PRINCIPLES OF EVIDENCE

FIFTH EDITION

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Teacher's Manual (Revised)

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CHAPTER I
INTRODUCTION: THE CONCEPT OF EVIDENCE

The authors' view the Law of Evidence to be not merely a set of rules which exclude facts from the consideration of the factfinder, but also as a set of opportunities for the skillful advocate who can articulate an argument for the admissibility or inadmissibility of facts which are helpful or harmful to her client's cause.

Thus, the focus of the study of the rules (whether common law or code) should include both discussion of the rationale for exclusion as well as discussion of the ways in which counsel can admit helpful evidence, within both the evidence rules and the rules of professional ethics.

Discussion could focus on American exceptionalism with respect to trial by jury in both civil and criminal matters. Indeed, the American reliance on the jury as factfinder arguably explains the uniquely American concern with rules of exclusion.

CHAPTER II
PRELIMINARY MATTERS

Judicial notice is a time and labor saving device for the proof of facts which are either: (1) generally known to residents of the trial jurisdiction or (2) easily verified by an authoritative reference. Note that the mere fact that the purportedly noticed fact is merely known to the judge (as opposed to generally known in the community) is not a basis on which to take judicial notice. The federal rules permit notice to be taken of "adjudicative" facts, but not of "legislative" facts. Adjudicative facts are historical facts relevant to the claims and defenses in the lawsuit. Legislative facts are those which form the policy basis of a statute or rule of law.

Examples of adjudicative facts based on common knowledge include, for example, the residential character of a neighborhood or the color of a municipality's police cruisers. Examples of adjudicative facts subject to ready verification include the time of a sunrise on a particular date or the speed limit on a particular street or highway.

The second category of facts appropriate for judicial notice are those capable of ready and certain verification by reference to authoritative sources. For this category of judicial notice, the proponent of the evidence must provide the court with the authoritative source. Typical facts in this category include geographical facts: (e.g., Main Street runs north and south with a 30 mph speed limit), historical facts (a city was incorporated on July 1, 1970), calendar facts (May 29 of last year was a legal holiday), and scientific facts not open to dispute (e.g., gasoline vapor is heavier than air). The opponent of evidence proposed for judicial notice has the opportunity to be heard on the propriety of judicial notice, including the opportunity to produce contrary authoritative sources.

Where the court is provided with authoritative sources which prove the fact, judicial notice, on request, is mandatory. The court may, in addition, judicially notice an appropriate fact on its own motion. Judicially noticed facts are binding on the jury in civil cases, while in criminal cases the jury may accept the fact as true but is not required to do so.

Varcoe v. Lee (pp. 5-9) states the generally accepted view of judicial notice as a shortcut to proof with 3 requirements (listed on p. 8) where the fact is generally known within the jurisdiction. The Evidentiary Foundation: "The Trial of William "Duff' Armstrong" (p. 12) illustrates the second branch of judicial notice: facts easily ascertainable by reference to indisputable accurate references like an almanac.

A good issue for discussion is the probative force of judicially noticed facts. Why should such facts be treated differently in civil and criminal cases?

The role of stipulations and limitations (p. 25) on the offer of evidence is an important aspect of pretrial litigation, particularly in complex litigation. Students should be queried on the advisability of such stipulations and limitations and the ethical and strategic issues which they raise.

B. Types of Formal Proof

This section of the Casebook focuses on an initial discussion of the various ways in which factual propositions are proved. A key matter for discussion here is the distinction between direct evidence and circumstantial evidence. Though jurors (and laypersons at large) are skeptical of circumstantial evidence, students should be made aware of both the superior probative force of circumstantial evidence (e.g. DNA, fingerprints) and the ability of articulate counsel to convey this to the factfinder. An example, from a classic prosecutor's closing rebuttal argument makes the point.

"Ladies and Gentlemen: the defense has told you that no one saw the defendant actually stab the victim, and that the government's case is, therefore, "merely circumstantial." Well, circumstantial evidence is the most probative evidence available, not subject to the vagaries of more or less reliable eyewitnesses. Imagine this situation. A person places a cat and a mouse in a box. Five minutes later, the person opens the box and finds only the cat in the box. Although the person did not see the cat eat the mouse, do we believe to a moral certainty that the cat ate the mouse? Of course. This is "merely circumstantial" evidence, yet it proves a fact beyond any shadow of a doubt."

Pages 26-29 outline real, demonstrative and testimonial evidence as the ways in which facts can be proved at trial. Obviously we will return to all of these matters in detail throughout the remainder of the course.

Pages 29-36 provide the basis for general discussion of the respective roles of judge, jury and counsel in the American adversary system. Rule 103 stimulates discussion about the objection process, the judge's "Umpireal" as opposed to "investigating magistrate" role, and the division between the court's ruling on admissibility and the jury's assessment of weight and credibility. It is also useful to discuss the working the importance of making a record and the necessity of "offers of proof."

P. 37 The discussion or relevancy (and materiality) is introduced at this point.

Logical Relevancy and Materiality (Rule 401).

Students often confound the terms relevance (or relevancy) and materiality. Though related, the terms are not identical. Relevance is the broader term including materiality with it. Materiality is defined by the pleadings in the lawsuit and refers to evidence which relates to the elements of the claims and defenses in the lawsuit. For example, in a contract case, evidence of a tort committed by the contract action defendant would be "immaterial."

It would, however, also be "irrelevant" because the term "relevance" refers to any tendency of the proffered evidence to prove a material fact. A fact which is "immaterial" obviously has no tendency to prove an element of a claim or defense. Even if material, however, evidence may still be irrelevant because it does not make the elemental fact on which it is offered more or less likely in the lawsuit.

Federal Rule 401 and the rule in essentially every jurisdiction admits evidence as

relevant if it has "any" logical tendency to prove a material issue. The rules favor admissibility of even marginally relevant evidence (so long as it does not run afoul of Rule 403) and do not require that the proffered evidence be the best or most reliable evidence on point.

Direct and circumstantial evidence are included within the area of relevant evidence. Direct evidence is evidence which, if believed, establishes or resolves a matter in issue in a lawsuit. Circumstantial evidence is evidence which serves as a basis from which the fact-finder may make a reasonable inference about a matter in issue. An example of direct evidence would be eyewitness testimony to the effect that the witness saw a person break open a window in the victim's home on a snowy evening, enter the house, and leave the house carrying a stereo. Circumstantial evidence of the same crime might be the fact that on the morning after the alleged crime was committed, the victim looked outside his home and noticed snow had fallen overnight and there were footprints leading from the street up to the window in his home, the window was broken, and the stereo was missing. These are all items of circumstantial evidence which certainly have a tendency to prove that breaking and entering had occurred in the victim's home. Each piece of circumstantial evidence is direct evidence of some smaller fact which has a tendency in logic to infer the greater fact which is an element of a claim or defense.

An objection to the relevance of proposed evidence should normally be raised by way of a pretrial motion in limine. Should it be necessary to raise a relevance objection at trial, the making of the objection should be coupled with a request to approach the bench for argument on the objection. Otherwise, the jury will hear both the irrelevant evidence and the relevance argument from the proponent of the evidence. The judge may sustain the objection and strike the evidence from the record but will be unable to strike it from the minds of the jury.

Legal Relevancy (Rule 403).

Although evidence may be logically relevant, that is, have probative value pursuant to Rule 401, it will only be admissible so long as its probative value is not substantially outweighed by the negative baggage described in Rule 403. Note that the balancing test of Rules 401 and 403 is tilted heavily in favor of the admissibility of logically relevant evidence or evidence with probative value, in that the prejudice must substantially outweigh the probative value in order to require exclusion.

However, where the probative value evidence is substantially outweighed by the dangers referred to in Rule 403, the trial judge will exclude otherwise relevant evidence. Of the Rule 403 considerations, the one that provides the most problems is the term “unfair prejudice.” Unfair prejudice does not refer to the fact that the evidence tends to make the opponent look guilty in a criminal case or liable in a civil case. Indeed, those qualities give the evidence its logical or probative value in the case. By unfair prejudice, the rules refer to evidence which will deflect the jury from actually deciding the case on its factual merits and lead or invite the jury to make its decision based on unfair considerations which do not relate to the issues in the case. Rule 403 balancing is appropriate to all offers of evidence with the exception of offers under Rules 412(c)(3), 609(a)(1), 609(b), and 609(c), which contain their own balancing tests.

The Old Chief Case (pp. 47-57) is the U.S. Supreme Court's most comprehensive treatment of the Rules 401-403 balancing test. Note the Court makes clear that the test of legal relevancy tilts heavily in favor of admitting logically relevant evidence even if somewhat prejudicial.

In Old Chief, the Defendant was charged with assault with a deadly weapon and being a felon in possession of a firearm. Ordinarily, the prosecutor would prove the "felon" element of the second charge by offering the Defendant's certificate of conviction for the earlier felony. Given the accompanying charge of assault with a deadly weapon in this prosecution, the defense argued that admitting the prior conviction for the same crime would be highly prejudicial.

The McVeigh case (pp. 57-69) provides an excellent insight into the balancing process under Rules 401-403 regarding the proffer by the defense of facts relating to alternative perpetrators in the largest domestic terrorism case in U.S. history. The Court of Appeals found no abuse of discretion in the trial judge's exclusion of such facts after reiterating the liberal ("any tendency") admissibility standard of Rule 401. The appeals court ruled that even if the proffered defense evidence had marginal relevan6e, it was substantially outweighed by the confusion and misleading factors of Rule 403.

The proffered evidence was testimony from an undercover government agent that: (1) another anti-government extremist group shared McVeigh's anti-government views and may have had vague designs on the Murrah Building or other federal installations as a terror target, and (2) that the agent observed two brothers at the extremist group headquarters before the bombing who resembled the initial rough and general sketches of the suspects.

On page 63, the court discusses the particular Rule 403 dangers of admitting "alternative perpetrator" evidence. This portion of the opinion should stimulate a lively discussion as to the nature of adequate evidence of the "alternative perpetrator" which would be required to guarantee admissibility.

The second part of McVeigh (pp. 64-69) deals with the 401-403 objection to certain victim impact testimony at the penalty phase of the trial. After noting the inadvisability of the use of "continuing objections," and the requirements of following up at trial following a denial of a motion in limine, the court affirmed the district court's admission victims personal histories both before and after the blast which clearly provided an emotional overlay to the government's case on sentencing. The court noted that "graphic descriptions of destruction and death are relevant on how the crime occurred...even when the issue is uncontested."

Students should be queried as to what kind of evidence would be "over the top" and substantially outweigh the probative value of the evidence. After all, isn't the point (the relevance) of victim impact testimony to prove the overwhelming impact of the crime beyond its legal significance?

Evidentiary Foundation: People v. Chambers (p. 70)

Note that the New York view on murder scene photographs requires the state to tie the photos to a disputed issue or to some other relevant purpose. Here the defendant opened the door to the photographs by disputing the issue of intent by raising an "accident by rough sex defense." Had the defendant defended with, for example, an alibi, would the pictures still be admissible?

2. Foundations

The article excerpts on pp. 72-76 introduce the requirement of authentication for evidence offered in court. It is useful that there is an authentication requirement for testimonial evidence, as well, but it is taken care of by the witness who "authenticates" herself by identifying herself in court before offering her observations.

This having been said, the real authentication problem arises with real, demonstrative and illustrative evidence. The McElhaney excerpt and Rule 901 provide the law and the technique of authentication. The Reilly case (p. 78) provides the law with respect to authentication and the limited showing required in demonstrating that the item offer is what it purports to be by a preponderance of the evidence. The case reminds students that to authenticate an item of evidence is to help show its relevance; authentication does not guarantee admissibility in the face of other objections, e.g. hearsay, privilege, etc.

The Dumeisi case (pp. 78-83) illustrates the variety of ways in which documents or other items of evidence can be authenticated. Here, some items are authenticated by a witness who has knowledge of their actual preparation while others are authenticated circumstantially. The Sacco and Vanzetti transcript (84-90) demonstrates the laying of a foundation via a chain of custody where the item of evidence is otherwise not uniquely recognizable as the item seized from the defendant. Students should be queried on why the "chain of custody" is required in such cases and whether an effective "chain of custody" was established for the bullets.

Finally, The Evidentiary Foundation: The Trial of John W. Jenrette, Jr., (pp. 90-97) is a vehicle to demonstrate the very simple foundation required to authenticate photograph. Note that we do not need the photographer, but only a person familiar with the scene portrayed on the photo. To authenticate the photo, such person need only testify: (1) that she is familiar with the scene and (2) that the photograph accurately portrays the scene as it was at the relevant time. Students should be aware that the opponent can voir dire the authenticating witness at the time of the offer of the exhibit to see if there are any misleading differences between the photo and the scene portrayed.

The Jenrette transcript also demonstrates an unnecessarily elaborate foundation for a videotape. The foundation for the video should be the same as for the photograph with the addition of testimony to the effect that the videorecorder was in good working order at the time of the recording. (Of course, if the video is lengthy, the witness will have to have viewed it on an earlier occasion outside of court.)

D. Preliminary Questions of Fact: The Role of Judge and Jury

Although the conventional wisdom is that the judge decides the "law" and the jury decides the "facts," Rule 104 provides that there are situations where in order for the court to rule on the admissibility of evidence, the court must make a threshold decision as to whether the proponent has established the underlying factual foundation. Thus, in these situations, the court must resolve a preliminary issue of fact. Examples include the voluntariness of a confession, the foundation for an excited utterance, etc.

Why do we leave these fact decisions to the court instead of the jury? The policy concern is to preserve the integrity of the jury system and to preserve the effectiveness of legal rules of exclusion. If the jury is exposed to the evidence which ends up not being admitted, the exposure of the jury to the inadmissible data makes their task more difficult if not impossible. In addition, to require a full scale evidentiary hearing before the jury on such foundational facts would seriously delay and extend trial.

It should be pointed out that the rules of evidence (except as to privilege) do not apply to foundational offers (Rule 103) and that the standard of proof for preliminary findings of fact by the court is the preponderance of the evidence, even in criminal cases (e.g. Bourjailly v. United States). Of course, once the court finds the foundational fact the evidence it supports will be admitted, leaving its weight to the jury.

Further, there is a difference between questions of competency and questions of conditional relevancy. As to questions of competency, exposing the jury to the evidence at issue creates potential taint problems. We want to avoid that taint, as it would defeat the purpose of the underlying principal that’s at issue.

But that concern does not arise in the context of Rule 104(b) determinations where the only question concerns the logical connection between certain items of proof. (There is no danger of taint with respect to 104(b) because there's no risk of the jury) At worst, the jury might be exposed to logically irrelevant evidence, which ordinarily carries little risk of prejudice.

Let's go back to Professor Morgan's first hypothetical: the car accident in which A, the agent, was driving, and the question now is whether A was defendant P's agent. The plaintiff wants to establish that A was driving. D objects that there is insufficient evidence on the record of an agency relationship between A and P.

Suppose the court doesn't believe that A was principal's agent, but there is enough evidence on the record to establish a prima facie case to that effect. Why would it be improper for the judge, under those circumstances, to simply to decide that because he disbelieves that A was P's agent, the proof should not be admitted?

Because that would subvert the jury's role. The court would be essentially saying, "I don't believe that the driver was principal's agent; notwithstanding there being a prima facie case to that effect, I don't believe it, I'm not persuaded, and so I am not going to admit evidence of A driving. This, in turn, would mean that, under the guise of ruling on the admissibility of evidence, the court could take away the proponent's right to have its case heard by a jury.

Keep in mind that, ordinarily to get the case to a jury, the proponent only needs to establish a prima facie case. Having met that burden you've got the right to the jury's verdict, and the court ought not to be able to take the case from the jury under the guise of making a preliminary factual determination on the relevancy of evidence.

So that's why we have a lower standard for Rule 104(b) determinations to keep the court from subverting the jury's function.

One more example: suppose the question is whether the driver of the car heard the mechanic's statement, "Your brakes are bad." Again, assume the proponent could establish a prima facie case to the effect that the driver heard the statement, but the court feels otherwise. Given the existence of a prima facie case, the trial judge should not be allowed to deprive the proponent of a jury trial just because the court disbelieves the proponent's proof on this point. Consequently, the standard that applies for Rule 104(b) determinations is not preponderance of the evidence; it is the same standard that applies to escape a direct verdict, a prima facie case standard sufficient evidence to support a finding with respect to that particular factual issue.

When push comes to shove, Rule 104(b) determinations are akin to questions of authentication of evidence. They involve purely questions of logical relevancy, not questions of competency or reliability of evidence. There is no reason not to let juries make these types of factual determinations, and that's why Rule 104(b) only gives the judge a limited screening function subject to the same standard that the proponent must meet to escape a directed verdict a prima facie case standard.

This approach preserves the jury's function, but is still vulnerable to certain evidentiary stalemates.

For example, at trial, suppose the witness is asked: "Who was driving the car?" The witness is about to say, "A was driving the car." But there is an objection, "Objection, your Honor, there's no evidence that A was an agent and therefore the that A was driving is irrelevant." Absent supporting evidence, Plaintiff's Counsel might then back off. He might instead ask a question aimed at proving that A was an agent –

"Mr. W, did P employ A in any capacity?" (a hyper-technical objection), "Objection, your Honor. Proof of A's agency for P, principal, is irrelevant, at best, unless there is prima facie evidence on the record that he was driving the car."

13. Deferred Rulings/Subject to Connection

To avoid the absurd result that this objection—and others like it could produce, Rule 104(b) allows the court to admit evidence subject to connection. Rule 104(b) says, "the court shall admit it **upon or subject to** the introduction of evidence sufficient to support a finding of the fulfillment of the condition."

"Or subject to" — if you make a commitment to the judge, judge, we'll connect up later on," the court will ordinarily allow it subject to connection. Failure to connect up yields the possibility of directed verdict (e.g., for failure to prove an element) or mistrial if the

unconnected evidence prejudices the opponent with respect to other counts or claims.

i.e. Welch case (pp.__) Government introduced very damning evidence that D helped secure a green card for the son of a JOC member, **subject to later proof that D knew he had a "no show" job.** We argued that evidence of alleged immigration fraud should not have been admitted subject to connection because it threatened to taint the remaining counts of the case. The court dismissed the case on other grounds, but it's questionable that the government introduced sufficient evidence of D's state of mind to withstand a mistrial motion for failure to connect up properly.

As to admitting proof of elements subject to connection, if the proponent fails to meet its prima facie burden its direct case will be subject to a directed verdict. And so there's no harm under those circumstances for the court to say, "Okay, I'm going to admit it subject to connection," because if you don't connect up anyway, you're not going to meet your burden of proof to get your case to the jury.

CHAPTER III
The Examination of Witnesses

A. Testimonial Competence

1. Introduction

Witness competency has two aspects. Rules 601, 605 and 606 treat whether a witness can testify at all based on four traditional competency factors; (1) ability to observe, (2) ability to remember, (3) ability to communicate, and (4) ability to understand the obligation to tell the truth embodied in the oath or affirmation. In federal practice, witnesses are presumed competent (with the exception of judges and jurors) and will be permitted to testify unless the opponent of the witness, by voir dire or otherwise, demonstrates to the court the witness's failure to meet one or more of the competency factors by a preponderance of the evidence. The Schneiderman case (p. 128) demonstrates the court's finding of competency despite some apparent weaknesses of the brain-injured plaintiff with respect to some of the competency factors.

The second aspect of competency is represented by Rule 602 which requires that a witness, albeit competent to testify generally under Rule 601, demonstrate a foundation of "personal knowledge" with respect to facts about which she will testify. That is, Rule 602 requires that the witness have been in a position to perceive via her senses the facts about which she testifies.

Note that students often confuse the "personal knowledge" or "lack of foundation" objection with a hearsay objection. Students should be instructed that the choice of objection is dictated by the substance of the question posed to the witness. For example, when a witness testifies that she was in Singapore last August 1st, and then is asked to describe what happened in Houston that day, the objection is "lack of personal knowledge." If the witness is asked what someone told her on the phone from Houston on August 1st, the objection is "hearsay." Note that though the way the witness knew about events in Houston may have been through hearsay, the hearsay objection only lies where the question seeks to elicit an out-of-court statement, e.g. the content of the phone call.

1. Witness Competency (p. 105)

This section begins with an excerpt from Ambrose Bierce's story about a man named Williamson who disappeared into thin air in 1854. After his disappearance, his estate eventually had to go though probate. This required proof of his disappearance. However, Mrs. Williamson, who had witnessed the disappearance, not surprisingly had lost her reason, so she was unavailable to testify. But the more important point is that even if she had wanted to testify, she would not have been competent to do so because, at common law, her loss of reason rendered her incompetent as a witness.

Competency in this context means "eligibility to testify." (When we looked at competency earlier his semester it referred generally to "eligibility for consideration by the

finder of fact eligibility to be admitted into evidence." In the context of witness competency, this means eligibility to testify.)

Professor Rowley's article, on page 105 traces the origin of witness competency. Early juries were composed of people who had witnessed the events at issue. Knowledge of the underlying events was required to qualify as a juror. The jurors would get together, go out into the community, investigate further, deliberate, and then return to the courtroom and report their findings. In the mid-16th century this practice changed and the law developed new requirements for being a juror and for being a witness. Jurors no longer could have any knowledge of the case, and various limitations were imposed to qualify as a witness. For the most part, these limitations were **status-based:** meaning that persons of certain status were not competent to testify. In other words, the common law judges created status-based limitations which rendered incompetent anyone who held a prohibited status.

2. Status Based Limitation

Examples: slaves and women couldn't testify. Perhaps the most arcane example: parties to the litigation couldn't testify.

Parties to a lawsuit: contract action, tort action, or whatever it was, you couldn't testify. What might be the rationale for that limitation?

Parties had a natural stake in the outcome worthy of being believed. Indeed, this doctrine was expanded beyond parties to include anyone who had an interest in the outcome. So, for example, a potential witness might have said, "Well, I'm not really personally involved in this lawsuit. I'm not going to profit from this. I've got no stake in the outcome." But opposing counsel might bring out the fact that the witness is friendly with plaintiff:

> You are friendly with the plaintiff, aren't you?
>
> Yes, I am. He's a friend of mine.
>
> So you would naturally prefer for plaintiff to win, wouldn't you?
>
> Well, I suppose so.

Well, Mr. Witness, I appreciate your candor and honesty, but you may not testify. You do have an interest in the outcome. And in certain common law jurisdictions, courts routinely deemed such witnesses incompetent.

Other examples: At common law, atheists were incompetent to testify. It didn't matter if you came into court and promised to tell the truth if, during the course of voir dire, you acknowledged that you didn't believe in God:

> Mr. Witness, do you believe in God?
>
> No, I don't.
>
> Mr. Witness, we appreciate your honesty, however you are not competent to testify.

The rules of evidence, for the most part, have eliminated status based limitations to witness competency, although some such limitations still exist under the federal common law.

a. Spousal Incompetency (p. 107)

Among the surviving limitations is the doctrine of spousal incompetence. (This doctrine is not codified in the FRE but survives as a matter of federal common law which the FRE chose not repeal.)

Spousal incompetence reflects the common law principle that one spouse may not testify for or against another.

Rationale: evolved over time.

Initially: Spousal incompetence was premised upon the belief that husband and wife were one. And so if either spouse was involved in litigation, the other was deemed a party as well, and therefore incompetent to testify under the doctrine of party incompetence.

Later the rationale became more policy-based, looking to promote family harmony and preserve the marriage.

Exceptions: Eventually, courts began to develop exceptions to this principle. So, for example, in a criminal case charging one spouse with misconduct against the other, the victim spouse could testify. Today, this principle of spousal incompetence survives, but its potential exceptions vary by jurisdiction.

The exceptions allow the witness-spouse and/or the party-spouse to waive the doctrine. The most common exception authorizes the witness spouse to waive the doctrine. Usually this is someone who is cooperating with the government and is perfectly willing to testify against him as I've said before, she wants the louse out of the house. And that's what happened in the Trammel case decided in 1980 in which the Supreme Court held that a testifying spouse could waive the protections of the doctrine such a waiver indicating the marriage is really over anyway, so there is no family harmony to preserve.

Now spousal incompetence, incidentally, is coterminous with the life of the marriage. That means that when the marriage ends, each former spouse become eligible to testify against the other. You are incompetent only during the life of the marriage.

This principle has occasionally provided support for the institution of marriage that the courts probably did not anticipate when they created it. Not infrequently, a marriage that has been on the rocks has been saved or at least preserved for the life of the grand jury because one spouse wants to keep the other spouse off the stand in a criminal prosecution so they reconcile. [Threat of criminal prosecution can be more effective than mania counseling!]

There have also been situations in which Ds have tried to get married to keep a potential adverse witness off the stand. What do you do under those circumstances? Suppose you are a prosecutor and you learn that the defendant wants to marry his girlfriend in an effort to keep her off the stand.

3. The marital communications privilege

This privilege applies to conversations between spouses made with an expectation of privacy. Such private conversations are protected even if they subsequently divorce. After divorcing, the spouses are eligible to testify against each other except as to private marital communications.

Rationale: the law wants to protect that expectancy interest that you had in the privacy of that conversation. And so, post-divorce, each spouse may testify as to observations but not as to conversations held in confidence.

4. State v. Lee (page 109-110)

This case illustrates a unique application of spousal incompetence because resolving the prosecution's spousal incompetence objection required the trial judge to make a preliminary factual determination that overlapped with the ultimate issue in the case.

The facts essentially are as follows. In 1901, Mack Lee killed James Williams. Lee, however, escaped, leaving behind his wife. Nine years later, in 1910, the police arrested someone named Guy Fenner for the murder of Mr. Williams. Now, as there was no question at trial that Mr. Williams had been killed by one Mack Lee, the only question for the jury was whether the defendant was Mack Lee. Well who would know that best? Presumably Mrs. Lee. So the defendant called Mrs. Lee to testify that he was not her husband. The prosecutor then objected arguing, “That's Mrs. Lee. Our position is that the defendant is Mr. Lee, and consequently, under the doctrine of spousal incompetence, she may not testify in his behalf.”

Who decides whether the witness, Mrs. Lee, is in fact married to the defendant. This is a classic preliminary factual determination involving a question of competency, and therefore, if the rules of evidence had applied, this would have been a Rule 104(a) determination for the trial judge. (At common law, competency-based determinations were also left for the trial judge.) Query: where the ultimate issue in the case overlaps with the preliminary factual determination and the ruling may deprive the D of his most

important exculpatory witness, does the trial judge still make this preliminary factual ruling?

There was also a second issue in the case: Whether by making the ruling in the jury's presence the court improperly expressed its opinion to the jury concerning the ultimate issue in the case.

On appeal, the appellate court said: These circumstances are admittedly unusual, but there is still no reason to depart from the conventional practice that the trial judge makes competency-based preliminary factual determinations. And while the court should not have made that decision in the presence of the jury, the error was not serious enough to warrant reversal.

The underlying rationale: While the proponent has the right to introduce evidence to the jury — and certainly evidence going to the ultimate issue — that evidence must be competent. The theory is that a party has the right to a jury trial on the ultimate issue of the case, but it must be based upon competent, admissible evidence. If the trial judge finds the evidence incompetent, the D has no right to present it to the jury.

b. Dead Persons Statutes

Dead man's statute really should be referred to as dead person's statutes to be more politically correct, or dead perchild to be perfectly neutral. They exist in most American jurisdictions, even those that have adopted the rules of evidence. These provisions stem from the law's dissatisfaction with earlier rules limiting witness competency. In essence, these statutes provide that, if someone was involved in a transaction with another person now decease resulting in litigation with the decedent's estate, the surviving party may not testify out the transaction with the decedent. It also disqualifies the surviving party from testifying about an underlying transaction with the decedent in litigation between the survivor and the decedent's estate.

Ironically, this legislation was adopted as part of a liberalizing trend — an effort by courts to narrow the common law's status-based preclusions against party testimony. You'll recall that, at common law, parties to the lawsuit were automatically deemed not worthy of belief, and therefore not eligible to testify about their version of the underlying events.

Eventually, everyone, even judges, recognized that this was a pretty silly rule. It makes more sense to have parties testify and subject them to cross-examination. All jurisdictions eventually eliminated the rule of party incompetence. But there was one situation in which legislatures felt that a party ought to be prevented from testifying, and that situation involved litigation between a survivor and a decedent's estate.

These statutes vary by jurisdiction, but as a general proposition: they apply (1) to the surviving party in litigation; (2), testifying about a conversation or transaction involving a person now deceased; and (3), the decedent's estate is a party to the lawsuit. And what this means is that the dead man's statutes, apply only in civil litigation.

Pages 110-113 give you examples of different provisions in different jurisdictions. So, one day in the quiet of your study, take a look at them. Now, as I said, the underlying purpose of these provisions is to eliminate any possibility of perjury. But do dead man's statutes, in fact, eliminate the possibility of corruption or witness perjury.

As originally proposed, FRE 601 essentially said that "everyone is competent as a witness, except as otherwise provided." This would have rendered state dead man's statutes inoperative because the FRE do not otherwise exclude a surviving party's testimony concerning a transaction with another party now deceased.

That proposal, met with a very angry response by the states. In essence, the "states righters" said that "'Questions of witness competency are properly matters for state law and the federal government should not arrogate itself to determine who may testify under state law."

Eventually, Congress compromised. And that compromise is reflected in the second sentence of Rule 601. The first sentence provides that "everyone is competent as a witness, except as otherwise provided." And then 601's second sentence says, "However, in civil actions and proceedings with respect to an element of a claim or defense, as to which state law provides the rule of decision, the competence of the witness shall be determined in accordance with state law."

So, we now know, as to federal matters, everyone is competent and the state dead man's statute doesn't apply, but when state law provides the basis for a claim or defense, the DMS takes precedence. Now, this compromise makes a fair amount of sense, but it certainly does not always work simply — i.e., cases involving a federal claim and a pendent state claim.

Suppose you're in federal court on a securities fraud claim, for example, but you also have a pendant state common law claim. The witness may be competent as to one and not as to the other. i.e., the witness is competent to testify as to the federal securities action, but not competent to testify about the state securities action, and yet the underlying facts may be one in the same.

What do you do under those circumstances? The courts have not come up with a reliable, consistent approach for dealing with this problem.

Because dead man's statutes exclude relevant evidence and don't provide complete protection against perjury, courts have traditionally construed them narrowly.

Example:

Ward v. Kovacs (pp. 114-118)

Issue: whether plaintiff could circumvent New York's dead man's statute through an imaginative interpretation of the statute's waiver provision. The New York statute provided for an exception to the witness' disqualification if the decedent's testimony, in this case a deposition,

is offered into evidence. Q: may the surviving party trigger this exception by offering the decedent's deposition into evidence on his own?

In other words, may the non-decedent survivor force the waiver? Does the exception apply **only** if the decedent's estate voluntarily offers the deposition into evidence or may the **survivor trigger** the exception? Plaintiff having offered the decedent's deposition into evidence, the question was whether this triggered the statutory waiver, thereby allowing the plaintiff survivor to testify as to the events that occurred on the evening when her hand was injured and she contacted defendant physician, who allegedly committed malpractice and then died before trial.

The Court of Appeals observed: "The dead man's statutes have been criticized as unfair in operation and unsound in principle."

From a policy standpoint, the court goes on to say that "the rationale for the dead man's statute does not apply once the decedent's deposition has been admitted into evidence." In other words, the decedent might no longer be available to testify, but here the decedent was deposed, subject to full cross-examination, and was certainly able to give his version of the events. And on this basis, the court says it declines to expand by implication the effect of New York's DMS. It suggests that the statute should not become an advocate's tool, which would be inconsistent with the trial as a search for truth. And that cross-examination of the survivor by the decedent estate's attorney should be satisfactory to bring out the full story.

Of course, the court thereby **expanded the exception by implication —** it really accepted a very imaginative "can-do" lawyer's argument. At first glance, this statute suggests that this exception only applies if the decedent's estate offers the deposition into evidence. But plaintiff's counsel must have said to himself, "I'm not going to let first - glance analysis be determinative. I know that courts don't like dead man's statutes. If I can give the court some arguable basis for ruling in my favor, I may get lucky."

Then he thought of offering the decedent's deposition into evidence on his own and arguing that the exception therefore applies. And lo and behold, counsel prevailed.
It's a good example of "can-do" lawyering.

Okay, so the deposition is offered into evidence, the exception is triggered, and the survivor can testify. What about the neighbors in this case — the neighbors who also observed the transaction between the physician and the patient? Would they be able to testify or does the dead man's statute render them incompetent? Does the dead man's statute even apply to them? No. So the neighbors could clearly testify under the circumstances of this case.

Next status-based limitation— Prior convictions — the so-called infamy preclusion to party competency.

The common law deemed anyone convicted of a felony automatically incompetent to testify.

Rationale: convicted felons utterly unworthy of belief, Today, virtually every jurisdiction has eliminated this common law status-based preclusion. Ironically, this push for reform came not from the defense bar, but from prosecutors. Why would prosecutors be anxious to eliminate this preclusion against witness competency?
Hoffman v. City of St. Paul (pp. 119-120)

Issue: Juror impeachment of a quotient verdict. The jury came back and said, "Well we're tired of deliberating. This has gone on too long. Let's just write down on paper how much we think the plaintiff should get. We'll divide it by 12. That will be the verdict." Sounds quite practical, but unfortunately the law does not permit quotient verdicts. And the question now is whether a juror would be competent to testify as to what occurred during the deliberations and thereby set aside the verdict.

What does the court say? It acknowledges the conflict between the desire for transparent justice — to find out what really happened during the jury deliberation process — and the principle of finality. And this court opts for finality.

Other concerns: protecting juror privacy and safeguarding the deliberation process. Otherwise, losing counsel would routinely make inquiry, etc.

Does it follow from this from this general rule of juror incompetence that courts will never allow jurors to impeach verdicts?

How would FRE 606 resolve this issue? Distinguish between intrinsic and extrinsic matters. Because extrinsic matters are extremely serious and fortunately relatively rare, Rule 606 creates an exception to the principle of juror incompetence. When you have extrinsic prejudicial information or some improper outside influence, a juror is competent to impeach a verdict.

Question: what constitutes an improper outside influence? Suppose that the jury misunderstood the law. Counsel for the losing side presents a juror's affidavit stating that, "We got back to the jury room. We didn't know what the hell the judge said. We did the best we could." And believe me, when you are out there and listen to some of these instructions -- Instructions can run an entire day and tears of boredom begin to stream down your face. So this scenario is entirely plausible — what result — competent or incompetent? It's not an outside influence. And beyond that, if we were to set aside verdicts based on this, no verdict would withstand attack because juries are always confused. Courts tend to view quite narrowly what constitutes an extraneous, prejudicial factor or an improper, outside influence.

The next question. Assuming that you have some extrinsic, prejudicial factor, is how is its impact to be evaluated? Should the juror be allowed to testify about the effect of this extrinsic factor? Rule 606 is ambiguous about this. It contains a broad prohibition against any inquiry into the jurors' thought processes, but then it has an exception for outside influences. And the question is, once this exception applies, is the juror competent to testify only about the outside factor or may the juror also testify about the impact of this external event on his or her deliberations? Most courts have restricted the scope of juror competence under these circumstances holding that a juror may testify about the occurrence about the outside event, but that the effect of this outside event, on the individual juror, is not a matter for testimony; as to that matter, the juror is incompetent. In other words, courts don't want to examine the subjective state of mind of any individual juror; instead, they apply an objective test. Question number one — was there an improper outside influence? Two, if so, what would be the likely effect of such outside influence on the mind of a reasonable juror?

United States v. Stewart (p. 122) provides an example of what is not an "extrinsic influence" mere jury misunderstanding or ignoring of the court's limiting instruction on the consideration of evidence. Though students may be offended by the fact that some jurors utterly failed to follow the court's instruction, that failure is "intrinsic," i.e. it is based on information from within the courtroom. Note the court's reference to Tanner v. United States in which the Supreme Court ruled that Rule 606 forbade impeachment of the jury's verdict despite the jurors being continually drunk and high during trial and deliberations. (See n. 5 at p. 127).

A. The Presentation of Proof: Basic Limitations

The Catch 22 excerpt (p. 148) demonstrates a poor fictional attempt at direct examination and could stimulate a discussion about the connection between the law of evidence and effective advocacy Stahl v. Sun Microsystems (p. 152) illustrates the exception to the rule against leading questions for direct examination of adverse witnesses. Here, the plaintiff called a former employee of the defendant and asked permission to put leading questions to her. Query: Was there any evidence that this was a hostile witness? NO! So, on what basis does the court authorize counsel to ask leading questions on direct?

The trial judge ruled that she was clearly identified with the defendant both through her previous employment and her ongoing relationship with one of D's key witnesses. And so the court found that she fit within one of the Rule 611(c) exceptions for leading questions (i.e. a witness may be identified with an adverse party without being affirmatively or emotionally hostile).

2. Assisting the Forgetful Witness

A forgetful witness's memory may be refreshed by showing the witness an item, usually a writing, which jogs the witness's memory. Normally the writing used to refresh will be one identified by the witness but identification or description of the refreshing document is not required. The steps in refreshing a witness's memory are as follows:

a. Establish the witness's failure of memory.

b. Mark the refreshing document for identification.

c. Show the witness the refreshing document and ask her to read it to herself.

d. Ask the witness if she has read it.

e. Ask the witness if her memory is now refreshed with respect to the forgotten fact.

f. Take the refreshing exhibit from the witness.

g. Repeat the question that drew the original failure of memory.

Any document or thing used to refresh recollection must be made available to the opponent for use in the opponent's next examination of the witness. That is, if the refreshing of recollection occurs on direct examination, the refreshing item must be available to opposing counsel before cross-examination begins. That being said, the custom in most courtrooms is for opposing counsel to be provided with a copy of anything marked as an exhibit before it is shown to the witness.

Though the proponent who uses the document to refresh may not offer the document into evidence unless it is otherwise admissible, the opponent may offer the pertinent parts of the refreshing document in evidence as it impacts (i.e. impeaches) the testimony of the witness.

Note that the trial court possesses the discretion to make available to the opponent any document used to refresh a witness's recollection in preparation for trial. Some courts have taken the position that even if a document used to refresh memory would be privileged or considered non-discoverable work product, it still must be produced. Therefore, counsel should take care to avoid refreshing recollection either before or during trial with a document which contains damaging information that is not already in the possession of the opponent.

United States v. Riccardi (p. 157)

Riccardi states the federal and predominant state view of Refreshing Present Recollection and distinguishes that practice from the hearsay exception for Past Recollection Recorded (Rule 803(5)). The key difference is that the practice under Rule 612 serves to "revive" the witness' present recollection so that the witness testifies not as to the content of the refreshing document (or other item) but from her now-revived memory. The practice under Rule 803(5) is for the witness to read a contemporaneous document's contents into evidence rather than rely on the witness' memory. Of course, Rule 803(5) requires a rather elaborate foundation for the document which is not required for a refreshing document. The only oddity in Riccardi is that though the witness testified from a refreshed recollection, the court permitted the witness to read the extraordinarily lengthy list to the jury and then affirm that each item's presence on the list served to refresh her memory. As the court noted, this is no different from examining counsel's asking leading questions from the list, a practice which Rule 612 sanctions.

In the real world, a witness will often attempt to read from a document which has been used to refresh and would not qualify for Past Recollection Recorded. Students should be queried as to the proper objections which should be lodged in that situation. There are at least three: (1) hearsay, (2) reading into the record a document that has not been admitted into evidence and (3) the testimony should be stricken because the witness has not been refreshed (or why does she need to read from the document?).

(skip back to p. 196, Rule 701: Opinion Testimony)

3. Rules Limiting Expert Opinion

Generally, the determination of factual conclusions is within the province of the jury or other trier of fact. Therefore, lay witnesses ordinarily are permitted to testify as to what they have perceived, e.g., seen, heard, felt, tasted, or smelled, without testifying as to their opinions derived or inferred from perception.

There are many situations, however, where a witness's inference, when based on perception, would be helpful to the members of the jury because it would give them a more accurate picture of the witness's perception.

Lay opinion is generally allowed where its admission makes the jury's fact-finding easier and more accurate, and where a witness provides an inference to the jury which takes the place of describing a series of perceptions which in common experience add up to a rather ordinary inference or characterization. In these situations, the lay person ordinarily describes his or her observations in terms of opinion. For example, witnesses will be allowed to testify that they observed a person who appeared happy, sad, nervous, excited, depressed, etc. Witnesses would be hard pressed to break down what they observed into the component parts of the observation that led to a conclusion. They are, however, capable of understanding what was observed and to preclude such testimony would be to deprive the jury of reliable evidence by operation of a hyper-technical rule. And, of course, the quality of these opinions can be tested on cross-examination to show the foundation or lack thereof, for the opinion. Other opinions of lay witnesses that are typically allowed when based on observation are opinions as to sobriety or intoxication, speed of moving objects, value of personal property, authenticity of handwriting, size, color, and weight of objects, and time and distance.

There is one other typical situation where lay witnesses are allowed, pursuant to Rule 701, to testify in the form of opinion. Commonly this situation is described as the collective fact doctrine. In collective fact situations, a witness forms an instantaneous opinion as to matters that are observed, even though there is an inability to express the component observations that gave rise to the instantaneous opinion.

The typical example is where a pedestrian claims that he was struck by a car and a witness is prepared to testify that she observed the accident and, based on that observation, reached the instantaneous conclusion that the pedestrian could have gotten out of the way of the car. Obviously, the witness could not describe the physics of body movement that

led to the opinion nor give a clear, factual statement as to facts that led to the opinion. That is, the observation of the witness and the witness's opinion are so intertwined as to make separation impossible. To preclude the witness from testifying as to this sort of opinion would preclude the jury from hearing any account of what the witness actually saw, and make the eyewitness testimony accessible to the jury. The federal rules do not compel such an anomalous result.

Finally, it should be noted that pursuant to Rule 704(a), lay opinions that are otherwise admissible are not precluded merely because they embrace the ultimate issue in the lawsuit. For example, if a plaintiff in an automobile accident case claims negligence on the basis of the defendant's drunk driving at a rate of speed that exceeds the speed limit, lay witnesses will not be precluded, on ultimate issue grounds, from giving opinions as to both the drunkenness of the defendant and the rate of speed of the defendant's car, so long as that opinion is stated in terms of miles per hour.

United States v. LeRoy (p. 194) presents an example of the offer of a layopinion which violates Rule 701. Rule 701 permits lay opinion when the proponent demonstrates the opinion is rationally based on the perception (i.e. first hand knowledge) of the person who renders the opinion. In LeRoy, there has been no foundation which demonstrates whether the absent probation officer had any perception or factual basis to opine that the defendant was "mentally unbalanced." Note on page 196 the court states the general rule that a witness may opine on the mental condition of a person but only if the witness is acquainted with the person and has observed the person's conduct.

United States v. Cox (p. 196) illustrates another effort to offer an improper lay opinion.

Here the improper lay opinion consisted of a witness' interpretation of the words spoken by the defendant. The lay witness was in no better position than the lay jurors to interpret the meaning of the words and thus the witness' opinion was not "helpful to the jury," violating Rule 701(b). Note a seemingly contrary view expressed in the colloquy in the Rosenberg trial on pp. 198-200).

c. The Expert Witness Exception to the Non-Opinion Rule

Expert opinion is required to provide conclusions or inferences from facts which a lay person is unqualified to make. When an issue in the case requires for its resolution an inference regarding some area of technical or specialized knowledge, the lay witness is in no better position than the average juror to assist in the making of that inference. If, however, the proponent is able to provide an expert witness who possesses the appropriate specialized education, knowledge, training, or experience, then that expert witness will be permitted to testify as to an inference from facts presented in the lawsuit which the jury, because of its lack of specialized training or experience, would otherwise be unable to make. Thus, the expert witness, assuming she has been qualified as such, will be permitted to testify as to his or her opinion or inference from such facts.

Qualifications

There are no particular requirements under federal or state rules for the qualification of an expert. The rules do require, however, that the trial judge be persuaded that the purported expert have knowledge or training in an area of specialized knowledge which is beyond the abilities of the ordinary juror. The expert may be qualified because of education, training, professional experience, and/or knowledge gained in some other way.

Proper Matters for Expert Testimony

On December 1, 2000, Federal Rule 702 was amended to conform to the Supreme Court's decisions in *Daubert v. Merrell Dow*, 509 U.S. 579 (1993) and *Kumho Tire v. Carmichael*, 119 S.Ct. 1167 (1999). In those decisions, the Court required trial judges to serve as gatekeepers who would exclude unreliable expert testimony whether of a scientific or non-scientific variety. The proponent of the expert testimony has the burden, under Rule 104(a), by a preponderance of the evidence in either a civil or criminal case of demonstrating: (1) the expert's qualifications, (2) the reliability and helpfulness of the expert opinion, and (3) the "fit" between the expert's opinion and the facts of the case.

In *Daubert* (p. 205), the Court listed a number of non-exclusive factors which trial courts should assess in determining reliability of proposed scientific evidence. They include: (1) whether the expert's methodology has been tested, (2) whether the theory applied by the expert or the methodology utilized has been published and subjected to peer review, (3) what the method's rate of error is when it has been applied, (4) whether there are standards and controls for the use of the methodology, and (5) whether the methodology or principle is generally accepted in its field. *Kumho Tire* (p. 214) extended the rationale and the factors considered in *Daubert* to non-scientific areas of expertise, making clear however, that any factor that the court believes is relevant to the reliability, and therefore, usefulness, of proffered expert testimony is appropriate for the trial court to consider in its gate-keeping function regarding expert testimony. Decisions regarding the admissibility of expert testimony, applying Rule 702 and *Daubert/Kumho Tire* are reviewed utilizing an abuse of discretion standard.

A review of the cases interpreting Rule 702 on this issue suggests that if the principle or methodology meets the last *Daubert* factor of general acceptance in the field of which it is a part, that no further inquiry is necessary, This test, announced in *U.S. v. Frye*, and applied in pre-federal rules jurisprudence, is generally regarded as a more strict test than required in *Daubert* and *Kumbo Tire* and as such compliance with the Frye Test virtually guarantees acceptance pursuant to Rule 702.

An additional factor that has gained general support from the lower federal courts is whether the principle involved and the methodology used has an existence outside of litigation (i.e. it's non-judicial uses). If the principle and methodology is utilized in science, industry or in any milieu outside of litigation and relied upon in those uses, it is likely to be determined to be an acceptable theory or methodology for use in trial testimony. For example, if in calculating damages in a lawsuit, an accountant uses the same cost accounting

theories and methodologies that are utilized by businesses in making decisions on business matters, it will likely pass Rule 702 muster. If, however, there is no reliance on the methodology or principle outside of litigation, further inquiry is likely to be made before allowing such opinions, making reference to the *DaubertKumho Tire* or other factors.

Expert Opinion Bases

Pursuant to Rule 703, an expert is permitted to rely on otherwise inadmissible evidence in reaching an expert opinion so long as such evidence is the type of evidence reasonably relied upon by experts in that particular field in forming opinions upon that subject. Prior to December 1, 2001, the lower federal courts had split on the issue of whether the otherwise inadmissible, but reliable data, relied upon by the expert could be offered before the fact-finder. Some courts ruled the Rule 703 data inadmissible for any purpose, others admitted the data for the limited purpose of evaluating the basis and weight of the opinion (though not for the truth of the data). The 2000 Amendment bars the disclosure of the Rule 703 data to the jury for any purpose by the proponent (but not the opponent) unless the probative value of the data in helping the jury evaluate the expert's testimony substantially outweighs it prejudicial effect. In the event that the court admits the otherwise inadmissible Rule 703 data, the opponent of the evidence is entitled to a limiting instruction to the effect that the data may not be used substantively.

United States v. Figueroa-Lopez (p. 227) presents a rather typical offer by the government in a criminal case, to offer a law enforcement veteran as an expert in the underworld of drug importation conspiracies or domestic organized crime. As do most courts, the court here finds that despite the ubiquity of organized crime in television and the movies, lay jurors need assistance from persons with specialized knowledge as to matters including the "operation, structure, membership and terminology of organized crime families." Note that the experts in the federal courts need not be qualified by education, but can gain their specialized knowledge through experience on the job. Note as well that after Kumho Tire (though Figueroa-Lopez precedes Kumho), the Daubert factors need not be used as the measuring stick of trustworthiness in disciplines or areas of specialized knowledge where the scientific method does not apply.

United States v. Figueroa-Lopez highlights the difference between expert or "specialized" knowledge and lay opinion based on perception. Rule 701 was amended in 2000 to avoid courts' blurring of the difference by adding 701(c) which precludes lay opinion where it is based on "scientific, technica1 or other specialized knowledge within the scope of Rule 702." The Note on p. 231 makes the point that amended Rule 701(c) seeks to preclude an end-run around testifying expert disclosure under the Federal Rules of Criminal Procedure and Federal Rules of Civil Procedure.

Evidentiary Foundation: The Trial of Wayne Williams (p. 231) demonstrates a typical foundation for the qualification of an expert witness. Although all courts require that the proponent lay a foundation of qualification for an expert, both state and federal courts split on whether the proponent "tenders" or "submits" the expert to the court for the court's "certification" or "qualification" in the presence of the jury. A significant number of jurisdictions do not permit the court to "certify" the expert witness in order to avoid the court

placing its imprimatur on the witness in front of the jury. In a tender jurisdiction, the opponent objects to qualifications and performs voir dire after the tender; in a non-tender jurisdiction, the opponent objects and performs voir dire at the point when the expert is asked for her opinion.

Opinions on Ultimate Issues

A federal court will permit an expert to form an opinion for the trier of fact which embraces an ultimate issue to be decided by the fact-finder in the case. For example, a medical expert in a medical malpractice case will be permitted to testify in many courts that a particular act on the part of the defendant doctor would be considered malpractice. Note, however, that Federal Rule 704 has been amended to exclude testimony on the ultimate issue of the legal sanity or insanity of a criminal defendant in a criminal case. In practice, the federal courts, in response to this recent amendment to Rule 704, have permitted the psychiatrist testifying in a criminal case to testify in the terms of the etiology of the mental disease or defect as they may involve the mental condition of the defendant at the time of the commission of the act in question. For example, a psychiatric expert could testify in a criminal case in federal court that a particular defendant suffered from a mental disease or defect, opine as to his diagnosis, and describe the symptoms characteristics, and treatment of the diagnosed mental disease or defect. An expert cannot testify, however, that the defendant "does not know right from wrong."

United States v. Scavo (p. 237)

Most federal courts permit an expert to testify as to ultimate issues "of face' but not ultimate issues "of law." Courts identify impermissible "issue of law" testimony as testimony in which the expert incorporates the legal standard into her testimony. For example, in a police misconduct case, an expert can testify that police discipline was lax, but cannot testify that the municipality's behavio* "showed a willful disregard of the rights of its citizens," the legal standard for municipal liability. Because Rule 704 must be read with the "need to assist the jury" requirement of Rule 702, permitting the expert to provide an opinion which explicitly embraces the legal standard invades the jury's province.

Various Possible Basis for an Expert Opinion (pp. 241-251)

The information in these pages discuss the various permissible bases for an expert opinion. The expert may base her opinion on (1) personal knowledge, e.g. the physical examination of a patient, (2) the assumption of the evidence in the record incorporated into a hypothetical question, and/or (3) reliance upon otherwise inadmissible evidence if of the type generally relied on by experts in the field, e.g. a patient's history obtained from treating physician.

Note that although Rule 705 permits the expert to state her opinion without revealing its basis to the jury, this is hardly a persuasive way to put on expert opinion evidence.

Rule 703

Rule 703 is worthy of discussion particularly in light of its amendment in 2001. The original formulation of Rule 703 permitted an expert in federal court to consider and rely on inadmissible evidence (usually hearsay) if she testifies that experts in the field find such evidence reliable in practice outside of court, but was unclear as to whether the expert can incorporate the otherwise inadmissible evidence into her testimony. Most federal (and state) courts permitted the expert to reveal the Rule 703 data to the jury with a limiting instruction to the effect that the jury cannot consider the 703 data for its truth (thus avoiding violation of the hearsay rule), but can consider the 703 in evaluating the weight of the expert's opinion. Fearing that most juror's would not understand that fine distinction and that Rule 703 would, therefore, permit an end-run around the hearsay rule, the Rulemakers in 2001 amended Rule 703 to tilt against permitting the jury to hear the 703 data. This tilt was accomplished by forbidding revelation of the 703 data to the jury unless its probative value outweighs its prejudice—the precise opposite of the usual Rules 401-403 balancing test which favors admissibility.

The amended Rule 703 has not proved popular with federal judges who find that enforcing the amended Rule 703's bar leaves a hole in the proof, requiring an expert to testify that she relied on some 703 data, but she cannot tell the jury what it is. Thus, some courts have effectively ignored the amendment by simply ruling that the presentation of the 703 data is so probative on the issue of the weight and credibility of the opinion, that its value outweighs the prejudice of jury misuse of inadmissible evidence.

McClellan v. Morrison (p. 224), a case decided under Maine's version of Rule 703 (identical to the former Federal Rule 703), provides an example of an expert relying: (1) on his own expertise and first hand observation of the subject of his opinion and (2) the kind of hearsay that medical doctors rely on in the practice of medicine.

The Trial of Richard Herrin transcript (p. 247) demonstrates 3 expert witness matters: (1) the use of the hypothetical question, (2) an opinion on the ultimate issue of the defendant's sanity (which would be impermissible under Federal Rule 704(b)), and (3) reliance on inadmissible hearsay.

C. Impeachment, Cross-Examination and Related Problems

1. Impeachment by Cross-Examination

Cross-examination is the opportunity given to counsel, after the direct examination, to question witnesses for one of two purposes: first, to call into question accuracy and completeness of the witness's testimony, the accuracy prong of cross- examination; and second, to call into question the honesty of the witness who has just testified. These prongs sometimes overlap, but you can appreciate how they are, at least theoretically separate and distinct. An absolutely honest individual can simply be wrong or mistaken rather than deceptive, the witness just didn't perceive the underlying event accurately.

Every party to a case, and certainly a defendant in a criminal case, has an absolute right to confront witnesses and to conduct cross-examination. Suppose that a government has testified on direct examination, the court takes a lunch break during which the witness

disappears. What should opposing counsel do?

At the very least, ask the court to strike witness' testimony - and that will be done routinely. If the testimony was severely damaging, the opponent may argue that striking the testimony is not enough and that a mistrial is required — and that in fact can occur. You have an absolute right to conduct cross-examination.

2. The Vouching Rule (p. 253)

Essentially this principle means that the party calling a witness vouches for that witness' credibility. In effect, the party adopts the witness' testimony as true and may not impeach her credibility. The rationale for the rule: cross-examination is necessary only when a witness is not trustworthy. But by calling the witness in the first place, the proponent vouches for his credibility for trustworthiness. Having vouched for his trustworthiness, you may not impeach your own witness.

The voucher rule dates back more than 1,000 years to the days of King Arthur and the Knights of the Round Table - when disputes resolved by retaining knights to engage combat for you. Having chosen your knight, there was more-or-less a nexus between you and your representative.

Eventually trial by combat was outlawed as uncivilized and so knights were replaced by professional witnesses who were known as compurgators. Competing compurgators would come to court and testify without knowing anything about the underlying event. The test of their truthfulness depended on which witness stuttered or stumbled first. In these situations once again, there was an informal nexus between the witness and the party — certainly one wouldn't do anything to cause your witness to be less than perfect.

Given the implicit moral nexus between the witness and the party calling him, it made sense to conclude that a party was bound by a witness's testimony; this assumption eventually developed into the voucher principle — you vouch for your witness's credibility and so you may not cross-examine that witness.

In 1681, Lord North first articulated this principle in Lord Colledge's trial set forth in the casebook (p. 235). He articulated an all-inclusive prohibition against any party impeaching a witness whom he called. Colledge's trial involved a treason prosecution in which the defendant wanted to discredit one of his own witnesses. In disallowing this, the judge said, "Whatsoever witness you call, you call them to testify the truth for you. And if you ask them any questions, you must take what they have said as true."

So, if you call a witness you are stuck with the witness's testimony. There was also a policy-based rationale for this rule; it wasn't simply a historical accident. The policy was that potential witnesses could be blackmailed into giving false testimony. If they were subject to cross-examination by the party calling them.

The justification, however, really makes no sense. It assumes first of all a weak-willed

witness, unethical counsel, and the availability of very embarrassing blackmail information. And if you have that combination of factors, then the witness could presumably be blackmailed before taking the stand. Further, this basis for the voucher rule overlooked the problem of turncoat witness.

Modern Abandonment of the Voucher Rule

The Turncoat Witness

The voucher principle prevented counsel from cross-examining a witness who has turned on the party who called her to testify. This situation arose often enough for common law judges eventually developed exceptions to the voucher principle.

The first exception could be triggered by counsel who might anticipate being stung by the voucher principle if counsel had reason to believe a witness might be hostile. If so, he could ask the judge to call the witness as a court witness. Once designated as a court witness, counsel could then cross-examine to one's heart's content.

In addition, the voucher rule did not prevent counsel from contradicting her own witness. You could introduce substantive evidence to contradict the witness' testimony (i.e., not to attack the witness credibility, but to prove your elements and own version of the case).

Next the voucher rule did not prevent counsel from drawing the teeth or drawing the sting when appropriate. Drawing the teeth or the sting refers to the situation which your witness has sordid past—someone with real credibility problem—prior convictions are a typical example.

The Trial of Mercury Morris (p. 254)

Mercury Morris, played halfback for the Miami Dolphins back in '72 when the ‘Phins became the only team in NFL history to win 17 games and to complete a perfect season. Mercury, however, had gone from scoring touchdowns to scoring cocaine and from busting tackles to just plain being busted. During his trial, how did the voucher principle become a problem for his lawyer?

Morris's defense attorney had to refrain from calling government informant Fred Donaldson as a witness, because then existing Florida law would have kept Morris from impeaching Donaldson. The defense decided to introduce certain evidence that would force the government to call Donaldson as a witness. Once Donaldson was called the defense could then cross-examine him. The voucher principle, which restricted counsel's ability to impeach its own witness, triggered this particular defense strategy.

Johnson v. Baltimore & O.R. Co. (p. 255) provides the rationale for the abandonment of the voucher rule by codifiers of the Federal Rules of Evidence and most states. Though the voucher rule may have made sense when witnesses were not observers of facts but either physical combatants or compurgators retained in early English history, the rule makes little

sense in a world where "we take our witnesses where we find them." The most common modern situations of impeaching a witness a party has called are the examination of an adverse witness and the turncoat witness called by the government.

Though a party may not call a witness soley to impeach the witness, when the witness gives unfavorable testimony, the party who called the witness will often impeach with a prior inconsistent statement.

3. The Scope of Cross-Examination

The federal courts and most of the states follow the "restrictive rule" on the scope of cross-examination, represented by Federal Rule of Evidence 611(b). This rule restricts cross-examination to the subject matter of direct examination and the credibility of the witness. The appropriate objection to a cross-examination question which exceeds the scope under Rule 611(b) is "beyond the scope of direct."

Though formally rejecting the "English" or "wide open" scope of cross-examination which permits the cross-examiner to inquire about not only the subject addressed on direct but any relevant matter in the case, courts in restrictive jurisdictions have the discretion to expand the scope of the cross-examination.

4. Impeachment Modes

a. Pursuing the Competency Factors

The Younger Article (p. 262) explains the first batch of impeachment modes: the factors of modern competence which are required by Federal Rule 601. It is important to point out to students that if a competency challenge of the witness on any of those factors is overruled after voir dire, these same factors may be used for impeachment to diminish the witness' credibility.

United States v. Sampol (p. 267) illustrates two impeachment matters. First, the court correctly applies the ban found in Rule 610 on impeachment by religious beliefs or the lack thereof. Second, the court rules that impeachment by drug addiction generally is not an acceptable mode of impeachment, though the cross-examiner may impeach with evidence that the witness was on drugs at the time he observed facts to which he has testified or is under the influence of drugs at the time his testimony is given. The former would impact the witness' ability to perceive and the latter would diminish his credibility regarding recollection or his ability to relate or communicate to the jury.

Note too the court's reminder that Rule 403 applies to impeachment evidence and that the marginal relevance of general inquiry into drug addiction would be outweighed by the prejudicial baggage of Rule 403.

Evidentiary Foundation: The Trial of John Scopes (p. 269)

The cross-examination of the child witness here demonstrates a "lack of memory" impeachment where a better memory would put seemingly harmful evidence in context.

Evidentiary Foundation: The Trial of Ethel and Julius Rosenberg (p. 274)

This excerpt demonstrates the rather unusual impeachment by showing the witness does not take the oath or affirmation seriously, the last of the competency factors.

b. Bias, Prejudice, Interest and Corruption.

The second batch of impeachment modes includes: bias, prejudice, interest and corruption. Though bias and prejudice are often used interchangeably (see Abel opinion p. 276); bias refers to a witness having a favorable disposition toward a party while prejudice refers to a negative disposition. The Evidentiary Foundation: The Trial of Bernhard Goetz (p. 276) provides a classic example of impeachment by interest, i.e. possessing a stake in the outcome of the litigation. Here, the victim Ramseur has a pecuniary interest in a civil tort action which might cause him to embellish Goetz's violent behavior in the criminal case.

United States v. Abel (p. 276) makes a number of important points: (1) Though bias, prejudice, interest and corruption are not specifically listed in the Federal Rule as permissible impeachment modes, the Court recognizes them as traditional common law impeachment which implicitly find their way into federal courts through the general language of Rule 611; (2) Rule 403 applies to impeachment as well as substantive evidence and will be balanced against the probative value of impeachment evidence on the issue of credibility; and (3) The fact that evidence admissible on one impeachment mode (bias) may not be inadmissible for another (prior act of dishonesty) does not make the evidence inadmissible.

Abel presents a step-by-step analysis on whether the witnesses sharing of a membership in a deadly prison gang with the defendant amounts to bias. The Court agrees that a shared membership in an organization permits an inference both that the witness subscribes to the organization's tenets and that he may be biased in favor of his fellow member. The Court rejects the argument that Rule 403 should have been invoked to preclude the description of the prison gang as a murderous, perjurious, and self-protecting organization because the Court found such characteristics probative on the depth of the witness' bias. By precluding the admission of the name of the gang (the Aryan Brotherhood) and its practice of murdering unfaithful members, the trial court mitigated the prejudice sufficiently to admit the witness' membership in the gang on bias. Note that the Court finds that evidence of membership in an organization committed to lying does not amount to a "prior act of dishonesty" within the meaning of Rule 608(b).

Evidentiary Foundation: The Trial Bruno Richard Hauptmann (p. 282)

This excerpt illustrates a not very effective attempt to impeach by corruption, i.e. that the state purchased the witness' testimony by giving her an all-expense paid trip to New Jersey.

Extrinsic Evidence and Collateral Matters

This would be a good time to point out that if the witness denies the impeaching information, the cross-examiner is permitted to prove the impeachment through the offer of extrinsic evidence, i.e. another witness or a document, where the impeachment relates to a "not-collateral" matter. To put it another way, the law permits the use of extrinsic evidence to prove impeachment with respect to central or important matters in the lawsuit. Which of the impeachment modes are "not collateral?"

- Bias, prejudice, interest, corruption—extrinsic evidence allowed
- Prior Conviction impeachment—extrinsic evidence allowed, but only by certificate of conviction
- The Competence factors—extrinsic evidence allowed
- Prior Acts of Dishonesty—extrinsic evidence never allowed
- Prior Inconsistent Statements—extrinsic evidence allowed on non-collateral matters

Prior Conviction Impeachment

Prior conviction impeachment is often devastating, particularly when the conviction offered is for the same or a similar crime to that charged in a criminal indictment or the civil law violation alleged in a civil case. The rationale of criminal conviction impeachment is that the witness who has violated society's norms by violating the criminal law is likely to violate the norm of telling the truth under oath. Though almost unanimous psychological opinion rejects the relationship between earlier criminal activity and truthfulness, nearly all courts permit some sort of criminal conviction impeachment in civil and criminal cases alike. Some states confine conviction impeachment to felony convictions or to dishonesty crime convictions while others permit impeachment by any crime and a few preclude conviction impeachment of criminal defendants.

Federal Rule 609 treads a middle ground by admitting all dishonesty crime convictions (less than 10 years old) and admitting violent felony convictions after performing a caseby-case balancing test. Because Rule 609 is so poorly drafted, it is helpful to point out to students a step-by-step approach to determining the admissibility of a criminal conviction in a federal court.

Step 1. Is the prior conviction for a crime of dishonesty or false statement? If yes the court "shall" admit it for impeachment.

Step 2. If the crime is a crime of violence, but a misdemeanor (it carries less than a year in jail), it is inadmissible.

Step 3. If the crime is a violent felony, it is admitted against any witness other than the criminal defendant ("the accused") only if its probative value on credibility is not substantially outweighed by the Rule 403 factors. If a violent felony is offered to impeach the criminal defendant, the conviction is inadmissible unless the defendant.

Step 4. All of the earlier steps in the Rule 609(a) analysis are trumped by the Rule 609(b) 10-year rule. If any otherwise admissible conviction is more than 10 years old, it is inadmissible unless its probative value on credibility outweighs its prejudice.

McGowan Article (p. 284)

As the McGowan article makes clear, the primary area of debate and concern is the use of criminal conviction impeachment to attack the credibility of the criminal defendant witness. The problem is, of course, the inability of the jury to understand that the prior conviction may only be used to assess the witness' credibility as opposed to considering the conviction on the issue of the defendant's propensity to commit crime. The Luck rule provided the trial judge discretion to exclude prior conviction impeachment of the defendant unless the government showed that the probative value for impeachment outweighed the prejudice to the defendant.

United States v. Mahone (p. 290) provides some content for the Rule 609(a) balancing test to be applied to non-dishonesty felonies offered to impeach the criminal defendant including:

1. the impeachment value of the crime,
2. the date of the prior felony and the witness-defendant's subsequent criminal history,
3. the similarity between the crime charged and the past crime,
4. the importance of the defendant's testimony, and
5. the centrality of the credibility issue in the litigation.

A student discussion should be encouraged on the implications of each of the above criteria. (1) As to "impeachment value," it should be pointed out that the balancing test does include impeachment by crimes of dishonesty or false statement (which have apparent impeachment value) which are automatically admitted. Thus, the "impeachment value" consideration relates only to violent felonies, which, apart from "he's violated society's norms" have no particular bearing on credibility. (2) Usually, the fact that the defendant has had a continuous criminal history in the intervening period between the past and present crime indicates that the past crime is relevant because "the defendant has not changed" so that the past crime is relevant on his character for truthfulness. (3) The similarity of the past and present crimes actually should cut against admissibility on the theory that the tendency to use the past similar crime for the forbidden propensity purpose as opposed merely for credibility is overwhelming. (Note that a Rule 404(b) analysis is inapposite. When offered for substantive proof under Rule 404(b), the similarity of the past and charged crime is often a prerequisite to admissibility.) (4) These consideration often go together. When the defendant is called to testify, it is usually to provide an alibi or claim of self-defense or justification. In most cases, this would represent central testimony where credibility is crucial.

Luce v. United States (p. 294)

Luce says that if a defendant testifies, the issue of the admissibility of the prior conviction obviously is preserved because there will be a full record from which the

appellate court can evaluate the prejudicial impact of the prior conviction. But according to Luce, what happens if the defendant chooses not to testify in light of the in limine ruling? Waiver of the issue for appeal!

Rationale: (1) There is not an adequate record to evaluate this issue; we don't even know if the prosecutor would have introduced that prior conviction- it is wholly speculative and (2) the absence of a complete record precludes a harmless error analysis (if the appellate court finds that the trial judge erroneously ruled the prior conviction admissible to impeach, its impact can't be evaluated so there's no way to conclude that this might have been harmless error).

Luce was an odd decision from a variety of standpoints. The trial judge ruled *in limine* that the prior conviction would be excluded if Luce limited his testimony to why he attempted to run away from the arresting police officer: "if that is all you say, it is not coming in," said the trial judge. "But if you take the stand and deny any prior involvement with drugs, then you may be impeached with the prior conviction."

Suppose, however, that Luce takes the stand, doesn't deny any prior involvement with drugs, but denies involvement with drugs on this particular occasion? The trial court's ruling didn't address that contingency and Luce decided not to testify. Despite this problematic aspect of the trial court's ruling, every Supreme Court judge concluded that Luce's failure to testify waived the objection, even Brennan and Marshall argued only that there might be other circumstances in which failure to testify would not amount to waiver.

Brennan and Marshall argued that, as Rule 609 determinations are uniquely fact based, in limine motions that don't require a well-developed factual record should not produce automatic waivers when a defendant fails to testify.

As a result, some courts have limited Luce to cases in which the defendant must take the stand in order for the factual record to be clear for the Court of Appeals. For example, they have not applied Luce to Rule 609(a)(2) determinations which don't involve a balancing of probative value versus prejudicial effect. Rule 609(a)(2) determinations only concern the question of whether the crime itself was one of dishonesty or false statement, a purely legal question.

A few state courts have declined to follow the Luce decision. Example: State v. McClure on page 296. In note 1 after Luce, the Oregon Supreme Court said that a defendant's proffer is sufficient for the court of appeals to review the trial court's balancing determination. In other words, the defendant can make a detailed proffer, outside the jury's presence, as to what his testimony would have been had he taken the stand. Such a proffer is enough to provide the appellate court with an adequate factual record to assess the trial court's ruling admitting the prior conviction.

McClure emphasized that the trial court's determination has a profound effect on the way that a case will be tried, the type of jury you will select, etc. The Court said that, given the importance of this in limine ruling, it should not be necessary for a defendant to take the stand to preserve the issue for appeal.

McClure, however, did require the defendant to take the stand if he received a favorable ruling from the trial judge. The problem with this requirement, however, is that it's **essentially unenforceable.** The defendant continues to have a privilege against selfincrimination and there could be a variety of reasons why a defendant might file a motion in limine in good faith, intending to take the stand, and then depending upon the development of the facts at trial counsel might advise the defendant, again in good faith, that testifying would not be a good idea.

Incidentally how is it that the Oregon Supreme Court can ignore Luce? Luce is a U.S. Supreme Court decision and now the Oregon Supreme Court declines to follow Luce.

The U.S. Supreme Court reigns supreme as to all questions of federal law, federal statutory law, or the constitution. But state supreme courts retain priority in interpreting state sta utes and state constitutional provisions. Although Oregon had adopted the federal rules of evidence, in Oregon, they are considered to be the Oregon rules of evidence. And a state supreme court may give its own state's rules whatever interpretation it thinks best. Under these circumstances, the Luce decision interpreting federal law is merely persuasive authority, it has no binding effect. So, always keep that in mind. If you are operating under state law, state supreme court decisions are supreme they trump the U.S. Supreme Court decision.

United States v. Smith (p. 296)

The Smith case provides a clear exposition of the workings of Rule 609(a) in criminal cases and the manner in which codification altered practice under the Luce rule. Smith also introduces the discussion of defining "crimes of dishonesty or false statement" within the meaning of Rule 609, a discussion which may be answered by the 2006 Amendment to the Rule. The notes following Smith provide fertile ground for discussion. Students should be reminded that state rules on prior conviction impeachment can vary widely from the Rule 609 approach. For example, some states permit impeachment by any conviction, some limit impeachment to prior felonies, and others limit impeachment to prior dishonesty convictions.

United States v. Tse (p. 304) provides an excellent and detailed analysis demonstrating Rule 609's distinction between the impeachment of the criminal defendant and the impeachment of all other witnesses, including government witnesses in criminal cases. As the court point out, the impeachment of the defendant is subjected to a more stringent test of admissibility (the government must show that the probative value of the conviction outweighs its prejudicial effect) because of the ease of the jury's inference that the defendant's criminal career demonstrates his propensity toward crime. The court's summary of the workings of Rule 609 in criminal cases at page 307 is an excellent précis of the Rule.

Evidentiary Foundation: The Trial of Mumia Abu-Jamal (p. 310)

The colloquy in this excerpt involves a discussion whether the crimes of arson and criminal mischief are "crimen falsi" crimes. This is significant here because

Pennsylvania, where the crime and trial occurred, permits impeachment of any witness, only by crimen falsi conviction. Note that many federal courts used to consider drug convictions to be dishonesty convictions (on the dubious grounds that some drugs are smuggled into the United States by stealth.) Students should appreciate that under Rule 609, when the court determines that a drug conviction is a crime of dishonesty or false statement, such conviction is per se admissible against a criminal defendant even in a drug prosecution. Note that if the court does not treat the drug conviction as a dishonest criminal conviction, it would never be admitted under the Rule 609(a) balancing test for criminal defendant impeachment because the probative value of a drug conviction would almost never outweigh the prejudicial impact of the jury hearing that the drug defendant has prior drug convictions. The 2006 Amendment to Rule 609 should end the practice of routinely admitting drug law convictions as dishonesty crime impeachment.

Evidentiary Foundation: The Trial of Bruno Richard Hauptmann (p.314)

The need for a good faith basis is illustrated - at least by implication - in the excerpt from the trial of Bruno Richard Hauptmann. Note that defense counsel must have tried to draw the sting because the witness had obviously been asked about *prior* convictions on direct examination. The problem, however, was that defense counsel apparently had not adequately interviewed his client who did not tell him about all of his prior convictions. Consequently, they're now being drawn out on cross-examination with the defendant thereby looking even worse after his partial disclosure on direct examination.

Note also that the witness was unable to remember and denied some of the prior convictions. His evasions raise the question of whether this is collateral or non-collateral. Rule 609 impeachment goes to the heart of credibility, routinely considered non- collateral. A prosecutor in the face of a witness's denial may introduce evidence of a prior conviction, usually in the form of a public record, a certified copy of the conviction.

Looking at this particular foundation, note how the very manner in which a question is asked can suggest that there was a prior conviction. This is why the law requires a good faith basis for asking the question; otherwise, counsel could easily mislead the jury on this point.

In Hauptmann, however, the prosecutor did not limit himself to asking about prior convictions. He also asked about various incidents in Hauptmann's life that did not produce a conviction, and that gives rise to the third mode of impeachment in the second group of four: bad act impeachment, which is distinguishable from prior conviction impeachment in that no conviction is required.

3. Prior Bad Acts

Rule 608(b) presents a narrow exception to the general rule that specific instances of conduct are not admissible to impeach a witness. The rule allows impeachment on cross-examination by inquiry into prior acts that relate directly to honesty or truth-telling ability. Whether or not a prior act relates to truthfulness or honesty is determined by examining the act

for an inference that the witness who commits such act fails to be honest or truthful. Note that the act must connote dishonesty irrespective of the lawsuit involved. It is for that reason that the facts that underlie any criminal conviction admissible pursuant to Rule 609(a)(2) (crimes involving dishonesty or false statement) will typically be admissible pursuant to Rule 608(b).

Extrinsic evidence of instances of conduct that show false statement or dishonesty is not allowed. Counsel is bound by the answers of the witness to be impeached, as given on cross-examination. And that is so even if the witness denies the impeaching conduct. The strict exclusion of extrinsic evidence precludes the conduct of a trial within a trial concerning whether the instance of conduct occurred, which inquiry would deflect the focus of the jury from the substantive issues involved in the trial.

When conducting cross-examination on instances of conduct relating to truthfulness and veracity, counsel should carefully inquire about the time, place, and circumstances of such conduct to obtain maximum impact even if the witness denies the conduct.

Cross-examining counsel must, of course, have a good-faith basis for believing that the witness actually committed the act or conduct which shows lack of truthfulness or veracity. The proponent of the witness who may be so impeached should move to exclude such cross-examination on Rule 403 grounds in a pretrial in limine motion, because evidence relevant to that inquiry carries the potential for unfair prejudice such as the potential use of the conduct for purposes other than the credibility of the witness. For example, in a case in which fraudulent conduct is alleged as part of a claim against a defendant, previous fraudulent conduct otherwise admissible pursuant to Rule 608(b) may be excluded because of the potential for its consideration by the jury for propensity purposes.

Rehabilitation

A witness who has been impeached by instances of conduct relating to truthfulness and veracity can be rehabilitated on redirect examination by showing the context and circumstances in which the prior conduct occurred, to lessen its impact. In most circumstances, however, it is wise to avoid any further testimony regarding such conduct and to refocus the jury on the substantive issues of the trial. In addition, because impeachment by use of specific instances or conduct relating to honesty is an attack on the character of the witness for honesty, that witness may be rehabilitated by calling a character witness to testify by way of reputation or opinion evidence, that the impeached witness has 2ood character for honesty. (See Rule 608(a)(2))

United States v. Provoo (p. 318)

The leading common law case limiting bad act impeachment was the Provoo (Pronounced "Provo") decision in your textbook. The defendant, a sergeant in the U.S. Army, was captured by the Japanese after the surrender of Corregidor in the Philippines. After the war, he was charged with 12 counts of treason committed between May 6, 1942 and August 14, 1945.

The indictment alleged that Provoo had offered his services to the Japanese, that he had informed on fellow POWs, that he had made a number of radio broadcasts for the Japanese, etc. His defense: duress that the Japanese had forced him to do it.

The trial was a high profile affair. The first witness against him was Jonathan Wainwright. When the Japanese invaded the Philippine Islands in December of 1941, Douglas McArthur was the commanding officer; Wainwright was his executive officer. Eventually, the Americans retreated to Corregidor from which McArthur eventually escaped, but not before making his famous promise: "I shall return." Wainwright remained on Corregidor, leading the American troops until their supplies ran out. In May of 1942, the American contingent surrendered and the infamous Bataan death march ensued.

Upon arriving at their POW camp, Provoo went to the Japanese and said, "I am a sergeant in the U.S. Army. I am qualified to run a prison camp if that is what you want me to do." They did, and so he did. James Clavel's novel, "King Rat," published in 1974, incidentally, is based upon the events that eventually led to the Provoo trial.

At his treason trial, Provoo testified in his own defense that he had acted under duress during the entire period. Cross-examination went along the following lines: "Mr. Provoo, isn't it a fact that you were once confined to a hospital because of homosexual aberrations?" Provoo was convicted.

On appeal, the Second Circuit held:

First, this line of inquiry was **completely irrelevant to credibility.** The court stated “no authority has been cited to suggest that homosexuality indicates a propensity to disregard the obligations of an oath.” The sole purpose and effect of this examination was to humiliate the defendant and increase the probability that he would be convicted, not for the crime charged, but for his general unsavory character. Relying upon the majority rule then prevalent in federal court, the appellate court rejected bad act impeachment and reversed his conviction.

Provoo, incidentally, was never convicted, as procedural difficulties prevented a retrial. Jonathan Wainwright, however, won the Congressional medal of honor.

Note that most states have rejected Prior Bad Act Impeachment on the theory that the impeachment is easily concocted and not generally probative enough of dishonesty to merit the risks of fabrication and the waste of time of collateral proof.

Evidentiary Foundation: The O.J. Simpson Civil Trial (p. 322)

This excerpt is an example of a totally improper attempted impeachment involving prior acts which do not indicate character for dishonesty. The impeachment in People v. Sorge (p. 323 note 2) is equally inappropriate if offered in a federal court in that it is offered purely for propensity to commit a similar crime rather than dishonesty.

Evidentiary Foundation: The Trial of Jeffrey Skilling (p. 326) is a classic Rule 608(b) impeachment by prior acts of dishonesty in lying about employment history.

Evidentiary Foundation: The Trial of Jesse R. Davis (p. 329)

Jesse Davis, a nurse at Bellevue Hospital in New York City, was indicted for manslaughter for causing a patient's death. The charges were based on an account published in a New York City paper by a reporter named Thomas Minnock. Minnock claimed to have witnessed the homicide while at the hospital pretending to be a patient.

At trial, Minnock was subjected to bad act impeachment in a variety of ways.

Not all of the acts used to impeach Minnock really concerned veracity. For example, counsel asked about his involvement, in his college days, with a 16-year-old girl. Now, the witness is obviously lying when he says that he was married to her, but at the same time, what did this incident have to do with veracity? This impeachment would be excluded under Rule 608(b), which requires a connection to veracity.

The witness was also asked about his arrest for kidnapping this girl. Ordinarily, a prior arrest is not admissible under Rule 608(b)(1). You will see that, on occasion, an arrest may be brought out, not when you are impeaching a witness directly, but rather when you are impeaching a character witness who has testified about the truthfulness of a principal witness of somebody else. [See FRE 608(b)(2) and 405(a) the Michelson case]

In the Davis case, counsel also asked a series of questions about a number of apparently intentional misstatements that the journalist made both in an article that he had written about the Bellevue incident and in other articles as well. The court, however, only allowed cross-examination concerning alleged misstatements in the article about the Bellevue incident not any others.

This was an unduly narrow ruling. Bad act impeachment allows you to use prior bad acts that relate to veracity. Obviously, the article misstating facts about the Bellevue incident goes to veracity. But the witness' intentional misstatements in other articles also bore on his truthfulness and should have been allowed. Although note once again that, if the witness had denied having made any prior intentional misstatements; one must take the witness's answer. You may not prove that the statement in the article in fact was untrue. This is collateral, and extrinsic evidence is not allowed.

4) Prior Inconsistent Statements

The theory of prior inconsistent statement impeachment is that the witness's present testimony is **either intentionally false or at least inaccurate by implication** if he said something contradictory in the past, he is either lying now or he was lying then. Or, at best, he is honestly mistaken now.

The following issues tend to arise with respect to prior inconsistent statement

impeachment. First, defining the inconsistency - what constitutes a prior inconsistent statement. Obviously, if the witness takes the stand today and testifies that the light was green, and you have a prior statement by him that the light was red, we have an inconsistency on its face. But what if the inconsistency is inferred?

There are two views for dealing with this issue. The first and predominant view was advocated by Professor Wigmore who wrote that, "The only proper inquiry can be whether there is within the broad statement some **implied assertion of fact inconsistent with the in-court testimony;" if so, it is inconsistent, and ought to be received.**

In other words, Wigmore said that the inconsistency may be inferred. A small **minority of** courts, **however, rejected this view** and required the statements to be facially **inconsistent.**

Next, suppose a criminal defendant testifies in great detail on direct examination. At the time of his first meeting with the police, however, he said nothing in response to police questions. May the witness' prior silence be used to impeach him under the theory that the prior silence is inconsistent with this trial testimony?

The answer depends on the circumstances surrounding the initial silence. Specifically, were the circumstances such that a reasonable person ordinarily would have been expected to make a statement; if not, then prior silence is not necessarily inconsistent with detailed trial testimony. And of course there is a constitutional dimension to this problem. If the witness has been Mirandized, there is a due process reliance interest to be protected. The officer told the witness that any statement would be used against him, so the witness remained silent. Due Process protects against such impeachment and so does common sense. We'll see shortly that on occasion pre-Miranda silence, or silence itself in non-criminal cases may be admissible not just for impeachment's sake, but substantively as non-hearsay. See infra Rule 801(D)(2)(b).

Once admitted, a prior inconsistent statement ordinarily comes in only to attack credibility; it is not admissible for the truth of the matter being asserted. Students may say, "Well, what difference does that make?" But it makes a great deal of difference because, if a witness testifies that "the light was green" and he previously said "the light was red," that prior statement, once admitted, comes in only for credibility's sake. The trial judge will instruct the jury that it may not use the statement to find that the light was actually red.

And perhaps more importantly, the court will not consider that prior statement that the light was red in evaluating whether the proponent has presented enough evidence to withstand a directed verdict or to sustain a favorable jury verdict. If you must prove that the light was red and all you have is a witness' prior inconsistent statement, which the court admitted only to impeach, that prior inconsistent statement will not count substantively, it will not help you establish the elements of your case. At that point, the rule against hearsay has considerable bite.

The Rule in Queen Caroline's Case

The potential application and effect of this impeachment mode is demonstrated by the McCormick excerpt on page 335. McCormick points out, however, that counsel's ability to use this technique most effectively was hampered in many jurisdictions by the so-called rule in Queen Caroline's case.

There are two aspects to the rule. The first which we will look to shortly, is recognized widely as the rule itself. The second is not always recognized as part of the rule in Queen Caroline's case, but it is a corollary to the rule.

First, the rule in Queen Caroline's case was that a party that wants to impeach a witness with a prior inconsistent statement must **first make the contents of the prior statement known to the witness before asking questions about it.**

So, the witness testifies "the light was green." Counsel, holds a letter the witness wrote to his mother stating that "the light was red." Under the rule in Queen Caroline's case, counsel must first show the witness the letter before asking about the prior inconsistent statement. So, the witness testifies that the "light was green." Counsel says, "Mr. Witness, I now show you what has been marked as plaintiffs #1 for identification. Can you tell me what this is?" "Yes. This is a letter that I wrote to my mother." Witness reads the letter, and then counsel asks him: "Did you ever tell anyone that the light was red?" The witness will now say, "Yes, of course. I told my mother that the light was red."

So, the rule in Queen Caroline's case essentially requires counsel to show his hand before asking the witness about a prior statement by **bringing the statement to the witness' attention.** The witness, having read the statement, **will not likely deny having made it, but will immediately acknowledge its existence.**

The rule in Queen Caroline's case prevented cross-examining counsel from setting up a scenario in which he might first elicit a witness' denial about a prior inconsistent statement — "Did you ever say the light was red?" "Absolutely not." "Are you sure?" "Yes, I'm certain." "You never made a statement to that effect?" "Never." Counsel ties the witness down, absolutely, committing the witness to that position, thereby making it impossible for the witness later plausibly to explain his prior inconsistent statement.

If the statement was oral - "Mr. Witness, do you remember going down to your local tavern and speaking to the bartender about the color of the light? And do you remember telling the bartender, Joe, that the light was red?" "Oh, yeah, I can recall that now," says the witness, "let me explain." So, the rule requires you to bring the time, place and content of the statement to the witness' attention.

The underlying rationale: a perceived need to protect the witness from being surprised. Thus, let's give the witness a chance to become familiar with and explain the prior statement.

Evidentiary Foundation: The Trial of Alger Hiss (p.338)

Although the rule was obviously an obstacle to effective cross-examination, the Evidentiary Foundation excerpt from the trial of Alger Hiss demonstrates that, in the

hands of capable counsel, this impeachment mode can still be quite effective. In this excerpt, cross-examining counsel showed the witness every prior inconsistent statement that he had made under oath and forced him to acknowledge, that given the contradictions, one of the statements under oath — either his present or his former testimony was untrue: you are either lying now or you were lying then.

Evidentiary Foundation: The Trial of Harrison A. Williams, Jr. (pp. 342-344)

The excerpt from the Abscam trial similarly shows the effective use of this impeachment mode. Here, the government's chief witness had previously testified that a con man would lie whenever necessary. On cross, defense counsel showed the witness his prior statement, but the impeachment was still effective — mainly because both statements were made under oath.

So, if you are a good lawyer and you have good material made under oath, a prior inconsistent statement really can't be explained away that easily. In other words, **when combined with oath impeachment, the rule in Queen Caroline's case will not necessarily undermine this mode of impeachment.** But, under other circumstances, it can certainly make things tougher.

Okay, so the first part of the rule was that a prior inconsistent statement had to be brought to the witness' attention before asking the witness about the statement. The second part of the rule often is not recognized as such, but really reflects an expansion of the original rule in Queen Caroline's case.

Part II: Before extrinsic evidence of a prior inconsistent statement can be offered into evidence, counsel must both ask the witness whether he made the statement and, if so, counsel must give the witness a chance to explain it. In other words, **before introducing proof** of a prior inconsistent statement, you must give the witness a chance to explain the statement.

Summary: the witness has testified that the light was green. The first part of Queen Caroline's case essentially holds that you may **not ask** the witness about a prior inconsistent statement, to the effect that the light was red, without first showing it to him or telling him about it.

The second part, the expansion, provides that after the witness has testified the light is green, **you may not introduce evidence** of the witness's prior statement that the light was red until you have first asked the witness about the prior inconsistent statement. In other words, the witness having testified that the light was green, you can't simply excuse the witness, let him get off the stand, and then immediately introduce his prior inconsistent statement to the effect that the light was red. He must first get a chance to explain the prior inconsistent statement.

So, the first part of the rule requires that you show the witness the statement before asking him about it, and the second part provides that, if you are going to introduce the prior inconsistent statement, you must first ask the witness about the statement give him a chance to explain it. You may not simply introduce the prior

inconsistent statement into evidence without first giving the witness a chance to address it.

This allows the cross-examiner to set-up the witness by eliciting a series of denials; getting the witness essentially to paint himself into a corner by absolutely denying the possibility of a prior inconsistent statement. In other words, one asks the witness, "Have you ever made a statement to the contrary?" "No." "Have you ever said that the light was red? Are you certain that you never made such a statement?" "Yes, I am certain. I never made such a statement." The witness embraces his denial.

At that point, when one springs the prior inconsistent statement upon him, it is too late for the witness to explain it away.

As for the second part of Queen Caroline's case, requiring counsel to ask the witness about any inconsistency before introducing extrinsic proof, it has been modified. It hasn't been abrogated entirely, but Rule 613(b) modifies it. Rule 613(b) provides that a prior inconsistent statement is not admissible unless the witness is given a chance to explain or deny the statement. This seems to codify the second_ aspect of the rule in Queen Caroline's case in most respects. However, Rule 613(b) provides for some flexibility as it does not specify ***when*** the witness must be given that opportunity presumably, recalling the witness at a later time would be enough).

So, after the witness has testified the light was green, Rule 613(b) allows counsel to introduce evidence of a prior inconsistent statement so long as the witness is given an opportunity at some time to explain that prior inconsistent statement; which means for example that the witness could get off the stand, you could then introduce your prior inconsistent statement, and then opposing counsel could recall the witness to explain the prior inconsistent statement.

The impact of the Rule 613(b) modification appears in the text in the context of the Abscam trial (p. 348). During the course of the trial of Senator Harrison Williams, defense counsel asked an FBI agent whether government witness, Mel Weinberg, had previously said he had erased certain portions of some tape-recordings, the prosecutor objected because defense counsel never asked Weinberg whether he had made a statement acknowledging having erased portions of the tape. (Weinberg was only asked whether he had erased any of the tapes, to which he said, "No." His prior statement to the FBI, however, contradicted his trial testimony denying any such erasure).

Under the second prong of Queen Caroline's case, proof of that prior inconsistent statement would not have been allowed without first asking Weinberg whether he made a prior inconsistent statement. Rule 613(b), however, changed that procedure so it is no longer necessary for counsel to ask a witness about a prior inconsistent statement before offering that statement into evidence, as long as the witness, here Weinberg, **at some point** is given opportunity to explain it.

Notice how the trial judge here initially did not know how to deal with this problem. But he eventually recognized that Rule 613(b) addresses it. This trial occurred several years after the rules of evidence had gone into effect, and defense counsel was still unfamiliar with exactly how the FRE changed common law doctrine. He initially has a vague recollection, correct as it turns out, that the FRE liberalized the admissibility of extrinsic proof, but he isn't quite clear on it.

Summary: Wrapping up the second group of four impeachment modes: bias impeachment, prior conviction impeachment, bad act impeachment, and prior inconsistent statement impeachment. Two basic considerations pervade this category. The first is that there must be a good faith basis for any question put to the witness involving these impeachment modes. And the second is whether extrinsic evidence will be allowed in the face of a witness' denial may you introduce extrinsic evidence to refine a witness's denial?

As to the second issue, the question of extrinsic proof, bias impeachment is always deemed non-collateral because bias goes to the heart of credibility, so extrinsic proof will be permitted. Same for prior conviction impeachment, non-collateral, and ordinarily easily established through introduction of the prior conviction record.

Bad act impeachment, in contrast is always deemed collateral extrinsic proof is never allowed. Bad act impeachment is simply viewed as not terribly probative, potentially prejudicial and very time consuming to prove.

Prior inconsistent statement impeachment: the rules don't specifically address this however, the courts have considered the nature of the inconsistency at issue: Is it really an inconsistency that goes to the crux of credibility? If so, the matter will be deemed non-collateral, especially when you have a document in court that could easily be introduced into evidence for impeachment's sake. On the other hand, if the prior inconsistent statement is an oral statement that is sort of tangential, the court will view it as collateral.

5) The Character Witness for Veracity

Character Impeachment

The final category, consisting of just one impeachment mode, is unique in that it does not involve asking the principal witness, the witness being impeached, any questions; rather it involves calling a character witness to attack the principal witness' credibility. Counsel attacks that principal witness' character for truthfulness by calling a character witness.

The rationale for character impeachment is easy to appreciate: Some people generally tell the truth, others don't. Wouldn't it help the jury to know what type of person the principal witness is? Isn't that the way we make judgments in everyday life — in our business dealings, for example? We want to know what type of person we are dealing with.

There are a number of ways in which character for truthfulness can be established. One is

to introduce prior instances of the principal witness' misconduct. Prior bad acts are certainly probative of character prior instances of false statement or perjury, for example.

A second way might be to call a character witness to give his personal opinion about the principal witness' character for truthfulness. "Mr. Character Witness, what is your opinion of principal witness character for truthfulness?"

A third option would be to call a character witness to testify to the principal witness' reputation for truthfulness.

Of these three options, the common law opted for the third. It allowed an attack on the principal witness' character for truthfulness only by calling a character witness to testify about the principal witness's **poor** reputation for truthfulness.

In effect, a person's reputation for truthfulness is simply the sum total of community gossip about his integrity, i.e., what does the community-at-large think of the principal witness' character for truthfulness?

Before analyzing character evidence further, we need to draw some basic distinctions and foreshadow a bit to that portion of the course that deals with character evidence in a somewhat different context. Confusion often occurs because courts and counsel tend to use the term "character evidence" haphazardly and inconsistently.

The term "character evidence" has two completely different applications depending upon its trial context. Students' understanding of character evidence will largely depend on appreciating the context within which you are working.

To begin drawing this distinction, remember that evidence can have a substantive and/or a credibility application, we can be in a substantive context or a credibility context. By substantive, we mean that part of the case that goes to establishing the elements of your claim or defense, i.e., proving the substance of your case.

In contrast, recall that we have spoken about cross-examination as being a trial within a trial, which is concerned with credibility. The jury evaluates each witness' credibility, and, after considering everyone's credibility, arrives at a judgment about the substantive elements of the case.

At this point in the course, we are in a credibility context, as cross examination and impeachment address the believability of each witness. This, in turn, means that character evidence is pertinent insofar as it goes to establishing **a witness'** truthfulness at trial, governed by FRE 608.

Character evidence substantively concerns parties rather than witnesses i.e., whether that party has a tendency to act in a certain way that might be probative of how he/she probably acted when the underlying event at issue occurred. (i.e., someone with a violent disposition is more likely to have acted violently on the occasion at issue.)

For example, substantive character evidence involves the following circumstantial links: (1) The prosecution establishes that D has a propensity for violence; (2) from which the jury can infer the defendant's violent character, (3) that D has a tendency to act in conformity with that violent character, and (4) that the defendant probably acted in conformity with that violent character.

This has nothing to do with his integrity or credibility governed by FRE 404 and 405.

The law places severe limits on the prosecution's right to prove character evidence substantively. *See* FRE 404(a). By comparison, credibility character evidence may be offered against any testifying witness.

(Substantive character evidence is addressed in Article IV specifically Rules 404 and 405. Recall our discussion of legal relevancy earlier in the semester addressed in Rule 403. Probative value is balanced against prejudicial effect. The rules that follow Rule 403, specifically Rules 404-415, involve specialized applications of this principle of legal relevancy. Rule 404 is the first specialized application of the principle of legal and it concerns character evidence in a substantive context. We'll return to substantive character evidence later.)

At this point, we are not in a substantive context; we are still in a credibility context concerned with impeachment, and the pertinent trait for our purposes is character for truthfulness or veracity. In contrast to substantive character evidence, the FRE deal with credibility issues in rules 607-612, and FRE 608(b)(2) specifically deals with character evidence for impeachment. Sometimes there is an overlap between the two contexts i.e. if the D testifies in a criminal case, his character may come into play both substantively and credibility-wise.

Returning to the credibility context and the final impeachment mode dealing with character evidence. The common law rejected the first two ways in which character evidence could be proven: either through specific incidents of misconduct or through opinion testimony, and instead required counsel to prove character by calling a character witness to testify about the principal witness' reputation for truthfulness. Let's first consider why the common law rejected specific acts to prove character.

Rationale: Because the common law established that bad act impeachment is collateral, it would have been inconsistent with the collateral evidence rule to allow counsel to prove character by introducing evidence of the witness' prior bad acts. This would have defeated the purpose of the collateral evidence rule in the context of bad act impeachment. i.e., having established that bad act impeachment is collateral, it would have made no sense to allow cross examining counsel to circumvent that limitation by introducing bad acts ostensibly under some other impeachment mode to establish the principal witness' poor character for truthfulness.

As for opinion testimony, it was rejected on efficiency grounds, it required too much time for each side to present a litany of witnesses to opine about another witness' character for truthfulness. And so instead, the law opted for calling a character witness to testify more or less as a summary witness concerning the principal witness' reputation for veracity, i.e. the character witness summarizes how the community-at-large views the principal witness. In essence, the impeaching character witness testifies "I am familiar with the principal witness' reputation for truthfulness, and it is bad" that is how you impeach the principal witness.

Mason Ladd article (p. 345)

Because the common law courts limited character proof to reputation evidence, the underlying foundation required counsel to establish the character witness' familiarity with the principal witness' reputation. The Ladd article identifies the elements of this foundation. Notice **that the character witness need not know the person about whom he testifies personally. Most of the time the** character witness knows the principal witness personally, but this is not required **because the character witness is just reporting the sum total of community gossip about the principal witness.** Certainly someone can have a community wide reputation without the character witness knowing the principal witness personally.

Let's look at how the BRE modify the common law approach.

5. Character Witnesses (p. 345)

United States v. Mandel (p. 348)

It is no coincidence that this case arose in Maryland, which has a long tradition of paying its governors embarrassingly paltry salaries. Maryland governors have historically resorted to imaginative acts of political corruption to supplement their incomes. Governor Marvin Mandel was certainly not unique. He merely followed in the footsteps of those such as Spiro Agnew who vaulted from the statehouse to become VP in the Nixon administration, just a heartbeat away from the presidency, and who avoided the big house only by negotiating a plea bargain removing him from office.

Maryland had a practice, much like other states, of limiting the number of racing days available each year. As a result, racetracks competed to get as many racing dates as possible because their profits depended on the number of races they offered.

Governor Mandel exploited this system by awarding some of his cronies extra racing days. He was paid for his efforts and ultimately he paid heavily himself because he was prosecuted for mail fraud and racketeering.

During his trial, the court apparently restricted co-defendant Ernest Corey's impeachment of a government witness named O'Toole. Corey wanted to impeach O'Toole by calling a character witness. The proposed testimony raised two issues: first, the defense proffered the character witness to testify, at least in part, based upon his **opinion** of Ms. O'Toole rather than based upon her reputation for integrity; second, his testimony about her

character for truthfulness reflected his familiarity with her at her place of employment rather than in the community-at-large.

So, there were two issues: the first is whether a character witness may testify in terms of his opinion of the principal witness; and secondly, must the character witness be familiar with the principal witness from having known her in her community, or is workplace contact sufficient?

The court addressed these issues in a relatively straightforward fashion. First, the most important point is that Rule 608 eliminates the common law restriction against opinion testimony meaning that today a character witness may be asked to express his opinion about the principal witness' character for truthfulness. The question need not be framed in terms of the character witness's familiarity with the principal witness' reputation for truthfulness.

Congress recognized that most reputation witnesses, in effect, are giving their opinion anyway. And so the common law restriction produced silly nitpicking that created unnecessary legal issues. For the most part, reputation evidence was really opinion evidence in disguise. So Rule 608 modifies common law doctrine and allows the character witness to testify in terms of her opinion of the principal witness. Remarkably in this major prosecution of a sitting governor, the trial judge apparently did not know that FRE 608 modified common law doctrine concerning permissible character witness testimony.

As for the pertinent community forming the basis for the character witness' opinion, the court says that very few people have a citywide, much less a statewide or national reputations, and so it is **entirely appropriate to focus on some pertinent alternative community:** perhaps the immediate neighborhood in which the witness lives or possibly his workplace. In essence, we're being told here that courts should apply Rule 608 in a commonsense fashion.

We have looked at all nine modes of impeachment, which according to Professor Younger cover the universe of potential impeachment modes. These apply to every witness. There are special impeachment methods however that apply to expert witnesses and also for cross-examination of character witnesses. Let's deal with these two types of special witnesses:

First, character witnesses: All nine modes of impeachment are available for a character witness. You can focus on the character witness's faulty perception or recollection, for example, concerning the principal witness. If the character witness has a prior conviction or prior bad act, those can all be brought out. You might even call a character witness to testify that another character witness has a poor reputation for truthfulness.

Rule 608(b)(2) however, suggests another possible way to impeach a character witness. Although it provides that specific instances of the principal witness' conduct may not be proven through extrinsic evidence, codifying the collateral evidence doctrine, prior instances of the principal witness' conduct are fair game for cross-examining his character witness. Rule 608(b)(2): they may, however, in the discretion of the court if probative of truthfulness or

untruthfulness be inquired into on cross-examination of the witness concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

So, Rule 608(b)(2) permits specific instances of the principal witness' conduct to be brought to the attention of any witness testifying about the principal witness' character.

Rationale: testing the character witness's credibility. The character witness, having professed familiarity with the principal witness' reputation or character for truthfulness, is now fair game for cross examination himself through questions that test the basis for his testimony. Therefore, counsel may now cross-examine the character witness by bringing to his attention specific instances of conduct involving the principal witness.

6. Special Procedures for Experts (p. 354); Ruth v. Fenchel (p. 354)

Expert witnesses are, of course, subject to the impeachment modes applied to lay witnesses. See Calderon v. Sharkey (p. 358, n. 3). As Ruth v. Fenchel illustrates, expert witnesses are also subject to a peculiar form of impeachment "by learned treatise." In an opinion written by New Jersey Supreme Court Justice William Brennan before his elevation to the U.S. Supreme Court, New Jersey confirms its support of the traditional rule which permits impeachment of an expert witness by contradiction from a passage in a book or treatise which the expert recognizes as authoritative. Where such impeachment is permitted, many states provide a limiting instruction to the effect that the treatise passage is admissible only for credibility and not for the truth of its contents. Here, the court permitted impeachment of a medical witness who had testified that a whiplash injury manifests itself soon after the accident with a passage from a learned treatise which states that such injury can manifest as late as two years postaccident.

Federal Rule 803(18), however, creates a hearsay exception for the learned treatise permitting it not only to be offered on impeachment but also as affirmative evidence admissible for its truth.

Evidentiary Foundation: The Trial of Herman Marion Sweatt (p. 360)

Here, a University of Chicago anthropologist denies the authoritative nature of the Encyclopedia Brittanica. At common law and many states, this denial blocks the ability of the cross-examiner to use this impeachment. However, under the Federal Rules, the authoritativeness of the treatise can be established on direct or cross by a friendly or unfriendly witness and then read to the jury in any event. Indeed, in federal court, the unfriendly expert's unwillingness to concede the authoritativeness of a clearly wellrecognized work can itself create the basis for an attack on the witness' credibility.

Evidentiary Foundation: The Trial of Dr. Sam Sheppard (p. 361)

This impeachment appears to be a learned treatise impeachment, but is in fact simply a prior inconsistent statement impeachment using the witness' own research. Thus,

there is no need (nor any desire) to lay a foundation for authoritativeness of the witness' writing.

7. Rehabilitation After Impeachment

After cross-examination, the party who initially called the witness has the opportunity to rehabilitate the witness who has been damaged on cross on redirect examination. The purpose of the redirect is to explain away any problems raised on cross and to clarify her testimony. Where the witness has been discredited on cross, the redirect examiner can bolster the witness' credibility once it has been attacked.

People v. Singer (p. 365)

Singer involves rehabilitation through prior consistent statements. We begin with the incident at issue, which was an abortion that occurred in October, 1947. After the abortion — the witness privately made a statement to the abortion victim's father, in substance, saying, "D is guilty." On November 12, 1947, testifying before the grand jury, the witness, in effect, said: "D is not guilty." Shortly afterwards, the witness was taken into custody by the authorities. On the 14th of November, the witness told the grand jury, in substance, "D is guilty." At the first trial, witness testifies again in effect, "D is guilty." And at the second trial he again testifies "D is guilty."

D is convicted of manslaughter. The issue on appeal concerns the propriety of admitting the witness' prior consistent statements on redirect examination.

To review: there were two trials here, during both of which the witnessed testified that D performed the abortion at issue. On cross-examination, however, defense counsel brought out the witness' November 12th grand jury statement that the defendant was **not** guilty. Defense counsel argued that the witness' trial testimony was a **recent fabrication —** that the witness had a motive to lie.

Now, why did the witness have a motive to lie? What event arguably gave rise to his motive to lie? What happened between the 12th and the 14th? He was taken into custody.

And then what happened — under the defense theory? Sure, **he made a deal with the devil.** He was arrested, he sold out to save himself, and now he'll say whatever the government wants him to say.

To rehabilitate the witness, the prosecutor introduces into evidence his prior consistent statement made shortly after the abortion. (The abortion occurred in the middle of October, and a day or two later, the witness told the victim's father, in effect, that the "defendant is guilty.")

Why does this statement have special evidentiary significance?

Because the witness made it immediately after the event at issue and **well before being taken into custody — i.e., before the alleged motive to falsify arose.** The motive to falsify

presumably occurred when the witness was taken into custody on the 14th of November. A month before that, we have a statement consistent with the witness' trial testimony to the effect that the defendant is guilty.

So, we have a series of statements: the first one was in October ("D guilty"); then we have the statement before the grand jury when he says, "not guilty;" he's taken into custody and all subsequent statements are to the effect that the defendant is guilty.

The issue here concerns the admissibility only of the October statement, not the others. In resolving this issue, how does the Court overcome the hearsay rule? Is it being offered for its truth?

No. It's admissible only for rehabilitation (credibility) not to establish the truth of the matter asserted. The theory here is the statement was made before the witness had a motive to falsify. At common law, such statements were routinely admitted, not for their truth, but to rehabilitate the witness, to enhance their credibility although you'll soon see a hearsay exception under the FRE for certain prior consistent statements.

Critical to the admissibility of a prior consistent statement at common law: it must have been made **before the event that gave rise to the alleged motive to falsify** meaning that in Singer, the only admissible prior consistent statement was D's October statement, which preceded his custodial arrest. **His post-custody grand jury testimony and testimony at the first trial both of which were consistent with his testimony at the second trial** would not have been admitted under this theory because they occurred after the event which gave rise to the alleged motive to falsify.

As a preview to the discussion of Hearsay, it should be pointed out that at common law the prior consistent statement was not offered for the truth but only positively on credibility and thus was not hearsay. However, the Federal Rules, for unknown and probably unsupported reasons, chose to admit prior consistent statements for their truth and for rehabilitation under Rule 801(d)(1)(B). Note that in Tome v. United States, the Court ruled that 801(d)(1)(B) statements are admissible for their substantive truth only if the motive to falsify pre-dates the consistent statement. Most federal courts, however, will still admit prior consistent statements for rehabilitation only irrespective of the statement's compliance with Tome's timeline analysis.

Evidentiary Foundation: The Trial of Bruno Richard Hauptman (p. 367)

Here, counsel attempts to bolster his own witness on direct examination by offering a prior consistent statement. This is improper as one cannot bolster or rehabilitate one's own witness until she has been attacked.

Evidentiary Foundation: United States v. Smith (p. 369)

In this excerpt, the Government attempts to bolster the credibility of its chief witness by testimony regarding his truthfulness. There are at least two errors in the

admission of this evidence. First, the Government appears to be bolstering a witness who has not yet been discredited on cross-examination. Second, the question, apparently going to the witness' opinion as to the veracity of his informant is not framed as an opinion, but rather appears to rely on specific instances of truthful conduct of the part of the informant-witness, which is forbidden by Rule 608(a).

United States v. Medical Therapy Sciences, Inc. (p. 370)

This case involves the application of Rule 608(a)(2). The defense maintained that the prosecutor artificially created an opportunity to bolster its principal witness by drawing the sting and then calling a character witness to rehabilitate the principal witness.

In other words, the government initially drew the sting from the witness bringing out the witness's sordid past and then called a character witness to rehabilitate the principal witness. The defense argued that this was improper bolstering as the principal witness' credibility had not been attacked.

Medical Therapy raises the question of whether, having drawn the sting, may the government rehabilitate its own witness by calling a character witness. The court of appeals generally agrees that, once the government draws the sting, it may not then rehabilitate its own witness by calling a character witness (p. 370). But why did the Court of Appeals permit it in this instance?

Because after the government drew the sting, the defense engaged in a vigorous cross-examination attacking the witness' credibility, so calling a rehabilitative character witness was proper. The defense, of course, claimed that the principal witness' character for truthfulness had not been attacked during cross-examination. Query: What constitutes an attack on veracity warranting rehabilitative testimony from a character witness?

The court says that the proper inquiry looks to the nature of the attack conducted on cross-examination. If opposing counsel employed an impeachment mode that focused on the principal witness' veracity in some respect — as opposed to the accuracy of his testimony — the proponent may rehabilitate him by calling a character witness.

This approach essentially is based on the "or otherwise" terminology of Rule 608(a)(2), which provides that evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise. The "or otherwise" language of the rule leaves open the possibility of attacking a witness' veracity other than by calling a character witness.

In Medical Therapy, the principal witness' veracity admittedly was not impeached by calling a character witness, but the court found that his veracity was "otherwise" attacked. In making that determination, the court considered which impeachment modes go to truthfulness and therefore may justify a character witness to rehabilitate the principal witness — some clearly do and some clearly do not. For example, if you are attacking the witness' perception — the quality of his perception, how much of a chance did the witness have

to perceive the underlying event — or if you are questioning the witness' recollection of the event, you are not attacking his honesty as such.

In contrast, if you are suggesting that the witness is a human parrot that will say whatever counsel wants, that does get closer to an attack on honesty.

Bias impeachment, by comparison, is not necessarily an attack on the witness' honesty. The fact that the witness is related to one of the parties in the case just establishes that the witness has somewhat of a stake in the outcome; it's not an attack on honesty as such (at least thereasoning of this court is that a bias attack alone would not justify calling a character witness. I don't know that all courts would agree with that, but you can at least understand this line of analysis.) Of course, if cross examination suggests that the witness' testimony has been bought and paid for — the witness is not just biased, but has been corrupted in some fashion — clearly that's an attack on the witness' veracity and a rehabilitative character witness could be called. Likewise, impeachment based on prior conviction or bad act impeachment opens the door to rehabilitative proof under Rule 608(a)(2) by calling a character witness.

What about prior inconsistent statement impeachment? Answer: it depends. Sometimes opposing counsel will employ prior inconsistent statement impeachment to suggest that the witness is either lying now or was lying then. This would be an attack on veracity. Other times, prior inconsistent statement impeachment that the witness is mistaken.

Evidentiary Foundation: The Trial of Julius and Ethel Rosenberg (p. 375)

Evidentiary Foundation: The Trial of Harrison A. Williams, Jr. (p. 377)

Both of these transcript excerpts illustrate the rehabilitation of witnesses by simply directing them to explain or clarify and therefore diminish the impact of testimony elicited earlier on cross-examination.

CHAPTER IV RELEVANCY REFINED

A. Mathematical proof

Both the Tribe article excerpt (p. 379) and the Garrison case (p. 382) demonstrate the dangers of purportedly mathematical proof. In both the Collins case and the Garrison case, the experts' foundation for their mathematical proof was extraordinarily unreliable and weak. Even if sound, it is worth discussing whether the admission of even well-grounded probability evidence of this type confuses the jury by seeming to quantify the unquantifiable "guilt beyond a reasonable doubt."

Smith v. Rapid Transit (p. 388) is a classic case is which the Court ruled that though it is relevant that the defendant's bus used the route in question during the general time of the occurrence of the accident, the fact that other buses may have used the same route in the same time period precludes the plaintiff from establishing the defendant's bus as the bus in question by a preponderance of the evidence. The classic hypothetical suggested by Smith (p. 389, n. 1) demonstrates the difference between a legal burden of persuasion and abstract statistical probability.

B. SUBSTANTIVE CHARACTER EVIDENCE

Character evidence is the most difficult and confusing subject in the law of Evidence. This section of the book focuses on the use of character evidence, i.e. evidence of a person's trait of character, to prove an element of a claim or defense or any other substantive matter the law permits (e.g., motive). Students should be reminded that like other evidentiary offers, offers of character are subject to the balancing excluding factors of Rule 403.

Rule 404 states the general rule that evidence of a person's character cannot be offered as proof that such person, whether or not a party, has acted in conformity therewith. In other words, character evidence generally cannot be offered on propensity. For example, in a case where the plaintiff claims the defendant caused him damage by negligent driving, the plaintiff is not permitted to offer evidence that the defendant is generally a negligent driver. Similarly, the defendant cannot offer evidence that he is a careful driver.

Where, however, a character trait is an essential element of a claim, charge, or defense in a lawsuit, character evidence is admissible on propensity. For example, where plaintiff sues defendant for defamation, alleging that defendant called him "a liar," plaintiff's character trait, honesty is an essential element of the claim or defense, and therefore is an issue. Thus, character evidence regarding plaintiff's honesty is admissible.

Rule 405 provides that such character evidence may be offered, where relevant, by way of reputation or opinion evidence, and in more limited circumstances by specific instances of conduct. Reputation and opinion evidence are offered through some witness other than the person whose character trait is in issue. Such character witness will be allowed to testify as to reputation or opinion regarding the pertinent character trait only after an

appropriate foundation is laid showing familiarity with the person in question for purpose of opinion evidence and knowledge of others who know the person in question for purposes of reputation evidence. With respect to reputation evidence, the character witness must, as a preliminary or foundational matter, establish familiarity with some community's view of the person's character trait by testifying that he has heard talk among members of the community regarding the person's character trait. Having done so, he will be permitted to testify as to the person's reputation in the community for the pertinent trait of character.

Where character evidence is offered by way of opinion, the character witness must offer evidence that he knows the person whose character trait is in issue, and is familiar with that person's particular character trait. Once this foundation is laid, the character witness will be permitted to testify as to his opinion regarding the person's pertinent trait of character.

Finally, where the character of a person is an essential element of a claim, charge, or defense, evidence offered in the form of specific instances of conduct which tend to show the person's pertinent trait of character is admissible. This is a very narrow permissible use of character evidence and requires that in order to prove the elements of a claim, charge or defense, it is necessary pursuant to the statute governing the cause of action or the law that allows the cause of action for the character of one of the parties to be proved. Such evidence may be offered through any witness with knowledge of the pertinent character trait, including the person whose character is in issue. In most cases, however, such testimony will be offered through the testimony of a witness other than the person whose character trait is in issue.

Rule 412 was amended in 1994. It is a comprehensive statement of the federal "rape shield statute." The Rule supersedes Rules 404 and 405 concerning character evidence when dealing with evidence of the sexual behavior or sexual predisposition of the victim in a criminal case where the defendant is charged with alleged sexual misconduct.

The rule is designed to encourage the reporting of offenses involving sexual misconduct by protecting the victim from inappropriate inquiry concerning sexual behavior or sexual predisposition. It does so by precluding completely any reputation or opinion evidence concerning the sexual behavior or sexual predisposition of the victim on any issue, including the state of mind of the defendant with regard to any relevant issue including whether the defendant believed that the victim was consenting to a sexual act. It also narrows the circumstances in which specific instances of conduct evidencing sexual conduct or sexual predisposition may be admissible.

There are four situations where specific instances of conduct as evidence of sexual behavior or sexual predisposition of the victim may be admissible. First, the conduct of the victim may be admissible to explain that someone other than the defendant is the source or cause of physical injury or physical condition of the victim. Second, if the conduct of the victim was with the defendant, it may be admissible on the issue of the consent of the victim to the charged conduct of the defendant. Third, the sexual conduct of the

victim may be admissible if the failure to do so would somehow violate the constitutional rights of the defendant. And fourth, the sexual conduct of the victim is offered by the prosecution.

The third situation, involving the constitutional rights of the defendant, is the most far-reaching exception to the general preclusion of Rule 412 and commonly arises when it is the claim of the defendant that the accusation against the defendant is motivated by an effort to explain a situation that the victim is trying to hide, that can only have resulted from sexual activity. For example, a defendant may claim that a teenager, in an effort to hide from her parents her voluntary sexual activity that she believed resulted in a pregnancy, accused the defendant of rape. In such a situation, a judge might rule that precluding evidence of the victim's sexual activity with someone other than the defendant might infringe on his confrontation rights pursuant to the Sixth Amendment to the United States Constitution, as the proffered evidence is relevant to show the victim's motive for falsely accusing the defendant.

Whenever a party seeks to introduce evidence of the sexual behavior or disposition of the victim, it must give notice to all parties and to the victim. The notice must state the conduct of the victim which is sought to be proved and the purpose of the proffer. The judge must then hold an in camera hearing on the admissibility of the proffered evidence, during which the parties and the victim have a right to be heard. All records of this proceeding are sealed.

Rules 413, 414, and 415 governing the admissibility of character evidence in civil and criminal cases involving a claim of sexual assault or child molestation became law in July of 1995. Although Rule 404(a) generally excludes evidence of similar acts when offered to prove the propensity of the criminal defendant or the civil party to commit the act which is charged, Rules 413, 414, and 415 create an exception for such offers in cases involving sexual assault or child molestation.

Of course, the admission of such evidence is subject to exclusion if it is prejudicial or confusing, or involves an undue waste of time pursuant to Rule 403. Relevant factors to be considered in the 403 balance are:

1. proximity in time to the charged or predicate conduct;
2. similarity to the charged or predicate conduct;
3. frequency of the prior acts;
4. surrounding circumstances;
5. relevant intervening events; and
6. other relevant similarities or differences

However, it is unavailing to argue that the evidence of similar crimes will prejudice the jury by inviting the inference that the defendant committed the crime or act alleged charged in the instant case because he committed a similar crime on an earlier occasion. After all, that inference is the very basis for admitting the similar crime evidence pursuant to Rules 413, 414, and 415.

What is the standard of proof required to obtain admission of similar crimes

evidence? As with offers made pursuant to Rule 404(b), the court will admit the similar crimes (criminal) or acts (civil) evidence where the proponent offers evidence sufficient to persuade a reasonable fact-finder by a preponderance of the evidence that the criminal defendant or civil party committed the earlier act of sexual assault or child molestation. Note that there is no requirement that the criminal defendant or civil party has been convicted of the similar act, nor does the rule require that the similar act be excluded if the criminal defendant or civil party was tried and acquitted of the similar act. While the terms of Rules 413 - 415 seem to suggest that the only method of proving these relevant character traits is by use of specific instances of conduct, an argument can be made that Rule 405(a) allows proof of relevant character traits in all cases by the use of reputation or opinion evidence. Unlike Rule 412 which excludes, by its plain terms, reputation and opinion evidence regarding the sexual conduct of a sexual misconduct victim, no such preclusion exists in Rules 413 - 415.

This evidence is most probative in criminal sexual assault and child molestation cases. On the civil side, the most common use of this evidence is in gender discrimination cases where the claim of discrimination or hostile work environment is based, at least in part, on a allegation that a party or a party's employee engaged in sexually assaultive behavior such as unwanted sexual touching.

Finally, in both civil and criminal cases, the proponent of an offer of similar crimes evidence pursuant to Rules 413, 414, and 415 must disclose such evidence to the party against whom it is offered at least fifteen days before trial and this evidence will, in virtually every case, be the subject of a pretrial in limine motion.

3. Character Evidence in a Civil Context

The Kelly decision illustrates the exclusion of propensity character evidence in civil cases. The decedent's wife sued to enforce the provisions of a life insurance policy under which she was the beneficiary. The insurance company defended that the policy did not apply because of a clause precluding liability if the insured died as a result of criminal misconduct.

In this case, the essential issue was whether the insured was committing a burglary when he was killed by a trap gun. In other words, he had broken into a cabin whose homeowner had set up a trap gun, and the central issue was whether he had broken into the cabin to commit a felony — to steal something — or for some non-felonious reason maybe he needed shelter, for example. If his goal was felonious, the policy was void.

To refute this defense, the widow proffered evidence of her husband's reputation as a peaceful and law-abiding citizen, presumably to give rise to the following series of inferences: My husband was a person of good character. He was a peaceful and lawabiding citizen. He had a propensity to act in a peaceful and law-abiding manner; and therefore — the final inference is — it's likely that he acted in conformity with that character trait when he entered the cabin.

The trial judge admitted this evidence, but the court of appeals reversed applying the common law rule that propensity character evidence is not admissible in civil cases. Those who read the Kelly case closely may have noticed that the court, at least implicitly, distinguished between character-in-issue and the circumstantial application of character evidence. In other words, between the propensity character evidence doctrine, which is what we had in this case — and where character is in issue by virtue of the pleadings of the case itself. In distinguishing between them, the court acknowledged that, when character is directly in issue by virtue of the elements of the case, there are no limits on the admissibility of character proof. But this was not such a case. Kelly involved the circumstantial application of character evidence, which was inadmissible in civil cases.

Professor Wigmore, incidentally, agreed with this approach. He wrote that "whether a contract has been breached or tort committed rarely touches upon **moral qualities;** therefore, it is appropriate to exclude Character evidence civilly."

But this only shows that even Professor Wigmore could be mistaken, because character isn't necessarily limited to moral qualities. For example, there can be character for sloppiness or character for good care or for craftsmanship. Furthermore, sometimes civil cases do involve moral issues: a wrongful death action, for example, may accuse the defendant of having committed a homicide, e.g. O.J. Simpson in the aftermath of his acquittal for murder.

RICO litigation — federal racketeering litigation — essentially accuses the defendant of having engaged in a pattern of racketeering activity.

Suits based upon conversion or common law fraud similarly accuse the defendant of having committed a crime — it's a civil trial, the burden of proof may be lower, the consequences are certainly different, but the underlying questions do involve moral character.

So, to a degree, the rule against admitting propensity character evidence in civil cases is based upon a false premise that moral qualities are all that count and furthermore that moral qualities are not involved in civil cases when quite the opposite is true.

By way of summary, we have three sets of rules for propensity character evidence. First, in criminal cases, no propensity character evidence about the D may be introduced until the defendant has opened the door.

Second, once the door has been opened, there are limits, as we'll see, on how character may be proven.

And third, propensity character evidence was never admissible in a civil case.

4. Character Evidence in a Criminal Context Evidentiary Foundation: The Trial of Alger Hiss (p. 395)

Here, the criminal defendant takes advantage of Rule 404(a)(1) which permits him to

offer good character evidence on a pertinent trait thereby permitting the jury to find him "Not Guilty" of the crime of perjury because he has the propensity to be honest.

It should be pointed out that Hiss' counsel seemed to confuse reputation and opinion testimony on the issue of Hiss' character for truthfulness. The foundation for reputation evidence requires evidence that the witness has heard talk about the defendant's character within a relevant community. Note too that "loyalty" is not a pertinent character trait in a perjury prosecution even if the perjury charge involves lying about espionage.

Michelson v. United States (p. 396)

In Michelson, the Supreme Court majority lays out the view of character evidence in criminal cases adopted by the Federal Rules of Evidence. First, the Court recognizes the defendant may offer reputation or opinion testimony on his good character on the trait of character which is pertinent to the litigation—here honesty. Second, the Court approves of the cross-examination of the character witness by asking him whether he has heard that defendant (whom the character witness says is honest in his opinion) has been arrested for a crime of dishonesty. The theory of this cross-examination is that if the character witness has heard of the arrest, then his opinion is questionable while if the character witness has not heard of the arrest, then the opinion is flawed because it is uninformed. Third, the Court permits the scope of questions about the character witness' knowledge of the accused to encompass the length of time encompassed in the character witness' opinion. Thus, if the witness claims to have known the defendant for 30 years, then asking about a 27 year-old arrest is appropriate.

The dissenters point out that permitting this sort of cross-examination creates a serious disincentive to the defendant's offering character evidence. Indeed, if the defendant offers a character witness, then the witness may be impeached with bad acts relating to the pertinent character trait of the defendant though such impeachment (e.g. arrests) would not be permitted as impeachment of the defendant himself as a witness. Note, too, Justice Rutledge's argument that the jury will never understand the limiting instruction to the effect that the mention of the arrest during the impeachment of the character witness is no evidence of either the arrest or the underlying act. This comment should stimulate discussion of the efficacy of limiting instructions generally.

Evidentiary Foundation: The Trial of Pete Seeger (p. 406)

The questions preceding the transcript suggest good point for discussion. The transcript also provides fodder for the doctrine of opening the door. Indeed, it appears that Seeger's counsel opened the door not only to bad character evidence, but unnecessarily so by permitting his good character witness to wander beyond relevant character traits.

In addition, the excerpt illustrates the requirement that the cross-examiner have a good faith basis for asking cross-examination questions, particularly where they will have the legally unintended, but practically intended, negative impact on the defendant himself. As in Michelson, this case demonstrates the serious downside of offering good character

evidence.

5. Special Rules for Evidence of Other Wrongs

Rex v. Smith (p. 414) presents a distinctly un-American view of "similar acts or crimes" evidence which would appear to admit such acts as propensity evidence.

United States v. Woods (p. 415) presents the universal American view of "other acts" evidence now controlled by Federal Rule of Evidence 404(b).

Rule 404(b) is not an exception to the general rule forbidding the use of character evidence to show propensity. Rather, Rule 404(b) admits character-type evidence of specific crimes, wrongs, or acts, other than those involved in the case at bar, for any relevant, non-propensity purpose, including the common, enumerated purposes illustrated in the rule.

Exceptions to the rule against propensity character offers are found in Rules 404(a) and 405(b) and include evidence of good character offered by a criminal defendant and rebutted by the government; evidence of a pertinent character trait of the victim (and contrary rebuttal by the government) or evidence of the victim's peacefulness when the defendant has offered evidence that the victim was the first aggressor in a homicide case; or impeachment; and character evidence where character is an essential element of a claim, charge, or defense. See also Rules 413 - 415.

Rule 404(b) allows specific instances of conduct to be used to prove such matters as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident by the direct terms of the rule. It should be noted, however, that this list is not exclusive and instances of conduct may be admissible for any other non-propensity purpose that is relevant to a lawsuit. Although more typical in criminal cases, Rule 404(b) proffers are equally admissible in civil cases. In addition, the specific instance of conduct need not have amounted to a criminal charge or conviction or been the subject of a lawsuit or a judicial inquiry.

For example, in a criminal case charging armed robbery, the prosecution might offer evidence of the theft of a car which was used in the getaway. The car theft, though not a charged offense, may not be offered to show the defendant's general bad character or propensity to crime but rather may be offered to show either the defendant's opportunity to commit the armed robbery, a general plan or scheme, or intent. Likewise, the use of other uncharged acts which bear a close similarity to the charged act may be offered to show the intent of a person, or if the similarities are close to identical, to show a particular modus operandi offered on the issue of the identity of the person alleged to have committed an act. A final example might be the offer of an earlier robbery which is offered to show a motive in a murder case where the murder victim is a witness to the robbery.

Note that all of 404(b) offers have an inescapable tendency to inform the jury, as a side issue, on the person's propensity. As with all other evidence (except for prior convictions under Rule 609 and prior sexual acts of a rape victim under Rule 412), evidence offered under Rule 404(b) is subject to the relevancy-prejudice balancing test of Rules 401 and 403. Therefore, it is appropriate for the court to balance the probative value and necessity of the 404(b)-type

evidence against its impermissible-propensity impact in determining admissibility.

The court need not make a preliminary finding that the person committed the act. To admit evidence of an act pursuant to Rule 404(b), the court need only determine that there is sufficient evidence pursuant to Rule 104 that the defendant committed the act. In making a determination as to the admissibility of Rule 404(b) evidence, most judges will look to the necessity of the evidence to a fair determination of the case, as balanced by the obvious prejudice to the party against whom it is offered.

In Woods a murder case where a mother is charged with killing her child, the government offered evidence that seven other of the defendant's children died under similar, unusual circumstances, arguing admissibility of the other events under the common law predecessor of Rule 404(b) on the substantive issue of did the mother cause the seventh death. The government argued that relevance of the other acts to be any or all of: (1) continuing plan, (2) identity by modus operandi or signature crime, or (3) lack of accident or mistake. Indeed, the Court seemed to amalgamate all of these arguments in admitting the other deaths in order to show that a crime, rather than an accident, occurred and that the defendant was the likely agent. Though not strictly speaking statistical or probability evidence, the 404(b) evidence does show the unlikeliness of an alternative innocent explanation for the death.

United States Hearst (p. 420)

When the Government offers "other acts" evidence against the defendant, such acts usually occurred earlier in time than the charged act. Here, the government offers other armed robberies which occurred a month after the charged acts in order to rebut the defendant's defense of duress to the charged robbery. The court correctly rules the later acts admissible, even though the later robberies were not identical to charged robbery, noting that the similarity of other acts and the charged act is only relevant where the similarity of the charged and other acts is the basis of relevance of the other acts, for example, where the other acts are offered on identity by showing modus operandi or "a signature."

Under these circumstances, the evidence of other crimes does not come in to e defendant's generalized propensity toward sexual aggression, but rather to establish his handiwork from which the jury can infer that it must be the same person. This is often a valid theory of admissibility (See FRE 404(b)), but the difficulty is that identity was not an issue in Woods. It was clear that Woods had custody of the children and there was no problem linking her to the alleged victim. So, the handiwork theory really didn't apply (especially absent proof that the victims all died the same way). As to the accident theory, it should not have applied because the defense did not contend that any accident had occurred; rather, the defense maintained that the children died of natural causes. Thus, this case was unique in that the court allowed the government to use other crimes evidence to establish a prima facie case. In other words, to establish an intentional killing of a human being. (The court's opinion refers to using this evidence to establish the corpus delecti. In this context, corpus delecti simply means the body of the crime — the elements of the case, the fact of an intentional killing.)

The Woods case, however, is still an example of the "doctrine of chances" at work. The theory of relevance rests upon the objective improbability of coincidences. Here, so many children

died in the custody of this woman that it couldn't have been purely coincidental; and so, the court allowed the government to admit this proof to establish a prima facie case.

To distinguish the "doctrine of chances," which is a permissible application of other crimes evidence, from propensity-type proof, which is impermissible, consider the following line of analysis. The anti-propensity doctrine holds that you may not use evidence of other crimes to infer a D's propensity for criminality - that is the prohibited inference. This precludes the government from arguing that, because someone committed another crime, he or she has a generalized disposition toward criminality - that is what is precluded by the common law and also under Rule 404, the first sentence.

By comparison, the "doctrine of chances" is not premised on the same series of prohibited inferences. It may be that the ultimate inference is the same that the defendant committed the alleged crime, but there is an intermediate inference that distinguishes it from improper propensity character evidence. This intermediate inference is not based on the D's subjective propensity as such but rather upon the objective improbability of the present crime being a coincidence, and therefore it is likely that the defendant committed the crime.

In other words, independent of the D's character, the sheer number of other crimes renders it objectively unlikely that the crime occurred through accident or natural causes.

For example, the prohibition against character evidence prohibits the prosecution from offering prior bad acts to establish an intermediate inference that the D has a subjective bad character from which the jury is asked to conclude that the D acted consistently with his bad character on the occasion at issue.

By comparison, under the doctrine of chances evidence of other instances (loss of spouses or children) is offered to prove the objective improbability of so many similar losses accidentally befalling an innocent person within a short time from which the jury is asked to conclude that one or some of the losses were the product of criminal agency rather than a random accident.

i.e. Suppose the D is charged with arson and there is evidence of 15 other fires occurring at properties that D owned. Under the doctrine of chances, the question for the jury is not whether the D is the type of person — a firebug who commits arsons, but whether is it objectively likely that so many fires could be attributable to natural causes. Because of the existence of that intermediate inference and the absence of any argument expressly made to the jury that the prior crimes establish the defendant's disposition to engage in criminality, courts justify admitting this proof under the "doctrine of chances."

To be sure, there's always the possibility that the jury will advert to the question of the accused's character and decide the case improperly on that basis. But because the doctrine of chances does not require the trier to consider the accused's character, it reduces the risk that the jury will use the evidence improperly.

Nevertheless, the final problem facing the government in Woods was that,

although the other deaths could be linked to the defendant, there was no proof as such — certainly nothing beyond a reasonable doubt — that the other babies died through criminal causes. On the contrary, the death certificates all said death from natural causes. So, not only had there not been a prior conviction, there was an implicit finding of nofault on the part of Woods.

With this in mind, the dissent in the Woods case suggested that evidence of other must be established by clear and convincing evidence before it may be used against the defendant. The majority' resolved this issue by deciding not to deal with it. They basically said, "Listen, if we had one or two deaths, you may have an argument here; but we have eight or nine or ten other situations that are quite similar. Taken collectively, we are persuaded that this is highly probative and sufficiently reliable to be admitted irrespective of the burden of proof."

Huddleston v. United States (p. 420 n. 4)

The Supreme Court eventually addressed that issue and resolved it in Huddleston, in which the defendant was charged with Intentional Possession of Stolen Property. His defense of course was, "I didn't know that the property was stolen. I lacked criminal intent."

In response, the prosecution introduced two other instances in which the defendant had been caught in possession of stolen property. The defendant then argued: "Well, you don't have enough proof to establish my criminal involvement in these other two transactions and therefore they shouldn't come in." The Supreme Court therefore had to decide what standard of proof governs the admissibility of other crimes evidence under Rule 404 (b).

You will recall that, under Rule 104(a), competency determinations are governed by a preponderance of the evidence standard. And so the defense said, "At the very least, the prosecution must establish the D's participation in these other crimes by a preponderance of the evidence." Although this argument looked like a winner, the SC said, "No, this really isn't a competency issue under Rule 104(a). It is a question of conditional relevancy under Rule 104(b)." Since the relevancy of these other crimes to establish the D's state of mind is conditioned on proof that he actually committed them. The Supreme Court says this is a question of conditional relevancy under Rule 104(b), which is a much lower standard — a prima facie case standard; meaning that the government just needs to establish a prima facie case that the D committed these other crimes.

Barnes v. City of Cincinnati (p. 423)

Barnes reminds students that Rule 404(b) application is not confined to criminal cases and that evidence of an alleged discriminator's disparaging words or acts toward other members of a protected class are relevant on the intent of the alleged discriminator in the present civil case.

Evidentiary Foundation: The Trial of Wayne Williams (p. 427)

This offer by the State is a classic offer of similar acts evidence offered for the purpose of showing common plan or scheme and identity. In short, the State is offering to prove, through other crimes which are very similar to the murders charged in the indictment, that whoever committed the charged crimes is the same person who committed the uncharged crimes. If the State can prove that Williams committed the other crimes, then the jury could infer that Williams, using the very similar modus operandi, placed his "signature" on the charged crimes. Note that though technically, the other crimes evidence is not offered for propensity, it is difficult to imagine the jury appreciating that fine legal distinction. However, where evidence is highly probative (and in many courts' minds, necessary), the prejudice of a forbidden propensity inference will not usually substantially outweigh the significant probative value of the of the other crimes evidence. Note that here, where the issue is common plan or identity, the substantial similarity of the charged and uncharged misconduct is critical to the relevance of the uncharged acts and thus, the attorneys will joust as the similarities and differences.

6. Special Rules for Cases Alleging Sexual Assault

The Tanford & Bocchino article excerpt (p. 435) provides the history, rationale and problems associated with Rape Shield Rules or Statutes. The conflict between protecting a victim's sexual privacy and the right to a complete cross-examination can be explored and students can determine if the Federal Rulemakers struck the appropriate balance in Rule 412.

The Karp (p. 440) and Natali & Stigall (p. 447) excerpts raise important issues regarding Federal Rules 413-415 which indeed amount to exceptions to Rule 404(a) in that Rule 413-415 foster the admission of prior acts of sexual assault or child molestation for the propensity inference in cases charging such acts. For example, in a rape case evidence of another rape by the same defendant is admissible to show the defendant committed the rape in the present case. The Government may argue and the jury may permissibly infer that "because he's done it before, he's done it again." Indeed, it was argued at the time of enactment that these three Rules should actually have been have been codified more sensibly as Rules 404(a)(4), (5) and (6). Why?

Rules 413-415 are the only Federal Rules of Evidence approved by Congress without the approval of either the Supreme Court or the Advisory Committee. Students should be queried as to why. Moreover, these three Rules are not effectively subject to the exclusionary balance of Rule 403. Obviously, evidence of an earlier rape would be the most prejudicial evidence available if the earlier rape were not offered on propensity, but because it is permitted on propensity, one cannot argue the prejudice of the propensity inference (as one might in a Rule 404(b) case) because its admissible probative value is for the purpose of proving propensity. It is also worth noting that the standard of proof for the admissibility of the prior and uncharged sexual assault is the preponderance of the evidence under Rule 104.

The history of these Rules shows that Congress believed that sex offenses are more repetitive than other offenses and that thus the propensity inference is reasonable in sexual assault and child molestation cases. Interestingly, Department of Justice statistics demonstrate that sex offenses are actually on lower on the scale of repeat offenses when compared to other

crimes. (See Natali & Stigall article p. 407). Congress also believed that if such prior offenses are admitted for propensity, more sex offense defendants would plead guilty because their conviction after trial would be assured if the jury was exposed to the prior crimes, and fewer female and child victim would be required to undergo the pain of testifying.

Finally, because comparatively few cases of sexual assault or child molestation are brought in the federal system, Congress intended Rules 413-415 to be models for state adoption. Few, if any, have done so. Why?

C. OTHER EXAMPLES OF LEGAL RELEVANCE

1. Habit and Custom

By its nature, habit, or routine practice testimony is circumstantial proof that certain conduct, or an act consistent therewith, occurred. Habit or practice evidence is only practically necessary in the absence of direct evidence of such conduct or act. Habit testimony can, however be powerful proof of conduct and even in a situation where it is not necessary, it can have substantial tactical value. For example, in a case where a plaintiff in an automobile train crossing action claims that he stopped before crossing the tracks has been impeached, evidence from a person who carpooled with the plaintiff on a daily basis and can say that the plaintiff always stopped at railroad crossings before proceeding, can have enormous persuasive power.

Rule 406 represents a departure from the common law in two respects. First, Rule 406 allows habit and routine practice evidence even where there is firsthand or direct evidence of the event in question. Second, habit and routine practice evidence is admissible without corroborating evidence.

For example, if a party seeks to prove that a letter was mailed by an organization, but no witness is able to actually recall the act of mailing, the party may offer evidence of the organization's routine practice in the creation and mailing of letters. A typical foundation might be as follows:

Q. Does your firm have any kind of routine practice regarding the mailing of letters?
A. Yes, I created it three years ago.

Q. Describe such practice.
A. After sign a final version of a letter, my secretary places it in a stamped envelope with an imprinted return address and puts it in an out box on her desk.

Q. What happens next?
A. Twice a day the mail assistant comes by my secretary's desk. She picks up all stamped mail and places it in a United States mailbox on the Vst floor of our office building.

Q. Who receives a letter that is returned by the post office?

A. My secretary, who will then give it to me.

If the witness recalls the writing and signing of a particular letter, the above foundation of habit or routine practice is relevant as proof that such letter was mailed. The presumption of the regularity of the delivery service of the United States mail provides prima fade evidence that such letter, if not returned, was in fad, delivered to the addressee (the mailbox rule).

Thus, a party can show the mailing and delivery of a letter, despite no direct evidence of same, by the use of:

(a) habit or routine practice to show mailing and
(b) the mailbox rule to show delivery.

Reyes v. Missouri Pacific Railroad Co. (p.451) provides the distinction between the oft-confused habit and character. Four public drunkenness convictions over a period of three and a half years simply does not rise to the level of reflexive or routine behavior that qualifies as "habit." Such evidence does not support an inference that because a person has been intoxicated on four occasions, he was drunk on the particular evening in question.

2. Subsequent Remedial Measures

Relevancy Unraveled, Part III (p. 454)

Rules 407-411 share the commonality that certain evidence is *a priori* inadmissible when offered to show liability or damages because of not admitting such evidence will further some societal goal. Thus, for example, Rule 407 bars evidence of subsequent remedial measures in order to incentivize owners of property or manufacturers of goods to repair or redesign their property or goods to protect future users from harm. The key to understanding each of Rules 407-411 is to appreciate that all of these Rules permit the subject evidence to be admitted if offered for some purpose other than liability or damages. Evidence of a subsequent remedial measure is admissible, for example, to rebut a claim by the defendant that it did not own or control the instrumentality or property which caused the harm. Students should be informed of the danger of raising lack of ownership or control because it opens the door to otherwise inadmissible evidence. Flaminio v. Honda Motor Co. (p. 456) applies Rule 407, before its explicit amendment, to strict liability cases. After Flaminio, Rule 407 was amended apply the bar on the admission of subsequent remedial measures to cases in which the plaintiff is not seeking to prove only negligence, but any "culpable conduct."

3. Compromise Offers and Settlements

The second excerpt from Relevancy Unraveled, Part III (p. 459) and EEOC v. Gear Petroleum Inc. illustrate the inadmissibility of settlement or compromise negotiations where offered on liability or the amount of damages.

4. Liability Insurance

Relevancy Unraveled, Part III revisited (p. 465)

One of the great myths of American trial practice is that the mention of insurance in a civil trial is an earth-shattering event which invariably calls for a mistrial. This is, of course, untrue. Though evidence of liability insurance is inadmissible when offered on liability or damages, the fact that the defendant is insured is often admitted on such issues as witness bias or dominion and control.

CHAPTER V
HEARSAY

A. Pages 469-473 lay out basics of stating the general rule against hearsay, the rationale for the rule and the hearsay dangers.

Summary of the basic rule.

Hearsay is an out-of-court statement, written or oral, which is offered to prove the truth of the matter contained in the statement. An out-of-court statement which is offered for any relevant purpose other than the truth of the matter asserted is non-hearsay. Thus, where the mere fact that an out-of-court statement was made is relevant, independent of whether the statement is true, the statement is non-hearsay.

In determining whether an out-of-court statement is hearsay, there is an essentially foolproof practical test by which one can persuade the trial judge that evidence is, in fact, hearsay. First, ask the question whether or not the only relevant purpose for the offering of the out-of-court statement is its truth. If the answer to that question is "yes," then the out-of-court statement is hearsay. If the answer to that question, however, is not clearly "yes," then ask the next question-whether the content of the out-of-court statement need be believed in order to be relevant. If the answer to that question is "yes," then the evidence is hearsay. If it makes no difference as to a relevant purpose in the lawsuit whether the statement is true, it is not hearsay.

For example, where a statement is offered to show that it was made in the hearing of a person, and such person's being on notice of the words contained in the statement is relevant in the lawsuit, the statement is not hearsay.

Likewise, where a prior inconsistent statement is offered for the purpose of showing that a witness ought to not be believed because he has spoken inconsistently, the truth of the statement is not necessary to its relevance. Thus, the statement is non-hearsay.

Furthermore, where the uttering or the writing of the out-of-court statement has legal significance irrespective of truth, it is non-hearsay. For example, the offer and acceptance of a contract are out-of-court statements which create legal duties and obligations when made. Likewise, the statement, "It's a gift," when uttered by a person who hands another money, has legal significance. Such statements which have legal significance independent of their truth, are called operative words or verbal acts and are non-hearsay because their relevance derives from the mere fact that they were made. That is, they are offered merely to show that they were uttered or written.

Moreover, the proponent may offer an out-of-court statement in order to prove the state of the knowledge of the maker of the statement, the declarant. In other words, the uttering of the statement tells the fact-finder something about what the declarant knows or intends. For example, in a civil commitment hearing, the petitioner may offer the following statement uttered by the person whose commitment to a mental institution is sought, "I am Napoleon." This

out-of-court statement is not offered for its truth, but rather for the purpose of showing the mental state of the declarant. The statement is not offered for its truth, but rather to show it was made. Thus, it is non-hearsay.

Finally, note that in a federal court, as well as in most of the state courts, the mere presence of the declarant in court as a witness, without more, fails to obviate the hearsay objection to the declarant's out-of-court statements unless this statement falls within the narrow requirements of Rule 801 (d)(1).

Queen v. Hepburn, (p. 473) an 1813 U.S. Supreme Court case, illustrates the rule in a remarkable case in historical terms, in which the plaintiff-slaves sue for their freedom. Plaintiffs argue that because their ancestors were given their freedom, they too are free. In support of their claim at trial, plaintiffs offer the deposition. The trial judge sustains an objection to the deposition on hearsay grounds. The Supreme Court (Marshall, CJ) affirmed.

This case is a perfect vehicle for the classic hearsay four-step analysis to be applied in response to any hearsay objection:

1. Is there an out-of-court statement?
2. If yes, is it offered for the truth of the content of the statement or for some other relevant non-truth purpose?
3. If offered for a relevant non-truth purpose, the statement is admissible with a limiting instruction.
4. If offered for the truth, the proponent must demonstrate that the out-of-court statement comes within an exception to the hearsay rule.

Though made to a court-reporter and under oath, the deposition is a statement made outside of the courtroom in the instant trial. (Indeed, it actually constitutes hearsay within hearsay.) It is offered for the truth contained in the statement and if there is no exception which covers such a statement, it is inadmissible. (The Federal Rules and many states provide an exception in some cases for depositions.)

It is worth exploring why hearsay is inadmissible. The testimonial ideal in an American courtroom involves testimony by a live witness reporting her personal observations to the fact finder and subjected to demeanor and credibility testing. Hearsay, of course, falls short of this ideal. First, the declarant is not ordinarily subject to the oath when the statement is made. Second, the declarant cannot be observed by the jury. Third, the declarant is not subject to cross examination in front of the fact-finder and fourth, there is doubt as to whether the declarant's observation was reported accurately to the witness.

Evidentiary Foundation: Trial of Harrison Williams (p. 476)

Senator Williams and co-defendant Feinberg were charged with bribery in the ABSCAM sting described earlier. At trial, the government's stingman, Weinberg, testified as to statements made to him by Errichetti, the Mayor of Camden, New Jersey.

Following the four step analysis, we see that the witness is reporting an out-of-court statement by Errichetti ("Feinberg is Williams' bag man") offered to prove that Feinberg is indeed Williams' bag man. Note that because the statement requires for its relevance that we believe the honesty, sincerity and accuracy of Errichetti, the hearsay dangers attend and thus the statement should be inadmissible absent a hearsay exception. (This might be a good time to introduce the notion of the theory of the exceptions: the hearsay dangers are diminished by the exceptions' circumstantial guarantees of trustworthiness).

Anderson v. United States (p. 479)

In Anderson, the defendants were charged with conspiracy to cast fictitious votes for candidates in a primary election. Two alleged co-conspirators gave perjured out of court statements at a hearing into the election returns in which they stated that a particular voter had in fact voted. The government offered the statements to show the statements were made and not for the truth in order to show that the defendants made false statements at the hearing in furtherance of their conspiracy. Thus, the out-of-court statements to the effect that "Sullins voted that day" were not offered to prove that Sullins, in fact, voted that day, but rather to show that the declarants stated that "Sullins voted that day" when the facts show that Sullins did not vote that day. Thus, clearly, the government did not offer the out-of-court statements to prove their truth, but for an opposite, relevant "non-truth" purpose.

United State v. Brown (p. 481)

This somewhat unusual case involves the concept of "hidden" hearsay.

Here the government indicts a tax preparer on 17 counts (in 17 different returns) of tax fraud by willfully overstating his clients' deductions. Because the defendant defended by claiming mistake, the government offered evidence of 140 other returns in which the defendant made the same or similar "mistakes." (This matter merits a discussion of the admissibility of other acts under Rule 404(b)).

According to the government's witness, Agent Peacock, she perused the 140 other returns and discovered 90-95% had overstated deductions similar to the 17 returns on which defendant was indicted. Thought the defense failed to object on hearsay grounds, the Fifth Circuit, as a matter of plain error, reversed the district court's admission of the Peacock testimony, stating that “a clearer case of hearsay testimony would be difficult to imagine."

What is the hearsay analysis here? Clearly, if Agent Peacock had testified that she had interviewed the 140 tax filer-clients and that 95% of them reported overstated deductions, no one would dispute such testimony is inadmissible hearsay. But here, the declarant "merely" stated that she had audited the returns and her audit revealed that 90- 95% of the returns contained overstated deductions. Thus, she was reporting in court on the contents of out of court written statements (the returns) and oral statements (from the taxpayers), in order to prove the truth of the matter asserted in those statements "the return contents overstated deductions."

This is, of course, hearsay.

The dissent offers an interesting, though misplaced observation: the declarant's testimony is somehow not hearsay because she had personal knowledge of the documents she audited. Though personal knowledge is generally required for the admissibility of a witness' observations, the claim that a declarant has "first hand knowledge" of the hearsay she reports in court is no answer to a proper hearsay objection.

This would be an apt moment, though, to discuss the oft-confused notions of first hand knowledge and hearsay. These two evidentiary requirements are first cousins, sometimes overlap, and reflect similar concerns. Consequently, lawyers sometimes blur the two and misstate the appropriate objection in court. The distinction is illustrated by distinguishing the following two statements. First, if a witness offers the testimony: "I was in Paris yesterday at 2 pm and at that time I saw a man murdered in New York." The objection is obviously "lack of personal knowledge." But if the witness would testify that "Pierre called me and said that he witnessed the murder in New York" (or Paris), the objection is "hearsay." The requirement of personal knowledge (see Rule 602) attempts to assure that a witness has some ability to perceive the underlying event she describes in her testimony. Though a witness often has no personal knowledge of an event described by a hearsay declarant, the vice of her reporting hearsay in court is the inability to cross examine the declarant. Note, the declarant may have personal knowledge of the subject of the out-of-court declaration and the witness may have personal knowledge of the making of the out of court statement, and yet the hearsay dangers still attend the testimony. Finally, bear in mind that admissible hearsay is only admissible if there is some foundation (often implicit in the nature of the out of court statement itself) that the declarant spoke from personal knowledge. For example, there are cases which exclude statements otherwise qualifying as "statements made in the belief of impending death" where the declarant-murder victim was shot in the back from a significant distance on the theory that she likely lacked personal knowledge of the agent of her death.

The Application of Basic Concepts

The cases and vignettes in this section provide exercises in what we think is the most difficult issue in the study of Evidence: step 2 in the classic hearsay analysis “what is the out-of-court statement offered to prove?” The key here is the connection between hearsay and relevance. An out-of-court statement can be offered for its truth, where the occurrence described in the statement is relevant to the claims and/or defenses in the lawsuit, or it could be offered for another purpose (other than the actual happening of the occurrence described in the out-of-court statement) which happens to be relevant. (Classic examples are verbal acts or state of mind.) The key to determining hearsay admissibility is relevance.

Our great mentor and teacher, Professor Irving Younger, posed the matter this way. Suppose X testifies that he spoke to his brother on the phone in London on August 1 and his brother said "It rained in London for the first 3 weeks of July." Is that statement hearsay? Answer; there is no way to tell until we understand the context of the case. That is, what is the case about?

If the case involves a contract action in which X promised to pay Y $1 million if it rained

during the first week in July, then the statement is hearsay because its only relevance in the lawsuit is whether it rained in London in the first 3 weeks in July. After all, if the issue is whether it rained for 3 weeks, we would like to have the observer of the alleged storm, the out-of-court declarant here to be cross examined.

But, if the case is a claim based on an insurance policy brought by X's brother's widow on an insurance policy on X' s life and the issue is whether X was alive on August 1, then the relevance of the statement has nothing to do with weather in London in July, but rather whether X spoke to the witness on August 1. In that case, the issue is not the truth of what X said, but whether X spoke at all on August 1. We do not need X, the declarant, to be present to be cross examined on that issue. We only need the presence in court of a person who can identify X' s voice and remember the date of the conversation. It is the witness' credibility which is key here, not the credibility of the declarant. Thus, students must understand that a decision as to whether a statement is hearsay requires an analysis of the relevant issues in the lawsuit and how the out-of-court statement relates to those issues.

The two most common offers of out-of-court statements for a purpose other than the truth are: 1) verbal acts or "operative legal words" and 2) the(st.4.q of in(i,n4,00K the declarant or the hearer. The first two cases in this section, Creaghe (p. 488) and Jones (p. 480), illustrate the verbal acts doctrine. In Creaghe, the statement of the cancellation of the insurance policy by the insured both must be admitted (as a matter of practicality) and should be admitted as a matter of hearsay law. The statement; "I cancel" are the operative legal words of cancellation, i.e. the words are not offered for their objective truth, but rather to show they were uttered in a situation where mere utterance, without more, creates legal obligations or the lack thereof, when the insured says: “I cancel” he is no longer insured as a matter of law. There are no hearsay dangers here. We don't care if the insured was sincere when he said “I cancel." Once the words are uttered the insurance contract is at an end.

Similarly, in Jones, a prosecution for making threats against a judge and prosecutor, the court correctly admitted the defendant's utterance of the threats as the "operative words" or verbal acts of the crime. The mere making of the threatening statements has legal significance; the statements are not offered for the truth.

The other very common offer of non-hearsay statements is the offer of the statement to show circumstantially the state of mind of either the declarant (the maker) or the hearer of the out-of-court statement. A simple example of the first follows, in a case in which the defendant claims insanity, he offers his own out-of-court statement “I am the Queen of England." This statement is obviously not offered for the truth of its content, but to show that the statement "was made" which is relevant to show circumstantially the unbalances state of mind of the declarant. Similarly, in Betts, the child's statement that "her father is mean" and her persistent statement that her father killed her brother were no admissible for the truth, but rather to create an inference regarding the fearful state of mind of the child-declarant, a relevant issue in a child custody case.

DeVincent (p. 491) provides a clear example of the second kind of state of mind non-hearsay offer. In an extortion prosecution, the government offers the victim's out-of-

court statement that the defendant is "bad" and "vicious" and knew of his reputation as an extortionist to demonstrate the victim's fear of the defendant, an element of extortion. Note that these negative terms associated with the defendant do not run afoul of Rule 404 because they are not offered on propensity but the victim's state of mind, a relevant non-propensity purpose under Rule 404(b) (though the jury would be hard pressed to appreciate that fine distinction).

The Pegler Foundation (p. 495) illustrates an offer of the out-of-court statement to show the state of mind of the hearer of the statement. Pegler has been sued for libel in that he wrote that Reynolds was a nudist. Because good faith and or a lack of malice would provide defenses to the libel claim, the fact that Pegler heard a person say that Reynolds was a nudist would be admissible not to show that Reynolds was a nudist, but rather to show inferentially Pegler's state of mind, i.e., good faith. There is no need to test the credibility, sincerity or demeanor of the woman who reported Reynolds to be nudist, because the legal relevance of the statement is established by Pegler's merely hearing the words.

The Riviello Foundation (p.496) is a further illustration of the DeVincent situation: the victim's statement offered to show his fearful state of mind in an extortion case. It is worth pointing out that Party Admissions have yet to be covered, the government's offer of Riviello's statement are party admissions and would obviate the hearsay discussion.

The McLennan case (p. 498) presents an excellent capstone for this primary discussion of the theory and practice of the hearsay rule. In McLennan, the government offers the statement of the defendant's former counsel who told the defendant that his earlier actions were illegal. Because the witness and the declarant are the same person (the former counsel), it is worth explaining why the statement is still potentially hearsay in federal court although the declarant is present in court and subject to cross examination (four states who use the policy-based analysis of hearsay find such statements as non- hearsay because the hearsay dangers do not attend them).

Having determined that in federal court and most states, the presence of the declarant does no obviate the hearsay analysis, the next question is "what is the lawyer's statement offered to prove" in McLennan? The correct answer is that the offer of the lawyer's statement that clients completed actions "are illegal" is admissible as non- hearsay on the defendant's state of mind with respect to subsequent similar transactions, but inadmissible hearsay on those counts in the indictment charging acts which occurred prior to the lawyer's statement. With respect to the prior acts, the lawyer’s statement could only have the relevant purpose of their truth since they could not logically bear on the defendant's knowledge or intent with respect to acts already completed.

E. Evasive Analysis

This section of the book is designed to point out often-misperceived or mistaken hearsay analysis. Often in court, offering counsel will respond to a proper objection with the response that "the statement is not being offered for its truth but just to show the statement was made." Often, courts will erroneously, as in Felder (p. 502), uncritically accept this without analyzing

whether the mere making of the statement is relevant. In Felder, the defendant was charged with criminal assault or battery, the elements of which in no way implicate the state of mind of the victim. Yet, the Felder court admitted the statement "this Joe is going to take your money" for its effect on the hearer, i.e. to show why the hearer-victim acted irrationally, an irrelevant purpose. Thus, the court should have sustained the hearsay objection since its only relevant purpose was its truth. Likewise, in the Foundation: Trial of Wayne Williams (p. 503), the court erroneously admitted an expert witness' testimony reporting the out-of-court statement of another expert to explain the declarant-expert's behavior though that behavior had no relevance to the Williams case.

The Snow case (p. 504) is tricky because the court confounds hearsay analysis with relevancy, effectively arguing that the statement on the name tag is admissible over a hearsay objection because it is relevant. Actually, the statement on the tag is an implied, but intended assertion that "this baggage belongs to Bill Snow," and thus is hearsay if offered to prove that the baggage belongs to Bill Snow. There is a simpler analysis: if the purpose of offering the tag is merely to authenticate the bag as Snow's, the foundation For authentication, the name tag, need not be admissible under Rule 103, and thus can authenticate the bag even if hearsay.

People v. Barnhart (p. 507)

Party Admissions.

The common law in many jurisdictions treats party admissions as an exception to the hearsay rule. Rule 801(2) simply treats admissions as non-hearsay. The distinction is merely formal, yielding the same result-admissions of a party opponent are admissible for their truth as against a hearsay objection.

Party admissions are statements made by a party in a lawsuit which are offered by the opponent. Though the simplest form of admission is a statement made by the opposing party in either his individual or representative capacity, Rule 801(d)(2) provides for a number of vicarious admissions (statements of a declarant other an the party opponent) which are attributed to the party opponent because of either the party's adoption of the statement or because of some relationship between the party opponent and the declarant.

Rule 801(d)(2)(G) provides that where a statement is made by a person and is adopted by a party opponent, such statement qualifies as an admission of the party opponent. Note that historically, adoption can be construed from the silence of the party opponent in circumstances where it is shown that the party opponent heard the statement, and where the party opponent would have been expected to deny the thrust of the statement. These tacit admissions are carefully scrutinized in light of the inherent ambiguity of silence in response to a statement.

Rule 801(d)(2)(C) provides that a statement by an agent authorized to speak on behalf of the party opponent is a vicarious admission which can be attributed to the party opponent. To meet this rule the declarant must be specifically authorized by the party to speak for the party

(e.g., an attorney).

Rule 801(d)(2)(D) provides a liberalized departure from the common law. This rule provides or the attribution of a statement to a party as an admission where the statement is made by an agent or employee of the party, the statement concerns a matter within the scope of the declarant's, employment, and the statement is made while the employment relationship between the declarant and the party exists. Note that the agent, employee, or servant need not be a speaking agent, i.e., an agent employed for the expressed purpose of speaking on behalf of the party (as is the agent described in Rule 801(d)(2)(C) above). For example, in a lawsuit brought against a corporation that owns a truck involved in a collision which gives rise to the claim, a statement of the truck driver as to the cause of the collision is treated as a vicarious admission of the defendant corporation. In laying the foundation for an admission pursuant Rules 8061)(2)(C) or (D), the proponent must show the existence of the foundation facts sufficient to enable a reasonable juror to find their existence by a preponderance of the evidence.

Rule 801(d)(2)(E) provides for the vicarious attribution to a party opponent of an out-of- court st ement made by a person who is shown to be a co-conspirator of a party opponent. In order to bring a statement within the so-called co-conspirator exception the proponent must demonstrate to the court as a preliminary matter that a conspiracy exists, that the declarant and the party opponent were co-conspirators and that the declarant's statement was made during the existence of the conspiracy and was made in the furtherance of the conspiracy, In a case where conspiracy is not independently charged, the foundation should be laid outside of the hearing of the jury with the proponent required to meet the standard of offering evidence sufficient for a reasonable juror to find the existence of the above foundational facts by a preponderance of the evidence.

The United States Supreme Court ruled in 1987 that a trial judge may consider the co-conspirator admission itself in deciding whether the proponent has made the preliminary showing of conspiracy necessary to admit the co-conspirator admission. Though the court left open whether the co-conspirator admission standing alone can form a sufficient foundation for its own admissibility, a 1997 amendment to Rule 801(d)(2)(E) clearly answered that question in the negative. It is important to note that Rule 801(d)(2)(E) admissions are admissible even when conspiracy has not been alleged as a claim or charge in a civil or criminal case, respectively, by either party, so long as the foundational requirements are met. Furthermore, a number of federal courts have ruled that Rule 801(d)(2)(E) applies to statements made during the course and in furtherance of any enterprise, whether legal or illegal, in which the declarant and the defendant jointly participated.

As to all party admissions, the rules precluding opinions in Rule 701 and 702 of the federal rules and the requirement of firsthand knowledge pursuant to Rule 602 do not apply. It is presumed that a party should be made to answer for all relevant statements made concerning the subject matter of any lawsuit.

As we will see, the true hearsay exceptions (with one exception-Rule 804(b)(6)) are based on reliability and necessity. Admissions, admissible for their truth in federal court although considered "non-hearsay," are admitted because it would be odd to exclude a

party's statement because that party cannot cross examine herself. Furthermore, it is almost inconceivable that a party would not be present at trial to contradict the admission if she challenges its truth.

Notice that our 4-step hearsay analysis can be short-circuited by inserting step 1(a) into the process: once we determine that a person has made an out-of-court statement (step 1) we should ask: who made the statement and who is offering it? If the statements were made by a party and offered by an opponent, the hearsay analysis is concluded and the statement is admitted if relevant. Thus, if we conclude that the statement is a party admission, there is no need to proceed to the next 3 steps of the hearsay analysis.

Johnson simply provides an example and reminder that an admission can only be offered by the opposing party.

I. EXCEPTIONS TO THE RULE AGAINST HEARSAY

Any discussion of whether an out-of-court statement comes within a hearsay exception assumes that we have already decided that the statement is in fact hearsay because it is offered for its truth. Though lawyers often say that they do not really care for what purpose a court admits an out-of-court statement so long as the jury gets to hear it, students should be reminded that admissible hearsay substantively proves its content and admitting a statement as hearsay as opposed to a non-hearsay purpose can make the difference between winning and losing a directed verdict motion.

All of the hearsay exceptions (with the exception of Rule 804(b)(6)) are based on some notion that the evidence bears some indicia of trustworthiness (a proxy for intrial cross examination) and practical necessity. Though modem social science has shown that some exceptions admit hearsay which is notoriously unreliable (e.g. excited utterances are often erroneous because the declarant of an excited utterance operates with impaired senses), the key to trustworthiness appears to be presumed sincerity of the declarant rather than accuracy.

The majority of hearsay exceptions provide for the admission of hearsay irrespective of the availability of the declarant, but the 6 exceptions contained within Rule 804 permit admission only if the declarant is "unavailable" within the term of art meaning of Rule 804(a). Students must be made aware of the fact that a declarant can be sifting in the courtroom (e.g. having asserted a privilege) and still be "unavailable" under Rule 804(a).

Declarations Against Interest

As the Jefferson article (p. 586) and the cases make clear, the reliability component of this exception is based on t e notion that a reasonable declarant would not utter a statement which subjects her to some sort of liability unlesslle believed the statement to be true. The foundation for admissibility includes: (1) unavailable declarant, (2) a statement against interest at the time of its making, and (3) so far against her interest that the declarant would not make unless she thought it true. (As with all exceptional hearsay, the

declarant must have personal knowledge of the content of the statement).

United States v. Biener (p. 532)

Biener, decided in 1943, was one of the first decisions to recognize the merits of establishing a exclusion from the definition of hearsay for statements made outside of court by declarants who are now present in court and available for cross-examination.

The defendant in Biener had been charged with one count of violating the Mann Act, which makes it a felony to transport a woman in interstate commerce for immoral purposes in other words, prostitution.

The government's chief witness against the defendant was one of his call girls. She initially cooperated with the FBI saying in substance, "The defendant is guilty. He brought me from Chicago to Philadelphia to engage in acts of prostitution, and I did."

At trial however, she testified in essence, "The defendant is not guilty. I never engaged in prostitution. It's true I was in Philadelphia, but only as a tourist. And the only bell I rang was the Liberty Bell." Naturally, the prosecution wants to impeach her. Of course, at common law you couldn't impeach your own witness and although there was an exception where the proponent had been surprised and prejudiced, the government could not establish surprise as the witness had previously told the FBI that she would recant her earlier statement. Even so, the trial judge let the prior statements in for impeachment's sake. Keep in mind that Rule 607 today eliminates the voucher principle so you can impeach -your ovvn witness.

After the trial judge allowed the witness to be impeached, the central issue became what evidentiary effect to give the prior inconsistent statements. The witness acknowledged having made the prior inconsistent statements, but said that they weren't true. She basically maintained that the FBI had pressured her so she told them whatever they wanted to hear.

The FBI agent then took the stand, denied having pressured the witness, and testified that she previously said she had gone from Chicago to Philadelphia to engage in prostitution.

These statements came in initially to impeach her. But the government's problem was that no other substantive evidence proved that the defendant had transported this witness from Chicago to Philadelphia to commit prostitution. In other words, the witness' prior inconsistent statement was really the only evidence that the government had against the defendant, **but this was only admissible to impeach her credibility.** So, based upon this gap, the defense moved for a directed verdict saying that there is no competent substantive evidence establishing this element of the crime. The court however denied the motion for a directed verdict and let the case go to the jury.

I don't know what prompted the judge to reconsider this ruling. Maybe during jury deliberations, his law clerk gave him a heads up: “Judge, you admitted the witness' prior inconsistent statement to impeach her, but, under the assertion oriented definition, they are still hearsay if offered for their truth. Other than these statements, the government had no

evidence establishing that this defendant brought anyone from Chicago to Philadelphia to engage in prostitution. And therefore, the defense was entitled to its directed verdict."

The judge, having more time to reflect, apparently realized: You're right. At this point, the court undoubtedly began praying for a judgment of acquittal. The jury however didn't cooperate, they convicted based on the witness' hearsay testimony. The judge then responded by doing the right thing. He issued a corrective ruling:

"Notwithstanding my earlier ruling denying D's motion for a directed verdict of acquittal, the jury's guilty verdict cannot stand because, other than the witness' hearsay statements, there was no substantive evidence establishing that defendant caused this woman to go from Chicago to Philadelphia to engage in prostitution."

The court granted the motion for judgment nov.

Biener thereby exemplifies how the hearsay rule can have significant bite when a statement is admitted for a non-substantive purpose to avoid the hearsay rule. i.e., the statement comes in but has little effect.

The trial judge's opinion acknowledged his prior error, but also took pains to point out that the common law rule makes no sense when your declarant is also an incourt witness.

Biener was the first published opinion to criticize the difficulties associated with the assertion-oriented definition of hearsay which prevailed at common law. Given the rationale underlying the hearsay doctrine, it rarely makes sense to enforce the rule when your OCD is also your ICW. The next case, U.S. v. Desisto, involved a similar problem and a court struggling with how to deal with it. Desisto signified the first time that any appellate court deviated from the common law rule.

United States v. DeSisto (p. 535)

DeSisto involved a hijacking that occurred in New York City. Wimpy was handcuffed to a tree for several hours. His cries for help were initially ignored — most people apparently thought that he was a tree-freak or something. When the police finally arrived, they began to free him by sawing down the tree. Eventually, someone — maybe Wimpy himself realized that, if they kept sawing the tree would crush him.

Anyway, they freed him, brought him to police headquarters and showed him photographs taken from their files of usual suspects — every one of whom had a last name ending in a vowel. When Wimpy saw DeSisto's photographs, he said "That's the one." DeSisto was arrested after which Wimpy identified him at a line-up, before a grand jury and at his first trial.

At the second trial on direct examination, he again identified DeSisto, but on cross-examination, defense counsel asked whether Wimpy had noticed the hijacker's arms. Wimpy said, "Yes." Counsel then asked whether the hijacker had any tattoos on his arms — to which

Wimpy replied "No." At that point, DeSisto stood up, took off his jacket, and showed the jury his grotesquely tattooed arms. Wimpy said, "That could not be the man. I made a mistake."

The government then tried to rehabilitate Wimpy — basically by taking him through all his prior identifications, which I have reviewed with you. In effect, these prior identifications are now prior inconsistent statements, given his present trial posture.

The court lets these prior statements into evidence, and the jury convicts without any other evidence identifying DeSisto as the highjacker.

The issue central issue on appeal was whether these prior inconsistent statements came in as inadmissible hearsay. They came in to impeach the witness at trial, but as in —Biener, the government had no other substantive evidence establishing DeSisto's guilt. So, while the prior statements initially came in to impeach the witness and therefore were not hearsay for that purpose, ultimately, the prosecution and jury used them substantively, thereby triggering the hearsay rule. In other words, substantively those statements were being offered for their truth—that "DeSisto was the man."

On appeal the government argued the policy underlying the hearsay rule makes no sense when the declarant is also the witness, fully subject to cross. The Second Circuit Court of Appeals agreed with this reasoning. Its opinion advanced the same types of policy concerns that the judge in Biener discussed focusing both on **common sense and the mental gymnastics** that the jury must undertake when the court gives its limiting instruction telling them to consider these statements only for impeachment's sake and not for their truth. No one is really capable of following that type of instruction.

The Second Circuit also suggested that **a statements made at trial might be less reliable than an earlier identification made closer to the event.** For example, Wimpy's initial identification of DeSisto from the photographs and the line-up was arguably more reliable than DeSisto's trial testimony. A witness is more likely to remember an event when it is still relatively fresh in mind.

The Second Circuit also noted that at **least some of the prior statements were given under oath before the grand jury and also at the first trial — and indeed the testimony at the first trial had been cross-examined.**

Ultimately, the DeSisto court focused on all these factors (some of the prior statements had been given under oath, some had been subjected to cross-examination, and all involved the witness' prior identification of the D, which was likely to be more reliable than the witness' in-court identification, and concluded that, together, they suggest treating this type of situation as non-hearsay. On this basis, the court held that these statements should come in for their truth and upheld the conviction.

DeSisto provided the initial framework for addressing how the FRE should treat this issue. Note that the DeSisto court didn't create a general carve-out for declarant witnesses, but essentially identified certain factors which, in this instance, provided enough assurance of

reliability to warrant treating his prior statements as non-hearsay.

These DeSisto factors framed the contours of the debate when Congress considered this issue in connection with the proposed rules of evidence. Rule 801(d)(j) as originally proposed by the Supreme Court Advisory Committee would have admitted all prior statements by an OCD who is also an ICW. In other words, the Supreme Court Advisory Committee recommended abrogating the common law rule as essentially a rule without a rationale; so, that all out-of-court statements made by in court witnesses would have been treated as non-hearsay.

That proposal however, encountered great resistance. Congressional liberals, in particular, argued that this approach admitted too much hearsay in criminal trials. And so they proposed an alternative that would have allowed witnesses to testify about their prior out-of-court statements if all the DeSisto factors were present (prior statements of identification made under oath and subject to cross-examination).

This, in turn, provoked Congressional conservatives who insisted that the proposal went too far in the other direction. Only one other hearsay exception, they pointed out, requires that a statement given under oath and subject to cross-examination. And that is the exception for prior testimony. Ultimately, Rule 801(d)(1), as adopted, compromised between these two positions. Let's take a look at Rule 801(d)(1) dealing first with prior inconsistent statements — 801(d)(1): The declarant testifies at the trial or hearing, is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition.

So, not all prior inconsistent statements come in for their truth (only those made in a formal setting as which there will likely be a record of the statement). In this respect, Rule 801(d)(1)(A) provides an important safeguard by avoiding potential swearing contests over whether the witness ever made the prior inconsistent statement.
Tome v. United States (p. 540)

Next, Rule 801(d)(1)(B) involves prior consistent statements by a witness subject to cross-examination: A statement "consistent with the declarant's testimony...offered to rebut an express or implied charge against the witness of recent fabrication or undue influence."

Under what circumstances have we seen prior consistent statements previously offered into evidence?

The issue arose in a credibility context to rehabilitate the witness. The case was People v. Singer, the abortion case in which the government introduced a prosecution witness' prior consistent statement made before the event that gave rise to the trial witness' alleged motive to falsify — before the witness was taken into custody. And the court let it in to rehabilitate.

The common law, however, admitted prior consistent statements only to

rehabilitate, which meant that they carried no weight substantively — a prior consistent statement wasn't admitted for its truth. So, for example, it couldn't help the government meet its burden of proof substantively to avoid a directed verdict, it could only rehabilitate a witness.

Rule 801(d)(1)(B) goes a step beyond that in that a prior consistent statement comes in not only to rehabilitate, but substantively as well — it comes in for its truth even though it would otherwise be hearsay under an assertion-oriented definition.

Now, the key factor for admitting a prior consistent statement, at common law, was that the statement must have been made before the event that gave rise to the alleged motive to falsify or that was the source of the improper influence.

801(d)(1)(B), however, did not specifically address that issue. Query: Must the declarant have made the prior consistent statement before the event that triggered the alleged motive to falsify?

In Tome, the government offered a witness' prior consistent statements to rebut a charge of recent fabrication. Defense counsel had implied that the complaining witness made up her story because she wanted to change her parental custody situation. The problem facing the government, however, was that the proffered prior consistent statements did not predate the alleged motive to falsify — they were just general prior consistent statements.

The trial court admitted them anyway and the issue on appeal became: for admissibility under 801(d)(1)(B), must the declarant have made the prior consistent statement before the alleged motive to falsify occurred?

The Supreme Court looked at the text of Rule 801(d)(1)(B), which limits the use of prior consistent statements to rebut an express or implied charge of recent fabrication or of improper influence. So such statements may not come in just to bolster a witness credibility generally. This limited purpose for admitting prior consistent statements implies — and the Advisory Committee text seems to confirm — that a prior consistent statement must predate the motive to falsify.

Rationale: only a statement that predates the motive to falsify is capable of rebutting a charge of recent fabrication. So, the Supreme Court in Tome essentially adopted the common law rule requiring that the statement must predate the event that gave rise to the alleged motive to fabricate. Prior consistent statements are not otherwise admissible.

Notice that, unlike prior inconsistent statements, which must have been made under oath, prior consistent statements need not have been made under oath. Congress must have recognized that prior consistent statements ordinarily wouldn't be made under such circumstances, and if the FRE imposed this requirement, there would almost never be occasion to apply this doctrine.

Statements of Identification

Prior statements of identification

Rule 801(d)(C) admits an out-of-court statement of identification where the declarant testi ies a a and is subject to cross-examination on the statement. The identification is admissible only where it is a statement which is made during or shortly after viewing either the person identified or a photograph of such person. This rule recognizes the likelihood that an identification is accurate when made, even if the memory of the identifying witness has faded by the time of the trial. This rule permits the out-of-court statement of identification to rehabilitate impeached identification witness without meeting the requirement of a prior consistent statement set out in Rule 801(d)(1)(B).

Public records or reports gain their reliability from the public duty or the duty imposed by law which accompanies the maker's obligation to observe and record the kinds of events contained in such public records or reports. In addition, the maker of the record or report will have no interest in reporting or recording information favoring one side over another. Note that there are three types of matters which are admissible under the public records exception:

(a) records or reports that disclose the activities of the public agency
(b) observations made pursuant to legal duty and which the public official has a legal requirement to record,
(c) factual findings (and conclusions and opinions derived there from) which are derived from an investigation made pursuant to law. *Beech Aircraft v. Rainey*, 109 S.Ct. 439 (1988).

Note that the rule strictly forbids the use of public records or reports against criminal defendants where such reports are made by law enforcement officers, while permitting the use of public records and reports including the results of official investigations to be used in any civil action or to be offered against the government in a criminal case.

As with the business records exception (Rule 803(6)), the entrant must have personal knowledge of the matters contained in the report or must obtain such information from one with personal knowledge assuming that the person who furnishes such information to the official entrant is under a business duty to do so. Furthermore, as with Rule 803(6), there is a trustworthiness proviso which provides an additional check on admissibility pursuant Rule 803(8). In determining whether the circumstances surrounding the creation of the report or record indicate trustworthiness, the Advisory Committee notes list the following factors as appropriate for consideration:

(1) the timeliness of the investigation,
(2) the special skill or experience of the official performing the investigation,
(3) whether a hearing was held, and the agency level at which it was held, and
(4) any possible bias on the part of the investigator or preparer with a view toward possible litigation.

There is, of course, overlap between the public records and reports exception and the business records exception, and there are many records which would qualify as both. In order to

avoid the government's use of the business records exception to offer the results of a police investigation against a criminal defendant under the business records exception, courts have held that the business records exception is as unavailable as is the public records exception for the purpose of offering police reports against criminal defendants. Others have ruled that evidence which does not qualify for admission against a criminal defendant under Rule 803(8) may be admissible under Rule 803(6), the exception for Records of Regularly Conducted Activity. Admission of hearsay against a criminal defendant must, of course, not run afoul of the Confrontation Clause of the Sixth Amendment to the United States Constitution.

H. NON-HEARSAY STATEMENTS ADMISSIBLE FOR THEIR TRUTH

1. Introduction

The Federal Rules of Evidence followed the universal common law in admitting out-of-court statements by parties for their substantive truth if the statement is offered by an opposing party. Unlike the common law, however, these statements, known as admissions, are characterized in the federal rules as "admissible non-hearsay" as opposed to "the admissions exception to the hearsay rule." Though admissions in the federal courts operate functionally identically to a hearsay exception, the federal rulemakers chose to treat admissions in a unique way because, unlike the hearsay exceptions, admissions do not bear any particular guarantees of trustworthiness.

State v. Johnson (p. 550)

Students (and some lawyers and judges) often confound party admissions with declarations against interest (Rule 804(b)(1)). This confusion is likely engendered by the unhelpful denomination of opposing party statements as "admissions," a term which implies that the statement must have been against the party-declarant' s interest when it was made. This is, of course, untrue. It is clearer to refer to party admissions by a more accurate descriptor: "any out-of-court statement by a party offered by an opposing party."

Evidentiary Foundation: The Trial of Lizzie Borden (p. 553)

The Lizzy Borden transcript provides another example of the difference an admission and a declaration against interest. We will see when we cover the DAIthat the statement must have been against the declarant's interest when it was made. Lizzy Borden, however, made a false exculpatory statement suggesting that someone else had an argument with her father, thereby implying that this other person might have been the killer. Accordingly, when she made that statement, it was not against her interest. It was very much in her interest.

At trial, it was offered by the prosecution as a false exculpatory statement; incidentally, is that statement even hearsay? No, the government is not offering that statement for its truth. They were only offering it to show that Lizzy had made a false exculpatory statement, which isn't hearsay.

The point is that this statement was not a declaration against interest at the time she

made it, but it still comes in as an admission — it is inconsistent with her position at trial right now. So the main point of the Borden transcript is that, although it was not against interest at the time it was made, Lizzie's statement still qualifies as an admission because admissions don't have to be against interest when they were made — they need only be against interest at the time of trial.

Bill v. Farmer Bureau Life Insurance Co. (p. 554)

The question here is how did the decedent die? Incidentally, there is a lot more going on here than meets the eye. But we are short on time so I can't really get into it in more detail with you. I can only tell you that the cause of death was not necessarily suicide; it may have been accidental sexual asphyxia.

The plaintiffs were beneficiaries under their son's life insurance policy. They're suing the insurance company, which declined to pay on the policy maintaining it was void due to suicide. Plaintiffs' claim of accidental death prevailed at trial.

On appeal, the defense argued that the trial judge improperly excluded crucial evidence specifically the father's lateral nodding of the head in response to the question: "Is there any doubt in your mind that your son committed suicide?" Is the father's lateral nodding of his head an admission?

First question: Is it a statement? Well, it is assertive conduct. Second: Is it being offered for its truth? If so, it is hearsay. And finally: Does it come in nevertheless as an admission?

Assertive conduct qualifies as hearsay, and certainly the father nodding his head under these circumstances is assertive conduct so this is hearsay if the statement is offered for its truth.

Note, incidentally, the question put to the father: Is there any doubt in your mind that your son committed suicide? Is not hearsay. Why not? Because it is not an assertive declaration. It is not capable of being true or false. The father's response however, by virtue of being assertive conduct, is hearsay.

Also note that, if the father testifying at trial had been asked, "Is there any doubt in your mind that your son committed suicide? His answer would have been ruled incompetent for lack of personal knowledge. He didn't observe the event and he would not likely have qualified to render a lay witness opinion under these circumstances because his answer would not have been based upon personal knowledge.

The court however allows this evidence because it's a party admission. So, the point is that the admission doctrine is actually broader than the witness competency requirement. Lack of personal knowledge or the declarant's incompetence to render an opinion does not necessarily preclude a statement being admitted as an admission.

In contrast, virtually every other hearsay exception, under Rules 803 and 804, requires

the declarant to have personal knowledge. However, as to admissions, the fact declarant lacks personal knowledge or is rendering what would otherwise be incompetent opinion does not bar admissibility.

Rationale: the party to a lawsuit is deemed to have personal knowledge of any event that he describes in an out-of-court statement. In essence, when the admission concept developed, the common law courts assumed that a party would not make a statement without having checked out the underlying circumstances.

In addition, as a party to a lawsuit who has voiced an opinion, under the estoppel rationale you are stuck with it. The problem with this rationale, however, is that people often make statements lacking personal knowledge because they don't necessarily have litigation in mind; and consequently, a declarant might not have taken the trouble to check out all the details.

Beyond that, the admission doctrine also applies to agents. which means that a party can be stuck with statements made by an agent who lacked personal knowledge.

Why do we tolerate this? There really is no good explanation other than the estoppel rationale that justifies the admission doctrine overall. If you or your agent make a statement, you are stuck with it.

There is one other problem with this case, which neither the court nor the parties apparently addressed: the father nodding his head laterally is, at best, an ambiguous statement. He shakes his head from side to side. We don't really know what he meant under those circumstances. He was obviously grief-stricken. He might not even have heard the statement, and might have been moaning in pain shaking his head from side to side. Q: Does ambiguity preclude admissibility?

Ordinarily, assuming that you can establish that the party heard the state and that is a conditional relevancy issue under Rule 104(b) the fact that the declarant's statement is somewhat ambiguous goes to weight rather than admissibility.

Next question: How would this case have been decided under the rules of evidence?

Rule 801(b)(1)(A): Let's assume that the father makes an out-of-court statement “I have no doubt that my son committed suicide." Under Rule 801(d)(2)(A), the statement comes in as a party admission.

Next question: How does 801(d)(2)(A) differ from Rule 801(d)(2)(B)? 801(d)(2)(B) deals with the adoptive admission doctrine. An adoptive admission does not mean that one of the parties is adopting the statement to take home and raise as a young child. It means that by words, actions, or inactions the party has somehow acknowledged the statement at issue to be true.

In fact, in the Bill case, who arguably made an adoptive admission?

The mother did. She acquiesced under circumstances in which a reasonable person arguably would have objected. So, that constitutes an adoptive admission.

Adoptive admissions can take a variety of forms. Sometimes it might be an affirmative statement accepting someone else's statement as true — saying, "Yes," or "Okay," for example might constitute an adoptive admission.

But usually the issue arises in the context of silence failure to contest a statement may constitute an adoptive admission. Two cases illustrate that point for you; Olert v. Zibell (p. 557) and United Sates v. Flecha (p. 559).

Here, the court points out that an adoptive admission by silence requires not only that the party hear the allegedly adopted statement, but that such party hears it in "circumstances which render it more reasonably probable that a man would answer the charge made against him than he would not." The court points out that an arrestee in the presence of the police would not be expected to reply to his co-actor's statement of "if we are caught, we are caught."

United States v. Kilbourne (p. 560)

Contrarily, where the murder defendant remains silent when confronted with his early, unexplained knowledge of the victim's death, the court finds an adoptive admission by silence.

Vicarious admissions

We have covered the party admission and the adoptive admission. The next aspect of the admission doctrine is the so-called vicarious admission, which concerns statements made by a party's agent. The issues that arise in this context tend to be: what types of statements by what types of agents will bind their principals. When these issues first arose, difficulties arose because courts applied conventional agency principles without regard to their practical consequences.

And, so the question becomes whether this statement is admissible against the corporate deep pocket. When this problem first arose, judges didn't know how to deal with it, so they applied conventional agency law; meaning that, if a principal authorized the statement, it could be used as a vicarious admission. In other words, under agency law the principal was stuck with the statement only if the principal authorized it.

As a result however, very few statements qualified as vicarious admissions because, absent explicit or implied speaking authority – an agent's statements were not admissible against the principal as vicarious admissions. That was the common law position, and it is laid out for you in Professor Morgan's commentary on page 563.

Big Mack Trucking Company, Inc. v. Dickerson (p. 564)

Plaintiffs husband met his demise when he was sandwiched between two trucks while eating lunch another example of the dangers of eating red meat. Two statements are at issue: first, the truck's driver statement to a company official essentially acknowledging that the brakes were defective; and second, a similar statement he made to an investigating police officer. Of course, both of these statements would qualify as admissions in an action against the truck driver, but as to the deep-pocket corporate defendant they are admissible only if they qualify as vicarious admissions.

As to the statement made to the company official, the court says that the common law did not extend the vicarious admission doctrine to in-house statements. Rather, the vicarious admission rule applies only to statements a company employee made to the outside world- that was a threshold requirement.

Okay, what about the truck driver's statement to the police officer?

That is a statement made to the outside world. But the court says that the company did not authorize him to make such statements. Absent explicit or implied authorization to speak, it does not come in. In other words, the rationale is: Mr. Truck driver, you were hired to drive trucks, not to make statements on behalf of your principal. That was the common law view, which Big Mack embraced.

So at common law, you had to establish the existence of an agency relationship and that such agency included "speaking authority." Since relatively few agents had speaking authority narrow scope to the doctrine.

Now, Martin (p. 565) was a 1954 decision, which reflects a new line of analysis ultimately taken by the rules of evidence. The defendant's driver made what the court characterizes as a declaration against interest. (It is true that the driver's statement was a declaration against his interest; however, this court, like others, blurred the distinction between the admission doctrine and the declaration against interest. They are separate principles.) Many admissions are obviously against the declarant's interest, but to qualify as an admission, your statement need not necessarily have been against interest when made.

In contrast, a declaration against interest must be against interest when made. **It does not, however, have to be against any party's interest.** This court consistently refers to the driver's statement as a declaration against interest, which it was as to him; but the central issue of the case involves whether the statement comes in as a vicarious admission. And vicarious admissions are separate and distinct from declarations against interest. Admissions are statements made by parties. Declarations against interest are almost always made by non-parties and require declarant unavailability as a condition for admissibility. (The distinction will become more apparent once we get into the declaration against interest doctrine.) So keep in mind, every time this court refers to the driver's statement as a declaration against interest, it is a declaration against interest as to him, but our present context concerns whether it qualifies as a vicarious admission (and to qualify as a vicarious admission, the statement need not have been against interest when it was made.)

One more example: Suppose that O.J. Simpson is picked up in Chicago and interrogated by the police about a homicide that occurred in Illinois. O.J. says, "I wasn't in Chicago on that day. I was in Santa Monica, California on that evening." That statement, when given, appeared self-serving and very much in his interest. However, when he is subsequently charged with Nicole's murder, the California authorities would seek to admit into evidence his statement to the Chicago authorities to establish his presence at the crime scene on the date in question. His statement would come in against him as an admission. It was not a statement against interest when it was made, he perceived it to be very much in his interest when it was made, but it comes in against him as an admission in his California murder prosecution. So, admissions operate independently of the declaration against interest exception.

Okay, back to Martin. Our focus is on whether the driver's statement qualifies as a vicarious admission (rather than as a Declaration Against Interest). Relying upon the conventional common law view, the company argued: "Wait a minute; this truck driver did not have speaking authority."

This court however, pierces the veil enveloping the common law rule, and says: The common law rule is contrary to public policy. Corporate officers, after all, usually don't drive trucks. There is no reason to protect corporations in ways that a sole proprietor would not get protected. If a sole proprietor says, "Oh my heck, the brakes failed," it comes in against him as an admission. There is no reason to protect corporations from similar statements their employees make, provided that those statements occurred within the scope of their employment.

The court emphasized the great need for such statements, and suggested that, to a certain extent, they are also reliable that typically corporate employees will attempt to speak accurately because their employment may depend upon accuracy. Now, of course, this rationale is somewhat questionable as that same desire to keep one's job might motivate an employee to make false statements of some kind. Ultimately, however, this court suggests that, even if reliability is questionable, the corporation should be stuck with it under an estoppel rationale: your agent made the statement, you employed him; so you are stuck with him and the statement.

Take a look at Rules 801(d)(2)(C) and (D). Admission by party opponent: The statement is offered against the party is (C) "a statement by a person authorized by the party' to make the statement concerning the subject." So Rule 801(d)(2)(C) essentially codifies the common law rule for vicarious admission, the agent must have speaking authority.

However, now look at subsection (D): "a statement made by the party's agent or servant concerning a matter within the scope of the agency or employment made during the existence of the relationship." That position codifies the court's position in Martin.

The key point is that the statement must concern a matter within the scope of the employment relationship and it must have been made during the course of that relationship. If it was made after the relationship terminated, it is no longer a vicarious admission because the declarant is no longer an agent. Under subsection (D), so long as the agent's statement concerns a matter within the scope of his employment, it comes in as a vicarious

admission; but you must establish the existence of the agency at the time that the statement was made.

Mahlandt v. Wild Canid Survival and Research Center, Inc. (p. 568)

First Question: Who is suing whom for what?

Plaintiffs are parents suing on behalf of their minor child for damages arising out of Sophie's alleged attack. The defendants are the research center and its employee, Mr. Poos.

Note first that Mr. Poos' statements came in against him as admissions. But the core of the case concerns whether his statements qualify as vicarious admissions so that they can also be used against his employer, the Research Center. You can begin to see how the admissibility of a proffered admission depends upon which subsection of FRE 801(d)(2) governs. For example, clearly, Mr. Poos' statement comes in against him as an admission under (d)(2)(A), but it doesn't necessarily come in against his employer unless it meets the requirements under 801(d)(2)(C) or (D).

The defendants won at the trial level. On appeal, plaintiffs argued that the trial court improperly excluded the following statements.

First: a note Poos wrote and left at his employer's door. The out-of-court declarant is Poos, and the out-of-court statement is "Sophie bit a child."

Poos also made an oral statement to his employer to the same effect, "Sophie bit the child."

And third we have corporate minutes stating that "Sophie bit the child."

Q: Hearsay or non-hearsay?

Hearsay: If the statement is offered to prove the matter described in the statement itself — that Sophie bit the child, it is hearsay. So, under the assertion-oriented definition it is hearsay.

Query: Are these statements admissible notwithstanding their hearsay status? Let's deal first with the corporate minutes. How might they be admitted into evidence - as an admission by the corporation.

Corporate minutes amount to the corporation speaking (albeit to itself).

Incidentally, would this vicarious admission also be admissible against Mr. Poos? No, the corporation is the principal and Poos is its agent. Since a principal lacks authority to bind its agent, a principal's statements are not admissible against an agent, at least not as vicarious admissions. So the vicarious admission runs upstream, but not downstream the corporate minutes are admissible against the corporation, but not against Mr. Poos.

Defendants also argued that none of these statements should have been admitted because Mr. Poos lacked personal knowledge of the underlying event. He never saw Sophie bite the child.

Query: whether personal knowledge is a prerequisite to admitting a vicarious admission. The defendants argue that the underlying commentary for Rules 803 and 804 requires personal knowledge before a hearsay exception can be admitted. The difficulty with this argument, however, is that the advisory committee comments make no reference to personal knowledge in connection with Rule 801; and furthermore, the common law courts allowed admissions irrespective of the declarant's lack of personal knowledge. Court concludes that 801(d)(2)(D) does not require personal knowledge.

Mahlandt's final issue concerned whether in-house memos can qualify as admissions. We saw that the Big Mack case held that internal statements do not qualify as admissions the statement must be made to the rest of the world. This court however rules, based on the advisory committee comments, that in-house statements qualify as vicarious admissions and enjoy no special protection. So this common law limitation does not apply to the federal rules.

Accordingly, internal memos and corporate, email may qualify as a vicarious admission. Cases like this have opened the door to investigative scrutiny of corporate documents such as routing slips, email and other types of internal statements. In the Microsoft litigation, internal email proved devastating to Microsoft's defense.

Summary So Far

Let's review the evolution of the admission doctrine under the FRE. First, we have the party admission plain and simple: any statement made by a party inconsistent with the party's position at trial today that is 801(d)(2)(A).

Then we have the adoptive admission. The adoptive admission typically occurs when there's silence under circumstances in which protest would reasonably be expected if the statement were untrue (Rule 801(d)(2)(B)).

Rule 801(d)(2)(C) contains the common law position on vicarious admissions requiring that the agent must have speaking authority. And then Rule 801(d)(2)(D) extends the common law vicarious admission to statements made by agents within the scope of their employment. And then finally, we have 801(d)(2)(E) statements made by co-conspirators. Let's turn our attention to that right now.

d. Co-conspirator Declarations

1. Introduction

Co-conspirator declarations are treated as admissions under the rules of evidence

analytically as an extension of the vicarious admission doctrine. Common law courts alogized conspiracies to business partnerships. For example, in a law or accounting partnership, the statements or actions of each partner bind the entire partnership, which is why when one partner acts negligently or commits egregious misconduct all other partners are held accountable for it.

The co-conspirator doctrine is based on a similar rationale. The co-conspirators are, in effect, partners in crime and so they bind each other by their words and actions. And so the rule at common law was that a conspirator's out-of-court statements, made in furtherance of a conspiracy, come in as admissions against all members of the conspiracy (including anyone who joined the conspiracy after the statements were made more or less under a ratification theory. You joined the conspiracy knowingly, you're stuck with whatever happened beforehand).

In addition to basing this doctrine on agency theory, there was also somewhat of a reliability rationale. Presumably, statements made to promote the conspiracy are likely to be true. The declarant certainly has ample motivation to speak truthfully.

Conspiracy law, after all, was developed in response to problems of proof occasioned by group crime. Group crimes tend to be more complex and more problematic than prosecuting individual violators. And so to help law enforcement get at complex conspiracies, the common law courts looked for ways to give prosecutors an assist, and the co-conspirator exception did just that.

Now, incidentally, notwithstanding this doctrine having originated in a criminal context, it applies across the board even in civil cases and even without a formal conspiracy charge. (i.e., civil racketeering cases such as RICO, for example, statements made by co-conspirators in furtherance of the conspiracy are admissible against other members of the conspiracy.)

United States v. Haldeman (p. 573)

This case illustrates how the doctrine applies. In Haldeman, the government proferred various tape-recorded statements that had been made by President Nixon and his Chief Aides, Haldeman and Erlichman. Haldeman's statements were admissible against him as admissions. Likewise Erlichman's statements came in against him individually. Nixon was not prosecuted.

This government now wants to admit these statements against former Attorney General, John Mitchell. The statements at issue concern the Oval Office conversations of cover-up and conspiracy in connection with the Watergate investigation. Mitchell's defense counsel came up with a very clever argument. He realized, having listened to the conversations carefully, that most were narrative accounts of prior events. Counsel argued that, as the participants were merely reviewing prior events, these conversations could not be in furtherance of a conspiracy.

The "in furtherance" requirement is crucial to the co-conspirator doctrine. Since most

conspiracies are purely forward looking, this usually means that historical accounts of prior events won't qualify.

And so, for example, if persons are also involved in the conspiracy — even though they were not present when these conversations occurred, our drug conversations would be admissible against them as co-conspirator declarations.

Resolving this issue requires an understanding of the so-called "furtherance" requirement. Why is that requirement imposed?

This can best be appreciated by thawing an analogy to the scope of employment language in the vicarious admission doctrine. Only statements in furtherance of the conspiracy fall within the agency rationale that provided the original justification for this doctrine. In other words, statements not in furtherance of the conspiracy are not within the scope of employment or within the scope of the criminal partnership.

The other reason for the "in furtherance" requirement is a reliability justification. If it is not in furtherance, it is not likely to be that reliable.

The court in Haldeman acknowledged that, as a general proposition, narrative statements do not fit within the furtherance requirement. But this case does not involve mere historical narratives. Rather, these backward looking statements were crucial to the Watergate Conspiracy. Since the objective of the conspiracy was to cover up a prior crime, the co-conspirators had to review prior events. Their goal was to impede the Senate Watergate Committee and the special prosecutor's investigations into the Nixon Administration's efforts to corrupt the democratic process. This made it essential for them to review prior events in order to mastermind the cover-up. And so, under these unique circumstances, their narrative accounts of prior developments were very much in furtherance of the conspiracy. On that basis, the court held that the "in furtherance" requirement had been satisfied.

Now, former AG John Mitchell wasn't going to go off to jail without a fight so he said: "Wait a minute, what about the personal knowledge requirement that hasn't been satisfied here. These declarants lacked personal knowledge of what they were describing."

The court's response: The co-conspirator rule is a subset of the admission doctrine, which does not require personal knowledge.

3. FRE 802(d)(2)(E)

Let's look at how the federal rules have codified common law conspiracy doctrine 801(d)(2)(E): A statement by a co-conspirator of a party made during the course of and in furtherance of the conspiracy. It must occur during the course of the conspiracy because otherwise the declarant would not be a partner in crime and the required agency relationship would be absent.

In other words, just as the vicarious admission doctrine requires an ongoing agency

relationship, the co-conspiracy rule requires an ongoing conspiratorial relationship. Rule 801(d)(2)(D), the vicarious admission doctrine, speaks of statements made during the existence of a relationship. Rule 801(d)(2)(E), the co-conspirator rule, speaks of statements made during the course of the conspiracy. So, statements made before or after the conspiracy don't qualify. And beyond that, the statement must be made in furtherance of the conspiracy consistent with common law doctrine.

Bourjaily v. United States (p. 577)

The admissibility of all hearsay exceptions is governed by Rule 104(a) it involves a preliminary factual determination concerning a matter of competency. Among other things, Bourjailly ruled that 104(a) determinations must be made by a preponderance of the evidence. So, the court must find by a preponderance of the evidence that the conspiracy existed and that the statement was made during the course of and in furtherance of the conspiracy.

Bourjaily also held that the statement itself may be considered in making that determination. In other words, in deciding if a conspiracy existed, the court may consider the statement itself along with other evidence that a conspiracy existed. The SC did not decide whether the statement alone might be sufficient to support a finding of conspiracy, noting only that the trial judge may consider it as one of the factors in determining whether a conspiracy or agency relationship existed.

6. Rule 801(d)(2)(E) Amendment

Congress amended Rule 801(d)(2)(E) in the aftermath of Bourjaily to underscore one key point. The critical language is the second sentence in 801(d)(2)(E): the contents of the statement shall be considered, but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and the scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is being offered under subdivision (E).

So, this amendment essentially codifies the Bourjaily decision, but says that there must be proof beyond the statement itself to establish the requisite foundation. Congress implemented that change because the Bourjaily decision left open the possibility that the statement alone might be sufficient to prove the existence of a conspiracy.

Evidentiary Foundation: The Trial of Harrison A. Williams, Jr. (p. 580)

The prosecution here tried to introduce co-conspirator Alex Feinberg's statement to the stingman Weinberg about Feinberg's arrangement with the Senator concerning their share in a mining operation. Williams' lawyer objects.

Note that this statement comes in against Feinberg directly as an admission, but that doesn't necessarily get it in as to the Senator. To do that, the government must find some other hearsay exception or some basis for arguing that it is not hearsay at all. The prosecutor argues

the statement was either a co-conspirator declaration or otherwise admissible as a vicarious admission (because Feinberg worked for Williams, and, therefore, was his agent). The defense responded that the co-conspirator doctrine did not apply because the conspiracy had not yet been formed. This triggers the government's fallback argument: even if there was no conspiracy, Feinberg was Williams' agent so this statement qualifies as a vicarious admission.

These arguments still required the government to establish the existence of either the agency or the conspiracy. Query: may the court consider the statement itself as proof of the agency relationship? In other words, suppose that the statement is, "Hey, Mel, the Senator and I have formed a conspiracy, and I want to talk to you about some actions we should take in furtherance of that conspiracy." (That is the kind of conversation I never had as a prosecutor, but I seem to get it all the time when I'm representing defendants). May the court consider that statement in determining the existence of the conspiracy? The Supreme Court addressed this issue in Bourjaily.

United States v. McDonald (p. 589) and Williamson v. United States (p. 600)

The McDonald case addresses the special corroboration requirement that FRE 804(b)(3) imposes when a Declaration Against Interest is proffered for exculpatory purposes. McDonald is otherwise known as the "Fatal Vision" case by the book and the movie of the same name. McDonald, a captain in the military, was accused of murdering his wife and children. In defense, he maintained that a Charley Manson-like group of hippies had invaded his home and killed his family, but that miraculously he survived.

As part of his defense, McDonald described a woman who walked around his home holding a candle throughout the whole ordeal. He described her as having blondehair, a floppy hat, and wearing high boots.

To support this defense, he offered numerous out-of-court statements made by one Helena Stoeckley admitting to having been at the homicide scene. Stoeckley acknowledged that she owned a blonde wig, some floppy hats, and high boots, and also admitted that she burned the wig and discarded the boots a few days after the killings.

McDonald proferred these statement against interest as exculpatory evidence. The trial court however, observing that Stoeckley was a dope addict, found her inherently unreliable and concluded that her statements lacked the special corroboration of reliability needed to clearly indicate trustworthiness under FRE 804(b)(3).

On appeal, the problem facing the government was that the trial judge really should not have made his reliability determination by focusing on the declarant's lack of credibility. In effect, the trial judge deemed Stoeckley incompetent to testify which violates conventional competency principles. Had Stoeckley been willing to testify under oath and claimed to have perceived and remembered the events at issue, she clearly would have been a competent witness.

The Court of Appeals, however, did not view this from a competency standpoint. Rather,

the Court emphasized that when statements against interest are proffered to exonerate, the rules require that corroborating circumstances must clearly establish the trustworthiness of the statement. Without really considering the corroborating circumstances, the appellate court essentially ruled that, given both this declarant's history of drug addiction and her pathetic appearance, the trial judge's ruling did not amount to an abuse of discretion.

This case ultimately demonstrates the importance of one word in 804(b)(3): that the corroborating circumstances must *clearly* indicate trustworthiness, the key word is *clearly*. That's a very high threshold to overcome. Without really considering the corroborating circumstances, the court simply concluded that the defense had not met that threshold.

The concurring judge basically said: "If this isn't sufficient corroboration, I don't know what is." Nevertheless he concurred in the outcome because of the wide discretion trial judges wield in such rulings.

Bottom line: McDonald stands for the proposition that it is very difficult to satisfy the special corroboration requirement imposed under Rule 804(b)(3).

Now, if McDonald limits a defendant' s ability to rely on statements against interest to exculpate how does the Supreme Court's decision in Williamson v. U.S, on page 600, limit the prosecutor's ability to use a statement against interest to incriminate another defendant in a criminal case?

The issue in Williamson concerned how to treat a co-defendant's confession that contained both self-incriminating and exculpatory parts to it.

The Supreme Court in Williamson says that the outcome depends upon the meaning of the term "statement" under the rules. If "statement" is defined to mean "an extended declaration," then the Court says that a statement against interest arguably includes both inculpatory and exculpatory parts of a confession. However, if statement is more narrowly defined to mean only "a single declaration or remark," as opposed to an extended declaration, then 804(b)(3) reaches only those remarks that are inculpatory in their own right. And the Court says: unfortunately the text doesn't define statement other than characterizing it in terms of an assertion.

Given the ambiguity in the text, the Court considers the policy underlying the statement against interest exception, and says that self-exculpatory statements do not fit within its rationale: People are not likely to make exculpatory statements because they are true; rather, they usually make them because they are trying to minimize their own exposure to liability. If the rationale for the declaration against interest exception is that this is a type of statement that would not have been made unless it were true, that rationale really does not extend to the exculpatory parts of a statement.

Therefore, if one has a confession in which the declarant acknowledges liability, thereby seemingly triggering the declaration against interest exception, but at the same time the

declarant tries to minimize liability by foisting blame on some third party against whom that statement is now being offered into evidence, Williamson says: Sorry, but the self-exculpatory part of the declarant's statement does not qualify as a declaration against interest you may not take the exculpatory part of his statement and use it against another defendant in a criminal case.

So, we have a bit of symmetry here. We have the special corroboration requirement imposed upon the defendant when a statement against interest is being offered to exonerate. And then we have the Court in Williamson saying that, to qualify as a statement against interest, only statements that are truly against interest will be considered those which are exculpatory will not be admitted.

United States v. Lang (p. 595)

Though the Court of Appeals may have misinterpreted rule 803(b)(3)'s requirement of the "against interest" factor, the case states an important and often neglected legal principle. Hearsay, like live testimony, is subject to Rule 602's demand that lay testimony must be based on personal knowledge. Though often, the personal knowledge foundation is apparent from the hearsay statement itself (e.g., in an excited utterance or present sense impression), it must be shown by the proponent of the hearsay where it is not apparent.

Evidentiary Foundation: The Trial of John T. Scopes (p. 604)

This vignette involves party admissions uttered by the defendant and offered by the government. It is a good vehicle to distinguish the often-confounded Admissions from Declarations Against Interest. Admissions are simply relevant statements by one party offered by her opponent. Period. An admission need not be against interest when made (although it ordinarily has become so at the time it is offered) and must be uttered by a party irrespective of the party's availability. A Declaration Against Interest requires an unavailable declarant (who need not be a party) who utters a statement against interest when made. Students must be discouraged from following the lead of some judges and many lawyers who refer to a non-existent hearsay exception known as an "Admission Against Interest."

c. Former Testimony

The next Rule 804 exception deals with prior testimony. Though given under oath on another occasion, prior testimony is still considered hearsay. The presence of an oath and the opportunity for cross-examination confer some indicia of reliability upon statements given in prior testimony both at common law and today under the FRE, a hearsay exception exists for certain types of former testimony.

The threshold requirement: declarant unavailability. The rule at common law was that, under such circumstances testimony that was subjected to cross-examination could be used against a party who had a prior opportunity and similar motive to cross-examine and also against anyone in privity with that party whatever that means.

So for example, if the defendant had an opportunity and similar motive to cross-examine a witness in the first proceeding who later becomes unavailable, in the second proceeding the transcript from the first trial may be offered into evidence against the same defendant who had a prior opportunity to cross-examine and also against anyone in privity with him. Privity essentially meant some type of legal relationship existed between the two.

At common law however, problems arose when parties tried to extend the former testimony exception beyond the privity situation. Consider the following hypothetical: Abner and Betty, two law students, both fly to Los Angeles for a job interview. On the way there, their plane crashes. Litigation against the airline by their estates.

Suppose that the actions have not been consolidated and so there are two separate proceedings against the airline. Suppose further that, in the first trial, the airline offers W as a witness against Abner's estate and that counsel for Abner's estate cross-examines W extensively. The first trial goes to judgment, and the second proceeding involving Betty's litigation follows. Assume that W has become unavailable and the airline offers into evidence W's transcript from the first trial. There is no privity relationship between Abner and Betty they just happened to be law students who went to the same school together.

The argument is that, even though Betty was not a party to the first cause of action, Abner's estate had every motive and opportunity to cross-examine the witness. Furthermore, this is the best evidence available since the witness is no longer around. The airline argues that Betty, the plaintiff in the second action, ought to be bound by the cross-examination Abner's counsel conducted in the first trial.

The argument against admissibility is that cross-examination is obviously a very personal right, that lawyering skills vary, that information available to counsel also varies, and so W's testimony should not be admissible against Betty in the second action.

As originally proposed, Rule 804(b)(1) would have allowed prior testimony of unavailable witnesses to be admissible if either the party against whom it is offered or someone with a similar motive and interest had an opportunity to examine the witness. In other words as proposed, 804(b)(1) would have allowed W's testimony to be admitted in the second proceeding against Betty's estate since Abner seemingly had the opportunity and motive to cross-examine in a fashion that would have been consistent with Betty's interest (i.e. this proposal would have dropped the common law privity requirement entirely).

But Congress rejected this proposal as unfair; that it was unfair to impose upon the Bettys of the world responsibility for the manner in which Abner's counsel conducted cross-examination at the first trial. Instead, Congress compromised.

Rule 804(b)(1): Testimony given as a witness at another hearing of the same or different proceeding etc., if the party against whom the testimony is now offered or in a civil action or proceeding a predecessor in interest had an opportunity and similar motive to develop the testimony by direct, cross, or re-direct examination. The rule limits prior testimony to cross examination by the same party in criminal ca:kes and expanded it in civil cases to

cross-examination by predecessors-in-interest i.e., meaning that there must be some type of relationship between the first party who conducted cross-examination and the party against whom the former testimony is now offered.

This predecessor in interest language basically resurrects the common law principle of privity at least in civil cases. In criminal cases, that principle does not apply as prior testimony is admissible only against a party who had an opportunity and similar motive to cross-examine. This means that, to admit former testimony, you must first consider your context: civil or criminal.

Civil case: you must establish the predecessor in interest relationship between the party against whom the testimony is now offered and the party who previously had an opportunity and similar motive to cross-examine.

Criminal case: there is no privity issue. You simply look to whether the party against whom former testimony is being offered had a similar motive and opportunity to cross-examine during the prior proceeding. The DiNapoli case (p. 607) applies this principle.

U.S. v. DiNapoli (p. 607)

Issue: whether a criminal D could offer an unavailable declarant's prior grand jury testimony against the government?

Defense Argument: The prosecution had every reason to examine and cross-examine the declarant before the grand jury.

What test does the Second Circuit Court apply in determining whether the government had a similar motive to crossoexamine the declarant before the grand jury? Whether the questioner is (1) on the same side of the issue in both proceedings and (2) whether the questioner had a substantially similar interest in asserting that side of the issue in the first proceeding.

The court says that, in a grand jury setting, the prosecutor is not necessarily the witness' opponent. He's not trying to prove a case; rather he's trying to determine whether there's probable cause to indict. But, the court fails to distinguish between investigatory and indicting grand juries. The latter usually rely upon law enforcement witnesses and routinely indict. By comparison, investigative grand juries are often employed in organized crime and complex white collar cases where the purpose is to uncover evidence of criminality to further a long term investigation. Such proceedings are often extremely adversarial as witnesses do their best to withhold evidence from the grand jury. Cross-examination under such circumstances is often very intense, and so there would quite likely be a similarity of interest between the prosecutor eliciting grand jury testimony from a recalcitrant witness and the prosecutor handling the case-in-chief at trial.

United States v. Koon (p. 612)

Issue: whether the prior testimony exception applies when intervening events may have potentially improved counsel's capacity to cross examine at the second proceeding?

Query: What outcome does the rule's text suggest?

No. The text focuses only on whether the party against whom prior testimony is now offered had a prior opportunity (and similar motive) to cross-examine. **It doesn't evaluate the qualitative nature of the prior cross-examination or that it must have been a similar prior opportunity.** It doesn't suggest that intervening events affect the analysis, in the Koon case those intervening events consisted of videotape enhancements, which arguably would have made cross-examination more effective. All that counts is whether the party had a prior opportunity and similar motive to cross-examine.

Is Koon consistent with DiNappoli?

No. DiNapoli considered the likelihood that cross-examination at trial would have been more effective than at the grand jury stage due to counsel not having the same confidentiality concerns (i.e., wiretaps and confidential informants). The court concluded that this meant that the government did not have a prior similar opportunity and motive to cross-examine the witness.

d. Dying Declarations

What is a dying declaration?

Suppose that Oliver Stone is on his death bed and says: I am aware of my impending death, I have personal knowledge that Lee Harvey Oswald had nothing to do with the assassination of President Kennedy he was framed by Fidel Castro who was retaliating for the CIA's plot to kill him using organized crime hitmen.

Query: Is that dying declaration admissible? No. A dying declaration must concern the circumstances of the declarant's death.

Rationale for the dying declaration exception: First, there is **high need** based on the decedent's unavailability **(although the declarant doesn't have to** have **the decency to die —** he just needs to be unavailable at trial). Second, high reliability based on the "beating of the wings of the angel of death" and the belief that few of us are willing to die with a lie on our lips.

Criticisms: vindictive declarants anxious to take a parting shot just before leaving the jurisdiction there have certainly been cases in which dying declarants made false accusations.

There are also potential reliability concerns you're not exactly at your best under such circumstances. There are also **problems with perception, memory, and communication skills.** You're also prone to suggestions from police officers and others at the scene. Also, what if you're an atheist? The rule does not exclude their dying declarations.

Far and away, the most important requirement at common law (and today as well): the declarant must have had a sense of his impending demise. So, the proponent must establish that the declarant really and truly believed that death was imminent. How do you establish this foundation?

-- the declarant's statements;
-- through surrounding circumstances (blood and guts _Adamson case (p. 622); priest administering last rites;
--statements made to the declarant

Shepard v. United States (p. 620)

At the end of this course you will see that the Shepard decision was the most significant hearsay opinion ever written by the Supreme Court, but not this particular part of the decision. This part of the decision concerns the admissibility of a dying declaration. The Court's handling of this issue, however, sets the stage for the more interesting question involving the outer limits of the state of mind exception to the hearsay rule. The Shepard court's treatment of that issue basically saves the rule against hearsay.

Dr. Shepard was on trial for murdering his wife. To establish his guilt, the government introduced his wife's out-of-court statement to her nurse in wich the wife said “This is what I had before collapsing. Dr. Shepard has poisoned me” hearsay or nonhearsay?

It is hearsay because it's being offered to establish that in fact Dr. Shepard poisoned her. But does it fall within the dying declaration exception?

Court says no for two reasons. First, when she made this statement, Mrs. Shepard did not speak without any hope of recovery. Since she thought she might recover, she didn't hear the beating of the wings of the angel of death. Absent the presence of the angel of death, the reliability rationale underlying this exception is missing, and the fact that she had the misfortune to die a few days later does not render her statement admissible.

Unless the victim speaks without any hope of recovery, the exception ordinarily does not apply. The language the Court employs is that **there must be a "settled hopelessness."**

The second problem that the Court addressed concerned the declarant's lack of personal knowledge. It had no evidence that the wife based her statement (that her husband poisoned her) on personal knowledge.

All hearsay exceptions require personal knowledge. The only situation that does not require personal knowledge is admissions, which the rules of evidence categorize as non-hearsay. Often, personal knowledge is apparent from the circumstances under which the statement was made, but in this case we only have her opinion that Shepard poisoned her and so it doesn't come in.

Keep in mind, however that, if the foundation for the dying declaration fails because, for example, the declarant did not speak without hope of recovery, other hearsay exceptions may apply: **See infra the present sense impression or the excited utterance.** If the person is quite excited under those circumstances and just blurts out a statement concerning the circumstances of his or her death, that exception might work for you. So, you must always remember that each hearsay exception must be considered separately take them one at a time. If one doesn't work, consider some other possibility.

State v. Adamson (p. 622) this was a high profile prosecution for the murder of investigative reporter Don Bolles. The problem that the court faced, although it didn't really address the problem explicitly is that Bolles said, "You better hurry up boys. I feel like I'm going." So there was still a sense of I want to live hurry up and get me some help. That statement arguably precludes the availability of the dying declaration exception.

But the Adamson court says that the proponent may establish a sense of impending death through either direct assertion or "indubitable circumstances," i.e. even in the face of a statement evincing some hope for survival, **you can establish the reality of impending death by looking at the objective evidence at the scene.** In this case, the court goes into great detail, graphically' describing the nature of the victim's injuries; such that it must have been apparent to everyone, including the victim that he was going to die.

FRE 804(b)(2)

Let's examine Rule 804(b)(2) to consider to what extent, if any, it modifies common law doctrine.

The rules of evidence expand upon the common law in that dying declarations are also admissible in civil cases. Incidentally, does a declarant who gives a dying declaration need to have the decency to die? Not in federal court.

2. Exceptions Not Requiring Unavailability

a. Business Records

At common law, an exception was established to allow merchants to admit their account books into evidence. This rule originally developed because a merchant who was a party to the case could not testify per party incompetency.

So, the common law said: Well, at least in business litigation where a merchant has prepared account books these books ought to be reliable enough to be admitted into evidence. Eventually, when merchants became competent to testify in their own right (i.e., when the common law eliminated the prohibition against party competency), the courts recognized that merchant records might be more accurate than their testimony, as busy merchants often lacked personal knowledge or recollection of the underlying transaction at issue.

So, the American courts created a rule which allowed business records to be admitted,

provided that each clerk or employee involved in the transaction could testify about it essentially to establish the foundation with respect to that document.

That rule however became impractical because employees were often unavailable or lacked personal knowledge concerning each record or simply couldn't remember the transaction. And so to expedite admissibility, state legislatures eventually developed a rule that allowed for broad admissibility of books and records. Johnson v. Lutz was the first major case to address the application of this doctrine.

Johnson v. Lutz (p. 629)

When this case was decided, the New York Court of Appeals was the most distinguished court in America certainly more prestigious than the U.S. Supreme Court. Even so, its decision in Johnson v. Lutz was criticized by Professor Wigmore among others.

The issue concerned application of New York's statute admitting business records. This statute was based upon a model act that had been proposed in 1927 and which virtually every state had adopted in some form. The rationale for admitting documents pursuant to this statute was that, when a business transaction has been duly reported on a company's books and records, that record-keeping procedure is likely to be very reliable.

The **routine nature** of the record-keeping procedure tends to make it reliable. Plus, presumably any employee reporting and recording the event **owes a duty of accuracy** to the company. Furthermore, companies often **check and rely** upon their business records, providing an ample basis for reliability.

We also have a **clear need** for these records because they are generally more reliable than the merchant's testimony, for example, who may no longer recall the transaction at issue (assuming he ever even had personal knowledge).

The NY statute contained a proviso concerning personal knowledge: "All other circumstances of the making of such writing or record including lack of personal knowledge by the entrant or maker may be shown to affect its weight, but they shall not affect its admissibility." This language seems to suggest that personal knowledge is not required to get a record admitted into evidence. And it was the NY Court's analysis of this language which led Professor Wigmore to criticize the decision.

Johnson was a wrongful death action. As is so often the case in situations of this kind, there were conflicting accounts of the collision.

Issue: whether the trial judge properly excluded a police report, which contained a bystander's statement about the accident. The plaintiff argued that the police report should have been admitted under the business record exception. But the New York Court of Appeals ruled (a) that the voluntary statement was not e in the regular course of any business **pursuant to a duty of accuracy;** and (b) the entry was based upon hearsay, lacking any indication of personal knowledge and thus it was inadmissible.

Based upon this court's reading of the statute, Professor Wigmore wrote, "This decision shows how difficult it is to amend a law effectively even in the presence of an obvious and conceded need for it. The most explicit words of a statute do not always avail to change the cerebral operations of the judiciary." Who is right: the court in Johnson v. Lutz or Professor Wigmore?

Professor Wigmore surprisingly failed to recognize that Johnson v. Lutz involved a double hearsay issue. Ordinarily business records report objective facts — i.e., the number of widgets manufactured or sold in a particular day. Under those circumstances, a business record reporting a single transaction of one kind or another is just a single hearsay problem for which the business records exception works quite well. For example,company records reflect a sale that occurred on a particular date; so the record, in effect, is the business' OCS concerning an objective transaction as to which someone **in the company had personal knowledge** (i.e. it's the record **or** recordkeeper speaking).

But Johnson v. Lutz did not involve the police department reporting an objective fact of some kind. Rather, it concerned a police report, which contained a bystander's statement. So, we have a hearsay statement within the report itself this is known as double hearsay.

The business record is the first link, and the bystander's statement within it is the second hearsay link. So, the business record first link basically says that a bystander made a statement, and the second link is the bystander's statement offered for its truth (i.e. the record keeper is reporting a statement made to him about how the accident occurred).

The problematic nature of a business record, which contains a hearsay statement within it, becomes apparent when you consider the following: Ordinarily, if a police officer who prepared this report had come into court and testified to what the bystander told him it would be considered inadmissible hearsay if offered for its truth. Why should the outcome change just because it was reduced to writing in a police report? If a police report contains an outsider's hearsay statement, there is nothing special about the police report that elevates the significance or reliability of such hearsay statements.

And so, the difficulty with Johnson v. Lutz is that it contained double hearsay, and that is what Professor Wigmore, notwithstanding his status as the grandfather of modem evidence law, overlooked. This wasn't just a business record as to which the entrant lacked knowledge of the event being reported; rather, the event being reported itself was a hearsay declaration.

Because of Johnson v. Lutz, if a business record contains a hearsay statement within it, a special line of analysis applies. In Johnson v. Lutz, the Court of Appeals emphasized that the circumstances under which the statement in the report was made were unclear. Indeed the court said: We don't even know if the bystander had personal knowledge of the event his statement described. The court further recognized that a bystander’s statement in a police report lacks the indicia of reliability attendant to an ordinary business record.

For an ordinary business record, employees make entries **pursuant to a duty of accuracy**

to the business. In contrast, the bystander in Johnson had no duty of accuracy to the police. This is not the typical situation in which the business can readily rely upon information within its books and records.

Furthermore, if an ordinary employee makes an inaccurate entry, the employee can be fired. This provides some guarantee of reliability that is absent for bystanders who owe no duty of accuracy to the business. So, essentially for volunteered statements where there is no duty of accuracy, the basis for reliability is missing.

Therefore, the first line of analysis for business records containing hearsay statements: ask whether the declarant had a duty of accuracy to the company. The business record exception does not encompass volunteered statements, although they may qualify on other grounds. (*See* Kelley v. Wasserman p. 631).

But the point right now is that Johnson v. Lutz was properly decided. Admittedly, the court did not address the broad statutory language suggesting that personal knowledge is not a prerequisite to admissibility. But, properly understood, that language on page 629 concerned the person making the entry in other words, the statute did not require the police officer making the entry in this case to have personal knowledge of the matter being described; the statutory proviso was not intended to mean that the information reported within the Business Record need not be based upon personal knowledge. The legislature merely intended that the record-keeper need not have personal knowledge of the recorded event. So, when the salesman calls in and says that he sold five widgets, the recordkeeper does not have to have personal knowledge of those sales. (But the salesman must.)

Now, Johnson v. Lutz became law in many jurisdictions. Question: How does Rule 803(6) resolve this issue for the modem business records exception?

It incorporates Johnson v. Lutz. The rule requires personal knowledge on the part of the declarant. The rule does not expressly address the question of whether the entry or statement must have been made pursuant to a business duty, but the drafters of the rule achieve that effect in the following ways: first, the text of the rule speaks in terms of entries made in the regular course of business and the advisory committee comments state that the rule incorporates Johnson v. Lutz.

Furthermore, the rule contains a carve-out for situations in which the record might not be reliable. The rule says: Unless the source of information or the method or circumstance of preparation indicates lack of trustworthiness ordinarily would exclude bystander statements contained within police reports.

The bottom line is that Johnson v. Lutz effectively has been codified by Rule 803(6).

Scope of the Term "Business"

The last sentence of 803(6) defines the term "business" expansively: basically to "include a business institution, association, profession, occupation, and calling of every kind whether or not

conducted for profit." Illegal businesses will qualify, provided the underlying foundation can be established. (Sometimes more difficult to do i.e., sponsoring witness; establishing routine nature of entries, etc., but it's often done.) Note that a police report is considered a "public record" under Federal Rule 803(8) rather than a business record under Rule 803(6).

Kelly v. Wasserman (p. 631)

Plaintiff sued to enforce an agreement granting her a life estate in two rooms of a house that she had deeded to defendant. The defendants who maintained that the agreement allowed plaintiff to live there only so long as the department of housing did not object.

At trial, plaintiff tried to introduce welfare department records in which her caseworker reported two conversations with the defendant. In each conversation, the defendant stated in substance, that the plaintiff has life estate.

Question: Did the D have a business duty to make the statement? Obviously not. The defendant did not work for the agency. The trial court excluded the statement citing Johnson v. Lutz. The intermediate appellate court affirmed. In other words, the trial court and the appellate division viewed the D as standing in the same shoes as the bystander in Johnson v. Lutz, having no business duty to report accurately.

But the Court of Appeals reversed. The Court of Appeals focused on the business duty concept only from the standpoint of the welfare department, reasoning that the welfare department had a responsibility to maintain records of this kind.

Question: Why should that make a difference? The welfare department after all seems to stand in the same position as the police department in Johnson v. Lutz, which also had a duty to keep accurate records, and that didn't save the police report J v. L from exclusion. So, why should the business record be admissible in Kelly v. Wasserman?

In other words, the difficulty here is that Kelly v. Wasserman interpreted the same language involving business duty that Johnson v. Lutz considered, and gave it a completely opposite interpretation. So Kelly at first glance appears inconsistent with Johnson v. Lutz. Can we reconcile the two cases? The answer is yes, but it requires a little bit of explaining.

Whenever a business record involves double hearsay, you must undertake a link analysis — or a double link analysis — as contemplated under Rule 805 (review briefly): hearsay within hearsay. Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statement conforms with an exception to the hearsay rule provided in these rules. What does that mean? For each hearsay link, the proponent must find a conforming hearsay exception justifying admissibility of the hearsay statement contained within that link.

Let's apply that analysis to Kelly v. Wasserman. We have two links: the business record is the first link and the statement within it is the second link. The foundation for the business record exception takes care of the first link. The statement was

recorded in the ordinary course of business and it was in the ordinary course of business to note statements of this kind; so, we have a proper business record.

Now, let's shift our focus to the statement within the business record. On what basis can we justify its admissibility? We have a defendant saying, "Plaintiff has a life estate." How can you get that statement in? Answer: a party admission.

Now, what about the bystander's statement in Johnson v. Lutz: "The light was red." There is no apparent exception. There might be one that we'll address shortly (present sense impression might cover it) but the court saw no apparent hearsay exception, especially given the lack of personal knowledge. By comparison, the statement in Kelly v. Wasserman was an admission pure and simple, and on that basis gets admitted.

For a business record you first must establish the foundational requirements for business record itself then apply a Rule 805 analysis: look to the statement within the business record and see if it fits within another hearsay exception. If so, the second hearsay link will be admissible.

Another way to conceptualize this problem is to imagine the business record coming to life. Instead of the business record being in court, the custodian of records is testifying. The custodian of records in the Johnson v. Lutz case would have testified: "Bystander said, 'light was red" naked hearsay, no exception, it is excluded. By comparison, in Kelly v. Wasserman the custodian of records would have testified that defendant said, "Plaintiff has life estate" an admission pure and simple and so it comes in.

In terms of the foundational requirements for Rule 803(6), they are of course set forth in the rule itself: you must establish that the record was made in the ordinary course of business, and **that it indeed was in the ordinary course of business to keep records of this kind.** Footnote: that language, that it was in the ordinary course of business to keep records of this kind codifies the so-called "germaneness" requirement underlying the business record rule (*see infra* shortly). And it must be a record of an event observed or reported by someone with personal knowledge.

Palmer v. Hoffman (p. 636)

This case begins to introduce the concept of germaneness. Palmer v. Hoffman involved a railroad accident. The defendant railroad investigated and prepared an accident report, which contained the engineer's signed statement.

The engineer's report was highly exculpatory. At first glance, did the RR appear to satisfy the foundational requirements for the business record exception?

No doubt, the RR called a witness to testify that this report was prepared in the ordinary course of business and that it was in the ordinary course of business to prepare reports of this kind; furthermore, the report was prepared by someone who had personal knowledge the engineer.

So, this report seems to satisfy the foundational requirements for the business record exception. Q: On what basis did the Supreme Court exclude his report?

The Supreme Court found that the engineer's report was not made in the ordinary course of business, as least **not as this statute intended.** Yes, this report was made in the ordinary course of business, but it **wasn't the regular business practice of the railroad to keep records of this kind.**

In other words, the court ruled: This entry was not germane to the D's business of running a railroad. Rather than being a report upon which the railroad relied in the ordinary course of its business, this report was purely litigation oriented.

It didn't pass the smell test. It was "dripping with motivation to falsify." In terms of the germaness requirement, Palmer v. Hoffman concluded that an accident report is not typical of a business entry that is systematically made pursuant to some established business routine. This was not a report, for example, setting forth the number of tickets sold. Both the engineer and the railroad had every reason to try to protect themselves, which is why the Court said the report was "dripping with motivations to misrepresent." If these types of reports were admissible, it would encourage businesses as a matter of routine to prepare "cover your ass" memos on a regular basis for the sake of admitting them at trial.

Now, central to all this, although the court doesn't identify it as such, is the principle of germaneness. The court basically was saying that this report was not germane to the railroad's business, which was to run a railroad and to make money i-yot to investigate accidents. Because this litigation-oriented report was dripping with motivations to misrepresent, it lacked the indicia of reliability customarily associated with business records.

Rule 803(6) codifies Palmer v. Hoffman. The Advisory Committee comments state as much, but the rule explicitly does so as well. After setting forth the foundational requirements, the second to the last sentence says: "unless the source of information or the method or circumstance of preparation indicate a lack of trustworthiness." And typically this means that litigation-oriented reports lack trustworthiness and therefore are not admissible as a business record.

Rule 805

Rule 805 says that multiple hearsay requires you to conduct a link-based analysis looking for a hearsay exception for each level of hearsay. This becomes problematic, however, with a business record containing a statement which, at first glance, appears to have been made in the ordinary course of business. Upon closer scrutiny, some statements that appear to have been made in the ordinary course of business are not really germane to the business at hand; in which case, while the entry may have been made in the ordinary course of business, if it wasn't in the ordinary course of business to keep records of this kind, the indicia of reliability that gave rise to the business record exception are absent.

Palmer v. Hoffman establishes the germaneness requirement, which Rule 803(6)

incorporates by requiring not just that the entry must have been made in the ordinary course of business, but also that it must have been the regular practice of that business to make records or memos of this kind.

The germaneness requirement might be better understood in the context of hospital records. A common evidentiary issue concerns the admissibility of a patient narrative in which a patient describes the outside event that led to the hospital visit. Two links of hearsay: (1) the hospital record itself reporting a patient's statement. So, the first link is the business record which says, "Patient made a statement." (2)The patient's statement describing the outside event: "I walked into a streetcar," for example.

Now, rather than simply apply Rule 805 in a mechanical fashion — looking at whether you have a business record, and if so, whether you've got a statement within it — courts have required **that the entry itself must have been relevant to the hospital's business of treating people**. It must have been germane to the business at hand.

So, under the 805-based analysis in the context of business records, you must ask yourself: What is the nature of the entry within that business record? You don't just ask yourself if you have a business record. The **germaneness requirement imposes the obligation to examine the nature of the statement itself to determine whether the patient's narrative was germane to the hospital's business.** If it is not germane, then you don't have a true business record and, because of that, the first link the business record — doesn't meet the requirement of the business record rule. In other words, if the statement within the business record is not germane to the business at hand, then the **problem is that the document is not a valid business record.** And so, it is not the second link that fails; it is the first link that fails.

Melton v. St. Louis Public Service Co. (p. 638) and Williams v. Alexander (p. 641)

Although germaneness is clearly required, the difficulty becomes deciding what types of statements within a business record qualify as germane. Courts often times disagree. In the Melton case for example, the court (p. 639) cited to another decision — City of Cleveland in which the patient said that she had "caught her heel and fell of the streetcar." The Melton court found that this statement was properly excluded as not germane.

But, how is that statement any different from the patient's statement in Melton that "He walked into a moving streetcar," which the court allowed into evidence? The Melton Court tries to explain this with the non-sequitor, it doesn't establish causation generally; rather, it shows how plaintiff got hurt, is made it germane to the hospital's business (diagnosis and treatment).

Likewise in the very next case, Williams v. Alexander (p. 641) plaintiff objected to the introduction of a hospital record, which contained a narrative account that "as he crossed the street one car ran into another that was at a standstill causing that car to run into him." Here the court reaches just the opposite conclusion from Melton holding that general statements of causation might be germane, but not the specific details of the causation. But doesn't this narrative, like Melton, contain a statement of both causation and how plaintiff got hurt?

Ultimately, devil is in the details of application, and conflicting cases abound. The general rule is that **general statements of causation in the context of a hospital record will be proper, but not specific details.** So for example, if an assault victim comes in for treatment, where the assailant struck the victim would pertain to treatment, but how the assailant was would not have been germane to the hospital's business and would therefore not be part of the business record.

United States v. Kim (p. 645)

The Kim decision arose from the so-called Korea-gate prosecutions of the late 1970s. The defendant was on trial for conspiracy to defraud the United States and for perjury. The issue on appeal concerned whether the trial judge mistakenly excluded a telex document D proffered into evidence.

So, we have a telex document reporting the existence of a business record, and the first question is: Why was this telex document hearsay? It's an out-of-court statement offered for its truth. **The telex document says "a business record exists"** and the telex is being offered to prove the existence of a business record. **In this case, the business record was a bank record.**

So, we have an OCS by the telex. The telex says that the bank record exists **and then the second hearsay link reveals that the bank record shows certain depositshaving been made.** So, the telex says that there is a bank record on file, and the bank record shows that certain deposits were made.

The issue is whether the telex can be admitted under any business record exception reasoning. Why does the court reject D's argument that the telex is a business record?

First, the court says that the business records must be made at or near the time of the event that it purports to describe. And the court here says that the telex is reporting events that occurred two years earlier i.e., deposits that occurred two years ago. The court reasons that the **record must be contemporaneous with the event being described**, and this did not happen here.

Why is this analysis flawed?

The court says that the business records must be contemporaneous with the event being described and that the pertinent event is the underlying deposit, which occurred two years earlier. However, the **telex is reporting a contemporaneous event —** and that is **the existence of** a business record. The telex basically says: "Defendant has a bank record." So, the telex is reporting a contemporaneous event. **The fact that the record now exists is the critical reference point.** That the bank record contains information about events that occurred a few years earlier does not change the fact that the existing **bank record is contemporaneous with the telex itself.** And so, the contemporaneousness requirement of 803(6) has been satisfied here.

Even so, why does the telex fail as a business record?

The court says that the telex was not made for a regular business purpose. And so it fails the Palmer v. Hoffman germaneness requirement codified in FRE 803(6).

The telex was generated for litigation purposes. And while it might have been sent in the ordinary course of business, it was not in the ordinary course of business to keep records of this kind.

Furthermore, Rule 803(6) contains an important proviso: it says "unless the source of information or the method of circumstance of preparation indicate lack of trustworthiness."

Here we have a litigation-oriented document reporting the existence of certain bank records, and the court concludes: the lack of trustworthiness associated with this document precludes its admissibility.

Finally, having lost his effort to get this admitted as a business record, the defendant tried to get the evidence admitted through the back door by arguing that the telex is a summary of a business record and thus qualifies as an exception to the Best Evidence Rule under Rule 1006. However, even if this telex qualifies as a summary, that would only justify its admissibility as an exception to the Best Evidence Rule — that wouldn't overcome hearsay objections. Remember, each competency principle stands on its own. Getting past the BER does not necessarily get you past the hearsay rule.

Evidentiary Foundation: The Trial of Alger Hiss (p. 651)

This foundation initially reviews the principle of refreshing recollection. Here counsel tried to refresh the witness' memory without the witness having claimed a lack of recollection of the underlying event. Upon objection, the court properly chastised counsel saying: You know better you are too good a lawyer not to know that the witness must first profess a lack of recollection before you may use this technique before allowing the witness to look at the document to refresh recollection.

The second point associated with this foundation is that counsel tried to get the document admitted as a business record when the witness describes a certain book: "That is one of a series of notebooks, which I have kept for years. Was it your practice to keep notes in that book of matters that you wanted to keep a rec rd of?" "Yes, it was my practice."

Bottom line is that it may have been your practice, but a regular course of practice akin to a regular diary entry will not qualify as a business record. Why? Because no one relies upon the accuracy of this document. To qualify under the BRE, the entry must be geimane to the business and must have been made in the ordinary course of the business.

Q: How might you get diary entries into evidence? Probative of state of mind.

Evidentiary Foundation: The Trial of Julius and Ethel Rosenberg (p. 653)

Taking a look now at the foundation involving the trial of Julius and Ethel Rosenberg. This is a good example of bumbling counsel and a bumbling court as well. The court here, for example, assumes that a police blotter would always be admissible. That, of course, depends on its contents. If it's an entry made in the ordinary course of business that just contains objective infonnation, then it would come in. But a police report that contains volunteered statements by third parties or by officers lacking knowledge would not automatically come in under Johnson v. Lutz (which by then had become the prevalent federal common law rule). The trial judge's assumption is simply too broad.

You can also see both defense counsel struggling to frame a proper objection and they just don't know how to do it. It was clear that defense counsel didn't understand the hearsay rule or the BRE. Bottom line when it comes to a business record: if it contains either (1) a statement made pursuant to a business duty or (2) objective information made in the ordinary course of business and it was in the ordinary course of business to keep records of this kind — and that is what I suspect happened here: this was objective-type infon-nation as reported by an immigration official, as opposed to a bystander's volunteered statements — the information will routinely come in under the business record exception.

b. Public Records

Beech Aircraft Corporation v. Rainey (p. 658)

The significant issue the Court decided in Beech Aircraft is that Rule 803(8)(c), which admits public investigatory reports which contain "factual findings," extends to conclusions and opinions expressed in such reports. Though Rule 803(6) explicitly permits the inclusion of opinions, diagnoses and conclusions in business records, the language of Rule 803(8) confines admissibility to "factual findings" in the report. Thus, a sensible statutory construction argument would hold that the drafters intended to exclude conclusions and opinions from public reports (particularly because of the significant weight jurors might attach to a report of a government investigation).

The Court, however, disagreed, holding that because the legislative history is equivocal and because the fact opinion distinction is hard to maintain, opinions and conclusions are admissible in 803(8)(C) reports as long as they stem from factual investigations.

a. Excited Utterances and Present Sense Impressions

The next hearsay exceptions may be treated together. They are the excited utterance, the EU for those of you abbreviating, and the present sense impression. As Professor Morgan observed, the common law developed two types of exception for spontaneous statements. The first exception, conceived by Professor Thayer, concerned statements contemporaneous with the event they describe known as present sense impression.

The second exception, conceived by Professor Wigmore, concerns statements that relate to an exciting or stressful event made while under the influence of that event. For example, if someone experiencing great stress during the exam says, "This exam is a nightmare," that

statement would be an excited utterance made while under the influence of the stressful event, and so it would qualify for admissibility assuming it is otherwise relevant.

On the other hand, suppose that someone else taking the exam, having diligently prepared in advance, feels no stress and says “this exam is a breeze.” This doesn't qualify as an excited utterance, but it does as a present sense impression because it is a statement contemporaneous with an event describing that event.

For both exceptions, the spontaneous nature of such statements provides some guarantee of their reliability. Before proceeding to distinguish between these two exceptions further, let me tell you what they're not: the Latin expression "res gestae," which literally means "things done" is frequently employed to argue for admitting such statements: i.e., “your honor, it's part of the res gestae.”— seeming to suggest that res gestae is the equivalent of a present sense impression. The premise is that the statement was close to, indeed almost part of, the event being described and therefore ought to be admitted. It is viewed more or less as the transaction itself speaking.

The difficulty, however, is that (1) the rules of evidence don't recognize any hearsay exception for res gestae and (2) that typically res gestae has become a sloppy substitute for analysis. Often when lawyers don't know what argument to advance for admitting hearsay, they'll say, “Aw, come on judge, it is part of the res gestae — let it in.”

Nager Electric Co. v. Charles Benjamin, Inc. (p. 669)

The next few cases distinguish between the Present Sense Impression and the Excited Utterance. In Nager, plaintiffs incurred heavy financial losses when fire destroyed their machinery, which had been stored at defendant's warehouse and this was no ordinary fire. It was the biggest fire in Philadelphia history at least until the 1980's when the Philadelphia police department fire bombed some protestors and accidentally incinerated an entire neighborhood.

In any event, the issue in this case was what caused the fire; how did it start? To prove that defendant's employees caused the fire, plaintiff introduced various statements the employees gave to the fire department inspector while the fire was still raging.

(Now incidentally, these statements were not admissible as vicarious admissions because when this case was decided, the vicarious admission doctrine did not extend to statements by agents who lacked speaking authority even if those statements concerned matters within the scope of their employment. Absent speaking authority, plaintiffs had to find another avenue for admissibility.)

In this case, the plaintiffs relied upon the excited utterance exception, and the court agreed. Citing Professor Wigmore, the judge ruled that statements made while under the influence of an exciting or stressful event are admissible as an exception to the hearsay rule.

Now the court, at some point, carelessly refers to these statements as spontaneous declarations or as spontaneous utterances. Keep in mind, however, that the present sense

impression which is another term for the spontaneous utterance was not the theory of admissibility; it was the excited utterance. Don't make the same mistake this court did, as **these terms are first cousins, not interchangeable identical twins.**

For example, a statement that is contemporaneous with an event, but not necessarily made while under stress from that event would not qualify as an excited utterance. The point is that not all present sense impressions qualify as excited utterances, and vice-versa. Not all excited utterances will qualify as present sense impressions.

To qualify as an excited utterance, (1) there must be a startling event and (2) the declarant must be under the influence of that startling event when he makes the statement. So, if a stressful event occurs, but your declarant happens to be very coolheaded — a cool-hand Lukeohis statement describing that event would not qualify as an excited utterance. The same statement might qualify as a present sense impression **depending upon whether it was sufficiently contemporaneous with the event that it describes.** In other words, for the present sense impression, there needs to be a **very close temporal connection** between the event and the statement. Finally, keep in mind that the excited utterance and the present sense impression both require the declarant to have personal knowledge.

The Nager case illustrates the excited utterance exception at work. Some of the statements were made at the fire, and some occurred a short distance away. **But all apparently were made while under the influence of the stressful event — the fire itself.**

To admit a statement as an excited utterance, the court will consider the declarant's demeanor and the surrounding circumstances. If the triggering event, the surrounding circumstances, and the declarant's demeanor suggest that he spoke while under the influence of that exciting event, the statement will be admitted as an Excited Utterance.

Note that Nager concerned two separate statements: the first made at the fire scene and the second de shortly afterwards some distance from the fire. This second statement might not have qualified as a present sense impression because a PSI must be contemporaneous with the event it describes. So, for example, a statement made an hour or so later, or even a half-an-hour later, would not qualify as a PSI. The key point is that a PSI really must be contemporaneous with the event that it describes, and most courts hold the passage of more than a few minutes removes the statement from that category.

Houston Oxygen Co. v. Davis (p. 672)

This case illustrates the Present Sense Impression at work. It is a statement that describes or explains an event or condition made while the declarant is perceiving **it or immediately thereafter**. In this case, the proffered statement: “They must have been drunk well find a wreck up the road if they keep up that rate of speed.”

For ease of analysis, let's suppose statement is, "They are driving dangerously." Declarants' car is going along, someone races by them, and declarant says, "They are going too fast."

Apparently this is a very relaxed declarant. The sentence doesn't end with an exclamation point so it's not an Excited Utterance, but it is a Present Sense Impression. The statement is contemporaneous with the event that it describes, and by virtue of being contemporaneous with the event, the statement is viewed as reliable and the appellate court finds that the trial judge should have let it in as a Present Sense Impression.

Rationale: when a statement is contemporaneous with an event, it is considered reliable because there are no memory problems. It's also considered reliable because whomever heard the statement also probably perceived the event and therefore can corroborate it. So, we have a variety of guarantees of reliability.

United States v. Narcisco (p. 673)

In Narcisco, the court rejects admission on the basis of Rule 803(1) and 803(2). The patient's statement is not a Present Sense Impression because it is not made contemporaneously or immediately after the event described in the statement. It does not qualify as an excited utterance because it was not uttered while in an excited state. Some statements could qualify for admission under both exceptions; this one qualifies under neither.

d. Declarations of Physical Condition

There are 2 hearsay exceptions which could apply to statements of physical condition. Rule 803(3) admits statements of a present physical or mental condition, i.e. a statement of a physical sensation or mental feeling. Rule 803(4) admits any statement of physical or mental condition, present or past, made to a person (usually a healthcare professional) for the purpose of medical diagnosis or treatment.

Dewitt v. Johnson (p. 680) and Meaney v. United States (p. 682)

DeWitt v. Johnson

Mrs. Johnson sued to recover for her daughter's personal injuries in a car accident. Proof of pain and suffering was critical to her case, and the issue on appeal concerned the plaintiff's mother's testimony about the child's expressions of pain and suffering.

So, the witness on the stand is the mother, and the declarant is the little girl. The out-of-court statement is, "It hurts." Hearsay or non-hearsay? As it's being offered to prove the truth of the matter being asserted in the statement that the injury hurts it is hearsay.

The next question is: Do we have a hearsay exception?

Note that the statements at issue — "it hurts" was not contemporaneous with the underlying automobile accident, but that doesn't matter because this is not a Present Sense Impression of the automobile accident clearly that would not apply. It's a description of a then-existing physical condition. So, the statement is contemporaneous not with the underlying automobile accident, but with the physical condition being described. All that's

required is a close relationship from a timing standpoint between the statement and the physical condition being described.

The defense also argues that such statements must be made to a physician — in other words, that to qualify as a statement of a then-existing physical condition, the OCS must be made to a physician (presumably this promotes reliability).

Here, no doctor was involved, and so the question is: Must a doctor be involved for a statement to qualify as a statement of then-existing physical condition?

No. Such statements at common law did not have to be made to a physician. I do we still have some guarantee of reliability? Well, yes in a sense. Remember that this is still an extension of PSI. The rationale for the PSI is that a spontaneous statement lacks an opportunity reflection.

Likewise, when someone describes a then-existing physical condition — "it hurts"— the declarant oftentimes doesn't have much time for reflection — at least that's the theory. Beyond that, courts believed that the best way to find out about a person's physical condition is not just to examine the person, but to consider his statements. What one says may be the best available evidence of physical condition, and so on that basis the Dewitt court rules that statements of then-existing physical condition need not be made to a physician.

Let's consider how the FRE apply this doctrine:

Rule 803(3) essentially codifies the Dewitt holding: "A statement of the declarant's then-existing state of mind, emotion, sensation, or physical condition, but not including etc..."

A statement of then-existing physical condition is admissible. Keep in mind, however, that it must be a statement of then-existing physical condition. So, if the little girl's statement for example had been, "Yesterday my knee hurt," or "last month my back hurt," the exception would not apply because the statement is no longer contemporaneous with the event being described — the underlying physical condition. If it is no longer contemporaneous with the condition, the guarantee for reliability is absent — there's been time to reflect and to fabricate and also more potential for memory problems to arise. So, the rule is strictly limited to statements of then-existing physical condition.

The next exception is for statements made for diagnosis and treatment as set forth in 803(4). And the question is: Why do we need an exception for diagnosis and treatment if we already have an exception for statements of then-existing physical conditions — what does this exception, which is codified in Rule 803(4) add?

At common law, there was an exception for statements made to a physician for purposes of diagnosis and treatment; indeed, the statement didn't even have to be made directly to a physician, so long as the declarant expected that the statement would eventually be used for treatment purposes.

The underlying rationale: the declarant knows that his medical treatment depends on the accuracy of the statement describing his physical condition. But again, the question is: Why do we need this hearsay exception if we already have one for theftexisting physical condition? Does Rule 803(4) really add anything?

The Meancy case answers this question. Meaney was decided in 1940 — about 35 years before the rules of evidence were adopted. But it's a precursor to the position taken by the Federal Rules of Evidence.

The decedent in Meaney was a WWI doughboy who died sometime after the war. His estate sued the federal government in its capacity as an insurer. The government's defense was that the soldier's life insurance policy had lapsed for lack of payment; however, the policy at issue contained a clause waiving payment of premiums upon occurrence of disability.

So, the key issue in this case was whether Meaney, had become disabled before the policy lapsed for lack of payment. The policy lapsed on January 30, 1919. The plaintiff had seen two physicians. The first sometime in 1919 and the second in 1920. The first doctor had died; so the question plaintiff's counsel faced was: How to prove that the soldier's disability occurred before January 30, 1919 when the policy had lapsed. Proffered the second doctor's testimony that, when Meaney met him in 1920, he told him that he had been very sick since sometime in 1917.

Let's assume that Meaney's statement to the physician, "I was disabled during hristmas of 1918" is the statement Plaintiff wants to get into evidence. Does the statement qualify as a statement of then-existing physical condition? No, it states a prior physical condition.

And so the question is: Under what circumstances if any may a statement of a prior physical condition be admitted into evidence? The trial court here applied the common law rule, which limited such statements to then-existing physical condition. But on appeal Judge Learned Hand reasons that, after all, this is a statement made to a physician. Oftentimes such statements are spontaneous. More importantly the patient knows that the doctor will rely on this statement for treating him, and so the patient has every incentive to tell the truth. **That rationale applies not just to then-existing physical condition but also to the patient's narrative concerning previous physical condition.** And so on this basis, Judge Hand rules that a patient's narrative of a previous physical condition is also admissible. Now, at the time this was a pioneering view but ultimately it is the viewpoint that the FRE adopts.

United States v. Tome (p. 684)

In Tome, the Court ruled that statements by a child abuse victim to thee doctors who were examining her for treatment are admissible under Rule 803(4) even though the government failed to show that the 4-year old declarant knew of the diagnosis or treatment purpose of her statements. Note that the eighth circuit and the dissenting judge in Tome would require a showing of such knowledge the part of the declarant in order to meet the reliability rationale implicit in the Rule. In addition, the Court ruled that because the identity of the abuser

is pertinent to diagnosis and treatment, such information is admissible here.

This would be a good point to mention the oddity of the Federal Rule 803(4) which, according to the explicit direction of the Advisory Committee Note, admits statements made for medical diagnosis to a physician seen only for purposes of litigation even if no treatment is contemplated. Most states, having determined that such statements have no indicia of reliability, disagree, admitting only statements made treating physicians.

e. Declarations of State of Mind

Federal Rule (803)(3) and most states admit out-if-court statements of a then-existing state of mind, including knowledge, intent, etc., because of the reliability inherent in a contemporaneous description of a present feeling or belief.

Adoption of Harvey (p. 691)

In Adoption of Harvey Bonnie Sue's family sued to obtain custody of her baby. The baby was born in April of 1951, and placed for adoption the following September.

The legal issue concerned whether Bonnie Sue had abandoned the baby. Under Pennsylvania law, abandonment essentially meant that the mother must have given up the child absolutely *with no intention of ever claiming any right to it again.* In other words, the critical legal issue was the mother's intent. State of mind, therefore, was directly in issue by virtue of the elements of the case.

Query: how do you prove state of mind? Proof can be inferred from actions but the common law courts recognized that **words can also establish a person's intent;** indeed, words are sometimes the best indication of intent.

In this case, Bonnie Sue made a variety of statements while she was in the hospital. In essence, these statements were to the effect: "I intend to put up my child for adoption."

On what basis would that statement be admissible at trial? An **admission.** It is being offered against the mother, who is a party to the case. It comes in against her as an admission pure and simple.

But apparently, at the hospital, she also made other statements in which she said, "I intend to keep my child." And the question is: On what basis can she get that statement into evidence?

Her statement, "I intend to keep my child," does not come in as an admission because admissions are only statements offered against a party. The Supreme Court of Pennsylvania, however, recognize that there was an exception, at common law, admitting state of mind declaration provided that it was a declaration reflecting her *then-existing* state of mind. And Rule 803(3) likewise adopts that position. Thus, the **state of mind declaration must**

be in the present tense. "I intend to keep my child," qualifies in this case.

Zippo Manufacturing Co. v. Rogers Imports, Inc. (p. 695)

The court in Zippo admits survey evidence on the issue of brand confusion in the public mind. Though the survey answers have sometimes been admitted as non-hearsay, the better view is the one adopted here: survey results are hearsay, but admissible under Rule 803(3) as a statement of present state of mind, attitude or belief. Note the court suggests an alternative approach of the residual exception. Though the Fifth Circuit decided the Dallas County case in 1961, Zippo is one of only handful of decisions which mentioned the residual exception (discussed *infra*.) prior to its codification in 1975.

Mutual Life Insurance Co. v. Hillmop (p.698)
Shepard v. United States (p.702)
United States v. Annunziato (p.706)
United States v. Layton (p. 711)
Hillmon (p. 698)

Thus far, our examples of state of mind declarations have all involved situations where state of mind was directly in issue by virtue of the elements of the case and the statement went to prove that state of mind. In Adoption of Harvey, the issue was whether the mother intended to give up her child for adoption? So state of mind by virtue of the elements of the lawsuit was directly in issue.

But the state of mind exception potentially also applies in other situation where state of mind is circumstantially probative of subsequent conduct. Taken to its extreme, however, this application of the state of mind exception threatens to eviscerate the rule against hearsay.

The case that creates the potential for undermining the rule against hearsay is Hillmon.

Our protagonist, or decedent, Hillmon was basically a hustler. He had been a soldier, a miner, a cowboy, and a general troublemaker. When he eventually married, perhaps in the spirit of George Joseph Smith, he took out four life insurance policies, making his wife Sally the beneficiary.

About a month later (March 1878), a man was shot at a desolate camp in Crooked Creek, Kansas. The man's face was singed by flames, but he was identified as Hillmon. A coroner's inquest, however, concluded only that it was the body of an unidentified man. Hilmon was never seen again, and his wife Sally then sought to collect on the life insurance policies.

The insurance company denied liability, claiming that Hillmon in fact wasn't dead — that someone else had been killed at Crooked Creek. The case eventually went to trial where it provoked such controversy that the state of Kansas barred the company from selling insurance in the state.

The company's position at trial was that the body found at the campsite belonged to a man named Walters. In support of that defense, they offered letters Walters had written to

his family in which he said, "I intend to go **from Wichita to Crooked Creek with Hillmon."**

So, the out-of-court declarant is Walters and the out-of-court statement is, "I intend to go from Wichita to Crooked Creek with Hillmon," offered to prove the truth of the matter asserted that Walters in fact intended to go etc. — from which we could infer that he acted upon that intent and went to Crooked Creek [with Hillmon.]

So, we have a state of mind declaration offered to prove conduct in conformity with that intent. You can appreciate how the Hillmon case illustrates a different application of the state of mind exception from the Adoption of Harvey in which the mother's state of mind was directly in issue by virtue of the elements of the case.

Other examples of state of mind being in issue: in an extortion case, the victim's fear would be state of mind in issue, or in a criminal fraud prosecution, intent to defraud; or in the Zippo case (confusion in a trademark infringement).

But that is not how state of mind was being used in the Hillmon case. In Hillmon, we have a declaration of a then-existing state of mind — but Hillmon's intent — his intent to go to Crooked Creek — was not an element of the case. It was not like intent to establish a domicile for example or fear in an extortion case or intent to give up a child for adoption in a custody situation; rather, in this case, his **state of mind was merely circumstantially probative of his subsequent conduct.**

In other words, we are using state of mind circumstantially — i.e., Walters' letters states his intention from which the jury can infer that that he probably acted in conformity with that intention. Here Walters' state of mind was not in issue, but his declaration of intent was being used to **prove some other link in the evidentiary chain** — i.e**.,** to prove subsequent conduct.

The court in Hillmon sustained the circumstantial use of the state of mind declaration to prove the declarant's subsequent conduct. Note — it must be a then existing state of mind Hillmon was initially widely and uncritically accepted. Eventually however, it became apparent that Hillmon threatened to undermine the rule against hearsay. After all, in Hillmon, we have Walters' statement, "I intend to go to Crooked Creek with Hillmon." It is an expression of his present intention concerning his future conduct. Now one problem with admitting Walters' statement "I intend to go to Crooked Creek with Hillmon," is that **it's subject to intervening circumstances** that might have kept Walters from acting on that intent. The courts, however, have always ruled that intervening circumstances go to weight rather than to admissibility.

Fair enough, but the problem is that once you allow a statement of intent to prove future conduct, it's not much of a stretch to say that the law should also allow a present state of mind to prove **previous** conduct. In other words, Hillmon sustained a present state of mind declaration to prove that he had the intent and that he acted on it. "I intend to go to Crooked Creek," and therefore he went.

The question now becomes whether you may use a state of mind declaration to prove something that happened in the past. The argument that you may is simply an extension of the Hillman Doctrine. If we can prove subsequent conduct from present state of mind declaration, why not also to prove previous conduct owhat is the difference between Walters' statement on Friday that he intends to go to Crooked Creek on Sunday and Walters' statement on Monday that he remembers having been in Crooked Creek yesterday?

The Supreme Court's decision in Shepard resolves this issue by drawing a line in the sand and confining the Hillmon Doctrine to state of mind declarations used to establish prospective or subsequent conduct and not prior conduct.

Shepard (p. 702)

We have previously considered this case in the context of a dying declaration. Suppose the statement is, "I believe Dr. Shepard has poisoned me." Once the Supreme Court rejected the application of the dying declaration exception, the government argued that this is a statement of present memory offered to prove a prior event — that Dr. Shepard poisoned his wife.

In rejecting this argument, Justice Cardozo referred to Hillmon as the high water mark beyond which courts have been unwilling to go. He says that declarations of intent casting light upon the future have been sharply distinguished from declarations of memory pointing to the past. Otherwise, he warns, the hearsay rule itself would succumb.

The Shepard limitation on the state of mind declaration is reflected in the rules of evidence. Rule 803(3): A statement of the declarant's then-existing state of mind etc., but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, etc. or terms of declarant's will. So, 803(3) codifies the Shepard Doctrine here: You may not use a state of mind declaration to prove prior conduct.

Anunziado (p. 706) essentially says: We evaluate whether the statement is principally forward looking or principally backward looking. If it is principally forward looking, which the court found to be the case in this instance, we're going to let it all in; if it principally backward looking, then we aren't going to let any of it in.

Now, another problem that arose in the context of Hillmon involves its implications for proving third-party conduct. Keep in mind that Walters' statement in Hillmon was, "I intend to go to Crooked Creek with Hillmon." And in Hillmon, the court used Walters' state of mind declaration to prove his subsequent conduct; it was not used to prove Hillmon's conduct.

Query: whether you may use a state of mind declaration to prove a non-declarant's subsequent conduct. The difficulty is that the state of mind exception only establishes the declarant's state of mind — not anyone else's.

Further, when you use a present state of mind declaration to prove third-party conduct, all the classic hearsay dangers are present. When Walters says he intends to go to Crooked

Creek with Hillmon, he is now reporting not just his own state of mind — his own intent — but Hillmon's intent as well — at least implicitly. But Walters, for example, may have misperceived Hillmon's intent or he might have had a motive to misrepresent Hillmon's intent.

The Layton case (p. 711) contains examples of this problem. The court, for example, discusses a California homicide case called People v. Alcalde. A young woman had been found brutally murdered by the side of the road. Her boyfriend was charged with the murder. At trial, the prosecutor introduced the victim's statement: "I intend to go out with Frank this evening." The trial court let this in to prove her intent and also to prove that she did go out with Frank that night. (i.e., to prove that Frank went out with her that night.)

The problem is that her state of mind declaration is not just being used to prove her intent, but also Frank's intent — that Frank intended to go out with her. In other words, it is one thing to say that she intends to go out with Frank; it's quite different to allow this evidence to prove that Frank intended to go out with her — at that point it is no longer a declaration of her own state of mind; it is a declaration of Frank's intent as well. The case goes to the California Supreme Court, which basically chose to ignore the problem.

In a separate opinion however, Justice Traynor pointed out that the probative value of the girl's statement depended upon the accuracy of her perception of Frank's intent. Was she honest in making that statement? Even if she was honest and thought she was going out with Frank, did she accurately perceive Frank's intention for that evening? She could have been honestly mistaken. So, all the hearsay dangers are present when a state of mind declaration is used to prove third-party conduct.

In other words, "I intend to go out with Frank," is admissible to establish the declarant's own intent, but not Frank's intent. As to Frank's intent this statement is the same as saying, "Frank intends to go out with me," but there is no hearsay exception for a non-declarant's state of mind. For example, if her out-of-court statement had been "Frank intends to go out with me tonight" the statement would be hearsay if offered for its truth and the state of mind exception would not apply.

Layton provides another example of this problem, the Pheaster case. The kidnapping victim said, "I intend to go to the parking lot to meet with Angelo." The trial court admitted the statement to prove that he intended to meet with Angelo. But it should not be admissible to prove that Angelo intended to meet him. Because as to Angelo's intent, all the hearsay dangers are present.

Based on this analysis, the Layton court declined to let the government introduce Jim Jones' statements of his intent to kill Congressman Leo Ryan insofar as those statements implicitly embraced the intentions of third-parties including Layton.

3. The Residual Exception — Flexibility for the Future

Dallas County v. Commercial Union Assurance Co. (p. 723)

Professor Younger considered the Dallas County case to be the best opinion on hearsay ever written; it certainly was the most practical.

The case arose when the Dallas County Courthouse was severely damaged after its clock tower collapsed onto the building. Dallas County sought reimbursement from its insurance carrier alleging that lightning struck the tower, causing it to collapse. As proof of lightning, the County produced some charred debris from the tower itself.

The insurance company denied liability, maintaining that lightning had not caused the tower collapse; indeed, the insurance company had a quite different explanation for the collapse. The defense maintained that a fire, which had occurred many years before the policy was issued, ultimately caused the tower's collapse.

To prove that point, the insuror introduced into evidence the Morning Times of Selma dated June 9th, 1901, which reported that a fire had occurred in the County Courthouse. The problem with the newspaper article is that it is hearsay if offered to prove the contents set forth in the article. In other words, it is hearsay if it is being offered to prove the matter being described in the article — that a fire occurred at the County Courthouse on a particular date. Is there an exception?

Notice the reasoning Judge Wisdom employed. He essentially says that we should apply a common sense approach. Common sense means that we should look to the best available evidence. In this case, he concludes the newspaper is probably the best available evidence of a fire having occurred in 1901.

From a necessity standpoint, this is the only evidence available to prove this point; furthermore, it is probably reliable. A newspaper is not likely to report a fire in a well-known County Building, unless such a fire occurred.

Judge Wisdom then suggests that the rule against hearsay should not be applied in a rigid mechanical fashion that on occasion it should work in a manner akin to the Best Evidence Rule; in other words, insist upon non-hearsay proof if it is available, but if it is not, admit the hearsay if it is otherwise reliable.

Now Judge Wisdom could have decided this case fell within the so-called "Ancient Document Exception," which the federal rules later codified in Rule 803(16). But he argues instead that we ought to apply a flexible approach based upon great need and probable reliability. Conclusion: there ought to be a **fail safe** catchall exception to the hearsay rule, which applies when no other exception is available.

The Federal Rules of Evidence eventually adopted Wisdom's approach, originally in Rules 803(24) and Rule 804(b)(5), and more recently re-codified in Rule 807. 807 formally establishes the residual exception Judge Wisdom contemplated and imposed certain conditions for the admissibility under these circumstances. The point is that, even if hearsay does not fit within any categotical hearsay exception, if it meets certain requirements, it may still be admitted under this residual provision.

To be admissible under the residual exception, a statement must have some circumstantial guarantee trustworthiness equivalent to all of the other hearsay exceptions; in other words, the proffered hearsay must be at least as reliable as the other exceptions set forth in Rule 804.

Second, you must also be able to establish that the residual hearsay is necessary because it is the most probative evidence available on point.

Third, the court must find that admissibility is in the interest of justice. And finally, the opponent must be given notice of one's intent to rely upon this rather novel hearsay exception.

Huff v. White Motor Corp. (p. 728)

In this products liability action, the 7th Circuit discusses the "most probative evidence available" on point requirement of Rule 807. The action was one for wrongful death brought by the survivor of crash in which the victim's truck's gas tank ruptured and caught fire allegedly because of the defective design of the fuel system.

At trial defendant manufacturer offered evidence of the decedent's hospital bed statements which proved that the decedent's clothes were aflame before the crash. (Decedent was a smoker). court The cou affirmed the admission of the decedent's statement as residual hearsay on t theory that statement is the only direct evidence of the cause of death and that direct evidence is superior, i.e. more probative, than expert accident reconstruction evidence and other circumstantial evidence.

United States v. Bailey (p. 734)

Bailey represents the correct view of Rule 807 (in the authors' view). The court rejects corroboration as guarantor or reliability (a principle affirmed by the U.S. Supreme Court in Idaho v. Wright) on the ground that: (1) the circumstances surrounding the making of the statement are the appropriate meas re or trustworthiness as they are for the enumerated exceptions; and (2) corroboration as a measure of trustworthiness is inconsistent with requirement that the residual hearsay must be necessary because it is the most probative evidence available. In addition, it finds that the proffered hearsay is unreliable because inter alia it was made during self-serving plea negotiations.

The Residual Exceptions to the Federal Hearsay Rule: Two Exceptions in Search of a Rule (p. 740)

Although Professor Sonenshein argues against the admission of "near miss" hearsay via Rule 807, the weight of federal circuit court authority admits near misses. Though near misses are by definition less reliable than the enumerated exceptions, the foundations for which they lack, federal courts often admit such hearsay despite the failure to identify any circumstantial factors which bring the near miss evidence up to equivalency of trustworthiness with the enumerated exceptions. Indeed, it could be argued the federal appellate mistreatment

of Rule 807 has to some extent realized Judge Weinsteins' position during the federal rules codification process that hearsay should be admissible in the discretion of the trial judge.

Impeaching the Hearsay Declarant (p. 747)

The Sonenshein article illustrates the rationale for Rule 806. Without Rule 806 (which every state has adopted as a rule or matter of common law), the Rules would create an incentive to avoid calling live witnesses.

J. HEARSAY AND CONSTITUTIONAL CONFRONTATION RIGHTS

Idaho v. Wright (p. 749)

Though the Ohio v. Roberts analysis in Idaho v. Wright would appear to be outmoded following the 2004 decision in Crawford (p. 754), Wright is still useful as a guide to interpreting the Residual Exception. In Wright, the Court ruled that a lower court should not consider corroboration as a trustworthiness factor in determining the admissibility of hearsay for purposes of the foimer Roberts Test for Confrontation.

Because Wright involved the Idaho Residual Exception (identical to Federal Rule 807) and because the "circumstantial indicia of trustworthiness" language of Rule 807 tracks that in Roberts, it would make sense that federal courts should not use corroboration as an indicator of trustworthiness for Rule 807 analysis.

The Sixth Amendment Confrontation Clause provides "in all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him." According to the United States Supreme Court in an early Confrontation opinion, the purpose of the Sixth Amendment confrontation requirement is to prevent the Sixteenth Century English criminal courtroom practice of trial by ex parte affidavit or deposition in lieu of live testimony from invading the American criminal proceeding." Justice Scalia, in his detailed history of the confrontation right in one of the Court's most recent Confrontation opinions traces the roots of the right to Roman law, its presence and derogation under English common law and its inclusion in American colonial and constitutional law, concluding as well that the Clause's purpose is the prevention of the use of trial by ex parte "testimony." Though the Court's Confrontation Clause jurisprudence from 1895 through 2005 seemed to reject so narrow a definition and purpose for the Clause, the Court in Crawford strongly affirmed that the Clause is not a Constitutional check on the admission of hearsay in criminal cases, but rather a narrow historical bar to conviction on secret evidence created and/or developed by the state. Indeed, the Crawford majority clearly has adopted the reasoning of Justice Harlan's concurrence in Dutton v. Evans—(see footnote below) in which he challenged "...the assumption that the core purpose of the Confrontation Clause of the Sixth Amendment is to prevent overly broad exceptions to the hearsay rule [in criminal cases]...I have become convinced that Wigmore states the correct view when he says:

The Constitution does not prescribe what kinds of testimonial statements shall be given infra-judicially, this depends on the Law of Evidence for the time-being but only what mode

of procedure shall be followed — i.e. a cross-examining procedure — in the case of such testimony as required by the ordinary law of Evidence...

Prior to Crawford, however, the Court's jurisprudence regarding the interplay of the Confrontation Clause and the Hearsay Rule led to a more complicated conclusion. In its first opinion addressing the interplay of the Clause and the Rule 35 years ago, the Court stated that though the Clause and the Rule address similar and to some extent overlapping values, the two doctrines "are not co-extensive." The Court reiterated this position in nearly all of its later decisions and has taken pains to explain that proffered evidence which violates the hearsay prohibition does not perforce violate the Confrontation Clause and vice-versa. Thus, on many occasions the Court has affirmed the admission of hearsay despite the inability of the criminal defendant to actually, figuratively or virtually confront his/her accuser; on other occasions the Court has endorsed the bar on the admission of otherwise "admissible" hearsay (i.e. hearsay which fits within one of the many exceptions to the hearsay rule) because such hearsay (though deemed reliable and necessary by common law judges and later by rules codifiers) fails to guarantee the accused's face-to-face confrontation with the absent hearsay declarant.

The Court's ambivalence toward the interplay of the Clause and the Rule evolved over time, however, into a position which seemed to essentially blur the distinction between the Clause and the Rule, finally identifying the test of one with the other. In California v. Green, the Court, having noted that the Rule and the Clause often overlapped but were not identical, ruled that otherwise admissible hearsay may be admitted over the Confrontation Clause objection of the defendant as long as the hearsay declarant is present in court and subject to cross examination. In other words, even though the declarant could not be cross-examined or confronted at the time when she made the out-of-court statement (as we can with a trial witness who simply recounts his out-of-court observations in front of the fact-finder) the presence of the declarant in court permitted sufficient confrontation to satisfy the Constitution. This seemingly small step into conflating the Rule and Clause was followed after a number of years with Ohio v. Roberts which succeeded in completely identifying the Clause and the Rule. In Roberts, the Court announced a two-part test for the admissibility of otherwise admissible hearsay over the Confrontation objection of the defendant: (1) the government must produce the hearsay declarant in court for purposes of cross examination and confrontation or demonstrate his/her unavailability; and (2) the statement must have been made under circumstances providing sufficient guarantees of trustworthiness. Such trustworthiness could be shown by the hearsay's falling within one of the historically and "firmly rooted hearsay exceptions" or by the statement's particularized guarantees of trustworthiness. The last would seem to embody any hearsay which qualifies for admission under Rule 807, the residual exception.

Thus, after Roberts, the admission of hearsay did not violate the Confrontation Clause it if were trustworthy and the declarant was present in court or practically impossible to produce. Roberts, then identified the Confrontation standard with the basic hearsay principle of admitting reliable evidence only, and obviated the Confrontation Clause requirement of actual or virtual "confrontation." When the Court removed the need for the government to demonstrate the unavailability' of its hearsay declarant in United States v. Inadi, it would seem that, despite

the Court's protestations to the contrary, the identification of the Confrontation and hearsay tests for admissibility were nearly complete. In short, the Confrontation Test would admit trustworthy hearsay. If the government could demonstrate that the proffered hearsay was worthy of admission (as it could in the vast majority of hearsay offers which meet either a firinly-rooted exception or qualify under the residual exception), the Confrontation Clause posed no independent bar to unconfronted testimony.

In 2004 the Court changed all or most of this jurisprudence in Crawford v. Washington, though it was unclear from the Crawford opinion whether the Court was announcing a new Confrontation test for "testimonial" hearsay only, thus leaving the Roberts test in Place for non-testimonial hearsay (and indeed, many lower courts have assumed that view), the Court's later pronouncement in Davis states the narrow view that the Confrontation Clause does not apply at all to non-testimonial hearsay and that the Clause is only implicated where the government attempts to offer testimonial hearsay.

Cruz v. New York (p. 767)

In Bruton v. United States, the Court ruled that a defendant is deprived of his Sixth Amendment Confrontation right where the court admits his non-testifying codefendant's confession at their joint trial despite a limiting instruction admitting the confession only against its maker. In Cruz, the Court decided a case involving "interlocking confessions," i.e. where both defendants have confessed and both confessions are admitted at their joint trial. The Cruz Court held that where a non-testifying codefendant's confession incriminating the defendant is not directly admissible against the Defendant, the defendant's Sixth Amendment rights are violated even if his own confession is offered against him.

CHAPTER VI
PRIVILEGES

1. The Basis for Privileges

The Wigmore excerpt (p. 773) and Jaffee v. Redmond (p. 776) provide the classic analysis and rationale for the recognition of privileges, the need to protect and promote an ulterior societal purpose which is deemed more important than the receipt of reliable evidence at trial or elsewhere in the litigation process. Students should be made aware of the proposal of a number of privileges for incorporation into the Federal Rules, which proposal was rejected in favor of relying on federal common law (in federal question and federal criminal cases) and state common or statutory law (in diversity cases) to provide the law of privilege in the federal courts. Thus, federal privilege law will vary from circuit to circuit, with the Supreme Court endorsing privilege for all federal courts in only a limited number of situations: (1) attorney-client, (2) executive privilege, (3) psychotherapist-patient, and (4) marital privilege.

B. THE EXECUTIVE PRIVILGES

Executive Privilege, Archibald Cox (p. 783)

The Cox article lays out the competing claims of the three branches of government involved in a claim by the Executive to withhold evidence from the Judicial and Legislative branches. Note the Separation of Powers principle is the basis of the privilege. Recognizing the need for some Executive Privilege, Cox leaves us to debate: (1) who should decide which branch should yield and when, and (2) on what basis should the decision be rendered.

United States v. Reynolds (p. 785)

In Reynolds, the court explains the National Security or States Secrets Privilege. In this civil suit by the survivors of pilots and crew killed in the crash of an Air Force plane on a mission involving secret weapons, the plaintiffs sought the production in discovery of the air force reports and other data relating to the crash. When the United States refused to produce, claiming state or national security secrets, the lower court ordered production in the absence of any real showing. The government refused to produce but offered to make the surviving crew members available for discovery. The court sanctioned the government for non-production. The Supreme Court ruled that when the government claims the privilege, it must be claimed by the head of the department or agency and the government must provide the court with enough information (without the disclosing the content of the claimed privileged data) so that the court is satisfied that "from the implications of the question, in the setting in which it was asked, that a responsive answer... or an explanation as to why it cannot be answered might be dangerous because injurious exposure could result."

The Court added that where there is a strong showing of necessity for disclosure of the information, the privilege should not be "lightly accepted," but that even the most compelling

necessity will not overcome privilege if the court determines that military secrets are at stake. Here, the necessity showing was weak in that the secret data likely did not bear on liability and the government had provided the plaintiffs with the alternative of interviewing the surviving crew.

United States v. Nixon (p. 789)

In Nixon, the Special Prosecutor investigating the Watergate break-in and White House cover-up, subpoenaed various items of evidence which revealed the content of White House meetings including the President. The President moved to quash the subpoena, claiming a privilege for confidential communications between the President and his closest advisors. The Court rejected the President's claim of an absolute privilege on either Separation of Powers or the doctrine which privileges such conversations to foster the free exchange of words and ideas among policymakers. The Court recognizes such a privilege only in the case of a demonstration by the Executive of the need to protect military, diplomatic or national security interests.

Though recognizing an interest in preserving confidences in Presidential decision making, the Court ruled that where the demand for evidence in a criminal proceeding is met with only a generalized confidentiality privilege assertion, the privilege must give way.

McCray v. Illinois (p. 798)

Noting that the Court, in Roviaro, has not even required the disclosure as a matter of right in the criminal trial, the Court provides an absolute privilege for secret police informants at the motion to suppress stage of the criminal prosecution. Query: Isn't the question of probable cause (i.e. the suppression of evidence) often the determining factor in whether there will be a trial at all? The note questions following McCray raise additional interesting questions as to application of the informer's privilege.

C. THE ATTORNEY-CLIENT PRIVILEGE

In Re Bonanno (p. 808)

The first question to be answered in the determination of whether a communication is protected by the attorney-client privilege is whether the person asserting the privilege is indeed a client. In Bonanno, the Second Circuit notes that the burden of demonstrating the attorney-client relationship rests on the client asserting the privilege. Here, the evidence amounted to mere characterizations of a relationship without sufficient factual details to support the existence f the relationship.

Upjohn v. United States (p. 814)

In Upjohn, the Court rejected the "control group" test for the definition of the "client" in the attorney-client privilege context. Prior to the decision in Upjohn, numbers of federal and state courts had limited the assertion of attorney-client privilege by a corporation to statements

made by decision-makers and other high officials in the corporation. Though some state courts still limit the privilege to the "control group," the facts and decision in Upjohn required federal courts to extend the privilege to any corporate employee at any level in the organization who speaks to counsel about matters within the scope of her duties for the purpose of seeking legal advice for the corporation.

Note that the majority never stated a test in its opinion, but that Chief Justice Burger laid out what has come to be known as the "subject matter test" in his concurrence.

People v. Meredith (p. 823)

In Merdith, the California Supreme Court recognizes: (1) that disclosure of confidential client information to a defense investigator does not waive the privilege; and (2) that observations by counsel (or members of the defense team) occasioned only by their access to confidential client communications are privileged. But, the Court continues, when counsel removes or alters a piece of physical evidence from the scene of its discovery (where counsel has learned of the scene from the client), the privilege does not bar evidence of the original location or condition of the evidence.

Swidler & Berlin v. United States (p. 845)

In Swidler & Berlin, the Court recognized the almost universal view that the attorney-client privilege survives the death of the client. Rejecting an exception for posthumous criminal investigations, the Court discourages less-than-absolute privileges, stating that privilege holders will be less willing to confide in counsel if they know that the confidences can be revealed after death.

Evidentiary Foundation: The Trial of Harrison Williams, Jr. (p. 836)

This transcript illustrates the manner in which an assertion of the privilege can arise in the courtroom. Note that the issue of waiver is deferred until the client chooses to assert it. Revelation of the confidence to a third-party waives the privilege.

D. THE PRIVILEGE FOR MARITAL COMMUNICATIONS

Trammel v. United States (p. 845)

In Trammel, the Court reaffirmed the privilege which precludes the government from requiring a spouse to testify against a criminal defendant spouse, but limited the claim of privilege to the witness-spouse as opposed to either spouse. Note that this privilege is limited to criminal cases and actually provides an immunity for the witness spouse from testifying at all against the defendant-spouse and is recognized for the purpose of fostering spousal harmony. This will be contrasted with the spousal confidential communication privilege which may be claimed by either spouse.

People v. Melski (p. 851)

Here, the New York Court of Appeals ruled that the confidential marital privilege does not apply to actions (as opposed to communications) observed by a spouse nor does it apply to communication made in the presence of third parties. Note that the purpose of this privilege is the maintenance of the sanctity of the marital relation as opposed to fostering spousal harmony. Note as well, that the confidential privilege survives the marriage and that either spouse or former spouse may assert the privilege and bar disclosure.

E. THE PHYSICIAN-PATIENT PRIVILEGE

United States *ex rel.* Edney v. Smith (p. 857)

Here, Judge Weinstein, perhaps the leading expert on Evidence, rules that where a party put his mental state in issue, he waives a claim of physician-patient privilege. Judge Weinstein questions the desirability of physician-patient privilege and presciently argues that the psychotherapist-patient privilege has more justification than physician-patient privilege (see Jaffee v. Redmond).

F. THE PRIEST-PENITENT PRIVILEGE

The court extends the priest-penitent privilege to associates of the clergyman who assist the clergyman in his/her duties by analogy to investigators, secretaries and paralegals who assist an attorney. The notes following the case raise questions as to whether the clergyman here was performing clergy-like duties and whether the analogy to attorney assistants makes sense in this context.

G. THE NEWSMAN'S PRIVILEGE

United States v. Criden (p. 869)

In Criden, the Third Circuit states that absent any countervailing constitutional concerns, the First Amendment absolutely privileges newsgatherers from revealing their sources. Where, however, countervailing concerns like the criminal defendant's right to a fair trial and compulsory process arise, the newsgatherers privilege may give way in a balancing process. In order to override the privilege, the defendant must show the relevancy of the information and its cruicial nature and the necessity of its production because of the unavailing efforts to obtain the same information from other sources.

CHAPTER VII
BURDENS AND PRESUMPTIONS

“Burden of proof” is more helpfully referred to as the "burden of persuasion" or the "burden of non-persuasion." Where a party bears the burden, it must plead and prove the element of the claim or defense to the appropriate standard (typically, a preponderance of the evidence in civil cases and beyond a reasonable doubt in criminal cases). The bearing and standard for the burden is established by precedent and statutory law and is based on such considerations as (1) which party seeks to change the status quo, (2) whether a party alleges an improbable event, (3) whether some policy militates for or against recovery, or (4) whether certain evidence is significantly more accessible to one party.

In criminal cases, though the state must, consistent with the Due Process Clause of the 14th Amendment, not shift the burden of persuasion on an element of the state's case to the defendant. The state may place the burden of persuasion by a preponderance on the defendant with respect to true affirmative defenses, that is, defensive claims which go beyond simply negativing an essential element of the state's case. *See* Farrell v Czarnetzky (p. 903).

Presumptions should be distinguished from inferences. Where the offer of evidence of Fact A is believed by the jury, a presumption requires the jury to infer Fact B unless the opponent rebuts the presumed fact by contravening evidence. In short, a presumption creates a mandatory, but not irrebutable, inference. An inference is simply a permissible but not mandatory conclusion from a fact. A classic presumption is known as the "mailbox rule." Pursuant to this rule, where the proponent shows that she properly and regularly addressed and mailed a letter, the jury should find it was received absent contravening evidence.

There are two basic views of the impact of a presumption. According to Thayer (and Wigmore), when the presumption arises because the proponent has offered evidence of the basic fact, the burden of production of contravening evidence shifts to the opponent. The ultimate burden of persuasion on the presumed fact, however, never shifts, remaining with the proponent who must prove the existence of the presumed fact. The opposing view, the so-called Morgan View, provides that the proof of the basic fact shifts the burden of proof to the opponent to persuade the trier that the presumed fact did not occur.

Federal Rule 301 adopts the Thayer approach for federal question cases (not covered by statute) and Rule 302 instructs federal courts to follow state law on presumptions in diversity cases. The Federal Rules are silent respecting presumptions in criminal cases, but the Constitution restricts the application of presumptions in criminal cases to those situations where the probative link between the basic fact and the presumed fact is strong. Otherwise, the requirement of government's proof of each essential element of its charge would be diluted.