Evidence Extravaganza – How to Rule in the Courtroom with Your Evidence Knowledge

Chartier & Nyamfukudza, P.L.C.
Mary Chartier
517.885.3305
www.cndefenders.com
mary@cndefenders.com

The Right to Present a Defense

The right to present a defense is a fundamental constitutional right under which a wide range of evidentiary issues fall. U.S. Const., amends. V, VI, XIV; Const. 1963, art. 1, §§ 13, 17, 20. Bias, credibility, and motive to lie are rationales that provide attorneys with a great deal of latitude for questioning. When an objection is posed regarding the admissibility of our line of questioning, it is often best to address the issue in terms of the evidentiary basis for the admissibility, as well as the constitutional basis if there is one. This will preserve the issue for appeal if the client is convicted. Be sure to also "federalize" the issue by stating the rationale under both the state and United States Constitutions to ensure that there is a basis for seeking habeas relief if the client is convicted.

I. A Few Background Cases on the Right to Present a Defense

- *Crane v. Kentucky*, 476 U.S. 683, 690; 106 S. Ct. 2142; 90 L. Ed. 2d 636 (1986): The Constitution guarantees "a meaningful opportunity to present a complete defense."

- *United States v. Scheffer*, 523 U.S. 303, 309-310; 118 S. Ct. 1261; 140 L. Ed. 2d 413 (1998): The Court held that because there is concern over the reliability of polygraph evidence, its exclusion does not violate a defendant's right to present a defense.

  A defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions. A defendant's interest in presenting evidence may bow to accommodate other legitimate interests in the criminal trial process. As a result, a state has broad latitude under the Constitution to establish rules excluding evidence from criminal trials.

  - ❖ Note: The exclusion of evidence must infringe upon a weighty interest of the defendant, and the rule must be arbitrary or disproportionate to the purposes that it was designed to serve to be found to violate a defendant's right to present a defense.

Examples of legitimate interests are ensuring that only reliable evidence is introduced at trial, preserving the jury's role in determining credibility, and avoiding litigation that is collateral to the primary purpose of the trial.

Argument Note:
• Identify a weighty interest and explain how excluding the evidence will infringe upon this interest *and* explain how the exclusion is arbitrary and disproportionate.

- *Chambers v. Mississippi*, 410 U.S. 284, 294-295; 93 S. Ct. 1038; 35 L. Ed. 2d 297 (1973): The right of an accused in a criminal trial to due process is the right to a fair opportunity to defend against the state's accusations.

- *People v. McGhee*, 268 Mich. App. 600, 637-638; 709 N.W.2d 505 (2005): A rule of evidence contravenes a defendant's due process right to present a defense if it infringes on a substantial interest or significantly undermines a fundamental element of his defense.

II. Bias and Motive

A. Basics on Bias

- *People v. Layher*, 464 Mich. 756, 762-764; 631 N.W.2d 281 (2001): Bias is a term used to describe the relationship between a party and a witness in favor of or against a party. Bias may be induced by a witness' like, dislike, or fear of a party, or by the witness' self-interest. A successful showing of bias on the part of a witness would have a tendency to make the facts to which he testified less probable in the eyes of the jury than it would be without such testimony.

  Bias is almost always relevant. A witness may be cross-examined on any matter relevant to any issue in the case, including credibility.

  An attempt to discredit a witness' testimony by showing that the witness may be biased in favor of, or against, a party or witness, is highly relevant, particularly in cases where that witness is effectively the sole or chief source of evidence that contradicts the accuser. Denying the factfinder this type of evidence undermines the truth-seeking process.

Argument Note:

- Cross-examination is liberally allowed and this is a long-standing tenet of the Michigan Supreme Court and the United States Supreme Court.

- ***Delaware v. Van Arsdall***, **475 U.S. 673, 677-679; 106 S. Ct. 1431; 89 L. Ed. 2d 674 (1986)**: Exposing a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.

- ***Davis v. Alaska***, **415 U.S. 308, 316; 94 S. Ct. 1105; 39 L. Ed. 2d 347 (1974)** (internal quotation marks and citation omitted): "The partiality of a witness is subject to exploration at trial and is always relevant as discrediting the witness and affecting the weight of the testimony."

- ***United States v. Abel***, **469 U.S. 45, 52-53; 105 S. Ct. 465; 83 L. Ed. 2d 450 (1984)**: A witness may be consciously or unconsciously biased against a party. A witness may be biased against a party based on like, dislike, fear, or self-interest.

B. Broad Cross-Examination is a Right

- ***Hayes v. Coleman,*** **338 Mich. 371, 381; 61 N.W.2d 634 (1953)**: "'The right of cross-examination is a right the law freely accords to any litigant who finds himself confronted by an adverse witness, and it may not be unduly restrained or interfered with by the court. . . . It is always permissible upon the cross-examination of an adverse witness to draw from him any fact or circumstance that may tend to show his relations with, feelings toward, bias or prejudice for or against, either party, or that may disclose a motive to injure the one party or to befriend or favor the other. The party producing a witness may not shield him from such proper cross-examination for the reason that the facts thus elicited may not be competent upon the merits of the cause.'" (quoting *Gurley v. St Louis Transit Co*, 259 S.W. 895, 898 (Mo. App. 1924).

- ***People v. Salimone***, **265 Mich. 486, 489-500; 251 N.W. 594 (1933)**: "One of the elementary principles of cross-examination is that the party having the right to cross-examine has a right to draw out from the witness and lay before the jury anything tending or which may tend to contradict, weaken, modify, or explain the testimony of the witness on direct examination or which tends or may tend to elucidate the testimony or affect the credibility of the witness."

C. A Witness' Arrest May Show Bias - Turning a Defense Loss into A Win

- ***People v. Layher***, **464 Mich. 756, 768-769; 631 N.W.2d 281 (2001)**: The Court held that evidence of a witness' prior arrest without conviction was admissible to show the witness' bias. The witness was a defense witness, and the Court

said the prior arrest was admissible to show he was biased for the defendant, but this ruling can be used to our advantage.

- ❖ **Note:** A trial court may allow inquiry into prior arrests or charges for the purpose of establishing witness bias where, in its sound discretion, the trial court determines that the admission of evidence is consistent with the safeguards of the Michigan Rules of Evidence.

> **Argument Note:**
> - Include in your argument how the evidence of a witness' prior arrest fits within the rules of evidence, e.g., how it is relevant and its relevance is or is not outweighed pursuant to M.R.E 402 and M.R.E. 403 or F.R.E. 402 and F.R.E. 403.

- ➢ **Hypothetical Argument Example:** Mr. Smith was initially arrested along with my client for the same offense. The charge was dismissed after Mr. Smith implicated my client and agreed to testify against him. Mr. Smith is biased and has a motive to lie because he does not want to face being charged for the same offense.

D. A Deal or Possible Deal with the Prosecutor May Be Indicative of Bias

- ***Wilkerson v. Cain*, 233 F.3d 886, 890-891 (5th Cir. 2000):** The defendant should have been allowed to cross-examine the key witness for the prosecution about a "deal" with the state. This encompasses not just the actual deal, but also what the witness believed the deal was or thought may happen after the witness testified.

E. Reasons to Limit Cross-Examination into Bias

- ***Olden v. Kentucky*, 488 U.S. 227, 232-233; 109 S. Ct. 480; 102 L. Ed. 2d 513 (1988):** The defendant was denied his constitutional right to cross-examination when he was not allowed to ask questions related to the complainant's sexual relationship with another man and her motive to lie and say that she was raped – and not admit to consensual sex – to preserve her relationship with this man.

  - ❖ **Note:** Some reasons for a court to impose reasonable limits on inquiry into the bias of a witness are, for example, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that would be repetitive or only marginally relevant.

F. Definition of Motive

- ***People v. Hoffman*, 225 Mich. App. 103, 105-106; 570 N.W.2d 146 (1997):** The court defined "motive" as it is defined by Black's Law Dictionary – cause or reason that moves the will and induces action; an inducement, or that which leads or tempts the mind to indulge a criminal act. The court also distinguished between "intent" and "motive." "Motive" is the moving power that drives a person to act for a definite result. "Intent" is the purpose to use a particular means to affect a result. "Motive" is that which incites or stimulates a person to do an act.

G. The Difference Between Motive Evidence and Propensity Evidence

- ***People v. Hoffman*, 225 Mich. App. 103, 107-108; 570 N.W.2d 146 (1997):** The court allowed evidence that the defendant hated women to support his assault against a woman. The court explained that the distinction between admissible evidence of motive and inadmissible evidence of character or propensity is often subtle. The court provided an example to explain the differentiation:

> An African-American man is savagely assaulted and battered by a Caucasian assailant. The assailant neither demands nor takes any money or property. The assailant is a total stranger to the victim. The assailant is later apprehended and charged with the attack. After the arrest, the prosecutor discovers that the defendant had been involved in several other violent episodes in the past, including bar fights, an assault on a police officer, and a violent confrontation with a former neighbor.
>
> Absent a proper purpose this other acts evidence would be inadmissible because its only relevance is to establish the defendant's violent character or propensity towards violence. However, if we were to add to this hypothetical the fact that all the defendant's prior victims were African-American and that the defendant had previously expressed his hatred toward African-American people, then the evidence of the defendant's prior assaults would be admissible to prove the defendant's motive for his conduct. By establishing that the defendant harbors a strong animus against people of the victim's race, the other acts evidence goes beyond establishing a propensity toward violence and tends to show why the defendant perpetrated a seemingly random and inexplicable attack.

❖ **Note:** This case opens up the door to using a great range of evidence to explore a witness' motive to fabricate testimony against the defendant.

H. Propensity Evidence or Bias Evidence

- ***Wynne v. Renico*, 606 F.3d 867, 871-872 (6th Cir. 2010):** The United States Court of Appeals for the Sixth Circuit held that the defendant's constitutional right to present a complete defense was not violated when the trial court refused to admit propensity evidence, such as threats to a former girlfriend, designed to show that the prosecutor's key witness committed the murder. The key was that the court believed that the evidence was designed to show propensity as opposed to bias or motive.

> Argument Notes:
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> - Do not let the prosecutor frame your evidence as propensity or character evidence and argue that you want to show that a witness acted in conformity with past conduct. Instead, argue the evidence is critical to show that the witness has a bias or motive to lie or it is necessary to show one of the permissible reasons listed in 404(b). For example, the witness is the real murderer and wants to point the finger at someone else. Be careful not to argue that the evidence will show the witness' character.
>
> - *A state court determination can be so fundamentally unfair that it deprives a defendant of due process, so be sure to argue that your client's due process rights are being violated when applicable.* A due process objection can turn an evidentiary issue that is critical to your case into a constitutional issue. This will help you with the standard of review, which will be de novo instead of abuse of discretion, and it can also help you if the case goes into federal court on a habeas petition when you argue both the state and United States Constitutions.

I. Credibility and Mental Illness – Psychiatric Evidence is Not Collateral

- ***United States v. Lindstrom*, 698 F.2d 1154, 1163 (11th Cir. 1983):** The defendant should have been allowed to cross-examine a key witness to an alleged fraud scheme about her mental health history because the medical records suggested a history of psychiatric disorders, manifesting themselves in violent threats and manipulative and destructive conduct having specific relevance to the facts at issue. The United States Court of Appeals for the Eleventh Circuit has explained why cross-examining a witness about his mental health is essential to preserving a defendant's Sixth Amendment right to confront witnesses against him.

Certain forms of mental disorder have high probative value on the issue of credibility. Although the debate over the proper legal role of mental health professionals continues to rage, even those who would limit the availability of psychiatric evidence acknowledge that many types of "emotional or mental defect may materially affect the accuracy of testimony; a conservative list of such defects would have to include the psychoses, most or all of the neuroses, defects in the structure of the nervous system, mental deficiency, alcoholism, drug addiction and psychopathic personality." Juviler, Psychiatric Opinions as to Credibility of Witnesses: A Suggested Approach, 48 Cal. L. Rev. 648, 648 (1960). Mental illness may tend to produce bias in a witness' testimony. A psychotic's veracity may be impaired by lack of capacity to observe, correlate or recollect actual events. A paranoid person may interpret a reality skewed by suspicions, antipathies or fantasies. A schizophrenic may have difficulty distinguishing fact from fantasy and may have his memory distorted by delusions, hallucinations and paranoid thinking. A paranoid schizophrenic, though he may appear normal and his judgment on matters outside his delusional system may remain intact, may harbor delusions of grandeur or persecution that grossly distort his reactions to events. As one commentator succinctly summarized the interplay between mental disorders and legal issues of credibility:

The delusions of the litigious paranoiac make him believe he has grievances, which he feels can be corrected only through the courts. His career as a litigant is frequently touched off by a lawsuit or legal controversy whose outcome left him dissatisfied. Often he will insist on conducting his own case, quoting voluminously from the cases and statutes. Because he is likely to be of better-than-average intelligence, he may mislead a jury that is uninformed about his paranoiac career and actually convince them that his cause is just.

Trivial incidents and casual remarks may be interpreted in a markedly biased way, as eloquent proof of conspiracy or injustice. In his telling them, these trivial incidents may be retrospective falsification to be given a grossly distorted and sinister significance. Even incidents of a decade or more ago may now suddenly be remembered as supporting his suspicions, and narrated in minute detail.

> On the other hand, so far as the power of observation is concerned, the paranoid witness may be quite as competent as anyone, and perhaps more than most; his suspiciousness may make him more alert and keen-eyed in watching what goes on.
>
> Delusions of persecution may evoke intense hatred. This may lead to counter-accusations resting on false memory, which may be very real to the accuser and be narrated by him with strong and convincing feeling. And indeed they may have a kernel of truth; because of his personality and his behavior, many people probably do dislike him. As Freud said, a paranoid does not project into a vacuum. Such a person not infrequently feels the need for vengeance.

III. Collateral Matters

A. Determining a Collateral Matter

- ***People v. Carner*, 117 Mich. App. 560, 572; 324 N.W.2d 78 (1982):** A test to determine if a matter is collateral is whether the cross-examining party would be entitled to go into the matter in its case in chief. If yes, then the matter is not collateral.

- ***Justice v. Hoke*, 90 F.3d 43, 47-48 (2d Cir. 1996):** There was only one witness for the prosecution, and his testimony was both uncorroborated and inconsistent with his prior statements. Thus, competent evidence establishing that the witness had a motive to fabricate the charges was of significant importance, and its exclusion could certainly have rendered the verdict questionable. The court held that the excluded testimony could have raised a reasonable doubt that did not otherwise exist because it would not only have challenged the sole prosecuting witness' version of the facts, but would have tended to establish his bias.

> **Argument Note:**
> - The key question is not whether extrinsic evidence contradicting a witness' is material or collateral, but **whether the assertion that the impeaching party seeks to contradict is itself material or collateral.** Thus, the court must focus on the *assertion being challenged.* For example, if you are challenging a witness' ability to see what happened – this assertion is material.

- ***People v. Rosen*, 136 Mich. App. 745, 759; 358 N.W.2d 584 (1984):** A witness testified that she only had one customer on a particular day providing her with the opportunity to view the defendant's conduct. The court held that evidence

that the witness told a police officer that business was good that day was *not collateral* because it bore on her ability to observe the defendant.

- ❖ **Note:** Extrinsic evidence may not be used to impeach a witness on a collateral matter, but there are three kinds of facts that are not considered to be collateral. The categories are:

  1. Facts directly relevant to the substantive issues in the case.
  2. Facts showing bias, interest, conviction of crime, and lack of capacity or opportunity for knowledge.
  3. Any part of the witness' account of the background and circumstances of a material transaction that as a matter of human experience he would not have been mistaken about if his story was true.

- ***People v. Teague*, 411 Mich. 562, 566; 309 N.W.2d 530 (1981):** In a death by stabbing case, testimony from an officer that the defendant had stabbed her husband ten years prior when she found out that he was having an affair was *collateral* because it was neither relevant to the substantive issues in the case nor independently provable by extrinsic evidence, apart from the contradiction, to impeach or disqualify the witness.

  - ❖ **Note:** The Court explained the evidence was inadmissible because of the remoteness of the incident – it occurred ten years earlier – and the testimony did not bear on the defendant's veracity. So two considerations are the *timing* of the alleged incident and the *type* of incident.

B. The Purpose of the Collateral Doctrine

- ***People v. Guy*, 121 Mich. App. 592, 604; 329 N.W.2d 435 (1982):** The purpose of the rule that a witness cannot be impeached on a collateral matter by use of extrinsic evidence is to avoid the waste of time and confusion of issues that would result from shifting the trial's inquiry to an event unrelated to the offense charged.

Argument Note: • In addition to explaining why the evidence is not collateral, as stated above, when offering your rationale for the line of questioning, make your record and explain why the evidence is not a waste of time or a confusion of the issues.

C. The "Complete Story"

- ***People v. Bostic*, 110 Mich. App. 747, 749; 313 N.W.2d 98 (1981):** "Res gestae" means circumstances, facts, and declarations that so illustrate and characterize the principal facts that they place the facts in a proper context. The court refers to the res gestae as the "complete story."

  While this case allowed testimony that an associate of the defendant's had been involved in a possible robbery and the defendant was wearing clothes taken during that robbery, the "complete story" concept can help us admit evidence to try and put witnesses' and the complainant's testimony in context.

> Argument Note:
> - If there is an objection that the evidence is collateral, characterize the evidence as going to the res gestae – and use the term "complete" – to make it easier for the judge to quickly process the argument and for the jury to hear that there is critical evidence that the prosecutor is trying to suppress that the jury should hear.

D. The Completeness of the Defendant's Statements

- ***People v. Warren*, 65 Mich. App. 197, 200; 237 N.W.2d 247 (1975):** When a prosecutor tries to admit only a portion of a defendant's statement, the defendant has the right for the complete statement to come in. An accused in a criminal prosecution is entitled to the benefit of the entire conversation in which an admission introduced in evidence against him was made, even though a part of the conversation is self-serving as to him. Thus, the "doctrine of completeness" requires the complete statement and not just the portion that the prosecutor wants the jury to hear.

IV. Cumulative Evidence

A. Corroborative Evidence or Cumulative Evidence

Preventing repetitive or cumulative evidence is considered a legitimate goal that the trial court can use to preclude the defendant from presenting his defense, so be prepared to show how the evidence is not cumulative. See *Delaware v. Van Arsdall*, 475 U.S. 673, 677-678; 106 S. Ct. 1431; 89 L. Ed. 2d 674 (1986). Explain how the witnesses are unique from each other or their perspective is different. A jury is more likely to believe four witnesses who say that your client was at work at the time of the shooting than just one.

"Cumulative" does not just mean that the evidence is the same. There is a difference between cumulative and corroborative. Courts repeatedly argue that

evidence that the prosecutor is seeking to admit corroborates a witness' testimony – for example, photographs corroborate a witness' version of events – and are not cumulative. See, e.g., *People v. Mills*, 450 Mich. 61, 75-76; 537 N.W.2d 909 (1995).

- ***People v. Daniels*, unpublished opinion per curiam of the Court of Appeals, issued August 12, 2003 (Docket No. 237010):** The Court of Appeals has aptly noted that corroboration comes from cumulative evidence. It is unfair for a court to exclude evidence because it is cumulative, thus opening the door for the prosecutor to argue that the defendant's theory is uncorroborated or insufficiently presented.

- ***People v. Cummings*, 42 Mich. App. 108, 110; 201 N.W.2d 358 (1972):** Evidence that supported the defendant's assertion of innocence was corroborating his assertion; the evidence was not cumulative. The evidence was not cumulative because it would allow defense counsel to more effectively present his case and cross-examine the prosecutor's key witness.

Argument Note:
• Use the language that the courts use – our witness is *corroborating* our client's defense, which is acceptable. And point out that corroborative evidence is naturally cumulative, but explain why it is not a waste of time for the jury to hear the evidence.

B. Motive to Lie/Evidence Not Cumulative or Collateral – Proof of Prior False Allegation of Rape

- ***Redmond v. Kingston*, 240 F.3d 590, 592-593 (7th Cir. 2001):** The United States Court of Appeals for the Seventh Circuit held that a prior false charge of rape was not cumulative because none of the other evidence presented involved a false charge of being raped or would furnish a *motive* for claiming rape. The court said that proof of prior lies in general would be inadmissible because they would not be proof that the complainant would lie about being raped. But the fact that she would previously lie about being raped to her mother and other professionals to get attention would show a motive for what would be an otherwise unusual fabrication. The court stressed that the evidence was not being used to merely show that she was a liar, but it was being used to show her motive to lie. The credibility of the complainant is *critical* to the central issue in a rape case. Denying the defendant the right to present this evidence infringes on his right of confrontation.

Argument Notes:

- Be prepared to clearly link the motive evidence that you want to admit to the charged offense – e.g, the motive to lie about rape is the attention and sympathy the complainant receives.
- Testimony about a prior false allegation of rape is not cumulative or collateral when the testimony of the complainant is the chief evidence of the defendant's guilt, as it often will be in a rape case. Be prepared to show how the other evidence – medical documentation – is insufficient to support a rape charge without the testimony of the complainant; thus, she is providing the chief evidence against the defendant and the prior false allegation is critical.
- A false allegation of rape is not sexual conduct; thus, evidence of the false allegation is not barred by the Rape Shield Statute.

Consideration for the Future: Evidence of a complainant's sexual conduct with people other than the defendant was admissible at common law in relation to certain issues. A possible issue to raise in criminal sexual conduct cases may be that the Rape Shield Statute violates the Constitution because this evidence was routinely admitted at common law when the Constitution was signed. The arguments in *Crawford v. Washington*, 541 U.S. 36; 124 S. Ct. 1354; 157 L. Ed. 2d 177 (2004), may be helpful. The opinion in *Crawford* dealt with the admissibility of testimonial statements made out of court. In determining that no other exceptions are constitutional other than those that existed in common law at the time the Constitution was signed, the Court stated:

> The historical record also supports a second proposition: that the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination. The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts. Rather, the "right . . . to be confronted with the witnesses against him," Amdt. 6, is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding. See *Mattox v. United States*, 156 U.S. 237, 243, 39 L. Ed. 409, 15 S. Ct. 337 (1895); cf. [*Missouri v.*] *Houser*, 26 Mo. [431,] 433-435 [(1858)]. As the English authorities above reveal, the common law in 1791 conditioned admissibility of an absent witness's examination on unavailability and a prior opportunity to cross-examine. The

> Sixth Amendment therefore incorporates those limitations. The numerous early state decisions applying the same test confirm that these principles were received as part of the common law in this country. [*Id.* at 53-54.]

This rationale is worth exploring to argue that the Rape Shield Statute, as well as other evidentiary rules and restrictions, violate the constitutional rights of our clients.

V. Doctrine of Chances – Making this Concept Work for the Defense

- ***People v. Mardlin*, 487 Mich. 609, 612-619; 790 N.W.2d 607 (2010):** This opinion is related to the "doctrine of chances," which is the doctrine of improbabilities. In essence, the prosecutor did not need to prove that the defendant engaged in prior acts of arson and he did not need to show any similarities between the various acts because the prosecutor was not arguing that they were similar in the sense that they were all fires of the defendant's home that occurred the day after he lost his job. In sum, the prosecutor was really saying to the jury – "Come on, of course this man started the fire. How many fires have you had?"

Argument Note:

- In trying to make this opinion advantageous to us as criminal defense attorneys, there is no reason that the "doctrine of chances" cannot be used against the prosecutor's own witnesses. For example, a woman who has regularly taken out PPOs against men when her relationship ends because she claims that they continue to contact her or a snitch who has claimed on more than one occasion that a person has "confessed" to him.

VI. 404(b) Evidence and Reverse 404(b) Evidence

A. General 404(b) Information

- ***People v. Crawford*, 458 Mich. 376, 385; 582 N.W.2d 785 (1998):** The defendant's prior conviction was improperly admitted as evidence of his character or propensity to commit the charged offense; thus, his conviction was reversed.

  The character evidence prohibition is deeply rooted in our jurisprudence. The rule is far from being a "mere technicality." The rule reflects and gives meaning to the central tenet of our system of criminal justice – the presumption of innocence. Underlying the rule is the fear that a jury will convict the defendant on the basis of his bad character rather than because he is guilty beyond a reasonable doubt of the crime charged. The problem with character evidence

and prior bad acts is that they will weigh too heavily with the jury and the jury will prejudge the defendant when he has a bad record. Our system is premised on the defendant standing trial for a particular charge and being provided with a fair opportunity to defend against the charge before the jury, not his past record.

“[I]n our system of jurisprudence, we try cases, rather than persons . . . .”

The Court pointed out a common problem with the prosecutor merely reciting a proper purpose and the trial court deeming the evidence admissible. Admission of prior bad acts evidence or character evidence against the accused must be closely scrutinized by the courts. In the context of prior acts evidence, 404(b) stands as a sentinel at the gate: the proffered evidence truly must be probative of something other than the defendant’s propensity to commit the crime. If the prosecutor fails to weave a logical thread linking the prior act to the ultimate inference, the evidence must be excluded, notwithstanding its logical relevance to character.

Argument Note: • Point out to the court that the prosecutor is mechanically reciting a “proper” purpose, but cannot truly explain a rationale; the evidence is really inadmissible propensity evidence.

- ***People v. Vandervliet*, 444 Mich. 52, 63-64; 508 N.W.2d 114 (1993), amended 445 Mich. 1205 (1994):** Evidence must be logically relevant *and* legally relevant. It is not just enough for the evidence to be logically relevant. This seems conceptually odd because if evidence is logically relevant to an event that would seem to make it legally relevant, but that is not the law. See also ***People v Denison*, 500 Mich. 385; 902 N.W.2d 306 (2017).**

Argument Note: • If you want evidence to be admitted, be sure to argue the evidence’s logical relevance – why it matters under 401 and 402 – and its legal relevance – how it comports with 403.

- ***People v. Golochowicz*, 413 Mich. 298, 309-311; 319 N.W.2d 518 (1982):** Before evidence of the defendant’s other bad act may be admitted: (1) there must be substantial evidence that the defendant actually perpetrated the bad act sought to be introduced; (2) there must be some special quality or circumstance of the bad act tending to prove the defendant’s identity or the motive, intent, absence of mistake or accident, scheme, plan, or system in doing the act and opportunity, preparation, or knowledge; (3) one or more of these factors must be material to the determination of the defendant’s guilt of the charged offense;

and (4) the probative value of the evidence sought to be introduced must not be substantially outweighed by the danger of unfair prejudice.

The "special circumstance" of the second requirement refers to the relationship between the charged and uncharged offenses that supplies the link between them and assures that evidence of the separate offense is probative of some fact other than the defendant's bad character.

Where the only conceivable justification for admission of similar acts evidence is to prove the *identity* of the perpetrator, the only justification for the admission of evidence of the separate offense is when the circumstances and manner in which the two crimes were committed are so nearly identical in method as to earmark the charged offense as the handiwork of the accused. Much more is demanded than the mere repeated commission of crimes of the same class, such as repeated burglaries or thefts. *The commonality of circumstances must be so unusual and distinctive as to be like a signature.*

Argument Notes:

- The link between the other act and the charged offense must be unique and distinctive.
- Not all purposes hold the same weight. Intent, absence of mistake, and identity are facts in issue, whereas motive, plan, or scheme are not facts in issue, but will help prove a fact in issue. Thus, it is less important for a prosecutor to admit evidence proving the latter.
- The purpose has to be genuinely controverted; the prosecutor cannot just argue "intent" because intent would be at issue in almost any case.

- ***People v. Sabin*, 463 Mich. 43, 58-59; 614 N.W.2d 888 (2000):** When the real issue contested is whether the act was committed, and the prosecutor's claim is that the disputed issue of mens rea requires admission of other acts evidence in the case in chief, the trial court should defer the ruling on admissibility where the jury would be likely to determine criminal state of mind from the doing of the act, allowing admission in the case in chief only if the evidence of other acts meets the standards for admission as proof of actus reus.

B. Relevance

- ***People v. Crawford*, 458 Mich. 376, 388-389; 582 N.W.2d 785 (1998):** Logical relevance is the "touchstone" of the admissibility of prior acts evidence and is determined by the application of 401 and 402.

401 provides that "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.

Pursuant to 401, evidence is relevant if two components are present: materiality and probative value. Materiality is the requirement that the proffered evidence be related to any fact that is of consequence to the action. The inquiry is: Is the fact to be proven truly in issue? A fact that is "of consequence" to the action is a material fact. Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case. If the evidence is offered to help prove a proposition which is not a matter in issue, the evidence is immaterial.

- ❖ **Note:** All elements of the crime are "at issue" when the defendant pleads "not guilty" to a crime; thus, they are material.

Then the inquiry is whether the proffered evidence tends 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. The threshold is minimal: "any" tendency is sufficient probative force.

Argument Note: • Note the key word – any. The standard is extremely low for admissibility.

C. Requirements for Similar Acts Evidence to be Admissible and the Difference Between Relevance and Materiality

- ***People v. Major*, 407 Mich. 394, 398-400; 285 N.W.2d 660 (1979):** The defendant did not claim that the alleged sexual act was innocent; thus, prior sexual acts were inadmissible as "similar acts." Similar acts evidence is only legitimate because of its tendency either to identify the defendant as the unknown actor in an alleged criminal act or to negate the defense that the act in question was not criminal because it was unintended, accidental, a mistake, or otherwise innocent.

  Before getting to a similar acts analysis, the prosecutor must first show as a threshold requirement, that the defendant's motive, intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act, is truly at issue *and* material.

  Relevancy and materiality are often used interchangeably, but materiality in its more precise meaning looks to the relation between the propositions for

which the evidence is offered and the issues in the case. If the evidence is offered to prove a proposition which is not a matter in issue or probative of a matter in issue, the evidence is properly said to be immaterial.

Then, as it relates to the defendant, for similar acts evidence to be properly introduced, there must be direct proof of three propositions from which a fourth is inferable and thus proved circumstantially. The propositions are:

> 1. The manner in which the criminal act in question or some significant aspect of it was performed bore certain distinguishing, peculiar, or special characteristics;
> 2. Certain specific similar acts, performed contemporaneously with or prior to or subsequently to the act in question, bore the same distinguishing, peculiar or special characteristics;
> 3. Similar acts were performed by the defendant; and
> 4. Accordingly, the crime in question was committed by the defendant.

Argument Note:

- It is the *distinguishing characteristics* that constitute the acts as similar not the fact that all constitute the same crime or violate the same statute. The distinguishing, peculiar, or special characteristics that are common to the acts and thus personalize them are said to be the defendant's "signature" and identifies him as the perpetrator, or, if his identity is not contested, negates the suggestion that his behavior in performing the challenged act was unintended, accidental, a mistake, or otherwise innocent.

  Be careful of a prosecutor arguing that the defendant committed this crime in the past; therefore, it is a similar act. There must be a signature – he always wore a "Scooby Doo" mask when he robbed the gas station and he always spoke in French. Argue that the signature must be unique and not something that was published in the newspapers because then it would be easy for another person to replicate.

D. Similar Acts Evidence – Knowledge as the Prosecutor's Basis for Admittance

- ***People v. Rosen*, 136 Mich. App. 745, 753; 358 N.W.2d 584 (1984):** A common argument by prosecutors for the admittance of a prior act is that the act proves the knowledge of the defendant as it relates to the instant case. The case in *Rosen* provides an example of how you can defeat this argument. Evidence of a prior drug delivery could not properly be admitted by the prosecutor under the "similar acts" rule of 404(b). "Before evidence of a prior bad act may be admitted to show one of the factors enumerated in the court rule, in this case

knowledge, that factor must be material to the determination of defendant's guilt of the charged offense." Critically, the materiality requirement is only satisfied if the enumerated factor is the subject of a *genuine* controversy.

> **Argument Note:**
> - Be prepared to argue that knowledge is not the subject of a genuine controversy. Your client's defense is not that he did not know his conduct was unlawful; your client's defense is that he did not commit the offense. Thus, knowledge is not at issue because your client is not the perpetrator.

- **Hypothetical Argument Note:** The evidence is not material to the determination of Mr. Smith's guilt. There is no genuine controversy that – if Mr. Smith is the man who sold the cocaine – he knew whether the substance being delivered was cocaine. The only issue in this trial is whether Mr. Smith was indeed the man who sold the cocaine or whether he is being targeted by a confidential informant who is trying to save himself from going to prison.

E. Prior Conviction is Just "Piling On"; Mechanical Recitation of "Knowledge as a Proper Purpose" is Insufficient

- ***United States v. Jenkins*, 593 F.3d 480, 486 (6th Cir. 2010):** The prosecutor argued a 1998 drug conviction was relevant to knowledge and intent. The court said that the conviction was "piling on" and prejudicial.

> **Argument Note:**
> - The prosecutor tried to mechanically use "knowledge" as a proper purpose. The court said that whoever possessed all the drugs in plain view obviously did not do so inadvertently, so claiming knowledge at issue was disingenuous. The issue of knowledge was subsumed by that of who possessed the drugs.

- **Hypothetical Argument Example:** Explain that your client is not claiming that he did not know about the drugs in the house, the defense is that he did not possess the drugs – he was merely a guest and did not live there.

F. Propensity Evidence – Evidence of a Similar Bad Act

- ***People v. Rustin*, 406 Mich. 527, 530-531; 280 NW2d 448 (1979):** Evidence of a prior drug sale to an undercover officer five days before the instant offense was inadmissible.

The prior offense did not establish a course of conduct because the defendant was asserting that he did not sell the drugs. He was not saying that he acted unintentionally or that he did not know the substance was a drug.

Argument Note:

- Be sure to clearly assert your defense when arguing unless that will work to the detriment of your client. If the defense is that your client did not commit the crime, you will have a stronger basis to argue that prior bad acts are inadmissible.

G. Reverse 404(b) Evidence

"Reverse 404(b) evidence" is a prior act by another that is offered as exculpatory evidence by the defendant, instead of being used by a prosecutor against a defendant.

When the evidence relates to a person and not the defendant there is not usually a concern that the jury will convict the defendant because he is a "bad" person based on his past conduct and the character evidence.

- ❖ **Note:** This is an area that is very open for arguments because the concern over prejudicing the defendant is not at issue.

- ***United States v. Aboumoussallem*, 726 F.2d 906, 911 (2d Cir. 1984):** The United States Court of Appeals for the Second Circuit stated that the standard of admissibility when a defendant offers similar acts evidence as a shield need not be as restrictive as when a prosecutor uses such evidence as a sword. The defendant should have been allowed to present evidence that he was duped into being a drug courier. The conviction was affirmed, however, because of the balancing test of F.R.E. 403.

Argument Note:

- Be prepared to argue the balancing test, e.g., why the relevant evidence is not going to confuse the jury or cause undue delay.

- ***United States v. Lucas*, 357 F.3d 599 (6th Cir. 2004):** A witness' prior conviction for selling drugs is inadmissible to show that he likely is the one guilty of the crime because the conviction would be used to establish propensity. Instead, the defendant would have to show a similarity in circumstances, such as similar packaging or similar modus operandi.

Argument Note:

- Investigate the prior crime and focus on some way that the prior crime and the current crime are similar. Consider the possibility

that the witness initially denied he was the guilty party in the prior offense, just as he is doing in the current offense, and some other similarity of circumstances.

- ***United States v. Stevens*, 935 F.2d 1380, 1402-1406 (3d Cir. 1991):** The court provided an overview of reverse 404(b) law and analysis from around the county and held that a defendant may introduce reverse 404(b) evidence as long as its probative value under Rule 401 is not substantially outweighed by Rule 403 considerations.

  - **Hypothetical Argument:** A defendant should be able to advance any evidence that rationally tends to disprove his guilt and passes the 403 balancing test. The evidence casts reasonable doubt on the prosecutor's theory and Mr. Brown is entitled to constitutionally present his defense under the state and United States Constitutions.

H. Other Acts and Statements in CSC and Domestic Violence Cases

MCL 768.27a provides the following:

> (1) Notwithstanding section 27, in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant. If the prosecuting attorney intends to offer evidence under this section, the prosecuting attorney shall disclose the evidence to the defendant at least 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered.
> (2) As used in this section:
>
> (a) "Listed offense" means that term as defined in section 2 of the sex offenders registration act, 1994 PA 295, MCL 28.722.
> (b) "Minor" means an individual less than 18 years of age.

768.27b provides the following:

> (1) Except as provided in subsection (4), in a criminal action in which the defendant is accused of an offense involving domestic violence or sexual assault, evidence of the defendant's commission of other acts of domestic violence or sexual assault is admissible for any purpose for which it is relevant, if it is not otherwise excluded under Michigan rule of evidence 403.

(2) If the prosecuting attorney intends to offer evidence under this section, the prosecuting attorney shall disclose the evidence, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered, to the defendant not less than 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown.

(3) This section does not limit or preclude the admission or consideration of evidence under any other statute, including, but not limited to, under section 27a, rule of evidence, or case law.

(4) Evidence of an act occurring more than 10 years before the charged offense is inadmissible under this section unless the court determines that 1 or more of the following apply:

(a) The act was a sexual assault that was reported to law enforcement within 5 years of the date of the sexual assault.

(b) The act was a sexual assault and a sexual assault evidence kit was collected.

(c) The act was a sexual assault and the testing of evidence connected to the assault resulted in a DNA identification profile that is associated with the defendant.

(d) Admitting the evidence is in the interest of justice.

(5) The amendatory act that amended this subsection does not alter or in any manner affect the statutes of limitation for the offenses described in this section.

(6) As used in this section:

(a) "Domestic violence" or "offense involving domestic violence" means an occurrence of 1 or more of the following acts by a person that is not an act of self-defense:

(i) Causing or attempting to cause physical or mental harm to a family or household member.

(ii) Placing a family or household member in fear of physical or mental harm.

(iii) Causing or attempting to cause a family or household member to engage in involuntary sexual activity by force, threat of force, or duress.

(iv) Engaging in activity toward a family or household member that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

(b) "Family or household member" means any of the following:

(i) A spouse or former spouse.

(ii) An individual with whom the person resides or has resided.

(iii) An individual with whom the person has or has had a child in common.

(iv) An individual with whom the person has or has had a dating relationship. As used in this subparagraph, “dating relationship” means frequent, intimate associations primarily characterized by the expectation of affectional involvement. This term does not include a casual relationship or an ordinary fraternization between 2 individuals in a business or social context.

(c) “Sexual assault” means a listed offense as that term is defined in section 2 of the sex offenders registration act, 1994 PA 295, MCL 28.722.

(7) This section applies to trials and evidentiary hearings commenced or in progress on or after May 1, 2006.

MCL 768.27c provides the following:

(1) Evidence of a statement by a declarant is admissible if all of the following apply:

(a) The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant.

(b) The action in which the evidence is offered under this section is an offense involving domestic violence.

(c) The statement was made at or near the time of the infliction or threat of physical injury. Evidence of a statement made more than 5 years before the filing of the current action or proceeding is inadmissible under this section.

(d) The statement was made under circumstances that would indicate the statement’s trustworthiness.

(e) The statement was made to a law enforcement officer.

(2) For the purpose of subsection (1)(d), circumstances relevant to the issue of trustworthiness include, but are not limited to, all of the following:

(a) Whether the statement was made in contemplation of pending or anticipated litigation in which the declarant was interested.

(b) Whether the declarant has a bias or motive for fabricating the statement, and the extent of any bias or motive.

(c) Whether the statement is corroborated by evidence other than statements that are admissible only under this section.

(3) If the prosecuting attorney intends to offer evidence under this section, the prosecuting attorney shall disclose the evidence, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered, to the defendant not less than 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown.

(4) Nothing in this section shall be construed to abrogate any privilege conferred by law.
(5) As used in this section:

(a) "Declarant" means a person who makes a statement.

(b) "Domestic violence" or "offense involving domestic violence" means an occurrence of 1 or more of the following acts by a person that is not an act of self-defense:

(i) Causing or attempting to cause physical or mental harm to a family or household member.

(ii) Placing a family or household member in fear of physical or mental harm.

(iii) Causing or attempting to cause a family or household member to engage in involuntary sexual activity by force, threat of force, or duress.

(iv) Engaging in activity toward a family or household member that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

(c) "Family or household member" means any of the following:

(i) A spouse or former spouse.

(ii) An individual with whom the person resides or has resided.

(iii) An individual with whom the person has or has had a child in common.

(iv) An individual with whom the person has or has had a dating relationship. As used in this subparagraph, "dating relationship" means frequent, intimate associations primarily characterized by the expectation of affectional involvement. This term does not include a casual relationship or an ordinary fraternization between 2 individuals in a business or social context.

(6) This section applies to trials and evidentiary hearings commenced or in progress on or after May 1, 2006.

Consider when preparing your argument:

- ✓ ***People v. Uribe*, 310 Mich. App. 467, 473-474; 872 N.W.2d 511 (2015), *vacated for other reasons*, 499 Mich. 921; 878 N.W.2d 474 (2016):** When the government seeks to admit evidence under MCL 768.27a, a court determines the admissibility of the evidence in three steps: (1) it ascertains whether the proffered evidence is relevant to the case at hand; (2) it determines whether the proposed evidence constitutes a listed offense under the statute; and (3) it analyzes whether the

probative value of the evidence is substantially outweighed by its prejudicial effect.

- ✓ Relevant propensity evidence that is typically excluded by MRE 404(b) is admissible under MCL 768.27a. *People v Duenaz*, 306 Mich App 85, 99; 854 NW2d 531 (2014). However, the Michigan Supreme Court has held that evidence otherwise admissible under MCL 768.27a still remains subject to the requirements of MRE 403. *People v Watkins*, 491 Mich 450, 481; 818 NW2d 296 (2012). While a defendant's criminal history is relevant to a similar charge, "evidence of sexual acts between the defendant and persons other than the complainant is not relevant to bolster the complainant's credibility because the acts are not part of the principal transaction." *People v Pattison*, 276 Mich App 613, 617; 741 NW2d 558 (2007) (internal quotations and citations omitted).

- ✓ MCL 768.27a is subject to the MRE 403 balancing test.

- ✓ When making this determination, this Court should consider factors such as: (1) the dissimilarity between the other acts and the charged crime, (2) the temporal proximity of the other acts to the charged crime, (3) the infrequency of the other acts, (4) the presence of intervening acts, (5) the lack of reliability of the evidence supporting the occurrence of the other acts, and (6) the lack of need for evidence beyond the complainant's and the defendant's testimony. *Watkins*, 491 Mich at 487-488.

- ✓ This list is meant to be illustrative, not exhaustive. *Id.* at 488. A court may also "consider whether charges were filed or a conviction rendered when weighing the evidence under MRE 403." *Id.* at 489.

- ✓ Where allegations are unproven, the probative value of the evidence is reduced and there is a danger of confusing the jury, turning the focus of the trial from the current charges to the defendant's prior acts. *United States v Hough*, 385 Fed Appx 535, 537 (6th Cir 2010). This diminishes the probative value of the evidence in order to avoid a mini-trial. *Id.* at 537-538.

- ✓ MCL 768.27a is unconstitutional because it allows the government to unabashedly introduce propensity evidence for the sole purpose of arguing that a defendant has a propensity to commit certain types of crimes because of his past actions, violating a defendant's right to due process. See US Const, amends V, XIV; Const 1962, art I, § 17. While MCL 768.27a was found constitutional under a separation of powers argument in *Watkins*, it is unconstitutional because of the immense due process violation.

When the prosecutor is trying to admit statements when the complainant is not present, remember –

- ✓ *People v. Olney*, 327 Mich. App. 319; 933 N.W.2d 744 (2019) - The complainant failed to appear at the preliminary examination. The district court permitted a police officer to testify regarding statements that the complainant made as substantive evidence for the purpose of establishing probable cause. The circuit court granted the defendant's motion to quash because (1) the complainant was never declared "unavailable"; and (2) the officer's testimony violated the Confrontation Clause of the Sixth Amendment. The Court of Appeals reversed because it agreed with the government's argument that MCL 768.27c contains no requirement that the complainant be unavailable in order to admit evidence of a statement that otherwise satisfies the statutory requirement.

- ✓ **The key part of the statute** – The statement was made under circumstances that would indicate the statement's trustworthiness. MCL 768.27c(1)(d).

- ✓ Circumstances relevant to the issue of trustworthiness include, but are not limited to, all of the following:
    - o (a) Whether the statement was made in contemplation of pending or anticipated litigation in which the declarant was interested.
    - o (b) Whether the declarant has a bias or motive for fabricating the statement, and the extent of any bias or motive.
    - o (c) Whether the statement is corroborated by evidence other than statements that are admissible only under this section.

Hearsay Basics

In general, hearsay evidence is defined as the following:

> (a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.
>
> (b) Declarant. A "declarant" is a person who makes a statement.

> (c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.
>
> (d) Statements which are not hearsay. A statement is not hearsay if—
>
> (1) Prior statement of witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or
>
> (2) Admission by party-opponent. The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity, except statements made in connection with a guilty plea to a misdemeanor motor vehicle violation or an admission of responsibility for a civil infraction under laws pertaining to motor vehicles, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy on independent proof of the conspiracy

Hearsay issues directly implicate a defendant's Confrontation Clause rights. The United States Supreme Court has breathed new life into the Sixth Amendment with *Crawford v. Washington*, 541 U.S. 36; 124 S. Ct. 1354; 158 L. Ed. 2d 177 (2004), and its progeny. The admission of hearsay testimony may be a violation of a defendant's constitutional rights, so be sure to object on both evidentiary *and* constitutional grounds. And if filing a brief, always cite to the United States Constitution and your state's constitution to be sure that the issue is federalized.

The Michigan Supreme Court has also articulated the importance of a defendant's Sixth Amendment right to confrontation in *People v. Fackelman*, 489 Mich. 515, 524-528; 802 N.W.2d 552 (2011).

> The Confrontation Clause of the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . .

to be confronted with the witnesses against him . . . ." US Const, Am VI. Since its birth as a state, Michigan has also afforded a criminal defendant the right to "be confronted with the witnesses against him," adopting this language of the federal Confrontation Clause verbatim in every one of our state constitutions. Const 1839, art 1, § 10; Const 1850, art 6, § 28; Const 1908, art 2, § 19; Const 1963, art 1, § 20. These constitutional provisions are underscored by MCL 763.1, which provides a criminal defendant the express right to "meet the witnesses who are produced against him face to face." These exact words have been codified in Michigan law since 1846. 1846 RS, ch 151, § 1; 1857 CL 5704; 1871 CL 7503; How Stat 9068; 1897 CL 11796; 1915 CL 15623; 1929 CL 17129.

"These constitutional and statutory provisions are not accidental. They were incorporated in the jurisprudence of this country by reason of the universal condemnation of the inquisitorial methods of the star chamber which had been in force in England." *People v Saccoia*, 268 Mich 132, 135; 255 NW 738 (1934). Specifically, the right to a face-to-face meeting with one's accusers described in MCL 763.1 is deeply rooted in the common-law right of confrontation. It can be directly traced back to the paradigmatic violation of this right, The Trial of Sir Walter Raleigh for High Treason, 1603, 2 Cobbett's Complete Collection of State Trials 1 (T. B. Howell, ed, 1809), in which Sir Walter Raleigh was convicted of treason after being denied the opportunity to confront his alleged accomplice and accuser, Lord Cobham, who had implicated him in a letter that was read to the jury. On trial for his life, Raleigh urged, "If there be but a trial of five marks at Common Law, a witness must be deposed. Good my lords, let my Accuser come face to face, and be deposed." *Id.* at 19.

This was the notorious example of unfairness that the Framers had in mind and wished to avoid when they guaranteed every criminal defendant the right to be confronted with the witnesses against him. To John Adams, who later drafted the Massachusetts Confrontation Clause, the contours of this right were quite clear: "Every Examination of Witnesses ought to be in open Court, in Presence of the Parties, Face to Face." 30 Wright & Graham, Federal Practice & Procedure, Evidence, § 6345, pp 521-522 (quotation marks and citation omitted). The great virtue of confrontation and cross-examination, repeatedly emphasized in founding-era documents, is that these mechanisms advance the pursuit of truth in criminal trials better than any others. See 3 Blackstone, Commentaries on the Laws of England (Jones, ed, 1976), p 373: This open examination of witnesses viva voce, in the presence of all mankind, is much more conducive to the clearing up of truth, than [a]

> private and secret examination . . . [given that] a witness may frequently depose that in private which he will be ashamed to testify in a public and solemn tribunal. . . . Besides, the occasional questions of the judge, the jury, and the counsel, propounded to the witnesses on a sudden, will sift out the truth much better than a formal set of interrogatories previously penned and settled; and the confronting of adverse witnesses is also another opportunity of obtaining a clear discovery, which can never be had upon any other method of trial. See also Hale, The History of the Common Law of England (6th ed, 1820), p 345: [O]ftentimes witnesses will deliver [in private] that, which they will be shamed to testify publicly. . . . [M]any times the very MANNER of delivering testimony, will give a probable indication, whether the witness speaks truly or falsely. . . . [Cross-examination] beats and boults out the truth much better . . . . [A]nd [is] the best method of searching and sifting out the truth . . . .
>
> Our country's Sixth Amendment jurisprudence has never lost sight of the truth-seeking function of the right of confrontation. See, e.g. *Mattox v United States*, 156 U.S. 237, 242-243; 15 S Ct 337; 39 L Ed 409 (1895); *California v Green*, 399 U.S. 149, 158; 90 S Ct 1930; 26 L Ed 2d 489 (1970); *Crawford v Washington*, 541 U.S. 36, 61; 124 S Ct 1354; 158 L Ed 2d 177 (2004). This historical understanding underscores that "the confrontation guarantee serves not only symbolic goals. The right to confront and to cross-examine witnesses is primarily a functional right that promotes reliability in criminal trials." *Lee v Illinois*, 476 U.S. 530, 540; 106 S Ct 2056; 90 L Ed 2d 514 (1986). [Footnotes omitted.]

Practitioners are also reminded that the burden is on the prosecutor to subpoena witnesses. It is immaterial to the analysis of whether a defendant's constitutional rights were violated for the prosecutor to argue that the defendant could have sent a witness a subpoena. *People v. Fackelman*, 489 Mich. 515, 529, n. 7; 802 N.W.2d 552 (2011).

A. Quick Analysis of Hearsay

- To determine if an out-of-court assertion is hearsay, the analysis starts with determining whether the statement is being offered to prove the truth of the matter asserted. See *Anderson v. United States*, 417 U.S. 211, 219-220; 94 S. Ct. 2253; 41 L. Ed. 2d 20 (1974).

- If the assertion is offered for any other purpose, it is not hearsay.

- In short, whether an assertion is hearsay depends on how it is being *used*. Is the jury supposed to believe the statement being made?

B. <u>When The Prosecutor Is Trying To Elicit Hearsay And Arguing That It Is Not For The Truth Of The Matter Asserted.</u>

In response to a hearsay objection, a prosecutor often says that the evidence is not being offered for the truth of the matter asserted. It is a standard response, but one in which the prosecutor often does not have much more when that rote response is truly explored.

A frequent argument by prosecutors is that testimony is not being offered for the truth of the matter asserted but to provide background and res gestae evidence about events that led to the start of an investigation or to show why officers acted a certain way. This is still hearsay because it is often really being offered for the truth of the matter asserted. But even if not, it is more prejudicial than probative because your client cannot confront the speaker. The jury does not need to know why an investigation began – all it needs to know is that an investigation began.

The United States Court of Appeals for the Seventh Circuit has explained the unfair prejudice that inures to a defendant when a hearsay tip of purported criminality is shared with the jury. *United States v. Mancillas*, 580 F.2d 1301, 1310 (7th Cir. 1978). The value of the information "ordinarily 'is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.'" *Id.* (quoting Fed. R. Evid. 403).

The United States Court of Appeals for the Sixth Circuit has also explained that a confidential informant's "tip" is hearsay and, often, testimonial. *United States v. Hadley*, 431 F.3d 484, 500, n 12 (6th Cir. 2005).

Reminder – Always try to make a "speaking objection" when you can. Don't just say, "Objection. Hearsay." Explain why so the jury knows you are not just being an obstructionist – "Objection. Hearsay. Mr. Smith is not here to speak to the jury and it's unfair because my client cannot question him."

C. Implied Hearsay

A related concept is implied hearsay. The prosecutor is not able to elicit what was said by the third-party because of a sustained hearsay objection, but then asks something along the lines of, "After you questioned Mr. Smith, what did you do next?" The jury cannot hear the words of Mr. Smith, but it can fill in the gaps – Mr. Smith provided evidence against your client that led to his arrest. This is improper because it is still based on hearsay. The prosecutor often offers this scenario when an officer acts on the basis of a hearsay statement. While the specific words may not be elicited, the substance of the statement is being put forth to the jury. A nice discussion of this concept can be found in *United States v. Reyes*, 18 F.3d 65 (2d Cir. 1994).

The term "implied hearsay" is different than the concept of an implied assertion from conduct. While the wording is often used interchangeably, the concepts are very different.

The Michigan Court of Appeals in *People v. Jones*, 228 Mich. App. 191, 207-208; 579 N.W.2d 82 (1998), modified in part and reversed in part on other grounds 458 Mich. 861; 587 N.W.2d 637 (1998), discusses the concept of an implied assertion from conduct being classified as hearsay, which is different than the concept discussed above. The implied assertion from conduct concept is used to denote hearsay where out-of-court conduct of a person is offered in evidence to demonstrate that person's belief. And so, to use a famous example, if the issue were the seaworthiness of a ship, evidence that the ship captain sailed away with his family aboard after making a thorough inspection of the ship was argued to be hearsay because it was the captain's implied assertion that the ship was seaworthy. The court said that this is not hearsay. The ship captain's conduct cannot be viewed as being a truthful assertion. Maybe the captain was not good at his job or was suicidal or hates his family – there are too many variables to view his conduct as being a statement that the ship was seaworthy.

D. When Defense Counsel Is Seeking To Admit Evidence That The Prosecutor May Object To As Being Hearsay

Remember to always have your rationale ready in case the prosecutor objects. Think through what objections may be made to questions and be ready with why the evidence is admissible.

The following are some examples of when hearsay is not offered for the truth of the matter asserted.

- What did the officer tell you when he came into the store? (Of course, you would likely lead the witness in cross-examination, so the question would be phrased differently.)

    This is not hearsay because it is not being offered for the truth of the matter asserted. You are not offering it to prove that what the officer said was true. It is being used to show the effect on the witness and his state of mind – for example, the witness had heard the officer say that they suspected a teenager from the neighborhood of committing the robbery; thus, the witness was predisposed to start thinking of your client. What a person was told may influence what information he recalls or what he thinks is relevant to share with the officer.

- Outside the bar, you said you were going to "f--- up Mr. Jones." (You want to elicit that the witness said he was going to "f--- your client up" to support your self-defense argument.)

  This is not hearsay because it is not being offered to show that the complainant really could "f--- your client up," but to show the effect on your client – he was reasonably afraid of imminent harm.

- What did your ex-girlfriend say to you at the apartment? (She said that your client would pay for cheating on her and end up in jail.)

  This is not hearsay because you are not offering this to show that your client will really pay for cheating on his ex-girlfriend and end up in jail, but it is being offered to show her bias and motive in making the allegations. It goes to her credibility, which is always relevant.

And remember that Facebook pages and social media are great places to find some interesting grounds to show bias, which is always relevant.

E. What Is Often Hearsay

Prosecutors often try to admit some items that are hearsay, such as:

- A sketch or composite drawing
- A postmark
- A telephone bill
- An invoice

A medical diagnosis is hearsay when it is offered for the truth of the matter asserted. *People v. Fackelman*, 489 Mich. 515, 530; 802 N.W.2d 552 (2011). Of course, a medical diagnosis would be non-hearsay if being offered for another reason, such as the effect on your client and why your client took a particular action, e.g., went to get a medical marijuana certification or was using medical marijuana.

F. What Is Not Hearsay

- When a statement is offered only to prove that a prior statement was made. *Anderson v. United States*, 417 U.S. 211, 220, n. 8; 94 S. Ct. 2253; 41 L. Ed. 2d 20 (1974).

- Physical conduct or reactions are not hearsay if they are not being used as assertions. *People v. Gursky*, 486 Mich. 596, 625, n. 55; 786 N.W.2d 579 (2010).

- A command is not hearsay – "Bitch, come out." *People v. Jones*, 228 Mich. App. 191, 205; 579 N.W.2d 82 (1998), modified in part and reversed in part on other grounds 458 Mich. 861; 587 N.W.2d 637 (1998). When a statement is made – regardless of the statement's truth – to show knowledge, intent, or state of mind, it is not hearsay. *Id.* at 206.

- Don't forget that greetings, true questions, and exclamations are often not hearsay.

G. Improper Vouching

***People v. Douglas*, 496 Mich. 557, 566; 852 N.W.2d 587 (2014)** – In *People v. Douglas*, 496 Mich. 557, 566; 852 N.W.2d 587 (2014), the Michigan Supreme Court granted the defendant a new trial because of the admission of the complainant's hearsay statements and improper vouching for the complainant on the part of the witnesses. In *Douglas*, there was no physical evidence or third-party witnesses to verify the alleged offense. See *Id.* at 567. The prosecution built its case around the credibility of the complainant. In *Douglas*, the defendant's ex-wife testified to the complainant's statements regarding the allegations. *Id.* at 568. A police officer and forensic interviewer also testified to hearsay from the complainant. *Id.* at 568-570. A Child Protective Services worker then testified that there was no evidence that the complainant had been coached or was being untruthful. *Id.* at 570.

Also look at *People v. Quresh*, unpublished opinion of the Court of Appeals, issued January 5, 2016 (Docket No. 323247), for an application of improper bolstering and vouching.

Experts

A Few Cases to Note

***People v. Thorpe & People v Harbison*, 504 Mich. 230; 934 N.W.2d 693 (2019)**
In these consolidated cases, the Michigan Supreme Court unanimously reversed the Court of Appeals decisions to affirm convictions in both cases. The cases featured "expert" testimony by two witnesses operating generally in western Michigan courts, Thomas Cottrell and Dr. Debra Simms. In *Thorpe*, Mr. Cottrell testified over objection that children lie about sexual abuse 2% to 4% of the time. He further stated that in his experience there were only two scenarios when children might lie, neither of which were present in Thorpe's case. In *Harbison*, Dr. Simms offered her usual claim that the child suffered "probable pediatric sexual abuse," a claim based on no physical findings, and grounded in her own assessment of the child's credibility.

Citing its previous decisions in *People v Peterson*, 450 Mich 349 (1995), *People v Beckley*, 434 Mich 691 (1990), and *People v Smith*, 425 Mich 98 (1986), the Court reaffirmed that testimony such as that offered by Mr. Cottrell and Dr. Simms in these two cases improperly vouches for the complainant's testimony and invades the province of the jury.

***People v. Cid*, published opinion of the Court of Appeals, 342402, issued February 27, 2020.**
Experts cannot testify to a "diagnosis" of "possible pediatric sexual abuse" in the absence of supporting physical findings.

***People v. DeLaCruz*, unpublished opinion of the Court of Appeals, 347982, issued December 17, 2019**
MRE 703 states that the facts or data that the expert bases his testimony on must be in evidence. This does not mean that all the materials that an expert reviews must be in evidence. MRE 703 aims to ensure that an expert has an evidentiary basis for his opinion, and this purpose is not offended when an expert reviews inadmissible materials without factoring them into his opinion. In short, the rule does not impose a requirement that the expert not expose himself to inadmissible material, as long as he bases the opinion on only admissible facts or data.

***United States v. Rios*, 830 F.3d 403 (2016)**
The United States Court of Appeals for the Sixth Circuit discusses the difficulties when an officer testifies as a fact and opinion (expert) witness.

Conclusion

There have been times in our nation's history when the law has been the engine of great social change, and attorneys have been the ones who drive this change. Undoubtedly, our society has gone through a period where attorneys are viewed as only out to make money, "liar" is often viewed as synonymous with "lawyer," and judges themselves seem to view our presence in the courtroom as a hindrance to their docket control. Criminal defense attorneys, however, always stand ready and committed to be the ones to protect our clients' rights, as well as the rights of all in society. It is only by continuing to challenge the government and standing up for our clients – even when we strike out – that the government is forced to uphold the guarantees of the Constitution.

End Note: This handout was meant to provide a brief overview of only a small fraction of cases that may be helpful to our clients and to generate some brainstorming about ways to present and preserve our clients' issues. Undoubtedly, there are numerous other cases that will be helpful to an understanding of these issues.