

**I. Basic Introductory Rules:**

**MAKING A RECORD.**

**Rule 103. Rulings on Evidence.**

(a) **Effect of erroneous ruling.** Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) **OBJECTION.** In case the ruling is one admitting evidence, a timely objection or motion to strike appears or record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

**TIMELY OBJECTION on a SPECIFIC GROUND.**

(2) **Offer of proof.** In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

**Your honor, if my witness was permitted to testify, she would show “x”. X = what the witness would testify to.**

(b) **Record of offer and ruling.** The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form. **FOR PURPOSES OF APPEAL.**

(c) **Hearing of Jury.** In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) **Plain Error.** Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

**4 WAYS TO PROVE PLAIN ERROR: U.S. v. Olono.**

**1. It was error.**

**2. It was plain – judge should have known.**

**3. It was harmful.**

**4. Without granting a reversal, it makes a mockery of judicial proceedings.**

**Rule 104. Preliminary Questions.**

(a) **Questions of admissibility generally.** Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). IN making its determination it is not bound by the rules of evidence except those with respect to privileges.

**Questions of admissibility are determined by the courts. Sustaining of objection or admitting of evidence = Judge using 104(a).**

**Motion in Limine – preliminary decision on exclusion or admittance - Cite 104(a)**

(b) **Relevance conditioned on fact.** When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

**Connect the evidence up – admit it, then, if the evidence doesn't connect up, it will be struck from the record with instructions for the jury to strike evidence.**

- (c) **Hearing of jury.** Hearings on the admissibility of confessions shall in all cases be conducted out of the hearings of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.
- (d) **Testimony by accused.** The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.
- (e) **Weight and credibility.** This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

**Rule 105. Limited Admissibility.**

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

**LIMITING INSTRUCTION**

**Rule 106. Remainder of or Related Writings or Recorded Statements.**

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

**Only related writing or recorded statements – can come in to complete the story and bolster your side's case. Otherwise inadmissible evidence cannot come in under 106.**

**Government of the Virgin Islands v. Archibald:**

The appropriate time for objection is as soon as the party knows or should reasonably know the grounds of objection unless postponement is desirable for a special reason and not unfair to the opposition.

Determining whether an error is harmless include:

1. whether erroneously admitted evidence is the primary evidence.
2. whether the aggrieved party was nonetheless able to present the substance of its claim.
3. The existence and usefulness of curative jury instructions.
4. The extent of jury argument based on tainted evidence.
5. whether erroneously admitted evidence was merely cumulative
6. whether other evidence was overwhelming.

**McEwen v. Texas & Pacific Railway Co.**

An objection not made is waived for appeal.

Doctrine of Opening the Door: When one party introduces otherwise inadmissible evidence, the opposing party may therefore, introduce otherwise inadmissible evidence to rebut or explain the prior evidence.

## **II. Relevancy**

Relevance: Evidence is generally relevant if you satisfy 2 components:

1. Piece of evidence is material – goes to a fact that is of consequence or determination of the act.
2. Makes it more probable or less probable.

Shows: Charge, Claim, Defense, or Background evidence and/or credibility.

### **Rule 401. Definition of “Relevant Evidence”**

“Relevant Evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

### **Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible.**

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

### **Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.**

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

**If there is a question about who wins – offering party or party suffering prejudice, the tie goes to the offering party. The time that prejudiced party would win is when it is Low Relevance and High Prejudice, such as shock value. The shocking material can be admitted if relevant, but not if just prejudicial and shocking.**

- Real Evidence = physical evidence having or alleged to have an actual connection to the events that are the subject of the trial: Ex: Murder Weapon
- Demonstrative Evidence = tangible items presented at trial that did not have a real connection to the events but will aid the trier to comprehend testimony or other evidence (Charts, models, maps, drawings, photographs, films, videotapes)
- Cannot introduce Ante-Mortem Photos – pictures of the deceased, happy at her prom, or with her kids having fun.

## **III. Authentication**

### **Rule 901. Requirement of Authentication or Identification.**

(a) **General Provision.** The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in questions is what its proponent claims.

(b) **Illustrations.** By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

- (1) **Testimony of witness with knowledge.** Testimony that a matter is what it is claimed to be.
- (2) **Nonexpert opinion on handwriting.** Nonexpert opinion as to the genuineness of handwriting, based upon familiarity **not acquired for purpose of the litigation.**
- (3) **Comparison by trier or expert witness**  
With specimens that have been authenticated. – Before or after anticipation of litigation.
- (4) – **Distinctive characteristics and the like**  
Contents of the letter (something that only the person would know)  
Peculiarity – special loops on the Ls or special Ss.
- (5) – **Voice identification**  
Call made by.  
At any time. Must become familiar with the defendant's voice even after the original call – so that you can recognize the calls.
- (6) – **Telephone conversations.**  
Call to.  
Telephone records to say the call was placed to said number at said time.
- (7) – **Public records or reports.**
- (8) – **Ancient documents or data compilation**  
(A) condition that it should be,  
(B) where it should be  
(C) at least 20 yrs.
- (9) – **Process or system.**  
Process or system used to produce a specific result and that it is an accurate result.
- (10) – **Methods provided by statute or rule.**  
**Basically – need a live body on the stand to bring in the evidence – through one of the 10 ways.**

#### **Rule 902. Self-Authentication.**

Extrinsic Evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

- (1) **Domestic Public Documents under seal.** Any document that has the official seal of the U.S., any State, district, Commonwealth, territory.
- (2) **Domestic Public Documents not under Seal.** Any document bearing the signature in the official capacity of an officer or employee of any entity above, in (1), having no seal – if an individual with a seal seals the document saying that the individual who signed the document had the right to do so.
- (3) **Foreign Public Documents.** A document in official capacity by a person authorized by laws of a foreign country to make the execution and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is a chain of certificates of genuineness of signature and official position relating to it.
- (4) **Certified Copies of Public Records.** A copy of an official record or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or

filed in a public office certified as correct by the custodian or another person authorized to make such a certification.

- (5) **Official publications.** Books, pamphlets, or other publications purporting to be issued by public authority.
- (6) **Newspapers and Periodicals.** Printed materials purporting to be newspapers or periodicals.
- (7) **Trade inscriptions and the like.** Inscriptions, signs, tags, or labels, purporting to have been affixed in the course of business and indicating ownership, control, or origin.
- (8) **Acknowledged documents.** Documents accompanied by a certificate of acknowledgement executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgements.
- (9) **Commercial paper and related documents.** Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.
- (10) **Presumptions under Acts of Congress.** Any signature, document, or other matter declared by Act of Congress to be presumptively or prima facie genuine or authentic.
- (11) **Certified domestic records of regularly conducted activity.** Admitted under 803(6), if accompanied by a written declaration of its custodian or other qualified person, certifying that the record
  - (A) Was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of these matters.
  - (B) Was kept in the course of the regularly conducted activity; and
  - (C) Was made by the regularly conducted activity as a regular practice.
- (12) **Certified foreign records of regularly conducted activity.** In a civil case – original or a duplicate of a foreign record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration by its custodian or other qualified person certifying that the record –
  - (A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;
  - (B) was kept in the course of the regularly conducted activity; and
  - (C) was made by the regularly conducted activity as a regular practice.

**The above documents can be introduced independent from anyone on the stand to authenticate them. They are considered authenticated already.**

#### **Rule 903. Subscribing Witness' Testimony Unnecessary.**

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

#### ***IV. Best Evidence***

##### **Rule 1001. Definitions.**

- (1) **Writings and Recordings:** Consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing,

magnetic impulse, mechanical or electronic recording, or other form of data compilation.

- (2) **Photographs.** “Photographs” include 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 produced from the same impression as the original.

### **Rule 1002. Requirement of Original.**

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.

**Best Evidence – deals with the necessity for the original. If the thing to be proved is the writing – the thing that needs to be proven, or – the party seeks to prove a matter by using writing as evidence of it.**

### **Rule 1003. Admissibility of Duplicate.**

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

### **Rule 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) **Original is lost or destroyed.** (unless destroyed in bad faith)
- (2) **Original not obtainable.**
- (3) **Original in possession of opponent.** If the adverse party does not bring it, you can introduce the copy.
- (5) **Collateral matters.** The writing, recording or photograph is not closely related to a controlling issue.

### **Rule 1005. Public Records.**

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

**You cannot obtain the original, you can only receive copies**

### **Rule 1006. Summaries.**

Lengthy writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or

duplicates, shall be made available for the examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

**Transcript – not the original – it’s thought of as an aid to understanding.  
Demonstrative Evidence is distinguished from real evidence – it has no probative value in itself, but presents a visual aid to the jury in comprehending the verbal testimony of a witness. A model, a map, a photo, and X-Ray.**

**Rule 1007. Testimony or Written Admission of Party.**

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.

**Rule 1008. Functions of Court and Jury.**

When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of rule 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

**Whether the document is the original → Judge.  
Whether the document is what they say it is → Judge.  
Has the original been destroyed and there are no possible originals? → Judge.  
If you lose or destroy evidence, the “Best Evidence” objection will not succeed.**

***V. Habit: Other Exclusionary Rules.***

**Rule 406. Habit; Routine Practice.**

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

**Habit is separate from Character. Character is a generalized description (honesty).  
Habit is one’s response to a particular situation.  
Must show: 1. the conduct happens with frequency and regularity. And 2) the person in question possessed that particular habit.**

**Rule 407. Subsequent Remedial Measures.**

When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product’s design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

**After an injury, evidence of any improvements cannot be introduced to show fault. However, it can be offered with a limiting instruction to show ownership or control. Repair, Design Change, Change of business Practices, New or Modified measure. Anything done prior to the accident is fair game. Also, anything done by a 3<sup>rd</sup> party is ok. It would be admissible, however, to impeach a witness – who says they did all that could possibly be done. Like in Anderson v. Molloy → The witness said they did all they could do – but after the rape, they installed chain locks. That shows what more could have been done – therefore showing that they didn't do ALL that they could do.**

**Also – steps to repair that occurred prior to the litigation can be introduced. Just not after to show negligence or faulty design.**

**Rule 408. Compromise and Offers to Compromise.**

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence

**Must be a claim disputed under validity – between 2 people. Must have an effort to settle by both parties.**

**Rule 409. Payment of Medical and Similar Expenses.**

Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

**Admission of guilt along with the offer to pay for medical treatment is not excluded.**

**Rule 410. Inadmissibility of Plea, Plea Discussions, and Related Statements.**

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

- (1) a plea of guilty which was later withdrawn;
- (2) a plea of nolo contendere;
- (3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing plea; or
- (4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

**Only statements up until the plea agreement is signed, or the grand jury are protected. After it's signed, they are not protected. The person must have authority**

**to plea bargain – not just an officer, must really be a prosecuting attorney with the possibility for plea bargaining.**

**Rule 411. Limited Liability.**

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

**Cannot introduce evidence that the guy had a high insurance claim – but you can introduce it to show agency (who controlled the car), bias, or prejudice.**

**Voir Dire – generally, there are questions such as – do you work for an insurance company...that is ok.**

**VI. Hearsay**

**Hearsay =**

- 1. An out of court**
- 2. Statement**
- 3. By a declarant**
- 4. offered for the truth of the matter asserted.**

**If any of the above criteria are not met, it is not hearsay, and therefore, should be admitted.**

**Rule 801. Definitions.**

The following definitions apply under this article:

- (a) Statement.** A “statement” is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.
- (b) Declarant.** A “declarant” is a person who makes a statement.
- (c) Hearsay.** “Hearsay” is a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter.

**Nonverbal conduct can be like pointing or something like that, a woman was crossing the street – that can be let in – she’s not intending to show that the light was green. She’s trying to cross the street. It was raining – what did you see out your window? People walking with umbrellas – these people weren’t using umbrellas to prove it is raining, but rather to keep dry**

**Questions, Directives, and silence are not considered hearsay – there is nothing asserted. Unless the silence is after an accusation – did you rob the bank? Silence could be a refusal of guilt.**

**VERBAL ACT – Independent legal significance; Have to prove the terms of the contract.**

**VERBAL PART OF ACT – The statement that clarifies an ambiguous act.**

**KNOWLEDGE OR STATE OF MIND OF THE HEARER- knew something that showed his mind state or knowledge. Example: Knew his mother was dying and opened a policy.**

**Rule 801. (d) Statements which are not hearsay.** A statement is not hearsay if –

(1) **Prior statement by witness.** The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

- (d)(1)(A) = inconsistent with prior testimony given under oath.
- (d)(1)(B) = consistent and used to rebut a charge against declarant of fabrication or improper influence or motive.
- (d)(1)(C) = identification of a person after perceiving the person.

### **801(d)(1)(A) = IMPEACHMENT RULE**

Must be at another trial or hearing (motions hearing, deposition, grand jury) or other proceeding. **NEED THE OATH.**

Inconsistent statement – 801(d)(1)(A) – can be flat inconsistent – red v. black or - an I don't know, I don't remember, Might be, could be, yes but....

You cannot bring the guy on the stand if you know he's going to make an opposing statement – for example – he says red jacket and they 2 weeks later writes you to tell you that it was a black jacket. You cannot put him on the stand so he says black jacket and use 801(d)(1)(A) against him since you could anticipate this answer.

### **801(d)(1)(B) – REHABILITATION RULE.**

There is always a motive to prefabricate if it's a statement made after Miranda rights by a snitch to save their own skin. It is not proper to include prior consistent statement if the witness is trying to make a deal with the government.

However, if the witness is trying to show that the attack was unwarranted and bolster their credibility and lack of bias or prejudice - Should show: At the time the consistent statement was made, there was no motive to prefabricate – this rule can be used to rehabilitate the witness after an attack on credibility, bias, prejudice, or interest. On redirect examination or by another witness.

### **801(d)(1)(C) – IDENTIFICATION RULE.**

There must be a way to get identifications by a witness in. This is what is covered by that rule. Out of court photographic id (through witness or officer who showed the pictures), out of court lineup id, on scene show up to free innocent, sketch. These are all admissible. But anything else – identification of the gun – that can't come in. Only the identification of the PERSON.

Confrontation clause – the witness does not have to take the stand, however – if it is deemed necessary by the adverse party, they must under the 6<sup>th</sup> amendment – if called for cross-examination.

**Rule 801. (d)**

**(2) Admission by Party-Opponent.** The statement is offered against a party and is (A) the party's own statement in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

- **(d)(2)(A) = Against the party and the party's own statement.**
- **(d)(2)(B) = Against the party and which the party has manifested an adoption that it is true.**
- **(d)(2)(C) = Against the party and by a person authorized by the party to make that statement on that subject.**
- **(d)(2)(D) = Against the party by the party's agent concerning a matter within the scope of the employment during the existence of the relationship.**
- **(d)(2)(E) = by a coconspirator of the party during the course and in furtherance of the conspiracy.**

**These statements all concern statements – the declarant does not need personal knowledge.**

**801(d)(2)(A) – Party's own statement against the party.**

**Also – if made in a representative way – Not what the individual did, but what the adverse party said them. – Representative capacity – John as represented by – trustee, guardian, conservator of a dead person, executor...**

**801(d)(2)(B) – High-Five, Low-Five, Headbutt – Party believes it to be true.**

**Party has shown or manifested that they believe the statement at question to be true. A hi-five would show that the party believes that it is true.**

**Silence – if a reasonable person would fight the accusation made against them with a denial and the person doesn't, that can be introduced. But – you must prove that the person heard the accusation and remained silent.**

**Contextual hearsay – if you put in the answer because it is admissible, the surrounding facts can also be admitted.**

**801(d)(2)(C) – Person authorized to speak.**

**Ex: Statements made by the lawyer on behalf of your client, accountant, press secretary, CEO...**

**801(d)(2)(D) – Agent or Representative – who was employed.**

**Statement concerning a matter within the scope of the agency or employment, made during the existence of their relationship. The individual must be employed with the company at the time the statement is made – classic example is the truck driver – he is an agent. If employed and talks about it being his fault, it is admissible.**

**DIFFERENCE BETWEEN C & D = C – you must be authorized to speak.**

**ALSO – D= If the statement is made at a time when you are terminated, it is inadmissible.**

**801(d)(2)(E) – Coconspirator during the course of the conspiracy.**

**Can be used in civil and criminal, however, most likely used in criminal**

**1. Conspiracy doesn't have to be charged in indictment.**

**3. All you have to show is an alleged concert of action.**

**5 foundational requirements.**

**1. Existence of conspiracy**

**2. Defendant is member of the conspiracy**

**3. Declarant is a member of the conspiracy**

**4. statement was made during the furtherance of the conspiracy**

**5. statement was made during the course of the conspiracy.**

**Statements made concerning the conspiracy prior to joining the conspiracy can be included, without personal knowledge.**

- **Narrative of a past event to a significant other or boasting are classic examples that show it was not in the furthering of the conspiracy.**

**Rule 802. Hearsay Rule.**

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

Constitutional Hearsay. CRIMINAL CASE ONLY.

4 Categories.

1. Witness / Declarant. Never confrontational problem – witness is the declarant and is present for confrontation.
2. Unavailability – Is the witness unavailable? If yes – and the government can prove – former testimony would be allowed.
3. Firmly Rooted = ???
3. “indicia of reliability” - ?

PERSONAL KNOWLEDGE IS NECESSARY FOR THE FOLLOWING:

Witness must testify that they have personal knowledge to the statement – they heard the actual statement. They don't have to have personal knowledge of the incident.

**Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial.**

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

**FOR (1) – (5) – Availability of the declarant is irrelevant.**

(1) **Present sense impression.** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

**Must Be PRESENT – NOT PAST.**

- **10 MINUTES OR LESS. Cannot have time to “Firm up his perjury”.**
- **ALSO – applies to statements made while on the phone or right after getting off the phone. “I’m going to Morton’s shop” – for truth of the matter. First thing said after phone call.**

(2) **Excited Utterance.** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

- **Must show that the declarant was under the stress of the startling condition or event. Must show stress and excitement.**
- **You must lay the foundation for this – Use of hands, inflection in voice, facial features, words like – OH MY GOD!!!**
- **The trigger for the startled condition does not have to be the occurrence itself. It can be something else that would reasonably cause stress – Ex: seeing the rapist later.**
- **Factors to consider when determining time lapse of excited utterances:**
  1. **Lapse of time between the event and the declarations.**
  2. **Age of the declarant**
  3. **Physical and mental state of declarant**
  4. **Characteristics of the event**
  5. **Subject matter of the statements.**

(3) **Then Existing Mental, Emotional, or Physical Condition.**

A statement of the declarant’s then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant’s will.

- **It must be present. The statement must be or present: My arm hurts, I’m going to New York. NOT PAST.**
- **Hillmon Doctrine – Can we use a statement of X to show what Y likely did? It is admissible if there is corroborating evidence to show that Y really did it. The statement can be used to show what Y intended to do.**
- **Statements should be examined for prejudicial weight.**

(4) **Statement for Purposes of Medical Diagnosis or Treatment.**

Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

- **Conveying how you feel or your need for treatment. Generally, statements of fault cannot be added in. I was struck by a car – that is**

necessary. I was struck by the car running the red light – not necessary – not admissible.

- **Statements of Pain show the physical condition easier. ALSO – don't have to be to a doctor – if from a doctor – should hold more weight when examining the credibility.**
  - **Statements from a Doctor to a Patient are not covered.**
- (5) **Recorded Recollection.** A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.
- **An individual previously knew, but now doesn't – first, you can refresh their memory by showing them the statement. If that doesn't help, then – lay the foundation – and can give the statement to the witness to read for the jury.**
  - **A witness cannot testify and then feign a lack of memory when required to testify. Can invoke 803(5) – to get the statements in.**

(6) **Records of Regularly Conducted Activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

**Four Requirements for Rule (6):**

1. **Produced under regular business activities. THIS CAN INCLUDE ILLEGAL ACTIVITIES – like a diary for drugs.**
  2. **It was the regular practice of the business activity to make such record.**
  3. **The record was made at or near the time of the event that it records.**
  4. **The record was made by or from information transmitted by a person with knowledge within the business.**
- **However, the witness on the stand doesn't need to have personal knowledge – just knowledge of the actual record.**
  - **Three Month Cutoff.**
  - **Cannot be made for litigation – must be real business record.**

**(7) Absence of Entry in Records Kept in Accordance with the Provisions of Paragraph (6).** Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

- **This evidence should be admitted – because it is the company’s fault or dishonesty.**
- **Must show that after diligent search, the document cannot be found and was omitted.**

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

- **What is observed.**
- **Civil Case**
  - **(A), (B), and (C) can be used by either side. (Ex: Cop reports anything he sees at a car accident)**
  - **Person doing the reporting must work for an agency. Not just a bystander.**
- **Criminal Case:**
  - **Government can use (A) – if they show they were just doing their job and it is unfrontational. But not (B), and (C). Defendant is owed confrontation. (b) and (C) are difficult to provide confrontation. (B) can be used only if non-confrontational = Ex. Warrant of Deportation.**
  - **(C) can only be used if it is factual findings resulting from investigation. Other than that, it cannot be used.**
    - **The only way it can be used is if the individual can be confronted concerning the evidence. Ex: Chemist reports it is cocaine based. He must be on the stand to testify to it. The report can’t come in under 803(8)(C), but maybe 803(8)(B).**
- **4 things to determine if the facts should be knocked out:**
  - 1. Timeleiness of the report. 6 month for public records.**
  - 2. Level of experience**
  - 3. hearing was held.**

#### 4. Possible bias.

- **Cannot include legal conclusions, only factual conclusions. EX: Cannot say -  
I conclude the defendant is at fault and therefore negligent**
  - **Any preprinted form is 803(8)(A).**
  - **HEARSAY WITHIN HEARSAY IS IN A PREPRINTED FORM –  
Statement by an outsider.**
- (9) **Records of vital statistics.** Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.
- **Goes with Authentication objection of 902 – don't need the witness, just the certificate.**
- (10) **Absence of Public Record or Entry.** To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.
- **Failure to pay taxes.**
  - **Must show that due diligence was used to try to find the information.**
- (11) **Records of Religious Organizations.** Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.
- (12) **Marriage, Baptismal, and Similar Certificates.** Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.
- (13) **Family Records.** Statements of fact concerning personal or family history contained in family Bibles, genealogies, charges, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.
- (14) **Records of documents affecting an interest in property.** The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the

record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

- (15) **Statements in documents affecting an interest in property.** A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.
- (16) **Statements in ancient documents.** Statements in a document in existence twenty years or more the authenticity of which is established.
- (17) **Market reports, commercial publications.** Market quotations, tabulations, lists, directories, or other published compilations generally used and relied upon by the public or by persons in particular occupations.
- (18) **Learned treatises.** To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.
- To use:**
- 1. Expert is on the stand – what did you base your observation on – then discuss the treaties by establishing that it is commonly used.**
  - 2. An expert uses another expert.**
  - 3. The judge can find by judicial notice that it is a learned treatise.**
- (19) **Reputation concerning personal or family history.** Reputation among members of a person's family by blood, adoption, or marriage or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of his personal or family history.
- (20) **Reputation Concerning Boundaries or General History.** Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.
- (21) **Reputation as to character.** Reputation of a person's character among associates or in the community.
- (22) **Judgment of previous conviction.** Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere),

adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

- **CIVIL CASES:**
  - **The conviction of the criminal case can be introduced into the civil trial to show guilt of the essential elements. EX: Guilty verdict for rape shows the elements of the tort claim are met.**
- **CRIMINAL CASES:**
  - **Crime carries more than a year in jail.**

(23) Judgment as to personal, family, or general history, or boundaries.

#### **Rule 804. Hearsay Exceptions; Declarant Unavailable.**

- (a) Definition of unavailability. Declarant:
- (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or  
**Husband Wife Privilege, Priest Pendant, Psychiatrist/ Patient, Attorney Client,**  
**Privilege is held by:**
    - **Attorney Client – Client,**
    - **Psychiatrist Patient – both,**
    - **Husband Wife – party called to the witness stand – they must invoke the privilege**
    - **Priest Pendant – both.**
  - (2) statement of the witness that he refuses to testify – or – response to refuse to testify.
  - (3) Testify to lack of memory of the declarant's statement (feigned or otherwise).
  - (4) Unable to present or to testify at the hearing because of death or then existing physical or mental illness or infirmity or;
- (b) HEARSAY EXCEPTIONS.
- (1) Former Testimony – testimony given as a witness at another hearing of the **same or a different proceeding**, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party **against whom the testimony is now offered**, or, in a civil action or proceeding, a **predecessor in interest**, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.
    - **There must be a motive to find that there is a similar motive to be a predecessor in interest. Any party with a similar interest and motive with developing testimony would count.**
  - (2) In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

- **Must be:**
    1. **A statement.**
    2. **To show that the person was dying or believed he was dying.**
    3. **Cause or circumstances of the impending death.**
  - (3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.
- \* Must be a statement against the declarant's best interests. A confession of the person would suffice. Ex: I robbed a bank, but John did not.**

**Rule 805. Hearsay Within Hearsay.**

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

- **Must find the exception for each part of the hearsay at the different levels.**

**Rule 806. Attacking and Supporting credibility of Declarant.**

When a hearsay statement, or a statement defined in Rule 801(d)(2)©, (D), or (E), has been admitted in 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 if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been 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.

**Rule 807. Residual Exception.**

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

**VI. Character Evidence.**

**Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes.**

- (a) **Character evidence generally.** Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except
- (1) **Character of accused.** Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution.  
**Criminal – Only defendant can do it.**  
**Civil – only sexual battery case.**
  - (2) **Character of alleged victim.** Evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;
  - (3) **Character of witness.** Evidence of the character of a witness, as provided in rules 607, 608, and 609.
- (b) **Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, **such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident**, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.
- **Cannot be used to show propensity to commit a crime.**
  - **TEST FOR OTHER CRIMES EVIDENCE:**
    - **MNPR/PL**
      - **M – Material – goes to show the charge, claim or defense.**
      - **N – Need – must show that it is necessary to win the case.**
      - **P – Proof – must show that the defendant did the other act.**
      - **R – Relevance – More likely than not that the defendant committed this crime with the admission of the evidence – adds or decreases probability of guilt.**
  
      - **P – Prejudice – Rule 403 – is it too prejudicial?**  
**This is the best objection if the other side meets the test.**
      - **L – Limiting Instructions – you are entitled to limit the evidence under 105.**
  - **Must show one of the other reasons, not just propensity.**
    - **Motive: Ex. He was arrested with coke – motive – coke habit – needed to rob the bank to support his coke habit.**

- **Rebut a claim of mistake or accident: Drunk – he didn't know where he was, he was so drunk – it was a mistake – but there have been prior burglaries and they found goodies from the home.**
- **Knowledge: knows what is going on. Ex: Drug smuggling on multiple occasions.**
- **Intent: Nature of defense – he didn't have the intent to do that, he had an alibi.**
- **Identity: Numerous similarities between the 2 bankrobberies.**
- **Consciousness of Guilt: After the crime, something was destroyed, which shows guilt – or perjury – attempt to show perjury.**
- **Extrinsic Act – wrong or crime outside of the indictment that generally does not occur the day of the crime or at the time of the crime. Would not have happened but for the crime – it's not extrinsic.**
- **Intrinsic Act – Interwoven with the crime itself.**
  - **ONLY EXTRINSIC EVIDENCE IS COVERED.**
- **Can be subsequent act – does not need to be prior, but different act.**

#### CHARACTER TRAITS:

1. Peace and Good order – applies to violence.
2. Truthfulness – crimes involving falsities – perjury, false statements, false reports, uttering a bad check, forgery, deception.
3. Honesty – You can be a truthful thief, but you're not honest.
4. Law-Abiding-Ness. – can go against to impeach a charge of always being law-abiding. ANY CHARGE, ARREST, CONVICTION, CHARGE, INDICTMENT, OR POLICE REPORT.

Examples:

Kidnapping: Peace and Good order.

Forgery: Truthfulness and Honest.

Rape: Peace and good order

Ralse Report: Truthfulness

Embezzlement: honesty

Shoplifting: Honesty

- **Rebuttal of this rule – can call a positive witness on behalf of the victim.**
- **412 trumps 404(a)(2) – victim self defense, which can be rebutted.**

#### Rule 405. Methods of Proving Character

- (a) **Reputation or opinion.** In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.
- (b) **Specific instances of conduct.** In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.
  - **Memorization – there are only 5 or 6 reasons for 405(b) – essential element of the charge, claim or defense.**

1. Libel or Slander. Truth is an absolute defense. Character for truthfulness of the author can be done by specific instances of conduct and reputation or opinion.
  2. Domestic relation suit for custody of child – fitness of parent is the primary inquiry for the kiddo.
  3. Negligent entrustment of an automobile – drunkenness is central element.
  4. Extortion – character of the defendant = violence. (must show fear of the victim)
  5. Rebut entrapment.
- If it is – 3 forms of evidence.
    1. specific instances of conduct of the defendant
    2. Reputation or
    3. Opinion
  - **Character is rarely used in a civil case – can never be introduced for fender/bender to show good driving.**
    - **Generally only things that would be a crime, like sexual battery, civil fraud, or something that would be a crime.**

Once the door for character evidence is opened, anything can come in concerning that:

1. Positive character witness for the victim
2. Negative character witness for the defendant.

**Rule 412. Sex Offense Cases; Relevance of Alleged Victim’s Past Sexual Behavior or Alleged Sexual Predisposition.**

(a) **Evidence generally inadmissible.** The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

- (1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.
- (2) Evidence offered to prove any alleged victim’s sexual predisposition.

**(b) Exceptions.**

(1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:

- (A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence;

**UNLESS: The defendant can show that he was not the one to cause the injuries in question.**

- (B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

**It is generally allowed, although not always if to show that the victim and defendant previously had consensual sex. This goes to show that is more likely that there was consent there.**

(C) evidence the exclusion of which would violate the constitutional rights of the defendant.

**If this evidence couldn't come in, it would violate the defendant's due process rights. Ex: I'm a lesbian, I don't have sex with men, he raped me – information that she had sex with a guy 2 weeks ago could come in.**

(2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.

**Ex: Girl says – I was a virgin and never had the booty. The door is opened for evidence that she had some sex.**

- **412 (a)(1) – intrinsic to the night in question – the defendant could probably show it.**
  - (a)(1) – night in question.**
  - (b)(3) – constitutionally required – for defense.**

#### **Rule 413. Evidence of Similar Crimes in Sexual Assault Cases.**

If defendant is on trial of sex offense and they want to introduce evidence of another sex offense, it is automatically admissible and relevant under 401. 403 – only possible exclusion – the prejudice might possible outweigh the probative value.

#### **Rule 414.**

Child molestation prior acts – prior or subsequent conduct.

(a) ability to argue.

#### **Rule 415.**

Civil suit – for attack on an adult or a child – evidence of assault on an adult or child molestation is inadmissible. Prior act – sexual battery on a child. Broader in terms of types of offenses and types of victims.

#### **Rule 601. General Rule of Competency.**

Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.

- **Under 601 – Intoxication, drug addiction, mental illness. But – at the time the witness testifies, or at the time the witness tries to narrate facts – the witness was so intoxicated, so under the influence of drugs, or so mentally ill that they can't narrate the facts.**

- **Very liberal. You have to show a lot to show incompetency.**

#### **Rule 602. Lack of Personal Knowledge.**

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.

- **Testifying to what he saw, tasted, touched, or smelled. Hearsay only deals with the declarant.**
- **Lack of certainty can go to weight but not admissibility.**

#### **Rule 603. Oath or Affirmation.**

Before testifying, every witness shall be required to declare that the witness will testify truthfully by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.

#### **Rule 604. Interpreters.**

An interpreter is subject to the provisions of these rules relating to qualifications as an expert and the administration of an oath or affirmation to make a true translation.

#### **Rule 605. Competency of Judge as Witness.**

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

#### **Rule 606. Competency of Juror as Witness**

(a). **At the Trial.** A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b). **Inquiry into validity of verdict or indictment.** Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

- **606(b) – cannot introduce extraneous evidence – that would be anything extra to the case not introduced into evidence; dictionary, rule book, instructions...**
- **TEST = Did the evidence come in at trial. If yes – it's admissible and able to be used during deliberation. If no – not ok to use.**

### **Rule 607. Who May Impeach**

The credibility of a witness may be attacked by any PARTY, including the party calling the witness.

- **You cannot call a witness to impeach. You must be surprised by the opposing testimony at trial.**
- **Cannot call a witness to get otherwise inadmissible evidence.**
- **Impeachment falls into 5 categories.**
  1. **Untruthful character – 608(a)(1)**
  2. **Bias – biased 611(b)**
  3. **Prior inconsistent statements – 801(d)(1)(a) – prior inconsistent statement under oath – if admissible – it can come in as substantive evidence.**
  4. **Defect of Capacity to perceive, recall or narrate.**
  5. **Contradiction – substance of witness’s testimony may be contradicted.**

### **Rule 608. Evidence of Character and Conduct of Witness.**

**(a) Opinion and Reputation evidence of character.** The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

**(b) Specific Instances of Conduct.** Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’ credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness’ character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused’s or the witness’ privilege, against self-incrimination when examined with respect to matters which relate only to credibility.

- **Must refer to truthfulness.**
- **A witness is presumed to tell the truth, credibility must be disproved.**
- **For (B) – Specific instances of conduct –**
  - Forgery, uttery, lie on credit report, being disbarred for stesaling funds – if witness admits – it can be admitted 608(b).
  - If witness denies, you’re stuck with the answer.
- **Question must have an action verb – person must have done something, not have something done to him.**
-

## **Rule 609. Impeachment by Evidence of Conviction of Crime.**

609 – Assuming it is admissible, you can bring out:  
nature of conviction  
date of conviction  
court  
sentence

Test for admissibility.

609(a)(1) – different rules, dependant upon the nature of conviction  
1. anybody other than defendant in criminal case.  
2.

dishonest, moral turpitude, - 609(a)(2) – easier to get in.  
Perjury, false report, false statement. Deceit or misrepresentation.

Time limit. Depends on when you were released – if sentence was 14 years ago – it depends on how long you've been out – under 10 – assuming you served 2 – you've been out 12 – that's over 10. inadmissible. Say it was 5 years – you've only been out 9 years – not quite 10 – you can admit it. Over 10 years old – even a jerkface can be rehabilitated.

FOR FINAL – C, D, E – not important.

## **Rule 610. Religious Beliefs or Opinions**

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.

## **611. Mode and Order of Interrogation and Presentation**

(a) Control by courts.

**OBJECTION TO BADGERING A WITNESS, UNDUE HARASSMENT**

(b) scope of cross-examination

Cross is outside the scope of direct and not to credibility – ask a question that couldn't be asked otherwise – beyond the scope of direct and does not go to credibility. Then – according to the last sentence of b says – must then say – nonleading direct examination. Day 1 – testifies – want to ask questions about day 3 – in nonleading manner – what happened on Aug. 3<sup>rd</sup> – with permission of court.

Subject matter of direct and matters affecting the credibility under the 5 basis for impeachment. 608 – truthfulness, 609, prior conviction, bias, motive, interest, capacity. 611(b) – if no specific rule authorizing impeachment – then 611(b). That is the default rule.

(c) Leading questions.

Background of witness and transition – going from fact a to fact b – transition question.  
Bad Memory, child witness, background, transition.

**Prejudice:**

**609 (a)(1) – rarely is prior crime of witness kept out because the government cannot shield the witness. The prejudice is not so high for a witness. It is not the defendant.**

**Test for collateral – could the other side in their case in chief put on evidence by calling the person**

**Test for relevancy on cross**

**Does it deal with fact on direct or will it effect credibility? Memory would effect credibility.**

**Rule 701. Opinion Testimony by Lay Witnesses.**

More liberal than common law, like most of the rules of evidence.

Lay witness could give an opinion on insanity.

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

**Rule 702.**

Standard of appeal – on protected record, object – abuse of discretion is the standard on appeal.

The court has a gatekeeping function.

1. Is the person an expert?
2. A, B, and C.

Attack on grounds of expert's background – proper training, experience...can show basis for appeal. However – it is a fairly liberal standard.

Reliability → Amended.

Scientific Evidence:

Accepted –

DNA

Shoeprint evidence, fingerprint evidence, hair and fiber

Polygraph Evidence – in some courts.

Rejected –

- Relevance – Example. U.S> v. Rice
- If it is not needed – testimony that another witness is lying or telling the truth – cannot bring expert to say – I sat in the courtroom and think the person is lying, I am basing my testimony on part of Mary's who I found to be credible and truthful.
- Based on speculation
- Based on unreliable theories

- Too conjectural – if...and if...and if...and if...

Delbare test - Reliable, Relevant, based on reliable language of 702

Assuming you've passed 702,

**Rule 703. Bases of Opinion Testimony by Experts**

If you're going to try to get in as a basis of opinion otherwise inadmissible evidence you must convince the court that it is generally relied upon by other experts and that the prejudicial is outweighed by probative value.

Facts presented at trial, facts presented outside of court but not perceived by him if they are reasonably reliable.

3 – the hired gun – a series of hypothetical – Dr. I want you to assume the following facts and then I will ask your opinion after the facts.

They hypos do have to be based on evidence at trial. That would be a basis for objection. Assumes facts not in evidence is a valid objection.

Separate Confrontation Argument. Testimony of an expert who serves primarily as a conduit with otherwise inadmissible hearsay –

**Rule 704. Opinion on Ultimate Issue**

- a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issues to be decided by the trier of fact.
- b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

704(a) – primarily in civil cases. Because of the problems had under 704(b) – shift the battle ground to whether admissible under 701, 702, and 403. Some examples that have been held to be admissible.

An IRS agent – funds on hand were not income.

An expert's opinion that certain false statements made by defendant had the ability to influence a loan officer to make a loan.

Basis for objection under 704:

- 1. Lay witness is not qualified to give an expert opinion.
- 2. Inadequately explored legal criteria. Like junk science.
- 3. Choosing of sides.
- 4. Opinion testimony is not necessary.
- 5. Opinion is beyond expertise

Under B – Cannot give opinion about mental state.

Ex: Expert to testify that because of AB and C, the defendant lacked the specific intent to commit the crime.

Not only to insanity – but any expert opinion as to the mental state of the defendant.

Background

Qualifications

Hired

What did you consider

What is your opinion?

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If an expert brings out his opinion on direct and you don't ask for the basis for that opinion, there can be a move to strike -

If the jury hears bad evidence you can:

5. motion to strike.
6. Motion for a mistrial
7. motion for judgment of acquittal.

Liberal construction of federal rules of evidence.

Possible Objections:

1. Relevance (401)
2. Unduly prejudicial (403)
3. Violates Best Evidence (1000)
4. No Authentication (901)
5. Hearsay

Refrigerator