<u>EVIDENCE OUTLINE</u>

Evidence law is about the limits we place on the information juries hear. Evidence rules presume that certain evidence will distract juries from their search for truth and produce wrong results. Rules of relevance attempt to focus the parties and the jury on the issues at hand. They guard against digression and distraction. Rules of reliability attempt to ensure that the evidence the jury hears is as good as it purports to be – or at least that its defects are apparent to the jury. Privileges exclude evidence that is both relevant and reliable in order to serve other societal interests.

Motion in Limine – A motion in limine is a motion to limit the evidence that will be submitted to the jury, by excluding matters that are not relevant, are prejudicial, or are otherwise inadmissible under applicable rules.

Limiting Instruction – When evidence is admissible for one purpose, but not admissible for another purpose, the court, upon request, must restrict the evidence to its proper scope and instruct the jury accordingly. It is possible to argue that a limiting instruction will result in unfair prejudice, and so the evidence should not be admitted even with a limiting instruction.

I. **Jury Deliberations: Rule 606(b).** The Rule says: upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.

   A. <u>*Tanner v. United States*</u>. Petitioners argued that the District Court erred in refusing to admit juror testimony at a post-verdict hearing on juror intoxication during the trial. It was claimed that jurors drank, smoked marijuana, ingested cocaine, and sold drugs to one another on lunch breaks from the trial. The court held that an additional post-verdict evidentiary hearing was unnecessary. In so deciding, the court said that the near-universal and firmly established common-law rule in the United States flatly prohibited the admission of juror testimony to impeach a jury verdict. Exceptions to the common-law rule were recognized only in situations in which an extraneous influence was alleged to have affected the jury. The distinction was not based on whether the juror was literally inside or outside the jury room when the alleged irregularity took place; rather, the distinction was based on the nature of the allegation. Lower federal courts treated allegations of the physical or mental incompetence of a juror as "internal" rather than "external" matters.

      Tanner stands for the system's unwillingness to look past the jury's verdict to expose whatever flaws in reasoning or understanding might lie behind the curtain of the deliberation room. *Tanner* shows that secret deliberations are an established

feature of the common law tradition and remain a central element of our trial system.

II. **Relevant Evidence: Rules 401* and 402.** Rule 401 says: "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Rule 402 says: All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Problems of relevancy call for an answer to the question whether an item of evidence, when tested by the processes of legal reasoning, possesses sufficient probative value to justify receiving it in evidence. Relevancy is not an inherent characteristic of any item of evidence, but exists only as a relation between an item of evidence and a matter properly provable in the case. The fact to be proved may be ultimate, intermediate, or evidentiary; it matters not, so long as it is of consequence in the determination of the action.

The fact to which the evidence is directed need not be in dispute. While situations will arise which call for the exclusion of evidence offered to prove a point conceded by the opponent, the ruling should be made on the basis of such considerations as waste of time and undue prejudice (Rule 403, below), rather than under any general requirement that evidence is admissible only if directed to matters in dispute.

A. Materiality. Evidence is material if it bears on a fact that is of consequence to the determination of an action. Whether evidence is material turns on what issues are at stake in the proceeding, which often turns on the substantive law of the jx. If it is important to proving or disproving something in the case, then it is material.

Materiality exists when the proffered evidence relates to one of the substantive legal issues in the case. Evidence is immaterial if the proposition for which it is offered as proof is not a legal issue in the case.

B. Probativeness. Evidence must be probative of a material fact. That is, evidence must have a tendency to make the existence of that fact more probable or less probable than it would be without the evidence. To be probative, evidence need not prove anything conclusively. It merely must have some tendency to make a fact more or less probable. In *United States v. James*, James gave her daughter a gun to defend herself against James' boyfriend Ogden, which the daughter used to kill Ogden. James claimed that she was afraid of Ogden because he had told her about some awful things he had done. The defense offered records that Ogden actually did the terrible things. The court allowed the evidence because the records, if admitted, would have corroborated James' testimony that she heard Ogden tell her these things, thus making it more likely that she actually feared Ogden. The chain of reasoning is as follows: If the jury hears this evidence, then it makes it more likely that Ogden actually did these things. If he did these things, then it is more likely that he in fact told her that he had done these things. If he in fact told her that he had done these things, then it is more likely that she was acting in reasonable self defense.

Probative evidence contributes to proving or disproving a material issue.

Mechanics – To establish relevance, one must show: (1) the point for which it is offered; (2) that the point is "of consequence" to the determination of the case under the law; and (3) that the evidence tends at least slightly to make the point more or less probable.

Conditional Relevance: Rule 104 – Rule 104(a) says: Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges. Rule 104(b) says: When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition. This rule deals with evidence that would be relevant only if some other condition is met.

In the situation of conditional relevancy, the probative value depends not only upon satisfying the basic requirement of relevancy as described above but also upon the existence of some matter of fact.

A. <u>104(a) Standard and Application</u>. The applicability of a particular rule of evidence often depends upon the existence of a condition. Is the alleged expert a qualified physician? Is a witness whose former testimony is offered unavailable? Was a stranger present during a conversation between attorney and client? In each instance the admissibility of evidence will turn upon the answer to the question of the existence of the condition. The judge has the responsibility for making these determinations. If the question is factual in nature, the judge will of necessity receive evidence pro and con on the issue. The rule provides that the rules of evidence in general do not apply to this process. The standard that the judge will use when deciding whether the condition is satisfied is a preponderance of the evidence standard.

B. <u>104(b) Standard and Application</u>. In some situations, the relevancy of an item of evidence, in the large sense, depends upon the existence of a particular preliminary fact. Thus when a spoken statement is relied upon to prove notice to X, it is without probative value unless X heard it. Relevance in this sense has been labeled "conditional relevancy." Such questions are appropriate for juries. The judge makes a preliminary determination whether the foundation evidence is sufficient to support a finding of the fulfillment of the condition. If so, the item is admitted. If after all the evidence is in and the jury could reasonably conclude that fulfillment of the condition is not established, the issue is for them. If the evidence is not such as to allow a finding, the judge withdraws the matter from their consideration. The standard that the judge will use when deciding whether the condition is satisfied is whether a reasonable juror would find that a preponderance of the evidence shows that the condition is satisfied.

C. <u>Distinguishing 104(a) Questions from 104(b) Questions</u>. Rules 104(a) and (b) both address how we should resolve questions on which the admissibility of evidence depends. In determining whether a party has introduced sufficient evidence to meet Rule 104(b), the trial court simply examines all the evidence in the case and decides

whether the jury could reasonably find the conditional fact by a preponderance of the evidence. We know two important facts about these dual standards of proof. The first is that the preponderance standard of Rule 104(a) is higher than the sufficient-evidence standard of Rule 104(b). Rule 104(a) makes clear that the evidence used to prove facts under that rule need not itself be admissible. Under Rule 104(b), however, only *admissible* evidence may be used to prove contested preliminary facts. Both 104(a) and (b) questions are in some sense for the court. In the one case, the judge must resolve the question herself by a preponderance of the evidence. In the other, she must decide whether sufficient evidence has been introduced – or will be forthcoming – that a jury could reasonably find the conditional fact by a preponderance of evidence.

III. **Unfairly Prejudicial Evidence: Rule 403*.** The Rule says: Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

These circumstances entail risks which range all the way from inducing decision on a purely emotional basis to nothing more harmful than merely wasting time. Situations in this area call for balancing the probative value of and need for the evidence against the harm likely to result from its admission. "Unfair prejudice" within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, and emotional one. In reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction.

A. <u>Balancing</u>. If the evils of a particular piece of evidence (say, its potential to confuse the jury) exactly offset the probative value of the evidence, Rule 403 grants the trial judge no discretion to exclude. Even if such evils actually outweigh probative value, though only slightly, the rule still grants no permission to exclude; only if these evils "substantially outweigh" the probative value of the evidence does Rule 403 give the judge *discretion* (not mandatory) to exclude the evidence. It is important to note, though, that if a piece of evidence is probative for many reasons, each of which being only slightly probative, the overall probativeness of the evidence may add up to make the evidence more important.

*Comparing Evidentiary Alternatives** - The question of admissibility is seen as inviting further comparisons to take account of the full evidentiary context of the case as the court understands it when the ruling must be made. On objection, the court should decide whether a particular item of evidence raised a danger of unfair prejudice. If it did, the judge should go on to evaluate the degrees of probative value and unfair prejudice not only for the item in question but for ***any actually available substitutes as well***. If an alternative is found to have substantially the same or greater probative value but a lower danger of unfair prejudice, sound judicial discretion is to discount the value of the item first offered and exclude it if its discounted probative value were substantially outweighed by unfairly prejudicial risk. Thus, "probative value" under Rule 403 may be calculated by comparing evidentiary alternatives. *Old*

Chief v. United States.

Necessity – In evaluating the probative value of a piece of evidence, the court will be strongly influenced by the proponent's need for the evidence.

B. Unfair Prejudice. "Unfair prejudice" means that a piece of evidence has an undue tendency to suggest a decision on an improper basis, commonly, though not always, an emotional one. Something is unfairly prejudicial when the evidence appeals to the juror's emotions when such emotions will overcome reason, facts, and evidence.

Undisputed Facts – If a party does not contest a fact that is of consequence, then a relevant exhibit's probative value may be minimal, but the other party is still allowed to prove its case. In such a situation, the judge will take into account the various pieces of evidence that are offered to prove an uncontested fact and may decide only to allow those pieces that are not very inflammatory or unfairly prejudicial.

i. *Photographs and Other Inflammatory Evidence*. If a photograph is of a nature to incite the passion or inflame the jury, the court must determine whether the danger of unfair prejudice substantially outweighs the exhibit's probative value. Photographs of a homicide victim's body are generally admissible because the fact and cause of death are always relevant in a murder case. However, if a defendant does not contest the fact that is of consequence, then a relevant exhibit's probative value may be minimal. Under such circumstances, gruesome photographs may have little use or purpose except to inflame, and their prejudicial effect can be significant. *State v. Bocharski*.

ii. *Computer-generated Animation*. A CGA may help an expert explain his or her opinion and make the testimony more persuasive than it otherwise might have been, but this is not a proper ground for excluding the evidence. A CGA should be deemed admissible as demonstrative evidence if it: (1) is a fair and accurate representation of the evidence it purports to portray; (2) is relevant; and (3) has a probative value that is not outweighed by the danger of unfair prejudice. The potency of the evidence is not a factor. However, the relative monetary positions of the parties is relevant for the trial court to consider when ruling on whether or not to admit a CGA into evidence. *Commonwealth v. Serge*.

iii. *Evidence of Flight*. The intentional flight of a defendant immediately after the commission of a crime, or after he is accused of a crime that has been committed, is not sufficient evidence in itself to establish guilt, but it is a fact which, if proved, may be considered by the jury in light of all other evidence in the case. Its probative value depends upon the degree of confidence with which four inferences can be drawn: (1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the

crime charged. The more remote in time the alleged flight is from the commission or accusation of an offense, the greater the likelihood that it resulted from something other than feelings of guilt concerning that offense. *United States v. Myers*.

Because of the inherent unreliability of evidence of flight, and the danger of unfair prejudice its use may entail, a flight instruction is improper unless the evidence is sufficient to furnish reasonable support for all four of the necessary inferences. *Id*.

iv. *Probability Evidence*. Whether or not mathematical probability statistics is helpful turns on the soundness of the math, the accuracy of the underlying facts, and the ability of jurors to assess flaws beyond the math. Probabilistic evidence poses a risk of unfair prejudice when it is wrong (either it rests on false date or mistaken math principles) and when jurors and opposing counsel cannot spot the flaws.

In *People v. Collins*, the court disallowed probability evidence because it "injected two fundamental prejudicial errors into the case: (1) the testimony itself lacked an adequate foundation both in evidence and in statistical theory; and (2) the testimony and the manner in which the prosecution used it distracted the jury from its proper and requisite function of weighing the evidence on the issue of guilt, encouraged the jurors to rely upon an engaging but logically irrelevant expert demonstration, foreclosed the possibility of an effective defense by an attorney apparently unschooled in mathematical refinements, and placed the jurors and defense at a disadvantage in sifting relevant fact form inapplicable theory. The court also noted that mathematical odds are not admissible as evidence to identify a defendant in a criminal proceeding so long as the odds are based on estimates, the validity of which have not been demonstrated.

v. *Effect of Stipulations*. The familiar, standard rule that the prosecution is entitled to prove its case by evidence of its own choice, or, more exactly, that a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the government chooses to present it. *Old Chief v. United States*. Thus, the offer of a stipulation does not, as a matter of law, force the prosecution to accept it. However, *Old Chief* held that in a case in which one of the elements of a crime is the defendant's legal status (here, being a felon), it does not matter why the defendant has that status, and so a stipulation may be required, especially when not entering into a stipulation would be unfairly prejudicial (especially considering the evidentiary alternative test, above).

IV. **Specialized Relevance Rules: Rules 407-411.** These rules reflect the rule writers' judgment that, as a matter of law, the evidence it governs fails a Rule 403 weighing test. Certain items of evidence may be directed to a material issue in the case and may be very probative of that issue, but they are excluded because of predictable policies designed to encourage certain public policy solutions to legal problems.

Subsequent Remedial Measures: Rule 407 – The rule says: When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the 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, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

The rule incorporates conventional doctrine which excludes evidence of subsequent remedial measures as proof of an admission of fault. The rule rests on two grounds: (1) the conduct is not in fact an admission, since the conduct is equally consistent with injury by mere accident or through contributory negligence; and (2) there exists a social policy of encouraging people to take, or at least not discouraging people from taking, steps in furtherance of added safety.

Although evidence of subsequent repairs is not admissible to prove negligence, etc., this evidence may still be admissible for other purposes, including proving ownership or control, rebutting a claim that a precaution was not feasible, and proving destruction of evidence.

A. Remedial Measures Prior to the Event. Evidence of measures taken by the defendant prior to the "event" does not fall within the exclusionary scope of Rule 407 even if they occurred after the manufacture or design of the product.

B. Feasibility. Rule 407 exempts subsequent remedial measure evidence from the exclusionary provision of the rule when it is offered to prove feasibility if feasibility has been disputed. There are two approaches to construing the feasibility exception: (1) narrowly, disallowing evidence of subsequent remedial measures unless the defendant has essentially contended that the measures were not physically, technologically, or economically possible under the circumstances then pertaining; (2) broadly, including the spectrum of motives and explanations for not having adopted the remedial measure earlier (basically, saying that something was not "feasible" means that, as a matter of judgment, the actor did not think that the measure should have been taken, then the accident happened, and then the actor takes the remedial measure). *Tuer v. McDonald*.

C. Impeachment. Subsequent remedial measure evidence has been held inadmissible to impeach testimony that, at the time of the event, the measure was not believed to be as practical as the one employed, or that the defendant was using due care at the time of the accident. *Id*. This rule seems to be consistent with the approach taken on feasibility.

D. Third-party Repairs. The public policy of the rule gives no grounds for excluding evidence of third-party repairs. Most third parties will not be dissuaded from making repairs just because evidence of those repairs might be offered against someone else. However, some courts have held that such evidence has too little probative force to get past Rule 403 because the probative value of most subsequent remedies is that

they amount to an admission by the defendant that the previous conduct was unsafe.

Compromise and Offers to Compromise: Rule 408 – The rule says: Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction: (1) furnishing or offering or promising to furnish or accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise the claim ; and (2) conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority. This rule does not require exclusion if the evidence is offered for purposes not prohibited by the foregoing. Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.

Evidence of an offer to compromise a claim is not receivable in evidence as an admission of the validity or invalidity of the claim. This exclusion is based on two grounds: (1) the evidence is irrelevant, since the offer may be motivated by a desire for peace rather than from any concession of weakness of position; and (2) the promotion of the public policy favoring the compromise and settlement of disputes. Since the rule excludes only when the purpose is proving the validity or invalidity of the claim or its amount, an offer for another purpose is not within the rule.

Evidence of compromise or offers to compromise is inadmissible to prove liability for, or invalidity of, a claim that is disputed as to validity or amount. Such evidence is also inadmissible to impeach through prior inconsistent statement. Conduct or statements made in the course of negotiating a compromise, as well as the offer to compromise itself, are also excluded. However, conduct or statements made during compromise negotiations regarding a civil dispute with a governmental regulator, investigative, or enforcement authority are not excluded when offered in a criminal case. Note that Rule 408 does not protect preexisting information simply because it is presented to one's opponent during compromise negotiations; one may not immunize otherwise admissible information under the guise of disclosing it during compromise negotiations.

A. Disputed Claim. The policy considerations above do not come into play when the effort is to induce a creditor to settle an admittedly due amount for a lesser sum. Hence the rule requires that the claim be disputed as to either validity or amount. Note, though, that the rule does not protect offers to compromise made before a "claim" of some sort has been made. A lawsuit is clearly a claim, and courts will sometimes deem informal oral or written demands to be claims.

   Although the filing of a suit is not a prerequisite for this exclusionary rule, there must be some indication, express or implied, that a party is going to make some kind of claim. Thus, a party's volunteered admission of fact accompanying an offer to settle immediately following the incident is usually admissible because there has not been time for the other party to indicate an intent to make a claim.

B. Exception: Statements made to Government Agents. The rule addresses the admission at criminal trials of conduct and statements made in civil compromise talks

when those negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority. Where an individual makes a statement in the presence of government agents, its subsequent admission in a criminal case should not be unexpected. Yet, statements made in compromise negotiations of a claim by a government agency may be excluded in criminal cases where the circumstances so warrant under Rule 403.

Negotiations v. Offers and Acceptances – The rule distinguishes statements and conduct made in compromise negotiations of a civil claim by a government agency from an offer or acceptance of a compromise of such a claim. The reason for this is that admitting such an offer or acceptance could deter a defendant from settling a civil regulatory action for fear of evidentiary use in a subsequent criminal action.

C. Impeachment. The rule permits evidence of compromise negotiations and of conduct and statements made in settlement talks when offered to prove a witness's bias or prejudice. For example: say a car accident injured two persons, A and B, both of whom sue the defendant. If the defendant settles generously with A, and A later testifies against B on the defendant's behalf, B could offer evidence of A's settlement to show her bias toward the defendant.

   Impeachment by Prior Inconsistent Statements – The rule prohibits the use of statements made in settlement negotiations when offered to impeach by prior inconsistent statement or through contradiction. Such broad impeachment would tend to swallow the exclusionary rule and would impair the public policy of promoting settlements.

D. Protection of Both Parties. The rule excludes compromise evidence even when a party seeks to admit its own settlement offer or statements made in settlement negotiations. The protections of the rule cannot be waived unilaterally because the rule, by definition, protects both parties from having the fact of negotiation disclosed to the jury.

E. Pre-existing Information. The rule cannot be read to protect pre-existing information simply because it was presented to the adversary in compromise negotiations.

F. Third Parties. This rule also bars evidence that one of the parties in the suit settled with a third party if that evidence is offered to prove liability for or invalidity of the claim.

Payment of Medical and Similar Expenses: Rule 409 – The Rule says: Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury. The policy reasons behind this rule mirror those of Rules 407 and 408. This rule treats evidence of third party settlements the same as Rule 408 does. This rule does not extend to conduct or statements not a part of the act of furnishing or offering or promising to pay (not to the negotiations, which Rule 408 does).

Evidence that a party paid (or offered to pay) the injured party's medical expenses is not

admissible to prove liability for the injury. However, unlike the situation with compromise negotiation (above), admissions of fact accompanying offers to pay medical expenses are admissible.

Liability Insurance: Rule 411 – The Rule says: Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness. There is a feeling that knowledge of the presence or absence of liability insurance would induce juries to decide cases on improper grounds, especially since such insurance does not suggest fault or lack thereof.

Evidence that a person was or was not insured may be admissible for any purpose other than to show negligent or wrongful action. In *Williams v. McCoy*, the court allowed plaintiff to introduce evidence of her own insurance to refute the argument by the defendant that she hired a lawyer because she was litigious. The Rule did not bar her explanation that she hired attorney due to negative encounter with defendant's insurance adjuster.

Evidence that a person was or was not insured against liability is not admissible upon the issue of whether she acted negligently or otherwise wrongfully. Nor is it admissible to show ability to pay a substantial judgment. Proof that a person carried liability insurance may be admissible and relevant for other purposes, including ownership or control, impeachment, and as part of an admission.

Inadmissibility of Pleas, Offers of Pleas, Plea Discussions, and Related Statements: Rule 410 – The Rule says: Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions: (1) a plea of guilty which was later withdrawn; (2) a plea of nolo contendere; (3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or (4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

Withdrawn guilty pleas, pleas of nolo contender, offers to plead guilty, nor evidence of statements made in negotiating such pleas are admissible in any proceeding. This protection may be validly waived unless there is an affirmative indication that the defendant entered the waiver agreement unknowingly or involuntarily.

A. <u>Breadth of the Exclusion</u>. Rules 407, 408, 409, and 411 all allow certain kinds of evidence except in the situations discussed by those rules. Rule 410, on the other hand, bars all evidence except those specifically allowed under the rule.

B. <u>Impeachment</u>. Statements the defendant makes during plea negotiations with the

prosecutor may not be used to impeach her should she later testify differently at trial. The rationale: if defendants worried that any statements they make during plea negotiations might be used to impeach them at trial, they might not enter plea negotiations.

C. Waiver. The Supreme Court has held that prosecutors may, as a precondition to any plea negotiations, demand that defendants agree that any statements they make during negotiations may be used to impeach any contradictory testimony they give at trial.

D. Plea Negotiations with the Prosecutor. If the defendant unilaterally offers information without first establishing that he is seeking a concession, a court may determine that no plea discussions had begun and that the defendant's statements are admissible against him. Further, if a prosecutor has designated a police officer to act as an agent for purposes of plea discussions, statements made to the police officer will fall within the rule's protection, but defendants speak at their peril to police officers who merely appear to have authority to negotiate pleas. Some courts have held that this trapping of defendants is unfair, and have interpreted the rule more generously, saying that the rule should exclude the defendant's statements if she exhibited an actual subjective expectation to negotiate the plea, and that expectation was reasonable given the totality of the objective circumstances.

E. Evidence Offered Against the Prosecutor. By its terms, the rule does not prevent the defendant from presenting evidence that the prosecutor offered to drop a charge during plea discussions (see *United States v. Biaggi*, where the court explained that plea negotiations are inadmissible "against the defendant," but it does not necessarily follow that the government is entitled to a similar shield, and held that the defendant was allowed to put on evidence that he rejected an offer from the prosecution of immunity in exchange for testimony because such evidence showed an innocent state of mind that was critical to critical to a fair adjudication of criminal charges). Some courts have informed the strict language of the rule and have barred such evidence against prosecutors.

V. Character Evidence.

Rule 404(a) – Subsection (a) of the Rule says: *Character evidence generally* – Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except: (1) *Character of accused* – In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404 (a)(2), evidence of the same trait of character of the accused offered by the prosecution; (2) *Character of alleged victim* – In a criminal case, and subject to the limitations imposed by Rule 412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor; (3) *Character of witness* – Evidence of the character of a witness, as

provided in rules 607, 608, and 609.

A. Character in Issue v. Circumstantial Character. When a person's character is itself an element of a crime, claim, or defense, character evidence must be admitted. For example, the competency of the driver in an action for negligently entrusting a motor vehicle to an incompetent person puts the person's character directly at issue. On the other hand, character evidence is susceptible of being used for the purpose of suggesting an inference that the person acted on the occasion in question consistently with his character. This is the sort of evidence sought to be barred by Rule 404(a).

B. General Rule and Exceptions. The circumstantial use of character evidence is rejected with important exceptions. That is, the general rule is that the prosecution cannot initiate evidence of the bad character of the defendant merely to show that she is more likely to have committed the crime of which she is accused. The following exceptions only apply in criminal cases, not civil cases (thus, in civil cases, there is no exception to the general 404(a) rule.

The first exception is that an accused may introduce pertinent evidence of good character, in which event the prosecution may rebut with evidence of bad character. Thus, the accused may introduce evidence of her good character to show her innocence of the crime.

The second exception is that an accused may introduce pertinent evidence of the character of the victim (*e.g.*, to support a claim of self-defense), and the prosecution may introduce similar evidence in rebuttal of the character evidence. Thus, the defendant may introduce reputation or opinion evidence of a bad character trait of the alleged crime victim when it is relevant to show the defendant's innocence. However, by specific exception discussed below, this rule does not extend to showing the bad character of victims in sex offense cases. Once the defendant has introduced such evidence, the prosecution may counter with reputation or opinion evidence of either the victim's good character generally, or the defendant's bad character for the same trait.

The third exception is that the character of a witness may be gone into as bearing on his credibility.

C. Civil Cases. Evidence of character to prove the conduct of a person is generally not admissible in a civil case, unless the person's character itself is one of the issues in the case (*e.g.*, in a defamation action when D is being sued for calling P a thief and pleads as an affirmative defense that she spoke the truth).

Rule 404(b) – Subsection (b) of the rule says: Other crimes, wrongs, or acts – Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

A. <u>Mechanics of 404(b)</u>. The basic rule is that when a person is charged with one crime, extrinsic evidence of her other crimes or misconduct is inadmissible if such evidence is offered solely to establish a criminal disposition. However, evidence of other crimes or misconduct is admissible if these acts are relevant to some issue other than the defendant's character or disposition to commit the crime charged in either a criminal or a civil case.

Knowledge – Evidence of a defendant's prior act may be allowed if it is being offered to prove that he had knowledge of how to commit the crime for which he is being charged, subject to a 403 balancing test. Such evidence is more likely to be admitted when there are very few people who have the sort of knowledge required for the perpetration of the crime alleged and the defendant is one with such knowledge.

Motive – The commission of a prior crime may be evidence of a motive to commit the crime for which the defendant is accused.

Identity – Evidence, including misconduct, that connects this defendant to the crime is admissible (*e.g.*, theft of gun used in later crime). Similarly, evidence that the accused committed prior criminal acts that are so distinctive as to operate as a "signature" or "modus operandi" may be introduced to prove that the accused committed the act in question. That is, if the defendant committed a particular crime in the past, and the present offense matches that crime in idiosyncratic ways, it may be inferred that the defendant committed the present offense as well. The similarities between the two crimes must be so distinctive that the inference that nobody else could have committed this crime must be able to overcome the jury's temptation to engage in propensity reasoning. The court in *United States v. Trenkler* said that the test must show that the characteristics relied upon are sufficiently idiosyncratic. The test must focus on the "totality of the comparison", demanding that the "conjunction of several identifying characteristics or the presence of some highly distinctive quality."

Narrative Integrity – Evidence of other acts may be admitted for the purpose of providing "narrative integrity" when (1) the evidence of the prior acts may be admitted if the evidence "constitutes a part of the transaction that serves as the basis for the criminal charge"; or (2) the prior act evidence may be admitted "when it was necessary to do so in order to permit the prosecutor to offer a coherent and comprehensible story regarding to the commission of the crime." *United States v. DeGeorge*.

Absence of Accident – In situations in which the defense will claim that the event occurred as a result of an accident or mistake by the defendant, the prosecution may put on evidence of similar misconduct by the defendant to negate the possibility of mistake or accident. For example, if Husband is on trial for shooting and murdering Wife, and he claims an accident occurred while cleaning his gun, prosecution may prove that six months ago Husband tried to stab Wife (or, as another example, that

Husband "accidentally" shot his previous Wife whilst cleaning his gun).

Doctrine of Chances – This doctrine allows evidence to show that it is unlikely a defendant would be repeatedly, innocently involved in similar, suspicious circumstances. Using the doctrine of chances allows a prosecutor to admit evidence of prior "accidents" that can persuade a jury that prior incidents are so similar that it is very improbable that the case at bar is actually accidental. This differs from "absence of accident," above, because here the previous "accidents" did not result from a mistake by the accused, but rather by some other person or event. However, If the inference of guilty plan seems as farfetched as that of innocent happenstance, we are prepared to attribute the events to chance.

B. Reverse 404(b). Evidence under Rule 404(b) may be also available to negative accused's guilt. When the defendant is offering that kind of proof exculpatorily, prejudice to the defendant is no longer a factor, and simple relevance to guilt or innocence should suffice as the standard of admissibility. A defendant must demonstrate that the "reverse 404(b)" evidence has a tendency to negate his guilt, and that it passes the Rule 403 balancing test.

    i. *United States v. Stevens*. Here, defendant was convicted of robbery and sexual assault. The court held that "other crimes" evidence was admissible to show that defendant was not the perpetrator. The court reasoned that the probative value of evidence that the victim of similar crime who did not identify defendant as his assailant outweighed the prospect of undue delay or of confusion of issues and was admissible as other crimes evidence in the prosecution for robbery and sexual assault to show that an unknown third person perpetrated both crimes and that other victims had misidentified defendant as their attacker. Thus, the defendant may introduce "reverse 404(b)" other crimes evidence so long as its probative value is not substantially outweighed by considerations of prejudice, confusion, or waste of time.

C. The *Huddleston* Standard and Rule 104(b). In *Huddleston v. United States*, the court said that courts may admit evidence of prior bad acts if there is sufficient evidence to support a finding by the jury that the defendant committed the similar act. In the Rule 404(b) context, similar act evidence is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor. Such questions of relevance conditioned on fact are dealt with under Rule 104(b). In determining whether the Government has introduced sufficient evidence to meet Rule 104(b), the trial court neither weighs credibility nor makes a finding that the proponent of the evidence has proved the conditional fact by a preponderance of the evidence. The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact by a preponderance of evidence.

Methods of Proving Character: Rule 405 – Subsection (a) of the Rule says: *Reputation or opinion* – In all cases in which evidence of character or a trait of character of a person is

admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct. Subsection (b) says: *Specific instances of conduct* – In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

A. Mechanics of 405. Evidence of specific acts of the person in question as demonstrating that person's character is permitted only in a few instances, such as where character is itself one of the ultimate issues in the case. Otherwise, witnesses who know the person may testify regarding their opinions or the general reputation of the person on direct examination.

   A defendant puts her character in issue by calling a witness to testify to the defendant's good reputation for the trait involved in the case. The witness may also give his personal opinion concerning that trait of the defendant. However, the witness may not testify to specific acts of conduct of the defendant to prove the trait in issue.

   The prosecution may then test the character witness by cross-examination regarding the basis for his opinion or knowledge by asking whether the witness knows of, or has heard of, specific incidences of misconduct. If the witness denies knowledge of these specific instances of conduct, the prosecutor may not prove them by extrinsic evidence. The prosecution may also rebut the defendant's character evidence by calling a witness to testify to the defendant's bad reputation or other opinion of the defendant's character for the particular trait involved.

B. Specific Instances of Conduct. The rule confines the use of evidence of this kind to cases in which character is, in the strict sense, in issue and hence deserving of a searching inquiry (character in issue).

Character Evidence in Sexual Assault Cases – Rules 413, 414, and 415 are true exceptions to the propensity evidence ban. These three rules permit prosecutors and civil plaintiffs to offer evidence of the defendant's other acts of sexual assault or child molestation on any matter to which it is relevant. By enacting Rules 413, 414, and 415 in 1994, Congress sought to ensure that federal trial judges could admit evidence of past sexual misconduct in sexual assault and child molestation cases. These three rules permit plaintiffs and prosecutors to offer evidence of other specific acts on any matter to which it is relevant, including the specific purpose of the defendant's propensity to commit sexual assault or child molestation. Evidence allowed under these rules must still pass a Rule 403 balancing test.

Evidence of Habit or Routine Practice: Rule 406 – When a person performs the same conduct over and over again the same way, we can predict with some confidence how that person will perform that act next time. The more predictive the evidence of other acts is, the more probative it is of present conduct. Yet, the category of habit extends only to relatively innocuous behavior (not of assaulting people, or murdering people, etc.). Proof of habit need not take any particular form. Rule 406 therefore permits evidence of specific acts.

A. Defining Habit. Habit is defined as a behavior "invariable regularity." Our most

invariable actions are those we do automatically and almost without volition. Few of us think about putting on a seatbelt, yet many of us do so every single time we drive. Lack of volition is therefore one sign that behavior qualifies as a habit. But the true touchstone of habitual behavior is regularity and hence predictability. The doing of habitual acts may become semi-automatic.

B. <u>Groups</u>. Equivalent behavior on the part of a group is designated "routine practice of an organization" in the rule.

C. <u>Determining when an Action is Habitual</u>. The judge makes a determination of whether to admit evidence of habit under Rule 104(a). Much evidence is excluded simply because of failure to achieve the status of habit.

Impeachment and Character for Truthfulness: Rules 607, 608, and 609 – Impeachment means the casting of an adverse reflection on the veracity of the witness. The primary method of impeachment is by cross-examination of the witness under attack, although witnesses are often impeached by extrinsic proof that casts doubt on credibility. The credibility of a witness may be attacked by any party, including the party calling him. FRE 607. Either party may offer evidence of a witness's character for untruthfulness. The opponent may then rebut with evidence of the witness's character for truthfulness. In either event, the evidence must take some form of opinion or reputation. FRE 608(a). On cross-examination a party may ask a witness about specific instances of the conduct of a witness to attack or support the witness' character for truthfulness. FRE 608(b). Either party may seek to impeach a witness by showing her past conviction of a sufficiently serious or deceptive crime. FRE 609.

A. <u>Character v. Non-character Impeachment</u>. There is a difference between alleging that the witness erred and alleging that the witness lied. A lawyer can call a witness mistaken by casting doubt on her powers of perception, memory, or narrative accuracy. Character evidence rules impose no constraint on these modes of calling a witness mistaken. A lawyer typically may ask a witness about her perception, memory, or narrative skills and may offer other evidence besides her testimony on these issues as long as the evidence is relevant under Rule401 and can survive a Rule 403 weighing test.

Similarly, there is a difference between alleging that the witness lied and that the witness is a liar. Just as there are several ways to call a witness mistaken, there are several ways to say she deceived. Three forms of non-character impeachment: (1) contradiction by conflicting evidence; (2) contradiction by past inconsistent statement; and (3) evidence of bias. None of these impeachment modes depends on the inference that the witness is generally a liar. Rules 402 and 403 of course constrain such evidence, as may rules governing hearsay, expert testimony, and privileges. However, impeachment by contradiction is sometimes so broad that it amounts to a general attack on the witness's truthful character.

B. <u>Impeachment Methods</u>. There are certain well-recognized, often-used impeachment methods. These traditional impeachment devices include: the use of prior

inconsistent statements; a showing of bias or interest in the litigation; an attack on the character of the witness by showing convictions of crime, prior acts of misconduct, or poor reputation for veracity; and a showing of sensory deficiencies. Some of these methods do not allow the examiner to impeach by extrinsic evidence, while others do so allow.

Prior Inconsistent Statements – A party may show that the witness has, on another occasion, made statements that are inconsistent with some material part of his present testimony. An inconsistent statement may be proved either by cross-examination or extrinsic evidence. In most cases, prior inconsistent statements are hearsay (see below), and are admissible only to impeach the witness (the evidence doesn't come in substantively). However, where the statement was made under oath at a prior trial, hearing, or other proceeding, or in a deposition, it is admissible non-hearsay and may be considered as substantive proof of the facts stated.

Bias or Interest – Evidence that a witness is biased or has an interest in the outcome of the suit tends to show that the witness has a motive to lie. A witness may always be impeached by extrinsic evidence of bias or interest. However, such extrinsic evidence is substantively inadmissible and may be admitted for impeachment purposes if relevant to show bias or interest.

Evidence of Character and Conduct of a Witness: Rule 608 – A witness may be impeached by showing that she has a poor reputation for truthfulness. The rules also allow an impeaching witness to state her personal opinions, based upon acquaintance, as to the truthfulness of the witness sought to be impeached. Further, on cross-examination, a witness may be interrogated with respect to any immoral, vicious, or criminal act of his life that may affect his character and show him to be unworthy of belief. Such an inquiry is permitted in the discretion of the court only if the act of misconduct is probative of truthfulness. Note, though, that a specific act of misconduct offered to attack the witness's character for truthfulness can be elicited only on cross-examination of the witness. If the witness denies the act, the cross-examiner cannot refute the answer by extrinsic evidence.

Conviction of Crime – Rule 609 permits a litigant to impeach a witness with evidence that the witness has been convicted previously of a crime. There must be an actual conviction of a crime; being arrested or indicted is not enough to satisfy the rule.

i. Rule 609(a)(1). A witness may be impeached by introduction of evidence that the witness has been convicted of a crime if the crime was punishable by death or imprisonment in excess of one year. The evidence is admissible against a witness other than the accused in a criminal case only if it survives a Rule 403 weighing test. The evidence is admissible in against the accused in a criminal case only if its probative value outweighs its potential to cause unfair prejudice to the defendant. The court in *United States v. Brewer* described five factors used for determining when the probative value of admitting the evidence outweighs its prejudicial effect: (1) the nature of the

crime; (2) the time of conviction and the witness' subsequent history; (3) similarity between the past crime and the charged crime; (4) importance of defendant's testimony; and (5) the centrality of the credibility issue.

ii. Rule 609(a)(2). This rule carves out a class of convictions as particularly probative of untruthful character and declares that they shall be admitted regardless of punishment. Admission of prior convictions involving dishonesty and false statements is not within the discretion of the trial court. Such convictions are always to be admitted, thus escaping balancing under Rule 403. Such crimes include those of perjury, subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the witness's propensity to testify truthfully. This rule applies only if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.

iii. Rule 609(b). When the conviction is more than ten years old, it will be excluded unless the court determines that the probative value of the conviction substantially outweighs its prejudicial effect. This is a reverse 403 weighing test. It establishes a rebuttable presumption that evidence of old convictions is not admissible.

iv. Rule 609(d). Juvenile adjudications are never admissible in civil cases or to impeach the testimony of criminal defendants. Even when used against other witnesses in a criminal case, they must survive the strictest standard of any prescribed in these rules. They are admissible only if the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission is necessary for a fair determination of the issue of guilt or innocence.

v. Appellate Review. If the trial judge disregards Rule 609's safeguards and wrongly admits evidence of past convictions to impeach a defendant, the defendant normally may appeal. The Supreme Court has ruled, however, that a defendant may not appeal from the trial judge's ruling unless two conditions are met: First, the defendant must have testified at trial. Second, the prosecutor must have introduced evidence of the contested conviction.

C. **Rehabilitation.** Rehabilitation concerns a party's attempt to support a witness's character for truthfulness. As Rule 608(a)(2) makes clear, one party may rehabilitate its own witness's character for truthfulness only after the other party has attacked the witness's character for truthfulness. If one party has: (1) offered opinion or reputation testimony of the witness's bad character for truthfulness (Rule 608(a)); (2) elicited on cross-examination evidence of specific acts of the witness that are probative of untruthful character (Rule 608(b)); or offered evidence of past conviction of the witness under Rule 609, the other party may use any of the techniques

permitted in Rule 608 to rehabilitate the witness's character for truthfulness.

Evidence that contradicts a witness's specific testimony may call in question the witness's general character for truthfulness. If the contradicted testimony can be explained as a mistake of perception, memory, or narration and might not be a lie at all, the contradiction certainly would not qualify as an attack on character for truthfulness. If, on the other hand, the contradicting evidence suggests the witness has lied intentionally and pervasively, the evidence might well constitute an attack on character for truthfulness. The truthfulness of a witness's testimony in this proceeding may be corroborated by non-character evidence without regard to the constraints imposed by Rule 608.

D. **Extrinsic Evidence in the Context of Character Evidence.** First, under Rule 405(a), the litigant may ask a character witness on cross-examination whether that witness has heard of a specific act committed by the person about whose character the witness is testifying. Regardless of the witness's answer, the lawyer may present no other evidence (i.e., no *extrinsic* evidence) regarding the act.

Second, under Rule 608(b), the litigant may cross-examine a witness about specific instances of conduct that bear on character for truthfulness. But the rule explicitly states that such conduct, "other than conviction of a crime as provided in Rule 609, may not be proved by extrinsic evidence." If the witness denies having done (or heard of) the specific act, the lawyer may present no other evidence about it.

Rule 608(b) imposes an absolute bar on extrinsic evidence only if the *sole* purpose for offering the evidence was to prove the witness' character for veracity. It also forbids extrinsic evidence about specific instances of conduct that bear only on character for truthfulness. But as we have seen, evidence of bias is not character evidence governed by Rule 608, so a witness's bias is not deemed collateral. Evidence tending to show a witness's bias, prejudice, or motive to lie is so significant that it is not considered a mere collateral matter but is deemed exculpatory evidence that may be established by extrinsic proof as well as by impeachment through cross-examination.

An important lesson of this segment is that Rule 608(b)'s bar against extrinsic evidence applies only to evidence offered to show the witness's general *character for truthfulness*. The rule places no restriction on extrinsic evidence offered to show that the witness lied about non-character matters *in this case*. The committee's note to the 2003 amendment to Rule 608(b) says that the amendment leaves the admissibility of extrinsic evidence offered for non-character-based grounds of impeachment (such as contradiction, prior inconsistent statement, bias and mental capacity) to Rules 402 and 403.

VI. **Rape Shield: Rule 412.** The Rule prevents the introduction of the evidence of the victim's past sexual behavior, with certain limited exceptions. In any civil or criminal proceeding involving alleged sexual misconduct, evidence offered to prove the sexual behavior or sexual disposition of the alleged victim is generally inadmissible.

Exceptions – In a criminal case, the following evidence is admissible: (1) evidence of sexual behavior by the victim offered to explain the source of physical evidence (that a person other

than the accused was the source of semen, injury, or other physical evidence); (2) past sexual behavior with the accused (specific instances of sexual behavior between the victim and the accused are admissible by the prosecution, or by the defense to prove consent); and (c) evidence the exclusion of which would violate the constitutional rights of the defendant.

Past Allegedly False Accusations – In the event the court determines there are prior false allegations of sexual molestation by the victim, the defendant shall be allowed to cross-examine the victim and to present evidence regarding same at trial. Such evidence does not concern the victim's prior sexual behavior or history or reputation for chastity, and thus is not governed by Rule 412. Rule 412 is inapplicable in sexual assault cases where defendant seeks to question witnesses regarding the victim's prior false allegations concerning sexual behavior for impeachment purposes.

VII. **Hearsay: Rule 801*.** Rule 801(c) says: "Hearsay" is 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. Rule 802 says: Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress. The reason for excluding hearsay is that the adverse party was denied the opportunity to cross-examine the declarant. Cross-examination allows the adverse party to test the declarant's perception, memory, narration, and sincerity.

Hearsay within Hearsay – Hearsay within hearsay is admissible only if both the outer hearsay statement and the inner hearsay statement fall within an exception to the hearsay rule.

Assertions – You can trace the distinction between hearsay and nonhearsay (below) by asking whether the significance of the evidence depends on the truth of the out-of-court speaker's belief. Communicative intent is the essence of an assertion. Close cases should be resolved in favor of admissibility.

Nonhearsay Uses of Out-of-Court Statements – An out-of-court statement that is introduced for any purpose other than to prove the truth of the matter asserted is not hearsay. The following are common nonhearsay purposes for evidence of an out-of-court statement

A. <u>Verbal Acts or Legally Operative Facts</u>. A nonhearsay out-of-court statement can be used to prove that a legal right or duty was triggered by – or an offense was caused by – uttering the statement. There are certain utterances to which the law attaches legal significance (*e.g.*, words of contract, defamation, bribery, cancellation, and permission).

B. <u>Statements Offered to Show Effect on Hearer or Reader</u>. A statement that is inadmissible hearsay to prove the truth of the statement may nevertheless be admitted to show the statement's effect on the hearer. For example, in a negligence case where knowledge of a danger is the issue, a third person's statement of warning is admissible for the limited purpose of showing knowledge or notice on the part of the listener.

C. Inconsistent Statements offered to Impeach. Lawyers often seek to impeach a witness's courtroom testimony with evidence that she once said something different. The theory is that the out-of-court statement proves that the witness has said different things at different times about this fact, and so her testimony on this point cannot be trusted.

D. Statements Offered as Circumstantial Evidence of Declarant's State of Mind. Statements by a declarant that serve as circumstantial evidence of the declarant's state of mind are not hearsay. Such statements are not offered to prove the truth of the matters asserted, but only that the declarant believed them to be true. The most common examples of this are evidence of insanity and evidence of knowledge. This is different than the state of mind hearsay exception discussed below.

E. Nonassertive Words. Involuntary expressions are perhaps the only clear example of nonassertive words. For example, if you bang your knee and say, "Ouch!" you probably do not intend to communicate your pain to anyone, and thus evidence of your exclamation probably would not be hearsay if offered to prove that you were in pain.

F. Words Offered to Prove Something other than what they Assert. For example, letters written by a testator concerning sundry business and political matters make assertions about the business and the political matters, but such letters were not intended to assert that the testator was competent. Thus, offering the letters to prove that the testator was competent is not hearsay.

Exceptions: Rule 801(d) – Rule 801(d) removes from the definition of hearsay certain statements that would be hearsay under the common law definition. Since the following types of statements are not hearsay, when relevant, they are admissible as substantive evidence.

A. Prior Statement by Witness: Rule 801(d)(1). Certain statements by a person who testifies at the trial or hearing, and is subject to cross-examination about the statements, are not hearsay. The Rule says that, if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, then the following is not hearsay.

   Prior Inconsistent Statement: Rule 801(d)(1)(A) – A witness's prior inconsistent statement is not hearsay if it was made under oath at a prior proceeding or deposition. For example, a statement made by the witness during grand jury testimony, if inconsistent with her in-court testimony, would be admissible not only to impeach her credibility, but also as substantive proof.

   i. Distinction: Rules 612, 613 and 801(d)(1)(A). There is a difference between using an out of court statement merely to impeach and using such statement substantively. Past inconsistent statements, when offered to impeach, are not

offered for the truth of what they assert, but merely to show that the witness says different things at different times and therefore should not be believed. FRE 613. Thus, Rule 613 allows impeachment for inconsistent statements, and extrinsic evidence may be brought in to show inconsistency, but such evidence will not come in substantively. The judge will often require a limiting instruction to that effect. Note that *United States v. Ince* held that the government cannot employ impeachment by prior inconsistent statement as a mere subterfuge to get before the jury evidence not otherwise admissible, and, thus, a trial judge should rarely, if ever, permit the government to impeach its own witness by presenting what would otherwise be inadmissible hearsay if that hearsay contains an alleged confession to the crime for which the defendant is being tried.

Rule 801(d)(1)(A) allows such statements to come in substantively, but there is the additional requirement that the statement must have been made under oath at a prior proceeding for it to come in substantively.

Rule 612 also does not concern hearsay. This rule deals with the mechanics of refreshing a witness's memory. Information used to refresh a witness's memory is not itself being admitted as evidence and need not be admissible. Rather, once the witness's memory has been refreshed, the witness simply testifies from memory in the ordinary way. However, recorded recollections may come in substantively under Rule 803(5), discussed below.

Prior Consistent Statement: Rule 801(d)(1)(B) – A prior consistent statement, regardless of whether made under oath, is not hearsay if it is offered to rebut an express or implied charge that the witness is lying or exaggerating because of some motive. A consistent statement offered for this purpose is admissible only when made before the alleged motive to lie or exaggerate came into being; *i.e.*, a prior consistent statement made after the motive to lie arose is not admissible.

Prior Statement of Identification: Rule 801(d)(1)(C) – A witness's prior statement identifying a person after perceiving him is not hearsay. Photo identifications are within the scope of this rule. Prior identification need not have been made at a formal proceeding or under oath, and its admissibility is not limited to rehabilitation of the witness.

The court in *commonwealth v. Weichell* explained that lineups, sketches, drawings, etc. done either by a witness or somebody else based on the witness's recollection, are going to be admissible under this rule.

B. <u>Admission by Party Opponent: Rule 801(d)(2)</u>. An admission is a statement made or act done that amounts to a prior acknowledgment by one of the parties to an action of one of the relevant facts. If the party said or did something that now turns out to be inconsistent with his contentions at trial, the law simply regards him as estopped from preventing its admission into evidence. The rule admits all statements made by party-opponents, whether or not those statements were against the speaker's interests when

she made them. The text of the rule requires only that there be a statement and that it be offered against its maker.

Rule 801(d)(2) – The Rule says: A statement is not hearsay if he statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement 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, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

The rule goes on to say that 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 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 offered under subdivision (E).

In General – To be an admission, the statement need not have been against interest at the time it was made. The statement may even be in the form of an opinion. Lack of personal knowledge does not necessarily exclude a party's admission. An admission may be predicated on hearsay.

i. The Party's Own Words. Rule 801(d)(2)(A) says that the hearsay rule poses no obstacle to confessions made freely, and says that a party's own words are "not hearsay" when offered against her at trial. A party cannot, however, take their own hearsay statement and use it to help themselves.

ii. Adoptive Admissions. A party may expressly or impliedly adopt someone else's statement as his own, thus giving rise to an "adoptive admission." FRE 801(d)(2)(B). Four elements must be satisfied for silence to be an adoptive admission: (1) the person heard and understood the accusation; (2) the person was able to respond; (3) the circumstances naturally occurred for a response; and (4) the person actually failed to respond.

   Miranda *Warnings* – If a person has been advised explicitly that she need not speak and that her words may be used against her, it is no longer natural to expect her to speak.

Vicarious Admissions – An admission is frequently not the statement or act of the party against whom the admission is offered at trial.

i. Co-Parties. Admissions of a party are not receivable against her co-plaintiffs or co-defendants merely because they happen to be joined as parties to the action. If there are two or more parties, the admission of one is receivable against her but, in the absence of authority, not against co-party.

ii. Authorized Spokesperson. The statement of a person authorized by a party to speak on its behalf (*e.g.*, statement by company's press agent) can be admitted against the party as an admission. FRE 801(d)(2)(C).

iii. Principal-Agent. Statements by an agent concerning any matter within the scope of her agency, made during the existence of the employment relationship, are admissible against the principal. FRE 801(d)(2)(D).

iv. Partners. After a partnership is shown to exist, an admission of one partner, relating to matters within the scope of the partnership business, is binding upon her co-partners since, as to such matters, each partner is deemed the agent of the others.

v. Co-conspirators. Admissions of one conspirator, made to a third party in furtherance of a conspiracy to commit a crime or a civil wrong, at a time when the declarant was participating in the conspiracy, are admissible against co-conspirators. The government need not demonstrate the unavailability of a nontestifying co-conspirator as a prerequisite to admission of the co-conspirator's out-of-court statements. FRE 801(d)(2)(E). However, testimonial admissions of a conspirator are admissible against a co-conspirator only if there was an opportunity to cross-examine the hearsay declarant (see Confrontation Clause below).

Preconditions – There are three preconditions that must be satisfied for the coconspirator exception. Those preconditions are: (1) that a conspiracy existed at the time the out-of-court statement was made; (2) that the conspiracy included both the declarant and the party against whom the statement is offered; and (3) that the declarant spoke during the course of and in furtherance of the conspiracy. The Supreme Court declared that a trial judge should decide these preliminary questions under Rule 104(a). Rule 801(d)(2) says that the contents of the statement shall be considered but are not alone sufficient to establish the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered.

Conspiracy – Application of the coconspirator exception does not depend on whether the government has formally charged conspiracy. Nor need you be an expert in conspiracy law to know whether the exception applies. The rule is meant to carry forward the universally accepted doctrine that a joint venture is considered as a coconspirator for the purposes of this rule even though no conspiracy has been charged. A joint venture is, at least, one who knew of the venture and intended to associate with it.

VIII. **Hearsay Exceptions Applicable only when the Declarant is Unavailable: Rule 804.** This section covers the four important exceptions requiring the declarant's unavailability: (1) former testimony; (2) statements against interest; (3) dying declarations; and (4) statements

offered against party procuring declarant's unavailability.

Unavailability Defined – A declarant is unavailable if: (1) he is exempted from testifying by court ruling on the ground of privilege; (2) he persists, despite a court order, in refusing to testify concerning the statement; (3) he testifies to lack of memory of the subject matter of the statement; (4) he is unable to be present or testify because of death or physical or mental illness; OR (5) he is absent and the statement's proponent has been unable to procure his attendance or testimony by process or other reasonable means. FRE 804(a)(1)-(5). Note that a declarant is not unavailable if his "unavailability" was procured by the proponent of the statement.

A. <u>Former Testimony: Rule 804(b)(1)</u>. The testimony of a now unavailable witness given at another hearing or in a deposition taken in accordance with law is admissible in a subsequent trial as long as there is a sufficient similarity of parties and issues so that the opportunity to develop testimony or cross-examine at the prior hearing was meaningful.

    Identity of Parties – The requirement of identity of parties does not mean that parties on both sides of the controversies must be identical. In criminal cases, it requires only that the party against whom the testimony is offered was a party in the former action. In civil cases, the party against whom the testimony is offered, or the party's predecessor in interest, must have been a party in the former action.

    "Predecessor in interest" includes one in a privity relationship with the party. In determining predecessor in interest, courts use a generous definition, believing that the practical and expedient view expresses the congressional intention: if it appears that in the former suit a party having a like motive to cross-examine about the same matters as the present party would have, was accorded an adequate opportunity for such examination, the testimony may be received against the present party.

    Identity of Subject Matter – The former testimony is admissible upon any trial in the same or another action of the same subject matter. The "cause of action" in both proceedings need not be identical. It is enough if the "subject matter" of the testimony is the same. In other words, the party against whom the testimony is offered must have had an opportunity and similar motive to develop declarant's testimony at the prior hearing.

    Similar Motive – The proper approach in assessing similarity of motive must consider whether the party resisting the offered testimony at a pending proceeding had at a prior proceeding an interest of substantially similar intensity to prove (or disprove) the same side of a substantially similar issue. Factors to look at include the nature of the two proceedings (what is at stake and the applicable burden of proof) and the cross-examination at the prior proceeding (what was undertaken and what was available but forgone).

    Use in Criminal Proceedings – The Supreme Court has held that there is no violation of an accused's right of confrontation, as long as: (1) the accused or his attorney was

present and had the opportunity to cross-examine at the time the testimony was given; AND (2) the witness, whose former testimony is sought to be used, is now unavailable, despite bona fide efforts by the prosecution to produce him. A greater showing of "unavailability" is required in criminal cases than in civil cases.

B. Dying Declarations: Rule 804(b)(2). In a prosecution for homicide or a civil action, a declaration made by the now unavailable declarant while believing his death was imminent that concerns the cause or circumstances of what he believed to be his impending death is admissible. The declarant need not actually die, but he must be unavailable at the time the declaration is offered. Note that there may be issues concerning the declarant's competency when dealing with dying declarations.

   Imminent Death – To make out a dying declaration the declarant must have spoken without hope of recovery and in the shadow of impending death. Fear or even belief that illness will end in death will not avail itself to make a dying declaration. There must be a settled hopeless expectation that death is near at hand, and what is said must have been spoken in the hush of its impending presence. What is decisive is the state of mind. Even so, the state of mind must be exhibited in the evidence, and not left to conjecture. The patient must have spoken with the consciousness of a swift and certain doom.

   Known Facts – The declaration is kept out if the setting of the occasion satisfies the judge, or in reason ought to satisfy him, that the speaker is giving expression to suspicion or conjecture, and not to known facts.

C. Statements Against Interest: Rule 804(b)(3). A statement of a person, now unavailable as a witness, against that person's pecuniary, proprietary, or penal interest when made, as well as collateral facts contained in the statement, is admissible. This exception differs from an admission (above) in that, under this exception, the statement must be against interest when made, and the declarant whose statement is admitted may be a stranger to the litigation rather than a party.

   Requirements – To qualify as an exception to the hearsay rule, a statement against interest must meet the following requirements: (1) the statement must have been against pecuniary, proprietary, or penal interest when made; (2) declarant must have had personal knowledge of the facts; (3) declarant must have been aware that the statement is against her interest and she must have had no motive to misrepresent when she made the statement; and (4) declarant must be unavailable as a witness.

   Corroborating Circumstances – All statements against penal interest offered in a criminal case must be supported by corroborating circumstances clearly indicating the statement's trustworthiness. The credibility of the witness who relates the hearsay statement in court is not a proper factor for the court to consider in assessing corroborating circumstances. The confession of a co-defendant implicating herself and the accused may not be admissible (see Confrontation Clause below).

Statement – A "statement" against interest for purposes of the exception means a single self-inculpatory remark, not an extended declaration.

D. Statements Offered Against Party Procuring Declarant's Unavailability: Rule 804(b)(6). The statements of a person now unavailable as a witness are admissible when offered against a party who has engaged or acquiesced in wrongdoing that intentionally procured the declarant's unavailability. The party need not have intended to make the witness unavailable at a specific trial, but any trial.

Elements – The court must find by a preponderance of evidence that (1) the defendant engaged or acquiesced in wrongdoing (2) that was intended to render the declarant unavailable as a witness and (3) that did, in fact, render the declarant unavailable as a witness.

IX. **Hearsay Exceptions in which the Availability of the Declarant is Immaterial: Rule 803.**

The following exceptions do not require that the declarant be unavailable.

A. Present Sense Impression: Rule 803(1). A present sense impression is admissible as an exception to the hearsay rule. If a person perceives some event that is not particularly shocking or exciting, and it does not in fact produce excitement in the observer, that person may nevertheless be moved to comment on what she perceived at the time or immediately thereafter.

B. Excited Utterances: Rule 803(2). A declaration made by a declarant during or soon after a startling event is admissible. The declaration must be made under the stress of excitement produced by the startling event. The declaration must concern the immediate facts of the startling occurrence. The event must be objectively startling enough to produce a nervous excitement (objective), and the declaration must be made under the stress of the excitement before the declarant had time to reflect upon it (subjective).

C. Then-existing Condition: Rule 803(3). A statement of a declarant's then-existing state of mind, emotion, sensation, or physical condition is admissible. It is admissible when the state of mind is directly in issue and material to the controversy, to show subsequent acts of the declarant (statement of intent to do something in the future is circumstantial evidence tending to show that the intent was carried out), but not admissible if it expresses a memory or belief of the declarant if offered for the purpose of proving the truth of the fact remembered or believed.

Generally, declarations of present bodily condition are admissible as an exception to the hearsay rule, but those of past physical conditions are generally excluded.

D. Statements for Purpose of Medical Diagnosis or Treatment: Rule 803(5). The rules admit declarations of past physical condition, as well as the cause or source of the condition insofar as reasonably pertinent to diagnosis or treatment, if made to medical personnel to assist in diagnosing or treating the condition. Such declarations are allowed even when made to a doctor employed to testify.

E. Past Recollection Recorded: Rules 803(5) and 612. Witnesses are permitted to refresh their memories by looking at almost anything. However, if the witness's memory cannot be revived, a party may wish to introduce a memorandum that the witness made at or near the time of the event. Use of the writing to prove the facts contained therein raises a hearsay problem. Yet, such a memorandum may be read into evidence if: (1) the witness at one time had personal knowledge of the facts recited in the writing; (2) the writing was made by the witness or made under her direction or that it was adopted by the witness; (3) the writing was timely made when the matter was fresh in the mind of the witness; (4) the writing is accurate and the witness vouches for the accuracy of the writing at trial; and (5) the witness has insufficient recollection to testify fully and accurately.

F. Business Records: Rule 803(6). Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum of record of any act, transaction, occurrence, or event, if made in the regular course of any business; and if it was the regular course of such business to make it at the time of the act, transaction, occurrence, or event or within a reasonable time thereafter. The trial court has discretion to exclude any business record if the source of information or other circumstances indicate the record lacks trustworthiness.

Authentication –

Use of Business Records

G. Official Records and Other Official Writings: Rule 803(8).

X. **Hearsay Residual: Rule 807.**