

# Evidence 101

## Part I

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# Coverage

- Three Major Areas
  - Relevance
    - The first question you should always ask is: How is this evidence relevant?
  - Witnesses: Testimonial evidence including
    - Form of examination
    - Opinions and Experts
    - Credibility and Impeachment
  - Hearsay

# Coverage

- Digressions
  - Writings
  - Privileges

# Relevance

- Definition of relevant evidence (FRE 401)
  - Relevant evidence is evidence which has the tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be w/o the evidence
  - Relevancy strand: Tendency to make the existence of any fact more or less probable than it would be w/o such fact

# Relevance

- Materiality strand: Fact must be “of consequence to the determination of the action.”

# Relevance

- Distinction between direct evidence and circumstantial evidence
  - We're talking about logical relevancy and logical relevancy problems involve only circumstantial evidence, not direct evidence
  - Direct evidence: That which does not depend on any inference for its relevancy. Example: Testimony of an eyewitness to a shooting that she saw the accused shoot the victim. No inference is required – the eye witness saw the accused shoot the victim

# Relevance

- Circumstantial evidence: Evidence whose relevancy depends on the drawing of an inference. Example: Testimony of an eyewitness that she did not see the actual shooting but that she did see the accused running from the scene of the crime.



# Relevance

- Types: (i) Logical Relevance and (ii) Discretionary, Pragmatic, or Policy – based Relevance

# Relevance

- Logical Relevance: Evidence that has any tendency to make a material fact more probable or less probable than it would be w/o the evidence (FRE 401)
  - Easy standard
  - Warning Signals: Evidence may n/ be logically relevant (i.e. may be too remote) if evidence involves some other:
    - Time
    - Event
    - Person
    - Than one involved in litigation

# Relevance

- Discretionary or Policy-based Relevance: Stricter standard of admissibility. Even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of
  - Unfair prejudice,
  - Confusion of issues,
  - Misleading jury,
  - Undue delay,
  - Waste of time,
  - Cumulative evidence
  - Note: FRE 403 makes NO mention of “unfair surprise.” The least likely ground to exclude logically relevant evidence is unfair surprise b/c it is NO ground for the exclusion of logically relevant evidence under FRE 403

# Relevance

- Recurring Relevance Patterns
  - Specific Problems Involving Logical Relevancy
  - Discretionary policy-based relevance

## Specific Problems Involving Logical Relevancy

- *Similar occurrences*: Where evidence is admissible even though it does involve some other time, some other event, or some other person not directly involved in litigation
  - Causation: To prove cause and effect
    - Hypo: P eats at D restaurant and gets sick. P suspects that it was the hamburger that he ate at McDonald's that made him nauseous. How can P prove that the hamburger meat served at McDonald's was bad? P can offer evidence that three of his friends who ate the same type of food (hamburgers), at the same time, and at the same restaurant (McDonald's) also got sick

## Specific Problems Involving Logical Relevancy

- Prior accidents or claims
  - Similar accidents: Evidence of other prior accidents may be admissible by a P (1) to prove that a dangerous situation existed *OR* (2) to prove that D was aware of a dangerous condition if P establishes a substantial identity of material circumstances. Issue: Was there a substantial identity of material circumstances?

## Specific Problems Involving Logical Relevancy

- Example: P is offering evidence of three other accidents at a particular RR crossing to show the dangerous nature of the crossing and that the city was on notice of how treacherous this crossing was. Is this evidence admissible? Depends on whether or n/ there is a substantial identity of material circumstances. P would have to show similar time of day, similar speed, similar weather condition.

## Specific Problems Involving Logical Relevancy

- Can the absence of similar accidents be admissible by the defense? Courts are generally reluctant to admit such evidence. The situation in this case is that D – not P – is offering evidence of absence of similar accidents to establish due care. What is required for absence of similar accidents to be admissible? (1) substantial identity of material circumstances *and* (2) D must show that if an accident had occurred, it would have been observed



## Specific Problems Involving Logical Relevancy

- Example: P is suing city after an accident at an intersection. D offers to prove that over the last 14 years, the intersection has remained the same and there have been no reported accidents. Is that admissible? Yes. First, the intersection has remained the same for the last 14 years – that proves a substantial identity of material circumstances. And second, no accidents have been reported.

## Specific Problems Involving Logical Relevancy

- Example: P slips and falls on a freshly waxed tile floor in a hotel lobby. D offers evidence that over the last week, 1,500 people have used the floor and no one has gotten hurt. Is this evidence by D admissible to establish due care on the hotel's part? No, b/c of one key fact. In the case of P's fall, the floor had been freshly waxed. It obviously couldn't have been freshly waxed at the point when each and every one of those 1500 other people walked across it. There is no substantial identity and such evidence would be inadmissible

## Specific Problems Involving Logical Relevancy

- General rule: P's prior accidents or claims are n/ admissible (note: there are some exceptions!)
- Hypo: P drives into bridge abutment and sues City that built and maintained bridge. D City seeks to show P has on *four other occasions driven into stationary objects and sued*. Admissible? No. It proves that P is accident prone but that kind of character evidence is not admissible to prove conduct

## Specific Problems Involving Logical Relevancy

- Exception # 1: To show common plan or scheme of fraud. If the City can show that the prior claims were *fraudulent*, then evidence is admissible
- Exception # 2: When the prior accidents are relevant on the issue of damages to P. If P is claiming an injury to the *same part* of his body that he previously injured, that is admissible

## Specific Problems Involving Logical Relevancy

- Intent or state of mind in issue: To infer intent from prior conduct
  - You can determine a person's SOM through their conduct
  - Hypo: P sues claiming pattern of gender discrimination in hiring. D employer denies intent to discriminate and claims that absence of women employees is b/c no women applicants were qualified. P offers to show that other well-qualified women were denied employment. Admissible? Yes, to show how D treated other qualified women who applied

## Specific Problems Involving Logical Relevancy

- Rebuttal evidence: To rebut defense of *impossibility*
  - Hypo: P ingests mouse while drinking Coke and sues D Bottler. D defends on ground that it is impossible for mouse to get into Coke. P offers evidence of another recent incident in which a mouse was found in Coke. Admissible? Yes. The first time might have been a coincidence, but not a different mouse on a different day!

## Specific Problems Involving Logical Relevancy

- Comparable sales to establish value: Sale price of other chattels or parcels of real property admissible if:
  - They are of the same type,
  - Those other sales took place at about the same time period,
  - Those other sales took place in the same general geographic area

## Specific Problems Involving Logical Relevancy

- Example: Prior sale of land can be used circumstantially to prove value of an existing piece of property if there is a substantial identity of material circumstance – similar location, similar size, similar condition. W/ respect to the sale of unique property – a Picasso painting – expert testimony would be required to show similarity of value



## Specific Problems Involving Logical Relevancy

- Habit evidence: Habit of person to act in certain way is relevant to show that person acted in the same way on the occasion in question
  - Definition: Evidence of the habit of a person or the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove conduct in conformity w/ the habit or the routine practice

## Specific Problems Involving Logical Relevancy

- **Overlapping rules**
  - Disposition evidence to infer conduct on a certain occasion is n/ admissible
  - Prior act evidence to infer conduct on the occasion in question is n/ admissible
  - Habit evidence – admissible. Habit of a person is admissible to infer that a person acted in conformity w/ his conduct on a particular occasion

## Specific Problems Involving Logical Relevancy

- Character v. Habit: Character is a generalized description of a person's disposition whereas habit is circumstantial evidence of a person's regular response to a repeated, specific situation
  - Hint: Look for such words as: (1) always, (2) automatically, (3) invariably, (4) regularly, (5) instinctively, and (6) w/o fail. Tip-offs that they're testing on habit evidence. (1) frequently and (2) often are n/ enough

## Specific Problems Involving Logical Relevancy

- Example: Passenger is suing Driver after a car accident. Driver's eyewitness testifies that Passenger was n/ wearing her seatbelt. Passenger calls W as a witness to testify that she drives to work every day w/ Passenger – and has done so for the last three years – and invariably Passenger wears her seatbelt. Is such evidence going to be admissible habit evidence? Yes, such testimony that P invariably wears her seatbelt will be admissible habit evidence

## Specific Problems Involving Logical Relevancy

- Hypo: Intersection accident. Did D stop for the stop sign? D offers witness to testify that D (1) is a cautious driver; (2) that witness has seen D stop at that stop sign on two other occasions; (3) that witness has seen D stop at that stop sign on ten or twenty prior occasions. Which of these is most likely to be admitted? Choice 3. If D has stopped at that stop sign on ten or twenty prior occasions, that is probably enough to make it habit. What is the consequence of introducing habit evidence? At the time of the accident – even if there were no eyewitnesses – habit evidence is admissible to show that D stopped at that stop sign

## Specific Problems Involving Logical Relevancy

- Habit evidence may be proved either by opinion testimony or by evidence of specific instances of conduct

## Specific Problems Involving Logical Relevancy

- Business routine: The routine practice of an organization is admissible just like habit (i.e. the normal business routine of the business is admissible to show that the business acted in conformity w/ the business routine on a given occasion).
- Example: Evidence of the routine by which a company answers phone orders, encloses certain order forms in an envelope, and then mails them out using FEDEX would be admissible as a routine business practice of a corporation such as The Home Shopping Network.

## Specific Problems Involving Logical Relevancy

- Industrial or trade custom is admissible as non-conclusive evidence of standard of care
  - We're interested in what others in the same business or trade have done in the past as some indication of what these parties should have done
  - Hypo: M tries to get off bus but driver closes the door on M's foot and drags her for several blocks. M sues Bus Co. alleging negligence in failing to install safety device that would prevent their buses from moving when passenger door is open. Bus Co. offers to show that no Bus Co. employs such a device. Admissible? Yes



## Specific Problems Involving Logical Relevancy

- What if M is able to show that 98% of the other bus companies do have the device – admissible? Yes
- Conclusive on liability issue? No, maybe the 98% of bus companies that do have it are acting out of an abundance of caution and that it is n/ customary in the industry for buses to have interlocking door devices

## Discretionary policy-based relevance

- Three areas of importance are: (1) liability insurance, (2) subsequent remedial measures, and (3) settlements.

## Discretionary policy-based relevance

- Liability insurance
  - General rule: Evidence that a person was or was not insured at the time of an accident is **not** admissible to show that the person acted negligently or wrongfully or to show ability to pay

## Discretionary policy-based relevance

- Exceptions: Admissible when relevant to:
  - Show ownership or control
    - Hypo: D denies ownership of building where P was injured. P offers to show D carries liability insurance on building.  
Admissible? Yes

## Discretionary policy-based relevance

- Impeach credibility of W by showing interest or bias
  - Hypo: W testifies (favorably) for D to facts of accident. P offers to show that W is the claims manager of D's liability insurance company – the same company that will have to pay if D is found liable. Admissible? Yes, the fact that D carries liability insurance and that W is the claims manager of D's liability insurance company is admissible to show that W is biased. This witness is employed by the insurance company, the real party in interest. Indeed, the insurance company will have to pay if D is found liable. Therefore, this witness is interested in giving this kind of testimony

## Discretionary policy-based relevance

- Statements made in connection w/ ownership of liability insurance are inadmissible (severance)
  - Example: D goes over to P and says, “I ran the red light. But don’t worry, my insurance will pay for it.” Is the first clause – “I ran the red light,” the admission – admissible? No, under 411, statements made in connection w/ ownership of liability insurance are inadmissible

## Discretionary policy-based relevance

- Subsequent remedial measures: Not admissible to show negligence, culpable conduct, a defect in a product, a defect in a product's design or a need for a warning or instruction
  - Rationale: We want to encourage businesses to make repairs after an accident w/o fear of retaliation later in court by use of such evidence. If we use this information against D, D will be dissuaded from making subsequent remedial measures

## Discretionary policy-based relevance

- Example: Evidence that D put new brake linings in his truck after an accident which was caused by faulty breaks would be inadmissible to prove negligence. This is a subsequent remedial repair – putting new brake lining in his truck after his brakes failed. Inadmissible under 407



## Discretionary policy-based relevance

- Example: In a product liability action against a tractor manufacturer, P introduced evidence that D corporation changed the design of its tractor three months after P was injured. Would that evidence be admissible? No, inadmissible under the general prohibition. The fact that in a PL action a tractor manufacturer changed the design of the product would be inadmissible

## Discretionary policy-based relevance

### – Exceptions: Admissible to show:

- Ownership and control

- Hypo: D denies ownership of building where P was injured. P offers evidence to show that D made repairs to the building.

Admissible? Yes

## Discretionary policy-based relevance

- Example: D cut down a rotted tree after one of its branches broke off and fell on P and injured him. This evidence would be admissible to show ownership and control if D first claimed that the tree was on city property. P can offer evidence that a week later, D cut that tree down. This is a subsequent remedial measure but it would be admissible to show ownership or control – that the tree was on D's property, not on the city's property

## Discretionary policy-based relevance

- Impeachment – feasibility of precautionary measures
  - Be on the lookout for a statement – like the ones listed below – where D denies the feasibility of precautionary measures followed by D taking subsequent remedial measures to repair:
    - » “There is no way I could have made this product any safer.”
    - » “There is no alternative design that would have made the product or premises safer.”

## Discretionary policy-based relevance

- Hypo: P walks into a glass door that is practically invisible. D contends there was and is no way to avoid such an accident (D has denied the feasibility of precautionary measures). P offers evidence to show that, after the accident, D put red stickers on the door to make them more visible. Admissible? Yes. “In the six months prior to July 1, how many other customers walked into the glass door?” Answer: twelve. “How many customers walked into the glass door after P ran into it?” Answer: none. “Is that because you took it upon yourself to put red stickers on the door to make them more visible?”

## Discretionary policy-based relevance

- Settlements: An offer to settle a claim which is disputed is inadmissible to prove liability for the claim or its amount
  - Note: There must be an actual dispute before settlement negotiations may take place!
  - Rationale: Encourage out-of-court settlement through settlement talks
  - Includes not only the actual settlement but also the offer to settle

## Discretionary policy-based relevance

- A broad rule of exclusion that covers
  - Actual compromises
  - Offers to compromise
  - Offers to plead guilty in a criminal case
  - Withdrawn pleas of guilty
  - Pleas of nolo contendere

## Discretionary policy-based relevance

- Admissions of fact, liability or damage made in course of offer to compromise a claim disputed as to liability or as to amount are not admissible



## Discretionary policy-based relevance

- Limitations. For rule of exclusion to operate
  - There must be a claim
    - Example: P is *suing* D after a car accident. D comes over to P and says, “I’ll offer you \$1,000 to settle this matter.” Is this admissible? No, it’s an offer to settle and under the general rule it is inadmissible
    - Hypo: A new neighbor is bitten by the Sullivan’s dog. When Mr. Sullivan gets home from work, Mrs. Sullivan tells her husband that their dog bit the new neighbor. W/o prior contact, Mr. Sullivan approaches P-to-be and says, “Are you the fellow who was bitten by my dog? Let’s settle.” In later lawsuit, P offers to testify to Mr. Sullivan’s admission of dog ownership and offer to settle. Admissible? Yes

## Discretionary policy-based relevance

- The claim must be disputed as to either liability or amount
  - Hypo: D says to P, “I admit that I owe you the full amount of \$10K on the promissory note, but if you want your money you’ll have to sue me for it. On the other hand, if you want to settle now, I’ll pay you \$5K for a full release.” Can P show that D admitted liability on the note? Yes, because D did not dispute either the liability or the amount of the promissory note. Indeed, D admitted that he owed P the *full* amount of \$10K on the promissory note
  - Compare: D says, “Let’s settle, I will admit I was negligent. Let’s agree on the amount of damage.” Admissible? No, because the admission of negligence was made as part of a settlement discussion of the *disputed* damage issue. There is no

## Discretionary policy-based relevance

- Statements made in connection w/ offers to settle are inadmissible
  - Example: In a negligence action following a car accident, D walks over to P and says, “I’m sorry, it was my fault. I’m willing to settle this matter w/ you.” Can the first sentence – an admission – be offered into evidence? Can it be severed? No, there is no severance under 408 for offers to settle

## Discretionary policy-based relevance

- Exceptions where offers to settle may be admissible:
  - To prove bias or prejudice of a witness,
    - Example: Evidence by P that D's expert witness received payment to testify against P as an offer to settle the expert's own claim against D may be admissible to show bias (offers to settle may be admissible to prove bias)

## Discretionary policy-based relevance

- To controvert a contention of undue delay by one of the parties, or
- To prove that a party attempted to obstruct a criminal investigation

## Discretionary policy-based relevance

- Payment of Medical and Similar Expenses
  - An offer to pay medical expenses is n/ admissible even though it is n/ a settlement offer. But if an admission of fact accompanies a naked offer to pay hospital or medical expenses, the admission may be admitted
  - Effect: The admission is severed and admitted in evidence. But the offer to pay medical expenses is excluded

## Discretionary policy-based relevance

- Hypo: D says, “It was all my fault. Let me pay your hospital bill.” Admissible? Yes, the former is admissible. “It was all my fault” is admissible b/c admission was made as part of a naked offer to pay medical bill and that is not a settlement offer

## Discretionary policy-based relevance

- Offers to plead guilty (410)
  - Offers to plead guilty, withdrawn guilty pleas, and pleas of nolo contendere are inadmissible against the individual who made the plea
  - Public policy: To encourage persons to make such pleas



## Discretionary policy-based relevance

- Exceptions where such offers to plead guilty may be admitted:
  - Prosecution for perjury, and
  - For purposes of impeachment

## Discretionary policy-based relevance

- Distinguish:
  - An actual guilty plea that is n/ withdrawn is admissible as an admission in any subsequent civil action
  - Evidence of a final judgment entered after a guilty plea following any felony conviction is admissible under a hearsay exception

## Character evidence

- Key factors affecting character evidence rules and their application:
  - Four preliminary questions: (1) determine the *purpose* for which the evidence is being offered, (2) method of proving character, (3) type of case – civil or criminal, and (4) what trait of character is involved.

## Character evidence

- What is purpose or offer of character evidence?
  - Character directly in issue (Person's character is a material element in the case.)
  - Character as circumstantial evidence of person's conduct at time of litigated event (Character evidence to prove conduct in conformity w/ character on occasion in issue)
  - Character to impeach the credibility of a witness (i.e. bad character for truthfulness to impeach the credibility of a witness who testifies at trial)

## Character evidence

- What method or technique to prove character? Possibilities are:
  - Specific acts of conduct
  - Opinion (personal opinion)
  - Reputation in the community
  - Reputation or opinion is a red flag that tells you you're in the realm of character evidence

## Character evidence

- What type of case? (civil or criminal?)
- What trait of character? (It must be the specific trait which is substantively in issue in the case)

## Character in **civil** cases

- Character evidence is *not* admissible when offered as circumstantial evidence to infer conduct at the time of the litigated event

## Character in **civil** cases

- Hypo: P sues D for personal injury damages alleging negligence arising out of an automobile accident. P offers a witness to testify that D has a reputation in the community for recklessness. Admissible? No. P is trying to suggest that if D has been reckless and careless in the past, then it is more than likely that D was driving his car recklessly at the time of the automobile accident



## Character in **civil** cases

- What's good for the goose is good for the gander. Evidence that D has a reputation as a *careful* person would be inadmissible character evidence in a negligence action

## Character in **civil** cases

- Hypo in negligence action: D seeks to testify that he has been driving for 40 years without ever being previously involved in an accident? Admissible? No. D is trying to suggest that since he's always been careful before, the jury should infer that he was careful this time
- Hypo in breach of warranty action: In a breach of warranty action, evidence that the seller was an honest man is an example of character evidence which is inadmissible

## Character in **civil** cases

- Character evidence is admissible in a civil case when the character of a person is an essential element of a claim, defense, or cause of action – character is directly in issue

## Character in **civil** cases

- Tip: Where knowledge of the character of *another* is in issue
- Don't be quick to assume that character is in issue!

## Character in **civil** cases

- Three types of cases:
  - Defamation where *truth* is a defense
  - Negligent entrustment
  - Wrongful death

## Character in **civil** cases

- Defamation where *truth* is a defense
  - Hypo: Grutz calls Yuckl “a crook.” P Yuckl sues D Grutz for *defamation* seeking \$1M for damages to P’s reputation. D seeks to show that P has on three prior occasions stolen money from his employer. D also seeks to show that, even before the alleged defamation, P had a reputation for being dishonest. Admissible? Yes. Since D’s defense is truth, P’s reputation before the defamatory words were spoken is critical

## Character in **civil** cases

- Don't get confused: Committing three larcenies is a specific act and this is a civil case where character is in issue. Specific acts come in. The testimony is admissible under 405(b). Don't confuse this example w/ impeachment of witnesses. 405 deals w/ character evidence of parties not impeachment of witnesses

## Character in **civil** cases

- **Negligent entrustment**

Negligent entrustment is a cause of action in tort law that arises where one party (the **entrustor**) is held liable for negligence because they negligently provided another party (the entrustee) with a dangerous instrumentality, and the entrusted party caused injury to a third party with that instrumentality. The cause of action most frequently arises where one person allows another to drive their car.



# Character in **civil** cases

If Albert lends his handgun to Bob, knowing that Bob has a propensity for violence, Albert may be held to have negligently entrusted the gun to Bob if Bob uses the gun to shoot someone during an argument. However, such cases are often hard to prove because judges and juries are less likely to find that an **entrustor** had a duty to check on the publicly available records of an entrustee, especially if he was merely a friend. Evidence in such cases is usually presented through testimony about the *entrustor's knowledge of the entrustee's reputation for violence*, and of specific acts of violence committed by the **entrustee**.

# Character in **civil** cases

- Example of NE: P is injured when Wanda collided w/ him while Wanda was driving D's car. P is suing D, owner of the car, for negligent entrustment.
- Step 1: Identify the parties: D is the entrustor. Wanda is the trustee.

## Character in **civil** cases

- Hypo: P is offering evidence that Wanda had three previous driving accidents that year. Is that testimony admissible?  
Yes. First, this is a civil case, negligent entrustment. Second, we're dealing w/ a specific act – three previous accidents. Third, character is in issue.
- A specific act where character is in issue is a proper form of character evidence. The character of the entrustee is in issue in a negligent entrustment case. Here, Wanda's character, the entrustee, is in issue to prove that D, the entrustor, negligently loaned her his car.

## Character in **civil** cases

- Compare: D is now offering the testimony of her husband that in his opinion, *D always inquired into a person's past driving record before loaning out her car*. This is opinion testimony being introduced to establish that the D acted with the requisite standard of care. What do we know? We know that character is in issue. But it is n/ the D's character which is in issue in this case. D is the entrustor. Instead, Wanda's character is in issue. She's the one who had the accident with D's car. Therefore, the husband's testimony would be inadmissible as character evidence
- These cases are colloquially referred to as *knowledge of the character of another*.

## Character in **civil** cases

- Method of proof. If character is directly in issue and therefore admissible, it may be proved by any one of the specific techniques (specific acts, opinion, reputation)

## Character evidence in **criminal** cases

- Basic rules:
  - Basic Rule 1: Bad character – whether in the form of specific acts of prior misconduct, prior crimes or convictions, bad opinion or bad reputation – is n/ admissible by the prosecutor if the sole purpose is to show criminal disposition in order to infer guilt from disposition

**UNLESS AND UNTIL**

## Character evidence in **criminal** cases

- Basic Rule 2: Defendant opens the door. The defendant is permitted to offer evidence of *good* character for the pertinent trait in the form of *reputation* and *opinion* to show disposition in order to infer innocence. Only then may the prosecution respond by showing the *bad* character of the accused. In other words, D, in a criminal case, would love to introduce evidence of his good character for the purpose of showing that he is not the type of person that would have committed this crime

## Character evidence in **criminal** cases

- Example of when the defense has come perilously close but has *not* opened the door
  - Example: In a murder case, D offers testimony by W: “I’ve been his neighbor for 14 years and he’s an honest man.” Is that a proper way for D to open the door? No, it is inadmissible b/c the trait of being an honest man does n/ bare on innocence to a charge of murder. Improper way to open the door.



## Character evidence in **criminal** cases

- Compare: W says, “I’ve been his neighbor for 14 years and he’s a kind and gentle person.” Gentle person is a trait that would bear on innocence to a charge of murder and this evidence would be admissible as a proper way for D to open the door.
- Hint: Focus on the particular trait being offered. That trait must go to proving innocence for that particular charge

## Character evidence in **criminal** cases

- What type of evidence is rebuttal by the prosecution limited to?
  - Last part of rule: Prosecution may so rebut: Rebuttal by prosecution is limited to reputation and opinion evidence only.

## Character evidence in **criminal** cases

- Example # 1: Prosecution is offering another neighbor's testimony that she has known D for 14 years and "he has a reputation for a violent temper." Reputation evidence for a violent temper is a proper and admissible form of rebuttal by the prosecution

## Character evidence in **criminal** cases

- Example # 2: In a trial where defendant has been charged with robbery, the defense calls a *witness* who testifies that he has been D's neighbor for 14 years and "D is an honest man."
- Is this admissible? Yes, b/c in a robbery case the trait of honesty goes towards proving innocence. Prosecution then asks the defense witness on cross-examination, "Did you know that D committed three burglaries in the last year?" This is a *specific act* – committing three burglaries – n/ reputation or opinion.

## Character evidence in **criminal** cases

- Is it a proper form of rebuttal? Yes, it is admissible. This question is being asked n/ to attack D's character but it is being asked to challenge the credibility of the witness. Must distinguish between character purposes and credibility purposes. We're n/ asking the witness this question to attack the D's character but it is being asked to challenge the credibility of the witness, himself.

## Character evidence in **criminal** cases

- This is a beautiful question b/c it is a double-edged sword. If the witness doesn't know about the three burglaries, then how well does he really know the D? On the other hand, if he does know about the three burglaries, then how credible of a witness is he?

## Character evidence in **criminal** cases

- Hypo: Tony Soprano is arrested and is on trial for *assaulting* an elderly woman. In court, he looks like a clean, upstanding middle-aged man. The prosecutor, however, has his “rap sheet” which shows 6 prior arrests for robbery, 3 prior convictions for assault, and 2 prior *convictions* for *perjury*

Character evidence in **criminal** cases

- Q1: As part of its *case-in-chief*, may the prosecutor introduce Tony's criminal history? No



## Character evidence in **criminal** cases

- Q2: May the prosecutor introduce Tony's criminal history or any part of it if Tony does n/ try to show his good character but only takes the stand and denies his involvement in the crime?
  - To show Tony's *disposition* to be violent? No
  - To *impeach* credibility? i.e., to show lack of truthfulness? Yes. The part of Tony's criminal background that deals w/ truthfulness would be admissible (i.e. namely, his perjury convictions) to impeach his credibility as a witness

Character evidence in *criminal* cases

- Q3: May Tony take the initiative to show his good character? Yes

## Character evidence in *criminal* cases

- Q4: For what trait may Tony show his good character? If Tony wants to show his good character, then he must introduce evidence of his reputation for *peacefulness* because the crime for which he has been charged is violent (i.e., assault)

## Character evidence in *criminal* cases

- Q5: What method or technique is available for Tony to demonstrate his good character? Specific acts of good conduct? Opinion? Reputation? Tony wants to present himself as a peaceful person to show that he acted consistent with this trait on the occasion in issue. Only evidence in the form of *reputation* or *opinion* is admissible. **Specific acts of good conduct are inadmissible when D is offering circumstantial evidence of his good character**

Character evidence in *criminal* cases

- Q6: Assume that Tony calls Pauly, a witness, who testifies that Tony has a good reputation for peacefulness and that in Pauly’s opinion Tony is peaceful. (i.e. “I know Tony’s reputation for peacefulness in the community and Tony is a pussy cat.”).

## Character evidence in *criminal* cases

- Q7: How may the prosecutor respond? After the accused offers evidence of good character, the prosecutor may respond by cross-examining the accused's good character witness by inquiring about any specific acts which would affect the opinion of the witness. In fact, the prosecutor could attack the credibility of the character witness himself by introducing evidence of Pauly's prior conviction for perjury or bad reputation for truthfulness

## Character evidence in *criminal* cases

- Q8: May the prosecutor ask Pauly on cross-examination, “have you heard (or do you know) that Tony was arrested six times for robbery?” Yes. This is a specific act. The rationale is that this question is being asked not to attack Tony’s character but instead, it is being asked to challenge Pauly’s credibility.

## Character evidence in *criminal* cases

- This is a beautiful question b/c it is a double-edged sword. If Pauly doesn't know that Tony was arrested six times for robbery, then how well does he really know Tony's reputation in the community? On the other hand, if Pauly testified that Tony had a reputation for peacefulness despite knowing that Tony had been arrested six times for robbery, then how credible of a witness is he?



Character evidence in *criminal* cases

- Q9: Suppose that Pauly says, “No, I don’t believe that Tony was arrested six times for robbery.” May the prosecutor call a witness to testify that Tony was in fact arrested six times for robbery? No. The prosecutor is bound by the specific answer of the witness

## Character evidence in *criminal* cases

- Q 10: May the prosecutor call a witness to testify that Tony has a bad reputation for *violence* and that in the witness's opinion, Tony is a violent person? Yes. After the accused offers evidence of good character, the prosecution may also respond by calling prosecution witnesses to testify to bad opinions or bad reputation in regard to the character of the accused

## Character evidence in *criminal* cases

- Victim character – Self-defense
  - The accused may take the initiative in homicide or assault cases, as part of a claim of self-defense, to show the character of the victim as circumstantial evidence to infer that on the occasion in question the alleged victim was the *first* aggressor. Again, the permissible method of showing character would be through *reputation* or *opinion* evidence.

Character evidence in *criminal* cases

- The prosecutor could then respond by showing (1) good reputation or opinion concerning the victim or (2) by showing the bad reputation or a bad opinion regarding the accused himself

## Character evidence in *criminal* cases

- Hypo: Tony shot and killed Harry during a barroom brawl. Tony is charged with murder but responds with a plea of self-defense. Tony claims that Harry attacked him with a broken beer bottle and that he, Tony, was in fear for his life and had no other choice but to shoot Harry

Character evidence in *criminal* cases

- Q1: May Tony call a W to testify that Harry had a bad reputation for violence and that in the opinion of W, Harry was a violent person? Yes
- Q2: If Tony does attack Harry's character, may the prosecutor now respond by calling a witness to testify that Harry had a good reputation for *peacefulness* and that, in the opinion of the witness, "Harry was a peaceful person?" Yes

Character evidence in *criminal* cases

- Q3: If Tony does attack Harry's character, can the prosecutor now call a W to testify that Tony has a bad reputation for violence and that in the opinion of the witness, "Tony is a violent person?" Yes

Character evidence in *criminal* cases

- Q4: Tony calls a witness to testify that W saw Harry use a broken beer bottle to stab and almost kill three bar patrons in fights Harry started last year. Admissible? No, this is evidence of specific acts and only reputation and opinion evidence are permissible methods of showing character



Character evidence in *criminal* cases

- Q5: What if W testifies that W told Tony about Harry's other acts of brutality a few weeks before Tony shot and killed Harry? Admissible? Yes. Relevant to show what?

## Character evidence in *criminal* cases

- To show Harry’s violent disposition in order to suggest that Harry was the aggressor? No, because specific acts is *not* a permissible method of demonstrating character
- To show Tony’s state of mind (his reasonable fear of being injured) during the fight with Harry? Yes. Tony is pleading self-defense. “I was correct in fearing for my life based on what I knew.” This is admissible to show Tony’s state of mind

Character evidence in *criminal* cases

- Victim Character – Sexual misconduct cases
  - In rape cases, reputation and opinion evidence is inadmissible but specific acts of sexual behavior by the victim are admissible in two instances.

## Character evidence in *criminal* cases

- First, behavior w/ other persons which would explain signs of rape. Example: Instances of sexual intercourse w/ other men than the D if it is used to show that D was n/ the source of sperm found on the victim after the alleged rape.
- Second, past behavior w/ the D – not with other men – which tend to show *consent*

Character evidence in *criminal* cases

- Specific instances of prior misconduct by the accused – D's other crimes offered for a non-character purpose

Character evidence in *criminal* cases

- Other crimes or prior acts of misconduct by D are *not* admissible during the prosecution's case in chief if the only purpose is to prove criminal disposition (i.e. if offered to show that because of D's bad character he likely committed the crime currently charged)

**BUT**

## Character evidence in *criminal* cases

- Prior crimes or prior acts of misconduct may be admitted at the initiation of the prosecutor when the misconduct is relevant to prove a material fact *other* than character or disposition (i.e. to prove some relevant issue separate and apart from bad character)

## Character evidence in *criminal* cases

- Therefore, although prior accused misconduct is not admissible to show criminal disposition (unless the accused first offers good character evidence), it would be permissible if relevant to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident



## Character evidence in *criminal* cases

- Tips for approaching MIMIC Evidence
  - This type of evidence is generally offered in a criminal case by the prosecution, not by the defense.
  - Do not forget to weigh the probative value of introducing this evidence against its prejudicial effect.
  - MIMIC evidence is never admissible to prove criminal disposition or propensity to commit a crime!

## Character evidence in *criminal* cases

- How it arises: It's a criminal case. D has not opened the door. D is charged in the indictment with one crime but now the prosecution wants to introduce evidence of D's other prior crimes or prior acts of misconduct. You must decide the purpose for which the other evidence is being offered. If it's being offered to show disposition, it's improper. But if it's relevant to some other issue in the case, it's admissible

## Character evidence in *criminal* cases

- Hypo: Tony Soprano is the Vice-president of HSBC Bank. He (1) gambles illegally and loses \$500K. In order to pay his debt, he (2) embezzles from his employer, HSBC Bank. Then he (3) falsifies the books to cover up the embezzlement. He discovers that auditors are coming to check the books on Monday. Tony (4) steals the key to get into the bank on Sunday night and (5) he sets the bank on fire in order to destroy the books.

## Character evidence in *criminal* cases

- Assume Tony is charged only with the crime of arson. Assume also that Tony offers no good character evidence and that he does not testify. May the prosecution, as part of its case-in-chief, introduce the illegal gambling, the embezzlement, the falsification of books, and the theft of the key? For what purposes?

## Character evidence in *criminal* cases

- These are all relevant separate and apart from character or disposition. First, the fact that Tony owed a substantial debt of \$500K for illegally gambling demonstrates that he was under great financial pressure, not to mention desperate to pay it off before something tragic happens. Thus, he had a motive to steal from his employer, HSBC Bank. Second, Tony's falsification of the books is evidence of a common plan or scheme to *COVER UP* the money that he embezzled from HSBC. In doing so, he exploited his position as Vice-president of the bank for personal gain. And the theft of the key shows *opportunity*.

## Character evidence in *criminal* cases

- Examples of issues on which prior misconduct of the accused may be relevant independent of character or disposition. Other crimes of past misconduct may be shown to prove what commentators refer to by the acronym, MIMIC:

# MIMIC

- Motive

- Hypo: D is charged w/ murdering a detective. The prosecutor offers evidence that D killed his wife three years ago. Admissible? N/ admissible b/c the prosecutor wants the jury to infer that if D killed before, then he'd kill again.

# MIMIC

- Compare: What if Detective, the victim of the murder charged, was killed b/c Detective was about to arrest D for the murder of his wife? Is this admissible? Yes. D had a motive to kill the detective to avoid being arrested for murdering his wife



# MIMIC

- In a burglary case, the prosecution offers testimony that D needed money to defend himself against three other recent charges of burglary. Is this admissible as motive evidence – that D needed money to defend himself against three other charges of burglary? No, it is highly prejudicial. Jury will think that if this man committed three other burglaries then he probably committed this one, too. Such testimony by the prosecution is inadmissible

# MIMIC

- In a murder case, D claims Victim was his friend and that he had no reason to kill Victim. In rebuttal, since motive is in issue, the prosecution may introduce evidence that both D and V took part in an earlier bank robbery and Victim hid all the stolen money. Such evidence would be admissible to prove motive

# MIMIC

- Intent
  - Must prove absence of accident
  - Hypo: D, who is charged with receiving stolen goods, claims that he was unaware that the goods were stolen. Prosecutor offers evidence that D has received stolen goods on five prior occasions from the same thief involved in the case. Admissible?  
Yes

# MIMIC

- Identity

- Hypo: Murdered victim is found with .45 caliber pistol, the murder weapon, next to the body. The pistol was owned by Mayor but was stolen in a burglary of Mayor's mansion three years ago. May the prosecution show that D, who is charged w/ murder of victim, burglarized Mayor's house three years ago and stole the gun? Yes

# MIMIC

- Modus operandi
  - Another way to prove identity. D must be charged with a crime that is distinctive and unusual – it must be D's trademark. D is charged w/ stabbing victim in the groin. Two years ago, D stabbed another victim in the groin. The prior crime would be evidence of MO. Don't forget to show relevance!

# MIMIC

- Hypo: D is charged w/ forging a doctor's name to a prescription in order to illegally obtain drugs from a pharmacy. D denies he did it. May the prosecutor show that D forged a prescription three years ago to illegally obtain drugs? No, because it's being used to show that if D had forged a doctor's name to a prescription in order to obtain illegal drugs before, then he'd do it again

# MIMIC

- Compare: What if the fictitious doctor's name used on both occasions was, "Alloysius Kevorkian Peabody?" It's admissible, b/c "AKP" is D's distinctive and unusual trademark

# MIMIC

- Common plan or scheme
  - Hypo: D is charged with a bank robbery. May the prosecution show that D stole a truck the day before the bank robbery? No. What if the truck was used in the bank robbery as the getaway car? Yes, how D came to be in possession of a vehicle that was not registered to him and that he did not have the owner's permission to use but that he was nonetheless operating on the day of the crime shows a common plan



# MIMIC

- MIMIC is subject to 403. Evidence relevant to show motive, intent, identity, and common scheme may be excluded if the judge believes that the *probative value is substantially outweighed by the danger of unfair prejudice*

# MIMIC

- Hypo: P is charged w/ bank robbery. Prosecution offers to show motive by evidence that D “was recently released from prison for sexual abuse of a child and needed money to support his heroin addiction.” Admissible? No. The probative value of introducing evidence that D was recently released from prison for sexually abusing a child and needed money to support a drug addiction is inflammatory and is substantially outweighed by the danger of unfair prejudice to D

# MIMIC

- MIMIC applies to civil as well as criminal cases

# MIMIC

- Special rule for cases involving sexual assault and child molestation – Prior similar acts allowed to show propensity

# MIMIC

- In civil or criminal cases charging D w/ sexual assault or child molestation, D's prior acts of sexual assault or child molestation may be shown by prosecution or P. This is disposition evidence: he did it before therefore you're entitled to assume that he did it again. There doesn't even have to be a charge for the prior act of sexual assault to be admissible!

# Writings

- Best Evidence Rule (BER): To prove the content of a writing, recording, or photograph, the original is required
- The BER is a rule of preference for the original. The difficulty comes in the application of the BER

# Writings

- Example: W is listening to her police band radio in her apartment when she hears the following broadcast: “A red car was just hit by a speeding blue car at the intersection of Maple and Seeder.” W, who lives at this intersection, rushes to her window, looks outside, and sees the red car at the scene w/ the blue car.

# Writings

- At the trial, W is called as a W for P and she is asked to testify as to what she heard on the police band broadcast. W's testimony will be (a) admissible as based on first hand knowledge, (b) inadmissible b/c of BER, (c) inadmissible as hearsay, or (d) inadmissible under both the BER and hearsay. Correct answer: (c) inadmissible as hearsay.



# Writings

- W's testimony as to what she heard on the police band broadcast was an out-of-court statement offered to prove its truth. W is testifying that the red car was hit by a speeding blue car. She didn't see the blue car speeding. All she did is look out her window and see the two cars at the scene a moment later. W is testifying as to "speeding" which is an out-of-court statement offered for its truth, inadmissible as hearsay.

# Writings

- What about the BER? BER doesn't apply b/c it says, "to prove the contents of a writing, the original writing is required." Here, there is no writing. A police band radio broadcast is merely words that emanate from the radio itself and vanish into the air.

# BER

- Requires that a party seeking to prove the content of a writing (includes film, photos, X-rays, and recordings) must either
  - Produce the original document or
  - Account for the absence of the original.
  - If the explanation for absence of the original is reasonable, then a foundation has been laid for secondary evidence. Thus, either a copy or oral testimony may be admitted to prove the content of the original

# BER

- BER applies to:
  - Legally operative documents: Documents that by their very existence create or destroy a legal relationship that is in dispute (e.g. deed, divorce decree, will, written K)
    - In a breach of warranty action, the actual representations have independent legal significance so the BER would require production of the actual warranty, itself (the certificate)
    - A photograph in a pornography action. Photo itself has independent legal significance and the party offering it into evidence would have to produce the photograph

# BER

- Where the writing is offered into evidence to prove an event
  - An x-ray to prove injury
  - A receipt to prove payment of money
  - A marriage certificate to prove marriage
  - A transcript to prove the utterance of certain words

# BER

- Where the testimony is reliant on the writing, itself, the BER applies; but where the testimony is reliant on personal knowledge, the BER does not apply

# BER

- Example: P seeks to testify as to what he remembers about the amount of pipe used, the number of workers employed, and the number of hours spent on the job in a breach of a construction K. Action is for breach of a construction K and P is going to testify as to what he remembers about the above things. P has also recorded this information in a notebook.

# BER

- P's testimony will be (a) admissible as based on firsthand personal knowledge or (c) inadmissible b/c it violates the BER. Is P's testimony reliant on the writing or is his testimony based on personal knowledge? Clearly, the first sentence of the facts said, "P seeks to testify as to what he remembers..." – personal knowledge. P's testimony is not reliant on what he wrote in the notebook. Correct: (a).



# BER

- When dealing w/ the BER, there are two layers: Step 1 is Best Evidence and Step 2 is the hearsay problem. Suppose that P did not remember and he had to look in his notebook to determine the hours spent. If P had to look in the notebook to testify, then P's testimony would be reliant on the writing and the BER would apply. Caveat: If the BER applies and the notebook has to be introduced into evidence, there is a second problem: a hearsay problem. P must find some way to offer this out of court statement – the notebook – into evidence.

# BER

- Hypo: Tony is charged with murdering his wife, Caroline. At the time of his arrest, Officer Smith found in Tony's possession an anonymous letter. It said, "Dear Tony, Your wife Caroline has been screwing Mr. Ed [signed Jacob]." In order to prove that Tony had a motive for killing Caroline, the prosecution seeks to introduce the content of this letter into evidence. Officer Smith takes the stand and testifies to finding the letter in Tony's possession. Then, instead of producing the letter, Officer Smith attempts to testify orally about what it said. What ruling on the following defense objections?

# BER

- Improper authentication: Overruled. We don't care who signed or sent the letter. This letter is relevant for the purpose of showing that Tony had notice that Caroline was having an adulterous affair with Mr. Ed.
- Hearsay: Overruled. The content of this letter is only being used to show the effect that it had on Tony after he read it
- Best Evidence Rule: Sustained. Officer Smith's sole knowledge came from reading this letter and he wants to testify in court as to what it said

# Approaching a BER Question

- Approach for analyzing a BER question
  - Step 1: Has the writing been *authenticated*?
  - Step 2: If the writing is a copy or if there is oral testimony about it, think about the BER. Is there a reason why the original has n/ been furnished?
  - Step 3: Is it hearsay? The two most common exceptions to hearsay for documents: (1) admission of party and (2) business records

# BER does not apply to

- BER does n/ apply to
  - Facts independent of the writing (i.e., witness has personal knowledge of a fact that just happens to be described in a writing. No need to produce the writing or explain its absence)
  - Collateral documents. The BER does n/ apply to writings of minor importance.
  - Duplicates – In place of originals.

# Facts independent of the writing

- For example, you can prove payment without a receipt, birth w/o a birth certificate, and death w/o a death certificate. In each of these cases, we're trying to prove some fact and there is a W who has personal knowledge of that fact

# Facts independent of the writing

- Hypo: Issue is – Did Tony make the payment? W testifies that he saw Tony pay \$10K and get back a receipt. Does the receipt have to be produced? No, b/c we're n/ trying to prove the content of the receipt. We're merely trying to prove the fact of payment. The witness' testimony is admissible b/c he has personal knowledge – he *saw* Tony pay \$10K and get back a receipt. The BER only applies when you're seeking to produce the content of the writing

# Facts independent of the writing

- Compare: What if *W* says, “I know Tony paid b/c I read it in the receipt.” Does the receipt have to be produced? Yes. Here, *W*’s sole knowledge came from reading the receipt so the receipt must be produced or its absence explained



# Collateral documents

- Hypo: Maddie happens to testify that she is divorced in a personal injury damage claim. No need to produce divorce decree.

# Collateral documents

- Example: P sues D over a K dispute. The date of the party's first conversation is at issue. P says, "the date was 1/20, I know b/c I remember reading a story about your daughter's engagement in the newspaper that day." D moves to strike. The motion should be (a) granted b/c the BER would require production of the newspaper or (d) denied b/c the contents of the newspaper were collateral to the issues being litigated.

# Collateral documents

- Correct: (d). You have to determine the purpose for which the testimony was being offered. P's testimony was being offered to show why he remembers the date of the party's first conversation, not to prove that it's true – that D's daughter actually got engaged. The contents of the newspaper were collateral to the issues being litigated and the BER does not apply

## Modifications to BER

- Public records – certified copies admissible in place of originals
- Voluminous documents – If originals are too voluminous to be produced in court, summaries, charts or calculations are admissible in place of originals as long as (1) originals would be admissible if offered; (2) the summary is properly authenticated; and (3) the originals are made accessible to opposing party

# Voluminous documents

- Hypo: Age discrimination suit. P reviews ten years of personnel records of D company and finds that every employee over 50 has been fired for “insufficient initiative.” Through a personnel expert, P offers a summary of these findings. Admissible? Yes

# Voluminous documents

- Two ways to authenticate the original records
  - Self-authentication: To authenticate the original records, this can usually be done by self-authentication. If you're dealing w/ a record of a public agency, self-authentication will work.
  - Judicial notice: If you're dealing w/ a regulation of a public agency or a private agency, judicial notice is another way to authenticate the original

# Voluminous documents

- To authenticate the summary, the main way this is done is by testimony based on personal knowledge. The person who drafted the summary would testify as to how he prepared the summary, the conditions that were involved, and to her own qualifications. By doing so, she could properly authenticate the summary itself through personal knowledge
- Summaries of voluminous records, once admitted, are admitted for their truth as well as substantively

# Duplicates

- A “duplicate” is a copy produced by any technique which avoids casual errors and “accurately reproduces the original.” Carbons, photographic copies, Xeroxes, faxes are all duplicates.



# Duplicates

- A duplicate is admissible to the same extent as the original (i.e. no need to explain absence of the original) *unless*:
  - A genuine question is raised about authenticity of the original, or
  - It would be unfair to admit the duplicate in lieu of the original

## Witnesses and Testimonial evidence

- Competency
- Form of examination of witnesses
- Opinion testimony
- Cross-examination
- Impeachment

# Competency

- 601: General rule of competency: Under rule 601, every person is deemed competent to be a witness except where state law supplies the rule of decision
  - Example: In a diversity case, where state law supplies the rule of decision, a child-witness to be rendered competent would have to satisfy the three CL requirements.

# Competency

- Test for competency under FRE is called Minimum competency test: Requires:
  - Personal knowledge (602), and
  - A declaration to testify truthfully (603)
    - Calculated to awaken the witness's conscience
- FRE is very liberal: Basic policy is to dispense w/ strict competency requirements, let the testimony in and let the jury determine the *weight* of such testimony

# Competency

- Personal knowledge and oath
  - Perception: W must have observed something
  - Memory: W must have remembered at least some of what he observed
  - Communication: W must be able to relate at least some of what he heard
  - Sincerity (oath or affirmation): W must demonstrate an appreciation of an obligation to tell the truth
  - FRE requirements: W must (1) have personal knowledge and (2) take an oath or affirmation

# Competency

- CL disqualifications abandoned
- Use of interpreters is permitted (604)
- Competency of judge or juror as witness (605 and 606)
  - Neither the presiding judge nor any juror may testify in the trial in which she is sitting
  - On the other hand, an attorney may be called as a witness

# Competency

- Dead Man Acts
  - Typical statute: An interested survivor cannot testify for his interest against the decedent or decedent's representatives about communications or transactions w/ the decedent in a civil case unless there is a *waiver*

# Competency

- Elements

- The witness who testifies must be an interested witness. The witness must have a direct stake in the outcome of the litigation. If there is a neutral witness, stop right there!
- The witness must testify for her own interest
- The witness must be testifying against the decedent or the decedent's representatives. If the interested witness is testifying for the decedent or his representatives, then the dead man's statute does n/ apply



# Competency

- Applies only to transactions or communications w/ the decedent
- Strictly civil (doesn't apply in a criminal case), and
- Dead man statute can be waived by representatives of the decedent

# Competency

- Don't assume that the dead man's statute applies unless the facts explicitly state that it does
- State dead man's statute applies in federal court if state whose substantive law applies has such a statute
  - Hypo: Diversity action in federal court. P sues D for breach of oral K. D admits he received an offer but denies he ever accepted it. D dies before trial. The state whose contract law applies has a Dead man statute. At trial, P testifies that, "D said to me, 'I accept your offer.'" The most likely ground to exclude P's testimony is the dead man statute

## Form of examination of witnesses

- Objectionable questions
- Witness use of writings in aid of testimony

## Objectionable questions

- Narrative (“Q: Tell us everything relevant that happened on that day.”)
- Leading: A question that suggests the answer to a W who is likely to use the suggested answer. (“Q: Isn’t it true that the sound you heard was like a pistol shot?”). Such questions are generally not allowed on direct examination

## Objectionable questions

- Leading questions are permitted in certain situations
  - Cross-examination. If prosecutor calls your client as an adverse witness, you can cross-examine him but you can't ask him leading questions
  - Can lead on direct as to *preliminary* matters
  - When you're examining the adverse party or a genuinely hostile witness

## Objectionable questions

- Misleading or compound or argumentative (Q. “Have you stopped beating your spouse?”)

## Witness use of writings in aid of testimony

- Basic rule: W must testify from his own independent recollection of event. W usually cannot read testimony from a previously prepared document but may use a writing in aid of oral testimony in two situations when the witness can't remember. Two situations are (1) refreshing recollection and (2) recorded recollection

## Witness use of writings in aid of testimony

- Refreshing recollection
  - When witness's memory fails, anything can be used to jog the memory of the witness while he is on the stand (including a bowl of fettucine alfredo)
  - The witness need n/ have prepared the writing herself nor must the writing have been prepared at or near the time of the event
  - The writing itself need not be admissible in evidence



## Witness use of writings in aid of testimony

### – Limitations:

- W must testify w/o looking at the writing (Examining counsel hands writing to W and gives W a moment to refresh her recollection. W testifies from her own recollection but she does n/ look at the writing, itself)
- Opposing counsel has an absolute right to inspect the document, to cross-examine using the document, and introduce relevant portions of the writing
- Even if the W had n/ been shown the writing while testifying, but had reviewed the statement prior to coming into court, the court could order production of the writing for opposing counsel if it is in the interest of justice

## Witness use of writings in aid of testimony

- Hypo: Mrs. Smith's home was burglarized. D is charged. Prosecutor calls Mrs. Smith to testify to the things that were taken from her house by the burglar. She cannot remember some of the items. The prosecutor has a copy of a tabloid newspaper that reports details of the burglary. What can the prosecution do to get Mrs. Smith to remember? Show her the article to refresh her recollection

## Witness use of writings in aid of testimony

- Q1: What ruling if D objects to use of the article to refresh on grounds of improper authentication, best evidence, and hearsay? The judge will overrule every objection. The only purpose of showing Mrs. Smith this article is to help refresh her memory of what items were stolen from her home on the night of the burglary. Anything can be used to refresh the witness's memory

## Witness use of writings in aid of testimony

- Q2: Is there a foundational requirement? The only foundation is that W must say, “I’ve drawn a blank.” Witness must be unable to remember. You can’t refresh the recollection of a witness just because you got the wrong answer
- Q3: Is the article admissible in evidence at the request of the prosecution? Yes.

## Witness use of writings in aid of testimony

- Q4: If the tabloid is used to refresh, may defense counsel see it? Use it in cross-examination? And, introduce the article into evidence? Yes. Any writing that you use to refresh the memory of your witness is entitled to be seen, used, and introduced into evidence by defense counsel

# Recorded Recollection

- If W is unable to remember all or part of the details of a transaction about which she once had personal knowledge, her own writing shown to be reliable may be admitted *in place* of her testimony

# Recorded Recollection

- Foundation for recorded recollection requires a showing that:
  - W has personal knowledge,
  - The writing was made by W or under the supervision of W. If the writing was made by someone *other* than W, then it must have been *adopted* by W at the time of the writing,
  - The writing was timely made by W – made at a time when the matter was fresh in his mind,
  - The writing must be accurate, and
  - W must be unable to remember all or part of the details of the transaction (necessity)

# Recorded Recollection

- Writing is admitted by being read into evidence
- Is recorded recollection hearsay? Yes, but it's admissible as an exception to hearsay



# Opinion Testimony

- Lay opinion
  - Admissible if
    - Rationally based on the perception of the witness (“I saw the automobile and it was going about 25 MPH.” – admissible)
    - Helpful to the trier of fact (“In my opinion, the driver was grossly negligent.” – n/ admissible even if rationally based upon perception)

# Opinion Testimony

- A lay witness may not testify as to legal conclusions

# Opinion Testimony

- Scope: The following areas are permissible for a lay witness to testify:
  - Speed and other physical measurements
  - Proper forms of lay opinion: “Car was going 50 MPH” or height, weight, and color
  - Improper forms of lay opinion: “The car was driving recklessly,” or “the car was driving carefully,” or “the bridge was properly constructed.” These are legal conclusions and a lay witness may not testify as to legal conclusions
  - Identity of a person

# Opinion Testimony

- Sensory descriptions
- Value of property
- Familiarity w/ a person's handwriting
- Sanity (but not that a person is mentally incompetent)
  - Improper: “She’s a schizophrenic.”

# Opinion Testimony

- Physical condition
  - Proper: “He appeared drunk,” “She was intoxicated.”
  - Improper: “He’s an alcoholic.” This is a legal conclusion requiring expert opinion and it would be an improper form of lay testimony

# Expert Opinion

- Expert Opinion
  - Four basic requirements for expert testimony to be admissible:

# Expert Opinion

- An expert must have special knowledge, skill, training, education, or experience. Court has broad discretion to determine what constitutes such type of skill

# Expert Opinion

- The opinion must be helpful or assist the trier of fact in understanding the evidence,
  - Appropriate subject matter: Means the opinion must “assist” the trier of fact. Subdivides into requirement that (1) the methodology must be reliable and (2) the opinion must be relevant (“fit” the facts of the case). Reliability and relevance (fit) are conditions to admissibility. This means that the proponent must convince the trial judge by a *preponderance of the evidence* that these conditions have been satisfied



# Expert Opinion

- The witness must be *qualified* as an expert,
  - In other words, the opinion must be within the expert's field of expertise
  - Qualifications need n/ be formal or academic. An expert can be qualified based merely on experience

# Expert Opinion

- Example: An expert truck mechanic who was qualified as an expert mechanic may not give an opinion as to the speed of two vehicles at the point of impact. That type of opinion is beyond the scope of the expert mechanic's field of expertise. To give an opinion on the speed of vehicles at the point of impact would require an expert on accident reconstruction, not an expert mechanic

# Expert Opinion

- The expert must possess reasonable certainty or probability regarding the opinion,
  - “Doctor, do you have an opinion based upon reasonable medical certainty about...”

# Expert Opinion

- Basis of opinion by expert
  - Issue: On what facts may an expert base his opinion?
  - Opinion must be supported by a proper factual basis

# Expert Opinion

- Facts supporting the opinion must be either:
  - Facts w/in the personal knowledge of the expert; or
    - Testimony by a coroner (qualified as an expert witness) as to the findings of an autopsy. These would be facts perceived before trial and would be a proper basis for an opinion

# Expert Opinion

- Facts that would not be within the personal knowledge of the expert but which could be supplied to the expert in court by the evidence usually through a hypothetical question; or
  - Facts about a fatal accident made known to the expert at trial despite her lack of personal knowledge.
  - “Assume Dr. Grosse that the following facts are true.” All of the facts in the hypothetical question must have been admitted into evidence

# Expert Opinion

- An expert may base his opinion on facts (1) that are not within the personal knowledge of the expert and (2) that are not in evidence in the case as long as the facts are of a type that experts in the field would reasonably rely upon in making out of court professional decisions

# Expert Opinion

- Hypo: Doctor hired to testify for P in a personal injury action based his opinion in part on a radiologist's report of what P's x-rays revealed. The witness doctor had never seen the x-rays. Neither the x-rays nor the radiologist's report are in evidence. May the doctor give his opinion? Yes. Doctors rely on radiologist's reports all the time in making out of court professional decisions



# Expert Opinion

- 705: Disclosure of facts or data underlying expert opinion
  - An expert need not give the reasons for her opinion on direct examination. However, she may be required to disclose such information on cross-examination

# Expert Opinion

- 704: Opinion on ultimate issue
  - 704(a): An expert witness may give an opinion on an ultimate issue
    - Example: Testimony as to whether a testator had sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty would be a permissible area for expert opinion.

# Expert Opinion

- But what if the expert is asked, “In your opinion, did the testator have legal capacity to make a will?” This would not be a proper question. Even though it goes to an ultimate issue, it goes well beyond what is permissible b/c it snatches the issue away from the jury. An expert cannot be asked to directly state whether the testator had legal capacity to make a will

# Expert Opinion

- 704(b): Limitation on an expert's ability to give an opinion on ultimate issues in criminal cases
  - Severe limitation
  - An expert may *not* give an opinion as to whether a criminal defendant did or did not have a particular mental state constituting an element of the crime charged or a defense thereto

# Expert Opinion

- Example: Murder case and the defendant pleads not guilty by reason of insanity. An expert witness may not be asked, “In your opinion, do you think that D was insane at the time of the killing?”

# Expert Opinion

- Learned Treatise
  - Hypo: P sues D for damages claiming serious injury resulting from negligence of D. Injury is that P has extra hole in his head. “Gray’s Anatomy” on page 22 states that such a hole is bad news.
  - Q1: May P start out by reading text to jury? No

# Expert Opinion

- Q2: May text be used to *impeach* contrary opinion by defense expert (that it is “normal” for a person to have more than one hole in his head)?  
Yes

# Expert Opinion

- A learned text, treatise or article concerning a relevant discipline is admissible as an exception to hearsay if:
  - Testimony of your own expert that the learned text, treaty or article is authoritative,
    - Authoritativeness for a learned treatise is established by (1) expert testimony or (2) by judicial notice
    - It's the standard in the field: "Gray's Anatomy is authoritative"



# Expert Opinion

- Your own expert actually relied on the text or treatise that you want to put into evidence on direct or it was called to his attention on cross-examination,

# Expert Opinion

- Admission on cross-examination of your opposing expert,
  - “Dr. Adams, are you familiar with Gray’s Anatomy? Do you consider it authoritative?”  
If he answers “yes,” then you can use it

# Expert Opinion

- Q3: May the text be offered for its truth? Yes, under FRE it is admissible for its truth as an exception to the rule against hearsay

# Expert Opinion

## – Limitations

- Expert must testify (at trial or deposition) unless judge takes judicial notice
- Treatise is admitted by being read to the jury. Text itself is n/ received as evidence unless offered by the adverse party

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