

Outline
Evidence

1) Procedures for Admitting and Excluding Evidence (Fed.R.Evid Art. I)

a) Objections and Motions to Strike

i) **Fed.R.Evid 103(a)(1)**

(a) Timeliness

(i) *Archibald* – W refers to D’s criminal conduct in testimony

1. If a party fails to make a timely objection –it is waived
2. The appropriate time to raise an objection is as soon as the party is aware of the grounds for objection
3. When a question is innocuous an objection after the answer has been given is still timely

(ii) DEPOSITIONS –

- a. Objections as to form should take place at the deposition on the theory that it can be cured
- b. Objections as to the substance of a deposition can wait until trial

b) Harmless Error

i) **Fed.R.Evid 103(a)**

- (1) If erroneously admitted evidence was the primary evidence relied on = reversible error
- (2) If the aggrieved party was able to present the substance of its claim independent of the evidence = harmless error
- (3) If the jury was given a useful and curative instruction = harmless error
- (4) The extent of jury argument based on the tainted evidence
- (5) If the erroneously admitted evidence was merely cumulative = harmless
- (6) If the other admitted evidence was overwhelming = harmless
- (7) This is a HEAVY burden to overcome
- (8) Test of harmless error
 - (a) Did it have a possible influence on the verdict by judge or jury
 - (b) Did you make a proper objection to it at the time

c) Plain Error

i) **Fed.R.Evid. 103(d)**

- (1) Plain Error = error not only clear from retrospect but also causing a miscarriage of justice
- (2) Four Prerequisites
 1. An error
 2. That is clear and obvious under current law
 3. That affects D’s substantial rights
 4. That would seriously affect the fairness, integrity, or public reputation of judicial proceedings if left uncorrected
- (3) “I am a walking violation of the sixth amendment”
- (4) Attorney falling on his own sword

(5) HOW COURT EVALUATES ERROR ON APPEAL

- (a) Protected Record → Constitutional Basis
 - (i) If you objected on the right grounds and it was a constitutional basis it **MUST** be reversed unless the state can prove it was **harmless beyond a reasonable doubt** – very hard burden to meet
- (b) Protected Record → Evidentiary basis
 - (i) Must prove the error was likely to have contributed to the outcome
- (c) Non protected record → Plain error
 - (i) Error
 - (ii) Plain to Judge
 - (iii) Hurt the defendant
 - (iv) Made a mockery of the proceedings
 - (v) *****VERY HEAVY BURDEN*****

d) Specificity

- i) *McEwen v. Texas & Pacific Railway* – Woman is hurt getting off a train, D presents evidence that she plays bridge; P objects but does not state the element in the questioning that was prejudicial
 - (a) An objection that the testimony was immaterial is insufficient
 - (b) Exceptions to the general Rule of specificity
 - i. Where the ground therefore is so manifest that the trial court could not fail to understand it
 - ii. When the evidence offered is clearly irrelevant and incompetent
 - iii. The objection of such nature that it could not be obviated
 - (c) If you make a specific objection on the wrong grounds and it is **overruled**, it will be affirmed on appeal **EVEN** if a good objection existed at the time and counsel failed to object to it
 - (d) If you make a specific objection on the wrong grounds and it is **sustained** the ruling will not be upheld on appeal

e) Offers of Proof

- i) **Fed.R.Evid 103(a)(2), (b)**
 - (a) *Padilla* – Sexual Assault case where the court did not allow D to introduce a tape recording; after P’s objection was sustained to exclude it, D made no further reference to the evidence in the form of an offer of proof.
 - 1. It is necessary to make an offer of proof even if the substance of the evidence is apparent from the context within which the question was asked. → This method of “apparent from the context” exception is more readily accepted during cross – examination
 - 2. Types of Offers of Proof

- i. Attorney offer of proof
 - You tell the judge what the answer would be and the judge would rule on the relevance (outside the hearing of the jury) or in a bench trial you could just yell it
- ii. Question and Answer form by the witness
 - 103(b) – MAY not MUST
 - Exclude the jury and then ask the witness the line of questioning
- iii. Exhibit – Offer the tangible evidence as an exhibit

1. Five forms of Evidence

- a. Testimony
- b. Physical evidence
- c. Demonstrable evidence (slip and fall evidence- show them the scar)
- d. Stipulations (can stipulate facts and testimony)
- e. Judicial Notice (least favored uncontroverted)

2) Preliminary Questions

a) Fed.R.Evid. 104

- (1) What does the judge decide?
- (2) In making its determination the Court is not bound by the rules of evidence except those with respect to PRIVILEGES
 - 1. 104(b) – **JUDGE** -- Evidence of other crimes wrongs, or acts to prove motive opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident
 - 2. 104(b) –**JURY**—Decides if a document or other evidence is what the proponent claims it to be
 - 3. 104(b) – **CONDITIONAL ADMISSIBILITY**—(Connecting up) – Where evidence presented that is subject to exclusion or motion to strike and its relevancy has not been shown or lacks adequate foundation the **JUDGE** may admit the evidence conditionally upon counsel’s promise to connect it up later
- (3) Hearing of the Jury – RULE 104 (c)
 - (a) Hearings on admissibility and confessions should be held out of the hearing of the jury
 - (b) Unring the bell
- (4) 104(b) Conditional Relevance
 - (a) Evidence is relevant if it makes a fact of evidence more or less probable than if the evidence were not introduced.
 - (b) Court can admit evidence conditionally subject to the party’s ability to be able to “connect it up” later
 - (i) Wait and see doctrine
 - (ii) Allowed in conditionally on a motion to strike
- (5) 104(a) Does not require that the Judge find the bad act occurred by preponderance of the evidence

3) Limited Admissibility

a) **Fed.R.Evid. 105 – LIMITING INSTRUCTION**

- (1) When Evidence which is admissible as to one party or for one limited purpose the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly
- (2) ANY statements made by a defendant in a multi – defendant party can only apply to that defendant
- (3) Evidence that comes in not for the truth of the matter asserted rather to prove motive, intent etc.
- (4) ATTORNEY should request limiting instruction → not self executing

4) Remainder of or Related Writings or Recorded Statements: **COMPLETENESS**

a) **Fed.R.Evid 106**

- (1) *Sweiss* – D meets with informant and offers to pay him to burn down a store. P admitted transcripts from one of the meetings and not the other. D seeks to offer the other transcript under Completeness doctrine
 1. The trial court does NOT have to sustain a completeness objection when the evidence sought to be admitted does not specifically explain portions already admitted
 2. The portions sought to be admitted:
 - i. MUST be relevant to the issues
 - ii. AND only those parts which qualify or explain the subject matter of the portion offered by the opponent need be admitted
 3. Under the doctrine of completeness another writing or tape recording is required to be read or heard if it is necessary to explain:
 - i. → 1. Explain the admitted portion
 - ii. → 2. Place the admitted portion in context
 - iii. → 3. Avoid misleading the trier of fact
 - iv. → 4. Insure a fair and impartial understanding
 4. **This rule is limited to writings and recorded statements and does not apply to conversations**
 5. **Completeness Doctrine – does not apply to separate utterances or occurrences pertaining to a different subject.**

a) Curative Admissibility (opening the door and the rule of completeness)

(1) *Archibald* – Doctrine of opening the door and curative admissibility

1. Provides that when one party introduces inadmissible evidence the opposing party thereafter may introduce otherwise inadmissible evidence to rebut or explain the prior evidence

- 1) Relevancy – relationship between an item of evidence and a proposition sought to be proved
 - a) **Fed.R.Evid 401 – 403**
 - i) *Kotsimpulos* – Guy who stole the tenderloins
 - (1) Relevancy – 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
 - ii) *Nicholas* – Test results revealed that D was in a class of people who could have raped V.
 - (1) The medical testimony was relevant although it only placed D in a class of people representing 60% of the population
 - (i) **Relevancy is a LOW threshold – marginally relevant is the threshold; Must show LOGICAL RELEVANCY ONLY (Under common law – legal relevancy)**
 - (ii) Relevant Evidence must go to the :
 - i. Charge = criminal case, indictment, element of the crime
 - ii. Claim = Goes to breach of Contract – Civil
 - iii. Defense = Civil or Criminal – accident or self – defense
 - iv. Background evidence/Credibility
 - iii) *Johnson* – Convicted for making false tax returns
 - (1) HELD: not admissible that he previously overpaid his taxes
 - (a) 401 – not relevant did not go to his defense
 - (b) 403 – Danger of confusing the jury outweighed any probative value
 - b) Irrelevant =
 - a. 1. Because it is not probative of the proposition for which it is directed
 - b. 2. Because the proposition is not provable in the case
 - c) Relevant =
 - a. Piece of evidence is material
 - b. The evidence has a tendency to make the existence of a fact more probable or less probable than it would be without that fact
 - d) RULE 403
 - a. 403 FAVORS admission
 - b. Balance
 - c. Must first be ADMISSIBLE UNDER 401
 - d. In cases of a tie, benefit usually goes to offering party
 - e. Admission of evidence on appeal
 - (1) Only reversed if the judge acted arbitrarily or capriciously
 - (2) *Layton* – Mass suicide case – “Last Hour Tape” with children screaming in the background
 1. Tape was HIGHLY prejudicial
 2. There was other evidence to prove that Jones knew D was going to airport to engage in violent acts
 3. The tape was confusing

4. Limiting instruction 105 could not compensate for the prejudicial and distracting effects of the tape
5. Huge emotional impact on the jury
6. THESE FACTORS OUTWEIGH THE PROBATIVE VALUE OF THE TAPE

I. RULE 901 – NOT A SUBSTANTIVE RULE – illustrative of method of proof
 - Authentication and Identification

- a) Evidence supports a finding that the matter in question is what its proponent claims it to be
- b) Illustrations (Illustrative not Exhaustive) – Evidence that conforms to the requirements of (a)
 1. Testimony of a witness with knowledge
 2. Nonexpert opinion on handwriting (not acquired in anticipation of litigation)
 3. Comparison by trier or expert witness
 - a. Hire an expert to familiarize themselves with with handwriting in anticipation for litigation
 - b. Compare handwriting samples from defendants
 4. Distinctive Characteristics
 - a. Contents of the letter – code, something only a particular person would know- responding to something only X would know about.
 5. Voice Identification (heard first hand, mechanical or electronic transmission or recording)
 - a. NOT person to whom the call is made
 - b. Tapes of calls made are not admissible unless you can authenticate the voice
 - c. Advisory Committee NOTES: The requisite familiarity may be acquired either before or after the particular speaking which is the subject of the identification. This can be done in anticipation of litigation –unlike handwriting
 - d. *Vitale* – Officer had spoken to D on two occasions and testified he recognized her voice –**this meets the standard for admissibility.**
 1. The fact that she met him proved circumstantially that she was the one who spoke with him on the phone 910(b)(4) – CONTENTS
 2. **minimal familiarity is sufficient to identify a voice**
 6. Telephone Conversations

- a. Calls made by W – Authenticated – I looked up Bennett’s phone number and called the number listed and the voice that answered said , “yes this is fred Bennett”
 - b. Self – Identification alone insufficient if D is the caller. “Hey X this is D” This is insufficient to establish that D called X.
7. Public Records or Reports
 8. Ancient Documents or Data (#1Not suspicious, #2found in a place that supports a finding of authenticity, #3has been in existence for 20 years or more at the time it is offered)
 9. Process or system (Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result
 10. Methods provided by rule or statute

THE ABOVE METHODS ALWAYS REQUIRE A SPONSORING WITNESS

- Five Standard Objections to a document
 1. Relevance 401
 2. Unduly Prejudicial 403
 3. Best Evidence Rule
 4. Not Authenticated
 5. Hearsay
- Authentication → If it is not authenticated = not relevant
- Very low standard → TO properly authenticate under 901(a) there must be a showing that there is sufficient evidence presented to support a finding that the item is what is proports to be
 1. *Johnson* – W unable to identify ax b.c of its changed condition.
 - i. HELD: The W’s inability to specify particular identifying features of the ax as well as the evidence of the ax’s changed condition should go to the question of weight for the jury.
 2. *Olson* – Chain of Custody Case – bullets
 1. HELD: D presented no affirmative evidence of tampering
 2. The nature of bullets make tampering unlikely
 3. **Where items have been in official custody and**

there is no affirmative evidence of tampering a “presumption of regularity” attends official acts of public officers and courts presume that their official duties have been discharged properly

4. you have the burden of showing something happened with affirmative evidence

II. RULE 902

- Self – Authentication
- JUST BECAUSE a document does not require a SPONSORING WITNESS for authentication – **this does not mean opponent cannot challenge the genuineness of it**
- Extrinsic Evidence of authenticity as a condition precedent to admissibility is not required with respect to the following
 1. Domestic Public documents UNDER SEAL
 2. Domestic public documents NOT UNDER SEAL (bearing a signature in the official capacity of an officer)
 3. Foreign Public Documents (bearing signature)
 4. Certified Copies of Public Records – **most commonly used**
 5. Official Publications (public authority; printed by govt)
 6. Newspapers and periodicals
 7. Trade Inscriptions (labels, tags, affixed in the course of business)
 8. Acknowledged Documents (accompanied by a certification of authenticity from a notary public or other officer authorized by law)
 9. Commercial Paper
 10. Presumptions under acts of congress (Prima facie authentic)
 11. Certified domestic records of regularly conducted activity
 - a. You don’t have to bring in some custodian of records to authenticate it
 12. Certified foreign records of regularly conducted activities

Contents of Writings, Recordings, and Photographs

III. RULE 1001

- Definitions
 1. Writings and Recordings

- a. Letters, words, numbers, set down by handwriting, typewriting, printing
 1. *Duffy* – Shirt with inscription on it. Is P required to introduce the actual shirt or was the description sufficient?
 1. HELD: An object bearing a mark or inscription is both a chattel and a writing and the trial judge has the discretion to treat them as either one
 2. Chattel – Not covered by best evidence rule.
 3. There was little danger of the witnesses inaccurately remembering three initials (not complex and long like a will or K)
 4. The terms of the writing were not in issue, they were circumstantial proof of D's presence.
 5. INSCRIBED CHATTELS DOCTRINE
 6. Artwork, Drawings = best evidence rule applies
 7. Photographs covered by best evidence rule.
 2. Photographs
 - a. Still, X-ray, films, videotapes
 3. Original
 - a. Photograph – original includes the negative
 - b. Computer – Any data stored in a computer may be printed out to constitute an “original”
 - c. IF you INTEND it to be an original – Four parties to a K. You print out four copies of the K for all the parties to sign. All the K's are originals
 4. Duplicate
 - a. Produced by the same impression as the original including enlargements or miniatures

IV. RULE 1002

- Best Evidence RULE
- TO prove CONTENT
- When the Writing itself is the thing to be proved
 - a) (deed, will, Contract)
 - b) LOOK FOR THE PHRASING OF THE QUESTION
 - c) A party seeks to prove a matter by using a writing as evidence of it
 - d) EX. D admit negligent driving in a letter he wrote → This rule is inapplicable. The letter is not what P seeks to prove

1. *Gonzales – Benitez* – Instead of the actual tape recordings admitted at trial P had one of the participants testify as to the contents of the conversations recorded. **D claims the tapes would be preferable to the testimony**
 - a. HELD: The Best Evidence Rule does not set up an order of preferred admissibility which must be followed to prove any fact
 - b. Best Evidence Rule is ONLY applicable when one seeks to prove the contents of documents or recordings
 - c. The inquiry was as to the conversation so either form of evidence was admissible. Testimony of participant was equal to tapes
 - d. **ORAL TESTIMONY IS COMPETENT TO PROVE CONVERSATIONS THAT WERE TAPED.**
 - e. NOTE: Transcripts: would be objectionable unless offered in conjunction with the original or duplicate recording (transcript could not go into the jury room)
 1. Transcripts are secondary evidence

V. RULE 1003

- Duplicates
- Admissible unless
 1. A genuine question is raised as to the authenticity of the original
 2. Under the circumstances it would be unfair to admit the duplicate
 - a. You must make the objection if it is unfair or you waive it.

VI. RULE 1004

- Admissibility of other evidence of contents
- Evidence of contents of the writing recording or photograph is admissible if :
 1. Originals are lost or destroyed (unless done in bad faith)
 2. Originals are not obtainable (Subpeona power only extends 100 miles)
 3. Original in possession of opponent – Opponent has been notified and still has failed to turn over the document
 4. Collateral Mattes (Evidence not related to a controlling issue)

- You do not get to 1003 or 1004 if the Best Evidence Rule does not apply on its face under 1002 → Make sure evidence satisfies criteria under 1002 before applying these rules
- 1004 – Lets you escape the restrictions imposed under best evidence rule four ways
 1. *Neville Construction Co.*- Brochure ensuring insulation was fire retardant was burned in fire. P testifies as to the contents of the brochure, D objects on Best Evidence Grounds.
 - a. HELD: advisory committee notes: IF failure to produce original is satisfactorily explained secondary evidence is admissible.
 - b. Rule recognizes no degree of secondary evidence
 - c. IF a document is lost or ruined, any form of testimony is ok, there is no hierarchy and any form of secondary evidence is admissible.
 - d. Proof that the original is lost normally consists of testimony describing a fruitless diligent search.
 - e. Deliberate/bad faith destruction of original – Judge is permitted to rely that adverse inference to the jury

VII. RULE 1005

- Public Records
- Public records (the originals) cannot be taken from agencies so copies are always accepted

VIII. RULE 1006

- Summaries
- IF you offer a blow up or summary chart the whole thing must be admitted in evidence
- You cannot introduce a summary if the underlying documents are not admissible or available
- LOOK OUT FOR SUMMARY INTERVIEWS – these are hearsay and NOT ADMISSIBLE
- “Voluminous” – Liberally interpreted
 1. *Bakker*-Took all the tapes and compiled them into one
 2. Legal Issue – Must the original tapes be admitted into evidence before the composite tapes were admitted— HELD—NO
 - a. The rule does not require that the original voluminous material be introduced into evidence rather only that the material be made available to the other party
 - b. CHARTS: When situations arise where a party charts to summarize information the originals must be introduced

- c. FOUNDATION: Must establish
 - 1. Admissibility of the underlying materials
 - 2. Accuracy of the summary (usually preparer's testimony is required to establish this)

**Summaries = Tangible exhibit or testimony – NOT A WRITTEN SUMMARY BY ONE OF THE LAWYERS

IX. RULE 1007

- Testimony or written admission of a party
 - a) Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered that party's written admission WITHOUT ACCOUNTING FOR THE NONPRODUCTION OF THE ORIGINAL
 - b) If a party admits to it at a deposition you do not need the original

X. RULE 1008

- Functions of the Court and Jury
 - a) Keep in mind provisions of 104(a) – Judge discretion
 - b) Issues for judge
 - 1. Whether loss of originals have been established
 - 2. Conditions of 1004 (bad faith) have been fulfilled
 - 3. Whether document is original or duplicate
 - 4. Whether it is a writing or chattel (Inscribed chattels doctrine)
 - 5. Whether if an item is a duplicate it should be allowed to be admitted
 - 6. Whether no originals are obtainable through judicial process
 - c) Exceptions → JURY
 - 1. Whether the writing ever existed
 - a. P offers secondary evidence to prove contents of original and D counters that no such original ever existed → Jury decides
 - 2. Whether something is actually the original
 - a. Two documents are produced and P claims one to be the original D claims the other to be the original → Jury Decides
 - 3. Whether other evidence correctly reflect the evidence
 - a. P establishes that a K is lost and testifies to its terms, D objects and gives his own version → Jury decides

I. RULE 406

- Habit, Routine Practice
 - a) Habit or routine practice is admissible to prove that the conduct of the person or organization on a particular occasion was in

conformity with the habit or routine practice. This is admissible REGARDLESS of the presence of eyewitnesses.

b) NOTES:

1. This is Habit:

1. 3400 incidences of how D loaded its trucks
2. Insurance company's agents routinely waived policy conditions
3. Dentist regular practice of informing patients of potential risks associated with molar extractions
4. Habitually crossing the highway to retrieve the paper
5. Taking the same route to the grocery store

2. This is not Habit

1. Evidence that engineer of train had been cited nine times for safety violations during 29 year career did not constitute a habit of operating trains negligently
2. D's late and inadequate performance of other K's did not establish routine practice
3. That party had a habit of losing temper (P needed to show that the D's specific response to the repeated situation of falling behind in the game of racketball was to freak out and endanger his opponents)
4. Four convictions of intoxication in three years insufficient to prove habit of intoxication

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II. RULE 407

- Subsequent Remedial Measures

- Exceptions

a) Most common Feasibility and Ownership

1. *Malloy* – Motel Rape Case. Key phrase – “WE DID EVERYTHING POSSIBLE TO MAINTAIN TOP RATE SAFETY” Then on cross you can ask “Then why did you just makeimprovements”
2. HELD: Rule does not protect you if you open the door
3. Watch for “There is nothing we could have done to make it safer...”
4. Watch for “Taking care of Was not my responsibility”
5. Watch for subsequent remedial measures by a third party (govt. or good Samaritan usually) – those are not barred

under 407 → you would then try to argue 403 (govt intervention is very prejudicial)

III. Rule 408

- Compromise or Offer to Compromise
- NOT ADMISSIBLE to prove LIABILITY or INVALIDITY of the claim or its amount
 1. Evidence of furnishing an offer
 2. Accepting an offer
 3. Promising to accept an offer
- This rule does not prevent the admission of any evidence otherwise discoverable merely b.c. it is presented in the course of compromise negotiations
- This rule does not require exclusion when evidence is offered for another purpose such as proving bias or prejudice of a witness
- Offer to compromise intermixed with admissions → Admissions admissible
 1. *Rochester Machine Corp.* – P wanted D whom they leased a building to to pay damages when the lease ran out. D offered to pay some in a letter but not others. P seeks to introduce the letter, D claims it was a compromise negotiation thus inadmissible
 - a. HELD: Even if the letter was an offer to compromise, the portions of the letter constituting distinct admissions are admissible
 - b. COMMON LAW – while an offer to pay a sum of money to compromise a dispute is not admissible in evidence to prove that the sum offered was admitted to be due, the DISTINCT ADMISSION OF A FACT is not to be excluded because it was accompanied by an offer to compromise the suit
 - c. Federal RULES – reject common law practice
 2. Settlements with Third Parties
 - a. Is this allowed?
 1. W for D on cross examination “Is it not true that you were also injured in the accident and filed a claim yourself against the railroad? Is it not true that the railroad settled with you?”—YES ADMISSIBLE
 - a. Inadmissible to show validity of the claim (that the R.R. was really negligent)
 - b. ADMISSIBLE to impeach W by a showing that he was biased and prejudiced

IV. Rule 409

- Offer to Pay Medical Expenses
 - *Evidence of offer or promise to pay medical expenses occasioned by an injury is not admissible to prove liability for the injury
 - *"similar Expenses" – personal property does not qualify
 - a. Admissions intermixed with offers
 - a. A statement of liability made in conjunction with an offer to pay medical expenses is not barred under rule 409. The statement will likely be severed

V. Rule 410 – DO NOT FORGET PERJURY

- Admissibility of Plea Bargains
- CRIMINAL RULE generally although applies to civil cases as well
- 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 discussion
 1. A plea of guilty later withdrawn
 2. A plea of nolo contendere
 3. Any statement made in the course of any criminal proceedings (Crim Pro)
 4. Any statement made in the course of any plea discussions with an attorney for the prosecution authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn
 1. *Greene* – D could not show that the DEA had real or apparent authority
- LIMITATIONS ON THE RULE
 - a) Such statements are admissible
 1. In any proceeding wherein another statement made in the course of the same pleas or plea discussion has been introduced and the statement ought in fairness be considered contemporaneously with it.
 2. IN a CRIMINAL proceeding for perjury or false statement if the statement was made by the defendant
 1. Under Oath
 2. On record
 3. In the presence of counsel
- LIMITATIONS ON PROTECTIONS
 - a) The moment the plea agreement is reached and D signs the plea agreement the second it is signed → D's admissions are no longer protected. Any incriminating statements made thereafter are admissible.
 - b) This rule allows subsequent prosecutions for perjury or false statements

- c) IT TAKES TWO – A d making admissions will not be covered under this rule

VI. Rule 411

- Liability Insurance
- 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
 1. Proof of agency
 2. Ownership
 3. Control
 4. Bias or prejudice of the witness
 - a. *Charter v. Chleborad* – Proof of liability insurance was used to impeach W. W worked for the insurance company.

I. RULE 801

- Hearsay DEFINITIONS

a) Statement

1. an ORAL or WRITTEN assertion
2. Nonverbal Conduct of a person if it is intended by the person –NOTHING is an assertion unless it is intended to be

1. Lineups – When V points it is an assertions.
 - a. When testifying to that in Court, D objects on hearsay, P argues it was nonverbal conduct, D rebuts it was intended as an assertion
2. A question is never hearsay
3. A directive is never hearsay
4. Silence not intended as an assertion is not considered to be a statement
 1. If it is used for probative value then it is hearsay
5. Negative result of an inquiry – generally not hearsay – Landlord hypo: No one ever complained of the steps

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b) Declarant

1. A person who makes a statement
 - a. Non human declarants
 1. If not human →Not hearsay

2. Radar gun → Not hearsay
3. Drug dog → Not hearsay

c) Hearsay

2. A statement
3. Not made by the person at the hearing or testifying
 - a. Out of court = another proceeding
 - b. If a person is testifying as to what he heard, saw, asserted or the contents of a document at another proceeding or occurrence = out of court
4. Offered into evidence
5. To prove the truth of the matter asserted

d) Statements which are not Hearsay

6. 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. A.)

INCONSISTENT

with the declarant's testimony and was given under **oath** and **subject to the penalties of perjury** at a

- i. Trial
- ii. Hearing
- iii. Deposition
- iv. (based upon ground of oath, cross –x, and jury observation – THIS

PRECLUDES GRAND JURY STATEMENTS
)?? Jury

observation at a deposition

- ☹ d(1)(A) –
 - Can apply to ANY proceeding where it is subject to cross and is inconsistent with the in court statement of the current proceeding
 - Grand Jury testimony – Can only be used if W is present and can be cross examined by his grand jury testimony
 - **If the WITNESS PLEADS THE FIFTH –YOU CANNOT USE THIS RULE**
 - What is an inconsistent statement –
Liberally Interpreted-
 - Flat inconsistency red v. black shirt
 - I don't remember
 - Maybe
 - Could be
 - Silence
 - Evasive Answers
 - Change in position
- ☹ **Admissible both for impeachment purposes and as substantive evidence**
- ☹ “other proceeding” → narrowly defined
 - *Castro – Ayon* – Immigration case
 - Held: The inconsistent statement under 801(d)(1)(A) could be used to impeach the witnesses and also to determine guilt
 - Also applies to grand jury proceedings
- ☹ **WILL ALWAYS BE INVOKED BY CROSS EXAMINING PARTY**
- ☹ W must always be available for cross

b. 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

- i. Statement must occur before the motive to fabricate arose
- ii. TOME – child N.M rape case
- iii. Cannot use to bolster the witness
→ **Rehabilitation rule** – Credibility of witness must first be attacked

☺ **WILL ALWAYS BE INVOKED BY THE PARTY SPONSORING THE WITNESS – redirect rule**

☺ You can always use a third party to rehabilitate the witness attacked as long as the original W is still available

☺ W must always be available for cross

☺ When this rule does not apply:

- 1. A statement made by a coconspirator or codefendant after Miranda rights
 - Curry favor with authorities
 - There is always reason to fabricate
- 2. Statement made by a person whose relationship is the same at the time of trial
 - Preexisting motive to fabricate because it is a member of the family (TOME)
- 3. On direct examination
 - There must be an attack
 - HYPO: car accident where unbiased witness later marries P – Prior consistent statement admissible after D impeaches him for bias

- c. C.) One of identification of a person made after perceiving the person
- i. Almost always criminal
 - ii. Any out of court ID is considered superior to an in court ID
 - iii. Four Forms of ID which can come in
 - iv. 1. Out of court Photographic ID – mug shots
 - v. 2. Line – up (through officer who conducted the line up)
 - vi. 3. Fresh on the scene ID
 - vii. 4. Sketch
 - viii. AN in-court misidentification can be restored by an out of court ID by W
 - ix. *Lewis* – W made a mis ID in court
 - x. Held: Just because W made a mis ID in court does not mean evidence of her prior identification should not be admitted provided declarant testify at trial and is subject to cross -X

☺ W must be available for CROSS

b) RULE 802 and the Confrontation Clause

1. *Owen* – Correctional facilities guard attacked. He has no memory or recollection of the attack. A month later he made a photo ID of D. A trial D testified he could remember identifying him during his interview with police but he could not remember seeing his face during the attack
 - a. Legal Issue: Whether the confrontation Clause of the 6th Amendment or Rule 802 bar testimony concerning prior out-of-court ID when the identifying witness is unable to explain the basis for his ID b.c of memory loss
 1. HELD: Confrontation Clause only gives the accused the right to be confronted with the witness against him
 2. This only secures adequate opportunity for Cross
 3. DOES THE CROSS HAVE TO BE MEANINGFUL TO QUALIFY AS ‘SUBJECT TO CROSS’? – no

II. RULE 801 (d)(2)(A) – (E)

- Admission by a party – opponent
- A statement is not hearsay if the statement **is offered against a party AND is**
 - a. (A) THE PARTY’S OWN STATEMENT IN EITHER AN INDIVIDUAL OR REPRESENTATIVE CAPACITY
 - a. If acting as a representative the statement needs to be relevant to the representative affairs
 - b. Must be offered AGAINST a party → This is not a self-serving rule
 - c. It can be a statement it need not be an admission
 - d. Made by the party → Not anyone else
 - b. (B) A STATEMENT OF WHICH THE PARTY HAS MANIFESTED AN ADOPTION OR BELIEF IN ITS TRUTH
 - a. When silence is relied on the theory is that, if untrue, under the circumstances a reasonable person contest the untrue statement made in his presence
 - b. Hi Five/Low Five RULE
 - c. Must Show:
 - i. The person (D) heard it
 - ii. The statement was an accusation
 - iii. A reasonable person would not have remained silent in the face of the accusation if UNTRUE
 - d. CONTEXTUAL NON – HEARSAY
 - i. Rule 106

- ii. **IMPORTANT**→”Nice Robbery Harry”
Harry Nods. The nod is indicative of manifested adoption of the statement but means nothing without the first half of the transaction. **HOW DO YOU GET THE FIRST PART IN?**
 - 1. Completeness Doctrine –
CONTEXTUAL NON-HEARSAY

- c. **(C) A STATEMENT BY A PERSON AUTHORIZED BY THE PARTY TO MAKE A STATEMENT CONCERNING THE SUBJECT**
 - a. Remember – offered against another party
 - b. Read U.S v. Forrez – 9th circuit
 - c. If in an appellate trial, the Government then changes their theory of the case can you use the opening or closing statements against the Govt to show they have no case—**FOR PURPOSES OF THE FINAL YES. MAKE THIS ARGUMENT**

- d. **(D) A STATEMENT BY THE PARTY’S AGENT OR SERVANT CONCERNING A MATTER WITHIN THE SCOPE OF THE AGENCY MADE DURING THE EXISTENCE OF THE RELATIONSHIP**
 - a. Admissions/comments made after the agent is no longer with the company are inadmissible →This is done to avoid wrath or vengeful testimony against company
 - b. **CONTRAST C** – It does not matter if you have authorization to speak
 - c. Testimony must be relevant + Relationship between declarant and the Company
 - d. If statement is made after termination →Not admissible

- e. **(E) STATEMENT BY A COCONSPIRATOR OF A PARTY DURING THE COURSE AND IN FURTHERANCE OF THE CONSPIRACY**
 - a. Must be made “during the course of, and in furtherance of the conspiracy
 - b. Statements made after the objectives of the conspiracy have either failed or have been achieved are usually inadmissible

- c. Does not have to be decided in the pretrial admissibility hearing
 - i. Can be admitted conditionally and if prosecutor does not tie it up → Motion to strike → Motion for mistrial → Cannot unring the bell
- d. Conspiracy need not be alleged in the indictment
- e. All you need is two or more actors in concert
- f. Can be used if coconspirator testimony is favorable to the d???????????????????? – that is not against
- g. If D joins an ongoing conspiracy statements made BEFORE D joined are admissible against him because they were made in furtherance of the conspiracy
- h. Statement does not have to be made TO a coconspirator just BY a coconspirator
- i. FIVE FOUNDATIONAL ELEMENTS
 - 1. The existence of a conspiracy
 - a. Agreement between two or more persons to commit crime
 - 2. D is a member of the conspiracy
 - a. Statement alone is insufficient (last sentence 801(d)(2)) – Must be independent evidence of D’s involvement in the conspiracy
 - 3. Declarant is a member of the conspiracy
 - a. Requires evidence independent from the statement
 - 4. Statement made in furtherance of the conspiracy
 - a. This is leeway for D’s attorneys
 - b. “FURTHERANCE” – narrative of a past event, boasting, bad mouthing = not in furtherance
 - c. If not made to someone involved in the commission of the crime = not in furtherance

5. Statement made during the course of the conspiracy
 - a. Statements made after the arrest of the coconspirator are not admissible
 - b. Prevents people from spilling after their rest to get a deal by implicating everyone

→(C), (D), (E)→The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority.

III. Rule 802

- Constitutional Hearsay
- Confrontation Clause
 - a) The right to confront witnesses
 - b) The inability to cross-examine is lack of confrontation
 - c) Constitutional Confrontation Objection occurs in FOUR CONTEXTS
 1. Prior Statement by witness who testifies in the present proceeding under oath and is subject to cross in regards to a prior statement
 - a. NO SEPARATE CONFRONTATION PROBLEM
 - b. No lack of confrontation when it is a witness/declarant on the stand
 - c. NOTE: There is still potential for a hearsay objection just not a confrontation objection
 2. Former testimony of a presently unavailable witness
 - a. 804(b)(1) – Former TESTIMONY
 - b. Hypo: W dies when case is on appeal
 1. To satisfy confrontation all the government has to show is that D had a lawyer and present unavailability of the W→ If they can meet that very low burden, then the former testimony is admissible????????????????????
 3. Other hearsay firmly rooted in our history
 - a. Everything is firmly rooted : TWO EXCEPTIONS
 1. 804(b)(3) – declaration against penal interest
 1. *Lilly v. Commonwealth*
 2. Held: Declaration against penal interest is presumptively unreliable
 3. Allows 803 objection and Confrontation Objection
 2. 807 – Residual Clause

4. Hearsay which is not firmly rooted
 - a. Evaluation of inherent untrustworthiness
 - b. Only way to get in Confrontation on an objection not deeply rooted is through circumstances surrounding the making of the statement in assessing its reliability

**FOR EXAM – How to deal with a confrontation question

1. Is witness/declarant on the stand → If yes = no confrontation issue
2. If it is former testimony → See if declarant is unavailable → If yes = no confrontation
3. See if it is coming in under an objection deeply rooted or not.

IV. Rule 803

- Hearsay exceptions
- Availability of declarant immaterial
- Personal Knowledge requisite – 602- No one can testify unless they have personal knowledge
- The following statements are NOT inadmissible under the hearsay doctrine even though the declarant is available as a witness
 - a) (1) **Present Sense Impression** –
 - a. FOR FINAL – Requires less than 10 minutes after to qualify as present sense impression – More than ten minutes → Will not qualify
 - b. FORWARD looking
 - c. Describes the event
 - d. Statement describing a condition
 - e. If you see something and are moved to speak = present sense impression
 - f. FINAL : Also applies to statements made immediately after terminating telephone calls.
 - g. NOTE: 803(1) does not require that the witness who recounts the hearsay utterance have had an opportunity to observe and check what declarant described
 - b) (2) Excited Utterance
 - a. If a statement does not RELATE, PERCEIVE, or DESCRIBE an event → **It cannot get in under 803 (1) or (2)!!**
 - b. No time period (specific)
 - c. Must relate to a startling condition
 - d. Must prove the declarant was under the stress of the event or condition → This gets more difficult to

prove the more time passes between the startling event and the statement

- e. Cannot go to an unrelated event
 - f. You can have a rekindling of an event – Seeing a picture a week later
- c) (3) Then existing mental, emotional, physical condition
- a. Admissible to show TRUTH and STATE OF MIND
 - b. My arm hurts, I love Mary, Tomorrow I am going to NY → Admissible
 - c. My arm hurt yesterday, → Not admissible under this rule
 - d. Must be a state of the DECLARANT's state of mind ALWAYS!!
 - e. Hillmon Doctrine
 - 1. Can we use the present intention of X to infer what Y did?
 - 2. Criticisms: A statement of what I intend to do should not bind what someone else intends to do
 - 3. Delveccio → This is the principle used for final
 - 4. *Pheaster* – Statements were admissible to prove that X intended to do something but not that he actually did it.
 - f. NO STATEMENTS OF MEMORY OR BELIEF
 - g. No looking backwards – “Last week my arm hurt”
 - h. Looking backwards = “firming up your perjury”
 - i. EXCEPTION = No looking backwards except as it relates to wills
 - 1. THEORY: Difficulty of proving what people intended after they died
- d) (4) **Statements for Purposes of Medical Diagnosis or Treatment**
- a. LOOKING BACKWARDS is permissible (contrast with 803(3) – Then existing mental, emotional, physical condition
 - b. Must convey need for treatment or symptoms
 - c. If the statement includes fault, that portion usually excluded
 - 1. Statements as to fault normally do not qualify under the rule
 - 2. Where it CAN come in is in sex abuse cases ONLY where the perpetrator is a continuing threat to the child and it is necessary to separate the child

- a. When the perpetrator is a neighbor, family member, babysitter etc.
 - d. Does not have to be statement made to a treating physician
 - 1. nontreating physician hired for litigation, nurse, ambulance driver,
 - 2. Can be a statement made by a third person if V is unconscious
 - e. Statements from doctor to patient are inadmissible
- e) (5) **Recorded Recollection**
 - a. THE DOUBLE STONE RULE
 - b. FOUNDATION
 - 1. W once had knowledge of
 - 2. But now has insufficient recollection
 - 3. Statement must have been made or adopted by the witness when his recollection was fresh
 - c. “Adopted” – means someone else wrote it you signed it.
 - d. If admitted, the record may be read into evidence but may not itself be received as an exhibit and offered to the jury unless by the adverse party
 - e. If your witness is a single stone and cannot remember what he testified to
 - 1. (612) may read his statement silently
 - 2. If he still cannot remember after reading it and there is no proof other than the record
 - 3. 803(5) admit the record
 - f. What if the statement was not adopted?
 - 1. Notes of the investigator → Not signed
 - 2. If it was never signed and never adopted, YOU HAVE NO FOUNDATION FOR 803(5)
 - Exam Questions
 - 3. Look for stenographer who prepares a statement →If witness chooses not to sign it W waives signature and adopts it automatically
 - g. Inventory HYPO:
 - 1. How many witnesses must be called if there is a counter and recorder who filled out inventory sheet separately
 - 2. If there is a record made by two people must call both people

- (f) 6) Records of Regularly Conducted Activity
 - a. Four requirements (FOUNDATION)
 - i. Show the record you are trying to get in was made and kept in the course of a regularly conducted business activity – not in anticipation of litigation – Regularly conducted does include ILLEGAL VENTURES
 - 1. *Keogh* – Dealers cheating on their taxes
 - 2. Held: The diary even though personal to D, shows every indication of being kept “in the course of his own business activity” – Personal records kept for business may qualify
 - 3. Business records = systematically checked and regularly and continually maintained.
 - ii. It is the routine of the business to keep the record
 - iii. Record was made at or near the time of the event – FOR FINAL Timely = less than three months – after that presumptively inadmissible
 - iv. Made by a person with knowledge of the business – A qualified witness is shown by a custodian, or certification under Authentication or self-authentication (secretary, did not have to be employed at the time the record was made – NO PERSONAL KNOWLEDGE REQUISITE – W need only have knowledge of the procedures under which the records were created)
 - v. First sentence is the KICK – OUT CLAUSE
- (g) 7) Absence of entry in records in accordance with 6
 - a. Look for lack of trustworthiness
 - b. have a custodian certify. You must introduce the document that does not contain the entry
 - c. Or if there is no document then you must show that after diligent search they could not be recovered- have custodian testify
 - d. Presentation under 803(7) requires FIRST, a foundation sufficient to qualify the record under 803(6), and SECOND either the record must be introduced or the custodian must testify that a diligent search failed to disclose the matter
- (h) 8) Public Records and Reports
 - a. Statements or declarations in any form – matters observed

- b. PRO – DEFENSE rule in criminal cases
- c. 803(8)(B) - Matters observed (criminal case) by law enforcement officers are not admissible
- d. IN a civil case either side can use this rule and in a criminal case only D can use it against the government
- e. Cannot be matters observed by a bystander – Must work for a public agency
- f. ANYONE can use records that are noncontroversial and made in the course of business
- g. B can be used if the maker of the report (other than police officer) is available for cross because the problem of confrontation does not exist
- h. FINAL – a factual finding cannot come in but something observed can come it – investigative opinion
- i. (c) – Factors indicative of trustworthiness
 - i. Timeliness of the report – six months – more elastic than business records
 - ii. Investigator’s skill and experience
 - iii. Whether a hearing was held
 - iv. Possible bias if the report was prepared in anticipation of litigation
 - v. Cannot include legal conclusions – only factual conclusions
 - vi. Something CAN NEVER qualify as both a business record AND a public record

**Multiple Hearsay 801(d)(2)(A) trumps 803(3)

V. Rule 804

- Hearsay Exceptions; Declarant UNAVAILABLE

a.) Definition of unavailability : Unavailability as a witness includes situations in which the declarant

1. Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant’s statement or
 - a. Attorney /client
 - b. Husband/Wife
2. Persists in REFUSING TO TESTIFY concerning the subject matter of the declarant’s statement despite an order of the court to do so
3. Testifies to lack of memory of the subject matter of the declarant’s statement
4. Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness
 - a. Offering party must show declarant’s inability to be there

5. Is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance
- b.) Hearsay EXCEPTIONS (unavailable declarant not W) – BEFORE YOU ASSERT ANY OF THESE YOU MUST ESTABLISH UNAVAILABILITY
1. Former testimony –
 - a. Civil cases can be a predecessor in interest (not criminal cases)
 1. *Lloyd* – Leading case on predecessor in interest – ENCOMPASSES ANY PARTY WITH SIMILAR INTEREST OR MOTIVE
 - b. Criminal
 - i. Trial 1 → Charge armed robbery- V testifies and there is a good cross and D gets off
 - ii. Appeal Trial → Victim has died can past testimony get in → yes
 - c. Mutuality of parties State v. D
 - d. Civil – fender bender
 - i. Trial 1 → P calls eyewitness who testifies in favor of P; D had ful cross
 - ii. Trial 2 → A is dead can introduce the testimony of A
 2. Statement under belief of impending death
 - a. Was this a criminal or civil case
 - b. Did the person BELIEVE he was dying
 - c. The statement he makes must relate to what he believe is the cause of him impending death
 - d. What if he thinks he is dying but then recovers and is unavailable for other reasons– still admissible
 3. Statement against interest (NOT FIRMLY ROOTED)
 - a. You must show it is ok under the confrontation clause
 1. *Williamson*
 4. FORFEITURE 404(b)(6)
 - a. When you scare/intimidate a witness as to keep them from testifying
 - b. Theory : You have no hearsay objection; you have no Confrontation objection; you have no valid objection whatsoever. Unclean hands

VI. Rule 807

- Residual Exception
- a) Offered as evidence of a material fact

- b) Statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts
- c) The general purposes of these rules and the interest of justice will be best served by admission of the statement into evidence

I. Rule 404 – DO NOT USE IN CIVIL CASES

- Character Evidence not admissible to prove Conduct
- a) Character Evidence Generally: Evidence of a person's character or trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion EXCEPT:
 1. Character of the accused
 - a. Evidence of a pertinent character offered by an accused or by the prosecution to rebut the same
 - b. Evidence of a trait of the alleged victim of the crime is offered by an accused and admitted under 404(a)(2)
 - c. Then the evidence of the same trait of character of the accused offered by the prosecution
 2. Character of alleged victim
 - a. Evidence of a pertinent trait of the the alleged victim of the crime offered by an accused or by P to rebut the same
 - b. Evidence of peacefulness of the victim offered by P in a HOMICIDE case to rebut evidence that the alleged victim was the first aggressor
 3. Character of witness
 - a. As provided in the 600s

→404(a) character

- Circumstantial use of character evidence
 - a) Only the D can open the door under 404(a)(1)
 - b) D cannot introduce favorable character evidence that does not illustrate pertinent characteristics of the crime (or specific acts illustrating good character)
 - c) Pertinent character traits of crimes
 - d) Every crime has two pertinent character traits and potentially three BUT never more
 - e) There are four pertinent character traits
 1. Peace and good order → Crimes of violence
 2. Truthfulness → Perjury, False Statement, forgery, deceptive conduct (communicative)
 3. Honesty → Drug Crimes, property Crimes, Theft (action)
 4. Law – Abiding → Applies to every crime
- Good faith basis for question
 - a) Must be known to the community
 1. Grand jury testimony = secret

- b) Time frame → Must be within the timeframe that the witness knew the D
- c) Same pertinent character trait
- Truth and Veracity → VERY TRICKY
 - a) PERJURY → Pertinent character trait is truth and veracity
 - b) Pertinent to show someone is likely lying on the stand
 - c) Conditional → D must first be attacked on cross and made (expressly or implicitly) to be a liar
 - 1. Character attack on D
 - 2. Prior inconsistent statement
 - 3. Prior Act
- b) Other crimes, wrongs, acts
 - i. MNPR/PLO??? – to get in prior bad acts of who?
 - ii. Defendant's use of other Crimes Evidence
 - 1. Reverse 404(b)
 - 2. Use against a codefendant
 - 3. Criminal use → Rarely civil
 - 4. 404(b) do not conviction only proof that it occurred
 - 5. Character evidence in a civil case
 - a) CIVIL BATTERY
 - b) CIVIL FRAUD
 - 6. Prosecutor can never open the door in civil or criminal cases
 - 7. NO such thing as character evidence for P in a civil case (other than under 405(b) in their case in chief → then only if truthfulness is attacked)

ONCE CHARACTER IS IMPEACHED → ENTITLED TO A LIMITING INSTRUCTION

VII. Rule 405

- Not a substantive rule → METHOD OF PROOF
- (b) Specific Acts very narrow = must be an essential element of the crime
 - a) Character in issue crimes
 - 1. Libel/Slander – truth is a complete defense (essential element of defense)
 - 2. Custody – Fitness of a parent
 - 3. Negligent entrustment of an automobile
 - 4. Extortion
 - 5. Rebut a defense for entrapment

VIII. Rule 412

- Sex offense cases; Relevance of alleged victims past sexual behavior or alleged sexual predisposition
 - a) Evidence generally not admissible

- a. (1) v engaged in other sexual behavior (She had sex with X yesterday) = not admissible
- b. (2) v's sexual disposition (V is a whore) = not admissible
- b) Three times it is admissible granted other admissibility obstacles have been overcome (relevancy, hearsay)
 - 1. Offered to prove someone else did it
 - a. If D can show that someone else caused the source of injury he is allowed to admit it (right to present his defense)
 - 2. Evidence of specific instances of sexual behavior in relation to the accused to prove consent
 - i. D must proffer consent
 - ii. D can show that on relevance grounds that their past relationship makes it more likely she consented this time
 - 3. Evidence the exclusion of which violates Due Process Rights of the D under 14th
 - i. *Ogden v. Kentucky*
- c) If V ever opens the door (I was a virgin before..... that places her virginity in question and evidence to the contrary is probably admissible)
- d) FOR FINAL → What clearly will not come in?
 - a. General negative character of victim for chastity
 - b. Specific conduct of V's sexual conduct with other men

IX. Rule 413 – CRIMINAL

- Evidence of SIMILAR crimes in Sexual Assault cases
- FOR ADULTS
- Does not overrule 403
- Look for similarities → The more similar the more probative it is
- This rule trumps the admissibility test of 404(b) → you do not have to get the past act in under motive, plan, identity etc.
- It automatically relevant
- Substantive as to the guilt of the D
- Only subject to 403

XI. Rule 414 - CRIMINAL

- Evidence of Similar Crimes in Child Molestation Cases
- FOR CHILDREN
- Present offense must be on child and prior act must be on child
- IF IT IS ANOTHER SEXUAL ACT ON AN ADULT → 404(b)- **this rule would not apply**
- Converse is not true: IF you are prosecuting an adult sexual assault case, you can bring in D's prior sexual assault on a child

- I. Rule 611
 - Mode and Order of Interrogation and Presentation
 - (a) – Do not cite on final
 - (b) – DIRECT OF SCOPE RULE
 - (c) – Leading questions
 - a) FIVE TIMES WHEN LEADING QUESTIONS ARE PERMISSIBLE
 1. Child Witnesses, Language Difficulties, Mental capacity – (Must ask the Court for permission to lead)
 2. If question relates to background
 3. Change of Topic
 4. Laying a foundation
 5. Witness is an adverse party or hostile to the calling party or identified with the adverse party
 6. Cross examination

- II. Rule 612
 - Writing used to refresh memory
 - a) **While testifying** (other side is entitled to inspect it, cross – examine the witness on it, introduce into evidence the relevant portions relating to the W’s testimony
 1. 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 and excise any portion not so related
 - b) **Before testifying** – the other side gets it only if the court deems it necessary

- III. Rule 613
 - Prior Statements of witnesses
 - a) Examining a witness concerning a prior statement
 1. Written or oral
 - b) Extrinsic evidence not admissible unless the witness is not afforded an opportunity to explain or deny the inconsistent statement
 - a. The burden is not on the attacking party to provide the witness with the opportunity to explain
 - b. If you wait to impeach the W by contradicting, extrinsic evidence and then the W cannot find or called by to the stand for purposes of explaining or denying the inconsistent statement your impeachment evidence will be stricken
 - c. Omissive statements are the same as inconsistent if the facts would be ones the W would normally give
 1. *Hines*

→This rule does not apply to ADMISSIONS OF A PARTY OPPONENT 801(d)(2)

- Contrast with 801(d)(1)
 - This is an IMPEACHMENT rule and in contrast, with 801(d)(1) is NOT offered for the truth of the matter asserted.
 - 801(d)(1) - Must be made under oath subject to the penalties of perjury
 - 801(d)(1) - Can be used to impeach and get an expansive instruction that the jury can consider the statement for its truth as well as for the impeachment of the credibility of the witness

IV. Rule 615

- Exclusion of Witnesses
- Who cannot be excluded?
 - a) P/D → Natural person (D can if he is being unruly)
 - b) Case agent
 - c) Adverse party's experts are entitled to hear the testimony of the expert of the opposing side
- If court fails to exclude W → Five sanctions
 1. Held in contempt
 2. Mistrial – If you find out after W testified that he corroborated his testimony
 3. Disclosure to jury as to the events (other side must stipulate to it)
 4. W stricken/ testimony stricken from record
 5. Limiting instruction

Extrinsic Evidence Test – not a collateral issue: Can I prove it independently in my case in chief → if the answer is no then the issue is collateral and you cannot use extrinsic evidence to prove it

V. Rule 609

- Impeachment by evidence of a conviction of a crime
- CROSS – EXAMINATION rule
- Four things can be disclosed about the crime
 1. Name of crime
 2. When crime was committed
 3. Where crime occurred
 4. Sentence of Crime
 → Details of crime MAY not be disclosed
- False pretenses and perjury → AUTOMATICALLY admissible -> no 403 balancing test to keep it out

I. Rule 701

- Opinion Testimony by Lay Witnesses
- IF the witness is not testifying as an expert, the W's testimony in the form of opinions and inferences are limited to those which are
 - a) Rationally based on the perception of the W. – 602 Standard

- 1. Cannot formulate an opinion based on hearsay – No Speculation
- b) Helpful to a clear understanding of a fact in issue – 403 analysis
 - 1. Not subject to 704 ban on ultimate issue
- c) Not based on scientific, technical, or other specialized knowledge
- FRE more liberal than common law
- Objections to Lay Testimony
 - a) Not based on Common knowledge
 - b) Does not go to a fact in issue
 - c) W is giving expert testimony

II. Rule 702

- Testimony by Experts
- Gatekeeping
 - 1. Is he an expert (104 (a))
 - 2. Daubert test
 - a. Findings based on sufficient fact and data
 - b. Product of reliable principles
 - c. Relied on those principles in coming to conclusion
- Daubert → Extends to non – scientific testimony
 - 1. *Carmichael*
- Objections to Expert Testimony\
 - a) Previously qualified as an expert?
 - b) Qualifications?
 - c) Lack of Reliability/HELPFULNESS
 - 1. Legal conclusions are not helpful and thus excluded on that basis
 - 2. Lack of relevance
 - 3. No needed
 - 4. Speculation
 - 5. Questionable theories
 - 6. Too conjectural → Too many hypotheticals to make it reliable
 - 7. Too conclusory

III. Rule 703

- Bases of Opinion Testimony by Experts
- This rule assumes you have passed 702 and the Daubert test
- Three types
 - a) Those perceived by or made known to the expert at or before the hearing (treating physician)
 - b) Those reasonably relied upon by experts in a particular field in forming opinions or inference upon the subject (Expert comes to court observes testimony) (Usually asked a series of hypos –

NOTE: in these hypos the facts given must be facts admitted in evidence)

- c) Hired GUN → Reads a report and shows up → Presentation of data to the expert outside of court and other than by his own perceptions

IV. Rule 704

- Opinion on Ultimate issue
- (a) Opinion or inference not objectionable b.c it embraces an ultimate issue to be decided by the trier of fact.
- (b) Exceptions
 1. Defendant
 2. Criminal Case
 3. Mental state (if)
 - a. Element of the crime
 - b. Element of the defense
 4. Cannot testify as to causation
- Bases for objection under 704
 - a) Laywitness (not qualified)
 - b) Inadequately explored legal criteria (junk science)
 - c) Choosing up sides → Telling the jury how to rule
 - d) Not necessary → Jury can draw their own conclusions
 - e) Beyond Expertise
 - f) Accused Mental State