Oct 30th 2023

Themis 7:

R 105 How it is used🡪 inadmissible if it is used in a different way improper. How to instruct the jury.

* Purpose:
* Proper scope.
* Some rule should be exclude and the evidence comes in🡪 too prejudicial under R 403 because there may be improper use that jury can make.
* Evidence is probative that brings with the risk.>>> confusion, inappropriate use, etc.
* Ex. Murder case🡪 can bolster jury.--> inappropriate use.
* R 403 argument can be rejected. Because probative value >>>>>>>>> risk of improper use of jury.
  + R 105: you can ask the court to instruct the jury how to use it not to use. “DON’T MISUSE.” “I allow the evidence to use this character as XXXX, do not use it for >>>>.”
  + EX. It is only to ascertain A, B., and C. do not use for D, and E.

1. R 105:

Limited admissibility

1. Probative but some risk of prejudice or inappropriate use.
   * Jury can just fire up and get no attention to the facts.: jury makes inappropriate use of the evidence.
2. On Request: How to use not to use the inappropriate use.
3. State v. Mathis: Evidence of criminal defendant financial need must be relevant for issues other than establishing D’s criminal motive in order to be admitted.
4. Immaterial
5. Irrelevant ? no. **immaterial**. YES
6. Judge properly excluded evidence of M’s financial need as proof of M’s motive for killing Caswell even though financial need was relevant to estalbishe motive.
7. Hall v. Montomery: exemplary damages are smart money 🡪 Emotional distress.
   * Evidence of wealth is relevant and material because it is damage
8. Sep 5th Thompson v. Chicago
9. Police officer misconduct falsely testifies and government did not do anything.--> illegally entered and searched his home 🡪 later cover up. “sufficiently
10. Unlawful searches and falsification of evidence
11. Temple’s testimony was “precisely the same type of conduct”
12. **Defence: Motion in limine: corruption and conspired.**
13. Fabricate grounds for criminal investigations and concealment, coverup,
14. Testimony of these witnesses was highly probative R 403
15. R 403: probative value was outweighed by the risk of unfair prejudice to Defendant or substantial concern about confusion of the issues, waste of time, delay or cumulative evidence.
16. Testimony was not cumulative🡪 the ct precluded this witnesses from testifying based on generalized concern that admitting this will entail mini trials.
17. Purpose and probative value of the pattern of misconduct evidence testimony of the citizen witnesses who were victims of SOS malfeasance… Brady🡪 exculpatory + credibility test.
18. Substantial similarity:
    1. Misconduct citizen, witness 🡪 misconduct involved in Thompson’s case
    2. Attacking credibility🡪 과거에도 이런 적?--> Testimony of prior behavior 🡪 illegal home search
    3. R 403:
    4. Overcomes harmless error defense.
    5. Detail, proffered.
19. Sep 5th Evidence: Is there substantive evidence?
20. Prior criminal behavior to attack credibility or impeachment
    1. Ability of plaintiff to establish defendant’s liability
    2. + defandant’s absence of prior incident to rebut
21. **Similar Occurrence in the past may be admissible** 
    1. Ex. Negligence of handling food for the restaurant owner character.
       1. Generalized Propensity to act in a certain way 🡪 can it be used? 🡪 Maybe. Presence or absence of evidence🡪 Maybe admissible
22. CASE: City
    1. Plaintiff🡪 if defendant was negligent in the past, this time, as well.
    2. Plaintiff is allowed to proffer evidence that there was a dangerous situation and defendant knew about it.
23. Evidence🡪 if not relevant (과거의 일과 관계가 없을 때)
    1. There was the same condition but different in the past.
    2. Fountain condition: (항상 그 상태가 같은가?)+ negligence
    3. Counsel offer of proof to proffer.
24. Whether it is **material**?
    1. Evidence is admissible to show the act in question arose from the same cause that led to similar acts in the past🡪 YES.
    2. If particular behavior resulted in an earlier accident, and plaintiff alleges that the same behavior led to the accident in which plaintiff suffered similar injuries, reasonable to infer the behavior was dangeours to be known so.
25. Prior Incident of Similar Character
26. Competent, and Material.
    1. Evidence establishing such causal relationship is material, competent, and admissible.
    2. Without causal relationship, collateral🡪 inadmissible.
27. **Jones v. Pak Mor Manu**
    1. Plaintiff injured in 1979. 1. 27.
    2. Improper design of machine.
    3. Plaintiff moved to exclude all evidence of the absence of prior similar accidents.
    4. Evidence was inadmissible in AZ law.
    5. 26 years
    6. Rule of inadmissibility = Rule of Relevancy.
    7. Relevant evidence: having any tendency to make the existence of any fact.
       1. Any tendency: can be relevant, or probative … ex. Speeding as a habit.
       2. R 401: persuasive. ANY TENDENCY.
       3. Consequence of determination of the action more probable or less than it would be without evidence
    8. Accident🡪 defective design. +과거에 일어난 적이 있음을 증명해야.
    9. R 402. Otherwise provided.
    10. Constitutional provision. Statute. rule
    11. Accident in the past: something did not happen than…>>> something happened.
    12. Negative evidence problem🡪 inadmissible.
    13. Auxiliary probative
    14. Plain nature of danger.
28. R 401: Relevance
    1. **Circumstantial evidence IS EVIDENCE.--> probative value .**
    2. Evidence that allows to infer the conclusion.
    3. Merely circumstance<<inadequate<<<<< it can be quiet probative.
    4. Direct evidence: evidence that is equivalent to conclusion.
    5. How evidence is relevant? What is the inferential chain?
       1. Ex. This purse is mine. 🡪 how infer that? What is inferential chain. Intellectual habit.
29. R 403:
    1. Even if it is relevant, the court can exclude.
    2. **Probative value of evidence**.>>> substantially **outweighed** by the danger of … **unfair prejudice**, **confusing the issue (scientific evidence, cognitive bias, statistical evidence), misleading jury (inflame, anger the jury**), undue delay, waste time, . .. present needlessly cumulative evidence.
    3. Even if specific rule doesn’t exclude it.
    4. Ct can discrete
30. **Old Chief v. U.S**.
    1. **Charge in felon on possession of firearm**: IN THE PAST: it is **ELEMENT** he charged.
    2. **Prior crime was violent**.
    3. **He feared that jury will be bad if they found it**.
    4. Excluding relevant evidence R 403.
    5. Exclude when risk of **confusion of issues**, **mislead**, unfair **prejudice**, substantially outweigh the probative value.--> inappropriate grounds.
    6. Ex. Certain kinds of scientific evidence, 🡪 the ct should be aware.
    7. Even if the issue is stipulated the court still allows the issues.--> discretionary.
31. Old Chief assault causing serious bodily injury 🡪 Discharge firearm🡪 indictment. **Felon in possession of a firearm**. In the past, he was convicted as felon.--> propensity?
32. **“We stipulated that Old Chief has convicted of Felon offence: which is violent crime.”**
    1. Overrule.. introduced the judgment
    2. **Stipulation** 🡪 irrelevant. **Even if it is relevant, it should be excluded under R 403**.
    3. **Stipulation of prior conviction**: **probative value is so low**. It is substantially outweighed by the risk of prejudice. Even if there is no particular rule.
33. prior conviction full record🡪 violation of a statute that requires a felon conviction as one of elements? NO
34. Evidence is not admissible if its unfair prejudicial effect substantially outweigh its probative value.
35. Proffered evidence has the tendency to taint the juror’s mind so that improper basis.
36. Relevance : Conviction in the past. Even if, it is exclusive. Because of unfair prejudice
37. Marginal probative value ⇑ persuasion in improper basis , unfair prejudice ⇓.
    * 1. Unfair prejudice
      2. Confusing the issue
      3. Mislead the jury (traffic ticket)
      4. Undue delay
      5. Wasting time
      6. Needlessly presenting cumulative evidence.
         1. 예. 안전벨트 안 한 증거. 4.5.6…..) 6명의 Witness
38. Probative value? 🡪 evidence that affects probability. That a fact is what the party claims. Whether evidence makes the hypothesis more or less likely.
39. Whether hypothesis makes p of evidence more or less likely.
40. If the evidence is offered to help thorugh the proposition that is not a matter in issue the evidence is immaterial.
41. State v. Chapple
42. **Gruesome** pictures: tendency that can prejudice juries. R403. Cause confusion… but admissible…. Because “be outweighed the probative value.”
43. **Mere prejudice doesn’t exclude the evidence.**
    1. **Accuracy of identification that the person made confession🡪 only matter.**
44. Unless the risk outweigh the probative value.
45. No dispute about the issues
46. .
47. **Jones v. Pak Mor Manu:** Characterization of evidence
48. Relevance of safety-history
49. Evidence is to establish evidentiary facts from ….. **inferred** that there have been no prior accidents.
50. “defective” 🡪 the same defect everywhere. AZ law product liability
51. CT🡪 R 403. Admit evidence of safety history concerning both the present and prior accidents.
52. Character element of the claim or charge in dispute.
53. Problem 8-16
54. Character: Cross-examination questions.
55. 반대임. Habit, (routine, specific, regular, automatic) is **admissible** if it is in conformity of the person’s.
56. **Habit: 4 hundred rules. R 406: more automatic**.
    1. Actual knowledge. Routine practice of Business.

Ex. My sexual habit is…

Ex. When I mail or pick up mail …🡪

Ex. When I drive… 🡪

Ex. When my husband pushes up…🡪 (알 수도 모를 수도)

1. Cross exam.
   1. EX. Q. Have you ever disciplined for failing of performance work? X
   2. EX. Q. How do you know that they do it all the time? O
2. Rule 404. Character.
   1. Propensity evidence.
3. Rule 404 (b). **Prior. Bad. Behavior.--> prejudicial?**
   1. **EX. City of Zion: Police excessive force**🡪 evidence sent to jury.
   2. **Probative value**
4. Schafer v. Time Magazine
5. Whether specific instances of misconduct are admissible to prove character R 405 (b) in an action for libel. GA law.
6. Libya sponsored attack on Pan Am 103.
7. Information lovejoy disclosed to Pan Am 103.
8. Michael Schafer Wrong ID.
9. Magazine: Pan Am 103 Terror
   1. David Lovejoy🡪 picture of Schafer🡪 misidentified 🡪 libel.
   2. “I have questions about your prior misconduct, Mr. Schafer, felony failed to child support, and tax return.
10. Is a specific instance of a person’s conduct admissible if it tends to prove an essential character element of the claim or charge in dispute? YES. Character evidence is not admissible to prove that
11. **Schafer’s character was essential because he sought to recover based on his reputation.**
12. Character evidence R 404 & R 405.
13. Do not govern the particular evidence but govern the particular argument.
14. Propensity evidence.
15. Sept 6th: Character🡪 e.x. drunk🡪 cause damage 🡪 liable . may be
16. Improper use?
17. **Reyes v. Missouri**
    1. Propensity Evidence
    2. Diversity: 4 prior misdemeanor convictions for public intoxication.
    3. **Train: conviction to be in-admissible under R 404 (a) Character.**
       1. **Propensity inference is prohibited. because it is prejudicial. It is not probative as it looks.**
       2. **Assault case: “you have to believe me because he has a violent character, e.x. this person embezzled money because he is loser so that’s why you should believe me.” 🡪 prohibited.**
    4. Motion in limine: prior misdemeanor convictions.
    5. R 404: with an examination of the purpose for which the evidence is proffered to act in his character inadmissible
    6. Habit of excessive drinking is un-persuasive.
    7. Habit evidence is highly probative and superior to character evidence because **the uniformity of one’s response to habit >>>> consistency with conduct conforms to character or disposition**.
    8. Semi automatic situation intemperate character
    9. **Habit is admissible evidence. It shows a persons response to be a repeated specific situation.**
    10. A habit of public drunkenness is not established by 4 convictions
    11. The ct improperly admitted prejudicial evidence
18. Impeachment arguments: propensity argument. Character Evidence Exception Criminal defendant: ex. One of them are violent.
19. Criminal Defendant: can open the door.

Themis 9 Themis 10 Character Evidence Exception : Criminal defendant

**R 404 (a) Pertinent trait : ARGUMENT. NOT EVIDENCE , not admissible TO PROOF. PROPENSITY INFERENCE IT IS NOT IRRELEVANT. But it isn’t worth it, it is prejudicial. 🡪 X**

* Defendant CHARACTER:

However, ***if the defendant chooses, or decides that they had impertinent character of violence/ or “I am a peaceful person;” “I am honest;” “I am a law abiding:” they can do that***.

* Pertinent trait: ex. Embezzlement defendant cannot introduce, “I like animals.”
* ***The prosecutor may offer evidence to rebut it.,*** “Oh, good! I will tell you why you are NOT law-abiding person.” Prosecutor can rebut “defendant is honest, violent, peaceful, or law-abiding.”

**Themis 11 Defendant 🡪 Character evidence > on Alleged victim**

🡪 Otherwise, DP can be violated in constitution.

(1) Who started the fight: assault case.

(2) R 404 (b) (2) (B) Pertinent trait of the victim can be opened by the defendant.

* 1. Defendant> > 🡪 **alleged victim’s pertinent trait**.
  2. Ex. ***Assault: who started fight? Defendant introduce that victim is violent. “He has a character of violence.” “He started fight first.” 🡪 OK***
  3. Defendant, “I am peaceful.” 🡪 ALLOWED. Propensity argument not about defendant, ***but about the victim***.
  4. Propensity about the victim. Being violent.
  5. If defendant ***opens the door*** about the victim,
  6. 🡪 the prosecutor can rebut, “victim is not violent. You are.”
  7. 🡪the prosecutor can introduce the defendant being the same trait. Ex. Homicide. The victim started it the first aggressor: the prosecutor can rebut the victim being peaceful.

Themis 9 Character Evidence R 404 (a)

When character evidence is admissible, how it is proved?

1. **Propensity: cannot proffer evidence** 
   1. Ex. To prove violence, I cannot proffer crooket evidence.
   2. Character witness!: Describe reputation is ok. To give his or her OPINION about the trait. Ex. **Witness** says, “that person has a reputation of violence.”
   3. Prosecution cannot bring character witness that describes all dirty crooket occasions, or evidence.”🡪 only his or her opinion.
   4. YES: E.x. “he has a reputation of violence. Or in my opinion,”
   5. NO: Witness says, “he did this 2 years go, he did that 3 years go, he did that 5 years ago … “ “Last year, what happened is… “ XXXXXXXXX

Themis 13 Proving character R 405 (a)

> Cross examination

a. **Prosecution** can only **ask about the specific conduct in the past, e.g., “Have you heard Mr X fight**?” Not to proof it e.g., “~~X reputation is violent.”~~

b. His or her own **opinion** about the trait : ok. EX. **Witness** says, “in my opinion, that person has a trait of violence.” OK.

c. R 404 (b) (1)

d. R 405 (a)

e. Cross examine about character. OK

* 1. Not to prove character. Still it is extrinsic evidence.
  2. Ex. “My friend is the peaceful person in my opinion.”
  3. EX. Prosecution can Cross examine—“did you know about the time 2 years ago he did this and that?” OK. **Just take the answer is ok. If no accept NO. CANNOT PROOF.**

Themis 14 Non propensity use of character evidence 405 (b)

**1. Trait, character itself is an issue, then, there is no universe of Propensity evidence.**

**2.ex. Child custody case: potential defendant is violent person🡪 no argument about propensity.**

**3. 🡪 His violence is an issue.**

4.ex. Defamation case: XXX is violent, v. XXX is not violent: whether XXX is violent or not” is an issue. 🡪 no propensity world.

🡪 you can prove it via prior conduct.

Themis 16: Non propensity use of Prior Conduct

* R 403. USE!
* R 105: Defendant’s prior crime: do I have to ask the court to instruct jury, “Ladies and gentlemen, this prior crime shows a part of this crime, ABC,,,, but don’t use it, your job is this case, that case,,,, etc.”
* Opportunity: he is the one who stole money; the company in safe in the past: CAPACITY, OPPORTUNITY, etc.
* Bank robbery: prosecutor may proof that car parking location; 🡪 bank robbery scheme. 🡪 a part of crime🡪 preparation: it is not propensity.
* R 403, or 105

Themis 17 Themis 18 Prior Crimes : NO Universe of propensity

**Motive, intent,**

* ***Prosecution can introduce: Prior occasions of drug sales. Will show whether the person had intent to distribute.***
* Prior occasion is NOT in action in conformity or Character.
* It is to show INTENT.
* The person’s mental state is distinct from the propensity to behave in certain way.
* Mental state of INTENT >>>>>>>>>>>>>>> propensity

**Identity**

* The person has distinctive TRAIT, then the jury should proof traits.
* Ex. The person who committed the crime is ***7 feet tall***, then ask him to stand up.
* ***Ex DISTICNTIVE DEEP VOICE; distinctive TATOOS, distinctive way of WALKING--> this is EVIDENCE. --> appropriate use***

**PLAN OR SCHEME**

* The prosecution wants to introduce the earlier occasion: R 404 (B)
* ***Things that inherent in the commission of that CRIME.***
* Ex. Stealing a car to use to get away car.
* Ex. Stealing data to break the code with access to other data.
* Ex. Building a relationship overtime in order to blackmail them.
* Should able to be proof the crime at issue.
* Abuse: this person has propensity🡪 Prohibited : unpersuasive

**Absence of mistake : Doctrine of chances**

* Is it an accident?
* Man marries old rich woman and the woman drawn on the next day.
  + It can be an accident. I don’t know. Maybe.
* If this happens every year: 🡪 **the court admit the prior conduct.**
* **Maybe once it was an accident, but at least one of the times was NOT ACCIDENT.**
* **Non-propensity use of the prior act. Listed in R 404 (B)**

Propensity argument

* Notice requirement
* R 404 (b) Prior crimes, wrongs, other acts🡪 cannot be proven.
  + (1)
  + **(2)🡪For another purpose🡪 clarify that you know it tells us…**

1. State v. Renneberg
   1. R 404 (a) (2)(A)
   2. Accused character
   3. Rennebert convicted of grand larcery, Milton aid and abet grand larceny.
   4. Narcotic Drug : prior drug addiction can be considred on at least 2 different grounds
      1. Witness credibility
      2. Unrelated act of misconduct: prior misconduct reflects poorly on the defendant’s character. Defendant first cited past conduct to show good character.
      3. Prosecution can rebut that defendant has no such trait.
      4. No scientific connection between a person’s drug addiction and credibility
      5. Risk of prejudice outweights a possible relevance….inadmissible to impeach his credibility.
   5. Addiction of drug: necessarily prejudicial. to the average juror.--> Improper to impeach testimony or credibility. Proper t o rebut the issue that she is a citizen.
   6. Defendant’s wife voluntarily put her character before the jury.
   7. His prior conduct: past good behavior🡪 cross examined as to specific acts of misconduct unrelated to the crime charged: 🡪 bear on credibility on the weight to be given to the witness testimony.
   8. Relating to credibility or character?
2. Edgington v. US
   1. Aid of fraud pension claim
   2. Exclusion of testimony offered to show defendant’s general reputation for truth.
   3. Establish a general character in-consistent with guilt of the crime with which he charged : admissible whether or not defendant testified.
   4. Good character generates a reasonable doubt.
   5. If the character is relevant to the crime in question, in … dishonesty, relevant character is enough to create a reasonable doubt of the defendant’s guilt.
3. Broyles v. Common wealth
   1. Prosecution rebuts disorderly conduct.
   2. Guil of the murder of Smithers.
   3. Questions were improper: because they related to the trait of character not involved in the crime which he was charged. “peace quiet.”
   4. The rule is not absolute purpose of testing accuracy and credibility of the witness testimony and not as substantive evidence of defendant’s guilt.
   5. Illegal sale of whisky is irrelevant to murder. Illegal traffic of whisky conviction ofr drunken driving reckless driving, disorderly conduct, has reasonable connection with man’s reputation for peace.
   6. Can be cross examined
   7. Broyles procuded witness who testified his quiet and peaceful character. Prosecutor questioned witnesses if they new B drunk drivining reckless disorder conduct X.--> accuracy and credibility of the character witness testimony.
4. U.S. v. Lemay: Child Molestation DP.
   1. R 414.
   2. Babysitter molestated a child.
   3. R 404 (b) evidence when used to prove the character in order to show action in conformity… sex offense lustful disposition
   4. **Propensity inference in sex crime characterization of the evidence a veiled propensity inference 🡪 improper.**
   5. Probative of the nephew’s credibility
   6. Probative value< prejudicial value
   7. USE
      1. Similarity of the prior acts to the crime charged
      2. Temporal proximity of the prior acts
      3. Frequency
      4. Whether intervening cir
      5. Necessity of evi
   8. R 404 (b) (2) permitted use of character public intoxication.
5. R 404 (b) other acts
6. U.S. v. miller: cocaine possession as an intent element. R 403 OK.
7. Proper no propensity purpose.
8. Crimes: bad acts in question.
9. U.S. v. Woods: R 403

중간에 안 함.

U.S. v. Azure

Redmond v. Kingston

\*

September 11th

1. If character of the victim is relevant to crime
   1. Ex. Peaceful Gandhi victim: NOT THE First aggressor is justified. If it is immediate danger and it is necessary to avoid a danger.
      1. In my reasonable belief, he is harmless.
      2. What the defendant believed? R404 (a) 2(B), “victims pertinent trait.”
      3. Peaceful victim -dead- can offer evidence against testimonials
2. Rape shield law Redmond.
   1. Redmond v. Kingston:
      1. The victim heather falsely informed her mother and police that she was forcibly raped by a stranger 🡪 TRUE she consented. Do rape shiled laws exclude otherwise admissible evidencd that an alledged victim of sevual assaul lied about prior sex incident? no
   2. The defendant’s ability to introduce on rape evidence about victims prior sexual conduct 🡪 X restricted.
      1. Go to R 403.
3. Wilson v. Williams
   1. If a party believes an error committed at trial, the party must raise a timely and specific objection to keep an issue for appeal.
   2. Motion in limine: pretrial motion that certain evidence be allowed or prohibited at trial
   3. Wilson murdered 2 police officers: He is a “Cop-killer”
   4. R 103 (b) Timely and specific objection focus the judge’s attention on possible errors.--> judge can counter act errors before they prejudice the trials outcome.
   5. Failure to object wasn’t kept🡪 Plain error….. no plain error.?
   6. Harmless error: Misuse did not affect the outcome

U.S. v. Adams X.

Luce v. U.S. X.

Ohler v. U.S. X

Boller v. Cofrances X

City of Cleveland v. Peter Kiewit X

Plumb v. Curtis X

State v. Mathis X

**Best Evidence Rule**

* 1. Cheaper, more persuasive.
  2. There is no best evidence rule in general.
  3. But, particular kind of …. Writings or recordings or photos or copy of the documents.-->너무 넓음
  4. **!! RULE ABOUT COPIES e.x. photocopies are fine.**
  5. If it is unfair to copied???? Absent that, copies are fine.
  6. **Not to describe the contents of document., do not describe video, or pictures. JUST SHOW US. Unless / Before you really need to.**
  7. Testimony witness can describe it.
  8. Confusion: coincidently record the video.
     1. Ex. Witness saw the event. 비디오가 있어도 Witness can describe what they saw.수 있음
  9. If the document is unavailable … R 104.

1. U.S. v. Duffy
   1. FBI: inside the suitcase was a white shirt with a laundry mark reading D.U.F.
   2. The government is required to produce the shirt
   3. Should be original? YES…….! Best evidence rule requires production of an original writing. UNLESS the original is unavailable.
   4. Duffy’s reliance on Whtson is misplaced. Distrcit Court did not abuse its discretion in declining to require production of the original shirt.
2. Meyers v. U.S.
   1. Best evidence rule:
   2. Lamarre : 3 perjury counts. Meyers: 3 suborning L’s perjury. Aviation corp.
   3. Transcript of Testimony
   4. 1941: War ended
   5. Does the best evidence rule only apply when the contents of a writing are sought to be proved? YES. The document itself. SHOW.
   6. Not all document. If contents of the document are AT ISSUE: ex. Business record: then, Best evidence Rule.
3. U.S. v. Diaz Lopez
   1. Best evidence rule
   2. The original of a writing recording photograph must be produced to prove whatever is said or pictured in it.
   3. Duplicate ,, original doesn’t matter.
   4. Search Database DIAZ. No record Form I-212 reapply after removal
   5. Does the best evidence rule apply to testimony that search of a PC database resulted no info? NO.
4. Wilson v. State
   1. Duplicate document is admissible as evidence to the same extent as the original
   2. Stealing another person’s paycheck.
5. Best evidence rule: 음란영화🡪 Original NO NEED.
   1. Offer original
   2. Includes duplicates. .. unless EXCEPTION
   3. A copy of public record
6. Seiler v. Lucas Film LTD
   1. Under the best evidence rule, must a proponent seeking to prove the contents of documentary evidence produce the original of the document? YES
   2. A proponent seeking to prove the contents of documentary evidence must produce the original of the document recreations of the document are not enough.
   3. Copyright infringement. Seiler must demonstrate that Imperial Walkers are substantially similar to his drawings.
   4. Reproductions are not admissible.

Doe Gilbert v. Ross X

**Witness Competency**

* Every person is competent to be a witness unless these rules provide otherwise: ex. 6 year old girl can be a witness.: State law governs.
* Ex. Exception: spouse can’t witness. (남편의 거짓말을 따라할 수) Judge can’t be a witness. R 601. Washington v. Texas.
* Erie Doctrine: where the state law supplies a rule of decision, federal courts must use state rules related to competency.
* Lawyer-witness rule: cannot take representation wheter the best interest as a client is for the lawyer to be a witness.
* Usually arises when adversary thinks you should be a witness and will move to disqualify you.

**Lay Witness**

1. R 602
2. Witness
3. Competence: who was competent to be witness? Spouses, parties, financial interest people 🡪 no competent to testify
4. R602: **personal knowledge requirement**
   1. Ex. Expert witness: special knowledge. Other than that , personal knowledge.
   2. Jury decides whether they believe or not.
   3. Witness, “I was there. I saw bank robbery.”🡪 Court still consider his personal knowledge enough. OR, Hearsay scream: “I was told from XXX that XXXXXXX.”
   4. The first question should be about “PERSONAL KNOWLEDGE,” ex**. Did you see this? Please describe the accident; etc**.
   5. “Was the car speeding?” XXX object. Because there is no foundation.
   6. FOUNDATION: things needs to show before evidence gets in: that is, personal knowledge.
5. **R 603 Oath or Affirmation to Testify Truth**
   1. They have duty to tell truth. Otherwise, perjury.
   2. Anyone under Oath or affirm testify truth: COMPETENT WITNESS.
   3. State law variations: Erie.
6. Only when witness has a personal knowledge ex. Whether victim was alive or dead.
   1. R 701
   2. “Was victim alive?”🡪 No foundation. No possible knowing.
   3. “Did you look inside the bedroom?” “YES.” “What did you see?” “Polish,” “Complete shock🡪” objection. “R 701. Opinion🡪 in my opinion……
   4. R 701 applies to all witnesses.
      1. Opinion is based on personal knowledge.
      2. Helpful to clear understanding.
7. Parker v. Hoefer
   1. If the facts would be unable to draw correct or intelligent inferences from the facts witness observed, can the witness testify that inferences the witness drew from the observation?
   2. Yes. Witness can testify what inferences the witness drew from the observation. ADMISSIBLE.
   3. Testimony is limited to facts and that a witness conclusions, judgments, or opinions are inadmissible.
   4. Mr parker, they became convinced he was having extramarital affairs. Only the witnesses were in a position to draw that conclusion.
   5. Hoefer doesn’t argue other methods for Mrs Parker to show Mr Parkers affection
   6. Witness testimony was admissible.
8. Krueger v. State Farm 1983
   1. Are a lay witness inferences or opinions only admissible if they are rationally based on the witness perception and helpful to a clear understanding of the witness testimony or a determination of a fact in issue?
   2. R 701, Lay witness inference or opinions are admissible only if **they are 1) rationally based on the witness perception, and 2) helpful to clear understanding of the witness’ testimony or a determination of a fact in issue**.
   3. Witness testimony🡪 his personal observation and recollection of concrete facts.

Expert Witness

1. R 702: Specialized.
2. R 154 : Criminal cases: distinction between showing witness, “I speak Polish,”
3. Frye : Expert Testimony
4. Daubert: What is meant scientific technical knowledge
5. R 703: Expert opinion. Expert witness as opinion ex. Relevant standard of care
   1. What kinds of information evidence or data can form the basis of expert testimony?
   2. EXPERTS have **BASIS**.
   3. Experts can opine on that evidence like : **PERSONAL KNOWLEDGE**. Ex. I saw the bridge and found XXXXX. I personally observe….
   4. Hearsay: In forming an opinion,…if they rely on opinion, that opinion is inadmissible. X DATA or FACTS O
   5. Epidemiologist: interviewed people, etc. 🡪 admissible even if basis is interview, which is inadmissible hearsay. But, if it is unreasonable relying upon it, X hearsay. It is because it will be conveyed to the jury.
   6. If data is inadmissible, the proponent of the opinion may disclose then to the jury if **their probative value… evaluate the opinion substantially outweighs their prejudicial effect**.
      1. It is valid opinion.
      2. Note in class: Expert can educate the jury in similar area.
      3. Expressing opinion applicable.
      4. Handwriting, testimony, etc. 망원경으로 본 것 등.
      5. Data: reasonably relied on.
      6. Studies, in journals.
      7. PTSD
      8. Expert can reasonably rely on: interview…..?
6. **Frye (General acceptance need**) v.--🡪applied🡪 Daubert (General Acceptance NO need, as long as jury comprehend, it is fine.) factors 2019
   1. Ex. Expert 1 says X, Expert 2 says XX🡪 not admitted. + alpha needed.
   2. Frye Test: it decides the plaintiff’s expert testimony is not admissible.
   3. General acceptance: admissible scientific expert testimony must be based on principles that are “generally accepted” by the scientific community.
7. Daubert factors 2019 R 702
   1. Bendectin: severe deformities babies.
   2. 1983 Merrel Dow Pharmaceuticals ….--> not clear that Bendectin actually cause birth defects.
   3. Not a cause.
   4. Merrell Dow relied on established scientific findings to support its position.
   5. Expert witness 8 . 🡪 They all says “bendectin caused birth defects.”
   6. Drug effects to humans: tests on aminlas, among other things, showed this was the case.
   7. R 702 is a screening function.
   8. Judge’s role is gatekeeper.
   9. Scientific knowledge
   10. Expert 🡪 unprecedented? Flood. Call 2 experts … witness who are qualified to win this case.
   11. Cardiologist: peer review. 🡪 Daubert factors. Certification Board.
   12. Special knowledge.
   13. Knowledge 🡪 perfume sense, wine tasting.
   14. Qualifying field of knowledge if relevant.
   15. Handwriting expert.
   16. Patent lawyer: expert adding based on knowledge…
   17. Guantanamo: can suspend trial because ABA guideline on capital cases. Expert testimony 불렀었음.
   18. Expert can educate the jury in similar area. Expressing opinion applicable to the case R703.: personal observation, microscope observation, handwriting testimony.
   19. Sufficient facts and Data: the expert will reasonably rely on.
   20. Studies in journals.
   21. Ex. Plaintiff beaten. PTSD: symptoms.--> it can be interviewed by expert witness.
   22. Reliability of report >>>> prejudicial effect valid opinion.
   23. R 702 (B) sufficient facts and data.
   24. XXXX “I am an expert, I believe this guy killed….” 🡪 expert Presssure jury.
8. Kumho Tire v. Carmichael
   1. Do the factors used in deciding whether scientific knowledge of an expert witness is admissible under D & Merrell apply to all expert testimony? Yes.
   2. “scientific knowledge” 🡪 and “technical or other specialized knowledge … 🡪 reliability standard.
   3. Ex. Determining if defect cause the blowout was not reliable.
   4. 4 symptoms of tire abuse cause a defect 🡪 these were all valid criticisms of C’s methodology.
9. U.S. v. Hines
   1. May an expert testimony as to the science behind eyewitness identification? Yes.
   2. Kassin’s testimony regarding factors that might affect the accuracy of identification is based on accepted psychological studies. They can draw the proper inferences from an eyewitness identification their common sense inferences may not be quite applicable.
   3. Testimony of the expert may assist the jury R 702.
   4. Kassin🡪 science of identification. & Jury uses these tools as it likes.
10. Wheeling Pittsburg Steel Corp. v. Beelman River Terminals Inc.
    1. To be admissible, must expert witness testimony relate to the witness area of expertise? YES
    2. Hydrologist 🡪 in flood risk management qualified him to testify as an expert on Beelman’s flood risk assessment.

**Witness credibility**

🡪 impeachment.

1. Still, you need not to make witness **INFLAMMATORY.** **You cannot bolster witness**. E.g., “you were KKK.” 🡪 R 402, R 403. Similar crime is ok.
2. **Bias**
   1. Leading questions, “Isn’t it true…”
   2. “isn’t it true that you are paid to witness?”
   3. “Isn’t it true if this lawsuit wins for corporation you get a job in corpo?”
   4. “Isn’t it you are gang?” “Isn’t it true that you are white supremist?”
   5. You can impeach by bias.
3. Perception or memory
   1. Isn’t it true you are drunk, tired, .. you don’t remember 6 years ago?...
4. **Cross examine** or you bring **extrinsic evidence** : the witness: Dr., “is he blind.”
5. Problem with **perception: e.x. drunken too much**
6. **Prior inconsistent statement**
   1. **Hearsay 관련.**
   2. **If the witness says, “the light was red,” in the past e.g., Deposition//// at stand, “the light is green,” then you can introduce the prior statement in order to impeach. 🡪 This guy is just convenient to inconsistent**
   3. **It is not telling the jury that it is truth. Jury should believe nothing.**
   4. **Video or notebook that quotes what the witness says.**
   5. **You have to give a chance to explain.**
7. **Rehabilitate: yes: once witness credibility attacked by prior inconsistent statement, a prior consistent statement may be offered as Substantive Evidence with extrinsic evidence**
   1. : red light, : green light, witness says, “there was no electricity on traffic light.”🡪 Witness prior inconsistent statement🡪 to rebut the impeachment,🡪 Witness can say, “REHABILITATE,” in “REDIRECT.” When you do that, extrinsic evidence is needed🡪 SUCH as police report that says, “there was no electricity on traffic light.” 🡪 Foundation🡪 Substantive evidence.
   2. Bradford v. State
      1. Can redirect exam be used to rehabilitate a witness who was impeached on cross exam by her or his prior inconsistent statement? YES
      2. Redirect exam🡪used to rehabilitate a witness who was impeached on cross exam by his or her prior inconsistent sts.
      3. Induced him to deny witnessing the incident could well have led to Bradford’s conviction.
      4. It was prejudicial error to exclude T’s explanation.
8. Credibility of witness
   1. No extrinsic evidence
   2. Bolster, v. Rehabilitate.
   3. Impeachment🡪 jury should not believe wht it has to testify.
   4. Witness lied on testimony
   5. Alibi lie
   6. Impeachment value more important not be decided from giving it.
   7. Similarity🡪 similar crime more prejudicial.
9. R 608: **Character** **witness to call lay witness “a liar.”** 🡪 **OK**.
   1. Cross examination about prior conduct: proof of dishonesty: by nature, liar.
   2. Reputation or opinion
   3. Defendant’s/ victim’s /and witness’ character.
   4. **(b) Ask witness about his truthfulness or un-truthfulness in cross exam, do not proof!--> ask witness, “isn’t it true that you lied on the job application last year?” “isn’t it true that you fabricate?” “Isn’t it true that you stole from Charity ABC?” “Isn’t it true that you embezzled money?” as a way of impeaching. 🡪 Then, witness answers, YES OR NO. 🡪 ACCEPT IT.**
10. R 609 Cross exam about prior criminal conviction
    1. What kind of crime?
    2. Crime of dishonesty act or false statement.
    3. **Perjury, fraud, or other crimes that by nature**, it was proven to dishonesty.
    4. R 403 doesn’t allow for the court to exclude those evidence. E.G. who the witness is?
    5. If Defendant=Witness in a criminal case, jury - risk of prejudice is strong.--> Propensity. X R 404, v. R 609🡪 R 609 (1) 🡪 Reverse R 403 if probative value outweighs the prejudicial effect.
    6. Federal rule: R 609. Even if it doesn’t involve dishonesty, you can still use this if this is **felony**. By death or punishment for more than a year. With certain limitation, you can use that to impeach.
       1. U.S. v. Alexander
          1. Can a criminal defendant’s prior conviction be admissible evidence for impeachment purposes? YES.
          2. R 609 (a) evidence of conviction is admissible if defendant’s prior crime was a felony and the probative value of such evidence outweigh its prejudicial effects.
          3. It involves dishonesty or false acts.
11. 🡪 Gogo Closing argument

For non-propensity purpose

* + - 1. U.S. v. Webster 1984

* 1. King said, “Clinton Webster helped me Rob the bank.”
  2. Can King be examined outside jury’s presence?
  3. Objection 🡪 OK
  4. King’s testimony exculpatory Webster. Webster wasn’t involved.
  5. Prior, inconsistent statements
  6. King’s prior inconsistent statements only be considered to impeach King’s credibility🡪 NOT SUBSTANTIVE EVIDENCE TO WEBSTER.
  7. Is evidence of a witness prior inconsistent sts admissible for impeachment purposes in a criminal case under R607 if the government offers the testimony in bad faith as a means to bring in inadmissible evidence? NO.
  8. Credibility of witness 🡪 attacked by any party including the party who called the witness.
  9. To impeach its own witness, a party must have called the witness in good faith and not as means to inttoduce inadmissible evidence 🡪 you may not call a witness to impeach him and hope the jury is confused between impeachment and substance evidence.

1. Alford v. U.S.
   1. AT trial, prosecutor called Bradley 🡪 “**where do you live?” \*2.**
   2. Bradley🡪 Federal custody. Government control.
   3. Bradley testify while in federal custody.
   4. Bradley bias.
   5. Judgment: Federal custody is not related to a felony conviction.
   6. Environment shapes the witness testimony.
   7. If it unnecessarily abuses the witness or threatens the witness constitutional rights 🡪 the cross exam could expose a witness hostile bias.--> possible.
2. Witness impeachment by criminal convictions and bad acts R 609
   1. Attacking a witness character for truthfulness🡪 all witness in civil and criminal , criminal defendant who testifies.
   2. Crime: punishable by death or for more than 1 year and for any crime, regardless of punishment.
      1. Establishing the elements of the crime require proving, or the witness admitting, a dishonest act or false sts.
      2. 🡪 admitted.
   3. Admitted subject to 403. In civil or criminal case,
   4. Witness is NOT the defendant.
   5. Impeachment value substantially outweighs the nature of the crime.
   6. Witness is the defendant: 🡪 impeachment value
   7. **Cross exam: all information establishing you need.**
3. 10 years passed, witness conviction or release from confinement, evidence is admissible
   1. only If probative value supported by facts and circumstances substantially outweighs its prejudicial effect. AND
   2. adverse party is given reasonable written notice of the intent to use it 🡪 fair opportunity to contest the evidence.
4. State v. Baker 1962
   1. Evidence of witness poor reputation for truthfulness is admissible to impeach the witness.
   2. Baker defendant for sexual acts with James A, minor.
   3. Condition, “you are drunken at the time. You are alcoholic, or habitual drunker.”
   4. Is evidence of a witness poor reputation for truthfulness admissible to impeach ? YES
5. Altobello v. Borden Confectionary Products, Inc
   1. FRE 609 (a) (2) evidence of a witness prior conviction is admissible for impeachment purpose if the indictment or trial record shows the prior crime involved deceit.
      1. Impeachment value of the prior crime
      2. Time elapsed and defendant’s conduct since prior conviction
      3. The similarity btw the prior crime and the crime at issue
      4. Importance of the defendant’s testimony
      5. Certainty defendant’s credibility
      6. Ex. Consider the witness previously convicted of theft. If the witness simply stole property, the prior conviction proves the witness criminal propensity but it doesn’t necessarily lessen the likelihood the witness will testify truthfully in the current case.
6. U.S. v. Opager 1974
   1. Does FRE 608 (B) restrict the admissibility of extrinsic evidence of a witness prior conduct when such evidence is introduced to show the witness general character for truth?
   2. Character for truthfulness is not the same as credibility. Accordingly, R 608 (b) imposes no limit on using extrinsic evidence to challenge the credibility of witness testimony on grounds other than w’s truthfulness.
   3. Posner’s claim tended to prove Opager’s predisposition, as early as 1974, to sell cocaine.
   4. The judge prejudicially errored in excluding those records in the mistaken belief R608 (b) made them inadmissible.
   5. Extrinsic🡪 Prior inconsistent statement🡪 **impeachment OK**
   6. Specific contradiction
      1. Drunken driving: “I have never drunken driving.”
      2. R 403
      3. **Credibility of witness-> rehabilitate🡪 redirect.**
7. U.S. v. Catalan-Roman
   1. Armed car robbery. Death penalty, Torres the driver was wounded in the incident.
   2. Is extrinsic evidence admissible to impeach a witness testimony on a matter of consequence, but not on a collateral matter? FRE 403 Balancing test, under which a judge can exclude.
   3. Relevant evidence if it’s probative value outweighed by considerations of undue delay or waste of time.
   4. Impeachment on a matter of consequence is worth the courts time.
   5. Impeachment on a collateral matter is not.
   6. Disfavor of impeachment of “collateral matters.”🡪 Attempts to impeach, even if it is appropriate, will be cut by the jdge if the pursuit of them seems to be likely lead to tangential issues.
   7. Hospital’s interview included details that may have been relevant to the jury’s decision on whether to recommend the death penalty.

**Hearsay**

* + - 1. Definition: Out of court statement+ Intended as assertion
         1. Out of court conduct is not hearsay if it was not intended as an assertion
         2. Offered for the truth of the matter asserted
    1. Captain of a ship: pointing or nodding X
    2. To show that a declarant witness made:
       - 1. An inconsistent statement with their testimony given under the penalty of perjury at a trial, hearing, or other proceeding or in a deposition
         2. A consistent statement with their testimony and is offered to

Rebut

Rehabilitate

* + 1. The statement is offered against an opposing party and is an opposing party statement

1. Criminal trial: prior consistent statements: robbery- if they rebut fabrication of witness🡪 admitted as “substantive evidence.”
2. Hearsay: substantive evidence
3. Prior out of court identification, e.g., lineup.
   1. Lineup and showup identifications are admissible as non-hearsay statements under Rule 801(d)(1)(C) of the Federal Rules of Evidence as long as the identifying witness testifies at trial
4. Moore v. U.S.
   1. Hearsay is in-admissible as evidence of a criminal defendant’s guilt unless it falls within a hearsay exception recognized by FRE.
   2. Is hearsay inadmissible as evidence of a criminal defendant’s guilt unless it falls within a hearsay exception recognized by FRE? YES
      1. Defendant may not have a chance to confront the hearsay declarant at trial.
      2. To challenge the factual basis for the statements or the declarant’s credibility
      3. Moore had heroin in his apt.
      4. In admissible as evidence of his guilt. Whether admission of hearsay was harmless or reversible error.
5. U.S. v. Gibson
   1. Gibson- systemically defraud invested persons.
   2. FRE 801 © defines hearsay as an out of court statement offered in evidence to prove the truth of the matter asserted
   3. Does FRE 801 © define hearsay as an out of court sts offered in evidence to prove the truth of the matter asserted? Yes. If the statement is not offered to prove the truth of the statement assertions
   4. It is not hearsay and FRE 801 © X
   5. Government did not offer the investors’ testimony to prove that the company’s promises were true.
6. Loetsch v. NYC Omnibus
   1. A statement is admissible non hearsay if it is indicative of the declarant’s state of mind when the statement was made.
   2. Wife dies, Loetshce plaintiff filed a wrongful death suit against NYC Omnibus Corp, the defendant. 🡪 recover damage for loss. Loetsch’s wife’s will🡪(죽기 4개월 전)🡪Reciprocated his wife’s tender affections for him with acts of cruelty and indifference.
   3. Is a statement admissible no hearsay if it is indicative of declarant’s state of mind when the statement was made? YES
   4. Trial court abused its discretion by excluding the will from evidence.
   5. Circumstantial evidence of wife’s state of mind🡪 (죽기 4개월 전)

🡪 Admissible, non-hearsay.

1. U.S. v. Zenni
   1. Non-assertive verbal conduct doesn’t constitute a statement and isn’t
   2. Does nonassertive verbal conduct constitute a statement subject to the hearsay rule? NO. FRE 801. Nonverbal conduct is not hearsay unless the speaker intended it to be an assertion regarding the matter sought to be proven.
   3. Actions speak louder than words.
   4. The phonecalls were offered by the prosecution as being relevant to an implied assertion
   5. H’s house was where People are able to place bets. The calls are not direct assertions but rather constitute non-assertive verbal conduct reflecting a belief the individuals held about the house.
   6. The calls to H’s house constitute non assertive verbal conduct and are exempt from the hearsay rule under R801
2. Olson v. Hodges 1945 Conspiracy?
   1. May an opposing party introduce a party declarants admission not only to impeach the declarant’s testimony but also as substantive evidence against the declarant? YES
   2. Olson signed the sts recounting Hodge’s careful driving, directly contradicted Olson’s testimony that Hodges was driving recklessly when the car crashed.
   3. Jury discredited Olson’s trial testimony but also as it discredited Olson’s entire case against Hodges. Hodges produced a statement Olson signed shortly after the accident.
   4. The statement attested that Hodges was a careful driver and had not been driving the car carelessly before the accident occurred, he was hospitalized and sedated after the accident no recollect of statements and no chance to read signed related to Olson’s credibility as a witness, not as to the truth of the statement assertions.

**Hearsay Exclusion**

* + - 1. Criminal conspiracy R 801 (d), R 801 (d) (2)
         1. Declaration against witness
         2. Statements adversary: prior inconsistent statement of the adversary party
         3. Statement: attributable
         4. R 801 (a) (2)
    1. Mahlandt v. Whild Canid Survival Research Center 1978

1. Are minutes of a meeting of a corp and sts made by an employee of the corp w/I the scope of his employment admissible against the corp? YES
2. **About any material fact are admissible against that party if proffered by the opponent,** 
   1. Person is authorized by a party🡪 Admissible against the party
   2. Not hearsay because they are reliable in that it is highly unlikely that a party its agent a false sts against itself.
   3. No guarantees for trustworthiness “don’t need the personal knowledge” R 801 (d) (2) (d) there is no abuse of discretion . R 403
   4. Poos absence at that meeting the minutes are not admissible against him🡪 corp directors meeting cannot be used against. A non attending, non participating employee
   5. Sufficient: he agent of the center and was acting within the scope of his agency when he made sts R 801 (d) (2) ©
   6. Wolf is within the scope of that employment.
   7. He had no personal knowledge of the truth of his sts. This is not a requirement. Under admission by party opponent rule.
   8. The notes and sts made by Poos are admissible against Poos because they were his own sts. Against Center Poos is an agent employee of the center and his custody
      1. Wilson v. City of Pine Bluff 1982
3. Criminal trespass guilty
4. May a party’s silence 🡪 Admission or acquiescence (묵인) in the face of an accusatory statements made by another person be admissible non hearsay evidence against the party? YES
5. The party’s failure to deny the accusation manifest the party’s adoption of belief in the accusation. Under the hearsay, exception for admission of a party opponent provided by R 801 (d) (2)
6. Judge party heard, understood statements personal knowledge of the stements subject matter and was physically and psychologically able to speak 2) relation to the party or event reasonable expectation of denial 3) statement untrue 🡪 denied
7. Police testimony 🡪 adequate grounds to conclude these foundational factors were satisfied.
8. Fact finder – woman statements 🡪 untrue 🡪 Wilson denied or explained
9. Non hearsy evidence 🡪 Wilson’s lack of response to women’s statements 🡪 adoptively admitted to statement truth
10. Judge did not abuse his discretion in admitting the police testimony
    * 1. **U.S. v. Cornett 1999**
11. Is the statement of party’s co-conspirator admissible non hearsay evidence against the party only if the co conspirator made the statement in furtherance of the conspiracy? YES
12. The proponent of admitting the statements into evidence must show that a conspiracy existed and 2) was made by a co-conspirator, 2) during the course of conspiracy, 3) in furtherance of the conspiracy ### intended to advance, facilitate, or promote the conspiracy’s ultimate objective.
13. Idle chatter or narratives of past conduct even if they implicate the party’s involvement in the conspiracy.
14. Causal references 🡪 unreliable and not necessarily indicative that the party would have authorized the statements.Bouttes romantic rivalry with Galloway 🡪 future drug deals through Galloway🡪얘는 돈 만 셌음. Harmless error? No🡪 reversed 🡪 conspiracy🡪 did not further statements touched on G’s involvement.
15. R 801 (d) (2) ( E ) : exception doesn’t satisfy inadmissible🡪 lack of compelling evidence 🡪 tape recording 🡪 error admission
16. There is another conspiror 🡪 girlfriend2, gv, etc. all agents.
17. Gv prepared to proof
18. Conversation cannot be construed in that way.
19. No hearsay exclusion
20. Government cant get the statements at all

Themis 57

**Statement of co-conspirators in furtherance of a conspiracy**

**🡪 during crime; while conspiracy was going on.**

**Ex. Undercover 🡪 Conspiracy 1, and conspirer 2 are caught on the wiretap.**

801 (d) (2)

* Ex. The guy sends the postcard to his uncle saying, “we are going to rob the bank next week. lovely weather here.” 🡪 just random blabbing. It is **not** “**furtherance” of the conspiracy**. It cannot be used against the other conspirator.
* It’s still used as the **truth of the matter asserted**? Hearsay? No
* Party admission doctrine: ~~“statement against the party.” “statement opposing party.”~~
  + 1. Problem 13-50

Tacit admission : 대답을 안 함.--> admitted.

경우 1 : Price fixing: plaintiff denies

경우 2: 바빠서 말할 기회가 없었음

경우 3: preliminary legal question of admissibility: jury 에게 감

Co-conspiror: murder, trespass🡪 you stepped. 🡪 silence

**★Is it reliable?**

Corroborating circumstance: criminal 🡪 when there is a penal interest. Civil🡪 X

🡪 Truth of the content of statement

R 804 (3) (B) Criminal trial

**Some corroboration to the truth statements**

Ex. Smoke detector 🡪 is not testimonial.

Against Susie’s penal interest.

2010 reform: prosecution🡪 some corroboration.

**Hearsay exception**

**Excited utterance**

* + 1. Miller v Keating

1. Is an unidentified declarant’s sts about startling event or condition admissible under the excited utterance exception to the hearsay only if the declarant
2. (1) personally observed the startling event or condition,
3. Made the statements while under the resulting stress of excitement
4. How much time? Before the declarant had time to reflect and fabricate.

🡪 YES. An unidentified declarant’s sts about startling event or condition is admissible under the exited utterance exception to the hearsay rule FRE 803 (2) only if declarant.

🡪 Judge must explicitly find the sts was not the product of the declarant’s conscious reflection. These conditions circumstantially guarantee the sts trustworthiness.

1. R 803 Hearsay exception:
   * Statements inherent trustworthiness justify admitting it into evidence regardless of whether the declarant is available to testify 🡪 NECESSITY.
     1. There was no direct or circumstantial evidence the declarant personally observed the accident … “I saw the bastard try to cut in.” 🡪 inference 🡪 another person’s opinion, or a desire to conceal the declarant’s own role in the accident.
     2. The judge failed to find explicitly that the sts was not the product of the declarants conscious reflection.
     3. Let alone that he made his statements while in that stae of mind excited utterance.

**State of mind**

**Themis 60:**

**State of mind R 803 (3)**

**Motive, intent or plan**

Mental feeling, bodily pain 🡪 THEn existing.

* **Contemporaneous**
* Jan 2023: Possible to prove then existing
  + 🡪 ex. The person was in pain. “I am in pain.”🡪 at that time, he was in pain.
* Mar 2023: cannot proof anything.
* Inward version of present sense impression.
* The best evidence to get because it is contemporaneous.
* Reliability

It doesn’t include memory or belief to prove a fact.

* “I believe John Smith robbed the bank.”
* Introduce: that will be hearsay.: out of court, intentded to assert, and offered to truth of a matter. >,.<
* **Declarant believed John Smith robbed the bank.--> THEN EXISTING MENTAL STATE: “BELIEF**”. ^^?? If itself is an issue.
* BELIEF OR MEMORY to show the fact. ^^??? If itself is an issue. MIGHT BE
* Vehicle.?

Hillman 🡪

Walters

“I plan to go to Clevenland to morrow.”

**🡪 Plan + INTENT.**

**ACT PURSUANT TO INTENT.**

**Pheaster 1976**

**“Angelo is gonna get me a free marijuana at parking lot.”**

**And never seen him again**

**🡪 PLAN+ Intent + ACT: EVIDENCE ADMITTED:**

* **Angelo went to parking lot. IT was Angelo who was there.**
* **PPL tell someone where they go, who they meet. And never seen him again,**
* **Predated Hillman**
* **Charged with murder**
* **Courts allow that evidence.**
* **Memory or belief is admitted.**

1. Mutual life ins co v. Hillman

1. are out of ct stat indicating a declarant’s intention?
   1. YES. Out of court stat that **show the declarant’s intentions** are admissible to prove such intentions if the act intended is material to an issue.
   2. Mutual life sought to introduce into evidence 2 letters from Walters to his sister and fiancé sent before Sallie’s husbands’ trip to Crooked creek. The letters expressed W’s intent to trip.
2. Walters Direct evidence of the fact
   1. “I intended to go…”
   2. “I leave a will to leave the property to Susie.” To executor.
   3. 🡪 Evidence use evidence as illumination(불빛 조명).

2. U.S. v. Veltmann

1. Is an out of court statement from earlier time regarding the declarant’s then-existing state of mind admissible if the circumstance show the declarant probably remained in that state of mind at the material time?
2. YES.
3. FRE 803 (3) ‘s exception to hearsay rule, out of court statements from an earlier time regarding the declarant’s then- existing state of mind is admissible if the circumstance shows the Declarant remained state of mind material
4. The evidentiary effect of statement is broadened by the continuity of time between the declarant’s earlier and more recent state of mind.
5. “Admissible” even if timespan between statement and the time is long.
6. Suicide within a few months of her death, a far shorter period than the 6 years gap in the fill case
7. E’s depression / Engstrom’s testimony so central to Chris and Carl Defense

**Hearsay exception: medical diagnosis**

R 803 (4)

Purposes of medical diagnosis

Describes medical history.

“My leg hurts because I fell down from the tree.”

Pertinent, treatment, OK.

Ex. Sexual assault

3. U.S. v. Iron Shell

1. Exceptions swallowed the rule?
2. Patient or DR?
3. Assault with intent to rape 9 years old girl
4. Mark Dr Testified: Lucy…
5. Marshall Police.. “Lucy was scared, “ “Lucy was screaming….”
6. Lucy said in detail , Lucy testified as well.
7. R 803. 2 tests. 1) Statement is reasonably pertinent (적절한 관련있는)to diagnosis or treatment 2) whether the declarant’s motive consistent with the purpose of the rule. 3) the reasonable for the Dr to rely on the information for diagnosis or treatment

Ex. Medical symptoms🡪 admitted.

Ex. Restaurant:식중독 집단 문제인지 개인 문제인지. 식중독: 의사가 아닌 부모일 경우.

1. Diagnosis Statement
2. Dr. Physician as Expert🡪 Basis of opinion: admissible.

**Hearsay Exception: Refreshing Recollection, Recorded Recollection**

**You can sing them aria. You can show them newspaper. Etc. you do everything to refresh the witness’ recollection.**

4. U.S. v. Booz

1. May a declarant with. No present recollection of his statement be able to testify from a record of the sts’ contents under the past recollection record exception to the hearsay rule? YES.
2. FRE 803 (5) : Identity and Accuracy: prerequisite
3. Alternatively, if the declarant doesn’t so testify a 2 part confirmation of the statements accuracy may be made if both the declarant and transcriber are available to testify at trial and if the declarant testifies that… accurately made and the transcriber testifies that the record was accurate when it was made.
4. 2 confirmation: unclear if Kulp accurately recall the truck’s plate number even after he reviewed B’s investigation notes.
5. 803 (5) exception, B’s notes that what kulp told bass in 1967 accurately conveyed K’s beliefe the truck’s place number is S0633. Kelp did not confirm. Bass did not transcribed what Kulp told him Kulp will be able to recount his past recollection when confirmed.
6. Stimulus , memory in writing
   1. Put it in the evidence
   2. R 805. 806.
   3. Accurate memorandum
   4. Past recollection of memory: 불현듯 떠오른 기억의 수집
   5. **🡪 admissible.**

5. Rush v. IL Cent R Co

1. Can a written sts recording the witness’ past recollection of an event be read to jury if the witness can testify based on the witness’ present recollection of the event?
2. 🡪NO
3. The witness can consult the sts to refresh his memory.
4. The witness cannot parrot the sts wording
5. An exception is if the witness’ memory is insufficiently prodded by the sts and the witness is unable to testify about the matters addressed in the sts.
6. Once Lockett consulted the transcript he was fully able to remember and describe the accident.
7. By contrast L’s transcribed account was an out of ct sts of what happened.
8. Admitting the hearsay evidence did not constitute plain error due to the instructions the judge provided the jury.
9. Rush 9 years old fell under the train and suffered injuries requiring leg amputation

6. Olesen v. Henningsen 1956

1. Is a contemporaneous record of an event, made in the regular course of BUS by one with personal knowledge of the event to transmit information about the event, admissible?
2. 🡪YES
3. The circumstance the record was made must make SINCERITY, ACCURACY, DETECTION, and CORRECTION of ANY ERROR likely and falsification UNLIKELY.
4. The operators were disinterested witnesses to Olesen’s call, it was natural for them to kae a sincere and accurate record of the call.
5. The circumstances show the telephone record meets the necessary tests was admissible.

7. U.S. v. De Georgia

**Business record: Reliability.**

Business have relatively accurate record.

You can still cross examine in general, in the ordinary course of business, given necessity, they are accurate.

* If a business record, such as 렌터카기록, was designed to note every transaction of a particular kind doesn’t contain a notation of a speicif transaction is the record admissible as evidence the transaction didn’t occur?
* A corollary to the business records exception to the hearsay is the admissibility of those records for what they don’t show Hertz.
* The computized record was properly admitted into evidence and corroborated confession
* Steal. Hertz Rental Car on Jul 2nd, 1968. Taking it across the state lines. Car was last rented on Jun 30th 1968. Removal. Constituted theft.
* Information comes in if the firm has policy to gather it for verification.
* Ordinary reliability. Ex. AOL PACER, outside the organization.
* **The source of information has to have personal knowledge.**
* **Ordinary course of business activity**
* You don’t need person who made a report to testify.
* **If something is outside of the ordinary course of business: that is hearsay within hearsay.**
* “Cousin, building is burned down. I think it’s arson.”🡪 He decided to write it down in the report.--> Source of the information is not PERSONAL KNOWLEDGE. This person is not working. If Someone outside this business operation.

8. U.S. v. Blechman

1. 통화기록
2. Business records exception
3. Information supplied by an outside person only if the business entity has adequate verification or other assurance of accuracy of the outside person’s information
4. GV plaintiff prosecuted Blechman Yass mail fraud and identify theft charges.
5. Blechman owned a AOL email account and PACER database account to crime.
6. R 803 (6) 🡪 Business Record Exception
7. Other evidence show that neither AOL nor PACER verified the authenticity of the information provided by their account holders. AOL accounts often were opened under fictitious names and addresses.
8. Blechman argued the email and PACER account records were double or layered hearsay to which R 803 (6) did not apply because the user input subscriber information was un-verified.

**Hearsay Exception : Public records:**

* Treating them as expert who sees, observes, what they concluded: the records.
* **Police or law report against the criminal defendant:** 
  + **Introduce only one part that describes their activities.** 
    - **What they did. 🡪 Only admitted.**
    - **Not what they saw and concluded.**
    - **Only police officer testifies, prior testimony is an exception.--> COME IN**
* **Observation of public officer**
  + **Admitted**
  + **Ex. Ministerial report, or FBI Database by the government agent**
  + **R803 (8) (A) (ii)**
  + **불법 crossing차 🡪 차 번호판.**
  + **Agent report says, “I saw a guy with T-shirt.”🡺 in.**
  + **Defendant says, “….shirtless guy,,,” 🡪 out.**
* **U.S. v. Quezada:** 
  + **Form I-205 admitted under public records exception.**
  + **Is a warrant of deportation admissible under public records exception to the hearsay rule? YES.**
  + **Warrant of deportation🡪 he came back to the US and arrested in TX for un-related crime**
  + **He was charged with illegal entry.**
  + **At trial, the prosecution sought – I-205.**
  + **Warrant of deportation: law enforcement observation carve out was implemented: the subjective andadversarial 🡪 un-reliable.**
  + **Nature of observations made at crime scenes.**
  + Observations within warrants of deportation are more objective and less adversarial. Furthermore, the INS deports more than a million aliens each year, making it unlikely that an INS agent would be able to remember the details of a single deportation on a witness stand without the underlying Form I-205. Consequently, the admission of these forms is vital to the government’s ability to prosecute illegal reentry cases.

**Confrontation clause**

**J’s note**

* **Is this criminal proceeding?**
  + **Yes: Move on**
  + **No: hearsay**
* **In a criminal proceeding, the accused shall enjoy the right to be confronted with the witnesses against him who:**
  + **Present Accused, accusatory statement of CRIME AND**
  + **The accuser** 😜**”쟤가 그랬데요” is not in the court to be cross examined. If witness is available, then, there needs no Confrontation clause.**
* **Confrontation clause is not applicable when:**
  + **The defendant ahs a chance to cross examine the witness and the witness unavailable by no part from the government**
  + **The defendant is the reason for the witness being unavailable at trial**
  + **The stas is not being admitted for the truth but for some other reason.**
  + **Sts made to law enforcement when they objectively indicate that the primary purpose of the interrogation is to enable police help to meet an ongoing emergency and not made for the purpose of creating a record for trial.**
* **Are you trying to get sth in?**
  + **Compulsory Process Clause**
  + **In a criminal proceeding, the** 😈 **accused shall enjoy the right to have compulsory process for 1) obtaining witnesses in his favor AND 2) admission of evidence needed for him for full defense.**

**1. Crawford v. Washington**

1. 1999: Crawford couple: Lenneth Lee tried to rape me🡪 Michael stabbed.
2. Lee… police took them in custody and asked separately
3. “Michael says, self defence.
4. Lee had no weapon.
5. Marital privilege: one spouse cannot testify against another spouse.
6. Prosecution offered evidence the recording of Sylvia’s sts to rebut self defence
7. Hearsay sts against penal
8. Is a recorded sts to the police by an unavailable witness admissible at trial?
9. 🡪 NO
10. Sylvia was not available to testify at trial because of the state marital privilege.
11. Washington Ct of APP reversed🡪 sts violated Crawford’s 6th Amendment Confrontation right.--> STS bore guarantees of trustworthiness and reinstating the conviction.

Confrontation of 6th provides that a defendant has the right to confront the witness providing,

1. “TESTIMONIAL” sts against him with a reasonable opportunity for cross exam.
2. Testimonial sts: in court testimony and its functional equivalent sts that the declarant would reasonably expect to be used by the prosecution.
3. Confrontation🡪 on its face negates almost every hearsay exception, hearsay may still be admissible under the caluse if the declarant is unavailable and the defendant had a prior opportunity for cross exam.
4. The court modifies the reliability test laid out in Ohio v. Roberts
5. Reliability has allowed admission of testimonial sts the Confrontation Clause clearly means to exclude.
6. Sylvia’s taped sts against Crawford is testimonial because it was made to INTERROGATION and Sylvaia knew it is used for trial.
7. Crawford did not have a chance to cross examine sts, its admission violates Confrontation Clause
8. 🡪 statements : inadmissible.

2. Davis Washington Hammon Indiana 2006

1. Testimonial hearsy sts are prohibited at a criminal trial unless the defendant is able to cross examine the declarant of such hearsay under oath.
2. 911: Calm Down. Adrian, “Davis assaults me,”
3. Amy, “assaulted me, battery
4. At trial, Amy did not show up.
5. 911: what’s testimony?
6. Police officer, “I can recount her sts.”
7. Husband objected that the officers’ testimony violates the Confrontation Clause.
8. **Are sts made to law enforcement personnel during 911 CALL or at a crime scene for the purpose of helping a police to meet ongoing 911 emergency “testimonial” and subject to requirements of he 6th confrontation?**
9. **🡪 NO**.
10. Emergency: overall reliability circumstances.
11. Confrontation🡪 Domestic violence
12. Ex. “He assaulted me.”🡪 Confrontation clause objection

Hearsay: how the court offers the truth

Ex. Public records

Ex. Not limited to Criminal cases.

✯🡪Out of the ct sts는 Confrontation Clause 해당 사항 없음.

✯Trustworthiness

3. U.S. v. Moore

✯Cross-examination

Confrontation clause: “Moore has heroin.”

✯Cross examine. “I see Moore break aptment”🡪 excited utterance?

✯Right of a criminal defendant.

✯Prohibition of the government.

* + - * 1. Statement made to law enforcement personnel is not testimonial if under circumstances, objectively indicating that the primary purpose of the interrogation is to enable police help to meet an ongoing emergency.
        2. The 6th: Confrontation: the domestic disturbance has happened & police were there🡪 find out🡪 the purpose of questiong was to investigate a possible crime, not gather information necessary to assist emergency.--> EXCLUDED unless confronted in cross examine
        3. Confrontation 🡪 testimonial 🡪 not admissible.
        4. Exception to Confrontation: unsafe conditions: testimonial accusations of wrongdoing but they are admitted being noticed.

4. Melendez Diaz v. MA

* + - * 1. Testimonial
        2. Blood Alcohol🡪 😈confront
        3. Report is testimonial
        4. Selma’s report: not testimonial 🡪 not formal enough to accuse 😈to qualify as testimonial.
        5. “this guy shoot my wife.”🡪 not confrontation
        6. GV produce witness 🡪 prior testing shows drugs.
        7. IL: if defense present evidence
        8. Defense plainly has a right to do that.
        9. Preemption of GV to do sth

5. U.S. v. Cain

* + - * 1. R 803: “I saw 2 guys walking the same road when I was driving.”
        2. Does the present sense impression hearsay rule apply only to a declarant’s description or explanation of an event or condition made **while or immediately after the declarant perceives it? YES**
        3. **R 803 (1) recognizes that in many circumstances, precise contemporaneity between EVENTS and STS is impossible and allows a slight lapse in time between declarant’s perception and the declarant’s sts about what he saw.**
        4. **If a longer time lapse separates the perception from the sts, the sts may be qualified as an admissible excited utterance. R 803 (2) but only if it can be shown the declarant’s sts was made while d was excited still.**
        5. The 1st caller informed the state trooper he saw 2 shirtless men walking away from the truck and tried to hitch a ride. 🡪 **Excited utterance :** 🫣is perceiving. 🫣 Is spontaneous made in response to event.
        6. Just a few mins after the first caller’s report, the 2nd caller seeing the men 5 miles away from the truck.--> R 803 (1) **Present Sense Impression exception is applicable**
        7. 🡪 the report was the only evidence linking Cain to the stolen truck.
        8. The error was prejudicial
        9. Cain’s conviction must be reversed
        10. Cain defendant interstate transportation of a stolen vehicle.

🫣 called Peter, said, “John is dead. 씨발, 내가 Safety scaffolding 해 놓으라고 했잖아.”🡪not spontaneous utterance. Just testimony.

U.S. v. Gray X

Themis 58:

**R 803 (1) Present Sense Impression:**

A statement describing or explaining an event or condition, made while or immediately after the declarant perceives it.

* **Contemporaneous: Spontaneous. Immediate.**
* **Hearsay? Offered for the truth of a matter. NO. Hearsay exception**
* In tragic car accident “My brother told me on the phonecall, “yo bro, omg, you look this car is speeding. WOOOOOOO!””..
* On the phonecall, victim says, “mom, dave is at the door, dave is at the door, I am going to get him,” then Dave kills the victim.--> CONTEMPORENEOUS. ASSERTION. TRUTH OF A MATTER.

Themis 59: Excited Utterance

R 803 (2) startling event: **declarant is under the stress. Excitement.**

* Breathing heavily, victim, “mom, building is on fire, please come and pick me up.”
* Out of court, intent for assertion, truth of a matter.
* Hearsay? NO. Exception.
* Longer time span than present sense impression.

>> Less time to make a careful lie.

**Themis 54 Statement by opposing party**

**R 801 (d) (2)**

**=Party admissions doctrine**

* **It doesn’t have to be admission.**
* **Complain or object to the introduction against you about their own statement**
* **Anything you said, can be against you,**
* **If you said it, we are not hear you complain that it is hearsay.-->”니가 불면 땡이다.”**
* **This is not finding. No personal knowledge requirement: 801 (d) (2) in-applicable.**
* **Don’t say,,, ~~Cross examine~~**
* **Miranda warning.**
* **Ex. You said, “the light is red.” At trial you say, “the light is green,” --. You can explain, “I was lying, I was confused,” “I didn’t know what I was talking about.”…… 🡪 NOT binding. You can’t complain that it is hearsay.**

**Evidence contains in record**

**The 3rd party guilt: 검사가 하는 말.**

**Admissions of party opponent= statement by opposing party**

Themis 56

**Statement of agents within scope of employment**

1. R 801 (d) Statement that are not hearsay.
2. Opposing party’s statement 🡪 Comes in

* You authorize to speak about it AND
* Agent speaking for you while the relationship lasts.

(3) Truck driver, “oh, my waist, I got hurt in this accident,”

> The CEO of the truck company has liability respondiate superior.

(4) The statement must be considered but doesn’t by itself establish the declarant’s authority under © the existence or scope of the relationship under (d) or the existence of the conspiracy or participation in it under (e )

If this statement is the only evidence, 🡪 insufficient to make it hearsay exclusion.

**Declarant UNAVAILABLE**

R 804

🡪 Opens the door for exception.

* Former testimony 804 (b) (1)
* Dying declaration
* **Statement against interest**
  + Ex. Privileged witness, or refuses to testify (courtroom), not remembering the subject matter, sts proponent is procure declarant’s attendance
  + You couldn’t get **them and their deposition** (they are outside the USA)
  + **You try to get at least DEPOSITION FIRST.**

**Declarant UNAVAILABLE- former testimony**

**Themis 68: Former Testimony R 804 (b) (1)**

* **The 2nd trial>>>> introduced by 1st trial.**
* **Ex. Jury sees the recorded the 1st trial.>> can cross examine…. No reason not to admit the evidence that is against YOU.**
* **Offered against the party: civil case, the opportunity for the similar motive for direct, cross, or redirect examination.**
* **IF! New case is not the same as the old case…..**
* **Ex. The 1st: Civil litigation🡪 the 2nd: criminal litigation.**
  + **You don’t have a similar motive to develop the testimony from the 1st trial🡪 INADMISSIBLE.**
  + **Retrial of the same issue is necessary + the witness is UNAVAILABLE.**
  + **Predecessor interest**
  + **You bring a lawsuit against grocery store: and 1st trial.. 2nd trial …🡪 >>>>> conglomerate grocery store.--> but still.. the same parties…..--> predecessor interest.--> Identical, and very similar case!--> ADMISSIBLE.**

**1. U.S. v. Duenas 2012**

1. **R 804: defines various exceptions that only applies if the declarant is not available to testify in the current proceeding.**
2. **Ray’s motive wasn’t the same to cross examine Smith🡪 there was no opportunity to cross examine**
3. **Isolated jungle Guan**
4. **2007: Police searched home: 82 grams of meth & stolen property**
5. **🡪 local police : “Waiver of Miranda Right.” 있었음.**
6. **Smith🡪 “I sold meth to get the goods.”**
7. **🡪 Conspiracy + possession to distribute it.**
8. **Act violated…🡪 Suppress statements: involuntary.**
9. **Trial: can you talk about the circumstances under which Ray was arrested and his ststsments made?**
10. **District ct.**
11. **Officer Smith was killed by drunken driver.**
12. **Officer Smith testimony: former testimony under 804 (b) (1).**
13. **The 2nd trial: Jury can READ.**
14. **Is former testimony at a hearing by an unavailable witness admissible at trial if it is offered against a party who had an opportunity and similar motive to develop the testimony through direct, cross, or redirect exam? YES**
15. **Former testimony at a hearing by an unavailable witness is NOT hearsay if it is offered against a party who had an opportunity and similar motive to develop the testimony through direct, cross, redirect exam as he ‘d have at trial.**
16. **Ray’s motive to cross examine Smith at the suppression hearing show SMITH was involuntary and violation miranda 🡪 not issue.**
17. **Ray’s motive for cross examining Smith would have been to challenge the substance.**
18. **Ray didn’t have a similar motive to develop Smith testimony.**

**Criminal, civil: 🡪 fair opportunity**

**2. Dykes v. Raymark Industries 1986**

Does FRE 804 (B) (1) provide hearsay rule exception for an unavailable declarant’s former testimony? YES.

R 804 (b) (1): former testimony to be “now offered against a party who had… in a civil case, whose predecessor in interest had… a chance and similar motive to develop it by direct, cross, or redirect exam.

The opportunity and similar motive test is practical and expedient, in formal cross examine the declarant if the former declarant were un-available to testify in the present case.

The judge must consider all circumstances.

The opposing party should explain as clearly as possible precisely why and how the party ‘d now examine the declarant differently from the way the declarant was examined formerly. Mrs Dykes Civil case

National Gypsum objected to admitting Smith Deposition from the earlier Jons Manville case

R 804 (b) (1) admit only if Johns Manvile was Gypsum’s predecessor in interest.

Reasonable to find Johns Manville had an adequate opportunity and was similarly motivated to examine Smith in the same way National Gypsum ‘d with to do if Smith could testify in the present case.

Smith expert testimony: Factual .. not an opinion subject to refutation.

**Themis 69: Dying declarations : R 804 (b) (2)**

**Declarant UNAVAILABLE: Dying Declaration**

* **The person thought, believed that they were dying: the last statement >>>**
* **oNLY about the cause, and circumstances of death.**
* **Not everything.**
* **Criminal case: Only homicide case, e.g., “Joey shot me!” 🡪 then, Joey is on a hook.--> and dead; not about robbery, etc.**
* **ABOUT THE CAUSE of death!**
* **Civil case: insurance.**
* **Confrontation clause: dying declaration DO NOT offend confrontation clause.(보통은 병원에서 말함)**
* **It is not clear whether the declarant had a personal knowledge, e.g., how the dying person knew.**
* **It must be clear in operation.**
* **Witness= declarant**

**1. Shepard v. U.S.**

1. **자신이 곧 죽을 거라 믿고.**
2. **Declarant’s sts** 🡪 **admitted.**
3. **Mercury in whisky**🡪 **마시고 수은중독 됨, said, “Dr. Shepard had poisoned me.”**
4. **Confrontation Clause**
5. **Is an out of court statement made by a declarant who is not in imminent expectation of death admissible under the dying exception to the hearsay rule?--> NO.**
6. **For a dying declaration to be admissible as an exception to the hearsay rule. The person making it must expect to die soon and have no hope of recovery.**
7. **Declaration must be made with knowledge of facts, not mere suspicion.**
8. **Zenana did not appear to believe that her death was imminent when she told nurse that Shepart poisoned her🡪 Recovering🡪 not dying declaration**
9. **Ct admitted it ….--> STATE OF MIND.**
10. **Defense theory that wife suicide🡪 improper use of hearsay**
11. **STS🡪 admissible . 🡪 can be excluded as R 403.**
12. **“Dr. Shepart has poisoned me.” 🡪 is not dying declaration.**
13. **Proponent failed to proof whether “imminent death.”**
14. **It is patent’s state of mind. “I will die. It’s my last word.”**

**Declarant UNAVAILABE- Statement against interest**

1. Haskell v. Siegmund 1960

* + - * 1. Is an out of court stat against the declarant’s $$$ pecuniary interest admissible under certain conditions? YES.
        2. “4” conditions of admissibility
        3. Actual knowledge or circumstances.

1. declarant must dead
2. sts must have been against the declarant’s pecuniary interest when it was made
3. declarant must have stated a fact relating to a matter🡺 immediate, personal knowledge
4. declarant must have had no probable motive for falsifying the fact declared.
   * + - 1. Peterson died before trial
         2. Statement admitted Siegmund drove the car with Peterson’s permission🡪 negligence.
         3. Peterson had personal knowledge of circumstances that he gave Sigmund the car.
         4. No Proof of any motive Peterson might have to make false statements.

(4) Peter Haskell🡪 Plaintiff Ralph 🡪 Siegmund: Car accident.

(5) Haskell sued Peter’s insurer (co-defendant) to collect.

He permitted S to use his car.

🡪 reasonable person in circumstances

(6) We’d make it true or untrue.

(7) Statement🡪interest 반할 경우??

🡪 She would have done so only if it is true.

(8) R 804 (3) (b) 🡪 smoke detector: 제3자가 증언 할 경우.

Themis 70: STS against interest R 804 (b) (3)

1. People generally don’t tell lie for their own detriment.
2. For the view of themselves, When the sts was made, it was against penal…etc. party’s interest.
   * + 1. To get in*. implicating the others. E.x. “I was a driver. Yes. But it was Mookey was a big guy not me*.”
       2. 🡪 This is against his, Mookey’s own interest.
       3. VERY STICKY Point: Should we bring it **broader??? Or NARROWER**?
       4. Confrontation clause: Mookey, the big guy would violate the Confrontation clause. Anyhow.
       5. R 804 (b) (3) (B) **Criminal case**: criminal liability must be supported by **CORROBORATING CIRCUMSTANCES** that clearly indicating **trustworthy**.
       6. 🡪 It needs **the extra corroborating circumstances**.
       7. EX> Witness says, “Back when I was in prison, I was told by prison-mate that he did do it. Not the guy there.” (쇼생크 탈출)🡪ADMITTED. **That person my prison-mate is not available now**. 🡪 Isn’t it fishy? It is against prinsonmates’ interest?
       8. 🡪 ***EXTRA CORROBORATING CIRCUMSTANCES*** needed.-->
       9. Then, it is admissible if that the prison-mate is NOT AVAILABLE.

2. Dallas County v. Commercial Union Assur. Co 1961

1. 1948 대통령선거.
2. Newspaper: “Deway defeats Truman.”--> In fact, Truman won.
3. 🡪 Hearsay. Exception to Hearsay Rule
4. Admissible as evidence?
5. 1957. Dallas Courthouse collapsed. But CT house damaged $100,000 🡪 Burned.
6. <Lightening?>
7. Locals say, “we saw lightening striking the courthouse on July 2nd.”🡪 This is not cause.
8. Assurance company: “the courthouse collapsed for reasons not lightening.”🡪 deterioration, A/C overloaded, etc.
9. Evidence: newspaper: 1901. 06. 09. Morning Times of Seima.
10. Courthouse dome caught fire and collapsed but the main building was saved.
11. Objection: inadmissible hearsay.
12. Conclusion: admitted.
13. When a fact is generally known throughout the community and the fact occurred so long ago that testimony of eyewitnesses is not trustworthy or is UNAVAILABLE, is a newspaper article admissible to show the fact?
14. YES. Hearsay exception🡪 ADMITTED.

**1) Be NECESSARY, AND**

**2) Be TRUSTWORTHY.**

***15. R 807.***

O. Unless Hearsay evidence is admitted, the facts it brings out may be lost because there is no other source readily available for the fact.

3. R 805 Hearsay within Hearsay

1. Police report: R 806 Witness: Credibility is subject to impeachment.
2. R 613. Chance to explain 있어야 함.

P. Authenticity:

* 1. R 805: Hearsay within hearsay
  2. Ex. Public record: Police report🡪 Smith Dying declaration.
  3. Criminal Case: Confrontation Clause.

Q. When a fact long time ago, Hearsay evidence maybe the only evidence of that fact.

**R. 2 part test**.

* 1. **58년전 화재**: No witness.
  2. **신문이 거짓말 할 이유는 없다**. – False report.
  3. 🡪 Then, the newspaper is admissible.
     + - 1. Present sense impression
         2. Excited Utterance
         3. False Report X.
         4. Business record. Public Market Records. R 803.
         5. **신문이 딱 exception과 맞지는 않지만, necessary, trustworthy in R 807🡪 OK.**

5. Bohler-Uddeholm America Inc v. Ellwood Group Inc.

1. Must R807 ‘s residual or catchall exception to the hearsy rule be used only where exceptional guarantees of trustworthiness and high degree of probativeness and necessity are present?
2. YES.
3. R 807; Statements that are not covered by R 803, or R 804,
4. 🡪 **807: Rarely applicable, and POLICY FOCUS**
5. **R 807:**
   1. Statement is offered as evidence of material fact.
   2. Statement is more probative on the point for which it is proffered than any other evidence the proponent can procure through reasonable efforts,
   3. General purpose of Rules and the interests of justice will best be served by admitting the sts.
   4. Jonsson’s affidavit was evidence of the party’s course of dealings.
   5. Affidavit was about joint venture: was highly probative discussions Jonsson attended as Viddeholm’s only representative and Uddeholm contradict Ellwood’s version of those discussions
   6. Admitting the affidavit served interest of justice by helping the jury deciding the truth
   7. Uddeholm followed R 807 ‘s procedural requirements
   8. E’s meeting attendee’s would rebut Jonsson’s assertions whereas Jonsson himself was dead.
   9. Affidavit was trustworthy because
      1. Necessity
      2. Practicality
      3. Persuasive
      4. **Trustworthy**🡪 R 807 : Policy concerns/ **ACCUMULATED BACKGROUND**. As hearsay exception of statements.
   10. R 807: Satisfying argument
       1. “Dr. Shepard poisoned me.”
       2. 🡪 it is not dying declaration but it is admissible under R 807.
       3. Trustworthiness.--> Equivalent confidence.
       4. No reason to lie.
       5. The sts is central to the case O
       6. Evidence is **probative** >>> prejudicial.
       7. Only evidence is symptom : expert testify 가. she displayed.
       8. R 102
       9. Opponent: traditional limits 🡪 reasonable.
       10. Dying declaration🡪 prosecutor is not convincing.
       11. Catchall exception R807

Themis 73: Catchall residual exception

\*

* **Present sense: I am hearing your noise … “UHhhhhh.”**
* **911 ambulence call is written by police: Testimony: so Confrontation clause applicable.**
* **Jury? Bolstering, rehabilitation is a matter of timing.**
  + **EX excited utterance at the time; 9:00 AM.**
  + **EX the same person testify at 13:00 what he saw; as testimony.**
  + **Enforcing accuracy of testimony that is not bolstering.**
  + **Bolstering: Some reason to think: witness testimony should be belived prior to credibility, : EX his eyesight is great.--> Rehabilitation: no, he is blind.**
* **Excited utterance can be made 🡪 when he committed some OTHER CRIME. 🡪 Prejudical** 
  + **Ex. I got a call from Donald Trump. I am so excited 🡪 Excited Utterance, but authentication problem.**
* **Prior inconsistent statement : prior statement doesn’t have to be under auth.**
* **Specific contradiction:** 
  + **ex. Nursery school fund stealing: “specific contradiction.” 🡪 you never harm the children.<----> charge: child molestation 🡪 admitted.**
  + **Conviction: drunken driver says, “I have never drnk in my life.” 🡪 admitted as specific contradiction. ISSUE: prosecutor cannot ask “have you drunk in your life?” 🡪 so prejudicial. ()**

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