

EVIDENCE

BASED ON FEDERAL RULES OF EVIDENCE

•DEFINITION

1. Acceptance of a fact as true without the necessity of formal proof

•LEGISLATIVE FACTS

1. **Advisory Committee notes** distinguishes Legislative from Adjudicative Facts
2. **Definition:** Those facts that are relevant to "legal reasoning" and the "lawmaking process"
- a. Includes statutory law and judicial decisions

•ADJUDICATIVE FACTS

1. The rules which "relate to the parties"
- a. Who did what, where, when, how, with whom and with what motive?
- b. Facts that normally would go to jury except that judicial notice may be taken because no reasonable person could dispute them
 - i. The reliability of radar speed tests
 - ii. The boiling point of water

•MANDATORY JUDICIAL NOTICE

1. Facts that are so universally known that they cannot reasonably be disputed (adjudicative)
2. Meaning of legal expressions (legislative)
3. Meaning of English words and phrases (legislative)
4. Federal and State law (legislative)
5. Federal and State rules of procedure (legislative)
 - a. [201(a) note] treat 2 through 5 as part of court's reasoning process and not as judicial notice

•PERMISSIVE JUDICIAL NOTICE

1. May take judicial notice of certain matters [201(c)] and required to take notice if an appropriate request is made by a party [201(d)]
 - a. Facts that are not reasonably subject to dispute and are capable of accurate determination from undisputable sources (almanacs, encyclopedias)
 - i. Ex: Blood-alcohol ratio, fingerprints, etc.
 - b. Facts that are such common knowledge locally, that they cannot be reasonably disputed
 - i. Ex: The location of a certain road
 - c. Records of State or Federal Court
 - d. Laws of other States or nations
 - i. After agreeing not to testify in one state, witness can testify in relevant case in other state [Baker v. GM]
 - e. Administrative regulations and orders
2. Federal Rules recognize judicial notice only to adjudicative facts formally (a - c above)

•EFFECT OF JUDICIAL NOTICE

1. **Civil Case:** Binding on jury to accept as conclusive any fact judicially noticed
2. **Criminal Case:** Jury instructed that it may, but not required to, accept any fact judicially noticed as conclusive [201(g)]

BURDENS OF PROOF

[301]

BURDEN OF PRODUCTION

BURDEN OF GOING FORWARD

•PROVIDE EVIDENCE TO SHOW FACT EXISTS

1. Must be sufficient to enable reasonable juror to support a verdict for the party with the burden (also called making a **prima facie** case)

•WITHOUT EVIDENCE, FACT DOES NOT GO TO JURY

1. Court would direct a verdict against the party who bears the burden

•BURDEN ON PARTY WHO ASSERTS FACT

1. Burden may shift

•PRESUMPTIONS

1. **Definition:** A deduction that the trier of fact is required to draw from the evidence in the absence of a contrary showing [U.S. v. Ahrens]
 - a. A presumption shifts the burden of going forward with the evidence
2. **Rebuttable Presumptions:** Place the burden of going forward with the evidence on the opposing party - or a directed verdict is entered against it
 - a. If opposing party meets its burden of going forward with the evidence, the case goes to the jury or judge - if not a directed verdict is entered against it
3. **Majority view: Bursting Bubble Theory:** A presumption is not evidence, but a preliminary assumption of fact which disappears after the introduction of sufficient evidence to sustain a contrary finding
 - a. Under this theory, the burden of persuasion as to the existence of a fact stays where it was at the beginning
4. **Conclusive Presumptions:** Rules of substantive law which cannot be rebutted by producing evidence to the contrary

•DIRECT EVIDENCE

1. Proves a proposition directly
 - a. Goes directly to material issue without interference
 - i. Ex: Eyewitness testimony on issue of who killed victim (eyewitness saw Defendant shoot victim)

•CIRCUMSTANTIAL EVIDENCE

1. Tends to prove issue indirectly through inference
 - a. Evidence of a collateral fact from which, alone or in conjunction with other facts, existence of a material or ultimate fact can be inferred
 - i. Ex: Defendant is seen standing over victim's body holding a gun in his hand (on issue of who killed victim)

TESTS FOR RELEVANCE

•IS EVIDENCE RELEVANT TO ISSUE?

1. Does it tend to prove or disprove a fact of consequence?
 - a. **Materiality** - Whether the evidence being offered relates to an issue in the case
 - i. Look to the pleadings and applicable substantive law
 - ii. Certain matters like bias and credibility of witnesses are always in issue
 - b. **Probableness** - Whether evidence logically tends to prove proposition for which it is offered
 - i. Trend: Regard "materiality" and "probableness" as parts of single test for relevant evidence [401]

•LIMITS ON OTHERWISE RELEVANT EVIDENCE

1. All relevant evidence is admissible except as excluded by some specific rule [402]
2. **Limited Admissibility** - When the evidence can be relevant to many issues, it may be admissible to one, but not another, for some reason
 - a. Jury instructions tell jury for which issue it is admissible and to disregard as to other issues

•EXCLUSION OF EVIDENCE

1. Judicial discretion, no matter how relevant, when its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence [403]
 - a. Even when admissible for a limited purpose because it is relevant on one issue, the judge may exclude it if it will greatly influence the jury's ability to disregard the nonadmissible issue
 - b. The probative value of "shocking", gruesome photographs, although possibly probative of some issues, may be substantially outweighed by likelihood of undue prejudice under 403
 - c. **Unfair surprise** - not ground for exclusion [403 note]
 - i. Additional ground for exclusion in some states
 - d. Abuse of discretion to admit prior judgment of conviction despite offer to stipulate [Old Chief v. US]

•DETERMINING RELEVANCY

1. Most relevancy problems involve **circumstantial evidence** - Is it probative or so unduly confusing that it should be excluded on discretionary grounds?
2. **Previous Accidents** - Generally not relevant in personal injury case (Just tends to prove Plaintiff is prone to litigate, and risk of confusion and unfair prejudice outweigh probableness)
 - a. Evidence of prior injury may be relevant to prove present claim is false and as to credibility

Continued on next page

BURDEN OF PERSUASION

•PRESENT LEGALLY SUFFICIENT EVIDENCE TO PERSUADE TRIER OF FACT ON ALL ISSUES

•BURDEN ON PLAINTIFF TO PROVE THE ALLEGATIONS IN THE COMPLAINT AND BURDEN ON DEFENDANT TO PROVE ALL AFFIRMATIVE DEFENSES

1. Burden does not shift

•STANDARDS OF PROOF

1. Preponderance of Evidence

- a. Fact at issue is more probable or likely to exist than not to exist

2. Clear and Convincing Evidence

- a. Existence of fact at issue is highly probable or reasonably certain
- b. Higher standard than Preponderance of Evidence

3. Beyond a Reasonable Doubt

- a. Sufficient evidence to overcome presumption of innocence of Defendant
 - b. Standard used in criminal cases
4. Court will instruct jury as to which party has burden

•RULINGS ON EVIDENCE [103]

1. **Erroneous** - only if substantial right of party is affected [See US v. Olano]
 - a. Conviction for perjury reversed only if judge's error seriously affects trial's fairness [Johnson v. US]
 - b. Timely objection or Offer of Proof to preserve record for appeal
 - c. No objection necessary if "plain error"
 - d. **Habeas** - trial error is not harmless when it affects verdict [O'Neal v. McAninch]
 - i. Suppression of evidence violates due process [Kyles v. Whitley]
2. **Jury cases** - to prevent inadmissible evidence (confessions)

•PRELIMINARY QUESTIONS [104]

1. General Admissibility Questions
 - a. Qualification to be a witness
 - b. Whether privilege exists
 - c. Admissibility of evidence
2. Admits evidence conditionally if determined that reasonable jury could find preliminary fact exists
3. Hearings on Confessions outside hearing of jury
 - a. Hearings on other preliminary matters, as justice requires

- b. Previous similar accidents and injuries to others by same conditions is admissible to prove:
 - i. Existence of a dangerous condition or defect or
 - ii. Defendant had knowledge of danger or
 - iii. That the dangerous condition was the cause of the present injury
- c. **Subsequent accidents** - Generally not admissible to prove causation of Plaintiff's injury or knowledge of danger during Plaintiff's injury
 - i. May be admissible to show existence of dangerous condition at time in issue
- d. **Absence of similar accidents**
 - i. **Majority view:** Not admissible to prove non-existence of dangerous condition or that condition was unlikely to cause Plaintiff's injuries
- e. **Admissible on issue of Defendant's knowledge of the danger**
- f. **Other Contracts**
 - i. Evidence of prior contracts between parties may be relevant for interpreting terms of present contract
 - ii. Not relevant to prove formation of present contract
- g. **Contracts with others** is generally irrelevant except when indications of common plan or scheme in all of Defendant's contracts
- h. **Sales of Similar Property** - Where not too remote in time then admissible to prove value

TYPE OF EVIDENCE ADMISSIBLE INADMISSIBLE

•CHARACTER [404] IN CIVIL CASES

- 1. Generally **not** admissible to prove probable conduct
 - a. Ex: Plaintiff cannot introduce evidence that Defendant is usually a reckless driver to prove he was negligent on day in question
- 2. **Admissible when directly in issue**
 - a. **Character is an ultimate fact in dispute** and must be proved by competent evidence [405(b)]
 - i. **Defamation:** Plaintiff sues Defendant for calling Plaintiff a thief and Defendant pleads truth as an affirmative defense
 - ii. **Negligent Entrustment:** Plaintiff sues Defendant for negligently permitting use of car by reckless driver; driver's character for recklessness is in issue
- b. Evidence of either **reputation** in the community or **specific acts** to show this character
 - i. **Libel:** Plaintiff is alleged to be a thief - evidence that Plaintiff has stolen things is admissible
- c. Federal Rules allow any type of evidence (reputation, opinion or specific acts) [404(b)]

•CHARACTER [404] IN CRIMINAL CASES

- 1. Generally **bad character inadmissible** to prove he is more likely to have committed crime
 - a. **Rationale:** Such evidence creates extreme prejudice
 - i. If prosecution permitted to show Defendant is a bad person, jury may convict regardless of guilt in crime charged
- 2. Accused may always introduce evidence of good character having a tendency to show he did not commit crime whether or not he takes the stand
 - a. **Methods of Proving Character: Reputation and Personal Opinion Testimony**
 - i. **Traditional View:** Witness limited to reputation only, not opinion or specific acts of Defendant
 - ii. **Modern View [405]:** Witness for Defendant may testify to Defendant's reputation and to his/her personal opinion [NOTE: Evidence of specific acts of Defendant is still not allowed]
- 3. Prosecution cannot initiate evidence of bad character of Defendant, but, if **Defendant puts character in issue** by having a character witness testify as to his opinion of Defendant's reputation, prosecution may **rebut** by showing Defendant's bad character
 - a. **Methods of proving character:** If Defendant limited to reputation evidence to show good character, then prosecution generally can show same type of evidence (witnesses' testimony that Defendant's reputation in community is violent)
 - b. **Cross-Examination of Defendant's character witnesses**
 - i. **Majority view:** Prosecution may test credibility of Defendant's witnesses by inquiring on cross-exam whether witness has **heard** of particular instances of Defendant's misconduct (reputation testimony)
 - (a) Prosecution may ask about arrests as well as convictions
 - ii. **Modern trend [405]:** On cross-exam, inquiry

is allowed regarding specific instances of conduct ["Do you know that ----?" is allowed]

- (a) If witness denies knowledge of specific instances of conduct, majority view is that prosecution cannot prove by extrinsic evidence (arrest/conviction records)

- c. The accused does not "open the door" by merely taking the stand

•VICTIM'S CHARACTER IN A CRIMINAL CASE [404(a)(2)]

1. Admissible in Homicide cases

- a. When Defendant claims Self Defense, he may introduce evidence of victim's violent nature to show victim was the aggressor
- b. The prosecution may then introduce evidence of victim's good character
 - i. Majority of courts do not allow prosecution to introduce rebuttal evidence of Defendant's reputation for violence to show Defendant was the aggressor

2. Methods of proving character: Majority - reputation and opinion evidence is admissible to show character of Defendant or victim

- a. On cross-exam, inquiry is permitted into specific instances of past conduct of victim

•OTHER BAD ACTS OF MISCONDUCT [404(b)]

- 1. Admissible to prove another element of present crime and not to show Defendant had criminal propensity
- 2. Upon reasonable notice by request of Defendant in a criminal case, admissible to prove another purpose - **MIMIC Rule: Motive; Intent; Mistake** (Absence of); Identity; Common Plan or Scheme
 - a. **Identity** - Ex: If modus operandi is a crime signature
 - b. **Common plan or scheme** - Ex: Evidence Defendant recently stole burglary tool is probative of burglary

•HABIT [406]

- 1. **Routine reactions or regular responses** as compared to character evidence - quality of conduct
- 2. **Habit is more specific than character evidence**
 - a. Ex. **Habit:** Defendant walks to work on the same streets every day and stops at the same stop sign every day
 - b. Ex. **Character:** The fact that Defendant is "careful" or "careless"
 - i. Drinking to prove drunk on specific occasion
- 3. **Rule:** Habit or routine business practice is admissible to prove conduct of person or organization on a specific occasion conformed to the habit or routine [406]
- 4. **Habit must be routine regularly performed without deliberation**
 - a. Ex: Evidence that mail is routinely put in a certain stack to be picked up by mail clerk and mailed by same is admissible to prove a particular letter was picked up and mailed

•EXCLUSION OF RELEVANCE FOR PUBLIC POLICY REASONS

Society wishes to encourage behavior involved

- 1. **Subsequent Remedial Measures:** Evidence of repairs following an injury to the Plaintiff is **inadmissible to prove negligence, culpable conduct, defect in product or design, or need for warning** [407]

a. Reasons for the rule

- i. Conduct is "equally consistent with injury by mere accident or through contributory negligence" [407 note]
- ii. The social policy of encouraging people to make such repairs [407 note]
- iii. Majority of circuits interpret Rule 407 to apply to products liability

b. Admissible

- i. **To prove ownership or control**
- ii. To prove Defendant has destroyed or concealed evidence (ex: Repairing fender to destroy evidence of collision)
- iii. To rebut evidence of Defendant's witnesses on safety of the condition

2. Settlement Offers or Negotiations

- a. Offers to compromise or compromises in settlement of a disputed claim **not admissible to prove liability** for or invalidity of claim or amount [408]

b. Reason for Rule

- i. **Irrelevant:** Offers may be motivated by "desire for peace and not from weakness of position" [408 note]
- ii. **Public Policy** favors settlement of dispute
- c. **Admissions:** Federal Rules also excludes any "conduct or statements" made in the course of negotiating a compromise

d. Admissible

- i. **To prove bias or prejudice** of a witness
- ii. To negative contention of undue delay in presenting a claim

iii. To prove obstruction of criminal prosecution

3. Offers to pay medical expenses [409]

- a. Evidence that Defendant paid or appeared to pay Plaintiff's medical bill is **not admissible to prove liability** for the Plaintiff's injuries

- i. Reason for Rule: Payment may be made for humanitarian motives and not admission of liability

- b. **Admissions:** Does not extend to conduct or statements accompanying offers to pay medical expenses (**Contra** to 2c Settlement Offers)

- i. Reason: Communication is essential to compromises so they should be protected but statements regarding offers to pay medical expenses are usually incidental [407 note]

4. Liability Insurance

- a. Evidence that one was or was not insured against liability is **inadmissible to prove negligence or wrongdoing** [411]

i. Reasons for Rule

- (a) Knowledge of presence of or lack of liability insurance would cause juries to decide on improper grounds
- (b) **Prejudicial effect on Defendant** - Whether Defendant had insurance or not does not tend to prove liability

b. Admissible

- i. **To prove ownership or control**
- ii. **To show bias**

•PLEAS AND RELATED STATEMENTS [410]

- 1. Withdrawn guilty pleas, pleas of nolo contendere, offers to plead guilty or evidence of statements to prosecute in making such pleas are **not admissible** in any proceeding

- a. **Reasons for Rule:** Prejudicial effect of the evidence would outweigh the probative value of a withdrawn plea of guilty as an admission

2. Admissible

- a. Where another contemporaneous statement in plea negotiations has been introduced
- b. In subsequent perjury prosecution, false statement made under oath, on record, and in presence of counsel
- c. To impeach inconsistent testimony [US v. Mezzanatto]

•RAPE [412]

- 1. Reputation or opinion of victim's past sexual behavior is not admissible in any civil or criminal proceeding

2. Exceptions: Admissible in criminal cases

- a. To show victim's past sexual behavior with others to prove whether Defendant was or was not the source of semen or injury
- b. To show victim's past sexual behavior with Defendant to prove consent
- c. When Constitution requires that evidence be admitted

- d. Above only admitted on motion with 15 days of trial and offer of proof at hearing in chambers

•SIMILAR SEXUAL ASSAULT CASES [413]

- 1. Evidence of Defendant's prior commission of sexual assault admissible in a **criminal case** to prove any matter to which it is relevant

2. Similar Child Molestation Cases [414]

- a. Evidence of Defendant's prior commission of child molestation is admissible in a **criminal case** to prove any matter to which it is relevant

3. Similar Acts in Civil Cases [415]

- a. Evidence of Defendant's prior commission of sexual assault in a child molestation is admissible in a **civil case** where a claim for relief is based on one's conduct of sexual abuse or child molestation

•DOCUMENTS (INCLUDES: 1) HANDWRITING; 2) VOICE (TELEPHONE); 3) PHOTOGRAPHS, X-RAYS)

1. Must be authenticated [401]

2. Best Evidence Rule [1002]

- a. Original is required only when contents of writing are at issue
- b. Copy admissible if original unavailable [1003]
- 3. Not available on collateral matters

NOTE TO STUDENT: This chart should be used only as a quick reference guide to majority law. Due to its condensed format it 1) does not contain jurisdictional differences and 2) should not be relied upon as a substitute for more comprehensive legal studies! © 2000 BarCharts, Inc. Boca Raton, FL

WITNESSES

PRESUMPTION OF COMPETENCY [601]

WITNESS MUST HAVE PERSONAL KNOWLEDGE [602]

EXCEPTIONS:

1. **Federal:** Judge and Jurors are incompetent to testify
2. **State:** (a) **Infancy** - determined by judge; (b) **Dead Man's Statutes** - interested parties cannot testify about oral communication offered against dead person

OPINION TESTIMONY

LAY WITNESS [701]

1. **Generally inadmissible**
2. **Admissible as to common sense impressions** such as: appearance, state of emotion, intoxication, speed of vehicle; and testimony helpful in resolving issues

EXPERT WITNESS [702]

1. **Generally admissible**
 - a. Specialized knowledge
 - b. Proper basis: Erye no longer controls; within judge's discretion: various factors can be applied [Daubert v. Merrell Dow]
 - i. "Abuse of discretion" is correct standard of review on decision to admit or exclude expert scientific evidence [General Electric v. Joiner]
 - ii. Rule of Daubert is extended to all technical and other specialized knowledge [Kumho Tire v. Carmichael]
2. **Opinion on ultimate issue is admissible**, including Defendant's state of mind at time of trial [704]
 - a. **Exception: opinion on criminal Defendant's state of mind at time of crime**
3. **Opinion admissible without first testifying to underlying facts or data unless required by Court [705]**
 - a. May be required to disclose underlying facts or data on cross-examination

CROSS-EXAMINATION

LIMITATIONS

1. **Tied to scope of direct examination**
2. **Credibility/Impeachment** (may also be attacked on direct)
 - a. **Prior Inconsistent Statement [613]**
 - i. Regarding relevant issues only; no extrinsic impeachment on collateral matters
 - ii. Witness must first have opportunity to explain or deny only with extrinsic impeachment
 - b. **Bias** - (is never collateral) - Must bend on substantive issue
 - c. Conviction of crimes involving dishonesty or false statement - permissible on direct [609(a)]
 - d. Special prejudice balancing test for all witnesses subject to **Rule 403**
 - e. Inadmissible convictions: [609]
 - i. More than 10 years elapsed
 - ii. Juvenile adjudications
 - iii. Witness has been pardoned and no subsequent criminal conviction in excess of one year
 - f. Opinion/reputation for truthfulness, after truthful character has been attacked [608]
 - g. Perception, Recollection, Narration - testimonial capacities
3. **REHABILITATION**
 1. Explanation on redirect
 2. Testimony of other witnesses as to good reputation for truth
 3. Prior consistent statement to rebut charges of recently fabricated testimony [801(d)]

PRIVILEGES [501]

STATE & COMMON LAW PRINCIPLES

1. Based on societal desires to encourage particular relationships
- a. Federal Rules have no specific privilege provisions
- b. Governed by principles of common law, except in diversity cases where Federal courts shall look to State rules
- c. There must be a **confidential** communication for person to apply
- d. Person who holds privilege may waive it consensually
- e. Eavesdroppers
 - i. **Modern view:** As long as holder of privilege was not negligent, there is no waiver, and eavesdropper cannot testify

ATTORNEY-CLIENT [502]

1. **Client holds privilege** to refuse to disclose and to prevent anyone else (including lawyer) from disclosing a **confidential communication** between attorney and client **during legal services**
2. Communication must have been made to an attorney (includes secretaries, law clerks)
 - a. Applies to consultations, even if client does not retain attorney
3. Documents and correspondence prepared by attorney for his own use are not privileged communications (not communications)
 - a. Ex: research memos, and witnesses' statements
4. **Work Product** - Attorney has qualified privilege
 - a. Not subject to discovery unless "good cause" shown
5. No privilege if: (a) made in presence and hearing of third party; (b) act of crime or fraud; (c) dispute between attorney and client (i.e. breach of duty)
6. Privilege survives death of client [Swidler v. U.S.]

SOCIAL WORKER-CLIENT

1. Extends Physician-Patient privilege in some states
2. **Patient holds privilege**
3. Applies whether or not patient is a party
4. Professional must be licensed or certified
 - a. Applies to **psychologists** and **psychiatrists**
- b. Notes taken by licensed clinical social worker are protected from compelled disclosure [Jaffee v. Redmond]
5. Communication must be confidential
6. **No privilege** if (a) Patient puts mental condition in issue; (b) Court ordered examination; (c) Commitment proceeding against patient

PHYSICIAN-PATIENT [503]

1. Statutory privilege based on encouragement of full disclosure for treatment
2. **Patient holds privilege** to refuse to disclose and to prevent physician from divulging any information acquired while attending the patient in his professional capacity
 - a. **If patient not present** - in most jurisdictions, doctor may assert on patient's behalf
 - b. **If patient incompetent or deceased** - may be asserted by guardian or personal representative
3. No privilege if: (a) nonmedical information; (b) patient/witness puts physical condition in issue; (c) criminal or tortious act; (d) dispute between doctor and patient; (e) contractual agreement exists
4. Generally, only recognized in civil proceedings
5. Applies whether or not patient is party to proceeding

CLERGY, ACCOUNTANT PRIVILEGES

HUSBAND-WIFE [504]

1. Protects marital relationship when valid marriage exists
2. **Spousal immunity** from testifying in criminal proceeding
 - a. **Common Law:** Both spouses barred from testifying against each other in civil or criminal cases during marriage
 - b. **Modern Rule**
 - i. Most states allow **either** spouse to testify for the other in civil and criminal proceedings where other is a party
 - ii. Most states - either spouse can be compelled to testify against other in a **civil** case
 - a. In a criminal case, Federal courts see privilege as **belonging to witness spouse** who cannot be compelled to testify or barred from testifying [Trammel v. U.S.]
 - c. Privilege exists only **during marriage** - ends on divorce
3. **Spousal Communications**
 - a. Must be communication made in reliance on sanctity of marriage which spouse would want to keep confidential
 - b. May be asserted by either party
 - c. Extends beyond marriage (divorce does not terminate)

HEARSAY

RULE

• **STATEMENT MADE OUT OF COURT** BY DECLARANT TO PROVE TRUTH OF MATTER ASSERTED IS INADMISSIBLE [801(c)]

POLICY REASONS

1. Adverse party denied opportunity to cross-examine, thereby denying constitutional confrontation and due process rights
 - a. Confrontation Clause rights violated when evidence includes out-of-court statements by an alleged accomplice unavailable to testify [Lilly v. VA]
2. Jurors cannot evaluate statement to determine reliability, therefore prejudicial

STATEMENT [801(a)]

1. Oral or written assertion or nonverbal conduct intended as an assertion
 - a. Ex. of **assertive conduct:** Declarant nods his head up and down indicating a yes response to question
 - b. **Nonassertive conduct** is not hearsay and is admissible to show both Declarant's state of mind and to prove truth of the matter asserted
 - i. **Policy Reasons:** This conduct does not involve veracity and the likelihood of fabrication is less
 - ii. **"Morgan Hearsay":** Traditional common law view: Although the declarant did not intend as an assertion, it is being offered as an assertion and is, therefore, just as objectionable as an assertion

OFFERED TO PROVE THE TRUTH OF THE MATTER ASSERTED

- Offered for purpose, other than to prove truth of the matter asserted (i.e. to show it had a certain effect on listener) there is no need to cross-examine Declarant and statement is not hearsay*
1. **Legally Operative Facts:** Legal significance to certain words and offered as proof of whether statement was made and is not hearsay
 - a. Evidence of words of "slander" or "libel" in defamation action
 - i. Ex: Defendant's use of words that "Plaintiff is a thief"
 - a. Plaintiff offers Defendant's statement to show that it was made and not for the truth (that Plaintiff is a thief)
 2. **Offered to show effect on recipient**
 - a. Admissible non-hearsay when offered to show hearer's state of mind in sense of showing hearer had notice or knowledge or motive
 - i. Ex: A third parties' statement that floor was wet is **admissible to show** Plaintiff had notice of the condition in a negligence action
 3. **Offered as circumstantial evidence of declarant's state of mind**
 - a. Not hearsay because not offered to prove truth of the matter asserted but that Declarant believed them to be true
 - i. Ex: Out of court statement by declarant: "I am Queen Elizabeth" would not be introduced as proof of its truth, but to prove declarant's insanity
 4. **Offered to show identity of declarant**
 - a. Admissible-usually used after declarant deceased
 5. **Offered to show time or place, when and where statement is made is admissible**

HEARSAY Continued on next page

LEADING QUESTIONS [611(c)]

CROSS-EXAMINATION

1. Cannot refuse answer

DIRECT EXAMINATION

1. Improper, except to establish preliminary facts; to aid witness with memory loss; when questioning hostile witness, child witness, timid witness; to develop testimony as necessary

WRITTEN MEMORANDA

• **PURPOSE:** TO PROMOTE CREDIBILITY AND MEMORY

• **PRESENT RECOLLECTION REFRESHED [612]**

1. Shown to witness
2. May not be read while testifying
3. Exception: past recollection recorded
- a. Read into evidence after proper foundation laid
- **ADVERSE PARTY**
 1. Entitled to inspect and introduce portions relating to testimony

•NOT HEARSAY UNDER [801(d)]

1. Prior Inconsistent Statement made under oath, if it was made at a prior proceeding or deposition [801(d)(1)(A)]
 - a. Admissible to both impeach the credibility and also as substantive proof
2. Prior Consistent Statement (whether under oath or not) offered to rebut an express or implied charge of recent fabrication or improper influence or motive on part of witness [801(d)(1)(B)]
 - a. **Bright-line Rule:** Admissible only when statements were made before fabrication/influence/motive [Tome v. U.S.]
3. Prior Statement of Identification of a person after perceiving him [801(d)(1)(C)]
 - a. Ex: Line-ups, photo ID's
 - b. **Policy Reason:** ID closer in time to event is more accurate
4. Admission by Party-Opponent: An out of court statement or conduct by a party to the present litigation that is used against them [801(d)(2)]
 - a. Does not have to be "against interest" at time made, merely contrary to party's present position
- b. **Judicial Admissions**
 - i. **Civil cases:** Party may be bound by statements in pleadings even with no knowledge of them
 - ii. **Prior criminal case pleadings:** (a) No contest or nolo contendere plea cannot be used as an admission because it does not admit guilt; (b) Guilty plea can be introduced as an admission in a subsequent civil or criminal proceeding involving the same act
- c. **Adoptive Admissions:** Statement a party has adopted or manifested belief in which is inconsistent with the position he takes at trial
 - i. **Silence (implied admission):** Party must have been (i) present and heard and understood statement; (ii) physically and mentally capable of denying the statement; (iii) A reasonable person would have denied the accusation under the circumstances
- d. **Vicarious Admissions** made by another may be imputed to party based on certain relationships
 - i. **Contents shall be considered but are not alone sufficient to establish truth**
 - ii. Co-conspirator statements governed by Rule 104(a) [see Bourjaily v. US]

HEARSAY EXCEPTIONS

WHERE DECLARANT NEED NOT BE UNAVAILABLE - WHERE GUARANTEES OF TRUSTWORTHINESS ARE INHERENT

•PRESENT SENSE IMPRESSION [803(1)]

1. Statement describing or explaining an event while declarant was perceiving the event or immediately thereafter
 - a. Does not have to be startling or exciting
 - b. Includes cases where a witness makes accident or crime report very shortly after it
 - c. Safeguard - Statement is free from memory deficits and there is no time for calculated reflections

•EXCITED UTTERANCE [803(2)]

1. Statement made about a startling event while under the stress of excitement is admissible
2. The event must produce shock or excitement
 - a. Theory: Person's reflective faculties are stilled and memory is not a problem
3. **Scope** - must relate to event or condition
4. No requirement of unavailability, competency or identification of declarant

•THEN EXISTING MENTAL OR PHYSICAL CONDITION [803(3)]

1. Statement of declarant's then existing state of mind, emotion, sensation, or physical condition (intent, plan, motive, pain, health, etc.) may be used to prove existence of that condition or to prove probable future conduct consistent with the intent
2. Statement of past memory or belief to prove the fact remembered is not admissible unless related to declarant's will
3. **Present physical condition** - When one's physical condition at certain time is in issue, statements made at that time are admissible to prove that condition
 - a. Ex. Plaintiff's statements at accident that he is in pain are admissible to prove that he was in pain
 - b. Theory: Statements are contemporaneous with symptoms and are more reliable than present testimony based on recollection
4. **Past condition:** Generally excluded
 - a. Ex. Last Friday I was in pain
 - b. Reason: No way to check memory of declarant by cross-examination and greater likelihood of falsification
5. Statements of present intent to prove subsequent conduct are admissible
 - a. Ex. Declaration that "I intend to go to Crooked Creek" admissible to show probability he went there [Hillman]
6. Statements as to past state of mind are generally not admissible
 - a. Ex. "I did not mean to kill him." in murder case
 - b. Reason: Danger of memory defects
- c. **Exception:**
 - i. Will cases dealing with execution, revocation, statements by testator before and after execution of Will are admissible to prove testamentary intent, state of mind at the time the Will was made

•STATEMENT FOR PURPOSES OF MEDICAL DIAGNOSIS OR TREATMENT [803(4)]

1. Statements made to medical personnel which are reasonably pertinent to diagnosis or treatment are admissible
2. **Reason:** Reliable because patients generally tell truth about their symptoms to their doctors
3. Includes both present and past statements
4. Federal Rule also allows statements of the cause or source of the condition insofar as reasonably pertinent to diagnosis or treatment
5. Factual statements of other circumstances surrounding event are inadmissible

•RECORDED RECOLLECTION [803(5)]

1. Memorandum or record on matter about which witness once had knowledge, but now has insufficient recollection, may be read into evidence
2. **Reason:** Statement made when fresh in mind is more reliable than testimony on stand
3. The document must have been prepared or adopted by the witness
4. The witness must vouch for the accuracy at time he/she made the recorded statement
5. Witness must have insufficient recollection to testify about matter
6. Can be read into evidence but not admitted as a document to go back to jury room unless offered by an adverse party
7. Compare with 612, Present Recollection Refreshed, where writing is not read into evidence so no hearsay problem and witness can be cross-examined as to what is remembered
 - a. A witness may use any writing or thing to refresh his/her present recollection
 - b. A witness may not read from document while testifying because the document is not authenticated
 - c. The document is not in evidence and is used only to refresh recollection

•BUSINESS RECORDS EXCEPTION [803(6)]

1. A writing, record or memorandum of any act, transaction, occurrence, if made in the regular course of business and it was the regular practice to make the record is admissible
2. **Reason:** Business incentive to keep accurate records - no motivation to lie
 - a. Also, too cumbersome to bring in everyone who contributed to record
3. **"Regular course of business"**
 - a. Ex. Hospital record entries are admissible if related to medical diagnosis and treatment
 - b. Self serving reports prepared in anticipation of litigation are inadmissible
4. Entry must be made by someone with a duty to make these entries
5. Entry must be made by someone with knowledge or from information transmitted by persons with knowledge
6. Person making entry need not testify, but record must be introduced by custodian of records or reliable, qualified witness with personal knowledge
 - a. Person must identify records and testify to their method of preparation and keeping

•ABSENCE OF ENTRY IN BUSINESS RECORDS [803(7)]

1. Business records are admissible to show no entry was made as long as it was the regular practice of the business to record and preserve these transactions

•PUBLIC RECORDS & REPORTS [803(8)]

1. Records, statements and reports prepared by a public official are admissible if:
 - a. Prepared by public employee within scope of duty
 - b. Must be made at or near the time of the event
 - c. Police reports are inadmissible in criminal cases
 - d. In civil cases, factual findings (including opinions and conclusions) are admissible
 - i. In criminal cases, only when offered against govt.

HEARSAY EXCEPTIONS

WHERE DECLARANT MUST BE UNAVAILABLE [804]

•POLICY REASONS

1. **Trustworthiness** - Special guarantees which make up for the lack of cross-examination
2. **Necessity** - Need for hearsay evidence, usually caused by unavailability of the declarant

•UNAVAILABILITY OF DECLARANT

1. Exempt due to privilege
2. Refuses to testify
3. Lack of memory of subject matter of statement
4. Physically unavailable (death, physical or mental illness)
5. Cannot be subpoenaed (out of country)

•EXCEPTIONS

1. **Former testimony [804(b)(1)]** of a now unavailable witness at another hearing or in deposition is admissible in a subsequent trial if:
 - a. Party against whom testimony is now being offered was a party to former suit and had opportunity and some motive to cross-examine as adverse party in present proceeding -or-
 - b. In a civil action, a predecessor with similar interests had an opportunity to cross-examine
 - i. Witness who gave testimony in earlier proceeding must be shown unavailable to testify in current trial
 - ii. The former testimony must have been given under oath or sworn affirmation and subject to cross-examination (former deposition, hearing or trial)
2. **Dying Declarations [804(b)(2)]:** In a homicide prosecution, or in a civil action, a statement made by unavailable declarant while believing his death is imminent that concerns the cause or circumstances of what he believed to be his impending death
 - a. Victim-declarant need not have actually died, as long as he is otherwise unavailable at trial
3. **Statements Against Interest [804(b)(3)]:** Statement which, when made, was against Declarant's pecuniary or proprietary interest or

tended to subject Declarant to civil or criminal liability such that a reasonable person would not have made it unless he believed it to be true

- a. The declarant, whose statement is admitted, may be a non-party to the litigation (distinguished from admissions - must be a party)
 - b. Declarant must have actual knowledge of facts and must have known statement was against interest
 - c. Statements which subject declarant to criminal liability and are offered to exculpate the accused are not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement
 - i. Policy - Do not want people confessing to get others off the hook
4. **Statement of personal or family history [804(b)(4)]** concerning own birth, adoption, marriage, etc. not excluded if declarant unavailable
 - a. Federal Rule includes any person "so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared" [804(b)(4)(B)]
 5. Forfeiture of right to object where party procures unavailability of declarant [804(b)(6)]
 6. **Residual Exception** (statement not covered by 803 or 804) [807] Other statements which carry a guarantee of trustworthiness if:
 - a. Offered as evidence of a material fact
 - b. More probative than other evidence on point
 - c. General interest of justice will be served by admission
 - d. Notice must be given to other side

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