

EVIDENCE RULES

Article I – General Provisions

103 – Rulings on Evidence

(a) Effect of erroneous ruling

(1) Objection

- Form objections should be made at time of statement to allow for reformation.
- Objections generally need to be *timely* and *specific*.

(2) Offer of proof

- Forms of evidence: testimony, physical evidence, demonstrative evidence, stipulations, judicial notice.
- “If allowed to testify, W would say...”
- “Now that you’ve heard offer, it is admissible b/c...”

(b) Record of offer and ruling

(c) Hearing of jury

(d) Plain error

- How appellate court looks at error:
 - Constitutional basis – reversed unless harmless beyond reasonable doubt.
 - Evidentiary basis – reversed if likely to have contributed to verdict.
 - No objection made – plain error.

104 – Preliminary Questions

(a) Questions of admissibility generally

- Motion in limine to exclude evidence before trial. Need not repeat to preserve.

(b) Relevancy conditioned on fact

- Court admits evidence subject to sufficient support of fulfillment of condition.
- Admissibility subject to *motion to strike* if not met, and to authentication.

(c) Hearing of jury

(d) Testimony by accused

- Accused does not become subject to cross on other issues b/c he testifies on a preliminary matter.

(e) Weight and credibility

- Evidence admitted over objection can be challenged on cross as to weight and credibility.

105 – Limited Admissibility

- Court can order a limiting instruction upon request of counsel to tell jury how to consider evidence. (i.e. Using information for credibility and not for impeachment.)

106 – Remainder of or Related Writings or Recorded Statements (Completeness)

- “Completeness”
- Adverse party may introduce parts of any writing or recorded statement which in fairness should be considered contemporaneously.
- Otherwise inadmissible evidence cannot be introduced under guise of completeness.

Article IV – Relevancy and its Limits

401 – Definition of “Relevant Evidence”

- Evidence is *material* if it goes to a fact that is of consequence to determination of action.
- Relevant evidence makes an action *more or less probable* than without evidence.
- Fact of consequence goes toward charge, claim, defense, background, or credibility.

402 – Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

- Relevant evidence excluded: confession taken without counsel violating Constitution; bad search warrant forcing suppression of evidence.

403 – Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, Waste of Time

- Start with 401 and then use 403.
- Relevant evidence may be excluded if probative value is substantially outweighed by danger of unfair prejudice.
- Overruled for “arbitrary and capricious” errors only.

404 – Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

(a) Character evidence generally

- Evidence of a person’s character or trait of character is not admissible for purposes of proving action in conformity therewith, EXCEPT:

(1) Character of accused

- Only D can “open the door,” and only to *pertinent* character traits.
 - P can offer character trait of D after trait of victim’s character has been attacked.
 - Must be reputation or opinion; person in community where D lives would know about.
 - Must be within time witness has known D.
 - Must be same trait that door was opened to.
 - Can’t ask if opinion would change if facts in CURRENT case were true.
- 4 Pertinent Character Traits
 - Peace and good order – violent crimes
 - Truth and veracity – crimen falsi
 - Honesty – theft, civil fraud, drug crimes
 - Law abidingness – anything; opens door to everything
- D’s case in chief after P has rested.
- *Criminal* rule; civil only for sex cases/fraud. NEVER in fender-bender.

(2) Character of alleged victim

- Accused offers character trait of victim then P can rebut the same or offer witness to impeach D’s character. (Limited to self-defense b/c 412 deals with sex cases)
- P can offer trait of peacefulness of victim in *homicide* case to rebut allegation that victim was first aggressor.

(3) Character of witness

- Provided in Rules 607-609.

(b) Other crimes, wrongs, or acts

- Case in chief. Offered by P against D.
- Can't offer in another crime to infer that b/c someone did something before they will do it again.
- Other crime may be admissible to prove:
 - Motive – like purpose between crimes.
 - Opportunity / Capacity – to prove D's ability to execute crime.
 - Intent – as in case of 2nd murder to rebut self-defense claim.
 - Knowledge
 - Identity – distinctive facts link person to multiple crimes.
 - Absence of mistake – similar crime to rebut claim of mistake.
 - Consciousness of guilt – threats, bribery, flight.
 - Common scheme – need almost strict similarity, “signature.”
- Need only some evidence to support finding that D did other act (Huddleston). Other act can be prior or subsequent.
- To admit other crime – MNPR/PL
 - Materiality – prior crime goes to charge or defense.
 - Need – must have a need to use other crimes evidence.
 - Proof – extrinsic evidence showing D did commit other crime.
 - Relevance – makes evidence more likely than not
- Weighed with
 - Prejudice
 - Limiting instruction
- Reverse 404(b) – D brings in co-D's prior to make his own case, or to rebut charge of wrongdoing. (i.e. bringing in clients to rebut charge of fraud by another client.)

405 – Methods of Proving Character

(a) Reputation or opinion

- Prior conduct is addressed in terms of reputation or opinion. “Have you heard?” “Do you know?”
- Specific instances of conduct can be addressed on cross.

(b) Specific instances of conduct

- Where character is an *essential element of charge, claim, or defense*.
- 5 Crimes Where Character Is An Essential Element
 - Libel / slander – truth is absolute defense.
 - Custody of a child – fitness of parent shown by specific instances.
 - Negligent entrustment – to show drunkenness.
 - Extortion – fear of victim can be shown.
 - To rebut entrapment

406 – Habit (Personal); Routine Practice (Business)

- Relevant to prove conduct a person was in conformity with habit or routine practice.
- Habit is a regular response to a repeated situation; almost reflexive.
- Activity must be frequent and regular.
- Witness must have knowledge of habit before testifying to it.
- Objections to routine practice should be made on sufficiency grounds.
- Routine practice need not be corroborated – only goes to weight.
- 4 or 5 times is not habit.

407 – Subsequent Remedial Measures (Civil)

- Evidence of subsequent measures is NOT admissible to prove negligence.
 - May show ownership, control, feasibility of precautions, *if controverted*, or impeachment.
 - i.e. Making a repair after claiming lack of control over property.
 - “We did everything we could” – opens door to prove otherwise.
- Repairs, design changes, firing employees, changes in rules are barred from admissibility.
- Does not bar efforts taken by 3rd party, not a D.
- Effort merely restoring situation to status quo is admissible → restoration which still violates statute is “continuing negligence.”

408 – Compromise and Offers to Compromise

- Evidence of compromising, or attempting to do so, a claim that is *disputed as to validity or amount* is NOT admissible to prove liability.
 - Evidence showing bias, prejudice, or proving an effort to drop claim (paying victim to drop claim) may be admissible.
- Evidence not admissible under this rule may be otherwise discoverable later in trial.
- Both parties must be willing to compromise. “Two to tango.”
- When effort is to induce creditor to settle an admittedly due amount for a lesser sum, the rule does not come into play.
- Conduct or statements made in negotiations are NOT admissible.
- Admissions of fact are not excluded even if combined with offer to compromise.
 - Hypothetical admissions are excluded.

409 – Payment of Medical and Similar Expenses

- Offer or payment of medical expenses (NOT personal property) is not admissible to prove liability.
- Conduct or statements not a part of offering to pay expenses ARE admissible.
- Where one part of statement admits guilt and other part is an offer to pay claims, may bifurcate and admit admission of guilt.

410 – Inadmissibility of Pleas, Plea Discussions, and Related Statements (< Criminal)

- Invoked only by D.
- NOT admissible against D: plea of guilty withdrawn, nolo contendere, statements not resulting in guilty plea.
- Ends after plea agreement is reached. Statements made after agreement ARE admissible.
- 3rd parties may be agents for prosecuting attorney only where they are vested with “real and apparent” authority to negotiate pleas.
- Plea IS admissible where in fairness it should be considered OR in a criminal proceeding for *perjury* or *false statement* if statement was made by the defendant under oath.

411 – Liability Insurance

- Evidence of insurance is inadmissible to show whether a person acted negligently or wrongfully.
- NOT excluded where offered to show agency, ownership, or control.
- Where D has no insurance, jury shouldn’t be questioned on insurance – avoids bias.

412 – Sex Offense Cases; Relevance of Victim’s Past Sexual Behavior / Predisposition

- Aims to safeguard victims against invasion of privacy, embarrassment, and stereotyping.
- Person against whom offered must be a “victim of alleged sexual misconduct.”
 - Rule doesn’t apply in defamation suit, but will apply for sex harassment.

(a) Evidence generally inadmissible

- Evidence offered to show victim engaged in other (outside of charged offense) sexual behavior is inadmissible.
 - Evidence intrinsic to *night in question* is admissible.
- Evidence to prove a victim’s sexual predisposition, reputation, or opinion for chastity is inadmissible.
 - Evidence concerning dress, speech, or lifestyle is inadmissible as it goes to predisposition, BUT such evidence on *night in question* is admissible.
- Mistake of fact is NOT a good defense to 412.

(b) Exceptions

(1) Criminal – Physical evidence; Consent; Violation of constitutional rights

- Specific instances of sex behavior by victim to prove one other than accused is source of semen is *admissible*.
- Specific instances of sex behavior by victim with respect to accused, offered by accused to prove consent, is *admissible*.
 - Victim’s sexual history is admissible to prove consent only where sex was with D.
 - Consent is decided immediately prior to intercourse.
- Evidence whose exclusion would violate D’s constitutional rights:
 - Victim’s expressing interest to have sex with 1st person they see.
 - Victim’s claiming she’s a lesbian, but where D can offer up sex with a man.
 - D has a right to an effective defense.
 - Still subject to 403 exclusion.

(2) Civil

- Admissible if otherwise so and probative value *substantially* outweighs danger of harm to victim.
- Reputation is only admissible if victim opens door.
- Presumption of *exclusion*:
 - Proponent must demonstrate admissibility.
 - Probative value must *substantially* outweigh prejudice.
 - “Harm to victim” is weighed in addition to prejudice.

413 – Evidence of Similar Crimes in Sexual Assault Cases (Criminal)

- (Criminal) D’s commission of another offense of sex assault is automatically relevant.
 - Need not be a conviction, but witness must come in and be subject to cross.
- Government must disclose evidence to D at least 15 days prior to trial.
- Still subject to 403.
 - End run around 404(b) b/c allows admission of prior crimes where sex crimes involved.
- High similarity between crimes makes other wrong more likely admissible.

414 – Evidence of Similar Crimes in Child Molestation Cases (Criminal)

- (Criminal) D’s commission of another offense of child molestation is automatically relevant.
- Child is a person below 14.

415 – Evidence of Similar Acts in Civil Cases Concerning Sexual Assault/Child Molestation

- (Civil) Evidence is admissible as provided in 413 / 414.
- More broad than above rules.

Article V – Privileges

501 – General Rule

▪ Husband / Wife

1. (Criminal) Anti-Marital Fact Privilege / Trammel

- Right to testify is up to spouse not on trial.
 - Spouse can testify to matters observed, NOT to marital communications.
- Only spouse can raise privilege, and can be invoked at any proceeding.
- Applies to ALL communication between spouses.
- Events preceding marriage may still be claimed as privileged.
- Terminated by divorce.
- Can't be forced to give adverse testimony.

2. (Civil and Criminal) Confidential Marriage Communications

- Can be asserted by any party to bar testimony of spouse willing to testify as to communication.
- Applies only to communications made during marriage, and in confidence.
- 3 Conditions:
 - Marriage must be valid at time of communication.
 - Privilege must be asserted with regard to utterances or speech, not what a person sees.
- EXCEPTION:
 - Government may compel testimony involving future or ongoing crimes between spouses, or injuries by one spouse to another or their children.

▪ Attorney / Client

- An attorney is any person authorized or reasonably believed by client to be authorized (mental state) to practice law.
- Representatives of lawyer are those persons paid by lawyer to assist in legal services – clerk, paralegal, accountant, and psychiatrist.
- Communication is privileged if not intended to be disclosed to 3rd parties other than those who are representatives of lawyer.
 - Oral or written communication.
- Documents created before client relationships are not privileged.
- Must be invoked by client.
- EXCEPTION:
 - Client asking for help in furtherance of crime.
 - Breach of duty by lawyer to client / ineffective assistance of counsel.
 - Statements made by client to lawyer regarding conduct are waived.
 - Attorney acting as a friend or business associate is not covered.
 - Knowledge is not protected, only communication.
- Eavesdropping – information overheard but meant to be confidential is not admissible.
- 612 waives attorney / client privilege b/c allows other side to see document.

Article VI – Witnesses

601 – General Rule of Competency

- Person really needs to be babbling to be incompetent.
- Witness under the influence of drugs or alcohol, or mentally ill.
 - Must show this at time witness testifies or at time of event of testimony.

602 – Lack of Personal Knowledge

- Foundation for testifying; standard is “sufficient to support a finding.”
- Witness can testify to what he saw, felt, touched, or smelled.
- Witness has NO personal knowledge when testifying to something he read in a report written by another.

603 – Oath or Affirmation

- Witness must take oath or affirmation before testifying.

604 – Interpreters

- Must be qualified as an expert and take separate oath. Must understand oath.

605 – Competency of Judge as Witness

- Cannot testify at trial at which he is presiding.
- Judge cannot view scene of accident and then preside over case, but can be a witness at a subsequent case testifying to what happened in the prior case.

606 – Competency of Juror as Witness

(a) At the trial

- Cannot testify at trial at which he is a juror.

(b) Inquiry into validity of verdict or indictment

- Juror cannot testify to any matter or statement occurring during jury deliberation, or to the effect of anything upon jurors’ minds regarding verdict.
- Juror cannot give affidavit or evidence on anything to which he couldn’t testify.
- Juror may testify only about improper information put before jury.
- Extrinsic evidence of things going on during deliberation are barred.
- BAD:
 - Consulting books or newspapers; conducting experiments; reviewing documents not admitted into evidence; discussing prior conviction that juror knew of but not admitted into evidence.

607 – Who May Impeach

- Any party may impeach a witness, including calling party.
- “Take out the sting” – impeaching own witness to lessen impact of other side’s doing it.
- CANNOT bring out inadmissible hearsay to take out sting. Morlang.
 - i.e. Witness can’t testify to his out of court statement under guise of rule.
- Impeachment: untruthful character – 608; bias – 611(b); prior inconsistent statements – 801(d)(1)(A) (substantive), 613(b)(non-substantive); defects of capacity; contradiction.

608 – Evidence of Character and Conduct of Witness

(a) Opinion and reputation evidence of character

- Credibility of witness can be attacked in form of *reputation* or *opinion*, subject to:
 - Evidence may only refer to *truthfulness* or *untruthfulness*.
 - Witness can't testify to D's violent nature.
 - Evidence of *truthfulness* is admissible only after it has been attacked.

(b) Specific instances of conduct (Cross only)

- Specific instances of witness' conduct to attack or support credibility, but NOT relating to conviction of crime, are admissible but NOT by *extrinsic evidence*.
- Must go to witness' truthfulness or to that of another witness as to which the character the witness being crossed has testified.
- Rule aims to show that character witness is not credible because he has not heard things that a credible reputation witness would have heard.
- Form of question on cross must be an action verb.
 - Did you cheat on your taxes? Did you commingle funds?
- Witness still retains privilege against self-incrimination.

609 – Impeachment by Evidence of Conviction of Crime (Cross-Examination)

- Prior conviction of witness is generally admissible, but only for crime, date, place, and sentence. NO details.
- Witness must testify to apply this rule.

(a) General rule

(1) Conviction of crime greater than 1yr

- Conviction of a crime with sentence greater than one year is admissible.
- Evidence that *accused* was convicted of such a crime is admissible if probative value outweighs prejudicial effect.
 - More similar the prior crime, the higher the prejudice. i.e. Sodomy.

(2) Crimen falsi

- Evidence that witness was convicted of crime involving dishonesty or false statement is always admissible.
- Perjury, false report, forgery, changing tags on goods in order to steal.

(b) Time limit

- Within 10 years from date of conviction or release from prison, which ever is later, is admissible.

(c) Effect of pardon, annulment, or certificate of rehabilitation

(d) Juvenile adjudications

(e) Pendency of an appeal

610 – Religious Beliefs of Opinions

- Evidence of religious beliefs is inadmissible EXCEPT to show bias or interest.

611 – Mode and Order of Interrogation and Presentation

(a) Control by court

(b) Scope of cross-examination

- Can ask anything asked on direct or 5 basis of impeachment.
 - Untruthful character – 608; bias – 611(b); prior inconsistent statements – 801(d)(1)(A) (inconsistent statement under oath – substantive), 613(b)(statement not under oath – non-substantive); defects of capacity; contradiction.
- Must do non-leading examination on new subject matter even though witness is still on cross.
- Use for impeachment where other rules don't work – beyond scope of direct; bias.

(c) Leading questions

- Cannot ask leading questions on direct EXCEPT:
 - Child witness unable to communicate effectively.
 - Hostile or adverse party.
 - Questions on background or preliminary matters.
 - Transition questions.
 - Laying foundation for authentication.

612 – Writing Used to Refresh Memory

- Party can present witness with any material to refresh his memory.
- Adverse party entitled to have writing produced, to inspect it, to use it on cross, and to introduce into evidence relevant portions.
- 612 – Past recollection revived; 803(5) – Past recollection recorded.

613 – Prior Statements of Witnesses

(a) Examining witness concerning prior statement (before this hearing)

- Can confront witness with prior inconsistent statement without putting it before him.
- Inconsistent statements must have been made by witness, not his agent or characterizations of a statement.
- Prior inconsistent silence may be admissible where it would be natural for a party to respond.

(b) Extrinsic evidence of prior inconsistent statement of witness

- Used for impeachment where party was not under oath.
- Extrinsic evidence of prior inconsistent statement not admissible unless witness given opportunity to explain or deny. (Subject to limiting instruction for use for impeachment)
 - Witness admitting statement, where statement is signed, is admissible into evidence.
 - Impeachment cannot be on collateral matters.
- Extrinsic evidence may need to be authenticated / best evidence before testimony.
- Used to impeach W after P's case in chief.

- Investigator can present extrinsic evidence of witness' statement included in a report. Overcomes hearsay objection.
- P can rehabilitate with 801(d)(1)(B) subject to Tome.
- Impeachment may be done in some cases under 803(5), 607, and 613(b).

614 – Calling and Interrogation of Witnesses by Court

(a) Calling by court

- Court may, at suggestion of parties or on its own, call witnesses.
- Parties are entitled to cross.
 - May use in lieu of 607 b/c it allows cross all the way.

(b) Interrogation by court

- Court may interrogate witnesses, but it has to be balanced and bring out points on both sides.

(c) Objections

- Objections to court's calling witnesses must be done immediately b/c you can't "unring the bell."

615 – Exclusion of Witnesses

- Court can exclude parties to prevent influencing them, EXCEPT:
 - Party who is a natural party.
 - Officer or employee of party who is not a natural party, designated as his representative by his attorney.
 - Person whose presence is shown by a party to be essential to presentation of case. (Expert witness)
- Sanctions:
 - Contempt.
 - Strike testimony of offending witness.
 - Mistrial.
 - Full closing argument to jury (Party's attorney stipulates to violation).
 - Limiting instruction disclosing nature of violation.
 - If violation is unintentional, striking testimony is too harsh.

Article VII – Opinion and Expert Testimony

701 – Opinion Testimony by Lay Witnesses

- Witness testimony in the form of opinions or inferences is limited to those that are:
 1. Based on personal knowledge (602); logical inference.
 2. Helpful to clear understanding of “facts in issue” or testimony. AND
 3. Not based on scientific or specialized knowledge within scope of 702.
 - Can’t evade requirements of 702 by using this rule.
- Lay witness testimony is useful when giving a “conclusion of facts observed” – staggering, voice slurred, pink eye...
 - Then witness can be asked if he has formed an opinion about that person.

702 – Testimony by Experts

- Trial court must make a number of preliminary determinations, 104(a), for expert.
- Witness qualified as an expert may testify in form of opinion or otherwise to technical / scientific / specialized knowledge if:
 1. Testimony is based on sufficient facts or data.
 2. Testimony is product of reliable principles and methods.
 3. Witness has applied the principles and methods reliably.
- Expert witnesses need not have personal knowledge of events on which they testify.
- A witness who knows no more than the average person is not an expert.
- No witness may testify to *legal conclusions*.
- Daubert Test for Reliability of Scientific Expert Testimony (Don’t Need All)
 - Whether expert’s technique or theory has been tested.
 - Whether technique or theory has been subject to peer review and publication.
 - Known rate of error in applying theory.
 - Existence and maintenance of standards and controls.
 - Whether technique is generally accepted in scientific community.
- Scientific evidence should generally be if it will *assist the trier of fact*, even if shaky, b/c it is subject to cross.
- Abuse of discretion is standard on appeal.

703 – Bases of Opinion Testimony by Experts (Form of testimony)

- Expert can acquire data / facts:
 - Firsthand observation / personal knowledge (602).
 - Presentation at trial / made known to expert at trial.
 - Presentation of data outside of court and other than by his own perception.
- All data must have been “reasonably” relied upon.
- Evidence in hypotesis asked to expert must have been present at trial.
- Data on which expert bases his opinion may be disclosed to jury only if probative value *substantially outweighs its prejudicial effect*.
- (Criminal) On 3rd way to acquire data, D has confrontation / 6th Amendment issue b/c no cross.

704 – Opinion on Ultimate Issue

- (a) (Civil) Testimony in form of opinion or inference, if otherwise admissible, is not objectionable because it embraces and ultimate issue for tier of fact.
- Cannot, however, tell jury what result to reach.
- Answers which respond in legal terms are generally inadmissible where they suggest a legal conclusion.
- Bases for objection:
 - Lay witness not qualified to give expert opinion.
 - Inadequately explored legal criteria – junk science.
 - Choosing up sides – telling jury what verdict to reach.
 - Opinion testimony not necessary.
 - Opinion beyond witness' expertise
- (b) Expert testifying on mental state or condition of *defendant* may NOT give an opinion or inference as to whether defendant did or did not have the required mental state of the crime charged, or defense thereto.
 - May explain disease and its typical effect on a person who suffers from disease.
- Subject to a limiting instruction, 105.

705 – Disclosure of Facts or Data Underlying Expert Opinion

- May ask witness the basis for his opinion.

Article VIII – Hearsay

801 – Definitions

(a) Statement

(b) Declarant

(c) Hearsay

(d) Statements which are not hearsay

(1) Prior statements by a witness

- Declarant must be present and subject to cross for 801(d)(1).

(A) Inconsistent statements

- Prior inconsistent statements must have been *made under oath*.
- Must have been at another proceeding with indicia of reliability – police interrogation is no good; statements too investigators no good.
- Invoked on cross.
- “Inconsistency” need not be diametrically opposed.
- Lack of memory, feigned or genuine, is inconsistent.
- Cannot call witness to elicit prior inconsistent statements for impeachment, where statements are otherwise inadmissible.

(B) Consistent statements (Rehabilitation rule)

- Consistent statement must have been made before motive to fabricate, source of bias, influence, or incapacity originated. Tome.
- Can only rehabilitate after an attack has been made. Only to *rebut*.
- Can’t use with family members testifying to consistent statement.
- Made to police, probably inadmissible b/c made to curry favor.
- Will come in where at time of statement there was no motive to fabricate, even if subsequently fell in love with declarant.

(C) Identification

- Statement made for purpose of identification after perceiving person is admissible.
- Lineups are good use of rule. D can use this to show misidentification at a lineup.
- Must be identification of a person, NOT an object.
- Objection on due process for suggestive circumstances surrounding ID.
- P can call person to whom ID is made as long as witness is there. “Opportunity” to cross is still available.

(2) Admissions by party-opponent (Relevant statements by party opponent)

- Statement offered *against* a party AND is:

(A) Party’s own statement

- Party’s own statement in an individual or representative capacity.
- Can’t offer your own out of court statements – self-serving.
- Personal knowledge not required.
- With multiple defendants, error to use one party’s admission, although inadmissible to other defendants, which incriminate other defendants. Must redact.

(B) Statement party has adopted

- Uses contextual non-hearsay to explain surrounding circumstances.
 - High 5 (tow truck murder), head nod, smile, etc.
- Judge uses 104(b) – conditionally relevant – to make a preliminary finding if statement was adopted. Determination is by preponderance of evidence.
- Signing a statement is an adoption.
- Silence – Would a reasonably competent person under the circumstances naturally respond with a denial?
 - Party must have heard statement and not been impeded in denying.
 - Must show D was present, had opportunity to deny, and failure to deny was unreasonable.
- Party who remains silent / claims privilege with police is not making an admission – protects 5th Amendment rights.
 - But, silence *before* custody may be used against D.

(C) Statement by person authorized by party

- *Authorized* to make statement and concerning subject matter for which he is authorized to speak.
- Statements made by lawyers can come back to haunt clients.
 - Opening statement in one trial can be used subsequently.
 - But, 408 (compromise negotiations) may preclude use of attorney statements.
- Press secretary, CEO, accountant would be authorized individuals.

(D) Statement by party agent concerning employment

- Statement made by a party's agent or servant 1) concerning a matter within scope of employment AND 2) made during existence of relationship.
- Statements by government attorney in one trial may be admissible against them in subsequent trial. Salerno.
- Need NOT be authorized to speak.
- Statements made after party has been terminated are inadmissible.
- Statements by independent contractors or expert witnesses are probably not statements by a party's agent.
- Statements need to be adopted to be used against party. An accident report is not an adoption if party merely reported facts.

(E) Co-conspirator Statements

- Foundation
 1. Existence of a conspiracy.
 2. D is a member of conspiracy.
 3. Declarant is a member of conspiracy.
 4. Statement is made *in furtherance* of conspiracy.
 - Idle chit-chat or boasting not in furtherance.
 5. Statement is made during course of conspiracy.
 - Statements made after arrest of co-conspirator are inadmissible; during concealment, perhaps.

- Joining an ongoing conspiracy will allow prior statements to be used against joining party.
- Forward looking statements are admissible.
- Statements will be allowed in conditionally (104(b)) subject to proving foundation. D should move to strike.

803 – Hearsay Exceptions; Availability of Declarant Immaterial

(1) Present sense impression

- Made while declarant was perceiving event, or immediately thereafter.
 - 10 or fewer minutes.
- Statement is limited to a *description* or *explanation*; statements of *opinion* DO NOT qualify.
- Declarant must have had personal knowledge of event.

(2) Excited utterance

- Statement relating to a startling event made while declarant was under stress of excitement.
- Responses to questions will generally be excluded, unless they trigger an excited response.
- Backward looking statements break chain of excitement – inadmissible.
- Rekindling event – triggers an excited utterance.
- Contents of statement, with declarant’s behavior, may be relied upon to establish occurrence of events.

(3) Then existing mental, emotional, or physical condition

- Present or future tense – state of mind, emotion, or physical condition.
- Statements of memory or belief to prove fact remembered (backward looking) are NOT admissible. (Present sense impression might get around this.)
 - EXCEPT statements relating to execution or revocation of will.
- Statements of existing body pain are admissible.
- Person’s declaration to prove mental state *at that time* is admissible, and not incompetent b/c it proves other matter. May bifurcate.
 - Recalling *previous* mental state is NOT admissible.
- Hillmon Doctrine:
 - Statement that one party intends to do something can be used to prove another party’s action as long as there is corroborating evidence.
- Proving V’s fear of D is inadmissible to prove identity.
 - Out of court statements of fear of D are admissible only when V’s conduct in conformity with fear is undisputed.

(4) Statements for purposes of medical diagnosis or treatment

- Requirements:
 - Made for purposes of medical diagnosis or treatment.
 - Describe or relate medical history or past or present symptoms, or general character of cause of symptoms.
 - Reasonably pertinent to diagnosis. (Even if *past* condition used.)
- Statements as to fault do not ordinarily qualify.
 - EXCEPT – sex abuse cases where attacker is parent or relative.

- Statement need not be made to a physician – attendant, ambulance driver, significant other, etc.

(5) Recorded recollection / “Double Stone”

- Witness once had knowledge, now has insufficient recollection to testify, and *made or adopted* by witness when matter was fresh in his memory and reflects that knowledge correctly.
- May be read into evidence, but not received as an exhibit unless offered by adverse party.
- Use where 612 fails to refresh recollection.

(6) Records or regularly conducted activity

- Foundation:
 - Record made in course of regularly conducted business activity.
 - Routine record; regular practice of business to make record.
 - Record made at or near time of event it records – *3 months*.
 - Record made or transmitted by person with knowledge.
- Does NOT include records made in anticipation of litigation. (Pre-printed injury forms / incident reports)

(7) Absence of entry in records kept in accordance with (6)

- Foundation of (6) + custodian testifying to absence of record upon search.

(8) Public records and reports

(a) Activities of office or agency

- Weather report, notice of service.

(b) Matters observed pursuant to duty at a public agency

- Non-controversial findings of fact. Non-investigative findings.

(c) Investigative findings.

- Civil actions and proceedings and against government in criminal cases.
- Conclusory findings are admissible subject to trustworthiness, but NOT where author is available and subject to cross – confrontation issues.
- Can only come in criminally if *against* government, on behalf of D.
- No legal conclusions.

(9) Records of vital statistics

- Authenticated if presented as 902 – certified copy of document under seal.
- Birth certificates, death certificates, marriage certificates.

(10) Absence of public record or entry

- Use primarily to show non-payment of taxes.
- Misspellings make searches invalid.

(11) Records of religious organizations

(12) Marriage, baptismal, and similar certificates

(13) Family records

(18) Learned treatises

- Established by *testimony* of an expert witness.
- May be read into evidence, but not received as an exhibit.

(21) Reputation as to character

- Reputation of character among associates in the community.

(22) Judgment of previous conviction

- Where penalty for crime is death or prison for over one year.
- (Civil) Can introduce in a civil case the docket entries and finding of guilt in a criminal case b/c have already proven essential element of tort.
- (Criminal) Can't use conviction of co-conspirator/defendant against D.

804 – Hearsay Exceptions; Declarant Unavailable

(a) Definition of unavailability

- Privilege – 5th, attorney / client, husband / wife
- Refusal
- Witness *testifies* to lack of memory
- Declarant is dead or physical or mental illness prevents testimony
- Declarant is absent from hearing and proponent can't procure attendance
- Witness is NOT unavailable if wrongdoing by proponent prevents attendance

(b) Hearsay exceptions

- Must show unavailability first.

(1) Former testimony

- Admissible if witness is unavailable and party against whom testimony is offered, or predecessor in interest, had opportunity and similar motive to develop testimony.
- Criminal: Mutuality of parties
 - D v. Gov't.
 - GJ – yes
 - Trial – yes
 - Gov't v. D
 - GJ – no (no prior opportunity to develop testimony)
 - Trial – yes
- Civil: Predecessor in interest
 - Can use 804(b)(1) if predecessor in interest had opportunity to develop testimony of unavailable witness.

(2) Statement under belief of impending death

- In a prosecution for *homicide* or in a civil suit, a statement by declarant while believing death to be imminent, concerning *cause or circumstances* of what declarant believed to be impending death.
- Can infer from state of illness that person was aware of danger of death.
- Person need not die, just believe they are dying.

(3) Statement against interest

- NOT firmly rooted.
- Statement which at time of making was contrary to declarant's interests, or would subject declarant to criminal or civil liability, or to render a claim by him against another invalid, that a *reasonable person in declarant's position would not have made statement unless believing it to be true.*
- Statements made to law enforcement implicating another will not come in b/c they curry favor.

- Statements to friend implicating another will come in.
- Statement exposing declarant to *criminal* liability and offered to exculpate accused is NOT admissible without corroborating circumstances indicating trustworthiness (at time statement is made).
 - Absence of close relationship makes fabrication less likely.
 - Whether statement made voluntarily after *Miranda*.
 - Where there is evidence statement made to curry favor.

(6) Forfeiture by wrongdoing

- Statement offered against a party that has engaged in wrongdoing intending to procure unavailability of declarant is admissible.
- Applies to all statements by absent witness, subject to 403.

805 – Hearsay Within Hearsay

- Hearsay included within hearsay is not excluded if each part of combined statement conforms with an exception to hearsay rule. (Report – 803(8)(a) form, 803(8)(b) observation)
 - But, business record with statement by outside declarant is double hearsay.

806 – Attacking and Supporting Credibility of Declarant (Impeachment Rule)

- When a hearsay statement or one under 801(d)(2)(C) – (E) is admitted into evidence, credibility of *declarant*, not witness reporting statement, may be attacked by any evidence as if he were on stand.
- Party against whom hearsay is offered can impeach credibility of declarant with any information admissible if declarant had testified, subject to 403.
 - Declarant’s statement must have been offered for truth of matter asserted.
- Can offer statements inconsistent with declarant’s statement, made at any time; must have logical connection to hearsay statement admitted.
- If declarant on stand, can be dealt with as if on cross.
- Potential confrontation issues when admitting unavailable declarant’s statements.

807 – Residual Exception

- Statement not covered by 803/804 but having circumstantial guarantees of trustworthiness (at time statement is made) is not excluded if:
 - Offered as evidence of material fact.
 - More probative for point offered than any other evidence. AND
 - Interest of justice served by admission.
- In sex abuse cases trustworthiness: spontaneity, consistent repetition, lack of motive to fabricate, unexpected terminology by child of that age.
- Grand jury testimony of unavailable witness is where residual exception is commonly used.
- Potential confrontation objection.

Article IX – Authentication and Identification

901 – Requirement of Authentication or identification

- (a) General provision**
- (b) Illustrations**
 - (1) Testimony of witness with knowledge**
 - (2) Non-expert opinion on handwriting**
 - (3) Comparison by trier or expert witness**
 - (4) Distinctive characteristics and the like**
 - (5) Voice identification**
 - (6) Telephone conversations**

902 – Self-Authentication (Extrinsic evidence of authentication not required)

- (1) Domestic public documents under seal**
- (2) Domestic public documents not under seal**
- (3) Foreign public documents**
- (4) Certified copies of public records**
- (5) Official publications (Issued by public authority)**
- (6) Newspapers and periodicals**
- (7) Trade inscriptions and the like**
- (8) Acknowledged documents**
- (9) Commercial paper and related documents**
- (10) Presumptions under Acts of Congress**
- (11) Certified domestic records of regularly conducted activity**
- (12) Certified foreign records of regularly conducted activity**

Article X – Contents of Writings, Recordings, and Photographs

1001 – Definitions

- (1) Writings and recordings**
 - NOT to oral statements.
- (2) Photographs**
- (3) Original**
- (4) Duplicate**

1002 – Requirement of Original

- For charge or claim.

1003 – Admissibility of Duplicates

1004 – Admissibility of Other Evidence of Contents

- (1) Originals lost or destroyed**
- (2) Original not obtainable**
 - Not obtainable by judicial process. Civil – 100miles; Criminal - nationwide
- (3) Original in possession of opponent**
- (4) Collateral matters**

1006 – Summaries

- If underlying document is admissible, turn over to other side for review, can summarize.

1008 – Functions of Court and Jury

- Court cannot rule out inadmissibility based on his view of content.
- If conditions met is for court.
- Fact questions on evidence are for jury.

Article XI – Miscellaneous Rules

1101 – Applicability of Rules

- (a) Courts and judges**
- (b) Proceedings generally**
- (c) Rule of privilege**
- (d) Rules inapplicable**
 - (1) Preliminary questions of fact (104(a))**
 - (2) Grand jury**
 - (3) Miscellaneous proceedings**