

UTAH BAR FALL FORUM 2009

ADVANCED EVIDENCE OUTLINE

By Stephen J. Cribari

University of Minnesota Law School
Criba001@umn.edu
612 625 6486

Preliminary Note

Citations to the Utah Rules of Evidence are to Utah Code Annotated, Utah Court Rules 2009 (LexisNexis).

Material that appears in smaller font represents direct quotes from the relevant rules of evidence or other sources.

I. Hearsay: What It Is and What It Isn't, and the Exceptions¹

(A) DEFINITION

What is it? Is it admissible? Does the objection “But the witness is testifying to her own hearsay!” make sense?

Sometimes, witnesses may recount their own prior statements

because they are *not* hearsay (*e.g.*, 801(d)(1));

precisely because they *are* hearsay (*e.g.*, 803(1),(2),(3),(4),5)),

but never just because “they are on the stand testifying now.” (That’s a harmless error test.)

FRE 801 (a-c)

(a) Statement. A “statement is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant. A “declarant” is a person who makes a statements.

(c) Hearsay. “Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

¹ This outline is based on the Federal Rules of Evidence. Unless noted otherwise, the Utah Rules of Evidence seems to be consistent with the Federal Rules of Evidence.

Definition:**An out-of-(this) court****statement**

Verbal or non-verbal assertions

Umbrellas, shrugs, grunts and physical gestures of various kinds

It's the intention to communicate that triggers concerns about perception, memory, sincerity, ambiguity

Silence as an assertion: what, if anything, is intended

circumstantial evidence of a fact v. direct assertion of a fact

by a declarant

People, pets, machines and: "☒ You got mail!"

The computer store/computer generated distinction

offered in court to prove the truth of the matter asserted

Diverting from, or going through, the statement

The *Radio Traffic* problem

This FRE definition is assertion-centered, not declarant-centered: what the witness said v. what the witness meant by what the witness said.

Implications, and the problem of irony

**WHAT'S THE BEST WAY TO KEEP YOUR SON FROM INHERITING?
INCLUDE HIM OUT OF THE WILL, OF COURSE! FRE 801(d)(2)(a-e) The
deceptively-named admissions**

801(d)(2)(a-e): Admissions by parties opponent: adversarial non-hearsay

(d)(2) Admission by party-opponent. The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (b) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made

during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

The party's statement must be offered against that party.

A fundamental need for relevance or always relevant? *The Curious Case of Leroy Crone*.

- (a) The party's own statement, individual or representative
- (b) Adoption or belief in truth
- (c) Authorization
- (d) Agency; scope of employment (duration)
- (e) Co-conspirator (duration and furtherance) (no need for independent evidence; preponderance; no need to show unavailability)

For (c),(d),(e): the "not quite independent evidence" requirement

FRE 801(d)(last sentence): The contents of the statement shall be considered by are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

Note that this "last sentence" does not appear in the Utah Rules of Evidence.

FRE 801(d)(1)(a-c): Certain prior statements of certain witnesses

(d)(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person.

Prior inconsistent statements

Certain types of *prior sworn* statements

Not just FRE 613 (impeachment, *see infra*) but for the truth of the matter asserted

Prior consistent statements

Certain types of *prior unsworn* statements. *Tome v. United States*, 513 U.S. 150 (1995)(non-hearsay use confined to those statements offered to rebut, and made prior to, a charge of recent fabrication or improper influence or motive).

You must rebut the alleged link between the witness and the alleged recent fabrication, improper influence or motive, and not just demonstrate that the witness's in-court testimony is true.

For the truth of the matter asserted, not just for rehabilitation (if that had been permitted)

Prior statements of identification

United States v. Owens, 484 U.S. 554 (1988)

What does “subject to cross-examination concerning the statement” mean? (Don’t think outside the box.)

FRE 802: Hearsay is not admissible except . . .

(B) EXCEPTIONS

“An exception, therefore reliable” or “reliable, therefore an exception?”

FRE 803, 804, 807: Circumstantial guarantees of trustworthiness; available and unavailable declarants; available and unavailable hearsay exceptions

FRE 803 Hearsay Exceptions; Availability of Declarant Immaterial

FRE 804 Hearsay Exceptions; Declarant Unavailable

FRE 807 Residual Exception. A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if . . .

FRE 803(1), (2), (3): Present Sense Impressions; Excited Utterances; State of Mind Statements

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

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

(3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

Present Sense Impressions (no time to fabricate - the connection to what's being described)

"I'm alive!"

Excited Utterances (not time to fabricate - the connection to what's being felt)

"I'm alive!"

State of Mind (the connection to nothing)

"I'm alive!"

The interesting problem of intentions, beliefs and memories

FRE 803(4): Statements for Medical Diagnosis and Treatment

FRE 803 (4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

Statements for Purposes of Medical Diagnosis or Treatment

What if it isn't "reasonably pertinent?"

FRE 803(5) (and, by way of implication, FRE 612) Past Recollection Recorded and Present Memory Refreshed

(5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable to witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

What you don't know you can't remember.

Who reads, and when?

FRE 803(6) and (8) Business Records and Public Records

(6) Records of regularly Conducted Activity. – A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness . . . (or by self-certification under the rules or law) . . . unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term “business” as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Not just a record of a business, but a record which it was the business of the business to make.

(8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

Facts and/or conclusions

FRE 804(a) Hearsay Exceptions; Declarant Unavailable

What does “available” mean?

(a) Definition of unavailability. “Unavailability as a witness” includes situations in which the declarant –

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant’s statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant’s statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant’s statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant’s attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant’s attendance or testimony) by process of other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying..

FRE 804(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former Testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Against whom, exactly? (The problem of privity.)

FRE 804(b)(2) “Dying Declarations”

(b)(2) Statement Under Belief of Impending Death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant’s death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

URE 804(b)(2) Statement under belief of impending death. In a civil or criminal action or proceeding, a statement made by a declarant while believing that the declarant’s death was imminent, if the judge finds it was made in good faith.

What exactly is the circumstantial guarantee of trustworthiness, and (for the criminal practitioner) in what form might “testimonial” dying declarations survive *Crawford v. Washington*, 541 U.S. 36 (2004)? (The Utah test in *State v. Menzies*, 889 P.2d 393 (Utah 1994), cert. denied, 513 U.S. 1115 (1995), was consistent with *Ohio v. Roberts*, 448 U.S. 56 (1980), and may survive for non-testimonial hearsay.)

FRE 804(b)(3) Statement against interest

A statement which was at the time of its making so far contrary to the declarant’s pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant’s position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Corroborating the trustworthiness of the exception, not the truth of the statement. (The rare issue in a civil case.)

FRE 804(b)(6) Forfeiture by Wrongdoing

A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

The Sixth Amendment and civil practice

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .” U.S. Const, amend. vi.

Giles v. California, ___ U.S. ___, 128 S. Ct. 2678 (2008).

FRE 807 Residual Exception

A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. (Provision for advance notice and time to object/prepare).

“Reliability” is not an exception

The statement must be trustworthy because of circumstantial guarantees of trustworthiness, not because it is true.

No “near misses”

FRE 102. Purpose and Construction. These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

Preliminary Note to Utah Rules of Evidence: . . . not to codify the law of evidence, but to formulate guides from which the law of evidence can grow and develop. These rules therefore supply a fresh starting place for the law of evidence and do not present an ultimate end.

Standard of Review: abuse of discretion (great deference).

Harmless Error: based on *Kotteakos v. United States*, 328 U.S. 750 (1946) (given the record as a whole, did the error substantially influence the outcome of the trial?)

II. IMPEACHING WITNESSES: CHARACTER AND REPUTATION EVIDENCE

Review of FRE 404 (a), (b): Evidence of character as predictive of conduct (a/k/a “Norm!”)

(*NB:* The *italicized* words in the following excerpt from FRE 404(a) do not appear in URE 404(a).)

(a) Character evidence generally

Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused - *In a criminal case*, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404 (a)(2), evidence of the same trait of character of the accused offered by the prosecution;

(2) Character of alleged victim - *In a criminal case, and subject to the limitations imposed by Rule 412*, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

(3) Character of witness - Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Rule 405. Methods of Proving Character

(a) Reputation or opinion.

In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific instances of conduct.

In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

FRE 404(a)(3) (and, by reference, 607, 608, 609)

(3) Character of witness - Evidence of the character of a witness, as provided in rules 607, 608, and 609.

FRE 607 Who may impeach whom?

FRE 607 Who May Impeach. The credibility of a witness may be attacked by any party, including the party calling the witness.

Any witness including your own . . . but that doesn't (necessarily) mean leading questions

Not everything is covered by the FRE

Prejudice, interest, bias, corruption, perception, memory, sincerity, memory, ability to communicate . . . and did I say memory?

Psychiatric conditions and their relevance, or not, to character and reputation, *e.g.*, dementia and Alzheimer's.

FRE 608 Evidence of Character and Conduct of Witness (To put it another way, when is who the witness is and what the witness does relevant on the question of whether the witness is a liar?)

We're dealing with sincerity, not just believability. We're dealing with personal, moral credibility, not just an evaluation of weight and credibility based on the meaning of the evidence. We're dealing with the witness's *character* (hence FRE 404(a)(3)) for telling the truth or for lying.

Reputation and opinion evidence of character

(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.

All the 405 rules apply here, with the understanding that the only relevant character trait is character for truthfulness.

Specific Instances of conduct evidence of character

FRE 608 (b) is an exception to the basic FRE 404 rule, but with limitations

(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.

URE 608(c) Evidence of bias. Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.

The use of questions, intrinsic and extrinsic evidence: you can ask it but you can't prove it (and you probably shouldn't even suggest that you could).

“It” what?

Example: witness to car accident: “I saw the red car go through the red light and hit the green car.” (The red car was driven by the defendant. Defense counsel now wants to impeach plaintiff’s eye-witness.)

- Questions about time of day, lighting, vision and memory issues of witness.
- Questions about prior marriage of witness to, and witness’s divorce from, the defendant.
- Questions about cleaning out the defendant’s checking account after the separation.
- Questions about witness’s arrest for forgery.
- Available proof of the above, short of conviction.

FRE 609 Impeachment by Evidence of Conviction of Crime

(a) General rule.

For the purpose of attacking the character for truthfulness of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.

URE 609(2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

(b) Time limit.

Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of pardon, annulment, or certificate of rehabilitation.

Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime that was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications.

Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal.

The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

Exceptions to the exception of FRE 404/608(b)

Not the act which got the conviction (that would be FRE 404(b)), but the conviction itself. *It's the conviction, not the underlying act, which is relevant.*

Which convictions? (a)(1) and (a)(2) convictions

The various prejudice tests (or not): the accused (criminal) and other witnesses

Statute of limitations

Utah proof limitations: *State v. Peterson*, 560 P.2d 1387 (Utah 1977) (oral testimony of the witness to

be impeached, or court record, certified copy of court record; but *not* the oral testimony of another witness).

The *Luce*, *Ohler* and *Abel* federal restrictions

Luce v. United States, 469 U.S. 38 (1984) (*in limine* but not testifying)

Ohler v. United States, 529 U.S. 753 (2000) (*in limine* but testifying to take the sting out)

United States v. Abel, 469 U.S. 45 (1984)(bias and character: we don't keep out evidence of bias because the witness also happens to be a liar)

FRE 613 Prior Statements of Witness: another exception to FRE 608(b)

(a) Examining witness concerning prior statement.

In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) Extrinsic evidence of prior inconsistent statement of witness.

Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).

Not for the truth of the matter asserted, but only as relevant to character for truthfulness. (The inference is that someone who has related conflicting accounts might not be truthful. But as to which account?)

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