**FALL 2015 – Evidence Outline**

**Introduction & Chapter 1**

## Subject is

* A BODY OF (MOSTLY EXCLUSIONARY) RULES, TELLING LAWYERS WHAT THEY CAN AND CAN’T DO TO ESTABLISH FACTS AT TRIAL
* “LAW” POINTS ARE ESTABLISHED DIFFERENTLY; EVIDENCE DEALS WITH FACTS

## Usually ONLY parties offer evidence (with a few exceptions to be noted)

* **WHO ARE THE PARTIES?**
	+ CRIMINAL CASE: THE STATE or THE DEFENDANT
	+ CIVIL CASE: PLAINTIFF or DEFENDANT
	+ Judges can on rare instances.
* **Who are *NOT* parties and *CANNOT* “offer” evidence?**
* A witness
* A victim
* Relatives of a victim

## How do Witnesses get head at trial?

* A PARTY CALLS THEM AND “**OFFERS**” THEIR TESTIMONY IN EVIDENCE
* A TESTIFYING WITNESS IS SAID TO BE “**GIVING**” EVIDENCE, BUT NOT OFFERING OR INTRODUCING IT
	+ MR. FASTOW **GAVE** EVIDENCE AT THE LAY-SKILLING TRIAL
	+ HE **DID NOT INTRODUCE** ANY EVIDENCE

**How Do Parties “OFFER” Evidence?**

* **FOR TESTIMONIAL EVIDENCE:**
	+ A PARTY’S LAWYER ASKS A QUESTION

[RESULT: EVIDENCE HAS NOW BEEN “OFFERED” BY THAT PARTY]. If witness doesn’t answer then the witness didn’t give any evidence.

* + THE WITNESS ANSWERS

[RESULT: EVIDENCE HAS NOW BEEN “GIVEN” BY THE WITNESS AND “INTRODUCED” BY THE PARTY]

* + THE ANSWER IS AUTOMATICALLY “IN EVIDENCE” UNLESS THE JUDGE SAYS OTHERWISE
* **FOR DOCUMENTARY AND TANGIBLE EVIDENCE - 4 STEPS:**

1. OLD COURTS: PARTY’S LAWYER HAS DOCUMENT MARKED BY CLERK FOR ID

* + - CLERK SAYS OUT LOUD: “THIS WILL BE P’S EX. 7 FOR ID”
		- NEWER COURTS: DOCS. ARE PRE-MARKED AND EXCHANGED

2. LAWYER ASKS QUESTIONS TO A WITNESS ABOUT THE DOCUMENT or THING

* + - THIS IS CALLED “LAYING THE FOUNDATION”
		- MAINLY TO PROVE AUTHENTICITY

3. LAWYER. OFFERS DOC./ THING IN EVIDENCE

* + - SAYS “I **offer** P’s EX. 7 for ID in evidence”

4. JUDGE SAYS THE MAGIC WORDS:

* + - “Ex. 1 for identification will be received/admitted in evidence”
		- Judge will have looked to the other side’s table to see if there is an objection.

**Relevance and Competence**

* **RELEVANT:**

- THE PIECE OF EVIDENCE MAKES A DISPUTED FACT A LITTLE MORE LIKELY OR LESS LIKELY TO BE TRUE THAN IT WAS A MINUTE BEFORE

* **IRRELEVANT**:
* DOESN’T MOVE THE SCALE AT ALL, EITHER WAY (PRETTY RARE)
* EASY TO ARGUE FOR RELEVANCE TODAY
* THE REAL COURTROOM ISSUE IS: WHETHER THE AMOUNT OF RELEVANCE IS ENOUGH IN THE JUDGE’S MIND TO OVERCOME:
* **TIME** NEEDED TO PUT IT IN
* POSSIBLE “**UNFAIR PREJUDICE**” OR **CONFUSION** OF THE JURY
* THESE ARE KNOWN AS “**COUNTERWEIGHTS**” TO RELEVANCE; hard calls; lots of discretion

**“Competent”**

* JUST ANOTHER WORD FOR “ADMISSIBLE.”
* MEANING: IT COMPLIES WITH ALL THE RULES OF EVIDENCE

**Federal Rules of Evidence**

* APPLY IN FEDERAL COURT TRIALS

- BUT NOT SENTENCING, BAIL HEARINGS, ETC.

* HAVE BEEN THE MODEL FOR STATES’ RULES, INCLUDING RULES OF TEXAS

**Texas Rules**

* APPLY IN STATE-COURT TRIALS
* UNTIL 2000 WE HAD SEPARATE CRIMINAL AND CIVIL RULES
* NOW COMBINED

**LAYOUT OF A COURTROOM**



* Lawyers have to ask permission to leave the podium – to approach the witness, an easel, confer with co-counsel etc.

**COLLOQUYS (“SIDEBARS”):**

1. AT THE BENCH

2. SOMETIMES IN CHAMBERS

3. SOMETIMES IN OPEN COURT WITH THE JURY ABSENT

* Colloquys are NOT evidende; but each party is entitled to have all colloquys be “on the record”
* EACH PARTY IS ENTITLED TO HAVE ALL COLLOQUYS BE “ON THE RECORD”
* If you waive it, you cannot raise on appeal.
* SUGGESTION: DO IT!

**NET RESULT**

* EVEN THE “TRIAL RECORD” CONTAINS LOTS OF ITEMS THAT ARE NOT IN EVIDENCE.
* EXAMPLES:
	+ OFFERED TESTIMONY THAT DID NOT GET INTO EVIDENCE
	+ ARGUMENTS OF COUNSEL
	+ DOCUMENTS THAT WERE MARKED BUT DID NOT GET INTO EVIDENCE

**WHY KEEP THESE NON-EVIDENCE ITEMS IN THE RECORD?**

* TO ENABLE THE COURT OF APPEALS TO KNOW WHAT HAPPENED
	+ TO ASSESS POSSIBLE ERRORS

**KEEPING OUT THE OTHER GUY’S EVIDENCE**

* BY OBJECTION
	+ MUST STATE A GROUND
		- E.G.: “CALLS FOR HEARSAY”; “IRRELEVANT”
	+ NEED NOT CITE A RULE BY NUMBER
	+ FAILURE TO STATE A GROUND WAIVES THE OBJECTION
	+ Before in evidence.
* BY TIMELY MOTION TO STRIKE, if you didn’t object. And the evidence is in.
	+ IF MOTION TO STRIKE IS GRANTED:
		- JURY IS TOLD TO DISREGARD THE EVIDENCE. How possible is this really?
		- IN A GROSS CASE, A MISTRIAL MAY BE DECLARED
		- NOTHING IS PHYSICALLY “STRICKEN”

- 1-3 word understanding of what the objections are. You need to set the ground properly and quickly. Timely motion to strike. Most of the rules are discretionary with the judge. If witness is still on the stand you may move to strike the witness. It will be granted if it is timely.

**When Your Offered Evidence is Wrongly Excluded by the Judge**

* MUST MAKE AN “OFFER OF PROOF” – SPECIAL MEANING IN THIS CONTEXT
	+ INFORMS THE COURT WHAT THE EVIDENCE WOULD HAVE BEEN. This is to the judge not the opposing counsel.
* REASONS FOR THE OFFER-OF-PROOF REQUIREMENT:
	+ 1. GIVES THE TRIAL JUDGE A CHANCE TO RECONSIDER THE EXCLUSION RULING
	+ 2. GIVES THE COURT OF APPEALS THE INFO THEY NEED TO DECIDE IF THE EXCLUSION WAS ERRONEOUS AND SERIOUS
* If you don’t do it it’s waived for appellate review.

**3 Types of Offer of Proof (ALL are Outside Jury’s Hearing)**

1. SUMMARY ORAL STATEMENT BY COUNSEL

2. DETAILED Q & A IN WRITTEN FORM – You have a chance to prepare.

3. DETAILED Q & A WITH WITNESS ON THE STAND – You ask the jury out of the court and you know exactly what the rules have said. If judge had NOT kept the evidence out you may tell the judge what will happen. You may get the judge to reverse his ruling after the witness has talked.

**Objecting in Advance: The Motion *“In Limine”* (**typically done in the last pre-trial conference)

* COUNSEL ASKS FOR ORDER IN LIMINE BEFORE TRIAL
* BASED ON PREJUDICE, don’t want the question even asked.
	+ E.G., BIG COMPANY; RICH PERSON; MINORITY PERSON
* THE IN LIMINE TOPICS ARE THEN OFF LIMITS
	+ LAWYERS CAN’T MENTION THEM IN JURY’S HEARING
	+ LAWYERS ARE RESPONSIBLE FOR THEIR WITNESSES NOT MENTIONING

- In Limine – limiting the subjects that will be allowed to be kept out of trial. Example: do not mention big companies, wealthy owner etc. Train all the witnesses so they do not reveal any of the thing that are in limine. If it is violated judge may try to correct it.

**Special Type of “In Limine” Order: A SUPPRESSION Order**

* CRIMINAL CASES ONLY
* FOR CONSTITUTIONAL VIOLATION ONLY
	+ BAD SEARCH
	+ BAD CONFESSION
* IF GRANTED, APPEALABLE PRETRIAL BY GOV’T

- Can be granted during trial but it is almost always granted before. Only for constitutional violations (unconstitutional searches) not to let witness, or be mentioned by the prosecution. If granted the federal statute will allow prosecution to appeal (they often do appeal these orders).

**Some General Pitfalls For Lawyers**

* HANDS IN POCKETS
* MAKING NOISES (JINGLING; TAPPING)
* COMMENTS: “I SEE.” – commenting on the testimony, not allowed – at least until closing arguments.
* LEADING THE WITNESS →→

**Leading**

* DEFINITION: QUESTION SUGGESTS THE EXPECTED ANSWER, typically yes/no questions
* NOT ALLOWED ON DIRECT – generally it’s boring
	+ EXCEPTION: PRELIMINARY MATTERS
	+ EXCEPTION: JOGGING TIMID WITNESS (ALLOWED WITHIN REASON)

- Preliminary matters – judges like you to lead on these things but you need to ask the clerk what the judge regards as preliminary. Name address and occupation are thought to be preliminary nothing else counts. Find out what and how the Court works.

All courts will allow the jogging timid witness. You are allowed to lead on direct a little bit.

**Improper Leading**

* USUALLY CAUSED BY FEAR
	+ LAWYER IS AFRAID WITNESS WON’T ANSWER AS EXPECTED
	+ QUESTION USUALLY STARTS WITH “DID” “DO” “ARE” or “WERE”
* THE CURE:
	+ BEGIN QUESTION WITH “TELL US WHAT HAPPENED WHEN ...,” “TELL US HOW ...,” OR “WHO ...,” “WHEN,” “WHERE,” ETC.

**Leading**

* IS ALLOWED ON CROSS
	+ BUT IS INCREDIBLY BORING
	+ BEST LAWYERS DON’T DO IT
	+ THEY ASK “WHO,” HOW,” “TELL US,” ETC.

**Proper Leading**

* RULES ARE REVERSED FOR AN “ADVERSE” WITNESS, FORMERLY CALLED “HOSTILE”
	+ THE OTHER PARTY
	+ A PERSON ALIGNED WITH THE OTHER PARTY
* HERE, LEADING IS ALLOWED ON DIRECT AND PRECLUDED ON CROSS

**How To Avoid Leading on Direct Examination**

* Begin question with: Who, How, What, Where, or When; or “Please tell us about what happened on/at \_\_\_\_\_\_.” “Please explain how \_\_\_\_\_”
* Do *not* begin with: Is, Did, Are, Were, Do you
* If you feel yourself leading, rephrase using Who, How, etc.
* Example: Instead of “Were you there when it happened?”, substitute “**Where** were you?” or even better: “**How** do you know it happened?” Let the witness tell the story! Only if the witness falters will you need to lead for one or two prompting questions.
* **RULE 403: *EXCLUDING RELEVANT EVIDENCE FOR PREJUDICE, CONFUSION, WASTE OF TIME, OR OTHER REASONS. The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.***
	+ **HOW TO HANDLE DOCUMENTS OR PHYSICAL OBJECTS IN COURT**
		- You can’t just talk about “this”
		- Say to the clerk, out loud: “Please mark this (document) (object) for identification.”
		- Clerk will say, out loud: “This will be prosecution exhibit #\_\_\_ for identification.”
		- To witness: “I show you prosecution exhibit #\_\_\_ for identification and ask you to identify it.”
		- After adequate identification and showing of relevance: “Your honor, I offer prosecution exhibit #\_\_\_ for identification into evidence.”
		- The judge: “It will be received in evidence.”
		- You can now show it to the jury, distribute copies, use blowup of excerpt on easel, etc.

**Role of Judge**

* GATEKEEPER, OR SCREEN
* CONSIDERS THE FOUNDATION POINTS PRELIMINARILY, BUT ONLY TO SEE IF THE EVIDENCE IS GOOD ENOUGH TO GO TO THE JURY FOR FINAL DECISION
* RULING OF ADMISSIBILITY USUALLY DOES NOT BIND THE JURY IN ANY WAY
* **EXAMPLE**:
	+ JUDGE AND JURY HEAR EVIDENCE THAT HANDWRITING ON A DOCUMENT IS GENUINE
	+ JUDGE “RULES” THE DOCUMENT IS AUTHENTIC, AND ADMITS IT IN EV.
	+ JURY CAN NOW SEE IT
	+ BUT: NOTHING BINDING HAS OCCURRED
	+ NEITHER SIDE IS PRECLUDED FROM PUTTING IN EVIDENCE THAT THE DOCUMENT IS FORGED, OR FROM ARGUING THAT POINT IN CLOSING.

**Ruling of Inadmissibility**

* WHERE THE JUDGE’S RULING IS TO EXCLUDE EVIDENCE, THE RULING IS BINDING, UNLESS CHANGED ON RECONSIDERATION

- YOU CAN RE-OFFER, USUALLY WITH BETTER FOUNDATION.

* EXCLUDED EVIDENCE CANT BE MENTIONED TO THE JURY

**Opening Statements**

* PURPOSE: to tell jury what **the evidence will show**
* DON’T USE ARGUMENTATIVE PHRASEOLOGY [NO ADVERBS! EASY ON THE ADJECTIVES! NO DEROGATORY NOUNS!]
* IN YOUR FIRST FEW TRIALS, KEEP SAYING: “THE EVIDENCE WILL SHOW...”

**To Be Avoided In Opening Statements**

* **ADVERBS**
	+ CALLOUSLY
	+ RECKLESSLY
	+ AMAZINGLY
	+ DISASTROUSLY
	+ MALICIOUSLY
	+ HORRENDOUSLY
	+ WANTONLY
* **LABELS**
	+ FOOL
	+ CRIMINAL
	+ CHARLATAN

**Demonstrative Evidence**

* SKETCHES, MODELS, VIDEOS, ETC., THAT **ILLUSTRATE A WITNESS’S TESTIMONY**; i.e. VISUAL AIDS
* CAN BE PREPARED BEFORE TRIAL, BY THE WITNESS OR BY SOMEONE ELSE
* CAN BE MADE BY WITNESS DURING TESTIMONY [A RISK, BUT DRAMATIC]
* THE WITNESS MUST TESTIFY WHAT IT REPRESENTS
* **DEMONSTRATIVE EVIDENCE IS TREATED AS PART AND PARCEL OF THE TESTIMONY IT**
	+ 1. CAN’T GO TO THE JURY ROOM IN MOST JURISDICTIONS (SINCE TESTIMONY CAN’T)
	+ 2. WILL BE STRICKEN IF THE TESTIMONY IS STRICKEN
		- e.g., WITNESS DOESN’T COMPLETE CROSS-EXAM
		- e.g., WITNESS FOUND TO LACK COMPETENCY
* ALTHOUGH DEMEANED AS MERELY TESTIMONY IN ANOTHER FORM, DEMONSTRATIVE EVIDENCE HAS GREAT PERSUASIVE POWER
* IT IS REMEMBERED BETTER THAN THE TESTIMONY
* Typically a photograph, map, showing or sounds. Something that will illustrate what the witness wants to describe. A visual aid.
* If you do not have testimony from the witness it will not be illustrative of the witness’ words. It will be remembered a lot better than the testimony.
* They can be done before trial, and you can have the witness draw it in trial but it can be dangerous. You need the judge’s permission to do this.
* If witness’ testimony gets stricken the demonstrative evidence must be stricken as well.

**A Word About “REAL” Evidence: Tangible Things**

* MURDER WEAPON
* BLOODY SHIRT
* THESE ARE USUALLY **IRRELEVANT**, STRICTLY SPEAKING
	+ THEY DON’T MAKE A FACT IN DISPUTE MORE OR LESS PROBABLE
* BUT ARE TRADITIONALLY ALLOWED WITHIN REASON
* Real Evidence – tangible things (objects, weapon). Usually irrelevant because there is no fact in dispute. Defense admits that it was a bloody shirt, and the murder weapon. They are traditionally allowed within reason to make the case come alive. It will be hard for jury to remember stipulations but they enjoy seeing the evidence. Prosecutors have persuaded the courts to go beyond a stipulated fact and put some of the real evidence to give life to the case.

**Appellate Impact of Erroneous Ruling Evidence**

* **RULE 103: RULINGS ON EVIDENCE**
	+ ***(a) Preserving a Claim of Error. A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:***
		- ***(1) if the ruling admits evidence, a party, on the record:***
			* ***(A) timely objects or moves to strike; and***
			* ***(B) states the specific ground, unless it was apparent from the context; or***
		- ***(2) if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.***
	+ ***(b) Not Needing to Renew an Objection or Offer of Proof. Once the court rules definitively on the record — either before or at trial — a party need not renew an objection or offer of proof to preserve a claim of error for appeal.***
	+ ***(c) Court’s Statement About the Ruling; Directing an Offer of Proof. The court may make any statement about the character or form of the evidence, the objection made, and the ruling. The court may direct that an offer of proof be made in question-and-answer form.***
	+ ***(d) Preventing the Jury from Hearing Inadmissible Evidence. To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.***
	+ ***(e) Taking Notice of Plain Error. A court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved.***
* USUALLY, THIS ERROR IS GROUND FOR REVERSAL ONLY WHERE:
	+ 1. A SUBSTANTIAL RIGHT WAS AFFECTED [i.e., NOT HARMLESS], and
	+ 2. STEPS WERE TAKEN TO “PRESERVE ERROR”
		- IF ADMITTED: OBJECTION, MTN. TO STRIKE
		- IF EXCLUDED: OFFER OF PROOF

**An Exception: “Clear Error” in a Criminal Appeal**

* Error RE. Evidence can be reversible, even without these steps, IF:
* It is in a criminal case
* Error is “clear”
* Error is likely to have had impact in the conviction
* Clear error: the lawyer should have made an offer of proof to get the evidence in, or the lawyer should have made an objection. It may be waived.

**The Constitutional Intersection**

* EVIDENCE RULINGS OFTEN HAVE CONSTITUTIONAL DIMENSIONS:
	+ FRUIT OF A BAD SEARCH (4TH AM.)
	+ FRUIT OF A BAD CONFESSION (5TH AM.)
	+ DENIAL OF 6TH AM. RIGHT OF CONFRONTATION
	+ DENIAL OF 6TH AM. RIGHT TO SUMMON WITNESSES
	+ FORCED SELF-INCRIMINATION (5th AM.)
	+ Constitution overrules the FRE, cannot be admitted if it goes against it.

**How “THE RECORD” Is Made**

* AT LEAST TWO KINDS OF “RECORD”:
	+ OF THE ENTIRE CASE – Clerk’s Record
		- KEPT BY THE CLERK
		- INCLUDES PLEADINGS, MOTIONS, Court Orders, ETC.
	+ OF THE TRIAL ONLY – Reporter’s Record
		- TESTIMONY AND COLLOQUYS (when lawyers approach the bench and talk to the judge where the jury cannot hear) TAKEN DOWN BY THE REPORTER
		- DOCUMENTARY AND TANGIBLE EVIDENCE KEPT BY THE CLERK

**Chapter 2: Relevance**

**Direct v. Circumstantial: Does it Matter?**

* **Direct:** eyewitness to a fact in issue. It tends to be more reliable. Psychological and legal studies have demonstrated that eye witness testimony is very unreliable if they are strangers. DNA, fingerprints are much more reliable.
* **Circumstantial:** everything else.

**Which Is More Persuasive?**

* **Traditionally:** eyewitness testimony was thought more reliable.
* **Modern View:** Unreliable for strangers. DNA or fingerprints are more reliable.
* Direct testimony is fairly reliable for persons the witness knows well, provided
* No animus to falsify
* No fraud driving the testimony

**Circumstantial Evidence Can Be Powerful**

* D’s unexplained fingerprints found
* D’s knife found
* D’s earlier threatened to kill victim
* D has five prior convictions with same M.O.

**The Concept of Probative Value**

* Measuring the tendency to convince the trier on a relevant fact
* Judges have to “weigh” probative value
* In ruling on relevance vs. the counterweights (R. 403: unfair prejudice; waste of time; confusion of the jury)
* An apples-to-oranges comparison, but done every day.

**Admissibility vs. Sufficiency**

**Admissibility**

* Means a single piece of evidence can be received
* Standing alone, that piece may NOT be enough to justify any conclusion on the fact involved.

**Sufficiency**

* Enough total evidence that reasonable jurors could find that the proof standard (preponderance, reasonable doubt, clear and convincing, etc.) Has been met.

**Half-Open Door Rules**

* Several of them in evidence law.
* One is about documents:
* Intro or portion by one party is OK
* But is a waiver of objections for any related parts offered by adverse party [R. 106]
* **R.106**: Court can require admission of the other parts “at that time” – i.e. NOW.

**Rule Extends**

* When an entire document is offered and admitted, R. 106 extends to *other* documents that should in fairness be considered together with it.
* Can compel admission at the time

**Probabilistic Evidence**

* Helpful, but can be misused
* Often counterintuitive
* Common Birthdays (Month, Day) in this room?

- Very helpful as long as it is done right because otherwise the opposing side will use it against you.

**Chapter 3: Introduction to the Hearsay Rule**

# In General

* WITNESSES USUALLY ARE NOT ALLOWED TO TESTIFY ABOUT OUT-OF-COURT STATEMENTS OF FACT
	+ MADE BY THE WITNESS
	+ MADE BY OTHERS
* DOCUMENTS CONTAIN STATEMENTS OF FACT AND USUALLY AREN’T ALLOWED IN EVIDENCE
	+ THEY ARE WRITTEN OUT OF COURT

# Examples:

* IN GENERAL:
	+ WITNESS CAN’T SAY WHAT HE TOLD THE POLICE
	+ LETTERS ARE INADMISSIBLE
	+ POLICE REPORTS ARE INADMISSIBLE
	+ NEWSPAPER ACCOUNTS ARE INADMISSIBLE

# Rationale

* WE WANT WITNESSES TO TELL US FIRST-HAND ON THE STAND WHAT THEY SAW AND DID
	+ CROSS-EXAMINATION IS AN ADVERSARY’S RIGHT;
	+ YOU CAN’T CROSS-EXAMINE AN OUT-OF-COURT STATEMENT
* E.G.:
	+ CHEMIST FROM THE POLICE LAB TESTIFIES TO THE BLOOD TYPE; THE WRITTEN REPORT IS **NOT** ADMITTED
	+ HOMEOWNER TESTIFIES THERE WAS AN INTRUDER; **NOT** WHAT SHE TOLD THE POLICE; **NOT** HER WITNESS STATEMENT TO THE POLICE
	+ BORROWER TESTIFIES LOAN PAYMENTS WERE MADE ON TIME; HER LETTER TO BANK SAYING SO IS **NOT** ADMITTED

# The Main Exception to What is Hearsay: Statements of a Party, when offered by an adversary party (RULE: says not hearsay, not an exception)

* CAN BE INTRODUCED BY THE OPPONENT, VIA ANY WITNESS WHO KNOWS WHAT THE PARTY SAID
* CORPORATE DOCUMENTS (LETTERS; MEMOS) OF ONE SIDE ARE ADMISSIBLE BY THE OTHER SIDE
* EXAMPLE: WHAT MR. JONES SAID
	+ TRIAL IN JONES v. SMITH – Smith asks Jones what Jones said? OK, not Hearsay.
	+ TRIAL IN JONES v. SMITH – Smith asks bystander what did Jones say? OK, not Hearsay.
	+ TRIAL IN JONES v. SMITH – Smith asks Smith what Jones said? OK, not Hearsay.
	+ TRIAL IN JONES v. SMITH – Jones asks Smith what Jones said? Hearsay.
	+ TRIAL IN JONES v. SMITH – Jones asks bystander what did Jones say? Hearsay.
	+ TRIAL IN JONES v. SMITH – Jones asks Jones what Jones said? Hearsay.

# The Basics

* A PARTY, OR ANY OTHER WITNESS, CAN ALWAYS TESTIFY TO **WHAT HAPPENED** IF THE WITNESS HAS FIRST-HAND KNOWLEDGE.
* WITNESSES CAN ALSO TESTIFY WHAT THE **PARTY X** SAID, BUT ONLY IF ASKED BY OPPOSING **PARTY Y’S** LAWYER.
* PARTY X’S LAWYER **CANNOT** ASK ANY WITNESS WHAT X, OR A BYSTANDER:
	+ SAID
	+ WROTE DOWN
	+ REPORTED BY PHONE
	+ TOLD OTHERS ORALLY
* NOTE THAT CONFESSIONS ARE STATEMENTS OF FACT BY “A PARTY” (DEFENDANT)
* HENCE **NOT HEARSAY** WHEN OFFERED **BY THE PROSECUTION**
	+ PROS. CAN ASK A BYSTANDER WHAT D. SAID
	+ PROS. CAN ASK A POLICEMAN WHAT D. SAID (IF HE HEARD IT)
	+ IF D. TESTIFIES AT TRIAL, PROS. CAN ASK D. WHAT D. SAID
* A VICTIM IS **NOT A PARTY** IN A CRIMINAL CASE
	+ HENCE, VICTIM’S OUT-OF-COURT STATEMENTS TO POLICE, NEIGHBORS, ETC., ARE USUALLY **NOT** ALLOWED TO BE INTRODUCED AT TRIAL BY EITHER SIDE
	+ VICTIM CAN OF COURSE TESTIFY TO WHAT HAPPENED

**Chapter 3: Hearsay Pared Down**

# Hearsay Definitions [Rule 801, Pared Down]

 **(d) Statements That Are Not Hearsay.** A statement that meets the following conditions is **NOT** hearsay:

* ***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement: {Declarant – person who spoke or wrote out-of-court. Some declarants are ALSO trial witnesses.}
* **(A)** is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;
* **(B)** is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or
* **(C)** identifies a person as someone the declarant perceived earlier.
* **(2) *An Opposing Party's Statement.*** The statement is offered against an opposing party and:

* **(A)** Was made by the [the opposing party] party in an individual or representative capacity;
* **(B)** Is one the party manifested that it adopted or believed to be true;
* **(C)** Was made by a person whom the party authorized to make a statement on the subject;
* **(D)** Was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; \*\*\*\* or
* **(E)** Was made by the party's coconspirator during and in furtherance of the conspiracy.
* The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

**(a) Statement.** "Statement" means a person's oral assertion [of a fact], written assertion, or nonverbal conduct, if the person intended it as an assertion [of a fact].

**(b) Declarant.** "Declarant" means the person who made the statement.

**(c) Hearsay.** "Hearsay" means a statement that:

**(1)** The declarant does not make while testifying at the current trial or hearing; and

**(2)** A party offers in evidence to prove the truth of the matter asserted in the statement.

1. The statement \*\*\* Does NOT by itself establish \*\*\* the existence of scope of the relationship under (D)
2. Except for those kinds of statements, the following [R. 801] is a definition of “hearsay”:

# Why else would a trial lawyer offer testimony about such a statement?

1. Many possible reasons; e.g.:
* To prove state of mind (self-defense, negligence, awareness, etc.)
* To impeach a witness’ credibility (prior inconsistent statement)

# How do we Know the Lawyer’s Intention?

1. The judge asks: “Why are you offering this?”
2. Only then can we tell if the evidence will be hearsay!!!!
3. A limiting instruction will be given

# The Hybrids

1. Many times,
2. Conduct [usually NOT regarded as statement]
3. Is accompanied by explanatory words [could include a statement] (“This $$ is for the book I bought from you”)
4. Treat the totality as conduct.
* No statement, so NO hearsay

# Examples of Hybrids (Conduct + Words)

1. Army promoting officer from 1st Lieutenant to Captain
2. Assigning a Student to an Advanced Class
3. Conferring a degree
4. Putting patient in ICU

**Chapter 3: The Rule Excluding Hearsay – What is Hearsay Evidence?**

* **Statements**
* NO STATEMENT = NO HEARSAY

- Hearsay is an out of court statement.

* **NOT Statements**
* Greetings
* Questions
* Commands
* Requests
* Exclamations – Gee, LOL, WOW, OMG.
* Promises (I will pay you $10 for a mowing his lawn every week)
* CANNOT BE HEARSAY
* **CONDUCT**
* CAN be a statement. IF intended to recite a fact.
* There is come conduct that is generally understood to be recited as facts.
* When police ask you to show how something happened. Reenactments are INTENDED to recite facts.
1. Pointing (in the context of a question).
2. Nodding or shaking head (YES or NO , in the context)
3. Thumbs UP/DOWN
4. Numbers with your fingers (In context, how many people were in the room?)
5. Middle Finger – it is a request or command of some kind. NOT a statement.
6. Covering your eyes (CAN’T SEE – Statement) \*
7. Covering your ears (CAN’T HEAR – Statement) \*
8. Fanning yourself with hands (“ I am feeling hot” – Statement) (Cold as well) \*
* Universally understood as statements

# Basic Operation of the Rule Excluding Hearsay

 1) A witness should testify what she saw

 2) A witness should usually not testify to what anyone said or wrote before trial.

 - This includes what the witness herself said or wrote

 3) A document should NOT be admitted to tell us what happened

# Meaning of Hearsay

1. NO testimony is allowed concerning any conversation that:
* Contains a “statement” [Recitation of present or past fact]
* Was made outside the present hearing
* Is offered to help in proving the fact stated in the statement is true

# Big Exception

1. Statements made by a party when elicited by the opposing side’s lawyer,

- From any witness knowledgeable about the party’s statement

1. These are “NOT hearsay” Rule 801(d)

# For NON-Party Utterances

1. Hearsay means an out-of-court “statement”
2. I.e., an out-of-court utterances recitation of a fact [Rule 801(a)]
3. Not all out-of-court utterances contain “statements:
* Promises (You’ll like it”) DON’T
* Commands (“Get out of Here”) DON’T

# Examples of Out-Of-Court Statements

1. “It’s sunny here” – Recites a Fact
2. “It rained yesterday” – Recites a Fact
3. “I love you” – Recites a Fact
* These are potentially hearsay if a witness later testifies to what was said

# Most Documents are Loaded with statements, and thus presumptively contain hearsay

1. E.G. Memo that says : “we got some flooding”
2. E.g. Letter that says: “You and I met last month on the subject of a merger”
3. ALL documents should be thought of as presumptively containing statements, and therefore likely *inadmissible hearsay*
4. Main exceptions:
* Other side’s writing
* Operative fact documents (Contract; lease; will)

# NOTE: The Same Facts Can and Should be Testified to by a Live Witness with Knowledge

1. Witness can testify “we got some flooding,” NOT: “He said we got some flooding”
2. Witness can testify “we met on the subject of a merger,” NOT “the memo stated we met on the subject of a merger”

# This Is the Whole Point of the Hearsay Rule

1. It’s the manner of proof that is blocked by the hearsay rule, not the substance.
2. We want to hear it live, and subject to cross-examination

# Rule 802 – Says Out of Court Statements Usually Cannot be Testified to

1. Nor can any document containing a statement of fact be introduced, generally
2. BUT: such testimony or document might fit under a hearsay exception and can then be introduced

# Rule 802 – “The Rule Against Hearsay”

1. Hearsay evidence [what a non-party stated out of court] is usually inadmissible to prove facts .
2. But first-hand testimony of the facts may well be admissible

# When is Out-Of-Court Conduct a “Statement”?

1. Conduct *is* regarded as a statement for hearsay purpose only if
2. When actor’s primary purpose was directly to narrate (recite) facts [R. 801(a)]
3. The vast majority of human conduct (99%) is NOT done for this purpose
4. It is to get on with life!
5. Therefore, no statement and no hearsay in later testimony to the conduct
6. Examples of the 1% Conduct that is a Statement:

1) Nod or shake of head for yes or no

2) Pointing to identify a person, place or thing

3) Reenactments

# Example of Conduct that is NOT a Statement

1. Action on Marine Insurance Policy
* Main Issue: seaworthiness of vessel later lost at sea
* Evidence: testimony that an experienced captain inspected thoroughly, then took his family aboard and set sail
* Objection that captain’s conduct was equivalent to a statement. Court said it was not to tell a story nor recite a fact; it is only a deduction (and they do NOT care).
* NO statements so NO Hearsay

# Further Example of Conduct that is NOT a Statement

1. Will probate
* Main Issue: testator’s sanity
* Evidence: testimony that locals sometimes laughed at him, checked up on him, would not engage him in any serious enterprise
* Was conduct intended?
* Is conduct not a statement?
* Laughed at him – conduct
* Checked up on him – conduct
* It is all conduct.
1. These actors were NOT intending to narrate!
2. We may see their conduct as full of factual meaning; but that is NOT the same as a main intent to narrate

# Further Example of Conduct that is NOT a Statement (Non-Narrative)

1. Promoting a lieutenant to captain
2. Giving an employee a bonus
3. Putting patient in ICU
4. Throwing wine in his face, and leaving the restaurant
5. Deductions, NO statements involved on first 2.

-[This one may be arguable, is her main intent to narrate?]

1. Putting patient in ICU is a statement.
2. Last one depends on the judge. But most might argue that it is conduct, and judge will want to know what will come out of it.

# Can You Think of Any Other Example of Conduct that is a “Statement”?

1. Other than signing, nodding head, pointing, reenactments
2. It has to be an action that is intended to directly *state a fact*
* eye contact + [H, C, DoKn, Case/CaHe, OK]

# Words That Give Meaning to Conduct Are Not Statements

1. Example: handing over cash, and saying “this for the July rent”
2. Example: handing car keys, and saying “it’s in the garage”
3. Therefore, a witness can testify to the actor’s conduct *and* the actor’s words
4. NO Statement = NO hearsay

# 2 Rules of Thumb

1) Mixed words and conduct:

- Treat as conduct

2) Then, if you can’t decide actor’s intention (was she mainly intending to narrate?): Treat as a non-statement

# Handling Very Short Sets of Words

* “Corona” on a beer mug
* “Porsche” on car
* “Plaza Club Restaurant”
* Laundry Mark “Jan”
* “University of Houston” on Entranceway
* There are regarded as mere markers, NOT statements
* Therefore cannot be hearsay

# “Offered to Prove the Truth of the Statement”

1. Some out-of-court statements are elicited at trial for other reasons, and are therefore not hearsay per R. 802

# Examples of Using Statements for Other Purposes

1. Impeaching a witness

- E.g.: prior inconsistent statement

- Does NOT come in for its truth

1. Words that are themselves a “necessary element” of the case
* E.G.: False Official Statement
* E.G.: Offer and Acceptance in Contract Case
* E.G.: Warranties in Breach of Warranty Case
* Sometimes called “Res Gestae”
* Sometimes called words that are an “operative fact”
* M-K Call this a “verbal act”
1. Proving the listener’s state of mind that is relevant to the Case or Defense, i.e., Where State of Mind Matters
* Testimony that X Said to D: “ I have a gun that is pointed at you”
* Self-defense requires proof of actor’s state of mind
* Truth of statement has nothing to do with it
* Testimony that X said to D: “These TV sets are stolen”
* If the trial is for receiving, knowledge is an element
* Caveat: limited offer will be enforced! ‘
* Testimony that X said to D: “The brakes of your car are bad” offered to show D’s Negligence in driving the car
* Negligence is a *state of mind*
* Can an unconscious person act “negligently”? NO.
* Testimony that Non-Party X said to P: “The brakes on D’s car are bad” offered to show P’s assumption of risk in riding D’s car
* Assumption of risk is a *state of mind*
* *Can an unconscious person assume a risk while unconscious? NO.*

# The Two Keys:

* NO Statement = NO Hearsay
* Not offered to establish truth of the statement = NOT hearsay

# The Hearsay Quiz in M-K

* Apply the definitional exceptions in R 801(d) IF APPLICABLE
* Some lawyers start with 801(d) analysis, to save time
* If you find it in 801(d), it cannot be hearsay
* NO worry about why it’s offered

# Suggested Mental Sequence

1. Check 801(d) - NOT hearsay
2. Is the witness testifying about a statement?
3. Is the testimony offered to prove that the statement was true?

- If So, the testimony is bringing in hearsay

1. Is there an applicable exception to the rule?

**Chapter 4: Definitional Exceptions to the Meaning of Hearsay**

# If Out-Of-Court Declarant is a Witness at Trial

1. A few definitional exceptions to “hearsay” apply [R 801(d)(1)]

# (1) Prior Inconsistent Statement

1. Always allowed to impeach
2. Now proponent is trying to get it in to establish truth as well
3. Has to have been under oath
4. Has to have been in a formal proceeding [Hence a limited rules.

# (2) Prior Consistent Statement

1. [Deleted from this course]

# (3) Statement of Identification of a Person

1. [Deleted from this course]

# A Closer Look at “Admissions” [R 801(d)(2)]

1. RECALL: we don’t analyze which way the statement cuts
2. If It’s a party’s statement and offered by the opposing lawyer, it is an “admission”

# Who the Witness on the Stand is Does Not Matter

1. Example: out-of-court statement by civil case Defendant
2. P’s Lawyer Can Introduce it by:

1) Asking P about it

2) Asking D about it

3) Asking a Bystander about it

# Example:

* What Mr. Jones Said
* Check PP

# Statement Adopted By a Party [R 801(d)(2)(B))]

1. Often vague in its operation
2. Could be by explicitly saying “that’s our view as well”
3. Could be by silence when an outsider says that’s the fact
4. Could be by merely filing away the statement ??

# Vicarious Admissions (Including Admissions of Organizations)

1. Keep in mind who the *parties* are:
* Criminal CasE: State (or U.S.) and D
* Civil Case: P & D
1. Only a party’s out of court statement qualifies under this definitional exception
* - Statements of county. Try to get out of it because person was specifically told not to make a statement on that matter. Companies dread that fact.

# The Party Need Not Have Said It Himself

1. Could be by an employee
2. Could be by a current accomplice
3. Etc.
* Job relatedness is the case. Because some of them have made admissions that others might no have made.

# Out-of-Court Statement by Agent or Servant [R. 801(d)(2)(D)]

1. Agent: one empowered to bind another (the principal) in contract
2. Servant: person subject to commands of another; an employee

# Servants are the Man Source of Company’s Admissions

1. Especially Internal Documents
* Email
* Memos
* Letters
* Postings
1. Also Phone Conversations
2. Sales Pitches
3. Etc.

# The Party *NEED* Not Have Authorized the Declarant to Speak for Her!

1. Statements made by employees are admissions of the employer if they are job-related.
2. They do NOT have to be authorized and will qualify *even if forbidden*
3. In a multiple-defendant or multiple plaintiff case:
* The statement of an employee is an admission of the employee [801(d)(2)(A)]
* It is also an admission of that person’s employer [801(d)(2)(D)]
1. Same for co-conspirators, agents, etc.
2. BUT, it is hearsay as to other Ds/Ps in the case

- It was not their servant/agent speaking

# Out-of-Court Statements CAN be by an authorized person [R 801(d)(2)(c)]

* Includes for example:
* Party’s lawyer – e.g. in a pleading or motion paper
* Press spokesperson

# Out-of-Court Statement of A Party’s Co-Conspirator [ R. 801(d)(2)(D)]

* Two Major Constraints –
* Statement was made during the conspiracy, i.e, NOT after arrest
* Statement was made in furtherance of the conspiracy
* Supposedly 2 conspirators (A & B). If statement was made out of court during conspiracy before in furtherance of conspiracy then that is thought to be the admission of all conspirators.

**Chapter 4: Exceptions to the Rule that Hearsay is Inadmissible**

# Rule 802 Excludes Most Hearsay

1. But there are exception
2. Context: the evidence is hearsay, but is allowed in anyway

# Two Groups of Exceptions to the Rule that Hearsay Evidence is Inadmissible

1. Group of exceptions that apply regardless of whether the declarant is available as trial witness [Rule 803]

-These are thought to be extra reliable forms of evidence

1. Group of exceptions that apply only if declarant is unavailable as trial witness [Rule 804]

# Unrestricted Exceptions

1. Keep in Mind –
* We do NOT need any exception to the exclusionary hearsay rule (R. 802) if we already have a definitional exception R.801(d)
* E.G.: statement is that of the opposing party or his employee, etc.
1. So –
* We are here talking about statements, where the declarant was
* One of our own people, OR
* A Non-party

**(1) Present Sense Impression**

* Testimony that:
* Declarant said something about what she was perceiving at that very time, or *immediately* after.
* When the Declarant said out of court something he was feeling, seeing or hearing.
* **Example**: witness: “he said ‘I see the truck is heading Northbound’” Offered to establish that the truck was heading North.
* A statement offered to prove the truth of the statement
* IT IS HEARSAY. BUT, IT IS ADMISSIBLE
* **Example:**
* Witness: “I said ‘He is coming straight this way’ “
* Offered to show the person was approaching the speaker
* IT IS HEARSAY. BUT, IT IS ADMISSIBLE
* **Example:**
* Witness: “She said “it” hot in here ‘”
* Offered to help establish the room was warm
* IT IS HEARSAY. BUT, IT IS ADMISSIBLE
* **CAVEAT:**
* Police reports (records) remain inadmissible
* BUT: policeperson can testify that a citizen reported his house was at that very moment being burglarized (Declarant is a non-party – present sense impression here)
* Planned by Congress that under no circumstances may the prosecution bring records. They are off limits and do NOT fit in any of these exceptions. He may testify as to what he did, or said, or felt but may not bring the records.
* **Example:**

**(2) Excited Utterance**

* Testimony that:
* Declarant said something about a startling event, while under the excitement caused by the event
* Declarant must have personally observed the startling event
* The judge must find that as a foundation fact; and that the declarant was in fact startled
* How? Usually assumed from the nature of the statement
* Overlaps with (1), but has longer time frame – the excitement may last for hours
* Type (1) was for any kind of event; type (2) has to be startling
* Declarant was startled by an event.
* Judge will have to do a foundation finding, that startled declarant.
* Could be a present-sense impression.
* **Example**:
* Testimony: “Jack said to me ‘the roof collapsed!’ it had happened three hours before. He was very upset.”
* Testimony: “Jill said to me: ‘the truck plowed into that car twenty minutes ago.’ “

**(3) Then Existing Mental, Emotional, Physical Condition of Declarant**

* Could be viewed as a subset of (1), present sense impression, but focusing on internal feelings and thoughts
* Many situations can be analyzed under either (3) or (1) with same result
* This is what we use for testimony on non-party declarations of intent, offered to help establish later conforming conduct.
* He said he intended to do it; therefore, a little more likely that he did do it.
* The drafters’ intent was to adopt the rule of Hillmon Case
* In that case, the evidence of intent was treated as creating some degree of likelihood that the intent was carried out;
* 803(3) includes statements of intent that involve additional persons (joint plan). As in Hillmon. BUT NOT a statement involving only a third person’s plan or conduct.
* **Examples:**
* Testimony: He said to me “My head hurts” [Would also fit under (1)]
* Testimony: I told him “I am really depressed” [Would also fit under (1)]
* Testimony: she said “I plan to leave Houston on Friday”
* Admissible to show the plan
* AND to show that she left on Friday! [Would not fit under (1) , fits (3)]
* **Examples:**
* Testimony**:** She said to me “I fear Jack is going to shoot me!”
* Diary Entry: “I fear Jack is going to shoot me!”
* These are the statements of someone else’s state of mind, NOT the declarants’
* ALL ARE INADMISSIBLE

- “Beliefs” About Facts are NOT Allowed Under this Exception

* Out-of-court declarations of belief are usually not allowed in for their truth
* Testimony: X said to me, “ I think Jack did it.”
* Diary entry: “Jill is making a lot of money these days”
* Further Example
* **Testimony: “X said he was going to head for NY, in order to get away from the gangster who had been pursuing him. He felt they would kill him for sure if he stayed here.”**
* [White text is admissible: orange text might be admissible as excited or present tense; green text is inadmissible, goes beyond declarant’s plan and motivation]
* Orange text 🡪 NO intent
* GREEN 🡪 Other people’s intent

**(4) Statements to Physicians**

1. Often overlaps with (1) and (3), but covers a wide group of statements that mere physical, mental, emotional condition
* Here, onset info is included

- Testimony: I heard him say to the Doctor “This pain started last month”

* General cause info is included
* Witness Testimony: I said to the Dr “ it began when I ate those eggs.”
* MOST will fit under 801 or 803.
* Rash, headaches, are ALL statements of physical conditions.
	+ Onset information is included. Declarant could say that they have a headache, and have had it for weeks. Under exception, will be admissible.
* Statements’ in presence of physician, nurses or staff, for diagnoses and if dr is a police doctor will NOT fit. They have to diagnose for treatment.
* Even something that started four years ago.
* Drafters thought that when speaking to a Dr for diagnoses or treatment, you will always tell the truth.
* Dividing line: no statements as to fault, unless needed medically
* Witness (Doctor) testifies: he told me “it began when Jack hit me with a hammer”
* Will have to be rephrased to eliminate Jack’s fault
* DOES NOT include name of culprit, unless doctor needs it.
* Fact that Jack did it is NOT necessary for diagnoses or treatment. Perhaps if it’s an emotional condition, doctor might need to know who the culprit is.
* **Example**
* Witness Testifies: **“I heard him say to the doctor, ‘it began after I ate those eggs that were bad, which is pretty usual for the main street dinner.”**
* The green part is unnecessary for diagnosis or treatment, and will be kept out; orange text is borderline; white text is ok.
* **Key** foundation Fact for (4) statement must have been made for purposes of diagnosis or treatment.
* Thus a victim’s statement to a doctor hired by police to find out what happened, or who the culprit is, would not qualify
* Statements during an insurance physical would not qualify

**(5) Past Recollection Recorded**

* Different from memory refreshing
* Here the witness testifies her memory cannot be refreshed
* But it was fresh at one time
* And she (or a helper) made a record of it at that time
* IT has to be a matter hat W once knew, but may remember what transpired.
* Refreshing 🡪 showing the document silently to W and they seem to remember after it. Since document is NOT being offered, there is NO issue.
* Documented and has been made part of the record.
* Mechanics of Using Exception (5)
* Lay Foundation
* Witness cannot now recall
* Witness at one time could recall
* Witness caused record to be made
* Identify the record
* Record can then be read in, but the document cannot be introduced except by other side

**(6) Business Records**

* Need not be commercial; any regular activity will qualify
* Church
* Book club
* Only applies to events occurring and observed inside the business
* Fact reports from outside are NOT covered and have to be masked out
* Records of a Regularly Conducted Activity – could be any type of entity. Records of 3rd parties, or side that is offering it (NOT opposite side).
* Difficult foundation to build. Do NOT attempt to do this with a live witness, with an affidavit it will be easier.
* Affidavit will say what regular practice is, and everything will be laid out.
* Foundation for (6) is complex.

1) Regular activity going on

2) This document made in the regular course of it

3) Made at or near the time of events listed

4) Made by (or via) a person with actual knowledge

5) Was the regular practice to keep records of this type

* Caveat
* None of this is necessary for the opposing party’s records
* Those are NOT hearsay; need NO exception
* Exception (6) is used for non-party records or party’s own records
* Prongs (3) & (4) could be difficult to prove if challenged
* Until 2000, lawyers often used the habit/routine practice rule [R 406]
* Witness does NOT really know what happened on this transaction
* Witness can say what the regular practice of the business is re making records

# Affidavit of Authenticity

* Federal Rule 902(11) allows affidavit practice
* Texas Rule 902 (10) is similar
* These are authenticity rules, but they are referenced in 803(6) as OK foundation method to remove hearsay problems

# Texas Rule is More Honest

* Federal rule specifies that the affiant swear the entries were made by a person with knowledge, etc.
* Texas Rule specifies that the affiant swear it’s the usual practice to have the entries made that way

**(7) Absence of a Business Entry**

* Serves as proof that the event did NOT happen
* Requires showing of the usual practice of the organization

**(8) Official Records and (9) Vital Statistics Records**

* **A**ll generally ok, except for law enforcement records in criminal cases
* Other kinds of official records are OK in civil and criminal cases
* These types of records fit under (8)

1) Ones that recite the general activities of the office

- E.g. documents describing:

* Procedures for highway construction bidding
* How the census is taken
* How the IRS conducts an audit

 2) Ones that recite matters observed pursuant to duty imposed by law

- E.g. reports on

* Real estate appraisals done
* Building inspections performed
* Highway construction bids received

3) Factual findings from investigations

- E.g. reports on

* National transportation safety board air disaster investigations
* Centers for disease control investigation of epidemics
* Police ballistics investigations (civil only)
* Police fingerprint checks (civil only)
* **(9) Types of Public Records that Fit Under**
* Births, deaths, marriages
* For these particular events, the public recorder office need not have any first-hand knowledge of the facts recorded
* Reports made to the office by citizens are ok here

# Blockage of Police Records Does NOT Apply in the Parts of Criminal Cases where Rules of Evidence do NOT apply

* Sentencing
* Grand Jury Proceedings
* Hearing on revocation of probation
* Bail proceedings
* Warrants
* [R. 1101(d)(3) – Federal rules inapplicable; NO hearsay rule, so NO exception needed)

# In Texas Courts the Restrictions on Police Reports are Likewise NOT Applicable Where the Rules in General Are NOT Applicable e.g.

* Sentencing
* Grand Juries R. 101(d)(1)
* Habeas Corpus
* Bail
* Search Warrants
* NO rules of evidence for sentencing, Judge has to be reasonable and arbitrary.
* Many proceedings are among the ones where these do NOT apply.
* Hearsay rule does NOT apply in these procedings.

# Church and Family Records [803 (11-13)]

* Treated much like public records under (9)
* Similar limited subject matter
* Births
* Deaths
* Divorces
Baptisms
* Etc.

**(18) Learned Treatises**

* **Foundation:**

- Acknowledged as authoritative by testimony of a witness

* **Procedure:**
* Can then read in relevant passages
* Cant put the book in

**(19-21) Reputation Topics**

* **Allowed Re.:**
* Personal or family history – “We all said ‘ Frank is John’s Nephew”
* Boundaries – “Folks in these parts always said ‘the ranch ended at the old oak tree’ “
* Character – in limited instances, as we have seen

**(22) Judgments of Felony Convictions**

* Admissible to prove any underlying essential fact
* Only judgments
* NOT arrests
* NOT indictments
* NOT verdicts

**MAIN "OTHER" PURPOSES OF OFFERING TESTIMONY ON AN OUT-OF-COURT STATEMENT (OTHER THAN TO PROVE THE TRUTH OF THE STATEMENT):**

1. **TO SHOW AWARENESS**
* **IN A RECEIVING CASE: "THESE TVs ARE STOLEN GOODS"**
* **IN A NEGLIGENCE CASE, TO OWNER: "THESE STAIRS ARE WOBBLY"**
* **IN A NEGLIGENCE CASE, TO PEDESTRIAN: "THESE STAIRS ARE WOBBLY"**
* **IN A FALSE TAX RETURN CASE AGAINST SIGNER, PREPARER SAID TO SIGNER: "WHAT WE HAVE PUT ON LINE 27 IS FALSE"**
* **IN AN AGGRAVATED ASSAULT CASE, WHERE SELF-DEFENSE IS PLEADED, BYSTANDER TO D: "HE HAS A GUN!"**
1. **TO IMPEACH THE WITNESS**
* **PRIOR STATEMENT, INCONSISTENT WITH WITNESS'S DIRECT TESTIMONY**
1. **TO SHOW PERMISSION OR CONSENT (OR ABSENCE THEREOF)**
* **BY OWNER OF CAR: "YOU CAN DRIVE IT ANY TIME"**
* **BY LANDLORD: "NO VISITORS ALLOWED AFTER 11:00 PM**
* **BY LAND OWNER: "VISITORS ARE WELCOME"**
* **BY LAND OWNER: "VISITORS ARE NOT ALLOWED HERE"**

**Chapter 4: Rule 804: Out-of-Court Declarations by Persons who are Now Unavailable**

# Thought to Be Weaker

* Rules drafters (and common law) developed a set of hearsay exceptions that could be used only when the declarant is unavailable at trial
* A compromise between outright exclusion and outright admissibility

# Meaning of “Unavailable”

* Without any connivance by proponent, declarant is:
* NOT findable
* Refuses to attend
* Refuses to answer even when directed by court
* Has a loss of memory
* Is dead
* Is incapacitated mentally or physically

# Former Testimony

* At a hearing or deposition in this or another case
* Now-opponent must have had opportunity and motive to cross-examine
* Directly or
* Through a party with similar interest (Civil Cases ONLY)

# Some Things that Will NOT Qualify

* Affidavits [NOT a hearing or deposition; NO chance to cross-examine]
* Grand jury testimony [NO chance to cross-examine]

# Some Things that Will Qualify

* Non-party testimony at earlier trial of this cases
* Non-party testimony at a deposition in this or another case (where opponent was party)
* Non-party testimony at a preliminary injunction hearing in this case
* NOTE – an opposing party’s testimony does NOT need this exception
* If offered by the adverse party, can be offered freely, regardless of prior oath or cross-exam opportunity

# Dying Declarations

* Supposed basis: NO ONE would falsify while soon to meet his maker
* Requirements:
* Homicide or civil case
* Declarant thought he was dying imminently (NOT “Going to be shot” some vague future time)
* Statement was re. cause of the impending death (i.e., whodunit)

# Examples (Given the Proper Foundation Facts)

* In a homicide case: “Jack did it”
* In a wrongful death action: “Bob shot me in self-defense”
* In a wrongful death action: “I never should have eaten those oysters”

# Third-Party Statements of Guilt/Fault

* Statement that was against declarant’s interest
* Made by a non-party
* Most are offered by Ds, civil and criminal, through witnesses
* To deflect blame

# Examples of NON-Party Concessions Offered by D, Through Witnesses:

* Testimony: “Nonparty X said to Me: ‘Our technician wired it wrong’ “
* Nonparty X co.’s Document recalling X’s autos for defective fuel lines
* Testimony: “Nonparty X said: ‘Sorry we blew up your house”

# Restriction on Non-Party Concessions

* When offered to exculpate a criminal accused:
* Must have corroborating circumstances that “clearly indicate its trustworthiness”
* Most cases hold them inadmissible!!
* Based on a general mistrust of the criminal community

# Out-Of-Court Statement Regarding Family History

* Example: testimony that “my mother told me I was Harry’s son”
* Example: testimony that “her father told me Jean was born in the naval hospital at Newport”
* Note: recall that declarant (mother, father) must be unavailable

# Declarations by Persons who have since Been “Rubber Out”

* If the remover is a party, these are now *admissible against him*
* Examples:
* Earlier 3rd Party’s Affidavit
* Earlier 3rd Party’s Grand Jury Testimony
* Earlier 3rd Party’s Oral Remark
* Earlier 3rd Party Letter

# Admissible Hearsay Declarants Are Impeachable

* They are treated just like witnesses
* To prevent abusive use of exceptions
* Same rules of impeachment

# The “Catchall”: Rule 807

* For the “almost” situations
* For the unprepared lawyer who DOES NOT know how to overcome a sustained hearsay objection
* For the judge who wants to be bulletproof on appeal

# Requirements:

* Evidence of a “material fact”

- ???

* More probative than anything else reasonably available

- A haven for the unprepared

* In the interests of justice
* Advance notice required
* Court effectively rewrites the hearsay exceptions
* Usually seen in civil cases
* The Bane of my existence; the judge usually smiles

# A problem with 6th Amendment Confrontation Clause, When Hearsay Exceptions Are Used by Prosecutors

* *Crawford v. Washington*

- “Testimonial” type hearsay must be kept out of criminal prosecutions, despite Rules 803, 804

**Chapter 5: Relevance Revisited -**

**Special Exclusions**

# Rule 404: Character Evidence; Crimes or Other Acts

 **(a) Character Evidence.**

**(1) Prohibited Uses. Evidence of a person’s character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.**

**(2) Exceptions for a Defendant or Victim in a Criminal Case. The following exceptions apply in a criminal case:**

**(A) a defendant may offer evidence of the defendant’s pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;**

**(B) subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim’s pertinent trait, and if the evidence is admitted, the prosecutor may:**

**(i) offer evidence to rebut it; and**

**(ii) offer evidence of the defendant’s same trait; and**

**(C) in a homicide case, the prosecutor may offer evidence of the alleged victim’s trait of peacefulness to rebut evidence that the victim was the first aggressor.**

**(3) Exceptions for a Witness. Evidence of a witness’s character may be admitted under Rules 607, 608, and 609.**

**(b) Crimes, Wrongs, or Other Acts.**

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

**(2) Permitted Uses; Notice in a Criminal Case. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:**

**(A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and**

**(B) do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice.**

# Character Evidence Usually NOT Allowed

* MEANING: EVIDENCE OF A GENERAL MORAL TRAIT OF A PERSON, OFFERED TO PROVE CONFORMING CONDUCT ON A PARTICULAR OCCASION
* SOMETIMES CALLED “PROPENSITY” EVIDENCE
* EXAMPLES OF THE EXCLUSION:
	+ HE’S A DRUNK, SO HE WAS PROBABLY DRUNK ON THE OCCASION IN QUESTION
	+ SHE’S A LIAR, SO SHE PROBABLY PERJURED AS CHARGED
	+ HE’S A THIEF, SO HE PROBABLY STOLE THE MONEY AS NOW ACCUSED

# The Reason Character Evidence is normally NOT allowed

* WE AREN’T REALLY SURE ABOUT:
	+ HOW OFTEN PEOPLE ACT IN ACCORD WITH THEIR SUPPOSED CHARACTER TRAIT
	+ THE INDELIBILITY OF A CHARACTER TRAIT OVER TIME

# A Few Exceptions, Where Character (Propensity) Evidence is Allowed:

* Very rare in civil cases – character as “an element”
* Civil and Criminal: impeaching a witness’ character for veracity
* Once in a while a person’s character is the actual element in a civil action. Most of the time it is not allowed.
* Many times child custody may be given to a person of “good character.” Statute says that child custody may only go to a person of good character.
* Licensing cases: state may refuse to give you a license to practice law because of lack of “good character.” Statutes usually say that can only be licensed to persons of “good character” Same thing with liquor licenses and various others.
* No questions where character is an element. Rare cases.
* Any person that lies places their veracity at issue is likely to be impeached, in both civil and criminal cases.

# For this course:

* KNOW THE NORMAL RULES:
	+ CIVIL CASES: NO CHARACTER EVIDENCE ALLOWED AT ALL, EXCEPT DISHONESTY USED TO IMPEACH A WITNESS
	+ CRIMINAL CASES: THE ACCUSED CAN INTRODUCE GOOD CHARACTER EVIDENCE; PROS. CAN THEN REBUT

# Criminal Cases

* Prosecution cannot introduce bad character (propensity) of the accused
* Defense can introduce good character of accused, or bad character of victim if relevant
* This opens the door for prosecution to rebut!!
* Rule 404(a)(2)
* If D may offer evidence of the D’s pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it.
* Prosecutor may have several witnesses to rebut this.
* Usually defense will call his mother, and the pastor.

# Form of character evidence (Where allowed at all) Rule 405

Not for 404(b), this is for true character evidence. 405(b) not covered. Won’t come up.

* **RULE 405:** METHODS OF PROVING CHARACTER

(a) By Reputation or Opinion. When evidence of a person’s character or character trait is admissible, it may be proved by testimony about the person’s reputation or by testimony in the form of an opinion. On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person’s conduct.

(b) By Specific Instances of Conduct. When a person’s character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person’s conduct.

* **ON DIRECT**: OPINION OR REPUTATION (residential or job community) ONLY
* **ON CROSS** (REBUTTING, OR SHOWING OPPOSITE CHARACTER TRAIT): SPECIFICS ARE ALLOWED
* You need a foundation for opinion and reputation. How long have you known him/her and then you must jump to ask what his opinion or reputation are like. Do you know D’s reputation in work community or home lifestyle.
* On cross : specifics are allowed to be questioned by the cross-examiner. It is problematic because it might get disastrous.
* Defense counsel may discuss the victim’s character (assault, homicide, rape so on). Defense may open the door so bad character may be relevant especially in self-defense.
* Having cross examination be so lengthy might not be the best thing in a trial.

# Special Note on Rule 404(b)

* THIS RULE DOES NOT REALLY DEAL WITH PROVING BAD CHARACTER (PROPENSITY)
* IT INVOLVES PROOF OF VERY SPECIFIC BAD DEEDS, AND ---
	+ IS OFFERED ONLY TO SHOW CULPRIT IDENTITY (M.O. OF THIS D), OR PLAN, ETC.
	+ MUST MATCH THE SPECIFIC CIRCUMSTANCES ON TRIAL
	+ **Does NOT deal with proving bad character. Repeats that you cannot use character as part of evidence of a crime, wrong or other.**

# Difference Between Character Evidence [Usually NOT allowed] and 404(b) Evidence [Allowed]?

(Also referred to as pattern evidence) (Can be specific because 405 doesn’t apply, this is not character evidence).

* CHARACTER EVIDENCE ADDRESSES THE DEFENDANT’S GENERAL PROPENSITY FOR A TRAIT
* **404(b) PROOF** MUST BE HIGHLY SPECIFIC
* EXAMPLE:
	+ CHARGE: BANK ROBBERY BY D
	+ WITNESS: CULPRIT HAD ORANGE SKI MASK AND A BRASS-INLAID SHOTGUN IN LEFT HAND
	+ OTHER EV. SHOWING THIS D HAS ROBBED THREE OTHER BANKS, ALWAYS WITH AN ORANGE SKI MASK ON, AND A BRASS-INLAID SHOTGUN IN HIS LEFT HAND -- WILL BE ALLOWED
* EXAMPLE: D IS CHARGED WITH ELECTROCUTING WIFE IN BATHTUB
	+ EVIDENCE: D’S TWO EX-WIVES DIED BY ELECTROCUTION IN BATHTUBS
	+ WILL BE ALLOWED
	+ HIGHLY SPECIFIC
* How many instances enough to be a pattern? Never two, maybe 3, depends how specific the pattern is.

# Examples of Character Evidence (Generally Disallowed)

* Example 1: D has a history of thefts
* Example 2: D has a history of killing people
* These show only a general propensity, i.e., character
* NOT specific, thus not allowed.

# “Habit” Evidence Also Allowed if Relevant

Weird, used to be thought of as the same thing as character evidence. What’s the difference? Distinguishing wont be on the exam, no one really knows where the dividing line is except the judge on the day. Two instances not going to be a habit.

* A FORM OF VERY SPECIFIC PROPENSITY EVIDENCE
* A PATTERN OF AUTOMATIC, UNREFLECTIVE CONDUCT
* SPECIFIC IN ITS DETAILS
* IS ADMISSIBLE – RULE 406
* Business routines allowed in.
* **RULE 406: HABIT; ROUTINE PRACTICE. Evidence of a person’s habit or an organization’s routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.**
* EXAMPLES OF HABITS –
	+ WALKING ON SHADY SIDE OF STREET
	+ TYING LEFT SHOE FIRST
	+ KEEPING UTILITY BILLS IN KITCHEN DRAWER
	+ ALL THESE PATTERNS ARE SPECIFIC AND ADMISSIBLE
* EXAMPLES SHOWING THE DISTINCTIONS:
	+ ALWAYS DRIVING CAREFULLY [NOT ALLOWED] not specific enough
	+ NEVER LEAVING KEYS IN THE CAR [ALLOWED]
	+ ALWAYS FOLLOWING DIRECTIONS ON OPENING OF CANISTERS OF COMPRESSED GAS [ALLOWED]
	+ ALWAYS BEING CARELESS ABOUT SAFETY [NOT ALLOWED]

# Problems / Cases

* 5A – relevant character trait. General rule is that it’s not admissible. No exception here. Prosecutor is starting this, there is no open door. It’s in case-in-chief. Now Rev. Gram, this is character evidence. General rule not allowed. Exception is 4042a. Method is admissible under 405a. So admissible.
* 5G – pattern evidence probably meets 404b
* 5I – – no pattern, not frequent enough and not specific enough.

# Keeping Out General, and Even Highly Specific, Propensity Evidence: The Rape Shield Rule

* FOR MANY CENTURIES, ANY CONSENT TO SEX WAS REGARDED AS A CHARACTER FLAW
* THEREFORE, DEFENSE COULD INITIATE THE ISSUE OF THE ALLEGED VICTIM’S LOOSE MORAL “BEHAVIOR” – AND USUALLY DID
* THE RESULT WAS: THE VICTIM WAS MORE ON TRIAL THAN THE DEFENDANT
* TRIAL WAS A TERRIBLE ORDEAL FOR MANY WOMEN
* RULE 412 WAS DESIGNED TO ALLEVIATE THE PROBLEMS
* ***RULE 412: SEX-OFFENSE CASES: THE VICTIM***

***(a) Prohibited Uses. The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct:***

***(1) evidence offered to prove that a victim engaged in other sexual behavior; or***

***(2) evidence offered to prove a victim’s sexual predisposition.***

***(b) Exceptions.***

***(1) Criminal Cases. The court may admit the following evidence in a criminal case:***

***(A) evidence of specific instances of a victim’s sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;***

***(B) evidence of specific instances of a victim’s sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and***

***(C) evidence whose exclusion would violate the defendant’s constitutional rights.***

***(2) Civil Cases. In a civil case, the court may admit evidence offered to prove a victim’s sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim’s reputation only if the victim has placed it in controversy.***

***(c) Procedure to Determine Admissibility.***

***(1) Motion. If a party intends to offer evidence under Rule 412(b), the party must:***

***(A) file a motion that specifically describes the evidence and states the purpose for which it is to be offered;***

***(B) do so at least 14 days before trial unless the court, for good cause, sets a different time;***

***(C) serve the motion on all parties; and***

***(D) notify the victim or, when appropriate, the victim’s guardian or representative.***

***(2) Hearing. Before admitting evidence under this rule, the court must conduct an in camera hearing and give the victim and parties a right to attend and be heard. Unless the court orders otherwise, the motion, related materials, and the record of the hearing must be and remain sealed.***

***(d) Definition of “Victim.” In this rule, “victim” includes an alleged victim.***

# Victim’s Sexual Conduct on Other Occasions is Now Limited To:

* ACTS WITH THE DEFENDANT, or
* NEAR-TERM ACTS WITH OTHERS TO SHOW OTHERS ARE SOURCE OF DNA, SCRATCHES, BRUISES, ETC.
	+ FOR SCRATCHES OR BRUISES, ACTS WITH OTHERS MUST BE WITHIN TIME FOR HEALING
* THESE ARE THE MODERN RULES FOR SEX CASES
* WHETHER THE EVIDENCE IS LABELED AS CHARACTER OR HABIT DOES NOT MATTER
* GENERAL “SLUT” EVIDENCE IS NOT ALLOWED UNDER THIS RULE
	+ NO OPINION TESTIMONY ON THIS
	+ NO REPUTATION TESTIMONY ON THIS
	+ THE ALLOWED INSTANCES MUST BE SPECIFIC EVENTS
* Even if it fits the exception the Judge can keep it out because it’s too damaging for the victim and has little probative value.

# Rape Shield in Civil Cases

* PARA. (b)(2) of RULE 412
* PRIOR SEXUAL HISTORY IS OK IF OTHERWISE ADMISSIBLE, BUT SUBJECT TO JUDGE WEIGHING PROBATIVENESS vs. HARM
* NO SLUT-REPUTATION EVIDENCE; JUST THE FACTS
* EVEN FOR THE NARROW EXCEPTIONS (CONDUCT WITH D; CUTS-AND-BRUISES):
	+ IN CAMERA HEARING IS REQUIRED IN ADVANCE
	+ A VERY IMPORTANT VICTIM SAFEGUARD

# “Bad Guy” Propensity Rules: 413-415

* **A MAJOR REVERSAL OF ALL RULES ABOUT CHARACTER**
* ***RULE 413: SIMILAR CRIMES IN SEXUAL-ASSAULT CASES***

***(a) Permitted Uses. In a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault. The evidence may be considered on any matter to which it is relevant.***

***(b) Disclosure to the Defendant. If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses’ statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.***

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

***(d) Definition of “Sexual Assault.” In this rule and Rule 415, “sexual assault” means a crime under federal law or under state law (as “state” is defined in 18 U.S.C. § 513) involving:***

***(1) any conduct prohibited by 18 U.S.C. chapter 109A;***

***(2) contact, without consent, between any part of the defendant’s body — or an object — and another person’s genitals or anus;***

***(3) contact, without consent, between the defendant’s genitals or anus and any part of another person’s body;***

***(4) deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person; or***

***(5) an attempt or conspiracy to engage in conduct described in subparagraphs (1)–(4).***

* ***RULE 414: SIMILAR CRIMES IN CHILD MOLESTATION CASES***

***(a) Permitted Uses. In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other child molestation. The evidence may be considered on any matter to which it is relevant.***

***(b) Disclosure to the Defendant. If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses’ statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.***

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

***(d) Definition of “Child” and “Child Molestation.” In this rule and Rule 415:***

***(1) “child” means a person below the age of 14; and***

***(2) “child molestation” means a crime under federal law or under state law (as “state” is defined in 18 U.S.C. § 513) involving:***

***(A) any conduct prohibited by 18 U.S.C. chapter 109A and committed with a child;***

***(B) any conduct prohibited by 18 U.S.C. chapter 110;***

***(C) contact between any part of the defendant’s body — or an object — and a child’s genitals or anus;***

***(D) contact between the defendant’s genitals or anus and any part of a child’s body;***

***(E) deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on a child; or***

***(F) an attempt or conspiracy to engage in conduct described in subparagraphs (A)–(E).***

* ***RULE 415: SIMILAR ACTS IN CIVIL CASES INVOLVING SEXUAL ASSAULT OR CHILD MOLESTATION***

***(a) Permitted Uses. In a civil case involving a claim for relief based on a party’s alleged sexual assault or child molestation, the court may admit evidence that the party committed any other sexual assault or child molestation. The evidence may be considered as provided in Rules 413 and 414.***

***(b) Disclosure to the Opponent. If a party intends to offer this evidence, the party must disclose it to the party against whom it will be offered, including witnesses’ statements or a summary of the expected testimony. The party must do so at least 15 days before trial or at a later time that the court allows for good cause.***

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

* A MAJOR REVERSAL OF ALL RULES ABOUT CHARACTER OR HABIT
* IN THESE KINDS OF CASES, EVERYTHING IS ADMISSIBLE FOR THE PROSECUTION
	+ ASSUMING COMPETENT WITNESSES, ETC.
* ANY PRIOR SEXUAL MISCONDUCT BY D WITH ANY OTHERS
* OR ANY CHILD MOLESTATION
* MAY BE ADMITTED ON DIRECT AND CROSS, IN
	+ SEXUAL ASSAULT CASES
	+ CHILD MOLESTATION CASES
* NO ARREST OR CONVICTION IS NEEDED
	+ WITNESSES ARE THE USUAL WAY OF PROVING
* NOTE: COURT MIGHT EXCLUDE, IF UNFAIR PREJUDICE (R. 403)
	+ Judge to avoid prejudice can put restrictions on it – for instance, must be the same gender, must have been in the last three years, etc.

# Reasons for “Bad Guy” Rules:

* THE SOCIAL ILLS OF CHILD ABUSE AND RAPE ARE LARGE
* RECIDIVISM IS VERY HIGH
* THEREFORE: WE SHOULD ALLOW TESTIMONY ABOUT PRIOR INCIDENTS [UNLIKE THE USUAL RULE], EVEN WHEN THERE IS NO SPECIFIC PATTERN
* THESE RULES ARE HIGHLY CONTROVERSIAL:
	+ NO SIMILAR M.O. IS NEEDED FOR THE PRIOR EVENTS
	+ NO TIME LIMIT ON THE PRIOR EVENTS
* TEXAS DOES NOT HAVE THESE PARTICULAR RULES OF EVIDENCE; BUT HAS A SIMILAR STATUTORY PROVISION RE. OFFENSES INVOLVING CHILDREN [SEE ART. 38.37, POSTED CLASS ***MATERIALS]*** ***Effective: September 1, 2013***
	+ ***Vernon's Texas Statutes and Codes Annotated Currentness***
		- ***Code of Criminal Procedure (Refs & Annos)***
			* ***Title 1. Code of Criminal Procedure of 1965***
				+ *** Trial and Its Incidents***

*** Chapter Thirty-Eight. Evidence in Criminal Actions (Refs & Annos)***

* + ***Art. 38.37. Evidence of extraneous offenses or acts***
	+ ***Sec. 1. (a) Subsection (b) applies to a proceeding in the prosecution of a defendant for an offense, or an attempt or conspiracy to commit an offense, under the following provisions of the Penal Code:***
		- ***(1) if committed against a child under 17 years of age:***
			* ***(A) Chapter 21 (Sexual Offenses);***
			* ***(B) Chapter 22 (Assaultive Offenses); or***
			* ***(C) Section 25.02 (Prohibited Sexual Conduct); or***
		- ***(2) if committed against a person younger than 18 years of age:***
			* ***(A) Section 43.25 (Sexual Performance by a Child);***
			* ***(B) Section 20A.02(a)(7) or (8); or***
			* ***(C) Section 43.05(a)(2) (Compelling Prostitution).***
	+ ***(b) Notwithstanding Rules 404 and 405, Texas Rules of Evidence, evidence of other crimes, wrongs, or acts committed by the defendant against the child who is the victim of the alleged offense shall be admitted for its bearing on relevant matters, including:***
		- ***(1) the state of mind of the defendant and the child; and***
		- ***(2) the previous and subsequent relationship between the defendant and the child.***
	+ ***Sec. 2. (a) Subsection (b) applies only to the trial of a defendant for:***
		- ***(1) an offense under any of the following provisions of the Penal Code:***
			* ***(A) Section 20A.02, if punishable as a felony of the first degree under Section 20A.02(b)(1) (Sex Trafficking of a Child);***
			* ***(B) Section 21.02 (Continuous Sexual Abuse of Young Child or Children);***
			* ***(C) Section 21.11 (Indecency With a Child);***
			* ***(D) Section 22.011(a)(2) (Sexual Assault of a Child);***
			* ***(E) Sections 22.021(a)(1)(B) and (2) (Aggravated Sexual Assault of a Child);***
			* ***(F) Section 33.021 (Online Solicitation of a Minor);***
			* ***(G) Section 43.25 (Sexual Performance by a Child); or***
			* ***(H) Section 43.26 (Possession or Promotion of Child Pornography), Penal Code; or***
		- ***(2) an attempt or conspiracy to commit an offense described by Subdivision (1).***
	+ ***(b) Notwithstanding Rules 404 and 405, Texas Rules of Evidence, and subject to Section 2-a, evidence that the defendant has committed a separate offense described by Subsection (a)(1) or (2) may be admitted in the trial of an alleged offense described by Subsection (a)(1) or (2) for any bearing the evidence has on relevant matters, including the character of the defendant and acts performed in conformity with the character of the defendant.***
	+ ***Sec. 2-a. Before evidence described by Section 2 may be introduced, the trial judge must:***
		- ***(1) determine that the evidence likely to be admitted at trial will be adequate to support a finding by the jury that the defendant committed the separate offense beyond a reasonable doubt; and***
		- ***(2) conduct a hearing out of the presence of the jury for that purpose.***
	+ ***Sec. 3. The state shall give the defendant notice of the state's intent to introduce in the case in chief evidence described by Section 1 or 2 not later than the 30th day before the date of the defendant's trial .***
	+ ***Sec. 4. This article does not limit the admissibility of evidence of extraneous crimes, wrongs, or acts under any other applicable law.***

# Federal Bad Guy Example 1:

* In a prosecution for sexual assault on Doris on July 1, 2008, any *other* act of sexual assault by D., on anyone, at any time, with any M.O., can be shown by witnesses (victims) or other admissible evidence
* Does NOT matter if D was ever charged or convicted in the other cases

# Federal Bad Guy Example 2:

* Child molestation of a 4-year-old
* Prosecutor can bring in evidence (E.g. Victim testimony) of any other molestations of children at any time in D’s life
* Usually by witnesses
* Can be by conviction records

# Rule 415

* In a civil trial for sexual assault or child molestation
* Evidence (usually testimony) of any prior assault or molestation is likewise admissible
* NO specific pattern needed
* This overrides the usual no-character-evidence rule

# Remedial Measures Following An Incident

* NOT admissible to show negligence, fault, etc. R 407
* Somebody falls down on your premises and you are accused of negligence and they bring an action. After the person fell before case came up for trial, the LL or owner repaired the part of the property involved. P may not submit the evidence, and it will not be used against you although you could have done it but did not until something occurred.
* Nobody would repair the railing if they knew it could be used against them, so to encourage them to make it safe for future incidents then the fixing will not be admissible to show negligence at the time of incident.
* Reason: we want to encourage repairs
* Is admissible to show the following, if they are controverted :
* Ownership or control (“that’s not my house.”)
* Feasibility of better condition or design (“I did everything physically possible before the incident.”)
* If that is your position at trial you have waived your immunity and the fact that you made repairs will be used against you to show that you are the tenant since you tried to hide it.
* If you deny at trial that there was any possible thing at the time of accident or before, you lose immunity because there is a way to fix hand rail firmly and you did not do it. It comes up in medical malpractice cases when Drs say that they did everything possible and they change protocol to make it safer you will waive immunity.
* Thus, repairer holds the key, risks opening the door by making over-broad contentions

# Failed Settlement Discussions – Rule 408

* Inadmissible to show liability
* Comments in settlement talks
* Terms of settlement proposals
* These statements can be used by counsel to shape discovery and trial testimony if the discussions fail
* Generally, cannot be used against you. Anything you said in way of offering or facilitate settlement.
* At first settlement meeting people tend to be very hostile and usually does not work until a few meetings. It allows to blow off steam and an amount may be discussed to settle.
* (b) Exceptions: you can show what happened to delay settlement. It often occurs when D is expecting other complaints by other claimants and to destroy evidence for both sides since you do not want other people finding the evidence. It may be considered as an attempt to obstruct a criminal investigation. Obstruction is a felony and will get you disbarred and jailed for 6 months.
* There is no fruit of the poisoned tree in this case. If you learn something that is relevant to your case you may use it since it is not protected.
* Comments made during failed settlement can be admitted to show points other than liability:

1. Impeachment: bias or prejudice of a trial witness (by evidence of things she said at settlement meeting)

2. Negativing contention of undue delay – i.e. to defeat laches (testimony showing seeming good progress of settlement talks)

3. Proving an obstruction charge

- Even a successful settlement agreement could be admissible for this

- E.g. settlement agreement providing for shredding of discovery documents, *so that they would NOT be found by government,* or other litigants

- E.g., testimony: “ He said at settlement: “let’s keep all this from the feds if they come around – we don’t want trouble”

# Criminal Guilty Plea – Rule 410

* A guilty plea that sticks:

- CAN be used in later cases (usually civil)

* A nolo plea that sticks:
* CANNOT be used in later cases (usually civil)
* WITHDRAWN pleas of guilty or NOLO:

- Cannot be used in later cases

* Statements (admissions) during court’s “Taking of a guilty plea”:

- Admissibility tracks above rules for pleas; cannot be used if plea is withdrawn

* NOTE: for a “not guilty” plea, there will be NO accompanying statements
* If it is withdrawn it is as though you never pled. They CANNOT be used. To withdraw D’s counsel will say that they wish to change their plea. No motion is filed. Judge is not allowed to ask why they are changing their plea.
* A “taking of a guilty plea,” may take a long time or a short amount of time. Judge will probe the D and will ask what the D did to plea guilty. Judge wants to see whether it is improvident or provident. Many Ds plead guilty to things they did not do because the government will indict them to worse crimes. TO accept a plea you have to convince the judge of the facts and what you did.
* Protected also if the guilty plea does not stick.

# Failed Plea Bargain Discussions Rule 410(4)

* Remarks of D are protected:
* ONLY if he is speaking to a prosecuting attorney, and
* Only if the topic is plea bargaining
* N.B.: talks with arresting officers do not qualify!

-If the plea bargain succeeds there will be a plea and thus no trial. But if the plea bargaining does not solve the case, then there is a failed plea bargain discussion.

- Talking to the police does not count as a plea bargaining discussion in the back of their cruiser or ever. NOT protected.

- What you say is protected but if new witnesses are involved in the discussion they may be subpoenaed.

# Only What Was Said In the Room is Protected

* If D later talks to others about the bargain, that talk is NOT protected
* If D later testifies in reliance on the bargain, that testimony is NOT protected, but the plea discussion is
* Half-open door concept applies here:
* If D testifies
* To another part of what was said in plea-bargain meeting,
* OR contra to hat he said in plea-bargain meeting,
* Protection is LOST for ALL of it
* If D testified and verdict comes out not guilty, government will look for perjury and if the D did testify he may be prosecuted for perjury. The rule will not help him.
* In a later prosecution for perjury, this rule affords NO protection:
* D testifies at trial: general denial
* Later case for perjury: prosecutor can introduce what D said at plea bargain meeting as the true story
* If D testified and verdict comes out not guilty, government will look for perjury and if the D did testify he may be prosecuted for perjury. The rule will not help him.

# Offer to Pay Injured Person’s Medical Expenses

* Is not admissible to show liability or amount
* This exclusion does not require that a prior claim has been made
* NOT admissible to show you were negligent

# Insurance Coverage

* Is NOT admissible to show liability or amount
* Is OFTEN admissible for other purposes, e.g.:
* Showing ownership of a vehicle, apartment building, etc.
* In an action to recover on a policy
* P cannot put in D’s evidence that they are insured.
* If somebody says something that is incriminating it could be kept out but generally is not admissible.
* Often admissible for other purposes.

#

**Chapter 6: Competency of Witnesses**

# Modern View

* Nearly everyone is competent
* Witness MUST be helpful by having some level of ability:
* To observe
* To remember
* To relate
* Some ability is required to state something that is relevant.
* If their memory is faulty nobody is perfect so it will be okay

# Counterweights Again

* Minimally competent testimony can be kept out if unfairly prejudicial, or confusing to the jury, per Rule 403
* This is often done rather than holding that witness is *per se* incompetent

# Oath Requirement

* Has changed over the centuries
* “GOD” no longer need be mentioned
* “Swearing” no longer need be stated
* Some expression of duty and commitment to tell the truth are required
* You have to take the oath if not the testimony will not be taken.
* There is some penalty for getting it wrong deliberately.
* Some sense of obligation and that something bad will occur if you do not say the truth.

# Submission to Cross-Exam

* Is required
* Witness who at beginning of testimony indicates a refusal to be cross-examined:
* Will be ruled incompetent if the non-calling party so moves
* Will be held in contempt if the summoning party so moves
* Witness who refuses after direct
* Will be held in contempt, and
* Will have his direct stricken

# Hypnotized Witnesses

* A *currently* hypnotized witness is NOT competent
* Courts are wary even of past hypnotic refreshment of memory, i.e., where witness is not now hypnotized
* But hypnotically refreshed witness for D cannot be summarily kept out
* They will never convict D of perjury since defense counsel will never allow hypnotize witnesses to prove that they lied.

# “Dead Man’s” Statutes

* Common Law: All witnesses were incompetent to testify to a conversation with a now-deceased person, even if the hearsay objection is somehow overcome
* Was thought unfair, or too tempting toward perjury
* When somebody has died and prior to death they said something, can you testify to what the person said? Assuming you were past hearsay.
* Most states have some vestige of the rule left
* Texas:
* If an estate is a party, NO party can testify to a conversation with deceased
* Unless “corroborated” or elicited by an opponent [R. 601(b)]
* Same rule for guardian or ward as a party
* Hearsay rule still needs to be dealt with, or the conversation will be kept out on that ground
* We have a few hearsay exceptions that might apply here
* Excited utterances
* Statements about wills
* More later

# Lawyers as Witness

* No incompetency rule, BUT:
* An ethics rule prohibits an advocating lawyer from testifying on anything other than formalities
* Courts enforce this ethics rule, with exception for client hardship
* No such “incompetency” rule
* If you are going to advocate the case that makes you a special kind of lawyer and you are incompetent to testify. Firm is not disqualified neither are your colleagues.
* You may sit at counsel table, and may prompt partner and even do research. You are not disqualified but you cannot advocate if you are a witness.
* Rationale
* Dual roles are thought to give lawyer too much advantage
* To be a witness on contested points, she must withdraw as the speaking advocate; not disqualified from working on the case
* A partner can take over
* Precluded lawyer can work on the case; no conflict of interest with client

# Jurors as Witnesses: Rule 606

* Rule covers live testimony
* Rule also covers affidavit testimony
* Neither is restricted pre-verdict
* Usually handled in camera; usually is about misconduct

# Both Forms are Heavily Restricted Post-Verdict

* Juror testimony (live or affidavit) about juror misconduct is generally NOT allowed
* Is allowed where testimony is about:

1) Outside influence (by persons; e.g., threats, bribes) or

2) Extraneous prejudicial info (by things, e.g., newspaper accounts) or

3) Mistake in entering verdict onto form

* You may introduce information to judge and counsel.
* Extraneous influence – threats and bribes. (Pay you $300 if you say not guilty, we will kill you if you say G)
* May not go further to say how it influenced jurors (inside circle)
* Things 🡪 newspaper articles, books, wall was breached by those sources.
* Rule does not let you inside the inner circle.
* Even in those 3 narrow instances, the post-verdict juror testimony cannot extend to impact on jurors’ minds
* The judge has to speculate on possible impacts; and decides what to do

# Note about Error in Entering Verdict on Form

* This exception for juror post- verdict testimony does NOT permit testimony about an erroneous *method* of arriving at the verdict
* Only deals with putting the verdict onto paper
* Error by the foreman if they added or dropped a zero. It happens. That exception over a miswriting in the verdict can be brought up by juror testimony. As long as they all agree in the amount of damages.

# Jurors as Witnesses: Texas Rule 606

* Post-verdict testimony OK for “outside influences”

- Probably subsumes the “extraneous prejudicial” info option in the federal rule

* BUT: no exception for errors in verdict forms

# Aid For Recalling the Rule

* Picture a circle around the jurors during and after trial
* Any impropriety testimony given pre-verdict is o.k., in camera
* After verdict, evidence of people or things coming from outside into the circle is OK
* But evidence of what transpired within the circle is NOT allowed, no matter how bad!

# Example 1:

* Juror slept through trial; another was drunk throughout trial
* Post-verdict testimony by a 3rd juror NOT allowed on either
* Federal and Texas Rules are the same on this
* Once the verdict is in, lawyers are normally allowed to interview the jurors and a lot of them will talk about the case. If a juror mentions something regarding another juror will NOT be allowed. It is too late. If there is an affidavit the judge will have to strike it.

# Example 2:

* Juror X told others about his special experience in crime detection;
* Several then changed their votes
* A juror cannot testify post-verdict to either point
* This is an internal misconduct matter; not “extraneous” or “outside” the circle

# Example 3:

* Juror went to scene at night; told other jurors what he saw
* If this comes up post-verdict:
* A close question
* 1st half may be admissible: “Extraneous” matter (the scene) getting into the circle [Although via a juror]
* 2nd half is inadmissible; intrusion into the circle

# “Personal Knowledge” Requirement of Rule 602

* What does it mean?
* Observed by the senses
* Not “processed” too much
* What does it exclude?
* Recitations labeled “opinion”
* Testimony on the state of mind or emotion of another person (“How did she feel about that?” “Why did she tell him to get lost?”
* What do you really know, first-hand?
* NOT MUCH!
* Not how old you are
* You could say you remember back to year X
* Not who are the senators from Texas, or who is the President of the US
* This objection is often waived
* For convenience in non-controversial situations
* But it is enforced if the issue is important to the case
* E.g. age, in a statutory rape case

**Chapter 7: Direct and Cross Revisited**

# Scope of Cross

* Federal Rule 611(b): generally limited to scope of direct + issues of witness credibility
* Court can allow wider scope

- Often does, to save time of recalling the witness

* Texas: NO limit on scope of cross –any relevant subject
* Under Federal law, you have to ask the judge to allow you to ask more topics on cross than there were on direct.
* Alternative is to hold witness outside so he can be

# Leading on Direct

* Allowed sometimes –
* Timid witness
* Momentary memory lapse
* Adverse witness (associated with other side)
* Also allowed on “preliminary matters”
* But you have to know the local practice on what is preliminary
* Strict rule: only name, address, occupation, and placement at the scene are preliminary
* In Harris County State Courts, all foundation questions are regarded as preliminary
* Examples:
* Authenticity of a document
* Familiarity with a person’s character or reputation.

# Memory Refreshing is Allowed

* In lieu of leading, any reasonable *silent* memory refreshment technique is ok
* These are NOT *putting the documents into evidence!!!!!*
* It does NOT need to be written by the witness him/herself.
* Document is NOT coming into evidence, but you do have to show it to the other side.
* Anything that will jog the witness’s memory will be allowed.
* The witness must then testify from his refreshed memory
* Other side is allowed to see the refreshment material

# Leading On Cross

* Broadly allowed
* Exception: your own client

-Here the rules are reversed; adversary leading on direct is ok, but you cannot lead on cross

# Witness Preparation Material: Federal Rule 612

* Used while on the stand: adverse party has right to see it, and to introduce parts pertinent to testimony
* Used before trial: federal rule: may seek an order to see it

- Routinely granted today

* You need to prepare your witness 3 different times on 3 separate day, so you are aware of what the witness will say.
* You will have to show all of the witness prep material you used on the witness.

# Texas Rule 612

* Used while on the stand: adverse party has right to inspect and to introduce parts pertinent to testimony
* Viewed pre-trial
* Criminal cases: absolutely right to see
* Civil case: need order, but easy to get in practice

# Work-Product Contention Will NOT Override the Foregoing

* Lawyer-prepared materials seen by witness:
* Will have to be handed over
* Work-product is flimsy even if not shown to witness [Explain]

# Cross-Exam is an Important Right

* If witness flees after direct exam, or refuses to complete cross, the direct will be stricken on motion

# Invoking “The Rule” Federal Rule 615; Texas Rule 614

* Rule separating witnesses so they cannot hear each other’s testimony
* The rule is mandatory on request of any party
* Custom is to make the request
* After voir dire the judge will ask to invoke “the rule” if anybody wants to.
* The rule excluding witnesses from hearing the testimony for a number of exceptions. Not the first witness but the other ones.
* It is a mandatory rule.
* Lawyers are forbidden to tell what the other witnesses have said. It is a serious violation and you will be held in contempt.
* Purpose of the rule is so that the later witnesses are not influenced by what previous witnesses have said.

# Some Witnesses are Exempted From “The Rule,” i.e., CAN Stay in Courtroom

* Individual parties
* One corporate witness can stay for each corporate party
* Persons shown to be “necessary” to presentation of the case - usually experts
* Victim him/herself is NOT a party.
* Only state and defendants are parties.
* If it is a corporate party can designate one person who is a non-first witness to be the corporate representative (that person can stay and may not be changed). You must choose at the beginning. Pick somebody who is on your witness list so other people can sit at the counsel table.
* People whom are “necessary” normally refers to the experts.
* If you expect to be a witness for P or D you may expect to be exempted.
* Additional Persons may be exempted by statute

- There are such statutes, Federal and Texas

# Statutory Exemptions from “The Rule”

* Federal: Victim’s Rights Act
* Victim is normally exempt from the rule
* Unless judge finds likely alteration of victim’s testimony
* Also relatives of an under-18 or deceased victim

# Texas

* “The Rule” [614]
* Exempts victims in criminal cases, unless judge finds presence would materially affect their testimony
* Texas Code of Criminal Procedure At. 36.03 Expands the Exemptions:
* Exempts close relatives of deceased victim;
* Exempts guardian of living victim [Parents NOT mentioned]???

# Discretionary Tightening of the Rule

* Pretrial order not to discuss expected testimony with other witnesses

- Also binds lawyers not to inform regarding what other witnesses say

* Normally issued only to fact witnesses
* Could also issue to experts

# Texas Statutory Tightening of the Rule

* Texas Criminal Cases
* Court MUST instruct witnesses regarding who they can speak with about the case during trial, and who they cannot speak with [Texas Code Crim 36.03(e)]

# Further Discretionary Tightening of “The Rule”

* Reading transcript of other witnesses testimony
* Forbidden by court order in some jurisdictions; not in others
* Penalty for breach:

- Discretionary: can strike the offending witness’ testimony.

**Chapter 8: Impeachment of Witnesses**

# Definition and Methods

* Impeachment is the process of attempting to weaken the perceived credibility of a witness.
* Most commonly done on cross.
* At least 6 methods of impeachment, each with its own rules limiting reach.
* **Methods to Impeach a Witness:**
1. **Cross-Examination:** witness on stand (credibility becomes an issue as soon as he answers the first question). NOT extrinsic.
2. **Call Impeaching Witness:** Extrinsic.
3. **Impeach Your Own Witness**: typically on direct. If W has gone south on you.

* **NON-Specific Methods**
* Impeachment evidence that you will bring out that not only applies to what is going on in the case
1. Diminished competence

- Impaired eyesight, hearing…

1. Bad Character

- Veracity ONLY (How believable is this witness)

1. Criminal Conviction

- Generally dealing with felonies (convictions NOT committed) and misdemeanors involving dishonesty.

* **Specific Methods**
1. **Diminished Competency**

-Specifically to THIS case. (W was looking the other way, perhaps was drunk)

1. **Prior Inconsistent Statements**
2. **Bias or Prejudice to a Party.**
* You will be allowed to impeach a witness in one of the 6 ways.
* If D is NOT a witness, CANNOT be impeached.
* Extrinsic evidence – testimony from somebody else. Admission of a document.

# Meaning of “Extrinsic Evidence”

* Doing the impeachment by
* Calling a witness to impeach the target witness, or
* Introducing a document to do so

# The 3 General Modes

* 3 forms of attack on the witness’ believability due to some general weakness as a witness
* Weakness NOT limited to this particular case

# The 3 General Attacks

1. **Prove Impaired General Competency**
* Unable to observe or remember things in general, not limited to this case
* Extrinsic evidence is allowed
1. **Poor character for veracity**
2. Bad reputation for truthfulness – extrinsic witness testimony is allowed, but NO specifics.
3. Prior dishonest non-conviction acts, established on cross. (Hence extrinsic evidence
* Only interested on how believable the witness is.
* ONLY character trait we care about.
* Rarely see this impeachment since it is so weak, jury usually sides with target witness.
* If you are on cross and cannot use an outside witness. You are stuck with the answer since you cannot get them to say the truth on the stand since they say they are not lying.
* **Texas does NOT allow impeachment by dishonest non-conviction acts, even on cross-exam.**
1. **Conviction of a Crime**
2. Any crime involving dishonesty. No weighing probative value or prejudice required.
3. Any felony, but subject to weighing probativeness against risk of prejudice.
4. Ten-year limit in either case.
* Misdemeanor that involves dishonesty – lying on hotel registry.
* 10-year from the time you got out of jail, or if no jail 10-year from commission of the crime.
* Texas Rule: Adds crime (misdemeanors) involving “moral turpitude”. The term "crimes involving moral turpitude," which may be used for impeachment purposes, encompasses crimes involving:

• Dishonesty, fraud, deceit, misrepresentation, or deliberate violence

• Matters of personal morality

• Conduct committed knowingly contrary to justice, honesty, principle, or good morals

• Baseness, vileness, or depravity

• Conduct immoral in itself, regardless of whether it is punishable by law, in that the doing of the act itself, and not its prohibition by statute, fixes the moral turpitude

• Immoral conduct that is willful, flagrant, or shameless, and which shows a moral indifference to the opinion of the good and respectable members of the community.[1](https://a.next.westlaw.com/Document/Ibf24a6ab3cce11d99267be94bc8d86b3/View/FullText.html?navigationPath=Search/v3/search/results/navigation/i0ad7052000000147f41e5cf7d165b870?Nav=ANALYTICAL&fragmentIdentifier=Ibf24a6ab3cce11d99267be94bc8d86b3&startIndex=1&contextData=%2528sc.Search%2529&transitionType=SearchItem&listSource=Search&listPageSource=04c9f558640f9512fe48683cccece22b&list=ANALYTICAL&rank=1&grading=na&sessionScopeId=934d4d73fc8a3a412e9fc72f556ba67f&originationContext=Search%20Result&transitionType=SearchItem&contextData=(sc.Search))

Criminal acts that involve intentional dishonesty for purpose of personal gain are acts involving moral turpitude.[2](https://a.next.westlaw.com/Document/Ibf24a6ab3cce11d99267be94bc8d86b3/View/FullText.html?navigationPath=Search/v3/search/results/navigation/i0ad7052000000147f41e5cf7d165b870?Nav=ANALYTICAL&fragmentIdentifier=Ibf24a6ab3cce11d99267be94bc8d86b3&startIndex=1&contextData=%2528sc.Search%2529&transitionType=SearchItem&listSource=Search&listPageSource=04c9f558640f9512fe48683cccece22b&list=ANALYTICAL&rank=1&grading=na&sessionScopeId=934d4d73fc8a3a412e9fc72f556ba67f&originationContext=Search%20Result&transitionType=SearchItem&contextData=(sc.Search)) Swindling, cheating, theft, including misdemeanor theft, and the making of a false affidavit for the purpose of securing monetary benefits to which the claimant is not entitled, are such offenses.[3](https://a.next.westlaw.com/Document/Ibf24a6ab3cce11d99267be94bc8d86b3/View/FullText.html?navigationPath=Search/v3/search/results/navigation/i0ad7052000000147f41e5cf7d165b870?Nav=ANALYTICAL&fragmentIdentifier=Ibf24a6ab3cce11d99267be94bc8d86b3&startIndex=1&contextData=%2528sc.Search%2529&transitionType=SearchItem&listSource=Search&listPageSource=04c9f558640f9512fe48683cccece22b&list=ANALYTICAL&rank=1&grading=na&sessionScopeId=934d4d73fc8a3a412e9fc72f556ba67f&originationContext=Search%20Result&transitionType=SearchItem&contextData=(sc.Search)) However, the misdemeanor offense of practicing medicine without a license is not an offense involving moral turpitude,[4](https://a.next.westlaw.com/Document/Ibf24a6ab3cce11d99267be94bc8d86b3/View/FullText.html?navigationPath=Search/v3/search/results/navigation/i0ad7052000000147f41e5cf7d165b870?Nav=ANALYTICAL&fragmentIdentifier=Ibf24a6ab3cce11d99267be94bc8d86b3&startIndex=1&contextData=%2528sc.Search%2529&transitionType=SearchItem&listSource=Search&listPageSource=04c9f558640f9512fe48683cccece22b&list=ANALYTICAL&rank=1&grading=na&sessionScopeId=934d4d73fc8a3a412e9fc72f556ba67f&originationContext=Search%20Result&transitionType=SearchItem&contextData=(sc.Search)) nor is possession of narcotic paraphernalia,[5](https://a.next.westlaw.com/Document/Ibf24a6ab3cce11d99267be94bc8d86b3/View/FullText.html?navigationPath=Search/v3/search/results/navigation/i0ad7052000000147f41e5cf7d165b870?Nav=ANALYTICAL&fragmentIdentifier=Ibf24a6ab3cce11d99267be94bc8d86b3&startIndex=1&contextData=%2528sc.Search%2529&transitionType=SearchItem&listSource=Search&listPageSource=04c9f558640f9512fe48683cccece22b&list=ANALYTICAL&rank=1&grading=na&sessionScopeId=934d4d73fc8a3a412e9fc72f556ba67f&originationContext=Search%20Result&transitionType=SearchItem&contextData=(sc.Search)) interference with the duties of a public servant,[6](https://a.next.westlaw.com/Document/Ibf24a6ab3cce11d99267be94bc8d86b3/View/FullText.html?navigationPath=Search/v3/search/results/navigation/i0ad7052000000147f41e5cf7d165b870?Nav=ANALYTICAL&fragmentIdentifier=Ibf24a6ab3cce11d99267be94bc8d86b3&startIndex=1&contextData=%2528sc.Search%2529&transitionType=SearchItem&listSource=Search&listPageSource=04c9f558640f9512fe48683cccece22b&list=ANALYTICAL&rank=1&grading=na&sessionScopeId=934d4d73fc8a3a412e9fc72f556ba67f&originationContext=Search%20Result&transitionType=SearchItem&contextData=(sc.Search)) possession of marijuana,[7](https://a.next.westlaw.com/Document/Ibf24a6ab3cce11d99267be94bc8d86b3/View/FullText.html?navigationPath=Search/v3/search/results/navigation/i0ad7052000000147f41e5cf7d165b870?Nav=ANALYTICAL&fragmentIdentifier=Ibf24a6ab3cce11d99267be94bc8d86b3&startIndex=1&contextData=%2528sc.Search%2529&transitionType=SearchItem&listSource=Search&listPageSource=04c9f558640f9512fe48683cccece22b&list=ANALYTICAL&rank=1&grading=na&sessionScopeId=934d4d73fc8a3a412e9fc72f556ba67f&originationContext=Search%20Result&transitionType=SearchItem&contextData=(sc.Search)) criminally negligent homicide,[8](https://a.next.westlaw.com/Document/Ibf24a6ab3cce11d99267be94bc8d86b3/View/FullText.html?navigationPath=Search/v3/search/results/navigation/i0ad7052000000147f41e5cf7d165b870?Nav=ANALYTICAL&fragmentIdentifier=Ibf24a6ab3cce11d99267be94bc8d86b3&startIndex=1&contextData=%2528sc.Search%2529&transitionType=SearchItem&listSource=Search&listPageSource=04c9f558640f9512fe48683cccece22b&list=ANALYTICAL&rank=1&grading=na&sessionScopeId=934d4d73fc8a3a412e9fc72f556ba67f&originationContext=Search%20Result&transitionType=SearchItem&contextData=(sc.Search)) or driving while intoxicated.[9](https://a.next.westlaw.com/Document/Ibf24a6ab3cce11d99267be94bc8d86b3/View/FullText.html?navigationPath=Search/v3/search/results/navigation/i0ad7052000000147f41e5cf7d165b870?Nav=ANALYTICAL&fragmentIdentifier=Ibf24a6ab3cce11d99267be94bc8d86b3&startIndex=1&contextData=%2528sc.Search%2529&transitionType=SearchItem&listSource=Search&listPageSource=04c9f558640f9512fe48683cccece22b&list=ANALYTICAL&rank=1&grading=na&sessionScopeId=934d4d73fc8a3a412e9fc72f556ba67f&originationContext=Search%20Result&transitionType=SearchItem&contextData=(sc.Search))

* If the witness admits the conviction, cannot use extrinsic evidence to prove the conviction.
* If the witness does NOT admit, can use record only (NO add’l witness)
* Crime; date of conviction; sentence,
* If witness admits, cannot use reports or other details of the crime.

# The 3 Specific Modes

* **3 Forms of Attack on the witness’ credibility in this particular case**

**- In general the witness must have good veracity but not for her present testimony**

1. **Impaired Specific Competency, i.e., on the occasion in question**
* Examples:
* Drunk
* Nighttime
* Looking the other way
* Extrinsic evidence is allowed
1. **Prior Inconsistent Statement of the Witness**
2. Easy to introduce; can go extrinsic if necessary
3. But, must afford target witness a chance during trial to explain the inconsistency
4. Therefore, CANNOT use this mode if witness has been excused and is beyond subpoena reach.
* Easiest to introduce and by far the most popular.
* Inconsistent with testimony NOW at current trial. Inconsistencies that happened before trial are NOT relevant.

**Texas Rule Has Additional Constraints**

* Must first inform witness about circumstances of his prior statement
* If witness unequivocally admits the prior statement, NO extrinsic evidence allowed.
* **613(a)**
1. **Bias or Prejudice**
2. Examples:
* Friend or relative of a party
* Animosity
* Business objective if one side wins
* Similarly situated neighbors
1. Extrinsic Evidence is allowed
* Biased toward one of the parties in the case.
* You do not know the parties but your business objective is certain party wins.
* If you get an explicit acquiesce everything else is allowed.

**Texas Rule On No-Ambush Foundation for Bias/Prejudice Attack**

* Similar to no-ambush requirements for prior inconsistent statement.
* Must first tell witness the circumstances that tend to show bias/prejudice
* No extrinsic evidence if witness concedes bias/prejudice
* **613(b)**

# Who can be Impeached?

* Any witness who answers any question places his credibility in issue, and can be impeached
* On cross, the federal scope-of-the-direct rule does NOT block impeachment [Note R. 611(b)’s SPECIFIC EXCEPTION FOR CREDIBILITY QUESTIONS]
* Can impeach your own witness
* At common law you could not impeach your own witness. Rule has been abolished. You can impeach the witness, as long as what they said was an actual surprise.
* Can impeach an impeaching witness
* A non-testifying party generally cannot be impeached
* But a hearsay declarant can be impeached

# Seriatim Impeachment Methods

* Are generally allowed, subject to discretion on waste of time
* Most commonly done when first method fails

# Example #1

* D. Testifies
* On cross, prosecutor tries to show prior dishonest acts – false income tax return **[R. 608(b)]**
* D denies filing false return [impeachment fails]
* Prosecutor can now switch to conviction-of-a-crime-mode: conviction for filing false return **[R. 609**] [Impeachment succeeds]

# Some Surprising Things

1. Non-mirandized statements can be used to impeach a testifying D
2. Pre-Miranda warning silence can be used to impeach a testifying D
* Non-mirandized statements can be used to impeach him if he testifies. Another reason why they are not put in the stand.
* On the issue of guilt, a statement Pre-Miranda may NOT be used.
1. Illegally seized items can be used to impeach a testifying D.
2. E.g. Illegally seized shirt with nifty cutouts. E.g. illegally seized cocaine.
3. These impeachment tools are said to be necessary to protect integrity of trial system.
* If the D testifies , and he says something inconsistent with what was seized illegally and illegally seized items will come into evidence.
* Avoid it – DO NOT put D on stand.
* If he testifies there is a serious risk that certain statements, or illegal seizured items may be admissible to impeach testimony.

**Chapter 9: Opinion Evidence**

# Opinions are Generally Inadmissible

1. **Rule 602** requires actual “knowledge” for most types of evidence
2. Knowledge means physical perceptions ONLY!!!!
3. In a practical justice system we need some room for opinions.
* Something actually experienced with their sense. Not something they were told by somebody else (TV, radio).
* No opinions from witnesses.
1. Experts excluded
2. Opinions by non-experts **[701]**

# Meaning of Opinions

1. About 98% of what we think we “know” are actually opinions (e.g. our own age; ID of US President or Texas Governor)
2. Opinions consist of:
* Facts learned from others who may actually know them
* Conclusions we have drawn from our own observations

# The Opinion Objection:

1. **General Rule**: opinions are NOT allowed in evidence
2. “Objection, Your Honor; It Calls for an Opinion”
3. If judge agrees, this sets the stage for further analysis.
4. Some kinds of opinions are admissible.

# Opinions of Non-Experts Rule 701

1. Allowed if:
2. Based on a physical perception by the witness, and
3. Rationally based, and
4. Helpful to the trier of fact

[NOTE: Your opinions about your age or famous office-holders will NOT qualify]

1. “Helpful” means there is NO other feasible way to convey the witness’s observation.
2. If testifying to a few facts can convey the story to the jury just as well, the opinion is disallowed.

# Examples of Admissible Lay Opinions

1. He was drunk
2. He was upset
3. She was nervous
4. She was angry
5. ALL require a foundation of a physical perception
* You have to perceive that somebody was in that condition.
* It is difficult to show what you perceived and to differentiate it from an actual opinion.

# Further Examples of Lay Traditionally Allowed

1. Insanity
2. Handwriting
3. Both require foundation of physical perception

- A non-expert can go into these aspects. Physical perception is required.

# Expert Opinions: 1st Hand Perception NOT Required [Rule 702]

1. Special knowledge or experience in some area
2. Scientific, business, arts, car repair, etc.
3. Crime detection? Controversial.

- Does NOT have to be technical, could be art, painting sculpture, finance or experience beyond what a juror would normally have.

# Expert’s Methodology Must Be Reliable

1. Checked initially by the judge before the trial
2. If judge finds methodology was reliable, opinion is admitted for jury evaluation
3. Jury may still find methodology was unreliable and give opinion NO weight
* Credentials used are not usually the problem.
* Because of scheduling, checking out of credentials happens very early in trial with jury excluded.
* Methodology was flawed. Judge will make ruling that the testimony was NOT helpful and it will be stricken.
* Juries are not bound by anything other than judicial notice.

# Voir Dire Prior to Getting Opinion is Almost Universal

1. Judge has already decided good methodology, but:
* Need to cut the expert down to size before the jury
* Did NOT consider X
* Did NOT consider Y
* Mistakes may have appeared carrying out the methodology

- You try to chop away witness’s credibility.

# Opinion on an Ultimate Fact [Rule 704]

1. The Old Cliché: “Invading the Province of the Jury”
* Was nonsense
1. NOW generally allowed if otherwise in compliance with rules
* - For centuries, common law case law said that the ultimate opinion of the case is invading the province of the jury should NOT be allowed in criminal cases. Cannot speak to mental states since those are for the trier of fact alone. In federal court, you have to know the elements of insanity and fight them, opinions on mental state of mind are NOT allowed. In Civil cases it is not a problem.
1. Exception (Federal Rule): State of mind of Criminal D
* The old cliché survives here
* Usually sanity is involved
* Expert must stay one-step back
1. Texas Rule: Does NOT have the Exception:
* Expert can always go to the bottom line, if methodology is good
* Fed. test: Unable to appreciate (i) nature/quality, or (ii) wrongfulness
* Texas test: Knew act was wrong

# Court-Appointed Expert [Rule 706]

1. Good in theory
2. Litigators cringe!!!!
* Court may appoint any expert the parties agree on and any of its own choosing.
* Even when attorneys dislike each other, they will agree as to what experts will be proposed.
* Ask parties to bring people into court to question them in chambers or on the record without the jury.

# Stipulating Expertise of your Expert Witness

1. Often volunteered by adversary
2. Seldom accepted
* Would remove drama
* No fear of any objection
* Usually, adversaries do NOT accept this.
* Once stipulation is offered any objections are gone.
* Thank profusely and decline to make stipulation.

**Chapter 11: Judicial Notice of Facts**

# Notice of Facts

1. Is the only type of notice involved here
2. Judicial notice of law or legislative intent are outside this course

# A Shortcut

1. Judicial Notice of a Fact is a *substitute for evidence* on that fact.
2. A nice device if you are caught without proof

- If you realize you are missing a piece of notice, because you overlooked it, so a way out is for you to ask the judge to take judicial notice that you missed it.

# Effect of Notice

1. In a civil case a proper judicial notice is binding on the jury as to the fact noticed,
2. In a criminal case the jury is instructed that *it may* conclude the noticed fact
* Judge is a very influential nudger
* Until judicial notice gets resolved is binding on everybody in the room.
* In a criminal case, jury can be compelled to be bound by anything including judicial notice of facts. It means it is still open.

# 2 Alternate Bases for Judicial Notice (Rule 201)

1. **Facts generally known in the locale; E.g.**
* In Houston, Main and Fannin are heavily traveled streets
* In Houston, part of exterior of Minute Maid Park is visible from Highway 59
* The Astros have played in Houston for many years.
1. **Facts NOT generally known, BUT ascertainable from references of indisputable accuracy**
* Closing price of IBM Shares on July 22
* High tide times at Galveston Island on April 17, 2015
* French is an official language in Belgium
* Jury is NOT likely to know this, but this can be easily found out about.
* Facts that are thought determinable by sources that are NOT realistically challengeable.

# An Improper Basis

1. Judge’s Personal Knowledge
* You cannot use judge’s personal knowledge. Not in the rule.
* Safe on appeal even if its judge’s personal knowledge because they will try proving it.

# Procedure [Rule 201]

1. Ask on the record for Court to take J.N. That “\_\_\_\_\_\_”.
2. Supportive references can be handed up to the bench freely to assist the judge
* These are NOT being received in evidence
* J.N. is a substitute for evidence

# Adversary

1. Is entitled to object before J.N. is taken
2. If it happens too fast, she can object afterward and has a right to be heard

- Rule allows for attorney to object and be heard afterwards. Judge may retract/resolve/vacate judicial notice.

# Ruling

1. Judge says: “The Court will take J.N. that the Sun rose at 5:14 AM over the Houston ship channel on May 29, 2015; the jury will be so instructed.”
* Listen carefully because judge may get request incorrectly.

# Effect in Civil Cases

1. Once taken, it is binding on the trier and the parties
2. Controverting evidence is NOT allowed
* But opponent can move to vacate the notice if it was improperly taken.

# Effect in Criminal Cases:

1. Instruction is permissive

- “The Jury is instructed that it may find without further evidence that the Sun rose at 5:14am…”

1. Controverting evidence is allowed
* But seldom happens
* Other side may contest it, by putting another witness disputing the information.

**Chapter 12: Privileges**

# Definition

1. A privilege is a right of some person or entity to block the admission of certain kinds of evidence in a case
* Even though relevant
* Even though crucial
* Even though NO prejudice under **Rule 403**
* **Will NOT** be found in Federal Rules
* Drafters had rules on privilege but Congress pursuant to its statutory power objected to all these privileges. They worried that these rules will get in the way of administration of police.
* NO meaningful FRE on Privileges, which is why state has them.
* Congress has not written any privilege rules that are meaningful.

# Purpose

1. To further some societal goal
2. Reflects humankind’s effort to civilize itself
* Encouraging certain kinds of human communications by keeping them out of the courts

# Federal Standards on Privileges

1. NO rules were actually enacted
2. The US Judicial Conference proposed the 500-series of rules, but they did NOT make it through Congress.
3. These proposals are now known as “standards”
* NOT officially “Rules”
* But they carry a lot of weight in the courts.

# Texas Rules - Attorney Client Privilege Rule [Rule 503]

1. A person who consults a lawyer *for the purpose* of obtaining legal advice has a privilege to block disclosure of what the person said or the lawyer said, if the circumstances were apparently confidential.
* Privilege simply says that other people cannot find out unless the client waives their right.
* It does not mean you cannot find out the facts in another way.
* Facts are NOT privileged.
* Under apparent confidential circumstances, paralegal may be present. Client may bring a helper within reason. Corporate clients often bring several people (still confidential).
* Hidden eavesdroppers do NOT jeopardize the privilege. They may be silenced by the court.
* NOT privileged – room full of people engaged in discussion. Things said at a press conference.

# Exceptions Very Narrow

1. Needs of the other side do NOT create any exception to the privilege

-They can try to discover the facts some other way

1. The only significant exception is: a later action between the lawyer and the client
* Malpractice
* Action to collect a fee
* Parties seem to break through privilege, especially in criminal cases, but there are NOT that many exceptions. Need is NOT a breach of privilege.
* In a malpractice action, between lawyer and client, there is NO attorney-client privilege.

# So-Called Crime/Fraud “Exception”

1. Where client’s main purpose is to involve the lawyer in assisting in a crime or fraud, the definition is NOT met (*Purpose is NOT to get legal advice)*
2. Not really an exception, but often-called one.
* There is no privilege if client tries to involve lawyer in assisting in a crime or fraud.
* Discussions were client’s purpose is to lure the lawyer does NOT meet the definition of attorney-client privilege.

# When Lawyer Then Declines The Representation

1. The privilege stands, per the definition
2. NO lawyer-client relationship is needed
* Privilege derives from the purpose of the communication
* Even though case will not be taken, privilege exists.

# Unknown Eavesdropper

1. No effect
* *Apparent* confidentiality is enough
* Some older cases contra
1. Eavesdroppers can be enjoined to maintain silence

# Both Sides of Conversation are Included

1. Traditionally, only what the client said was privileged
2. However, what the lawyer said usually inherently reveals what the client said, and was called “Derivatively Privileged”
* E.g.: “Hmmm then I think you are guilty of murder!”
* Privilege rule simplifies this and both sides are privilege now.
* If lawyer or client’s deposition is being taken are NOT allowed to say anything if anything came from their conversation with either party.
1. Most modern decisions shorten the analysis and say the privilege covers both ways.
* BOTH sides are privileged.

# The Client “OWNS” the Privilege, Meaning:

1. She can decide whether or NOT to block disclosure in court
2. She can decide which of lawyer’s helpers, or her own helpers, should see it
* “Own a privilege” – 1) person who owns privilege (client) can decide whether to stand on the privilege or (2) to waive it.
* Client makes this decision, NOT lawyer.
* To decide which helpers you will see. How wide the scope you will be. Big companies struggle with this since many people have seen the privileged document. Clients decide how many and which people will see it. Cannot get too excessive since privilege might be taken away.

# The Problem of Waiver

1. ONLY the client or his representative (Who is often the lawyer) CAN waive
2. **Waives by acting:**
* By disclosure; or
* Personally authorizes disclosure of the communication; or
* Authorizes an agent to decide on disclosure of the communication
1. **Waives by implication**
* Lawyer for a litigant is usually presumed to have authority to waive, unless facts show otherwise
* Some person to disclose the communication is a “knowing waiver”. By action or deliberation.
* It is assumed that the lawyer has authority in litigation to decide on a waiver.

# Client Decides

1. Lawyer MUST honor the client’s waiver instruction
* Even if embarrassing to the lawyer
* This is a result of client “owning” the privilege
1. **Waiver by conduct: Half- Open Door Rule**
* Revealing parts in testimony
* Revealing one opinion but asserting privilege on others on same topic
1. **Waiver by Producing in Litigation:**
* Codifies the half-open rule
* Other communications that ought “in fairness” to be considered with waived item.
* In complex cases, a privileged document slips through. Lately, federal courts have protection available for inadvertent waiver. If you get a court order, it is binding and will be honored in other courts as well.

# Waiver: Affirmative Use of Counsel Opinions

1. Using lawyer’s advice to get a benefit in court
* Is an involuntary waiver
* E.g. mentioning an opinion of counsel, to show good faith or lack of fraud
1. Lawyer can then be deposed, must answer the whole topic
2. Other lawyers’ opinions on the topic are also waived
* If you use counsel’s opinion, to get a benefit, privilege is gone.
* To help you fight off a fraud charge.
* Affirmatively used what counsel told you to do so it is a waiver.

# No Pick-and-Choose Waivers

1. Waiving as to one communication usually operates as a waiver on other privileged communications on same topic, up to the date of the waiver.
2. May be some relief from this “spreading stain” of waiver, if accidental
* Court order on this is binding
* Parties’ agreement is binding, at least for this case

# Texas Rule 503

# TWO Marital Privileges

1. **The “Marital Communication” Privilege**
2. Made during marriage under apparent privacy conditions
3. Privilege belongs to the speaking spouse
4. Does not extend to contemporaneous actions
5. Privilege survives divorce
* ONLY to married (common law and officially).
* One spouse who communicates in confidence during marriage something to the other spouse. Speaking spouse owns the privilege. Whoever speaks keeps spoken communication confidential. It will survive a divorce, so if you spoke before the divorce you still have a privilege.

# Exceptions

1. Actions between the spouses
2. Criminal case where alleged victim was the listening spouse, or a minor child
3. Several other exceptions. Rule 504.
4. The “**Privilege NOT TO be Called” By the Prosecution. Rule 504.**
5. Belongs to the witness-spouse NOT the accused spouse; it is her choice
6. Ends with divorce
7. Does NOT apply where witness-spouse is the alleged victim
8. Non-accused spouse has a right to not be subpoenaed by the state.
9. **CAN**
* CAN be forced to be a witness for the defense.
* CAN voluntarily testify for the state (prosecution).
* CAN be forced by the other side in a civil case (husband/non-husband/any party). Very narrow privilege.
1. **CANNOT**
* CANNOT be forced to be a witness for the prosecution
1. Non-accused spouse may testify for prosecution. If it involves the matrimonial privilege may prevent the non-accused spouse from speaking, but cannot stop her from getting on the stand.
2. READ RULE.
3. Non-accused spouse (wife) MUST testify if summoned by the accused spouse (husband)
4. Her privilege is to refuse to be a witness for the prosecution.

# Many Other States, Common Law

1. Opposite of the **Texas Rule**
2. There, the privilege to prevent the wife from testifying belongs to the husband

# Privilege Against Compelled Self-Incrimination

1. D CANNOT be required to testify
2. D CANNOT be obliged to write out a confession
3. BUT: if D writes a document on his own initiative, this privilege does NOT apply;
4. Absent some other privilege, it can be subpoenaed and used by the prosecution

# Problem of Business Files

1. They are created voluntarily so are not protected by this privilege
2. Giving them to a lawyer will NOT help
3. But sometimes, producing them in response to subpoena could have effect of making a forced statement.

# Civil Cases: Judicial Comment on Invoking the 5th

1. Civil Plaintiff Invoking

- Is apt to be non-suited in Texas

1. Civil Defendant Invoking:

- Will have heavy negative judicial comment for invoking 5th Amendment in Texas

1. All other privileges are unmentionable

# Clergyman-Penitent

1. Works similarly to lawyer-client privilege
2. Applies in BOTH civil and criminal cases
3. Main issue today is: What organizations are “RELIGIONS”?

# Trade Secret [507]

1. Only a quasi-privilege
2. Court can override it if maintaining the privilege would “work injustice”
3. Pretty easy to break today, with protective order

# Physician-Patient Privilege

1. No privilege in Criminal Cases in Texas
2. Almost non-existent even in civil cases, due to exception (e)(4) of the Rule:
* No privilege where the patient’s condition is part of a party’s claim or defense
* May apply in impeachment situations

# Mental Health Professionals [510]

1. No privilege in Criminal Cases
2. In civil cases:
* Tracks the Doctor-Patient rule
* Includes drug-abuse workers
* Same large exception

# Party’s Work Product [Fed.R.Civ.P. 26(b)(3)]

1. Is NOT a privilege, but somewhat like one
2. Party’s materials prepared in anticipation of litigation, or for trial, are covered

-Lawyer stuff is a big part of it, but not all of it

1. Can be (and Often is) overridden by a showing of need.
2. Mental impressions of counsel are usually masked out

# Texas Rules of Civil Procedure 192

1. Is similar to Federal Practice:
* Counsel impressions are called “CORE” work product, generally blocked
* The rest is called “other work product” and can be had by showing “substantial need”
1. Lawyer Memo to file is work product, NOT privileged; BUT can contain “CORE” info
2. Unsettled whether work product has protection in criminal cases

- 3 Courts of Appeals have said YES. See e,g. Wright v. State

1. If NO protection, procedure would likely be: grand jury subpoen

# Journalist’s Privilege

1. Federal case law creates a quasi-privilege: MUST exhaust other possible avenues of evidence first
2. Texas has a statute creating this privilege
3. Covers persons who do news gathering or dissemination
* For a substantial portion of their livelihood, or
* For substantial financial gain
1. Also covers their employer companies
2. Also covers university scholars and researchers
* But NOT other amateur bloggers
1. Privilege has 2 Prongs
2. To refuse to disclose any information collected in that capacity, whether or not confidential
3. To refuse to disclose sources
4. Publication of the collected information by a news medium is NOT a waiver
5. **LIMITS**
* Court can order disclosure by journalist IF:
* No other way to obtain the evidence;
* Subpoena is narrowly drafted; and
* Interest of justice outweighs public interest in news flow
* The News article, broadcast, etc., itself is NOT privileged
* Will be admissible if compliant with the other rules of evidence, especially hearsay
* Usually is objectionable on hearsay ground

# Journalist’s Privilege in Texas Criminal Cases

1. Similar to the Civil Privilege **EXCEPT:**
2. No source privilege IF:
3. A felony is committed in journalist’s presence, and no other way to prove it; OR
4. Source admitted commission of a felony, and NO other way to prove it; OR
5. Probable cause exists that source committed felony and no other way to prove it; OR
6. Info was obtained by breach of grand juror’s duty of secrecy; OR
7. Disclosure of source is needed to protect life or prevent serious bodily harm

# Information OTHER THAN Source

1. Criminal Rule tracks the civil rule
2. Judge can order disclosure if necessary and narrowly tailored

- E.g. must have independent evidence that a crime has occurred

# Abrogation of Nearly ALL Privileges in Child-Abuse Cases

1. All privileges vanish in proceeds “regarding the abuse or neglect of a child,”

- **EXCEPT:** attorney-client privilege

1. Main purpose of abrogation: to block both spouses marital communication privileges

**Chapter 13: Authentication**

# Definition

1. A subset of relevance
2. Authentication Evidence is
* Needed before documents and tangible things are received in evidence
* Not needed for testimony

# Meaning Of “Authentication” Proof:

1. Evidence that the document (or physical thing) is what its proponent contends it is

-Example: the steering wheel from the D’s car

Example: a check written and signed by D

1. Does not depend on document being truthful, or correct
* Example: a forged check is “authentic” if the proponent (lawyer offering) contends it’s a forged check
* Example: a counterfeit bill, offered by the government in a counterfeiting case, is “authentic” if the government contends it is counterfeit
* Does NOT have anything to do as to the actual authentication of documents.

# Proponent Controls How Much Foundation Evidence Is Needed

1. She can decide what her contention is:
* A steering wheel from a ’99 Ford Explorer, vs.
* *The* steering wheel from P’s ’99 Ford Explorer
* An axe of the ZZZ type vs.
* *The murder weapon* in this case

# Still Need Relevance

1. Must of course stay within the bounds of relevance
2. If a “steering wheel” has NO relevance, authentication alone will NOT allow it in

# Chain of Custody

1. Is *one* method of authenticating items that could have been altered
2. No Hard-and-fast requirements
3. Chain with broken links sometimes ruled OK
4. Typically prosecution may introduce evidence and it will go through several people (links in chain of custody).
5. Loose standard

# Taking the Authenticating Witness on Voir Dire

1. [Texas: Pronounced “Vorr Dyer”]
2. Rest of US: “Vhwhar Deer”
3. Court permission needed for voir dire, per rule 611
* BUT permission is often assumed
* Usually witnesses are taken on voir dire when they are authenticating evidence
1. It is generally improper to take the authenticating witness on voir dire prior to time when the document or object is offered in evidence
* Would unduly interrupt the foundation evidence of the proponent
* But upon the offer, voir dire is normal

# 2 Purposes of Voir Dire

1. To defeat the foundation and keep the item out of evidence
2. If the item comes in, to weaken its impact

# Authentication

1. Judge is gatekeeper, as usual
2. Judge’s ruling is NOT binding on the jury
3. Judge is NOT bound by evidence rules (Except Privilege)

# Jury is the Ultimate Decider of ALL Facts (Including Authenticity)

1. Therefore, MOST lawyers choose an authentication method that follows the rules of evidence and can be introduced in the jury’s presence

- Judges are gatekeepers, so it is NOT binding. Jury will decide.

# Ways to Authenticate [Rule 901(b)]

1. Ten are listed in the rule
2. List is illustrative NOT exclusive
3. SEE the rule
4. **#1: Testimony from a lay witness with knowledge**
* The most traditional way
* Probably the most dramatic
* DO NOT lead (it ruins the drama)
1. Affidavit Testimony on Authenticity is OK
* Often used in bench trials
* In jury trials, affidavits are inadmissible hearsay o the merits, but are ok for the judge to rule on foundation questions
* Rules of Evidence DO NOT apply

# Pros and Cons of Affidavit Practice

1. **Pro:** cannot be cross-examined
2. **Con:** jury cant normaly see the affidavit. R. 103(b), 104(c)
3. **CAN** do it by affidavit but jury cannot normally see it.
4. Judge will make the decision as to its authenticity; no witness is bound, since judge is bound by all rules except privilege.
5. Other choice is to put a live witness on the stand.
6. Affidavit cannot be cross-examined. Probably safer than a live witness.
7. **Method #3: Comparison by Expert Witness or By Jury**
* Comparison to previously admitted specimens
* With jury, there is no way for them to pre-announce their ruling on authenticity (Left in the air)
1. **Method #4: Distinctive Characteristics**
* Problem: pointing them out without a witness
* Workable ONLY in bench trials

# Voice Authentication METHOD #5

1. Requires familiarity
2. But it can be acquired *AFTER* a phone call in question
3. E.g., by hearing a party speak in courtroom or in a deposition

# Alternate Voice Authentication Method #6

1. #6 – For Phone Calls, Testimony that
2. X’s Phone number was dialed and circumstances suggest X was on the line

- Can include self-identification

1. Similar procedure for a business

# N.B:

1. Authenticating a document or recording does NOT overcome the hearsay rule
2. That must be separately addressed

# Self-Authenticating Documents [Rule 902]

1. Public Documents under seal
2. Public documents NOT under seal, but with sealed attestation sheet attached
3. Government publications
4. Newspapers and periodicals
5. Trademarks on goods or premises

- Includes corporate logos

1. Documents with private signatures, but acknowledged before a notary
2. Business records with declaration

**Chapter 14: Best Evidence Rule**

# Applies ONLY to:

1. Writings
2. Photographs
3. Recordings

# For Other Kinds of Evidence

1. There is NO general rule that a lawyer must put forth the “best,” or even the most reliable, evidence

# The Best Evidence Rule [Rule 1002 & 1003]

1. When the content of a writing (or photo or recording) is drawn into question, the original or a mechanical copy of it must be introduced into evidence

# What VIOLATES The Best Evidence Rule

1. A witness telling us what the document said, or what the photo showed, or what the recording contained!!!!!!

# Examples of Breach of The Best Evidence Rule

1. Witness testifying: “My lease permitted pets”
2. Witness testifying: “My diploma says *Bachelor of Arts”*
3. “The picture clearly showed…”
4. “The whole thing was recorded on tape, and *on the tape he admitted stealing the money.”*
5. I had an email from *saying to meet at the old hotel”*

- Everything after “saying” is a violation of the BEST evidence rule

# Examples of NO Violation Of the Rule

1. Witness testifying: “I signed a lease”
2. Witness Testifying: “I majored in Liberal Arts”
3. In both cases, the witness is telling events, NOT telling the content of a document
4. The fact that the same facts could also be proved by getting into the contents of a document is NOT a bar to use of this testimony
* Example: witness describing bank robbery scene, when it is also on video recording
* Example: witness telling about a telephone stock fraud, when a transcript of the call exists
1. The BER does NOT apply to testimony about facts or events, as long as the witness does not say what is in the writing or photo or recording
2. The testimony may be objectionable on other grounds:
* Lack of independent recollection
* Lack of first-hand knowledge

# Exemptions from the B.E. Rule [Rule 1004]

1. Witness allowed to testify to document’s contents where:
* Document is lost or destroyed, or
* Document not obtainable (withheld by distant third party) or
* Document in hands of adverse party, or
* Ev. Is on a minor point

# One Further Class of Exemptions [Rule 1007]

1. In all cases:

- Can prove the contents by testimony of the adverse party, or by his written admission (e.g. in a letter)