Evidence

OVERVIEW

I. Evidence is used as a mechanism for proving the facts
   a. The point of a trial is to prove the facts
   b. Evidence makes the fact more or less likely than without the evidence.
II. Motion in limine—motion on the eve of trial used to admit or restrict admission of evidence
   a. Reasons to bring motion before trial:
      i. Make arguments in writing and give judge time to think.
      ii. Jury does not hear something they do not have right to hear (and mentioning it at trial = contempt or grounds for mistrial)
      iii. Whether admitted could change your approach at trial
III. Stipulations: facts agreed on by both parties.
IV. Then: Jury selection, opening statements, presentation of evidence, closing arguments, jury instructions.

RELEVANCE

I. PROBATIVENESS AND MATERIALITY (FRE 401 AND 402)

RULE 401: Evidence is relevant if:

(a) it has a tendency to make a fact more or less probable than it would be without the evidence; and (logical relevancy)

(b) the fact is of consequence in determining the action. (materiality)

- Liberal thrust

RULE 402: All relevant evidence is admissible unless excluded by a specific rule, law, or constitutional provision. – Default. Irrelevant is inadmissible.

   a. Probativeness
      i. Does the evidence have any tendency to make the fact more or less probable than the fact would be without the evidence?
         1. If you have upped the level of certainty at all, then that is enough.
      ii. Easy standard to meet—"any tendency"
      iii. If a fact is undisputed, evidence of it is not probative.
      iv. Examples:
         1. Problem 1.1: As police arrest husband for murder, wife is shouting "show me the body!" Not a normal response. Probably prompted by the fact that her husband killed someone, hid the body, and told her. More probable than without evidence that he is guilty of murder.
   b. Materiality
      i. Does the fact matter to the case?
      ii. Fact that the party is trying to prove with evidence is of consequence to the case
         1. Have to know what the law is to satisfy the materiality standard—elements of the crime/case determine what is material.

iii. At trial, opposing lawyer may object simply that the evidence is *irrelevant*—whether the objection is based on materialness or probative value.

- You need to know the fact you're trying to determine in order to determine whether evidence is probative

- For materiality - connects the fact to the action
  - You need to know two things: the fact you're trying to prove and the substantive law (in the governing jurisdiction)

c. Examples for Rule 401:

i. Problem 1.2: Prosecutor attempting to impeach he testimony of Defense's star witness. Attempting to show improper motivation of the witness due to his member in a gang that requires members take a vow to lie and kill.

1. Probative? The fact that Mills is part of the gang that has a creed to lie means it is likely that he may be lying in his testimony that Ehle's (other witness) is falsely implicating the D. Prosecutor is restoring credibility to Ehle's testimony by impeaching Mills, who said that Ehle's was a liar.

ii. Problem 1.3: Polygraph results are excluded, but Defense calls polygraph examiner to testify about the D's demeanor about the test. D said "hook me up doc" and really wanted to take the test. P may argue that the D knew the results would not be admitted for reliability and D took it willingly knowing that. But D would not offer the test as evidence if it was not good results.

1. Probative? YES! Even if his excitement to take the test is the result that the test will never be admitted, the evidence still has some small *tendency* to push toward the fact that the D may be innocent.

iii. Problem 1.4: D Charged with violation of statute which says "unlawful for any person who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition." D carrying loaded handgun over WI-IL border. D convicted for assault and battery in MA, which carried punishment of up to 2.5 years in prison. D said she did not know assault and battery punishable up to 2 years.

1. **ANSWER:** Statute does NOT require proof of knowledge to convict her. Therefore, knowledge has no bearing on this case. Is NOT material and therefore NOT relevant

iv. Probative v. Material: Testimony from any employer about a murder victim's salary is *probative* of earning potential, but NOT *material* to the D's guilt or inncocence.

v. Problem 1.5: D present evidence of his BAC to prove that he did not knowingly or purposefully kill the victims. BUT Montana law does not allow voluntary intoxication to be considered in determining the existence of a mental state.

1. Material? NO! The fact that D is trying to prove (voluntary intoxication) is NOT material to proving state of mind in a murder case in Montana.

vi. ***United States v. James*:** D charged with murder, but claims self-defense, where the victim had told her about his past violent acts.

1. Self-Defense: Reasonable fear of imminent death or serious bodily harm. D is trying to make the case that she had reason to fear the victim.
   a. To Support her credibility, D sought to admit evidence of police reports of the victims past violent acts.
2. Probative? YES! Existence of the documents corroborating her statements makes her self-defense claim more probable.
3. Material? YES! Because her self-defense claim is of consequence to her being charged with murder.
4. BUT evidence may be inadmissible based on Rule 403 prejudice.

vii. Problem 1.6: Police officer shot a man carrying a violin case in a back alley claiming that he thought it was a gun when he raised it. Case was filled with money.
   1. Absence of a gun and the presence of money makes it less likely that victim raised it and aimed the case at the officer. Why would V aim a violin case full of money at the officer if it did not have a gun in it?
   2. Inference from the fact that the case was full of money instead of a gun points plausibly in the direction that the cop is lying. Officer may be lying to manufacture a basis for his fear in his self-defense claim.

II. BALANCING PROBATIVE VALUE AGAINST DANGER OF UNFAIR PREJUDICE (FRE 403)

RULE 403: The court **may exclude** the relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

NOTE : EVIDENCE HAS ALREADY PASSED 401 AND 402!

a. If the evidence will lead the jury to resolve factual issues in a way that is improper or based on an improper basis (generally emotion due to gruesome photos, or sympathy for D or victim).
   i. Anything that enflames is a contender for Rule 403.
   ii. Look for evidence with very little probative value (none if facts are undisputed).
b. **Unfair Prejudice:** Undue tendency to suggest decision on an improper basis, commonly, though not necessarily, through emotion.
c. **Committee Notes:** When considering whether to exclude evidence based on Rule 403, a judge should give consideration to the probable effectiveness or lack of effectiveness of a limiting instruction to the jury.
   i. The availability of other means of proof may also be an appropriate factor. – must assess all alternatives. If it's the only piece of evidence, likely to be higher.
d. **REMEMBER:** Needs to *substantially* outweigh the probative value.
   i. 50-50 probative and dangerous? NO! Cannot exclude evidence because does not substantially outweigh the probative value. Does not outweigh at all.
   ii. 45 probative and 55 dangerous? NO! Should not exclude evidence because 45-55 does not substantially outweigh.
   iii. **IMPORTANT:** NO judicial discretion *until* the danger substantially outweighs the probative value. Once the danger substantially outweighs the probative value, then the judge has the discretion. But if it does not substantially outweigh the probative value, **then it must come in.**
      1. 10 probative and 100 danger? Judge has discretion to exclude, but risks the possibility of abuse of discretion.
      2. 10 probative and 1000 danger? Judge has discretion to exclude, and will most likely abuse his discretion if he allows it.
e. **RULE:** If alternative evidence (e.g. general stipulation over detailed conviction record) has roughly the same probative value, but a lower danger of unfair prejudice, the court should insist the alternative evidence be used.
   i. **NOTE:** The more alternatives available, the less probative it becomes, and that a stipulation usually does not make a difference because the prosecutor has the choice of which evidence to offer in his case. BUT often times evidence that is offered for a legitimate purpose can also be probative of another *illegitimate* purpose.
   ii. ***Old Chief v. United States*:** Old Chief previously convicted of a similar violent crime that is listed on his conviction record. Prosecution offers the list of convictions as proof that

Old Chief is a convicted felon. Old Chief offered to stipulate that he is a felon that committed a crime punishable by more than one year. But Prosecutor wants to give full evidence (because more damaging).

1. **A criminal D may NOT stipulate or admit his way out of the full evidentiary force of the government's case.**
2. **HELD:** Offering entire list of prior convictions has very little probative value for the present charges AND is unfairly prejudicial to the jury deciding the current charges.
3. **Story of how he achieved his legal status is irrelevant**

f. Examples for Rule 403:

- **i.** ***State v. Bocharski*:** D stipulated that there was a murder, victim was stabbed a number of time, but still claimed he was innocent. P wants to admit pictures to evidence. P gets to choose the evidence, even if D wants to stipulate. Pictures are gruesome depicting the inside of the victims skull and how deep the knife went in is displayed using a metal rod.
  1. **RULE:** On Appeal, Rule 403 challenges are reviewed for an abuse of discretion by the trial judge.
  2. Court said judge's decision to allow 2/6 pictures as an abuse of discretion because the P never mentioned them in trial and the probative value was incredibly low.
  3. **REMEMBER:** Rare to overturn trial judge's 403 judgment because 403 has the word "may", which requires discretion as to the word "substantially," but once the outweighing is *so* substantial, then "may" really becomes "must" such that not excluding the evidence would be an abuse of discretion.
- **ii.** ***U.S. v. James*:** Risk of unfair prejudice to show the document proving the victim had committed crimes in the past. Risk that jurors will think that the victim was a scumbag that deserved to die.
- **iii.** ***U.S. v. Jackson*:** Judge made D stipulate to the fact that he was in Georgia and have a false ID, but not in an area with another bank robbery, which would have posed a danger of unfair prejudice substantially outweighing the probative value under Rule 403.
- **iv.** ***OJ Simpson Case*:** D seeks to admit evidence of 41 uses of the n word in a phone conversation held by the lead detective who testified to never using the term. The fact D is trying to prove is his racist bias to undermine his credibility. Judge rules just to admit 2 uses, excluding others because of the danger of unfair prejudice substantially outweighing the probative value.
- **v.** Problem 1.8: Picture offered shows the gun that P claims was used in the crime, but the gun claimed is surrounded by a bunch of other guns. Offered to prove that D owns that type of gun and witnesses said the gun was very clean.
  1. Picture including all guns, including his roommates, is misleading because it makes D look like a crazy gunperson. The picture is misleading because only one fun in the picture is owned by the D and is the gun in question in this case.
  2. BUT probative value in connection with the image of the gun because one can infer that if the exterior of the gun is clean, then he also takes care of the inside of the gun.

III. Rule 105

a. Admissible for some purposes, but inadmissible for other purposes

IV. Specialized Remedial Measures

a. Evidence of Subsequent Remedial Measures

RULE 407: When measures are taken that would have made an earlier inquiry or harm less likely to occur, evidence of the *subsequent* measures is not admissible to prove: negligence, culpable conduct, a defect in the product or its design, or a need for a warning instruction. But the court may admit this evidence for another purpose, such as impeachment or—if disputed—proving ownership, control, or the feasibility of precautionary measures. Esentially perform 403 test for you. The court MUST exclude. Automatic rule balance and exclusion.

- **i.** Want to promote safer conduct. If we punish people for fixing things, then they won't fix it and things will remain unsafe.
- **ii.** If D in negligence or strict liability case says they had no ownership/control of something, but then did something to the object (like fix it), it proves they had control.
- **iii.** This parties are NOT protected under this rule. So evidence of a third party's repairs is admissible under this rule.
- **iv.** Examples:
  1. Problem 2.1: A wolf chained to a fence after attacking a small dog then attacks a boy. If boy sues wolf's owner and owner claims wolf is not his, Rule 407 allows admission of evidence that the chaining of the wolf is probative of his ownership, which is now disputed.
     - **a.** But if the small dog's owner sues the wolf's owner, evidence of the owner subsequently chaining the wolf is NOT admissible to prove negligence, since strict liability applies here and the owner's negligence is of no consequence to the action under 401(b).
  2. Problem 2.2: V killed by wood chipper. D barred by Rule 407 to admit evidence that company lengthened the chute of the chipper to make accidents less likely. In opening statements, P says that chipper machines like the one involved in the care are in use by Army Corp of Engineers. P trying to establish machine is not dangerous, otherwise these people would not be ordering it. Evidence here would provide context so jury is not mislead, rather than to prove negligence.
  3. Problem 3.3: Wood chipper machine alleged to be unsafe and have caused an accident, and D-company says that the chute is the safest length you could *possibly* put on that machine. Evidence of D subsequently lengthening the chute will be admitted because the *feasibility* (i.e. *possibility*) is in dispute. **REMEMBER:** If feasibility of making the machine safer is in dispute, party may offer evidence to impeach/show that it was feasible (like the fact that the company actually lengthened the chute).

b. Evidence of Liability Insurance

RULE 411: Evidence that a person was or was not insured against liability is NOT admissible to prove whether the person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, such as proving a witness's bias or prejudice or proving agency, ownership, or control.

- **i.** Doesn't bar all evidence of liability insurance, only for certain purposes. CANNOT use evidence of an insurance policy to prove negligence.
- **ii.** Examples:
  1. Problem 2.5: Evidence showing the person that took the recording worked for insurance company would not be offered to prove negligence or wrongful conduct, because it is being offered because the insurance adjuster asking the questions is biased and asked questions in a way that might lead her to say something that would be damaging to her case.
  2. Problem 2.6: Rule 411 should not have applied to bar this evidence since no proof that the D acted negligently or otherwise wrongfully. Offered under the exception of offering the evidence to establish witness bias.

a. Then under Rule 403, the unfair prejudice (that the insurance is liability insurance) does not substantially outweigh the probative value (that D and the expert witness-doctor had the same mutual insurance and this would have received less of a dividend).

3. Problem 2.7: The owner tried to offer in evidence her own liability insurance to make the jury conscious of her own innocence, namely that she lacked a motive to conceal abuse. The twist is that it is P, not D, who wants the evidence of liability insurance in, so D is trying to *disprove*, not *prove* negligence. The key word in the rule is the word "whether," and if a broad interpretation of the word is taken, then Rule 411 will exclude this evidence ("whether" implies that evidence of insurance should not be permitted on negligence issues in general).

RULE 408

- As a matter of policy, the discussions of negotiations and compromise cannot be admitted into evidence
- They want to promote settlement and discussion
- Not really covered

RULE 409

- Offer to prove medical expenses, not admissible to prove liability for the injury
- Want people to do nice things like that

Rule 410:

- Prohibits admissibility of anything concerning guilty plea that was later withdrawn
- A nolo contendere plea

EVIDENCE OF A PERSON'S CHARACTER PROPENSITY

I. The Character-Propensity: General Character Evidence under Rule 404(a)

a. **First Question to Ask when Dealing with Rule 404:** What is the reason that the evidence is being offered for?
   i. Is it being offered to prove the conclusion that the D acted due to his propensity? If the answer is NO, then Rule 404 does not bar the evidence.
      1. Most common: violence, dishonesty (fraud)
      2. Propensity evidence is "too relevant"
   ii. Asking this question will help on the exam. He is going to try and trick you into thinking that the evidence was offered to prove a propensity, when it was really offered **for another valid purpose under another rule.**
      1. This goes back to how narrow Rule 404 really is. Evidence can be offered for any other reason, but NOT to prove propensity.

b. **RULE 404(a)(1):** Prohibited Uses. Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.
   i. If the offering party is NOT trying to prove D acted in accordance with that trait on a particular occasion, then Rule 404 does not apply.
   ii. NOT a ban on character evidence in general, JUST on character evidence offered to prove the D acted in accordance with that character or propensity.

iii. **What is Rule 404(a)(1) seeking to accomplish?**
   1. Bars evidence of a person's propensity in order to prove that the person acted in accordance with the propensity on a particular occasion.
      a. If offering propensity evidence to prove something *other than* that the person acted in accordance with the propensity on a particular occasion, then perfectly fine—*e.g.* rebut evidence of victim's personal trait, offer evidence of D's same trait, or (homicide case) offer evidence of V's peacefulness to rebut D's theory that V was the first aggressor.

c. **404a2 - Exceptions for a D or Victim—CRIMINAL CASES ONLY** (!!**watch out on Exam** – will put something like assault or battery!!)
   i. **404(a)(2)(A):** A Defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it.
      1. Ex: D offers evidence to say he is a peaceful person and the charge could have only been committed by someone with violent tendencies. Prosecutor can offer evidence of D's violent propensity.
   ii. **404(a)(2)(B):** Subject to the limitation in Rule 412 (rape shield), a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may: (i) offer evidence to rebut it; or (ii) offer evidence of the defendant's same trait.
      1. Alleged victim's personal trait
      2. Once you open the door to the victim's character, prosecutor can offer evidence to rebut accusation of victim's trait.
         a. Prosecutor can rehabilitate victim through character/propensity evidence.
      3. Prosecutor can also offer evidence of the D's SAME trait that he claims the victim had.
      4. Ex: D saying I did what I did (self-defense) because V acted violently and offers evidence that V has a propensity for violence and acted in accordance with that propensity on that occasion. It would be more believable that you needed to defend yourself. Prosecutor can show how D has a propensity for violence and acted violent here.
   iii. **404(a)(2)(C):** In a **HOMICIDE CASE**, the prosecutor may offer evidence of the alleged victim's trait for *peacefulness* to rebut evidence that the victim was the first aggressor.
      1. If D claims V was first aggressor, in a self-defense case, P can offer evidence of V's peacefulness to say that it would be inconsistent with V's character to act as the first aggressor.
         a. This is the only time prosecutor can show evidence of victim's propensity evidence of peacefulness - ONLY TO REBUT EVIDENCE THAT WAS PRESENTED TO STATE THEY WERE FIRST AGGRESSOR
         b. Diff between 404a2b – distinction is that it is not necessarily propensity evidence.
      2. **IMPORTANT:** The D can respond by cross-examining the prosecutor's character witnesses (the ones testifying that the victim was peaceful) regarding <u>specific acts of violence committed by the victim</u>.
         a. In addition, the D could proceed under Rule 404(a)(2)(B) and offer testimony (reputation or opinion) that the victim had a propensity for

violence. **RISK** in taking this route is that the P can then turn on the D and offer testimony (reputation or opinion) that the D has a propensity for violence because the D opened the door by offering propensity violence of the V.

iv. **EXAM NOTE!!:** On the exam, he is going to try to trick you by giving you a civil case that looks a lot like a criminal case (Assault, battery, etc.) or WRONGFUL DEATH and this rule WILL NOT APPLY!

d. **Exceptions for a witness—Rule 404(a)(3)**

i. **RULE 404(a)(3):** Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

ii. Once a witness takes the stand, their credibility is in question. One effective way to impeach/challenge the credibility of the witness is to show that this person is a liar by showing that the person has a propensity to be untruthful and is acting untruthful now.

II. Character Propensity in Crimes, Wrongs, and Other Acts: Rule 404(b)

a. **RULE 404(b)(1):** Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

i. **What is Rule 404(b)(1) trying to accomplish?**

1. Bars evidence of a person's crimes, wrongs, or other acts to probe that the person has a propensity in order to prove that a person acted in accordance with that propensity on a particular occasion.

a. **BUT** exceptions in Rule 404(b)(2)—evidence offered to show motive, intent, knowledge, opportunity, identity, plan, etc.

i. **NOTE:** this list is NOT exhaustive—there are other reasons this evidence can be offered **as long as it is not being offered to prove a propensity and the person acted in accordance with that propensity.**

ii. BUT reasons must still satisfy Rule 403.

b. **RULE 404(b)(2):** Permitted Uses. Evidence **may** be admissible for another purpose, such as proving motive, opportunity intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by D in a criminal case, the prosecutor must: (A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and (B) do so before trial—or during trial if the court, for good cause, excuses lack of pretrial notice.

i. **NOTE:** this list is NOT exhaustive—there are other reasons this evidence can be offered **as long as it is not being offered to prove a propensity and the person acted in accordance with that propensity. This is discretionary!**

ii. Don't even need to look at exceptions, just look at whether trying to use propensity

iii. BUT reasons must still satisfy Rule 403.

1. Should give limiting instruction if its permitted and will consider that in 403 balance

2. T

c. Examples:

i. ***People v. Zackowitz*:** D was charged with murder while defending his wife's honor. The prosecutor sought to admit in evidence that D owned several guns to show that he had a violent propensity, and because of this propensity he was more likely to be deliberate (necessary element for murder one), and hence was inadmissible under FRE 404(b)(1).

1. **NOTE:** If D had denied he was the shooter, evidence of the weapons would have been admissible on the issue of *identity*; or if D had argued self-defense or

heat of passion, P may offer evidence of D's deliberateness in selecting an appropriate weapon, which goes toward *preparation*; these two hypos would be "another purpose" under Rule 404(b)(2).

III. Methods of Proving Character—Rule 405(a)

a. **RULE 405(a):** When evidence of a person's propensity is offered under 404(a)(2)[CRIMINAL ONLY] to prove that on a particular occasion, the person acted in accordance with that propensity, it may be proved only by testimony about the person's reputation or by testimony in the form of an opinion. On *cross-examination* of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct.

- **i. Direct Examination:**
  1. ABSOLUTELY NOTHING related to specific acts on direct examination.
  2. Specifics facts about acts are not being offered as evidence—only the reputation of the D and the W's opinion of the person.
- **ii. Cross-Examination:**
  1. Specific acts by the D can come out on cross, but purpose is merely to test opinion of witness or test witness' understanding of reputation.
- **iii. On Re-Direct Examination:**
  1. D can ask if the W has heard of an act that would reflect D's propensity to rehabilitate the witness's opinion testimony.
     - **a.** If yes they knew of the specific instance, but still have a bad opinion of the D—not good. Knew of specific good propensity act but still has a bad opinion.
     - **b.** If they did now know, then their opinion of the D is weakened.

- So under rule 404a2ab or c - it may be proved by testimony of the person's reputation about the propensity or by testimony in the form of the opinion about that propensity. On cross examination, the court can look at prior acts, but you cant offer evidence of the act to prove that the act occurred.
- Under 405a - the witness can say "sue has a reputation of **being peaceful** or in my opinion, sue is peaceful." - must be limited to THAT pertinent trait.
- On cross-exam, it is meant to hurt the knowledge of the witness. That you clearly don't know the person.
  - Jury shouldn't consider the act or believe the act is true. They should only consider it to assess the credibility of the witness
  - When asking about a prior act, the standard is a **good faith belief** that the act actually took place.
- If the specific act is brought up in cross - examination of the person's conduct, then on re-direct the defense can bring it up again to get more context
- In 405a - if the prosecution is the one introducing the evidence, the defense, on cross, can say are you aware that she committed this peaceful act on x
- Same thing if the propensity has to do with the victim

b. Examples:
- **i.** ***Michelson v. United States*:** Party asking the questions has the right to test the validity of the reputation testimony given by the character witness. D opened the door to his own reputation for honesty, prosecution will cross examine to show that witness's familiarity with the D's reputation is not good.
  1. P can offer character witness to show that D is dishonest, but is constrained in the same was D was. P can offer witnesses who can testify to D's *reputation* of dishonest or their *opinion* of D's dishonesty.
- **ii.** Can only give an **opinion** on the propensity or talk about their **reputation** that they have that propensity.
  1. EX: "In my opinion, D is a peaceful person." or "I have heard around the neighborhood that she is peaceful."
  2. NOT: "D has refused to act with violence in the past, so I don't think D would act with violence in this case."
- **iii.** Witness CANNOT make references to specific instances of conduct

c. Timeline
- **i.** **Rule 404(a)(2)(A): In a criminal case**, propensity evidence offered under Rule 404(a)(2)(A) of the D's propensity→ 405(a) requires that propensity evidence offered be offers in reputation or opinion→ Direct examination by D of the witness in the form of reputation/opinion of D→ Cross examination by P can offer specific instances to counter the propensity evidence.
- **ii.** **Rule 404(a)(2)(B): In a criminal case**, propensity evidence offered by the D about the V's propensity under 404(a)(2)(B)→ P can (1) offer evidence to rebut and (2) offer evidence of the D's same trait under Rule 404(a)(2)(B)→ P can do either of those things on cross-exam by referring to specific instances under Rule 405(a)
- **iii.** **Rule 404(a)(2)(C): In a homicide case**, when D is claiming self-defense, P can offer evidence of V's propensity for peacefulness under Rule 404(a)(2)(C)→ P must offer evidence in the form of opinion/reputation of the V under Rule 405(a)→ On cross, D can offer specific instances of the V's conduct

IV. Proving Character: Evidence of Propensity when Essential to a Charge, Claim, or Defense—Rule 405(b)

a. **RULE 405(b):** Specific Instances of Conduct. When evidence of a person's propensity is offered to prove a fact other than that on a particular occasion the person acted in accordance with that propensity, the propensity may be proved by relevant specific instances of the person's conduct.
- **i.** If you MUST establish a propensity to prevail on the factual issue, then can do what you want and offer specific instances on direct examination.
- **ii.** Examples of when Rule 405(b) may apply:
  1. Rebutting an Entrapment Defense: When alleging entrapment, a D claims a government agent induced her to commit a crime she otherwise would not have committed.
     - **a.** P can rebut this claim by offering evidence that the D was "predisposed" to commit the crime.
     - **b.** The factual existence of a predisposition is critical to the case.
     - c. Rule 405b applies only when the existence of the character trait and not conduct in accordance with the trait, is the thing to be proved - arises rarely

2. Proving or Rebutting a Defense of Truth in a Libel or Slander Action: D's public accusation that the P is a thief could give rise to an action for libel or slander.
    a. If D claims in defense that her accusation was truthful, the trial will focus on whether the P is indeed a third, bull, or liar.
    b. In this event, the existence of the character trait is critical to the case.
3. Resolving a Parental Custody Dispute: Judge must determine which of the parties are the better parents.
    a. Litigants aims to prove the existence of a character trait, NOT action in accordance with that trait.

In all three situations, the litigant's aim is to prove the existence of the character trait, not action in accordance with the trait

V. Never goes through the propensity box

i. Examples:
    1. Problem 3.16: D in a criminal case offering evidence of V's violent nature (exception under 404(a)(2)(b)—D may offer evidence of alleged V's propensity). D could offer V's statement to prove violent nature. Only on cross-exam could specific instances come up. Could offer witness to testify of reputation/opinion to show propensity.

VI. Non-Propensity Uses of "Other Acts" Evidence—Rule 404(b)(2) exceptions

a. Proving Knowledge

i. Problem 3.1: Hacker penetrated encryption system to send computers to non-existent high school. Another incident occurred sending laptops with hacker also bypassing the encryption system. If this scheme is predicated on special knowledge, like sophisticated hacking, then prosecutor offering evidence to show that this person is one out of a few who have that special skill.
    1. **NOTE:** The more technical knowledge required, the more likely proof of that knowledge is not character evidence such that 404 can be bypassed.
    2. For knowledge, the relevant evidence to show that he is in the pool of people who could have done it. The fewer people that have this knowledge, the greater the probative value.

ii. Problem 3.2: Davis arrested for selling drugs after police identified him an hour after witnessing a drug transaction from a lookout point. Prosecutions wants to introduce evidence that D previously convicted for distributing drugs as evidence of D's knowledge of drug trade and therefore his identity as seller.
    1. NOT admissible. Using for propensity purpose. Unless there was something unique here and highly sophisticated that most drug dealers would not know, then *maybe* admitted for knowledge. 403 would be dangerous.

iii. Problem 3.3: Evidence is admissible to show that the railroad and its employees had knowledge that Harrison (conductor) often drank while he was conducting on the railroad and did nothing about it.

b. Proving Motive

i. Problem 3.4: Two FBI agents murdered. FBY agents were following 3 men in a can before they opened fire on the agents. Government wants to prove that D was charged with attempted murder in WI three years earlier. D plead not guilty, fled, failed to appear, and was aware of outstanding arrest warrant. Speaks to motive – he is about to be arrested for his previous conviction and he would have went to jail. 403 might be an issue.

1. P could try to admit evidence based on theory that if FBI agents had stopped D, they would have realized he had a warrant and D likely would have gone to prison for the attempted murder in WI, so D opened fired not to get caught.
2. BUT Rule 403 issue: Prior charge of attempted murder sounds a lot like murder in this case and he probably did the other one if he fled, so convict him here.

c. Proving Identity

i. **NOTE:** This exception ONLY applies when identity is a disputed fact at trial.

ii. Problem 3.6: Evidence of the finger print on V's gun is the best evidence to show D's identity, and the assault rifle is the second best, but the whole other arsenal will run afoul of 404(b)(1)(D owned such a collection to prove that he had a violent propensity and that he acted in accordance with the propensity on a given occasion) and Rule 403 (unfair prejudice substantially outweighs probative value).

1. BUT fingerprints and assault rifle go toward proving identity (V killed with that kind of rifle) instead of character evidence under Rule 404(b)(2).

iii. Problem 3.7: A raid finds cocaine as well as illegal lottery lists in an apartment. The P is trying to proe that D owned that apartment by admitting in evidence his previous gambling conviction as well as the lottery lists.

1. P is trying to prove what D did in his apartment is like what he did when he got convicted, and thus this evidence would be barred by Rule 404(b)(1).
2. P should have framed the evidence as *knowledge* or *identity* under Rule 404(b)(2)—like this apartment looks like D's apartment because of the lottery stuff.

iv. Modus Operandi: this crime and other crime bear the same clear "signature." We know D committed a crime in the past. Current crime matches other one in idiosyncratic ways, so we can infer that D committed the present crime. This could not be anyone else's crime.

1. ***U.S. v. Trenkler*:** P tried to prove that D created the bomb based off of a bomb he once built that was similar. We know D built the Quincy bomb and that bomb is very similar to this bomb. We know D built the first bomb, so he must have built the very similar second one.
    a. P sought to admit evidence of the previous bomb to establish *identity* or *knowledge* under Rule 404(b)(2).

d. Maintaining Narrative Integrity

i. Prosecutors like to be able to establish trust with the jury, which means being able to tell the whole story and offer evidence.

ii. Narrative integrity is a valid non-propensity purpose for admitting evidence.

iii. Problem 3.10: Judge bars testimony that gun was pointed at V's head or classify it as Russian roulette. P's argument is that it is important for the jury to know it was pointed at her face, and not enough that he just shot the gun. Might have better memory of the gun if it was pointed at your face, rather than shooting guns off in the backyard.

1. P saying that the fact that the gun was pointed at V's head is important for narrative integrity because V had to see the gun.

iv. ***United States v. DeGeorge*:** P tried to admit evidence that D had collected insurance on three previous boats he had lost to prove that D defrauded the insurance company the same way on this occasion.

1. P tried to admit evidence for *narrative purposes* (i.e. context) under 404(b)(2), namely how D go the insurance on the boast in the first place through a shell corporation owned by his buddy. Wasnt for propensity!

2. **IMPORTANT:** Notice why P is admitting this to evidence. If it is for showing that D has a propensity from which an inference can be drawn, then likely barred under 404(a)(1). BUT P is offering it for a narrative/context specific purpose because jury is likely wondering why there are all these transactions between the shell company, the friend, and the D.
3. P wants to show these transactions because D could not insure under his own name because of 3 previous incidents that his boat "sank."
4. D should request limiting instruction under Rule 105. Rule 403 unlikely to bar evidence here because probative value is so high.

e. Proving Absence of Accident

i. Bringing in a past act to show that anyone who committed the past act would not put themselves in a similar situation to have the accident happen again.
   1. **REMEMBER:** Defendant must claim accident first in order for this to work.

ii. Problem 3.11: P wanted to admit evidence that D, who killed his wife while cleaning his gun, did the same with his first wife. P would admit evidence that there is no way this could happen twice while being on accident, which would likely be admissible under Rule 404(b)(2) *lack of accident*.
   1. Anyone who had committed an act of that sort by accident would likely avoid any possible repetition of the accident. Would not put himself in a position to repeat.

iii. Problem 3.12: D previously clubbed a dog to death that D claimed was attacking him. Here, D claims he accidentally tossed Leo the dog into the street after the dog bit him (not as revenge for a fender-bender with dog's owner).
   1. Lack of accident does not work because first instance was not an accident—he intended to kill the dog. Evidence does not work under 404(b)(2) because no lack of accident.
   2. Looks like propensity evidence. Killed dog before, propensity to kill dogs, acted with that propensity here.
   3. If he goes through the trouble of offering evidence of his peacefulness, on cross, the Pros can ask if they are aware of instance of beating the dog according to 404a

f. Proving the Commission of "Other Acts": The *Huddleston* Standard

i. **RULE 104(a):** The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.
   1. The court preliminarily decides whether evidence is admissible or if witness is qualified, based on the judge's determination of a *preponderance of the evidence*.
   2. **NOTE:** Used when a statement is already relevant, confessions, or to determine the qualifications of a witness.

ii. **RULE 104(b) Relevance that Depends on a Fact.** When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.
   1. The court preliminarily decides whether, based off all of the evidence, there is sufficient evidence from which **the jury** can *reasonably* find by a *preponderance of the evidence* that the other relevant act occurred or the fact exists; if so, that evidence stays in, but otherwise, there is a limiting instruction under Rule 105.

2. This only deals with *conditional relevance*, namely the fact had to be true for the evidence to be *relevant*.
3. ***Huddleston*:** Prosecution trying to prove that D knew he was in possession and selling stolen goods. D's defense is that he did not know they were stolen so he could not have knowingly possessed stolen goods. D's "other acts" are selling stolen TV's and appliance. The issue is a matter of relevance, so within 104(b).
    a. **104(b) issue:** Were the TVs from the previous act stolen or not?
        i. If stolen, then RELEVANT to this case.
        ii. If NOT stolen, then IRRELEVANT to this case.
    b. **RULE:** Any issue decided under Rules 104(a) and (b) is decided by **a preponderance of the evidence.**
    c. ***Huddleston* 104(b) timeline:**
        i. P must offer evidence showing that it is more likely than not that the fact is true (TVs were stolen).
        ii. Court decides whether the fact is true by a preponderance of the evidence.
        iii. This evidence is *conditionally relevant*, allowing the evidence. BUT P must prove the fact is true.
        iv. If jury finds the fact is true, then the evidence is relevant and can be considered. If jury find the fact is NOT true, then they CANNOT consider the evidence and limiting instructions are required under Rule 105.

VII. Evidence of the Defendant's Propensity in Sexual-Assault and Child-Molestation Cases

a. **RULE 413:** In a criminal case in which a Defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault. The evidence may be considered on any matter to which it is relevant.
    i. **NOTE:** So any evidence of a prior sexual assault is admissible under this rule, BUT still had to get past the *Huddleston* standard.
        1. Prior instance of sexual assault must be found by the Court by a preponderance of the evidence.

VIII. D will often claim the v consent, but knowledge that the d has committed rapes on other occasions is frequently critical in assessing the relative plausibility of these claims and accurately deciding cases that would otherwise become unresolvable swearing matches

IX. You may also have a victim who does not want to testify, which is why prior evidence takes on a higher probative value

1.

b. **RULE 414:** In a criminal case in which a defendant is accused of a child molestation, the court may admit evidence that the defendant committed any other child molestation. The evidence may be considered on any matter to which it is relevant.
c. **RULE 415:** In a civil case involving a claim for relief based on a party's alleged sexual assault or child molestation, the court may admit evidence that the party committed any other sexual assault or child molestation. The evidence may be considered as provided in Rules 413 and 414.

X. Evidence of the Victim's Propensity in Sexual-Assault Cases: The Rape Shield

a. **RULE 412. Sex-Offense Cases: The Victim's Sexual Behavior or Predisposition**
    i. **(a) Prohibited Uses:** The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct:

1. Evidence offered to prove that a victim engaged in other sexual behavior; or
2. Evidence offered to prove a victim's sexual predisposition.

ii. **(b) Exceptions**

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

b. Rule 412(a) takes all past acts and all sexual propensity evidence off of the table. None if it is admissible.

i. Protecting the victim from having her character come to use in trial and jury making inferences.

c. Rule 412(b)(1)(A)—situation where D is arguing it was not him. D might be able to explain better because there was another incident.

d. Rule 412(b)(1)(B)—D would argue that given the kinds of things we had done before together I thought V was ok with this (given our prior sexual history).

e. Rule 412(b)(1)(C)—In case of conflict, Constitution wins (ex: violation of the confrontation clause or due process).

f. **REMEMBER:** Exceptions from Rule 412(b)(1) ONLY APPLY IN CRIMINAL CASES! They do not apply in civil cases.

XI. The Habit-Propensity Distinction—Rule 406

a. **RULE 406:** Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eye witness.

i. Why isn't habit a propensity?

1. Does NOT go through the propensity box. A habit is a repetitive action where propensity is more of a character trait.
2. Habit = more specific
3. Propensity = more general (and, thus unreliable).

XII. Habit - describes ones regular response to a repeated and specific situation

XIII. Propensity- things they'd be inclined to do

XIV. Look for things like "they always do x"

a. Examples:

i. ***Halloran v. Virginia Chemicals*:** Halloran, as part of his habit, kept the water at the same temperature he usually does when he uses it to speed up Freon, but the coil got the temperature well above the safe level, and thus the can of Freon exploded.
   1. The more automatic, specific, and repetitive conduct, the more this is a habit such that evidence to draw an inference may be admitted.
   2. Court said habit evidence here is OK—Halloran had a habit of heating Freon with heating coil, acted in accordance with that habit on this occasion.

ii. Problem 3.19: Doctor proscribed what should have been an antihistamine but was a steroid. Plaintiff's estate may introduce evidence that doctor did this with eight other patients to prove a habit and that on that occasion the doctor acted in accordance with this habit.

XV. Character and Credibility Overview

a. **General Rule:** Evidence of a person's character/propensity, if offered to prove that the person acted in accordance with their propensity on this occasion, is generally barred.

b. **7 Exceptions to this rule:**
   i. **RULE 413:** Similar offenses in a sexual assault prosecution.
   ii. **RULE 414:** Similar offenses in a child molestation prosecution.
   iii. **RULE 415:** Similar offenses in a civil action concerning sexual assault or child molestation.
   iv. **RULE 404(a)(2)(A):** Character of a criminal defendant, offered by the accused.
   v. **RULE 404(a)(2)(B):** Character of a victim, offered by a criminal defendant.
   vi. **RULE 404(a)(2)(C):** Character of a homicide victim's peaceful character, offered by the prosecutor to rebut the evidence that the victim was the first aggressor.
   vii. **RULE 404(a)(3):** Character of a witness

IMPEACHING WITNESSES

I. Requirement of Personal Knowledge

a. **RULE 602:** A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703.
   i. Generally, some sensory experience with the matter is requires: saw, heard, smelled, touched, etc. with their own eyes, ears, hands, etc.

II. Modes of Impeachment and Proving Witness's Propensity for Untruthfulness/Dishonesty

a. **RULE 607:** Any party, including the party that called the witness, may attack the witness's credibility.

b. **Ways to challenge:** Perception, Memory, Narrative, or Sincerity
   i. **Modes of Impeachment:**
      1. Contradiction by conflicting evidence
         a. Witness has testified and offered an observation and you want the jury to come to a contrary conclusion so you offer another witness or document that conflicts.
      2. Contradiction by past inconsistent statements

a. Witness saying something here, but in a formal proceeding or informal conversation, witness said something completely different.

3. Bias/Improper motive
   a. There is a motive to lie or not tell the truth
   b. Maybe testifying against family member and cannot bring themselves to do it, threatened, bribed, etc.
4. Character for dishonesty/untruthfulness
   a. Person has a propensity to be dishonest and acted in accordance with it on this occasion.
   b. Rule 404(a)(3) exception. Once witness takes the stand, honesty is fair game.
   c. Even if you do not attack on cross exam, can still call other witnesses to attack through reputation/opinion testimony (no specific instances).

c. **RULE 608(a). Reputation or Opinion Evidence**. A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.
   i. **Applies only when you're trying to undermine the witness's credibility suggesting they are a liar or has a character for untruthfulness**.

d. **RULE 608(b). Specific Instances of Conduct.** Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, *on cross-exam*, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of: (1) the witness; or (2) another witness whose character the witness is being cross-examined has testified about.,
   i. As a general rule, CANNOT use specific instances to prove the propensity you want to prove. BUT on *cross-exam*, court can allow specific instances if they are probative of character for truthfulness of witness or another witness who the witness on cross is testifying about.
   ii. Extrinsic evidence is anything you're not getting from the witness at the time of the trial
   iii. May only ask about the dishonest act and no extrinsic evidence about the act.
   iv. DON'T GET CONFUSED WITH NON-CHARACTER IMPEACHMENT BY CONTRADICTION OF INCONSISTENT STATEMENT
   v. Extrinsic Evidence NOT ALLOWED (except for conviction under Rule 609).
      1. Example of Extrinsic Evidence not being allowed:
         a. Ask witness if he lied on tax returns.
         b. Witness says NO!
         c. Attorney offers document showing witness just life. Objection sustained! Extrinsic evidence is NOT allowed!
   vi. NO bolstering of a witness's truthfulness *until* there has been an attack. !!!! Will try to trick and provide bolser BEFORE attack !!
      1. Attack could be:
         a. Reputation/Opinion testimony for untruthfulness.
         b. Questions on cross and redirect of specific instances of dishonest conduct.
            i. Must be a good faith basis for it.
            ii. WILL TRY TO TRICK WITH EE !!

vii. Examples:

1. Problem 4.1 (P. 269):

a. (1) Not probative of the truthfulness of the witness.

b. (2) Evidence about a witness's truthfulness cannot be offered until their truthfulness has come under attack. Since it has not yet been attacked, then cannot offer it under 608(a).

c. (3) Defense on direct examination is inquiring into the truthfulness of another witness with specific instances using extrinsic evidence.

i. Under 608(b), extrinsic evidence is not admissible to prove specific instances of a witness's conduct. So objective to this evidence would be sustained.

ii. Question about specific instances can only be asked on cross-exam and they would be allowed if they are probative of truthfulness or untruthfulness of the witness.

d. (4) Witness's opinion about the other witness. Admissible.

e. (5) Under Rule 608(b), specific instances of conduct can be asked about on cross-exam if its probative of the witness's propensity for truthful/untruthfulness.

i. This question about being in a drunken rage does not go to truthfulness, so probably not allowed.

f. (6) Since this question asks about whether the witness lied on their med school application, this question goes directly to truthfulness of the witness and would be allowed under 608(b).

i. On cross-exam and directly speaks to the witness's truthfulness.

PROBLEM 4.2

- Lied about three things
  - D must open the door first
  - Rule 404 - prohibits prosecution from dishonesty in ITS CASE AND CHIEF
  - Two separate things that would trigger the introduction into this trial
    1. If the D puts him on the stand for his own defense - character for truthfulness is now in issue. Now can ask about any of the lies
    2. If someone gives an opinion or reputation about the defendant - 404a2a
       - Offering favorable propensity
       - Now that defense has done that, prosecution can look into prior acts
       - Same evidence can be provided to prove diff things

III. Proving Witness's Propensity for Untruthfulness with Use of Criminal Convictions

a. **IMPORTANT** for the EXAM! Very complicated! Lots of internal balancing (Rule 403, opposite Rule 403, and no balancing sometimes—depends on the rule).

b. **RULE 609:** The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:
   i. Used as a mode to offer evidence of a conviction as proof that the witness has a propensity to lie and is lying during their current testimony.
   ii. **REMEMBER:** Can offer extrinsic evidence under Rule 609, unlike under Rule 608 (evidence of specific instances).
   iii. **RULE 609(a)(1):** For a crime that, in the conviction jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:
      1. **(A)** MUST be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and
         a. Evidence of a conviction itself must be admitted subject to Rule 403 (both criminal and civil cases)
         b. (A) does not apply if you are a D in a criminal case! If you are a D in a crim case, must go to (B)

      2. **(B)** MUST be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence *outweighs* its prejudicial effect to that defendant. [only applies to crim D]
         a. Probative value must outweigh the prejudicial effect. DIFFERENT FROM RULE 403: in Rule 403, prejudicial effect must substantially outweigh the probative value.
         b. If probative value > prejudicial effect, MUST be admitted and must be allowed to ask about the conviction.
         c. DOES NOT HAVE TO BE SUBSTANTIALLY OUTWEIGHED!
         d. **NOTE:** Presumption of inadmissibility unless the probative value of the evidence outweighs its *prejudicial effect* to that D.
         e. May only impeach the D this way if the D chooses to testify
            i. Exists because more strict than 609a1A and liberal 403 balance
      3. **RULE for Weighing Evidence of a Past Criminal Conviction:** Five factors to determine whether probative value outweighs the potential to cause unfair prejudice:
         a. Nature of the Crime
            i. The more crimen falsi, the more probative (because crimen falsi crimes say something about truthfulness)
         b. Time of conviction and the witness's subsequent history
            i. The fewer and farther between convictions, the less probative.
         c. Similarity between the past crime and the charged crime
            i. The more similarity, the more danger of unfair prejudice.
         d. Importance of the D's testimony
            i. The more important, the more danger of unfair prejudice.
         e. Centrality of the credibility issue
            i. The more central, the more probative.
   iv. **RULE 609(a)(2):** for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime require proving—or the witness's admitting—a dishonest act or false statement.
      1. **THERE IS NO PUNISHMENT REQUIREMENT OF DEATH OR IMPRISONMENT FOR THIS!**

2. Crimes of **dishonesty** or **false statement**.
    a. Examples of *crimen falsi*: (1) Perjury, (2) Fraud, (3) Embezzlement, (4) False pretenses
    b. Committee Notes List of Crimes: (1) Perjury, (2) Subornation of perjury, (3) False statement, (4) Criminal fraud, (5) Embezzlement, (6) False pretense, or (7) any other offense in the nature of *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the witness's propensity to testify truthfully.
3. "…if the court can readily determine…"
    a. CANNOT have a mini trial to determine whether the witness's crime consisted of an act of dishonesty.
4. **NOTE:** No probative/prejudicial balancing AT ALL. !! If prior crime of dishonesty, then it is coming in, regardless of prejudice. This is the ONLY rule 403 does not apply to.
5. **REMEMBER:** Can offer extrinsic evidence under Rule 609, unlike under Rule 608 (evidence of specific instances).

v. **RULE 609(b). Limit on Using Evidence After 10 Years.** This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if:
1. Its probative value, supported by specific facts and circumstances, ***substantially outweighs*** its prejudicial effect; and
2. The proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.
3. **NOTE:** Balancing is the opposite of Rule 403—probative value substantially outweighed by the unfair prejudice. Conviction older than 10 years is presumptively barred from admission UNLESS the probative value substantially outweighs its prejudicial effect.
4. Clock does not start to run until the D is released from jail for the crime. If conviction is entered and no prison time, then clock starts running at the moment the conviction is entered.
5. If it is a crim in falsi crime, but it is 10 years old, then you STILL have to do the balancing test.

vi. **RULE 609(d):** Juvenile convictions are NEVER admissible in civil cases or to impeach the testimony of criminal defendants.
1. **RULE:** Juvenile adjudications are admissible against a witness ONLY if an adult's conviction for that offense would be admissible to attack the adult's credibility; and… admitting the evidence is necessary to fairly determine guilt or innocence.

vii. Examples:
1. Problem 4.3:
    a. (1) Inadmissible. Nothing about a conviction in the question> act asked about has nothing to do with honesty/dishonesty.
    b. (2) Inadmissible. Nothing about conviction in the question. Extrinsic evidence barred by Rule 608 to prove that witness is dishonest.
    c. (3) Admissible. Rule 609(a)(1) will permit this question if punishable by more than 1 year (felony). This is satisfied! Rule 609(a)(1)(B) will permitted if the

probative value of the evidence outweighs its prejudicial effect to the Defendant.

d. (4) Probably inadmissible. Rule 609(a)(2) does not apply because turnstile jumping does not involve *crimen falsi*. And most judges would not regard a conviction of turnstile jumping to be probative of character for truthfulness or untruthfulness as required by 608(b).

i. D was sentenced to 3 months, but we do not know how much she *could have* gotten. If turnstile jumping is punishable by more than a year in prison, which seems unlikely, and if the judge find that the probative value of the evidence outweighs the danger of unfair prejudice, the evidence may be admitted under Rule 609(a)(1)(B).

e. (5) Because of the age of the conviction, it is presumptively admissible under Rule 609(b): it is not admissible unless its probative value, support by specific facts and circumstances, substantially outweighs its prejudicial effect. Still, evidence seems probative—if not for its age, the conviction of lying to a federal investigator would have been automatically admissible under Rule 609(a)(2).

i. BUT need to know what D served. Did he serve the entire two-year sentence or was he paroled? VERY IMPORTANT. Turns on when he was released from prison for the clock to start ticking.

ii. Conviction would be admissible under Rule 609(a)(2) which gets NO BALANCING because it deals with convictions for crimes of untruthful/false statements.

1. **REMEMBER:** This is totally admissible regardless of the age of the conviction under Rule 609(a)(2).
2. **WILL GIVE US A Q LIKE THIS**

2. Problem 4.4: In a criminal case with D-W, evidence of prior conviction would have been admitted under Rule 404(b)(2) (another purpose which was special knowledge of cocaine distribution). Judge excluded under Rule 403 and determined probative value was relatively low and danger of unfair prejudice was high.

a. BUT Rule 609(a)(1)(B) requires probative value to outweigh prejudicial effect. We must assess probative value in relation to the fact that the offering party is trying to prove. The first time, prosecution trying to offer knowledge. However, probative value as it relates to truthfulness, it could have higher probative value showing D is untruthful person. Weight of probative value may change based on the reasons for which evidence is being offered.

b. This is discretionary. Conceptually, nothing wrong with saying for one purpose low PV and for another, high PV

3. Problem 4.5: In a civil case with P-W, D seeks to admit in P-W's misdemeanor conviction, under Rule 609(a)(2) for meter fixing. The theft had three *disjunctive* statutory elements, only the second of which was *crimen falsi*. And because P-W did not admit that the theft was because of the second element, his conviction is inadmissible under Rule 609(a)(2).

Rule 609 Standards of Admission (Permissive standard → Restrictive Standard)

- **Rule 609(a)(2):** Conviction of "any crime… must be admitted if the court can readily determine that establishing the elements of the crime required proving—or the witness's admitting—a dishonest act or false statement," subject only to the limited imposed by Rule 609(b), (c), and (d).
- **Rule 609(a)(1)(A):** If the witness is not the accused in a criminal case, conviction of a crime "punishable by death or by imprisonment for more than one year… must be admitted, subject to Rule 403."

- **Rule 609(a)(1)(B):** If the witness is the accused in a criminal case, conviction of a crime "punishable by death or by imprisonment for more than one year…must be admitted… if the probative value of the evidence outweighs its prejudicial effect to that defendant."
- **Rule 609(b):** "If more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later," evidence of a conviction "is admissible only if…its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect."
- **Rule 609(d):** Evidence of a juvenile adjudication is NEVER admissible in a civil case or to impeach the accused in a criminal case, but may be admitted to impeach another witness in a criminal case if the evidence otherwise qualifies under Rule 609 and "admitting the evidence is necessary to fairly determine guilty or innocence."

Reasoning behind the various standards for admission:

- **Rule 609(a)(1):** More serious crimes suggest greater readiness to lie under oath. This rule therefore generally requires that crimes used to impeach have been punishable by death or more than a year in prison.
- **Rule 609(a)(2):** Crimes involving deceit are especially probative of one's propensity to lie and are therefore made "automatically admissible."
- **Rule 609(b):** Older crimes are less probative of present character and so are less readily admitted.
- **Rule 609(c):** A person's successful rehabilitation diminishes the probativeness of past crimes, and a later "finding of innocence" would reduce probativeness to zero.
- **Rule 609(d):** If the witness was a juvenile at the time of her past offense, there is a greater chance her character has changed and perhaps improved.

IV. Rehabilitating an Impeached Witness

a. RULE 608 allows opinion/reputation testimony of a second witness about the first witness.

b. Examples of Rehabilitation:

i. Problem 4.6:

1. **Inadmissible**—Evidence of Johnson's bias is not an attack on her character for truthfulness. As a result, Rule 608(a) bars evidence in support of Johnson's truthfulness!

a. Question of bias is NOT an attack on truthfulness and Rule 608(a) requires that truthfulness be attacked before the witness can be rehabilitated.

b. Original Q re bias is admissible – extrinsic evidence of bias IS admissible. So if she lied about being in business with D's father, they can bring EE

2. **Probably Inadmissible—**Rule 608(a) allows evidence in support of Johnson's character for truthfulness only after that character has been attacked. Here, evidence that specifically contradicts one aspect of Johnson's testimony probably does not amount to an attack on her character for truthfulness, especially because Johnson just may have been mistaken.

a. Committee Notes: Whether evidence in the form of contradiction is an attack upon the character of the witness must depend on the circumstances.

3. **Admissible—**P's question about the loan application appears to be an acceptable way under Rule 608(b)(1) to attack Johnson's character for truthfulness. Now that her character for truthfulness has been attacked, Rule 608(a) permits the D to offer opinion or reputation evidence in support of Johnson's character for truthfulness.

a. NOW party that is sponsoring Johnson can offer another witness to testify to the truthfulness of the witness to rehabilitate Johnson. BUT REMEMBER, cannot offer extrinsic evidence.

4. **Admissible—**Evidence of Johnson's armed robbery conviction appears to be an acceptable way under Rule 609(a0(1)(A) to attack her character for truthfulness.

a. Evidence offered under Rule 609(a)(1)(A) gets Rule 403 balancing: Does the probative value substantially outweigh the risk of unfair prejudice?

b. Now that Johnson's character for truthfulness has been attacked, Rule 608(a) permits the D to call Johnson's neighbor to support her character for truthfulness with opinion or reputation evidence.

c. Rule 608(b)(2) in turn permits the P to cross-examine the neighbor about specific instances of Johnson's conduct to attack her character for truthfulness. The purpose of P's question is to test whether the neighbor's opinion of Johnson's credibility is well informed and well considered.

PROBLEM 4.7 PAGE 310

- Bonner is suggesting that Angelita has a bias
- Lying in this part instances versus lying in *generally*
- IF THERE IS UNTRUTHFULNESS, WHAT IS IT STEMMING FROM?
    - Is it stemming from circumstances motivating him to lie or is it because they're a liar.
- Her truthfulness wasn't attacked - its more of a bias attack

V. Extrinsic Evidence

a. Under **RULE 608(b)**, extrinsic evidence may NOT be offered to prove specific instances of conduct in order to prove that the witness is truthful or untruthful.

i. BUT can offer extrinsic evidence to prove another non-character purpose, such as bias, contradiction, conviction, etc. OK for anything except offering a past act to show character for truthfulness/untruthfulness.

b. Two points in the rules governing character evidence where the litigant reaches a dead end due to the no extrinsic evidence rule:

i. Rule 405(a)—litigant asks a character witness on cross-exam whether that witness has heard of a specific act committed by the person about whose character the witness is testifying.

1. Regardless of the witness's answer, the lawyer CANNOT present any other evidence regarding the fact (i.e. no extrinsic evidence)

ii. Rule 608(b)—litigant may cross-examine a W about specific instances of conduct that bear on character for truthfulness, BUT the rule explicitly states that "except for criminal convictions under Rule 609, extrinsic evidence is not admissible to prove a specific instance of a witness's conduct."

1. If the witness denies having done (or having heard of) the specific act, the lawyer CANNOT present other evidence about it.

iii. In both of these circumstances, the litigant must take the answer of the witness to the question posed on cross-exam.

1. **BUT** extrinsic evidence that tends to prove *both* a collateral matter AND *something else* may be admissible. ??

c. Examples:

i. Problem 4.8:

1. NO! Loan officer's testimony would be extrinsic evidence! Can ONLY provide opinion or reputation evidence.

2. YES! P can call another witness to testify to her bias due to her working for the father or can offer extrinsic evidence to show bias. But cannot call a witness to testify to the past acts of truthfulness/untruthfulness. But if it happens to show truthfulness, but entered for bias, then still allowed!
    a. **REMEMBER:** Extrinsic Evidence, under 608(b), is NOT admissible to prove specific instances of conduct to prove that the witness is truthful/untruthful.

ii. *Abel*: Suggests witness has bias in favor of D. If he was willing to kill or steal for D, probably willing to lie in court for D. It might say something about witness's character for truthfulness, but offering evidence to prove bias and extrinsic evidence rule does not bar that.
    1. Just because effect is showing character for untruthfulness does not mean that you cannot offer extrinsic evidence for another purpose. Admissibility for a proper purpose is fine. BUT must still pass Rule 403 balance.

iii. *Pisari*: D charged, not convicted, of earlier robbery at knifepoint. Robbery is not *crimen falso* crime, what does it have to do with character for truthfulness? If the question truly goes to whether the witness is dishonest, then excluded by extrinsic evidence rule. Cannot prove an act of dishonesty that is asked about to show witness is untruthful and cannot go beyond the witness. If court allows for the purpose of identity, motive, knowledge, etc, that would be a valid purpose.

HEARSAY

I. Historical Prelude

a. The witness should not make statements that someone else said because of ambiguity, insincerity, incorrect memory, and inaccurate perception.
b. Trial of Sir Walter Raleigh: Hearsay is unreliable. Four things get in the way of accuracy and reliability: perception, memory, narration, and sincerity. Putting someone under oath and having chance to cross-examine is a way to counter these four problems.

II. Defining Hearsay

a. **RULE 801(a):** "Statement" means a person's oral assertion written assertion, or nonverbal conduct, if the person *intended* it as an assertion.
    i. **Committee Notes:** Burden of proof is on the party claiming an assertion was intended. Close cases should be resolved in favor of admissibility and against deeming the evidence hearsay.
b. **RULE 801(b):** "Declarant" means the person who made the statement.
c. **RULE 801(c):** "Hearsay" means a statement that:
    i. **(1)** the declarant does not make while testifying at the current trial or hearing (out of court statement); and
    ii. **(2)** a party offers in evidence to prove the truth of the matter asserted in the statement.
d. **Hearsay Buzz words:** "I said"; "He said…"; "I told the cop…"; introduced documents with out-of-court statements.
e. **Typically,** if person is making a statement at trial, don't have a problem unless they are referring to what they said before. It must be THIS hearing. Usually 801c1 is not an issue, its 801c2 that is a problem.

f. Examples:

i. Problem 7.1 (P. 384): Victim's written statement—affidavit of a roll-over crash—is given out of court. Her affidavit stated that she watched rollover crash tests of the same model SUV conducted by automaker 2 years before fatal crash and in the tests the vehicle rolled over because of tire explosions at normal speeds. Witness dies before trial. Prosecution offers the affidavit to prove that the automaker's own tests had demonstrated the rollover hazard.

1. **Inadmissible hearsay.** Out of court statement (assertion reduced to written words). Assertion that manufacturer knew SUVs had tendency to roll over. Trying to prove that manufacturer knew SUVs has tendency to roll over, so offering to prove the truth of the matter asserted.

ii. Problem 7.2 (P. 384-85): Declarant makes out of court gesture *intending* to signal that he would replace his bike if he had the money, but he does not have the money. Dc rubs his fingers together to signal that he has no money. P offers testimony of W stating this to prove Dc was short on money. **Inadmissible hearsay.**

iii. Problem 7.3 (P. 385): To prove D was the person who robbed Marilyn, at trial, P asked witness what she did at police station. She looked at a lineup. Prosecutor: What did you say to the detective? Witness: I said, "He's number three." **Inadmissible hearsay**. D is #3 and they are offering to prove that truth of the matter asserted.

1. **EXAM TIP**: Any time someone is prompted with a question like "What did you say?"—pay attention. Hearsay candidate (necessarily an out of court statement).

iv. Problem 7.4 (P. 385): P offers a machine's readout of D's blood. This is NOT a statement under Rule 801(a) because *no person* made it. Hearsay applies to human declarants, not machines.

v. Problem 7.5 (P. 386): D claims self-defense after hearing Dc describe several of his past violent acts. When D testifies what she heard Dc say, D is not proving Dc's sincere intention to communicate that he was threating D as under Rule 801(c)(2), BUT the *effect* it has on D as he heard it to give her reasonable fear. **NOT hearsay.**

vi. Problem 7.6 (P. 386): Dc makes out of court statement, "I bought those two horses." D testifies she sold these horses because she though the horses belonged to Dc after Dc told her they were his. D is not proving Dc's sincere intention to communicate that Dc bought the two horses under Rule 801 (c)(2). D offering statement to show the *effect* it had on D as she heard it to lead her to believe she could sell the horses.

g. Common NON-Hearsay Purposes for Offering Out-of-Court Statements

i. To prove the statement's impact on someone who heard it.

1. For example, when claiming self-defense. If Alice told Dave that Victor was going to hurt him and the evidence that Alice told Dave that information is offered, then it is admissible so long as it is being offered to prove that Dave had a reason to fear Victor when he shot him.

a. BUT if being offered to prove that Victor was looking to hurt Dave and that Victor had a gun, then inadmissible (because offered to prove the truth of the matter asserted).

ii. To prove a legal right or duty triggered by—or an offense caused by—uttering the statement.

1. Saying I do, I accept, I will kill you,

iii. To impeach the declarant's later, in-court testimony.

1. Theory is not that the out of court statement is true and the present testimony is false. It is that witness has said diff things at diff times about this fact so the testimony on this point cant be trusted

III. Defining Assertions

a. Sometimes people deliberately use conduct to assert and make an assertion we would normally make in an oral or written form.

i. Goes to subjective mindset of person

ii. If person intends conduct to be an assertion, they become a *declarant* making a *statement*.
iii. What is the assertion? = What are you trying to prove?
1. What fact is being asserted? = What fact are you trying to prove?
a. If they are equal, then hearsay because being offered to prove the truth of the matter asserted.

b. Examples:
i. Problem 7.9: Dc-Captain brought his family on board a ship, nonverbal conduct implying that the ship was seaworthy (conducted an inspection. Did not appear to be doing it for an audience or otherwise intend it to be an assertion). When P offers evidence of Witness-dockworker testifying about this, indeed this is offered to prove Dc's belief that the ship was seaworthy, but this is an assertion that Dc *did not intend to communicate* (unintended assertion) such that P could prove the truth of the matter asserted in the statement as under Rule 801(c)(2). **Not hearsay. No assertion, just conduct.**
1. Any testimony about the inspection would be hearsay
ii. Problem 7.10: Declarant0chair of atomic energy commission told reports that he would take his wife and children to a former blast site. Reporters there and Dc may have been communicating that blast site is safe or else he would not take his family there. P offers testimony of W seeing declarant's trip to prove that declarant intended to communicate. Offering party trying to prove site is safe. **Hearsay.**
iii. Problems on Pg. 401-402:
1. (1) Assertion. Hearsay. He intended to communicate that British Beef was safe to eat by biting into a burger.
2. (2) No assertion. Cannot be hearsay. The two witness offered to testify that Laci Peterson did not mention that Scott Peterson bought a boat.
a. Statements can be that either (1) she did not know about the boat or (2) she did not want to talk about the boat.
i. (1) No intention of communicating an assertion.
ii. (2) Her silence is used to assert that she does not want to talk about the boat or is not happy about him buying a boat.
iii. (1) is the correct answer—P offering this to show that Laci did not know, so she could not have used her silence to make an assertion. There was no intent in her silence to communicate an assertion.
3. (4) Not an assertion. That is just conduct of the dead police officer. Police Officer was firing a riot gun at a crowd and hit the murderer.
4. (6) Assertion. Victim intended to communicate a fact that Nelson stabbed him.
5. (8) Assertion. Hearsay. Offered to prove that Smith had seen the victim before he became ill and died. In the diary, the victim asserts that he saw Smith and intended to communicate that he saw her.

IV. Hearsay within Hearsay

a. **RULE 805:** Hearsay within hearsay is not excluded by the rule against hearsay if each party of the combined statements conforms with an exception to the rule.
b. Example:
i. A: I shot Bill.
ii. B: A said, "I shot Bill."
iii. C: B said that A said, "I shot Bill."

V. Impeaching Declarants

a. **RULE 806:** When a hearsay statement has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the

declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

i. • You can do to a hearsay declarant the same thing you can do to any witness - impeach!
    • Can attack that person's truthfulness
    • Suggest person has a bias
    • Evidence of prior inconsistent statement
    • Person may have had a hindrance of accurate perception or memory

ii. • Ex. Claire is declarant and she will not be testifying at trial
    • Can attack truthfulness even if not witness at trial. Her statement is being admitted and it might be that she is a liar or there is improper influence
    • Extrinsic evidence - 613b - must be given opportunity to explain or deny it
    So this rule says, if person is not at trial, doesn't matter if the person was given the opportunity to explain or deny it

b. You can impeach the declarant, even if at the time at trial the declarant is not testifying. Bias, prior inconsistent statement, bad perception, bad memory.

i. Everything you can do to a witness, you can do to a declarant, to impeach their statement admitted through a hearsay exception or a hearsay exclusion.

c. **NOTE:** The Court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it.

VI. Exclusions from the Hearsay Rule

a. **Overview of Statements EXCLUDED from Hearsay:**

i. **Rule 801(d)(1): Declarant-Witness's Prior Statements**

1. (A) Prior Inconsistent Statements
2. (B) Prior Consistent Statements
3. (C) Statements of Identification

ii. **Rule 801(d)(2): Opposing Parties' Statements**

1. (A) Party's Own Statements
2. (B) Adopted Statements
3. (C) Statements by Spokespersons
4. (D) Statements by Agents
5. (E) Coconspirators' Statements

b. Statements of an Opposing Party Offered Against that Party

i. **RULE 801(d)(2):** A statement that meets the following conditions is *not hearsay*:

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

2. **REMEMBER:** Statement itself does not, by itself, establish the existence of authority, a relationship, or a conspiracy (*Bourjaily*). HAVE to prove the

relationship outside of the statement—so cannot use the statement alone to prove the existence of relationship, conspiracy, etc.

ii. **EXAM TRICK:** Party will offer his or her own statements in his favor—HEARSAY! Would NOT fall within Rule 801(d)(2) because it would NOT be offered **against** an opposing party.

iii. **RULE:** Party offering evidence under Rule 801(d)(2) must prove the existence of Spokesperson relationship (C), Agency relationship (D), or Conspiracy (E) **by a preponderance of the evidence.**

1. Offering party must provide evidence in addition to the statement to prove these relationships by a preponderance of the evidence.
2. **RULE 104(a) and Hearsay:** When deciding a preliminary question for hearsay, the trial court CAN consider the hearsay statement in addition to other evidence to make the determination because Rule 104(a) suspends the rules of evidence for preliminary questions and Rule 801(d)(2) requires consideration of additional evidence to make the determination.

iv. **Rule 801(d)(2)(E)—Coconspirator's Statements**

1. **RULE:** Preconditions to offering coconspirator's statements under Rule 104(a):
   a. (1) Conspiracy existed at the time of the out-of-court statement was made.
   b. (2) Conspiracy included both the Dc and the party against whom the statement is offered; and
   c. (3) Dc spoke during the court of and in furtherance of the conspiracy.
   d. These preconditions must be proven by a preponderance of the evidence (*Bourjaily*).

v. Examples:

1. Party's Own Statements
   a. Problem 7.11 (P. 410): P sues airline for suffering injuries that diminished her capacity to work. D may offer P's billing record that show she worked normally under 801(d)(2)(A)—made by her in her capacity and offered against her.
      i. Admissible under Rule 801(d)(2)(A) because it is the party's own statement and offered against her.
   b. Problem 7.12 (P. 410-11): D tells police "You can take my blood," intending to communicate his blood is different and that he is innocent. D offers his statement at trial to prove this (essence of assertion is that he is innocent, and trying to prove he is innocent), but this is hearsay under 801(c). Also because he is offering this *in his own favor*, 801(d)(2)(A) does not apply, so not excluded. Still hearsay.
      i. Inadmissible because hearsay under 801(c).
      ii. Rule 801(d)(2)(A) does not apply because D is offering it in his own favor, NOT against the opposing party (i.e. Prosecutor must offer it against D).
2. Adoptive Admissions
   a. Problem 7.13 (P. 411): "You can get more drugs from my buddy." Under 801(c), this out of court statement intended to communicate that his buddy had drugs and would sell them, and when P offers this statement to prove this, this is hearsay. Now the buddy, upon hearing the statement, got up and got a bag of drugs ready (when he gets up, he is manifesting his adopting of Monica's statement and that is as if he said it himself). P was trying to prove by this reaction (nonverbal statement) that D intended to sell drugs.
      i. Statement offered against the buddy as an adoptive admission under Rule 801(d)(2)(B), so this is NOT hearsay.

ii. Admissible!
iii. Why not Rule 801(d)(2)(E) (Conspiracy)? Because the statement refers to her "buddy" not necessarily the D in this case. Adoptive theory is better way to go, but conspiracy may work.
iv. Relevance of the statement is not at issue, it is relevant regardless of whether the statement is hearsay or whether the buddy manifested that statement

c. Prior Statements of a Declarant-Witness

i. Prior Inconsistent Statements Offered to Impeach
1. **RULE 613:** Extrinsic evidence of prior inconsistent statement admissible if witness given the chance to explain/deny and other party can cross-examine.

ii. Prior Inconsistent Statements Offered "Substantively"
1. ALL 801d – FIRST THRESHOLD – MUST BE TESTIFYING AT TRIAL AND SUBJECT TO CROSS EXAM
2. In order for **Rule 801(d)(1)** to apply, *the declarant MUST be testifying at trial.* Evidence admitted under this rule deals with statements made by the declarant.
   a. If the declarant is NOT at trial, then Rule 801(d)(1) CANNOT apply because the declarant has to be testifying and subject to cross-exam for this rule to come into play.
   b. **Rule 801(d)(1)(A)** deals only with prior inconsistent testimony of the declarant-witness in other hearings, trials, etc.
   c. **Rule 801(d)(1)(B)** deals with the declarant witness's prior consistent statements.
3. **RULE 801(d)(1)(A):** A statement is not hearsay if the *declarant testifies and is subject to cross-examination* about a prior statement and the statement (A) is inconsistent with the Dc's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition.
   a. Statement that falls under this rule can be offered **substantively** to prove the truth of the statement:
      i. Trying to prove that prior inconsistent statement is true, this is different than impeachment
      ii. Not hearsay if declarant-witness testifying about prior statement (made under oath at a proceeding, etc.) that is inconsistent with the statement the witness is now making.
   b. Rule 801(d)(1)(A) Timeline:
      i. P asks a question about a witness's (1) prior inconsistent statement that (2) was given under threat of perjury at another proceeding.
      ii. D objects to the question as hearsay.
      iii. P clarifies that he is offering t, the evidence to impeach the witness's testimony with the prior inconsistent statement (Rule 801(d)(1)(A)).
      iv. Under Rule 613(a), P must prove the statement to opposing counsel on request.
      v. Under Rule 613(b), extrinsic evidence of the witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and

the adverse party is given an opportunity to examine the witness about it.

c. **REMEMBER:** Rule 801(d)(1)(A) only comes into play when 1. D is testifying at trial, 2. inconsistent prior statement is offered to prove the witness is unreliable AND 3. the statement was given under threat of perjury (in a prior proceeding).

i. So NO emails, texts, out of proceeding statements, etc.

d. **EXAM TIP:** If the witness is a party in the proceedings (P or D) and the opposing party offers a prior statement, is it admissible? YES!

i. **YES!** Remember Rule 801(d)(2) allows for statements made by one of the parties to be offered against them. NO requirement of being given under threat of perjury, subject to cross, etc.

4. Example:

a. Problem 7.17 (P. 438-39): W's prior statement to police was that she saw D fire the fatal shot, but now W testifies under oath that she was nowhere near the crime scene.

i. Because W was not under oath, Rule 801(d)(1)(A) does not apply. Indeed, P is introducing the interviewing officer's statement to impeach W, not as substantive evidence, and thus Rule 613 applies to such that evidence of this prior statement is *admissible extrinsic evidence* under Rule 613(b)

ii. Assume *arguendo* this prior statement was given at a *grand jury*. Although W was not subject to cross-exam then, W testifying is subject to this now such that 801(d)(1) applies, and (A) applies because W then gave the prior statement under penalty of perjury. So the entire statement comes in.

1. P cannot begin with the W's grand jury testimony (hearsay). If he asked W and she says she was not there, THEN prosecutor can offer prior inconsistent statement.

VII. This is extrinsic evidence of the prior inconsistent testimony

VIII. Can be used if its simply for impeachment purposes only, but the problem is that the prosecutor needs it for the truth of the matter bc she rests on that alone [she wants it to be used substantively]

a. Make sure you are looking to see WHY in impeachment purpose is in cases like this

b. Because this is the only evidence in this case, it would likely be dismissed

a. Problem 7.19 (P. 453): W-Dc (at grand jury) says "D hit me with an open hand." W-Dc (at current trial) says "D pushed the door into my eye." GJ testimony is hearsay until witness says something inconsistent, then Rule 801(d)(1)(A) magic happens. Can offer prior testimony from grand jury hearing (not hearsay anymore) and no substantive evidence on the record.

IX. She is testifying and subject to cross exam. What she is saying is inconsistent. The prior statement was under oath at the grand jury

X. This is not hearsay and is admissible (at least under 802)

a. Cannot say "tell me about your grand jury testimony" because she hasn't said anything inconsistent yet to prove the truth of the matter asserted.

i. 801d exclusion doesn't apply yet until she is inconsistent

XI. **always look at timing. LOOK FOR TRIGGER IN 801D1a

a. Prior Consistent Statements

i. **RULE 801(d)(1)(B):** A statement is not hearsay if the *declarant testifies and is subject to cross-examination* about a prior statement and the statement (B) is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying.

ii. **801d1bi** – Deals with bias

- 801d1Bi - this is about bias.
- Ex. Say she was threatened and the D is saying youre testifying this way because youre angry with D
  - Prosecutor would offer consistent testimony from the grand jury (as long as the grand jury testimony was made before the influence)
- Jan - prior grand jury statement
- Dec - trial testifying
  - Recently - would have to happen between the prior statement and the current trial - that's what makes it "recent"
    - Must be after the prior statement but before the trial testifying
  - Chronology matters!!!!!
  - That prior statement CAN be an out-of-court statement
  - In B, it does not require that the prior statement be given under the penalty of perjury, unlike A
  - TRIGGER - there must be an express or implied charge that the testimony is fabricated because of an improper influence

801d1Bii

- Can be used in cases of memory, narrative, perception, propensity, truthfulness, credibility, etc.
  - Any non-bias ground can come in substantively and sequence and chronology doesn't matter
  - Must wait for the witness to be impeached or attacked as untruthful
  -

iii. **IMPORTANT:** As soon as counsel implies or explicitly says that the witness/declarant fabricated the testimony or has an improper bias, the sponsoring counsel can offer the

W-Dc's consistent prior statement to rebut that assertion. Once counsel implies that there is improper motivation, the prior consistent statement becomes non-hearsay and admissible if the motivation came into existence *after* the prior statement (*Tome*).

1. Rule 801(d)(1)(B) Timeline:
    a. (1) Prior consistent statement (given 4/4/15)—offered substantively to prove the truth of the matter asserted.
    b. (2) Event that would trigger Rule 801(d)(1)(B)—Improper motivation occurs.
    c. (3) Testimony at trial (given one year later)
    d. Admissible? YES! Improper motivation occurred *after* the prior consistent statement, so the prior consistent statement was not tainted by the improper motivation. Prior consistent statement is admissible under Rule 801(d)(1)(B).

b. REMEMBER different between 801(d)(1)(A) and 801(d)(1)(B)

i. Rule 801(d)(1)(A) deals with prior inconsistent statements **given under threat of perjury**. BUT Rule 801(d)(1)(B) does NOT have that requirement! Any prior consistent statement can be offered—no need for under threat of perjury.

c. Prior Statements of Identification

i. **RULE 801(d)(1)(C):** A statement is not hearsay if the *declarant testifies and is subject to cross-examination* about a prior statement and the statement (C) identifies a person as someone the declarant perceived earlier.

ii. Declarant looking at a lineup/photo and choosing someone, or looking a particular suspect and saying that is the one.

1. Trial might not happen for a while after initial event and events that happened earlier are more reliable.

iii. Still subject to cross-examine for purpose of Rule 801(d)(1) even if he cannot remember.

iv. Example:

1. *U.S. v. Owens*: W-DC's memory was fuzzy and he did not remember much detail of the beating he took because D hit him on the head. BUT W-Dc remembered identifying the D as the aggressor (despite possible suggestions by visitors). The Court said this was *not hearsay* under Rule 801(d)(1)(C) because even though he was unavailable under 804(a)(3) for lack of memory, he was still subject to cross-exam under 801(d)(1).

XII. Unavailable Declarant—Exceptions to the Rule of Hearsay

a. Establishing that the Declarant is Unavailable

i. **RULE 804(a):** A declarant is unavailable as a witness if the declarant:

1. **804(a)(1):** is exempted from testifying about the subject matter of the declarant's statement because the court ruled that privilege applies.
2. **804(a)(2):** refuses to testify about the subject matter despite a court order to do so.
3. **804(a)(3):** testifies to not remembering the subject matter (lack of memory means unavailability).
4. **804(a)(4):** cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness.
5. **804(a)(5):** is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:
    a. **(A)** the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or

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

ii. As soon as the witness becomes unavailable, what was inadmissible becomes admissible (it is still hearsay, but admissible hearsay).

b. Former Testimony

i. Ask who it is being offered against and whether opportunity for cross exam with similar motive

ii. **RULE 804(b)(1):** The following are not excluded by the rule against hearsay *if the declarant is unavailable* as a witness: (1) Testimony that:

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

iii. Declarant CANNOT be there. Cannot be available.

iv. HAS to be offered against a party (or predecessor in interest) had the same opportunity and motive to develop the testimony.

v. **EXAM TIP:** Watch for "The declarant is going to testify…" because the exception does NOT apply unless the declarant is unavailable/not testifying.

1. There will be opportunity, prior trial proceeding, similar motive—BUT WAIT, the declarant was available to be a witness. Trick question. Make sure you determine whether or not the Declarant is available FIRST, then move on to these exceptions.

vi. **REMEMBER:** Grand Jury testimony does not qualify as a "hearing" under (A) of this rule because (B) requires that the party of the former testimony is being offered against have an opportunity to develop the former testimony on direct, cross, or redirect at the prior hearing.

vii. Examples:

1. Problem 7.22 (P. 474) (Opportunity to examine): V testified in a grand jury and P offers this hearsay evidence now against D. FRE 804(b)(1)(B) is not satisfied because D did not have a chance to develop the testimony by direct, cross, or redirect examination at grand jury hearing. Inadmissible hearsay.
2. Problem 7.23 (P. 475) (Similar Motive): V previously testified against D in a *civil action* for negligence in drunk driving where D had an opportunity to cross-examine. V now unavailable due to head injury and prosecutor now offers this testimonial hearsay in this *criminal case* for drunk driving. Did D have a similar motive to develop this testimony in the civil action as he does now? Likely: the objectives of both were defense for being drunk, so 804(b)(1)(B) would allow the hearsay.
    a. Previous P in the civil case likely had the same motive to prove D was drunk in the negligence action as Prosecutor had to prove D was drunk in the criminal case.
3. *Duenas*: There as former testimonial hearsay from a prior suppression hearing where D cross-examined Smith to establish that D's confession was involuntary because he was not Mirandized. But at the current trial D is challenging Smith's statements on substance. The court held the motives were NOT similar as to admit under Rule 804(b)(1)(B).
    a. First hearing: arguing confession was involuntary.
    b. Trial: trying to prove guilt beyond a reasonable doubt

c. Statements Against Interest

i. **RULE 804(b)(3):** The following are not excluded by the rule of hearsay if the declarant is *unavailable* as a witness: A statement that

1. **804(b)(3)(A):** a *reasonable person* in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

2. **804(b)(3)(B):** is *supported by corroborating circumstances that clearly indicate its trustworthiness*, if it is offered in **a criminal case** as one that tends to expose the declarant to criminal liability.

ii. Two questions to ask to use this rule:

1. Unavailable declarant?

2. Criminal case where statement tend to expose *declarant* to criminal liability.

iii. If, during this case, criminal defendant, then 801(d)(2)(A) exclusion. Anything they say that is adverse to them and favorable to prosecution is not hearsay.

1. *Any* statement made by the party (including statements to police, confessions, etc.) that is being offered *against* that same party.

iv. **804b3b-**

• Im being charged

Morgan says - I committed the crime for which d has been charged

○ It is a statement against morgan's interest

§ It would expose her to criminal liability

§ Part b says if Im offering the statement in my favor to prove to the jury that someone else has taken responsibility or something…it might create reasonable doubt - we don't want me to be able to do that

□ Morgan could have been persuaded to make this statement

- Morgan's statement would have to be supported by corroborating circumstances that indicates its trustworthiness - I would have to prove the trustworthiness. You must link the declarant to the crime

v. Examples:

1. *Williamson*: *Williamson* held that part of a statement that is *self-serving* would be inadmissible hearsay (not even neutral statements are admissible), while the part of the statement that is *self-inculpatory* would be admissible hearsay under this rule.

a. *Minority view*: look at all the statements together, which would help explain what happened as to be admissible narrative.

2. Problem 7.25 (Civil Trial): D set fire to a building and made statement to investigator saying Alice asked him to torch building. Said he drove to the building with gas can, but lost his nerve when he remembered that a family with two kids lived upstairs so he poured a little bit of gas, lit it, and took off.

a. He is trying to exculpate himself by saying he lost his nerve and kids lived there and trying to blame Alice. Really the only part that can come in is driving to the restaurant with a can of gas and pouring in window. Civil case, so (B) does not come into play.

b. Statement by statement analysis under *Williamson*:

i. "I owed Alice a few factors, and she asked me to torch the Partridge for her so she could collect on the insurance." NOT inculpatory. Not admissible under *Williamson*.

ii. "I drove to the restaurant with a can of gas the ways he told me." Possible against his interest and inculpatory BUT "the way she told me" is pinning it on Alice so strike from question/record.
iii. "But I lost my nerve when I remembered that a family with two little kids lived upstairs from the restaurant." Inculpatory—knew that there were people that lived above the restaurant but lit it any way.
iv. "So I just poured a little bit of gas into the window." Inculpatory.
v. "Then I lit it and took off." Inculpatory.

3. Problem 7.26 (Criminal trial):
   a. Barone's (D's) statement: Rule 804(b)(3) does NOT come into play. Criminal case where Barone is the D and his statement is offered against him. NOT HEARSAY under Rule 801(d)(2)(A).
   b. Limoli's Statement offered by his Sister at trial: this is Barone's trial, not Limoli's. Since being offered against Barone, this is a hearsay statement.
      i. Unavailable? YES! Limoli is dead.
      ii. Statement Against interest? "Use lemon juice and they can't tell you shot a gun."—NOT corroborating evidence under Rule 804(b)(3)(B)—need something <u>in addition to</u> the hearsay statement to corroborate the statement.
      iii. "Admission that Barone committed robbery and shot security guard in the neck." Inculpatory and satisfied Rule 804(b)(3)(A) with corroborating evidence of Barone's statements under Rule 804(b)(3)(B).
         1. Entire statement is inculpatory, even though the statement implicates Barone, it shows that Lemoli was an accomplice in the robbery (felony murder rule).
         2. Corroborating Evidence of Barone's statements—Satisfy Rule 804(b)(3)(B) because they are corroborating evidence that are not hearsay. "Lemon juice" by Lemoli cannot be offered as corroborating evidence because cannot corroborate hearsay statement with another hearsay statement.

- **Will try to trick us with statements against opposing party that are not hearsay!**
- **What about fact that limoli said this to his sister?**
  - **Always look at circum. And context of the statements – a reasonable person in the declarant's position**
  - **Whether the statement made in that context was a statement against his interest**
  - **Saying barone shot him in the neck – still against limoli's interest bc conspiracy and would be up for felony murder**
  - **Just bc in privacy of home doesn't mean it cant be against his interest**
  - **It if it was made to police, might be kind of exculpatory to mention he was only respons for calf shot**
  - **The corroborating evidence does not nec have to be admissible**

d. Dying Declarations
- **i.** **RULE 804(b)(2):** The following are not excluded by the rule against hearsay if the *declarant is unavailable* as a witness:
  - **1.** **804(b)(2):** In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.
- **ii.** Person must have *subjective belief* that death is imminent; only a genuine belief.
  - **1.** Must believe theyre going to die
  - **2.** Person can survive and its still admissible as a dying declaration
  - **3.** All that matters is that in their mind, at the time they made a statement, they thought they were going to die.
  - **4.** Homicide – can be more than one victim and one victim dies and one survives
  - **5.** 806 can come into play
- **iii.** REMEMBER, must be unavailable—but not necessarily dead. Just unavailable.
- **iv.** REMEMBER, must be in (1) prosecution for homicide OR (2) a civil case.
- **v.** Examples:
  - **1.** Problem 7.28 (P. 498): V wounded and 4 hours later doctor tells him he has no chance to life. V says "I know D and he did not shoot me."
    - **a.** This would be admissible hearsay on a *broad view* of "cause and circumstances" of death under 804(b)(2).
    - **b.** On a *narrow view* of "cause and circumstances", telling who did NOT shoot him is arguably not about the death's cause or circumstances. Also arguable is how long "Imminent" means.
    - **c.** Seems like the court will have to make a 104(a) preliminary determination about the 804(b)(2) requirements were met by a preponderance of the evidence.
  - **2.** *Shepard*: Imminence not met because declarant did not believe she would die in saying "you're going to get me better, right?" Also, personal knowledge issue. How did she know Dr. Shepard poisoned her? If no personal knowledge, then inadmissible.

e. Forfeiture by Wrongdoing
- **i.** **RULE 804(b)(6):** The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:
  - **1.** **804(b)(6):** A statement offered against a party that wrongfully cause—or acquiesced in wrongfully causing—the declarant's unavailability as a witness, an did so intending the result.
  - **2.** Must act intentional and wrongful
- **ii.** Does spousal privilege ever come into play?
  - **1.** Confession given to wife and admission of wife's diary with confession would be inadmissible because of spousal privilege.
  - **2.** Did D intend to make his wife unavailable? YES!
    - **a.** BUT the "wrongful" requirement would NOT be satisfied here because D did not do anything wrong or illegal in telling his wife.
- **iii.** Examples:
  - **1.** *U.S. v. Gray*: D on trial for mail fraud. Prosecution wants to offer previous victim's out of court statements. Must find that she committed murder (by preponderance of the evidence) and intended result so that V could not testify as a witness. Here, she had not been charged with fraud at the time V was murdered, so unlikely D kill him to make him unavailable at this trial.
    - **a.** *Gray* held that causing such unavailability applies to all trials and proceedings. This can happen by murder or intimidation. But if a party intends to kill

declarant for a reason other than causing his unavailability, the court would have to make a 104(a) determination.

b. Arguing it wasn't to prevent him from THIS trial, but the rule says unavailability as a witness, not as a witness at a particular trial

XIII. Exceptions to the Rule of Hearsay (Dc Availability Immaterial)

RULE 803: The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

a. Reputation Concerning Character
- **i.** **RULE 803(21):** A reputation among a person's associates or in the community concerning the person's character.

b. Present Sense Impression
- **i.** **RULE 803(1):** A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.
- **ii.** Not typical hearsay concerns. If you are describing something as it is happening, the amount of thinking you would have to do to lie about it is too much.
- **iii.** "Immediate"
  1. The more minutes that pass, the farther you are from being immediate within this rule.
  2. **EXAM:** "just" = immediate
  3. "Immediately after" open to interpretation—Court must make a preliminary finding that the statement was made immediately after the event.
     - **a.** Rule 104(a) is used because statement is relevant regardless of the finding.

- This can be the declarant themselves OR say if someone spilled coffee and said, that was hot, and I saw it happen, I could testify she said that was hot
- It may be written as well

c. Excited Utterances
- **i.** **RULE 803(2):** A statement relating to a startling event or condition made while the declarant was under the stress of excitement that it caused.
- **ii.** Fear, extreme pain, euphoria, etc.
- **iii.** Could go on for hours, days, etc.
  1. Still showing signs of stress, physical reaction still taking place.
- **iv.** **EXAM:** Exclamation point! = Excited utterance.
- **v.** "Crying and upset" may also be an excited utterance.
- **vi.** Statement has to relate to the event and making a statement about the event that caused you stress in the first place.
- **vii.** 911 usually satisfy present sent and excited utterance
- **viii.** Examples:
  1. Problem 7.26 (P. 512): Dc said "That dog just bit me!" is both an 803(2) excited utterance because of the explanation point and a present sense impression.
     - **a.** Later in the day the DC said, "As I was walking by, the dog lunged at me." This is likely not a present sense impression because this was not immediately after, but perhaps a judge could find under 104(a) an excited utterance because she was still under the stress and excitement of the dog bite.
  2. Problem 7.30 (P. 513): Old woman telling 911 about the dog attack in the hallway that she was *hearing through the door*. Candidate for present sense impression since describing the event as it is happening..

a. Rule 803 apply only when the Dc has *personal knowledge*, which is unlikely here as for the statement to be admissible as a present sense impression. Could not confirm what was happening—only heard.
i. BUT if Declarant is at trial, then no problem here.
b. Likely excited utterance under Rule 803(2) because she is a "wreck" while she is calling 911.
i. Court would have to find under Rule 104(a) that the caller was under stress or excitement.

3. Problem 7.31 (P. 512): Domestic violence V tells story of abuse to police, crying, but then denies at trial.
a. NOT prior inconsistent statement under 801(d)(1)(A) because statement to police not given under penalty of perjury!
b. Not 613 bc that only applies when its JUST to impeachment and not also for the truth of the matter asserted
c. LOOK AT WHETHER THEY ARRIVED AT THE SCENE IMMEDIATELY AFTER
d. Maybe present sense impression under 803(1) because she is still experiencing the injury in that she is still rubbing her head, but this is a stretch because of the "immediate" time requirement.
i. Police likely took a little while to get there.
ii. Need a timeframe for the Court to find that this happened "immediately" after the event under Rule 104(a).
e. More likely that this is excited utterance under 803(2) because she was crying and she was still under stressful excitement, and this is admissible.
i. Need finding by preponderance of the evidence under Rule 104(a).

d. Statements of Then-Existing State of Mind or Condition
i. **RULE 803(3):** A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it related to the validity or terms of the declarant's will.
ii. Person reflecting about what is going on with their body/mind at the time they made the statement.
1. My leg hurts.
a. BUT NOT: My leg is broken (because broken leg based on x-ray you saw yesterday).
b. UNLESS you see bone sticking out of leg.
2. I am exhausted.
3. Lots of overlap between present sense impression. Plan is most significant difference
iii. In terms of plan, etc. best understanding is every part of statement comes in with exception of reference to the other person.
iv. I am going to x
v. **EXAM:**
1. "I am planning to meet with Alex in my office after class." Fall within exception?
a. NO! Plan was conceived prior to form the plan to meet after class. This statement talks about Alex's state of mind/intent/plan. Offered to prove Dc's intent and Alex's intent as well.

2. Advisory Committee Notes Accepts *Hillmon*, despite the rule contradicting the holding.
    a. **IMPORTANT:** Rule limits *Hillmon* to be offered to ONLY prove the Dc's future conduct, not the conduct of a third party mentioned.

vi. Example:
1. *Mutual Life Insurance v. Hillmon*: Insurance Co wants to prove Walters intended to go with Hillmon to Colorado (because Hillmon's body supposedly found in KS and no other suggesting Walters would be in KS except for the letter). Evidence shows present plan to go with Hillmon to Colorado.
    a. BUT Hillmon likely left out because cannot speak to the plan/intent of a third party.
2. Problem 7.33 (P. 519): "I'm going to pick up a pound of wee Angelo promised me for free."
    a. "Angelo had promised me" is dependent on memory and thus would be stricken as hearsay. For "a pound of weed" this is a plan admissible under 803(3). Admissible hearsay.
    b. Also, because kidnap case where declarant is unavailable, this would be admissible as an 804(b)(3) statement against interest.
3. *Shepard*: Offered evidence that Ms. Shepard was suicidal (state of mind) and likely killed herself. Government rebutted with the statement claiming she was murdered by Dr. Shepard to rebut her suicidal state of mind.
    a. Cannot fall within this exception. Implicated the intent of a third party (Dr. Shepard) and refers to the past/memory.
    b. PLUS prejudice is too great to admit.

e. Statements Made for Medical Diagnosis or Treatment
i. **RULE 803(4):** A statement that:
1. **(A)** is made for—and is reasonably pertinent too—medical diagnosis or treatment; and
2. **(B)** describes medical history; past or present symptoms or sensations; their inception or their general cause.
ii. ANY medical professional—does not have to be a doctor.
iii. Why are these reliable?
1. Rule assumes you will not lie to your doctor—incapable of fabricating (emergency) or disinclined to fabricate (health hangs in the balance).
iv. CANNOT…
1. Implicate third parties
2. Offer information about who is at fault for the emergency/condition.

- Significant overlap
- If telling doctor about headache or ankle….often times, it's a present sense of impression, then existing physical condition, or even an excited utterance
- However, this exception would allow for admission of a statement of MEDICAL HISTORY - including things that happened decades ago.
    - If its in the past, not excited utterance not statement of then existing physical condition bc it happened a while ago…unless its still there
- These statements usually would be privilege bc anything comm by patient to doctor is protected

- But these are admissible bc its usually a patient who is offering these statements….which is waiving the priv
- Or may not be privilege if the patient has put medical history at issue
- Statements of advisory committee make it complicated….
    - Extends to statements of causation
    - Statements as to fault are NOT ordinarily qualify or are narrowly qualified
    - Insinuations of negligence are not permissible

CONFRONTATION CLAUSE

I. Intro to CC

a. Worry about the Confrontation Clause after you get past hearsay hurdle!
  i. If no hearsay issue, then no CC issue!
b. **Applies only in criminal cases.**
c. **Does NOT apply when D offered statement against Prosecution.**
d. **Outline of CC Problem:**
  i. Declarant unavailable (not appearing at trial).
  ii. No prior opportunity to cross-examine.
    1. If prior opportunity to cross-examine, CC right is fulfilled and prosecution can offer hearsay statement from Dc who is unavailable.

II. Confrontation Clause Framework

a. **RULE:** The Confrontation Clause bars:
  i. Hearsay… that is testimonial (*Crawford* and *Bryant*)…
  ii. In a criminal prosecution…
  iii. Offered against the D…
  iv. Declarant unavailable…
    1. If Dc shows up to testify at trial, NO CC ISSUE--- but still have a FRE issue.
  v. D had NO opportunity to cross-examine (*Crawford*)
b. *Ohio v. Roberts*: Hearsay is admissible (despite the CC) if statement as adequate indicia of reliability by being one of the following: (1) Firmly rooted hearsay exception OR (2) Particularized guarantees of trustworthiness.
  i. **NOTE:** Overruled by *Crawford*.
c. ***Crawford v. Washington*:** The Confrontation Clause prohibits the admission of *testimonial hearsay* against a D if (i) the *declarant is unavailable* to testify at the D's trial, and (ii) the D had *no opportunity* to cross-examine the declarant.
  i. Huge effect on Prosecutors
    1. In Domestic Violence cases, no opportunity to examine with statement to police or a grand jury, so CC bar admitting statements of victims that refuse to cooperate.
  ii. PROBLEM: Dying declarations will almost always be barred by CC under this rule. Footnote 6 in *Crawford* allows for admission of dying declarations.

d. What is "Testimonial"?

- **i.** Testimonial Statements
  - **1.** Obvious testimonial statements
    - **a.** Testimony at trial, under oath, grand jury, police interrogation, confession.
    - **b.** May be statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.
  - **2.** The admission of "testimonial" hearsay violates the Confrontation Clause if:
    - **a.** The declarant is *unavailable* to testify at the D's trial; and
    - **b.** The defendant has *no prior opportunity* to cross-examine the declarant.
- **ii.** Non-Testimonial Statements
  - **1.** Confrontation Clause does NOT apply in a situation where a statement offered is NOT testimonial.
    - **a.** But still have to deal with Hearsay. Must fall within hearsay exception/exclusion.
  - **2.** **RULE:** Statements are Non-Testimonial if given to meet an ongoing emergency.
    - **a.** *Reasonable person standard*. Would reasonable person being interrogated think this was an ongoing emergency/would a reasonable officer think this is an ongoing emergency?
    - **b.** What is the purpose of the Q & A?
      - **i.** To enable police to respond to an emergency?
        - **1.** If so, nontestimonial.
        - **2.** Usually 911 situations
      - **ii.** If purpose to establish past events to use in the prosecution for a crime.
        - **1.** Testimonial.
- **iii.** ***Michigan v. Bryant*:**
  - **1.** *Davis*: V calls 911 saying her boyfriend is here, jumping on her, using his fists. 911 operator asking questions about the attacker.
    - **a.** Present sense impression hearsay exception.
    - **b.** Primary purpose to help police respond to ongoing emergency.
  - **2.** *Hammon*: Police respond to DV call. V on porch, appeared frightened, saying nothing was wrong. Once officer remained with D in kitchen while police took V in living room where she talked to police and signed a battery affidavit.
    - **a.** Affidavit = Present sense impression
    - **b.** Oral statements = excited utterances
    - **c.** No emergency because no violence going and V separated from D.
    - **d.** Primary purpose of police questions to prove past relevant to criminal prosecution of D.
  - **3.** *Bryant*: Man bleeding at gas station. Police ask what happened?
    - **a.** Dying declaration hearsay exception
    - **b.** Police do not know the situation, if gunman is in vicinity. Police need to ask questions to find out what happened and secure the area.
    - **c.** Guy likely thought he was going to die, asking about ambulance Court decided non-testimonial statements.

e. Examples:

- **i.** Problem 8.4 (P. 678): Cannot be a dying declaration because the event had not yet happened. Lacked knowledge of the issue.
  - **1.** Seems like a testimonial statement. Reasonable person in her position would have understood her statements would be used prosecutorally at trial and she was trying to serve as a posthumous witness.
- **ii.** Problem 8.5 (P. 679): Statement against interest? If he was telling C because he wants him to go to the police, then that would be testimonial. Here, seems like there was an understanding that it was confidential. The whole thing may be statement against interest because G had nothing to gain (implicated himself in burglary, which led to murder, accessory after the fact).
  - **1.** Argument for testimonial: reasonable person would have though nephew would not tell.
  - **2.** Non-testimonial if telling nephew in hopes that he would tell police because declarant could not, but does not seem like the case here.

f. Forfeiture of Right to Confrontation

- **i.** **RULE:** If D acted with purpose or intent to wrongfully cause the Dc's unavailability, the D forfeits his right to confront opposing witnesses.
- **ii.** ***Giles v. California*:** Forfeiture exceptions applies only when the D engaged in *wrongful* conduct *designed* to prevent the witness from testifying.