

1 

- Rule 412. Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition
- (a) Evidence generally inadmissible.
- The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):
 - (1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.
 - (2) Evidence offered to prove any alleged victim's sexual predisposition.
-
-

2 

- Rule 412. Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition
- (b) Exceptions.
 - (1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:
 - (A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;
 - (B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and
 - (C) evidence the exclusion of which would violate the constitutional rights of the defendant.
 - (2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.
- (c) Procedure to determine admissibility.
 - (1) A party intending to offer evidence under subdivision (b) must --
 - (A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and
 - (B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.
 - (2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.
-

3 

- Rape shield laws. Historical context, evid. of prior sexual involvement admissible on theory of probable consent on occasion in issue.
- FRE 412(a) Cannot admit evid. victim engaged in other sexual behavior, or to prove victim's sexual predisposition. Exceptions:
 - In criminal case, can offer evid of specific instances of sexual behavior by victim to show someone other than the accused source of semen, injury, or other physical evid.

- Evid of specific instances of prior voluntary sexual contact with def to support claim of consent; and
- Instances in which exclusion would violate constitutional rights of def.

4 

- FRE 412(b). In a civil case, past sexual behavior or sexual predisposition of an alleged victim is admissible if:
 - Otherwise admissible under the Rules of Evidence; and
 - Probative value substantially outweighs danger of harm to any victim and of unfair prejudice to any party.
 - Reputation evidence of victim only admissible if placed in controversy by the victim.
 -

5 

- Under FRE 412, to determine admissibility in criminal or civil case, proponent must:
 - File written motion no less than 14 days prior to trial (unless court finds "good cause" for late filing)
 - Serve the motion on all parties and notify the alleged victim or victim's guardian or representative.
 - Court must conduct *in camera* hearing and afford victim and other parties a right to attend and be heard. All filings, hearing record, etc., will remain under seal unless otherwise ordered by the court.

6 

- Rule 413. Evidence of Similar Crimes in Sexual Assault Cases
 - (a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.
 - (b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.
 - (c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.
 - (d) For purposes of this rule and Rule [415](#), "offense of sexual assault" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved--
 - (1) any conduct proscribed by chapter 109A of title 18, United States Code;
 - (2) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person;
 - (3) contact, without consent, between the genitals or anus of the defendant and any part of another person's body;
 - (4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or
 - (5) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(4).

7 

- Rule 414. Evidence of Similar Crimes in Child Molestation Cases
 - (a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of

child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.

- (b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.
- (c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.
- (d) For purposes of this rule and Rule [415](#), "child" means a person below the age of fourteen, and "offense of child molestation" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved--
 - (1) any conduct proscribed by chapter 109A of title 18, United States Code, that was committed in relation to a child;
 - (2) any conduct proscribed by chapter 110 of title 18, United States Code;
 - (3) contact between any part of the defendant's body or an object and the genitals or anus of a child;
 - (4) contact between the genitals or anus of the defendant and any part of the body of a child;
 - (5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or
 - (6) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(5).

8 

- Rule 415. Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation
- (a) In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule [413](#) and Rule [414](#) of these rules.
- (b) A party who intends to offer evidence under this Rule shall disclose the evidence to the party against whom it will be offered, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.
- (c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

9 

- FRE 413-415. In civil or criminal sexual case, or child molestation case, evid. of def's prior similar sexual offenses are admissible for any purpose.
 - Prior similar sexual misconduct defined very broadly
 - Trumps Rule 404(b)
 - Strong presumption of admissibility
 - Still subject to balancing under Rule 403 (majority but not unanimous rule)

10 

- Note: Texas does not have in its Rules of Evidence rules similar to FRE 413-415. Thus, evidence of prior claims of sexual misconduct are generally inadmissible in the guilt-innocence phase of a Texas sexual crime trial.
- However, pursuant to Tex. Code Crim. Proc. 38.37, in a case involving sexual crimes

against a minor, evidence of other crimes, wrongs, or acts are admissible if *committed by the defendant against the same victim*.

- In this instance, the defense is entitled to a limiting instruction, like the following, if timely requested:

"You are instructed that if there is any testimony before you in this case regarding the Defendant's having committed offenses against the alleged victim other than the offense alleged against him in the Indictment in this case, you cannot consider said testimony for any purpose unless you find and believe beyond a reasonable doubt that the Defendant committed such other offenses, if any were committed, and even then you may only consider the same in determining the state of mind of the Defendant and the child and the previous and subsequent relationship between the Defendant and the child."

- Extraneous incidents are admissible generally in the punishment phase (after a finding of guilt), but the defendant is entitled to the following instruction:

"The State has introduced evidence of extraneous crimes or bad acts other than the one charged in the indictment in this case. This evidence was admitted only for the purpose of assisting you, if it does, in determining the proper punishment for the offense for which you have found the defendant guilty. You cannot consider the testimony for any purpose unless you find and believe beyond a reasonable doubt that the defendant committed such other acts, if any, [sic] were committed."

11 

- Witness Competency

- FRE 601, 603 Every person presumed competent to be witness (601), subject to willingness to take oath in a: "form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so." (603)

-
- TRE 601. COMPETENCY AND INCOMPETENCY OF WITNESSES

- (a) General Rule. Every person is competent to be a witness except as otherwise provided in these rules. The following witnesses shall be incompetent to testify in any proceeding subject to these rules:

- (1) *Insane persons*. Insane persons who, in the opinion of the court, are in an insane condition of mind at the time when they are offered as a witness, or who, in the opinion of the court, were in that condition when the events happened of which they are called to testify.

- (2) *Children*. Children or other persons who, after being examined by the court, appear not to possess sufficient intellect to relate transactions with respect to which they are interrogated.

- Texas Rule also subject to similar oath requirement. (603)

12 

- Children as witnesses. *US v. Allen*, US Military Court 1982. Charge sexual assault minor. Witness 4 yoa victim. Asked whether she understood Jesus and the devil, knew she was supposed to tell the truth, all affirmative. At one point, child became confused and testified telling the truth was bad, lying was good.

- Held competent to testify. Met requirements of Rule 603.

13 

- Dead Man Statutes. No federal rule on dead man statute.
- *Reinke v. Stewart*, M.D. Ca. 1981. 2 cops find drunk, put him on the highway, where he is struck and killed. Father files 1983 action.
- In support of MSJ, defs. offer affidavits from witnesses concerning their interactions with decedent after he was left on the highway. (Issue apparently whether officers should have realized it was dangerous to leave decedent due to his intoxication [.17 bac on autopsy]).
- Father objects to affidavits on basis of "dead man's statute."
- Court holds governed by federal law; no dead man's statute - no problem.

14

- States' dead man statutes vary. Very limited in Texas. TRE 601(b):
 - Applies only in civil actions by or against executors, administrators, or guardians, in which judgment may be rendered against them as such.
 - Applies only to statements by the testator, intestate, or ward.
 - Does not apply if statements corroborated or witness called to testify to same by opposing party.
 - However, HS rule may still apply.

15

Hypnotically-enhanced evidence

- *Rock v. Arkansas*. US 1987. Woman accused of killing her husband. Cannot remember, undergoes hypnosis in Arkansas state court case. Statute precludes admissibility of hypnotically-enhanced evidence so defendant can only repeat statements made prior to hypnosis.
 - Why is hypnotically-enhanced evidence suspect?
 - Regardless of suspect nature, USSC held it was unconstitutional to deny defendant of right to testify solely because testimony was subject to prior hypnotic enhancement.
 - In Texas, as to non-defendant witnesses, hypnotically-enhanced evidence admissible if court finds, by clear and convincing evidence, that strict criteria to ensure reliability was followed in hypnosis session. *State v. Medrano*, 127 SW3d 781 (Tex.Ct.Crim.App. 2004). Of course, *Rock* would control in all state court cases due to federal due process rights of defendant to testify on his own behalf.
 - If interested, detailed student commentary re rationale for exclusion at: Comment, *Hypnotically Enhanced Evidence in Criminal Trials; Current Trends and Rationales*, 19 Houston Law Review 765 (1982).

16

- FRE 605 Judge cannot testify in the trial over which he is presiding as a witness
- FRE 606
 - Juror may not testify in a trial in which he is a juror
 - Upon inquiry into validity of verdict or indictment, juror cannot testify to any matter or statement occurring during deliberations, or to the effect of anything on any juror's decision, excepting only when external prejudicial information is brought to any juror.

17

► Definitions



- Credibility = believability
-
- Impeachment = noun form of verb to impeach: to dispute, disparage, deny, or refute
-

- Bias = partiality, a leaning toward or against a witness, a side in a lawsuit, a particular type of lawsuit, etc.
-
- Prejudice = prejudgment of an issue in dispute, root word prejudice
-
- Cross-examination = the questioning, usually by form of leading questions, of a witness called by the opponent, or of the adverse party, or of a hostile witness.

18 

- Rule 607. Who May Impeach
- The credibility of a witness may be attacked by any party, including the party calling the witness.
-
- Rule 611. Mode and Order of Interrogation and Presentation
 - (a) Control by court.
 - The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to
 - (1) make the interrogation and presentation effective for the ascertainment of the truth,
 - (2) avoid needless consumption of time, and
 - (3) protect witnesses from harassment or undue embarrassment.

19 

- Means of impeachment
- Nonspecific impeachment
 - Showing bias or influence
 - Showing defect of capacity
 - Showing untruthful disposition
 - Cross-ex on nonconviction misconduct
 - Cross-ex on convictions
 - Testimony from character witnesses
- Specific impeachment
 - Prior inconsistent statements
 - Contradiction
 -
 -

20 

- ▶ Cross-examination notes:
 - ▶
 - ▶ X-ex is not coextensive with impeachment, because x-exing counsel is free not just to detract from the testimony of the witness, but also to elicit helpful testimony from an adverse witness.
 - ▶
 - ▶ Practice point: Don't impeach by x-ex on a point unless the witness has said something on direct to harm your case.
 - ▶
 - ▶ Practice point: Always try to get *something* out of every witness, if possible. If not possible, shut up.

- ▶
- ▶ Practice myth: Never ask a question to which you do not know the answer.
- ▶

21

- ▶ Impeachment on a collateral matter – Generally not allowed.
- ▶ First question: What is a collateral matter?
 - Defined best by test: A matter is not collateral if the answer to the question could be admitted into evidence for some purpose other than impeaching the witness. Examples:
 - ▶ Impeachment regarding history of alcohol or drug use unless some evidence alcohol or drugs affected witness at time of event observed;
 - ▶ Evidence that insured in a fire claim had a previous suspicious fire loss (unless can establish pattern);
 - ▶ Evidence that police officer was involved in violent incident after incident in issue (again, unless pattern can be shown).
 -
 -

22

- ▶ *US v. Abel*, US 1984. Robbery case, Abel charged. Co-conspirator, Ehle, pled guilty and testified against Abel.
 - Mills, not a participant in the robbery but who had spent time in prison with both Abel and Ehle, then testified that Ehle had admitted he intended to implicate Abel falsely to receive favorable treatment.
 - Prosecutor then says he is going to impeach the witness, Mills, by showing through Ehle that Abel, Ehle, and Mills were all members of the “Aryan Brotherhood,” a white racist secret prison gang which required its members to commit perjury, theft, and murder for each other, and to deny the existence of the organization.
 - Court allows it, but tells prosecutor not to use the term “Aryan Brotherhood,” because it was too inflammatory.

23

- ▶ No particular rule on ability to show bias of witness, simply goes to relevance. Credibility of a witness called by the other side is always relevant. Therefore, the bias of a witness can always be shown, subject to Rule 403 objection.
- ▶ Problem was that evidence had tendency to impeach Mills and Abel by mere association with an organization. However, court holds that proof of witness bias is always admissible. If witnesses belonged to an organization and a fair inference of that organization is that its members promote perjury, it has a tendency to cast doubt on the credibility of the witnesses and is therefore admissible.

24

- ▶ What if Aryan Brotherhood was a religious organization that promoted perjury? Inadmissible under FRE 610.
 - Is this a fair distinction?
 - Is this type of bias propensity evidence? Yes.
 - ▶ Yes.
 - Is this inadmissible character evidence?
 - ▶ Not in this instance.
- ▶ However, this can be a close call. *See Outley v. City of NY*, 837 F.2d 587 (2d Cir. 1988)

(evidence of litigiousness of claimant not admissible to show bias against police officer defendants because violates Rule 404).

25 

- ▶ Prob. 8-A. Defense counsel on direct gets expert to testify he is paid \$1600 per day. Can plaintiff's counsel cross-examine witness as to:
 - Total pay for this case?
 - ▶ Yes.
 - How often he has testified for the same client?
 - ▶ Yes.
 - How much made testifying for same client in past year?
 - ▶ Probably.
 - How much the witness makes each year testifying?
 - ▶ In most jurisdictions, no.
 - How often the witness testifies for the plaintiff versus the defense?
 - ▶ Yes
 - Percentage of expert's income from testifying?
 - ▶ Yes
 - How expert spends the money he makes testifying?
 - ▶ Probably not, but case dependent.
 -
 -

26 

- *Charter v. Chleborad* 8th Cir. 1977. Medmal case. Def. calls witness who testifies plaintiff's expert has reputation for untruthfulness. (Remember, can do so as per FRE 608(a)). Pl. wants to show def's witness works for def's malpractice carrier. What purpose for the latter?
 - Bias. Cast doubt on reliability of witness.
 - Trial court excludes. Reversed. Trial court was incorrect in excluding, because of importance of expert's testimony to plaintiff's case.
 - More difficult case. Showing expert is insured by same carrier that insures def. Award could increase expert's premium. Admissible?
 - Expert has testified in 188 cases for same malpractice carrier. Admissible?
 - Expert sits on board of malpractice carrier. Admissible?
 - Test is under Rule 403.

27 

- Questions regarding the certainty of eyewitness identification (or description of events), generally goes to the weight, rather than the admissibility of the evidence, provided the witness claims to have had sufficient ability to observe and has apparently sufficient mental capacity to testify. However, can the defense in a criminal case offer expert testimony refuting the reliability of eyewitness testimony?
- Generally, yes. Same issues arise concerning admissibility of expert testimony under FRE 702 (to be addressed later), but refusal to allow defendant to offer such testimony has been held to constitute a violation of the defendant's right to present a defense, under the Compulsory Process Clause of the 6th Amendment ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the

accusation; to be confronted with the witnesses against him; *to have compulsory process for obtaining witnesses in his favor*, and to have the Assistance of Counsel for his defence.”).

28 

- Rule 608. Evidence of Character and Conduct of Witness
- (a) Opinion and reputation evidence of character.
- The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations:
 - (1) the evidence may refer only to character for truthfulness or untruthfulness, and
 - (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.
- (b) Specific instances of conduct.
- Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in [rule 609](#), may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness
 - (1) concerning the witness' character for truthfulness or untruthfulness, or
 - (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.
- The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness.

29 

- FRE 608(a). Lawyer can attack – by opinion or reputation -- character of any witness for untruthfulness. If done, opponent can support character for truthfulness in same fashion.
- FRE 608(b). Court has discretion to allow impeachment of a witness by cross-examining counsel only asking him about specific instances of past conduct, other than crimes covered by Rule 609, which are probative of veracity or character for truthfulness or untruthfulness.
 - In other words, as to Witness A, can ask if it is true that he has cheated, embezzled, defrauded, or destroyed evidence, even if no conviction resulted.
 - Can do the same thing to Witness B with respect to Witness A, if Witness B has testified that Witness A has character for truthfulness or untruthfulness.
 - As to bad acts, must rationally relate to credibility. In other words, cannot ask whether witness beat or murdered someone, because does not go to character for truthfulness.
 - Cannot prove by extrinsic evidence.

30 31 

- U.S. v. Manske. Manske tried on drug conspiracy charges, based largely on testimony of Pszeniczka [Pz]. Manske's lawyer wants to cross-examine Pz about threats he made to 5 other people, and also wants to question 2 threatened folks as to Pz's threatening comments. Court refuses and Manske convicted, appeals. Are mob-type (“die if you testify truthfully”), threats by Pz admissible under 608(b), as bearing on character for truthfulness, or do they just show propensity for violence?

- Admissible because he attempted to prevent truthful testimony.
- If Pz and two witnesses say "not true," can defense call a witness to testify to the contrary?
 - Not under 608(b), but possibly to show bias of Pz and other 2 denying witnesses.
-

32 

- Non-conviction bad acts for impeachment purposes under 608(b) are generally limited to those bad acts which bear directly on lies or deception.
- Are false tax returns or failure to file tax returns admissible under 608(b)?
 - Mixed authority, but mostly due to application of FRE 403. Majority rule seems to be admissible.
- False employment applications, credit applications, false resumes?
 - Generally yes.
- What is the interplay between 608(b) evidence and impeachment on collateral matter prohibition?
 - FRE 608(b) is actually an exception to the collateral impeachment rule. In other words, but for 608(b), opposing counsel usually would not be allowed to impeach a witness on a prior bad act unrelated to the matters at hand.
- Texas especially restrictive on admissibility of 608(b) non-conviction bad act testimony for impeachment purposes.