

may be many other explanations for Bruce's sadness, the alternative inference chains probably would be irrelevant to the case. As long as one inference chain can be connected to the case, making it even a little bit more (or less) likely that Bruce died as a result of a suicide, the evidence will be considered relevant. Remember, the evidence does not have to make it probable that Bruce died as a result of suicide. The relevancy standard is much less stringent; the evidence need only make it slightly more likely he died as a result of suicide.

Practical Tip: Facts of consequence can provide keywords, phrases, or concepts for electronic discovery. There are two broad categories of e-discovery technologies: linguistic and sociological. See John Markoff, *Armies of Expensive Lawyers Replaced by Cheaper Software*, N.Y. Times, Mar. 5, 2011, at A1. For example, in the context of the illustration, "Connecting Sadness to Suicide," one might conduct a linguistic search of all of Bruce's emails or other documents for the keywords: sadness (and related terms, i.e., depression); suicide; and accident in hope of better understanding the cause of Bruce's death. Of course, opposing counsel might request that Bruce's lawyer undertake the same search. Facts of consequence also help with a sociological e-discovery approach. This approach adds an inferential analysis to the search "by mimicking the deductive powers of a human Sherlock Holmes." *Id.* A sociological approach does not rely on keywords but rather attempts to visualize a chain of events. For example, to uncover securities fraud, a sociological approach may look at the number of times an S.E.C. document was edited and the roles of the person involved in the editing. In a different context concerning corporate insider information being leaked to the press, a sociological approach to e-discovery might involve a search of executive communications with "call me" around the time the information was leaked. Someone with something to hide — leaking information — would want to talk directly with persons or the press.

[C] Identifying Relevant Evidence

[1] Constructing Inference Chains

The following problems provide the opportunity to apply the relevance rules by constructing inference chains to link various types of evidence to the case. In drawing these inference chains, it becomes clear that the application of the doctrine of relevance can be quite complex.

Relevance Analysis Problems

Problem #3-1: Solomon's Parable

Judge Judy was asked to decide a most difficult question: which of two women claiming to be the mother of an infant child was indeed the biological mother? Each woman claimed that the child was hers. Judge Judy told the women that there was an easy solution: she was going to cut the child in half. At this pronouncement, one of the women began to cry. She shouted, "No! I can't stand it; don't do it!" The other woman was ashen-faced, but silent.



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1. Are the women's reactions to Judge Judy's decision relevant? To what issue are their reactions relevant?
2. What assistance do the Advisory Committee Notes provide in resolving the relevancy issues in this problem?
3. If the parable instead involved two men, who both claimed to be the father of the child, would their reactions be similarly relevant or irrelevant? Compare the relevancy of the reactions of the alleged mothers with the reactions of the alleged fathers.
4. Ethics Consideration. You are the attorney for one of the women. She testified that she is the biological mother. Before the conclusion of the trial, she told you that she is not the biological mother. What should you do? Illinois Rules of Prof'l Conduct R. 3.3(a) (3). *See* MRPC 3.3 (a)(3).

Practical Tip: The lawyer may wish to consult the judge about how best to proceed when a client has refused to correct false testimony.

Problem #3-2: With Love, Freddy

Freddy Krueger is accused of killing his friend Jason with a single blow to the head. At trial, the prosecution wishes to introduce love letters written by Freddy to Jason's wife only months before Jason's death. The defense objects to the introduction of the letters.

If Freddy did write the letters, are the letters probative? To what are they probative? Write out the chain of inferences that makes the letters relevant.

Problem #3-3: Missing

Joan accidentally left her purse on the snack bar after purchasing popcorn at the local movie theater. Joan remembers seeing other patrons in the area, but cannot describe any of the people, even in the most general of terms; she was in a hurry to catch the beginning of the feature film. In her purse were four new \$50 bills. The purse was recovered in a bathroom after the movie, but all of the money was missing.

Which of the following evidence is relevant in determining who took the money? Explain your answers by describing the inferences you drew from the evidence.

1. Bob, another patron, paid for popcorn right before the movie started with a new \$50 bill.
2. Patrons Susan and Jamie left the movie theater halfway through the film.
3. Harvey, another patron, was convicted of the possession of marijuana in 1999.
4. The purse was found in the restroom. (Does it matter whether the purse was recovered in the women's room or the men's room? Why? If the purse was recovered in the women's room, what impact, if any, is there on the relevancy of the evidence in numbers 1, 2, and 3 of this problem, above?)

Problem #3-4: Eddie f

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5. Eddie was divor child support.
6. Eddie was virtu different bank.
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Problem #3-4: Eddie from Boston

Eddie from Boston was accused of robbing the First City Bank of Massachusetts. Eddie is alleged to have used a "Saturday Night Special" revolver during the robbery.

Which of the following items of evidence would be relevant to the prosecution's case? Explain, using inference chains.

1. Eddie withdrew money at the same bank the day prior to the robbery after having a friendly ten-minute conversation with the teller (no one else was in line).
2. Eddie had an eight-year-old bank robbery conviction in a different state, Maryland.
3. Eddie was fired from his previous job as a clerk in a convenience store as a result of an unproven allegation that he stole money from the cash register.
4. Eddie had participated in two barroom brawls the week before the bank robbery.
5. Eddie was divorced and delinquent in his payments of \$400 per month in child support.
6. Eddie was virtually broke. His only asset was a \$49 savings account at a different bank.
7. Eddie owned a rifle.
8. Eddie has two children, ages two and seven.
9. Eddie has been convicted of marijuana possession on two separate occasions in the past four years.
10. Eddie prefers "rock" to Bach and gin without tonic.

Problem #3-5: The Reel Thing

Wanda brought suit against three insurance companies, all of which had insured the life of her husband, Harry. She claimed that the body recently found in Pond Apple Creek was Harry's and that, as the beneficiary, she should be paid the million dollars from the insurance policies on Harry's life. Wanda offers in evidence an authenticated letter from Harry's fishing buddy, Al. Al wrote to Harry saying, "I look forward to fishing with you at the Pond Apple Creek at the end of September." Harry has been missing since September 30th.

Is this letter relevant? If it is relevant, relevant to what? Write out the inference chain that justifies your conclusion.

the physical attributes of a person's involvement, including the defendant.

Furthermore, the defendant's circumstances encompass any prior experiences he had, which would provide a reasonable basis for belief that another person's intentions were to injure him or that the use of deadly force was necessary under the circumstances.

A person may be said to reasonably believe that deadly physical force is about to be used against him, if a reasonable person in his shoes, that is, in the same circumstances and situation that he faced, would so believe. In other words, in this case you must scrutinize the reasonableness of any belief the defendant claims to have had by reference to a hypothetical reasonable person who was transported into the subway car on December 22, 1984, and who face the exact situation which confronted the defendant.

1. How is the *Goetz* jury asked to deal with the particular circumstances of the shooting?
2. How does the jury instruction define the scope of relevant evidence in the case?
3. In light of the jury instructions, how broad is the permissible scope of relevant evidence?
4. How is the scope of relevant evidence affected by whether the self-defense instruction is "objective" or "subjective"?

Problem #3-13: A Bottle of Red

Billy was observed purchasing a bottle of red wine at a liquor store at 2:00 p.m. on Tuesday. At 7:00 p.m. on the same day, he was arrested for driving while intoxicated on the local highway. The prosecution offers evidence about Billy's wine purchase in Billy's subsequent trial for driving while intoxicated. The defense objects.

1. Should the judge admit the evidence? Why?
2. Would it be relevant if Billy was seen carrying an empty, rather than a full, bottle of wine at 2:00 p.m.?
3. Would it be relevant if Billy was observed carrying a half-empty wine bottle at 2:00 p.m.?
4. Would the 2:00 p.m. purchase of wine be relevant, if, at the time Billy was arrested, he smelled of beer? Explain.

Problem #3-14: "Name Your Price"

The defendant offers the testimony of Price in a workers' compensation action. Price states that, "The plaintiff tried to bribe me to testify in his favor."

Is this testimony relevant? If so, relevant to what? Explain.



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several witnesses to lay the foundation for a single piece of evidence, such as a gun or a computer printout, even though a fragmented approach is not necessary.

The admissibility of conditionally relevant evidence provides needed flexibility to attorneys in presenting their case. It allows the attorneys to control what evidence to present and in what order. While a counsel's ordering of witnesses may be confusing to the jury, the opening statement and closing arguments can offer clarity and guidance.

FRE 104(b) codifies conditional relevance. FRE 104(b) gives judges discretion to conditionally admit evidence so long as the evidence will be "connected up" at a later time by proof of the missing fact.

Illustration: Connecting the Gun to the Crime

Jorge was charged with the shooting death of his girlfriend, Lourdes. A gun was found outside of the house where Lourdes was killed. Is the gun relevant evidence?

Answer. The gun may be conditionally relevant to the shooting death of Lourdes if additional evidence shows that it was the particular gun used in the shooting (and not a gun unconnected to the incident). The gun may be admitted in evidence pending a later showing, through ballistics tests or otherwise, that this was the gun in question.

Conditional Relevance Problems

Problem #3-19: Hedge Cutter

With wispy white clouds drifting lazily overhead one hot and sunny May day, Gilligan was severely injured while cutting the hedges. Gilligan claimed that he was injured when the rotary hedge cutter he was using suddenly exploded. At trial, Gilligan offers a piece of steel blade found ten yards away from the accident site.

1. The defendant objects to this evidence. What is the basis for this objection?
2. How is this evidence conditionally relevant?
3. Does adding visual language to the problem, such as "[w]ith wispy white clouds drifting lazily overhead one hot and sunny May day," affect the way this problem is considered? How would this visual language be received by a jury?

Problem #3-20: Stoneys

Alice is accused of breaking into Jim's Stone Crab Restaurant through a rear window and stealing 80 stone crab claws and two tins of mustard sauce. No fingerprints were discovered. At trial, the prosecution offers in evidence a pair of thin black kitchen gloves found near the perpetrator's point of entry. The defendant objects to this evidence.

1. Are these gloves conditionally relevant? Why?
2. What must be shown for the gloves to be admitted?



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2. *90210 Drug Place*. Suppose a police officer testified for the prosecution in the same case that, "I often saw the defendant, Donny, hanging out at 'Drug Place,' a location near the defendant's home that was commonly used as a place where people sold drugs." Admissible?

3. *Ethics Consideration*. Donny wants his cousin to testify that he does not live at the address listed as the return address on the package. However, as his attorney you have done your due diligence and had your detective do some digging. It turns out that Donny's cousin is listed as the owner of the property. Do you allow Donny to go on the stand and testify that his cousin does not live at or have any connection to the address listed as the return address on the package? Ohio Rules of Prof'l Conduct R. 3.3(a)(3). *See* MRPC 3.3 (a)(3).

Problem #4-3: Malpractice Monsoon

James Monsoon brought a medical malpractice suit against the M. Cohan Hospital, claiming the physicians did not provide standard treatment for a blood clot in his legs. The hospital, in its defense, offered evidence that the plaintiff did not disclose at any time during his treatment that he was regularly smoking marijuana and taking cocaine, thus interfering with the proper treatment protocols set up by the physicians at the hospital.

1. Is the evidence of the plaintiff's drug use unfairly prejudicial?

Problem #4-4: Discrimination, Inc.

Dan Doniwitz, the Chief Operating Officer of Dash Energy, Inc., was accused of gender discrimination after firing a senior employee, Susan Spikes. Spikes filed a claim before the Civil Rights Commission and, at the hearing, offered the fact that a different employee had submitted a gender discrimination claim as well. The other employee's claim was about the marketing department's conduct, however, not Doniwitz's. Should the Commission consider the other claim in light of an unfair prejudice objection?

Problem #4-5: "A Lot Is Riding on Your Tires . . ."

Kate is charged with cocaine conspiracy. She testifies at trial and mentions she has a five-year-old daughter, named Becca. In rebuttal, the prosecution offers a photograph of Becca playing with large sums of money while sitting inside an empty tire in what looks like Becca's room. Admissible? Why?

Common Types of Exclusion Under FRE 403

A plethora of evidence may be labeled "unfairly prejudicial," but certain kinds of evidence are particularly susceptible to exclusion on this basis. Consequently, most of this chapter will focus on various types of evidence often believed to present a special danger of unfair prejudice: (1) probability evidence of guilt (specifically, the likelihood of another person with the same characteristics committing the crime charged); (2) evidence depicting violence in a manner that is physically revolting; (3) novel scientific evidence; and (4) similar events, happenings, or occurrences.



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§ 4.02 PROBABILITY EVIDENCE OF GUILT IN A CRIMINAL CASE

Statistical evidence is routinely admitted at trial to assist the trier of fact. However, one type of statistical evidence is particularly misleading and generally excluded. This type of evidence, denoted here as “probability evidence of guilt,” is specifically offered in a criminal case to show the unlikelihood that another person with the same characteristics as the accused committed the crime charged. Such evidence suffers from a variety of defects, not the least of which is its power to exert extreme influence over a jury.

A red flag should go up when probability of guilt evidence is offered. It is important to investigate the reliability of the data “sample” used to calculate the probability. For example, was the data sample reasonable in size and content — was it under inclusive or over inclusive? An arbitrarily drawn sample may skew the probability results and render the evidence misleading, unfairly prejudicial, and ultimately inadmissible under FRE 403.

If the probability of guilt testimony concerns individuals’ traits (e.g., hair color, beards, or moustaches), it is important to know whether the traits are dependent or independent, meaning related to and influencing each other or not. Treating dependent traits as independent will undermine the validity of probability results and warrant their exclusion as misleading and unfairly prejudicial. (See *People v Collins* in the Cases and Rules section of this chapter that discusses the reliability problems of conflating dependent and independent traits in probability testimony; and Daniel L. Faigman, David H. Kaye, Michael J. Saks & Joseph Sanders, *Science in the Law: Standards, Statistics and Research Issues; Science in the Law: Social and Behavioral Science Issues; Science in the Law: Forensic Science Issues*, 215–17 (2002).

Problem #4-6: It Had to Be You . . .

The defendant, Lester, is charged with first-degree murder in Walhalla, South Carolina, a rural town of 4,000 people. At trial, the prosecution introduced evidence showing that the defendant had the same general description, the same nickname, and the same address as the person linked to the crime by independent evidence. The defendant claims mistaken identity. In rebuttal, the prosecution offers a mathematical professor, Egbert Einstein. Professor Einstein intends to testify that there is an extreme improbability, one in twelve million, of these characteristics belonging to a second person in Walhalla.

What flaws, if any, can you find in Professor Einstein’s evidence? Should his testimony be admitted? Why? See e.g., *Branion v Gramly*, 855 F.2d 1256 (7th. Cir. 1988); *People v Collins*, 68 Cal. 2d 319, 438 P.2d 33 (1968).

Practical Tip: Consultants (e.g., statisticians) are often helpful in assessing the validity of the underlying data and sample for calculating a probability rate. Consultants also help lawyers develop trial strategies and questions for witnesses, especially expert witnesses. Lawyers sometimes inform consultants at the time of retention that they may be asked later to serve as expert witnesses — in effect, these consultants are really expert witnesses on call.



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§ 4.03 EVIDENCE OF EXCESSIVE VIOLENCE

Evidence showing the results of violence is a routine part of many different cases, particularly violent crimes. In a murder case, for example, the prosecutor must prove that a person died. The death may have been horrific. While evidence of the death is permitted to prove the case, Rule 403 imposes some limitations. Specifically, it is improper to offer evidence that so blinds a jury to the facts of the case that the jury makes an emotional determination. A shorthand description of this limit is that the evidence cannot be so violent in appearance that a reasonable jury will “lose its lunch” as a result of viewing it. Excessively violent evidence that fails the “lose your lunch” test is unfairly prejudicial.

Excessive Violence Problems

Problem #4-7: Lose Your Lunch

Ernest and Samantha, the leaders of a radical political party, were found shot to death in their living room. The scene was gruesome and the stench of death was everywhere. Franklyn, a known contract killer, was charged with the murders. At trial, the government offers testimony of a crime scene search officer, Jan, who testified that she visited the scene immediately following the murders and took color photographs of the bodies. The prosecutor then attempted to introduce in evidence the glossy 8 x 10 photographs taken by Jan. Franklyn’s attorney objects.

1. What ruling and why?
2. Should the prosecutor agree to stipulate to the fact that Ernest and Samantha were killed by gunshots?
3. Should the judge approve the stipulation if both parties agree to it?

Practical Tip: Although photographs of excessively violent crimes are routinely admitted to prove elements of a case (e.g., location and condition of the body), defense counsel may limit the total number of photographic exhibits by objecting to some photographic evidence as cumulative and therefore unfairly prejudicial under FRE 403.

Violent Videos & Limiting Instructions

Problem #4-8: More Lose Your Lunch — Terrorism

Defendant was charged with disclosing classified information regarding Navy ships to individuals who support jihad terrorism. At trial, the prosecution showed excerpts from several pro-jihadist videos that included an execution and a suicide bombing. The court only allowed the prosecution to show a minute of a video scene showing bloody bodies and also required the prosecution to delete a scene with a headless body. In addition, the court instructed the jury to view the videos “dispassionately” and to only consider them for the purpose of determining whether defendant acted with knowledge and intent in disclosing the classified information. Did the court abuse its discretion in permitting the state to play excerpts from the videos? See *United States*

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Emotionally Difficult Demonstrations & Depictions

Evidence involving emotionally difficult demonstrations and depictions, while different than evidence of violent behavior, can have a similar prejudicial impact on the trier of fact. Yet, this kind of evidence also might be integral to the case and one or more of its elements and consequently admitted. The following problems illustrate this point.

Problem #4-9: Legs

Ned Carlyle lost both of his legs to amputation after an automobile accident. After being fitted with prosthetics, he learned to walk again. Ned sued the driver of the other car on a negligence theory and sought damages. At trial, Ned testified about the accident.

PLAINTIFF'S ATTORNEY: Ned, please describe the injuries you received from the accident.

A: My legs were crushed from the knees down. The "jaws of life" were used to extract me from the car. Here's what happened —

DEFENDANT'S ATTORNEY: Objection. This evidence is unnecessary.

1. What ruling and why?

PLAINTIFF'S ATTORNEY: Can you show the ladies and gentlemen of the jury what your legs look like today?

A: Certainly. (Ned begins to remove his prosthetics to show the jury his stumps, intending to point to where his legs once were).

DEFENDANT'S ATTORNEY: Objection, Your Honor. The witness's actions are unfairly prejudicial.

2. How should the judge rule?

3. If the judge rules in favor of the defendant, but the plaintiff already has engaged in the forbidden behavior, does the defense counsel have any recourse? What can be done?

Problem #4-10: A Day in the Life

Susan White, a crane operator at a major road construction site, was severely injured in a crane accident. Susan sued the crane manufacturer based on a theory of strict products liability. To show damages, Susan offered a film depicting an average day in her life subsequent to the accident, including how she eats, gets out of bed, bathes, and travels on the city streets with other pedestrians.

1. Is such a film admissible? Explain.

2. Ethics Consideration. Suppose that Susan cannot afford to pay to have someone film her for a day. Can Susan's attorney cover the filming costs for

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If character is in issue, all forms of evidence may be used as proof, including reputation, and opinion evidence, as well as specific acts. *See* FRE 405. When character comprises an element, it is more important to the case than when it is offered circumstantially to prove conduct.

Illustration: Character Evidence as an Essential Element

One dark night, Dad loaned his car to his oldest child, Sonny, so Sonny could go on a date with Barbara. Sonny had been in eleven accidents in the preceding year, had received fourteen moving vehicle violations, and had his license suspended three times. Dad thought "Maybe this time will be different." Sonny drove Barbara home and parked the car in Barbara's driveway. Unbeknownst to Sonny, the car was still in "drive" and the car ended up in Barbara's living room. Dad is sued for negligent entrustment of the automobile to Sonny. Is Sonny's prior driving record admissible?

Answer: Sonny's prior driving record, including all of his specific instances of misconduct behind the wheel, is admissible character evidence. Sonny's character as a reckless driver is directly in issue in this negligent entrustment action. One of the elements of the tort of negligent entrustment is that Dad knew or should have known of Sonny's propensity for reckless driving and consequently should not have loaned him the car. When character is directly provable as it is here, all forms of character evidence (reputation, opinion, and specific acts) are permitted.

[A] Problems Involving Character as an Essential Element of a Case

The problems that follow identify and provide illustrations of the types of problems that might fall within the exception to the general rule excluding character evidence, character as an essential element. This exception is sometimes labeled, "character in issue" evidence, but it is more precisely seen as evidence that must be offered to prove an element of the claim, cause of action, or defense, not evidence that is merely helpful, in an indirect way, to proving a case.

Problem #5-13: Rambo III

Jim Rambo, Houston Rambo's cousin, was known around town as a "one-man terrorist gang." He had burned down the town hall, shot three different people in the leg, and participated in twenty-four different bar fights. One hot and dusty June day, Perry, the owner of Perry's Grocery, hired Rambo to serve as the security guard for the store. Perry gave Rambo a low-caliber pistol to carry while on duty. During his fifth day on the job, Rambo got into a fight with one of the customers and shot the customer in the leg. The customer brought suit against Perry, claiming negligent hiring. Plaintiff's first witness is the mayor of the town. The mayor will testify that in his opinion, Rambo is extremely dangerous, if not lethal. He will also recount all of the prior incidents involving Rambo's harmful behavior. Which parts of the mayor's testimony, if any, are admissible?



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Problem #5-14: Blue v. Jones

In this slander action, Jones, a Portland businesswoman, allegedly called the commissioner of baseball, Vincent T. Blue, a "lazy nerd" after Portland was denied a major league baseball franchise. Which of the following evidence is admissible at trial? Why?

1. Blue offers testimony that he worked past midnight on eighteen previous occasions.
2. Blue offers testimony that he has a reputation in baseball for being very industrious.
3. Blue offers evidence that he is a peaceful, non-violent person.
4. Jones offers the testimony of Peter Potamkin, a former commissioner, who states that in his opinion, Blue was "lazy."
5. Jones offers evidence that Blue has a reputation among major league baseball owners for being a nerd.

Problem #5-15: United States v. Lorean

The defendant, Lorean, is charged with possession with intent to distribute cocaine after a government "sting" operation. Lorean admits to possessing the cocaine, but claims he was entrapped by an undercover police officer. The jurisdiction uses a subjective test of entrapment, which asks (1) whether the police induced or created the crime, and (2) whether the defendant was predisposed to committing the crime charged. Which, if any, of the following items of evidence offered by Lorean are admissible?

1. Testimony by Lorean's father stating that his son would never violate any criminal laws whatsoever. To the father's knowledge, his son had violated the law only once, when as a child he stole a ball from the local five and dime store. Admissible?
2. Lorean's brother testifies that, in his opinion, Lorean is an extremely honest person. Admissible?
3. Can the prosecution offer evidence that Lorean was arrested for the possession of marijuana fifteen years prior to trial?

§ 5.05 MIXED CHARACTER EVIDENCE PROBLEMS**Problem #5-16: Bad Cop, Good Cop**

Austin was prosecuted for resisting arrest and assault on a police officer after being stopped and frisked while leaving a bar. Austin claimed he acted in self-defense. At trial, Austin offered Cheryl, a former friend of the officer, as a character witness to state the officer had a reputation in the community for exhibiting "excessively aggressive and violent tendencies."

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1. Is Cheryl's testimony admissible? Why?
2. Suppose the prosecution offers evidence that the accused, Austin, had committed four prior assaults on police officers. Admissible?

Problem #5-17: Murray Christmas

The defendant, Murray Christmas, is prosecuted for check forgery. The prosecution's first witness, Alec, recounts the events in question. He then exclaims, "That Christmas fellow has a reputation in this community for being a liar."

1. Is this testimony admissible? Explain.
2. Murray's good friend, Magritte, is the first witness for the defense. He testifies that Murray's reputation in the community is one of peacefulness and truthfulness. Is this testimony admissible? Why?
3. On cross-examination, Magritte is asked whether he has heard that Murray had been arrested for attempted embezzlement from the American Express Company the previous year. Is this question permissible?
4. Can the prosecution cross-examine Magritte about Murray's purported embezzlement if the prosecution has no concrete knowledge about the embezzlement, but instead bases its question on rumors?
5. In rebuttal, the government offers a new witness, Sgt. MacKnife, to testify that defendant, Murray, had been arrested for embezzlement three years earlier, and that the witness, Magritte, had been indicted for perjury only two months before the trial. Is this testimony admissible? Why?

§ 5.06 OTHER ACTS EVIDENCE: OFFERED FOR NON-CHARACTER PURPOSES [FRE 404(B)]

Sometimes, acts occurring prior or subsequent to the incident in question are admissible at trial for a limited purpose, one other than to show a person's propensity. Admissible non-character purposes include, but are not restricted to, (1) motive, (2) intent, (3) identity, (4) absence of mistake, (5) knowledge, (6) opportunity, (7) common scheme or plan, and (8) guilty conscience. "Motive" evidence indicates why someone behaved the way he or she did on a later occasion. "Intent" evidence suggests what was in the person's mind — the mental state — at the exact time of the incident. (Thus, motive is different from intent. Motive can precede an incident by a considerable amount of time, while intent is measured only at the precise time of the incident. Motive can help create and give rise to intent. For example, a love triangle may be the motive for a violent crime, while the intent of the actor is the desire to kill.) "Absence of mistake" evidence negates an opponent's suggestion that the bad result, for example, a house burning down, was an accident or mere mistake. "Knowledge" evidence indicates that a person knew or at least should have known something, often negating a claim of ignorance. The knowledge issue arises, for example, when drugs are imported in the hull of a boat or trunk of a car and the transporter claims no knowledge of the contents. "Opportunity" evidence generally negates a claim of lack of



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Should these two other acts described above be admitted at trial? See *United States v. Hearst*, 563 F.2d 1331 (9th Cir. 1977).

Problem #5-23: Attempted Murder, She Wrote

The defendant, Agnes, has AIDS. After biting an FBI agent, she is charged with attempted murder. The prosecution wants to offer evidence that the FBI agent had arrested the defendant on three prior occasions. Should these prior acts be allowed in evidence?

Problem #5-24: Oregano?

Vern Parrish, a college student, was charged with the possession of marijuana. Vern testified at trial that he did not know what marijuana looked like. He claimed that he was surprised when the police, who were conducting a search pursuant to a valid warrant, found the substance in the back of his refrigerator. In rebuttal, the prosecutor, Anne Bluestone, offers evidence that the defendant had been charged with the possession of marijuana on two prior occasions. (Both of those prosecutions were dropped for insufficient evidence.) Admit? Why? Is the fact that the defendant was a young college student relevant to the admissibility of this other acts evidence? Would the analysis change if the defendant attended middle school? Was a senior citizen?

Problem #5-25: Psychobubbles

Mickey's wife, Sarah, died in their Jacuzzi hot tub one evening in January. Mickey later was charged with her murder. Mickey claims at trial that the death was the result of a terrible accident. In rebuttal, the prosecution offers evidence that two of the defendant's three previous wives died of unknown and allegedly accidental causes in their Jacuzzi hot tubs as well.

1. Is this evidence admissible? If so, is the evidence admissible to show the defendant's propensity to kill?
2. Can the other acts evidence be admitted on a non-character theory, called the "doctrine of chances"? (Pursuant to this theory, the evidence is offered to show that the occurrence of other events diminishes the probability that the event in question occurred by chance.) Does it matter which justification for admissibility is advanced?
3. If Mickey is charged only with the death of his first wife, who also died in a hot tub, are the *subsequent* deaths of his other wives in hot tubs relevant and admissible? Does it make a difference whether the "other acts" occurred before or after the event in question?

Problem #5-26: Procrastinate Now!

Four people from a group known as "Procrastinate Now!" are accused of blowing up a McDonald's with dynamite. An anonymous announcement claimed that the act was intended to be a symbolic gesture against one of the spear-carriers of American capitalism, and warned that Dairy Queen was next. At trial, the prosecution introduced evidence that the defendants had been observed stealing ten sticks of dynamite and

several blasting caps one week prior to the explosion from a display case at the "Club Dyn-o-mite" Weaponry Store. The trial court admitted the evidence over objection.

Was it error for the court to admit the evidence? Explain.

Problem #5-27: Child Abuse

Sally brings suit against her former husband, Gary, seeking damages for the sexual abuse of their daughter, Megan. At trial, Sally offers an expert to testify that Gary's child from another marriage was sexually abused by him. Is the expert's testimony admissible?

Problem #5-28: Going in Stiles

The defendant, Joshua, is charged with selling cocaine to an undercover police officer, Officer Stiles. At trial, the prosecution offers the testimony of Officer Stiles.

PROSECUTOR: Now Officer Stiles, what happened exactly nine months to the day after the cocaine sale at issue in this case?

A: Well, nine months after the defendant sold me cocaine, I observed him selling cocaine to another officer, Officer Burnes.

1. Admissible?

2. Would it be significant if the alleged sale to Officer Burnes was still a pending felony case? Would it be relevant if there had been a conviction in the sale to Officer Burnes?

3. If the "other act" sale to Officer Burnes is admitted at trial pursuant to FRE 404(b), would it be proper for the trial judge to explain the purpose of such evidence to the jury by simply repeating FRE 404(b)? Would such an instruction constitute reversible error? See *United States v. Cortijo-Diaz*, 875 F.2d 13 (1st Cir. 1989).

Problem #5-29: Muddy for the Defense

Mark Muddy, attorney at law, was prosecuted for filing a false statement with the Securities and Exchange Commission on behalf of a local bank. He defends the suit by claiming that he mistakenly filed the erroneous statements.

1. In rebuttal, can the prosecutor introduce other false statements filed by Muddy for other clients?

2. Can the prosecutor show that Muddy is a greedy person by offering evidence of shady transactions in which Muddy took financial advantage of his siblings?

3. Can the prosecutor offer Muddy's sudden preference for untraceable financial transactions to show Muddy's intent regarding the statements he filed with the Securities and Exchange Commission?



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19. On the issue of whether the accused committed burglary, evidence that the defendant twice attempted to escape the jurisdiction after being arrested for the crime.
20. On the question of whether the Jaguar XJ12 convertible was a gift or loan from Ronald Crump, Crump's statement, "Here are the keys to the Jaguar; you can use it for a year as a birthday present."
21. On the issue of whether a newspaper article had defamed the mayor, a statement by the reporter the day after the article had been published to the effect that "Yeah, I said some not-so-nice things about the mayor in that article."

Problem #10-17: Is It Really Hearsay II?

State whether each of the following statements technically satisfies the requirements of hearsay. Answer each question either "yes," meaning the utterance technically satisfies the hearsay definition, or "no," meaning the utterance is not technically hearsay.

Assume all statements are made out-of-court unless otherwise indicated. (*Note:* This question does *not* ask whether the evidence ultimately will be admissible. Admissibility is predicated on various other requirements as well.)

1. To show that the witness, Darlene, is telling the truth, Darlene testifies on direct, "I said in my deposition last Wednesday, consistent with my testimony here today, that the blue car ran the red light."
2. On the issue of who started a fistfight between Cassidy and the Sundance Kid, a pre-fight statement by Jones to the Sundance Kid, "Hey, Sundance, Cassidy is gunning for you."
3. On the issue of whether there was a breach of contract, Lynn testified at trial that "the contract stated I was to deliver the pork bellies by the 16th."
4. To show that Larry and Claudia were friends, the fact that they talked to each other at a party for several hours.
5. On the issue of whether Arlene committed the crime, her pre-trial claim, "I did not commit this crime."
6. On the issue of whether Joe conspired to commit the crime, Joe signaled "thumbs up" when he was asked to join the conspiracy.
7. On the issue of whether Joe agreed to commit the crime, Joe remained silent when asked by his friend, Rick, "You're not going to chicken out on this job, are you?"
8. On the issue of whether Stevie paid a parking ticket, Stevie possessed a violator's "receipt of payment" issued by the Department of Motor Vehicles.
9. To show that Stevie paid a parking ticket, a photograph of Stevie paying money at the cashier's window of the Department of Motor Vehicles.



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10. On the question of whether Sally died in the helicopter crash, Sally's statement made immediately after the crash "Hey, I'm still alive!"
11. On the issue of whether the defendant attempted to bribe a government official named Ted, evidence that the defendant attempted to kill Ted before he could testify against the defendant at trial.
12. On the issue of whether the transfer of Joan's Jaguar automobile to Kim was a gift or a loan, the statement by Joan one hour after the transfer occurred (and offered at trial by Joan), "that was a loan I made to Kim."
13. On the question of whether Amy, the defendant, acted in self-defense in killing Vinnie, the victim, her statement made just prior to the fight in question and offered by her at trial, "I am scared of Vinnie, the victim."
14. On the issue of whether the taxi cab was safe, the fact that the cab driver drove away in the cab after a visual inspection of it.
15. On the issue of whether the defendant, South, is guilty of the crime charged, evidence that South yelled "Over here!" and set a fire at the scene of a gang fight to intentionally direct suspicion to him and away from the youngest members of the gang, East and West.
16. On the issue of whether Ozzie likes Harriet, Ozzie's prior statement, "Harriet has no faults."
17. On the issue of whether Ozzie likes Harriet, Ozzie's statement, "I like Harriet very much."
18. On the issue of whether Ozzie left all of his money to Harriet, Ozzie's statement, "I like Harriet very much."
19. On the issue of whether Sharon had been poisoned, her prior statement, "I've been poisoned!" offered by her at trial.
20. On the issue of whether Sharon acted reasonably in drinking a glass of liquid that contained poison, the statement by her friend just before she drank the liquid, "Watch out for that glass of pink-colored liquid, Sharon, it looks like poison."
21. On the issue of whether his leg hurt, Alan's statement, "My leg is hurting me."
22. On the issue of who shot the sheriff, Eric's statement offered by him, "I did not shoot the sheriff."
23. On the issue of whether Cassandra went to the store on the afternoon in question, Cassandra's statement made that morning, "I'm going to go to the store this afternoon to get some shopping done."
24. On the issue of whether Cassandra went to the store that afternoon, her husband Herman's statement, also made that morning, "Cassandra told me she's going to go to the store this afternoon."

25. To show that the lamp belonged to Rebecca and not to her boyfriend Jordan, Jordan's statement, "This lamp belongs to Rebecca."
26. To further show that the lamp belonged to Rebecca and not Jordan, Jordan's statement, "This is one ugly lamp."
27. On the issue of how Lenny felt about Brian, the fact that Lenny shook hands with Brian upon seeing him.
28. To show that Barnaby committed the crime of mayhem, his unsuccessful attempt to bribe a prospective witness after his arrest.
29. To show that Paolo is not a thief, the fact that he was named chief financial officer by the president of the company.

§ 10.03 STATUTORY NON-HEARSAY [FRE 801(D)]

FRE 801(d) declares that certain out-of-court statements are not hearsay, even though they technically meet all of the hearsay elements. Because of this seeming contradiction, we are labeling this section "statutory" non-hearsay. The important point is not the label, which could also be hearsay "exemptions" or "hearsay but not excluded," but rather that these categories escape the general hearsay exclusionary rule.

These statements include certain prior statements of witnesses and admissions by party opponents. The rationales underlying these exemptions extend beyond the reliability of the statements. Admissions, for example, might not be reliable, but are a product of the adversary system and can be rebutted by parties if they want to attempt to do so. With prior statements of witnesses, by definition, a witness is testifying and subject to cross-examination to flesh out the degree of reliability of the prior statement.

[A] Prior Statements of Witnesses [FRE 801(d)(1)]

The FRE permit prior statements of a testifying witness to be admitted for the truth of the matter asserted in three situations, provided that the witness is subject to cross-examination at trial about the prior statements:

1. *Sworn prior inconsistent statements of witnesses.* Prior inconsistent statements of a witness are admissible for the truth of the matter asserted if they were made under oath and subject to the penalty of perjury at a prior trial, hearing, deposition, or other qualifying proceeding (such as a grand jury proceeding). Because the prior statement was made under oath, and there is an opportunity at trial to cross-examine the witness on it, sufficient indicia of reliability exist to admit the statement for its truth.

2. *Prior consistent statements of witnesses.* A prior consistent statement of a witness is admissible for the truth of the matter asserted if the statement is offered to rebut a charge of recent contrivance or fabrication. These prior consistent statements, unlike prior inconsistent statements admitted for the truth, need not be made under oath. When not offered pursuant to this provision, prior consistent statements are



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Problem #10-23: That's the Man, Officer!

In a robbery trial, an eyewitness, Ethel, testifies that she saw the defendant snatch the victim's purse and quickly exit the mall through the Kmart located on the mall's south side. Ethel added, "I ran up to Officer Thursday. I was out of breath and couldn't speak. Later, he showed me several photographs. I pointed to the photograph of the defendant, indicating that he was the guy who snatched the purse and ran out of the Kmart."

1. Is Ethel's testimony hearsay? Why?
2. Ethel wishes to testify that "my best friend, Marv, was standing right next to me when the defendant ran out of the store. Marv also told the police officer after looking at the pictures that the defendant was the fellow who snatched the purse." Is this testimony admissible?

[B] Opposing Party Statements [FRE 801(d)(2)]

To constitute opposing party statements under the restyled FRE, an out-of-court statement must fulfill two requirements. The statement (1) must have been made by or on behalf of a party opponent, and (2) must be offered against that party. By this definition, it becomes clear that the word previously used before the restyling, "admissions" is a misnomer — the opposing party need not admit anything in the statement. Rather, the theory of opposing party statements is that "you made the statement, now you explain it." This signifies that a party will be held responsible for his or her own utterances, whether a fact is "admitted" in the statement or not.

In addition, the rationale underlying admissibility is so strong that a lack of personal knowledge by the declarant is not a bar to admission. Statements by opposing parties are admissible under FRE 801 even if they violate the personal knowledge requirement and the rule prohibiting lay opinions.

There are five different types of opposing party statements recognized by the FRE. A statement is considered part of this category in each of the following situations:

1. It is the party's own statement. FRE 801(d)(2)(A).
2. The party adopts or acquiesces in the statement of another person. FRE 801(d)(2)(B).
3. The party authorizes another person to make statements about a subject. FRE 801(d)(2)(C).
4. The party's agent or servant makes the statement concerning a matter within the scope of the agency or employment, during the existence of the relationship. FRE 801 (d)(2)(D).
5. A co-conspirator of the party makes the statement during and in furtherance of the conspiracy. FRE 801(d)(2)(E).



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[B] Problems — Availability of Declarant Immaterial [FRE 803]

[1] Present Sense Impressions, Excited Utterances, Present State of Mind, Statements Made for Purposes of Medical Diagnosis, and Prior Recollection Recorded

These hearsay exceptions are all grounded in sufficient indicia of reliability to warrant excepting them from the general hearsay exclusion. FRE 803(1), (2), and (3), present sense impressions, excited utterances and state of mind, in particular, share a common thread — they are made spontaneously, without the time for reflection or thought. Further, present sense impressions and state of mind observations also are close in time to the event or activity in question, negating the need to remember. The spontaneity for excited utterances is thought to be the presence of excitement, although this exception has been criticized for the same reason — excitement is thought to foster inaccuracy even though it might be stilling reflection at the same time. The longstanding history of this exception has overcome such objections. Statements made for medical diagnosis or treatment seems to stand out from the others in this group because these statements can be in the past-tense, “backwards looking.” Their reliability is ensured by their purpose — to obtain accurate diagnosis and treatment from the information provided by the declarant.

These hearsay exceptions have an added dimension lying outside evidentiary boundaries — the Constitution. Even if statements are admissible under the hearsay rules, their admissibility in a criminal trial against an accused must still comply with the Sixth Amendment Confrontation Clause. While the next chapter will review the Confrontation Clause in depth — particularly since new life has been breathed into it after *Crawford v. Washington*, 531 U.S. 36 (2004) — it is useful to think about whether the evidence is being offered by the government against a criminal defendant, particularly for these exceptions and the business records exceptions.

The scope of these provisions is often ambiguous. For example, how long can excitement from an incident last to support an exception under FRE 803(2)? Also, under FRE 803(3), does a statement about planning on meeting another person come in for only the declarant’s intent or both the declarant and the person(s) the declarant aims to meet? These issues are not directly answered by the rules, and require interpretation.

Problem #10-42: Hoops II

Bari is charged with the murder of Kim “Hoops” Henderson. At trial, the prosecution calls Kim’s neighbor, Bernie, to testify. Bernie says that, one hour before Kim’s disappearance, his 15-year-old son Josh calmly stated, “Pops, there goes Hoops Henderson with her basketball to the park again. She is with Bari.” Can Bernie testify about his son Josh’s statement? Explain.



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Problem #10-43: Demoted

A sales representative for a pharmaceutical firm was demoted for “weak performance.” The rep brought suit, citing stellar company reviews, strong client recommendations, and large amounts of business the rep had done on the company’s behalf. The firm offered in evidence in-house company memos explaining why the company was demoting the plaintiff, calling the memos present-sense impressions under FRE 803(1). Admissible hearsay? Explain.

Problem #10-44: Arson Redux

A witness for the prosecution in an arson case testifies that as she was watching television, she stated to her husband, “Isaac, it smells like kerosene around here, don’t you think?” (The house caught fire moments later.) Is this statement admissible through a hearsay exception? If this statement is excluded from trial, what is the most likely reason why?

Problem #10-45: Slip and Fall

Plaintiff sued defendant Grocery Store. Plaintiff is on the witness stand, testifying on direct examination.

PLAINTIFF’S ATTORNEY: What happened on March 1, 1993, at 3:00 p.m.?

A: I slipped and fell in the defendant’s grocery store.

PLAINTIFF’S ATTORNEY: What occurred immediately following your fall?

A: A clerk of some sort rushed up to me and stated, “Hey, that garbage has been on the floor for a couple of hours; let me help you up.”

DEFENDANT’S ATTORNEY: Objection. Hearsay.

1. What ruling and why?

2. What is the relevance of the Advisory Committee’s Note to Federal Rule of Evidence 803(1)?

PLAINTIFF’S ATTORNEY: What else, if anything, occurred?

A: I heard a bystander, who I did not know and have not seen since, say, “Look Hernando, that man just slipped and hit his head hard on the floor!”

DEFENDANT’S ATTORNEY: Objection. Hearsay.

3. What ruling and why?

PLAINTIFF’S ATTORNEY: How did you feel at approximately 7:00 p.m. that night?

A: I felt achy all over, like my bones were not glued together very well.

DEFENDANT’S ATTORNEY: Objection. Hearsay.

4. What ruling and why?



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A: I told my wife Susan that my skid-proof shoes did not stop me from falling over backwards on some junk left on the floor of the defendant's grocery store.

DEFENDANT'S ATTORNEY: Objection. Hearsay.

5. What ruling and why?

Problem #10-46: "So How Was YOUR Day?"

During her lunch hour, Amy witnessed a horrific car crash in which several people were seriously injured. Because Amy was shaken up after observing the carnage at close range, she left her investment banking job much earlier than usual. After an hour-long commute home, she still felt agitated. When she walked into the house, her sister, Emma, asked her about her day. Scarcely able to contain herself, Amy said, "I saw a woman and two youngsters practically killed by a guy who ran a red light! He went through the intersection long after the light had turned red. It made me sick."

The people injured in the crash subsequently brought suit and Emma is asked to testify about Amy's statement. Amy is available to testify, but prefers not to recall the incident. Is Emma permitted to testify to Amy's statement? Explain.

Problem #10-47: "No Breaks"

Pamela Plaintiff files suit against Erik Defendant, claiming that Erik negligently caused an automobile accident. Erik took the witness stand on his own behalf. During the course of his testimony, Erik stated, "Just as I was preparing to stop at the red light, I yelled to my wife, Marge, who was in the passenger seat, 'Honey, I have no brakes!'"

Is this statement an admission under FRE 801(d)(2)? Explain.

Problem #10-48: New York State of Mind

Bo is charged with murdering Vince in upstate New York. At trial, William testified for the defense. William stated that during a conversation with Bo one week before Vince mysteriously disappeared, Bo had stated:

1. "I like Vince."
2. "As a matter of fact, Vince was my best friend last year."
3. "I think I'll pay Vince a visit tomorrow to tell him how I feel."
4. "Vince told me, 'Bo, I'm going out of town in a couple of days to go fishing with Fred.'"

Are these statements admissible hearsay, if any?

Problem #10-49: Who Shot J.R.?

Harry Hogan is charged with attempted murder after allegedly shooting and seriously injuring J.R. At trial, a government witness, Landon, testified about the events on the evening of April 26, 1993, when J.R. was shot.



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