EVIDENTIARY FOUNDATION AND USE

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INTRODUCTION

Application of a rule of evidence is best understood by seeing it in use. The use of evidence, more than reading the rule along with its commentary and explicating caselaw, demonstrates the "how" and "why" of admissibility, the rationale for a rule's scope and purpose. And in a trial setting, evidentiary use occurs during each party's closing argument (and the subsequent, if often indecipherable, jury instructions).

Many texts offer materials on evidentiary foundations - the predicate questions necessary to elicit a particular type of evidence. Study of these techniques illustrates the mechanics of the courtroom but fails to provide the Evidence student with a complete understanding of the purpose(s) for which the evidence (fact or opinion) was admitted.

Closing arguments show the Evidence student (and novice practitioner) the rationale for the admission of an item of evidence. In a closing, the questions of "why" a piece of evidence was admitted, and "how" it might be considered (i.e., used), are (or should be) answered. And when evidence is admitted for a limited purpose, *see*, Rule 105, F.R.E., the closing argument must be scrutinized - has counsel properly cabined or circumscribed the evidence or taken the evidence and mis-used it, arguing it for purposes for which it was not admitted (and instead for which it was properly excluded)? The same is true with jury instructions - the question must be asked whether the instructions make clear the limited purpose and proscribe improper use.

These materials provide examples of "use" of evidence under those Rules which are applied most commonly in litigation. For each rule, a case file is briefly summarized to provide context to the subsequent examination and argument. A brief transcript of foundational questions and responses provides context for a closing argument excerpt. The argument excerpt focuses on the particular piece of evidence at issue, and what purpose(s) it was properly admitted for. Where evidence may serve multiple purposes but a Rule admits it only for a limited one, an "impermissible" closing argument is also excerpted to show the boundaries of the Rule's application and how the evidence was not authorized to be used.

Studying these closing argument examples in conjunction with traditional Evidence course materials - the individual Rule of Evidence, its commentary, and applicable caselaw - serves to make concrete the scope of each Rule and its role in the trial process.

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RULE 401 - RELEVANCE

Rule 401:

Evidence is relevant if:

(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and

(b) the fact is of consequence in determining the action.

FRE Commentary:

Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case. Does the item of evidence tend to prove the matter sought to be proved? Whether the relationship exists depends upon principles evolved by experience or science, applied logically to the situation at hand...The rule summarizes this relationship as a "tendency to make the existence" of the fact to be proved "more probable or less probable."...

The standard of probability under the rule is "more * * * probable than it would be without the evidence." Any more stringent requirement is unworkable and unrealistic. As McCormick § 152, p. 317, says, "A brick is not a wall," or, as Falknor, Extrinsic Policies Affecting Admissibility, 10 Rutgers L.Rev. 574, 576 (1956), quotes Professor McBaine, "* * * [I]t is not to be supposed that every witness can make a home run." Dealing with probability in the language of the rule has the added virtue of avoiding confusion between questions of admissibility and questions of the sufficiency of the evidence.

The rule uses the phrase "fact that is of consequence to the determination of the action" to describe the kind of fact to which proof may properly be directed. The language is that of California Evidence Code § 210; it has the advantage of avoiding the loosely used and ambiguous word "material." ...The fact to be proved may be ultimate, intermediate, or evidentiary; it matters not, so long as it is of consequence in the determination of the action...

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

general requirement that evidence is admissible only if directed to matters in dispute...A rule limiting admissibility to evidence directed to a controversial point would invite the exclusion of this helpful evidence, or at least the raising of endless questions over its admission.

Foundation:

[Civil trial: issue of medical malpractice, whether doctor was careless when performing surgery. Examination by plaintiff's counsel.]

Q: Sir, do you know the defendant, Dr. Malman?

A: Yes.

Q: Did you see him the night before the surgery in this case, that is, the night of March 22, three years ago?

A: Yes.

Q: Tell the jury where and when you saw him.

A: Dr. Malman was at a gentleman's club, buying drinks and dancing with the performers.

OPPOSING COUNSEL: Objection.

THE COURT: Overruled.

Q: Sir, how long did you remain at the club?

A: Dr. Malman and I closed it down, at 2 a.m.

Q: Do you know where he went then?

A: We drove to the river, and he and I jogged three miles in the dark. By that time it was 4 a.m., and I left him. He said he was going to the hospital for a 6 a.m. surgery. I dropped him there and went home.

Q: Do you know how much alcohol he imbibed?

A: That I can't say, mostly I remember him buying for others.

Q: Did you drink?

A: No. I was the designated driver.

Q: No further questions.

Use:

[Plaintiff Counsel - Closing Argument]:

Members of the jury, our contention is simple. You can't perform surgery, using a scalpel on a person's vital organs, without a good night's sleep and a clear head. And Dr. Malman had neither.

We now know that Dr. Malman was partying the night before. He and the witness "closed it down." Now, the issue is not that some people go to a chess club and others to a gentlemen's club, but the issue is rest. Was he rested?

No. Club, river, hospital. No rest.

And what else do we know? The witness was the "designated driver." Who is that? The one person in a group who does not drink, in order to be able to drive everyone home safely. Why is that important? Because if he is the designated driver, and Dr. Malman was his passenger, that is a piece of circumstantial evidence that Dr. Malman was drinking that night.

Can I prove that? No, I have only his friend as a witness, and no blood alcohol test. But you are permitted to use your common sense. You may draw inferences, logical conclusions. If the friend is the designated driver, what does that make Dr. Malman?

Let me now turn to what I believe the Judge will tell you about the law, and what the law requires of a surgeon...

Comment:

Evidence need only tend to advance the inquiry. In the words of one court,

> Evidence is relevant if it logically tends to establish a material fact in the case, tends to make a fact at issue more or less probable, or supports a reasonable inference or presumption regarding the existence of a material fact. Evidence that merely *advances an inference* of a material fact may be admissible, even where the inference to be drawn stems only from human experience.

Commonwealth v. Hawk, Pa., 709 A.2d 303 (1988). In this example, the fact of someone else being the designated driver does not conclusively prove that Dr. Melman was drinking. It is admissible, however, to "advance [the] inference" that he was.

Rule 404:

Character Evidence.

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

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

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

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

(i) offer evidence to rebut it; and

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

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

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

FRE Commentary:

In most jurisdictions today, the circumstantial use of character is rejected but with important exceptions: (1) an accused may introduce pertinent evidence of good character (often misleadingly described as "putting his character in issue"), in which event the prosecution may rebut with evidence of bad character; (2) an accused may introduce pertinent evidence of the character of the victim, as in support of a claim of self-defense to a charge of homicide..., and the prosecution may introduce similar evidence in rebuttal of the character evidence, or, in a homicide case, to rebut a claim that deceased was the first aggressor, however proved; and (3) the character of a witness may be gone into as bearing on his credibility. McCormick §§ 155-161. This pattern is incorporated in the rule.

...

"Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main

question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened."

RULE 404(a) In Practice - I

Foundation:

[Trial: Criminal case, wife is charged with murdering her husband. Defense is that husband beat the wife regularly, and she murdered him in self-defense. Examination by defense counsel.]

Q: Please tell the jury your relationship to the deceased.

A: I am his mother.

Q: I'm sorry to have to ask you these next questions, but did your late son have a problem controlling his temper?

A: Yes.

Q: Did you observe your son ever do that?

A: Yes.

Q: Once, a few times or many?

A: Many, way too many.

Q: Ma'am, based upon observing your son at these times, did you develop an opinion as to what type of character he had in terms of peacefulness or aggressiveness?

A: Yes.

Q: What is that opinion?

A: It is my opinion that my son had an explosive temper, and when he went off he could be extremely dangerous.

Q: Ma'am, how did you come to form that opinion?

A: From seeing behaviors in the home, in his interactions with other people. Family and strangers.

Q: How about other people in the family and in the community who knew your son. Among them, what was his reputation in terms of being non-violent or being violent?

A: I hate to say it, but everyone I spoke to about my son talked about how violent, how reactive,

how volatile he was.

Q: No further questions.

Use:

[Defense counsel - closing argument]

Self defense. What is it? The Judge will tell you - it is a right, a right to be used carefully, but a right each of us has. A right to take necessary steps when we are in danger.

And how do we know we are in danger? From the circumstances, from the relative size of the person, from the history.

My client has told you that history, one of violence and degradation. Are there witnesses to that? For the most part, no. Battering takes place behind closed doors. Victims of battering make excuses, they camouflage what has happened to them.

So how can I stand before you and say "believe my client?" Because we now know what type of man her husband was. A man of a violent aggressive character. We know that in two ways, and from a most reliable source. His own mom.

What is his character? You've heard her opinion and it is a solid opinion. Opinions are worth the facts that go into them. She is his mom, and she's seen plenty. It's not a one-shot opinion, it is an opinion gained from years of experience.

How else do we know that my client's husband was a man of violence? His mom related to you the reputation her son had in the family and in the community. You get a reputation from how you act. And what was his reputation? Listen to what his own mother testified to. "Everyone I spoke to about my son talked about how violent, how reactive, how volatile he was." Listen to the judge's instruction when we are done. She will tell you that you may use proof of a person's character to prove how he acted the day of this terrible incident.

And that character is of being a violent man. That evidence proves my client's story, proves that the husband was the aggressor that day, and clearly supports my client's need to act in self-defense.

Comment:

Evidence of a person's character, to prove action in conformity therewith, is limited almost exclusively to criminal cases and to circumstances where the defense initiates its use. The form must be that of opinion or reputation testimony. The relevance of this has been explained as follows:

> [E]vidence of the victim's aggressive character may be admissible...to establish that the victim was the aggressor. Federal Rule of Evidence 404(a)(2) permits the use of "evidence of a pertinent trait of character of the victim of the crime offered by the accused . . .." However, Fed. R. Evid. 405 limits the type of character evidence to reputation or opinion evidence unless the character or trait of character is an essential element of the charge, claim, or defense...[T]he use of evidence of a victim's violent character to prove that the victim was the aggressor is circumstantial use of character evidence

United States v. Bautista, 145 F.3d 1140, 1152 (10th Cir. 1998). In the example, the testimony of the mother establishes her [now deceased] son's character for being aggressive; and this provides circumstantial proof of the son being the actual aggressor, *i.e.*, that the son "acted in conformity" with his character on the day of the slaying.

RULE 404(a) in Practice II

Foundation:

[Trial: Criminal case, wife is charged with murdering her husband. Defense is that husband beat the wife regularly, and she murdered him in self-defense. Examination by defense counsel.]

Q: Do you know my client, the defendant, Lily Langer?

A: Yes.

Q: How, and for how long?

A: We attend the same church and live in the same neighborhood. I'd say we've known each other for fifteen years.

Q: Over those years have you seen her a little or a lot?

A: A lot, especially at church activities.

Q: Do you know other people who know Ms. Langer?

A: Yes, from church, PTA, food drives, and just the neighborhood.

Q: Among the people you know who know my client, does she have a good reputation or a bad reputation for being a peaceful person?

A: Excellent.

Q: What have you heard?

A: People call her the "peace maker." We've had trouble in our neighborhood over the years, and she goes out and talks the kids down, she helps people work through issues. That's what they say about her. And when she got arrested on this case, all people could see was "not Lily. She's not that way."

Q: No further questions.

Use:

[Defense Counsel, Closing Argument]

Folks, common sense tells us one thing. Violent people murder; non-violent people don't. They may have to take up arms to defend a child or a loved one or themselves, but they don't go out and murder.

And what do you know about Lily Langer? That is her reputation. What is reputation? It's what everybody says, because that's how people have come to understand you. Your character is on display every day, and the people who see you every day get to know it. In a sense, you earn your reputation by doing things over and over.

In a courtroom, a person's character is as good a piece of evidence as an eyewitness. An eyewitness who saw this might have said "she killed her husband only as a last resort, to defend herself." Well, the law says that evidence of a person's character is just as good as an eyewitness, the same type of evidence. It says "she is not that kind of person, so when she fired that shot it was not a criminal murder, it was a peaceful person acting in self-defense."

Comment:

A criminal defendant's "good" character regarding the trait at issue in a particular crime is substantive evidence, proof that can, standing along, lead to a finding that the prosecution has failed to prove its case beyond a reasonable. Its evidentiary power is in the proof that a defendant is likely to have acted in conformity with her/his "good" character, and thus not in the criminal manner alleged by the prosecution. As one court has explained,

> A defendant may introduce character testimony to show that "the general estimate of his character is so favorable that the jury may infer that he would not be likely to commit the offense charged." *Michelson v. United States*, 335 U.S. 469, 476, 93 L. Ed. 168, 69 S. Ct. 213 (1948). Unlike an affirmative defense, character evidence is never legally sufficient to render a defendant not guilty. Standing alone, however, character evidence may create a reasonable doubt regarding guilt. In some circumstances, evidence of good **character** may of itself create a reasonable doubt as to guilt, and the jury must be appropriately instructed.

United States v. John, 309 F.3d 298, 303 (5th Circuit 2002)(citation and internal quotations omitted). In this example, the reputation and opinion testimony of the good character of the accused for the pertinent trait of non-violence is admissible to show that it is unlikely that the prosecution theory, that the defendant acted criminally, and thus confirm that the prosecution has not proved at least one element of its case beyond a reasonable doubt.

Rule 405:

Methods of Proving Character

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

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

FRE Commentary:

The rule deals only with allowable methods of proving character, not with the admissibility of character evidence, which is covered in Rule 404 .

Of the three methods of proving character provided by the rule, evidence of specific instances of conduct is the most convincing. At the same time it possesses the greatest capacity to arouse prejudice, to confuse, to surprise, and to consume time. Consequently the rule confines the use of evidence of this kind to cases in which character is, in the strict sense, in issue and hence deserving of a searching inquiry. When character is used circumstantially and hence occupies a lesser status in the case, proof may be only by reputation and opinion. These latter methods are also available when character is in issue. This treatment is, with respect to specific instances of conduct and reputation, conventional contemporary common law doctrine. McCormick § 153.

...

According to the great majority of cases, on cross-examination inquiry is allowable as to whether the reputation witness has heard of particular instances of conduct pertinent to the trait in question. Michelson v. United States, 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168 (1948); Annot., 47 A.L.R.2d 1258. The theory is that, since the reputation witness relates what he has heard, the inquiry tends to

shed light on the accuracy of his hearing and reporting. Accordingly, the opinion witness would be asked whether he knew, as well as whether he had heard. The fact is, of course, that these distinctions are of slight if any practical significance, and the second sentence of subdivision (a) eliminates them as a factor in formulating questions. This recognition of the propriety of inquiring into specific instances of conduct does not circumscribe inquiry otherwise into the bases of opinion and reputation testimony.

The express allowance of inquiry into specific instances of conduct on cross-examination in subdivision (a) and the express allowance of it as part of a case in chief when character is actually in issue in subdivision (b) contemplate that testimony of specific instances is not generally permissible on the direct examination of an ordinary opinion witness to character...Opinion testimony on direct in these situations ought in general to correspond to reputation testimony as now given, i.e., be confined to the nature and extent of observation and acquaintance upon which the opinion is based...

Rule 405(a) In Practice

Foundation:

[Trial: Criminal case, wife is charged with murdering her husband. Defense is that husband beat the wife regularly, and she murdered him in self-defense. Cross-examination of defense "good character" witness by prosecution.]

Q: You came here to tell us that, based on what you've heard, this defendant has a good reputation in the community, correct?

A: Yes.

Q: And you claim that you listen well in the neighborhood, and you therefore hear what people have to say about this defendant, correct?

A: Sure.

Q: Did you ever hear that the defendant was arrested, three years ago, for selling drugs?

A: No.

Q: And did you ever hear about her hitting an employer?

A: Yeah, I heard about that.

Q: No further questions.

Use [PERMISSIBLE]:

The defense asks you to conclude that she is innocent because being violent is not part of her character. A person's character is proved through her reputation - if you live a good life, people will say only good things about you. But in order to have a good witness, you need one who actually listens.

The defense character witness in this case? She clearly doesn't listen well. She never heard about the defendant's drug arrest. Is she really listening to ALL of the reputation? Or is she hearing only a selected portion?

And what a strange definition of non-violence this witness has. Yes, the defendant has a reputation as a non-violent person, but is also known to hit. Is that your definition of a reputation for being non-violent?

Use [IMPERMISSIBLE]:

The defense wants to raise a reasonable doubt by saying “Hey, I’m non-violent, and non-violent people don’t kill.” But what do we know - she sells drugs and hits people. Non-violent? No way. She is dangerous.

Comment:

The cross-examination of a “good”character witness regarding her/his knowledge of bad acts committed by the defendant is not to prove the defendant’s bad character, but to challenge the foundation or weight of the character witness’ testimony. As one court has explained,

> the Government may challenge the defendant's character witnesses by cross-examining them about their knowledge of "relevant specific instances" of the defendant's conduct.Fed. R. Evid. 405(a).
>
> This "specific act" cross-examination of a defendant's reputation witness is allowed not for the purpose of proving that the defendant committed the particular bad acts, but rather is permitted so that the Government may test the knowledge and credibility of the witness. The rationale given for allowing such questions is that, if answered affirmatively, they might cast serious doubt on the witness's testimony, thus serving a legitimate rebuttal function, and that, if answered negatively, they would show that the witness did not know enough about the accused's reputation to testify.

United States v. Monteleone, 77 F.3d 1086, 1089 (8th Cir. 1996) (citation and internal quotations omitted). In this example, the examination challenges the strength of the witness’ claim of the defendant’s good character but may not be argued as proof of the opposite, bad character. The latter may be established only by the prosecution calling “bad” character witnesses.

Rule 404(b):

(b) Crimes, Wrongs, or Other Acts.

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

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

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

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

FRE Commentary:

[E]vidence of other crimes, wrongs, or acts is not admissible to prove character as a basis for suggesting the inference that conduct on a particular occasion was in conformity with it. However, the evidence may be offered for another purpose, such as proof of motive, opportunity, and so on, which does not fall within the prohibition. In this situation the rule does not require that the evidence be excluded. No mechanical solution is offered. The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403 . Slough and Knightly, Other Vices, Other Crimes, 41 Iowa L.Rev. 325 (1956).

Notes of Committee on the Judiciary, Senate Report No. 93-1277.

This rule provides that evidence of other crimes, wrongs, or acts is not admissible to prove character but may be admissible for other specified purposes such as proof of motive.

Although your committee sees no necessity in amending the rule itself, it anticipates that the use of the discretionary word "may" with respect to the admissibility of evidence of crimes, wrongs, or

acts is not intended to confer any arbitrary discretion on the trial judge. Rather, it is anticipated that with respect to permissible uses for such evidence, the trial judge may exclude it only on the basis of those considerations set forth in Rule 403 , i.e. prejudice, confusion or waste of time.

Rule 404(b) In Practice

Foundation:

[Products liability and negligence action, suit against Rubberking (tire manufacturer) for exploding tire that caused car accident and serious bodily injury. Legal theory, in part, is that manufacturer knew of the defect for years but did not improve the manufacturing process. Accident at issue involved Gerry Jones, and occurred in Delaware in 2003. Examination by plaintiff counsel.]

Q: Sir, what is your name?

A: Adam Glubb.

Q: In 2002, did you own a car?

A: Yes.

Q: What type of tires did you have?

A: Rubberking.

Q: What happened to you in terms of those tires and your car?

A: I was driving with my family, the tire exploded, and I swerved off the road. I hit a tree, and my wife was killed. Our son Joseph was blinded, and I lost three fingers.

> DEFENSE COUNSEL: Objection.
>
> THE COURT: Overruled. Members of the jury, I will give you an instruction momentarily on how this evidence is to be considered.

Q: Did you make any complaint to anyone as a result of that accident?

A: Yes, I sent a letter to the President of Rubberking, explaining what happened. I also included the traffic safety report from the Delaware state police, which concluded that the tire was the cause of the accident.

Q: No further questions.

> THE COURT: Members of the jury, sometimes evidence is important in a case to prove, or disprove, a particular fact. The 2002 accident evidence is not being admitted to prove that the tire caused the 2003 accident. Instead, it is being admitted to try and prove that Rubberking was aware of problems with its tires.

> Like any other evidence, you first decide if you believe it. If you do, then you will use it for the limited purpose I have described, to decide if in fact the defendant manufacturer had what we call "notice" that there was a problem with the tire.

Use:

[Closing Argument - Plaintiff's Counsel]

When does a company do something wrong? When the company makes something, it proves dangerous, the company hears about it, but takes no action. It ignores the warning.

When we have our own homes, and someone tells us "hey, there is ice on your sidewalk," if we ignore it and the next person slips, we are at fault. It was dangerous and we didn't fix it. Not only that, but we didn't warn people.

The same is true here. And Rubberking knew it. How? Another tire exploded, an explosion that had terrible consequences. And the surviving father, that poor man who had to watch his wife die and his child be blinded, he wrote and told them about it.

And they did nothing.

The Judge will tell you that to be successful in our suit, we must prove that Rubberking had knowledge of the problem. You saw the witness, you read the letter he sent. Knowledge? You bet.

Impermissible Use:

[Closing Argument - Defense Counsel]

Ladies and gentlemen, why did I ask that poor man who had an accident in 2002 to come to court? Because the proof is in the pudding. His tire exploded, causing injury and death. The same type of tire exploded on my client's care. That proves bad manufacture, dangerous manufacture, negligence.

Comment:

When evidence is admissible for a non-character purpose under Rule 404(b), it must be argued for that purpose and no other. If it is to prove motive, then the closing argument must so use it; and if, as in this example, it is to prove notice, then it may be so argued but not used for other, additional impermissible grounds. As one court has explained,

> Rule 404(b)...generally prohibits the use of evidence of prior bad

> acts to show conduct in conformity therewith. If counsel had sought admission of the evidence during the case, rather than slipping it in sub silentio during closing argument, defense counsel could have raised a Rule 404(b) objection. If brought in evidence in the case-in-chief, the defense could have answered it with evidence. If identified as admissible, it might have been presented to the jury with a limiting instruction. Counter evidence might be presented or an argument might be fashioned to meet evidence that the court admitted. But none of that happened. For when plaintiffs' counsel in rebuttal closing argument--virtually the last word to the jury from counsel--testified to and argued the fact of asserted prior discrimination against women, she denied Tidyman's its opportunity for a fair hearing and denied Tidyman's the due process to which it is entitled. On this record, where discrimination was vigorously contested and much turned on characterizations and questions of degree, Tidyman's was necessarily prejudiced by the improper argument.

Hemmings v. Tidyman's Inc., 285 F.3d 1174, 1208 (9th Cir., 2002). In this example, the evidence of the other accident was admissible to establish notice, the limited 404(b) purpose, and was ro argued in the first example. The latter example uses it for character, a forbidden purpose.

Rule 406

Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.

FRE Commentary:

An oft-quoted paragraph, McCormick, § 162, p. 340, describes habit in terms effectively contrasting it with character: "Character and habit are close akin. 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. 'Habit,' in modern usage, both lay and psychological, is more specific. It describes one's regular response to a repeated specific situation. If we speak of character for care, we think of the person's tendency to act prudently in all the varying situations of life, in business, family life, in handling automobiles and in walking across the street. A habit, on the other hand, is the person's regular practice of meeting a particular kind of situation with a specific type of conduct, such as the habit of going down a particular stairway two stairs at a time, or of giving the hand-signal for a left turn, or of alighting from railway cars while they are moving. The doing of the habitual acts may become semi-automatic." Equivalent behavior on the part of a group is designated "routine practice of an organization" in the rule.

Agreement is general that habit evidence is highly persuasive as proof of conduct on a particular occasion. Again quoting McCormick § 162, p. 341:

> Character may be thought of as the sum of one's habits though doubtless it is more than this. But unquestionably the uniformity of one's response to habit is far greater than the consistency with which one's conduct conforms to character or disposition. Even though character comes in only exceptionally as evidence of an act, surely any sensible man in investigating whether X did a particular act would be greatly helped in his inquiry by evidence as to whether he was in the habit of doing it.

Rule 406 in practice

Foundation:

[Medical malpractice, claim that nurse failed to sterilize instruments leading to an infection. Examination by defense counsel.]

Q: Sir, what is your name?

A: Lamont Feinstein

Q: Sir, how do you know my client, Nurse Randall?

A: She and I have worked together as nurses for fourteen years.

Q: In what settings?

A: Always hospital surgery suites.

Q: Were you present on the day of the surgery that is the subject of this lawsuit?

A: No. I was off beginning a six week paternity leave.

Q: In your fourteen years working with Nurse Randall, have you ever observed her care for surgical instruments in the pre-operation prep process?

A: Yes. Literally thousands of times.

Q: What would she do in terms of instrument sterilization?

A: It wouldn't matter if the instruments were brand new, or if another nurse had already sterilized them. Randall sterilized everything, often twice. It slowed us down, but she did it.

Q: No further questions.

Use:

[Defense Closing Argument]

Members of the jury, we all know someone who never changes her routine. The person who says, before driving her car, "is everyone buckled in?" The person who comes to work and goes immediately to the coffee machine, no matter how much work there is or how late she is.

It's like someone on auto-pilot, like it is programed into her or his brain circuitry. You can't start without doing that task.

And we joke about it. You may be out of work for a week, but when you come back you're told "Joe made the coffee trip every day last week while you weren't here."

Well, when a person acts with such consistency and regularity, the law says that this is evidence that she must have done so on the particular day that a lawsuit is about. So you don't have to take my client's word that she sterilized those instruments; we know from her colleague that she sterilizes everything, day in and day out. That is solid proof that she sterilized the instruments for this operation, and that proves she was not negligent.

Infections can happen in hospitals, like anywhere else. But this infection did not come because of Nurse Randall. She's the infection preventer.

Comment:

Habit evidence is admissible to prove action in conformity therewith. The threshold is high, with a significant showing of regularity arising to the level of a reflexive response to a recurring stimulus or condition. As one court has explained,

> It is well-established that habit evidence may be used to prove a person's conduct on a particular occasion: "Evidence of the habit of a person . . . whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person . . . on a particular occasion was in conformity with the habit . . . ." Fed. R. Evid. 406; see also United States v. Newman, 982 F.2d 665, 668 (1st Cir. 1992). n2
>
> - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -
>
> n2 In contrasting habit evidence with character evidence, the Editorial Explanatory Comment to Rule 406 provides an example

> of a person's habitual seat belt use as more probative evidence that the person was wearing a seat belt on a particular occasion than evidence that the person is generally a safety-oriented person. Fed. R. Evid. §§ 406.02, cmt.

Babcock v. GMC, 299 F.3d 60, 66 (1st Cir., 2002). In this case, the habit is that of always sterilizing items twice, which is admissible to prove that the defendant must have done so on the day of the operation at the core of the litigation.

Rule 407

When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:

- negligence;
- culpable conduct;
- a defect in a product or its design; or
- a need for a warning or instruction.

But the court may admit this evidence for another purpose, such as impeachment or--if disputed--proving ownership, control, or the feasibility of precautionary measures.

Notes:

The rule incorporates conventional doctrine which excludes evidence of subsequent remedial measures as proof of an admission of fault. The rule rests on two grounds. (1) The conduct is not in fact an admission, since the conduct is equally consistent with injury by mere accident or through contributory negligence. Or, as Baron Bramwell put it, the rule rejects the notion that "because the world gets wiser as it gets older, therefore it was foolish before." Hart v. Lancashire & Yorkshire Ry. Co., 21 L.T.R. N.S. 261, 263 (1869). Under a liberal theory of relevancy this ground alone would not support exclusion as the inference is still a possible one. (2) The other, and more impressive, ground for exclusion rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety. The courts have applied this principle to exclude evidence of subsequent repairs, installation of safety devices, changes in company rules, and discharge of employees, and the language of the present rules is broad enough to encompass all of them. See Falknor, Extrinsic Policies Affecting Admissibility, 10 Rutgers L.Rev. 574, 590 (1956).

The second sentence of the rule directs attention to the limitations of the rule. Exclusion is called for only when the evidence of subsequent remedial measures is offered as proof of negligence or culpable conduct. In effect it rejects the suggested inference that fault is admitted. Other purposes are, however, allowable, including ownership or control, existence of duty, and feasibility of

precautionary measures, if controverted, and impeachment. 2 Wigmore § 283; Annot., 64 A.L.R.2d 1296. Two recent federal cases are illustrative. Boeing Airplane Co. v. Brown, 291 F.2d 310 (9th Cir. 1961), an action against an airplane manufacturer for using an allegedly defectively designed alternator shaft which caused a plane crash, upheld the admission of evidence of subsequent design modification for the purpose of showing that design changes and safeguards were feasible. And Powers v. J. B. Michael & Co., 329 F.2d 674 (6th Cir. 1964), an action against a road contractor for negligent failure to put out warning signs, sustained the admission of evidence that defendant subsequently put out signs to show that the portion of the road in question was under defendant's control. The requirement that the other purpose be controverted calls for automatic exclusion unless a genuine issue be present and allows the opposing party to lay the groundwork for exclusion by making an admission. Otherwise the factors of undue prejudice, confusion of issues, misleading the jury, and waste of time remain for consideration under Rule 403 .

2011 Note:

Rule 407 previously provided that evidence was not excluded if offered for a purpose not explicitly prohibited by the Rule. To improve the language of the Rule, it now provides that the court may admit evidence if offered for a permissible purpose. There is no intent to change the process for admitting evidence covered by the Rule. It remains the case that if offered for an impermissible purpose, it must be excluded, and if offered for a purpose not barred by the Rule, its admissibility remains governed by the general principles of Rules 402, 403, 801, etc.

[Negligence case. Suit is against a parking lot company. Defense claims it does not own the gate that crashed down on the car leaving the parking lot, causing damage to a departing car. Rather, it claims the City owns the gate. Cross-examination of defendant by plaintiff's counsel.]

FOUNDATION:

Q: Sir, you have claimed that you can't be at fault because you do not own the parking lot, you only rent it. Is that the gist of your testimony?

A: Yes.

Q: Sir, I am handing you exhibit P-12. Tell the jury what that is?

A: It is a bill for a new gate at the parking lot.

Q: Sir, it is for a new gate with an electric eye to detect vehicles, isn't that correct?

> DEFENSE COUNSEL: Objection.
>
> THE COURT: Counsel approach. [AT SIDEBAR] What is the offer?
>
> PLAINTIFF COUNSEL: This is to prove ownership.
>
> THE COURT: Return to your seats. [SIDEBAR DISCUSSION CONCLUDED]
>
> THE COURT: The objection is overruled. Members of the jury, this next evidence is to be considered by you on deciding who owns the gate, not whether anyone was negligent. Counsel, proceed.

Q: Sir, that receipt is for a new gate with an electric eye to detect vehicles, isn't it?

A: Yes.

Q: It is to replace the gate that was involved in this accident, correct?

A: Yes.

Q: To upgrade the gate at a cost of $48,000?

> DEFENSE COUNSEL: Objection as to upgrade.

> THE COURT: Sustained. Members of the jury, disregard that it was an upgrade. The only issue here is ownership.

Q: At a cost of $48,000?

A: Yes.

Q: And the date is two days after this accident, correct?

A: Yes.

Q: Tell the jury who paid for that gate.

A: I did.

Q: No further questions.

REDIRECT BY DEFENSE COUNSEL:

Q: Why did you pay?

A: Because the owner wouldn't and it was a safety issue. The City was obstinate.

RECROSS BY PLAINTIFF COUNSEL:

Q: Sir, the accident was a Thursday, correct?

A: Yes.

Q: And you paid this bill the following Saturday?

A: Yes.

Q: No further questions.

USE (PERMISSIBLE):

[Plaintiff Closing]

We proved a simple fact. Ownership. While it is true that the defendant is trying to pass the buck, and not accept responsibility, actions do speak louder than words. $48,000 of actions.

Who pays $48,000 for something he does not own? No one except a charity. And one thing is sure

- Parkright Corporation is no charity. It is a business that was negligent in its operation...

USE (IMPERMISSIBLE):

Who is at fault here? Parkright. How do we know that? The accident happened when there was no electric eye, a tool necessary to prevent parking lot gates from hitting people. It could have been avoided - they simply had to do what they did *after* the accident, installing an electric eye. Which is the proof in the pudding - fixing a mistake.

Comment:

"Rule 407 is based on the policy of encouraging potential defendants to remedy hazardous conditions without fear that their actions will be used as evidence against them." TLT-Babcock, Inc. v. Emerson Electric Co., 33 F.3d 397, 400 (4th Cir. 1994). The exclusion arises from this public policy interest more than from a lack of relevance, although some commentaries also question the evidentiary value of such proof. As one court has explained in regard to the utility of such evidence,

> subsequent remedial measures constitute an unreliable class of evidence that is very poor proof of negligence or defectiveness. See 2 Weinstein's Evidence § 407, 13-14 (noting that the unreliability of evidence of subsequent remedial measures is the primary justification for the rule)...The evidence is highly prejudicial to the defendant while proving very little, beyond suspicion, on the matter of whether a defect existed at the time of the injury or whether the remedial measure had any efficacy in the absence of design engineering...

Padillas v. Stork-Gamco, Inc., 2000 U.S. Dist. LEXIS 14373, 4-5 (D. Pa., 2000). Where, however, the evidence is used to prove a contested point such as ownership, it may be admitted *for that limited purpose*. The distinction between the two closing argument excerpts in this example is that the first uses the evidence for the limited purpose, to establish ownership; the second closing exceeds this and returns to the forbidden purpose, using a remedial measure as proof of liability.

Rule 409: OFFER TO PAY MEDICAL AND SIMILAR EXPENSES

FRE 409

Evidence of furnishing, promising to pay, or offering to pay medical, hospital, or similar expenses resulting from an injury is not admissible to prove liability for the injury.

Notes:

The considerations underlying this rule parallel those underlying Rules 407 and 408 , which deal respectively with subsequent remedial measures and offers of compromise. As stated in Annot., 20 A.L.R.2d 291, 293:

[G]enerally, evidence of payment of medical, hospital, or similar expenses of an injured party by the opposing party, is not admissible, the reason often given being that such payment or offer is usually made from humane impulses and not from an admission of liability, and that to hold otherwise would tend to discourage assistance to the injured person.

[Negligence case. Suit is against a parking lot company. Defense claims it does not own the gate that crashed down on the car leaving the parking lot, causing damage to a departing car. Rather, it claims the City owns the gate. Cross-examination of defendant by plaintiff's counsel.]

FOUNDATION:

Q: Sir, you have claimed that you can't be at fault because you do not own the parking lot, you only rent it. Is that the gist of your testimony?

A: Yes.

Q: Sir, I am handing you a letter. Do you agree that it is on your letterhead?

> DEFENSE COUNSEL: Objection. May we approach?
>
> THE COURT: Yes. [AT SIDEBAR]
>
> DEFENSE COUNSEL: Judge, in that letter my client offered to pay the plaintiff's medical bills. This is inadmissible in a liability determination.
>
> PLAINTIFF COUNSEL: This is admissible not to prove liability, but to prove ownership.
>
> DEFENSE COUNSEL: Judge, it should be excluded under 403.
>
> THE COURT: I'm overruling the objection. Return to your tables. [SIDEBAR DISCUSSION CONCLUDED]
>
> THE COURT: Members of the jury. This next piece of evidence is being admitted for one purpose only, to let you decide whether Parkright owned, or had direct responsibility for, the gate. It is evidence that Parkright offered to pay medical bills after the accident.
>
> This evidence does not have any relevance as to whether Parkright was negligent. Our society applauds good deeds, and many people and companies offer to pay medical bills as a good deed, or for good public relations. So when you deliberate, you may not use this evidence to reason that if Parkright offered to pay the bills that is because the accident was Parkright's fault. It is admissible only to decide if Parkright is responsible for the gate. Counsel, proceed.

Q: Read the letter.

A: Dear Sir, we at Parkright were willing, as a gesture of good citizenship, to assist you in paying medical bills arising from the accident at the parking lot. If this will help you and your family, please notify us.

USE (PERMISSIBLE):

[Plaintiff Closing]

We proved a simple fact. Ownership. While it is true that the defendant is trying to pass the buck, and not accept responsibility, actions do speak louder than words.

Who offers to pay medical bills for a complete stranger when an accident is not the fault of the person making the offer? No one except a charity. And one thing is sure - Parkright Corporation is no charity. It is a business. And by making this offer it confirmed that it was responsible for the gate.

USE (IMPERMISSIBLE):

Who is at fault here? Parkright. How do we know that? The accident happened and they run out and offer to pay medical bills. Doesn't that say "it's my fault, I'm sorry?"

Comment:

The clarity of this rule as one of exclusion brooking virtually no exception is so great that no recent decisions apply it or explicate its underpinnings. Language from a case that pre-dates enactment of the Federal Rules articulates the rule's rationale:

> [H]ospitalization under the circumstances is as reasonably to be attributed to a prudent effort to lessen the results of the injury if there should be liability established, as to a purpose to confess liability. It would be serious indeed to hold that the giving of emergency medical attention to an injured employee might be construed into an admission sufficient by itself to fix liability. Sound policy requires that the way be left clear promptly to treaty the injury, leaving to a more deliberate examination the decision whether liability to make compensation should be admitted or denied. The mere according of medical treatment in an emergency is not an admission sufficient to carry the burden of showing an injury in the course of employment.

Winningham v. Travelers Ins. Co., 93 F.2d 520, 521 (5th Cir.-OLD, 1937). In this example, the use

of such an offer is allowed, as in the case of a subsequent remedial measure, only to establish a contested fact such as ownership. The second closing argument, that treating the offer as an admission of liability, is in direct conflict with the rule.

Rule 411: LIABILITY INSURANCE

FRE

Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, such as proving a witness's bias or prejudice or proving agency, ownership, or control.

Notes:

The courts have with substantial unanimity rejected evidence of liability insurance for the purpose of proving fault, and absence of liability insurance as proof of lack of fault. At best the inference of fault from the fact of insurance coverage is a tennuous one, as is its converse. More important, no doubt, has been the feeling that knowledge of the presence or absence of liability insurance would induce juries to decide cases on improper grounds. McCormick § 168; Annot., 4 A.L.R.2d 761. The rule is drafted in broad terms so as to include contributory negligence or other fault of a plaintiff as well as fault of a defendant.

[Negligence case. Suit is against a parking lot company. Defense claims it does not own the gate that crashed down on the car leaving the parking lot, causing damage to a departing car. Rather, it claims the City owns the gate. Cross-examination of defendant's investigator by plaintiff's counsel.]

FOUNDATION:

Q: Miss, you took photographs that you have shown the jury, correct?

A: Yes.

Q: And although you claim that they portray my client rollerblading within two weeks of the incident, those photos have no date, correct?

A: Yes.

Q: They were taken on a digital camera that does have the capacity to print a date and time on each shot, correct?

A: Yes.

Q: But without that date we have only your word as to when they were taken, correct?

A: Yes.

Q: And you have described yourself to the jury as an investigator, correct?

A: Yes.

Q: Just a person who gets the facts, correct?

A: Yes.

Q: But in fact you are paid by Ajax Insurance, the insurance company for the defendant, correct?

DEFENSE COUNSEL: Objection.

THE COURT: Counsel approach. [AT SIDEBAR] What is the offer?

PLAINTIFF COUNSEL: This is to prove bias and his professional training and capacity.

> THE COURT: Return to your seats. [SIDEBAR DISCUSSION CONCLUDED]
>
> THE COURT: The objection is overruled. Members of the jury, the fact that this witness works for an insurance company in and of itself has no bearing on who was at fault in this case. You may consider this evidence only to decide whether this witness has a bias, that is, whether you find her believable. Counsel, proceed.
>
> PLAINTIFF COUNSEL: Judge, we also seek to have this admitted as to training and skill level.
>
> THE COURT: Jurors, you may also consider this in deciding how well trained the investigator is. Only those two purposes - bias and training.

USE:

[Plaintiff Closing]

Members of the jury, a negligence case has two parts - deciding who was at fault and then identifying the harm. We have shown you that Parkright was at fault, and our medical experts and the plaintiffs themselves have detailed to you the injuries, and how long they lasted.

How does Parkright respond? With undated photos claiming to show the plaintiff roller blading two weeks later, an attempt to say that "hey, those injuries can't be so severe if he is back blading two weeks later." But how can we rely on this investigator's word? She is an insurance investigator, with a camera designed to impose a date and time on a photo. She has the know-how, she has the training. And what is NOT on that photo, a date? Why, you ask? Because she is no independent investigator - her paycheck comes from the insurance company, which loses money if my client prevails. The law has a simple word for that - bias. And the Judge will instruct you - bias is an issue for you to use, a tool, in deciding who to believe.

Undated? Unbelievable.

Comment

Rule 411 flows from dual premises: a relevance challenge because the decision to purchase insurance has no connection with a person's degree of carelessness or recklessness, and a fear of excessive jury verdicts, explained by one court as being "founded on the view that knowledge of its existence would overthrow the requirement of fault as the foundation for negligence liability and moreover would result in extravagant verdicts."Kiernan v. Van Schaik, 347 F.2d 775, 781 (3d Cir., 1965). It may, however, be used to show a particular witness's bias. As one court has explained,

> In this case the fact that defendant's insurer employed Mr. Alder was clearly admissible to show possible bias of that witness.
>
> ...
>
> Based upon Rule 403 of the Federal Rules of Evidence defendant also argues that the trial court acted within its discretion in excluding evidence of insurance. This argument is without merit. In our opinion the probative value of the evidence far outweighs any danger of unfair prejudice. Also, there is no indication in the record or briefs of the parties that any particular prejudice was threatened in this case. Rule 403 was not designed to allow the blanket exclusion of evidence of insurance absent some indicia of prejudice. Such a result would defeat the obvious purpose of Rule 411.

Charter v. Chleborad, 551 F.2d 246, 248-249 (8th Cir., 1977). In this example, the credibility of the investigator was called into question, particularly as to being biased. Employment by the insurance company is admissible as a ground for bias.

RULE 412

Sex-Offense Cases: The Victim's Sexual Behavior or Predisposition

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

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

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

(b) Exceptions.

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

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

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

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

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

(c) Procedure to Determine Admissibility.

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

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

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

(C) serve the motion on all parties; and

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

(2) Hearing. Before admitting evidence under this rule, the court must conduct an in camera hearing and give the victim and parties a

right to attend and be heard. Unless the court orders otherwise, the motion, related materials, and the record of the hearing must be and remain sealed.

(d) Definition of "Victim." In this rule, "victim" includes an alleged victim.

NOTES:

Rule 412 has been revised to diminish some of the confusion engendered by the original rule and to expand the protection afforded alleged victims of sexual misconduct. Rule 412 applies to both civil and criminal proceedings. The rule aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process. By affording victims protection in most instances, the rule also encourages victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders.

Rule 412 seeks to achieve these objectives by barring evidence relating to the alleged victim's sexual behavior or alleged sexual predisposition, whether offered as substantive evidence or for impeachment, except in designated circumstances in which the probative value of the evidence significantly outweighs possible harm to the victim.

...

As amended, Rule 412 bars evidence offered to prove the victim's sexual behavior and alleged sexual predisposition. Evidence, which might otherwise be admissible under Rules 402 , 404(b) , 405 , 607, 608 , 609 , or some other evidence rule, must be excluded if Rule 412 so requires. The word "other" is used to suggest some flexibility in admitting evidence "intrinsic" to the alleged sexual misconduct. Cf. Committee Note to 1991 amendment to Rule 404(b).

Past sexual behavior connotes all activities that involve actual physical conduct, i.e. sexual intercourse and sexual contact, or that imply sexual intercourse or sexual contact. See, e.g. United States v. Galloway, 937 F.2d 542 (10th Cir. 1991), cert. denied, 113 S.Ct. 418 (1992) (use of contraceptives inadmissible since use implies sexual activity); United States v. One Feather, 702 F.2d 736 (8th

Cir. 1983) (birth of an illegitimate child inadmissible); State v. Carmichael, 727 P.2d 918, 925 (Kan. 1986) (evidence of venereal disease inadmissible). In addition, the word "behavior" should be construed to include activities of the mind, such as fantasies or dreams. See 23 C. Wright & K. Graham, Jr., Federal Practice and Procedure, § 5384 at p. 548 (1980) ("While there may be some doubt under statutes that require 'conduct,' it would seem that the language of Rule 412 is broad enough to encompass the behavior of the mind.").

The rule has been amended to also exclude all other evidence relating to an alleged victim of sexual misconduct that is offered to prove a sexual predisposition. This amendment is designed to exclude evidence that does not directly refer to sexual activities or thoughts but that the proponent believes may have a sexual connotation for the factfinder. Admission of such evidence would contravene Rule 412's objectives of shielding the alleged victim from potential embarrassment and safeguarding the victim against stereotypical thinking. Consequently, unless the (b)(2) exception is satisfied, evidence such as that relating to the alleged victim's mode of dress, speech, or life-style will not be admissible.

Under the exception in subdivision (b)(1)(B), evidence of specific instances of sexual behavior with respect to the person whose sexual misconduct is alleged is admissible if offered to prove consent, or offered by the prosecution.

Admissible pursuant to this exception might be evidence of prior instances of sexual activities between the alleged victim and the accused, as well as statements in which the alleged victim expressed an intent to engage in sexual intercourse with the accused, or voiced sexual fantasies involving the specific accused. In a prosecution for child sexual abuse, for example, evidence of uncharged sexual activity between the accused and the alleged victim offered by the prosecution may be admissible pursuant to Rule 404(b) to show a pattern of behavior. Evidence relating to the victim's alleged sexual predisposition is not admissible pursuant to this exception.

Under subdivision (b)(1)(C), evidence of specific instances of conduct may not be excluded if the result would be to deny a criminal defendant the protections afforded by the Constitution. For example, statements in which the victim has expressed an intent to have sex with the first person encountered on a particular occasion might not be excluded without violating the due process right of a rape

defendant seeking to prove consent. Recognition of this basic principle was expressed in subdivision (b)(1) of the original rule. The United States Supreme Court has recognized that in various circumstances a defendant may have a right to introduce evidence otherwise precluded by an evidence rule under the Confrontation Clause. See, e.g., Olden v. Kentucky , 488 U.S. 227 (1988) (defendant in rape cases had right to inquire into alleged victim's cohabitation with another man to show bias).

Foundation:

[Trial: Defense is consent, claim is that bruises on complainant were caused by another person. Predicate for admissibility is a hearing under Rule 412(c). For purposes of this illustration, such a hearing has been granted and evidence limited to the complainant's sexual conduct within seventy-two hours prior to the alleged rape has been deemed admissible. Examination of complainant and then physician by defense counsel.]

Q: Miss, today you have alleged that my client raped you and, in doing so, grabbed your thigh area so hard as to leave bruising. Is that your accusation?

A: Yes.

Q: And it is your claim that those bruises were left by him, correct?

A: Yes.

Q: And before you went to the police on the night of this incident, you went home to your boyfriend, Andrew Jacks, didn't you?

A: Yes.

Q: And you and he had not been together for two or three days, correct?

A: Yes.

Q: And he saw the bruises and asked what happened?

A: Yes. I showed him.

Q: And that's when you said my client raped you, correct?

A: Yes.

Q: In fact, you had sex with another man, not my client, one day earlier, didn't you?

A: Yes.

* * * * *

[Cross-examination of the emergency room doctor]

Q: Doctor, you have described bruises found on the complainant's thigh, correct?

A: Yes.

Q: Based upon your experience, it is correct to say that they were not fresh bruises, that is to say bruises inflicted within two hours of when you saw her, correct?

A: Yes.

Q: In fact, you could not tell if they were four hours old or twenty-fours, correct?

A: Well, twenty-four hours would be the outside limit, but yes, that is the range.

Q: No further questions.

USE (PERMISSIBLE):

[Defense Closing]

How is it that you can tell this is a false accusation of rape? There was sex, yes, but no rape. No force.

You see, she came home with bruises that she had to explain to her boyfriend. And the bruises are not from my client - as the doctor explained, they could have been twenty four hours old. And what happened within that twenty-four hour period? She had sex with another man.

That explains the bruises, and the lack of freshness. She could not tell her boyfriend she had been with two men, and she could not say that she consented with any man. Hence, the cry of rape.

USE (IMPERMISSIBLE):

What did she do one day before having sex with my client? She had sex with another man. Each day her boyfriend is gone, a different man.

This is not a person who was raped. This is a person who freely consents to sexual conduct.

Comment:

The salutary purposes of "rape shield" provisions are clear - the protection of individual privacy, and the recognition that other sexual conduct, or sexual predisposition, has no (or virtually no) relevance in determining what transpired between two individuals at a discrete time and place. And even

where relevant, the evidence may be excluded where the probative value is weak. As one court has explained,

> A rape victim's communications and acts with the defendant are fundamentally different from prior sexual conduct with persons other than the defendant. While a rape victim's sexual history with others only goes to show a generalized attitude toward sex that says little if anything about the victim's attitude toward sex with the defendant, the victim's prior acts *with the defendant* can shed considerable light on her attitude toward having sex with him. For this reason, rape shield laws often have specific exceptions for evidence of prior sexual conduct with the defendant, *see, e.g.,* Fed. R. Evid. 412(b), and the Supreme Court has also indicated that prior sexual conduct with the defendant is relevant to the issue of consent...
>
> ...
>
> Even though the evidence is relevant, it may properly be excluded if its probative value is outweighed by other legitimate interests. The Supreme Court has held that certain legitimate interests can justify excluding evidence of a prior sexual relationship between a rape victim and a criminal defendant. *Lucas, 111 S. Ct. 1747 at 1747-48, 114 L. Ed. 2d 213 at 213-14* . The *Lucas* Court stated that the rape shield statute in question (requiring notice of an intention to present evidence of past sexual conduct) "represents a valid legislative determination that rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy." *111 S. Ct. at 1746, 114 L. Ed. 2d at 212.* These considerations are in addition to the more traditional considerations about prejudice and confusion of the issues that trial courts may always balance against probative value in deciding whether to admit or exclude evidence.

Wood v. Alaska, 957 F.2d 1544, 1551-1552 (9th Cir. 1992). In this example, the evidence of prior sexual contact is admissible because of the criminal defendant's Due Process right to present a defense, but even there its use is cabined. Proper use is to provide an alternate source of the bruises; but it is impermissible to extrapolate from the second act of intercourse that the complainant is predisposed toward sexual activity and thus was not raped.

Rule 413: SIMILAR CRIMES IN SEXUAL ASSAULT CASES

FRE 413

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

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

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

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

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

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

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

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

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

NOTES:

"This report is transmitted to Congress in accordance with the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322 (September 13, 1994). Section 320935 of the Act invited the Judicial Conference of the United States within 150 days (February 10, 1995) to submit 'a report containing recommendations for amending the Federal Rules of Evidence as they affect the admission of evidence of a defendant's prior sexual assault or child molestation crimes in cases involving sexual assault or child molestation.'

"Under the Act, new Rules 413, 414, and 415 would be added to the Federal Rules of Evidence. These Rules would admit evidence of a

defendant's past similar acts in criminal and civil cases involving a sexual assault or child molestation offense for its bearing on any matter to which it is relevant. The effective date of new Rules 413-415 is contingent in part upon the nature of the recommendations submitted by the Judicial Conference.

"After careful study, the Judicial Conference urges Congress to reconsider its decision on the policy questions underlying the new rules for reasons set out in Part III below

Foundation:

[Trial: Defense is consent, claim is that bruises on complainant were caused by another person or by rough but consented-to sex. Prosecution examination of non-complainant witness.]

Q: Ma'am, the incident this jury is judging occurred on June 12 of last year. Subsequent to that date, did you have an encounter with this defendant?

A: Yes.

Q: How long after that date?

A: Labor Day.

Q: Please tell the jury what occurred.

A: He and I met at a lakeside beach. We talked, had a few drinks, and then he asked me to go canoeing with him. I did.

Q: Did something happen during the canoe ride?

A: We paddled to a secluded beach, and sat and talked. All of a sudden he pushed me down, grabbed my breasts, and tried to put his hand between my legs. I struggled, and bit him. He punched me and then canoed away. I had to walk back.

CROSS-EXAMINATION BY DEFENSE COUNSEL

Q: Miss, you reported this to the police, didn't you?

A: Yes.

Q: And my client was arrested and brought to court, correct?

A: Yes.

Q: And you testified at that trial, correct?

A: Yes.

Q: And that jury heard about how much you drank that day, correct?

A: Yes.

Q: Tell this jury how much you had that day.

A: A half of vodka.

Q: By "a half" you mean a half bottle, right?

A: Yes.

Q: And that jury heard that you waited two weeks to report the accusation, right?

A: Yes.

Q: And that jury found my client not guilty, correct?

A: Yes.

USE:

[Prosecution Closing]

Rape doesn't happen in a public setting, where there are witnesses; and it doesn't happen in a bank or store where there are security cameras. It happens in private. Because that is where force and power can be exercised.

And rape can happen with few marks, or even none.

But here we have marks - bruises. Bruises are a sign of force.

And here we have a defendant who apparently uses force to get what he wants. He used force on the canoe trip incident. How do you know that? The victim testified.

Yes, he beat that case - he was found "not guilty." But the law says you may make a decision independent of that first jury - you may decide if the young woman who took that canoe trip was forcefully sexually assaulted by this defendant. Ask yourself - if he didn't do it, why would she come in here, to testify and re-live that? To testify and be cross-examined? What motive does she have to come here and do anything except tell the truth?

And if you reason it out like that and say "yes, she is a truth teller," you may then use that evidence, as the Judge will instruct you, to weigh. To say, in effect, that's the kind of person he is. And people who have that ingrained in them, who perform that type of behavior on others, probably did so here as well.

So is there proof?

Live testimony of the victim in this case.

Bruises on the victim in this case.

And another victim. And her testimony is the window inside the mind, and the nature, of this man. Tell him with your verdict what that evidence shows him to be - a violent sexual criminal.

Comment

Rule 413 is intentionally a propensity rule, one that allows other acts to serve as a predictor or confirmation of the defendant's alleged behavior in the case at hand. As one court has explained,

> In passing Rule 413 Congress believed it necessary to lower the obstacles to admission of propensity evidence in a defined class of cases. Its rationale for sexual assault cases includes the assistance it provides in assessing credibility:
>
> > Similarly, sexual assault cases, where adults are the victims, often turn on difficult credibility determinations. Alleged consent by the victim is rarely an issue in prosecutions for other violent crimes--the accused mugger does not claim that the victim freely handed over his wallet as a gift--but the defendant in a rape case often contends that the victim engaged in consensual sex and then falsely accused him. Knowledge that the defendant has committed rapes on other occasions is frequently critical in assessing the relative plausibility of these claims and accurately deciding cases that would otherwise become unresolvable swearing matches.
>
> 140 Cong. Rec. S129901-01, S12990 (R. Dole, Sept. 20, 1994).
>
> Prosecutors often have only the victim's testimony, with perhaps some physical evidence, linking a defendant to the sexual assault. Unlike other crimes, the defendant may raise consent as a defense--as he did here--reducing the trial to a "swearing match" and diffusing the impact of even DNA evidence. Rule 413 is based on the premise that evidence of other sexual assaults is highly relevant to prove propensity to commit like crimes, and often justifies the risk of unfair prejudice. Congress thus intended that rules excluding this relevant

evidence be removed.

United States v. Enjady, 134 F.3d 1427, 1431 (10th Cir., 1998). In this example, that is the precise focus of the closing argument - he did it criminally once before, thus he did it criminally in this episode.

RULE 401 - RELEVANCE (BIAS)

[For the text and commentary regarding this Rule, *see* page 1, *supra*.]

Rule 401 (bias) in Practice

Foundation:

[Trial: Criminal case, wife is charged with murdering her husband. Defense is that husband beat the wife regularly, and she murdered him in self-defense. Cross-examination of defense "good character witness" by prosecutor.]

Q: Ma'am, you have come here today to tell us that you have heard only good things about the defendant, correct?

A: Her reputation for non-violence, yes.

Q: The defendant is your employer, correct?

A: Yes.

Q: And she loaned you money to pay for your daughter's summer camp, correct?

A: Yes.

Q: And you date her brother, don't you?

A: On and off.

Q: No further questions.

Use:

We all know, when deciding whether to believe someone, that the person's allegiances, her relationships, can count. We always ask - gee, is that person a friend of a party, or a stranger? Is the friend "spinning" thing a little to favor the party?

You saw that here. The defense character witness - she is a person who "owes" this defendant - her job, her daughter's summer camp, her own romantic involvement with the defendant's brother.

The law uses a simple term - it is called "bias." And the Judge will tell you clearly - a witness' bias is a proper consideration in deciding how reliable, how trustworthy, that witness' testimony is.

And we urge you to consider that - this is the testimony of a biased witness, and not worthy of your belief.

Comment

The Federal Rules of Evidence are silent on the issue of admitting proof of a witness' bias, but the historic record is clear that such proof has always been accepted as "relevant." As the United States Supreme Court has explained,

> Before the present Rules were promulgated, the admissibility of evidence in the federal courts was governed in part by statutes or Rules, and in part by case law. See, e. g., Fed. Rule Civ. Proc. 43(a) (prior to 1975 amendment); Fed. Rule Crim. Proc. 26 (prior to 1975 amendment); Palmer v. Hoffman, 318 U.S. 109 (1943); Funk v. United States, 290 U.S. 371 (1933); Shepard v. United States, 290 U.S. 96 (1933). This Court had held in Alford v. United States, 282 U.S. 687 (1931), that a trial court must allow some cross-examination of a witness to show bias. This holding was in accord with the overwhelming weight of authority in the state courts as reflected in Wigmore's classic treatise on the law of evidence. See id., at 691, citing 3 J. Wigmore, Evidence § 1368 (2d ed. 1923); see also District of Columbia v. Clawans, 300 U.S. 617, 630-633 (1937). Our decision in Davis v. Alaska, 415 U.S. 308 (1974), holds that the Confrontation Clause of the Sixth Amendment requires a defendant to have some opportunity to show bias on the part of a prosecution witness.
>
> With this state of unanimity confronting the drafters of the Federal Rules of Evidence, we think it unlikely that they intended to scuttle entirely the evidentiary availability of cross-examination for bias. One commentator, recognizing the omission of any express treatment of impeachment for bias, prejudice, or corruption, observes that the Rules "clearly contemplate the use of the above-mentioned grounds of impeachment." E. Cleary, McCormick on Evidence § 40, p. 85 (3d ed. 1984). Other commentators, without mentioning the omission, treat bias as a permissible and established basis of impeachment under the Rules. 3 D. Louisell & C. Mueller, Federal Evidence § 341, p. 470 (1979); 3 J. Weinstein & M. Berger, Weinstein's Evidence para. 607[03] (1981).
>
> We think this conclusion is obviously correct. Rule 401 defines as "relevant evidence" evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Rule 402 provides that all relevant evidence is admissible, except as otherwise provided by the United States Constitution, by Act of Congress, or by applicable rule. A successful showing of bias on the part of a witness would have a tendency to make the facts to which he testified less probable in the eyes of the jury than it would

be without such testimony.

United States v. Abel, 469 U.S. 45, 50-51 (U.S., 1984). In this example, the opponent rightly exposed the witness' potential allegiance to the party on whose behalf the witness was called. This evidence provides a basis for the jury to conclude that the witness' testimony is entitled to lesser weight, or should be rejected in its entirety.

RULE 608(A) - CHARACTER OF WITNESS

FRE 608(a)

(a) Reputation or Opinion Evidence. A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

NOTES:

In Rule 404(a) the general position is taken that character evidence is not admissible for the purpose of proving that the person acted in conformity therewith, subject, however, to several exceptions, one of which is character evidence of a witness as bearing upon his credibility. The present rule develops that exception.

In accordance with the bulk of judicial authority, the inquiry is strictly limited to character for veracity, rather than allowing evidence as to character generally. The result is to sharpen relevancy, to reduce surprise, waste of time, and confusion, and to make the lot of the witness somewhat less unattractive. McCormick § 44.

The use of opinion and reputation evidence as means of proving the character of witnesses is consistent with Rule 405(a) ...

Character evidence in support of credibility is admissible under the rule only after the witness' character has first been attacked, as has been the case at common law...Opinion or reputation that the witness is untruthful specifically qualifies as an attack under the rule, and evidence or misconduct, including conviction of crime, and of corruption also fall within this category. Evidence of bias or interest does not.

Foundation:

[Civil trial. Lawsuit against school teacher for sexual harassment of student. Examination of defense witness by defense counsel.]

Q: Please tell the jury your name.

A: My name is Anne Marie Baptiste.

Q: And how and where are you employed?

A: St. James' school. I am an English teacher and the girls' junior varsity soccer coach.

Q: The same St. James school where Ms. Quinn, the plaintiff, is a student?

A: Yes.

Q: How long have you taught there?

A: Four years.

Q: And how long have you known Ms. Quinn?

A: Those four years.

Q: Tell us how, and how well, you know her?

A: Quite well. For two of those years she was in my home room and English classes; and in the second of those years she played soccer on the JV team.

Q: As a teacher and as a coach, how closely did you get to observe her?

A: Quite closely, indeed in the soccer context it was very close.

Q: Ms. Baptiste, have you ever discussed Ms. Quinn with other students, and with other teachers?

A: Both.

Q: In what contexts, and how often?

A: With other students, especially when they had issues and wanted to speak with me. As to teachers, her name came up at faculty meetings, and in one-on-one discussions.

Q: From those discussions, what did you learn about her reputation as being a truthful or an untruthful person?

A: Unfortunately, she was well known as untruthful. Students and teachers both complained about that, regularly.

Q: Now, reputation is what others say about someone. But you had your own opportunities to interact with, and observe, Ms. Quinn. Based upon your observations and interactions, did you develop your own opinion regarding whether she is a truthful or an untruthful person?

A: Yes, I did.

Q: And what is that opinion?

A: Sadly, it confirms her reputation. From all of my interactions with her, as well as my observations of her, it is my opinion that she is an untruthful person.

Q: No further questions.

USE:

[By defense counsel]

You know, we ask a lot of jurors. You have to sit here, lose time from your lives, and make judgments.

And we ask you to be lie and truth detectors. No machinery, just your skills of observation and your common sense.

But the law gives you an extra tool. It allows you to learn if a witness has a character for being dishonest. The theory is simple, and it reflects what our common sense and common experience tell us. Listen to what the Judge will instruct you - that if you believe that a witness has a dishonest character, you may use that in deciding whether she was untruthful here.

And, sadly, we had to give you such evidence. Evidence from a teacher, a coach - the kind of person who spends hours every day encountering, observing, and interacting with a student. The person who really can identify the character trait of dishonesty.

And that's the trait Ms. Quinn has. The teacher, Ms. Baptiste, knows it - from hearing what other students and faculty say, and from her own intimate knowledge of this plaintiff. A knowledge built up over two years.

We ask you to use that knowledge. Use it to conclude that Ms. Quinn is a dishonest person. And to conclude that, in a court of law, it is wrong to rely on statements of a dishonest person.

Comment

Rules 608 and 609 allow proof of the witness' character for dishonesty (only after which evidence showing the witness' character as an honest person may be adduced in response). Rule 608(a) limits such proof to opinion or reputation testimony, from which two deductions are permitted - first, that the witness being impeached in fact has a dishonest character; and, second, that this warrants the factfinder concluding that the character trait of dishonesty caused the witness to lie in this case, thereby entitling the factfinder to reject the witness' testimony. The predicate to such testimony as that the impeaching witness have a foundation for her/his testimony. As one court has explained,

> The rules of evidence permit (with various limitations) impeaching a witness by evidence that he has a reputation for untruthfulness or even--a novelty--by opinion evidence that he is untruthful. Fed. R. Evid. 608(a); Note to Rule 608(a) of Advisory Comm. on 1972 Proposed Rules. The fact that Coleman had lied to Miskiw about Queen Elizabeth's cousin would not fit the older or newer [**14]

> version of the rule. The telling of a lie not only cannot be equated to the possession of a reputation for untruthfulness, but does not by itself establish a character for untruthfulness, as the rule explicitly requires whether the form of the impeaching evidence is evidence of reputation or opinion evidence. Trials would be endless if a witness could be impeached by evidence that he had once told a lie or two. Which of us has never lied? Cf. David Nyberg, The Varnished Truth: Truth Telling and Deceiving in Ordinary Life (1993). But there is more here. Miskiw wanted to testify that Coleman had a reputation for untruthfulness among people who had worked with Coleman and members of his family, who regarded him as "the blackest of the black sheep of the family." Was this a "community" within the meaning of the rule? We suppose so. Coleman is a peripatetic felon. He is not a member of any stable community, but that is true of a lot of lawabiding people in our mobile society, and a community doesn't have to be stable in order to qualify under the rule. Cf. McCormick on Evidence § 43 at p. 159 (4th ed. 1992). It was Miskiw's job as a reporter to determine Coleman's reputation for trustworthiness [**15] in order to decide whether to place any credence in his gossip about the royal cousin. His interviews with members of Coleman's "community" enabled him to testify to Coleman's reputation in that community on the basis of personal knowledge.
>
> Miskiw had also spent a fair amount of time with Coleman himself, in an effort to determine whether the gossip was accurate. On the basis of his personal contacts with Coleman he formed the apparently well-substantiated opinion that Coleman was "a consummate liar." This opinion was admissible wholly apart from evidence about Coleman's reputation in his own community.

Wilson v. City of Chicago, 6 F.3d 1233, 1239 (7th Cir., 1993). In this case, the coach had developed her own opinion of the plaintiff through personal observation, and learned of the plaintiff's reputation in conversations with others at the school. This permitted both reputation and opinion testimony as to the plaintiff's character as an untruthful person, and the resulting closing argument asking jurors to use this as a basis for rejecting the plaintiff's version of events.

FRE 608(b):

(b) Specific Instances of Conduct. Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:

(1) the witness; or

(2) another witness whose character the witness being cross-examined has testified about.

By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.

NOTES:

Particular instances of conduct, though not the subject of criminal conviction, may be inquired into on cross-examination of the principal witness himself or of a witness who testifies concerning his character for truthfulness. Effective cross-examination demands that some allowance be made for going into matters of this kind, but the possibilities of abuse are substantial. Consequently safeguards are erected in the form of specific requirements that the instances inquired into be probative of truthfulness or its opposite and not remote in time. Also, the overriding protection of Rule 403 requires that probative value not be outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury, and that of Rule 611 bars harassment and undue embarrassment.

Rule 608(b) in Practice

Foundation:

[Civil trial. Lawsuit against school teacher for sexual harassment of student. Examination of plaintiff by defense counsel.]

Q: Miss Quinn, you attended St. James for four years, correct?

A: Yes.

Q: And you know that, as part of the process of this litigation, the lawyers were allowed to examine your school record, correct?

A: Yes.

Q: You agree, don't you, that your record includes two suspensions for cheating on tests, isn't that right?

A: Yes.

Q: And they were not incidents on the same day, right?

A: True.

Q: In fact, you cheated once, got suspended, returned, and did it again. Isn't that correct?

A: Yes.

Q: And the second suspension was the same year that you accused my client of harassing you, isn't that right?

A: Yes.

USE:

[By defense counsel]

You know, we ask a lot of jurors. You have to sit here, lose time from your lives, and make judgments.

And we ask you to be lie and truth detectors. No machinery, just your skills of observation and your common sense.

But the law gives you an extra tool. It allows you to learn if a witness has committed dishonest acts. The theory is simple, and it reflects what our common sense and common experience tell us. Listen to what the Judge will instruct you - that if you believe that a witness has been dishonest in her past, you may use that in deciding whether she was untruthful here.

And, sadly, we had to give you such evidence. Evidence from Ms. Quinn's own mouth, her admissions to being suspended, twice, for cheating. Cheating on a test. That's lying.

Cheating, getting caught, and doing it again.

We ask you to use that knowledge. Use it to conclude that Ms. Quinn is a dishonest person. And to conclude that, in a court of law, it is wrong to rely on statements of a dishonest person.

COMMENT

Rule 608(b) is the less-utilized (and less-available) means for impeaching a witness by proving her/his character as an untruthful person. It permits a limited inquiry, on cross-examination of the challenged witness, into prior dishonest acts; and no extrinsic proof of the same is allowed. As well, the court has great discretion in deciding which acts qualify as sufficiently dishonest. As one court has explained,

> Federal Rule of Evidence 608(b) permits inquiry, at the court's discretion, into specific instances of a witness's conduct that are "probative of truthfulness or untruthfulness." Fed.R.Evid. 608(b). Rule 403 circumscribes the court's discretion by requiring the court to weigh the probative value of the evidence against the danger of

> unfair prejudice from it. See Fed.R.Evid. 403.
>
> Acts probative of untruthfulness under Rule 608(b) include such acts as forgery, perjury, and fraud. 3 Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence P 608[5] at 608-45 to 608-46 (1994). Unlike these acts, seeking discharge in bankruptcy does not show a disregard for truth that would cast doubt on a witness's veracity. [A lawyer's] borrowing from his clients, while ethically questionable, is likewise irrelevant to his truthfulness as an expert. To infer untruthfulness from any unethical act "paves the way to the exception which will swallow the Rule." 3 Weinstein & Berger, supra, P 608[05] at 608-49.

Ad-Vantage Tel. Directory Consultants v. GTE Directories Corp., 37 F.3d 1460, 1464 (11th Cir., 1994) (citations and footnote omitted). In this case, the witness admitted that she had in fact cheated on school tests on too occasions, once after being caught. The inquiry was circumscribed and no extrinsic proof (documents or other witness testimony) adduced. The witness' admission to these acts permits the closing argument that she has a dishonest character and thus should not be believed.

RULE 609 - IMPEACHMENT BY CONVICTION

FRE 609

(a) In General. The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

(1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:

(A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and

(B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and

(2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving--or the witness's admitting--a dishonest act or false statement.

(b) Limit on Using the Evidence After 10 Years. This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if:

(1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and

(2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

(c) Effect of a Pardon, Annulment, or Certificate of Rehabilitation. Evidence of a conviction is not admissible if:

(1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding that the person has been rehabilitated, and the person has not been convicted of a later crime punishable by death or by imprisonment for more than one year; or

(2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile Adjudications. Evidence of a juvenile adjudication is admissible under this rule only if:

(1) it is offered in a criminal case;

(2) the adjudication was of a witness other than the defendant;

(3) an adult's conviction for that offense would be admissible to attack the adult's credibility; and

(4) admitting the evidence is necessary to fairly determine guilt or innocence.

(e) Pendency of an Appeal. A conviction that satisfies this rule is admissible even if an appeal is pending. Evidence of the pendency is also admissible.

NOTES

As a means of impeachment, evidence of conviction of crime is significant only because it stands as proof of the commission of the underlying criminal act. There is little dissent from the general proposition that at least some crimes are relevant to credibility but much disagreement among the cases and commentators about which crimes are usable for this purpose. See McCormick § 43; 2 Wright, Federal Practice and Procedure; Criminal § 416 (1969). The weight of traditional authority has been to allow use of felonies generally, without regard to the nature of the particular offense, and of crimen falsi without regard to the grade of the offense. This is the view accepted by Congress in the 1970 amendment of § 14-305 of the District of Columbia Code, P.L. 91-358, 84 Stat. 473. Uniform Rule 21 and Model Code Rule 106 permit only crimes involving "dishonesty or false statement." Others have thought that the trial judge should have discretion to exclude convictions if the probative value of the evidence of the crime is substantially outweighed by the danger of unfair prejudice. Luck v. United States, 121 U.S.App.D.C. 151, 348 F.2d 763 (1965); McGowan, Impeachment of Criminal Defendants by Prior Convictions, 1970 Law & Soc. Order 1. Whatever may be the merits of those views, this rule is drafted to accord with the Congressional policy manifested in the 1970 legislation. The proposed rule incorporates certain basic safeguards, in terms applicable to all witnesses but of particular significance to an accused who elects to testify. These protections include the imposition of

definite time limitations, giving effect to demonstrated rehabilitation, and generally excluding juvenile adjudications.

Subdivision (a). For purposes of impeachment, crimes are divided into two categories by the rule: (1) those of what is generally regarded as felony grade, without particular regard to the nature of the offense, and (2) those involving dishonesty or false statement, without regard to the grade of the offense.

Foundation:

[Civil trial. Lawsuit against school teacher for sexual harassment of student. Examination of school teacher, called as on cross, by plaintiff counsel.]

Q: Mr. Jones, you are the defendant in this case, correct?

A: Yes.

Q: You do know Ms. Quinn, don't you?

A: Yes.

Q: You sent her e-mails regularly, didn't you?

A: Yes.

Q: You signed some of your e-mails "your special friend," didn't you.

A: That was a joke.

Q: Sir, the issue is whether you signed e-mails in that way. You did, didn't you.

A: Yes.

Q: And you did meet with Ms. Quinn on several occasions after school, at malls and a fast food restaurant, didn't you?

A: A few times.

Q: Sir, the purpose of those meetings was to initiate a sexual relationship, isn't that true?

A: Absolutely not.

Q: To get her drunk and take advantage of her, correct?

A: Absolutely not.

Q: Sir, you are the Donnie Jones with a date of birth of 1-12-1988, correct?

A: Yes.

Q: The Donnie Jones who, two years ago, resided at 1212 N. Hunts Street, correct?

A: Yes.

Q: The same Donnie Jones who pled guilty, before Judge Arbuthnot on October 17, two years ago, to the crimes of recklessly endangering another person and driving while intoxicated?

> DEFENSE COUNSEL: Objection.
>
> THE COURT: Overruled. Members of the jury, I will instruct you at length, at the end of trial, as to how this evidence is to be considered. For now, let me give you a simple explanation. If a person has a criminal conviction, you may consider that not in deciding whether he committed the act he is being sued over, but whether he is an honest, credible witness.

Q: Sir, are you the same Donnie Jones who pled guilty, before Judge Arbuthnot on October 17, two years ago, to the crimes of recklessly endangering another person and driving while intoxicated?

A: Yes.

USE (PERMISSIBLE):

(By Plaintiff's Counsel):

You know, we ask a lot of jurors. You have to sit here, lose time from your lives, and make judgments.

And we ask you to be lie and truth detectors. No machinery, just your skills of observation and your common sense.

But the law gives you an extra tool. It allows you to learn if a witness has been convicted of a crime.. The theory is simple, and it reflects what our common sense and common experience tell us - dishonesty can be proved by showing that people have knowingly broken the law. Listen to what the Judge will instruct you - that if you believe that a witness has been convicted of a crime, you may use that in deciding whether he was untruthful here.

And, sadly, we had to give you such evidence. Evidence from Mr. Jones' own mouth, his admission to being convicted of two crimes. Recklessly endangering another person; Drunk driving. That's breaking the law; that's dishonest.

We ask you to use that knowledge. Use it to conclude that Mr. Jones is a dishonest person. And to conclude that, in a court of law, it is wrong to rely on statements of a dishonest person. A tool for saying, "Mr. Jones, we don't believe your claim of innocent contact with this young woman, a student entrusted to your care."

USE (IMPERMISSIBLE):

[By plaintiff counsel]

Our claim is simple. This teacher used his authority, his power, to harass a young woman.

Look at him. An admitted criminal, a person guilty of law-breaking. Someone who drinks and drives. That is precisely the type or person who would stoop to such despicable conduct.

COMMENT

Rule 609 permits the admission of a prior conviction, proved on cross-examination or extrinsically, for a limited purpose: to impeach the witness' character and thus challenge the believability of the witness' testimony. It does not permit use of that record for other purposes. As one court has

explained,

> Rule 609 was crafted to apply in those cases where the conviction is offered only on the theory that people who do certain bad things are not to be trusted to tell the truth.

United States v. Johnson, 542 F.2d 230, 234-235 (5th Cir.-OLD, 1976). Here, the conviction was admissible to establish a dishonest character and thus challenge the witness' [defendant's] credibility; it was not admitted, however, under 404, and thus use of it to prove propensity to commit the acts being sued over is not allowed.

RULE 612 - WRITING USED TO REFRESH MEMORY

FRE 612

Writing Used to Refresh a Witness's Memory

(a) Scope. This rule gives an adverse party certain options when a witness uses a writing to refresh memory:

(1) while testifying; or

(2) before testifying, if the court decides that justice requires the party to have those options.

(b) Adverse Party's Options; Deleting Unrelated Matter. Unless 18 U.S.C. § 3500 provides otherwise in a criminal case, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record.

(c) Failure to Produce or Deliver the Writing. If a writing is not produced or is not delivered as ordered, the court may issue any appropriate order. But if the prosecution does not comply in a criminal case, the court must strike the witness's testimony or--if justice so requires--declare a mistrial.

NOTES:

The treatment of writings used to refresh recollection while on the stand is in accord with settled doctrine. McCormick § 9, p. 15. The bulk of the case law has, however, denied the existence of any right to access by the opponent when the writing is used prior to taking the stand, though the judge may have discretion in the matter. An increasing group of cases has repudiated the distinction...and this position is believed to be correct. As Wigmore put it, "the risk of imposition and the need of safeguard is just as great" in both situations. 3 Wigmore § 762, p. 111. To the same effect is McCormick § 9, p. 17.

> The purpose of the phrase "for the purpose of testifying" is to safeguard against using the rule as a pretext for wholesale exploration of an opposing party's files and to insure that access is limited only to those writings which may fairly be said in fact to have an impact upon the testimony of the witness.

Rule 612 in Practice

Foundation:

[Civil trial. Lawsuit against school teacher for sexual harassment of student. Examination of school teacher, called as on cross, by plaintiff counsel.]

Q: Sir, you made certain promises to your student, didn't you?

A: I don't know what you mean.

Q: Sir, promises about gifts, trips and more, isn't that correct?

A: I have no memory of such promises.

Q: Sir, I hand you my client's school notebook. You recognize her handwriting, don't you?

A: It looks familiar.

Q: Sir, please turn to the inside back cover, and read to yourself what is written there. Let me know when you are finished.

A: Okay, I've read it.

Q: Do you now remember talking to her about trips, gifts and more?

A: Well I did talk with her about vacations at the beach and about the types of gifts that are for sale along the boardwalk, but I'm sure she misconstrued my comments.

USE (PERMISSIBLE):

[By plaintiff counsel]:

You know this was more than a normal student-teacher relationship. He would talk with Ms. Quinn about trips to beach, about buying presents on the boardwalk. He may have "conveniently" forgotten those conversations, but you saw it - he "remembered" them once his memory was refreshed.

First it was "I don't remember." Then it was "oh well, my remarks must have been misconstrued." But he admitted it here - he did discuss those topics with my client.

USE (IMPERMISSIBLE):

[By plaintiff counsel]:

You know this was more than a normal student-teacher relationship. He would talk with Ms. Quinn about trips to beach, about buying presents on the boardwalk. He may have "conveniently" forgotten those conversations, but you saw it - he acknowledged that she had written those words in her school notebook.

Why else would a student write that unless a teacher had promised her such special treats?

COMMENT

Two principles apply to the practice of refreshing recollection - the witness must acknowledge a lapse of memory, and the document itself does not stand as evidence but instead is a tool to trigger or prompt the faulty memory. As one court has explained as to the first condition,

> It is hornbook law that a party may not use a document to refresh a witness's recollection unless the witness exhibits a failure of memory.

United States v. Balthazard, 360 F.3d 309, 318 (1st Cir., 2004). The second principle is equally settled law:

> It is at most a document to refresh D'Ambrosio's recollection about oral statements he claims to have heard, and a document which refreshes recollection is not admissible under Rule 612, Fed. R. Ev.

Costello v. City of Brigantine, 2001 U.S. Dist. LEXIS 8687, 79-80 (D.N.J., 2001). In this case, the proper use of the document was to refresh the memory of the witness (or remind the witness of the contested fact); however, it is impermissible to present the contents of the writing as substantive evidence, unless it meets a hearsay exception.

RULE 613 - IMPEACHMENT WITH PRIOR STATEMENT

FRE:

(a) Showing or Disclosing the Statement During Examination. When examining a witness about the witness's prior statement, a party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party's attorney.

(b) Extrinsic Evidence of a Prior Inconsistent Statement. Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).

NOTES:

The Queen's Case, 2 Br. & B. 284, 129 Eng. Rep. 976 (1820), laid down the requirement that a cross-examiner, prior to questioning the witness about his own prior statement in writing, must first show it to the witness...The rule abolishes this useless impediment, to cross-examination. Both oral and written statements are included.

The provision for disclosure to counsel is designed to protect against unwarranted insinuations that a statement has been made when the fact is to the contrary.

...

The familiar foundation requirement that an impeaching statement first be shown to the witness before it can be proved by extrinsic evidence is preserved but with some modifications. The traditional insistence that the attention of the witness be directed to the statement on cross-examination is relaxed in favor of simply providing the witness an opportunity to explain and the opposite party an opportunity to examine on the statement, with no specification of any particular time or sequence. Under this procedure, several collusive

witnesses can be examined before disclosure of a joint prior inconsistent statement

Foundation:

[Civil trial. Lawsuit against school teacher for sexual harassment of student. Cross-examination of school teacher's alibi witness by plaintiff counsel.]

Q: Sir, today you have told the jury that Mr. Jones could not have been with Ms. Quinn on the night before Thanksgiving, last year, because you and Jones were at a basketball game. Is that your testimony?

A: Yes.

Q: Under oath?

A: Certainly.

Q: Sir, didn't you submit a report to the School Board when it began an internal inquiry into Ms. Quinn's allegations?

A: Nothing formal.

Q: Okay, nothing formal, but a memo under your name, correct?

A: A short memo.

Q: Sir, short or long, it was a memo that you wrote, or typed, or dictated, and submitted under your name, correct?

A: Yes.

Q: And the subject matter of that report was titled "knowledge regarding allegations of harassment of student Quinn by Mr. Jones." You remember putting that in the topic line of the memo, correct?

A: Sounds right.

Q: And you wrote in that memo, and I quote, "This teacher cannot provide much information on this issue. I have had little contact with Mr. Jones, social or otherwise, during the school year."

A: May I see that?

Q: Sir, answer the question. Did you write that?

A: It sounds like the brief memo.

Q: And, sir, that was written in December, after Thanksgiving, correct?

A: I'll have to look at it and see.

> PLAINTIFF COUNSEL: Your Honor, may this memo be marked as P-12 and shown to the witness? A copy was previously provided to defense counsel.
>
> THE COURT: It may. Proceed.

Q: Sir, you now have before you document P-12. That is your memo to the school board, isn't it?

A: Yes.

Q: Turn to the bottom of the page, where words are highlighted. Do you see them?

A: Yes.

Q: Read along with me. You wrote in that memo, and I quote, "This teacher cannot provide much information on this issue. I have had little contact with Mr. Jones, social or otherwise, during the school year." Did I read that accurately?

A: Yes.

Q: And tell the jury the date of your memo.

A: December 14.

Q: No further questions.

USE (PERMISSIBLE):

[By plaintiff counsel]:

So how does Mr. Jones try and defend himself? We suggest that he tried to use a phony alibi.

You remember, his fellow teacher came in and said "Jones couldn't have met Ms. Quinn the night before Thanksgiving. He was with me at a basketball game."

Sounds good. Maybe too good to be true.

But you have the power and knowledge to brand it a lie, a phony alibi. Why? Because this witness wrote something different, that December, to the school board. Here, let me read it to you:

> "This teacher cannot provide much information on this issue. I have had little contact with Mr. Jones, social or otherwise, during the school year."

The law is clear. When a witness says one thing one day, and another here in court, you can say "we don't believe you here in court because you change your stories." We've all heard that before, when we say that someone "can't keep the story straight." Well, that's what we've shown here.

USE (IMPERMISSIBLE):

[By plaintiff counsel]:

So how does Mr. Jones try and defend himself. We suggest that he tried to use a phony alibi.

You remember, his fellow teacher came in and said "Jones couldn't have met Ms. Quinn the night before Thanksgiving. He was with me at a basketball game."

Sounds good. Maybe too good to be true.

But we have proved it to be a lie. How? Because this witness wrote something different, that December, to the school board. Here, let me read it to you:

> "This teacher cannot provide much information on this issue. I have had little contact with Mr. Jones, social or otherwise, during the school year."

You should believe that statement, written when his own job depended on an accurate statement. Written to his superiors. Written just a week or two after this supposed basketball game.

That memo is true - not the story you heard here in court today.

COMMENT

Rule 613 is procedural in nature, governing the practice or methodology of impeachment. Implicit in the Rule is the recognition of the right to deploy this method to challenge witness credibility. As one court has explained,

> A basic rule of evidence provides that prior inconsistent statements may be used to impeach the credibility of a witness. As a preliminary matter, however, the court must be persuaded that the statements are indeed inconsistent.

United States v. Hale, 422 U.S. 171, 176 (U.S., 1975). However, the prior statement is *not* admissible for its truth unless it meets a separate hearsay exception. As another court explained,

> Prior statements of witnesses are hearsay and are generally inadmissible as affirmative proof. It is a well-established principle of evidence that prior inconsistent statements of a witness are admissible to impeach that witness. including the party calling him. But this works no change in the traditional view that prior unsworn inconsistent statements are hearsay and generally should not be

considered by the jury as direct evidence

United States v. Palacios, 556 F.2d 1359, 1362-1363 (5th Cir.-OLD, 1977) (internal quotations, citations and footnote omitted). In this case, the witness was impeached with an out-of-court statement contradicting his trial testimony, giving opposing counsel the tool to argue that the witness' testimony should not be believed; however, as the previous statement was not under oath and did not meet any hearsay exception, it could not be argued as being the truth and as substantive proof of the opposing party's case.

RULE 701 - LAY OPINION TESTIMONY

FRE:

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

(a) rationally based on the witness's perception;

(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and

(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

NOTES:

Witnesses often find difficulty in expressing themselves in language which is not that of an opinion or conclusion. While the courts have made concessions in certain recurring situations, necessity as a standard for permitting opinions and conclusions has proved too elusive and too unadaptable to particular situations for purposes of satisfactory judicial administration. Moreover, the practical impossibility of determining by rule what is a "fact," demonstrated by a century of litigation of the question of what is a fact for purposes of pleading under the Field Code, extends into evidence also. The rule assumes that the natural characteristics of the adversary system will generally lead to an acceptable result, since the detailed account carries more conviction than the broad assertion, and a lawyer can be expected to display his witness to the best advantage. If he fails to do so, cross-examination and argument will point up the weakness. If, despite these considerations, attempts are made to introduce meaningless assertions which amount to little more than choosing up sides, exclusion for lack of helpfulness is called for by the rule.

...Rule 701 has been amended to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing. Under the amendment, a witness' testimony must be scrutinized under the rules regulating expert opinion to the extent that the witness is providing testimony based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Foundation:

[Civil trial. Lawsuit against school teacher for sexual harassment of student. Direct examination of witness by plaintiff counsel.]

Q: Please tell the jurors your name.

A: Cassandra Whitby.

Q: Ms. Whitby, were you at the mall here in town the night before Thanksgiving?

A: Yes.

Q: Now, at that time did you know the plaintiff, Ms. Quinn?

A: Yes.

Q: Tell the jury whether it was a passing acquaintanceship or something greater.

A: I was the leader of the church choir in which she sang, and I was her counselor at summer camp a few years in a row.

Q: Did you see her at the mall that night?

A: Yes.

Q: With who?

A: That man over there. [Witness points.]

COUNSEL: Indicating, for the record, the defendant Jones.

THE COURT: The record shall so indicate.

Q: How close did you get to them?

A: It was in the food court, and I was maybe 8 or 10 tables away.

Q: Tell the jury what you observed?

A: She was drunk.

DEFENSE COUNSEL: Objection, no foundation; and opinion.

THE COURT: Sustained. Lay a foundation.

Q: Ms. Whitby, what experience do you have with intoxicated persons?

A: I'm 25. I've been at parties, seen drunks in bars, you know. And I teach school, and we get lectures about observing students to see if they are high, under the influence. We've seen some videos.

Q: How long did you get to observe the two people, the defendant and Ms. Quinn?

A: About ten minutes.

Q: Doing what?

A: Talking, getting up and moving around.

Q: Could you hear their words?

A: Some of them - they were a little loud and giggly. I could hear some, not a lot.

Q: What else did you see?

A: I saw them eating, trying to get out of their chairs, trying to pour some juice or some kind of liquid from a bottle in a bag into a cup. And I saw her hair and make-up, they were a little mussed up.

Q: Based on those observations and on your knowledge of intoxication, how would you describe their condition?

A: Drunk.

DEFENSE COUNSEL: Objection. Insufficient observation. She never smelled alcohol, checked their eyes, anything.

THE COURT: Overruled. You may cross-examine on those points.

Q: Thanks. Let me ask you one other group of questions. After they left, did you walk past their table?

A: Yes.

Q: Did you find any papers?

A: Yes. There was a folded-up piece of paper on one of the seats. It looked like composition paper, the paper students get for a three-ring binder.

Q: What was on the paper?

A: I opened it and it read "he loves me, he loves me not, he loves me."

Q: Had you ever seen Ms. Quinn's handwriting?

A: Several times. She'd write me a note about choir practice, things like that.

Q: Tell the jury who wrote those words on that paper?

A: She must have - it was her handwriting. I don't know when she wrote it, but it was hers.

Q: I have no further questions.

USE:

[By plaintiff counsel]:

How do we know their contact at a mall was more than student teacher, more than a mere encounter or a discussion of classes or even a student talking about problems with a respected elder?

They were drunk together. Ms. Whitby saw it. She knows the signs of intoxication. And she put the two of them in that category - she saw their behaviors and told us, in a word, what all of us know the signs of. They were drunk.

And drunk while talking about what? Not homework. Love. "He loves me, he loves me not, he loves me." Why would Ms. Quinn write those words if there were not something going on? And we know the note was written by Ms. Quinn, because Ms. Whitby knows her handwriting.

COMMENT

The lay opinion rule permits, first, testimony that is a "shorthand" version of a lengthy factual description (as long as there is personal knowledge and the observation is based upon a rational perception of the facts). As one court has explained,

> The prototypical example of the type of evidence contemplated by the adoption of Rule 701 relates to the appearance of persons or things, identity, the manner of conduct, competency of a person, degrees of light or darkness, sound, size, weight, distance, and an endless number of items that cannot be described factually in words apart

> from inferences. . . .
>
> . . . Testimony that a person was "excited" or "angry" is more evocative and understandable than a long physical description of the person's outward manifestations. . . . For example, a witness who testifies that an individual whom he saw staggering or lurching along the way was drunk is spared the difficulty of describing, with the precision of an orthopedist or choreographer, the person's gait, angle of walk, etc.

Asplundh Mfg. Div.. v. Benton Harbor Eng'g, 57 F.3d 1190, 1196 (3d Cir. 1995). A second type of lay opinion testimony is that of a specialized knowledge for identification purposes, as when a lay witness renders an opinion that a face in a photograph or a signature on a document is that of a person with whom the lay witness has some degree of familiarity. [This also involves an interplay with Rule 901, governing authentication.] As one court has explained,

> Rule 901(b) illustrates two ways of authenticating or identifying through the testimony of a witness the handwriting on a document as being written by a particular person. The handwriting may be identified through a lay witness who has familiarity with the alleged author's handwriting and who did not acquire that familiarity for purposes of the litigation.

United States v. Scott, 270 F.3d 30, 49 (1st Cir., 2001). Here, the lay witness gave two permissible opinions - that the plaintiff was drunk, a “shorthand” for a detailed series of factual observations, and an opinion as to authorship of a document based upon significant familiarity with handwriting.

FRE

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

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

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

NOTES

702: Rule 702 has been amended in response to Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 [125 L. Ed. 2d 469] (1993), and to the many cases applying Daubert, including Kumho Tire Co. v. Carmichael, [143 L. Ed. 2d 238,] 119 S.Ct. 1167 (1999). In Daubert the Court charged trial judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony, and the Court in Kumho clarified that this gatekeeper function applies to all expert testimony, not just testimony based in science. See also Kumho, 119 S.Ct. at 1178 (citing the Committee Note to the proposed amendment to Rule 702, which had been released for public comment before the date of the Kumho decision). The amendment affirms the trial court's role as gatekeeper and provides some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony. Consistently with Kumho, the Rule as amended provides that all types of expert testimony present questions of admissibility for the trial court in deciding

whether the evidence is reliable and helpful. Consequently, the admissibility of all expert testimony is governed by the principles of Rule 104(a). Under that Rule, the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence.

Daubert set forth a non-exclusive checklist for trial courts to use in assessing the reliability of scientific expert testimony. The specific factors explicated by the Daubert Court are (1) whether the expert's technique or theory can be or has been tested--that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community. The Court in Kumho held that these factors might also be applicable in assessing the reliability of non-scientific expert testimony, depending upon "the particular circumstances of the particular case at issue." 119 S.Ct. at 1175.

No attempt has been made to "codify" these specific factors. Daubert itself emphasized that the factors were neither exclusive nor dispositive. Other cases have recognized that not all of the specific Daubert factors can apply to every type of expert testimony.

703: Rule 703 has been amended to emphasize that when an expert reasonably relies on inadmissible information to form an opinion or inference, the underlying information is not admissible simply because the opinion or inference is admitted....

When information is reasonably relied upon by an expert and yet is admissible only for the purpose of assisting the jury in evaluating an expert's opinion, a trial court applying this Rule must consider the information's probative value in assisting the jury to weigh the expert's opinion on the one hand, and the risk of prejudice resulting from the jury's potential misuse of the information for substantive purposes on the other. The information may be disclosed to the jury, upon objection, only if the trial court finds that the probative value of the information in assisting the jury to evaluate the expert's opinion substantially outweighs its prejudicial effect. If the otherwise inadmissible information is admitted under this balancing test, the trial judge must give a limiting instruction upon request, informing

Foundation:

[Civil trial. Lawsuit against school teacher for sexual harassment of student. Direct examination of psychologist by plaintiff counsel after qualifications have been established and the witness approved to testify as an expert.]

Q: Dr. Wooten, does Ms. Quinn, the plaintiff, show any signs of psychological trauma, or harm?

A: Yes.

Q: Please tell the jury your background in this case?

A: I was retained, after the litigation started, to evaluate Ms. Quinn and assess her emotional state.

Q: What materials did you review, and who if anyone did you interview, in order to make that assessment?

A: I interviewed Ms. Quinn on three occasions, and her parents. Her dad, who is now deceased, spoke with me twice; her mom, three times.

Q: What else did you do?

A: I reviewed her school records, including teachers' comments about classroom behavior. I also administered certain tests, personality tests, and an IQ test.

Q: Are those all the types of sources a psychologist usually relies on in formulating an opinion?

A: Yes.

Q: And what, in fact, is your opinion, based on all of these materials, interviews and tests?

A: It is my opinion that Ms. Quinn was growing up as a healthy, normal teenager; that around the time that she claims this teacher started to harass her she developed signs of stress, and that she now suffers from post-traumatic stress disorder. In other words, she suffered an emotional trauma, and we are now seeing the aftermath - depression, eating disorder, problems with sleep.

Q: Thank you. I have no further questions.

USE (PERMISSIBLE):

[By plaintiff counsel]:

Members of the jury, we know beyond question that Ms. Quinn was the victim of sexual harassment. We know that from her own testimony; we know that from the inexplicable behavior of this teacher; and we know that from expert testimony.

You remember Dr. Wooten. The doctor examined Ms. Quinn, using the tools of psychology. The examination was thorough. And it showed a diagnosis - post-traumatic stress disorder.

The word "post" means "after." A disorder after a traumatic event. And the onset of that diagnosis coincides with the one event we have been talking about - the harassment by a person in a position of trust, a teacher.

When a person has been burned, we know it either because we saw the fire touch her, or because the burned skin has a mark on it. Here, the fire was the harassment; and the burned skin is the doctor's examination showing the suffering this child underwent. We have proved that she was harassed and that she has suffered from that harassment.

USE [IMPERMISSIBLE]:

You heard Dr. Wooten, the psychologist. Think of all the people he spoke with, Even Ms. Quinn's dead father. What each of those people did was to tell the doctor that Ms. Quinn was suffering - that she used to be fine, and now she has problems, problems that coincide with the harassment. Her teachers, her mom, her late dad - they saw it, they knew it. And now you know it too.

COMMENT:

Expert opinion testimony is admissible as substantive evidence, even when it embraces an "ultimate" issue. *See* Rule 704, F.R.E. As long as its meets the *Daubert*/Rule 702 criteria, it is admissible with the appropriate weight to be assigned by the factfinder(s). As one court has explained,

> [a]s expert evidence, the testimony need only assist the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue. As circumstantial evidence, [the expert's] data and testimony need not prove the plaintiffs' case by themselves; they must merely constitute one piece of the puzzle that the plaintiffs endeavor to assemble before the jury.

City of Tuscaloosa v. Harcros Chems., 158 F.3d 548, 564-565 (11th Cir., 1998). While experts *may* rely on evidence that is in itself inadmissible, the expert may not repeat the inadmissible evidence to the jury and it is not available as substantive evidence. As one court has explained,

> the Court examines the expert's opinion and its efficacy in assisting

> the litigant in meeting the applicable burden of proof. As an initial matter, an expert can rely on inadmissible hearsay evidence such as another expert's report, in arriving at an opinion. The expert cannot, however, certify the truth of a prior expert's opinion.
>
> Moreover, the inadmissable evidence relied on by the expert is not somehow transmogrified into admissible evidence simply because an expert relies on it.

Fisher v. Sellas (In re Lake States Commodities, Inc.), 272 B.R. 233, 242 (Bankr. D. Ill., 2002) (citations omitted). Here, the expert's opinion was certainly helpful to understanding the testimony of the plaintiff *and* to a determination of fact; and based upon appropriate scientific methodology it is admissible. However, while the expert may identify the various sources considered, the substance of what each source told the expert was not independently admissible, and thus may not be argued as separate, supporting, pieces of evidence.

RULE 801- STATEMENT NOT ADMITTED FOR ITS TRUTH

FRE

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

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

(c) Hearsay. "Hearsay" means a statement that:
(1) the declarant does not make while testifying at the current trial or hearing; and
(2) a party offers in evidence to prove the truth of the matter asserted in the statement.

NOTES

The definition of "statement" assumes importance because the term is used in the definition of hearsay in subdivision (c). The effect of the definition of "statement" is to exclude from the operation of the hearsay rule all evidence of conduct, verbal or nonverbal, not intended as an assertion. The key to the definition is that nothing is an assertion unless intended to be one.

...

The definition follows along familiar lines in **including only statements offered to prove the truth of the matter asserted.** If the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay.

Foundation:

[Civil trial. Lawsuit against school teacher for sexual harassment of student. Direct examination of plaintiff's mother by counsel for plaintiff.]

Q: Good evening. Please tell the jury who you saw at the local mall the night before Thanksgiving.

A: Him. The defendant. And my daughter.

Q: Ma'am, before that night, did you have any reason to suspect that your daughter had any other than an ordinary student-teacher relationship with the defendant?

A: Truly, not until that afternoon.

Q: What happened that afternoon?

A: I received an anonymous telephone call.

Q: And what did the caller say?

> DEFENSE COUNSEL: Sidebar, Your Honor.
>
> THE COURT: Okay.
>
> [AT SIDEBAR]
>
> THE COURT: What's the problem?
>
> DEFENSE COUNSEL: The mother is going to say that the anonymous caller told her the daughter was going to be at the mall on a romantic meeting with the teacher.
>
> THE COURT: Why is this admissible?
>
> PLAINTIFF'S COUNSEL: We are not introducing this for the truth of the matter asserted. But we need to explain why the mother went to the mall that night. And, I note that the defense counsel's opening denied any contact on the night before Thanksgiving. A jury will think it bizarre that this mother went to the mall the night when most people are at home preparing for the holidays unless they hear why she went.

> THE COURT: But I don't like this "romantic" stuff. Here's what I'm going to do. We'll take a recess. Instruct the mother that she may say that she received a call that her daughter was meeting an adult at the mall, and I'll give a limiting instruction. [SIDEBAR DISCUSSION CONCLUDED]
>
> THE COURT: Members of the jury, I'm sure you've all heard the term "hearsay." In a very over-simplified definition, the hearsay rule says that one witness cannot come to court and tell us what other people said. That's because we can't tell if the other people are reliable, if they know what they are talking about.
>
> I am going to let the plaintiff's mother tell you what someone told her. It does not mean that this person told the truth - it will just be used by you as background to try and decide the background of that day and decide whether, and why, the mother went to the mall. Proceed.

Q: And what did the caller say?

A: It was a strange voice. All it said was "your daughter will be meeting an adult tonight at the mall."

Q: Did that concern you?

A: Yes.

Q: So what did you do?

A: I waited until after dinner, and went to the mall to see for myself.

Q: And who did you see?

A: As I pulled up I saw the defendant, hurrying out to his car. I went inside and my daughter was at the food court, at a table with two glasses of soda.

Q: No further questions.

Use [PERMISSIBLE]:

[By Plaintiff Counsel]

One of the questions you must resolve is whether there was this surreptitious meeting at the mall the night before Thanksgiving. And while the defendant denies being there, we have the testimony of

the plaintiff and of her mom.

Now, I'm the first to admit that a mom or dad has plenty of other things to do, the night before the big turkey feast, than to go to the mall. But my client's mother had a reason, the kind any parent would understand. She received a phone call involving a meeting, an encounter between her teenaged daughter and an adult.

That's why the mother went to the mall. And that's why she was in a position to see the defendant, slinking away toward his car. And that's how she came to see the table with one person - her daughter - and two cups of soda. The other cup was his.

Use [IMPERMISSIBLE]:

One of the questions you must resolve is whether there was this surreptitious meeting at the mall the night before Thanksgiving. And while the defendant denies being there, we have the testimony of the plaintiff and of her mom. They both saw him.

And we have the testimony of a third person. Mom got tipped off - someone knew the defendant was going to be there, and told mom. "Your daughter will be meeting an adult tonight at the mall." What was that person telling mom? That her daughter would be meeting *this* adult. The defendant.

COMMENT

An out-of-court statement, even one in the mode of a declarative sentence, is not necessarily a hearsay statement. To qualify as hearsay, the statement must have been intended as an assertion when spoken *and* be introduced for the purpose of proving the truth of the assertion. Where the latter condition is not present, the statement is not hearsay and its admissibility is governed by application of relevance principles and the balancing of Rule 403. As one court has explained,

> To a student first embarking on Evidence 101, the key to understanding hearsay is, long before venturing into the thicket of the hearsay exceptions, to develop a sure "feel" for the difference between those utterances that are hearsay and those that are not. One must be able to negotiate the territory that McCormick called "the borderland of hearsay." It is not enough to know that a challenged statement is admissible. That can be a lucky guess. Is it admissible because the hearsay rule is satisfied?, or is it admissible because the hearsay rule is inapplicable?
>
> The classic classroom teaser posits a witness who testifies that he spoke by telephone with his brother in London, who said, "It is raining in London." To the professor's query as to whether that brotherly utterance is hearsay, the only intelligent answer is "I don't have the foggiest." It depends on the purpose for which the statement

> is offered. If it is offered to prove that at a given time it was raining in London, it is, of course, hearsay. If it is offered to prove that at a given time the brother was alive and able to speak, it is, with equal certainty, non-hearsay. The first purpose needs the brother to be shown to be trustworthy. The second purpose is indifferent to trustworthiness, and the hearsay rule is only designed to guarantee trustworthiness.

Stoddard v. State, 850 A.2d 406, 410-411 (Md. Ct. Spec. App., 2004). At the same time, hearsay may not be snuck into the record under the guise of a non-hearsay purpose where that justification is not sustained under a basic relevance analysis. As one court has explained,

> Whether a disputed statement is hearsay frequently turns on the purpose for which it is offered. If the hearsay rule is to have any force, courts cannot accept without scrutiny an offering party's representation that an out-of-court statement is being introduced for a material non-hearsay purpose. Rather, courts have a responsibility to assess independently whether the ostensible non-hearsay purpose is valid.

United States v. Sallins, 993 F.2d 344, 347 (3rd Cir. 1993). Here, the trial court admitted the statement for a non-hearsay purpose, to explain why a mother would go to the mall at a time (the night before Thanksgiving) when such a trip might be unexpected or seem unjustified. The admission of the call is to explain why the mother responded, and not proof that there was in fact a meeting at the mall. Use for this second purpose in a closing argument is forbidden, as that argues that the assertion is indeed true.

RULE 801(d)(1) - PRIOR INCONSISTENT STATEMENT

FRE

A statement that meets the following conditions is not hearsay:

(1) A Declarant-Witness's Prior Statement. The declarant testifies and is subject to crossexamination about a prior statement, and the statement:

(A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition.

NOTES

The position taken by the Advisory Committee in formulating this part of the rule is founded upon an unwillingness to countenance the general use of prior prepared statements as substantive evidence, but with a recognition that particular circumstances call for a contrary result...

Prior inconsistent statements traditionally have been admissible to impeach but not as substantive evidence. Under the rule they are substantive evidence [when made under oath at a trial, deposition or similar proceeding].

Foundation:

[Civil trial. Lawsuit against school teacher for sexual harassment of student. Cross examination of plaintiff's mother by counsel for defendant.].

Q: Ma'am, today you are saying that you saw my client leave the mall, correct?

A: Yes.

Q: You're sure of that, correct?

A: Oh yes.

Q: You're not saying that just because you want to improve your daughter's case, are you?

A: No.

Q: Ma'am, do you remember when this lawsuit began, you went to a procedure called a deposition?

A: Yes.

Q: And so the jurors know, a deposition is a proceeding, under oath, where each side asks questions of the other side's witnesses. Correct?

A: Yes.

Q: You were deposed exactly one year ago, correct? Back just a month or two after Thanksgiving?

A: That sounds right.

Q: And although I was asking the questions, your daughter's lawyer was present. Isn't that right?

A: Yes.

Q: In fact, this happened at your daughter's lawyer's office, correct?

A: Yes.

Q: There was a court reporter, like today?

A: Yes.

Q: You were under oath, correct?

A: Yes.

Q: And, after the deposition, you had the opportunity to read over the court reporter's transcript and note any errors, right?

A: Yes.

Q: Ma'am, I'm going to read a question from that deposition and your answer. When I am done I'm going to ask whether you said those words. Please listen. Counsel, I am reading from page 42.

> Question: And you're not sure who you saw leaving the mall, are you?
>
> Answer: I thought it was the teacher, but it was dark and the man moved quickly. His hat kept me from seeing his whole face.

My question to you is, you said that answer, under oath. Didn't you?

A: Yes.

Use:

[By Defense Counsel]

Members of the jury, you have the power. You have the power to say "we believe this fact" or "we do NOT believe this fact." The law gives you that exclusive power.

And the law gives you tools. When a person tells one story one day, and another story another day, the law says that you can do what common sense tells you - reject the witness' testimony here, because you don't know which story to buy.

But the law gives you a second tool. When a witness has told a different story and done so under oath, the law says "jurors, you have the right to decide that the earlier version, told under oath, is the truth."

And where does that come into play here? Remember Ms. Quinn's mom, who came here and sat on that witness chair and said that she saw my client leave the mall the evening before Thanksgiving? What do we know? She said the opposite under oath, back at a time when the Thanksgiving event was fresh in her mind.

What did she say at that deposition? I've blown it up for you, so read along as I read aloud:

> Question: And you're not sure who you saw leaving the mall, are you?
>
> Answer: I thought it was the teacher, but it was dark and the man moved quickly. His hat kept me from seeing his whole face.

That's what she said. Under oath. Fresh in her mind. With her lawyer sitting next to her. And she read it over and never said "hey, that's wrong. Please correct this."

What does that tell you? That what she said at that deposition is the truth. She never saw the face of anyone - she saw a man, and nothing more.

That's the truth. Some man. Not this man.

COMMENT

Once an out-of-court statement is determined to satisfy a hearsay exception (or, as in the case of Rule 801(d), be defined as non-hearsay admissible for its truth), the proponent may establish its existence through cross-examination or extrinsically (the latter being done in compliance with Rule 613's assurance of giving the declarant an opportunity to explain the inconsistency) *and* ask the jury to accept the out-of-court version of events as the true one. As one court has explained,

> During direct examination by the government of three of its witnesses, the prosecutor introduced, for purposes of impeachment, prior inconsistent statements made by the witnesses before the Grand Jury. Defendant argues that the court erred in failing to give a limiting instruction to the effect that these prior sworn statements did not constitute substantive evidence.
>
> Fed.R.Evid. 801(d)(1)(A) provides that prior inconsistent statements by a witness are not hearsay and are competent as substantive evidence if the declarant testifies at trial and is subject to cross-examination concerning the statement, and the prior inconsistent statement was given under oath at a "trial, hearing, or other proceeding." Grand jury proceedings fall within the ambit of "other proceedings[.]" The district court did not err in refusing to give a limiting instruction.

United States v. Wilson, 806 F.2d 171, 176 (8th Cir., 1986). In this case, the witness admitted that she made a contradictory statement at a deposition, under oath. Thus, the cross-examiner was entitled to argue that this, rather than the witness' in-court statement, was the true version and ask the jurors to reach the same conclusion.

RULE 801(d)(1) - PRIOR CONSISTENT STATEMENT

FRE

A statement that meets the following conditions is not hearsay:

(1) A Declarant-Witness's Prior Statement. The declarant testifies and is subject to crossexamination about a prior statement, and the statement:

(B) is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying

NOTES

Prior consistent statements traditionally have been admissible to rebut charges of recent fabrication or improper influence or motive but not as substantive evidence. Under the rule they are substantive evidence. The prior statement is consistent with the testimony given on the stand, and, if the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally.

Rule 801(d)(1)(A) in Practice

Foundation:

[Civil trial. Lawsuit against school teacher for sexual harassment of student. Redirect examination of plaintiff's mother by counsel for plaintiff.]

Q: Ms Quinn, the defense attorney asked you some questions about Christmas Eve. Remember?

A: Yes.

Q: Defense counsel asked you whether you saw his client, the defendant, on Christmas Eve. Correct?

A: Yes.

Q: And defense counsel asked you whether you were insulted by the defendant, because he refused to dance with you at that Christmas Eve party, do you remember that?

A: Yes.

Q: Did that refusal to dance with you cause you to bring this lawsuit?

A: No.

Q: Did you complain to anyone about the harassment of your daughter by this defendant before the Christmas party?

A: Yes.

Q: To whom did you complain, and when?

A: The first Monday after Thanksgiving, I went to the School Board and met with the Superintendent of Schools.

Q: And what did you tell that person?

A: I told the superintendent what I have said here - that I followed them to the mall, saw the teacher leave the mall, and found my daughter in the food court. I told the superintendent about all of the harassment.

Q: No further questions.

Use:

How do we know that the defendant met a teenage girl at the mall? Many ways.

Let me tell you one of them. Five days after that event, my client's mother went to the school superintendent and told that official everything. That proves that this teacher abused his position of trust and met young Ms. Quinn at the mall. It was reported promptly, there was no reason like a refusal to dance with someone to fake a report, and it was the truth. It is the truth.

COMMENT

Notwithstanding the general prohibition against having a witness tell her story in court *and tell the factfinder all of the other times the witness has recounted this version*, the Rules explicitly permit use of a prior consonant statement *as a response* to an attack or insinuation of corrupt motive or recent fabrication. To satisfy this requirement and be admitted as substantive evidence, the prior statement *must* pre-date the occurrence of the alleged corrupting influence or the onset of fabrication. As the United States Supreme Court has explained,

> a prior consistent statement introduced to rebut a charge of recent fabrication or improper influence or motive was admissible if the statement had been made before the alleged fabrication, influence, or motive came into being, but it was inadmissible if made afterwards. As Justice Story explained: "Where the testimony is assailed as a fabrication of a recent date, . . . in order to repel such imputation, proof of the *antecedent* declaration of the party may be admitted."
>
> McCormick and Wigmore stated the rule in a more categorical manner: "The applicable principle is that the prior consistent statement has no relevancy to refute the charge unless the consistent statement was made before the source of the bias, interest, influence or incapacity originated." E. Cleary, McCormick on Evidence § 49, p. 105 (2d ed. 1972) (hereafter McCormick). See also 4 J. Wigmore, Evidence § 1128, p. 268 (J. Chadbourn rev. 1972) (hereafter Wigmore) ("A consistent statement, at a *time prior* to the existence of a fact said to indicate bias . . . will effectively explain away the force of the impeaching evidence" (emphasis in original)). The question is whether Rule 801(d)(1)(B) embodies this temporal requirement. We hold that it does.

Tome v. United States, U.S., 115 S.Ct. 696, 700 (1995). Here, once the defense alleged that the trial testimony was a result of a corrupt motive (the rejection of plaintiff's mother at a dance), the witness' consistent statement pre-dating the dance was admissible both to rebut this allegation and, under 801(d)(1)(B), for its truth. This allowed plaintiff's counsel to argue, in closing, that the mother's report to the school authorities was true, thus proving the claim being made here in court.

RULE 801(d)(1)- STATEMENT OF IDENTIFICATION

FRE

A statement that meets the following conditions is not hearsay:

(1) A Declarant-Witness's Prior Statement. The declarant testifies and is subject to crossexamination about a prior statement, and the statement:

(C) identifies a person as someone the declarant perceived earlier.

NOTES

The admission of evidence of identification finds substantial support, although it falls beyond a doubt in the category of prior out-of-court statements. The basis is the generally unsatisfactory and inconclusive nature of courtroom identifications as compared with those made at an earlier time under less suggestive conditions.

Foundation:

[Civil trial. Lawsuit against school teacher for sexual harassment of student. Direct examination of mall employee by plaintiff's counsel.]

Q: This past year, did you work at the local mall?

A: Yes.

Q: In what capacity?

A: I sold soda and snacks at the food court. My store there, where I worked, was called Trina's Treats.

Q: Did you work there the night before Thanksgiving?

A: Yes.

Q: Did you see this young woman, seated next to me, that night [pointing at the plaintiff]?

A: Yes. She was there with some man, and later her mother came in and made a fuss. Then, a day or two later, the police spoke with me about it.

Q: Let the record show that the witness pointed to my client, the Plaintiff, as the young woman she saw that night. Do you see the man here today who was with my client that night?

A: It might be that man over there, but I can't be sure.

Q: Which man over there?

A: The man in the blue suit with the yellow tie.

Q: Let the record show that the witness pointed to the defendant. Tell the jury why you can't be sure.

A: Well, I see so many people at the mall that, after a day or two, the faces all sort or merge.

Q: Okay, before you mentioned that police came. Was that within a day or two of when you saw my client and her mother?

A: Yes.

Q: Did the police ask you to look at any kind of a book?

A: Yes. They had a school yearbook with a section of faculty photos. I was asked to look at each teacher and see if any of them was the man I saw with your client.

Q: And did you pick one?

A: Yes. And I circled it.

Q: Before I show you the book, tell me why you picked that one and circled it.

A: Because that was the guy I saw with the girl.

Q: I am handing you P-12, a school yearbook. Would you please turn to page 29 and see if the faculty photos are there.

A: They are.

Q: Is any of them circled?

A: Yes. One.

Q: And is your handwriting next to that picture?

A: Yes.

Q: Tell the jury what is written there.

A: It has my name, because I signed it, and the words "this is the man who was with the teenager."

Q: And was that the man who in fact was with my client?

A: Yes.

Q: Read the name printed under that photo.

A: Donnie Jones.

Q: Your Honor, there is a stipulation that this photo is in fact a photo of Mr. Jones, the defendant.

DEFENSE COUNSEL: So stipulated.

Q: No further questions.

Use:

[Plaintiff Counsel]:

How else did we prove that Mr. Jones was not at some basketball game but was at the mall with Ms. Quinn? We found the mall employee who sold them sodas and cookies. She could not identify Mr. Jones here in court, but she did something better - she went through a book of photos, and of all the people she saw she picked only one - this man - as the person at the mall.

She saw his photo within a day or two of seeing them at the mall, and she identified it. An identification when everything was fresh in her mind.

Look. Here it is. Her signature, her handwriting. And what did she write? "This is the man who was with the teenager." And that's the truth.

COMMENT

Whatever problems may exist in eyewitness identification, the Federal Rules permit a jury to learn of a testifying witness' out-of-court identification *and* to consider that statement [an assertion that this is the person in question] for the truth of that assertion. As the Supreme Court has explained,

> Rule 801(d)(1)(C) defines as not hearsay a prior statement "of identification of a person made after perceiving the person," if the declarant "testifies at the trial or hearing and is subject to cross-examination concerning the statement."..
>
> ...
>
> ...The premise for Rule 801(d)(1)(C) was that, given adequate safeguards against suggestiveness, out-of-court identifications were generally preferable to courtroom identifications.

United States v. Owens, 108 S. Ct. 838, 843-844 (U.S., 1988). In this case, it is of no moment that the witness can no longer identify the defendant as the teenager's mall companion; as the witness was subject to cross-examination, her out-of-court identification is admissible for its truth and may properly be argued as substantive evidence.

FRE

(2) An Opposing Party's Statement. The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

NOTES

[2011 Note Statements falling under the hearsay exclusion provided by Rule 801(d)(2) are no longer referred to as "admissions" in the title to the subdivision. The term "admissions" is confusing because not all statements covered by the exclusion are admissions in the colloquial sense--a statement can be within the exclusion even if it "admitted" nothing and was not against the party's interest when made. The term "admissions" also raises confusion in comparison with the Rule 804(b)(3) exception for declarations against interest. No change in application of the exclusion is intended.**]**

Admissions by a party-opponent are excluded from the category of hearsay on the theory that their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule. No guarantee of trustworthiness is required in the case of an admission. The freedom which admissions have enjoyed from technical demands of searching for an assurance of trustworthiness in some against-interest circumstance, and from the restrictive influences of the opinion rule and the rule requiring firsthand knowledge, when taken with the apparently prevalent satisfaction with the results, calls for generous treatment of this

avenue to admissibility.

The rule specifies five categories of statements for which the responsibility of a party is considered sufficient to justify reception in evidence against him:

(A) A party's own statement is the classic example of an admission...

(B) Under established principles an admission may be made by adopting or acquiescing in the statement of another...Adoption or acquiescence may be manifested in any appropriate manner. When silence is relied upon, the theory is that the person would, under the circumstances, protest the statement made in his presence, if untrue. The decision in each case calls for an evaluation in terms of probable human behavior....

(C) No authority is required for the general proposition that a statement authorized by a party to be made should have the status of an admission by the party...

(D) The tradition has been to test the admissibility of statements by agents, as admissions, by applying the usual test of agency...A substantial trend favors admitting statements related to a matter within the scope of the agency or employment.

(E) The limitation upon the admissibility of statements of co-conspirators to those made "during the course and in furtherance of the conspiracy" is in the accepted pattern.

Foundation:

[Civil trial. Lawsuit against school teacher for sexual harassment of student. Direct examination of newspaper reporter by plaintiff's counsel.]

Q: Please tell the jury how you are employed.

A: I am a reporter for the Bridgeton Tattler.

Q: And what is that?

A: It is a local newspaper in Bridgeton. Sort of a gossip sheet.

Q: Did you have any involvement covering the events that are at the root of this lawsuit?

A: Yes.

Q: When did you first get involved?

A: It was a few days after Thanksgiving. There was a school board meeting. The plaintiff's mother was there, and so was the defendant, who came with a lawyer.

Q: Let me ask you first whether you had any contact with the defendant?

A: After I heard the mother's allegations, which she presented to the school board, there was a recess. I went up to the defendant and asked him, point blank, "well, were you with her at a mall?"

Q: And how did the defendant respond?

A: He just hung his head, he didn't speak. He got a tear in his eye.

Q: What about his lawyer? Did you engage that person in conversation?

A: I asked my question to the defendant a second time, at which time the lawyer stepped in between us and said "I'm his lawyer and I'll do the talking here." So I asked the lawyer "well, was he there with her just before Thanksgiving?"

Q: And how did the lawyer respond?

A: She said "my client's meeting with the young woman, at the mall, was a total coincidence and there was nothing covert or inappropriate about it."

Q: No further questions.

Use:

[Plaintiff Counsel]

How else did we prove that Mr. Jones was not at some basketball game but was at the mall with Ms. Quinn? It's not just the mall employee, or Ms. Quinn, or Ms. Quinn's mother.

Jones himself admits he was there. An admission he made not once but twice.

We all know that when someone asks us a question that is an accusation, our silence is, in effect, an admission. If we have an auto accident and the other driver jumps out and says "hey buddy, why did you run the light," we will say "no I didn't" unless the accusation is true. Then we just get silent.

Well that's what happened here. The reporter spoke to the defendant, and asked him point blank. And did he say "no, I wasn't there?" No. He got a tear in his eye.

And that's not all. As soon as the question was asked a second time, his lawyer answered it on his behalf. "My client's meeting with the young woman, at the mall, was a total coincidence and there was nothing covert or inappropriate about it."

We hire lawyers to talk for us. And, of course, if the lawyer says it wrong, we say "hey, that's incorrect." But here, there was no correction - just a silent approval of what the lawyer said. "The meeting was a total coincidence." Well we know one thing for sure - you can't have a "total coincidence" meeting without being at the mall. He admitted it - he was there.

COMMENT

The rule allowing a party's admission into evidence as substantive proof is far-reaching. There is no threshold requirement of reliability; nor must there be proof of the declarant having personal knowledge of the subject matter. Rather, all that is needed is proof that a party (directly, vicariously, or by agency) made a statement deemed useful by that party's opponent. As one court has explained,

> admissions of a party-opponent under Rule 801(d)(2) are accorded generous treatment in determinations of admissibility. See, e.g., Fed. R. Evid. 801 advisory committee note (stating that "no guarantee of trustworthiness is required in the case of an admission" and that admissions enjoy "freedom . . . from the restrictive influences of the opinion rule and the rule requiring first-hand knowledge"); Russell v. United Parcel Serv., 666 F.2d 1188, 1190 (8th Cir. 1981) (holding that "firsthand knowledge is not required where admissions are involved").

Aliotta v. AMTRAK, 315 F.3d 756, 761 (7th Cir., 2003). In this case, the plaintiff established two admissions by defendant, one by silent acquiescence and a second by a spokesperson's words (words authorized and, as well, adopted or approved by acquiescence). While the jury need not believe those admissions, it is entitled to; and, therefore, counsel may argue those assertions as being the truth counsel seeks to prove in this litigation.

RULE 801(d)2 - ADMISSION (CO-CONSPIRATOR)

FRE

The statement is offered against an opposing party and:
(E) was made by the party's coconspirator during and in furtherance of the conspiracy.
The statement must be considered but does not by itself establish the...existence of the conspiracy or participation in it under (E).

NOTES

Admissions by a party-opponent are excluded from the category of hearsay on the theory that their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule. No guarantee of trustworthiness is required in the case of an admission.

...

(E) The limitation upon the admissibility of statements of co-conspirators to those made "during the course and in furtherance of the conspiracy" is in the accepted pattern. While the broadened view of agency taken in item (iv) might suggest wider admissibility of statements of co-conspirators, the agency theory of conspiracy is at best a fiction and ought not to serve as a basis for admissibility beyond that already established...

Foundation:

[Criminal Trial. Defendant Rau is charged with the murder of Zachary Wittels. Direct examination of undercover police officer Smith by prosecutor. **Note - Rau is standing trial alone.**]

Q: Tell the jury how you are employed?

A: I am an agent of the state Bureau of Investigation.

Q: And from July to November of last year, did you perform that function openly?

A: No. I was undercover.

Q: Undercover where?

A: I infiltrated a drug organization and worked with the defendant Rau.

Q: What was his job in the organization?

A: He was what they called "the enforcer." If there was trouble, he'd go to settle it.

Q: Did you actually see him in this role?

A: I saw him carrying a gun, going around with the main dealer and also when money was collected from the street dealers each night.

Q: And did he have a nickname?

A: Rau-Rau.

Q: Who was Zachary Wittels?

A: Wittels owned a grocery store in the neighborhood.

Q; Were you present when he was shot?

A: No. I was in the house around the corner from his store. It was used for packaging drugs, which were then distributed to the street sellers for sale to individual customers. I heard the shots and went around to where his body was.

Q: Earlier you described someone as the "main dealer." What is the name of that person?

A: Lannie Agnes. She ran the organization and paid everyone, from Rau and the other top guys to all of us workers.

Q: Who was her main assistant, if she had one?

A: Benny Fielder. He was the one who ran things when she was not around?

Q: Did you hear any conversation involving Lannie Agnes and Benny Fielder that related to Mr. Wittles?

A: Yes, a few days before the shooting.

Q: Before you tell us about that conversation, was this defendant, Rau, present?

A: No. That day he was at the beach.

Q: Who spoke, and what was said?

A: Lannie Agnes said "that grocer's time is up." Then she turned to Fielder and said "get Rau-Rau a nine that's clean. Tell him it's time to do the grocer."

Q: What does "clean" mean?

A: A gun that can't be traced.

Q: And after that was said, what happened?

A: Fielder reached into a bag and pulled out a nine millimeter gun.

Q: Agent, after the shooting did you witness any further discussion about this crime?

A: Yes.

Q: Tell us about it.

A: About an hour after the shooting, Lannie Agnes came up to us in the drug storage house. At that time, all of the crew - the street sellers, the drug packagers - were there. She said "yo, listen up. Rau did me a big favor this afternoon, and now I need one from all of you. If anyone asks, Rau was at the beach all day today."

Q: No further questions.

Use:

[Prosecution]

How do we know who committed the murder? In effect, Mr. Rau has admitted it himself.

You see, when you join a conspiracy, all of the members speak in one voice. They have a unified purpose - selling drugs and protecting their drug dealing - and the words of one are the words of all. That's reality, and that's what the law provides.

So when Mr. Rau, or "Rau-Rau" as he was called, joined this group, he became part of a team. One team member's words are his words too.

And what did the team, and therefore Mr. Rau, say? Two things.

Before the murder, it was 'get Rau a gun.' A "clean" gun. A nine millimeter gun. The precise type of gun used in this murder, as the ballistics expert explained.

And after the murder? What did Mr. Rau say? Not in his voice, but through the voice of his partner? That he took care of the problem - Mr. Wittels. Listen to his words - and they are his although they came out of Lannie's mouth: "Rau did me a big favor this afternoon, and now I need one from all of you. If anyone asks, Rau was at the beach all day today."

And what was that favor? The murder of Zachary Wittels.

COMMENT[1]

The admissibility of one conspirator's statement(s) against the other conspiracy member(s) parallels the doctrine of conspiratorial liability - just as the act of one conspirator is attributed to all, so too is it that the words of one conspirator, when uttered *during* and *in furtherance of* the conspiracy, are admissible as if they were spoken by the alleged conspirator on trial. As one court has explained,

> Out-of-court declarations made by coconspirators of the accused during the course and in furtherance of a conspiracy are not hearsay and are admissible. Fed. R. Evid. 801(d)(2)(E). Of course, such declarations are admissible only if the accused was engaged in a

[1] In this and the ensuing examples, the hearsay rules are illustrated without regard to the Confrontation Clause analysis engendered by Crawford v. Washington, 541 U.S. 36 (2004), which excludes "testimonial" hearsay when introduced by the prosecution unless there is proof of the declarant's unavailability *and* the prior statement was subject to cross-examination. A *Crawford* analysis is eschewed here, as the purpose of *Evidentiary Foundation and Use* is to illustrate general usage of significant evidentiary rules without regard to specific constitutional limitations. It is sufficient to note that in the remaining examples involving criminal cases, the admissibility of the statement may be at issue in light of *Crawford*.

> conspiracy with the declarants, and determining whether the accused committed the crime of conspiracy is the province of the jury. Rule 104(b) preserves both the proper role of the judge in determining whether out-of-court coconspirator declarations are admissible and the proper role of the jury in determining whether the accused is guilty of conspiracy. Under Rule 104(b), the district court may conditionally admit coconspirator declarations if it finds by a preponderance of the evidence that the accused was a member of the conspiracy and the declarations were made in the course and in furtherance of the conspiracy. In making this preliminary factual determination, the district court is free to rely on the out-of-court declarations of the putative coconspirators. Once the declarations are so admitted, the jury's role is to decide whether the declarations, in conjunction with the rest of the evidence, prove sufficiently that the accused committed the crime of conspiracy.

United States v. Stotts, 323 F.3d 520, 521 (7th Cir., 2003) (citations omitted). Here, given the proof of the conspiracy's existence as testified to by the undercover officer, it was proper for the prosecutor to argue that the words of the co-conspirators were in essence admissions by the defendant himself to planning and carrying out the murder.

FRE

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(1) Present Sense Impression. A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.

(2) Excited Utterance. A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

NOTES

The present rule proceeds upon the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he may be available. The theory finds vast support in the many exceptions to the hearsay rule developed by the common law in which unavailability of the declarant is not a relevant factor.

...

Exceptions (1) and (2). In considerable measure these two examples overlap, though based on somewhat different theories. The most significant practical difference will lie in the time lapse allowable between event and statement.

The underlying theory of Exception [paragraph] (1) is that substantial contemporaneity of event and statement negative the likelihood of deliberate of conscious misrepresentation. Moreover, if the witness is the declarant, he may be examined on the statement. If the witness is not the declarant, he may be examined as to the circumstances as an aid in evaluating the statement. Morgan, Basic Problems of Evidence 340-341 (1962).

The theory of Exception [paragraph] (2) is simply that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication. 6 Wigmore § 1747, p. 135. Spontaneity is the key factor in each instance, though arrived at by somewhat different routes.

Foundation:

[Civil[2] Trial. Defendant Rau is being sued in a wrongful death action on the allegation that Rau murdered Zachary Wittels. Direct examination of victim Wittels' wife by counsel for the estate.]

Q: Ms. Wittels, were you with your husband the day of his murder?

A: I was working in the back of the store, and he was out in the front area.

Q: Did you actually see him get shot?

A: No. I heard the shots, heard someone running, and then I got to my husband's side. I held him, but he was already unconscious.

Q: Let me take you to the moments before you heard the shots. Did your husband say anything to you?

A: He was telling me to get some extra soda from the back. Then he said "here's that darned Rau kid, coming in."

Q: Did you see who he meant?

A: No. I just heard my husband, and then moments later the door of the store opened. I heard that.

Q: How could your husband tell if anyone was coming?

A: Because the store has a glass front door and big windows.

Q: Let me take you now to the moments after the shooting. While you were holding your husband did you speak to anyone else?

A: Yes. I don't know his name, but a young kid, about 12, had been in the store playing pinball. He was crying, breathing heavily, like panting. He said "Rau almost shot me." He burst into tears and ran out.

Q: No further questions.

Use:

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[2] This problem has been transformed into a civil case to avoid the Confrontation problems in admitting hearsay in a criminal trial. *See* note 2, *supra*.]

[Counsel for the Estate]

Sometimes the witness who sees a murder, or sees a murderer approach, can't be here in court. But that witness' words can.

What happened just before the murder? Mr. Wittels said "here's that darned Rau kid, coming in." The door opened, the shots were fired.

The law admits such statements. They are not the product of thinking. Rather, they are the human brain operating as a television camera, reporting and displaying things as they occur. Imagine a person walking along with you and that person says "hey, there's a robin flying away." The person didn't take time to think - she just saw it and in effect replayed the video for you.

But we have more evidence. Some child was in the store. We don't know his name, or where he lives. But we know what he said, and that he too must have been speaking the truth.

You see, when a truly exciting event happens, the mind stops working in terms of its ability to come up with a strategy or a deception. It just lets the exciting event take over. Remember when the twin towers were hit in New York? Imagine having witnessed that event, and running down the street yelling "two planes hit the World Trade Center." That person was yelling without thought - he or she was just replaying the event, in words, that had come to dominate his or her experience.

Well, that youth playing pinball saw his own terrifying experience. And he didn't make something up, or decide to blame someone. His mind wasn't working that way. It was on autopilot, telling what it saw. And what it saw was Rau. "Rau almost shot me." He was so distraught that he cried and ran away in terror.

That is the emotional state of a person who has been overwhelmed by a tragic event - and because of that, his words are the photo image of that event. Rau did almost shoot the youth - as he shot Mr. Wittels.

COMMENT

These hearsay exceptions are premised on the notion that in certain circumstances the critical or cognitive faculties of the brain are suspended and the mind allows nothing more than a guileless recounting of what the declarant has observed. As one court has explained in describing the present sense impression exception,

> Courts have agreed on three principal criteria for the admission of statements pursuant to this rule: (1) the statement must describe an event or condition without calculated narration; (2) the speaker must have personally perceived the event or condition described; and (3) the statement must have been made while the speaker was perceiving the event or condition, or immediately thereafter. A statement that

> meets these requirements is generally regarded as trustworthy, because the substantial contemporaneity of event and statement minimizes unreliability due to defective recollection or conscious fabrication.

United States v. Ruiz, 249 F.3d 643, 646-647 (7th Cir., 2001) (internal quotations and citations omitted). Regarding the companion exception of excited utterance, another court has explained that

> [a] statement comes within the excited utterance exception to the hearsay rule and is admissible to prove the truth of the matter stated, when the statement is spontaneous and impulsive, thus guaranteeing its reliability...The statement must be prompted by a startling event and be made at such time and under such circumstances as to preclude the presumption that it was made as the result of deliberation.

Esser v. Commonwealth, 566 S.E.2d 876, 879 (Va. App.2002). Here, one statement of each variety was adduced; and as the respective contemporaneity and excitement conditions were established, the statements are admitted and me be argued as proving the truth of what the absent declarants asserted.

FRE

A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

NOTES

Exception (3) is essentially a specialized application of Exception [paragraph] (1), presented separately to enhance its usefulness and accessibility. See McCormick §§ 265, 268.

The exclusion of "statements of memory or belief to prove the fact remembered or believed" is necessary to avoid the virtual destruction of the hearsay rule which would otherwise result from allowing state of mind, provable by a hearsay statement, to serve as the basis for an inference of the happening of the event which produced the state of mind)....The rule of Mutual Life Ins. Co. v. Hillman, 145 U.S. 285, 12 S.Ct. 909, 36 L.Ed. 706 (1892), allowing evidence of intention as tending to prove the doing of the act intended, is of course, left undisturbed.

Foundation:

[Civil trial. Wrongful death suit against building owner where furnace exploded. Victim's body was never recovered. Direct examination of victim's spouse.]

Q: Mr. Willow, when was the last time you saw your wife?

A: The morning of the explosion.

Q: Did you see your wife enter the Empire Building?

A: No: I drove her to the subway stop at around 8 a.m.

Q: What did your wife tell you before she left you?

A: She said "Honey, my first stop has to be Dr. Jackson's office. I have a meeting with him, and I think I'm going to get the job."

Q: And where is Dr. Jackson's office?

A: In the Empire Building. I'd driven my wife there before, for her initial job interview.

Q: And how important was this job?

A: it was critical. I was out of work due to an injury, and without her income we would not be able to make it.

Q: No further questions.

Use:

[Plaintiff Counsel]

Fires incinerate. They incinerate identification, bones, teeth, clothing, DNA. So the defense says, well if there is none of that then Ms. Willow just wasn't there.

Being incinerated doesn't mean someone wasn't there. It just means no trace is left, a result of their negligence.

And how do we know that she went there? Because she told her husband her plan. What was on her mind? One thing - taking care of business, of her family. By going to that building and getting that job.

When someone says "that's where I intend to go", it's a pretty good indicator that they in fact are going there. And here, when the reason for going was incredibly important, we know that her intent was in fact carried out. She was there. To get a job. And instead, look at what happened.

COMMENT

The non-controversial use of this Rule occurs when a declarant expresses a mental or physical condition such as "I feel tired" or "Boy, I'm sad." Each statement is, in effect, a "present sense" impression of an internal condition rather than an external one. But Rule 803(3) extends as well to statements of intent, the outgrowth of the decision in Mutual Life Ins. Co. v. Hillman. That exception is premised on two presumptions - that when a person states her intent to commit a future act the expression is an honest one, *and* that a person is likely to carry out that intention. As one court has explained,

> Under the Hillman doctrine the state of mind of the declarant is used to prove by inference other matters in issue. Thus, when the performance of a particular act by the declarant is in issue, his intention (state of mind) to perform that act may be shown. From that intention, the jury can draw the inference that the person performed the act as intended.

United States v. York, 1987 U.S. Dist. LEXIS 484 * n.5 (N.D. Ill 1988), citing to United States v. Pheaster, 544 F.2d 353, 376 (9th Cir. 1976). Here, the intention of the deceased to go to a particular building and office may be argued as a statement of her true intent, and thus as circumstantial proof that she in fact was in the building when the catastrophe occurred.

FRE

A statement that:

(A) is made for--and is reasonably pertinent to--medical diagnosis or treatment; and

(B) describes medical history; past or present symptoms or sensations; their inception; or their general cause.

NOTES

Even those few jurisdictions which have shied away from generally admitting statements of present condition have allowed them if made to a physician for purposes of diagnosis and treatment in view of the patient's strong motivation to be truthful. McCormick § 266, p. 563. The same guarantee of trustworthiness extends to statements of past conditions and medical history, made for purposes of diagnosis or treatment. It also extends to statements as to causation, reasonably pertinent to the same purposes, in accord with the current trend, Shell Oil Co. v. Industrial Commission, 2 Ill.2d 590, 119 N.E.2d 224 (1954); McCormick § 266, p. 564; New Jersey Evidence Rule 63(12)(c). Statements as to fault would not ordinarily qualify under this latter language. Thus a patient's statement that he was struck by an automobile would qualify but not his statement that the car was driven through a red light. Under the exception the statement need not have been made to a physician. Statements to hospital attendants, ambulance drivers, or even members of the family might be included.

Conventional doctrine has excluded from the hearsay exception, as not within its guarantee of truthfulness, statements to a physician consulted only for the purpose of enabling him to testify. While these statements were not admissible as substantive evidence, the expert was allowed to state the basis of his opinion, including statements of this kind. The distinction thus called for was one most unlikely to be made by juries. The rule accordingly rejects the limitation. This position is consistent with the provision of Rule 703 that the facts on which expert testimony is based need not be admissible in evidence if of a kind ordinarily relied upon by experts in the field.

Foundation:

[Civil trial. Claim for damages brought by mother of nine year old, averring that divorced father broke child's arm. At trial, nine year old is unable/unwilling to identify the defendant as the perpetrator or admit that his arm was broken forcefully. Direct examination of family physician.]

Q: Doctor, where is your practice?

A: The Andorra neighborhood of town.

Q: And are you familiar with the Thomas family, and their nine year old son Jason?

A: Yes. I know the family, I've been the primary care physician for most of the children, and I've treated Jason since his birth.

Q: Did you see Jason in your office last year?

A: Yes, in October.

Q: Had Jason, in prior visits, talked with you about himself and his health?

A: Yes.

Q: And was he a cooperative patient, forthcoming, or difficult?

A: He was young, but he always seemed to tell me what was going on, and what I asked him about.

Q: In the October visit, what was he there for?

A: He came in with his arm wrapped in a towel, with a bag of ice on it. He was in a lot of pain.

Q: How did your examination proceed?

A: I first manually checked his arm, and then took an x-ray. It was broken above the wrist, and I set it, wrapped it in gauze, and then applied a soft cast.

Q: Is part of your examination an interview to determine how an injury happened?

A: Yes.

Q: And how did you interview Jason?

A: I first wanted to calm him down, and so I went about the examination and engaged in small talk. Once he was comfortable, and in less physical pain, I told him "Jason, I need to know what happened and who did this so I can be sure to fix this the right way."

Q: And how did he respond, if at all?

A: He said "Dad did it. At a motel. He got angry, grabbed my arm, and twisted it super-hard."

> DEFENSE COUNSEL: Objection.
>
> THE COURT: The words "he got angry" are stricken from the record. Members of the jury, a doctor can only tell us what a patient said that the doctor needed to know in order to treat the person.

Q: So he said "dad did it" and that it was "twisted superhard?"

A: Yes.

Q: No further questions.

Use:

[Plaintiff Counsel]:

When I spoke to you in the opening statement, I told you I would prove three things: Jason's arm was broken, it was broken deliberately by his dad, and it caused severe pain. Well, no one disputes that his arm was broken, or that he was in pain.

It's tough for a child to come to court, and so I am stuck with the fact that, when Jason was here in the same room with his dad, a person he by nature would love, that he didn't say "dad did it." But we have proved that, indeed, dad did it.

Where do people tell the truth? At the doctor's. Why? First, some of us, like Jason, develop a trusting relationship with the people charged with our care. And, second, we know - whether we are nine or ninety - that telling the doctor the truth is the only way to get the right and necessary treatment.

Jason told his doctor "dad did it" and his arm was "twisted superhard." That's what he said when he had no conflicting emotions, when he had only one goal - tell the truth to get the right treatment.

And the law recognizes that what a person says to his or her doctor can be found, by you the jury, to be the truth. Just as if he said it under oath.

And that's the proof we rely on - in the trusting atmosphere of the doctor's office, where people

know the importance of telling the truth, where there is no pressure, Jason said “dad did it.” And that’s the truth - because dad did do it.

COMMENT:

This hearsay exception is based on a simple, if not necessarily accurate perception - people seeking medical assistance, due to their own self-interest, are likely to provide accurate information in order to secure the best treatment and care. As one court has explained,

> the exception is based on the belief that a person seeking medical treatment is unlikely to lie to a doctor she wants to treat her, since it is in her best interest to tell the truth. In other words, the rule is bottomed upon the premise that a patient's "selfish motive," id., in receiving proper treatment guarantees the trustworthiness of the statements made to her physician.

Olesen v. Class, 164 F.3d 1096, 1098 (8th Cir., 1999) (internal quotation and citation omitted). Normally, statements identifying *who* caused the injury or condition are not admissible, as this information is presumptively unnecessary to treatment. As another court has explained,

> this guaranty of trustworthiness...does not ordinarily extend to statements regarding fault...Thus, a declarant's statement relating the identity of the person allegedly responsible for her injuries is not ordinarily admissible under Rule 803(4) because statements of identity are not normally thought necessary to promote effective treatment.

United States v. Joe, 8 F.3d 1488, 1494 (10th Cir., 1993). Where courts divide on this issue is when an injury is visited upon a child, with varying receptiveness to a claim that disclosure of an abuser’s identity is part of the “treatment.” *Compare*, United States v. Joe, 8 F.3d 1488, 1494 (10th Cir., 1993) (“Statements revealing the identity of the child abuser are "reasonably pertinent" to treatment because the physician must be attentive to treating the child's emotional and psychological injuries, the exact nature and extent of which often depend on the identity of the abuser [and] physicians often have an obligation under state law to prevent an abused child from being returned to an abusive environment”), and United States v. Beaulieu, 194 F.3d 918, 921 (8th Cir., 1999) (Statements by a child abuse victim to a physician identifying the abuser are admissible only when the prosecution shows the victim's motive in making the statement was consistent with the purpose of promoting treatment-- "'where the physician makes clear to the victim that the inquiry into the identity of the abuser is important to diagnosis and treatment, and the victim manifests such an understanding.'"). Here, under either the relaxed or stringent approach, the child was aware of the rationale for explaining causation to the doctor, so the statement identifying the father as perpetrator and describing the onset of the injury is admissible for its truth.

RULE 803(5) - RECORDED RECOLLECTION

FRE:

A record that:

(A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;

(B) was made or adopted by the witness when the matter was fresh in the witness's memory; and

(C) accurately reflects the witness's knowledge.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

NOTES:

A hearsay exception for recorded recollection is generally recognized and has been described as having "long been favored by the federal and practically all the state courts that have had occasion to decide the question."... The guarantee of trustworthiness is found in the reliability inherent in a record made while events were still fresh in mind and accurately reflecting them. Owens v. State, 67 Md. 307, 316, 10 A. 210, 212 (1887).

The principal controversy attending the exception has centered, not upon the propriety of the exception itself, but upon the question whether a preliminary requirement of impaired memory on the part of the witness should be imposed. The authorities are divided. If regard be had only to the accuracy of the evidence, admittedly impairment of the memory of the witness adds nothing to it and should not be required. Nevertheless, the absence of the requirement, it is believed, would encourage the use of statements carefully prepared for purposes of litigation under the supervision of attorneys, investigators, or claim adjusters. Hence the example includes a requirement that the witness not have "sufficient recollection to enable him to testify fully and accurately."

No attempt is made in the exception to spell out the method of establishing the initial knowledge or the contemporaneity and accuracy of the record, leaving them to be dealt with as the circumstances of the particular case might indicate.

Foundation:

[Civil trial. Claim for damages brought by mother of nine year old, averring that divorced father broke child's arm. At trial, nine year old is unable/unwilling to identify the defendant as the perpetrator or admit that his arm was broken forcefully. Direct examination of family physician.]

Q: Doctor, where is your practice?

A: The Andorra neighborhood of town.

Q: And are you familiar with the Thomas family, and their nine year old son Jason?

A: Yes. I know the family, I've been the primary care physician for most of the children, and I've treated Jason since his birth.

Q: Did you see Jason in your office last year?

A: Yes, in October.

Q: In the October visit, what was he there for?

A: He came in with his arm wrapped in a towel, with a bag of ice on it. He was in a lot of pain.

Q: How did your examination proceed?

A: I first manually checked his arm, and then took an x-ray. It was broken above the wrist, and I set it, wrapped it in gauze, and then applied a soft cast.

Q: Is part of your examination an interview to determine how an injury happened?

A: Yes.

Q: And how did you interview Jason?

A: I first wanted to calm him down, and so I went about the examination and engaged in small talk. Once he was comfortable, and in less physical pain, I told him "Jason, I need to know what happened so I can be sure to fix this the right way."

Q: And how did he respond, if at all?

A: I don't remember his precise words. It has been a while.

Q: Would it help you to look at the chart?

A: Well, my nurse filled it out, but she was in there with me. It sure wouldn't hurt.

Q: Sir, I am handing you the chart. Just read it to yourself and put it down when you are done.

[pause]

Q: Sir, having looked at that chart, does it refresh your memory of what he said?

A: No. I see what is written there, but I don't personally remember it.

Q: Well, doctor, how are records kept in your office?

A: A nurse makes written records of each visit; and then at the end of the day I read over the document and make sure that the nurse has recorded it accurately and completely.

Q: Did you do that with this record?

A: Absolutely.

Q: Okay. Tell us, please, what is written in the record.

A: He said "Dad did it. At a motel. He got angry, grabbed my arm, and twisted it super-hard."

> DEFENSE COUNSEL: Objection.
>
> THE COURT: The words "he got angry" are stricken from the record. Members of the jury, a doctor can only tell us what a patient said that the doctor needed to know in order to treat the person.

Q: So he said "dad did it" and that it was "twisted superhard?"

A: Yes.

Q: No further questions.

Use:

[Plaintiff Counsel]:

When I spoke to you in the opening statement, I told you I would prove three things: Jason's arm was broken, it was broken deliberately by his dad, and it caused severe pain. Well, no one disputes that his arm was broken, or that he was in pain.

It's tough for a child to come to court, and so I am stuck with the fact that, when Jason was here in the same room with his dad, a person he by nature would love, that he didn't say "dad did it." But we have proved that, indeed, dad did it.

Now, doctors see lots of patients, so they can't remember everything. But they write or dictate or review records the same day, precisely to ensure accuracy so that the chart can be relied on by other doctors, so it can be used for follow-up visits, for a myriad of reasons. And only accurate comments stay in the report.

And what does the report tell us the child said? Jason told his doctor "dad did it" and his arm was "twisted superhard." And that's the proof we rely on - in the trusting atmosphere of the doctor's office, where people know the importance of telling the truth, where there is no pressure, Jason said "dad did it." And that's the truth - because dad did do it.

COMMENT

Notwithstanding the preference for live testimony, prior documentation of an event is admissible on its own merits where it stands in lieu of a current recollection. The first necessary condition is a lack of memory; when this is established, the court must then focus on the circumstances under which the recollection was recorded. As one court has explained,

> Federal Rule of Evidence 803(5) allows a document to be read to the jury as a past recollection recorded if (1) the witness once had knowledge about the facts in the document, (2) the witness now has insufficient memory to testify about the matters in the document, and (3) the document was recorded at a time when the matters were fresh in the witness' mind and the document correctly reflects the witness' knowledge of the matters.

United States v. Smith, 197 F.3d 225, 231 (6th Cir., 1999). Here, the witness had no current recollection of the child's examination but had reviewed the notes the same day they were created and approved them, making them admissible for their truth.

FRE:

A record of an act, event, condition, opinion, or diagnosis if:
(A) the record was made at or near the time by--or from information transmitted by--someone with knowledge;
(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
(C) making the record was a regular practice of that activity;
(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and
(E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

NOTES

The element of unusual reliability of business records is said variously to be supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation...The rule...adopts the phrase "the course of a regularly conducted activity" as capturing the essential basis of the hearsay exception as it has evolved and the essential element which can be abstracted from the various specifications of what is a "business."

...

Sources of information presented no substantial problem with ordinary business records. All participants, including the observer or participant furnishing the information to be recorded, were acting routinely, under a duty of accuracy, with employer reliance on the result, or in short "in the regular course of business." If, however, the supplier of the information does not act in the regular course, an essential link is broken; the assurance of accuracy does not extend to the information itself, and the fact that it may be recorded with scrupulous accuracy is of no avail. An illustration is the police report incorporating information obtained from a bystander: the officer qualifies as acting in the regular course but the informant does not. The leading case, Johnson v. Lutz, 253 N.Y. 124, 170 N.E. 517 (1930), held that a report thus prepared was inadmissible. Most of the

authorities have agreed with the decision... The rule follows this lead in requiring an informant with knowledge acting in the course of the regularly conducted activity.

Entries in the form of opinions were not encountered in traditional business records in view of the purely factual nature of the items recorded, but they are now commonly encountered with respect to medical diagnoses, prognoses, and test results, as well as occasionally in other areas...

Problems of the motivation of the informant have been a source of difficulty and disagreement. In Palmer v. Hoffman, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943), exclusion of an accident report made by the since deceased engineer, offered by defendant railroad trustees in a grade crossing collision case, was upheld. The report was not "in the regular course of business," not a record of the systematic conduct of the business as a business, said the Court. The report was prepared for use in litigating, not railroading. While the opinion mentions the motivation of the engineer only obliquely, the emphasis on records of routine operations is significant only by virtue of impact on motivation to be accurate. Absence of routineness raises lack of motivation to be accurate. The opinion of the Court of Appeals had gone beyond mere lack of motive to be accurate: the engineer's statement was "dripping with motivations to misrepresent." Hoffman v. Palmer, 129 F.2d 976, 991 (2d Cir. 1942). The direct introduction of motivation is a disturbing factor, since absence of motivation to misrepresent has not traditionally been a requirement of the rule; that records might be self-serving has not been a ground for exclusion.

Foundation:

[Civil trial. Claim for damages brought by mother of nine year old, averring that divorced father broke child's arm when child and father stayed at a motel for the weekend. At trial, nine year old is unable/unwilling to identify the defendant as the perpetrator or admit that his arm was broken forcefully. Direct examination of motel employee.]

Q: Where do you work?

A: Heaven's Delight Motel.

Q: What is your job there?

A: I am basically the office manager. I work the desk two days a week, and otherwise supervise the desk clerks, pay bills, and try and keep a handle on what's going on.

Q:: How does the motel record who stays there?

A: When a person comes in the clerk on duty has to see a photo driver's license. Then the clerk writes down the name and address on the license, the license number, and the date of birth. Then the guest signs his or her name next to that. It's on a card. One card for each guest or group of guests, like a family.

Q: What happens to the cards?

A: We're a small operation. They go in a box, and every two or three days I file them.

Q: Pursuant to a court order, did you search the cards and get one for the date of March 28th of last year?

A: Yes.

Q: I'm handing you what has been pre-marked Plaintiff's Exhibit P-15 for identification purposes. Please look at it and tell us what it is.

A: It's one of our cards, and it's from the date you just said.

Q: Is it in your handwriting?

A: No. And I can't say who wrote it - last March we had a lot of temp help.

Q: But is it filled out in the way you've told us the motel does it, or differently?

A: In the same way.

Q: Please read what the card says.

A: Guest was James Anderson. Address is 1212 Muldaur Street, Beardsley. New Jersey license, license number GBG423F49. Date of birth 12-7-68.

> PLAINTIFF COUNSEL: If the Court please, there is a stipulation that the defendant in this case has that address, that date of birth, and that driver's license.
>
> DEFENSE COUNSEL: So stipulated.

Q: And was it signed?

A: Yes, by someone named James Anderson.

Q: No further questions. We move the admission of P-15.

> THE COURT: Admitted.

Use:

[Plaintiff Counsel]

I told you when this case began that I would prove every fact. I told you I would prove three things: Jason's arm was broken, it was broken deliberately by his dad, and it caused severe pain.

Well, where did Jason tell the doctor this happened? "At a motel."

Details show that an accusation is true. When the details back it up, the story is true.

And how did we prove the details?

Let me show you again P-15. What does it say? James Anderson registered; that same weekend, at the motel. Well, we've proved the detail. He was at a motel. And the detail confirms the story of Jason - his arm was hurt at a motel.

It's all there.

COMMENT:

There is an assumption that businesses and organizations have a strong incentive to maintain accurate records of their transactions and occurrences. As one court has explained,

> Business records are made reliable by "systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by duty to make an accurate record as part of a continuing job or occupation." Fed. R. Evid. 803(6) Advisory Comm. Note. For this reason, business records may be admitted notwithstanding the unavailability of the record's author, so long as a "custodian or other qualified witness" testifies that the document was "kept in the course of a regularly conducted business activity and also that it was the regular practice of that business activity to make the [record]."

Parker v. Reda, 327 F.3d 211, 214-215 (2d Cir., 2003). Concerns arise when some of the information contained in the record is provided by a person outside of the organization, as this reporter has no commitment or incentive to accuracy. Even here, however, the organization may use internal checks to validate the information, thereby making it part of this exception, As another court has explained,

> In applying the business records exception of the hearsay rule to hotel guest registrations, the inquiry is not controlled by the status of the recording person as a hotel employee or a guest. Rather, the key to satisfying Rule 803(6) in this context is whether an employee was able in some way to verify the information provided--for example, by examining a credit card, driver's license, or other form of identification. If such verification is obtained by the employee, we see no reason why the guest card that has been filled in by the guest himself would not qualify as a business record and thus be admissible for the truth of its statements.

United States v. Zapata, 871 F.2d 616, 625 (7th Cir., 1989) (internal quotations and citations omitted). Here, the hotel's regular practice of checking a registrant's information against his/her driver's license establishes the reliability of the resulting record, making it admissible pursuant to 803(6).

RULE 803(7) - ABSENCE OF ENTRY IN RECORDS

FRE

Evidence that a matter is not included in a record described in paragraph [803](6) if:

(A) the evidence is admitted to prove that the matter did not occur or exist;

(B) a record was regularly kept for a matter of that kind; and

(C) neither the possible source of the information nor other circumstances indicate a lack of trustworthiness.

NOTES

Failure of a record to mention a matter which would ordinarily be mentioned is satisfactory evidence of its nonexistence. Uniform Rule 63(14), Comment. While probably not hearsay as defined in Rule 801, *supra,* decisions may be found which class the evidence not only as hearsay but also as not within any exception. In order to set the question at rest in favor of admissibility, it is specifically treated here.

Foundation:

[Civil trial. Claim for damages brought by mother of nine year old, averring that divorced father broke child's arm when child and father stayed at a motel for the weekend. At trial, nine year old is unable/unwilling to identify the defendant as the perpetrator or admit that his arm was broken forcefully. Defense cross examination of motel clerk.]

Q: You've told us that these cards, including exhibit P-15, are the records used in your business, correct?

A: Yes.

Q: And the cards have a space or two to mark the number of guests, correct?

A: Yes.

Q: There is one space for the number of adults, correct?

A: Yes.

Q: And another space labeled "minor children," correct?

A: Yes.

Q: And it is mandatory policy for you and your employees to fill out these cards accurately, correct?

A: Yes.

Q: And that information is important, isn't it, for insurance purposes, in case of damage, for lots of reasons. Right?

A: Yes.

Q: So, for example, if there is a family at your motel with two adults and three minor children, the card would have the number "2" in the space labeled "adult guests" and the number "3" in the space labeled "minor children." Isn't that right?

A: Yes.

Q: Please look again at P-15.

A: Yes.

Q: The number “1" is written in the space labeled “adult guests,” correct?

A: Yes.

Q: Tell the jury what is written in the space labeled “minor children.”

A: Nothing.

Q: In other words, it is left blank.

A: Yes.

Q: And that’s how your records are supposed to look if there is one adult and no child, correct?

A: Yes.

Q: No further questions.

Use:

[Defense Counsel]

Sure, my client was at a motel, but he was there without a child. And you don’t have to take my client’s word for it.

Let’s look at P-15, which the plaintiff made such a show about. Yes, it shows that my client was registered at this motel, but what else does it tell us?

It’s mandatory to record all guests, but the entry for children was left blank. And this is at a motel where it is mandatory to check these facts.

P-15 shows the defense to be true - there was no child hurt at the motel, because in fact no child was there.

COMMENT:

The fact that a particular event has not been recorded is not intended as an assertion that the act did not occur. Rather, it is circumstantial proof, or proof by implication, that there was no such occurrence in organizations where recordation of actual events is the norm. As one court has explained,

> Just as a notation in a business record may provide evidence of the occurrence of an event, under Fed. R. Evid. 803(7), the absence of an entry in relevant business records may be used to prove the

nonoccurrence or nonexistence of a matter. The logic of this rule was eloquently and forcefully explained by Professor Wigmore:

> When a book purports to contain all items transacted within the scope of the book's subject, the absence of an entry of transaction of a specific purport is in plain implication a statement by the maker of the book that no such transaction was had. The psychology of it is the same as that of testimony on the stand by a person who denies that a sound took place in his presence because he heard no such sound. The practical reliability of it is shown by every day's practice in every business house. All industry and commerce is daily conducted on the negative as well as on the affirmative showings of the regular books of entry. The repetition in modern times of rulings so divorced from common experience is astonishing. They must make the businessman think that law is just a queer game.

Armstead v. United States Dep't of Housing & Urban Dev., 815 F.2d 278, 286 (3d Cir., 1987) (Hunter, J., dissenting). In this example, the failure to note the presence of a child guest when such a presence is routinely recorded stands as substantive proof that no child was in residence.

FRE

A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) neither the source of information nor other circumstances indicate a lack of trustworthiness.

NOTES

Public records are a recognized hearsay exception at common law and have been the subject of statutes without number. McCormick § 291. See, for example, 28 U.S.C. § 1733, the relative narrowness of which is illustrated by its nonapplicability to nonfederal public agencies, thus necessitating report to the less appropriate business record exception to the hearsay rule. Kay v. United States, 255 F.2d 476 (4th Cir. 1958). The rule makes no distinction between federal and nonfederal offices and agencies.

Justification for the exception is the assumption that a public official will perform his duty properly and the unlikelihood that he will remember details independently of the record. Wong Wing Foo v. McGrath, 196 F.2d 120 (9th Cir. 1952), and see Chesapeake & Delaware Canal Co. v. United States, 250 U.S. 123, 39 S.Ct. 407, 63 L.Ed. 889 (1919). As to items (a) and (b), further support is found in the reliability factors underlying records of regularly conducted activities generally.

Foundation:

[Civil trial. Suit against local electric company for fire started at home in Hardaway Township after electric wire was blown loose from pylon during Hurricane George. Examination of state utility board employee by plaintiff.]

Q: Mr. Fensterer, where are you employed?

A: At our state utility board.

Q: And your job there?

A: I am the general administrator. That's a management position, running the agency, filing reports with the Legislature, doing our annual budget, and coordinating our various departments.

Q: Do you have any background in electricity, electrical engineering, or any related science?

A: No. My background is in business administration.

Q: What responsibilities does the state board have regarding electrical outages, downed wires, and storm damage?

A: We are charged by the Legislature with investigating what are termed "power interruptions" and "extraordinary power-related accidents."

Q: And who does the actual investigating?

A: We have a team - just like the teams that investigate railroad accidents or airplane crashes. The team includes a chemist, an engineer, a trained fire investigator, and one member of an electrician's union or an electrical contractor.

Q: Did such a team investigate the storm damage and electricity-related problems that occurred last year, in our state, after Hurricane George?

A: Yes. A full report was prepared.

Q: By this same type of team?

A: Yes. And this report also had input from a meteorologist and a representative of the national hurricane center.

Q: Do you have the report with you?

A: Yes. It is this 300 page document.

PLAINTIFF COUNSEL: Your Honor, I ask that this be marked P-1 for identification.

THE COURT: Fine.

Q: Sir, is P-1 the report you just mentioned?

A: Yes.

Q: Did the report examine, among other incidents, the downed wires in Hardaway Township and the resulting home fire there?

A: Yes, at pages 97 through 103, and in the conclusion at pages 268 through 272.

Q: Before you tell us the conclusion, does the report describe how the investigation was done?

A: Yes. The team was at the scene within three days of the hurricane. Photos were taken, emergency personnel who responded to the scene were interviewed, electric company employees were spoken with, and samples were taken of the wiring that was involved. A mechanical engineer also examined the pylon, the tower that held the wires.

Q: Please turn to page 271 and read to the jury the conclusion as to how the fire started and whether it was preventable.

A: Here's what it says. "This fire was completely preventable, and was due to faulty wiring and pylon maintenance. The electric utility used wire with an insulation factor of 12 rather than the recommended factor of 16, and the pylons attached the wires with two horseshoe staples rather than four at each connection. This resulted in a wiring system that was particularly susceptible to storm damage, and the reduced insulation made fire more likely by a factor of three."

PLAINTIFF COUNSEL: Your Honor, I move the admission of P-1.

THE COURT: Granted.

Use:

[Plaintiff counsel]

The electric company lawyer told you, in her opening statement, that this fire was an "act of God." That is a term that means that a force of nature took over so our best precautions could not stop a fire or other tragedy from occurring.

But you now know that it was an act of the electric company playing God, taking risks with other people's lives. The storm didn't cause the fire - the electric company did.

Why do I tell you that this is a certainty?

Our Government has agencies with skilled personnel. Their job is to investigate incidents, using the best science, and then reach a conclusion. A conclusion needed to assist the public, to teach us about what happened in an incident and to prevent a bad occurrence in the future.

Who were these people? A chemist, an engineer, a trained fire investigator, and one member of an electrician's union or an electrical contractor. Aided here by a meteorologist and a representative of the national hurricane center.

And what did these skilled people conclude?

Let me read it to you:

"This fire was completely preventable, and was due to faulty wiring and pylon maintenance. The electric utility used wire with an insulation factor of 12 rather than the recommended factor of 16, and the pylons attached the wires with two horseshoe staples rather than four at each connection. This resulted in a wiring system that was particularly susceptible to storm damage, and the reduced insulation made fire more likely by a factor of three."

Think about that. This fire was "completely preventable." By whom? The electric company. The defendant. Those people over there.

COMMENT

Rule 803(8) represents one of the most far-reaching exceptions to the rule excluding hearsay. By its terms, an investigative report complete with conclusions and opinions is admissible without the need for the report's preparers to testify. The rationale is simple - a government agency charged with the task of conducting such investigations is presumed (absent proof to the contrary) to have acted responsibly and without bias. As one court has explained,

> The rationale of Rule 803(8)(C) is explicated in the advisory committee's note as being grounded on a presumption of reliability of government records. The note explains that it is "assumed that a public official will perform his duty properly." Fed. R. Evid. 803(8)(C) advisory committee's note. As was explained in Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd., 505 F. Supp. 1125, 1145 (E.D.Pa. 1980), "the drafters of 803(8)(C) were motivated by a variation on the theme underlying all hearsay exceptions -- that circumstantial guarantees of trustworthiness are provided by the presumption that governmental officials will perform their duties faithfully. Accordingly, they were agreeable to the receipt into evidence of governmental agency findings."

Coleman v. Home Depot, Inc., 306 F.3d 1333, 1341 (3d Cir., 2002). It is undisputed that this extends to the opinions or conclusions found in such reports, absent a showing of untrustworthiness. As the Supreme Court has explained in allowing into evidence "evaluative" reports,

> portions of investigatory reports otherwise admissible under Rule 803(8)(C) are not inadmissible merely because they state a conclusion or opinion. As long as the conclusion is based on a factual investigation and satisfies the Rule's trustworthiness requirement, it should be admissible along with other portions of the report.

Beech Aircraft Corp. v. Rainey, 109 S. Ct. 439, 450 (U.S., 1988). Here, the report was prepared as part of the agency's required work; it was generated by an extensive investigation with appropriate expertise; and no challenge was made to its trustworthiness. Thus, the report itself provides substantive evidence of the cause of the fire.

FRE

(a) Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant:

(1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;

(2) refuses to testify about the subject matter despite a court order to do so;

(3) testifies to not remembering the subject matter;

(4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or

(5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:

(A) the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or

(B) the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

(b) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1) Former Testimony. Testimony that:

(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

(B) is now offered against a party who had--or, in a civil case, whose predecessor in interest had--an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

NOTES

Former testimony does not rely upon some set of circumstances to substitute for oath and cross-examination, since both oath and opportunity to cross-examine were present in fact. The only missing one of the ideal conditions for the giving of testimony is the presence of trier and opponent ("demeanor evidence"). This is lacking with all hearsay exceptions. Hence it may be argued that former testimony is the strongest hearsay and should be included under Rule 803, supra. However, opportunity to observe demeanor is what in a large measure

confers depth and meaning upon oath and cross-examination. Thus in cases under Rule 803 demeanor lacks the significance which it possesses with respect to testimony. In any event, the tradition, founded in experience, uniformly favors production of the witness if he is available. The exception indicates continuation of the policy. This preference for the presence of the witness is apparent also in rules and statutes on the use of depositions, which deal with substantially the same problem.

Under the exception, the testimony may be offered (1) against the party against whom it was previously offered or (2) against the party by whom it was previously offered. In each instance the question resolves itself into whether fairness allows imposing, upon the party against whom now offered, the handling of the witness on the earlier occasion.

Foundation:

[Civil trial: issue of medical malpractice, whether doctor was careless when performing surgery. Examination by plaintiff's counsel.]

Q: Please tell the jury your name and what you do for a living.

A: My name is Howard Chambers, and I am a court reporter. I attend trials, depositions, all sorts of legal proceedings, and I take a complete stenographic record of what is said, check it against an audio tape I make of the proceedings, and then create a certified transcript, the official record of everything that was said and that occurred.

Q: Did you attend a trial two years ago, involving this plaintiff and this defendant?

A: Yes, I was the official court reporter at that proceeding.

Q: And was that trial about this same incident, the surgery in this case that occurred March 23 of three years ago?

A: Yes. I have the record, and the case has the same official court number as the proceedings here today.

Q: Did that trial go all of the way to its conclusion?

A: No. In the middle of the trial a bomb exploded near the courthouse. All proceedings were terminated. Once the emergency ended, the Judge who was presiding had heart pain and had to be hospitalized. Another judge came in and declared a mis-trial.

Q: Did any witnesses testify before the interruption?

A: Yes. Several.

Q: How about a woman named Tasha Harett?

A: Yes. She testified the first day.

> PLAINTIFF COUNSEL: If the Court please, there is a stipulation by and between counsel that Ms. Harett is now deceased.
>
> DEFENSE COUNSEL: That is correct.
>
> THE COURT: You may proceed with the notes.

Q: Mr. Chambers, did you bring with you the entirety of Ms. Harett's testimony?

A: Yes, I did. It wasn't long.

Q: Please read it aloud here, reading each question and her answer.

A: Okay.

Question by plaintiff counsel: Ms. Harett, where do you work?

Answer by witness: I run a coffee stand at the hospital.

Question by plaintiff counsel: Did you see Dr. Malman the morning of March 23?

Answer by witness: Yes. He bought coffee from me.

Question by plaintiff counsel: And how do you remember that particular day?

Answer by witness: Later that same day I was fired from the hospital, it was downsizing. It was my last day.

Question by plaintiff counsel: And how did Dr. Malman look and what did he say?

Answer: His eyes looked blood shot and he said to me, "Ms. Tasha, I need a cup of your coffee to put my pieces back together."

Cross-examination by defense counsel.

Question by defense counsel: Dr. Malman didn't say he had been drinking, did he?

Answer by witness: No. But he sure looked it.

Question by defense counsel: Well, you've seen doctors tired after a difficult surgery, right?

Answer by witness: Yes.

Question by defense counsel: And they can look as tired and beat down as a person who had a hard night of partying, right?

Answer by witness: Yeah, I guess so.

Question by defense counsel: And you can't be sure what time this was, only that it was in the morning, correct?

Answer by witness: That's right.

Q: Mr. Chambers, did that conclude the testimony of Ms. Harett?

A: Yes.

Q: Nothing further. Than you for coming here today.

Use:

[Plaintiff Counsel - Closing Argument]:

Members of the jury, our contention is simple. You can't perform surgery, using a scalpel on a person's vital organs, without a good night's sleep and a clear head. And Dr. Malman had neither.

We now know that Dr. Malman was in no shape to perform surgery that morning. Who told you that? Well, she wasn't here, but you heard the sworn testimony from Tasha Harett, the lady who old coffee outside of the hospital.

What did she see? "His eyes looked blood shot and he said to me, 'Ms. Tasha, I need a cup of your coffee to put my pieces back together.'"

Sworn testimony counts, whether you heard it live or it was recorded at an earlier trial. It counts the same. And what does it provide us? More proof of the doctor partying the night before surgery.

Let me now turn to what I believe the Judge will tell you about the law, and what the law requires of a surgeon...

COMMENT

Prior recorded testimony, where the witness/declarant is now unavailable, is essentially no different than the witness testifying at the current trial. The opportunity for cross-examination was assured, and the witness has testified under oath. The testimony thus stands on an equal footing with that presented live (but for the inability of the factfinder(s) to observe the witness' demeanor), and its use has been accepted since at least 1895, when the Supreme Court affirmed its use in criminal trials notwithstanding the Confrontation guarantee.

> The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief. There is doubtless

> reason for saying that the accused should never lose the benefit of any of these safeguards even by the death of the witness; and that, if notes of his testimony are permitted to be read, he is deprived of the advantage of that personal presence of the witness before the jury which the law has designed for his protection. But general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case. To say that a criminal, after having once been convicted by the testimony of a certain witness, should go scot free simply because death has closed the mouth of that witness, would be carrying his constitutional protection to an unwarrantable extent. The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused.

Mattox v. United States, 156 U.S. 237, 242-243 (U.S., 1895). The *sine qua non* for admissibility is the opportunity for fair cross-examination by the party of interest. As one court has explained,

> [i]n order for Rule 804(b)(1) to apply the opportunity to cross-examine must be "adequate," or "meaningful"; however, it need not be unbounded.

United States v. King, 713 F.2d 627, 630 (11th Cir., 1983). Here, as the witness was deceased, the prior testimony stood as an effective replacement for and on an equal footing with the testimony of live witnesses. On its own, if believed, it is legally sufficient to prove the point(s) testified to.

FRE

A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

NOTES:

The circumstantial guaranty of reliability for declarations against interest is the assumption that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true. Hileman v. Northwest Engineering Co., 346 F.2d 668 (6th Cir. 1965). If the statement is that of a party, offered by his opponent, it comes in as an admission, Rule 803(d)(2), and there is no occasion to inquire whether it is against interest, this not being a condition precedent to admissibility of admissions by opponents.

...

The exception discards the common law limitation and expands to the full logical limit. One result is to remove doubt as to the admissibility of declarations tending to establish a tort liability against the declarant or to extinguish one which might be asserted by him, in accordance with the trend of the decisions in this country. McCormick § 254, pp. 548-549. Another is to allow statements tending to expose declarant to hatred, ridicule, or disgrace, the motivation here being considered to be as strong as when financial interests are at stake. McCormick § 255, p. 551. And finally, exposure to criminal liability satisfies the against-interest requirement.

Foundation:

[Civil trial: issue of medical malpractice, whether doctor was careless when performing surgery. Suit is against doctor. Examination by defendant (doctor's) counsel.]

Q: Please tell us how you are employed?

A: I am the chief nurse at Arrowhead Hospital.

Q: And, at the time of the surgery at the core of this litigation, did Susan Howell work there?

A: She was an operating room nurse.

Q: Before we turn to Nurse Howell, tell us what a Chief Nurse does?

A: I supervise all nurses, check their assignments, and ensure that they comply with all hospital and safety regulations.

Q: And are your responsibilities and your authority known to the nurses who work under you?

A: Yes. In the Hospital personnel bulletin, this is explained.

Q: Does this extend to the power to fire, or discipline, nurses?

A: Yes.

Q: Let me now take you to Nurse Howell. Before this surgery, what was her standing at the hospital?

A: She was a probationary employee.

Q: Please explain what that means?

A: She did not have tenure or union protection. She was still being observed to determine whether she should be kept as a full-time employee.

Q: And who had the sole authority to make that decision?

A: I did.

Q: Did Nurse Howell have any other financial support at the time she was a probationary employee?

A: No. She was a single mother, and this was her sole source of employment.

Q: Okay. Let me now take you to two days after this surgery. March 25th. Did you have a conversation with Nurse Howell?

A: Yes, I did.

> DEFENDANT'S COUNSEL: Your Honor, may we approach?
>
> THE COURT: Yes.
>
> [AT SIDEBAR]
>
> DEFENDANT'S COUNSEL: Your Honor, Nurse Howell is the witness you determined to be unavailable, pursuant to Rule 804(a), at the hearing last week. She is the person who we proved had a concussion and lost all memory of this event.
>
> THE COURT: I remember. You may proceed. [SIDEBAR DISCUSSION CONCLUDED]

Q: Please tell us the circumstances of the conversation and what she said to you.

A: Nurse Howell came to my office and asked to speak with me. She said "I know that I'm on probation, and I might lose my job, but I have to tell you this. I went ahead with Dr. Malman in surgery two days ago, and I simply wasn't up to par. I'd been partying the night before, and I didn't remember to scrub before the operation. I'm not sure, also, if I got all the items ut before we sewed up. I tried to hide it in the O.R., but now I just can't keep it in."

Q: Thank you. I have no further questions.

Use:

[Defendant's Counsel - Closing Argument]:

Members of the jury, our contention is simple. My client was not at fault.

We now know that unbeknownst to him, his own surgical assistant was in no shape to perform surgery that morning. In fact, she reported that to her superior, even though it meant the nurse risked her entire future.

The law sets forth what common sense tells us. Reasonable people don't say things that will hurt their own interest unless those things are true. Here was Nurse Howell, a single mother who's own financial security and the financial security of her child depended on this job. And what did she do? She admitted to engaging in a dangerous surgery, an admission that could cost her her job.

A reasonable person wouldn't hurt herself unless it was true. And the truth was there - that Nurse Howell did something dangerous - careless, unprofessional, surgery. Not my client - the nurse.

COMMENT

Where the declarant is proved to be unavailable, a statement made by that person at a time and under circumstances where the admission would be seen as detrimental to the speaker's pecuniary or penal interest is admissible. The thesis is simple - people do not say words adverse to their own interests unless the words are true. As the United States Supreme Court has explained,

> A number of exceptions have developed over the years to allow admission of hearsay statements made under circumstances that tend to assure reliability and thereby compensate for the absence of the oath and opportunity for cross-examination. Among the most prevalent of these exceptions is the one applicable to declarations against interest -- an exception founded on the assumption that a person is unlikely to fabricate a statement against his own interest at the time it is made.

Chambers v. Mississippi, 410 U.S. 284, 298-299 (U.S., 1973) (footnote omitted). It is the portion of the statement that blames the declarant that is admissible; if the declarant also blames others, those allegations are not admitted under this exception. Again, as the Supreme Court has explained,

> Rule 804(b)(3) is founded on the commonsense notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true. This notion simply does not extend to the broader definition of "statement." The fact that a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts. One of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature.

Williamson v. United States, 512 U.S. 594, 599-600 (U.S., 1994). In this case, the nurse was rendered unavailable by her loss of memory; and when she reported her dereliction, her probationary status made it virtually assured that her employment would be terminated. This self-exposure to financial harm established the reliability of her averments and made them admissible to support the doctor's claim that he was not the cause of the injury to the plaintiff.

RULE 806 - ATTACKING CREDIBILITY OF DECLARANT

FRE:

Attacking and Supporting the Declarant's Credibility

When a hearsay statement--or a statement described in Rule 801(d)(2)(C), (D), or (E)--has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

NOTES:

The declarant of a hearsay statement which is admitted in evidence is in effect a witness. His credibility should in fairness be subject to impeachment and support as though he had in fact testified. See Rules 608 and 609. There are however, some special aspects of the impeaching of a hearsay declarant which require consideration. These special aspects center upon impeachment by inconsistent statement, arise from factual differences which exist between the use of hearsay and an actual witness and also between various kinds of hearsay, and involve the question of applying to declarants the general rule disallowing evidence of an inconsistent statement to impeach a witness unless he is afforded an opportunity to deny or explain. See Rule 613(b).

The principle difference between using hearsay and an actual witness is that the inconsistent statement will in the case of the witness almost inevitably of necessity in the nature of things be a prior statement, which it is entirely possible and feasible to call to his attention, while in the case of hearsay the inconsistent statement may well be a subsequent one, which practically precludes calling it to the attention of the declarant. The result of insisting upon observation of this impossible requirement in the hearsay situation is to deny the opponent, already barred from cross-examination, any benefit of this important technique of impeachment. The writers favor allowing the subsequent statement.

Foundation:

[Civil trial: issue of medical malpractice, whether doctor was careless when performing surgery. Examination by plaintiff counsel.]

Q: Sir, please tell us your name and what you do for a living.

A: I am John Thomas. I am a physician and I work at Arrowhead Hospital.

Q: Did you know Nurse Howell when she worked at the hospital?

A: Yes.

Q: Did she have any relationship with Dr. Malman?

A: Yes. The two of them were lovers, based upon what I heard.

DEFENSE COUNSEL: Objection, hearsay.

THE COURT: Counsel, isn't this hearsay?

PLAINTIFF COUNSEL: No, Permit me, and I'll lay the foundation.

Q: Doctor, please do not tell us what any third party told you; instead, tell the jury only what you observed.

A: On several occasions, Nurse Howell came into the physician's lounge and went right up to Dr. Malman. She would say things like "I'm free tonight, can you take me to dinner?" On every occasion he concurred. They'd kiss and head off holding hands. Once I caught them coming out of a supply closet - he had lipstick on his face, and she was blushing.

Q: Let me turn to another issue. Did you ever work with her yourself?

A: Many times.

Q: Based upon your encounters with her, and your observations, do you have an opinion as to her character in terms of being truthful or dishonest?

A: Yes. Sadly, I must tell you that my opinion, based on numerous observations of her, is that she is a dishonest person.

Q: No further questions.

Use:

[Plaintiff Counsel]

You know, it is hard to show that a witness who is not here is not telling the truth. We all heard the Chief Nurse. And I'm sure you must have felt that she was accurately telling us what Nurse Howell told her.

But was Nurse Howell telling the truth? You did not get to see her, and judge her demeanor. You did not get to hear her and judge her speech. And of course she took no oath.

But why would someone like her tell these things to the Chief Nurse if they weren't true? Sadly, we now know why.

She had a bias - she was blaming herself to cover for a man she was emotionally engaged with. Emotionally and physically. And she is a dishonest type of person.

What does that combination tell you? That there is no reason to believe Nurse Howell's unsworn accusations - because she has a bias to cover for the defendant, and because she is a generally dishonest person.

COMMENT:

A hearsay declarant is, for all intents and purposes, a witness (albeit an absent one). And, notwithstanding the person's absence (and perhaps more necessarily as the factfinder cannot observe and assess demeanor), he/she is subject to impeachment to as great an extent as a witness who takes the stand. As one court has explained,

> The [trial] court harbored the misconception, reinforced by the government, that hearsay declarants cannot be impeached if they fail to testify at trial. This belief is squarely contradicted by Fed.R.Evid. 806, which provides,
>
> > When a hearsay statement, or a [co-conspirator's statement as defined in rule 801(d)(2)(E)], has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. [Emphasis added.]
>
> Thus, a hearsay declarant is deemed to be a witness whose credibility is subject, in fairness, to impeachment.

United States v. Moody, 903 F.2d 321, 328 (5th Cir., 1990). In this case, the declarant (ruled unavailable) made statements supporting the defendant doctor. It was proper and permissible for the

plaintiff to respond with extrinsic proof of the nurse' bias toward the physician and the nurse's character for dishonesty.

FRE

(a) In General. To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

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

(1) Testimony of a Witness with Knowledge. Testimony that an item is what it is claimed to be.

(2) Nonexpert Opinion About Handwriting. A nonexpert's opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation.

(3) Comparison by an Expert Witness or the Trier of Fact. A comparison with an authenticated specimen by an expert witness or the trier of fact.

(4) Distinctive Characteristics and the Like. The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.

(5) Opinion About a Voice. An opinion identifying a person's voice--whether heard firsthand or through mechanical or electronic transmission or recording--based on hearing the voice at any time under circumstances that connect it with the alleged speaker.

(6) Evidence About a Telephone Conversation. For a telephone conversation, evidence that a call was made to the number assigned at the time to:

(A) a particular person, if circumstances, including self-identification, show that the person answering was the one called; or

(B) a particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone.

(7) Evidence About Public Records. Evidence that:

(A) a document was recorded or filed in a public office as authorized by law; or

(B) a purported public record or statement is from the office where items of this kind are kept...

NOTES:

Authentication and identification represent a special aspect of relevancy...Thus a telephone conversation may be irrelevant because on an unrelated topic or because the speaker is not identified. The

latter aspect is the one here involved. Wigmore describes the need for authentication as "an inherent logical necessity." 7 Wigmore § 2129, p. 564.

This requirement of showing authenticity or identity fails in the category of relevancy dependent upon fulfillment of a condition of fact and is governed by the procedure set forth in Rule 104(b).

...

Subdivision (b). The treatment of authentication and identification draws largely upon the experience embodied in the common law and in statutes to furnish illustrative applications of the general principle set forth in subdivision (a). The examples are not intended as an exclusive enumeration of allowable methods but are meant to guide and suggest, leaving room for growth and development in this area of the law.

The examples relate for the most part to documents, with some attention given to voice communications and computer print-outs.

Foundation:

[Civil trial: issue of medical malpractice, whether doctor was careless when performing surgery. Examination by plaintiff counsel.]

Q: Ma'am, please explain how you are employed?

A: I am a secretary at Arrowhead Hospital.

Q: And are you familiar with Dr. Malman, the defendant in this case?

A: As a member of the secretarial pool, I've had to work with him on occasion.

Q: Have you ever seen his handwriting?

A: Yes, on many occasions.

Q: People always joke about a doctor's handwriting. Were you able to read it, and to tell his writing from that of other physicians?

A: Yes.

Q: Ma'am, I am showing you P-17, a handwritten note, dated March 21st, a few days before the surgery in this case. First, have you ever seen that before?

A: No.

Q: Is it on a form you've seen at the hospital?

A: Yes.

Q: What is the form used for?

A: A staff member's request for a leave of absence.

Q: Whose handwriting is on the note?

A: Dr. Malman's

Q: How do you know?

A: I've seen it before.

Q: Okay. Tell us what the note says.

A: It said "two week leave requested; surgeon needs time to address personal health issue. Failure to address issue may impact on surgeon's performance. Surgeon is under great stress."

Q: Is the note signed?

A: Only with the initials "A M."

Q: Was Dr. Malman the only "A.M." at the hospital?

A: No. There were four physicians with those initials, all surgeons. We used to joke about it.

Q: Then how do you know this is Dr. Malman's note?

A: Because I recognize his writing.

Q: No further questions. I move the admission of P-17.

THE COURT: Admitted.

Use:

[Plaintiff Counsel]

It is not just our witnesses who have proved that Dr. Malman was not in condition to handle surgery on that March day. He admitted it himself.

What was he undergoing in the days before this surgery? Stress. Personal problems. Problems sufficient for him to ask for a leave of absence. And how do we know that? He wrote it down, in handwriting recognizable to a fellow employee. The secretary who had written up his handwritten documents in the past.

Look at P-17. We now know who authored it, even though Dr. Malman denied doing so. It's his handwriting, and they are his words. It's the real thing. He admitted that he should not be performing surgery - "two week leave requested; surgeon needs time to address personal health issue. Failure to address issue may impact on surgeon's performance. Surgeon is under great stress."

His own words tell the truth. He was under stress. He should not have performed surgery.

COMMENT:

The authenticity of a document (or, in a telephone conversation, the identification of a voice) is a matter of having one witness state, from her/his personal knowledge, that the itemis what it purportss

to be. The authenticating witness is a link in establishing the evidence's relevance. As one court has explained,

> As a general rule, tangible evidence such as photographs must be properly identified or authenticated before being admitted into evidence at trial...Authentication and identification are specialized aspects of relevancy that are necessary conditions precedent to admissibility...Rule 901(a) only requires that the proponent of documentary evidence make a showing sufficient to permit a reasonable juror to find that the evidence is what its proponent claims.

United States v. Blackwell, 224 U.S. App. D.C. 350 (D.C. Cir., 1982) (citations omitted). Authentication permits admission of the evidence - it is then for the jury to decide whether to credit the authenticating testimony, and if so what weight and significance to give the evidence itself. As one court has explained,

> Proof of authorship need not be beyond a reasonable doubt in order to warrant admitting the document. The Third Circuit requires that a prima facie case of the author's identity be established for a writing to be admissible. The ultimate issue of authorship and probative weight is for the jury.

United States v. Sinclair, 433 F. Supp. 1180, 1196 (D. Del., 1977). Here, the secretary had sufficient familiarity with the physician/defendant's handwriting to permit her to identify the document as having been written by him. This testimony ensures the *admission* of the writing; the jury must then resolve two discrete questions - whether the secretary is indeed accurate as to the authorship of the writing, and if it was the defendant's whether it has significance applied to the facts at hand. Here, plaintiff's counsel was able to argue that, having authenticated the writing as that of the defendant, it stood as an admission of inability to perform surgery and thus circumstantial proof of the doctor's malpractice at the operation in question.