdiction embracing wholly extraterritorial torts.⁸

Background

Passed as part of the Judiciary Act of 1789, the ATS provides federal court jurisdiction for aliens’ tort claims involving violations of international law and treaties. While there has been much detailed historical scholarship regarding the origin of the ATS, suffice it to say that it was essentially a creature of the Marbois incident. In 1784, French diplomat François Barbé-Marbois was assaulted in Philadelphia by another French citizen. The French Minister lodged a protest and the French threatened to leave Pennsylvania if full satisfaction were not

¹ No. 10-1491, 2013 U.S. LEXIS 3159 (U.S. Apr. 17, 2013).

² 28 U.S.C. §1350 (“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”).

³ David Davenport, *The Supreme Court Blocks the Politicization of International Law*, FORBES, Apr. 25, 2013, www.forbes.com/sites/daviddavenport/2013/04/25/the-supreme-court-blocks-the-politicization-of-international-law.

⁴ Editorial, *A Giant Setback for Human Rights*, N.Y. TIMES, Apr. 18, 2013, at A26.

⁵ Davenport, *supra* note 3.

⁶ *Id.*

⁷ *E.g.*, the Second Circuit’s opinion in *Kiobel*, 621 F.3d 111 (2d Cir. 2010), was more than 80 pages long.

⁸ Frank C. Razzano and Jeremy D. Frey, *Limitations on the Jurisdiction and Reach of the Alien Tort Statute*, 79 U.S.L.W. 2311 (2011); Frank C. Razzano, Jeremy D. Frey, and John C. Snodgrass, *More on the Alien Tort Statute: John Doe VIII and Flomo Rulings Add to the Chaos*, 80 U.S.L.W. 285 (2011).

accorded. But the demanded satisfaction was not available in any federal forum because the tort involved a foreign citizen. The Marbois affair was a subject of comment at the Constitutional Convention by John Jay, who complained that the inability to provide any redress threatened the new nation's conduct of foreign affairs. The Marbois incident's publicity ultimately led to the enactment of the ATS in the 1789 Judiciary Act.

Until a landmark Second Circuit decision in 1980, the ATS had virtually been forgotten. In *Filartiga v. Peña-Irala*,⁹ the Second Circuit allowed a Paraguayan citizen to sue under the ATS for the alleged torture and murder in Paraguay of plaintiff's brother. The defendant, a Paraguayan police officer, had moved to New York, where the suit was brought. *Filartiga* was a so-called "foreign cubed" case in that it involved a foreign tort and both a foreign defendant and a foreign plaintiff. It lacked any connection to the U.S. except that the defendant was found in New York.

In the years after *Filartiga*, the number of ATS suits exploded. These cases have included claims by foreign plaintiffs against banks and financial services businesses, the extractive industry, transportation and telecommunications businesses, and pharmaceutical companies, for allegedly aiding and abetting human rights abuses overseas. These cases have typically arisen from foreign armed conflicts, and have often involved corporate defendants' international business operations and overseas development projects.

One notable case, *Khulumani v. Barclay National Bank Ltd.*,¹⁰ was a human rights case involving apartheid-era conditions in South African mines. The resulting U.S. judgment against the defendants famously brought condemnation from the South African government: then South African President Mbeki said, "We consider it completely unacceptable that matters that are central to the future of our country should be adjudicated in foreign courts which have no responsibility for the well-being of our country...."¹¹

The rapid growth of ATS cases in the decades after *Filartiga* required the lower federal courts to wrestle with difficult issues of statutory interpretation, such as who can be an ATS plaintiff, who can be sued under the ATS, and precisely what torts "in violation of the law of nations" are actionable under the ATS.

In 2004, the Supreme Court issued its ruling in *Sosa v. Alvarez-Machain*,¹² which restricted the scope of international law violations that are actionable under the ATS. *Sosa* involved allegations that the DEA had directed the kidnapping and transportation of the plaintiff from Mexico to the U.S. Rejecting plaintiff's ATS claim, the Court held that "federal courts should not recognize claims under federal common law for violations of any international law

⁹ 630 F.2d 876 (2d Cir. 1980).

¹⁰ 504 F.3d 254 (2d Cir. 2007).

¹¹ Quoted in *Kiobel v. Royal Dutch Petroleum Co.*, 642 F.3d 268, 270 (2d Cir. 2011) (denying reh'g).

¹² 542 U.S. 692 (2004).

norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATS] was enacted.”¹³

***Kiobel*’s Facts and the Second Circuit’s Opinion**

Kiobel, a “foreign cubed” case, involved allegations by Nigerian plaintiffs that certain non-U.S. corporations, including Royal Dutch Petroleum, had aided and abetted Nigerian government security forces in attacking and killing Nigerian civilians who were resisting the companies’ oil exploration.

After the dismissal of certain of the plaintiffs’ claims by the district court, the Second Circuit ruled *sua sponte* that the oil companies were not proper defendants for an ATS suit. The Second Circuit concluded that corporate liability for international law torts “is not recognized as a ‘specific, universal and obligatory norm,’ ...[and therefore] not a rule of customary international law that we may apply under the ATS.”¹⁴ On this basis, the court concluded that corporations could not be liable under the ATS for torts in violation of the law of nations. This ruling was contrary to holdings in various other circuits.¹⁵

In its turn, the Supreme Court granted certiorari in *Kiobel* in October 2011 to resolve the Circuit split and to address the issue of corporate liability under the ATS. At oral argument in February 2012, however, it became clear that the Justices had identified the “lurking” issue of extraterritoriality. After the oral argument, the Court ordered re-briefing and re-argument on the extraterritorial application of the ATS. That issue was re-argued to the Court in October 2012.

***Kiobel* Supreme Court Opinions**

In *Kiobel*, the majority found that there was nothing about the ATS that supported a conclusion that the First Congress intended to include torts committed in foreign lands. Noting the presumption against extraterritoriality,¹⁶ the Court ruled that in the absence of any clear indication to the contrary, the ATS must be limited to domestic conduct. The majority also briefly addressed the issue on which *Filartiga* based its result: that transitory tort jurisdiction was a feature of English common law that had been incorporated into the new nation’s jurisprudence at its founding. The Court said that “the question...is not whether a federal court has jurisdiction to entertain a cause of action provided...by international law. The question is instead whether the court has authority to recognize a cause of action under U.S. law to enforce a norm of

¹³ *Id.* at 732. Note that the ATS extraterritoriality question that the Supreme Court focused on in *Kiobel* was not presented in *Sosa*.

¹⁴ *Kiobel*, 621 F.3d at 145 (quoting *Sosa*, 542 U.S. at 732).

¹⁵ E.g., *Sarei v. Rio Tinto, PLC*, 671 F.3d 736 (9th Cir. 2011); *John Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011); *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252 (11th Cir. 2009).

¹⁶ *Kiobel*, No. 10-1491, 2013 U.S. LEXIS 3159, at *10 (U.S. Apr. 17, 2013) (citing *Morrison v. Nat’l Australia Bank Ltd.*, 561 U.S. ___, 130 S. Ct. 2869 (2010)).

international law.”¹⁷ Since the ATS did not have the requisite indicia of extraterritorial application, the transitory tort doctrine was inapplicable.

The majority also made clear its view of the perils of interpreting the ATS to assert universal tort jurisdiction. The Court emphasized the risk that

other nations, also applying the law of nations, could hale our citizens into their courts for alleged violations of the law of nations occurring in the United States, or anywhere else in the world. The presumption against extraterritoriality guards against our courts triggering such serious foreign policy consequences....¹⁸

The Court’s majority was careful to anticipate future arguments that a tort is not extraterritorial if some aspect of the tort’s commission (such as its planning) is done here. Justices Alito and Thomas stated that “a cause of action falls outside the scope of the presumption [against extraterritoriality]...only if the event or relationship that was ‘the ‘focus’ of the congressional concern’ under the relevant statute takes place within the United States.”¹⁹ The majority held that the U.S. nexus must be of “sufficient force to displace the presumption against extraterritorial application.”²⁰ This is vague, to be sure, but it provides fertile ground for dismissal of ATS cases where the U.S. nexus is lacking, such as where neither the tort’s commission nor the plaintiff’s injury occurs here.²¹

Justices Breyer, Ginsburg, Sotomayor, and Kagan all concurred in the result but did not agree with application of the presumption against extraterritoriality. For these Justices, it seems that the essence of the ATS is about granting federal court jurisdiction to aliens for certain violations of the law of nations. They argued that jurisdiction under the ATS could be found where (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant’s conduct substantially and adversely affects an important U.S. interest, including preventing the U.S. from becoming “a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.”²² In short, it appears that these Justices would affirm the application of the ATS to a situation like that presented in *Filartiga*.

¹⁷ *Id.* at *16.

¹⁸ *Id.* at *25.

¹⁹ *Id.* at *28 (Alito and Thomas, JJ., concurring) (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 245 (1991)).

²⁰ *Id.* at *26 (majority opinion).

²¹ Justice Kennedy’s somewhat enigmatic concurring opinion left open the possibility that there might be circumstances, perhaps involving genocide, in which the breadth of the Court’s opinion might need to be reconsidered.

²² *Kiobel*, 2013 U.S. LEXIS, at *31 (Breyer, Ginsburg, Sotomayor, and Kagan, JJ., concurring).

Assessing *Kiobel*

The 9-0 result in *Kiobel* is perhaps not so remarkable. The majority opinion arises from the current Court's keen sense of the limitations of judicial power and its role in foreign affairs. *Filartiga* was decided at a time when shouldering responsibility for human rights abuses overseas seemed closer to the political mark. American exceptionalism in the human rights arena was all the rage. At the same time as *Filartiga*, for example, the U.S. decided not to participate in the Moscow summer Olympics in protest over the Soviet Union's human rights record.

Then came cases like *Khulumani* and others, which resulted in potent objections by foreign governments to the projection of U.S. power and morality overseas through judicial fiat. *Filartiga*'s expansive (and expensive) approach of opening federal courts to the world's human rights abuse claims now seems dubious, particularly in light of the current federal budget sequester. It is small wonder that this Supreme Court would be disinclined to read the ATS, one of the oldest and oddest of federal statutes,²³ as a warrant for universal tort jurisdiction.

While the result in *Kiobel* may not be remarkable, the breadth of the Court's majority ruling is a surprise: the Department of Justice, for example, had urged the Court to hold that an American corporation could be liable in tort for a violation of international law. Many thought that the Court might only rule out "foreign cubed" cases. It could have done this and still reached the same result. Few expected the majority's near-categorical ruling that the ATS lacks extraterritorial effect.

On April 22, 2013, the Supreme Court granted cert. in another ATS case, *Bauman v. DaimlerChrysler Corp.*²⁴ In that case, Daimler was sued in the U.S. under the ATS by Argentinian residents who alleged that Daimler's Argentine subsidiary had collaborated with state security forces in Argentina to torture and kill individuals during Argentina's "dirty war." The Ninth Circuit held that Daimler was subject to personal jurisdiction in California through the contacts of its subsidiary, and consequentially found that the district court's exercise of personal jurisdiction was reasonable. The Supreme Court is now poised to decide next term yet another case involving the ATS: this time, the focus is on the required U.S. nexus. The Court may seize the opportunity to decide the broader issue of whether it violates due process for a court to exercise general personal jurisdiction over a foreign corporation based on the fact that an indirect corporate subsidiary does business here.

In any event, the Court's *Kiobel* ruling that foreign torts may not be reached under the ATS will likely return the ATS to the obscurity it had in the first 200 years of its history. Our national experiment with universal jurisdiction in the federal courts for international law torts seems to be at an end for now. As construed in *Kiobel*, ATS jurisdiction is limited to cases brought by an alien for international law torts that occur in the U.S. (or perhaps on the high seas and not within the jurisdiction of another country). So it will be a rare case indeed in which a

²³ See *Kiobel*, 621 F.3d 111, 115 (2d Cir. 2010) (describing the ATS as a statute "unlike any other in American law and of a kind apparently unknown to any other legal system in the world.").

²⁴ 644 F.3d 909 (9th Cir. 2010), cert. granted, No. 11-965, 2013 U.S. LEXIS 3163 (Apr. 22, 2013).

plaintiff will choose to resort to international law to try to secure federal court jurisdiction for a tort claim.

There are still many unanswered questions about the ATS after *Kiobel*. For example, we do not know who an “alien” is, whether a corporation is a proper ATS defendant, what is the required mental state for aiding and abetting ATS violations, or what international law torts are actionable under the ATS. It is also not clear when the U.S. nexus is sufficient that the tort may be said to have been committed here for ATS purposes. One thing, however, seems certain: without Congressional action that extends the ATS extraterritorially, the ATS is likely to be a rarely used vehicle for federal court jurisdiction in the future.

**A
PRACTITIONER'S
GUIDE TO
EVIDENCE**

By

Frank C. Razzano, Esq.

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I. RELEVANCE

A. Introduction - what is relevant information?

1. Under Federal Rule of Evidence (“FRE”) 401, relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to a determination of the action more probable or less probable than it would be without the evidence.
2. Under FRE 403, even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of 1) unfair prejudice, 2) confusion of the issues, 3) misleading of the jury, or 4) considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

B. Relevant evidence comes in two forms:

1. Direct evidence - This is evidence that does not depend upon an inference for its relevancy.
 - a. Example: A witness testifies that he saw the defendant’s car run the red light.
2. Circumstantial evidence - This is evidence where its relevancy depends not only on the credibility of the witness testifying, but also upon inferences that can be drawn from the evidence.
 - a. Example: Following a bank robbery, a witness testifies that she saw the defendant running from the bank.

C. What is conditional relevance?

1. Under FRE 104(b), when the relevance of the evidence depends upon the fulfillment of a condition of fact, the court admits the evidence subject to the introduction of evidence sufficient to support a finding of the fulfillment of the condition.
 - a. Example: A defendant is arrested for murder. When he is arrested he is in the possession of a gun for which he has a permit. The prosecution may seek to offer the gun in evidence subject to the prosecution’s ability to link the defendant’s gun to the murder.

II. EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME- FRE 403

A. Introduction - How can relevant evidence be excluded?

1. Under FRE 403, although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. It can also be excluded if it will likely cause confusion of the issues, mislead the jury, or will cause an undue delay or waste of time.
 - a. In deciding whether to admit the evidence, the court's main inquiry will be: Does the evidence have a tendency to cause the jury to decide the case based on a proper basis or emotion?

B. Examples of relevant evidence that has been excluded under FRE 403

1. In United States v. Abel, 469 U.S. 45 (1984), Abel and two other co-defendants were charged with bank robbery. Before trial, the prosecution notified the defense that one of the co-defendants had agreed to be the prosecution's witness against Abel. When the defense learned of this, it notified the prosecution that it intended to call Mills, a person who served prison time with both Abel and the co-defendant. At trial, Mills testified that Abel's co-defendant intended to falsely implicate Abel in order to receive favorable treatment from the government. The government then recalled the co-defendant as a rebuttal witness to say that Mills and Abel were members of the Aryan Brotherhood, a prison gang which required its members to deny membership in the gang and to commit perjury to benefit the members of the gang. The Supreme Court held that under FRE 403, the district court did not abuse its discretion in admitting this evidence since it was directly relevant to show Mills's bias.
2. In United States v. Li, 206 F.3d 78 (1st Cir. 2000), the defendants were charged with conspiracy to smuggle aliens into the United States. The defendants were crewmembers of a fishing vessel that had undocumented Chinese nationals aboard. The prosecution sought to offer evidence of the unsanitary conditions on the boat and the fact that the defendants physically beat the aliens. The court held that the evidence of unsanitary conditions was relevant to the defendant's profit motive, and that the evidence of the physical abuse was relevant to show that the defendants were part of the conspiracy. The court also held that the probative value of the evidence was not exceeded by its inflammatory nature under FRE 403. See also Old Chief v. U.S., 519 U.S. 172, (1997) (the

Supreme Court held that the name and nature of the defendant's prior offense was held to be probative).

3. In Wyninger v. New Venture Gear, Inc., 361 F.3d 965 (7th Cir. 2004), the court held that proffered evidence of sexual harassment in a different division by a different supervisor while relevant, was excludable under FRE 403.

III. KINDS OF EVIDENCE

A. Direct vs. Circumstantial

1. Direct evidence is evidence which, if believed, automatically resolves the issue.
2. Circumstantial evidence is evidence which, even if believed, does not resolve the issue unless additional reasoning is used.

B. Real v. Demonstrative evidence

1. Real evidence

- a. Real evidence is evidence that played a direct role in the events in question.
- b. Real evidence is admissible to show that the piece of evidence (usually a tangible object) offered is the object involved in the events in question in a substantially unchanged condition.
 - i. If the object is readily identifiable, the court can admit it based upon the testimony of a witness.
 - ii. When the object does not have characteristics that allow it to be readily identified, such as narcotics or a gun, a chain of custody must be established.

2. Demonstrative evidence

- a. Demonstrative evidence is evidence that played an indirect role in the events in question.
- b. Demonstrative evidence is admissible to explain or illustrate testimony.
 - i. Common examples include: maps, models, charts, photographs, movies, videotapes, sound recordings, x-rays, experiments, and views.

IV. QUALIFICATION OF WITNESSES

A. General rules of competency

1. At common law many individuals were incompetent to testify:
 - a. Slaves were incompetent to testify;
 - b. A married woman was incompetent to testify that her child born during a lawful marriage was illegitimate; and
 - c. Convicted perjurers.

B. Competency under the Federal Rules of Evidence

1. FRE 601 - Everyone is competent unless a FRE provides otherwise. Notably, judges and jurors are made incompetent under FRE 605 and 606.
2. FRE 602 - The witness must testify from personal knowledge.
3. FRE 603 - The witness must take an oath and solemnly promise to tell the truth.
4. FRE 701 - The witness must preferably state facts rather than opinions. However, the witness may give an opinion if it is:
 - a. Rationally based on his own perceptions,
 - b. Helpful to fact-finder, and
 - c. Not based on scientific, technical, or other specialized knowledge.

C. Requirements of Competency

1. Oath or Affirmation- FRE 603
 - a. Under FRE 603, before testifying, every witness is required to declare that he or she will testify truthfully, by oath or affirmation administered in a manner calculated to awaken the witness's conscience and impress the witness's mind with the duty to do so.
 - b. Example: In United States v. Ward, 973 F.2d 730 (9th Cir. 1992), a *pro se* defendant in an income tax evasion case filed a motion to challenge the oath that he was administered. In his motion, the defendant stated that he was unable to take the traditional oath and proposed an

alternative oath that would replace the word “truth” with “fully integrated honesty.” The court held that FRE 603 does not require any particular form of oath, only an oath that impresses on a witness the duty to tell the truth. The court further stated that the rule is flexible and designed to accommodate the witness. Thus, the court reversed the conviction because the trial judge refused to permit the witness to testify under the requested oath.

- c. Example: In Ferguson v. Commissioner, 921 F.2d 588 (5th Cir. 1991), a taxpayer in a civil action against the Internal Revenue Service refused on religious grounds to swear or affirm. However, he was willing to declare that the facts he would give were to the best of his knowledge and belief accurate, correct, and complete. The court held that under FRE 603, the trial judge should have accommodated the witness’s First Amendment religious rights and permitted the alternative oath.

2. Personal Knowledge - FRE 602

- a. Under FRE 602, the witness must testify based on personal knowledge.
 - i. Personal knowledge is derived through the five senses: sight, hearing, touch, taste, and smell.
 - ii. However, personal knowledge of the subject matter of the testimony means more than that the witness personally experienced similar circumstances.
- b. In addition to having perceived the event with one of his five senses, the witness must personally recall the event.

3. Communication

- a. In addition to perceiving and recalling the event, the witness must be able to communicate what he remembers to the court.

D. Issues in determining competency

1. The use of qualifying phrases

- a. Is the witness still deemed to be competent if the witness says “I believe?” or “I think?” in his testimony?

- i. Yes. If the witness was in a position to observe the transaction or event, and is merely qualifying his recollection, then the testimony should be admitted, and his qualification will go to the weight the jury will give the testimony.

2. Inferences and Opinions of Witnesses

- a. Personal knowledge includes inferences and opinions, as long as they are grounded in personal observation and experience.
 - i. Example: In United States v. Doe, 960 F.2d 221 (1st Cir. 1992), the defendant was charged with illegally transporting a pistol in interstate commerce. At trial, a gun shop owner testified that he had ordered the pistol from a South Carolina telemarketing firm, and received the pistol sometime after ordering it. The defendant was then asked whether he was familiar with the particular model of gun. The defendant answered affirmatively and went on to say that the gun was manufactured in Brazil. The defense objected on the grounds that whether the gun was manufactured in Brazil was not within the defendant's personal knowledge under FRE 602. The court overruled the objection and held that a witness's personal knowledge includes inferences and opinions, as long as they are grounded in personal observation and experience.
 - ii. Example: In Dimaso v. Duo-Fast Corp., 1991 WL 104183, an age discrimination case, the plaintiff's testimony that the 22-year-old was hired to replace him was based on a rational inference drawn from his perception of the facts surrounding his termination and, therefore, proper.

3. Intoxication

- a. Intoxication goes to the weight of the eyewitness testimony, not its admissibility.
 - i. Example: In Busse v. Bayerische Motoren Werke, 1997 WL 106716, a personal injury and wrongful death case, the defendant moved *in limine* to exclude an excited utterance made by two witnesses to the accident and to preclude the witnesses from

testifying. The defendant contended that the witnesses had been drinking at a bar before the accident, and they were too drunk to see anything. The court held that witness's intoxication goes to the weight of the eyewitness's testimony, not its admissibility.

E. Opinion testimony by a lay witness - FRE 701

1. Introduction

- a. Under FRE 701, a witness, who is not testifying as an expert, can testify through opinions as long as they are rationally based on their perception.
- b. Example: A witness is permitted to testify as to the approximate speed an automobile is traveling.
- c. Example: A witness can testify as to another person's intoxication.
- d. Example: No lay witness may testify as to someone's mental competency.
- e. Example: In Williams v. Muhammad's Holy Temple of Islam, Inc., 2006 U.S. Dist. LEXIS 7425, the court held that a lay witness may not testify as to the psychiatric history of the plaintiffs relatives or testify that the plaintiff was "crazy."

V. **DIRECT EXAMINATION**

A. Introduction

- 1. The examination of a witness typically goes through four stages:
 - a. Direct Examination: The party who called the witness engages in direct examination.
 - b. Cross Examination: Opposing counsel may cross-examine the witness.
 - c. Redirect: The party who called the witness may then conduct a redirect examination.
 - d. Recross: The cross-examining side then gets a brief opportunity to recross.

2. Once a witness has been qualified as competent (he has personal knowledge which he perceived through one of his five senses; personally remembers; is able to communicate; and, taken the oath) the lawyers will begin to examine the witness on direct examination.

B. Leading questions - FRE 611

1. A leading question is a question that suggests the answer
 - a. You can avoid leading questions by asking questions which begin with “who,” “what,” “which,” “when,” “where,” “how,” or “why.”
 - b. Under FRE 611 (c), leading questions should not be used on direct examination of a witness, except as necessary to develop the witness’ testimony.
2. When are leading questions allowed?
 - a. On cross-examination;
 - b. When a party calls a hostile witness as an adverse party, or when a witness identified with an adverse party;
 - c. Preliminary matters, such as name, age, date of birth;
 - d. Matters that are not in controversy;
 - e. Inconsequential matters;
 - f. Introducing a new subject matter;
 - i. Example: “Let me next draw your attention to September 11, 2001.”
 - g. Refreshing recollection;
 - i. Example: If the witness states “I just don’t recall the date that the World Trade Center collapsed right now.” Counsel would be permitted to say - Was it September 11, 2001?”
 - h. A reluctant witness;
 - i. A predisposed witness;

VI. REFRESHING A WITNESS'S RECOLLECTION

A. Introduction

1. Under FRE 612, a witness may be shown a writing for the purpose of refreshing his recollection.
2. Although there is no Federal Rule addressing the issue, most courts will allow the use of anything, whether written or real evidence, to refresh a witness's recollection.

B. Elements of refreshing recollection

1. The witness must testify that he has no present recollection of the matter;
2. The witness must state that the writing will assist him in giving testimony;
3. Having reviewed the writing, the witness must then be able to speak independently of it.
 - a. There is generally an exception for professional witnesses who are permitted to speak from their notes, i.e. police officers and expert witnesses.

C. What is the adverse party entitled to?

1. An adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce into evidence those portions that relate to the testimony of the witness.
 - a. FRE 612 provides for a production of documents to the adverse party used to refresh the recollection of the witness before the witness testifies if the court in its discretion determines it is necessary in the interest of justice.

VII. AUTHENTICATION OF RELEVANT EVIDENCE

A. Introduction

1. Authentication requires counsel to lay a foundation showing that the evidence he intends to introduce is reliable and is what it purports to be. It applies to a wide variety of evidence not just documents. If the evidence is not authenticated, it is not relevant.

2. Example: The gun produced at trial is only relevant if it was the gun used in the course of the bank robbery.
- B. Authentication does not always mean admissibility
1. Authenticating an item of evidence does not necessarily get it into evidence.
 2. Example: Once you authenticate a document, you must show that it is either non-hearsay or falls within an exception to the hearsay rule and that it satisfies the best evidence rule before it will be admitted.
- C. Requirements of authentication or identification
1. Under FRE 901(a), the requirement of authentication or identification is satisfied when the evidence is sufficient to support a finding that the matter in question is what its proponent claims.
 2. Under FRE 901(b)(4), the document can be authenticated by “appearance, contents, substance, internal patterns, or other distinctive characteristics taken in conjunction with the circumstances.”
- D. How do you authenticate a writing? - FRE 901 (b)
1. Through testimony of a person who prepared the writing;
 2. Through testimony of a person who signed the writing;
 3. Through testimony of a person who saw the writing being prepared or signed;
 4. By an admission by a party opponent;
 5. By identification of the writing as part of the business records of a corporation;
 6. By calling a person who is familiar with the handwriting in question.

VIII. AUTHENTICATING OTHER ITEMS OF EVIDENCE - FRE 901 and 902

- A. Self-Authenticating Documents - FRE 902
1. Under FRE 902, certain documents are self-authenticating. These include the following:
 - a. Domestic public documents under seal;

- b. Domestic public documents not under seal;
- c. Foreign public documents;
- d. Certified copies of public records;
- e. Official publications;
- f. Newspapers and periodicals;
- g. Trade inscriptions and the like;
- h. Acknowledged documents;
- i. Commercial paper and related documents;
- j. Any document or other matter declared by Act of Congress to be a *prima facie* genuine or authentic;
- k. Certified domestic records of regularly conducted activities;
- l. Certified foreign records of regularly conducted activities.

B. Other Common Items

- 1. Voice identification - FRE 901(b)(5)
- 2. Telephone conversations - FRE 901(b)(6)
- 3. Public Records or Reports - FRE 901 (b)(7)
- 4. Process or System - FRE 901 (b)(9)

C. Practitioner's Note - Chain of Custody

- 1. A chain of custody is required when things which cannot be identified by unique characteristics. Common examples are blood, drugs, or guns. These items require testimony to show they are what the proponent claims.
- 2. Often chain of custody problems go to the weight of the evidence, not its admissibility.
 - a. In United States v. Houston, 892 F.2d 696 (8th Cir. 1989), the defendant was charged with possession of crack cocaine. The police observed the defendant leaving a known crack house carrying a diaper box and getting into a car and driving off. The police subsequently stopped the

car, looked in the box, and saw several plastic bags inside which looked like crack cocaine. The defendant was arrested and the car was seized. The next day, another officer removed the box from the car and took the bags out of the box and put them in a plastic evidence bag, labeled, and sealed the bag. The bag was then transported to the crime lab where the bag was inventoried. At the crime lab, the bag was opened and chemically analyzed. The defendant argued that because the box had been left in the car for some period of time, without a chain of custody before it was removed, it was inadmissible under FRE 901. The court ruled that while the chain of custody had some flaws, this fact went to the weight of the evidence, not to its authenticity.

IX. BEST EVIDENCE RULE

A. Production of the original document

1. Under FRE 1001, 1002, and 1003, to prove the content of a writing, recording, or photograph, the original must be produced. However, a duplicate is admissible unless there is a genuine question raised as to the authenticity of the original or it would be unfair to admit the duplicate in lieu of the original.

- a. In Seiler v. Lucasfilm, Ltd., 808 F.2d 1316 (9th Cir. 1986). The plaintiff alleged that he had created creatures called Garthian Striders and that Star Wars producer, George Lucas, had infringed his copyright by using Imperial Walkers in the movie “The Empire Strikes Back.” The plaintiff attempted to introduce at trial blowups of the Garthian Striders. The court held that the best evidence rule prevented the plaintiff from using the blowups, and granted summary judgment for the defendant. As the plaintiff could not produce the original drawings of the Garthian Striders, prior to 1980, the year that “The Empire Strikes Back” was released, the court held that there was a danger of fraud. On appeal, the Ninth Circuit affirmed the district court’s holding and stated that because the plaintiffs drawings were ‘writings’ within the meaning of the best evidence rule, the plaintiff must either produce the original or show that it is unavailable through no fault of his own.
- b. In United States v. Leight, 818 F.2d 1297 (7th Cir. 1987), diagnostic-quality copies of x-ray of deceased child were admissible in prosecution of child’s mother for murder after the Government accidentally destroyed the original x-ray.

B. Admissibility of other evidence of contents

1. Under FRE 1004 an original is not required if:
 - i. The originals were lost or destroyed unless the proponent lost or destroyed them in bad faith;
 - ii. The originals are not obtainable by judicial process or procedure; or
 - iii. The original is in possession of the opponent.

C. The use of summaries

1. Under FRE 1006, the contents of voluminous writings, recordings, or photographs, which cannot be conveniently examined in court, may be represented in the form of a chart, summary, or calculation. However, the originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place.

D. Practice Note - Functions of the court and the jury

1. Under FRE 1008, authentication is a preliminary matter for the court, but issues of whether the writing ever existed or is the original is an issue for the jury.

X. JUDICIAL NOTICE

A. Introduction

1. FRE 201 allows judicial notice of only adjudicative facts. Legislative facts are not subject to judicial notice.

B. What are legislative facts?

1. Legislative facts are relevant to legal reasoning or the process of creating law.
2. Example: In Roe v. Wade, 410 U.S. 113 (1973), the Supreme Court considered certain social, political, and medical facts in arriving at its holding. These are all legislative facts.

C. What are adjudicated facts?

1. An adjudicated fact is a fact which is not subject to reasonable dispute because it is either:

- a. Generally known within the territorial jurisdiction of the trial court, or
 - b. Capable of accurate and ready determination by the use of sources whose accuracy cannot be reasonably questioned.
 - i. In In re Taser Int'l Shareholder Derivative Litig., 2006 U.S. Dist. LEXIS 11554, the court held a court may take judicial notice of matters of public record, such as SEC filings, when referenced in a complaint.
 - ii. In United States v. Henry, 417 F.3d 493 (5th Cir. 2005), the court took judicial notice that a twelve-gauge shotgun was a “destructive device” under the Sentencing Guidelines, which defines a “destructive device” as having a bore of more than half an inch.
2. Practice Note
- a. Under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), when a court takes judicial notice of a scientific test, it is, in essence, saying that under Daubert, the test is reliable, i.e., scientifically sound and methodologically reliable.
- D. Judicial notice is discretionary
- 1. Under FRE 201(c), a court may take judicial notice, whether requested to or not.
- E. Judicial notice is mandatory if requested
- 1. Under FRE 201(d), a court shall take judicial notice, if it is requested by a party and supplied with the necessary information.
- F. Objections to judicial notice
- 1. Under FRE 201 (e), the party is entitled to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed.
- G. Timing of taking judicial notice
- 1. Under FRE 201(f), judicial notice may be taken at any stage of the proceeding.

- H. The procedural effect of judicially noticed fact.
 - 1. The distinction between civil v. criminal cases
 - a. FRE 201(g) provides that judicially noted facts are indisputable in civil cases, but in criminal cases the jury is to be instructed that it may, but is not required to, accept as conclusive, any fact judicially noticed.

XI. TYPES OF WITNESSES - LAY v. EXPERT

- A. Who are lay witnesses?
 - 1. Under FRE 701, a lay witness may testify in the form of opinions and inferences if they are rationally based on the perception of the witness and are helpful to a clear understanding of the witness' testimony or the determination of the fact in issue.
 - 2. In order to testify a lay witness must: (1) take an oath; (2) personally have experienced an event which is material to the lawsuit through one of his five senses; (3) be able to recall the event; and (4) be able to communicate that event.
 - a. In Lubbock Feed Lots, Inc. v. Iowa Beef Processors, Inc., 630 F.2d 250 (5th Cir. 1980), the court held that an individual who had overheard telephone conversations could testify as to the nature of the business relationship between the parties to the conversation.
 - b. In Krueger v. State Farm Mut. Auto. Ins. Co., 707 F.2d 312 (8th Cir. 1983), the court held that an eyewitness to a car accident was permitted to testify regarding his estimates of distances and speeds, but was not allowed to state his belief that the motorist had time to avoid the accident.
- B. Who are expert witnesses?
 - 1. Under FRE 702, a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
 - a. (a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
 - b. (b) The testimony is based on sufficient facts or data;

- c. (c) The testimony is the product of reliable principles and methods; and
- d. (d) The expert has reliably applied the principles and methods to the facts of the case.

2. The Daubert Standard

- a. In Daubert v. Merrell Pharmaceuticals, Inc., 509 U.S. 579 (1993), the Supreme Court held that the Frye test did not survive the adoption of the Federal Rules of Evidence. In its opinion, the Court stated that there were many factors that would bear on the inquiry as to whether an expert proposing to testify to scientific knowledge would assist the trier of fact in understanding and determining the fact at issue.
- b. These factors included: the scientific methodology employed; whether the theory or technique had been subject to peer review or publication; whether the scientific technique had a known or potential error rate; and, finally, whether the technique had gained general acceptance.
- c. The Court indicated that the inquiry envisioned by FRE 702 was a flexible one, and cited to a law review article by Mark McCormick, entitled Scientific Evidence: Defining a New Approach to Admissibility, 67 Iowa L. Rev. 879 (1982), in which the author suggested eleven factors that should be considered in determining admissibility:
 - i. The potential error rate in using the technique;
 - ii. The existence and maintenance of standards governing its use;
 - iii. The presence of safeguards in the characteristics of the technique;
 - iv. Analogy to other scientific techniques whose results are admissible;
 - v. The extent to which the technique has been accepted by scientists in the field involved;
 - vi. The nature and breadth of the inference adduced;
 - vii. The clarity and simplicity with which the technique can be described and its results explained;

- viii. The extent to which the basic data is verifiable by the court and the jury;
- ix. The availability of other experts to test and evaluate the technique;
- x. The probative significance of the evidence and the circumstance of the case; and
- xi. The care with which the technique was employed in the case.

3. Standard on Review

- a. In General Electric Co. v. Joiner, 522 U.S. 136, 138-39 (1997), the Court held that a trial court's decision concerning Daubert's reliability requirement is subject to appellate review only for an abusive discretion.

4. Daubert's gatekeeper function

- a. Daubert requires that the district courts act as "gatekeepers." In other words, the district court's goal is to determine reliability and relevance and to insure that an expert's testimony rests upon a reliable foundation so that it can be called "scientific knowledge."
- i. In Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999), the Court held that the Daubert factors apply to the testimony of engineers and other experts who are not scientists. The Court noted that Daubert's "gatekeeper" function applied not only to scientific testimony, but also to "'technical' and 'other specialized' knowledge." In determining the admissibility of an engineering expert's testimony, the Court held that district courts could consider one or more of Daubert's factors and noted that Daubert does not constitute a definitive checklist. The Court further held that the district court's decision not to admit the expert's testimony in this case was appropriate, because it doubted his methodology and found it unreliable.
- ii. In Goebel v. Denver & Rio Grande W. R.R. Co., 215 F.3 1083 (10th Cir. 2000), the plaintiff, a locomotive engineer, brought a lawsuit contending that he suffered brain damage when he was exposed to diesel exhaust at high altitudes. His expert, a

toxicologist, testified there was a causal connection between the plaintiffs' exposure to the diesel fumes and his current symptoms. The defendant objected to the admission of the testimony contending that there was an insufficient basis for the jury to hear the testimony. The court of appeals held that the district court judge did not perform his "gatekeeper" function because he did not perform his task of finding sufficient facts to insure that the expert's testimony was both reliable and relevant.

5. Characteristics of Daubert

a. Mathematical certainty not required

- i. In Bonner v. ISP Technologies, Inc., 259 F.3d 924 (8th Cir. 2001), the plaintiff was exposed to an organic solvent manufactured by the defendant during her employment on an assembly line. The plaintiff's expert testified that her medical problems were caused by that exposure. The expert's opinion was based on the fact that her symptoms occurred immediately after exposure. Although no published studies supported the expert's conclusion and the expert's causation theory was not tested, the court of appeals ruled that the expert was allowed to testify because "[t]he first several victims of a new toxic tort should not be barred from having their day in court simply because the medical literature, which will eventually show the connection between the victims' condition and the toxic substance has not yet been completed." Id. at 928.

b. Scientifically sound and reliable methodology

- i. In Ruiz-Troche v. Pepsi Cola of P.R. Bottling Co., 161 F.3d 77 (1st Cir. 1998), the First Circuit held that Daubert "neither requires nor empowers trial courts to determine which of several competing scientific theories has the best provenance. It demands only that the proponent of the evidence show that the expert's conclusion has been arrived at in a scientifically sound and methodologically reliable fashion." Id. at 85.

6. Specific Examples of Daubert Questions

- a. Alternative Design of Product
 - i. In Winters v. Fru-Con Inc., 498 F.3d 734 (7th Cir. 2007), the court found no abuse of discretion when the trial court excluded the testimony of both expert witnesses when they failed to test alternate designs in a product liability case.
 - b. Soft Sciences
 - i. In United States v. Van Wyk, 262 F.3d 405 (3d Cir. 2001), an expert in forensic stylistics was called to compare the writing styles of certain threatening communications and the writing style of the defendant in known documents. The agent testified that although this was a new science, he was qualified to testify because he had attended seminars in the field, conducted research and text analysis for five years, and worked on text analysis in a number of high-profile cases. The court ultimately held that the expert was permitted to testify that he found similar patterns between the known and unknown writings, but he was not allowed to opine that they were probably made by the same person.
 - c. Lie detector tests
 - i. In United States v. Henderson, 409 F.3d 1293 (11th Cir. 2005), the court held that a polygraph is admissible only when the parties stipulate in advance as to the test's circumstances and scope of admissibility or to impeach or corroborate the testimony of a witness at trial.
- C. How must the expert testify? - FRE 702
- 1. Testimony must be derived from experience
 - a. The Committee Notes on FRE 702 makes clear that if the expert is relying on experience to reach his conclusion, he must explain how his experience lead him to his opinion.
- D. The basis of the expert's opinion - FRE 703
- 1. Under FRE 703. The facts or data upon which an expert bases an opinion or an inference may be those perceived by or made known to the expert at or before the hearing.

- a. For example, a physician may base his expert opinion on lab tests even though those lab tests have not been authenticated or offered into evidence in the proceeding.
- E. Opinion on the ultimate issue - FRE 704
 1. Under FRE 704(a), an opinion or inference is not objectionable because it embraces the ultimate issue to be decided by the trier of fact.
 2. Under FRE 704(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.
- F. Disclosure of facts or data underlying an expert opinion - FRE 705
 1. Under FRE 705, an expert may testify in the form of an opinion - and give reasons for it - without first testifying to the underlying facts or data unless the court requires otherwise. However, the expert may be required to disclose the underlying facts or data on cross-examination.
- G. Judicial notice of scientific method
 1. A court can take judicial notice of general scientific principles. Examples include:
 - a. Internet;
 - b. Fax machine;
 - c. Mail;
 - d. Fingerprinting;
 - e. Fire arms identification;
 - f. Chemical analysis of drugs
 - g. Chemical tests for intoxication;
 - h. Blood tests.
 2. Proper Foundation
 - a. When such evidence is offered, the proponent must lay a foundation by showing:

- i. The qualifications of the person or persons operating the machine/conducting the tests; and that
 - ii. The machine was in good working order or the scientific instrument was properly calibrated at the time in question.
 - 3. Judicial notice
 - a. Judicial notice of scientific method is nothing more than a court accepting the method's reliability and relevance under Daubert.
- H. Experimental evidence and simulations
 - 1. A trial judge retains a great deal of discretion to allow the introduction of evidence of an experiment conducted outside the court or inside the court.
 - a. Evidence of an experiment to show how an accident occurred will be admitted only if there is a very high degree of similarity.
 - b. Simulations will be admitted only if the data inputted is reliable and valid mathematical or scientific principles are utilized.

XII. CROSS EXAMINATION

- A. Introduction
 - 1. Under FRE 611(b), cross-examination should be limited to the subject matter of direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if upon direct examination.
- B. The purpose of cross-examination
 - 1. To impeach; and/or
 - 2. To elicit helpful information that supports your theory of the case.
- C. Collateral matters v. extrinsic evidence
 - 1. Extrinsic evidence
 - a. Extrinsic evidence is any evidence other than testimony from the witness currently on the stand.

- i. Example: For example, a witness to a traffic accident may be asked about forging a check five years ago. If the witness denies the forgery, we may not contradict the witness by introducing another witness who will swear that the first witness forged the check. We may not produce the forged check itself. Unless we have a forgery conviction, we cannot contradict the witness with extrinsic evidence.
 2. Collateral matters
 - a. A collateral matter is relevant to the case solely because it impeaches a witness. A non-collateral matter, in contrast, proves a fact in consequence other than impeachment. If a piece of evidence both proves a fact in consequence and impeaches a witness, then it is non-collateral.
- D. Leading questions are permitted in a cross examination
 1. Leading questions should be permitted on cross-examination.
 - a. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, the line of questioning may consist of leading questions.
 2. Leading questions v. argumentative questions v. questions without foundation.
 - a. Leading question
 - i. See discussion above; leading question are ones that seem to suggest an answer.
 - b. Argumentative question
 - i. These are questions whose sole purpose is not to elicit information, but to contest a fact with a witness who is argumentative.
 - c. Questions without foundation
 - i. In cross-examining a witness, the questioner will not be allowed to ask a question that has no foundation, i.e., a fact that has not been testified to by the witness or established during the course of the trial.

- ii. Example: Suppose counsel asks a witness: “When did you stop beating your wife?” Before he may do so, counsel must lay a foundation to show that the witness did or likely is beating his wife.

E. Impeachment of witnesses

- 1. Under FRE 607, any party, including the party calling the witness, may attack the credibility of a witness.

F. How does one impeach a witness?

1. Contradiction

a. Introduction

- i. Contradiction is the process of disputing the witness’s testimony by confronting a witness with a fact different from what the witness has testified to.
- ii. The purpose of contradicting the witness is to show that if a witness is inaccurate as to one fact, he may be inaccurate as to all.
- iii. However, if the witness denies the contradicting fact, the cross-examiner will not be allowed to prove that fact by extrinsic evidence if the matter is collateral. But, a prior inconsistent statement going to a material matter is not collateral. See United States v. Barrett, 539 F.2d 244 (1st Cir. 1976).

b. Example of improper contradiction question: “Are you telling us that the FBI agent was lying when he testified earlier?”

- i. The question is improper because the witness cannot possibly know the mental processes going on in someone else’s mind. He is not competent to testify that someone else is lying, mistaken, or confused. Inconsistencies between what one witness says and what another witness says should be discussed in closing.

2. The witness lacks one of the four prerequisites for being a witness

a. Oath

- i. See discussion above.

- b. Personal knowledge
 - i. The witness lacks personal knowledge because he did not perceive the events with one of his five senses. In other words, the witness is merely speculating.
- c. Mental impairment
 - i. Opposing counsel is attempting to show that the witness's ability to observe, remember, or narrate the events correctly has been impaired.
 - ii. Example: The witness may be impeached by showing that he was drunk or high at the time of the events even though he claims to have witnessed the event sober.
- d. Lack of communication
 - i. The witness must be able to communicate his/her own thoughts.
 - ii. Example: On cross-examination the defense attorney asks, "Isn't it a fact that you spent six hours with the Assistant United States Attorney who wrote out your direct examination which you memorized?" Assuming he says "yes," then counsel may argue to the jury that this was not a witness, but a computer reciting what the prosecution had fed to him.
- e. Practitioner's note:
 - i. These matters are never collateral and extrinsic evidence is admissible.

3. Bias

- a. Bias is a predisposition toward a party. The witness may be shown to be biased in favor of a party or biased against a party. The witness's interest in the outcome may also be shown as a form of bias.
- b. Bias is never collateral and extrinsic evidence can always be introduced to prove bias.

4. Prejudice

- a. Prejudice is an unreasonable predisposition against a party.
 - b. Prejudice is never collateral, and extrinsic evidence can always be introduced to prove prejudice.
- 5. Interest
 - a. Interest is defined as having an interest in the matter or a motive to lie regarding the matter.
 - b. Interest is never collateral and extrinsic evidence can always be introduced to prove interest.
- 6. Corruption
 - a. Corruption in this context usually entails a witness being bribed to testify a certain way.
 - b. Corruption is never collateral and extrinsic evidence can always be introduced to prove corruption.
- 7. Practice Note
 - a. With respect to bias, prejudice, interest, and corruption, you must have a good-faith basis to ask the question.
- 8. Character for truthfulness or untruthfulness - FRE 608
 - a. Reputation or Opinion Evidence - FRE 608(a)
 - i. A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. However, evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.
 - ii. Example: In United States v. Tedder, 403 F.3d 836 (7th Cir.), a defendant charged with money laundering testified that he thought his offshore gambling business was lawful. The court allowed his two brothers who had not seen him in ten years to testify under FRE 608 that his reputation for truthfulness was bad.
 - b. Specific Instances of Conduct - FRE 608(b)

- i. Under FRE 608(b), a witness can be cross-examined about specific instances of misconduct if it is probative of the witness' truthfulness, however, 608 prohibits specific instances of misconduct from being proved by extrinsic evidence.
 - ii. Under FRE 608(b)(1), the credibility of a witness may be supported by evidence in the form of opinion or reputation after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.
 - iii. Under FRE 608(b)(2), the credibility of another witness whose character the witness being cross-examined has testified about may be supported by evidence in the form of opinion or reputation after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.
- c. Practitioner's Note
- i. Under FRE 608(b), the giving of testimony by an accused or any other witness does not operate as a waiver of their Fifth Amendment privilege.
 - (a) Example: If the defendant was on the witness stand and he was questioned about a bank robbery that does not fall under FRE 404(b), he would retain the right to invoke the Fifth Amendment.
 - ii. The acts that may be used for impeachment are limited to those involved in truthfulness and veracity. This would include acts of fraud, obtaining property under false pretense, or perjury. Therefore, acts of violence, such as disorderly conduct, battery, or even a murder, do not constitute “conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness.”
 - (a) Example: In United States v. Pavton, 159 F.3d 49 (2d Cir. 1998), the court held that a judge must determine the nature of the crime to determine whether dishonesty is involved.
 - iii. The witness can only be asked about the fact itself, not an arrest, a charge, an indictment, a suspension,

or an expulsion. Credibility does not rest on arrest and indictment. Instead, credibility rests on the commission of the act itself.

- iv. If the witness denies the act, the witness's answer must be taken without any further follow-up under FRE 608(b). However, if the evidence is offered for a purpose other than "attacking credibility," such as contradiction, prior inconsistent statement, lack of mental capacity, then extrinsic evidence may be offered.
- v. A good-faith basis for asking about specific instances of conduct is required.

9. Conviction of a Crime - FRE 609

- a. Under FRE 609, a conviction of a crime can be introduced for the purpose of attacking the credibility of the witness in two circumstances:
 - i. A crime punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, but only if the court determines that its probative value outweighs its prejudicial value under FRE 403: and
 - (a) Example: In Sport v. Continental Western Insurance Co" 2006 U.S. Dist. LEXIS 7927, the court held that evidence of prior convictions were inadmissible under FRE in an automobile accident case.
 - (b) Example: In United States v. Mahone, 537 F.2d 922 (7th Cir. 1976), the court held that it should make an explicit, on-the-record finding regarding prejudice taking into account the impeachment value of the conviction, the time of conviction and subsequent history, the similarity between the crimes, the importance of defendant's testimony, and the centrality of the credibility issue.
 - ii. Evidence that the witness has been convicted of a crime involving dishonesty or false statement regardless of the punishment.
 - (a) Crimes involving dishonesty or false statement are not subject to the FRE 403 analysis. A court does

not have discretion under FRE 609 to exclude convictions involving dishonesty or false statement.

b. Admissibility Restrictions - FRE 609

- i. Under FRE 609(b), evidence of a conviction is not admissible more than ten years after conviction or the release of the defendant from confinement, whichever is later, unless the court determines, in the interest of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.
 - (a) When the conviction is more than ten years old, advance written notice must be given of the intent to use such evidence.
- ii. Under 609(c), evidence of a conviction is not admissible if 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 the person has not been convicted or a subsequent crime, which is punishable by death or imprisonment in excess of one year, or the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.
- iii. Under FRE 609(d), evidence of juvenile adjudication is not admissible, except in a criminal case, where a juvenile adjudication of a witness other than the accused is introduced and would be admissible to attack the credibility of an adult and the court is satisfied that the admission in evidence is necessary for a fair determination of the issue of guilt or innocence.
- iv. Under FRE 609(e), pendency of an appeal is admissible but does not render the conviction itself inadmissible.

10. Impeachment based on belief or opinion on matters of religion - FRE 610

- a. Under FRE 610, evidence of a person's beliefs or opinions on matters of religion is not admissible for the purpose of

showing that by reason of their beliefs or opinions, the witness's credibility is impaired or enhanced.

- i. Example: A devout Catholic on the witness stand has cooperated with the government and is testifying against a defendant in a criminal case. It would be improper for a prosecutor to ask the witness whether he had confessed his sins for the purpose of enhancing his credibility.

11. Prior inconsistent statements - FRE 613

- a. Under FRE 613, a witness may be examined on the basis of a prior inconsistent statement. The statement need not be sworn.
- b. If the statement is made under oath in a prior proceeding, it may qualify under FRE 801 to be considered by the jury, not only for impeachment purposes, but also for the truth of the matter asserted therein.
- c. Under FRE 613(a), while the statement need not be shown or its contents disclosed to the witness, upon request it must be shown or disclosed to opposing counsel.
- d. Under FRE 613(b), extrinsic evidence of a prior consistent statement is admissible only if the witness is afforded an opportunity to explain or deny it.

G. Practitioner's notes: Things to consider when cross-examining an expert

1. Are the facts on which the expert's opinion is based reliable?
 - a. Is the physical evidence contaminated, incomplete, misleading, or authentic?
 - b. Did the people who provided information to the expert give reliable information?
 - c. Are the documents authentic?
 - d. Are the documents incomplete, hearsay, or unreliable?
2. Is testing reliable?
 - a. Did the expert use the correct test?
 - b. Was it administered correctly?

- c. Was the test interpreted correctly?
- 3. Does the expert's opinion deserve any weight?
 - a. Does it defy common sense?
 - b. Does it fit with the facts?
 - c. Do other experts agree?
 - d. Is the opinion subjective?
- 4. Is the science sound?
 - a. Is science subjective?
 - b. Does it have methodology and procedures?
- 5. Is the expert qualified?
 - a. See James S. McKay "What All Experts Have in Common: A Five Step Analytic Approach to Dealing with Expert Testimony," *The Champion*, July 2006.

XIII. CORROBORATION/ACCREDITATION

- A. Introduction
 - 1. What is corroborating evidence?
 - a. Corroborating evidence is evidence that tends to support a proposition that is already supported by some other evidence, therefore confirming the proposition.
 - i. Example: A witness testifies that she saw X drive his automobile into a green car. Meanwhile Y, another witness, testifies that when he examined X's car later that day, and noticed green paint on its fender.
- B. When is it permitted?
 - 1. Evidence supporting the credibility of a witness may not be introduced unless the witness's credibility has been attacked.
- C. How may a witness's credibility be accredited or bolstered when it is attacked?
 - 1. By introducing evidence of the witness' character for truthfulness

- a. If a witness' credibility has been impeached by conviction of a crime, specific acts of misconduct, or a prior inconsistent statement under FRE 608(a), evidence of the witness's truthful character may be admitted by "opinion or reputation evidence or otherwise."
 - b. Where a witness's character for truthfulness has been impeached by conviction of a crime or a prior bad act, the witness may accredit himself by calling another witness who will testify as to the witness's character for truthfulness by opinion or reputation.
2. Prior consistent statements
- a. Where a witness has been impeached by a prior inconsistent statement, he may offer into evidence a prior consistent statement which predates the charge of recent fabrication, improper influence, or motive under FRE 801(d)(1)(B). Under this rule, the prior consistent statement has a substantive effect and can be offered for the truth of the matter asserted therein.

XIV. CHARACTER EVIDENCE

A. Introduction - FRE 404 (a)

- 1. Under FRE 404(a), evidence of a person's character or trait of character is not admissible for the purpose of proving that the witness acted in conformity in the particular occasion.
 - a. Example: In a civil suit from a car accident, the plaintiff is unable to show that the defendant has a general character trait of carelessness, or even that the defendant is a generally careless driver, to suggest that the defendant probably acted carelessly in the particular accident under litigation.
 - b. Example: In U.S. v. Whittington, 26 F.3d 456 (4th Cir. 1994), the court held that a witness's testimony describing the defendant as a "dangerous woman," a "rat," and a "snake" was improper character evidence.
 - c. Example: In Reyes v. Missouri Pac. R. Co., 589 F.2d 791 (5th Cir. 1979), the court held that evidence of four prior misdemeanor convictions for public intoxication was considered improper character evidence to show that the plaintiff was drunk and had passed out on the railroad tracks when he was run over.

- d. Example: In U.S. v. Wyers, 546 F.2d 599 (5th Cir. 1977), the court held that a reference to the defendant's unemployment was not character evidence under Rule 404(a).

B. Exceptions for a defendant or victim in a criminal case - FRE 404(a)(2)

1. Rebuttal by prosecution:

a. Character of the defendant

- i. If the defendant puts on proof of good character, the prosecution may rebut this evidence by cross-examination or by putting on his own witness saying the defendant is bad.
- ii. Specific incidents
 - (a) The prosecution may even cross-examine the witness about specific instances of bad conduct if:
 - (b) (1) He has good faith basis for believing the defendant really committed the bad act;
 - (c) (2) The bad act is relevant to the specific character trait testified to by the witness.
 - iii. No extrinsic evidence
 - (a) The prosecutor's ability to show specific bad acts is limited to cross-examination. He may not put on extrinsic evidence (e.g., other witnesses) to prove that the specific acts took place, if the character witness denied that they did.

b. Character of the victim

- i. In a criminal case, FRE 404(b) is usually used in the self-defense context. The goal in using Rule 404(b) evidence in a self-defense case is to show that the alleged victim was the aggressor. To accomplish this goal, one should use evidence of the alleged victim's other crimes, wrongs, or acts that reflect upon his motive, intent, preparation, plan, or absence of mistake in threatening, assaulting, or attempting to assault the defendant.

- (a) Example: In U.S. v. Greschner, 647 F.2d 740 (7th Cir. 1981), the court held that evidence of the victim's participation in a prior stabbing was relevant to prove self-defense.
 - (b) Example: In U.S. v. Keiser, 57 F.3d 847 (9th Cir. 1995), the court held that only reputation and opinion testimony, not specific instances of a victim's conduct, are admissible to prove the victim's character in a self-defense claim.
 - ii. Practitioner's Note
 - (a) 404(a)(2)(B) is subject to the limitations outlined in FRE 412. This rule is discussed within.
 - c. Practitioner's note
 - i. Under 404(a)(2)(C), in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.
- C. Crimes, Wrongs, or Other Acts - FRE 404(b)
- 1. Under FRE 404, evidence of other crimes, wrongs, or acts may be admissible for purposes other than to prove character, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, 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 such evidence it intends to introduce at trial.
 - 2. Test for admissibility
 - i. In Huddleston v. United States, 485 U.S. 681 (1988), the Supreme Court held that to utilize FRE 404(b), a court must do four things to protect the defendant from undue prejudice:
 - (a) First, the evidence must be offered for a proper purpose, not solely to prove character.
 - (b) Second, the evidence must be relevant as required by FRE 402.

- (c) Third, the trial judge must make a FRE 403 assessment to determine the probative value of the similar act evidence and whether it is substantially outweighed by its potential for unfair prejudice.
- (d) Fourth, although district court is not required to make a preliminary finding that the government already proved the “other act” by preponderance of the evidence before submitting similar acts evidence to the jury, the evidence is only admissible if there is sufficient evidence to support a finding by the jury that the defendant committed the similar act.

3. Use of acquitted conduct is not barred

- a. Example: In Dowling v. United States, 493 U.S. 342 (1990), the defendant was charged with armed bank robbery. At trial, the prosecution offered evidence that the defendant and another man were wearing ski masks and carrying handguns in the robbery. The prosecution also offered evidence that two weeks after the bank robbery, two men entered a woman’s home in the same town as the bank wearing ski masks and carrying handguns. The witness stated that she struggled with the robbers, and during that struggle, a mask of one of the men came off. Later, the witness identified that man as the defendant in the present case. The defendant was charged with burglary and assault, but the jury returned a verdict of not guilty. The Court held that the fact of acquittal did not bar the use of the underlying facts if it otherwise meets the requirements of FRE 404(b).

4. Evidence used to prove *modus operandi*

- a. Example: In United States v. Carroll, 207 F.3d 465 (8th Cir. 2000), the defendant was charged with armed robbery. His identity was at issue. A man robbed the bank with a handgun wearing a nylon stocking to mask his face. He jumped over the teller’s counter during the robbery and stuffed money into his bag. Six years before, the defendant was convicted of another bank robbery and sentenced to two years in prison. In that case he was armed with a handgun and had a nylon stocking over his head. The court held that wearing a nylon stocking as a mask and carrying a gun was a common *modus operandi* in a bank robbery case, and thus it does not uniquely identify the defendant as the offender under 404(b)

5. Evidence offered for “other purpose”
 - a. Example: In United States v. Curtin, 443 F.3d 1084 (9th Cir. 2006), a defendant was charged with soliciting underage girls over the Internet. When he was arrested, the defendant’s computer contained stories about incest. The government argued the stories were admissible under FRE 404(b). The court disagreed and held that to be admissible, the government must show sufficient evidence that the defendant committed an act that was similar and not too remote in time.
6. Evidence used to prove consent
 - a. Example: In Olden v. Kentucky, 488 U.S. 227 (1988), a black man was charged with kidnapping and rape of a white woman. The defendant claimed that the sex was consensual and the only reason the white woman had brought the charges was that her live-in boyfriend had seen her leaving the car when she returned home. The court held that restricting the woman’s cross-examination was an improper limitation on the defense’s right to show bias and motive.
7. Intent
 - a. Other crimes may be used to prove that the defendant had the particular intent required for the crime charged. This can be used to rebut the defendant’s claim that he did the act innocently or unknowingly.
8. Motive
 - a. Other crimes may be used to establish the defendant’s motive for the crime.
 - b. Example: The defendant, a nurse, is charged with stealing Demerol from a hospital. The prosecution may show that the defendant has an addiction to prescription drugs to show that she had a motive to steal the drug.
9. Identity
 - a. Other crimes may be used to show that the defendant was really the perpetrator. The goal is to show that the other crimes were part of a common plan or scheme.

- b. Example: The defendant was charged with embezzling money. At trial, the prosecution can show that the defendant embezzled money from three prior employers since this is part of a more general scheme to steal from his employers.

D. Methods of proving character; by reputation or opinion - FRE 405(a)

1. Introduction

- a. Under FRE 405(a), in all cases in which evidence of character or traits of character is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion.

2. The defendant's good character evidence

- a. In a criminal case, the defendant can show his own good character by the witness's testimony that the defendant has good reputation for honesty or non-violence, or by testimony that in the witness's opinion, the defendant possesses these favorable traits. However, the defendant cannot show specific instances to prove his own good character.

3. Rebuttal

- a. If the defendant makes this showing, he "opens the door" for the prosecution to rebut by reputation or opinion evidence.
- b. The prosecution may use evidence of specific acts during the cross-examination of the defendant's good character witness.

4. Practitioner's notes

- a. Good-faith basis
 - i. Before the cross-examination about a specific act, the prosecutor must have a "good faith basis" for believing that the specific act actually occurred.
- b. No extrinsic acts
 - i. The prosecution cannot use extrinsic evidence to prove the specific acts. It is merely allowed to ask the defendant's witness about them.

E. Methods of proving character; by specific instances of conduct - FRE 405(b)

1. Introduction

- a. In cases where character is in issue, i.e., where character is an essential element of the cause of action, proof may be made by specific instances of the person's conduct.
 - i. See Crumpton v. Confederation Life Ins. Co., 672 F.2d 1248 (5th Cir. 1982).

2. Common examples:

- a. Libel case
- b. Career criminal offender
- c. Possession of firearm by convicted felon:
 - i. Example: In United States v. Phillippi, 442 F.3d 1061 (7th Cir. 2006), the defendant was charged with attempting to acquire a firearm when he answered "No" to an ATF form asking if he was under indictment for a felony. The defendant claimed that he made an honest mistake. The court stated that because the government's evidence had a purpose beyond showing felony status, i.e., he knowingly lied, it was admissible.

F. Sex-offense cases: The victim's sexual behavior or predisposition - FRE 412

1. Introduction

- a. Prohibited Uses. The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct:
 - i. Evidence offered to prove that a victim engaged in other sexual behavior; or
 - ii. Evidence offered to prove a victim's sexual predisposition.
- b. Exceptions.

- i. Criminal Cases. The court may admit the following evidence in a criminal case:
 - (a) Evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;
 - (b) Evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and
 - (c) Evidence whose exclusion would violate the defendant's constitutional rights.
- ii. Civil Cases. In a civil case, the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy.

2. Criminal case example

- a. Example: In U.S. v. Richards, 118 F.3d 622 (8th Cir. 1997), a sexual abuse case, the court held that if the prosecutor does not assert that the semen found in the victim belongs to the defendant, then the defendant may not assert that it belongs to another man in order to introduce evidence that the victim had intercourse with others prior to the assault in question.

3. Civil case example

- a. Example: In Rodriguez-Hernandez v. Miranda-Velez, 132 F.3d 848 (1st Cir. 1998), a sexual harassment case, the district court did not abuse its discretion under Rule 412 by admitting evidence that the plaintiff's relationship with her boyfriend distracted her from her work while excluding allegations that she was promiscuous, a lesbian, and suffering from a sexually transmitted disease.
- b. Example: In Excel Corp. v. Bosley, 165 F.3d 635 (8th Cir. 1999), a sexual harassment suit, the trial court properly excluded evidence offered by the employer that the plaintiff, during the months of alleged harassment by her

ex-husband co-worker, had sexual relations with him outside the workplace and without the employer's awareness.

- c. Practice note
 - i. Under FRE 412, a written motion must be filed before trial and *in camera* hearing must be held before any party is able to offer evidence of prior sexual behavior.

XV. EVIDENCE OF HABIT - FRE 406

A. Introduction

- 1. Under FRE 406, evidence of a person's habit or the routine practice of an organization, whether corroborated or not and regardless of the presence of eye witnesses, 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.

B. What is a habit?

- 1. Habit describes one's regular response to a specific situation. It is only when examples offered to establish such pattern of conduct or habit are "numerous enough to base an inference of systematic conduct," that examples are admissible. Strauss v. Douglas Aircraft Co., 404 F.2d 1152, 1158 (2d Cir. 1968)). See also 2 Wigmore, Evidence § 376 (3rd ed. 1940). The key criteria are "adequacy of sampling and uniformity of response or ratio of reactions to situations." Advisory Notes, Rule 406, Fed.R.Evid.
- 2. Examples that do not satisfy FRE 406.
 - a. Example: In Rivera v. Union Pacific R. Co., 868 F. Supp. 294 (D. Colo. 1994), the court held that a railroad's general practice of following safety practices cannot be used to show that it was not negligent on a particular occasion.
 - b. Example: In Levin v. United States, 338 F.2d 265 (D.C. Cir. 1964), the court held that a defendant's practice of being home on the Sabbath as the Orthodox Jewish ritual requires—rather than at the scene of the crime—was not a habit because of its volitional nature.
- 3. How is habit proven?

- a. Proof of habit can be made by opinion testimony or by evidence of specific instances sufficient to establish the habit.

XVI. SUBSEQUENT REMEDIAL MEASURES - FRE 407

A. Introduction

1. Under FRE 407, evidence that remedial measures were taken following an accident is not admissible to prove negligence.

B. Practitioner's note

1. Evidence of subsequent remedial measures may be introduced for some other purpose, such as proving ownership, control, or the feasibility of cautionary measures if controverted.
2. Example: In Hickman v. Carnival Corp., 2005. WL 3675961, a plaintiff sued a ship owner for injuries sustained while using a barstool. The plaintiff sought to introduce the subsequent remedial repair of the barstool on the theory that the defendant's repair of the stool was illustrative of its negligence maintaining it. The court found this evidence to be inadmissible as such a claim would eviscerate FRE 407.

XVII. OFFERS OF SETTLEMENT - FRE 408

A. Introduction

1. Under FRE 408, offers of settlement are not admissible to prove liability or the amount of damages. However, they can be used in criminal cases.
2. Example: In Burns v. City of Des Peres, 534 F.2d 103 (8th Cir. 1976), the court held that all evidence relating to an attempted settlement of a constitutional zoning controversy when it was pending in state court was inadmissible.
3. Example: In Manko v. U.S., 87 F.3d 50 (2d Cir. 1996), the court held that whether offered by the prosecution or defense, settlements in civil cases are admissible in subsequent criminal cases because the policy of encouraging and protecting civil settlement negotiations under Rule 408 is not sufficient to outweigh the need for accurate criminal prosecutions.

- B. FRE 408 applies only to disputed claims.
 - 1. Example: If a debtor writes a letter in which she admits the existence of the debt but claims she is unable to pay, the letter would be admissible.
 - 2. Offers of compromise of disputed claims involving third parties are entitled to the same protection.

XVIII. PLEAS, PLEA DISCUSSIONS, AND RELATED STATEMENTS - FRE 410

- A. Introduction
 - 1. In a civil or criminal case, evidence of the following is not admissible against the defendant who made a plea or participated in the plea discussions:
 - a. A guilty plea that was later withdrawn;
 - b. A *nolo contendere* plea;
 - c. A statement made during a proceeding on either of those pleas under Federal Rule of Criminal Procedure 11 or a comparable state procedure; or
 - d. A statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea.

XIX. LIABILITY INSURANCE - FRE 411

- A. Introduction
 - 1. Under FRE 411, evidence that a person was or was not insured against liability is inadmissible on the issue that a person acted negligently or otherwise wrongfully. However, FRE 411 does not exclude evidence of insurance, or lack thereof, when offered to prove bias, prejudice, proof of agency, ownership or control.
 - 2. Example: A classic example might be insurance evidence as bearing on motive, i.e., a defendant in a hit-and-run prosecution would be allowed to show his insurance to help establish his lack of motive to flee the crime scene.

XX. HEARSAY GENERALLY

A. Introduction - what is hearsay?

1. Under FRE 801, hearsay is “a statement or assertive conduct which was made or occurred out of court and is offered in court to prove the truth of the matter asserted.”

B. Why do we care about hearsay?

1. Main worries - ambiguity, insincerity, incorrect memory, and inaccurate perception.
 - a. All of these worries relate to the fact that the person making the out-of-court statement, the declarant, is not available for cross-examination.
2. The 4 elements of hearsay
 - a. The declarant makes
 - b. An out-of-court
 - i. An out-of-court statement is any statement except one “made by a witness during trial while testifying before the trier of fact.”
 - c. Oral, written, or verbal statement
 - i. See below.
 - d. That is offered to prove the truth of the matter asserted.
 - i. The relevant inquiry is whether the truth of what the statement is asserting is relevant to the fact at issue.
 - ii. Example: In U.S. v. Tann, 532 F.3d 868 (D.C. Cir. 2008), the court held that statements on eighteen forged checks instructing the bank to pay money from the employer’s account to the order of the defendant were not hearsay when offered only to prove that the checks had been created by defendant, not to prove truth of any statement asserted on checks.

C. Hearsay analysis - four questions that should be asked with respect to every statement

1. Is the statement an out-of-court statement?

2. What is the purpose for which it is being offered?
3. If the statement is offered for a non-hearsay purpose, ask yourself, is that purpose relevant, and, if so, is the purpose outweighed by the risk of unfair prejudice under FRE 403?
4. If the statement is an out-of-court statement offered for its truth, does it fall within an exception?

XXI. WHAT IS A “STATEMENT”?

A. Introduction

1. Under FRE 801(a), a “statement” means a person’s oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

B. What was a statement at common law?

1. The common law rule - third party statements made out of court which imply or an opinion or statement on the matter at issue is inadmissible hearsay -was set forth in Wright v. Latham, 7 Ad. & El. 3 13 (1837) decided by the House of Lords in 1837.

C. What is an oral assertion?

1. When a person says something it is generally easy to determine whether his utterance is a statement - simply look at the words themselves - if they appear to be an assertion of fact or opinion, they are a statement. If said out of court, this is hearsay.

D. What is nonverbal assertive conduct?

1. Nonverbal assertive conduct is treated as if it were a statement, so that it can be hearsay.
 - a. Example: X pulls Y’s mug shot out of a collection of photos. Since X intends to assert “that is the perpetrator,” this act will be hearsay if offered on the issue of whether the defendant was the perpetrator.

E. Can silence be a statement?

1. A person’s silence will be treated as a “statement,” and thus possibly hearsay, if it is intended by the person as an assertion.

F. What is the effect of nonassertive conduct and implied assertions?

1. Conduct that is not intended by the declarant to be an assertion (“implied assertions”) has divided courts and commentators. In Wright v. Doe D’ Tatham, the House of Lords declared such conduct hearsay, a position rejected by the Federal Rules.
2. Example: In United States v. Zenni, 492 F. Supp. 464 (E.D. Ky 1980), a police officer entered the defendant’s residence looking for evidence of illegal bookmaking. While he was on the premises, the police officer answered the phone and the callers asked for bets to be placed on various sporting events. The prosecution offered these statement to prove that the defendant was engaged in bookmaking. The court held that the calls were non-hearsay since the persons calling did not intend to make an assertion.
3. Example: In United States v. Reynolds, 715 F.2d 99 (3d Cir. 1983), the government sought to introduce a statement - “I didn’t tell them anything about you” - made by one co-defendant to another co-defendant at the time of their arrest. The government argued that it was offering the statement not to show that the other co-defendant was involved in a conspiracy, i.e., he was guilty. The court held that this statement was an implied statement that was relevant only to show the co-defendant’s involvement, since it would be irrelevant if, in fact, it was offered to show there was nothing to tell. Therefore, it was an out-of-court statement offered for its truth, and thus was inadmissible.

G. What are the effects of verbal acts

1. There are certain statements which, when made, have legal consequences. These are not hearsay.
 - a. Examples:
 - i. Words of offer and acceptance;
 - ii. Slander;
 - iii. Words of donative intent;
 - iv. Notices or warnings;
 - v. Prior inconsistent statements.

XXII. TESTIMONY IMPLICITLY BASED ON HEARSAY

A. Introduction

1. In-court testimony is not the sort that is typically vulnerable to a hearsay objection. However, in-court testimony can still be hearsay if it is based on hearsay and not personal knowledge.
2. Example: In United States v. Brown, 548 F.2d 1194 (5th Cir. 1977), an Internal Revenue agent testified that she had examined tax returns prepared by the defendant and found that the tax returns consistently overstated deductions. The court concluded that the agent could have only known of the overstated deductions by talking to the taxpayers who supplied information about their deductions. Consequently, the testimony was improper hearsay.

XXIII. MULTIPLE HEARSAY

A. Multiple hearsay

1. If the out-of-court statement contains layers of hearsay, each level of hearsay must have an exception.
 - a. Example: Suppose that the lawyer wants to introduce a patient's hospital file to show that when the patient was struck by the defendant, he began bleeding from his head. The hospital's file has a note by the staff physician on duty saying that, when the patient came to the emergency room for treatment, he told the staff physician that when he was hit by the defendant he began bleeding profusely from the head. The only live witness that is able to testify in court is a records clerk from the hospital.
 - i. This is double hearsay - one hearsay declaration - the patient's statement about what happened to him - wrapped in another hearsay declaration - the doctor's statement about what the patient said.

XXIV. STATEMENTS WHICH ARE NOT HEARSAY

A. Introduction

1. Under FRE 801(d), certain statements are never hearsay.
 - a. Prior inconsistent statements under oath - 801(d)(1)(A)
 - b. Consistent statements offered to rebut charge of recent fabrication-801(d)(1)(B)

- c. Prior identification of a person - 801 (d)(1)(C)
 - d. Party Admissions - 801(d)(2)
 - e. Adoptive Admissions - 801(d)(2)(B)
 - f. Agents & Employees - 801(d)(2)(C) and (D)
 - g. Admission by Coconspirator - 801(d)(2)(E)
- B. Prior inconsistent statement under oath - 801(d)(1)(A)
- 1. Prior inconsistent statements are not hearsay in two circumstances:
 - a. A statement inconsistent with the declarant's testimony and given under oath subject to the penalty of perjury at trial, hearing, or other proceeding, or in a deposition; or
 - b. A statement consistent with the declarant's testimony and offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.
 - i. Example: In United States v. Tome, 513 U.S. 150 (1995), the defendant was charged with sexually assaulting his minor daughter in June, but the matter was not reported to the police until August. In April, the defendant, who was divorced from his wife, petitioned the court for primary custody of his daughter. The petition was to be scheduled for hearing in August, the same time that the daughter reported the incident to the police. At trial, the daughter testified that she wanted to live with her mother, and she understood that if her father went to jail she could live with her mother. The prosecutor called a neighbor who babysat for the child in July who testified that the child told her at that time that the father had sexually assaulted her. The Supreme Court made it clear that only prior inconsistent statements made *before* the event giving rise to the motive to fabricate were properly admissible under the rule. Accordingly, because here the victim's statement was made in July, and the reason to fabricate which arose in April, the statements were held to be inadmissible.

C. Adoptive Admissions - 801(d)(2)(B)

1. Admission by silence

- a. Where an individual would naturally be expected to deny a statement if untrue, the witness's silence may constitute an admission of the accusation.
- b. Example: In United States v. Flecha, 539 F.2d 874 (2d Cir. 1976), the court held that to constitute an admission by silence - an adoptive admission under FRE 801(d)(2)(B) - there must be circumstances present which render it reasonably more probable than not that a man would answer the charge against him. Thus, not everything said in a defendant's presence, which he does not respond to and dispute, is an adoptive admission by silence.

XXV. HEARSAY EXCEPTIONS WHERE THE AVAILABILITY OF THE DECLARANT IS IMMATERIAL - FRE 803

A. Introduction

1. The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:
 - a. Present Sense Impression;
 - b. Excited Utterance;
 - c. Then-Existing Mental, Emotional, or Physical Condition;
 - d. Statement Made for Medical Diagnosis or Treatment;
 - e. Recorded Recollection;
 - f. Records of a Regularly Conducted Activity;
 - g. Absence of a Record of a Regularly Conducted Activity;
 - h. Public Records;
 - i. Public Records of Vital Statistics;
 - j. Absence of a Public Record;
 - k. Records of Religious Organizations Concerning Personal or Family History;
 - l. Certificates of Marriage, Baptism, and Similar Ceremonies;

- m. Family Records;
- n. Records of Documents That Affect an Interest in Property;
- o. Statements in Documents That Affect an Interest in Property;
- p. Statements in Ancient Documents;
- q. Market Reports and Similar Commercial Publications;
- r. Statements in Learned Treatises, Periodicals, or Pamphlets;
- s. Reputation Concerning Personal or Family History;
- t. Reputation Concerning Boundaries or General History;
- u. Reputation Concerning Character;
- v. Judgment of a Previous Conviction;
- w. Judgments Involving Personal, Family, or General History, or a Boundary;

B. Present sense impression - FRE 803(1)

- 1. Under FRE 803(1), a statement describing or explaining an event or condition made while the declarant perceived the event or condition or immediately thereafter is not hearsay, and is therefore admissible.
 - a. Example: In United States v. Hawkins, 59 F.3d 723 (8th Cir. 1995), a 911 caller reported hearing a disturbance from the defendant's apartment, which was located directly above his. Seven minutes later, a second call was received from a pay phone asking the police to go to the same apartment because the caller's husband had pulled a gun, and there were drugs in the apartment. A search of the apartment revealed crack cocaine and a loaded semi-automatic pistol. The court held that the time gap between the first and the second call did not preclude the admission of the second call, which described or explained the events under FRE 803(1). It is important to note that under the Supreme Court's new interpretation of the confrontation clause it is possible that these statement may prove inadmissible since it was not a call for assistance.

- b. Example: Bill was juggling knives in the kitchen while his three young children played at his feet. His wife, Joan, was on the phone in the same room talking to her sister Becca. Joan, while eyeing her husband's antics, said to her sister, "Yes, he's practicing his juggling right now, using my best set of kitchen knives." Just at that moment, Bill dropped one of the knives on his four-year-old son Tom. Tom screamed, "Owww" Joan shouted, "I warned you not to throw knives in the air with all those kids around!" All of Joan's comments are present sense impressions as she is describing Bill's actions.

C. Excited utterance - FRE 803(2)

- 1. Under FRE 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 is not hearsay.
 - a. Example: In Jones v. Greer, 627 F. Supp. 1481 (1986), the victim heard a noise and came upon the defendant who took him to the basement and shot him in the face. The victim managed to crawl up the stairs and call for help. The victim told the officer who arrived on the scene what happened and gave him description of his attacker. The court admitted the victim's description as an excited utterance because he had been severely wounded and was in shock when he made the statement.

D. Then-existing mental, emotional, or physical condition - FRE 803(3)

- 1. Under FRE 803(3), a statement of a 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 a fact remembered or believed, unless it relates to the execution, revocation, identification, returns of the declarant's will is not excluded.
 - a. Example: In Mutual Life Insurance v. Hillmon, 145 U.S. 285 (1892). Mr. Hillmon's widow sued to collect on a life insurance policy which Mr. Hillmon had taken out shortly before he left for the West. She claimed he died in Crooked Creek, Colorado, where a badly burned corpse was found. The insurance company claimed the corpse was that of another man, who Mr. Hillmon had asked to accompany him and who had disappeared around the same time. The insurance company's theory was that Mr.

Hillmon had killed the other man, passed his corpse off as his own in order to collect the insurance proceeds. To prove that the other man had accompanied Mr. Hillmon and, therefore, it might be the other man's corpse, the life insurance company offered letters written by the other man to relatives shortly before he disappeared. The Supreme Court reversed the lower court's decision that the letters were inadmissible hearsay and held that the letters were admissible to prove that the man accompanied Mr. Hillmon to Crooked Creek. The Court held that "whenever the intention is of itself a distinct and material fact in a chain of circumstances, it may be proved by contemporaneous oral or written declarations of the party.... 'Wherever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings are original and competent evidence.'" Id. at 295-96.

- i. The notes of the House Committee on the Judiciary stated that "the committee intends the rule to be construed to limit (the Hillmon Doctrine) so as to render statements of intent by a declarant admissible only to prove his future conduct, not the future conduct of another person."

E. Statement for the purpose of medical diagnosis for treatment - FRE 803(4)

1. Under FRE 803(4), statements made for the purpose 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 diagnose or treatment, are not excluded by the hearsay rule.
 - a. Example: In United States v. Tome, 61 F.3d 1446 (10th Cir. 1995), the defendant was charged with sexually abusing his daughter. The government offered into evidence statements made by the child to a number of pediatricians and child service workers describing her father's attacks. For example, she told a pediatrician who treated her for a vaginal rash during a "get-acquainted" interview that her father had put his "thing" in her. The court concluded that the statement was admissible under FRE 803(4) since the statement was reasonably pertinent to treatment.

F. Recorded recollection - FRE 803(5)

1. A recorded recollection is a record that:
 - a. Is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;
 - b. Was made or adopted by the witness when the matter was fresh in the witness's memory; and
 - c. Accurately reflects the witness's knowledge.
2. If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

G. The record of a regularly conducted activity - FRE 803(6)

1. The record of a regularly conducted activity is an exception to hearsay if:
 - a. The record was made at or near the time by — or from information transmitted by — someone with knowledge;
 - b. The record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
 - c. Making the record was a regular practice of that activity;
 - d. All these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and
 - e. Neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.
2. Example: In Palmer v. Hoffman, 318 U.S. 109 (1943), the Court held that to qualify as a business record the record must have been made for the systematic conduct of the business as a business. Thus, the Supreme Court held that an employee's version of an accident given two days after it occurred at the railroad's foreign office was inadmissible as a business record. The Court held that because the act of statements from employees about accidents is not within the normal course of the business, it is not a business record.

3. Practitioner's note:
 - a. This hearsay exception applies to all kinds of business records whether or not conducted for profit.
- H. The absence of an entry in records kept in accordance with the provisions of the above rule - FRE 803(7)
 1. Evidence that a matter is not included in a record described in FRE 806(6) if:
 - a. The evidence is admitted to prove that the matter did not occur or exist;
 - b. A record was regularly kept for a matter of that kind; and
 - c. Neither the possible source of the information nor other circumstances indicate a lack of trustworthiness.
- I. Public records and reports - FRE 803(8)
 1. A record or statement of a public office falls under FRE 803(8) if:
 - a. It sets out
 - i. The office's activities;
 - ii. a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or
 - iii. In a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and
 - b. Neither the source of information nor other circumstances indicate a lack of trustworthiness.
- J. Records of vital statistics - FRE 803(9)
 1. A record of a birth, death, or marriage, if reported to a public office in accordance with a legal duty.
- K. Absence of public record or entry - FRE 803(10)
 1. Testimony — or a certification under Rule 902 — that a diligent search failed to disclose a public record or statement if the testimony or certification is admitted to prove that:

- a. The record or statement does not exist; or
 - b. A matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind.
- L. Records of religious organizations - FRE 803(11)
 - 1. A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.
- M. Marriage, baptism, or similar certificates - FRE 803(12)
 - 1. A statement of fact contained in a certificate:
 - a. Made by a person who is authorized by a religious organization or by law to perform the act certified;
 - b. Attesting that the person performed a marriage or similar ceremony or administered a sacrament; and
 - c. Purporting to have been issued at the time of the act or within a reasonable time.
- N. Family records - FRE 803(13)
 - 1. A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.
- O. Records of documents affecting an interest in property - FRE 803(14)
 - 1. The record of a document that purports to establish or affects an interest in property if:
 - a. The record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;
 - b. The record is kept in a public office; and
 - c. A statute authorizes recording documents of that kind in that office.

P. Statements and documents affecting an interest in property - FRE 803(15)

1. A statement contained in a document that purports to establish or affects an interest in property if the matter stated was relevant to the document's purpose — unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.

Q. Statements and ancient documents - FRE 803(16)

1. A statement in a document that is at least 20 years old and whose authenticity is established.

R. Market reports, commercial publications - FRE 803(17)

1. Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.

S. Learned treatises - FRE 803(18)

1. A statement contained in a treatise, periodical, or pamphlet if:
 - a. The statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and
 - b. The publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.
2. If admitted, the statement may be read into evidence but not received as an exhibit.
3. Example: In Tart v. McGann, 697 F.2d 75 (2d Cir. 1982), the court counseled that FRE 803(13) makes learned treatises admissible and that they are not limited to use on cross-examination alone.

T. Reputation concerning person or family history - FRE 803(19)

1. A reputation among a person's family by blood, adoption, or marriage — or among a person's associates or in the community — concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.

- U. Reputation for setting boundaries or general history - FRE 803(20)
 - 1. A reputation in a community — arising before the controversy — concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.
- V. Reputation as to character - FRE 803(21)
 - 1. A reputation among a person's associates or in the community concerning the person's character
- W. Judgment of previous conviction - FRE 803(22)
 - 1. Evidence of a final judgment of conviction if:
 - a. The judgment was entered after a trial or guilty plea, but not a *nolo contendere* plea;
 - b. The conviction was for a crime punishable by death or by imprisonment for more than a year;
 - c. The evidence is admitted to prove any fact essential to the judgment; and
 - d. When offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.
 - 2. The pendency of an appeal may be shown but does not affect admissibility.
 - 3. Example: In United States ex rel. Miller v. Bill Harbert Int'l Constr., Inc (D.C. Cir. 2010), a defendant company's guilty plea in a criminal prosecution for a bid rigging scheme was admissible against the co-defendant companies in a later civil false claims action against the companies, to prove facts essential to the plea. The court held that Rule 803(22) did not preclude its admissibility because the present case was not a criminal case.
- X. Judgment as to personal family or general history of boundaries - FRE 803(23)
 - 1. A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:
 - a. Was essential to the judgment; and

- b. Could be proved by evidence of reputation.

**XXVI. HEARSAY EXCEPTIONS: DECLARANT UNAVAILABLE -
FEDERAL RULE OF EVIDENCE 804**

A. Introduction

- 1. Rule 804 specifies five hearsay exceptions that require a showing that the declarant is unavailable to testify at trial. In contrast, the exceptions enumerated in Rule 803 do not depend on the unavailability of the declarant.

B. Under FRE 804, a declarant is unavailable if any of the following situations exist:

- 1. Privilege-804(a)(1)
- 2. Refusal to testify - 804(a)(2)
- 3. Lack of memory - 804(a)(3)
- 4. Death or illness - 804(a)(4)
- 5. Absence - 804(a)(5)
 - a. The proponent has been unable to procure the declarant's attendance by process or other reasonable means.

C. Exceptions to the hearsay rule

- 1. Former testimony - FRE 804(b)(1)
 - a. Former testimony is testimony that
 - i. Was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and
 - ii. Is now offered against a party who had — or in a civil case, whose predecessor in interest had — an opportunity and similar motive to develop it by direct, cross, or redirect examination.
- 2. Statement under belief of impending death - FRE 804(b)(2)
 - a. A statement under belief of impending death is a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances. A

statement under belief of impending death is only allowable in a prosecution for homicide or in a civil case.

b. Elements:

- i. The declarant must believe that his death is certain. This can be proven through circumstantial evidence such as the type of wound that he had.
- ii. FRE 804(b)(2), unlike the common law, does not require that the declarant be unavailable because he is dead. Only that he be unavailable.
- iii. The dying declaration must be based upon personal knowledge.
- iv. The statement must relate to the cause or circumstances of what the declarant believes to be his impending death.

3. Statement against interest - FRE 804(b)(3)

a. A statement against interest is a statement that

- i. 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
- ii. Is supported by corroborating circumstances that clearly indicate its trustworthiness,
- iii. Note:
 - (a) If it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

b. Elements

- i. The statement must be contrary to declarant's pecuniary or property interest;
- ii. The statement must intend to subject to civil or criminal liability;

- iii. The statement must tend to render a claim invalid by the declarant against another;
- iv. The statement must be trustworthy.
- c. Example: In Williamson v. United States, 512 U.S. 594 (1994), the police pulled over a car and found two suitcases full of cocaine. The driver said he was transporting the drugs on behalf of the defendant. When the driver of the car was unavailable to testify, the prosecution offered the statement into evidence under FRE 804(b)(3) to prove defendant's guilt. The prosecutor argued that the statement was against the driver's penal interest because he had admitted that he was transporting illegal drugs. The Court held that FRE 804(b)(3) makes admissible "only those declarations or remarks within the confession that are individually self-inculpatory. It does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory." Id. at 599-601. The Court remanded the case to the lower court for consideration for whether each portion of the statement was self-incriminatory. The Court went on to say that the question of "whether a statement is self-inculpatory ...is a fact-intensive inquiry, which would require careful examination of all the circumstances surrounding the criminal activity involved." Id. at 603 04.
- 4. Statement of personal or family history - FRE 804(b)(4)
- 5. Forfeiture by wrongdoing - FRE 804(b)(6)

XXVII. HEARSAY AND CONSTITUTIONAL CONFRONTATION

A. Introduction

- 1. The Sixth Amendment to the U.S. Constitution provides that a criminal accused shall have the right "to be confronted with the witnesses against him."

B. The purpose of the "Confrontation Clause"

- 1. The primary purpose of the "confrontation clause" is to guarantee a right to cross-examination. Obviously, when hearsay statements are used against a criminal accused pursuant to some hearsay exception or exemption, the declarant cannot be cross-examined.
- 2. However, if the declarant's words are offered to be credited regarding the facts they relate, the declarant, though not technically

a witness, may be acting in the capacity of a witness for purposes of the confrontation clause. The Supreme Court has declined to confine “witnesses” as used in the clause to its strictest sense, that is, only persons who take the stand.

- a. There are 6 modern Supreme Court confrontation clause cases: Williams v. Illinois 132 S. Ct. 2221 (2012); Bullcoming v. New Mexico, 131 S. Ct. 2705 (2011); Michigan v. Bryant, 131 S. Ct. 1143 (2011); Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009); Davis v. Washington, 547 U.S. 813 (2006); Crawford v. Washington, 541 U.S. 36 (2004).

C. 6 modern Supreme Court Confrontation Clause cases

1. Crawford v. Washington, 541 U.S. 36 (2004).

- a. The rule that emerged prior to the Supreme Court’s 2004 decision in Crawford was that if hearsay evidence fell within a “firmly rooted” hearsay exception or exemption - meaning, one that had a sound basis in both history and reason - it was presumed reliable and probably satisfied the Confrontation Clause.
- b. In Crawford, the evidence admitted by the trial court consisted of tape-recorded statements of Mr. Crawford’s wife. These recorded statements were made to the police during the interrogation and suggested that her husband’s stabbing of the victim was not in self-defense. The trial court admitted the statements.
- c. After examining the historical roots of the Confrontation Clause, the Supreme Court in Crawford determined that the Confrontation Clause would be violated if un-cross-examined “testimonial” hearsay evidence were admitted against an accused at trial.
- d. According to the Supreme Court in Crawford, even if such statements were “firmly rooted” or otherwise deemed reliable, they cannot be admitted if they are “testimonial.” Although the Supreme Court in Crawford did not clearly define what it meant by “testimonial,” this concept would be parsed out in later decisions.

2. Davis v. Washington, 547 U.S. 813 (2006)

- a. After Crawford, Davis v. Washington (which it combined with another somewhat similar case, Hammon v. Indiana)

shed further light on the meaning of “testimonial” statements.

- b. In Davis, the Government introduced the tape of a 911 call that the victim made while the assault was in progress. In contrast, in Hammon, the Government introduced an affidavit taken by the police when they arrived at the scene after a domestic assault had taken place. Upon arrival, the police officers found the victim on the front porch. They later found the defendant inside the house and then detained him while the victim spoke with the officers. The victim subsequently signed an affidavit. The disturbance was over when the police arrived.
- c. The Court held that the statements to the 911 operator in Davis were admissible while the statements to the police officers in Hammon were not. The Court distinguished the cases on the grounds that the statements in Davis were made while the events were taking place, while the statements in Hammon were made after the event for the purposes of investigation.
- d. The Court noted that any reasonable person would recognize that the statements in Davis involved a contemporaneous emergency and, that when viewed objectively, they were necessary to resolve that emergency. Hence, the victim in Davis was not acting as a witness when she made the statements to the 911 operator.
- e. In contrast, the sole purpose of the officer’s questioning in Hammon was investigative in nature. In other words, the substance of the interrogation in Hammon was a substitute for live testimony because the victim recounted the events after they occurred, which is essentially the nature of direct testimony.
- f. Interestingly, the Davis Court avoided the necessity of determining whether and under what circumstances, statements made to individuals, other than law enforcement agents, can be “testimonial.”

3. Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009)

- a. In Melendez-Diaz v. Massachusetts, the Supreme Court further clarified the meaning of Crawford and of “testimonial” statements. During a state-court drug trial of Melendez-Diaz, the prosecution introduced certificates of

state laboratory analysts stating that the material seized by police was cocaine of a certain quantity. As required by Massachusetts's law, the certificates were sworn to before a notary public and were submitted as *prima facie* evidence of what they asserted. The Supreme Court held that the certificates were testimonial. Thus, their admission violated the defendant's Sixth Amendment right to confront the witnesses against him as defined by Crawford. As a result, the Court held that the chemist ("analyst") must testify, unless he is unavailable and there had been a previous opportunity for cross-examination.

4. Michigan v. Bryant, 131 S. Ct. 1143 (U.S. 2011)

- a. In Michigan v. Bryant, the court shed further light on when a statement made on the scene to police officers by a crime victim is made to resolve an emergency or, on the other hand, is testimonial. In this case, the victim was dying (a possible health emergency) and the shooter was still at large (a possible danger to the public) when the victim identified the shooter to the police. The court held that the statements were non-testimonial.

5. Bullcoming v. New Mexico, 131 S.Ct. 2705 (2011)

- a. In Bullcoming v. New Mexico, a senior member of a crime lab took the stand to support the introduction of the test report done by a different, non-testifying analyst in the same lab. The court held the second surrogate analyst's testimony about the statements in the report of a separate certifying analyst violated the Confrontation Clause.

6. Williams v. Illinois, 132 S.Ct. 2221(2012)

- a. Most recently in Williams v. Illinois, an expert witness from the police lab tested a defendant's DNA and then coupled those lab results with a DNA report from an independent lab that tested the DNA found in the rape victim. Based on that comparison, the police lab witness testified to a match. A 4-justice plurality of the court held that this testimony was permissible on the facts of the case for two reasons:
 - i. Out-of-court statements referenced by an expert witness solely for the purpose of explaining the basis for that expert's opinion are not offered for

their truth and, as such, do not trigger the Confrontation Clause.

- ii. The report was not testimonial because the results were not directed to prove the guilt of the defendant. The plurality focused on the fact that Williams was not even a suspect at the time the test was conducted. Thus, even if the report had been admitted into evidence, there would have been no Confrontation Clause violation.
- iii. In Justice Thomas's concurrence, he found that the testimony was admissible because the report on which it was partially based was not formally sworn. In his view, only formally sworn material can be "testimonial."
- iv. In Justice Breyer's concurrence, he found that such DNA tests and their results fall outside the scope of the Confrontation Clause so long as the lab procedures are reliable, and the defendant still retains the right to call employees of the lab as witnesses. Accordingly, if the premise of a lab report's accuracy were shown to be untrue, then the testimony of the expert would fall under the Confrontation Clause.
- v. A 4-justice dissent found that the report was testimonial and was offered for its truth since no one making the report or participating in the test was on the stand to be confronted.

XXVIII. ATTACKING AND SUPPORTING CREDIBILITY OF DECLARANT

FRE 806

A. Introduction

- 1. Under FRE 806, when a hearsay statement or statement defined in FRE 801(d)(2)(C), (D), or (E) has been admitted into evidence, the credibility of the declarant may be attacked and, if attacked, may be supported by any evidence which would be admissible for those purposes as if the declarant had testified as a witness.

B. Practitioner's note

- 1. Evidence of the statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to a requirement that the declarant may have afforded an

opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

XXIX. RESIDUAL EXCEPTION - FRE 807

A. Introduction

1. Under FRE 807, a statement may be admitted as an exception to the rule against hearsay if the court makes the following findings:
 - a. The statement has circumstantial guarantees of trustworthiness;
 - b. Prior notice of the intent to use the evidence is given;
 - c. The statement must be “more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts;”
 - d. The statement is offered as evidence of a material fact;
 - e. The interest of justice would be served by admission of the statement.

XXX. PRIVILEGES - FRE 501 and 502

A. Introduction

1. Most privileges are not constitutionally based. The privilege against self-incrimination is the only exception.
 - a. Therefore, each state is free to establish whatever privileges it wishes and to define the contours of those privileges as it sees fit.

B. Privileges under FRE 501

1. There were a number of specific proposed federal rules of privilege, but they were never enacted. FRE 501 is the only federal rule dealing with privileges. That is, normally federal judges will decide what privileges to recognize based on prior federal case law and the court’s own judgment.
 - a. Common privileges are:
 - i. Physician patient privilege;

- ii. Marital privileges;
- iii. Attorney-Client Privilege.

C. Privileges under FRE 502

1. FRE 502 took effect on September 19, 2008 and was intended to provide uniformity in the law governing waiver of privilege when documents that have privileged content are disclosed in litigation.
2. According to the Advisory Committee notes, a second purpose was to respond “to the widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product have become prohibitive due to the concern that any disclosure (however innocent or minimal) will operate as a subject matter waiver of all protected communications or information.”
3. Since the new rule went into effect, questions remain whether Rule 502 has been applied with relative consistency and in ways that allow litigants to reduce their costs. As the cases below illustrate, courts have taken varying approaches to some of the core elements under Rule 502 and it may take further decisions to truly discern clear standards for its application.
4. 502(d)
 - a. The new rule specifically sanctioned so-called clawback agreements in which the parties agree that inadvertent production can be cured and waiver avoided by a demand by the producing party that the disclosed document be returned. In Rajala v. McGuire Woods, LLP, No. 08-2638-CM-DJW, 2010 WL 2949582 (D. Kan. July 22, 2010), U.S. Magistrate Judge Waxse considered whether the court had the power to impose a clawback agreement as part of a protective order when one of the parties did not consent. Though Rule 502 is silent on this issue, Judge Waxse cited the statement of congressional intent regarding Rule 502, which explains that subsection (d) ““is designed to enable a court to enter an order, whether on motion of one or more parties or on its own motion, that will allow the parties to conduct and respond to discovery expeditiously, without the need for exhaustive pre-production privilege reviews.”” Judge Waxse also found authority for a court imposed order under Federal Rule of Civil Procedure 26(c) (1), which permits the court, for good cause, to “issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.”

Having determined that he had authority to enter an order over a party's objections, Judge Waxse rejected plaintiff Rajala's arguments against doing so by referring to the general purpose of Rule 502. To deny entry of such a clawback provision merely because Plaintiff would be deprived of the opportunity to demonstrate that the producing party had not taken reasonable care to prevent disclosure would defeat the purpose behind Rule 502(d) and (e). The goal is not to encourage disputes regarding waiver and inadvertent production, but to prevent such disputes from arising in the first place.

- b. Judge Waxse concluded that it was in the best interests of both parties and the court to impose a clawback provision over the plaintiff's objection.

5. 502(b)

- a. Rule 502(b) provides that disclosure is not a waiver when it is inadvertent and when the disclosing party took "reasonable steps" to prevent and to promptly rectify the disclosure. Rule 502(b). The rule does not define the extent or nature of the "reasonable steps" a litigant must take to avoid waiver. Most courts that considered this issue in 2010 recognized that in large-scale electronic document productions, perfection should not be required. For instance, in Olem Shoe Corp. v. Washington Shoe Co., No. 09-23494-CIV, 2010 WL 3981694 (S.D.Fla. Oct. 8, 2010), U.S. Magistrate Judge O'Sullivan considered whether defendants waived privilege when their copy service provided plaintiffs with an entire set of documents marked as attorney-client privileged. When the plaintiffs emailed defense counsel's paralegal to inquire whether they had intended to disclose these documents, the paralegal did not respond for eight days. Only when the plaintiff's counsel again contacted defense counsel, this time directly, did defense counsel respond, the same day, with a clawback email.
- b. The plaintiff's counsel refused to return the documents, arguing that the disclosure was not inadvertent and that privilege was waived; defense counsel moved to compel the return of the documents. Judge O'Sullivan first held that the disclosure was "clearly inadvertent." *Id.* at *3. "The defendant sent the documents to a commercial copier service with instructions that the documents labeled 'Attorney-Client Privilege' be returned to the defendant.

The copier service mistakenly produced the privileged documents to the plaintiff.” Id. The delivery instructions amounted to reasonable steps to prevent disclosure. The court also found that the defendant’s counsel took the required prompt steps to rectify the error once he learned of it by sending the plaintiff “a detailed four-page letter by mail and email providing the plaintiff’s counsel with instructions on returning the documents.” Id. Judge O’Sullivan blamed both parties for lack of promptness in rectifying the disclosure.

- c. The plaintiff’s counsel waited approximately 20 days after receiving the documents before sending the email about the privileged documents. The plaintiff’s counsel failed to directly notify the defendant’s counsel and instead communicated this information to the defendant’s paralegal. The undersigned also finds fault in the defendant’s counsel and his staff. It is inexcusable that the defendant’s paralegal would not have responded to the plaintiff’s email and, at the very least, communicated the contents of the email to the defendant’s counsel. It seems that the defendant’s counsel may have failed to properly supervise his paralegal. Id. Notwithstanding the delay, Judge O’Sullivan found no waiver had occurred and ordered the plaintiff to return.

XXXI. PRESUMPTIONS - FRE 301

A. Introduction

- 1. The term “presumption” refers to a relationship between a “basic” fact (B) and a “presumed” fact (P). When we say that fact P can be presumed from fact B, we mean that once B is established, P is established or at least rendered more likely.

B. The effect of presumptions in civil cases:

- 1. In civil cases, most courts hold that a presumption has one of two types of effects: 1) a “bursting bubble” effect, or 2) a so-called “Morgan” effect.
 - a. The “Bursting Bubble” view:
 - i. Most courts believe that a presumption should be given the following effect: if B is shown to exist, the burden of production (but not the burden of persuasion) should be shifted to the opponent of the presumption. This is called the “bursting bubble”

approach because once the opponent discharges his production burden by coming up with some evidence that the presumed fact does not exist, the presumption disappears from the case, and the jury decides the issue as if the presumption never existed.

b. Morgan (minority) view:

- i. A minority of courts follow the “Morgan” view which argues that the presumption should not only shift the burden of production, but also the burden of persuasion, to the presumption’s opponent.
- ii. Example: If the plaintiff benefits from the presumption that when a letter is mailed, it is presumed to have been received, once the plaintiff showed that he properly addressed and mailed the letter, it would be incumbent on the defendant to not only come forward with evidence that he never received the letter, but also persuade the jury by a preponderance of the evidence that he never received it.

C. FRE 301

1. FRE 301 adopts the majority, “bursting bubble” view.

D. The effect of presumptions in criminal cases:

1. The constitutionality in a criminal case depends on precisely the effect given to the presumption.
2. Permissive presumptions:
 - i. A so-called “permissive” presumption (one in which the judge merely instructs the jury that it “may” infer P if B is shown) will almost always be constitutional, so long as the fact finder could “rationally” have inferred the presumed fact from the basic fact, the presumption will be upheld.
3. Mandatory:
 - i. A “mandatory” presumption is subjected to much more stringent constitutional scrutiny.
 - (a) Shift of persuasion burden:

- (b) I) if the presumption shifts the burden of persuasion to the defendant, and the presumed fact is an element of the crime, the presumption will normally be unconstitutional. This runs afoul of the rule that the prosecution must prove each element of the crime beyond a reasonable doubt.