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**~Federal Rules of Evidence~**

Master Flow Chart and Objections

**RELAVANCE** (**401**)

* Conditional relevance (**104(b)**)
  + ***Response***: will prove shortly (**402**)
* Relevant but not admissible (**407-411**)

**PREJUDICE**  (**403)**

**Question Formation**

LEADING (**611**)

* Can’t do it on Direct
* Assumes facts not in issue
* Usable for refresh recollection

CALLS FOR NARRATIVE (unwritten, **611**)

CALLS FOR CONCLUSION (opinion) (**701**)

IRRELEVANT (before foundation laid)

NO GOOD FAITH BASIS

IMPROPER CHARACTERIZATION (unwritten)

* Calling for improper opinion (**701**)

HARASSING THE WITNESS (**611**)

**Answer Objections**

NONRESPONSIVE –usually only part is not responsive (also obj. IRRELEVANT, **401-402**)

NARRATIVE (**611**/unwritten)

LACK OF PERSONAL KNOWLEDGE (**602**)

IMPROPER CONCLUSION (**701**)

**AUTHENTICATION (901)**

* (1) Can you recognize?
  + Personal knowledge (**602**)
* (2) Please tell us what it is?
  + Relevance (**401**)
* (3) How do you know Exhibit 1 is X?

**HEARSAY**

* ***Response***: Not offered for the truth (**801**)
* ***Response***: Prior W Statement (**801(d)(1)**)
* ***Response***: Party admission (**801(d)(2)**)
* ***Response***: Exception under **803**
* ***Response***: Unavailable and **804**
  + Confrontation Clause(***Criminal***)

**PRIVILEGE** (501)

**BEST EVIDENCE (1001)**

THE [SOME WRITING] SPEAKS FOR ITSELF –

* Response - if not offering the best evidence, must account for, via a testimony of some specificity, the absence of writing (**1004**)

***Used in exams so far***:

802 – Hearsay

403 - Prejudicial

701 – Lay Opinion

611 – Leading Questions

401 – Relevance

404 – Character Evidence (impermissible propensity inferences)

602 – Lacks personal knowledge

609 – Past Criminal Conduct

702 – Expert Witness Certification (depends on questions asked)

901 – Authentication (remember the foundation)

1002 – Best Evidence

Intro: Evidence in a Common Law System

Evidence is the branch of the law that addresses how *fact information is taught and learned in judicial proceedings and used* to generate judicial decisions.

The striking feature of our common law system of evidence is its focus on admissibility. To be sure, there are rules about good or bad evidence and the judge makes rulings on these matters (see Preliminary Questions), but, because of the nature of the jury system, we are particularly concerned about what evidence the jury sees.

Juries are a black box. All we can control are the inputs. Once the jury is charged with the decision there is no way to know how the jury used the evidence presented to make its decision.

**PM**’s Paths of Decision:

* Logically🡪 Path of the applicable law (articulated by judge)
  + Facts proved 🡪 Legal Rule 🡪 decision according to the law
* Sense of justice🡪 FF usually will acknowledge
  + Facts proved 🡪 Logic, experience, intuition? 🡪 Just and “right” outcome
* Prejudice, superstition, emotion 🡪 FF usually will not acknowledge
  + Facts proved🡪 emotion, sympathy, prejudice, confusion 🡪 Outcome req’d by emotion…

Evidence rules are meant to improve the quality of decision by making sure the **inputs** are of sufficient quality/prevent jury from taking “wrong” path to decision. Thus, our system uses the judge as a filtering mechanism (***both to improve jury decisions and legitimize the jury process***).

Due to the great benefits that we (supposedly) incurred from trial by jury we are content with the opaqueness of jury decisions. We will accept the result if it could have been based on right reasoning:

* *US v. Tanner*: drunk, drugged jurors—did not reexamine the verdict, because will not look at internal influence on the jury (internal/external distinction)

Along the same lines, lawyers are only permitted to argue legitimate inferences from the evidence presented but this does not prevent juries from making and using these illegitimate inferences. This also motivates what evidence is admissible (see Relevant but Inadmissible, Character Evidence, Sexual Offenses, etc.).

**PM**’s Process of inference:

Facts Proved (SMOKE) 🡪 Logic & Experience 🡪 (FIRE) Fact of Legal Consequence

Preliminary Questions: FRE 104

**Summary**: FRE 104 is the quintessential judge-as-filter rule. The judge necessarily hears all of the evidence and determines what, if any of it, the jury will see. 104(b) is particularly important because of its bearing on relevancy.

Under Rule 104 the judge deals with:

(a) Whether:

* + The witness is qualified (601, 602, 701, 702))
  + A privilege exists (501)
  + The evidence is admissible (Pretty much everything else)

(b) The relevancy conditioned on fact

* + If evidence is *only relevant* if some factual condition is fulfilled, judge will admit such evidence upon/subject to the introduction of supporting evidence (***see below***)

(c) Hearing of a jury

* + Admissibility of confession always done without the jury
  + Other preliminary matters done without jury when (i) interests of justice require, or (ii) accused is the witness ***and*** so requests

(d) Cross-examination of ∆

* + ∆ cannot be cross examined on other issues when testifying on preliminary matter

(e) Weight and credibility

* + Does not limit party’s right to introduce to the jury evidence relevant to weight or credibility

**FRE 104(b)**: Conditional Relevancy

Sometimes that we may not know whether there is a legitimate connection between a particular fact and a fact of legal consequence without knowing a third fact. When the relevancy of evidence is dependent on the existence of some other fact the judge “shall” admit the evidence on condition of/subject to proof that the fact does exist.

* + The proof need only be sufficient that a jury *could* find a legitimate connection between the evidence and the fact of legal consequence.
  + Jury makes ultimate determination whether the condition has been fulfilled.
  + *Rim Problem*: Evidence – Rim; Fact of legal consequence – Whether the rim came from the car in question; Legitimate connection – Any evidence that made it more likely that the rim came from the car (it was of the same model as the car, it hadn’t been in the field long, etc.).

Relevancy: FRE 401, 402

**FRE 401**: **PM**’s Test for Relevance:

Evidence is relevant if;

1. It has *any tendency* to make a fact more or less probable than it would be without the evidence; and
2. The fact is of consequence in determining the action.

* ***Solomon’s Judgment Problem***: You cannot tell whether something is relevant without knowing *what it is you are trying to decide*. Thus, the most important question for relevance is “What is this evidence offered to prove?” In 401’s terms, what is the “fact . . . of consequence”? If Solomon were deciding not who was the *real* mother, but who would be the *better* mother, we have little question about the relevance of the women’s responses. Relevance of evidence thus depends on what issue is actually being decided.

Relevance under this rule is made up of Traditional Relevance and Traditional Materiality:

1. Traditional Relevance: Is the Fact connected to another fact by logic or experience? (Is a red car connected with speeding?)
2. Traditional Materiality: Is the fact to which it is connected of consequence to the outcome of the action? (Is speeding connected with negligent driving?)

* ***Pizza Problem***: The fact of eating while operating heavy machinery is, through logical and experience, connected to carelessness (traditional relevancy) but for issues of workers comp, carelessness is not a fact of legal consequence (traditional materiality). Therefore, the evidence is not relevant.

Relevance does not have to lead unambiguously to single conclusion; it can just narrow the possibilities but must have at least one relevant, legitimate inference based on logic and experience pointing to a fact of legal consequence.

* ***Burned Butt Problem***: The burned cigarette butt’s relevancy can be argued but it is likely relevant b/c it makes it (even a little) more probable that the driver was indeed distracted by lighting a cigarette.

**FRE 402**: Admissibility of Relevant Evidence

Relevant evidence is admissible UNLESS forbidden by:

* Constitution
* Federal statute
* FRE (see Relevant but Inadmissible, Hearsay)
* Supreme Court

Irrelevant evidence is ***NOT*** admissible.

***Relevancy*** of evidence should not be confused with ***sufficiency*** of evidence. It may require many pieces of relevant evidence to be sufficient. As in the ***Burned Butt Problem***, relevance is determined individually but the FF weighs all of the relevant evidence to determine sufficiency. Remember this for *motions for directed verdict*.

**PM**: Although not directly mentioned in **401**, evidence which has a connection to the believability of a witness is almost always “relevant.” (See **607-609**)

Relevant but Inadmissible: FRE 403, 407­–411

**Summary**: Some relevant evidence has such power to invoke illegitimate inferences (403, 411) in the minds of the jurors or otherwise creates incentives that would undercut important policy preferences (407-410). Such evidence is inadmissible despite its relevancy. Rules 407-411 are often referred to as Rules of Exclusion b/c they exclude relevant evidence because of considerations extrinsic to the trial process itself.

**FRE 403**: Prejudicial Evidence

Relevant evidence ***may*** be excluded if its probative value is ***substantially*** outweighed by either

* The danger of
  + ***Unfair prejudice***,
  + Confusion of the issues, ***or***
  + Misleading the jury
* ***Or*** considerations of
  + Undue delay,
  + Waste of time, ***or***
  + Needless presentation of cumulative evidence

**PM**: ***Remember, when it really hurts, think 403!***

In making 403 balancing determination, court will consider:

1. Nature of unfair prejudice,
2. Quality/importance of legitimate inference,
3. Alternatives for establishing legitimate point, ***and***
4. Importance of issue to which legitimate inference relates.

*Old Chief*: ∆ had previously been convicted of assault. He wanted to stipulate to prior conviction so could avoid details (and name) of crime from coming before the jury. Government wanted to prove actual crime, tell facts and indicate that it was a felony.

* **Supreme Court said FRE 403 – prejudice outweighs probative**
  + Key was government had **alternative** way of proving (stipulation)

Prejudice was that jury would assume ∆ committed this crime b/c he committed previous similar crime.

* Distinguish from *Lopinson* (current crime at issue v. no distinction necessary among past crimes)
  + *Lopinson* was the case about the pictures of the murder scene.

Statistical Proof **not** admissible (*People v. Collins*)

* Potentially misleading (oversimplification, gives identification artificial sense of certainty)
* No foundation for frequency of occurrence of individual factors
* Sometimes may be admissible but not sufficient to support a verdict (ex: blue bus hit victim, 4/5th of blue buses on that route belong to ∆—relevant but not sufficient - *Smith v. Rapid Transit*)

Some probability evidence is admissible: (1) fingerprints, (2) blood test, (3) DNA evidence (**PM** seems to like the idea of the use of DNA to exclude rather than to identify).

~Exclusions~

**Summary:** The following rules categorically exclude otherwise-relevant evidence for policy reasons about affecting out-of-court behavior.

**FRE 407**: Remedial Measures

* When measures are taken that would have made an *earlier* injury or harm *less likely* to occur, Evidence of the subsequent measures is not admissible to prove:
  + Negligence
  + Culpable conduct
  + A defect in a product or its design
  + A need for a warning or instruction
* But the court may admit this evidence for another purpose, such as
  + Impeachment
  + (If disputed) proving ownership, control, or feasibility of precautionary measures

Policy Rationale:

* Don’t want to deter people making things safer by decreasing risks
* Unfair to penalize ∆ at trial for taking socially desirable action of decreasing risks

NB: **407** doesn’t speak to subsequent remedial measures that *must* be taken by the pty, but policy rationale only works if it is limited to pty’s voluntary actions (or when requirement to take action is weak)

***REMEMBER, even if a remedial measure is admitted under an exception, challenge it under 403!!***

NB: Subsequent remedial measures are often not sufficient evidence of negligence; need not be sufficient to meet the exclusion rule.

**FRE 408**: Compromise and Offers to Compromise (***Settlement Negotiations***)

* Evidence of:
  + Furnishing, promising, or offering (or accepting, promising to accept, or offering to accept) a valuable consideration in compromising/attempting to compromise a claim
  + Conduct or statement made during compromise negotiations about the claim is
* (a) **Inadmissible** to
  + Prove or disprove the *validity* or *amount* of a ***disputed claim***
  + Impeach by a prior inconsistent statement or a contradiction
* (b) Court may admit this evidence for another purpose, such as:
  + Proving a witness’s bias or prejudice
  + Negating a contention of undue delay
  + Proving an effort to obstruct a criminal investigation or prosecution

Policy Rationale: **PM** says very similar to 407

* We favor settlements out of court
* 408 removes disincentive: fear settlement attempts/conversations will be used in court
* ***Plot Thickens Problem***: In a car accident caused by D that injures P and V, P could use the settlement between D and V b/c it isn’t about the ***disputed claim***, *i.e.*, the one between D and P.
* ***Mediation Problem***: **PM**: mediation is as close as you can get to aligning yourself with the policy rationale of **408** without being covered. That being said, I think for that reason it will likely be covered. Are there limited purposes or issues on which statements in mediation should be admitted? Maine's version of Rule 408 has been amended to prohibit admission of statements made during court ordered divorce mediation for any purpose.
  + Point out that **408** doesn’t technically cover statements made in Mediation but that such statements would like be excluded because of the matching policy rationales.

**FRE 409**: Payment of Medical Expenses

To prove liability for the injury; evidence of

* furnishing,
* promising to pay, or
* offering to pay

Medical, hospital, or similar expenses resulting from an injury is ***not admissible***.

Policy Rationale:

* **PM**: Strong public policy to encourage people to adjust loss voluntarily
* **PM**: Strong public policy to encourage people to get medical care/reduce barriers to medical care

NB:Doesn’t cover conduct/statements made in connection with payment, just the payment itself (more narrow than **408**)and No “dispute” requirement

**FRE 410**: Plea Bargains

(a) Inadmissible **against** ∆ who *made* a plea or *participated* in plea discussions

* (1) Evidence that guilty plea was later withdrawn
* (2) Evidence of *nolo contendere* plea
* (3) Any statement made **in the course** of proceedings under FRCP 11 re: (1) or (2)
* (4) Evidence of plea statements:
  + Any statement **made in the course of plea** discussions w/ prosecutor that either:
    - (i) Did not result in guilty plea, or
    - (ii) Resulted in a guilty plea that was later withdrawn

(b) EXCEPT if

* (1) Another statement made in plea discussion has been introduced (and only fair to consider statements together)
* (2) In criminal proceeding for perjury or false statement, where ∆ made statement: (I) under oath, (II) on record, (III) in front of his counsel
* ***Plea Bargain Problem***: Statements made while attempting to bargain with law enforcement agent would not be excluded because the agent has not authority to bargain, would have to be with prosecutor or other person who has such authority.
  + NB: Context really matters as to whether conduct/statements constitute *plea discussions* (nature of the conversation, to whom statement is made i.e. someone with authority to make a plea deal, etc.)

NB: **410** lacks an impeachment *exception*. If ∆ testifies under oath to innocence, statements inadmissible.

If gov’t later goes after him for perjury—then may be offered if he had a lawyer at the time he made the statement (**410(b)**).

**FRE 411**: Liability Insurance

Evidence concerning whether or not someone is insured for liability:

* (a) Inadmissible to prove negligence or other wrongful act
* (b) Admissible (may) for other purposes:
  + (i) Proof of agency, ownership, or control
    - NB: Must be contested, serious issue, no other way to prove
    - ***Hit and Run Problem***: Proof of insurance admissible to show no reason to run
  + (ii) Proof of bias or prejudice of a witness
    - NB: If other attorney lies/misleads, “opens the door”—if implies client will have to pay out of pocket when does have insurance (*St. Pierre v. Houde*)

***REMEMBER, for all of these Exclusions, check 403!!!***

Character Evidence: FRE 404, 405, 406

**Summary:** Character evidence is evidence once again that may be admissible but is inadmissible. In this case, the dominant concern is that the jury will draw ***Propensity Inferences***, that is, that because a person has a certain trait, she acted in accordance with that trait in this case.

**404** only bars evidence where its ***only*** probative force is via a propensity inference.

There are permissible, non-propensity inferences: Evidence is relevant for inference of particular intent, relationship, means, opportunity, etc. (expertise, specialized knowledge, etc.). Such an inference satisfies **404** though not necessarily **403** (possibility of propensity inference generally = unfair prejudice).

When character evidence comes in for such a limited purpose (non-propensity inference), the attorney cannot explicitly argue for or from any improper (read: propensity) inferences.

***REMEMBER: If character evidence comes in for a limited purpose, try to get it thrown out with 403!!***

Propensity inferences are allowed for machines (instrumentalities). We are not worried about character evidence with things like we are with people. If it was dangerous on a prior occasion it is probably dangerous in this case. (*Exum v. General Electric Co*)

**FRE 404**:

**404(a)**: Character Evidence Generally

1. (1) Evidence of a person’s character/character trait is not admissible to prove that on a *particular occasion* the person acted in accordance with the character or trait.
2. (2)Exceptions for ∆ or Victim in a Criminal Case
   1. (A) ∆ may offer evidence of ∆’s *pertinent* trait
      1. And *if evidence is admitted*, prosecutor may offer evidence to rebut it [***“Opening the door”***]
   2. (B) (Limited by **412**) ∆ may offer evidence of alleged victim’s *pertinent* trait
      1. And *if evidence is admitted*, prosecutor may:
         1. Offer evidence to rebut it
         2. Offer evidence of ∆’s *same* trait
   3. (C) In homicide case, prosecutor may offer evidence of alleged victim’s trait of *peacefulness* to *rebut* evidence that victim was the first aggressor
3. (3) Exceptions for a Witness
   1. Evidence of a witness’s character may be admitted under Rules **607**, **608**, and **609**

**404(b)**: Evidence of a person’s other crimes, wrongs, or acts

1. (1) Not admissible to prove a person’s *character* in order to show that on a *particular occasion* the person acted in accordance with her character.
2. (2) May be admissible for *another purpose*, such as [non-exclusive list]:
   1. Proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident
   2. On request by a ∆ in a criminal case, the prosecutor must:
      1. (A) Provide reasonable notice of general nature of any such evidence that prosecutor intends to offer at trial ***and***
      2. (B) Do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice

* ***Money or Death*** and ***Return to the Scene of the Crime Problems***: **404** may allow a very distinctive character trait (an MO that is unique) b/c this is about ***identity*** but not allow a broad character inference (robbed from safes before).
* ***Mayor Problem***: Does **not** apply to causes of action that have “character at issue” (e.g. corruption, defamation, divorce)
  + **Can still try to apply 403** (waste of time—“trying” many cases, see *Easerly v. Letwin*)

**FRE 405**: Method pf Proving Character

(a) **Reputation or opinion**

1. In cases where character evidence is admissible, proof may be made by:
   1. Testimony as to reputation
   2. Testimony in the form of an opinion
      1. W must have basis for knowledge (contact or member of comm.)
      2. ***No extrinsic evidence*** of character, even when “door has been opened”

Specific instances of conduct may be explored as proof on cross-examination

(b) **Specific instances of conduct**

1. May be used as proof where a person’s character or character trait is an essential element of a charge, claim, or defense
   1. When core of legal case or ∆ fashions defense around character trait

NB: On cross examination, must have **good faith basis** for asking about a specific instance

* *Must* to take W’s answer, cannot independently prove fact did happen

**FRE 406**: Habit

Evidence of a person’s habit or an organization’s routine is Admissible

* Relevance: Evidence is relevant to prove that certain conduct was in conformity with that habit or routine
* Admissible regardless of:
  + (i) Whether evidence has been corroborated
  + (ii) Presence of eyewitnesses

NB: More specific than character evidence: *semi-automatic response to recurring specific situation*. Not considered character evidence because it doesn’t require an inference to character.

1. Permitted Chain of Inference: Person has habit of stopping at stop signs 🡪 regardless of person’s overall temperament, person stopped at stop sign on this particular occasion

Evidence of Sexual Offenses: FRE 412, 413, 414, 415

**Summary**: These rules were part of the adoption of Sex Sheild Laws. The intent was in line with **403** and **404**: to prevent moral or social prejudice (which totally subsumes the probative value of the evidence) and the propensity inference that inextricably follows from it. Presumptively past sexual behavior of victims is not admissible with a few exceptions.

**FRE 412**: Victims Past Behavior

**(a)** Not admissible in a civil or criminal proceeding involving alleged sexual misconduct:

* **(1)** Evidence offered to prove that a victim engaged in *other sexual behavior*
* **(2)** Evidence offered to prove a victim’s *sexual predisposition*

**(b)** Exceptions

* **(1) Criminal Cases:** Court may admit:
  + **(A)** Evidence of *specific instances* of victim’s sexual behavior, if offered
    - To prove that *someone other than ∆* was source of ***semen, injury, or other physical evidence***
  + **(B)** Evidence of *specific instances* of a victim’s sexual behavior with respect to the *person accused*, if offered:
    - By ∆ to prove *consent*
    - By the prosecutor (Opens Door)
  + **(C)** Evidence whose exclusion would violate D’s constitutional rights (includes Confrontation Clause and DPC)
* **(2)** **Civil Cases**:
  + Court may admit evidence offered to prove a victim’s *sexual behavior* or *sexual predisposition* if
    - Its probative value *substantially outweighs* the danger of harm to any victim and of unfair prejudice to any party (reverse **403** – Higher bar).
  + Court may admit evidence of a victim’s *reputation* ONLY IF victim has placed it in controversy

**(c)** Procedure to Determine Admissibility 🡪 requires (1) motion and (2) hearing

When Prosecution brings in evidence of victims past sexual behavior, door opens to defense

Evidence of victims past sexual behavior can be admitted to negate “inference of innocence” (*Jacques*)

**FRE 413** & **414**: Prior Sexual Crimes of ∆ – ***Criminal*** Case

**(a)** When ∆ accused of sexual assault/child molestation, court may admit evidence that:

* ∆ committed any other sexual assault/child molestation
* Evidence may be considered on any matter to which it is *relevant*

**(b)** If prosecutor intends to offer this evidence, the prosecutor must disclose it to ∆ at least 15 days before trial or at a later time that court allows for good cause

**(c)** This rule does not limit the admission or consideration of evidence under any other rule

**(d)** Defines sexual assault/child molestation for purposes of **413/414**

**FRE 415**: Similar Prior Sexual Acts of ∆ - ***Civil*** Cases

**(a)** Court may admit evidence that the party committed any other sexual assault or child molestation

* The evidence may be considered as provided in **413** & **414**

**(b)** If party intends to offer this evidence, the party must disclose it to the party against whom it will be offered at least 15 days before trial or at a later time that court allows for good cause

**(c)** This rule does not limit the admission or consideration of evidence under any other rule.

In **413-415**, prior sex acts were admissible for ***ALL*** infers; now subject to **403** balancing (*US v. Guardia*)

Competency and Examination of Witnesses: FRE 601, 602, 611

**Summary**: Plainly stated, these rules determine what qualification a witness must have (**601** and **602**) and how an attorney may exam the witness and her testimony (**611**).

**FRE 601**: Competency in General

* Every person is competent to be a witness unless these rules provide otherwise.
* But in a ***civil*** case, state law governs the witness’s competency regarding a claim or defense for which state law supplies the rule of decision

**FRE 602**: Lack of Personal Knowledge

* A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter
  + Evidence to prove personal knowledge may, but need not, consist of the ***witness' own testimony***. (Don’t forget to lay the foundation)
    - Ex: Witness has personal knowledge of this crash because witness testifies to being at the scene when it happened (Foundation: Lead up to being at crash)
* This rule does not apply to a witness’s expert testimony under Rule **703**

**FRE 611**: Mode and Order of Interrogation and Presentation

* (a) **Control by court**: The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to

1. Make the interrogation and presentation effective for the ascertainment of the truth,
2. Avoid needless consumption of time, and
3. Protect witnesses from harassment or undue embarrassment.

* (b) **Scope of cross-examination**: Cross-examination should be limited to
  + The subject matter of the direct examination ***and***
  + Matters affecting the credibility of the witness.
    - NB: Must have good faith basis for doing this (unwritten)

The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

* + If you want to get info from an opponent witness that wasn’t covered on direct examination, you can bring them back and directly examine them for your case
* (c) **Leading questions**: Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. (Read: Establish Foundation) Ordinarily leading questions should (Read: within judges discretion) be permitted on

1. On cross-examination; and
2. When a party calls
   * + A hostile witness,
     + An adverse party, ***or***
     + A witness identified with an adverse party.

* ***High Sticking Problem***: May refresh recollection with a leading question but must show that recollection is exhausted and should try to use least leading formulation possible.
  + This falls under “except as may be necessary to develop the witness' testimony” – **611(c)**

Types of Questions:

* Wide Open: “What happened on July 2, 1776?”
  + Objection: “Calls for a Narrative.”
* ***Ordinary Open***: “Where were you around 4 pm on July 2, 1776?”
* Soft Leading: “Were in Independence Hall on July 2, 1776?”
  + No sustainable objections but these are weaker, less precise questions
* Hard Leading: “On July 2, 1776, you were in Independence Hall, weren’t you!”
  + Objection: “She’s leading the witness your honor.”
  + All the information is contained in the “question” – Available only on Cross

Objections

* Objections to ***Questions***
  + Overbroad/ “calls for narrative” (**unwritten**)
    - No boundaries to control scope of answer
  + Objections to leading questions
    - Assumes contested fact/fact not in evidence (e.g., “When did you stop beating your wife?”
    - Makes contested fact unfairly inaccessible to the witness
  + No good faith basis (**unwritten**)
  + Harassing the witness (**611**)
  + Attorney Putting Own Credibility at Issue (*Berger*)
  + Asserting Own Belief in Argument (*Berger* – “I believe the ∆…”)
  + Create Misimpressions of the Evidence/Trying to Confuse (*Berger*)
  + Ultimate Conclusion (**701**) “Isn’t it a fact that the evidence shows beyond a reasonable doubt that . . . .”
* Objections to ***Answers***
  + Lack of personal knowledge (**602**)
  + Non-responsive (**unwritten** – Usually on Cross)
  + Narrative (**611(a)(2)??**)
  + Ultimate Conclusion (**701**)

Credibility of Witnesses: FRE 607, 608, 609

**Summary**: The rules in this section treat who can attack a witness’ credibility (impeach the witness) and how those attacks can be carried out. Impeachment includes all efforts to convince the fact finders not to accept testimony or evidence provided by a witness. ***You can attack the testimony or the witness herself***.

Cross-examination is the primary tool to impeach a witness and generally involves showing that witness:

* Lied intentionally,
* Had/has a faulty perception or recollection of the subject of the testimony, ***or***
* Made statements that are factually incorrect

When you can’t get to these things on cross-examination alone you use extrinsic evidence to attack no the statements made by the witness but her character: reputation or opinion (**608**) or criminal convictions (**609**), the latter being the only case where specific instances may be proved by extrinsic evidence (otherwise you have to just take the answer).

**FRE 607**: Who May Impeach a Witness

Any party, including the one calling the witness, may attack the witness’ credibility

**FRE 608**: Evidence of Character and Conduct of Witness

This rule is remarkably similar to **405**. The credibility of a witness may be attacked or supported only by testimony in the form of ***opinion or*** testimony re a her ***reputation*** but subject to ***two limitations***:

1. The evidence may only treat character for truthfulness, ***and***
2. Evidence of truthful character (that is, support for a witness’ character for truthfulness) of a witness is admissible ***only after*** her character has been attacked as untruthful (Rehabilitation).

* ***Red light/Green light Problem***: Contradictory evidence (she says green, he says red) is not ordinarily an attack on truthfulness so no rehabilitation allowed.

Except as provided by **609**, ***specific instances*** used to attach a witness’ character for truthfulness ***cannot*** be proved by ***extrinsic evidence*** (*Lawyer must “take the answer”*). The court may allow for such specific instances to be inquired into on cross-examination of a witness ***concerning two matters***:

1. The witness' own character for truthfulness or untruthfulness, or
2. The character for truthfulness of another witness as to which character the witness being cross-examined has testified.

Neither a witness nor the accused waives her privilege against self-incrimination when examined regarding matters that relate only to character for truthfulness.

**FRE 609**: Impeachment by Evidence of Conviction of Crime

For the purpose of impeaching a witness, evidence that a witness (***other than the accused***) was convicted of a crime shall be admitted:

* Subject to **403**, if the crime was *punishable by death or imprisonment > one year* under the law under which the witness was convicted;

Evidence that the witness (***accused only***) has been convicted of such a crime shall be admitted if

* The court determines that the probative value of admitting this evidence outweighs (NB, not substantially outweighs as in 403) its prejudicial effect to the accused;

Evidence that any witness (***including the accused***) has been convicted of a crime shall be admitted regardless of the punishment, if

* The crime was one of dishonesty or false statements.

**Time limit**: Not admissible if more than 10 years has elapsed since the conviction or release from confinement imposed for that conviction, whichever is later, unless the court determines, in the interests of justice, that the probative value of the conviction ***substantially*** outweighs its prejudicial effect. Advance written notice of the intent to use the evidence must be given to the opposing party.

**Effect of pardon**: Evidence of a conviction is not admissible under this rule if

1. The conviction has been the subject of a pardon or other equivalent procedure and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, ***or***
2. The conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

**Juvenile adjudications**: Generally not admissible under this rule. The court may, in a criminal case, allow such evidence re a witness (***not the accused***) if conviction of the offense would be admissible to attack the credibility of an adult and court is satisfied that the evidence is necessary for a fair trial.

**Pendency of appeal**: Doesn’t make conviction inadmissible. Evidence of an appeal is admissible.

Hearsay: FRE 801, 802, 803, 804, 807

~Introduction~

**801(a)-(c):**

Statement: A verbal or written assertion, ***or*** nonverbal conduct that the actor intended as an assertion.

Declarant: A person who makes a statement.

Hearsay: “[A] statement, other than one made by the declarant ***while testifying at the trial or hearing***, offered in evidence to prove ***the truth of the matter asserted***.”

* In short, flag any statement offered into evidence that was not/is not made at trial.
* ***Writings necessarily fall under the hearsay rule***.

**FRE 802** makes hearsay inadmissible except as required by FRE or the SCt (see 803-04, 807 exceptions).

The crux of the hearsay rule is why the statement is being offered in evidence. If it is offered “***for the truth of the matter***” then it could be hearsay but if it is offered to prove that the statement was made, it cannot be.

Policy Rationale:

There is an underlying ***reliability and trustworthiness concerns*** and in the case of common law systems, we don’t trust the jury to be able to give hearsay the reduced weight it deserves, thus we simply make it inadmissible (See 807 and exceptions generally). This is distinct for ***801(d)(2)***; it is about ***accountability***, not reliability. There is an additional component of ***necessity*** addressed in ***804*** and (possibly) **807**.

**803** and **804** show ***balancing act between reliability and necessity***. Where there is great reliability (**803**) we are less concerned about necessity and where there is greater necessity (**804**) we give allowances for less reliability. All of this balancing is done to deal with the loss of the protections normally offered by ***CROSS-EXAMINATION***.

* ***Personal knowledge*** is ***required*** for ***all*** ***hearsay*** except opposing party statements (see **602**).

~Non-Hearsay~

**Summary**: Two classes of statements are deemed non-hearsay in certain circumstance; prior statements by a witness (that is, someone testifying at trial) and admissions by party-opponents (that is opponents to the party presenting the evidence).

**FRE 801(d)**:

*Prior statements by a witness are non-hearsay when*:

The declarant

1. Testifies at the trial or hearing,
2. Is subject to cross-exam concerning the statement, ***and***
3. The statement is
   1. (I) ***Inconsistent*** with the declarant's testimony, and (II) was given under oath subject to the penalty of perjury at a trial, hearing, other proceeding, or in a deposition,
   2. (I) ***Consistent*** with declarant's testimony and (II) is offered to rebut an express or implied charge against the declarant of *recent* fabrication, improper influence or motive, ***or***
   3. One of ***identification*** of a person made after perceiving the person (see and identify)

*Statements made by an opposing party are non-hearsay when*:

The statement is

1. Offered against a party ***and***
2. Is
   1. The party's ***own statement***, in either an individual or a representative capacity,
   2. A statement of which the party has manifested an ***adoption*** or belief in its truth,
      1. Used to be called an Adopted Admission – Objectionable statements made in ones presence and one does not object (counter-argument, didn’t object for a reasons and did not adopt view).
   3. A statement by a ***person authorized*** by the party to make a statement concerning the subject (lawyer, publicist, etc.),
   4. (I) A statement by the party's ***agent*** or servant (II) concerning a matter within the scope of the agency or employment, (III) made during the existence of the relationship, ***or***
   5. A statement by a ***coconspirator*** of a party during the course and in furtherance of the conspiracy.

The statements themselves help but are not sufficient to establish the necessary relationship in ***c, d, and e*** (*Bourjaily*). The content of the statements can lay the foundation but further evidence (though not necessary a lot) is required.

***NB: Personal knowledge is not required for party-opponent statements*** (*Mahlandt*) but this is the ***only*** exception under the hearsay rule. Conclusory rule is relaxed here as well (see **701**).

~Exceptions~

**Summary**: There are three kinds of exceptions to the hearsay rule: exceptions for which availability of the declarant is immaterial (**803** – High reliability, therefore less necessity req’d), exceptions that require that the declarant be unavailable (**804** – High necessity, therefore less reliability req’d), and residual exceptions (**807** – commonly called the catchall exception).

**FRE 803**: Availability is Immaterial

1. *Present sense impression*: A statement describing or explaining an event or condition made **while** the declarant was perceiving the event or condition, or **immediately thereafter**. (Lay people can generally comment on sobriety, or other common sense things – always subject to impeachment)
2. *Excited utterance*: A statement relating to a **startling** event or condition made **while** the declarant was **under** the stress of excitement **caused** by the event or condition (prove stress or excitement).
3. *Then existing mental, emotional, or physical condition*: A statement of the declarant's **then existing** state of mind, emotion, sensation, or physical condition (**such as intent, plan, motive, design, mental feeling, pain, and bodily health**), but **not** including a statement of memory/belief to prove the fact remembered/believed unless relates to execution, revocation, identification, or terms of declarant's will. In other words:

|  |  |
| --- | --- |
| Looking backward | Looking forward |
| - Only admissible on state of mind  > “I saw B yesterday,” but only to prove thought saw B.  > Can’t be used to prove saw B then. | - Admissible for all inferences   * Worker’s Comp - “I am going on business trip” * Can be used to support inferences that planning to go on trip, was a business trip, and even that went on trip (*Hillmon*). |

1. *Statements for purposes of medical diagnosis or treatment*: Statements made for purposes of medical diagnosis/treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or **general character** of the cause or external source thereof insofar as **reasonably pertinent** to diagnosis or treatment (**NB**: does **not** apply to statements of fault). Admissible if arguably part of the medical picture but usually doesn’t include identity of perpetrator ***unless*** you can argue that it is about avoid the source of the injury in the future.
2. *Recorded recollection*: A memorandum/record **(I)** re: a matter about which a W once had K but now insufficient recollection to testify fully/accurately, **(II)** shown that made/adopted by W when the matter was fresh in W’s memory and **(III)** to reflect that K correctly. If admitted, read into evidence but not received as exhibit unless offered by an adverse party. (**Contrast w/ 612**)
3. *Records of regularly conducted activity*: A record, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the record. All as shown by the testimony of the **custodian** or **other qualified witness** (902(11), Rule 902(12)) ***unless*** some indication of a **lack of** **trustworthiness**. (**Remember**: like dbl hearsay, each S in record must have an exception)

* ***Four Legs*** (leading questions are okay to establish foundation):
  + Is this document maintained in ordinary course of business (OCB)?
    - OCB: All aspects of the business including such matters as accidents – trustworthiness exception still applies (*Palmer v. Hoffman*).
  + And your business has a regular practice of making records of this kind?
  + And this was recorded at or near the time the event occurred?
  + And this information was recorded with personal knowledge?

1. *Absence of entry in records kept in accordance with the provisions of paragraph (6)*: Evidence that a matter would normally be included in (6) record but was not, to prove the nonoccurrence or nonexistence of the matter, ***unless*** some indication of a **lack of** **trustworthiness**.
2. *Public records and reports*: Records, in any form, recorded by public offices/agencies, of
3. The activities of the office or agency,
4. Matters observed pursuant to **duty** imposed by law and there was a **duty** to report, ***excluding***, in **criminal** cases, matters observed by police officers/other law enforcement ***or***
5. In civil cases and, against Gov’t in criminal cases, **factual findings** resulting from an legally authorized investigation, ***unless*** some indication of **lack of trustworthiness**.
6. *Records of vital statistics*: Records/data compilations, in any form, of births, fetal deaths, deaths, or marriages, **if** the report thereof was made to a public office pursuant to requirements of law.
7. Absence of public record or entry
8. Records of religious organizations
9. Marriage, baptismal, and similar certificates
10. Family records (*Lilly Leinback*, family bible, grave stone)
11. Records of documents affecting an interest in property
12. Statements in documents affecting an interest in property
13. Statements in ancient documents (20+ years and authenticated)
14. Market reports, commercial publications
15. Learned treatises
16. Reputation concerning personal or family history (*Leinbeck*, reputation as illegitimate)
17. Reputation concerning boundaries or general history
18. Reputation as to character (among associates/in community)
19. Judgment of previous conviction (punishable by death/imprisonment >1year, to prove any fact essential to sustain judgment, but not including, when offered by the Gov’t in a criminal prosecution for purposes other than impeachment, judgments against persons not the accused.)
20. Judgment as to personal, family or general history, or boundaries

**FRE 804**: Unavailability is Required

*(a) A declarant is unavailable if she*:

1. Is exempted from testifying by court on the ground of privilege; ***or***
2. Persists in refusing to testify despite an order of the court to do so; ***or***
3. Testifies to a lack of memory of the subject matter of her statement; ***or***
4. Is dead or then existing physical/mental illness prevents her from being present/testifying; ***or***
5. Is absent from the hearing and the proponent of a statement has been unable to procure her attendance (or, in some cases, testimony) by process or other reasonable means.

***A declarant is not unavailable as a witness if her unavailability as defined above is caused by the wrongdoing of the proponent of a statement to prevent her from attending or testifying.*** (*See* **804(b)(5)**)

*(b) If the declarant is unavailable then the following are admissible (despite being hearsay):*

1. *Former testimony*: Declarant’s testimony given as a witness at another hearing (same or different proceeding), or in a deposition taken in compliance with law in the course (same or different proceeding), if the party *against whom* the testimony is now offered (***or predecessor in interest*** – *Civil*), ***had an opportunity and similar motive*** to develop the testimony by direct, cross, or redirect examination.
2. *Statement under belief of impending death*: In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that her death was imminent, concerning the cause or circumstances of what she believed to be impending death.

* *Shepard*: Wasn’t a dying declaration b/c made the statements two days into sickness that lasted weeks. Left open the question of actual knowledge (poison v. being shot).

1. *Statement against interest*: A statement which was at the time of its making

* So far contrary to the declarant's ***pecuniary*** or ***proprietary*** interest, ***or***
* So far tended to subject the declarant to civil or criminal liability, ***or***
* To render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.

A statement tending to expose the declarant to criminal liability and ***offered*** (not stated) to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

1. *Statement of personal or family history*:
2. A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had ***no means of acquiring personal knowledge*** of the matter stated; ***or***
3. A statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.
4. *Forfeiture by wrongdoing*: A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

**FRE 807**: Residual Exception

Even if **803** or **804** don’t cover it, hearsay evidence is admissible if the statement:

* Has equivalent circumstantial guarantees of trustworthiness,
* Is offered as evidence of a material fact,
* Is more probative than any other evid the proponent can obtain through reasonable efforts ***and***
* (Thorough its admission) Will best serve the purposes of these rules and the interests of justice

Only admissible if before trial/hearing, the proponent gives adverse party reasonable notice of intent and statement’s particulars, including the declarant’s name and address.

~Confrontation Clause~

**6th Amendment:** In all ***criminal*** prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him.

**Summary**: Because the confrontation clause requires that the accused be confronted with witnesses against him, it is necessarily in tension with hearsay exceptions. The Court has determined when, no matter what the FRE says, a statement may not be used in court without the declarant being present.

**Scope**: *Criminal* cases **ONLY**!

**Old Rule**: *Ohio v. Roberts* (court weighed two factors)

* (1) Declarant unavailable (necessity)
* (2) Effective means to test evidence: “marked w/ indicia of reliability”
  + Can be shown totality of circumstances (surrounding statements), but corroboration by other evidence alone not sufficient (*Idaho v. Wright*)

**Current Rule:** *Crawford v. Washington*

* Testimonial Statements: Made for purpose of proceeding to determine guilt
  + May ***only*** be admitted if:
    - The declarant is unavailable, ***and***
    - The statement was tested by cross examination at prior hearing
* Non-Testimonial Statements: Made when not contemplated for proceeding to determine guilt
  + May be admitted if
    - Qualifies under a firmly rooted hearsay exception, ***or***
    - Qualifies under a newer exception that provides a good reason and guarantee reliability (**807**)

**PM**: When has a testimonial statement been adequately tested by cross-examination?

* Prior trial in the same case – *Mattox.*
* Preliminary hearing in this case? (Maybe but less likely b/c full incentives may have been absent)

**Examples**

* *Davis v. Washington*: 911 call accusing boyfriend
  + Non-testimonial: primary purpose was to alert police to ongoing emergency
  + Admissible as excited utterance
* *Hammon v. Indiana*: post-assault interview by police
  + Testimonial: no ongoing emergency, primary purpose was investigation for trial
  + Inadmissible because no cross-examination
* Remember, confrontation clause issues are waived if the defendant makes the declarant unavailable by wrongdoing 🡪 **Rule 804(b)(6)**

Privileges: FRE 501

**Summary**: Privileges are a special category of evidence rules. They are designed to support or protect out-of-court relationships from potential harm from forced disclosure of confidences in court (husband-wife, lawyer-client, clergy-parishioner, etc.). Especially with those that deal with professional relationships, privileges should not be confused with professional obligations, which may overlap but do not have the power of law. The attempt to instantiate rules was a mess and so only **501** was adopted. It left privileges to the states in diversity cases, to federal statutes (not FRE) and common law

NB: Many of privileges are in statutes that have to do with licensing of an employment class – e.g. social worker

**FRE 501**:

*Left to Common Law with some caveats*: Except as otherwise required by the ***Constitution*** or provided by ***Fed Statute*** or ***FRE***, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the ***common law*** as they may be interpreted by the US courts in the light of reason and experience.

*Left to States in Diversity*: However, in civil cases, with respect to an element of a claim or defense as ***to which State law supplies the rule of decision***, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with ***State law***.

**Some Proposed Privilege Rules (varies by State)**

Rule 502: Confidential Reports

Rule 503: Attorney-Client

Rule 504: Psychotherapist-Patient: *Jaffee*; *Commonw v. Fuller* (Rape crisis center – in camera review)

Rule 505: Husband-Wife: Confidential comm privlg - angry statement exception (like excited utterance)

Rule 506: Communications to Clergymen

Rule 507: Political Vote

Rule 508: Trade Secrets

Rule 509: State Secrets

Rule 510: Identify of Informer

* Newsperson’s Privilege:

No newsman’s privilege (*Branzburg v. Hayes*). Many states have “shield laws” which create qualified privileges, exception granted for “extraordinary situations, required to protect the public good.”

Attorney-Client Privilege:

Protects communications ***both ways*** between lawyer and client.

***The test*** as to whether a lawyer is YOUR attorney and therefore your communications are protected by privilege, is ***objective*** (as opposed to a client reasonably believing X is her attorney). *Prichard v. US*.

* For ***Corporate Clients***: Extends to all employees, not just those who make legal decisions for a company, if communications relate to the employee’s work, if the purpose of the communication is to facilitate the providing of legal services to the corporations, and if the communications are confidential. *Upjohn*.
* ***Black Acre Problem***: Evidence disclosed to your attorney is no privileged just b/c you told it to her, the same is true of *documents/emails*. Otherwise, privilege extends to all communications for which you had a reasonable expectation of privacy (The presence of a known 3d party will destroy privilege unless that 3d party is necessary to provide legal advice (interpreter, secretary)).

Communication: Whether verbal, virtual, or documented, must be for purpose of obtaining legal advice about past conduct (legal or illegal) or future (legal only) conduct.

* **Smoking Gun Problem**: No privilege for tangible evidence. Client can only advise client to turn it over to the police. Cannot keep it, hide it, or advise how to hide it. (See also *Clark v. State*)

Waiver of Privilege: When there is a hearing on the issue of incompetent counsel, the privilege is waived (lawyer can defend herself).

Opinions and Expert Testimony: FRE 701, 702, 703, 704, 705, 706

***Summary***: The goal of the opinion (**701**) an expert testimony (**702–706**) rules is to give the fact finder the information she needs to make the best determination possible but where practicable, ***leave the inferences to be drawn by the fact finder***. **701** covers things that a lay person could speak to while **702** indicates that there are some areas where more expertise is required.

~Opinion Testimony~

**FRE 701**: Opinion Testimony of Lay Witness

The average witness’ testimony in form of an opinion is limited to one that is:

* + - Rationally based on the witness’s perception;
    - Helpful to understand the witness’s testimony or to determine a fact in issue; ***and***
    - Not based on scientific, technical, or other specialized knowledge within the scope of **702**.

*Commonwealth v. Holden*: Witness testified that the ∆ winked. Prosecutor asked witness what he thought the wink meant. OBJECTION: opinion/conclusion. Inferences must be left to the factfinder.

* Witness just has the responsibility to describe conduct as objectively as possible (e.g. acted crazy v. disoriented)

Commonly Received Lay Opinions (not exhaustive):

* State of Mind
  + Angry
  + Sad
  + Fearful
* State of health (more limited, general only)
  + Drunk
  + Sick
  + Healthy

Attorney should watch how questions are phrased (***what was his condition v. your opinion of condition?***)

~Expert Testimony~

**Summary**: The primary tool of the fact finder is common understanding and experience. By their very nature, technical or scientific based determinations are outside of that scope. Thus, expert witnesses.

Pre-FRE:

* *Frye*: Established a rule of “general acceptance” for expert testimony’s reliability: based on procedures generally accepted in the field
  + This meant cutting-edge theories or experts w/o substantial communities were kept out
* *Daubert*: Post-**702(a)** but pre-**702(b-d)**; said **702** overruled ***Frye***
  + Is the evidence based on scientific knowledge?
    - Gave “non-exclusive” list of factors for judges to consider
      * Tested in medical or scientific community?
      * Has it been published? (Peer review and validity)
      * How high is the potential rate of error?
      * Is there general acceptance of the theory?
  + Now in **702(b)-(d)**
  + *Kumho Tire Company* – Extends *Daubert* to technical, non-scientific expertise

***Expert witnesses*** are not bound by BER for the basis of their testimony (but second-hand data may provide basis for cross examination)

**FRE 702**:Testimony by Expert Witness

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if

* The expert’s scientific, technical, or other specialized knowledge will help the trier of fact to ***understand the evidence*** or to ***determine a fact in issue***
* The testimony is based on sufficient facts or data (**703**)
* The testimony is the product of reliable principles and methods ***and***
* The expert has reliably applied the principles and methods to the facts of the case.

Expert testimony is allowed only when the court is persuaded that jurors will benefit from help.

**FRE 703**:Bases of an Expert

* An expert may base an opinion on facts or data in the case that the ***expert has been made aware of or personally observed.***
* If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted
* But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury ONLY IF their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect (Reverse **403**).

**PM**: This rule gives the factual basis required for expert testimony. Fact need not be admissible and use those facts as a basis does not make them admissible. It isn’t clear what prejudicial effect there could be.

**FRE 704**: Opinion on an Ultimate Issue

**(a)** *In General*: An expert’s opinion is not objectionable just because it embraces an ultimate issue.

**(b)** *Exception*: In a ***criminal*** case, an expert witness must ***NOT*** state an opinion about ***mens rea***.

* Whether ∆ did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Left to fact finder.

**FRE 705**:Disclosing the Facts or Data Underlying an Expert

* Unless the court orders otherwise, an expert may state an opinion, and give the reasons for it, ***without*** first testifying to the underlying facts or data
* But the expert may be required to disclose those facts or data on cross-examination.
* Opposing counsel may object due to lack of factual basis:
  + If there is a good-faith basis to believe that there is no factual basis the Court can order that the foundation be laid before testimony.

**FRE 706**:Court-Appointed Expert Witnesses

These are very rare but can have some real benefits.

**PM** Pros:

* Partisan influence is eliminated. (very important!)
* Jury and judge not required to choose between competing experts.
* Savings in cost and effort.
* Outcome more likely to be mainstream.

**PM** Cons:

* Expert may have own biases against which there is no counterbalance.
* Expert essentially decides issue, not judge or jury
* Hard to fit in our method of adversary presentation. (Who questions? Crosses?? Awkward!)
* Outcome and approach not likely to be innovative.

Authentication and Best Evidence: FRE 901, 902, 1001–1007

~Authentication~

**Summary**: Documents or other tangible evidence can be powerful because of its intrinsic high credibility. Due to that power, they must be authenticated before they may be admitted. This provides a basis for the fact finder to believe that the evidence is what the proponent claims it is. Some evidence must be authenticated by some other testimony or source (**901**), other evidence is self-authenticating (**902**), meaning that if it meets certain requirements then it is certified authentic in and of itself. There is no hard and fast formula, all the rule gives us are illustrations.

Authenticity ***need not*** be proven beyond a reasonable doubt or even by a preponderance. It need only be sufficient that the jury could have found that it was authentic. ***Ultimate determination left to jury***.

**FRE 901**:Authenticating or Identifying Evidence

**(a)** **In General**: To authenticate or identifying an item of evidence, the proponent must produce [extrinsic] evidence sufficient to support a finding that the item is what the proponent claims it is.

**PM**: Evidence is sufficient when it shows:

* Was a particular identified document or thing in real life connected with some fact of legal consequence to this case?
* Is the document or thing which is proffered in court **the actual thing** which has the legitimate real-life connection?

**PM**: Laying the Foundation - Questions:

1. I show you a document marked Exhibit 1 for Identification, can you recognize it?
2. Please tell us what it is
3. How are you able to recognize Exhibit 1 as (the deed from G) (the gun you found at the scene) (the medical record for P)??
   1. Lawyers miss this one most – without it, ***open to “lack of foundation” objection***.
   2. Can authenticate by
      1. Recognition: Must be unique (animal, clothes, painting, signature, etc.)
      2. Statute, Seal, Gov’t Record: Authentication of the patent in *Ventrex*
      3. Chain of Custody (Lawyer should make sure not to break)
      4. Agreement (Stipulation?)
      5. Deposition Testimony
      6. Requests for Admissions??

**(b)** **Examples.** The following are examples only — not a complete list — of evidence that satisfies the requirement:

* (1) Testimony of a Witness with Knowledge
  + Testimony that an item is what it is claimed to be
* (2) Non-Expert Opinion About Handwriting
  + A non-expert’s opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation.
* (3) Comparison by an Expert Witness or the ***Trier of Fact***
  + A comparison with an authenticated specimen by an expert witness or the trier of fact.
* (4) Distinctive Characteristics and the Like
  + The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.
* (5) Opinion About a Voice
  + An opinion identifying a person’s voice — whether heard firsthand or through mechanical or electronic transmission or recording — based on hearing the voice at any time under circumstances that connect it with the alleged speaker.
* (6) Evidence About a Telephone Conversation
  + For a telephone conversation, evidence that a call was made to the number assigned at the time to:
    - (A) A particular person, if circumstances, including self-identification, show that the person answering was the one called OR
    - (B) A particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone.
* (7) Evidence About Public Records
  + Evidence that:
    - (A) A document was recorded/filed in a public office as authorized by law OR
    - (B) A purported public record or statement is from the office where items of this kind are kept.
* (8) Evidence About Ancient Documents or Data Compilations (*Threadgill v. Armstrong*)
  + For a document or data compilation, evidence that it:
    - (A) Is in a condition that creates no suspicion about its authenticity AND
    - (B) Was in a place where, if authentic, it would likely be AND
    - (C) Is at least 20 years old when offered.
* (9) Evidence About a Process or System
  + Evidence describing a process or system and showing that it produces an accurate result.
* (10) Methods Provided by a Statute or Rule
  + Any method of authentication or identification allowed by a federal statute or a rule prescribed by the Supreme Court.
* ***Spite Fence Problem***: A ***view*** (taking the jury out to see the fence at issue) ***is not evidence*** because there is nothing to put in the record. In the 2d problem, when the ***photograph*** is offered into evidence, that would be enough.
  + NB: You do not need to know who took the photograph; the only foundation needed is that the photo is “fair and accurate representation of fence”. Get a witness (or leave to the fact finder if they have had a view) to authenticate via testimony of accuracy.
  + NB: Remember issues of possible distortion (*Adamczuk* – day v. night), use **403**
  + Videos the same as photos. Remember, **PM** things digital media should require stricter authentication process

**PM**: Laying the Foundation (Photographs, Videos) – Questions:

1. I show you a photograph, which has been marked for I.D. as Exhibit 1. Do you recognize ***what it depicts***?
2. What is depicted by Exhibit 1 for I.D.?
3. Does Exhibit 1 fairly and accurately depict X as it existed at [the time in question]?

Hidden Cameras, X-Rays, Tape Recordings, etc. (Things no human experienced first-hand):

* Authenticate by circumstantial evidence (See “I am going in” Plane Crash Hypo)

**FRE 902**: Evidence that is Self-Authenticating

* The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted
* (1) Domestic Public Documents That Are Sealed and Signed.
  + A document that bears:
    - (A) A seal purporting to be that of the United States; any state, district . . . a political subdivision of any of these entities; or a department, agency, or officer of any entity named above AND
    - (B) A signature purporting to be an execution or attestation.
* (2) Domestic Public Documents That Are Not Sealed but Are Signed and Certified
  + A document that bears no seal if:
    - (A) It bears the signature of an officer or employee of an entity named in (1)(A) ***and***
    - (B) Another public officer who has a seal and official duties within that same entity certifies under seal — or its equivalent — that the signer has the official capacity and that the signature is genuine.
* (3) Foreign Public Documents
  + A document that purports to be signed or attested by a person who is authorized by a foreign country’s law to do so.
* (4) Certified Copies of Public Records
  + A copy of an official record — or a copy of a document that was recorded or filed in a public office as authorized by law — if the copy is certified as correct by:
    - (A) The custodian or another person authorized to make the certification ***or***
    - (B) A certificate that complies with Rule 902(1), (2), or (3) a federal statute, or a rule prescribed by the Supreme Court.
* (5) Official Publications
  + A book, pamphlet, or other publication purporting to be issued by a public authority.
* (6) Newspapers and Periodicals: Printed material purporting to be a newspaper or periodical.
* (7) Trade Inscriptions and the Like
  + An inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control.
* (8) Acknowledged Documents
  + A document accompanied by a certificate of acknowledgment that is lawfully executed by a notary public or another officer who is authorized to take acknowledgments.
* (9) Commercial Paper and Related Documents
  + Commercial paper, a signature on it, and related documents, to the extent allowed by general commercial law.
* (10) Presumptions Under a Federal Statute
  + A signature, document, or anything else that a federal statute declares to be presumptively or prima facie genuine or authentic.
* (11) Certified Domestic Records of a Regularly Conducted Activity (cf. *US v. Stone*)
  + The original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)-(C), as shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court
  + Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record — and must make the record and certification available for inspection — so that the party has a fair opportunity to challenge them.
* (12) Certified Foreign Records of a Regularly Conducted Activity (cf. *US v. Stone*)
  + In a civil case, the original or a copy of a foreign record that meets the requirements of (11) modified as follows: the certification must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the country where the certification is signed - ***Plus notice requirements of (11)***

~Best Evidence~

**Summary:** When trying to prove the content of writings, photographs, or recordings, the original is preferred and must produced if available. Duplicates (exact duplicates, like a photocopy) are just as admissible unless there is question about the original’s authenticity**.** In these case, hearsay is NEVER at issue, truth is immaterial, we are just talking about what is the best way of demonstrating what the content IS not its veracity. This is a rule of preference rather than of admissibility (***just produce or account for the absence of the best evidence***). (Accounting for the absence of the writing just means that the proponent needs to ***testify with some specificity*** why it can’t be produced)

* ***Accident Report Problem***: How you frame the questions is EVERYTHING. If you ask, what did you say in the accident report? 🡪 OBJECTION! The Accident Report speaks for itself! If you ask, what do you recall from the accident? 🡪 No objection.
* ***Barnyard Justice Problem***: Billboard would be best evidence but it can’t be brought into the courtroom. There is no requirement to use the “second best evidence.” What you use then (a witness’ testimony, a picture, both, or any combination plus a view (not a view by itself though)) is a matter of trial tactics.

***Expert witnesses*** are not bound by BER for the basis of their testimony (but second-hand data may provide basis for cross examination)

**Rule 1001: Definitions**

* **(a)** A “writing” consists of letters, words, numbers, or their equivalent set down in any form
* **(b)** A “recording” consists of letters, words, numbers, or their equivalent recorded in any manner
* **(c)** A “photograph” means a photographic image or its equivalent stored in any form
* **(d)** An “original” of a writing or recording means the writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it
  + For electronically stored information, “original” means any printout — or other output readable by sight — if it accurately reflects the information. An “original” of a photograph includes the negative or a print from it
* **(e)** A “duplicate” means a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.

**Rule 1002 Requirement of the Original**

* An original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise.

**Rule 1003 Admissibility of Duplicates**

* A duplicate [as in **Rule 1001(e)**] is admissible to the same extent as the original UNLESS a genuine question is raised about the original’s authenticity or the circumstances make it unfair to admit the duplicate.

**Rule 1004 Admissibility of Other Evidence of Content**

* An original is not required and other evidence of the content of a writing, recording, or photograph is admissible IF:
  + **(a)** All the originals are lost or destroyed, and not by the proponent acting in bad faith;
  + **(b)** An original cannot be obtained by any available judicial process;
  + **(c)** The party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; OR
  + **(d)** The writing, recording, or photograph is not closely related to a controlling issue.

**Rule 1005 Copies of Public Records to Prove Content**

* The proponent may use a copy to prove the content of an official record — or of a document that was recorded or filed in a public office as authorized by law — if these conditions are met:
  + The record or document is otherwise admissible AND
  + The copy is certified as correct in accordance with Rule 902(4) or is testified to be correct by a witness who has compared it with the original
* If no such copy can be obtained by reasonable diligence, then the proponent may use other evidence to prove the content.

**Rule 1006 Summaries to Prove Content**

* The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court
* The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.

**Rule 1007 Testimony or Statement of a Party to Prove Content**

* The proponent may prove the content of a writing, recording, or photograph by the testimony, deposition, or written statement of the party against whom the evidence is offered.
* The proponent need not account for the original.