



**TOURO UNIVERSITY**  
JACOB D. FUCHSBERG LAW CENTER  
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**Touro Law Review**

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Volume 26 | Number 1

Article 1

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December 2012

## **Madison 1, Bush 0: Survey Testing Mr. Madison's Hypotheses**

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### **Recommended Citation**

Gordon, Daniel (2012) "Madison 1, Bush 0: Survey Testing Mr. Madison's Hypotheses," *Touro Law Review*. Vol. 26: No. 1, Article 1.

Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol26/iss1/1>

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## TRIAL EVIDENCE 2011: ADVOCACY, ANALYSIS, & ILLUSTRATIONS

*Martin A. Schwartz,*<sup>\*</sup> *Deborah Jones Merritt,*<sup>\*\*</sup> and *Hon. William G. Young*<sup>\*\*\*</sup>

### I. INTRODUCTION

PROFESSOR SCHWARTZ: This segment will review fundamental evidentiary principles as well as recent developments in evidence law, concentrating on the Federal Rules of Evidence.<sup>1</sup> Many of New York's evidence principles mirror the Federal Rules.<sup>2</sup> New York is one of the relatively few states that does not have an evidence code; most New York evidence law derives from decisions of the New York courts. While mainly similar, there are some differences between federal evidence law and New York evidence law.

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<sup>1</sup> All references to the Federal Rules of Evidence are to the rules in effect before December 1, 2011.

<sup>2</sup> *Clemente v. Blumenberg*, 705 N.Y.S.2d 792, 798 (Sup. Ct. 1999) ("New York common law and the New York Civil Practice Law and Rules (CPLR) contain many of the same principles of evidence contained in the FRE.").

## II. FUNDAMENTAL EVIDENCE PRINCIPLES AND CONCEPTS

PROFESSOR SCHWARTZ: When looking at evidentiary issues, one should begin with Federal Rules 401<sup>3</sup>, 402<sup>4</sup>, and 403.<sup>5</sup> Rule 402 and 403 principles lay the groundwork for analyzing other evidentiary issues. Rule 402 makes a very basic point that to be admissible evidence must be relevant.<sup>6</sup> This premise is one of the few absolutes in the law of evidence. On the other hand, if the evidence is relevant, the best we can say is that it *may* be admissible.<sup>7</sup>

The definition of “relevance” is located in Federal Rule of Evidence 401 and is consistent with common law definitions.<sup>8</sup> The language has changed slightly from the common law which referred to “materiality.” The federal definition does not use the concept of materiality, but instead refers to facts “of consequence in determining the action . . . .”<sup>9</sup> According to Rule 401, “Evidence is relevant if: (a) it has any tendency to make a fact more or less probably than it would be without the evidence; and (b) the fact is of consequence in determining the action.”<sup>10</sup> Essentially, Rule 401 requires that there be a logical relationship between the evidence sought to be introduced and a “fact . . . of consequence” in the case.<sup>11</sup>

The facts of consequence can come from three potential places: 1) the substantive law governing the particular controversy; 2) the

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<sup>3</sup> FED. R. EVID. 401 (“Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.”).

<sup>4</sup> FED. R. EVID. 402 (“All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.”).

<sup>5</sup> FED. R. EVID. 403 (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”).

<sup>6</sup> FED. R. EVID. 402.

<sup>7</sup> See FED. R. EVID. 402 advisory committee’s note (“Not all relevant evidence is admissible. The exclusion of relevant evidence occurs in a variety of situations and may be called for by these rules, by the Rules of Civil and Criminal Procedure, by Bankruptcy Rules, by Act of Congress, or by constitutional considerations.”).

<sup>8</sup> FED. R. EVID. 401 (“‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”).

<sup>9</sup> FED. R. EVID. 401.

<sup>10</sup> *Id.*

<sup>11</sup> See *id.*

credibility of a witness; and 3) background facts that may help the jury understand how the controversy came about. The trial judge must analyze the complaint and the answer to determine the claims and defenses. Then, by turning to the substantive law governing those claims and defenses, the trial judge is able to determine the “facts of consequence.”<sup>12</sup>

HON. WILLIAM G. YOUNG: For example, in an intentional interference with contract case, there has to be “(1) the existence of a valid contract, (2) defendant’s knowledge of the contract, (3) defendant’s intentional procuring of the breach of the contract, and (4) damages.”<sup>13</sup> In a negligence case, there has to be a duty, a negligent discharge of the duty that has to be the proximate cause of some injury, and damages.<sup>14</sup> However, determining the logical relevance of evidence can sometimes be difficult.

PROFESSOR SCHWARTZ: Notwithstanding that difficulty, the standard regarding logical relevance of evidence is not very demanding. The rule itself says, “any tendency.”<sup>15</sup> It is not required that the evidence *necessarily* prove the fact.<sup>16</sup> For example, in *United States v. Poindexter*,<sup>17</sup> the defendant was charged with drug possession.<sup>18</sup> The government agent found a container with drugs, and the defense wanted to show that the defendant’s fingerprints were not on the container.<sup>19</sup> The government objected on the ground that that circumstance did not *necessarily* prove that the defendant did not possess the drugs.<sup>20</sup> The trial judge sided with the government,<sup>21</sup> and the

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<sup>12</sup> See Robin Kundis Craig, *When Daubert Gets Erie: Medical Certainty and Medical Expert Testimony in Federal Court*, 77 DENV. U. L. REV. 69, 83 (1999) (“Because in diversity cases the underlying state-law claim or defense establishes which facts are ‘of consequence to the determination of the action,’ state law necessarily influences the court’s application of the Federal Rules.”).

<sup>13</sup> *Key Bank of N. N.Y. v. Lake Placid Co.*, 479 N.Y.S.2d 862, 868 (App. Div. 1984) (citing *Israel v. Wood Dolson Co., Inc.*, 134 N.E.2d 97, 99 (N.Y. 1956)).

<sup>14</sup> See *Lorencz v. Ford Motor Co.*, 483 N.W.2d 844, 846 (Mich. 1992) (explaining the elements of a negligence claim in a tortious action).

<sup>15</sup> FED. R. EVID. 401.

<sup>16</sup> See *id.* (requiring that the evidence make the fact merely “more probable or less probable”).

<sup>17</sup> 942 F.2d 354 (6th Cir. 1991).

<sup>18</sup> *Id.* at 357.

<sup>19</sup> *Id.* at 357-59.

<sup>20</sup> *Id.* at 358.

<sup>21</sup> *Id.* at 358-59.

circuit court reversed.<sup>22</sup>

The trial court's ruling was flawed because evidence may well be relevant even though it does not necessarily prove a "fact of consequence."<sup>23</sup> As *Poindexter* illustrates, negative evidence may sometimes be relevant; the defendant sought to show that his fingerprints were *not* on the container.<sup>24</sup> In the words of one Sixth Circuit judge, to be relevant, "evidence . . . simply has to advance the ball."<sup>25</sup> In other words, the evidence does not have to score a touchdown. Trial judges understand that attorneys typically must piece together various types of circumstantial evidence to prove a particular fact.

Federal trial judges have Rule 403 on their minds all the time.<sup>26</sup> Rule 403 is the principal means by which federal trial judges (and their state judge counterparts) control the admissibility of the evidence.<sup>27</sup> Rule 403 provides that even though the evidence is relevant, the trial judge can exclude that evidence if she finds that its probative value is "substantially outweighed by the danger of" one or more of the enumerated factors.<sup>28</sup> One factor is "unfair prejudice."<sup>29</sup> Often, out of convenience, attorneys and judges refer to the factor as "prejudice," but the modifier "unfair" is important. The Advisory Committee's Note to Rule 403 defines "unfair prejudice" as evidence that has a "tendency to [bring about a result on an] improper basis."<sup>30</sup> A prime example would be evidence bringing about a result on an emotional basis rather than through an intellectual evaluation of the

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<sup>22</sup> *Poindexter*, 942 F.2d at 359-60.

<sup>23</sup> See FED. R. EVID. 401 advisory committee's note.

<sup>24</sup> *Poindexter*, 942 F.2d. at 358, 360.

<sup>25</sup> *Dortch v. Fowler*, 588 F.3d 396, 401 (6th Cir. 2009).

<sup>26</sup> See, e.g., *United States v. Dockery*, 955 F.2d 50, 54 (D.C. Cir. 1992) ("[T]he Government's right to introduce its proof is always subject to the trial court's responsibility under . . . [Rule] 403 to limit unduly prejudicial or cumulative evidence."); *Langer v. Presbyterian Med. Ctr. of Phila.*, Nos. 87-4000, 91-1814, 88-1064, 1993 U.S. Dist. LEXIS 15118, at \*10 (E.D. Pa. Oct. 19, 1993) ("[I]n the efforts to give the parties the process they are due, one is always mindful of the tempering effect of . . . [Rule] 403 . . .").

<sup>27</sup> See *United States v. Geisen*, 612 F.3d 471, 495 (6th Cir. 2010).

<sup>28</sup> FED. R. EVID. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.").

<sup>29</sup> *Id.*

<sup>30</sup> FED. R. EVID. 403 advisory committee's note (" 'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.").

evidence.<sup>31</sup> However, it is crucial to keep in mind that even evidence that has a tendency to bring about a result on an emotional basis will be excluded only if “its probative value is *substantially* outweighed” by that specific danger.”<sup>32</sup> Some of the other factors listed in Rule 403—“confusion of the issues”<sup>33</sup> and “misleading the jury”<sup>34</sup>—seem to overlap. There also seems to be some overlap in the time factors. For example, “needlessly presenting cumulative evidence,” “wasting time,” and “undue delay,” all overlap to some extent.<sup>35</sup>

Another important aspect to note about Rule 403 is that it is an exclusionary rule.<sup>36</sup> It authorizes the judge to exclude relevant evidence,<sup>37</sup> but it is an exclusionary rule that favors admissibility by placing the burden on the opposing party to show that the probative value of the evidence is “substantially outweighed” by one or more of the countervailing factors. It is important to emphasize both that Rule 403 heavily weighs in favor of admissibility, and grants tremendous discretion to the trial judge.

In *Sprint/United Management Co. v. Mendelsohn*,<sup>38</sup> the Supreme Court stressed the fact that trial judges have very broad discretion in making Rule 403 determinations.<sup>39</sup> This discretion includes the option of only admitting certain parts of the evidence to mitigate the unfair prejudice. Another option for the judge is issuing a limiting instruction concerning the evidence.<sup>40</sup> Giving a limiting instruction to the jury may successfully focus the jury on the relevant aspects of the evidence as well as decrease the potential for unfair prejudice. On the other hand, in some circumstances, counsel for a party who is entitled to a limiting instruction may choose not to re-

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<sup>31</sup> *Id.*

<sup>32</sup> FED. R. EVID. 403 (emphasis added).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*; see, e.g., *United States v. Stevens*, 935 F.2d 1380, 1399 (3d Cir. 1991) (“In sum, we are persuaded that the probative value of [the] proposed testimony was substantially outweighed by considerations of ‘undue delay, waste of time, or needless presentation of cumulative evidence.’ ” (quoting FED. R. EVID. 403)).

<sup>36</sup> *United States v. Tse*, 375 F.3d 148, 162 (1st Cir. 2004).

<sup>37</sup> See *United States v. Schumacher*, 238 F.3d 978, 980 (8th Cir. 2001).

<sup>38</sup> 552 U.S. 379 (2008).

<sup>39</sup> *Id.* at 384 (“In deference to a district court’s familiarity with the details of the case and its greater experience in evidentiary matters, courts of appeals afford broad discretion to a district court’s evidentiary rulings.”).

<sup>40</sup> See FED. R. EVID. 105 (“If the court admits evidence that is admissible against a party or for a purpose—but not against another party or for another purpose—the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly.”).

quest one for fear that the instruction in question might highlight the evidence in question by having it singled out for the instruction.

HON. WILLIAM G. YOUNG: Another issue which arises under Rule 403 is whether evidence can be admitted when the fact has already been stipulated to. The Supreme Court, in deciding *Old Chief v. United States*,<sup>41</sup> held that if the defendant charged with being a felon in possession of a weapon stipulates to the felony, the court should not allow the prosecution to prove that felony.<sup>42</sup>

PROFESSOR MERRITT: *Old Chief* has been read quite narrowly. It is an unusual opinion with a narrow holding accompanied by broad dictum that cuts *contrary* to the holding. Following *Old Chief*'s holding, lower courts have allowed defendants to stipulate to the prior felony in felon-in-possession cases; judges have then excluded evidence of the particular felony as unfairly prejudicial.<sup>43</sup> Nevertheless, in most other prosecutions, the lower courts follow the Supreme Court's dictum that "a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the Government chooses to present it."<sup>44</sup>

If there is one other area in which trial courts might apply *Old Chief*'s holding, it could be child pornography. Defendants have argued that it is unnecessary to show this inflammatory pornography to the jury if the defendant stipulates that the material is child pornography.<sup>45</sup> Judges certainly do not like this material and might welcome a

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<sup>41</sup> 519 U.S. 172 (1997).

<sup>42</sup> *Id.* at 191-92.

<sup>43</sup> *See, e.g.,* United States v. Coleman, 552 F.3d 853, 859 (D.C. Cir. 2009); United States v. Jones, 159 F.3d 969, 979 (6th Cir. 1998); United States v. Blake, 107 F.3d 651, 653 (8th Cir. 1997). When trial judges violate *Old Chief*, however, appellate courts sometimes find the error harmless. *See, e.g.,* Jones, 159 F.3d at 979 (explaining that although the trial court erred by not accepting the defendant's admission of a prior conviction, the error was harmless in that there was still "overwhelming evidence" against the defendant in the case at bar).

<sup>44</sup> *Old Chief*, 519 U.S. at 186-87; *see id.* at 187 ("This is unquestionably true as a general matter."). For the reaction in the lower courts, *see* United States v. Jandreau, 611 F.3d 922, 924 (8th Cir. 2010), which discusses cases distinguishing *Old Chief* and notes that the defendant was "unable to direct us to any case that has expanded [*Old Chief*] beyond cases dealing with prior convictions . . ." *Id.*

<sup>45</sup> *See, e.g.,* United States v. McCourt, 468 F.3d 1088, 1091 (8th Cir. 2006) (discussing the defendant's contention that his stipulation to possession of child pornography was sufficient under *Old Chief* to exclude admission of the physical evidence offered by the prosecution); United States v. Caldwell, 586 F.3d 338, 342 (5th Cir. 2009) (discussing the defendant's claim that excerpts from videos that he previously stipulated contained child pornography

stipulation keeping it out of the courtroom. Yet, many judges do admit child pornography, recognizing its close association with the prosecution's case, and appellate courts have upheld those Rule 403 decisions.<sup>46</sup>

PROFESSOR SCHWARTZ: Rule 403 plays a vital role in the admissibility of physical evidence, that is, real and demonstrative evidence. One type of real evidence that is commonly allowed involves a party demonstrating his or her injury to the jury, on the theory that this evidence is more probative than alternative types of evidences, such as a photograph or testimony about the injury.<sup>47</sup>

A memorable example of the potential power of demonstrative evidence appears in the Hollywood film *Philadelphia*.<sup>48</sup> In a poignant and moving scene from the 1993 award-winning film, Tom Hanks' character, a successful attorney, sues his former law firm under the Americans with Disabilities Act for unfairly dismissing him due to his having AIDS. Hanks' character was fired after lesions from his illness appeared on his face. Hanks' attorney, while directly examining him, asks him to remove his shirt to show the jury the appearance of the AIDS lesions on his back; by the time of the trial, the lesions on his face had faded. Upon emphatic objection from the defense, the court allowed Hanks to bare his back. This likely had a major impact on the jury.

### III. OTHER ACT, CHARACTER, HABIT, AND OTHER SPECIAL RELEVANCE ISSUES IN CIVIL CASES

PROFESSOR MERRITT: Federal Rule of Evidence 404(a), also reflected in New York case law, states that one cannot use "[e]vidence of a person's character or a trait of character" to suggest that she acted in a specific way "on a particular [disputed] occasion."<sup>49</sup> Our justice system rests on the premise that people are accountable for the things they *do*, not for who they are or what they

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should not have been played for the jury).

<sup>46</sup> See, e.g., *United States v. Polouizzi*, 564 F.3d 142, 153 (2d Cir. 2009); *McCourt*, 468 F.3d at 1091-93.

<sup>47</sup> See *McCullough v. Filion*, 378 F. Supp. 2d 241, 254 (W.D.N.Y. 2005) (noting that demonstrative evidence is admissible so long as the issue is material).

<sup>48</sup> *PHILADELPHIA* (TriStar Pictures 1993).

<sup>49</sup> FED. R. EVID. 404(a).



*did* in the past.<sup>50</sup> Suppose, for example, that a man is a reckless drunken driver but has never hit anyone. If, on the *one day* he is sober, he happens to hit a pedestrian through no fault of his own, he should be tried based on what happened *that day*. Neither events that occurred earlier in his life nor his general character are admissible under Rule 404(a).

That rule, however, has numerous exceptions. The most important exception is Federal Rule 404(b),<sup>51</sup> which allows evidence of a party's bad acts if the proponent can show that the evidence serves a purpose other than demonstrating that the person has a bad character or a tendency to act in a bad way.<sup>52</sup> If the proponent can persuasively point to that other purpose, the court may allow evidence of the bad acts to demonstrate that other purpose.<sup>53</sup> Suppose, for example, that an elderly man falls down the stairs and dies after his son brushes against him near the top of the stairs. The state charges the son with homicide, claiming that he pushed his father. The son argues that the fall was an accident; he testifies that he stumbled against his father rather than pushing him. Rule 404(b) allows evidence of other acts to prove intent,<sup>54</sup> so the judge may allow the prosecutor to introduce evidence that the son attempted to poison his father the day before the staircase "accident." The attempted poisoning suggests that the son is a bad person, but it also suggests that the "stumble" was an intentional push.<sup>55</sup>

PROFESSOR SCHWARTZ: This issue was presented in *Sprint*. In *Sprint*, individual "X" made the decision to fire the plaintiff, and the plaintiff wanted to introduce evidence that some other decision maker, "Y" or "Z," also acted discriminatorily on other occasions.<sup>56</sup>

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<sup>50</sup> See FED. R. EVID. 404 advisory committee's note ("The circumstantial use of character evidence is generally discouraged because it carries serious risks of prejudice, confusion and delay."); DEBORAH JONES MERRITT & RIC SIMMONS, *LEARNING EVIDENCE: FROM THE FEDERAL RULES TO THE COURTROOM* 313-15 (2d ed. 2011).

<sup>51</sup> FED. R. EVID. 404(b).

<sup>52</sup> *Id.*

<sup>53</sup> See, e.g., *United States v. Jackson*, 12 F.3d 1178, 1182-83 (2d Cir. 1993) (holding that a defendant's prior trafficking of narcotics with the co-conspirator was admissible to show the defendant's intent to work with the co-conspirator).

<sup>54</sup> FED. R. EVID. 404(b).

<sup>55</sup> For further discussion of Rule 404(b), including the difficulty of distinguishing propensity from intent, see MERRITT & SIMMONS, *supra* note 50, at 342-67.

<sup>56</sup> *Sprint/United Mgmt. Co.*, 552 U.S. at 381-82.

PROFESSOR MERRITT: The trial judge in *Sprint* applied a hard and fast rule that a plaintiff can never introduce evidence that relates to one manager if she is attempting to prove that another manager engaged in the discrimination.<sup>57</sup> The Supreme Court disagreed, holding that this type of evidence “is neither *per se* admissible nor *per se* inadmissible.”<sup>58</sup> Instead, relevance depends upon the unique facts of each case: There are some cases in which the acts of one manager bear upon the intent of another, but other cases in which those acts are unrelated.<sup>59</sup> This remains a hot issue in employment discrimination cases.

With respect to character evidence, Rule 404(b) is not the only exception to the character rule. Character evidence is also admissible when it is an element of the crime or civil action.<sup>60</sup> For example, character is an element in child custody cases, because the judge must understand the character of the mother and father to determine the best interests of the child. Character is also an element in a defamation case if the allegedly defamatory statement attacks the plaintiff’s character.

Yet another exception is Rule 406, “Habit Evidence,” which allows a party to introduce evidence that a person has a habit of acting in a particular way.<sup>61</sup> A “habit” is conduct that a person or business engages in on a routine basis.<sup>62</sup> Some of these actions may seem to establish a person’s character, but they are admissible as long as they occur regularly and routinely enough to constitute habit.

The Federal Rules of Evidence create special exceptions to the general bar on character evidence for both sexual assault and child molestation cases.<sup>63</sup> These exceptions, which apply in both civ-

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<sup>57</sup> *Mendelsohn v. Sprint/United Mgmt. Co.*, 466 F.3d 1223, 1225 (10th Cir. 2006).

<sup>58</sup> *Sprint/United Mgmt. Co.*, 552 U.S. at 381.

<sup>59</sup> *Id.* at 387.

<sup>60</sup> FED. R. EVID. 404 advisory committee’s note.

<sup>61</sup> FED. R. EVID. 406.

<sup>62</sup> *See* FED. R. EVID. 406 advisory committee’s note (“[Habit] describes one’s regular response to a repeated specific situation.”).

<sup>63</sup> FED. R. EVID. 413(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.”); FED. R. EVID. 414(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.”); FED. R. EVID. 415(a) (“In a civil case in

il and criminal cases, allow a party to introduce evidence of an opponent's prior sexual assaults and child molestations. Equally important, the exceptions allow the party to argue explicitly that these acts establish the opponent's bad character. In other words, a prosecutor can argue that because the defendant previously molested children, he is more likely to be guilty of the current molestation charges.

When applying all of these character evidence rules, the judge's preliminary determination under Rule 104 is especially important. Suppose that the judge allows a plaintiff in a sex discrimination trial to introduce evidence that her manager discriminated against other women; the judge admits this evidence to prove intent under Rule 404(b). But how much evidence does the plaintiff have to introduce about these prior acts? Does she have to prove by a preponderance of the evidence that they occurred?

The answer is "no."<sup>64</sup> The plaintiff does not have to prove the prior acts of discrimination to get them before the jury; rather she only has to satisfy the *prima facie* standard, presenting enough evidence that a reasonable jury could find by a preponderance of the evidence that the prior discriminatory acts occurred.<sup>65</sup> If the plaintiff meets that standard, the judge will allow her to present evidence of the alleged prior acts of discrimination. The jury will weigh that evidence as part of its overall assessment of the plaintiff's case. The jury may find that the prior discrimination occurred, but that the manager treated the plaintiff fairly. Conversely, it may find that the prior acts were not discriminatory, but that the manager did discriminate against the plaintiff. The plaintiff must prove her own discrimination case by a preponderance of the evidence. In doing that, she can introduce other acts of alleged discrimination, as long as a reasonable jury could find that those acts more likely than not occurred.

**PROFESSOR SCHWARTZ:** The defendant in such a hypothetical may then seek to introduce evidence to show he did not discriminate in those prior cases, presenting the unwelcoming danger of

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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 . . .").

<sup>64</sup> See FED. R. EVID. 104(b) (requiring merely that evidence introduced be "sufficient" to show that the incident actually happened.)

<sup>65</sup> *Bourjaily v. United States*, 483 U.S. 171, 181 (1987); *Huddleston v. United States*, 485 U.S. 681, 687 (1988). See generally MERRITT & SIMMONS, *supra* note 50, at 406-23.

the trial judge having to conduct several mini-trials.

PROFESSOR MERRITT: Let us turn briefly now to the rape shield rule. This rule operates in the opposite direction from the exceptions we have been discussing. It reinforces the bar on character evidence by preventing parties from introducing a particular brand of character evidence.<sup>66</sup> A male defendant charged with rape, for example, cannot argue that the female complainant consented because she was a “loose” woman who in the past enjoyed sexual relations with other men. Most judges today would not consider that evidence relevant; the fact that a woman consented to sexual relations with one man has no bearing on whether she agreed to have similar relations with a different man. But as a backstop to that, the rape shield rule prohibits this type of character evidence about rape victims.

Courts and legislatures developed rape shield rules for criminal cases, but the federal rules—and most state rules—apply the prohibition to civil cases as well.<sup>67</sup> Suppose, for example, that a plaintiff sues her employer for sexual harassment. The employer may respond that the plaintiff welcomed sexual comments in the workplace. To support that defense, some defendants will try to introduce acts of the plaintiff’s sexual behavior outside of the workplace. In a federal civil case, the defendant can introduce that type of evidence only if the probative value of the evidence substantially outweighs the prejudice to the plaintiff.<sup>68</sup> Many judges have struck that balance by holding that actions outside the workplace on the plaintiff’s own time are unlikely to be sufficiently probative to be admitted.<sup>69</sup> Potential plain-

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<sup>66</sup> See FED. R. EVID. 412(a) (“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.”).

<sup>67</sup> See, e.g., FED. R. EVID. 412(a) (“[E]vidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct . . . .”); CAL. EVID. CODE § 783 (governing admissibility of the plaintiff’s sexual conduct “[i]n any civil action alleging conduct which constitutes sexual harassment, sexual assault, or sexual battery . . . .”).

<sup>68</sup> FED. R. EVID. 412(b)(2).

<sup>69</sup> See, e.g., *B.K.B. v. Maui Police Dep’t*, 276 F.3d 1091, 1105 (9th Cir. 2002) (excluding the plaintiff’s outside-of-work activities); *Wolak v. Spucci*, 217 F.3d 157, 160 (2d Cir. 2000) (same); *Excel Corp. v. Bosley*, 165 F.3d 635, 641 (8th Cir. 1999) (“[W]e cannot find that the district court abused its discretion in refusing to admit into the record, evidence of alleged sexual relations between Bosley and Johnson outside the workplace.”); *Rodriguez-Hernandez v. Miranda-Velez*, 132 F.3d 848, 856 (1st Cir. 1998) (holding that evidence of the plaintiff’s relationship with a married man was not admissible because it took place outside

tiffs, in other words, can swear at home without giving up objections to harassing language at work.

PROFESSOR SCHWARTZ: There are two issues present. One is the admissibility of evidence of a person's character, which under the Federal Rules of Evidence is usually done by reputation or opinion evidence.<sup>70</sup> New York, however, allows *only* reputation evidence to prove character.<sup>71</sup> The second issue, which should be analyzed separately, is the admissibility of other acts.<sup>72</sup> One should separate these two issues because they are often treated separately in the rules and by the courts.<sup>73</sup> Even in the rape shield rule, there are separate references to sexual behavior and sexual predisposition.<sup>74</sup> Additionally, there is a specific reference in the rules to evidence of an alleged victim's reputation.<sup>75</sup> Therefore, even though there are obvious relationships between other act and character evidence, it is helpful to separate them for the purposes of analysis.

PROFESSOR MERRITT: Rule 408, which governs statements made during settlement discussions, is the next Article IV rule we will examine. Rule 408 forbids parties from using statements made during settlement negotiations to prove liability.<sup>76</sup> There are four key points about this rule. First, the rule bans these statements

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the workplace).

<sup>70</sup> FED. R. EVID. 405(a).

<sup>71</sup> See *People v. Bouton*, 405 N.E.2d 699, 703 (N.Y. 1980) ("[R]eputation . . . is the raw material from which that character may be established.").

<sup>72</sup> See FED. R. EVID. 404(b).

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.

*Id.*

<sup>73</sup> Compare FED. R. EVID. 404(a) (describing character evidence), with *id.* 404(b) (describing "[e]vidence of other crimes, wrongs, or acts").

<sup>74</sup> Compare FED. R. EVID. 412(a)(1) (describing a victim's prior sexual behavior as inadmissible), with *id.* 412(a)(2) (describing a victim's sexual predisposition as inadmissible).

<sup>75</sup> See FED. R. EVID. 412(b)(2) ("Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.").

<sup>76</sup> FED. R. EVID. 408(a).

no matter who offers them. Sometimes a party wants to offer his own statement from a settlement negotiation because he believes it shows good faith; Rule 408, however, prohibits the party from doing this.<sup>77</sup>

Second, note that Rule 408 only protects statements made during compromise negotiations.<sup>78</sup> Unilateral offers from one side to the other before lawyers are even involved do not constitute settlement negotiations.<sup>79</sup> Often in employment discrimination cases, the employer will offer the employee a tempting deal at the same time the employee is terminated. The employee can usually use the employer's offer as evidence at trial, because it occurred before the onset of any settlement discussions.<sup>80</sup>

Third, Rule 408 *does* allow introduction of statements from settlement negotiations when a party offers the statement for some purpose other than proving liability.<sup>81</sup> One of the most common "other" purposes is bias. If two different plaintiffs sue the same defendant, and the defendant settles with one of the plaintiffs, that plaintiff may be willing to come into court and testify on behalf of the defendant. In this situation, the other plaintiff can introduce evidence of the settlement in order to show that the witness who settled her claim may be biased.<sup>82</sup> Depending on how her settlement was structured, the witness may even have a financial interest in helping the defendant avoid liability to other plaintiffs.

Finally, Rule 408 protects discussions in civil settlements from admission in both civil and criminal trials.<sup>83</sup> When a drunk driver negotiates a civil settlement with an injured victim, the driver's statements during that negotiation are not admissible in any criminal trial.<sup>84</sup> The only exception is when a party's civil negotiation occurs

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<sup>77</sup> *Id.* (evidence is "not admissible on behalf of any party").

<sup>78</sup> *Id.* 408(a)(2) ("conduct or statements made in compromise negotiations" are "not admissible").

<sup>79</sup> *See, e.g.,* Lee Middleton Original Dolls, Inc. v. Seymour Mann, Inc., 299 F. Supp. 2d 892, 895 (E.D. Wis. 2004) (determining that one party's unilateral offer was not a compromise negotiation for purposes of the rule).

<sup>80</sup> *See, e.g.,* Seasonwein v. First Montauk Secs. Corp., 324 Fed. Appx. 160, 162 (3d Cir. 2009); Cassino v. Reichhold Chems., Inc., 817 F.2d 1338, 1342-43 (9th Cir. 1987).

<sup>81</sup> FED. R. EVID. 408(b).

<sup>82</sup> *See id.* (listing bias as a permissible purpose).

<sup>83</sup> FED. R. EVID. 408 advisory committee's note; United States v. Davis, 596 F.3d 852, 860 (D.C. Cir. 2010).

<sup>84</sup> *See* United States v. Bailey, 327 F.3d 1131, 1146 (10th Cir. 2003) (holding that Rule 408 bars settlement discussions in criminal cases because, in part, "the potential prejudicial effect of the admission of evidence of a settlement can be . . . devastating to a criminal de-

with a government agency.<sup>85</sup> Under those circumstances, statements from the civil settlement negotiations *are* admissible in any criminal trial. This is very important to remember if you represent a client who is under investigation by the Securities and Exchange Commission; the Federal Drug Administration; or any other federal, state, or local agency acting in its regulatory authority. Statements made during those settlement discussions are admissible in any criminal trial.

#### IV. HEARSAY AND ITS EXCEPTIONS

PROFESSOR SCHWARTZ: Hearsay is any out-of-court statement—anything other than what was said on the witness stand—that is offered in court “to prove the truth of the matter asserted” in the statement.<sup>86</sup> Therefore, an out-of-court statement is not hearsay when it is not offered in court to prove the truth of the fact asserted but rather is only offered to prove that the out-of-court statement was made.<sup>87</sup>

HON. WILLIAM G. YOUNG: The trial judge must then ask himself whether the mere fact that the statement was made is independently relevant.<sup>88</sup> Where a witness hears the event and then comes to court to testify, there is not a hearsay problem because one can cross-examine him about his ability to hear, how far he was away, what the ambient background noise was, etc.<sup>89</sup> One can also cross-examine him as to his bias and motive for testifying.<sup>90</sup> However, if one hears an event, speaks about it, and is overheard by another person who then becomes the witness at trial, the situation will be different.<sup>91</sup> There would be a hearsay problem in the second scenario because one cannot cross-examine the out-of-court declarant.<sup>92</sup>

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fendant . . .”); *United States v. Meadows*, 598 F.2d 984, 989 (5th Cir. 1979) (“Rule 408 . . . govern[s] the admission of related civil settlement negotiations in a criminal trial.”).

<sup>85</sup> FED. R. EVID. 408(a)(2).

<sup>86</sup> FED. R. EVID. 801(c).

<sup>87</sup> *See, e.g., Anderson v. United States*, 417 U.S. 211, 220 (1974).

<sup>88</sup> *Id.* at 221.

<sup>89</sup> *See United States v. Deeb*, 13 F.3d 1532, 1539 (11th Cir. 1994) (discussing the uses of cross-examination).

<sup>90</sup> *Id.* (requiring that “the cross-examination probe[] the witness’s motive or inducement to lie . . .”).

<sup>91</sup> *See United States v. Daniels*, 572 F.2d 535, 539 (5th Cir. 1978) (discussing the differences between single level and double level hearsay).

<sup>92</sup> *Id.*

There are four different categories of exceptions to hearsay, each of which depend on the status of the declarant.<sup>93</sup> In the first category, the declarant is the witness.<sup>94</sup> In the second category, the declarant is the adverse party and this is governed by Rule 801(d)(2).<sup>95</sup> The third category, which comes directly from the common law, contains the “reliable exceptions” and is governed by Rule 803.<sup>96</sup> The fourth category contains the “necessary exceptions.”<sup>97</sup> To fall within the fourth category, one must first prove that the declarant is unavailable.<sup>98</sup>

PROFESSOR SCHWARTZ: If the out-of-court statement is admissible under Rule 801, it is a hearsay exemption.<sup>99</sup> One exemption which has been occurring frequently in civil cases is the admissibility of an employee’s statement against her employer, referred to as a “vicarious admission.”<sup>100</sup> The proponent has two possibilities for introducing the employee’s statement against the employer.

The first, Rule 801(d)(2)(C), is a codification of the common law “speaking authority” rule.<sup>101</sup> Under this rule, if the employee has the authority to speak about the particular subject, then the employee’s statement is admissible against the employer, and this is accepted in New York law as well.<sup>102</sup> Not accepted in New York, but accepted under the Federal Rules of Evidence, is the second possibility. Where the proponent is not able to show that the employee had speaking authority, then under Rule 801(d)(2), the proponent may be

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The admission of double level hearsay . . . creates far greater obstacles to the accused’s right to confront the witnesses against him than does the admission of single level hearsay. When a witness’ testimony constitutes single level hearsay, the defense attorney can cross-examine that witness concerning the reliability and good faith of the source of the evidence against the defendant. When a witness’ testimony constitutes double level hearsay, however, even this safeguard is unavailable. This situation certainly creates grave possibilities for abuse.

*Id.*

<sup>93</sup> FED. R. EVID. 801(d).

<sup>94</sup> *Id.* 801(d)(1).

<sup>95</sup> *Id.* 801(d)(2).

<sup>96</sup> FED. R. EVID. 803.

<sup>97</sup> FED. R. EVID. 804(b).

<sup>98</sup> *Id.*

<sup>99</sup> *Bourjaily*, 483 U.S. at 187.

<sup>100</sup> *See, e.g., Dunnom v. Bennett*, 290 F. Supp. 2d 860, 870-71 n.1 (S.D. Ohio 2003).

<sup>101</sup> FED. R. EVID. 801(d)(2)(C).

<sup>102</sup> *Id.*; N.Y.C.P.L.R. 4517 (McKinney 2001).



able to convince the judge that the employee made a statement that concerned the subject matter of the employment.<sup>103</sup> In addition to the requirement that the statement must be concerned with the subject matter of the employment, the statement must also be made by the employee during the time he is employed.<sup>104</sup> For example, if an automobile repair mechanic made a statement about the brakes on a truck, the employee's statement may be admitted against the employer because the statement was about the subject matter of the employment, even if the employee does not have the authority to speak. However, New York law does not recognize this second possibility.<sup>105</sup>

This issue recently arose in the Barry Bonds prosecution.<sup>106</sup> Barry Bonds' trainer, Greg Anderson, who refused to testify in court, made some out-of-court statements that the prosecutor wanted to introduce.<sup>107</sup> The Ninth Circuit held that the statement was not admissible against Barry Bonds because the trainer was neither an agent nor an employee of Barry Bonds, but instead was an independent contractor.<sup>108</sup> This raises the additional issue of how one would determine whether the declarant is an agent or employee of the party against whom the statement is sought to be introduced.<sup>109</sup> In Barry Bonds' case, the Ninth Circuit turned to common law principles and relied on the Third Restatement of Agency for the conclusion that an athletic trainer is to be considered an independent contractor, not an employee.<sup>110</sup>

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<sup>103</sup> FED. R. EVID. 801(d)(2)(D).

<sup>104</sup> *Id.*

<sup>105</sup> *See* *Loschiavo v. Port Auth. of N.Y. and N.J.*, 448 N.E.2d 1351, 1352 (1983) (accepting statements made only "within the scope of [an employee's] authority").

<sup>106</sup> *United States v. Bonds*, 608 F.3d 495 (9th Cir. 2010).

<sup>107</sup> *Id.* at 498.

<sup>108</sup> *Id.* at 504.

<sup>109</sup> *Id.* at 504-07 (discussing ten factors enumerated in the Second Restatement of Agency that a court should consider in their totality, with no one factor being dispositive or having any particular importance over another).

<sup>110</sup> *Id.* at 504-05.

Although the parties presented this issue primarily under the Second Restatement, we have independently reviewed the Third Restatement, which abandons the term independent contractor. . . . We find nothing in the later Restatement's provisions that would materially change our analysis or cause us to reach a different result than the district court.

*Bonds*, 608 F.3d at 504-05.

PROFESSOR MERRITT: One of the most widely used hearsay exceptions is state of mind. In one sense, this exception is quite broad. It allows a party to introduce the declarant's then-existing state of mind, emotion, sensation, or physical condition.<sup>111</sup> Examples of admissible statements are: "I'm hungry," "I'm sleepy," "I'm bored," "I'm scared," and any other reference to what is occurring inside the person's mind. But in another sense, this exception is quite narrow: It does not allow the party to admit the reasons *behind* the speaker's state of mind.<sup>112</sup>

A classic example of this occurs when a homicide victim makes a statement a few days or weeks before the homicide, indicating that she was afraid of the person later accused of the killing. Suppose, for example, that a woman was murdered, and her husband was charged with the crime. The victim's best friend may want to testify that just a week before the murder, the victim said: "I feel so afraid, because my husband acts like he will kill me."

Under the state-of-mind exception, a judge would admit the first part of this statement because the friend is describing the victim's mental state at the time she spoke—she was afraid.<sup>113</sup> But the second part of the statement is not admissible because the *reason* for the victim's fear is not part of her state of mind.<sup>114</sup> The prosecutor can draw some advantage from the first part of the statement: The victim's fear may fit with other evidence to suggest that she feared her husband. But the most useful part of the victim's statement—from the prosecutor's perspective—is not admissible.

A hypothetical based loosely on the facts in *Leelanau Wine Cellars, Ltd. v. Black & Red, Inc.*<sup>115</sup> illustrates a different attempt to use the state-of-mind exception. In that case, one wine company sued another for trademark infringement. Both companies used the word "Leelanau," which refers to a Michigan peninsula, on their products. Imagine that as part of the trademark case, the plaintiff's manager testifies that a customer told him, "I know your Leelanau

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<sup>111</sup> FED. R. EVID. 803(3).

<sup>112</sup> See *id.* (excluding statements derived from memory).

<sup>113</sup> Cf. *United States v. Joe*, 8 F.3d 1488, 1491 (10th Cir. 1993) (admitting deceased wife's statement to doctor that she was "afraid sometimes").

<sup>114</sup> *Id.* at 1492-93 (holding that the wife's explanation of why she was afraid did not fall within the state-of-mind exception) (citing *United States v. Rodriguez-Pando*, 841 F.2d 1014, 1019 (10th Cir. 1988)).

<sup>115</sup> 502 F.3d 504 (6th Cir. 2007).

wine! I tried it at the Michigan State Fair.”<sup>116</sup> The plaintiff wants to introduce this statement because it did *not* sell its wine at the fair; only the defendant sold wine at the fair. The plaintiff, therefore, will argue that the statement shows customer confusion, an element of trademark infringement.

The customer’s statement occurred outside the courtroom; he is not present to defend or explain the statement. If the plaintiff introduces the customer’s statement for the truth of the matter asserted—that he tried a wine named “Leelanau” at the state fair—then it is classic hearsay.<sup>117</sup> The plaintiff may argue that the statement expresses the customer’s state of mind, but that exception will not serve the plaintiff’s purposes. The first part of the statement, “I know your Leelanau wine,” is admissible as an expression of the customer’s contemporaneous state of mind; at the time he spoke, the customer was remembering an image of the wine. But the second part of the statement—“I tried it at the Michigan state fair”—is not admissible under this (or any other) hearsay exception. The second part of the statement offers the *reason* why the customer remembered the wine; recall that reasons are not admissible under the state-of-mind exception.

But the trademark plaintiff has another option here. The winery can offer the customer’s statement, not to prove the truth of the matter asserted (that a Leelanau wine was sold at the Michigan State Fair), but to show that the customer *believed* that the plaintiff’s wine was sold at the fair. When combined with other evidence establishing that only the defendant’s wine appeared at the fair, this belief will support the plaintiff’s argument that customers confused the two wines.<sup>118</sup>

This example illustrates that although reasons are not admissible under the state-of-mind exception, parties sometimes can achieve

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<sup>116</sup> In the actual case, the plaintiff relied upon similar anecdotes. See *Leelanau Wine Cellars*, 502 F.3d at 519 (discussing testimony about a business association that believed that the plaintiff was participating in a food and wine festival, when the defendant was the actual participant).

<sup>117</sup> FED. R. EVID. 801(C) (“‘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.”).

<sup>118</sup> See *Leelanau Wine Cellars*, 502 F.3d at 515 (explaining how liability for trademark infringement hinges on whether or not the “‘defendant’s use of the disputed mark is likely to cause confusion among consumers regarding the origin of the goods offered by the parties.’” (quoting *Daddy’s Junky Music Stores, Inc. v. Big Daddy’s Family Music Ctr.*, 109 F.3d 275, 280 (6th Cir. 1997))).

the same result by introducing a state-of-mind expression to show that the speaker believed a particular matter—regardless of whether it was true. This will not work in every case, but the technique is particularly helpful when an out-of-court declarant's beliefs are relevant to the case.

The state-of-mind exception includes another twist that troubles many lawyers. Statements that are forward-looking, which talk about one's future plans, are admissible under this exception.<sup>119</sup> The declarant's expressed intention, in turn, offers circumstantial evidence that the declarant did, in fact, do that thing. The Supreme Court allowed this use of the state-of-mind exception in the infamous nineteenth-century case, *Mutual Life Insurance Co. of New York v. Hillmon*,<sup>120</sup> and the Federal Rules preserve that ruling.<sup>121</sup>

A more difficult question arises when the declarant includes another person in the stated plan. Suppose, for example, that Kate tells her mother that she plans to meet John at the gym. If Kate is murdered at the gym and the state charges John with the crime, the prosecutor will want to admit Kate's out-of-court statement as circumstantial evidence that she met John at the place she was murdered. The statement, however, offers questionable evidence that Kate actually met John at the gym: Kate might have misunderstood John's intent, John might have intended to meet Kate but changed his mind, John might have lied to Kate, or John might have planned to meet Kate but got stuck in traffic. One person's statement about another person's intent is much less reliable than the person's statement about her own intent.

The Supreme Court in *Hillmon* nonetheless held that this type of statement, one that expresses a plan involving a third party, is admissible.<sup>122</sup> The common law, therefore, included references to a

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<sup>119</sup> FED. R. EVID. 803(3). However, a judge may conclude that some of these statements are so tentative that they are inadmissible under FED. R. EVID. 403. A declarant who makes the statement in March that he plans to go shopping in June, for example, may not have made a sufficiently probative statement about what he will be doing in June. But as a general matter, a declarant's statement about what he personally intends to do is admissible under the state-of-mind exception.

<sup>120</sup> 145 U.S. 285, 299-300 (1892) (holding that decedent's letters, which expressed an intent to do an act in the future, were admissible evidence to show that the act was actually done).

<sup>121</sup> FED. R. EVID. 803 advisory committee's note ("The rule of *Mutual Life Insurance Co. v. Hillmon*, . . . allowing evidence of intention as tending to prove the doing of the act intended, is, of course, left undisturbed.").

<sup>122</sup> *Hillmon*, 145 U.S. at 299-300. The issue in *Hillmon* centered on whether a body found

third party's actions within the state-of-mind exception. Federal Rule of Evidence 803(3) may have intended to reverse this part of *Hillmon*.<sup>123</sup> But the rule's language is ambiguous, and several federal courts have admitted references to third parties under the state-of-mind exception.<sup>124</sup>

Some of these courts, including the Second Circuit, do require corroborating evidence before admitting *Hillmon*-like references to third parties.<sup>125</sup> The party offering evidence under the state-of-mind exception does not have to prove beyond a reasonable doubt that the third party took the planned action, but the party must offer some evidence of the third party's action apart from the hearsay statement.<sup>126</sup>

PROFESSOR SCHWARTZ: The New York State courts take this approach as well.<sup>127</sup>

PROFESSOR MERRITT: I will discuss one other common hearsay exception: statements made for the purpose of medical diagnosis or treatment.<sup>128</sup> This exception is gaining prominence because prosecutors often use these statements in domestic violence and child abuse cases.<sup>129</sup> If the victim refuses to testify—or is too young to testify competently—the prosecutor may rely upon statements that the victim made to a doctor as a way of proving what types of injuries

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at Crooked Creek, Kansas, was that of an insured man named Hillmon or that of another man named Walters. *Id.* at 294. The insurance company claimed that the body belonged to Walters and sought to introduce letters that Walters allegedly wrote to his fiancée. *Id.* In those letters, Walters mentioned that he intended to travel with Hillmon in a direction that included Crooked Creek. *Id.* The Court held that the letters—including the references to Hillmon—were admissible hearsay because they expressed Walters' state of mind. *Id.* at 295.

<sup>123</sup> See H.R. REP. NO. 93-650, at 13 (1973), reprinted in 1974 U.S.C.C.A.N. 7075, 7087.

<sup>124</sup> See, e.g., *United States v. Barraza*, 576 F.3d 798, 804-05 (8th Cir. 2009); *United States v. Pheaster*, 544 F.2d 353, 375-80 (9th Cir. 1976).

<sup>125</sup> See, e.g., *United States v. Best*, 219 F.3d 192, 198-99 (2d Cir. 2000) (relying upon corroborating testimony to admit hearsay statement referring to third party's intent).

<sup>126</sup> *Id.* at 199.

<sup>127</sup> See, e.g., *People v. James*, 717 N.E.2d 1052 (N.Y. 1999) (discussing the corroboration standard New York takes with respect to hearsay testimony).

<sup>128</sup> FED. R. EVID. 803(4).

<sup>129</sup> See, e.g., *United States v. Renville*, 779 F.2d 430, 436-37 (8th Cir. 1985) ("Statements by a child abuse victim to a physician during an examination that the abuser is a member of the victim's immediate household are reasonably pertinent to treatment."). See generally MERRITT & SIMMONS, *supra* note 50, at 533-35 (discussing application of Rule 803(4) to domestic violence and child abuse cases).

were suffered.<sup>130</sup> Even when the victim testifies, statements to medical providers offer important supporting evidence. Civil litigants also use these statements to substantiate claims of abuse.

The medical treatment exception admits hearsay statements made for the purpose of medical diagnosis or treatment if the statement was “reasonably pertinent” to the diagnosis or treatment.<sup>131</sup> The exception rests on the assumption that patients are unlikely to lie to medical providers when seeking needed treatment. The “reasonably pertinent” restriction stems from that rationale. Doctors cannot report all statements made by talkative patients; they can only recount ones that were “reasonably pertinent” to the treatment.

This caveat is not as restrictive as lawyers sometimes believe. If a patient seeks emergency treatment for a broken nose, the doctor must understand how the injury occurred to treat the patient effectively. Fractures from a fall may differ from those stemming from a fist fight. Equally important, the doctor must determine whether the current injury relates to an underlying pathology. If the broken nose resulted from a fall, the patient may be developing muscle weakness, neurologic impairment, low blood pressure, or a host of other diseases that require treatment. Many facts are reasonably pertinent to medical treatment.

On the other hand, if a third party caused the patient’s injury, the third party’s *identity* usually is not reasonably pertinent to medical treatment. The doctor may need to know that the broken nose stemmed from a fall and that the patient fell because *someone* pushed her, because both of these facts help the doctor treat the nose and any underlying pathology. However, the attacker’s identity is less clearly linked to medical treatment. In domestic violence or child abuse cases, therefore, this exception traditionally had limited utility: It allowed evidence identifying the injury, but not the attacker.<sup>132</sup>

Two recent trends are expanding this exception, making it more powerful in domestic violence and child abuse cases. First, the exception applies to psychological treatment as well as physical care.<sup>133</sup> Suppose that a battered wife visits her psychotherapist and

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<sup>130</sup> See, e.g., *United States v. Nick*, 604 F.2d 1199, 1201-02 (9th Cir. 1979) (admitting a doctor’s testimony of a child’s declarations to establish cause of injury, without the name of the assailant, because such testimony is expressly allowable under the Federal Rules of Evidence).

<sup>131</sup> FED. R. EVID. 803(4).

<sup>132</sup> See, e.g., *Nick*, 604 F.2d at 1201-02.

<sup>133</sup> See, e.g., *United States v. Newman*, 965 F.2d 206, 210 (7th Cir. 1992).

says, “My husband hit me with a bottle, and I keep re-imagining the scene—I can’t get it out of my head.” This statement will help the therapist diagnose post-traumatic stress disorder in the wife. To understand and treat that stress, moreover, the therapist must know the identity of the attacker. A husband’s repeated attacks have a different psychological effect than a one-time mugging by a stranger. When using the medical treatment exception to admit statements made to psychologists, some courts have included the perpetrator’s identity, finding it “reasonably pertinent” to treatment.<sup>134</sup>

The second recent trend stems from medicine itself. Doctors now view victims of child abuse or domestic violence as patients suffering from distinctive diseases.<sup>135</sup> Abuse incidents, doctors have argued, are not isolated situations; they reflect an ongoing disease that victims and the health care system must tackle together.<sup>136</sup> Prosecutors have adapted this argument for the courtroom, contending that an abuser’s identity is relevant to the victim’s medical treatment. A child cannot be treated for sexual abuse without uncovering the perpetrator, stopping the ongoing abuse, and addressing the child’s relationship to the perpetrator. A few courts have accepted this argument in child abuse cases, admitting the abuser’s identity under the medical treatment exception.<sup>137</sup> The argument has been less successful in domestic violence cases, but one court accepted it after the abuse victim died from her injuries.<sup>138</sup>

PROFESSOR SCHWARTZ: The business record exception is another exception to the rule against hearsay, and the elements of this

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<sup>134</sup> See, e.g., *United States v. Kappell*, 418 F.3d 550, 556-57 (6th Cir. 2005) (admitting identification that victims of child sexual abuse made to a psychotherapist while obtaining treatment); *United States v. McHorse*, 179 F.3d 889, 900-01 (10th Cir. 1999) (admitting identifications that victim of child molestation made to physician and psychotherapist; noting reliability of these statements when made while seeking treatment).

<sup>135</sup> See Sherry A. Falsetti, *Screening and Responding to Family and Intimate Partner Violence in the Primary Care Setting*, 34 PRIMARY CARE: CLINICS IN OFFICE PRACTICE 641, 642 (2007) (describing family and intimate partner violence as a disease with “both acute and chronic health effects.”).

<sup>136</sup> *Id.* (advocating screening and more aggressive treatment of family violence diseases); Robert S. Thompson & Richard Krugman, *Screening Mothers for Intimate Partner Abuse at Well-Baby Care Visits*, 285 J.A.M.A. 1628, 1630 (2001) (“The time to act is now. If intimate partner abuse were a new cancer affecting one quarter of adults, the money would be found. It should be found now for family violence.”).

<sup>137</sup> See, e.g., *United States v. Balfany*, 965 F.2d 575, 579-80 (8th Cir. 1992); *United States v. George*, 960 F.2d 97, 99-100 (9th Cir. 1992).

<sup>138</sup> *Joe*, 8 F.3d at 1495.

exception are listed in Rule 803(6).<sup>139</sup> The New York Court of Appeals addressed a recurring issue involving this exception in *Johnson v. Lutz*,<sup>140</sup> where it answered the question of what happens when the information on the business record comes from someone outside of the business entity who did not have a business duty to transmit the information.<sup>141</sup> Courts consistently hold that under these circumstances, the admissibility of the record depends on whether there is a hearsay exemption or exception that covers that transmittal of the information.<sup>142</sup> The rationale is that such an exemption or exception would substitute for the absent business duty to transmit. Therefore, in these circumstances, the admissibility of the business record depends upon the proponent being able to piece together two hearsay exceptions (i.e., the business record exception and an exception or exemption for the transmittal of the information).

Under the Federal Rules of Evidence, there is a separate public records hearsay exception.<sup>143</sup> Sometimes, when government records are introduced, federal judges refer to the business record rule as though the public record exception did not even exist. However, there is, in fact, a separate public record exception, which encompasses a specific hearsay exception for governmental investigatory reports.<sup>144</sup> The key to the admissibility of these investigatory reports is their “trustworthiness.”<sup>145</sup> The Advisory Committee’s note to this rule lists some of the factors that a judge should consider in determining the reliability of an investigatory report: the timeliness of the investigation, the expertise and experience of the investigators, the procedures that the investigators used, and whether there are motivational problems, such as whether the investigation was undertaken and the report prepared with an eye toward litigation.<sup>146</sup> This is an especially important hearsay exception because if the report is

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<sup>139</sup> FED. R. EVID. 803(6).

<sup>140</sup> 170 N.E. 517 (N.Y. 1930).

<sup>141</sup> *Id.* at 518 (stating that the memorandum was not admissible because it was not made during the normal course of business).

<sup>142</sup> *Hochhauser v. Elec. Ins. Co.*, 844 N.Y.S.2d 374, 377 (App. Div. 2007) (stating that a statement is admissible only if the evidence “‘falls within one of the recognized exceptions to the hearsay rule . . . ’” and it is reliable).

<sup>143</sup> FED. R. EVID. 803(8).

<sup>144</sup> *Id.* 803(8)(C).

<sup>145</sup> *Id.*; *Fox v. United States*, 934 F. Supp. 1133, 1137 (N.D. Cal. 1996) (admitting the Coast Guard investigatory report into evidence if it meets the “trustworthiness standard” set forth by the Supreme Court).

<sup>146</sup> *Colvin v. United States*, 479 F.2d 998, 1001 n.3 (9th Cir. 1973).



admissible, it can carry great weight with the jury since it carries the imprimatur of a governmental agency.

In *Beech Aircraft Corp. v. Rainey*,<sup>147</sup> the Supreme Court held that an investigatory report containing findings of fact pursuant to an investigation authorized by law may be admissible even if it contains a conclusion or an opinion.<sup>148</sup> There are circuit court decisions that interpret the *Beech Aircraft* decision to apply only to factual conclusions but *not* to legal conclusions.<sup>149</sup> However, it is not always clear whether a conclusion is factual or legal. For example, if a report states that a police officer's use of force was unreasonable, it may be debatable whether such a statement is a factual conclusion or a legal conclusion. The answer will likely depend on the context in which the word "reasonable" was used, i.e., whether it was used in a lay factual sense or in a legal sense.

An investigatory report is potentially admissible in civil cases and in criminal cases when the criminal defendant offers it into evidence, but not when the government does so.<sup>150</sup> Lastly, this hearsay exception does not admit all of the underlying data and information upon which the findings of fact in the investigatory report were based.<sup>151</sup> Another hearsay exception or exemption would have to cover the underlying data or information.<sup>152</sup>

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<sup>147</sup> 488 U.S. 153 (1988).

<sup>148</sup> *Id.* at 162.

<sup>149</sup> *Sullivan v. Dollar Tree Stores, Inc.*, 623 F.3d 770, 777 (9th Cir. 2010) ("Pure legal conclusions are not admissible as factual findings."); *Hines v. Brandon Steel Decks, Inc.*, 886 F.2d 299, 303 (11th Cir. 1989) ("Legal conclusions are inadmissible because the jury would have no way of knowing whether the preparer of the report was cognizant of the requirements underlying the legal conclusion and, if not, whether the preparer might have a higher or lower standard than the law requires."); *Zeus Enters. v. Alphin Aircraft, Inc.*, 190 F.3d 238, 243 (4th Cir. 1999) (holding that the evidence was not admissible under the investigatory hearsay exception because the evidence "involved no factual determinations and was strictly a legal ruling").

<sup>150</sup> Ross P. Masler, *The Second Circuit Review—1987-1988 Term: Evidence: The Towering Inferno: Trustworthiness of the Tower Report Under Federal Rule of Evidence 803(8)(C)*: *United States v. Durrani*, 55 BROOK. L. REV. 625, 639 (1989) (stating that evidence admitted under the public records exception are presumed admissible and the burden is on the opposing party to challenge its trustworthiness).

<sup>151</sup> *City of Cleveland v. Cleveland Elec. Illuminating Co.*, 538 F. Supp. 1257, 1271 (N.D. Ohio 1980).

<sup>152</sup> FED. R. EVID. 803(6).

## **V. CONCLUSION**

Relevance, unfair prejudice, character evidence, and hearsay are the four cornerstones of trial evidence. These principles have governed Anglo-American law for centuries, but they continue to evolve. In recent years, employment discrimination suits fueled new rulings on relevance and character evidence, while the Barry Bonds' prosecution tested the boundaries of party-opponent hearsay. New legal claims and courtroom disputes will similarly reshape evidentiary rules in the years to come.