

Evidence Refresher for Busy Defenders

Professor Franklin D. Rosenblatt
Associate Professor
Mississippi College School of Law
10.22.2025

Agenda

- Objecting to Improper Openings
- Reverse 404(b)
- Jury Secrecy
- Invoking “the Rule”
- Social Media Evidence
- Telling the jury about harsh punishments
- Experts
- Impeaching Lying Liars about Their Other Lies
- Hearsay: the World’s Worst Definition

Hypo

In its opening statement the prosecutor uses the following words to describe your client:

- Violent
- Selfish
- Predatory
- Sneaky
- Liar
- Untrustworthy

What can you do? What should you do?

Character

- 404(a) – closely guards use of character
- 404(b) – “other acts” if offered for non-propensity reason
- 405 – character, when at issue, only proved by reputation or opinion



Miss. R. Evid. 404(b)

(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. 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.

404(b) Mnemonic: MIAMI COP

- Motive
- Intent
- Absence of Mistake
- Modus operandi
- Identity
- Common scheme or plan
- Opportunity
- Preparation

Also

- Knowledge
- Lack of accident



“Reverse 404(b)”

Defendants have the same right to offer Rule 404(b) evidence as prosecutors. Defendants can use “Reverse 404(b)” to prove that someone else committed the crime attributed to them. No notice is required.

Jury Secrecy Rule / No Impeachment Rule: a Hypothetical

- *Your client lost at trial. You heard second-hand that at least one member of the jury was racist. Do you have any options?*

Miss. R. Evid. 606: Juror's Competency as a Witness

- (a) At the Trial. A juror may not testify as a witness before the other jurors at the trial. If a juror is called to testify, the court must give a party an opportunity to object outside the jury's presence.
- (b) During an Inquiry into the Validity of a Verdict or Indictment.
 - (1) Prohibited Testimony or Other Evidence. During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.
 - (2) Exceptions. A juror may testify about whether: (A) extraneous prejudicial information was improperly brought to the jury's attention; or (B) an outside influence was improperly brought to bear on any juror.

“No impeachment” rule applied

1. Jury members were drunk and high during deliberations
2. Jury members slept through key parts of deliberations
3. Jury members openly disregarded judge’s instructions
4. Jury members made racist comments about each other
5. Jury members made overtly racist comments about the defendant
6. Jury members refused to explain why they would not vote to convict
7. Jury members searched on their phones for other information about the defendant
8. Jury members were bribed to reach a certain result
9. Jury members made a mistake when filling out the verdict form

“No impeachment” rule – **exception met**

1. Jury members were drunk and high during deliberations
2. Jury members slept through key parts of deliberations
3. Jury members openly disregarded judge’s instructions
4. Jury members made racist comments about each other
- 5. Jury members made overtly racist comments about the defendant**
6. Jury members refused to explain why they would not vote to convict
- 7. Jury members searched on their phones for other information about the defendant**
- 8. Jury members were bribed to reach a certain result**
9. Jury members made a mistake when filling out the verdict form

Invoking “the Rule”

Rule 615. Excluding Witnesses

At a party’s request, the court must order witnesses excluded so that they cannot hear other witnesses’ testimony. Or the court may do so on its own. But this rule does not authorize excluding:

- (a) a party who is a natural person;
- (b) an officer or employee of a party that is not a natural person, after being designated as the party’s representative by its attorney; or
- (c) a person whose presence a party shows to be essential to presenting the party’s claim or defense.

[Restyled effective July 1, 2016.]

Rule 1101. Applicability of the Rules

(a) To Courts and Proceedings. These rules apply to all cases and proceedings in Mississippi courts, except as provided in subdivision (b).

(b) Exceptions. These rules – except for those on privilege – do not apply to the following:

- (1) the court's determination, under Rule 104(a), on a preliminary question of fact governing admissibility;
- (2) grand-jury proceedings;
- (3) contempt proceedings in which the court may act summarily; and
- (4) these miscellaneous proceedings:
 - extradition or rendition;
 - issuing an arrest warrant, criminal summons, or search warrant;
 - probable cause hearings in criminal cases and youth court cases;
 - sentencing;
 - disposition hearings;
 - granting or revoking probation; and
 - considering whether to release on bail or otherwise.

Social Media Evidence

- Authentication
- Hearsay
- Adoptive Admissions
- Best Evidence Rule
- Ethics

 **Butler County Sheriff's Office** Update: In Custody



Like · Reply ·  1,051 · 15 hrs

↪ 107 Replies · 3 mins

 **Andrew Marcum** I ain't tripping half of them don't even know me
Like · Reply ·  3,170 · March 2 at 11:36am

^ Hide 804 Replies

 **Butler County Sheriff's Office** Andrew Marcum - If you could stop by the Sheriff's Office, that'd be great.
Like ·  4,819 · March 2 at 2:21pm

Telling the jury about harsh punishments

- Judges jealously guard against defense attempts to inform the jury about harsh consequences of convictions, on the thinking that juries will nullify
- *Does the defense have any options?*

Rule 702 – Testimony by Expert Witnesses

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

Rule 702 Advisory Committee Notes

“As has long been the practice in Mississippi, Rule 702 recognizes that one may qualify as an expert in many fields in addition to science or medicine, such as real estate, cotton brokering, auto mechanics or plumbing. *Boggs v. Eaton*, 379 So. 2d 520 (1980); *Early-Gary, Inc. v. Walters*, 294 So. 2d 181 (Miss. 1974); *Ludlow Corp. v. Arkwright-Boston Mfrs. Mut. Ins. Co.*, 317 So. 2d 47 (Miss. 1975). Rule 702 is the standard for the admission of expert testimony from such other fields as well as for scientific testimony. See *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999).”

Rule 702 Advisory Committee Notes

“By the 2003 amendment of Rule 702, the Supreme Court clearly recognizes the gate keeping responsibility of the trial court to determine whether the expert testimony is relevant and reliable.”

Impeaching Lying Liars about Their Other Lies

Rule 608(b) Specific Instances of Conduct. Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:

- (1) the witness; or
- (2) another witness whose character the witness being cross-examined has testified about.

Hearsay: the World's Worst Definition

Rule 801 - Hearsay

(a) Statement. "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

(b) Declarant. "Declarant" means the person who made the statement.

(c) Hearsay. "Hearsay" means a statement that:

- (1) the declarant does not make while testifying at the current trial or hearing; and
- (2) a party offers in evidence to prove the truth of the matter asserted in the statement.

Is this statement hearsay?

A man hands the police a note that says: “THA MAN
IN THA BLU JAKT ATAKD ME WITH AN ALOOMNIM
BASBAL BAT”

Is this statement hearsay?

A man hands the police a note that says: “THA MAN IN THA BLU JAKT ATAkd ME WITH AN ALOOMNIM BASBAL BAT”

1. If offered to prove the man had a low level of education
2. If offered to prove the man survived the attack
3. If offered to prove that Frankie, who was seen in a blue jacket, was the attacker
4. If offered to prove that the man was not blind
5. If offered to prove the cause of the man’s injuries
6. If offered to prove that police were on notice of potential dangers in that neighborhood
7. If offered to impeach the man’s testimony that he was attacked by a man in a red jacket

Is this statement hearsay?

A man hands the police a note that says: “THA MAN IN THA BLU JAKT ATAkd ME WITH AN ALOOMNIM BASBAL BAT”

1. If offered to prove the man had a low level of education **NOT HEARSAY**
2. If offered to prove the man survived the attack **NOT HEARSAY**
3. If offered to prove that Frankie, who was seen in a blue jacket, was the attacker **HEARSAY**
4. If offered to prove that the man was not blind **NOT HEARSAY**
5. If offered to prove the cause of the man’s injuries **HEARSAY**
6. If offered to prove that police were on notice of potential dangers in that neighborhood **NOT HEARSAY**
7. If offered to impeach the man’s testimony that he was attacked by a man in a red jacket **NOT HEARSAY**

Which of these questions calls for hearsay?

- (1) Prosecution: “Officer, what did she tell you?”
- (2) Prosecution: “Officer, what did you learn as a result of talking to the victim?”

Which of these questions calls for hearsay?

- (1) Prosecutor: “Officer, what did she tell you next?”
- (2) Prosecutor: “Officer, what did you learn as a result of talking to the victim?”

Answer: BOTH. In each question, the prosecution wants the jury to hear and believe the out of court statement of the victim. Don't let your adversary smuggle things they want the jury to believe through non-hearsay rationales such as “effect on the listener” – the reasons are often irrelevant. ARGUE that the real reason the statement is elicited is for the truth of the matter asserted

Hearsay or not hearsay?

- Prosecutor: “What did you do after you pulled the car over?”
- Officer: “I called for K9. The dog sniffed the car and alerted for the presence of illegal drugs.”

Hearsay or not hearsay?

- Prosecutor: “What did you do after the car pulled over?”
- Officer: “I called for K9. The dog sniffed the trunk and began barking to alert me to the presence of illegal drugs.”

Answer: NOT HEARSAY. The officer is narrating what he saw and did. The dog's detection of drugs is not an out of court statement, because the dog is not a person.

The officer can still be impeached about the dog's training and accuracy; probable cause reasons for the stop; and the officer's own memory, bias, inconsistencies, and character for untruthfulness.

Hearsay or not hearsay?

Offered to prove that the powdery substance found on the defendant was cocaine, a report from Dr. Snow, a chemist at the crime lab, with his analysis and findings that the substance is cocaine

Hearsay or not hearsay?

Offered to prove that the powdery substance found on the defendant was cocaine, a written report from Dr. Snow, a chemist at the state crime lab, with his analysis and findings that the substance is cocaine

Answer: HEARSAY. The report is an out of court statement offered for the truth of the matters asserted. In other words, the prosecution wants the jury to believe that what Dr. Snow wrote is true.

IN ADDITION, admitting this report violates the Confrontation Clause of the Sixth Amendment

For more

Google “SSRN Franklin Rosenblatt” to take my free evidence refresher quizzes (with answers and explanations)

- Relevance
- Propensity
- Hearsay

2025 Fall OSPD & MPDA Public Defender Conference

Session Three:
Evidence Refresher for Busy Defenders

Wednesday, October 22, 2025
3:30- 5:00 p.m.

Franklin D. Rosenblatt

