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## [Some of] Your Evidence Questions Answered

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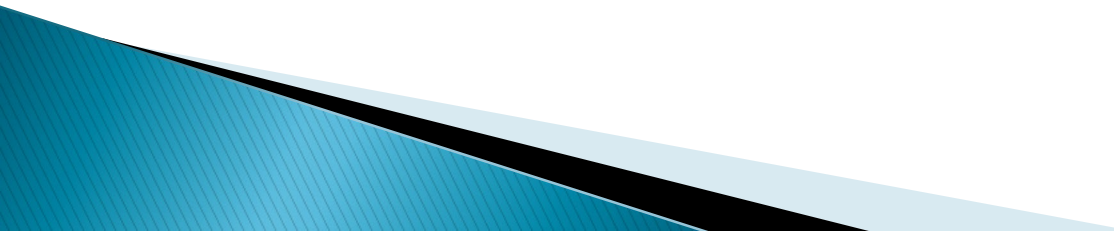
# [SOME OF] YOUR EVIDENCE QUESTIONS ANSWERED!

Judicial Conclave 2013

# MANY THANKS!

- ▶ Rebekah Gallegos
  - ▶ Jeff Hoffman
  - ▶ Jason Kerkmans
  - ▶ Jeff Mitchell
- 
- ▶ Martina Kitzmueller
  - ▶ Rod Frechette

# ROADMAP

- ▶ 11–701 Lay opinion testimony
  - ▶ Medical records as business records
  - ▶ Discovery of documents under Review  
Organization Immunity Act
  - ▶ Foundation for Social Media
  - ▶ Foundation for Intoxilyzer gas simulators
  - ▶ Character evidence
- 

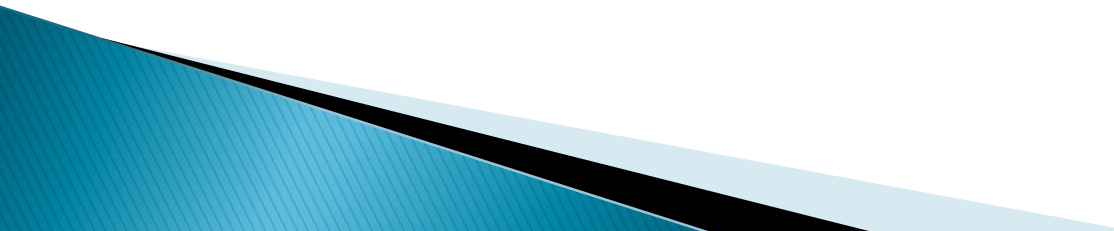


# LAY OPINIONS VS. EXPERT TESTIMONY

ROLL THE VIDEOTAPE! [49]

# RULE 11-701 OPINION BY LAY WITNESSES

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

- (A) rationally based on the witness's perception;**
  - (B) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and**
  - (C) not based on scientific, technical, or other specialized knowledge within the scope of Rule 11-702 NMRA.**
- 

# Rule 11–701 Steps

- 1) **Rationally based on the perception of a witness?**
- 2) **Helpful to the jury?**
  - a) **Could the jurors have judged it for themselves?**  
(E.g., were they there?)
  - b) **Does it add something beyond the fundamental facts?**
- 3) **Not based on scientific, technical, or other specialized knowledge?**

**ACN: not meant to exclude prototypical examples of “appearance” and “manner of conduct”**

# TOUR GUIDE JASON KERKMANS!

- ▶ TURN THY CLICKERS ON!



# Problem: cigarette sales

- ▶ Defendant charged with selling cigarettes to a 17 year old.
- ▶ Witness:
  - ▶ “The buyer looked 18.”
- ▶ Proper lay opinion testimony?
- ▶ CLICKERS:
  - ▶ A) YES
  - ▶ B) NO

# ANSWER: cigarette sales

- ▶ 1) **Rationally based on their perception?** [YES]
- ▶ 2) **Helpful to the factfinder?**
  - a) Could the jurors have judged it for themselves? (were they there?) [NO]
  - b) Does it add something beyond the fundamental facts? [YES]
- ▶ 3) **Based on specialized knowledge?** [NO]

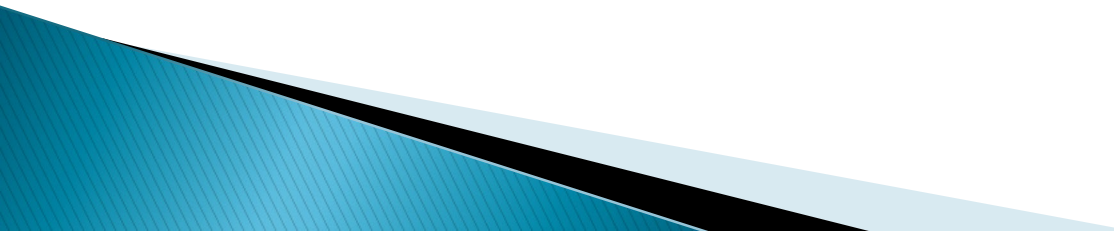
ACN to F.R.E.: “the appearance of persons”



# Problem: Cocaine use

- ▶ Trafficking case
- ▶ Witness: Based on looking at the substance and tasting it, the substance was cocaine.
- ▶ Proper lay opinion testimony?
- ▶ CLICKERS:
  - ▶ A) Yes
  - ▶ B) No

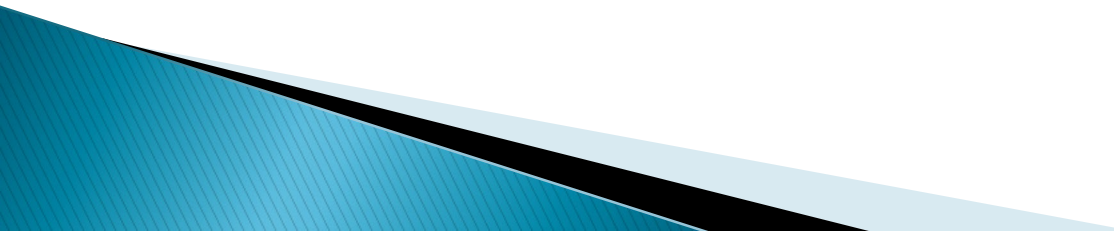
# ANSWER: Cocaine use

- ▶ 1) Rationally based on her perceptions? [Yes]
  
  - ▶ 2) Helpful to jury ?
    - a) Could the jurors have judged it for themselves? (were they there?) [No]
    - b) Does it add something beyond the fundamental facts? [YES]
  
  - ▶ 3) Specialized knowledge?
- 

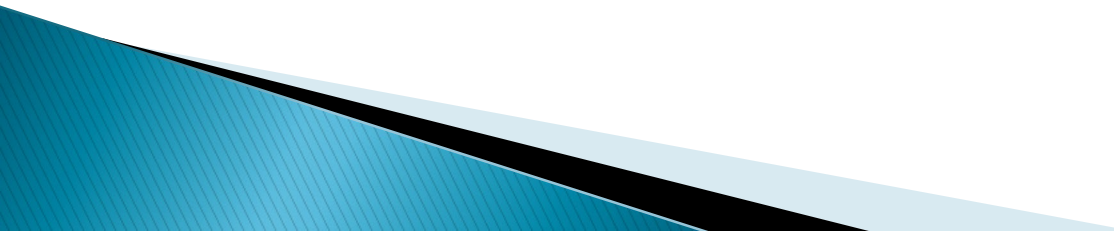
# Answer: Cocaine use

- ▶ ACN:

A lay witness can testify that a substance appeared to be a narcotic, so long as a foundation of familiarity with the substance has been laid.

- ▶ Not specialized knowledge, but a layperson's *personal knowledge*.
- 

# BUT: the region in Colombia from which certain marijuana is from?

- ▶ HA!
  - ▶ Beyond 701 and into expert territory!
  - ▶ Requires “specialized knowledge.”
- 

# ANOTHER EXAMPLE: A businessman can testify to projected profits.

- ▶ ACN provides “particularized knowledge in a certain business” can be contained within lay opinions.

# U.S. v. Meling, 47 F.3d 1546 (9th Cir. 1995)

- ▶ [Judge Kozinski]
- ▶ Meling attempted to kill his wife with cyanide and then tampered with Sudafed to try to cover it up. (TRUTH STRANGER THAN FICTION!)
- ▶ Lay opinion testimony at issue
- ▶ The Paramedic and 911 operator: “In my opinion, it sounded like he was feigning grief.” ADMISSIBLE?



# Meling

- ▶ **1) Rationally based on their perception? [YES]**
  
- ▶ **2) Helpful to the factfinder?**
  - a) Could the jurors have judged it for themselves? (were they there?) [NO, they were not in the same position as a paramedic or 911 operator.]
  - b) Does it add something beyond the fundamental facts? [YES]
  
- ▶ **3) Based on specialized knowledge? [NO]**

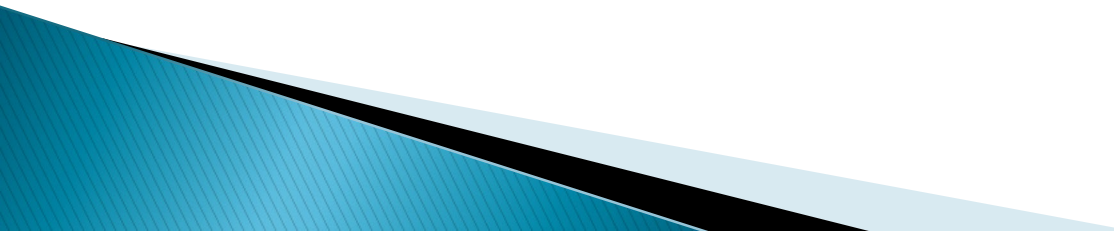
**ADMITTED.**



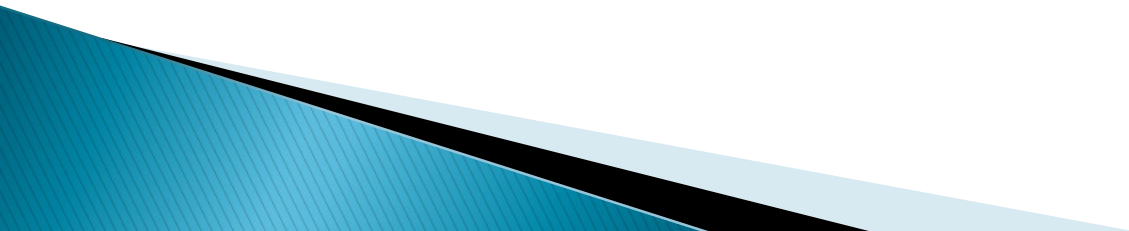
# Government of the Virgin Islands v. Knight, 989 F.2d 619 (3d Cir. 1993)

- ▶ Knight repeatedly struck victim's head with a gun; it went off and killed her.
- ▶ Lay opinion testimony at issue: can an eye-witness testify that it looked like the gun went off accidentally?

# Knight

- ▶ **1) Rationally based on their perception? [YES]**
  
  - ▶ **2) Helpful to the factfinder?**
    - a) Could the jurors have judged it for themselves? (were they there?) [NO]
    - b) Does it add something beyond the fundamental facts? [YES]
  
  - ▶ **3) Based on specialized knowledge? [NO]**
- 

**BACK TO GEORGE!**



# GRAB YOUR CLICKERS!

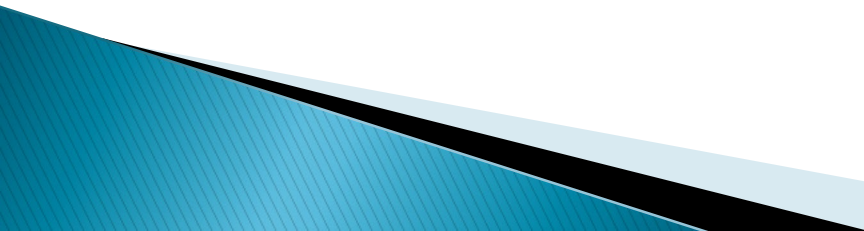


Judge Sutin



Chief Judge Kennedy


# State v. Santillano, No. 30,302 (Ct. App. 2012)

- ▶ Was it appropriate for the detective to testify that, in his training and experience, child sex abuse victims often delay reporting?
  - ▶ Majority: based on experience, not specialized knowledge. (But it's on the edge!)
  - ▶ Special concurrence: specialized training and expertise that a normal person would not have.
- 

# MY FAVORITE CONCURRENCE JOKE

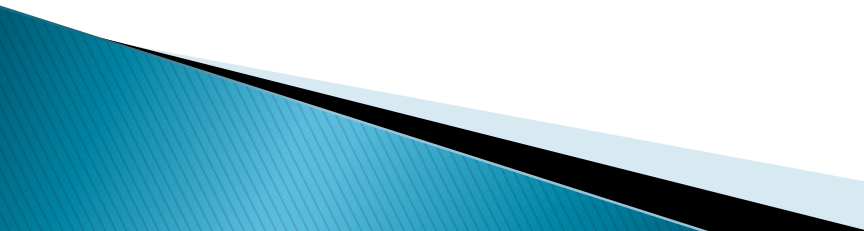
- ▶ Credit to Judge Harris L Hartz
- ▶ Wells v. Colorado DOT

# McCormick on Evidence

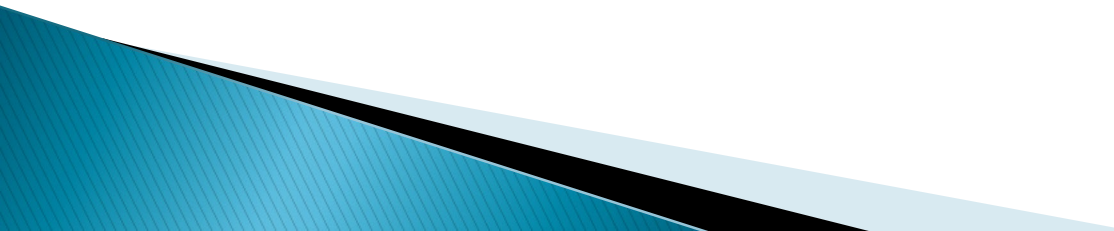
- ▶ Why is the opinion being admitted?
  - ▶ 1) Because it is impractical to verbalize the primary data (e.g., “she looked 18; he looked drunk”).
  - ▶ OR
  - ▶ 2) Because the witness can draw a more reliable inference from the data (the stuff of experts!).
- 



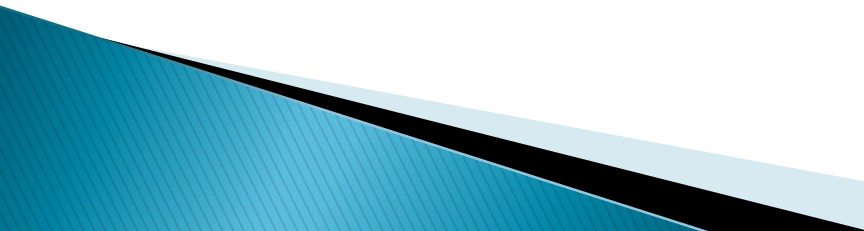
# Advisory Committee Note to Fed. R. Evid. 701

- ▶ Endorses State v. Brown, 836 S.W. 2d 530 (Tenn. 1992)
  - ▶ 1) Lay opinions “result from a process of reasoning familiar in everyday life. . . .”
  - ▶ OR
  - ▶ 2) Expert opinions “result from a process of reasoning which can be mastered only by specialists in the field.”
- 

# 2000 Advisory Committee Note to Fed. R. Evid. 701

- ▶ An officer can testify that someone looked suspicious.
  - ▶ But not that certain words were “code” words for drug quantities and prices.
  - ▶ So, Santillano?
- 

# State v. Santillano

- ▶ Professor Anne Poulin of Villanova University School of Law: **Let it in as lay opinion.**
  - ▶ A risk: is the experienced-based opinion formed by any sort of bias?
  - ▶ But, the reasoning process does not require an expert methodology.
  - ▶ *Experience-based Opinion Testimony: Strengthening the Lay Opinion Rule*, 39 Pepp. L. Rev. 551 (March 2012)
  - ▶ My personal take: if you let it in, use 11-403 aggressively.
- 

# MEDICAL RECORDS

- ▶ INTO THE HEARSAY ARENA!!!

# A QUICK WORD ON A HEARSAY

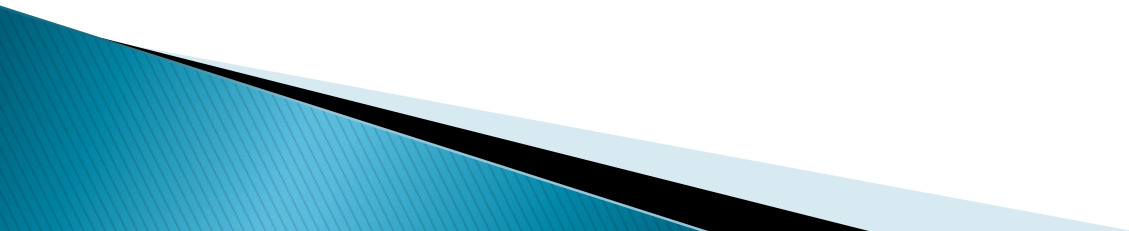
- ▶ EVEN IF THE PERSON IS TESTIFYING, IT IS STILL HEARSAY IF HIS OR HER OUT OF COURT STATEMENT IS OFFERED FOR THE TRUTH OF THE MATTER ASSERTED!
- ▶ EXAMPLE
- ▶ Testifying witness: “Then I told the officer the light was green.” Objection, hearsay! (SUSTAINED!)
- ▶ I KNOW JUDGE NASH KNOWS THIS – I SAW HER RULE CORRECTLY!



# ROLL THE VIDEOTAPE!

- ▶ [58] The Verdict – a doctor is sued for malpractice.
- ▶ James Mason!
- ▶ Charlotte Rampling!
- ▶ Paul Newman!

**TOUR GUIDE JEFF MITCHELL!**



# Rule 11–803(4). Statement made for medical diagnosis or treatment

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

.....

## **(4) Statement made for medical diagnosis or treatment.**

A statement that:

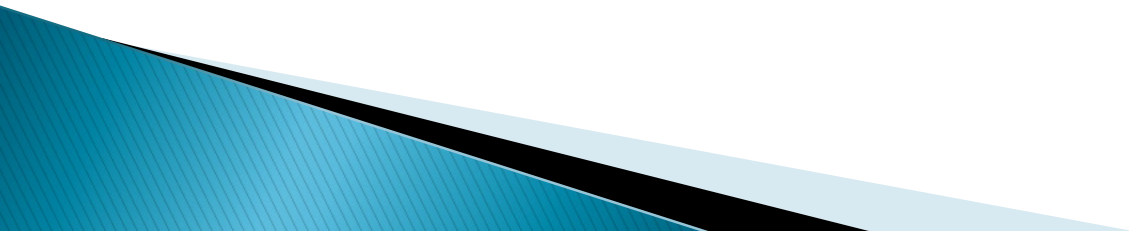
**(a)** is made for — and is reasonably pertinent to — medical diagnosis or treatment, **and**

**(b)** describes

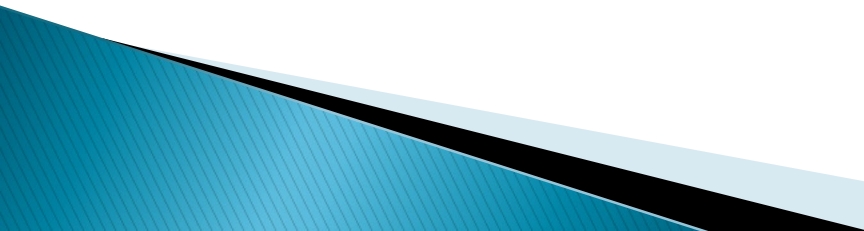
- medical history,
- past or present symptoms, pain, or sensations,
- their inception, or
- their general cause.



# THE RATIONALE?



# People don't lie to their health care providers!

- ▶ (BAHA!)
  - ▶ EXCEPTIONS?
  - ▶ “I exercise four times a week.”
  - ▶ “I’ve been avoiding sweets.”
  - ▶ “I promise to floss.”
- 

# Advisory Committee Note to F.R.E.

- ▶ **“Statements as to fault would not ordinarily qualify . . . .”**
- ▶ **It need not have been made to a physician.**  
“Statements to hospital attendants, ambulance drivers, or even members of the family might be included.”

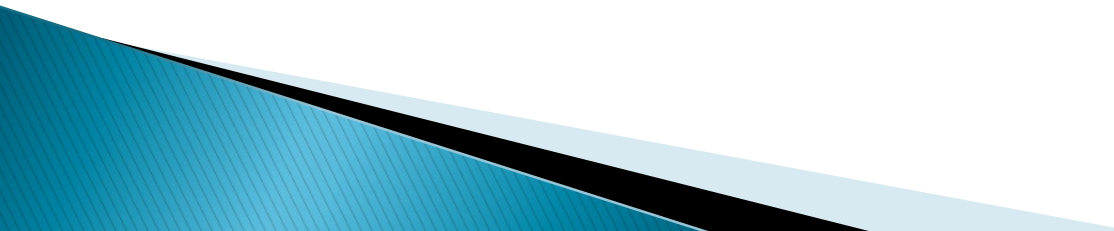
# EXAMPLE: statements of fault

- ▶ “A car struck mine.” ADMISSIBLE
- ▶ “The other car ran a red light.” NOT ADMISSIBLE. NOT REASONABLY PERTINENT TO TREATMENT OR DIAGNOSIS.

# BUSINESS RECORDS

- ▶ (Leading up to medical records AS business records.)

# SIX ELEMENTS of BUSINESS RECORD EXCEPTION

- (1) record of a business that is
  - (2) regularly maintained,
  - (3) made promptly near the time the information therein was obtained,
  - (4) based on knowledge of the record-maker or the provider of info,
  - (5) supported by in-court testimony, and
  - (6) appears trustworthy.
- 

# 11-803(6) [Business records]

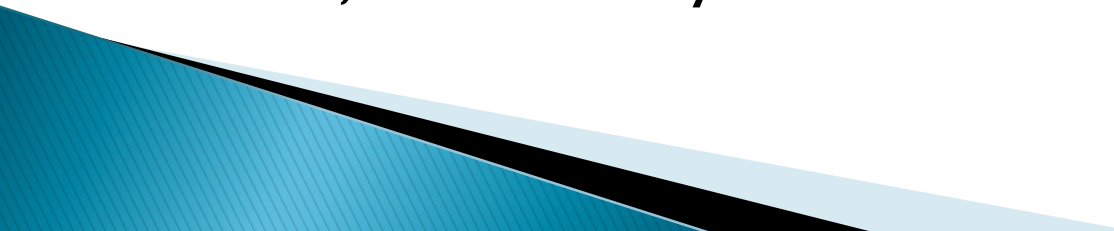
The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

.....

- (6) Records of a regularly conducted activity.** A record of an act, event, condition, opinion, or diagnosis if
- (a) the record was made at or near the time by — or from information transmitted by — someone with knowledge,
  - (b) the record was kept in the course of a regularly conducted activity of a business, institution, organization, occupation, or calling, whether or not for profit,
  - (c) making the record was a regular practice of that activity, and
  - (d) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Paragraph 11 of Rule 11-902 NMRA or Paragraph 12 of Rule 11-902 NMRA or with a statute permitting certification.

This exception does not apply if the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

# RATIONALES

- ▶ If they are kept regularly as a part of a “business” procedure, they are probably reliable.
  - ▶ It is too cumbersome to bring in someone to testify to every aspect of the record (e.g., receiving, payment, packaging, shipping, calculations, etc.).
  - ▶ Plus, necessary evidence!
- 



# Admission of medical records as business records

- ▶ State v. Ruiz, 94 N.M. 771 (1980) (superceded by statute on other grounds).
- ▶ Defendant was charged with burglary, but claimed he could not have formed intent because he was under the influence of PCP.
- ▶ Defendant was found in a nearby park, acting bizarrely, taken to Emergency Room.
- ▶ At issue was admissibility of medical records: Intern notes, “Patient says he used PCP at 7:00 p.m.”
- ▶ Double hearsay! FUN!
- ▶ Why is it DOUBLE HEARSAY?

# DOUBLE HEARSAY

- ▶ LEVEL I: The intern's statement in the medical record.



- ▶ LEVEL II: The patient's statement to the intern.

# 11-805 Hearsay within hearsay

- ▶ Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule.

# First step: medical records as business records

- ▶ First step: the Intern's statements in the record itself as a business record.
- ▶ Foundation?

# 11-803(6) [Business records]

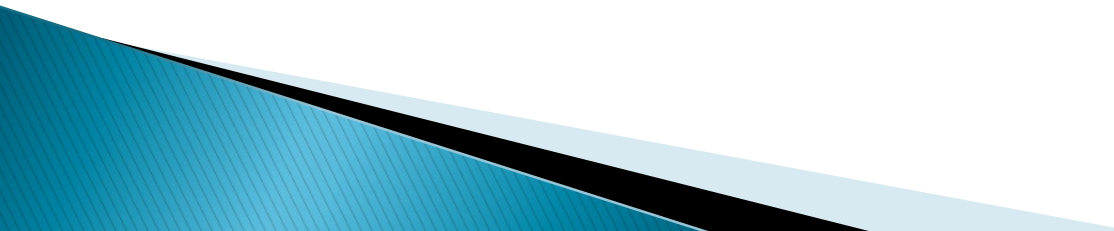
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This exception does not apply if the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

# SIX ELEMENTS of BUSINESS RECORD EXCEPTION

- (1) record of a business that is
  - (2) regularly maintained,
  - (3) made promptly near the time the information therein was obtained,
  - (4) based on knowledge of the record-maker or the provider of info,
  - (5) supported by in-court testimony, and
  - (6) appears trustworthy.
- 

# Second step: statement of patient within the medical records

- ▶ Admissible by way of 11-803(4)

# Rule 11–803(4). Statement made for medical diagnosis or treatment

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

. . . .

## **(4) Statement made for medical diagnosis or treatment.**

A statement that:

**(a)** is made for — and is reasonably pertinent to — medical diagnosis or treatment, **and**

**(b)** describes

- medical history,
- past or present symptoms, pain, or sensations,
- their inception, or
- their general cause.



# State v. Ruiz

“The State contends that a statement as to the time the PCP was ingested was not reasonably pertinent, either to diagnosis or treatment.”

Is the State correct?

**CLICKERS!**

A) Yes

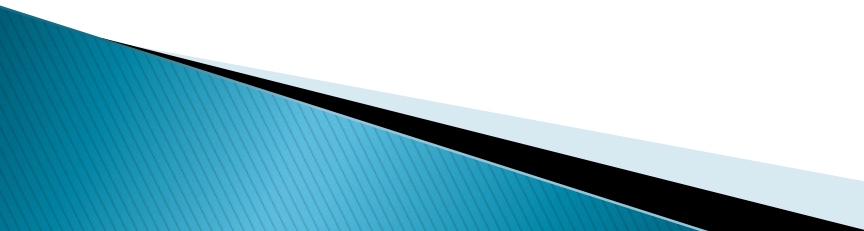
B) No

# State v. Ruiz:

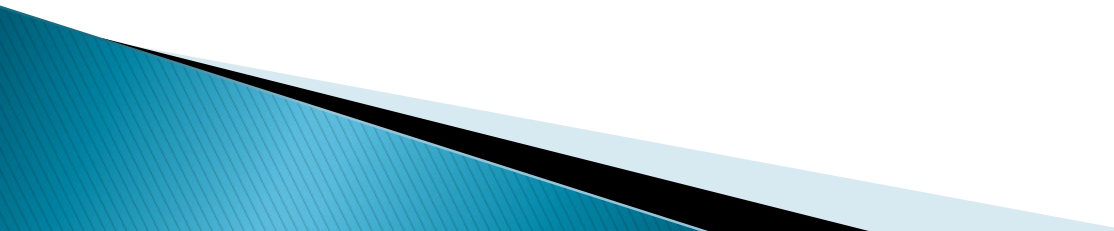
## The State is wrong!

- ▶ Quoting *Weinstein*:
- ▶ “Since doctors may be assumed not to want to waste their time with unnecessary history, the fact that a doctor took the information is prima facie evidence that it was pertinent.”

# State v. Ruiz

- ▶ The intern's record recommends that defendant should be observed for possible convulsions and to prevent defendant from doing bodily harm to himself.
  - ▶ The intern's record states that defendant was unable to give a lucid history.
  - ▶ In these circumstances, the defendant's statement of the time he ingested the PCP was reasonably pertinent to his treatment.
- 

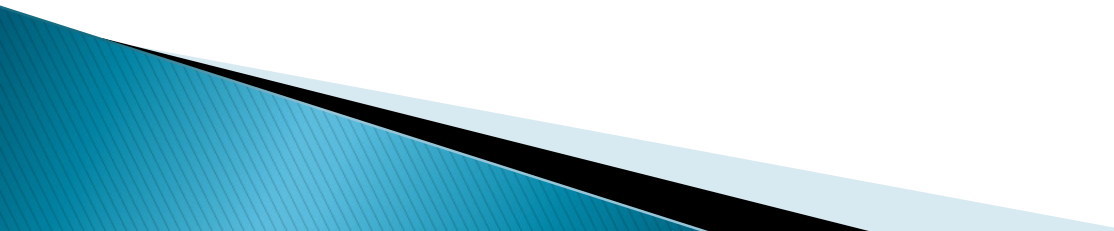
# Both levels of hearsay met!

- ▶ Intern's statement – business record
  - ▶ Patient's statement – statement made for diagnosis and treatment
  - ▶ Admissible!
- 

# While we are talking about medical records . . . .

- ▶ BACK TO TOUR GUIDE KERKMANS:
- ▶ New Mexico Review Organization Immunity Act

# Discovery of ROIA records

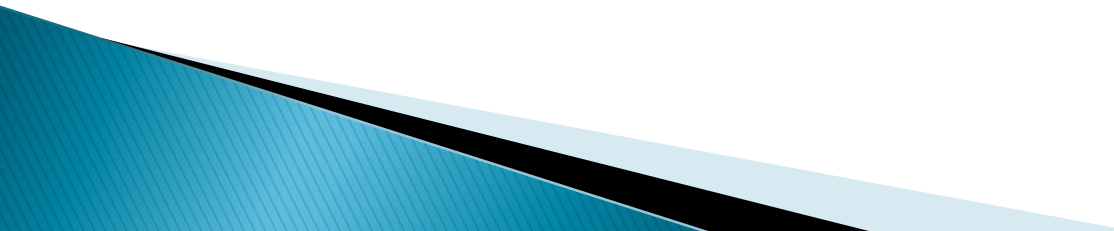
- ▶ What is a Review Organization?
  - ▶ Why does it need immunity from disclosure?
- 

# Southwest Community Health Services v. Smith, 107 NM 196 (1988)

The party seeking to invoke the NMROIA to prevent discovery of review material has the burden to prove:

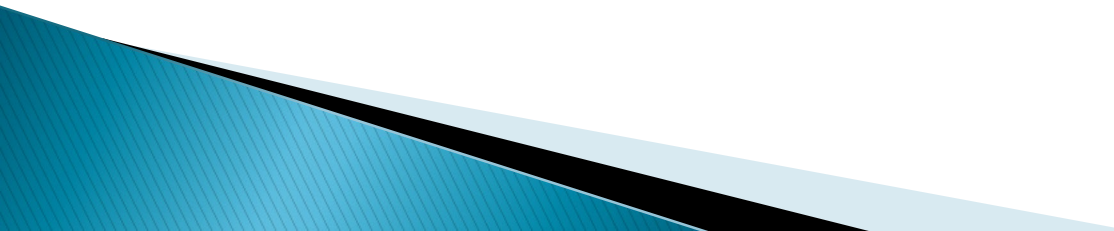
- 1) that the data or information was created exclusively for the peer review purpose and no other purpose, or
- 2) that the opinions were formed exclusively as a result of the peer review deliberations.

# NMROIA

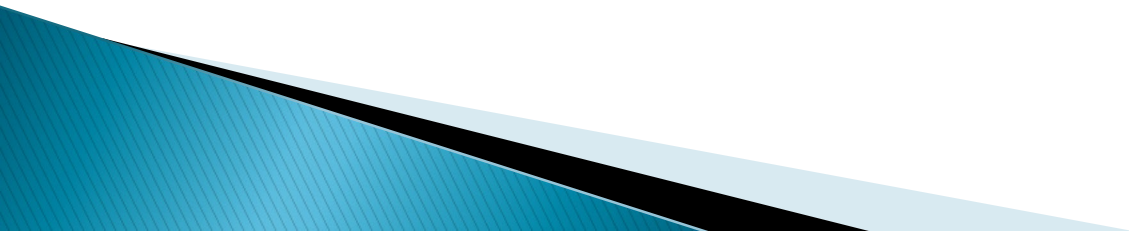
- ▶ The burden then shifts to the party seeking access to the material to show that the information is critical to its cause of action or defense.
  - ▶ The trial court must then determine if that party's cause of action or defense turns on the information being sought.
- 



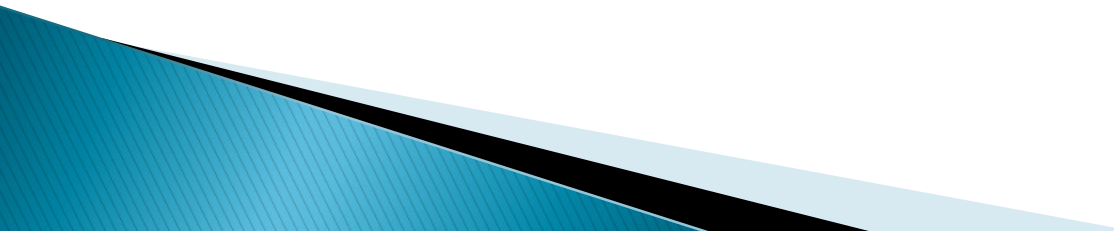
# NMROIA

- ▶ The judge must “balance the need to ensure the confidentiality of peer review against the need of litigants to discover evidence essential to the merits of their case.”
  - ▶ To do this, the trial judge will need to conduct an *in camera* examination of the information, and possibly hold an evidentiary hearing as well.
- 

# TOUR GUIDES REBEKAH GALLEGOS AND JEFF HOFFMAN



# Foundational Requirements for Text Messages and Social Media

- ▶ First! What do we mean by Social Media?
  - ▶ A.K.A. How to win CANDY at the Judicial Conclave!
  - ▶ What is a TWEET?
  - ▶ A Facebook “poke”?
  - ▶ A “Snapchat”?
- 

Back to Messages

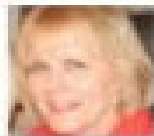
Mark as Unread

Report Spam

Delete

Between You and Kathy [REDACTED]

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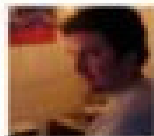
**Kathy** [REDACTED] September 2 at 3:32pm

Dear Gregory,

My friend Susan just started on the facebook and she helped me set one up too. She's using it to talk to her son in graduate school and I thought that since you have trouble returning voicemails from your dear old mother I'd give it a try.

xoxo,  
MOM

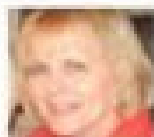
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**Greg** [REDACTED] September 2 at 7:44pm

hey ms [REDACTED] i think you've got the wrong person. honest mistake im sure.

---



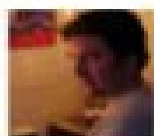
**Kathy** [REDACTED] September 3 at 8:13am

Dear Gregory,

Obviously you've inherited your father's crackpot sense of humor. This is a good way for us to keep in touch, but I can't seem to see the rest of your page. Is something wrong? Okay, well keep in touch and call soon.

MOM

---



**Greg** [REDACTED] September 5 at 11:53pm

heyy yeah i dont really know whats going on but you're not my mom.

# A Little About Social Media

- ▶ Common accounts:
  - Facebook, Twitter, LinkedIn, MySpace, etc.
- ▶ Creating an account:
  - Anyone can do it, and may not be who they say they are (example: Manti Te'o's phantom girlfriend)
- ▶ Notifications / Monitoring
  - Ways to access (computer, smartphone, tablet, etc.)
  - Privacy settings and Notifications
- ▶ Items that might be “authored”
  - Typed postings, location, purchases, internet activity, etc.

# Authentication

- ▶ Two possible levels:
  - 1. Evidence to support that the alleged author owns the account.
    - In other words, did the alleged author actually own/create the social media account
  - 2. Evidence to support the author of a particular posting/message.
    - If there is evidence that the purported author owns the account, that fact can be supporting evidence.

# Rule 11-901. Requirement of Authentication or Identification

**(A) In general.** To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

. . . .



# Is it authentic?

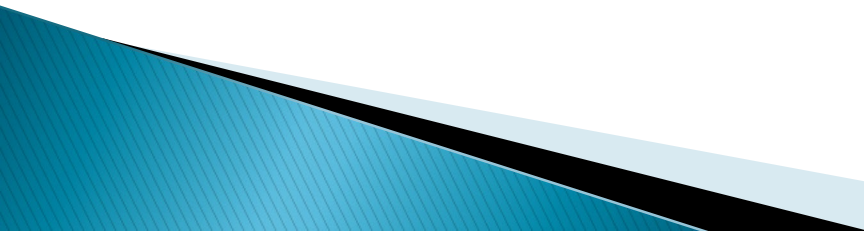
- ▶ Conditional relevance: If it is not what the proponent claims it is, then it is NOT relevant.
- ▶ 11–104(B) Preliminary determination – **would a reasonable juror**, by a preponderance of the evidence, conclude that it is authentic.



# Relevant Rule 11–901(B) examples:

- ▶ (1) Testimony of a witness with knowledge.
- ▶ (3) Comparison by an expert witness or the trier of fact. A comparison with an authenticated specimen by an expert witness or the trier of fact.
- ▶ (4) Distinctive characteristics and the like.  
The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.
- ▶ (9) Evidence about a process or system.  
Evidence describing a process or system and showing that it produces an accurate result.

# Griffin v. State, 19 A.3d 415 (Md. 2011)

- ▶ Griffin is charged in a shooting death.
  - ▶ At trial, Griffin girlfriend's MySpace profile was admitted to demonstrate that she threatened a witness called by the state.
  - ▶ The girlfriend was a witness.
  - ▶ "REMEMBER SNITCHES GET STITCHES! . . . ."
- 


# Griffin v. State, 19 A.3d 415 (Md. 2011)

- ▶ Did the alleged author actually author the computer message?
- ▶ Ways to establish foundation:
- ▶ 1) offer a witness with personal knowledge of the drafting and sending (Rule 11-901(B)(1))
- ▶ 2) search the purported author's computer (Rules 11-901(B)(3), (4), or (9))
- ▶ 3) figure out how to obtain that information directly from the social media (e.g., legal compliance officer) (Rules 11-901(B)(3),(4), or (9))

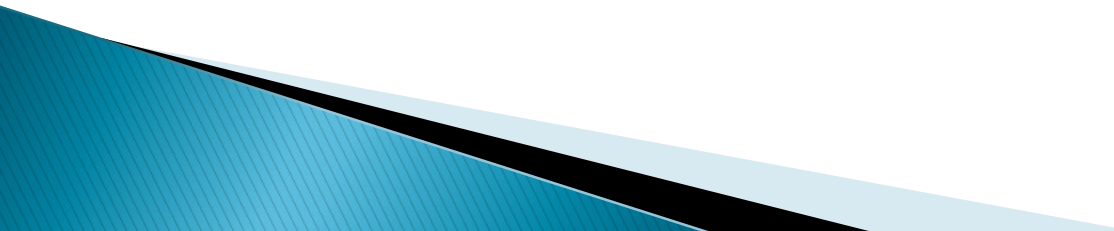
# What if it's not as clear?

- ▶ Hypos without clear answers:
  - 1 – Plaintiff is alleging that they developed a severe rash as a result of doctor's failure to clean instruments. Doctor wants to admit plaintiff's Facebook account showing the purchase of rash cream 3 days before appointment.
  - 2 – Defendant is being accused of a crime, and seeks to admit Facebook entry that tracked his alleged GPS location at the time of the crime.
  - Is there sufficient foundation to authenticate that the plaintiff or defendant actually *authored* information?

# Other factors

- ▶ Content:
  - ▶ Does the message contain knowledge only the author would know?
  - ▶ Is there evidence regarding whether the alleged author actually owned and/or monitored the account?
  - ▶ **Does it contain distinctive characteristics?**
    - Photos, Biographical info, communications with others, access to account, security settings, etc.
- 

# People v. Valdez, 201 Cal. App. 4th 1429 (2011)

- ▶ Defendant convicted of attempted murder, assault, etc.
  - ▶ Also convicted of street gang enhancements.
  - ▶ Prosecution's gang expert relies on social media pages to form his opinion that Valdez was an active gang member.
- 

# People v. Valdez

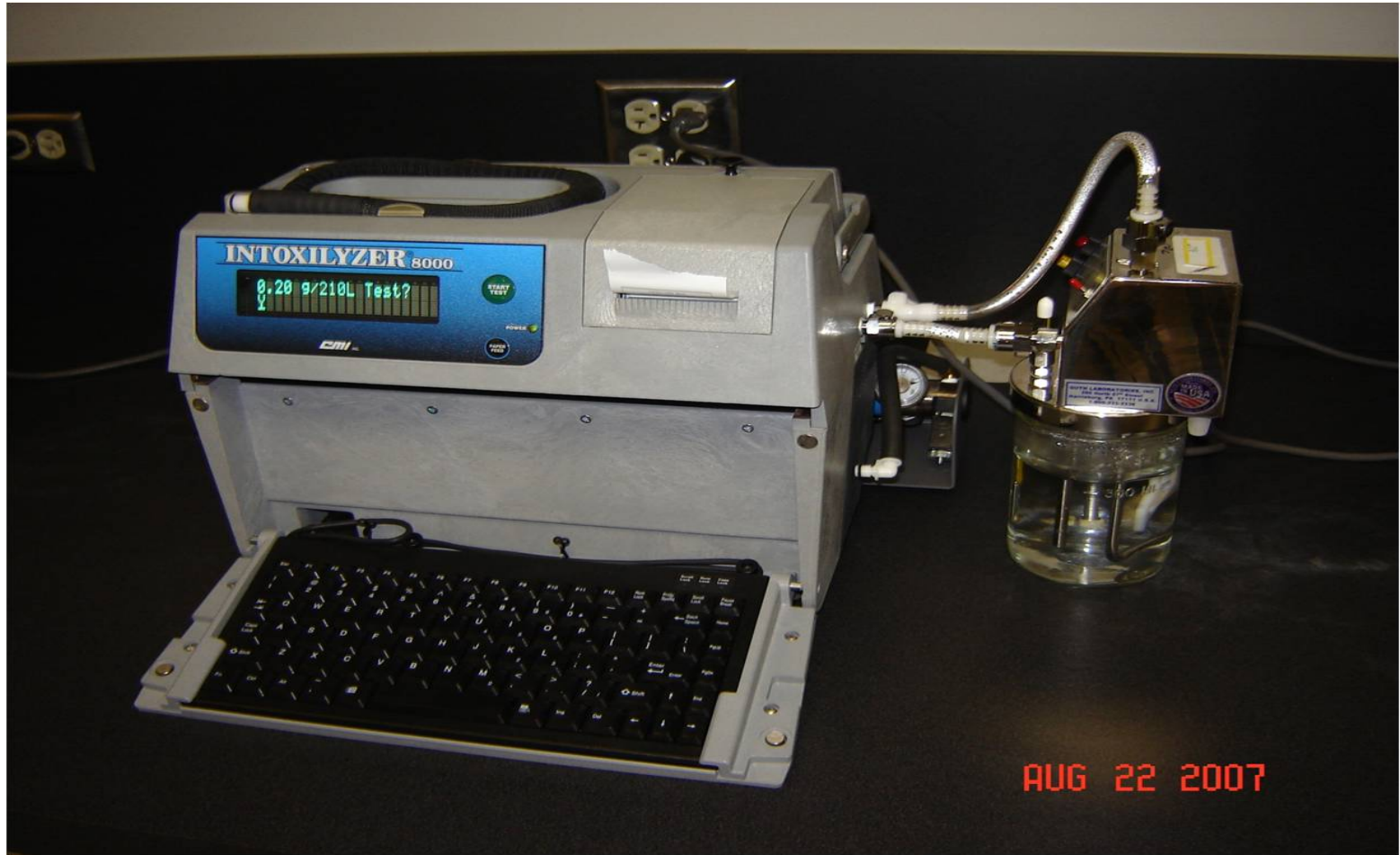
- ▶ The greeting from Valdez's sister was one of many posts by friends and by the page owner that included personal details: “Hey, big brother, I kinda miss you around the house. Love ya. Bye. Congrats on the job.”
- ▶ Additionally, the page owner's stated interests, including an interest in gangs generally and in T.L.F. specifically, matched what the police otherwise knew of Valdez's interests from their field contacts with him.

# People v. Valdez

- ▶ Additional factor: there was a password requirement for posting and deleting content.



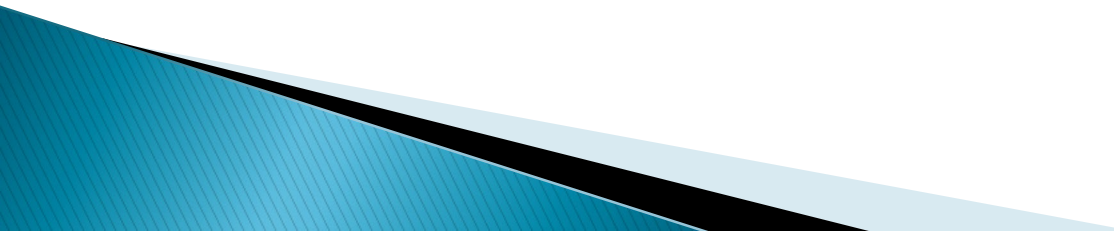
# Foundation for gas simulators to calibrate Intoxilyzer 8000



# THE GAS CANISTER SIMULATOR



# Starting point: State v. Martinez

- ▶ Officer's testimony that he saw a current SLD certification sticker was sufficient foundation to admit BAT card.
  - ▶ Subject to 11-104(A): the BAT card is a judicial determination, not one of conditional relevancy.
- 

# 11-104 Preliminary questions

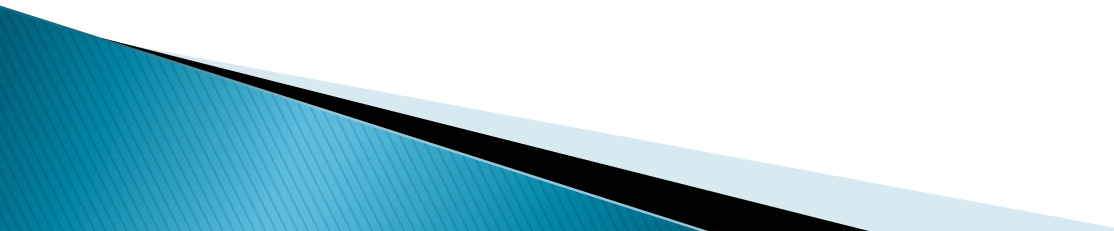
- ▶ **A. [Competent evidence?] In general.** The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.
- ▶ **B. Relevance that depends on a fact.** When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.
- ▶ . . . .

# State v. Martinez

- ▶ Re-affirmed that “compliance with the [Scientific Laboratory Division of the Department of Health] regulations is a ‘condition precedent to admissibility’ of the result of a breath test.”

# 7.33.2.15 (B)(1)NMAC

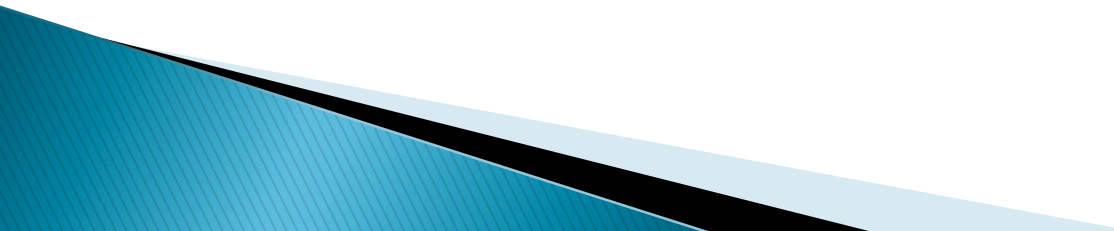
## Approved Methods for Sample Collection, Analysis, and Retention

- ▶ (1) Samples of the subject's breath shall be collected and analyzed pursuant to the procedures prescribed by SLD and employing only SLD approved equipment and certified instruments.
- 

## 7.33.2.16 SLD LISTS: SLD will maintain lists of the following:

- ▶ A. all certified laboratories
- ▶ B. breath alcohol instruments and equipment that have been approved by SLD for use under the New Mexico Implied Consent Act.
- ▶ . . . .
- ▶ **And the canister: NOT ON THE LIST!**

# HOW CAN AN OFFICER TESTIFY THAT THE GAS SIMULATOR IS WHAT IT IS?

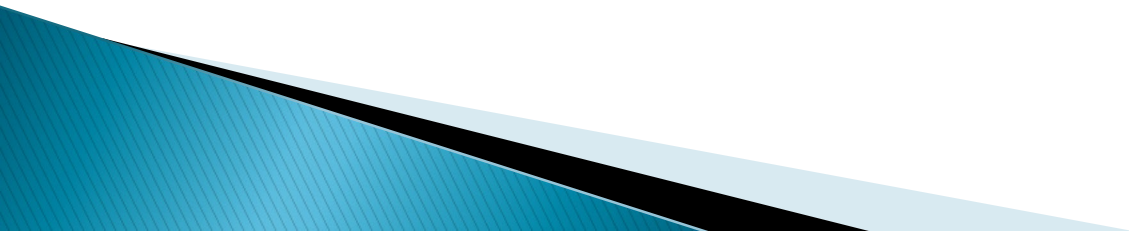
- ▶ I don't think an officer can!
  - ▶ I think you need SLD to revise the regulations or to testify that the specific canisters are tested.
- 



# FOR ADDITIONAL READING

- ▶ *Strengthening Forensic Science in the United States, A Path Forward*, National Academies Press
- ▶ [www.nap.edu/catalog/12589.html](http://www.nap.edu/catalog/12589.html)

# CHARACTER EVIDENCE



# Justice Jackson on the Character Evidence Rules

The approach is “archaic” and “paradoxical.”

However, it is “workable even if clumsy.”

# CHARACTER EVIDENCE RULES

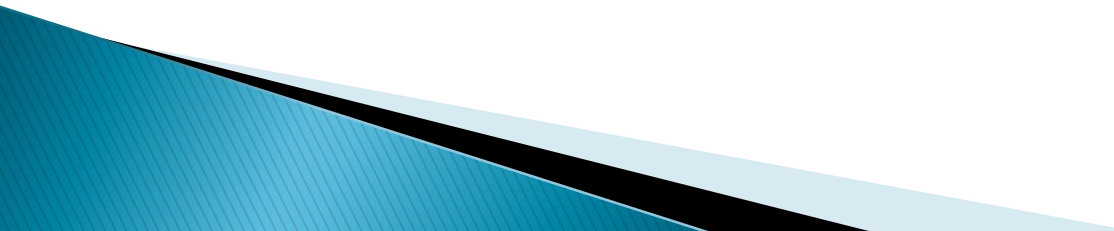
- ▶ 11-404(A) Ban on character evidence and exceptions
- ▶ 11-404(B) “Other act” evidence and examples of “other act” evidence that is NOT character evidence
- ▶ 11-405 HOW to prove character when it is permissible to do so
- ▶ 11-406 Habit evidence
- ▶ 11-412 Rule pertaining to sex crimes
- ▶ 11-607 to 11-609 Rules governing a WITNESS’s character for truthfulness or untruthfulness

# 11-404(A)(1). Character evidence


## **(A) Character evidence.**

**(1) Prohibited uses.** Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

# Character evidence

- ▶ You generally can't use character evidence for the purpose of showing that someone has a certain character and took an action in accordance with that character.
  - ▶ BUT you can use that evidence for other reasons.
  - ▶ Non-character reasons!
- 

# What's the risk?

- ▶ Excessive weight to a person's "character" or to other acts. **PROPENSITY EVIDENCE!**
  - ▶ Assigning the correct weight to character evidence is hard.
  - ▶ Concern that the character evidence justifies conviction regardless of guilt or innocence. **Preventative conviction.**
  - ▶ Confuse and distract jury? Waste of time with counter-propensity evidence.
- 

# People v. Zackowitz, 254 N.Y. 192 (1930): THE RATIONALE

- ▶ Judge Cardozo:
- ▶ A criminal defendant should be able to “start[] his life afresh,” and be judged based on what he is now accused of having done wrong, not on past misdeeds that are no longer in issue.



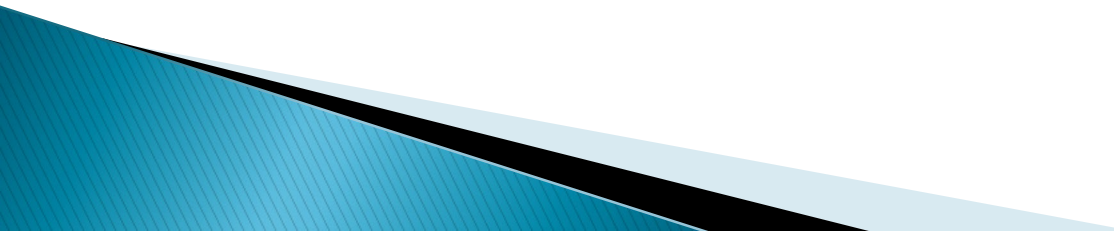
So, when would character evidence *NOT* be used to show an act in accordance therewith?



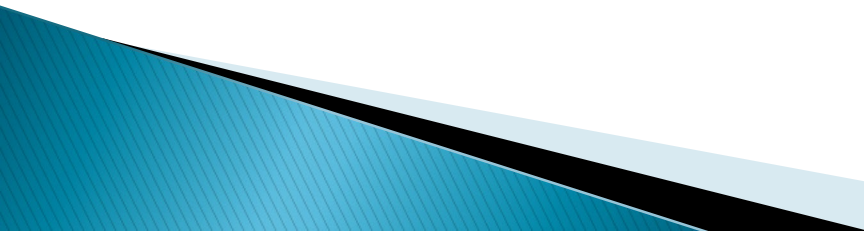
# “CHARACTER IN ISSUE”

- ▶ “Character in issue” is a term of art for situations in which character is relevant for some purpose *other than to show conduct in conformity with character.*

# Berryhill v. Berryhill, 410 So.2d 416 (Ala. 1982): Is the parent fit?

- ▶ Father's violent character was directly relevant to his fitness as a parent—the issue to be decided by the court.
  - ▶ The violent character was NOT proved in order to demonstrate that he acted violently on a particular occasion.
- 

# 11-404's EXCEPTIONS:

- ▶ Character of a defendant in a criminal case.  
11-404(A)(2)(a)
  - ▶ Character of a victim in a criminal case.  
▶ 11-404(A)(2)(b) and (c)
  - ▶ Character of a witness in any case.  
11-404(A)(3) [POINTS YOU TO 11-607 to 11-609].
- 

# 11-404(A)(1)

## **(A) Character evidence.**

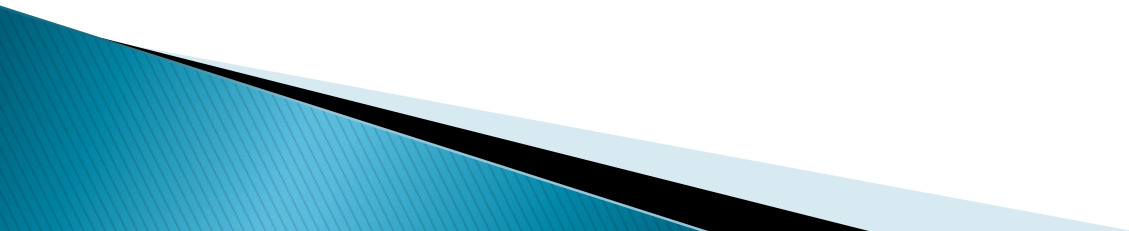
**(1) Prohibited uses.** Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

# Rule 11-404(A)(2)(a) [Defendant's character]

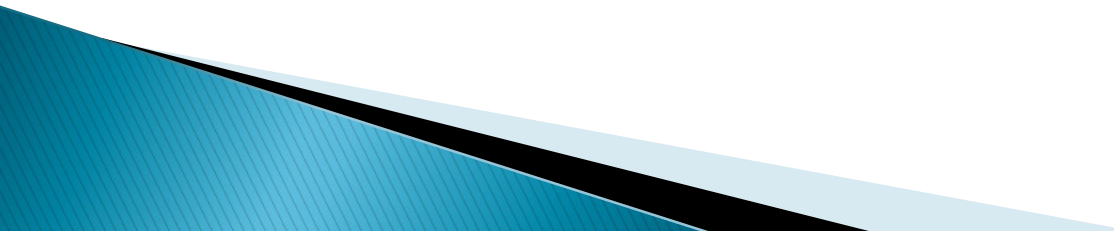
**(2) Exceptions for a defendant or victim in a criminal case. The following exceptions apply in a criminal case:**

**(a) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it; . . . .**

WHAT DOES “PERTINENT TRAIT”  
MEAN?



# “PERTINENT TRAIT” EXAMPLES

- ▶ In a battery case: reputation for peacefulness.
  - ▶ In an embezzlement case, reputation for honesty.
  - ▶ NOT: in an embezzlement case, a reputation for peacefulness.
- 



# State v. Davis

## PERTINENT TRAIT!

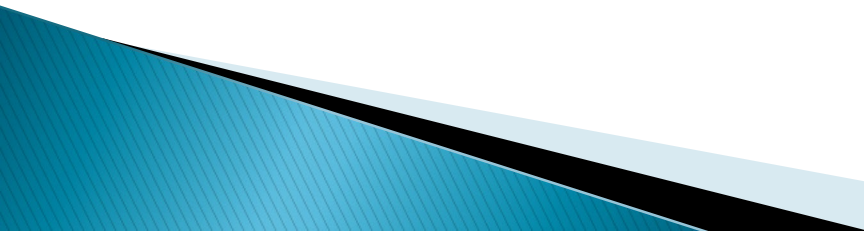


Judge Fry



Chief Judge Kennedy

# State v. Davis, 2012 WL 2309367 (2012) (unpublished)

- ▶ Defendant convicted of contributing to the delinquency of a minor, selling or giving alcohol to a minor, and attempted selling or giving alcoholic beverages to a minor.
  - ▶ Defendant offered testimony about his character for treating children in a safe and moral way.
  - ▶ Trial court excluded.
- 

# State v. Davis

- ▶ Majority assumed without deciding that it was error, but found that it was not reversible error.
- ▶ Judge Kennedy, dissenting in part, found it to be reversible error. His discussion of the character trait:
  - ▶ **Defendant's character for the safe and moral treatment of children was pertinent in such a case: it "tends to show that" Defendant did not purchase minors alcohol or encourage them in sex acts.**

# 11-404(A)(2)(b) [VICTIM'S CHARACTER]

- (b) subject to the limitations in Rule 11-413 NMRA [orders involving immunity], a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may:
- (i) offer evidence to rebut it; and
  - (ii) offer evidence of the defendant's same trait;
- .....

# Rule 11-404(A)(2)(c)

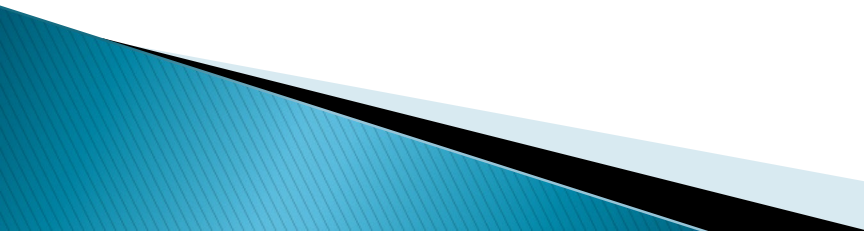
(c) in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

# Rule 11-404(A)(3) [WITNESSES]

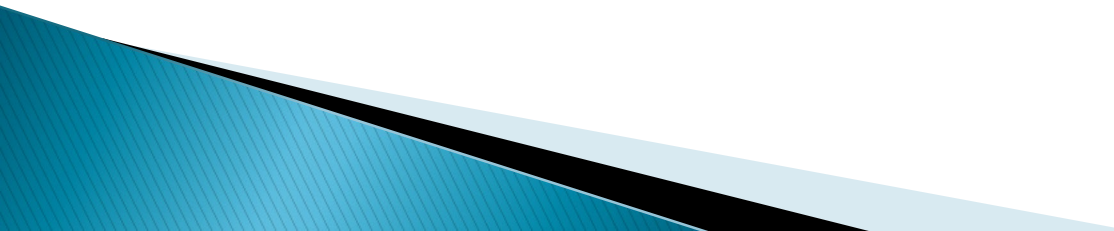
**(3) Exceptions for a witness.** Evidence of a witness's character may be admitted under Rules 11-607, 11-608, and 11-609 NMRA.

# NOTE: Rule 11-405(A) [HOW TO PROVE CHARACTER]

**(A) By reputation or opinion.** When evidence of a person's character or character trait is admissible, it may be proved by testimony **about the person's reputation** or by testimony in the form of **opinion**. On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct.



# 11-404(A)(2)(a) & (b)

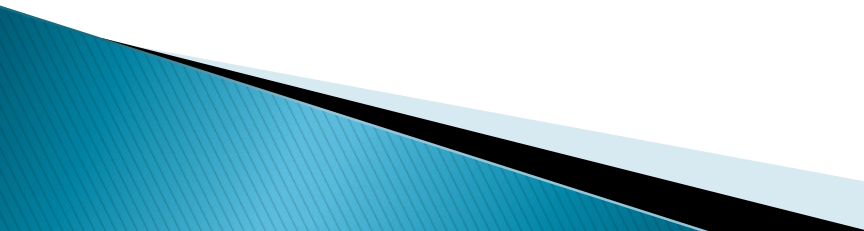
- ▶ A *DEFENDANT* can invoke either: evidence of the defendant's own character and evidence of the victim's character.
  - ▶ DOES THAT MAKE ANY SENSE, GIVEN THE RATIONALE BANNING CHARACTER EVIDENCE GENERALLY?
  - ▶ WHY IS IT PERMITTED?
- 



# To give the defendant a fighting chance!

- ▶ To create reasonable doubt!

# 11-404(A)(2)(a) & (b): the prosecution can respond in kind.

- ▶ If the defendant puts on evidence of the defendant's GOOD character, the prosecution can respond with evidence of the defendant's BAD character.
  - ▶ If the defendant puts on evidence of the victim's BAD character, then the prosecution can respond with evidence of the victim's GOOD character.
  - ▶ **AND WHAT ELSE?**
- 

# 11-404(A)(2)(b)(ii): The prosecution strikes back!

- ▶ If the defendant offers evidence of a victim's BAD character, then the prosecution can put on evidence of the victim's GOOD character **AND THE DEFENDANT'S BAD CHARACTER.**
- ▶ So, defendants must choose wisely as to whether they want to open the door.

# AGAIN: Rule 11-404(A)(2)(b)(ii)

- ▶ If defendant puts victim's character in issue, prosecution can put on evidence that defendant has the same trait.

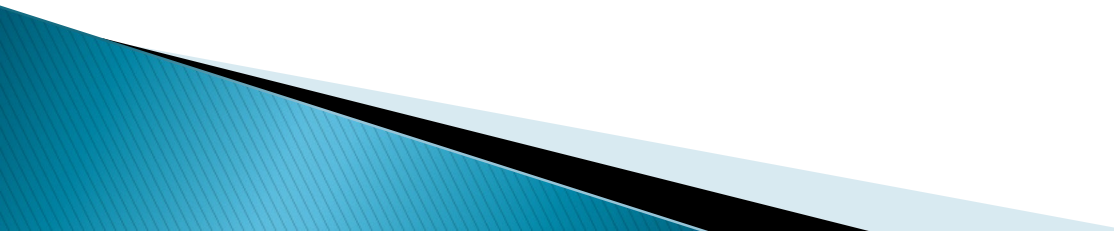
D: Victim has a reputation of violence.

THEN

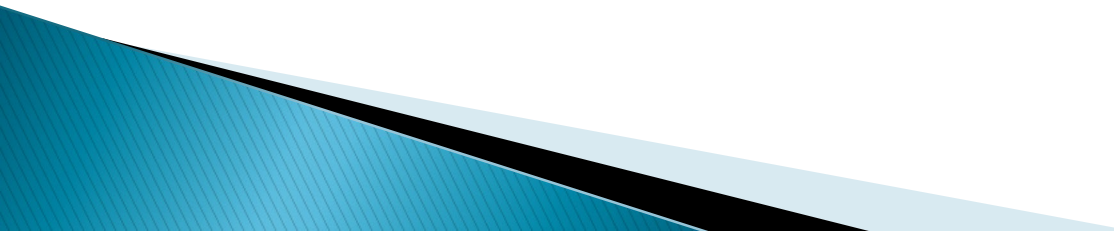
P: Defendant has a reputation of violence.

# NOT FOR CIVIL LITIGANTS

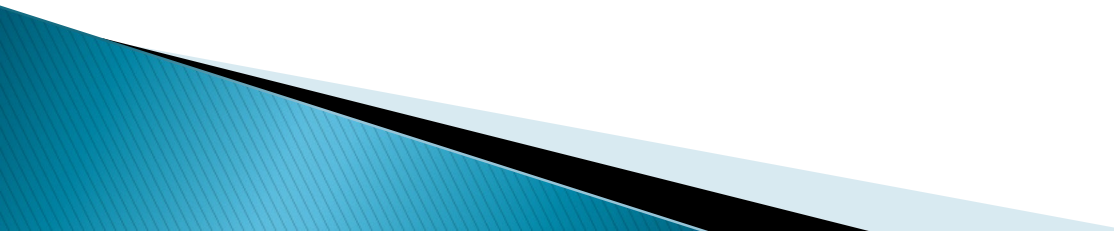
WHY?



# WHY? RATIONALES

- ▶ THE DEFENDANT IN CRIMINAL CASES OUGHT TO HAVE A STAB AT CREATING REASONABLE DOUBT.
  - ▶ Character evidence is of little probative value, so in cases where the burden is different (civil), it's not worth much.
  - ▶ But reasonable doubt is a small burden to meet (perhaps)– so character evidence might carry the day.
- 

# PROBLEM

- ▶ A criminal defendant charged with murder testifies that he shot the victim after the victim lunged at him with a knife.
  - ▶ Can defendant testify to that?
  - ▶ CLICKERS
  - ▶ A) Yes
  - ▶ B) No
- 

# ANSWER

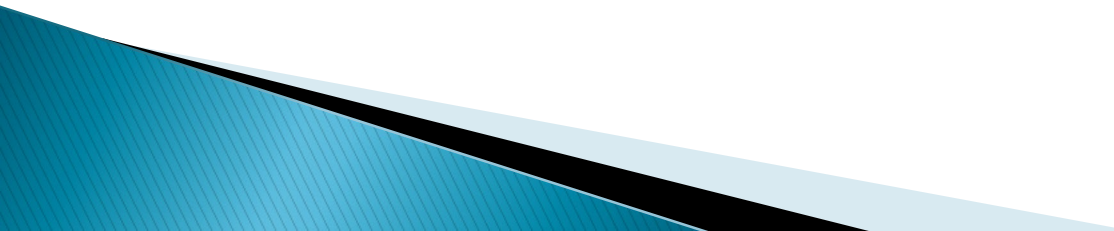
- ▶ SURE! THAT'S NOT CHARACTER EVIDENCE!
- ▶ Rather, offered to show how the victim acted on THAT occasion. NOT the victim's *character*.
- ▶ Although it could give rise to a character inference, the actions the defendant attributes to the victim support the defendant's defense *even if they were wholly out of character for the victim*.



# PROBLEM CONTINUED

- ▶ Can the prosecution then introduce evidence of the victim's peaceful character?
- ▶ Of the defendant's violent character?


# ANSWER: YES and NO

- ▶ YES: 11-404(A)(2)(c) permits the prosecution to offer evidence of the victim's good character in this instance.
  - ▶ NO: Not of the defendant's character.
- 

# Rule 404(A)(2)(c)

**(c) in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.**

# PROBLEM

- ▶ Criminal defendant charged with murder claims self-defense and introduces evidence that the victim was prone to violence.
  - ▶ Can the prosecution offer evidence of the victim's peaceful character? Of the defendant's violent character?
  - ▶ CLICKERS
  - ▶ A) Yes and Yes
  - ▶ B) No and No
- 

# ANSWER!

- ▶ YES AND YES
- ▶ Once the defendant offers evidence of the victim's character, the prosecution can offer evidence of both the defendant and the victim's character.

# 11-404(B) Crimes, wrongs or other acts.

**(1) Prohibited uses.** Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

**(2) Permitted uses; notice in a criminal case.**

This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

[NOTICE REQUIREMENT]

# 11-404(B) NOTE: THESE ARE NOT EXCEPTIONS!

- ▶ If other acts come in for reasons OTHER than for character, they are NOT character evidence.

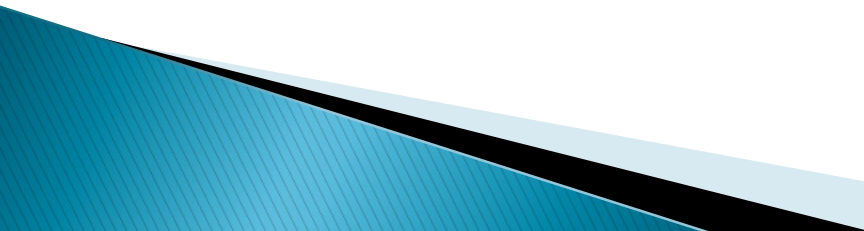
# REMEMBER: We're not talking about character for truthfulness of witnesses!

- ▶ That's 11-404(A)(3) and 11-608 and 11-609.
- ▶ Specific acts of conviction are permitted under 11-609.



# Rule 11-405(A) [HOW TO PROVE CHARACTER]

**(A) By reputation or opinion.** When evidence of a person's character or character trait is admissible, it may be proved by testimony **about the person's reputation** or by testimony in the form of **opinion**. On **cross-examination** of the character witness, **the court may allow an inquiry into relevant specific instances of the person's conduct.**



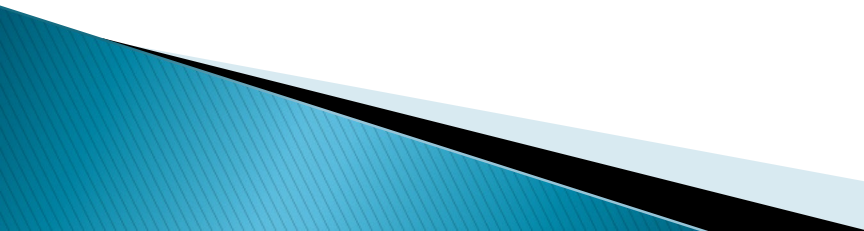
# MANNER OF PROOF

Controlled by Rule 11-405.

Opinion or reputation ONLY on direct.

- ▶ WHY CAN SPECIFIC ACTS BE ASKED ABOUT ON CROSS-EXAM?

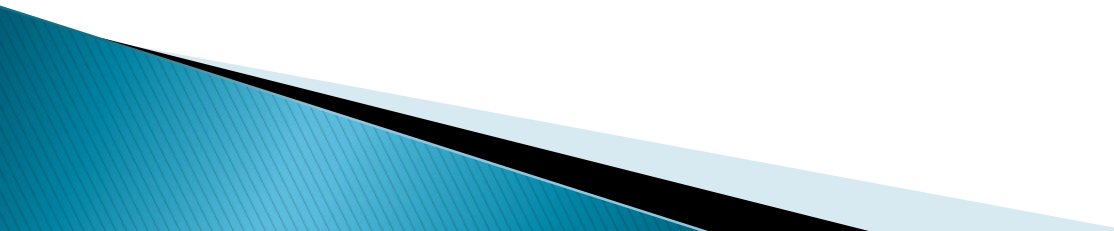
# RATIONALE: SPECIFIC INSTANCES on CROSS-EXAMINATION

- ▶ Not used to prove or disprove character traits.
  - ▶ Rather, testing the witness's KNOWLEDGE of reputation of defendant (IF SHE HAS OFFERED REPUTATION EVIDENCE) or her FAMILIARITY with defendant (IF SHE HAS OFFERED OPINION EVIDENCE).
- 

# PRACTICAL REALITY: THE PUNCH IS IN THE QUESTION!

- ▶ It doesn't matter what the answer is.
- ▶ And you can't prove it up to the jury.

# HOW BIZARRE IS THAT?!

- ▶ A party may *insinuate* by asking about it.
  - ▶ But a party may not *prove* it to the jury.
  - ▶ **WWJBS?**
- 



# NOTE: 11-405(A) DOES NOT APPLY to RULE 11-412 [SEX -CRIMES]

The mode of proof for sex crimes is different.

They *require* specific acts.

POLICY CHOICE!



# 11-405(B) [CHARACTER IN ISSUE]

**(B) By specific instances of conduct.**

When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of conduct.

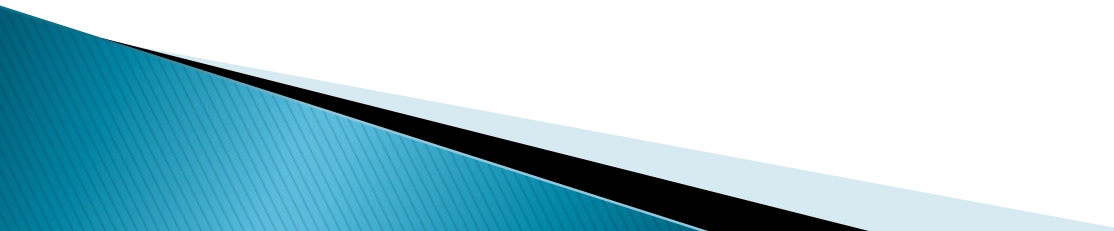


# 11-405(B): CHARACTER IN ISSUE

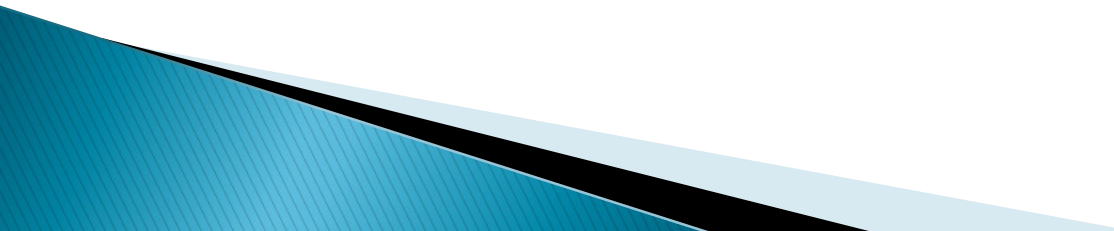
- ▶ Applies when the EXISTENCE of the character trait– not conduct done in accordance with that trait – is the thing to be proved.

- 1) Defamation cases [You are a cheat! I am not a cheat!]
- 2) Custody cases – best interests of the child; fitness of a parent.

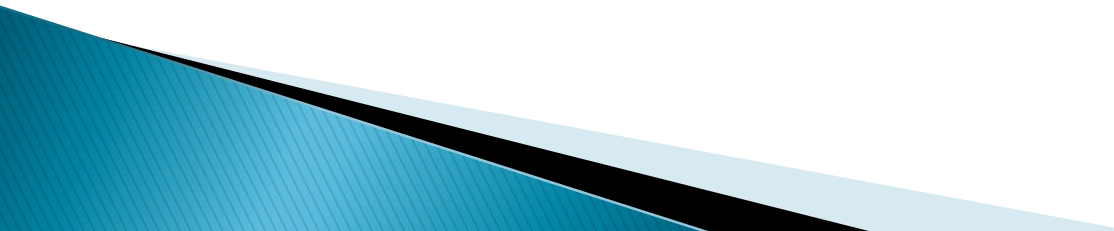
# PROBLEM

- ▶ May a criminal defendant charged with tax evasion call his sister to testify that she thinks the defendant is totally honest?
  - ▶ CLICKERS
  - ▶ A) Yes
  - ▶ B) No
- 

# ANSWER

- ▶ But of course. Opinion evidence.
  - ▶ May he call a neighbor to testify that he has a reputation as ethical and law-abiding?
  - ▶ CLICKERS
  - ▶ A) Yes
  - ▶ B) No
- 

# ANSWER AND **ADDITIONAL** **PROBLEM**

- ▶ But of course. Reputation!
  - ▶ **PROBLEM:**
  - ▶ May he call a police officer to testify that the defendant turned in an expensive watch he found on the street?
- 

# ANSWER AND . . . .

- ▶ NOOOOOOOOOOO. Specific act evidence!
- ▶ May the defendant himself testify about turning in a watch?

# ANSWER

- ▶ NOOOOOOOOOOOOOOO. Specific act evidence.

# PROBLEM

- ▶ In a battery case, can the defendant testify to his own character for peacefulness?

# ANSWER: YOU BET!

- ▶ But what?



# OPENS THE DOOR FOR THE PROSECUTION TO RESPOND!

**11-404(A)(2) Exceptions for a defendant or victim in a criminal case. The following exceptions apply in a criminal case:**

**(a) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it; . . . .**

**IN WHAT FORM?**

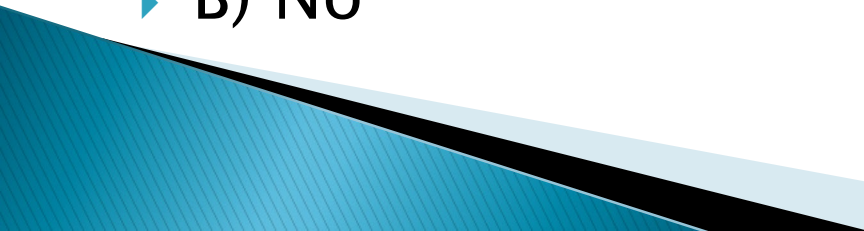


# REPUTATION AND OPINION!

(Specific instance inquiry on cross.)

**11-405(A) By reputation or opinion.** When evidence of a person's character or character trait is admissible, it may be proved by testimony **about the person's reputation** or by testimony in the form of **opinion**. On **cross-examination** of the character witness, **the court may allow an inquiry into relevant specific instances of conduct.**

# PROBLEM

- ▶ A criminal defendant charged with murder calls his minister, who testifies that the defendant is “gentle” and “wouldn’t hurt anyone.”
  - ▶ Can the prosecution call a rebuttal witness who will testify that the defendant attacked him in a supermarket checkout line a year before the killing?
  - ▶ CLICKERS
  - ▶ A) Yes
  - ▶ B) No
- 

# ANSWER AND . . . .

- ▶ NOOOOOO. Specific act evidence.
- ▶ **PROBLEM**
- ▶ Can the prosecution ask the minister on cross: “Are you aware that the defendant attacked someone in a supermarket checkout line?”

# ANSWER

- ▶ Yes!
- ▶ 11-405(A) Specific inquiry on cross!

# 11-404(B) Crimes, wrongs or other acts.

**(1) Prohibited uses.** Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

**(2) Permitted uses; notice in a criminal case.**

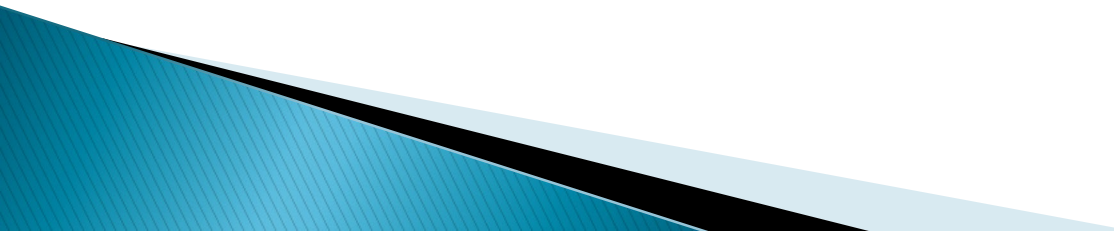
This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

[NOTICE REQUIREMENT]






# ROLL THE VIDEOTAPE: ANATOMY OF A MURDER

- ▶ [10]
  - ▶ MURDER TRIAL. DEFENDANT IS TESTIFYING.
  - ▶ If the murder involved firearms, why might it be admissible?
- 

# Anatomy of a Murder

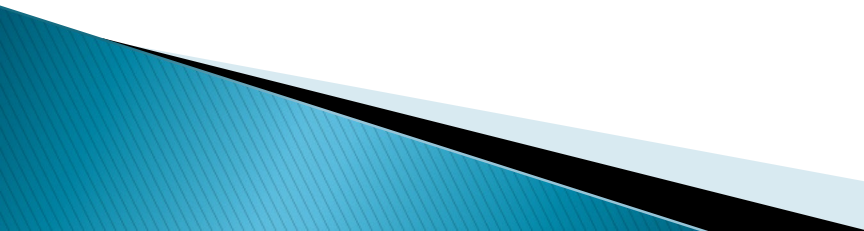
- ▶ Knowledge of the use of firearms!
  - ▶ But 11-403?
  - ▶ Trivia: the “judge” is Joseph Nye Welch – who was counsel to the Army in the McCarthy hearings of 1954.
  - ▶ Welch was the one who asked McCarthy, “Have you no decency sir?”
- 




# U.S. v. LEONARD PELTIER



# U.S. v. Leonard Peltier

- ▶ On June 26, 1975, two Special Agents of the FBI were killed in South Dakota.
  - ▶ Peltier and three others are charged with the murders.
  - ▶ Shortly before noon on June 26, the agents were in unmarked cars and following three people (including Peltier) in a red and white van.
  - ▶ The van stopped; there was shooting and the agents were killed.
- 

# Leonard Peltier's trial

- ▶ The government offered the following:
  - ▶ On November 22, 1972, Peltier was charged with attempted murder in Milwaukee.
  - ▶ He was arrested, pled not guilty, and released on bond.
  - ▶ On July 29, 1974, he failed to appear for trial and a bench warrant was issued for his arrest.
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# 11-404(B) Crimes, wrongs or other acts.

**(1) Prohibited uses.** Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

**(2) Permitted uses; notice in a criminal case.**

This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

[NOTICE REQUIREMENT]



# Admissible?

- ▶ What is the best argument for admission of the evidence of the outstanding warrant for FTA?

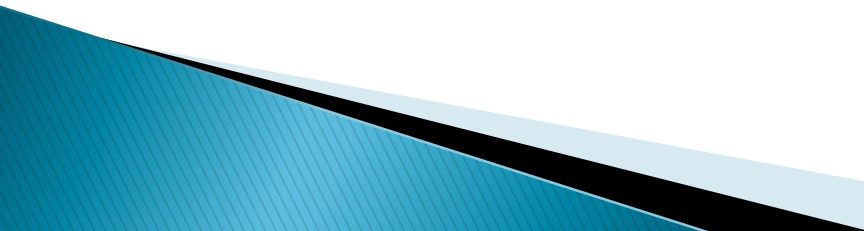
# U.S. v. Peltier, 585 F.2d 314 (8th Cir. 1978)

- ▶ Motive to react with deadly force (8th Circuit affirmed trial court admission).
- ▶ Defense? What might defense argue?

# 11-403

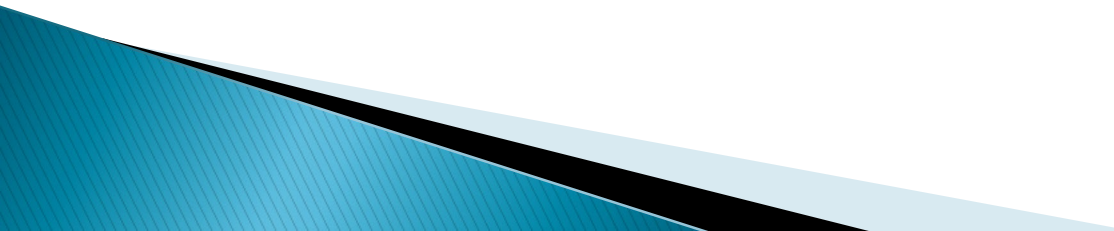
- ▶ Peltier was two states away *and* it was a year after issuance of the warrant.
- ▶ Low probative value, substantially outweighed by the risk of unfair prejudice.

# Problem

- ▶ At Peltier's trial, the prosecution sought to prove these facts:
  - ▶ On November 14, 1975 (5 months after the shooting), Oregon State Police stopped two cars (motor home and a station wagon).
  - ▶ Peltier was in the motor home.
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# Problem

- ▶ Peltier's AR-15 (a high velocity, small caliber weapon) was found in the motor home.
  - ▶ According to the autopsy of the agents, the agents were killed with a high velocity, small caliber weapon.
  - ▶ Is the possession admissible?
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# Problem

Admissible to show identity.

- ▶ Not that he is the kind of person who would shoot someone, but that he was the person in possession of the gun that killed the FBI agents.

11-403?



# Peltier

- ▶ Prejudice from possession of the AR-15 alone is unlikely to substantially outweigh the high probative value.

# MANY THANKS!

