Rules of Evidence Primer

The rules of evidence used in college and high school mock trial competitions are abbreviated, simplified versions of the Federal Rules of Evidence. Although pretty much identical everywhere, students need to be alert for state, local, and competition-specific variations. In addition, case materials may include brief summaries of court decisions interpreting the rules, and often include stipulations affecting the admissibility of evidence.

The primer identifies a core of evidence rules that every "mock trial" attorney should know. The primers on exhibits and expert witnesses identify a few more core rules. Of course, the case materials for an academic year or a particular competition may put in play rules that are outside the core.

The primer includes references to authorities and other materials that you may not use directly because mock trial rules restrict you to what's in the case materials. Why are they included here? (1) To persuade you that the author may know what he's talking about. (2) To help you better understand the reasoning that influences how judges and lawyers think about and apply the rules of evidence. (3) Because an authority can suggest an argument. You often can base an argument on common sense and the knowledge your judges bring to the courtroom. You don't need an authority to make an argument.

Three Observations

In putting a case together, a team needs to account for the rules that govern what information must or may be admitted into evidence, or excluded, and in what form. As far as possible, a team should build its case on testimony and exhibits that are clearly admissible. It should not rely on evidence that is plainly inadmissible, or evidence that a judge is likely to rule inadmissible. When in doubt, a team prepares its best arguments for the admissibility of the evidence, but it must be ready to deal with an adverse ruling.

The presiding judge decides if evidence is *admissible or inadmissible*. She does not decide the *weight* of the evidence. A decision that evidence is inadmissible means the jury will not hear it. A judge may decide to keep a piece of evidence from the jury because it is too unconnected to the case, too unreliable or implausible for the jury to consider, or unfairly prejudicial or misleading. A judge may not keep out evidence because the judge thinks the source isn't credible, or personally finds the evidence unpersuasive. It's the jury's job to make those decisions. In coming to a verdict, the jury may give decisive weight to a piece of evidence, no weight at all, or anything in between. Attorneys argue admissibility to the judge, weight to the jury.[1]

[1] Rule 104(e). The policy underlying the rules is "to give the [jury] . . . as much evidence as possible, and then permit it to give the evidence it receives whatever weight the evidence deserves." Frederic L. Borch III, "The Use of Co-Conspirator Statements Under the Rules of Evidence: A Revolutionary Change in Admissibility," 124 Mil. L. Rev. 163, 186 (1989).

The rules of evidence confer a great deal of discretion on the presiding judge. Almost always a judge can rule either way without committing legal error. Few rules are clear cut. Most are open to interpretation, and their application depends on facts that the judge must evaluate. Some rules expressly commit a matter to judicial discretion. In evidentiary disputes, the starting point is the language of the applicable rule, but the outcome turns as much on the judge's sense of fairness.[2] An attorney should always strive to make a judge want to rule in her favor.

Foundations

A foundation is a preliminary fact or set of facts required to open the door to evidence of other facts. One way to look at the law of evidence is through the lens of a single question: "What do I have to prove first?"[3] Most rules of evidence require proof of foundational facts. Trial lawyers know they must lay foundations and have acquired a "foundation-laying" habit.

Some foundations are simple to lay, some complex. If an opponent objects, the judge, like a building inspector, determines if the foundation is good enough. In making that decision, the judge for the most part is not bound by the rules of evidence.[4] The judge can use information the jury will not hear. Preparation includes identifying the foundational facts necessary to win the admission into evidence of the testimony and exhibits that a team wants to present.

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[2] Judges tend to treat the Federal Rules of Evidence "not as a rigid code, but as suggestive variations on the theme sounded in Rule 403, balancing of probative value against cost." Richard A. Posner, "Clinical and Theoretical Approaches to the Teaching of Evidence and Trial Advocacy, 21 QLR 731, 735 (2003). In *Pirates of the Caribbean: The Curse of the Black Pearl* (2003), the notorious pirate-lawyer, Hector Barbossa makes a similar point:

> Elizabeth Turner: Wait! You have to take me to shore. According to the Code of the Order of the Brethren-
> Barbossa: First, your return to shore was not part of our negotiations nor our agreement so I must do nothing. And secondly, you must be a pirate for the pirate's code to apply and you're not. And thirdly, the code is more what you'd call "guidelines" than actual rules. Welcome aboard the Black Pearl, Miss Turner!

[3] James W. McIlhaney, *McElhaney's Trial Notebook* 355 (2006).

[4] Rule 104(a). The small parts of the rules of evidence that bind a judge at the stage of making evidentiary rulings deal with the attorney-client and other privileges that protect communications from disclosure to both judges and jurors.

Relevance Defined (Rules 401 & 402)

Rule 402 affirmatively declares relevant evidence to be admissible. Unless another rule provides for exclusion, being relevant is the only thing required to get evidence admitted.[5]

The definition of relevance is so generous that almost anything can qualify.[6] Rules 401 & 402 are not written to exclude evidence, but to open the door to its admission. The test of relevance is logic and common sense, and the law allows that jurors collectively have brains and sense enough to decide for themselves what's relevant.

Rule 401 says that evidence is relevant if it has "any tendency to make a fact more or less probable than it would be without the evidence, and the fact is of consequence in determining the action." The definition has two parts. Evidence must have *probative value*, meaning it logically proves or disproves something, and it must be *material*, meaning that what it tends to prove or disprove is consequential to the resolution of the case.

To have probative value, a piece of evidence need only have a "tendency" to prove or disprove something. Evidence is offered piece by piece. Each new item is not expected to conclusively prove anything. It's enough that when all the pieces come together, the whole tends to prove or disprove a fact of consequence. Until all the evidence is in, it is difficult for a judge to say that any single piece has no probative value. Effectively, the rule encourages judges to admit evidence, leaving to the jury the task of deciding its worth.

To be material, a piece of evidence must tend to prove something that connects to an issue in the trial. Because the credibility of witnesses is an issue in every trial, evidence tending to prove that a witness should or should not be believed is always material. Otherwise, materiality depends on the substantive law governing the claims and defenses asserted by the parties. Suppose a hungry "raptor" escapes from the local Jurassic Zoo. The sharp-toothed reptile makes a meal of a dozen tasty teens. A lawsuit is brought. The claim against the zoo is based on a statute that makes the owner of an "inherently dangerous animal" strictly liable for injuries the animal causes. The law does not require the claimant to prove the owner was at fault in any way, and proof that the owner was careful is not a defense. For this claim, testimony showing the zoo took extraordinary precautions and made superhuman efforts to prevent the creature's escape is not material.

The requirement that evidence be probative and material is not applied strictly. Introductory testimony about a witness's marital status, employment, and the like is

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[5] Stephen Saltzburg, *Trial Tactics* 7 (2007).

[6] *See* David Crump, "On the Uses of Irrelevant Evidence," 34 Houston L. Rev. 1, 6-20 (1997).

deemed relevant because it gives jurors a feel for the person whose testimony they are being asked to believe. Testimony and photographs showing in detail the setting where an event took place are relevant because of the chance that they might help the jury better understand what happened. So-called "background" facts are admitted when they place a relevant fact in a context, make it more intelligible, or give it color and flavor.[7]

At the stage of building a case, relevance should take care of itself. A team selects from the case materials the testimony and exhibits it believes best prove its case. It usually has no incentive to include irrelevant evidence.[8] At trial, however, a team's attorneys need to be ready to explain how each piece of evidence contributes to the proof of a fact of consequence.

Excluding Relevant Evidence (Rule 403).

Rule 403 gives a judge discretion to exclude relevant evidence that carries a substantial danger of getting in the way of the jury deciding the case on the merits. While allowing for exclusion, the rule tilts heavily in favor of admission. Relevant evidence may be excluded only when it presents a danger that "substantially" outweighs the evidence's probative value.

Rule 403 is not intended to save an attorney from having to deal with prejudicial evidence. An opponent's evidence should be prejudicial. The rule offers relief only when a piece of relevant evidence is deemed too dangerous, either because it is "unfairly" prejudicial, or would seriously "mislead" or "confuse" the jury."[9]

Rule 403's primary target is evidence that has some but not a lot of probative value.[10] The probative value of a piece of evidence depends on what fact of consequence it is offered to prove, along with the other evidence that could be used to prove that fact. Factors effecting probative value include the need for the evidence, and the strength of the evidence. In a murder case, for example, it's unlikely the prosecution needs an enlarged color photograph of the body to prove that the victim is dead. That fact may not be in dispute, and can be proved by less, stomach-churning means. It's also unlikely

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[7] In *Old Chief vs. United States*, 519 U.S. 172, 187 (1997), the United States Supreme Court observed that evidence has "force beyond any linear scheme of reasoning" and may help tell "a colorful story with descriptive richness."

[8] A lawyer stuck with a bad case may be motivated to make strategic use of irrelevant evidence, hoping to distract the jury from the issues. Such use raises ethical issues. See David Crump, "On the Uses of Irrelevant Evidence," 34 Houston L. Rev. 34, 20-46 (1997). In the mock trial setting, it raises questions about a student-attorney's preparation and judgment.

[9] A third danger is evidence not worth the time required to present it. The rule gives judges authority to stop attorneys from stalling or wasting time. See Richard D. Friedman, "Minimizing the Jury Over-Valuation Concern," 2003 Mich. St. L. Rev. 967, 972 (2003). Because "mock trial" competition rules impose limits on the length of trials, time is usually not a factor in "mock trial" evidentiary rulings.

[10] Fed. R. Evid. 403 advisory committee note.

that the photograph standing alone proves much of anything about how the killing was done. The photograph's probative value is nil or weak; the prejudice is high. [11] However, the photograph could become highly probative in conjunction with other testimony. For example, an expert pathologist testifies that the killer fired the fatal shot while standing no more than three feet in front of the deceased. It is difficult for the pathologist to adequately explain his conclusion without photographs showing the pattern of particles of unburned gun powder embedded in the skin around the entry wound.

"Unfair prejudice" refers to evidence that is likely to trigger in jurors an excessive emotional response, or awaken a prejudice, that makes it difficult for jurors to judge fairly. A boy accidentally kills himself while playing with a loaded gun that belonged to a neighbor. In their lawsuit against the neighbor, the boy's parents allege that their son got hold of the gun because the neighbor carelessly left it out on a table in his backyard. The case is bifurcated, meaning the only issues before the jury when the boy's mother takes the witness stand is whether the neighbor was careless, and his carelessness caused the boy's death.[12] The boy's mother is asked to relate her reactions on seeing her ten-year-old son's dead and bloodied body. The mother's testimony has no obvious tendency to prove anything regarding the neighbor's carelessness. On the other hand, the testimony is likely to be heartrending. Under the influence of strong emotion, the jury may not be able to fairly consider the evidence showing the neighbor was not careless. In the language of the rule, the evidence's probative value is substantially outweighed by the "unfair prejudice" the mother's testimony is likely to cause.

"Misleading/confusing" refers to evidence that is likely to misdirect juror's attention. Misdirection is practiced by magicians to induce audience members to overlook something by getting them to focus elsewhere. Lawyers, like magicians, are known to practice misdirection.[13] A professional figure skater, a star of "Red Wedding on Ice," is fired for being overweight. In his lawsuit against the show's producer, he claims he was not overweight. Three years later, the case goes to trial. The attorney for the skater seeks to introduce evidence of the skater's weight at the time of trial, along with recent color photographs of him in costume, and videos of him skating at recent

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[11] K.S.Douglas, D.R. Lyon & J.R.P. Ogloff, "The Impact of Graphic Photographic Evidence on Mock Trial Jurors' Decisions in Murder Trial: Probative or Prejudicial," 21 Law and Human Behavior 495 (1997)(The experimental groups show photographs were twice as likely to render a guilty verdict.); David A. Bright & Jane Godman-Delahunty, "Gruesome Evidence and Emotion: Anger, Blame, and Jury Decision-Making," 30 Law and Human Behavior 183 (2006) (gruesome photographs increase the conviction rate and measurably increase juror distress and anger.)

[12] Bifurcation is the procedural device that divides a trial into two parts. The first part is a trial to determine a defendant's guilt or liability. The second part is a trial to determine the penalty or amount of damages, if guilt or liability is found. In the first part of a bifurcated trial, evidence related solely to the penalty or amount of damages is not material. Mock trial cases are usually bifurcated.

[13] For research confirming what magicians have always known, see Christopher Cabris & Daniel Simons, *The Invisible Gorilla* (2011) & http://www.theinvisiblegorilla.com/gorilla_experiment.html. See also Sydney A. Beckman, "Hiding the Elephant: How the Psychological Techniques of Magicians Can Be Used to Manipulate Witnesses at Trial," 15 Nevada L. Rev. 632 (2015).

charity events. However, the sole issue in the case is the skater's weight three years earlier, at the time he was fired. Arguably, his present weight has some tendency to prove what he weighed three years ago, but it might just be the result of recent diet and exercise. The evidence's probative value is slight, while piling up a lot of evidence of the skater's current weight directs the jury's attention away from the evidence proving the skater's weight at the time he was fired. In the language of the rule, the evidence's probative value is substantially outweighed by the danger that it will mislead or confuse the jury.

Rule 403 is an important rule of evidence. That's because of its usefulness in all the situations where evidence is relevant and legitimately admissible for one purpose but not for another. As the United States Supreme Court observed: "There is no rule that testimony admissible for one purpose and inadmissible for another is thereby rendered inadmissible; quite the contrary."[14] For judges, the usual practice is to admit the evidence and instruct the jurors that they may not use the evidence for the impermissible purpose.[15] Rule 403 gives the evidence's opponent an argument for the evidence's exclusion, exclusion being the only sure way to prevent jurors from misusing it.

Personal Knowledge (Rule 602).

The rule requires a lay witness (a person who is not an expert) to have personal knowledge of the event or thing about which the witness testifies. Personal knowledge comes from seeing, hearing, smelling, tasting, or touching the event or thing. A sentient being also has personal knowledge of his actions and what he is currently doing, thinking and feeling, and memory of what he did, thought, and felt in the past. Only information that a witness perceived firsthand is thought to be sufficiently reliable to be received into evidence.

Rule 602 does not require a witness to be certain about what he perceived. Answers with qualifiers, such as "I'm not sure, but . . . ," "I believe so," and "My best estimate is," are acceptable. These qualifications go to the weight of the evidence, not its admissibility.[16] On the other hand, the rule makes inadmissible answers using the words "I guess" or "I suppose."

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[14] *United States v. Abel*, 469 U.S. 45, 56 (1984).

[15] Rule 105. Trial lawyers commonly believe that instructions to disregard or limit the use of evidence are ineffective. *United States v. Krulewich*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring). Empirical research presents a mixed picture. It shows that such instructions work, albeit imperfectly and better under some circumstances than others, and sometimes not all. David Alan Sklansky, "Evidentiary Jury Instructions and the Jury as Other," 65 Stanford L. Rev. 407, 439 (2013); see also Michael J. Saks and Barbara A. Spellman, *Psychological Foundations of Evidence Law* chapter 3 (2016); Dan Simon, *In Doubt: The Psychology of the Criminal Justice System* 184-189 (2012).

[16] Thomas A. Mauet & Warren D. Wolfson, *Trial Evidence* 58-59 (4th ed. 2009).

Trial attorneys know to ask questions that elicit from a witness the foundational facts necessary to show that a witness was physically able to perceive the event or thing. They also know that foundational testimony can enhance a witness's credibility. For example, before a witness gets to testify that a truck involved in a traffic accident ran a red light, the examining attorney gets the witness to testify to seeing the truck and the traffic light. Q: Where were you when you first saw the truck? A: On the northwest corner of Grand and Snelling. Q: Where was the truck? A: On Snelling Avenue, heading south toward the intersection. Q: From where you were standing, could you see the traffic light for south bound traffic? A. Yes. Q: As the truck approached the intersection, was the traffic light red, yellow or green?[17]

Some facts lie beyond the possibility of personal knowledge. For these facts, an attorney can never lay the required foundation. (1) A witness can never have personal knowledge of what goes on inside another person's head or body. Our senses do not open the door to experiencing what another person is thinking or feeling. The rule bars a witness from guessing about what another person was intending to do, or the reasons or motives for another person's actions. (2) A witness can never have personal knowledge of possibilities that did not occur, or of the future. Our senses do not allow us to experience events that did not happen. One can imagine the future, but one cannot experience and remember it. The rule bars speculation about "what might-have-been," or "what-will-be."

Lay Witness Opinions (Rule 701).

Lay witnesses are generally expected to stick to facts and skip opinions. However, the law recognizes that the distinction between fact and opinion is often meaningless. People asked to describe what they saw typically mix the two. "The car was going fast." "It had been raining, the road was slick." "The child was crying hysterically." People use words to summarize impressions, often formed quickly, based on observations that are difficult, if not impossible, to describe precisely. Think of the combinations of vocal tone, facial expression, and body language that underlie opinions like "She was really angry" and "He sounded like he was kidding when he said that." The rule was written to allow lay witnesses to state opinions about things "that cannot be described factually in

[17] See James W. McElhaney, *McElhaney's Trial Notebook* 356, 371-374 (2006).

words apart from inferences."[18] These kinds of opinions are allowed because they make testimony clearer and more understandable.[19]

The foundation for a lay witness opinion is testimony showing four things: (1) The opinion is about something the witness personally perceived. (2) It is something the witness could rationally infer from what he perceived. (3) It will help the jury in its deliberations. (4) It is not based on scientific, technical, or other specialized knowledge.

The first element parallels Rule 602. The witness must have personal knowledge, meaning the witness must be an eyewitness. The opinion must be about what the eyewitness saw, heard, or otherwise perceived. The opinion must be based solely on the witness's personal observation and experience; it cannot be based on a mix of the personal observation of the witness and the observations of others.[20]

The second element demands rationality, which comes from a combination of observation and experience. How much observation and experience depends on the circumstances. A brief look may be enough for most people to infer that a person looked "sick," but a longer and closer inspection to infer that a person was "feverish" or "at death's door." An ordinary person presumably has sufficient experience to say, "I heard a loud bang," but not enough to identify the bang as rifle fire. An army ranger is likely qualified by experience to identify the bang as a rifle shot.

The third element looks to whether the opinion will be "helpful" to the jury's deliberations. An opinion is "helpful" when it gives the jury the kind of insight into an event that only an eyewitness can give. Consider the testimony of an undercover agent who participated in a hand-to-hand exchange of money for illegal drugs. Of the several participants on the seller's side, the agent testifies: "In my opinion, Mr. Barksdale was the boss." The opinion is based on the agent's perception of subjective factors such as

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[18] Examples include testimony relating to the appearance of persons and things, identity, the manner of conduct, degrees of light and darkness, sound, size, weight, speed, and distance. Fed. R. Evid. 701 advisory committee note, citing *Asplundh Mfg. Div. v. Benton Harbor Engineering*, 57 F.3d 1190, 1196 (3d Cir. 1995). Although such opinions are admissible, they are not necessarily accurate. Research shows that people are "generally inaccurate in estimating physical properties, systematically underestimating distances, overestimating duration of time, and misestimating speeds. People also tend to perform poorly on estimating properties of other people, such as judgments of height, weight, and age." Dan Simon, *In Doubt: The Psychology of the Criminal Justice System* 99 (2012)

[19] Walking is "so mechanically and energetically complicated that if we actually had to think our way through each element involved, we might never walk again." Gretchen Reynolds, "Parsing the Inner Life of Walking," *The New York Times*, September 25, 2018. "Even if a witness were able to precisely observe and describe what he saw, no one would want him to. To describe a man walking down the street would require a detailed description of all his parts moving at angles and speeds relative to each other that would provide an interesting joint exercise for choreographers, orthopedists and others but that would hardly help a juror or judge visualize the event. The abstraction: "He was walking," or "He was walking slowly," is enough in most cases." 3 Jack B. Weinstein et. al., *Weinstein's Evidence* ¶701.01 (1996).

[20] Anne Bowen Poulin, "Experienced-Based Opinion Testimony: Strengthening the Lay Opinion Rule," 39 Pepperdine L. Rev. 551, 562, 571, 579-581, 606-607 (2013).

the respect the other participants showed Mr. Barksdale, their deference to him when they spoke, and the deal being made only after Barksdale subtly signaled his approval. The opinion is helpful because it gives the jury the eyewitness' unique insight into Mr. Barksdale's role in the transaction.[21]

An opinion is unhelpful when it is likely to distort the jury's deliberations. The law charges the jury with the task of deciding what inferences to make, and what conclusions to draw from the evidence it hears. Opinion testimony carries the danger that jurors will defer to the authority of the witness instead of reasoning things out for themselves. The lay witness who asserts that a driver was "negligent" or that a police officer used "excessive force" merely tells the jury what result to reach. The opinion does not help the jury in its deliberations. It is also likely to be misleading because a single witness usually has only partial knowledge of all the relevant facts, or the witness's knowledge includes facts that the jury will not hear because the rules of evidence make them inadmissible. An opinion based on only part of the evidence or tainted by knowledge of inadmissible evidence is not helpful.

The fourth element prevents an expert witness from evading the requirements governing expert testimony by masquerading as a lay witness.[22] If the testimony is based on scientific, technical, or other specialized knowledge, Rule 702 governs its admissibility.[23]

Hearsay Defined (Rule 801).

Hearsay is about secondhand knowledge. "Essentially it is a report by one person of what some other person said or wrote."[24] The rules state a general ban on hearsay (Rule 802),[25] but include numerous exclusions and exceptions (Rules 801, 803 & 804). The ban and all the exclusions and exceptions together don't much matter if the testimony is not hearsay. So, we start with what is not hearsay.

Hearsay is commonly defined as an out-of-court statement offered to prove the truth of what the statement asserts. This workaday definition captures the basic elements. Rule 801 (a-c) contains the controlling legal language.

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[21] See *United States v. Garcia*, 413 F.3d 211-212 (2d. Cir. 2004).

[22] Fed. R. Evid. 701 advisory committee note.

[23] Rule 702 will be discussed in the primer on experts.

[24] Richard A. Posner, "On Hearsay," 84 Fordham L. Rev. 1465, 1467 (2015).

[25] Hearsay is suspect because of the absence outside the courtroom of one or more safeguards that are thought to make in-court testimony reliable. A witness at trial swears an oath to tell the truth, speaks in the presence of judge and jury, and is subject to immediate cross-examination. Lawrence Tribe, "Triangulating Hearsay," 87 Harvard Law Review 957 (1974).

● Only a "person" can make a hearsay statement. That person is called the "declarant." A non-human (animal or thing) cannot make a hearsay statement. Thus, hearsay is not an objection to the use in court of a photograph generated automatically by a traffic camera, or a machine-generated receipt showing the time a car entered and left a parking lot. Hearsay is not an objection to a witness testifying that the deceased's talking parrot said that "Ms. Scarlett killed Mr. Body in the kitchen with the knife."

● The person/declarant must have made the statement "out-of-court," meaning the statement was not made from the witness stand at the current trial. Hearsay can only occur when a witness in court repeats a statement made out-of-court. A witness with personal knowledge testifies at trial: "I saw Wyatt holding a smoking gun." In-court statement. Hearsay becomes an issue if the witness adds: "And last night over dinner, I told Jack all about seeing Wyatt holding a smoking gun," and he told me that 'he too saw Wyatt holding a smoking gun'." Both the witness's statement to Jack,[26] and Jack's statement to the witness were made out-of-court.[27]

● There must be a statement. To make a statement, a person/declarant must intend to communicate something to someone, whether by oral, written, or other means. People ordinarily intend their words (oral or written) to communicate, but do not intend their conduct to communicate. For example, people usually unfurl umbrellas and hold them over their heads to avoid getting wet. They do not intend the unfurling to communicate anything, although the action would signal to someone watching that it's probably raining outside. Without an intent to communicate, the act of unfurling the umbrella is not a statement subject to the hearsay rules.[28] Now, if a person is asked "Is it raining outside?" and the person answers by opening his umbrella and pointing at it, the person intended his conduct to communicate. He made a statement.[29] A witness can testify to having a conversation with someone, but there is no hearsay issue until the witness relates statements made during the conversation. A detective can testify to getting a telephone call from an informant, and immediately after to searching a dumpster where he found a stolen umbrella. One can infer from the detective's subsequent action at least part of what the informant told the detective, but there's no hearsay issue. The detective did not testify to a statement made during the telephone

[26] The out-of-court statement of a testifying witness is usually treated as hearsay when offered to prove the truth of what the statement asserts. It is not treated as hearsay in the limited circumstances described in Rule 801(d)(1). See Daniel J. Capra, "Prior Statement of Testifying Witness: Drafting Choices to Eliminate or Loosen the Structure of the Hearsay Rule," 84 Fordham L. Rev. 1429 (2016).

[27] See Clifford S. Fishman, *A Student's Guide to Hearsay* 12 (Rev. 4th ed. 2011).

[28] See Christopher G. Miller, "Implied Assertions in Evidence Law: A Retrospective," Miss. Coll. L. Rev. 1, 3-6 (2014).

[29] The burden of proving that conduct is intended as an assertion rests on the party opposing admission of the evidence. Fed. R. Evid. 801(a), Advisory Committee's Note.

call, and his search of the dumpster is not a statement unless he intended his conduct to communicate something to someone.[30]

● The statement must assert that something is true. An example is the declarative sentence "It's cold outside." Many other kinds of statements are not assertive. The question "Is it cold outside?" seeks information, it does not assert that it is cold outside. The order "Put on a warm coat," and the request "Please loan me a pair of gloves" do not assert that it is cold outside. All three - the question, the order, and the request - may be circumstantial evidence that the speaker was thinking that it was cold outside, but they are not assertive statements for hearsay purposes. Whether a statement is assertive can be difficult to determine. A statement clothed in non-assertive form can nonetheless sound assertive and been intended as an assertion. "Please hand me that cup of hot chocolate" is formally a request, but it contains an assertion that the cup contains a comforting cold weather drink. The question "How cold is it outside?" contains an assertion that it's cold outside. The answer "It's so cold that I saw a dog stuck to a fire hydrant" is the punchline to an old joke with an assertion that can't be taken literally.

● The assertion in the statement must be something the declarant intended to make. The law presumes that a declarant intended what his words expressly state, but not every conceivable thing his words might imply. When a statement is offered to prove something it implies, it is hearsay only if the implication was on the declarant's mind when he made the statement. Implied assertions are not hearsay unless they are intentional.[31] A police officer, while searching the house of a suspected bookmaker, answers telephone calls from unknown persons placing bets on the Green Bay Packers. The prosecution offers the wagering statements as circumstantial proof that the house's owner was a bookmaker. The statements do not expressly assert that the house's owner is a bookmaker, and it is exceedingly unlikely that the unknown bettors thought they were saying anything about the bookie's house being used for gambling. It can be exceedingly difficult to sort out which implications where on a declarant's mind and which were not.

● The statement must be offered to prove the truth of what it asserts. It is not hearsay when offered to prove something, proof of which does not depend on the statement being true. There's a litmus test. Assume the statement is false. If the false

[30] See Graham H. Lilly, Daniel J. Capra, Stephen A. Saltzburg, *Principles of Evidence* 4310-4312, 4316-4336 (6th ed. 2012). However, conduct motivated by a belief in a proposition has been treated as hearsay. For example, testimony that an officer arrested an individual represents the officer's assertion that he had probable cause to make the arrest. It is an out-of-court statement of the officer's opinion that the individual is likely guilty of committing a criminal act. [need citation]

[31] See Graham H. Lilly, Daniel J. Capra, Stephen A. Saltzburg, *Principles of Evidence* 4255-4316 (6th ed. 2012); Christopher G. Miller, "Implied Assertions in Evidence Law: A Retrospective," Miss. Coll. L. Rev. 1 (2014); and Jack B. Weinstein and Margaret Berger, *Weinstein's Evidence Manual*, loc. 27966-27980 (Student ed., 10th ed. 2015).

statement proves what the party offering the statement says it proves, the statement is not being offered for its truth. The idea is best explained by examples.[32]

a. *The statement is offered as evidence of the declarant's state of mind.* Little Nell sues her employer claiming that Quilp, a male supervisor harassed her. A witness testifies that Quilp said to him: "Nell is a sexy dresser," and "Nell really has the hots for me." Quilp may be delusional. Nell, in fact, may loath him and dress conservatively. Quilp's statements, whether true or false, are nonetheless admissible. They go to prove his lecherous state of mind.[33]

b. The statement is offered for its effect on the hearer's state of mind. Canio is on trial for murdering his wife Nedda. A witness testifies to overhearing Nedda tell her husband that she was having an affair with a happier clown. Nedda's statement is admissible because, even if she was lying to Canio about the affair, her statement could be what inflamed her jealous husband to commit murder.

c. *The statement is offered to show the hearer's awareness or knowledge of a fact that will be proven by other evidence.* Mr. Chaplin falls on a banana peel in front of Mr. Hardy's pie shop.[34] He sues Mr. Hardy for negligence. A witness, Mr. Laurel is called to testify that he told Hardy about three earlier incidents of comics slipping on banana peels in front of the store. The testimony is not admissible to prove the earlier incidents happened, but it is admissible to prove that Mr. Hardy was on notice of a possible banana-peel danger requiring his attention.

d. *The statement is offered for its falsity, not its truth.* Mr. Gordon testifies that his neighbor Professor Zarkov told him that "Daleks are invading the earth disguised as Cybermen, and they are holding secret meetings at local Walmarts." At a hearing on Zarkov's sanity, the testimony is admissible proof that the professor is crazy. It is offered because it is both false and crazily so.

e. *The statement is offered as context necessary to understand admissible testimony.* An undercover officer testifies to a conversation she had with the defendant about buying drugs. As you will soon see, the defendant's part of the conversation is admissible as the statement of an "opposing party."[35] The officer's part is admissible if it

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[32] A witness must have personal knowledge of the statement, in the sense that the witness saw and heard the declarant make the statement, or the witness read it in a document. In the examples, the words in the statement are relevant even if the facts asserted in the statement are false.

[33] Clifford S. Fishman, *A Student's Guide to Hearsay* 30-31 (Rev. 4th ed. 2011).

[34] "How to Slip on A Banana Skin in A Silent Movie," https://www.youtube.com/watch?v=YmnU4DO2w00

[35] Rule 801(d)(2).

is not offered to prove the truth of anything the officer said, but to provide context necessary to understand the defendant's part of the conversation.[36]

f. *The statement is offered because it is inconsistent with the witness's in-court testimony*. A witness testifies that the person who robbed the liquor store was tall and Orc-like, a description that fits the accused. However, in a statement before trial the witness said the robber was "kind of short, like a Hobbit." On cross-examination, defense counsel confronts the witness with the inconsistent statement. The statement before trial is not hearsay because the effect on the witness's credibility does not depend on the out-of-court statement being true. It depends on the inconsistency, which is present even if the pretrial statement is false. It's possible that both the pretrial and trial statements are false. The real robber could have been a midsized, grey Wizard.

g. *The statement is a legal act relevant to the case*. A couple sues a resort for breaching a written contract to host their wedding. To prove a breach of contract claim, the couple must prove that there is a contract. The contract is the legal act the defines the parties' responsibilities to each other. It is not hearsay. A public official sues a newspaper for publishing an article saying the official took a bribe. To prove libel, the official must prove the newspaper published a false statement. The part of the newspaper article containing the false statement is the libelous act. It's not hearsay.

Hearsay Exclusions and Exceptions (Rules 801(d), 803, 804, and 805).

The general ban on hearsay reflects a preference for live testimony rather than proof using pretrial statements. The hearsay exclusions and exceptions represent circumstances where the law has decided that a pretrial statement is sufficiently reliable to dispense with live testimony, or at least the required foundational facts give jurors enough information to decide for themselves if the statement is reliable. And some exclusions and exceptions are grounded in fairness or necessity: the lack of better means of proof.[37]

Each hearsay exclusion or exception is like a uniquely shaped box. A piece of hearsay gets into evidence if it neatly fits into its box - without too much bending or breaking. But there are a lot of boxes. The task is to find the right box and demonstrate that the piece fits. If it fits, the judge admits the out-of-court statement for the truth of what the statement asserts.

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[36] See, e.g., *United States v. Sorrentino*, 72 F.3d 294 (2d Cir. 1995).

[37] See Stephen Saltzburg, "Rethinking the Rationale(s) for Hearsay Exceptions," 84 Fordham L. Rev.1485 (2016). Some hearsay statements may be more reliable than the testimony the declarant might give at trial, because the declarant's perception and memory were better when the statement was made, or the declarant at the time lacked a motive to lie, or at least the ability to tell a good lie. See Edward J. Imwinkelried, "The Case for the Present Sense Impression Hearsay Exception," 54 Univ. Louisville L. Rev. 455, 471-481 (2016).

When a party relies on a hearsay exclusion or exception, the party needs to lay a foundation. In the face of an objection, the party seeking admission of the hearsay statement must identify an exclusion or exception box (by name or rule number). The party then has the burden of persuading the judge by the preponderance of the evidence that it has laid the required foundation. Not being bound by the rules of evidence, the judge may consider the hearsay statement itself as one foundational fact, even before its admission into evidence.

When a judge admits a hearsay statement, the declarant becomes the equivalent of a witness. Most hearsay exclusions and exceptions require a foundation showing that the declarant has personal knowledge of the facts asserted in the statement. If the statement contains an opinion, a foundation is needed showing that the declarant has the combination of personal knowledge and experience that make the opinion rational. A declarant's guesses and speculations are not admissible.[38]

Being the equivalent of a witness, a declarant's credibility is an issue. A party may impeach the credibility of a declarant who does not take the witness stand by any means that the party could use against a live witness. The party can inquire on cross-examination or otherwise present evidence of the declarant's bias, prejudice, interest, improper motive, or inconsistent statements. The side that put the hearsay into evidence may introduce evidence bolstering the declarant's credibility.[39]

This primer focuses on a selected few of the many exclusions and exceptions, ones that are particularly important, or crop up frequently in "mock trial," or at least illustrate how the exclusions and exceptions work.[40]

● *Rule 801(d)(2): Opposing Party Statements.*[41] This exclusion stands at or near the top of hearsay-related rules that a "mock trial" attorney should know. It applies to hearsay statements by a party to the lawsuit offered into evidence by the opposing party. It does not allow a party to put in evidence its own out-of-court statements.

The exclusion allows the admission into evidence of anything said, including statements on matters about which the party-declarant had no personal knowledge, and

[38] Of the few exclusions and exceptions that dispense with the personal knowledge requirement, the most important is Rule 801(d)(2), which deals with opposing-party-statements.

[39] Rule 806; s*ee* John G. Douglas, "Virtual Cross-Examination: The Art of Impeaching Hearsay," 34 J. Mar. L. & Com. 149 (2003).

[40] Additional hearsay exceptions are discussed in the primers on exhibits and experts.

[41] The phrases "opposing party statement" and "party-opponent admission" refer to the same thing: statements made admissible by Rule 801(d)(2). The first phrasing is based on the text of the rule as amended in 2011; the second on the pre-2011 language. Some "mock trial" rules continue to use the older language.

opinions that are not rationally based on his observation and experience.[42] The exclusion is based on the notion that a party should be accountable at trial for everything he said. The statement may not be reliable, but it is probably as reliable, and possibly more reliable, than the party's self-interested, in-court testimony. And it's fair to admit the statement because a party can testify at trial that he never made the statement, or explain to the jury how he was mistaken, guessing, or had been misled when he made it.[43]

The basic foundation is simple. The judge must be satisfied that the declarant is a party, and that it is the opposing party that wants the declarant's statement admitted into evidence. To identify the opposing parties, look at the headings on the legal documents in the case file. A heading on a complaint in a civil case might read: "B.B. Wolf, Plaintiff v. Orson Swine and Tusker Pig, Defendants." Parties on opposite sides of the "v" are opposing parties. The exception allows Wolf to put in evidence the out-of-court statements of Swine and Pig, and the two defendants to put in evidence Wolf's out-of-court statements. It does not allow Swine to put in evidence the out-of-court statements of Pig, or vice versa. Swine and Pig are not opposing parties.[44] The heading in a criminal case might read: The State of Minnesota v. Road Runner. The victim, the person Mr. Runner ran over, is not a party in the case. The victim's out-of-court statements are not admissible party-opponent statements.

The rule identifies several situations where a person who is not a named party can make an opposing party statement.[45] In each situation, certain foundational facts link the person to the named party. The most commonly-used link is a showing that the declarant was an agent or employee of the party when the statement was made, and the statement concerned a "matter in the scope" of the agency or employment.[46] For example, a truck driver involved in an accident tells a police officer at the scene, "It was

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[42] See Anthony Bocchino & David Sonnenshein, *A Practical Guide to Federal Evidence* 193 (9th ed. 2009).

[43] See Graham H. Lilly, Daniel J. Capra, Stephen A. Saltzburg, *Principles of Evidence* 170-171 (6th ed. 2012). The rationale becomes questionable in circumstances where a party may not have a fair opportunity to deny or explain the statement. For example, the declarant might be a former officer of the defendant corporation with a grudge, or a current employee aligned with a faction hostile to a company's current management.

[44] See Clifford S. Fishman, A Student's Guide to Hearsay §§ 5.2- 5.5. (Rev. 4th ed. 2011).

[45] Rule 801(d)(2)(B thru E).

[46] Rule 801(d)(2)(D). This subpart of the rule, when adopted, radically changed the law, making admissible against a party statements by a party's agent or employee that the party did not authorize or approve. The subpart has been criticized for allowing into evidence statements that may consist of nothing more than office gossip and speculation. See 4 Weinstein's Evidence para. 801(d)(2)(c)[01] at 801-216-801-217 (1984). Taking account of the criticism, statements have been ruled inadmissible based on the notion that repetition of rumor lies outside the scope of a declarant's employment. When the declarant relied on an unidentified source, statements have been ruled inadmissible for lack of foundation showing that the unidentified source was acting within the scope of his employment. *See* Michael H. Graham, *Evidence Law Mastery* 153-154 (2016).

all my fault. My foot hit the gas pedal instead of the brake." The next day the trucking company fires the driver. In a suit against the trucking company, the driver's statement is an admissible "opposing party statement," because the driver made the statement while still employed by the company, and the statement related to his truck-driving duties.

In a criminal case, the exclusion allows the prosecution to put in evidence the out-of-court statements of the defendant.[47] A harder question is whether the exclusion allows a criminal defendant to put in evidence the out-of-court statements of law enforcement officers concerning a case they worked. Outside the world of mock trial, the answer is "maybe." It depends on the precedents governing the court where the case is being tried.[48] Inside the world of mock trial, the answer is arguably "yes," unless the case materials state otherwise.[49] Nothing in Rule 801(d)(2) says that it does not apply against the government in criminal proceedings, and fairness notions say that the prosecution and defense in a criminal case should stand on equal footing.[50]

It's a mistake to assume that party-opponent statements are always received into evidence.[51] They may be excluded based on any of the rules that bar the admission of relevant evidence. Most importantly, they may be excluded under Rule 403 based on considerations that include the declarant's lack of personal knowledge, or the statement being an opinion not rationally based on the declarant's perceptions or not helpful to the jury's deliberations.[52]

● *Rule 803(3): Present State of Mind or Condition*. This exception belongs at or near the top of any list of hearsay exceptions, ranked by their importance. It applies to statements by a declarant of his present state of mind, or present physical or emotional condition. "I'm desperate. I don't know how I'm going to put food on the table." "I'm

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[47] Thomas A. Mauet & Warren D. Wolfson, *Trial Evidence* 151 (4th ed. 2009) ("Any words or acts by a criminal defendant before arrest are admissible against him as [party-opponent-statements]. After arrest, constitutional principles apply, but a properly admonished defendant may . . . waive his Fifth Amendment (self-incrimination) and Sixth Amendment (counsel) rights and make [statements admissible under the rule].")

[48] For discussion of the divergent positions that courts have taken, see Jared M. Kelson, "Government Admissions and Federal Rule of Evidence 801(D)(2)," 103 Virginia L. Rev. 356 (2017).

[49] Recent college mock trial case materials have included a judicial precedent stating that in a criminal case a police officer is not considered a "party opponent" for the purpose of the admissibility of statements under Rule of Evidence 801(d)(2).

[50] See Anne Poulin, "Party Admissions in Criminal Cases: Should the Government Have to Eat Its Words?" 87 Minn. L. Rev. 401 (2002).

[51] Graham H. Lilly, Daniel J. Capra, Stephen A. Saltzburg, *Principles of Evidence* 178 (Concise Hornbook Series, 6th ed. 2012).

[52] *See* 30B Michael H. Graham, *Federal Practice and Procedure: Federal Rules of Evidence* § 7015, at 191 (2011 ed. & 2016 Supp).

going to buy a gun." "My ears are ringing." "I'm feeling joyous." These are all statements of a declarant's present state of mind or condition that could be relevant in a case. The exception is based on the premise that there is no better evidence of what is going on inside a person's head than the person's own statements. Of course, it is very easy to lie about one's internal life. People do it all the time, for good and bad reasons. Nonetheless, the statements are admitted for the truth of what they assert. It is assumed that the jury will be told of anything that exposes the declarant to have lied. The witness who heard the statement can be cross examined, and evidence can be introduced showing that the declarant had a motive to lie or a dishonest character.

The foundation is a showing that (1) the statement describes the declarant's state of mind or condition at the time the statement was made, and (2) the statement is not a present memory of a previous state of mind or condition, or a past event. Almost always, the foundational facts can be inferred from the content of the statement itself. The words "My back aches" qualify as a statement of the declarant's present physical condition; the words "My back has been aching for a month" do not. Of the words "I'm scared to turn on my computer. Some clown has been cyberstalking me for weeks," the first sentence qualifies, the second does not.

In some instances, additional foundation may be required. A recurring situation involves the use of a declarant's statement of intent as circumstantial proof of someone else's conduct. Holmes tells Watson "I'm going to meet Moriarity at the Reichenbach Falls." A few days later, Holmes' body is found at the bottom of the Falls with a bullet in his famous brain. At the Professor's trial for murder, the prosecution offers Holmes' statement as proof that Moriarity was at the Falls. The statement on its face qualifies as a statement of Holmes' present intent to meet Moriarty at the Falls, but it does not include foundational facts showing the basis for Holmes' belief that Moriarity would be there. Without corroborating evidence, the statement's reliability is suspect. A judge could be persuaded to exclude it.

● *Rules 803(1) and 803(2), Present Sense Impressions & Excited Utterances.* These two exceptions are closely related. They often crop up in mock trial, less often in real life. They illustrate the importance of carefully reading rules and knowing exactly what foundational facts are required.

Rule 803(1) applies to hearsay statements that describe or explain an event as it is being watched, or very soon thereafter. Think football announcer describing a play as it unfolds before his eyes, or just after the play ends. The exception is based on the belief that the statement is reliable because the declarant does not have time to forget or fabricate.[53] The foundation is testimony showing that (1) the declarant perceived the event, (2) the declarant made the statement while perceiving the event, or immediately

[53] Fed. Rule 803(1) advisory committee note. The rationale for the exception is dubious considering research showing that less than one second is required to fabricate a lie. Richard A. Posner, "On Hearsay," 84 Fordham L. Rev. 1465, 1469-70 (2016); but see Edward J. Imwinkelried, "The Case for the Present Sense Impression Hearsay Exception," 54 Univ. Louisville L. Rev. 455 (2016).

after the event, and (3) the statement describes or explains the event. The longer the lapse of time between the observation and the statement the more likely the judge will rule the exception inapplicable.[54]

Rule 803(2) applies to hearsay statements about a startling event made while the declarant was under the stress or excitement caused by the event. Being shot at or being robbed, or witnessing someone being shot at or robbed, are examples of events that could be startling. Excited utterances are considered trustworthy because it is thought that a declarant in a state of excitement lacks the ability to concoct a lie.[55] The foundation is testimony showing that (1) the declarant personally observed a startling event; (2) the event caused the declarant to experience stress or excitement; (3) the declarant made the statement while under the stress or excitement caused by the event; and (4) the statement related to the event.

The exception for excited utterances is broader in two respects than the exception for present sense impressions. (1) An excited utterance does not have to be made during or "immediately after" the event. Say that a pedestrian struck by a car recovers consciousness a week later. He could make an excited utterance if on recovering consciousness he was stressed or excited by his memory of the accident. The rule only requires that the statement be made while a declarant is under the stress or excitement caused by the event. (2) An excited utterance does not have to "describe" or "explain" the event; it need only "relate" to the event. A driver is heard to exclaim moments after an accident: "I shouldn't have waited to get new glasses." The driver's statement does not describe the event, but it does relate to the event.

Ordinarily, if a judge is persuaded that a statement fits into a hearsay exception box, the statement is admitted as proof of what the statement asserts to be true. Nothing more is required. However, when a declarant will not be testifying at the trial, an attorney may be able to persuade the judge to require additional foundation, more specifically, facts showing the declarant had personal knowledge and the ability to accurately describe or explain the event. Consider the admissibility of statements a caller made to a 911 operator describing a shooting in progress outside a bar. The caller sounds excited. However, he does not give his name and is never identified. All that exists is the recording of the call. The caller's statements fail to mention important facts reported by other witnesses. It is uncertain that the caller saw what he was describing,

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[54] See Clifford S. Fishman, *A Student's Guide to Hearsay* §8.7 (Rev. 4th ed. 2011).

[55] Fed. R. Evid. 803(2) advisory committee note. The justification is unconvincing. Research shows that lying for some people is a spontaneous response to stress. Think five-year-olds and missing cookies. In addition, the excitement caused by a startling event makes poor witnesses of most people. Shock and excitement cause people to become less observant and less able to remember what they saw. See Richard A. Posner, "On Hearsay," 84 Fordham L. Rev. 1465, 1470-71 (2016); Alan G. Williams, "Abolishing the Excited Utterance Exception to the Rule Against Hearsay," 63 U. Kan. L. Rev. 717 (2015).

and it's possible he was drunk. Without more foundation, the reliability of the statements in the 911 recording is suspect.[56]

● *Rule 804*. The most important thing to know is what Rule 804 does not say. It does not make admissible every out-of-court statement by a person who is "unavailable" to testify.[57] It merely says that proof that a person is "unavailable" is part of the foundation for the five hearsay exceptions contained in subpart b of the rule.[58]

● *Rule 804(b)(3): Statement Against Interest*. The exception is one of the five Rule 804 exceptions. It is based on the common-sense notion that people, even dishonest people, do not volunteer statements they know would hurt them, unless compelled by a belief that what they are saying is true. The foundation is facts showing (1) the declarant is "unavailable" to testify; (2) the statement was contrary to the declarant's interest at the time he made it; and (3) the statement was "so contrary" to the declarant's interest that a "reasonable person in the declarant's position" would not have made the statement unless he believed it was true.[59] As a practical matter, the rule requires the party offering the statement to lay a detailed foundation regarding the declarant's position at the time the statement was made. A lot of foundational facts are necessary to persuade a judge that a statement fits into this hearsay box.

● *Rule 805: Hearsay within Hearsay*. The rule deals with the situation of a hearsay statement containing another hearsay statement. The rule says that the two hearsay statements must each qualify on its own for admission. The issue arises most often when a party offers into evidence a business or public record. Suppose the official police report of a traffic accident contains both the officer's description of what he saw after arriving at the scene of the accident, and the officer's report of a statement by an eyewitness saying that the driver of the truck ran the red light. Both the eyewitness's statement and the officer's description of what he observed are hearsay if offered to prove the truth of what the statements assert. However, with a proper foundation, the police officer's statements will be admissible under the hearsay exception for statements in a business or public record.[60] However, the admission of the report into evidence

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[56] *See Brown v. Keene*, 355 F.3d 82 (2d Cir. 2004).

[57] See Anthony J. Bocchino & David A. Sonnenshein, *A Practical Guide to Federal Evidence* 246 (NITA, 9th ed. 2009).

[58] Obviously, a declarant is unavailable if dead, or too sick or infirm to take the stand. He is unavailable if he absents himself, and all attempts to find and get him to come to court fail. Less obviously, a declarant can be in the courtroom but still unavailable, because at the time of the trial he has no memory of the events, he rightly asserts a privilege not to testify, or he simply refuses to testify. Rule 804(a).

[59] In a criminal case, the foundation can have an added element. Proof of corroborating circumstances is required to admit a declarant's confession of a crime offered to exculpate another person accused of committing the same crime. A corroborating fact might be a showing that the declarant knows facts that could only be known by the perpetrator of the crime.

[60] These exceptions will be discussed in the primer on exhibits.

does not make admissible the witness's statement. For it to be admissible, it must fit into its own hearsay exception box.[61]

The General Ban on Character Evidence (Rule 404)

Be forewarned. Much of the law dealing with character evidence is "archaic, paradoxical and full of compromises and compensations by which an irrational advantage to one side is offset by a poorly reasoned counter privilege to the other."[62] For an advocate, this clumsy system creates opportunities. When a judge has discretion and the rule she is being asked to apply don't make much sense, an attorney can carry the day with a well-crafted argument.

The term "character evidence" describes evidence that does not relate directly to the facts in dispute at a trial. It is a form of circumstantial evidence. It involves proof that a person has a certain character trait, and having that trait makes it more likely that the person did something at issue in the case. A dishonest person is said to be predisposed to lie; a reckless person to take chances; a charitable person to extend a helping hand.[63] Listen as two friends talk about a rumor that a guy they know is cheating on his spouse. One says: "I'm sure he's cheating; it's just the sort of thing he'd do." The other says: "You've got him pegged right. It's probably not the first time either." For the two friends, character proves guilt. The next day the two friends are called for jury duty.[64]

Research shows that there is good reason to think jurors cannot be trusted to properly evaluate character evidence. As Mr. Spock would observe, humans are prone to error. They jump to conclusions about another person's character based on very little

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[61] If the witness's statement is inadmissible, the police report can be admitted if the inadmissible part is "redacted," meaning the inadmissible part is blacked out or otherwise excised.

[62] *Michelson v. United States*, 335 U.S. 469, 486 (1948); see Peter Tillers, "What's Wrong with Character Evidence," 49 Hastings L.J. 781 (1998).

[63] Character is not the same as habit. "Character is a generalized description of one's disposition, or of one's disposition in respect to a general trait such as honesty, temperance, or peacefulness." 1 McCormick on Evidence 1081 (7th ed. 2013). Habit is a person's "regular response to a repeated specific situation," or an organization's "routine practice." The distinction is important because Rule 406 says that "habit" evidence is admissible circumstantial proof that a person or organization did something, even if no one remembers it being done. See Charles Rose, *Everyday Evidence: A Practical Approach* eBook loc. 2530-2605 (2012).

[64] Among psychologists the theory that character traits determine how humans act has largely been replaced by the theory that situational pressures and interactions play a more important role. Based on current theory, a prior act of dishonesty can be useful in predicting a second act of dishonesty only if all the surrounding facts and circumstances are identical, which they rarely are. Anna Roberts, "Conviction by Prior Impeachment," 96 Boston U. Law. Rev. 1977, 1996 & notes 129-135 (2016).

evidence,[65] and they believe mistakenly that character reliably predicts conduct.[66] In addition, character evidence tempts jurors to return a verdict based on the desire to reward a good person or punish a bad person, despite what the non-character evidence proves or fails to prove about the issues in dispute.[67]

To prevent unfair prejudice, the rule-makers wrote a general ban on the use of evidence of a person's character to prove that the person has a propensity to do something. The general ban is found in the first sentence of Rule 404(a), which reads: "[e]vidence 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."[68]

The rule-makers also wrote exceptions to the general ban. Exactly because of the potential for character evidence to prejudice an adversary's case, trial lawyers search the exceptions for any pretext that might get the evidence before the jury. "For canny trial

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[65] Roderick Munday, "Stepping Beyond the Bounds of Credibility: The Application of Section1(f)(ii) of the Criminal Evidence Act 1898," Crim. L. Rev. 511, 513 (1986) ("Psychologists have reported for several decades on the tendency of people to judge one another on the basis of one outstanding 'good' or 'bad' characteristic. This is popularly known as the 'halo effect.' In essence, it represents our propensity to oversimplify our perception of others' personalities and to take for the whole that portion of someone else's personality which happens to be visible to us."). For extended discussion, see Lee Ross and Richard E. Nisbet, *The Person and the Situation* (2d ed. 2011).

[66] See Barrett J. Anderson, "Recognizing Character Evidence: A New Perspective on Character Evidence," 121 Yale L. J. 1912, 1931-1936 (2012); Michael Saks & Barbara Spellman, *The Psychological Foundations of Evidence Law*, eBook loc. 2830-3105 (2016). Research shows that a single instance of prior conduct is an especially unreliable predictor. An analysis of published studies found the level of predictability was worse than flipping a coin. Edward J. Imwinkelried, "Reshaping the 'Grotesque' Doctrine of Character Evidence: The Reform Implications of the Most Recent Psychological Research," 36 Sw. U.L. Rev. 741, 760-761 (2008). Research also shows that psychologists and psychiatrists, using in-depth clinical examinations and meticulously constructed histories, made wrong predictions two out of three times. Miguel A. Mendez, "Character Evidence Reconsidered: People Do Not Seem to be Predictable Characters," 49 Hastings L.J. 871, 876-877 (1998)

[67] *Michelson v. United States*, 335 U.S. 469, 475-76 (1948). In criminal cases, the law demands proof beyond a reasonable doubt, but character evidence pushes jurors toward resolving their doubts against an accused. *See* Theodore Eisenberg & Valerie P. Hans, "Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Conviction on the Decision to Testify and on Trial Outcomes," 94 Cornell L. Rev. 1353, 1357 (2009) (Based on an analysis of data from more than 300 criminal trials, the authors conclude that juries appear to rely on criminal records to convict when other evidence in the case normally would not support conviction. The effect in otherwise weak cases is substantial and can increase the probability of conviction to over 50% when the probability of conviction in similar cases without criminal records is less than 20%.)

[68] The ban on character evidence cannot keep jurors from searching the available evidence for clues about character. In the absence of formal proofs of character, jurors infer the character of a party or witness from the person's demeanor, along with whatever tidbits of background information the judge allows them to hear. See Daniel D. Blinka, "Character, Liberalism, and the Protean Culture of Evidence Law," 37 Seattle U.L. Rev. 87, 92, 104, 113-115 (2013). In criminal cases, savvy jurors can figure out that an accused has a criminal past from the accused's choice not to offer evidence of his good character and not to testify in his own defense. See Larry Laudan and Ronald J. Allen, "The Devastating Impact of Prior Crimes Evidence and Other Myths of the Criminal Justice Process," 101 J. Crim. L. & Criminology 493 (2013).

lawyers, the propensity rule is largely an exercise in evasion."[69] In the scheme of things, vast amounts of evidence of character are routinely admitted. So much that one can say: "[I]nadmissible character evidence is a small island in a vast sea of admissible character evidence."[70]

Character evidence comes in two forms. The first is testimony by so-called "character" witnesses offered to prove that a person has a pertinent character trait. Under the rules, a "character" witness is limited to stating his opinion about a person, or describing the person's reputation in the community. He may not relate specific instances of the person's conduct.[71] For example, a character witness could testify: "I would not believe Marty Wolf if he swore on a stack of Bibles and the original script of Casablanca." The witness cannot add examples of Wolf's whoppers to prove or corroborate his opinion that Wolf is a big fat liar.[72] Research shows that a "character" witness's opinion or reputation testimony is too vague and general to be very persuasive.[73]

The second form of "character evidence" is proof of specific instances of conduct from which one can infer that a person possesses a character trait predisposing him to commit certain kinds of acts. Evidence of specific acts is the "most convincing" form of character evidence, and "[a]t the same time, it possesses the greatest capacity to arouse prejudice, to confuse, to surprise, and to consume time."[74]

The rules do not automatically bar the admission of this dangerous kind of character evidence. It's fair to say that an accused on trial for selling illegal drugs to teenagers is unlikely to be acquitted if jurors learn that he has a history of selling illegal drugs to teenagers. Jurors are likely to think, "if he did it before, he probably did it again." Under the rules, that would be a misuse of the evidence. Nonetheless, the judge is likely to admit the evidence and deal with the danger by giving a limiting instruction. She will tell jurors that the law says they may not reason that the accused is guilty because he did something bad in the past. The judge presumes the jury will follow her

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[69] Daniel D. Blinka, "Character, Liberalism, and the Protean Culture of Evidence Law," 37 Seattle U.L. Rev. 87, 110-112 (2013).

[70] Peter Tillers, "What's Wrong with Character Evidence," 49 Hastings L.J. 781, 813 (1998).

[71] Rule 405(a) and Rule 608.

[72] Rule 405(a); Daniel D. Blinka, "Why Modern Evidence Law Lacks Credibility," 58 Buffalo L. Rev. 357, 396-397 (2010); Josephine Ross, "He Looks Guilty": Reforming Good Character Evidence to Undercut the Presumption of Guilty," 65 U. Pittsburgh L. Rev. 227, 236-240 (2004).

[73] Michael J. Saks & Barbara A. Spellman, *The Psychological Foundations of Evidence Law* eBook loc. 2496-2500 (2016).

[74] Fed. R. Evid. 405 advisory committee note (1972).

instruction.[75] In mock trial, there's no jury to instruct, but the effectiveness of a limiting instruction as a cure is one factor a judge can consider in determining whether to admit a piece of character evidence.

Exceptions to the General Ban

The remaining sections of this primer discuss exceptions that allow the use of the dangerous and "most convincing" form of character evidence.

● *A Criminal Defendant Calls a Character Witness* - Rule 404(a).

This exception allows the use of specific instances of conduct to impeach the testimony of a "character witness." Rule 404(a)(2) permits a criminal defendant to call "character witnesses" to testify that he or the victim has a pertinent character trait.[76] As observed earlier, a "character" witness can only speak in generalities. He can state his opinion or describe the reputation of the accused in the community for a pertinent character trait.[77]

The government in response is not limited to generalities. On cross-examination of the defendant's character witness the government can ask about specific acts of the accused. For example, an accused's "character" witness might testify on direct: "I've known Norman Bates for twenty years and it's my opinion that he would not hurt a

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[75] Rule 105. Judges work with a presumption that jurors follow instructions, but they share with practicing lawyers and scholars the view that evidentiary instructions don't work. For example, Judge Jerome Frank compared them to "exorcising phrases intended to drive out evil spirits; . . . no longer believed in, yet an inextricable part of a conventional system of observances." *United States v. Grunewald*, 233 F.2d 556, 574 (2d Cir. 1956) (Frank, J. dissenting in part) (internal quotation marks omitted), *rev'd*, 353 U.S. 391 (1957). Mock trial jury studies paint a different picture. They show that evidentiary instructions probably do work, although imperfectly and better under some circumstances than others. David Alan Sklansky, "Evidentiary Instructions and the Jury as Other," 65 Stanford L. Rev. 407, 423-439 (2013). Where character evidence is concerned, the studies show that people tend to take the forbidden path, notwithstanding judicial instructions. Michael J. Saks and Barbara A. Spellman, *The Psychological Foundations of Evidence* loc. 3218-3241 (2016); Michael D. Cicchini and Lawrence White, "Convictions Based on Character: An Empirical Test of Other-Acts Evidence," 70 Florida L. Rev. 347 (2018); but see Larry Laudan & Ronald J. Allen, "The Devastating Impact of Prior Crimes Evidence and Other Myths of the Criminal Justice Process," 101 J. Crim. L. & Criminology 493, 500-503 (2011). Research also shows that an instruction, by calling attention to the evidence, can boost its prejudicial effect. David Alan Sklansky, "Evidentiary Instructions and the Jury as Other," 65 Stanford L. Rev. 407, 450 (2013); Dan Simon, *In Doubt: The Psychology of the Criminal Justice System* 185-188 (2012).

[76] Rule 405(a). The exception discussed in the text applies to criminal cases only. Rule 404(a) bars both sides in a civil case from using character evidence of any kind as circumstantial proof of the other party's conduct. Myron H. Bright, Ronald L. Carlson & Edward J. Imwinkelried, *Objections at Trial*, eBook loc. 724-730 (7th ed. 2015).

[77] Rule 405(a); Anthony J. Bocchino & David A. Sonenshein, A Practical Guide to Federal Evidence 160 (9th ed. 2009).

fly."[78] On cross-examination, the prosecutor can ask: "Are you aware that the police have identified the bodies of six persons murdered at the Bates Motel?"[79]

Research indicates that the testimony of "character" witnesses more likely hurts than helps criminal defendants. People prefer tangible examples to vague generalities, and they tend to emphasize negative information about others over positive. On balance jurors are more persuaded by the prosecution's negative specifics than the defense's positive generalities.[80]

When a criminal defendant presents character evidence, he opens the door for the prosecution to rebut the evidence with evidence of its own.[81] If he does not present character evidence, the door stays closed. The government is blocked from offering character evidence.[82] To maintain the block a defense inadvertently must be careful. In opening statement it must not portray the accused as an honest, law-abiding citizen, and defense witnesses must not volunteer anything that sounds like a testament to the accused's good character.[83]

● *When Character is an Essential Element of a Charge, Claim, or Defense - Rule 405(b)*

This exception crops up occasionally in mock trial. It makes admissible all forms of character evidence, including evidence of specific acts, in cases where the substantive law makes a person's character an "essential element" of a charge, claim, or defense. The difference between an ordinary case and one where character is an "essential element" is best explained by comparing two lawsuits involving the same accident.

In the first, the injured person sues the driver of the truck that put her in the hospital. She claims the truck driver was speeding; the driver says he wasn't. The injured person offers evidence showing that the truck driver has a string of tickets for speeding and reckless driving. The judge will exclude the evidence. Of course, the

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[78] https://www.youtube.com/watch?v=dYDxxHrlmUg

[79] If the witness admits knowing about the murders, the admission tells the jury that the witness is either biased or has a very weird personal standard for evaluating character. If the witness denies knowing about the murders, the denial tells the jury that the witness does not know Norman all that well. Either answer makes the witness's testimony less credible. Edward J. Imwinkelreid, *Evidentiary Foundations* § 6.01[5] (2014).

[80] Jennifer H. Hunt & Thomas Lee Budeshein, "How Jurors Use and Misuse Character Evidence," 89 Journal of Applied Psychology 341-61 (2004).

[81] *Michelson v. United States*, 333 U.S. 469, 479 (1948) ("The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him.)

[82] See Charles H. Rose, *Everyday Evidence: A Practical Approac*h, eBook loc. 1914 (2012).

[83] Joseph F. Anderson, Jr., *Effective Courtroom Advocacy*, eBook loc. 2654-2669 (2009);

evidence is circumstantial proof that tends to make it more likely that the truck driver was speeding at the time of the accident, but it is not essential proof. The law does not require the plaintiff to prove that the driver is a reckless person or has a character flaw that makes him prone to speeding. The plaintiff need only prove that the driver was speeding at the time of the accident. The plaintiff can prove that by the usual means: eyewitness and expert testimony, together with physical evidence. In this case, the general ban applies. The law fears the jury will give the string of traffic tickets too much weight and undervalue evidence showing that at least on this occasion the driver was not speeding.

In the second case, the same injured person sues the company that employed the driver. She claims that the company was negligent because it allowed an unsafe driver to get behind the wheel of its trucks. At trial, the same character evidence is offered - the string of traffic tickets for speeding and reckless driving. The evidence is admissible this time as essential proof of the company's negligence. To prove its negligence, the plaintiff must prove that the driver was the kind of person a "reasonable" company would not employ to drive its trucks. The plaintiff must prove that the employee was a reckless driver, and the company knew, or should have known, that he was a reckless driver. The string of tickets is essential evidence.[84]

● Specific Acts Offered to Prove Something Other than Character - Rule 404(b)

Rule 404(b) is an important rule. It makes evidence of specific acts admissible if a party can show that it is being offered to prove something other than a person's propensity to do something bad. As observed earlier, where evidence is legitimately admissible for one purpose but not another, the usual practice is to admit the evidence.

By its terms, Rule 404(b) allows the use of evidence of any relevant "prior crime, wrong, or other act" by any "person" when offered to prove anything other than propensity. The rule puts no limit on the kind of prior conduct that can be offered into evidence. It may include evidence of a person's involvement in murders, pillages, rapes, arsons, and any other abominations, including crimes that did not result in an arrest or conviction, and crimes that the person denies committing.[85] The rule's use of the word "person" means the act can be that of a party, witness, or someone who is neither a party nor a witness. The rule's list of permissible purposes includes intent, motive, knowledge,

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[84] Joseph F. Anderson, *Effective Courtroom Advocacy* loc. 2924-2937 (2009); James W. McElhaney, *McElhaney's Trial Notebook* 257-259 (2006).

[85] Where the federal rules of evidence apply, a judge need only determine that the jury could reasonably find by a preponderance of the evidence that the accused committed the prior act. Rule 104(b); *Huddleston v. United States*, 485 U.S. 681, 689-90 (1988). In many states, the standard of proof is higher when the prior act involved criminal behavior. In Texas, for example, the standard is "proof beyond a reasonable doubt." See *Harrell v. State*, 884 S.W.2d 154, 160-61 (Tex. Crim. App. 1994). In Minnesota and more than a dozen other states, the evidence must be "clear and convincing." See *State v. Ness*, 707 N.W.2d 676 (Min. 2006). In mock trial, the matter is open to argument, absent guidance in the case materials.

opportunity, identity, plan, preparation, absence of mistake, and lack of accident, but the list is not exhaustive, and the possible uses are "almost infinite."[86] With so many possibilities "it is not hard for an attorney to make a colorable argument that at least one applies in every case."[87]

It helps to distinguish two applications of the rule: the acts of witnesses, and the acts of parties. The two applications overlap when the "person" is both a witness and a party, a common situation in mock trial.

Witnesses. The rule opens the door to any theory of impeachment that does not depend on the inference that the witness has an untruthful character. For example, it makes admissible evidence of an act tending to show that a witness has a bias or motive to lie or lacked the capacity to accurately see or recall.[88]

A government witness testifies to seeing the defendant sell heroin to teenagers. In response, defense counsel offers evidence that the prosecution's witness regularly beats up his wife, was recently arrested for mugging an old lady, and is currently on probation after pleading guilty to torturing a dog. Of course, the evidence tends to prove that the witness is a despicable person. Nonetheless, the proof is admissible under Rule 404(b) because it shows the witness has a "motive" to lie. The situation makes the witness dependent on the good will of the prosecutor to stay out of jail, or at least get favorable treatment. It gives the witness a motive to tell whatever fairy tale the witness thinks will make the prosecutor happy.[89]

Say the issue in a case is who provoked a bar fight. An eyewitness testifies it was the defendant. In response, defense counsel offers evidence showing that the eyewitness over many months drank in excess and downed opioid pills. Of course, the evidence tells the jury that the witness is an addict. Nonetheless, the proof is admissible under Rule 404(b) if counsel can show that the witness was drinking and popping pills the night of the fight and has medical evidence that the mix causes the witness to hallucinate and suffer memory loses. The evidence is relevant because it calls into question the witness's capacity to accurately see and recall.[90]

In both examples, Rule 404(b) allowed the attorney to get before the jury evidence that impeaches the witness's credibility. If the incidental effect of the evidence

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[86] *United States v. Stephans*, 365 F.3d 967, 975 (11th Cir. 2004) (The list provided in the rule is not exhaustive and the "range of relevancy outside the ban is almost infinite.")

[87] Stephen Salzburg, *Trial Evidence* 367 (2007)

[88] Rules 609 and 608, which are discussed later, control the use of bad act evidence to impeach a witness on the ground that he has a dishonest character.

[89] See Terrence F. McCarthy et al., *McCarthy on Impeachment: How to Find and Use these Weapons of Mass Destruction* loc. 1188-1370 (2016)

[90] See Michael H. Graham, *Evidence Law Mastery, Hands-On Learning* 617-618 (2016).

is to make the witness look bad, so be it. Opposing counsel has limited means to prevent the admission of the evidence. She can object based on Rule 611(a), which gives a judge discretion to exclude evidence that causes a witness "undue embarrassment." She might also try invoking Rule 403, but that rule protects parties from unfair prejudice, not witnesses.

Parties. Judges these days tend to carefully monitor the admission of evidence of the "other acts" of a party, knowing the prejudice the evidence can cause. At the threshold, the side offering the evidence is expected to clearly explain how the evidence is relevant for a purpose other than proving propensity. The side must name specifically the fact of consequence that the evidence is offered to prove. It must then explain the reasoning that logically connects the prior act to the fact of consequence, and it must show that the connection in no way relies on proving propensity.[91]

Say an accused is on trial for the murder of a police officer. At the accused's trial, the prosecution offers evidence showing that before the murder the accused was arrested and charged with smuggling and dealing cocaine, but managed later to escape from custody. The evidence would be admissible under Rule 404(b) to prove the accused had a "motive" to kill the police officer. When the now-deceased officer approached, the accused had a motive to use force - to prevent being recaptured and tried for the drug crimes. The only inference that need be drawn to establish the evidence's relevance is that a person with a motive to commit a specific crime is more likely to have committed the crime than someone without a motive. The inference can be drawn even if the accused had generally peaceful character.[92]

Say an assailant pistol whips a person. While fleeing the scene the assailant drops the pistol. The police recover it. At trial, the defendant claims someone else committed the crime. The prosecution seeks to put in evidence showing that a month earlier the defendant stole the dropped gun (with its one-of-a-kind serial number) from a local gun store. The evidence is admissible under Rule 404(b) as proof of the "identity" of the assailant. The only inference that need be drawn to establish the relevance of the evidence is that a person who recently possessed the unique weapon used in the assault is more likely to have committed the crime than someone who never possessed it. The inference does not depend on the defendant's character.[93]

Once the proponent of the evidence shows that the evidence has a permissible purpose, Rule 403 comes into play. To keep the evidence out, the opponent must persuade the judge that the "unfair prejudice" the evidence is likely to cause

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[91] Edward J. Imwinkelreid, "The Ambivalence in the American Law Governing the Admissibility of Uncharged Misconduct Evidence," UC Davis Studies Research Paper Series, No. 438 (2015).

[92] Lee E. Teitelbaum & Nancy Augustus Hertz, "Evidence II: Evidence of Other Crimes as Proof of Intent," 13 N. Mex. L. Rev. 423, 425 (1983).

[93] Edward J. Imwinkelreid, "The Ambivalence in the American Law Governing the Admissibility of Uncharged Misconduct Evidence," UC Davis Studies Research Paper Series, No. 438 (2015).

substantially outweighs its probative value. Looking at the reported decision, one finds a "vast assortment of fact patterns," "many arguments for and against the admission," and "a bewildering assortment of inconsistent rulings."[94]

From the reported cases, commentators have come up with lists of factors that judges have considered.[95] (1) The extent to which the point to be proved is disputed. (2) The adequacy of the proof that the prior conduct happened. (3) The probative force of the evidence. (4) The proponent's need for the evidence. (5) The availability of less prejudicial proof. (6) The evidence's inflammatory or prejudicial effect. (7) The similarity to the charged crime, or other wrongdoing. (8) The judge's assessment of the effectiveness of limiting instructions. The list can help a lawyer's search for possible pieces of argument. The advocate's task is to find pieces specific to the case that can be welded into a persuasive argument, for or against the evidence's admission.

● Conduct Proving that a Witness has a Lying Character - Rules 608 & 609.

Rules 608 & 609 are impeachment rules. They control the use of specific instances of conduct to prove that a witness has a lying character, and therefore is willing to disregard the oath to tell the truth.[96] Underlying the two rules is a belief that prior conduct will help jurors identify witnesses whose testimony should not be trusted.[97] It's assumed that evidence of a past lie tends to prove that a witness has a lying character.[98] The rules are also influenced by a notion that a witness who

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[94] Michael J. Saks and Barbara A. Spellman, *The Psychological Foundations of Evidence Law* 3140-3143 (2016)

[95] The list in the text draws primarily on Charles H. Rose, *Everyday Evidence: A Practical Approach* loc. 2170-2177 (2012). Similar lists can be found in other trial evidence books.

[96] Rule 404(a)(3) specifically exempts from the character evidence ban evidence made admissible by Rules 608 and 609.

[97] Research into lying shows that most people lie a little, and mostly with benign intentions. The majority of lies are told by a small part of the population, about ten percent. These prolific liars fib more frequently, tell more "big" lies, and are less inhibited about lying. Kim B. Serota and Timothy R. Levine, "A Few Prolific Liars: Variation in the Prevalence of Lying," 34 Journal of Language and Social Psychology 138 (2014). What a judge and jury should want to know about a witness is not whether he has told lies (everyone has), but whether the witness is a prolific liar "who tells really big lies under really serious circumstances." Michael J. Saks and Barbara A. Spellman, *The Psychological Foundations of Evidence* loc. 3286 (2016).

[98] Research shows that dishonest behavior is the result of a mutual interaction between character and situation, and that even trivial situational differences effect whether a person will behave dishonestly. Dan Ariely, *The (Honest) Truth About Dishonesty: How We Lie to Everyone - Especially Ourselves* 31-54 (2013). No psychologist would consider one dishonest act to be a sufficient basis to conclude that an individual has a propensity to lie. See Julia Simon-Kerr, "Credibility by Proxy," 85 George Washington Law Review 152, 212 (2017). And even a person with a propensity to lie outside the courtroom is likely to feel inhibited by the unique situational factors found in the courtroom – the formal setting, the oath, the presence of strangers scrutinizing every word, and the prospect of cross-examination. *See* Barrett J. Anderson, "Recognizing Character: A New Perspective on Character Evidence," 121 Yale L.J. 1912, 1932-

committed a wrongful act, even one not involving a lie, is less worthy of belief. The underlying logic involves two inferences: a person who was willing to disobey the law or ignore basic social norms has a generally bad character, and a person with a generally bad character is more likely to testify falsely.[99]

When a judge relies on Rules 608 or 609 to admit evidence, she will give, if asked, a limiting instruction. She will tell the jury that it may consider the evidence for the sole purpose of deciding if the witness testified truthfully.

Rule 608(b) deals with specific instances of conduct that did not lead to a criminal conviction. It allows a cross-examiner to ask a witness about acts from which a jury might reasonably infer that the witness has a propensity to lie. The judge doesn't have to allow the inquiry. The rule expressly leaves the matter to the judge's discretion.

The rule permits a cross-examiner to ask about lies, misrepresentations, or deceitful acts of all kinds, along with "the details, a process that makes the prior lie more 'vivid' while permitting multiple questions regardless of the answers."[100] The inquiry is not necessarily limited to actual lies. Some judges hold the expansive view that any behavior seeking personal advantage by taking from others in violation of their rights reflects adversely on a witness's character for truthfulness. Examples include theft,

1933 (2012); Michael J. Saks and Barbara A. Spellman, *The Psychological Foundations of Evidence* loc. 3261-3297 (2016).

[99] Justice Oliver Wendell Holmes is the oft-cited source. In 1884, the Justice observed that a prior criminal or bad act shows a "general readiness to do evil" from which one can infer a "readiness to lie." *Gertz v. Fitchburg RR Co.*, 137 Mass. 77, 78 (1884). However, prevailing psychological theories and existing empirical research provide no support for the argument that someone who has been found guilty of a criminal offense in the past is more likely to lie on the witness stand than someone who has no prior conviction. James E. Beaver & Stephen L. Marques, "A Proposal to Modify the Rule on Criminal Conviction Impeachment," 58 Temple L.Q. 585, 613 (1985). The assumption that "disobedience to law is logical evidence of a greater propensity to lie" has been described as "'junk science' at its worst." Danny W. Holley, "Federalism Gone Far Astray from Policy and Constitutional Concerns: The Admission of Convictions to Impeach by State Rules – 1990-2004, 2 Tenn. J.L. & Pol'y 239, 303 (2005).

[100] Daniel D. Blinka, "Why Modern Evidence Law Lacks Credibility," 58 Buffalo L. Rev. 358, 397 (2010).

selling or buying stolen property, bribery, and threats aimed at keeping a witness from testifying.[101]

A cross-examiner must have a "good faith" basis for questions about a person's prior conduct. A cross-examiner cannot make something up and present it to the jury as if it were a fact.[102] Cross-examination by false or baseless insinuation is not allowed.[103]

A cross-examiner can get stuck with a lie. If a "mock trial" witness's pretrial statement does not bind him to admit the prior conduct, the witness may be able to claim that the conduct never happened or tell a false version of what happened. If that happens, the cross-examiner cannot use what is called "extrinsic evidence" to prove the lie.[104] She cannot call another witness, or put in evidence a document, to prove the conduct took place or contradict the witness's version of what happened.

Rule 609 controls the use of criminal convictions to attack a witness's character for truthfulness. The rule is complex. It's not worth spending a lot of time studying the rule, unless the competition's case materials give a witness a criminal conviction. It's enough to know the basics.

The rule has two primary parts. One part, Rule 609(a)(2) says that a judge must allow the impeachment of a witness with convictions for what are called *crimina falsi*, crimes in which the ultimate criminal act is one of deceit. These are crimes where a prosecutor must prove a "dishonest act or false statement" to win a conviction. Examples are perjury, fraud, and forgery.[105] Convictions for other kinds of crimes are not admissible under this subsection, even if the person acted deceitfully while committing the crime. A murderer, for example, does not commit a *crimina falsi,* even if

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[101] *See United States v. Manske*, 186 F.3d 770, 774-775 (7th Cir. 1999).

[102] A good faith basis is required only when the cross-examiner's question asserts that a fact is true; it is not required if the cross-examiner merely asks if something is true. The question "Your mother wears combat boots, right?" requires a good faith basis; the question "Did your mother ever wear combat boots?" does not. Michael Graham, *Evidence Law Mastery, Hand-On Learnin*g eBook loc. 625 (2016).

[103] The restriction is judge made; it's not mentioned in the rules of evidence. *See* Todd B. Berger, "The Ethical Limits of Discrediting the Truthful Witness: How Modern Ethics Rules Fail to Prevent Truthful Witnesses from Being Discredited Through Unethical Means," 99 Marq. L. Rev. 283, 311-314 (2015). In mock trial, the restriction can be inferred from the rules against unfair extrapolation.

[104] The term "extrinsic evidence" is defined as evidence that cannot be elicited during the cross-examination of the witness being impeached. It's extrinsic evidence if another witness must be called to prove the impeaching facts or provide the foundation for the admission into evidence of a document that proves the impeaching facts. Paul F. Rothstein, "Just What Evidence of Witness Misdeeds Does Federal Evidence Rule 608(b) Exclude? – Imwinkelried vs. Rothstein," 49 Creighton L. Rev. 121, 122, 124 (2015).

[105] Rule 609(a)(2). The words "dishonest act" in the rule could be interpreted broadly to mean any illegal or corrupt act, but the legislative history strongly suggests that the words were intended to be narrowly construed, so that Rule 609(a)(2) is limited to crimes that necessarily involve deceit, falsification, or untruthfulness. See Graham Lilly, Daniel Capra and Stephen Saltzburg, *Principles of Evidence* 286-87 (6th ed. 2006).

he used deceit to lure his victim to the isolated spot where he fired the fatal shot and tried to cover up his crime by burying the body. For murder, killing is the ultimate criminal act, not deceit. To prove murder, a prosecutor does not have to prove deceit.[106]

The other part, Rule 609(a)(1) deals with convictions that did not involve a "dishonest act or false statement," but are deemed serious breaches of the law, defined as felonies.[107] For these crimes, the judge must apply a balancing test. When the witness is the defendant in a criminal case, the prosecution must persuade the judge that the probative value of admitting the evidence outweighs its prejudicial effect on the accused. When the witness is someone other than the defendant in a criminal case, Rule 403 applies. The party opposing the evidence's admission must persuade the judge that the unfair prejudice the conviction will cause outweighs its probative value.

Courts have identified five factors for consideration in balancing a conviction's probative value against its prejudice to a defendant: (1) the impeachment value of the prior crime evidence; (2) the proximity in time of the conviction and the defendant's subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the witness's testimony; and (5) the centrality of the credibility issue.[108] The list is not exclusive. Other relevant factors may be considered.[109]

Proof that a witness was criminally convicted can be made in one of two ways: either by cross-examination of the witness or by introducing a public record of the conviction. In "mock trial," the impeachment usually must be accomplished on cross-examination because the case materials rarely include the record. The inquiry on cross-examination is restricted to the fact of the conviction, the date, the name of the crime,

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[106] Fed. R. Evid. 609, Committee Notes to the 2006 Amendment, https://www.law.cornell.edu/rules/fre/rule609

[107] Rule 609(a)(1). A felony is a crime punishable by more than one year in prison. A misdemeanor is a crime punishable by a year or less in prison. A misdemeanor conviction can be used to impeach the credibility of a witness only if it involved a false statement or dishonest act.

[108] Jack B. Weinstein and Margaret Berger, *Weinstein's Evidence Manual*, loc. 23900-23909 (Student ed., 10th ed. 2015).

[109] Another factor may be the reliability of a conviction as proof that a witness committed the earlier crime. Anna Roberts, "Impeachment by Unreliable Convictions," 55 Boston College L. Rev. 563, 593-600 (2014). At a time when DNA testing has proved that many people have been wrongfully convicted and the legal system has come to appreciate the enormous power prosecutors wield, it's become reasonable to doubt that a conviction means a person committed a crime. See Anna Roberts, "Conviction by Prior Impeachment," 96 Boston University Law Review 1977, 1993-94 (2016).

and the sentence received. A cross-examiner cannot inquiry about details of how the crime was committed.[110]

The credibility of a witness who has been impeached by a criminal conviction can be rehabilitated by testimony showing the circumstances of the conviction if they somehow lessen the blow of the impeachment. For example, if a witness committed a crime to support a drug habit and the witness has been drug-free for a substantial time following the crime, that fact would tend to rehabilitate the witness.[111] But a witness who attempts to explain away or minimize his conviction opens the door for the opponent on cross-examination to ask about the details of how and why the prior crime was committed.[112]

Where does all this leave an advocate? She can count on being allowed to use a witness's prior lie to impeach the witness's credibility. A judge applying Rule 609 must admit evidence that the witness was convicted of a crime that required proof of a false statement. A judge applying Rule 608 will allow a cross-examiner to ask a witness about prior lies the witness told, unless common sense tells the judge that the lie is not evidence of a lying character.[113] A mother's lie to save her child from harm does not tend to prove a propensity to lie in other circumstances. A lie told fifteen years ago when the witness was a teenager says nothing about the mature adult's character for truthfulness.[114]

Beyond that, an advocate can count on nothing. The two rules give individual judges enormous discretion, but no guidance on how to rule when the prior crime or

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[110] Myron H. Bight, Ronald L. Carlson & Edward J. Imwinkelried, *Objections at Trial*, E-book loc. 2031-2055 (7th ed. 2015). However, when the conviction is for a crime of dishonesty, Rule 608 opens the door to inquiry by a cross-examiner into the details of how the crime was committed. The two rules together allow what one alone does not. Anthony J. Bocchino & David A. Sonnenshein, *A Practical Guide to Federal Evidence* 135 (9th ed. 2009).

[111] Anthony J. Bocchino & David A. Sonnenshein, A Practical Guide to Federal Evidence 139-140 (9th ed. 2009). Testimony that the witness pled guilty to the impeaching crime can undercut the conviction's probative value. The plea can be seen as an act of honesty. See 120 Cong. Rec. 37,082 (1974) (statement of Sen. Biden) (for defendants, a guilty plea is like "having admitted their guilt, which in a way is almost speaking for their credibility, having acknowledged they did it.")

[112] Myron H. Bight, Ronald L. Carlson & Edward J. Imwinkelried, *Objections at Trial*, E-book loc. 2055--2063 (7th ed. 2015).

[113] The inquiry must be about a specific lie. A cross-examiner cannot ask a witness if he ever lied. Everybody lies a little. *See Wilson v. City of Chicago*, 6 F.3d 1233, 1239 (7th Cir. 1993) (Posner, J.); Terence F. MacCarthy et al., *MacCarthy on Impeachment: How to Find and Use These Weapons of Mass Destruction* loc. 1428 (2016).

[114] See Terence F. MacCarthy et al., *MacCarthy on Impeachment: How to Find and Use These Weapons of Mass Destruction* loc. 1446 (2016).

conduct did not involve a lie.[115] The rules effectively leave a judge to decide the matter based on nothing more than personal intuition and precedent.[116] Unsurprisingly, judges coming from different backgrounds have different intuitions about which crimes or acts mark a person as an untrustworthy witness. The precedents are inconsistent. Taken together, they don't make much sense.

In practice, the uncertainty is less than one would expect. Empirical studies show trial judges incline to allow the impeachment.[117] Judges routinely allow direct examiners leeway to ask about a witness's "background," including age, education, occupation, service in the armed forces, family life, and assorted homely tidbits. The point of such evidence is to provide jurors with a snapshot of the character of the witnesses.[118] Allowing Rule 608 and 609 impeachment is a way to balance the picture. The jury gets to see both the good and bad sides of the witnesses. With a complete picture, jurors are in a better position to decide which witnesses to trust.[119]

Judges also start with a preference to let jurors make up their own minds as to whether the impeaching information is probative of the witness's credibility.[120] And when a witness's credibility is crucial to deciding a case, judges tend to admit just about anything that might help jurors decide which version of the facts to believe.[121]

- **Evidence that a Witness has a Truthful Character – Rule 608.**

A final observation. It's often forgot that Rule 608 restricts the use of character evidence to prove that a witness is a truthful person. Subpart "a" says that evidence that a witness has a truthful character is admissible only after the witness's character for truthfulness is attacked. Subpart "b" says that inquiry into specific instances of conduct

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[115] Douglas Ziegler, "The Confusing Relationship Between Rules 608(b) and 609 of the Federal Rules of Evidence," 46 N.Y.U. L. Rev. 527, 530, 532 (2002-2003).

[116] See Julia Simon-Kerr, "Credibility by Proxy," 85 George Washington Law Review 152, 158 (2017).

[117] See, e.g., John H. Blume, "The Dilemma of the Criminal Defendant with a Prior Record – Lessons from the Wrongfully Convicted," 5 J. Empirical L. Stud. 477, 490 (2008). (In a study of wrongfully convicted defendants, the prosecution in every instance was allowed to use the criminal record to impeach a defendant who chose to testify); Harry Kalven & Hans Zeisel, *The American Jury* 147 tbl. 4 (1966) (If a defendant with a record testified, 72% of the time the jury learned about the record. The percentage is based on 1534 defendants from Samples I and II who had criminal records).

[118] Daniel D. Blinka, "Character, Liberalism, and the Protean Culture," 37 Seattle L.R. 87, 113-114 (2013).

[119] See Julia Simon-Kerr, "Credibility by Proxy," 85 George Washington L. Rev. 152, 202-203 (2017).

[120] See, e.g., *United States v. Howell*, 285 F.3d 1263, 1268 (10th Cir. 2002)("We are not certain what evidence of two convictions for theft by taking, one conviction for armed robbery, and one conviction for aggravated assault says about [the witness'] credibility, but we are certain that the jury should have been given the opportunity to make that decision.")

[121] See Jack B. Weinstein and Margaret Berger, *Weinstein's Evidence Manual*, loc. 23916 (Student ed., 10th ed. 2015).

to prove character can only be made on cross-examination.[122] The two parts together mean that a "mock trial" witness on direct or redirect examination should not be able to testify to acts showing him to have been an exemplary Boy Scout. A politician may not talk about the times he didn't take a bribe. A police officer may not tell the jury he was named "Officer of the Year."[123]

[122] See Michael Graham, *Evidence Law Mastery, Hand-On Learning* 688 (2016).

[123] J. Alexander Tanford, *The Trial Process: Law, Tactics and Ethics* 216-217 (4th ed. 2009). The evidence may also be inadmissible hearsay. For example, testimony that a witness was named "Officer of the Year" is an out-of-court statement by the police officials who decided that the witness merited the award.