



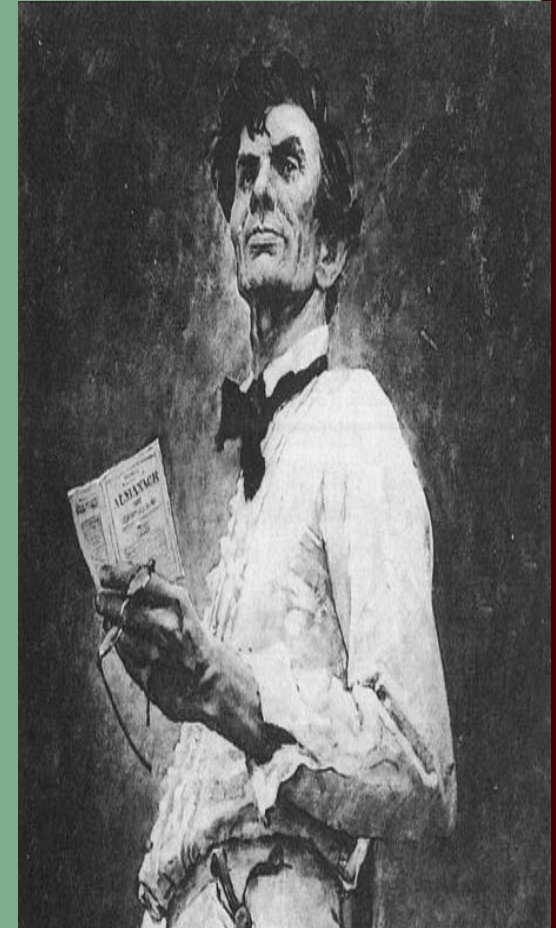
# Evidence for Delaware Criminal Defense

# Impeachment



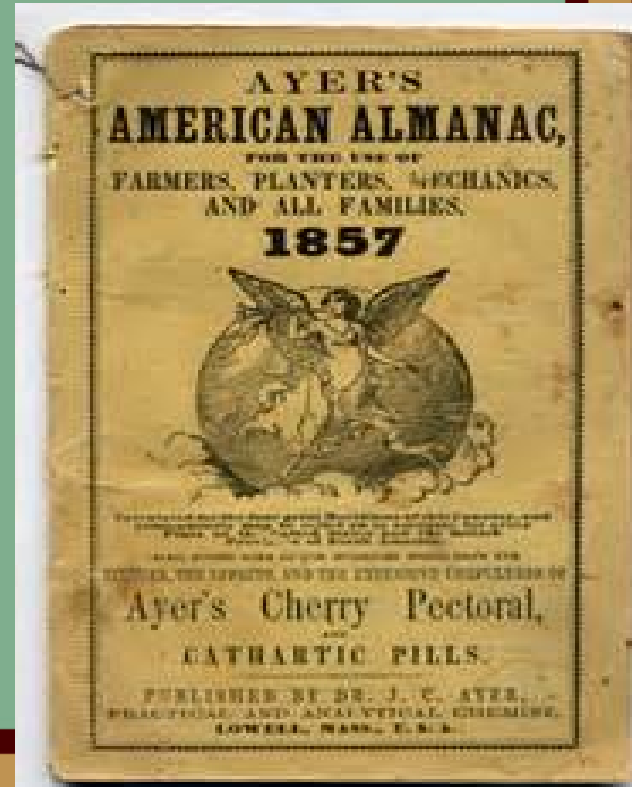
# The Story: Murder Trial

- Witness: “At 11 p.m. I saw defendant, 150 feet away, hit the victim over the head.”
- At prior codefendant’s trial: “I could see because the moon was full; and directly overhead.”



# The Potential Impeachment Material

- Per the Farmer's Almanac, the moon was in the first quarter and riding "low" on the horizon at the precise time of the murder.



# A Preliminary Inquiry: *Why* Do We Impeach?

The big  
**WHY**



impatiens, impatient-  
to suffer, endure; see  
**im•peach** (im-pēch)  
1a. To accuse. b. To c  
duct in office before  
try to discredi





# Impeachment Rationales - 1

- Discredit witness' 'live' version
- And/or
- Support your version –  
crediting the prior statement



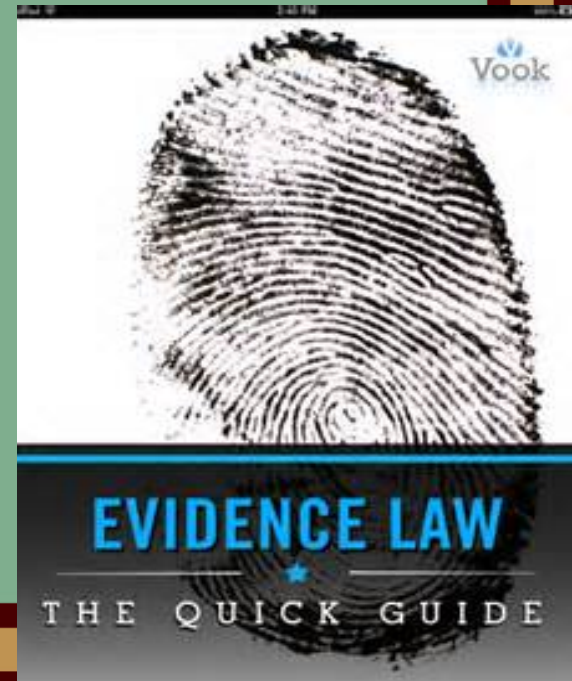
# Impeachment Rationales - 2

- Control
- Drama
- Jury Instruction
- Closing Argument



# Mastering Impeachment 1: Impeachment and Evidence Law

- Character Impeachment – the chronic liar:
  - 608
  - 609
- Case-specific Impeachment – liar *or* mistaken:
  - 613
  - Bias
  - Capacity
  - Inconsistent Facts





# Mastering Impeachment 2: Impeachment and Hearsay

- Impeachment only, or
- Impeaching *and* Substantive

–801

–803

–807



**LOOK INSIDE!**

**Evidence**

**The Hearsay Rule**

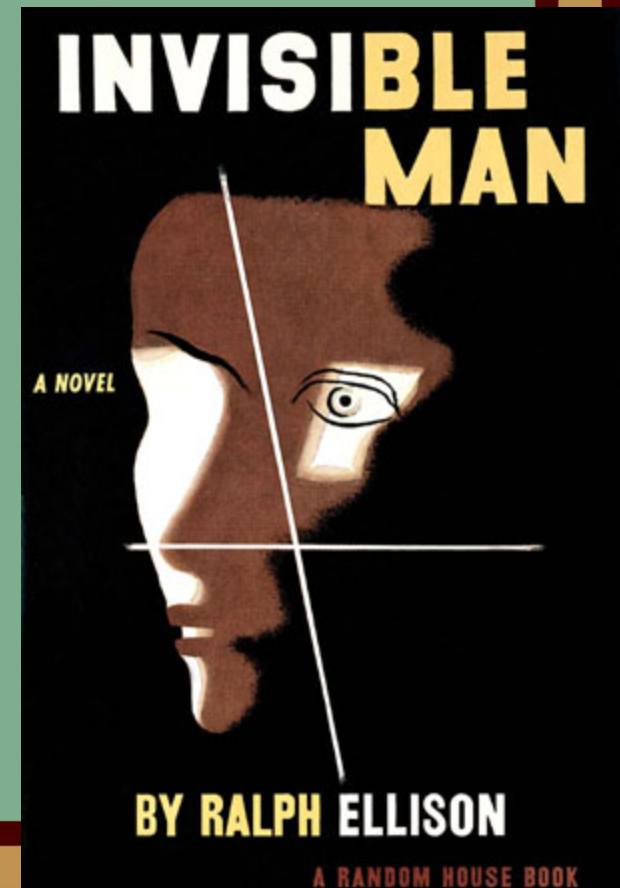
Rule 802  
Rule 803

# Mastering Impeachment 3:

Extrinsic or Intrinsic	Intrinsic Only	Extrinsic Only
Bias	608(b) Dishonest Acts	608 Character
609		
613***		
Capacity		
Contrary Facts		

# Impeachment and Hearsay

- Rule 806 –
- Hearsay declarants may be impeached just like live witnesses.

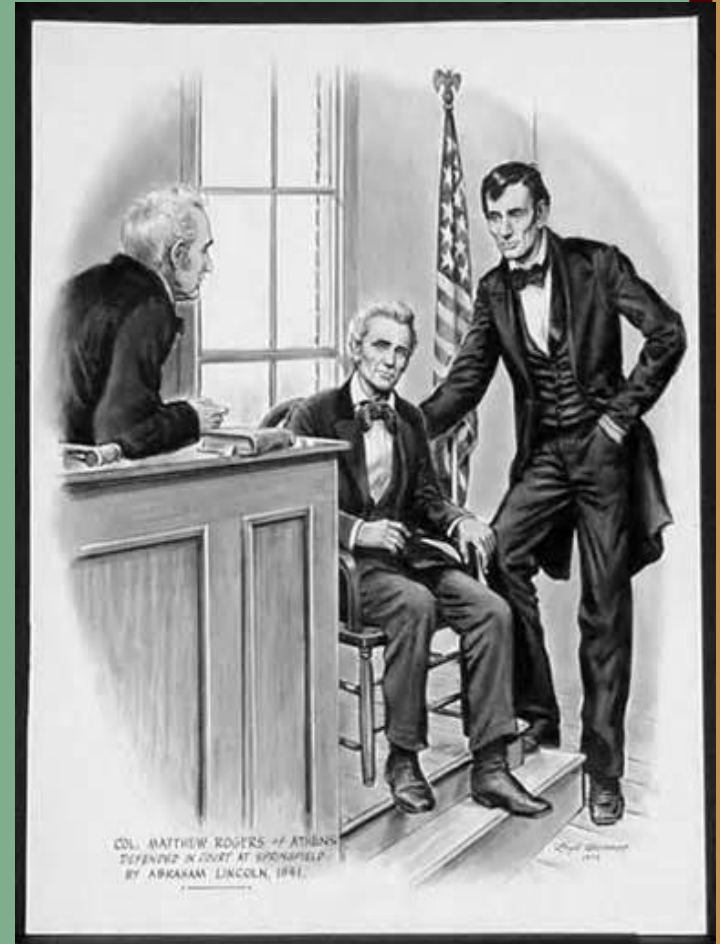


# Mastering Impeachment 5: The Rest is Style and Practice



# So, Back to Abe Lincoln

- Do you entice the witness to say the moon was full?
- Do you impeach on cross?
- Do you impeach extrinsically, after he is off the stand?
- And does impeachment work if the moon is still shining?



# What Did Lincoln Do?

- Q: How could you see from a distance of a hundred and fifty feet or more without a candle at eleven o'clock at night?
- A: The moon was shining real bright.
- Q: A full moon?
- A: Yes, a full moon.





# Next?

- Lincoln made the witness read the Farmer's Almanac.



# The Lesson(s)?

- If incontrovertible physical evidence, it might be safe to break the rules.
- And it's worth discussing – a delayed [extrinsic] impeachment would have been much less potent



# By The Way, Isn't The Almanac Inadmissible Hearsay

- In 1857, it was judicially  
noticed as accurate



# How May I Impeach Thee: Let Me Count The Ways

- 607 – anyone may impeach *any* witness
- 608(a) – extrinsic – character for dishonesty
- 609 – *crimen falsi*
- Bias
- 613 – inconsistent statement



# Inconsistent Statements

- Written
- Oral
- Sworn/unsworn
- E-mail
- Text



# Prior Inconsistent Statements

- **613:** A *procedural* Rule:
- In examining a witness concerning a prior statement made by the witness...the statement need not be shown nor its contents disclosed to the witness at that time...





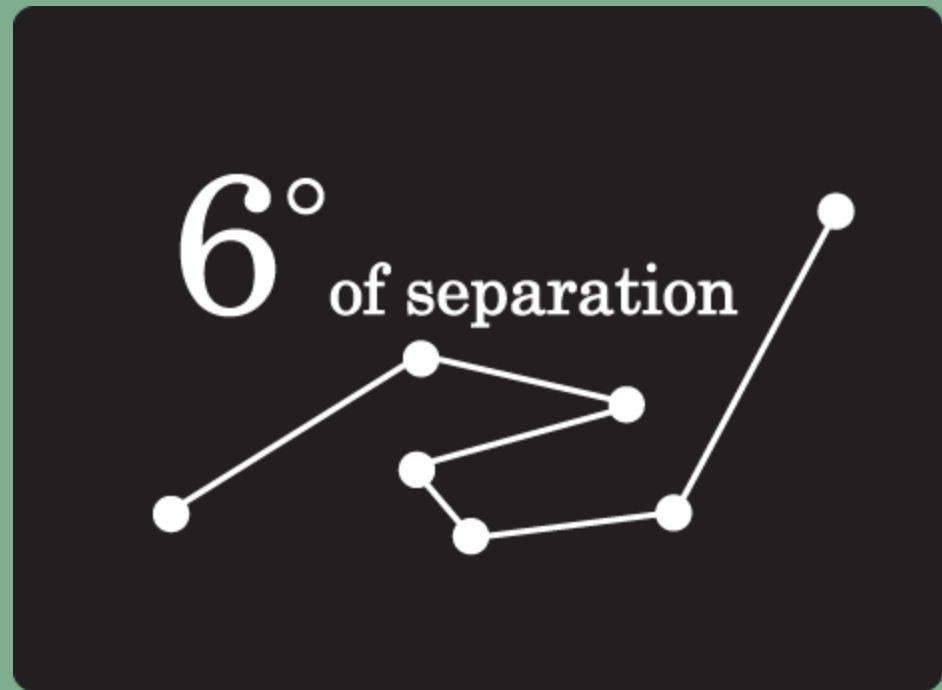
# Prior Inconsistent Statements

- **Extrinsic evidence...not admissible unless**
  - the witness is afforded an opportunity to explain or deny the same and
  - the opposite party is afforded an opportunity to interrogate the witness thereon,
  - or the interests of justice otherwise require
  - *Or* witness does not clearly admit the prior statement

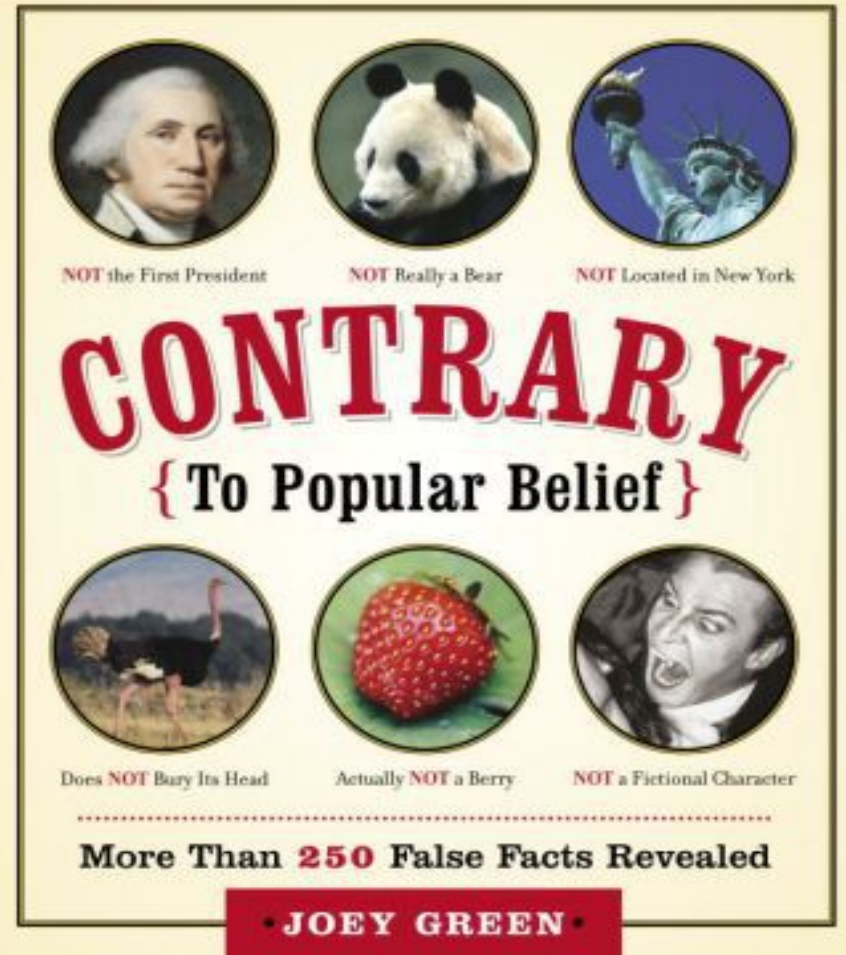
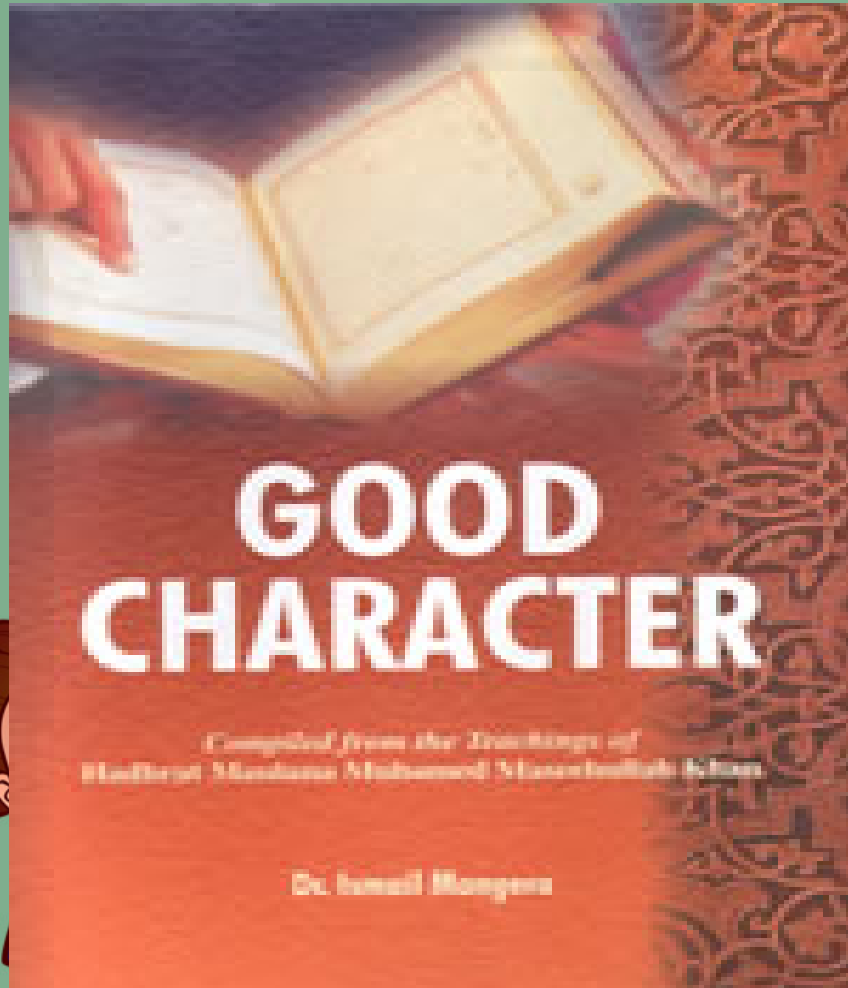


# *How Inconsistent?*

- Enough – need not be 180 degrees opposite

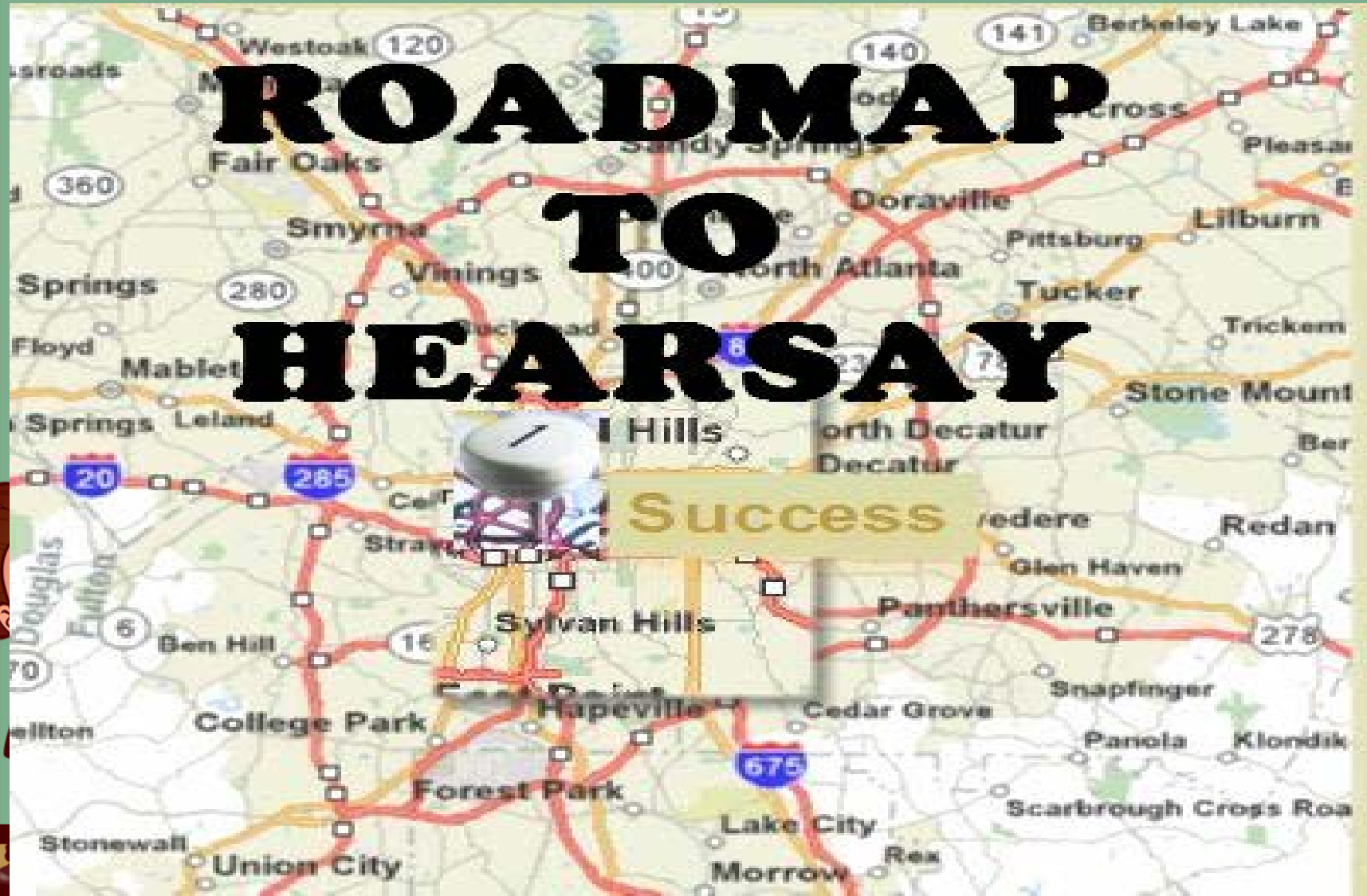


# Permissible Response to Witness Impeachment

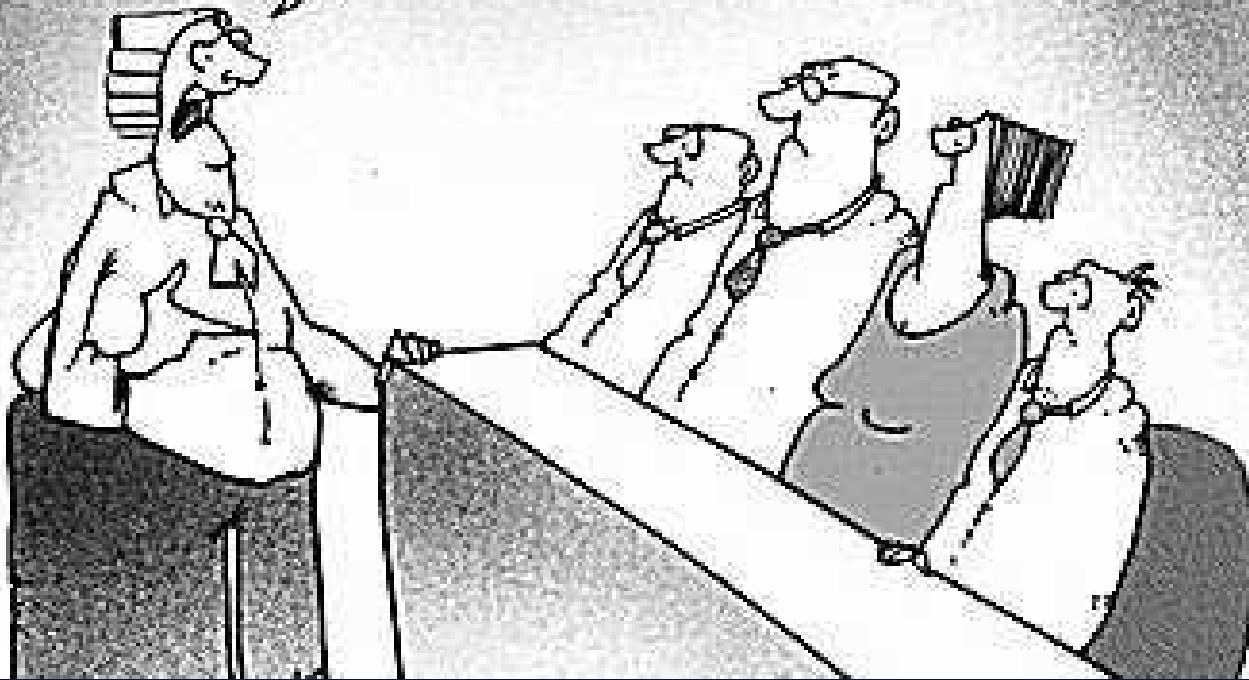


# Let's Start With Hearsay

## ROADMAP TO HEARSAY



LADIES AND GENTLEMEN OF THE JURY  
WE HAVE HEARSAY EVIDENCE FROM  
THE LADY WHO TOLD A FRIEND OF  
HER HAIRDRESSERS COUSIN JULIE..  
WHAT MORE DO WE NEED?



# Estate Litigation

Husband and wife each have a will with different beneficiaries. Who dies first (husband or wife) determines inheritance.





# Estate Litigation

Deputy: I came upon the scene, and I saw the bodies of the husband and wife.

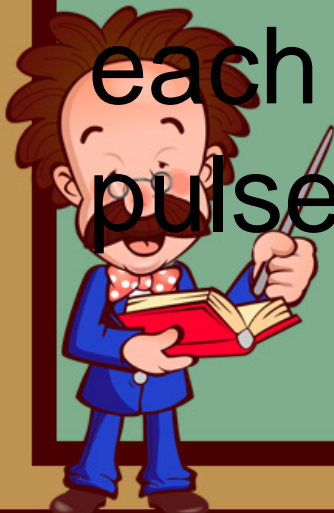


# Estate Litigation:

Deputy:

I leaned over the two bodies, and the husband said “I’m alive.”

I then put my hand on the neck of each of them, and there was no pulse.



# Is “I’m Alive” Hearsay?

- “I’m Alive.”
- “Willie Mays is the greatest ballplayer ever.”



# What is “reliability?”

- The factors to be considered in evaluating testimony are perception, memory, and narration (and sincerity).
- With hearsay, we cannot measure these because the declarant is not present.



# Dual Analytical Approaches (95% overlap)

## Declarant Focused

- Does the probative value depend on the credibility of the speaker?

## Assertion Focused

- Controlling issue is whether there is an assertion

Trust Me

*I'll take care of you.*



# Hearsay – Some Tests and Some Recent Decisions



**WANTED:**





# Is It Hearsay (1)?

Officer: The drug dog barked, and this told me the defendant had recently possessed contraband.



# Is It Hearsay (2)?

- “I pronounce you husband and wife.”
- “I find you not guilty.”
- “I accept your offer.”
- “This is my gift to you.”



# Is It Hearsay (3)?

Erik babysat two children, Calen and Jasmine. Calen died, and the injuries *could* have occurred while he was babysitting the two children.



# Is It Hearsay (3)?

- Jasmine's mother : "A day or two after Calen died, my daughter asked me **if Erik was going to get her.**"
- Jasmine was 18 months old at the time.



# Is it Hearsay (4)?

Slip and fall in supermarket. Manager's wife, present at time of accident, seeks to testify that "just before the woman fell, I heard my husband yell, '*Lady, please don't step in the ketchup.*'"



# Is It Hearsay (5)?

- Impeachment Trial.
- Witness: I heard the President say, “I never had sex with that woman.”



# Is It Hearsay (6)?

BOB EVANS #0001

10854 Rte 588  
Rio Grande, OH  
(740)245-5324

Order # 0514

11/21/2007 R18D1 20:19

SALE \$ 17.70

TIP \$ 3.30

TOTAL \$ 21.00

VISA  
ISSUED TO: [REDACTED]  
EXP. DATE: CARD NOT EXPIRED  
AUTH. #: 193626

```
*****  
*                                     *  
*   THANK YOU FOR VISITING          *  
*   BOB EVANS                       *  
*   Rio Grande, OH                  *  
*                                     *  
*****
```





# Hearsay – A Test (95% reliable)

- How many people have to be telling the truth for the statement to matter?
- Witness only? NO
- Witness *and* declarant? YES



# Not for the Truth

If for any purpose other than  
“the truth of the matter  
asserted,” hearsay rules do not  
apply.



# Not for Its Truth: Spillover

- Rule 401: Is non-hearsay purpose relevant?
- Rule 403: Is there a risk of juror mis-use of proof “for its truth?”



# Issue 2 – Police Course of Conduct



Of

Conduct





INDIRECT

# Course of conduct and *Crawford* - *WARNING*

- Indirect hearsay, contained in “course of conduct” testimony, may violate *Crawford*.
- we hold the State violated Wheeler's Sixth Amendment right to confrontation when it introduced into evidence the substance of inadmissible hearsay statements to an investigating police detective



Wheeler v. State, 36 A.3d 310,  
320 (Del. 2012)

# Warning: Indirect Hearsay and *Crawford*

- Agent testified that he telephoned the supervisor and provided a description of the suspect,
- Agent testified that the supervisor provided a tracking number for the package
- Agent testified that he later searched a particular parcel with the same tracking number



Hot Off the Press!



Breaking News

# Indirect = *Crawford* Violation

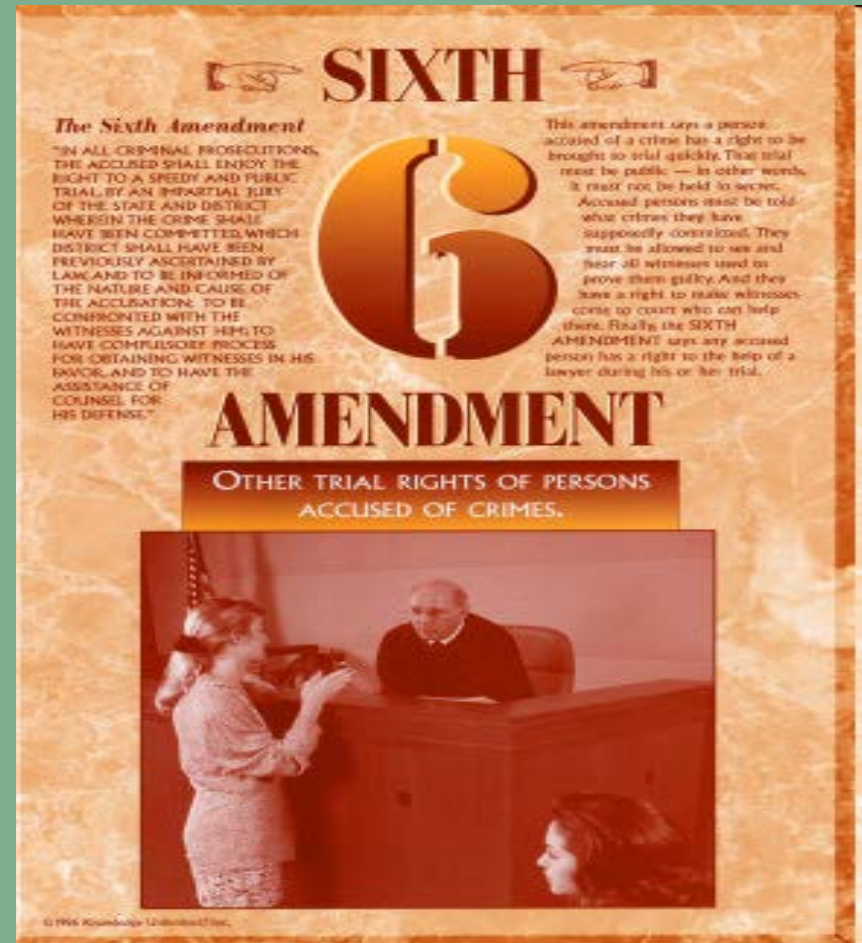
- Conveying the substance of what the supervisor said...introduced testimonial statements for the purpose of the Confrontation Clause, even though he did not quote the supervisor verbatim.
- United States v. Brooks, 2014 U.S. App. LEXIS 22217, 10 (9th Cir. Ariz. Nov. 24, 2014)



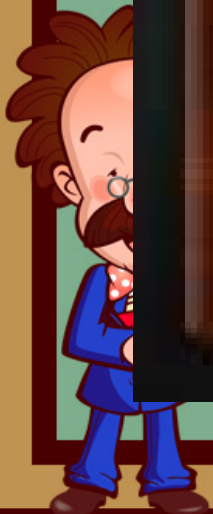


# Issue 3 – *Crawford* and Confrontation

- What's hot?
- Emergency
- Forfeiture
- Forensics

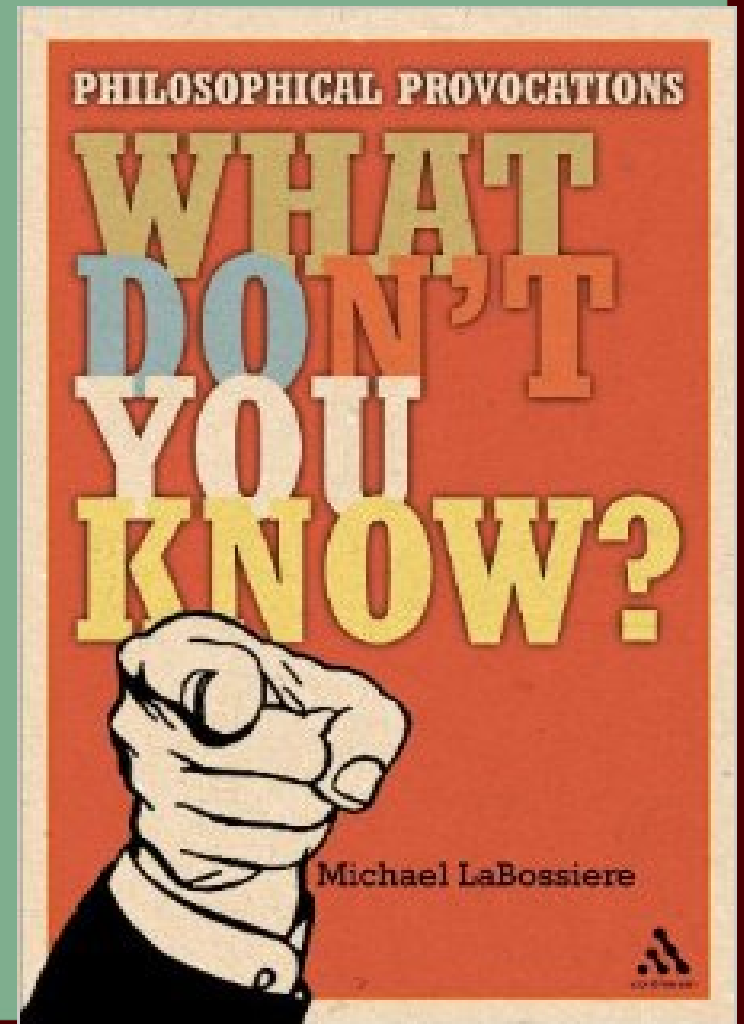


# A Final Test/Reminder



# What's Missing?

- “Bryant did it.”



# What's Missing?

- Did victim see this, hear about it, or guess?



MICHAEL POLANYI

## Personal Knowledge

*Towards a Post-Critical Philosophy*

*A chemist and philosopher attempts to bridge the gap between fact and value, science and humanity*

# Pennsylvania and Personal Knowledge

- Victim, shot repeatedly while running down the street, tells police “Aaron Griffin did it.”
- Admissible?
- proof of the victim's actual observation of the facts declared is not required; instead, what needs to be shown is that the victim had the opportunity to observe the facts that he declares.

Commonwealth v.  
Griffin, 453 Pa. Super.  
657, 666 (Pa. Super.  
Ct. 1996)



# Last But Not Least

**and finally...**





# Character and 404(b)

Everyone is guilty  
of something....

other

DOLORE  
BAD  
ACTS



# Let's Talk "Character"

## Successful Character Traits

responsible  
caring  
honest  
helpful  
enthusiastic  
creative  
confident

## Inferring Character Traits from a Character's Actions



Book Title: \_\_\_\_\_



**Action**

**Inferred  
Character Trait**




# Basic Character Rules

- No character evidence in civil cases to prove action in conformity
- *Some* character [pertinent trait] in criminal cases to prove action in conformity
  - Defendant's good character
  - Victim's bad character
  - Defendant's bad character to rebut *any* proof that homicide victim was initial aggressor
- *Witness* character OK in criminal and civil



# What is Prohibited?

- 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.



# What is Permissible?

- 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



# Are There More Grounds?

- The list is not exclusive
- under the inclusionary approach, the proponent is allowed to offer evidence of uncharged misconduct for any material purpose other than to show a mere propensity

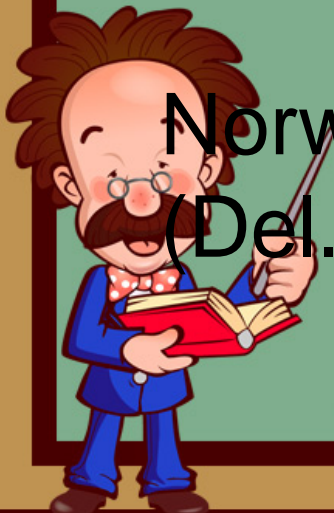
**Getz v. State, 538 A.2d  
726, 730 (Del. 1988)**



# 404(b) *a la* Delaware

- (1) the evidence must be offered for a proper purpose as outlined in Rule 404(b);
- (2) the evidence must meet the relevancy requirement imposed by Rule 402;
- 

Norwood v. State, 95 A.3d 588, 595-596  
(Del. 2014)



# 404(b) *a la* Delaware

- (3) the evidence must pass the Rule 403 balancing test to ensure that its probative value is not substantially outweighed by its potential prejudice to the defendant; and (4) there must be a limiting instruction to the jury regarding the particular purpose for which the evidence may be used





# Delaware, 404(b), and Prejudice

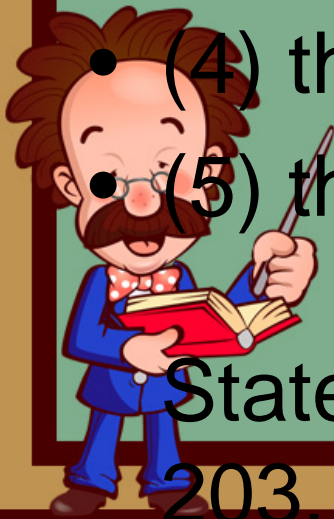
- when it is to be used against a defendant facing a potential conviction for specific crimes before a jury...it is important that the Rule 403 balancing be conducted in an exacting manner

Norwood v. State, 95 A.3d 588, 597 (Del. 2014)



# 403 on top of 404(b)

- (1) the extent to which the point to be proved is disputed;
- (2) the adequacy of proof of the prior conduct;
- (3) the probative force of the evidence;
- (4) the proponent's need for the evidence;
- (5) the availability of less prejudicial proof;

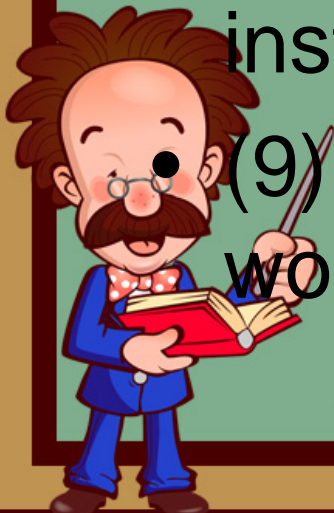


State v. Monroe, 2010 Del. Super. LEXIS

203, 30-31 (Del. Super. Ct. May 14, 2010)

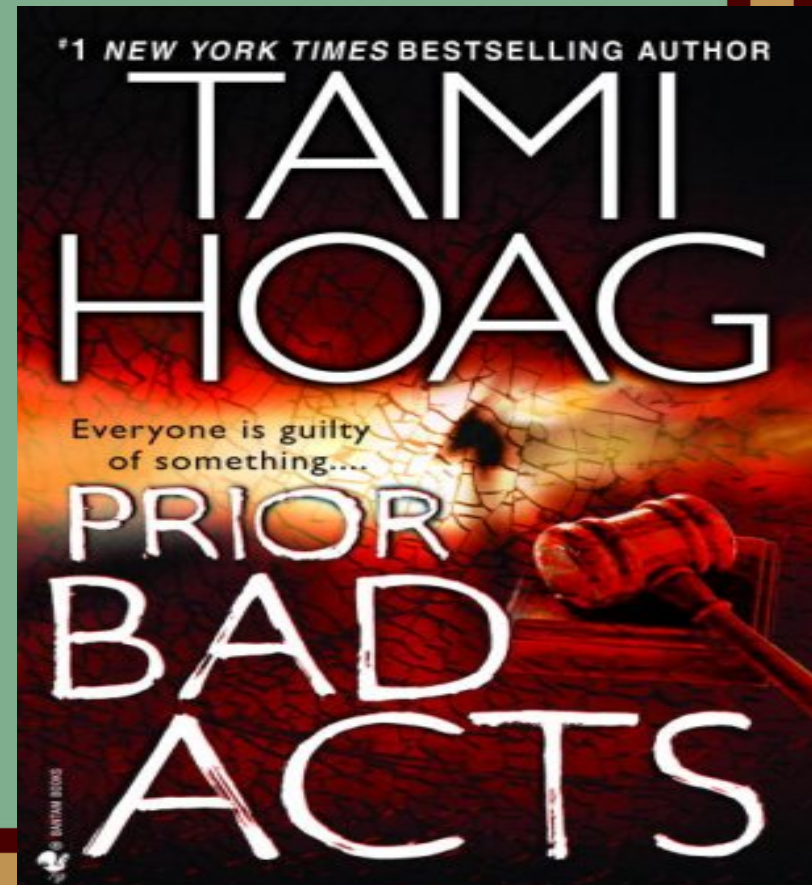
# 403 on top of 404(b)

- (6) the inflammatory or prejudicial effect of the evidence;
- (7) the similarity of the prior wrong to the charged offense;
- (8) the effectiveness of limiting instructions;
- (9) the extent to which prior act evidence would prolong the proceedings



# Act or Character

- When are “other acts” admissible, and when are they “character?”



# Visualizing “Other Acts”

- Is the other conduct “inside” or “outside” of the box?
- Even if “inside,” is it relevant? (At a drug bust, there are child porn photos on the table.)

Time  
Place  
Act



# A Starting Presumption

- All acts “outside of the box” = character.
- What is “character?”
- “Character” is “propensity.”
- “Propensity” is “did it once, did it again.”



# A Simple(?) Test

- Defendant charged with 2013 Good Friday bank robbery.
  1. Convicted of another robbery in 2009.
  2. Convicted of another bank robbery in 2009.
  3. Convicted of another gunpoint bank robbery in 2009.
  4. Convicted of another gunpoint PNC bank robbery in 2009.
  5. Convicted of another gunpoint PNC bank robbery in 2009, on Good Friday.

