



TAANA2015

34th Annual Meeting and Educational Conference
Philadelphia | October 1-2, 2015

SO YOU WANT TO APPEAL? SHOW ME THE EVIDENCE

Presented by:

Teressa M. Sanzio, JD, MPA, RN



DISCLAIMER

- The purpose of this presentation is to provide general information rather than advice or opinion. Accordingly, the information should not be used as a substitute for legal counsel or legal services. The information presented may not be updated as the law of evidence continues to evolve. If legal advice is required, please seek the services of an attorney.



Opening Remarks

- Courtroom rules to persuade
- Evidentiary issues are questions of law
- Appellate reversal rare
- Judge's discretion
 - RELEVANT EVIDENCE
 - RELIABLE EVIDENCE
 - LIMITATIONS TO ADMISSION OF RELEVANT EVIDENCE



RELEVANCE

FRE 401-402: General Relevance Rules

FRE 403: Judge's Discretion

Relevant evidence may be excluded if

Probative value is substantially outweighed by:

A danger of unfair prejudice

The evidence confuses the issues

The jury is misled

Danger of undue delay/wasting time

Evidence is cumulative

Old Chief v. United States, 519 U.S. 172 (1997)
(trial court's discretion is not without limits)



RELEVANCE

- Character Traits: FRE 404(a), 405
- Other Acts: FRE 404 (b)
- Habit: FRE 406
- Policy Exclusions: FRE 407-415
- Privileges: FRE 501 and State Law



FRE 404: Character, Crimes, or Other Acts

- FRE 404:
- (a) **Character Evidence**
 - (1) Inadmissible to prove that on a particular occasion the person acted in accordance with character or trait
 - (2) Admissible in CRIMINAL if Defendant opens the door
 - (3) Exceptions for Witness:
 - evidence of witness's character may be admitted under 607, 608, 609



FRE 404

- FRE 404
- 404 (b) **Crimes, Wrongs, Other Acts**
 - Inadmissible to show person acted in conformity with prior bad acts.
 - Only admissible in criminal as circumstantial proof of motive, intent, opportunity, knowledge, identity, lack of mistake.
 - FRE 404 (b) is the most reversed evidentiary rule---prejudicial---remember 403 considerations
 - *Huddleston v. U.S.* 485 U.S. 681(1988); *Dowling v. U.S.*, 493 U.S. 342 (1990)



FRE 405: Proving Character Evidence

- FRE 405: Method of Proving Character
 - (a) By Reputation or Opinion. On cross examination, court may allow inquiry into relevant specific instances of person's conduct.
 - (b) By Specific Instances of Conduct if person's character/character trait is an **essential element of the charge, claim, defense**



Habit: FRE 406

- Habit is recurring conduct in a recurring specific situation.
- Only admissible if there are enough repetitive specific incidents to constitute habit---otherwise inadmissible.



Sex Offenses/Child Molestation

- FRE 412-415
 - Victim's sexual history
 - Defendant's sexual history
 - Sexual Assault
 - Child molestation
 - Bar analysis under 404(b)
 - FRE 403 still applies to the analysis



Other Limits to RELEVANCE

- FRE 407: Subsequent Remedial Measures
- FRE 408: Compromise Offers and Negotiations
- FRE 409: Offers to Pay Medical and Similar Expenses
- FRE 410: Pleas, Plea Discussions, Related Statements
- FRE 411: Liability Insurance



Privilege

- FRE 501-502
- Policy considerations
- Developed through common law and vary among jurisdictions
- Thoroughly research applicable law with privilege issue
 - Who is the holder of the privilege?
 - What communications are protected?
 - What constitutes waiver of the privilege?
 - When does a privilege terminate, if at all



RELIABLE

- Relevant evidence should not be admitted if it is not reliable:
 - The witness offering it has no knowledge or expertise
 - The data is unreliable
 - The testimony is hearsay
 - The testimony is elicited by leading questions
 - Lack of foundation or authentication



FRE 601-615: Witnesses

- Witness competency: FRE 601-606
 - Perception, memory, sincerity, communication
- FRE 602: Requires personal knowledge
- FRE 603: Oath
- FRE 611: Mode and Order of Examining Witnesses
- FRE 612: Refreshing recollection



Impeachment Rules

- FRE 607-610 and Rehabilitation: FRE 613,
 - Bias + interest
 - Bad reputation for truthfulness: FRE 608(a)
 - Prior bad acts: FRE 608(b)
 - Prior convictions: FRE 609
 - Prior inconsistent statements: 801(d)(1); FRE 613
 - Contradictory facts
 - Treatises: 803(18)
 - Rehabilitation: *Tome v. U.S.* 513 U.S. 150 (1995)



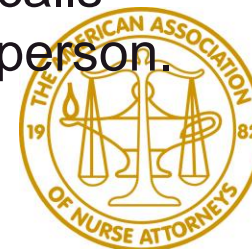
FRE 613: Witness's Prior Statements

- Impeachment: (prior testimony, affidavits, pleadings, omissions)
 - What fact to you plan to impeach W with (recommit the W to the fact)
 - Direct W to the date, time, place and circumstance of the prior statement
 - To ensure reliability, establish the statement was made--read it—and ask W to admit making it
 - If W denies and statement is important, then you must prove, at next opportunity, that W made statement



Hypothetical

- George testified on direct that left work after a hard day, and walked to car in parking lot, and noticed a baggie filled with white powder near the curb. George bent down to pick it up and then saw Defendant run across street with a knife in her hand.
- Assume Defense counsel does not cross examine George.
- Prosecutor calls George's boss and asks if George has a reputation as an honest person.
- Assume Defense counsel decides to cross George.
- George is asked if he lied on his job application.
- Assume Defense counsel attempts to introduce the job application.
- Assume Defense impeaches George on cross. Prosecutor calls George's boss to testify if George has reputation as honest person.
- Can Defense counsel ask boss if he knows George drinks?



Rehabilitation

- Redirect: Rule 613(b): Ask W to explain why or the circumstances under which the prior inconsistent statement was made.
- Rule 801(d)(1)(B) allows admission of prior consistent statements in rebuttal when cross suggests that the W's in-court statement differs from prior consistent statement because of recent reason to fabricate, or there is improper influence or motive.
- *Tome v. U.S.*: prior consistent statements being offered to rebut an implication of recent fabrication, improper influence or motive must have occurred prior to the event giving rise to the implication of recent fabrication, improper influence or motive



Opinion/Expert Testimony

FRE 701-706

- Admission of opinion/expert testimony is within judge's discretion
- SOR on appeal is an Abuse of Discretion;
See *General Electric Co. v. Joiner*, 522 U.S. 136 (1997)



Opinion Testimony

- FRE 701:
 - If a witness is not testifying as an expert, testimony in the form of opinion is limited to one that is:
 - (a) rationally based on W's perception
 - (b) helpful to understand W's testimony or determine a fact/issue
 - (c) not based on science, technical or other specialized knowledge within the scope of FRE 702



Expert Opinion Testimony

- FRE 702:
- A witness who is qualified as an expert by knowledge, skill, experience, training or education may testify in the form of an opinion or otherwise if:
 - (a) the E's scientific, technical or other specialized knowledge will help fact finder to understand evidence or to determine a fact at issue;
 - (b) testimony is based on sufficient facts/data;
 - (c) testimony is product of reliable principles and methods; and
 - (d) E has reliably applied the principles/methods to facts of case



Expert Opinion Testimony

- FRE 703: Bases of Expert Opinion Testimony:
 - Expert needs to be aware of facts or data
 - An expert may also testify to inadmissible evidence if such evidence forms the basis of the testifying expert's independent opinion.
 - But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs the prejudicial effect



Analysis of Expert Opinion

- (1) Is expert qualified to testify about scientific, technical or other specialized knowledge that will help fact-finder?
- (2) How were the opinions and conclusions reached, i.e. how is scientific validity determined? (4 *Daubert* factors)
- (3) Were the tests and methods that were used done so in a proper way?
- *Frye* Analysis: general acceptance standard---



Analysis of Expert Opinions

- Under FRE 104 (a), judge decides whether expert testimony passes evidentiary tests (FRE 401; FRE 702)
- Proponent has burden of proving right to admissibility by preponderance of evidence
- *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) applies to all federal court trials, most states
- Some states still apply *Frye* analysis (NY, PA, CA, FL) *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)
 - General acceptance standards



Analysis: Expert Testimony

- In *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), the court held that the trial judge's gate keeping obligations also apply to technical and other specialized knowledge and the trial judge may consider all or none of the *Daubert* factors or he/she may consider any other factor that applies to reliability.



Opinion of Ultimate Issue

- FRE 704:
 - (a) An opinion is not objectionable just because it embraces an ultimate issue
 - (b) **Exception:** in a criminal case, an Expert must not state an opinion about whether the defendant did or did not have a mental state/condition (intent) that constitutes an element of the crime or of a defense. Those matters are for the fact-finder.



You be the Judge

- Malpractice case: Testimony re: personal practice of expert.
- P's attorney on cross of expert: "Does SOC require a colorectal surgeon, who is interpreting an ultrasound in a complex case, to call the referring colorectal surgeon to discuss the fact that the report may not have all the information in it?"
- D attorney: "Objection. Assumes facts not in evidence."
- Court: "Overruled."
- Doctor: "The SOC does not require a phone call."
- P's attorney: "That's not my question. I didn't ask you if the SOC required a phone call in all cases. I asked you specifically in complex cases such as this---you already agreed this is a complex case---did SOC require the surgeon to call the doctor after sending the report to discuss it?"
- Doctor: "No."
- P's attorney: "That's different than your personal practice, isn't it?"
- D attorney: "Objection. Relevancy."



FRE 801-807: Hearsay

- Hearsay Defined: FRE 801-802:
 - Is there a verbal or written statement, or an assertive conduct?
 - Was the statement or conduct made out of court?
 - And is the content of the statement being introduced to prove a matter at issue in the trial?
 - If answer to all three questions is “yes,” then Hearsay
 - Inadmissible, unless it is reliable.
 - Hearsay Exceptions: 803, 804



Non-Hearsay

- Non-Hearsay: FRE 801(d):
 - Not offered to prove the truth of the matter asserted, but offered for another reason---Declarant's state of mind--- (to prove knowledge, motive, intent)
 - Offered to prove effect on Listener---Listener's state of mind (notice, fear)
 - Offered as circumstantial evidence of speakers state of mind
 - Prior statements by witnesses
 - Statements of a party opponent (party admissions)



Hearsay Exceptions

- FRE 803
 - 23 exceptions whether Declarant available or unavailable
- FRE 804: Declarant is Unavailable as Witness
- Exceptions:
 - Former testimony: 804(b)(1)
 - Dying declarations: 804(b)(2)
 - Statements against interest by non-parties: 804(b)(3)
 - Statement of personal or family history
 - Statement offered against a party that wrongfully caused Declarant's unavailability



Hearsay Exceptions

- Residual Exception: 807
 - Last resort category
 - Requirements:
 - Trustworthiness
 - Material proof
 - Most probative available proof
 - Serves interest of justice
 - Opponent must be given notice of use



FRE 901-903: Documentary Evidence/Authentication

- FRE 901: Authentication: is item what proponent claims it is?
 - If item is not properly authenticated, then inadmissible
- FRE 902: Self-authenticating evidence is admissible
- FRE 903: Subscribing Witness's Testimony: is necessary to authenticate a writing only if required by the law of the jurisdiction that governs its validity



FRE 1001-1008: Contents of Writings, Recordings, Photos:

- Foundational comments:
 - Must fairly and accurately depict something relevant;
 - Must fairly and accurately depict what witness saw
 - Use of diagrams to assist---W must be familiar with scene depicted at the relevant date and time



Judicial Notice

- FRE 201
 - Limited Scope: adjudicated facts
 - Generally known facts
 - Verifiable facts
 - Determined from sources whose accuracy cannot be questioned



Administrative Proceedings

- Informal: ALJ is decision maker
 - Weight of evidence: relevance arguments
 - Substantial evidence= one conclusion can be drawn
 - Hearsay: usually admitted but given probative weight
 - Objections required to preserve record for appeal
 - Standard of Review: De Novo if solely a question of law
 - Otherwise Standard of Review is abuse of discretion
 - Request ALJ make FOF and COL; objections to inadequate FOF and COL are waived if not requested
 - Consideration to exhaustion of administrative remedies



Appellate Review

- Preserve the record
 - Affirmative defenses must be in the Answer or waived
 - Go beyond R. Civ. P for affirmative defenses not listed (i.e. collateral estoppel, capacity to sue, imputed contributory negligence)
 - Motions to Dismiss must include all grounds for dismissal or those not raised could be waived
 - Attorneys fees
 - Frame arguments in light of SOR



Objections

- Before Trial
 - FRE 104
 - FRE 105: limiting instructions
 - MIL, Motion to Preclude Evidence
 - Pretrial Memorandum

During Trial:

Must state solid legal basis

Timely

Protect record



Objections

- What can you object to?
 - Questions
 - Answers
 - Exhibits
 - Excluded evidence (determined by MIL)
 - Irrelevant material/testimony
 - During jury selection
 - Opening and closing
 - Misconduct of counsel or court



Offers of Proof: FRE 103

- Use if evidence excluded after objection sustained
- Creates record for appellate court
- Outside jury presence
- Convince judge why evidence should be permitted, what proposed evidence will be
- Examination of witness
- Exhibits, which should be made part of record



Ethical Violations

- ABA Rules of Professional Conduct Rule 3.1
- ABA Rules of Professional Conduct Rule 3.3
- ABA Rules of Professional Conduct Rule 3.4



The End!

THANK YOU FOR YOUR ATTENTION

TERESSA M. SANZIO, RN, MPA, JD

TSANZIOLAW@GMAIL.COM

602-993-3215





