EVIDENCE OUTLINE
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**** DO A **RELEVANCE** ANALYSIS AND A **FRE 403** ANALYSIS AT THE BEGINNING AND END OF EVERY ISSUE ****

## I. EVIDENCE GENERALLY

- Order of Proof
  - Each side has to present their case-in chief
  - The party with the burden of proof goes first—either the plaintiff or the state—followed by the adversary. The key is to be presenting evidence of each element of your case-in-chief
  - Present testimony of witnesses
    - Start with direct examination by the calling party
    - Then cross-examination by the adverse party
    - Then redirect by the calling party
    - Then re-cross by the adverse party
    - Further redirect and re-cross as is necessary
  - Then the adversary brings their case and must present all the elements of their defense
  - When each side has completed the process in their case-in chief, the party will rest.
  - After you rest, you have the opportunity to present rebuttal case. Now the case in chief is done and case in rebuttal occurs. Opponent will also have that opportunity. Rebuttal testimony is narrower and is to give the opportunity to rebut the case in chief.
  - Then each side will rest, and each side is ready for the jury, at least in evidentiary terms

- How to get a witness to identify evidence
  - 1. Show evidence to opposing counsel
  - 2. Ask court to approach the bench (they say yes)
  - 3. Then you hand the witness exhibit A

- 4. Then you ask "what is this?" (so that it is not a leading question)
- 5. (Lay the foundation)
- 6. Then you ask to move exhibit A into evidence

## II. DIRECT V. CROSS EXAMINATION AND FRE 611

- General Order of Procedure
    1. Direct Examination
        - First, the party who called the witness engages in direct examination.
    2. Cross Examination
        - After the calling side has finished the direct examination, the other side may cross-examine the witness.
    3. Re-Direct Examination
        - The calling side then has the opportunity to conduct re-direct examination.
    4. Re-Cross examination
        - Finally, the cross-examining side gets a brief opportunity to conduct re-cross.

FRE 611(a): Control by the court.

- The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to 1) make the interrogation and presentation effective for the ascertainment of the truth, 2) avoid needless consumption of time, and 3) protect witnesses from harassment or undue embarrassment.

FRE 611(b): Scope of cross-examination.

- Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness (i.e. impeachment?). The court may, in exercise of discretion, permit inquiry into additional matters as if on direct examination

FRE 611(c): Leading questions

- Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions

- **Direct Examination**
    - Leading Questions:
        - Generally
            - The examiner **may not ask leading questions** on direct.
        - Definition:
            - A leading question is one that suggests to the witness the answer desired by the questioner
                - I.e. Auto negligence suit by P against D. Question by P's lawyer to P: "Was D driving faster than the speed limit at the time he hit you?" This is leading, since it suggests that the questioner desires a "yes" answer.
        - Hostile Witness"
            - Leading questions **are allowed on direct if the witness is "hostile."** The opposing party will almost always be deemed hostile; so will a witness who is shown to be biased against the calling side, as well as a witness whose demeanor on the stand shows hostility to the calling side.
- **Cross Examination**
    - Leading Questions:

        - Leading questions are usually **permitted** during cross-examination (FRE 611(c)).
        - EXCEPTION: If the witness is biased in favor of the cross-examiner (i.e. one party is called by the other and then "cross-examined" by his own lawyer), leading questions are not allowed.
    - Scope:
        - The federal rule is that cross is **limited** to the **matters testified to on the direct examination** (FRE 611(b)).
    - Credibility:
        - The witness's **credibility may <u>always be attacked</u>** on cross-examination.

- FRE 611(a)
    - Generally
        - Court has discretion over scope and order of interrogation
    - Attorney can recall the other side's witness as a witness in their case
    - Attorney needs to ask the judge as a matter of convenience to ask these questions now rather than to recall the witness as a witness in chief
        - TWIST: The witness is now yours and so it is basically now direct examination and so you cannot ask non-leading questions
            - If <u>witness is adverse and hostile</u> to you, under FRE 611(a) you can ask the judge to ask questions in a leading fashion.

## III. MOTIONS IN LIMINE

- General
  - Motion to exclude or include evidence (includes both)
  - For several reasons we use them:
    - 1) Serious piece of evidence that we for sure want to include
    - 2) Want to mention the evidence in our opening statements and don't want to get an objection.
  - It is a document you file with the court asking them to make a decision about the admissibility of evidence before the trial.
  - Allows more opportunity to make a reasoned argument, allows you to provide case-law and allows you to really discuss evidentiary law. What parts of his record will be exclude or allow the jury to hear? It will help you make tactical decisions and if you need to settle the case or not
  - One of the issues stemming from a motion in limine is whether you need to object in trial about things that were ruled on in limine in order to preserve error on appeal.

- **Opening Statements**
  - More likely for attorney to object during closing statements instead of opening
  - Defense counsel reserves opening statements.
  - Prosecution must open.
  - If any facts are left out, other side can move for a directed verdict.
  - Reserving opening statement, in a criminal case, Δ doesn't have to make an opening statement
    - You almost never reserve an opening statement because then you're not really giving jurors a prism through which to view the case.

- **Closing Statements**
  - No rules.
  - Can argue, are supposed to argue, talk about credibility of witness

## IV. DIRECT V. CIRCUMSTANTIAL EVIDENCE

- Generally
  - Analytically there is no difference between direct v. circumstantial evidence because both require the jury to use inferential reasoning. Generally speaking what distinguishes circumstantial from direct evidence is the length of the inferential chain
  - All litigated cases rely on at least some circumstantial evidence.

- **Direct Evidence**
  - Direct Evidence is that which if accepted as genuine or believed to be true, necessarily establishes the point for which it is offered. If witness is believed, the trier must believe the truth of the fact it establishes.
  - Direct evidence is evidence, which, if believed, automatically resolves the issue.
    - Example:
      - W says, "I saw D strangle V." This is direct evidence on whether D strangled V.
  - Direct evidence is more likely to have probative value and is easier to establish to have probative value than Circumstantial Evidence

- **Circumstantial Evidence**
  - Circumstantial Evidence is that which does not depend on the credibility of the witness alone, but also upon an inference to be drawn from the evidence.
  - It is not enough to just believe the witness, even if we believe them we have to draw an inference. And if we have to draw an inference, we are looking at Circumstantial Evidence.
  - Circumstantial evidence is evidence, which, even if believed, does not resolve the issue unless **additional reasoning** is used.
    - Example:
      - W says, "I saw D running from the place where V's body was found, and I found a stocking in D's pocket." This is only circumstantial evidence of whether D strangled V.

- **Probative Value**
  - The probative value of direct evidence is not necessarily higher than circumstantial evidence, but the judge will sometimes more readily admit it.

## V. RELEVANCE

- Generally
  - Only **relevant** evidence may be admitted
  - As long as you make an argument that something is relevant, you cannot be wrong.
    - As soon as you hear the claim you say "Objection"
  - To be admitted under FRE 401 an item of evidence needs only to make a fact of consequence somewhat more or less likely than it would be were the evidence not known.

- Key Points
  - FRE 402 requires that evidence must be relevant to be admitted at trial, and that all relevant evidence is admissible unless otherwise provided.
  - FRE 401 requires that to be relevant, an evidentiary fact must connect by a process of inferential reasoning to a "fact of consequence" in the case. The essential elements of the substantive law that governs the case determine what facts are "of consequence"
  - FRE 401 requires that to be relevant, an evidentiary fact must make a fact of consequence "more or less probable." The judge decodes this issue under the "any tendency" standard by examining the necessary inferences and the reasonableness of the generalizations underlying them.

FRE 401: Definition of "Relevant Evidence"

- "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

FRE 402: Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

- All relevant evidence is admissible, except as otherwise provided by the Constitution, or Congressional rule, or Supreme Court decision. Evidence which is not relevant is not admissible

  - Analysis
    - Is it relevant?
      - a) <u>Is the item offered to prove a fact that is "of consequence" to the case</u>?
        - Materiality—if it matters to the legal resolution of that dispute
      - b) <u>Does the evidence actually tend to prove (or disprove) that fact by making it more (or less) probable</u>?
        - "any tendency"= sufficiency standard
          - Very minimal standard—saying that the judge should find the evidence to be relevant if the judge believes that there is **any** probability that the relevant connection exists.
          - The question of sufficiency goes to whether a reasonable person could be persuaded by the evidence to the level demanded by the applicable burden of persuasion.
          - (No legal v. Logical arguments needed)
    - If we raise the question of bias, that could be closer to the credibility of the question.
      - Your conviction of a crime is automatically admissible if it was over 1 year
      - If your prior conviction is about dishonesty it is <u>always</u> admissible

- Either way you defend by saying 403 and character.

- **Relevance and Impeachment with Background Information**
  - Impeachment of the credibility of the witness is not character evidence
  - Reasonable background information about the witness who is testifying is "always admissible... it allows the jury to make better informed judgments about the credibility of the witness and the reliability of that witness' observation"
  - It is relevant to show evidence to impeach a witness's assertion of what they have previously said.
    - Can make that evidence high relevant for impeachment purposes because it goes directly against what the witness has said before

- **Conditional Relevance**
  - Judge Decides under 104(b) to have evidence conditionally accepted.

| FRE 104(b): Relevancy Conditioned on Fact<br>• When the relevancy of evidence depends on the fulfillment of a condition of fact, the court shall admit it upon, or subject to the introduction of evidence sufficient to support a finding of the fulfillment of the condition |
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  - Definition:
    - Evidence whose relevance depends on some other fact or condition
      - On its fact, it would be relevant if we knew something else.
  - Example
    - You say, "we would like this to be conditionally accepted until we have corroborated it with another's testimony."

- **Other Relevance Rules/Relevancy—Specific Applications**
  - Generally
    - Some principles exclude and limit certain kinds of evidence that might satisfy the bas relevancy standard because of:
      - 1) Minimal relevance, and
      - 2) Policy

  - **1. Subsequent Remedial Measures**

| FRE 407: Subsequent Remedial Measures<br>• When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted or impeachment. |
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    - A. Generally:
      - Post-accident precautions, taken to prevent similar accidents, may not be proved to show negligence or culpable conduct, but may be proved to show such points as ownership or control.

- The exclusionary principle applies not only to design changes, but to many other measures taken to prevent future accidents, including design and labeling changes.
    - The exclusionary principle is broad and covers physical changes in the premises or machine involved in the accident, changes in design, safety modifications (i.e. guard rails), labeling changes, new warnings, modifications in instructions, and changes in personnel and procedures.
- Products liability suits
    - FRE 407 does apply in this setting—i.e. strict liability—suits in federal courts.
- Subsequent measures do not reliably indicate prior negligence or fault.
- FRE 407 makes evidence of subsequent remedial measures inadmissible to prove negligence, culpable conduct, defect, or need for a warning or instruction
    - Timing is important—the exclusionary mandate applies only to remedial actions taken after the event and is the subject of litigation.
- It is subject to **FRE 403**, such evidence may be admissible for other purposes, such as to show:
    - 1) Ownership
    - 2) Control
    - 3) Feasibility
        - Sometimes a defending party offers evidence that it would be impossible or impracticable to make a particular change that would prevent similar accidents. Here too, proof of subsequent measures is admissible, if it tends to refute the testimony.
    - 4) Impeach the witness.
        - Sometimes a defending party offers testimony that the machine or premises in question has a particular safety feature, or that certain procedures are always followed. Proof of post-accident modifications in the machine or premises, or post-accident changes in procedures, is admissible if it tends to refute such testimony, thus impeaching the witness.
- The evidence should be admissible for these other purposes only if they are contested issues in the case (Credibility can always be controverted)

- B. We want to encourage people to change dangerous conditions
    - Excludes from admission, evidence of measures taken after the π's injury
        - Measure had to be taken **after** the **π's** injury.
            - If a number of people were injured, and after the 2nd person's injury, the owner changed the condition, then it is a subsequent remedial measure for that person. But if someone comes after them, then it is NOT a subsequent remedial measure as to this later person.

- If 3 people are injured and its changed after 2nd person, then 1 and 2 can bring it in as a subsequent remedial measure but the 3rd cannot.

- C. If change of design, can the company/plaintiff now offer evidence that they changed in order to impeach the expert's testimony? No
  - What if the expert was an internal employee?
    - Then it DOES become impeachment.
    - So if you're the very person who says it should be changed and then you come in and say it is inadequate, then I can impeach you.
    - The expert says that it was totally adequate design and he's a third party—then the fact that the company changed it does not impeach this expert's testimony

- D. If you bring it in to show ownership or control, I must have said that I did not have ownership or control.
  - If I admit to ownership or control, you cannot bring in evidence that I have ownership or control
  - I.e. USF says I have no ownership of sidewalk but they are fixing it so the subsequent remedial measure shows that they have control.

- E. FRE 407 and FRE 403 objection
  - Low Probative Value:
    - First, the evidence has relatively low probative value for the prohibited purpose. I.e., a Δ may take subsequent remedial action out of an abundance of caution even though there was no negligence or defect
  - Countervailing 403 Factors:
    - A concern that admission of the evidence to prove negligence or fault may tend to misled the jury or confuse the issues
      - If the jurors hear evidence that in fact has very low probative value, they may be misled into thinking that the evidence is more probative than it really is.

- F. Key Points
  - FRE 407 makes evidence of subsequent remedial measures inadmissible to prove negligence, culpable conduct, defect or need for a warning or instruction.
  - FRE 407's exclusionary mandate applies only to remedial action taken after the event that is the subject of the litigation
    - If government makes the change, 407 doesn't apply
  - Subject to FRE 403, subsequent remedial measure evidence may be admissible for other purposes, the most likely of which are those listed in FRE 407: to show ownership, control, or feasibility or to impeach the credibility of a witness. The evidence should be admissible for these other purposes only if they are contested issues in the case.

- **2. Offers of Compromise**

**FRE 408: Compromise and Offers to Compromise**

(a) **Prohibited uses**: Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:

- (1) Furnishing or offering or promising to furnish—or accepting or offering or promising to accept—a valuable consideration in compromising or attempting to compromise the claim and
- (2) Conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case, and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority
- (Civil dispute with government agency—not excluded when offered in crim case—if you make statements in front of government agents don't be shocked if it comes in)

(b) **Permitted uses**: This rule does not require exclusion if the evidence is offered for purposes NOT prohibited by (a). Examples of permissible purposes include proving a witness's bias or prejudice, negating a contention of undue delay, and proving an effort to obstruct a criminal investigation or prosecution

- A. Generally
  - Statements about disputed amount are excluded unless 2 parties agree
    - Doesn't protect offers to compromise before a claim arises
  - BARS:
    - Compromises/attempts to compromise a claim to prove liability, negligence, etc, but NO bar to witness bias, etc. Inducts conduct or statements made in the course of negotiations.
  - All jxs recognize an exclusionary principle that excludes settlement agreements and statements regarding efforts to reach a settlement when offered to prove either "liability or the invalidity of the claim or its amount."
  - FRE 408 makes evidence of compromises, offers of compromise, and conduct, statements during compromise negotiations inadmissible to prove liability (applies only to compromises between the parties to the action).
    - Requires the presence of a disputed claim (controversy over fault/liability)—otherwise, offer is gratuitous
    - Subject to **FRE 403**, such evidence may be admissible for other purpose, such as:
      - 1. To prove bias, prejudice of a witness
      - 2. To negate a contention of undue delay, or
      - 3. To prove an effort to obstruct a criminal investigation or prosecution
        - Again, despite lack of "if controverted" language, the evidence should be admissible for these other purposes only if they are contested issues.

- B. We want to encourage people to compromise on **disputes**.

- There must be a **dispute**.
- You have to see some indication in the fact pattern that shows that defendant was responsible before the compromise was made.
    - I.e. "I was texting, I'm sorry I'll pay for all the damages." — this IS an offer of compromise.
    - I.e. "You idiot why weren't you paying attention? (DISPUTE) — I'm sorry I'll pay for all the damages — this is EXCLUDED under 408.

- C. Statements
    - Since settlement talks sometimes fail, the exclusionary principle can succeed in its purpose only if it applies to statements made during negotiations that fail
    - Form does not matter
        - To avoid making statements that could actually concede anything, lawyers instinctively negotiate by speaking hypothetically or conditionally (i.e. lets just suppose, or for the sake of settlement, we could say my client was speeding).
        - Under FRE 408, however, the form of such statements makes no difference.
        - Even unqualified assertions (my client was speeding) are excludable so long as the purpose of the parties was trying to settle the case.
    - FRE 407 excludes not only compromises and offers of compromise but also — at least in civil actions — conduct or statements made during compromise negotiations.

- D. Disputed Claims
    - Offers of compromise and statements of fault are inadmissible pursuant to FRE 408 only if made during compromise negotiations over a disputed claim.
        - IF there is no disputed claim or if the statement of fault occurs outside the context of compromise negotiations, the statement of fault occurs outside the context of compromise negotiations, and the statement of fault will be admissible.
    - The exclusionary principle comes into play only when there is a claim and a dispute that goes either to validity or amount
        - Claim
            - Filing suit means a claim exists. The exclusionary principle applies here, but doesn't apply merely because someone comments that he should compensate another or receive compensation from another
        - Dispute
            - The exclusionary principle doesn't apply to every statement that follows the events that produce a claim, for the purpose is to encourage settlement of disputes. If neither the validity nor the amount of a claim is disputed, the principle doesn't apply.

- **3. Payments of Medical Expenses**

**FRE 409: Payment of Medical Expenses**

- Evidence of offering to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for that injury.

- A. Generally
  - FRE 409 makes evidence of furnishing or offering or promising to pay medical or similar expenses inadmissible to prove liability
    - This rule does not apply to statements (including statements of fault) made in conjunction with the payments.
    - Example: "I'm sorry I was texting I'll pay for all the damages, I'll pay for your medical bulls (statement for paying of med expenses—EXCLUDED under 409)
      - BUT all other statements accompany medical bills are NOT excluded under 409 if they do not get excluded under 408
      - So look for statements + Other arguments accompanying medical expenses

- B. Admissibility of Statements made in conjunction with Medical Payments
  - In one significant respect FRE 409 differs from FRE 408: Statements made in conjunction with the payments—including statements of fault—are not excluded.

- **4. Liability Insurance**

**FRE 411: Liability Insurance**

- Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

- A. Generally
  - FRE 411 makes evidence that a person was or was not insured against liability inadmissible to prove negligence or liability (or ability to pay)
    - Subject to **FRE 403**, such evidence may be admissible for other purposes such as to show proof of agency, ownership, or control, or bias or prejudice of the witness
    - Again, despite lack of "if controverted" language, the evidence should be admissible for these other purposes only if they are contested issues.
  - BE CAREFUL
    - More encompassing than the wording of the rules suggest—cannot include insurance.
    - You have to have some relevant evidence as to why you're offering evidence of insurance
      - I.e. they'd like to sue me for my son's car accidence
      - If you see mention of the insurance—there must be some relevance—not just that they money is available

- B. Rationale
  - Liability coverage is excluded for 2 reasons:
    - (1) It is irrelevant on issues of carefulness v. negligence
    - (2) Proof of liability coverage could easily be misused—the presence of insurance might tempt juries to find liability where none exists or boost recovery unjustifiably and the absence of coverage might persuade juries to find against liability or reduce recover unjustifiably.

- C. Exceptions
  - There are several important exceptions to the coverage of the exclusionary principle
    - (1) Agency, ownership, or control
      - The purchase of liability coverage for a car, machine, or premises obviously indicates that the purchaser has an interest in the thing in question. Proof of coverage is admissible when it tends to show such points
    - (2) Impeachment
      - Often insurance investigators or adjusters interview eyewitnesses, and sometimes they prepare statements for eyewitnesses to sign or they make summaries of such statements. When such investigators or adjusters testify to the substance of the eyewitness statements, or when written proof is offered in which investigators or adjusters played a role, their connection with liability carriers may be shown when it bears on the bias in their testimony or the possible accuracy of their written work.

- D. Key Points FRE 408-411
  - 1. Under FRE 408, 409, and 411, evidence of compromises offers of compromise, payment or offers to pay medical and similar expenses, and liability insurance is not admissible to prove liability.
  - 2. Subject to FRE 403, such evidence may be admissible for other purposes. The permissible purposes listed in FRE 408 and FRE 411, like the permissible purposes listed in FRE 407 are the most common purposes for which the evidence governed by those rules is likely to be admissible, but the lists are not exclusive.
  - 3. When evidence is offered for a theoretically legitimate permissible purpose, FRE 403 should require exclusion if the issue is not a contested one.

## VI. FRE 403

| FRE 403: Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time<br>• Although relevant, evidence may be excluded if its probative value is **substantially outweighed** by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. |
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- A. Generally
  - This is the last step in the relevance analysis
  - Lots of discretion given to the court
  - About increased prejudice and misguiding the jury, confusion of the issues.
  - Applies to all evidence It is the #1 rule for excluding otherwise relevant evidence.
  - Cost-Balance Analysis:
    - The benefit= probative value—the tendency to prove something
    - The costs= are listed, non-exhaustively in this rule like unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, needless presentation of cumulative evidence.
      - The probative value must be substantially outweighed by the danger for it to be excluded under FRE 403.
  - We presume that evidence that passes 401 is admissible. We start with the presumption of admissibility. So all relevant evidence is admissible unless the costs outweigh the benefits.
  - If the scale is completely even, the evidence is admitted because the costs must **substantially** outweigh, based on our presumption of admission.
  - Arguing prejudicial is a bad objection.
    - Everything is prejudicial or you wouldn't enter it into evidence.
    - So prejudice is not a cost.
    - The rule is concerned with UNFAIR prejudice.

- B. Analysis

  (1) **Analyze the Probative Value of the Evidence**
  (2) **Estimate the Danger that the Evidence Poses to the Jury's rational Decision-Making process** (EXAM: Specifically identify the danger)
  (3) **Weigh the probative value against the danger, and exclude evidence if the danger substantially outweighs the probative value**.

- C. Probative Value
  - Definition:
    - Degree to which the evidence (if believed) will alter the probabilities of a fact of consequence and an essential element in the case.
  - Consider:
    - The availability of other means of proving the fact of consequence, strength of inferences, probabilities of underlying generalizations, centrality of the point to the case, and degree to which it is disputed.
      - i.e. if the chain breaks down in a couple places, then the evidence lacks some probative value. It is somewhat helpful but not as much as if all 4 inferences could be drawn out.

- D. FRE 403 Dangers
  - Generally:
    - The danger that evidence might suggest an important basis upon which the jury could decide the case

1. **Confusion of the issues** (collateral)
   - Definition:
     - Evidence confuses the issues when it focuses the jury's attention to closely on a factual issue that is not central to the outcome of the case.
   - Collateral
     - Some issues are termed "Collateral' which usually means that their connection to the essential elements is trivial and may be based on complicated or attenuated theories of relevance.
     - It is not that these collateral issues are irrelevant, rather, they are too distracting and tend to *confuse the issues*.

2. **Unfair Prejudice**
   - Definition:
     - The danger that evidence might suggest an improper basis upon which the jury could decide the case
   - Two principal risks of unfair prejudice:
     (a) Evidence about a party can trigger a response that has nothing to do with its logical connection to a fact of consequence
     (b) If Evidence could be used by the jury in a manner that violates a rule of evidence law.
   - Remember:
     - That the test is not whether the evidence is detrimental but whether it is so unfairly prejudicial as to substantially outweigh its probative value.
   - FRE 403 requires the judge to balance the testimony probative value against the danger that it will be used improperly.

3. **Misleading the Jury**
   - Definition:
     - The danger of being *misleading*, usually involves a risk that an item of evidence will cause the jury to draw a *mistaken* inference.
   - Types of evidence that can be misleading
     - I.e. Videotaped reenactments of accidents or other events have been called misleading because jurors may treat them as documentations of the actual event
     - I.e. The use of complex statistics and probabilistic evidence, such as DNA identification evidence is also challenging for the jury.

4. **Undue Delay, Waste of Time, and Needless Cumulative Evidence**
   - Generally
     - Each of these dangers illustrates a different aspect of the same underlying problem: The introduction of evidence always absorbs court time, incurs expense by the opposing party and by the state-run judicial system, and expends the attention of the jury. The dangers of delay and waste of time are easily quantifiable.

        - Undue Delay
            - As a general rule, evidence may not be excluded solely to avoid delay. Under 403, the court should consider the probative value of the proffered evidence and balance it against the harm of delay.
        - Waste of Time
            - Courts have held that evidence may waste the jury's time if offered to prove stipulated, collateral, or background facts.
        - Needless Presentation of Cumulative Evidence
            - The danger underlying *needless presentation of cumulative evidence* is less quantifiable.
            - It includes the expenditure of trial time on repetitive testimony, plus the risk of losing the jury's attention.
- E. Case law: **Old Chief v. US**
    - The D was accused of being a felon and he offered to stipulate to it. The eagerness to stipulate was because he was charged with assault.
    - P refused to accept the stipulation and allowed the P to offer evidence EVEN WHEN it is not a controverted fact and the D has stipulated to that fact. So evidence of name and type of felon conviction IS admissible. But the rest of the argument is the FRE 403 argument. Is the Probative Value outweighed by the cost.
    - In the balancing scheme, the Probative Value is low and the costs are high, so it is easy for the costs to substantially outweigh the benefits of the evidence.
    - We do not want them to draw an inference based on character, which is what prior would bring in.
    - The probative value is always outweighed by unfair prejudice.
        - BASICALLY: If it's highly prejudicial and there is a less prejudicial method available, ability of party "to tell a story" must yield here.

- F. Substantially Outweigh
    - Generally
        - Evidence should be excluded only when the judge is quite confident that the prejudicial aspects of the evidence outweigh its probative value.
        - The burden in FRE 403 favors wrongful decisions to admit evidence over wrongful decisions to exclude it

| Probative value of offered relevant evidence | Negative effect of Rule 403 listed factor | Whether trial court may exclude evidence |
|---|---|---|
| High | 1. High, mid, or low | 1. No |
| Mid | 1. High<br>2. Mid or Low | 1. No (Perhaps yes—if probative value were near the bottom of the "mid" range and the negative effect extremely high, or if probative value were extremely low and the negative effect near the top of the "mid" range, Rule 403 might allow exclusion<br>2. No |
| Low | 1. High<br>2. Mid<br>3. Low | 1. Yes<br>2. No (Perhaps yes—see above)<br>3. No |

- G. FRE 403 and Photographs

- I.e. when someone is dead
    - You do not just get the photos of the body that is dead just because the body is dead. You still have to show some relevance (i.e. body's positioning) etc being highly probative, otherwise it has a lot of 403 dangers.

- H. Limiting instructions
    - Definition
        - If evidence has a proper relevant use but also creates the risk of an improper use, judge may instruct the jury to consider evidence only for its proper use.
    - Generally
        - When an item of evidence has a proper relevant use to prove a fact of consequence but also creates the risk of improper use, the judge may give a limiting instruction that directs the jury to consider the evidence only for its proper use.
        - The most common explanation for the failure of jurors to follow limiting instructions is that jurors react negatively to limits on their ability to perform "free behaviors"—especially when they are instructed to ignore uses of evidence that appear to them highly relevant.

## VII. PRELIMINARY QUESTIONS OF FACT UNDER FRE 104

FRE 104(a) Questions of Admissibility Generally.

- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of the evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except with those with respect to privileges. (**DETERMINED BY JUDGE**).

FRE 104(b) Relevancy Conditioned on Fact

- When the relevancy of evidence depends upon the fulfillments of condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition. (**DETERMINED BY JUROR**)

- A. FRE 104 (a)
  - Generally
    - Generally, Rule 104(a) is left to the judge
    - The judge will have to answer at least three kinds of preliminary questions
      - (1) Questions of law
      - (2) Questions of fact
      - (3) Question that require the exercise of discretion
    - 104 (a) governs:
      - Existence of a privilege
      - Qualifications of a witness
      - Application of most hearsay exceptions
      - Impeachment issues
      - Application of best evidence rule.
    - **EXAM: Almost never have to refer to 104(a) because every decision the judge makes is pursuant to 104(a), so you would be saying it all the time**.
    - Proponent must persuade judge by a preponderance of the evidence:
      - May consider inadmissible, but not privileged, evidence
      - May consider credibility of a witness
      - Admits or excludes the evidence but doesn't inform jury about decision
      - Opponent may reduce item's probative value (if admitted)with evidence that preliminary fact is not true, but jury does not re-decide the preliminary q.
  - Key points
    - (1) Most preliminary questions of fact raised by the application of the rules of evidence to decide the admissibility of an offered item are for the judge to decide pursuant to 104(a).
    - (2) Both parties may present evidence on 104(a) preliminary questions of fact, and the judge must be persuaded by a preponderance of the evidence by the party asserting the application of the rule.
    - (3) In deciding preliminary questions pursuant to 104(a), the judge may consider evidence that would not be admissible under the rules of evidence, but may not consider privileged evidence

        - (4) After the judge decides the preliminary question under FRE 104(a) the judge either admits or excludes the item. The judge does not inform the jury about the decision on the preliminary question.
        - (5) The opponent may attempt to reduce the item's probative value, if the item of evidence is admitted, with evidence that the preliminary fact is not true, but the jury does not re-decide the preliminary question.
    - Standard
        - The SC has held that judges are to decide preliminary questions of fact under FRE 104(a) "by a preponderance of the evidence" in both civil and criminal cases
    - Burden
        - The burden is on the party asserting the application of an evidence rule permits admission of an item→ must persuade the judge that it is more likely than not that the preliminary fact is true.
        - And the judge is not bound by the rules of evidence, except for privileges—meaning that the judge may take other inadmissible evidence into account such as hearsay.
    - Materiality
        - Judge gets to decide materiality—fact of consequence—since the substantive law determines it

- B. FRE 104 (b)
    - Generally
        - Generally, Rule 104(b) is left to the jury.
        - When it is a weight question and how much emphasis, that is the jury's decision.
        - But even when it is the jury's decision, there is a function for the judge. (2 things the judge does and 1 for the jury)
        - FRE 104(b) would appear to require the judge to apply the higher threshold o "evidence sufficient to support a finding."
            - Yet because there is no *analytic* difference between questions of relevance and questions of conditional relevance, there is no way to define a *special class of identifiable cases* in which 104(b) should apply.
        - There are very few reported cases in which preliminary questions of fact are identified and formally decided under FRE 104(b).
            - Most of them raise questions of **notice**.
        - 104(b) Governs:
            - Authentication and identification
                - Huge authentication problem if it's on a computer—because you have a huge control issue.
            - Personal Knowledge
            - Best evidence—whether an item is an original or a copy
            - Conditional relevance (i.e. notice)
    - Key points
        - (1) If a "condition of fact" necessary to establish the relevance of an offered item of evidence is in serious dispute, FRE 104(b) provides that the court may admit the offered item "conditional upon" later proof of the necessary fact.
        - (2) The FRE 104(b) standard is higher than the FRE 401 standard of "any tendency." In some cases, courts require the proponent to satisfy the higher

standard of "evidence sufficient to support a finding" in proving a "condition of fact" deemed necessary to the relevance of an offered item of evidence"
        - (3) Both parties may present evidence on FRE 104(b) "condition of fact" questions, and the judge must determine whether there is evidence sufficient to support a finding that the preliminary fact is true. In making this decision, the judge may consider only evidence that would be admissible to the jury.
        - (4) After the judge determines the sufficiency of the evidence on the preliminary question under 104(b), as under FRE 602 and 901, the judge either admits or excludes the offered item. The judge doesn't inform the jury about his or her determination of the sufficiency.
        - (5) The opponent may present evidence relevant to disprove the preliminary fact to the jury. The jury will decide the preliminary fat as part of its ultimate decision-making. The judge may instruct the jury that it must decide the preliminary fact question before it can consider the offered item of evidence to which it pertains.
    - Standard:
        - "Evidence sufficient to support a finding"
            - Means evidence from which a jury could reasonably find the preliminary finding to be more probable than not.
    - Exceptions to 104(b):
        - (1) FRE 104(b) rather than 104(a) applies to fact finding on preliminary facts that are critical to the relevance of offered items of evidence
        - (2) FRE 104(b) applies the "sufficiency" standard, meaning that the judge decides only whether "evidence sufficient to support a finding" on the preliminary fact question has been introduced
            - SO ANALYSIS:
                - *Step 1*: The judge makes a preliminary determination whether the foundation evidence is sufficient to support a finding of fulfillment of the condition= standard for the judge. "The court shall admit it upon, or subject to the introduction of evidence sufficient to support a finding on the fulfillment of the condition (FRE 104b)
                    - May **not** consider inadmissible evidence or credibility
                    - Conditionally admits or excludes the evidence, but doesn't inform jury about determination of sufficiency
                - *Step 2*: the jury must determine if they believe D is connected to the possession of 2 stolen trucks (i.e.) by determining it by a preponderance of the evidence.
                    - Opponent should seek a limiting instruction that jury must decide preliminary fact question before considering offered item of evidence.
                    - If proponent doesn't proffer the later evidence to support the inference, or the evidence doesn't ultimately support the inference, opponent should move to strike earlier testimony.
    - Conflicting evidence
        - Conflicting evidence doesn't go to admissibility but rather to the weight, so the jury must resolve this conflict
    - Conditional Relevance
        - The jury decides questions of conditional relevancy

- When a spoken statement is relied upon to prove notice to X, it is without Probative Value unless X heard it. But that is an issue of conditional relevance the jury will get to decide. The proponent could argue that I will be establishing this in the next few questions or witnesses, and the judge will usually say ok, just connect the dots. But the opponent should make sure it is connected. Despite this type of issue, the judge has some role in conditional relevancy decision-making.

## VIII. LAYING THE FOUNDATION

- Definition
  - Laying the foundation for proof= no evidence is permissible until it is first shown to be what its proponents claim it is.

- A. Witnesses
  - General
    - The foundational requirements for witnesses are set forth in:
      - FRE 601 (competency)
      - FRE 602 (personal knowledge)
      - FRE 603 (oath or affirmation to testify truthfully)
      - FRE 605 and 606 (incompetency of judge or jurors)
      - FRE 611 (form and examination of witnesses)

**1. Competency**

| FRE 601: General Rule of Competency |
| --- |
| • Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined by state law. |

- Generally
  - FRE 601 states a bold general assumption: that every person is competent to testify as a witness.
  - Usually, facts bearing on competency affect weight of testimony
    - I.e. the advisory committee note to FRE 601 makes clear that, apart from the judge and the jury, people who witnesses relevant events cannot be prevented from testifying solely because of their status or their interest in the case. However, the fact of a witness's status (felony conviction or a spousal or familial connection to a party) or a witness's interest in the outcome of a case might still affect that witness's truthfulness. Thus such facts are relevant, and are usually admissible to *impeach* the credibility of the testifying witness. The Federal Rules of Evidence permit the jury to decide whether such status or interest affects a witness' credibility.
- Key points
  - FRE 601 establishes that all persons are competent to testify. In most cases, facts that bear on competency are treated as affecting the weight of the witness's testimony but do not disqualify the witness.
  - Particular challenges to the competency of individual witnesses may be resolved as a matter of the trial court's Rule 601 discretion, or under FRE 602, 603, and 403.
- **Challenges to competency**
  - Trial court's discretion (601)
  - Inability to take an oath (603)
  - FRE 403 concerns

- Cannot meet personal knowledge requirement of 602

- **Challenging a witness's mental competency**
  - The advisory committee note to FRE 601 states that "no mental or moral qualifications for testifying as a witness are specified."
    - However, FRE 603 abolishes the moral qualification of taking a religious oath in favor of the acknowledgement of the secular obligation to testify truthfully. Thus it is correct to say that there are no moral qualifications to be a witness
    - There are two main approaches taken by the courts
      - (1) FRE 601 cannot be used to evaluate the ability of persons to testify. Rather the authority of the court to control the admissibility of the testimony of persons so impaired that they cannot give meaningful testimony is to be found outside of FRE 601 such as in Rule 603 or even Rule 602. (*US v. Ramirez*)
      - (2) Under FRE 601, the trial court retains the discretion it had under common law to decide whether an individual witness is competent to testify (*US v. Devin*)
    - Appellate courts seldom overturn a trial court's finding that a witness is competent to testify (i.e. *US v. Cassidy*)
- **Child Witnesses and competency**
  - Child witnesses can raise troublesome issues of competence with regard to their ability to remember events and relate them accurately and truthfully. A federal statute establishes a presumption of competency for children who are victims of crimes of abuse and who have witnessed crimes against other (18 USC §3509 (c)).
  - A competency examination may be held only if compelling reasons exist and only upon motion by the opposing party and an offer of proof of incompetency.

**2. Personal Knowledge**

FRE 602: Lack of Personal Knowledge
- A witness may testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness's own testimony. The rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.

- Generally
  - FRE 602 mandates that before a witness may testify about a matter, the witness must be shown to have personal knowledge of that matter by evidence "sufficient to support a finding."
  - The requirement that the witness must "know" the matters about which thye testify as a result of their own sensory perception is essential to our system of proof: Witnesses perceive real world events and describe these events to the jury, and the jury perceives the witnesses and evaluates whether or not to rely on them.
- Key Point

- FRE 602 requires that all witnesses (other than experts testifying to their opinions) must have personal knowledge of the matters about which they testify. The proponent of a witness must present evidence sufficient to support a finding of the witness's personal knowledge, typically by having the witness testify that the witness saw, heard, or otherwise perceived those events.

- The requirement of "Personal knowledge"
  - The most common kind of personal knowledge is *visual perception* making the witness an eyewitness or *percipient witness*.
  - If a witness's testimony is not based on personal knowledge, then it is probable based on either speculation or on what someone else has said to the witness—which is disguised hearsay
- The requirement of "Evidence sufficient to support a finding"
  - FRE 602 explicitly says hat the proponent of a witness must produce evidentiary facts that the judge finds are "sufficient to support a finding" of knowledge
    - So that the jury could *reasonably find* that it is more probable than not that the witness has personal knowledge.
  - To satisfy the sufficiency standard:
    - Usually all the proponent needs to do is to ask whether the witness did in fact see or hear the matters that are about to be described to the jury.
    - FRE 602 provides that the witness's own testimony—"I saw that"—will suffice.

**3. Form- Examination of Witnesses**

- A. Direct Examination
  - Must use non-leading questions (open ended)
  - Designed to elicit the story/narrative from the witness
- B. Cross Examination
  - Ok to use leading questions that suggest the answer
  - Scope is limited to the subject matter of the direct examination and matters affecting credibility of the witness
- C. Order of Interrogation
  - Court can decide to take a witness out of order—can ask leave of court to ask questions beyond the scope of direct because more efficient than to call them again for your case in chief.
  - Supposed to ask non-leading questions since its your witness, but if witness is adverse or hostile to you, you can ask leave of court to ask leading questions.

- B. Authentication of Documents and Exhibits

FRE 901 (a): General Provision.

- The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

FRE 901 (b): Illustrations.

- By way of illustration only, and not by way of limitation the following are

examples of authentication or identification conforming with the requirements of the rule:

- (1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be.
- (2) Non-expert opinion on handwriting. Non-expert opinion a to the genuineness of handwriting, based upon familiarity not acquired for the purposes of litigation.
- (3) Comparison by trier or expert witness. Comparison by the trier of fact or by expert witnesses with specimens with have been authenticated.
- (4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with the circumstances.
- (5) Voice identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.
- (6) Telephone conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business if (A) in the case of a person, circumstances including self-identification, show the person answering to be the one called or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the phone.
- (8) Ancient documents or data compilations. Evidence that a document or data compilation in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, + (C) has been in existence 20 years or more at the time it is offered.
- (9) Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.
- (10) Methods provided by statute or rule. Any method of authentication or identification provided by Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority.

- General
  - In addition to witnesses, information is conveyed to the jury through the use of exhibits. The term "exhibits" encompasses a wide array of items—real and demonstrative evidence, written documents of all kinds (audio, video, and photographic records), and electronic and data compilations.
    - The foundational requirement for exhibits is set forth explicitly in FRE 901
  - Analysis:
    - For Proponent:
      - 1) State what the proponent claims the exhibit is
      - 2) Show the evidence that is sufficient to support a finding that the exhibit is what the proponent says the exhibit is
  - There are **two parts to FRE 901**.
    - 1. FRE 901 (a) establishes the basic foundation and the evidentiary standard that the proponent of an exhibit must satisfy.
      - FRE 901 (a) requires the proponent of an exhibit to do 2 things:
        - (1) To state what the proponent *claims* the exhibit to be

- In Relevance, the proponent of an exhibit must articulate a connection between the exhibit and the parties or the litigated events of the case.
- This *connection* is typically what the proponent *claims* the exhibit to be for purposes of FRE 901 and what courts require the proponent to prove in order to identify or authenticate it.
- The Rule 901 foundation, therefore, follows from the articulation of *why tangible objects, photos, recordings, or written documents are relevant*.

▪ (2) <u>To produce evidence "sufficient to support a finding" that it is what the proponent claims</u>
- FRE 901 (a) requires more than just showing a signed document which on its own might satisfy FRE 401 (Relevance)—it requires that the proponent satisfy a higher standard of probability—*evidence sufficient to support a finding*.
- FRE 901(b) sets forth various options for satisfy the FRE 901 (a) sufficiency standard/requirement
  - If there is no person with personal knowledge of the fact at issue, then circumstantial evidence can be offered, such as the testimony of someone who can recognize the landlord's signature (FRE 901(b)(2)).
- Judicial Determinations of Sufficiency under FRE 901(a)→ the Judge's task of making this rough estimate of underlying probabilities involves the same though process as estimate probative value under 403.
  - Evidence "sufficient to support a finding" means evidence upon which the judge thinks a jury *could reasonably find* a fact to be more likely true than not.

- 2. FRE 901(b) sets forth illustrations of the kinds of foundation facts that the drafters decided should satisfy this standard.

▪ The process of laying the foundation:
- Q: Please tell the jury your name and occupation
- A: My name is Joseph Jones and I am not employed
- Q: Do you know the Δ Harry Hunt in this case?
- A: Yes he is my uncle
- Q: Did you previously work in the Δ's office?
- A: Yes I worked there two summers ago.
- Q: I am handing you a piece of paper, marked plaintiff's Exhibit 7 for identification. Do you recognize it?
- A: Yes
- Q: What is it?
- A: It is a rental agreement from my uncle's office.
- Q: How do you know that?

- A: It is printed with his business logo, and it states that it is a rental agreement between himself and Jane Smith, Tenant.
- Q: Do you recall seeing this particular agreement before?
- A: Yes
- Q: Could you tell us how you remember it?
- A: It was the first day I was working for my uncle 2 years ago. HE asked me to deliver some rental agreements to his tenants after he signed them. He had a stack of them. This was on top.
- Q: What happened next?
- A: HE signed a whole stack of them. I really liked the apartment, which is why I remember it.
- Q: SO to the best of your recollection, you saw the Δ sign Exhibit 7 two years ago?
- A: Right.
- Q: Your honor, I now offer Plaintiff's Exhibit 7 for identification into evidence as plaintiff's Exhibit number 7.

- After the foundation is laid, the proponent asks the judge to admit the exhibit "into evidence."
  - The opponent may object either because the foundation is not adequate under FRE 901 (a) or on grounds of some exclusionary rule, such as hearsay, or FRE 403.
- Identification:
  - Usually refers to *who* authored the writing, or whose voice is speaking
- Authentication
  - Usually refers to the genuineness of the connection between *what* the exhibit is and the specific facts of the case.

**1. Real Evidence**

- Generally
  - Real evidence refers to tangible items that played some role in the litigated event and from which the jury may draw inferences.
- Examples:
  - The weapons used in a crime or a home appliance that is alleged to be defective.
  - The item's connection to the specific events in dispute is what makes it relevant and that *connection* is "what the proponent claims" for purposes of satisfying FRE 901
- Foundation
  - The foundation for real evidence typically consists of a witness who can identify the item's physical involvement in the case
    - Yet sometimes months have elapsed between the finding of the real evidence (i.e. the knife at the crime scene and its introduction as an exhibit at trial)
- Ways to identify the Real Evidence:
  - (A) **Identification through a readily identifiable characteristic**
    - One typical method of identification is that the witness may recognize the knife—typically because it has a readily identifiable characteristic.
    - The witness's personal knowledge satisfies FRE 901(b)(1).

- (B) **Identification through chain of custody**
    - Chain of custody is the second typical method of ID, most often used when an exhibit is generic and has no readily identifiable characteristic.
    - For example, the links in the chain of custody of the knife would consist of the people who handled the knife between the time of its discovery at the crime scene and its appearance in the courtroom. A complete chain of custody under FRE 901(b)(4) would require the testimony of *all* such people plus testimony to show that the exhibit was stored in a secure place when it was not being handled.
- (C) **Unchanged condition established through chain of custody**.
    - The chain of custody can also establish that the item has not been tampered with and that it is in the same condition as it was when it was discovered.
    - This showing may be required if the condition of the item is as important as its identity and if it is an item that might be adulterated or tampered with.
- (D) **Under FRE 901(a0, the complete chain of custody is <u>not</u> always required**
    - Cases decided under 901(a) make it clear that the complete chain of custody need not always be proved to satisfy the sufficiency standard.
    - Even where gaps exist in the chain of custody of substances that require testing, courts have held that a jury *could* reasonably find that the exhibit in question was adequately identified and still in an unchanged condition.

- Key points
    - (1) Real evidence is a tangible exhibit that played some role in the events that are in dispute at the trial
    - (2) Real evidence is usually identified pursuant to FRE 901(b)(1) by testimony from a witness who recognizes the exhibit because of its readily identifiable characteristic, or by testimony concerning its chain of custody pursuant to FRE 901(b)(4). FRE 901(a) requires the judge to decide whether the proffered testimony is evidence sufficient to support a finding of the exhibit's identity. For some real evidence such as drugs or blood samples, it is also necessary to establish the exhibit's unchanged condition.

**<u>2. Demonstrative Exhibits</u>**

- Generally
    - Demonstrative exhibits reproduce or depict persons, objects (such as items of real evidence that are not brought into court) or scenes that are connected to the litigated events in the case.
        - Examples are models, diagrams, drawings, or photographs.
    - These exhibits are offered to illustrate or explain the testimony of witnesses, including experts, and to present complex and voluminous documents.
    - They can also be referred to by counsel during closing and opening arguments

- Demonstrative exhibits are authenticated by testimony from the witness whose testimony they illustrate.
    - The witness has knowledge of the nature of the exhibit's content and the connection of that content to the case.

- **Requirements**:
    - 1. Demonstrative Exhibits Must Assist the Trier of Fact
        - A) The proponent must be prepared to show that the exhibit is a "fair or accurate or true" depiction of what the proponent claims that it portrays.
        - B) Although this additional requirement is not part of the literal FRE 901 burden, courts enforce it to make sure a demonstrative exhibit will assist the trier of fact by increasing its understanding of the relevant events.
            - This normally would be assumed with real evidence.
        - C) the witness who has personal knowledge of the real item must testify that it is like the real thing that it is helpful to the finder of fact.
    - 2. Application of FRE 403 to Demonstrative Exhibits
        - Some demonstrative exhibits are generally admitted as a matter of course, such as photographs of the scene of the crime or accident.
        - But sometimes their admission raises 403 dangers such as unfair prejudice or misleading the jury.
            - Photographs of gruesome injuries at a crime scene may generate fear of unfair prejudice
            - Complex charts and graphs may present of a danger of misleading the jury.
- **Demonstrations and Experiments in Court**
    - Sometimes a witness's testimony about an out-of-court event can be illustrated through a demonstration or experiment in court.
        - 1. Such in-court demonstrations are tested for relevancy under 403.
        - 2. Such in court demonstrations are also tested under 403 to see if a fair comparison is made since they may present unfair prejudice and may mislead the jury.
- **Recorded and computer generated reenactments, animations, and simulations of events**
    - A variety of filmed or computer-generated recordings can be used in trials to portray out-of-court events for the jury, typically in personal injury and criminal cases.
    - Re-enactments and animations
        - Are subject to 1) the "fair and accurate" representations requirement and 2) they must accurately reflect the testimony and the physical evidence and the reasonable inferences that may be drawn from them.
    - Computer generated *simulations*
        - Are more complex in that they are produced by inputting information into a computer program that determines how an event "must have happened" and provide a visual image of that conclusion.

        - A simulation adds information beyond the testimony of percipient witness
    - Is such to objection under 403
        - Principal risk: is that the presentation inevitable simplifies the real-world events and that much data pertinent to the accident reconstruction are supplied by outside sources who are unknown → can mislead jury
- Key points
    - (1) Demonstrative exhibits reproduce the likeness of some tangible object, person, or scene, and are helpful to the jury's understanding of other testimonial, documentary, or real evidence. More complex forms of demonstrative exhibits include in-court demonstrations and experiments and out-of-court re-enactments, animations and simulations
    - (2) Demonstrative Exhibits are usually identified pursuant to FRE 901(b)(1) by testimony from a witness as to what their contents are, the witness's basis for being able to identify them, and the witness's opinion that they are a fair and accurate reproduction.
    - (3) Demonstrative evidence may be subject to exclusion under 403.

**3. Recordings**

- Generally
    - Audio, video, and photographic recordings of events that occurred outside the courtroom are a cross between demonstrative evidence and eyewitness testimony
    - Although they may be offered together with the testimony of a witness who perceived the events, the recordings themselves are an independent record of them, imprinted not in human memory, but on tape or film.
    - The recording reveals what the equipment "saw" or "heard" perhaps with less risk of human fallibility than a human eyewitness
- Authentication by percipient witnesses
    - Authenticated if a percipient witness can testify that the recording is a far and accurate record of the real-world event
        - If the recording functions as a "silent witness" because there is no percipient witness to the event, FRE 901 may require proof of the recording process and of the chain of custody of the recording itself.
- Authentication of voices
    - 1) Someone familiar with the voice can authenticate it
    - 2) Expert testimony.
- Satisfying the FRE 901 Foundation With a Percipient Witness
    - When a camera or other device records what a witness is also seeing, that "percipient witness" can authenticate the recording.
    - The foundation:
        - The witness would identify the events in the recording, state the basis for the witness's ability to identify the events, and affirm that the recording is a "fair or accurate or true" record of the events perceived.

- Silent witness—satisfying the FRE 901 requirement Without a Percipient Witness
    - Sometimes a recording device records what no human witness has seen or heard
    - When a recording device functions as a "silent witness" a percipient witness doesn't exist and cannot testify to the simplified foundation.
    - Instead "recordings made by equipment that operate automatically may satisfy the requirements of the FRE so long as a witness testifies to the type of equipment or camera used, its general reliability, the quality of the recorded product, the process by which it was focused, or the general reliability of the entire system.
    - FRE: As long as the equipment is "routine checked" to make sure its working properly—foundation is okay.
    - Authentication
        - Recordings can also be authenticated by their content alone.
- Application of FRE 403 to Recordings
    - Sometimes the admission of recordings can raise dangers under 403.
    - Video recordings and reenactments that portray gruesome events such as personal injuries, autopsies of crime victims are frequently objected to as unfairly prejudicial.
- Key Points
    - (1) Recordings of events may be authenticated pursuant to FRE 901 if a percipient witness can testify that the recording is a fair and accurate record of the real-world event.
    - (2) If the recording functions as a "silent witness" because there is *no* percipient witness to the event, FRE 901 may require proof of the recording process and of the chain of custody of the recording itself.
    - (3) Recordings may be subject to exclusion under FRE 403

**4. Written Documents**

- Generally
    - Typically a written document is relevant because its contents are connected to the litigated events of a case by the identity of its author or by knowledge of its organizational structure.
    - The law of evidence, however, doesn't treat the signature or recital of authorship on the face of the document, without more, as sufficient proof of authenticity.
- Authentication
    - Usually identified by testimony that identifies the author or the source of the document, typically using the signature, the contents, the location of the document or other circumstances
        - To authenticate handwriting:
            - 1) Person can identify their own handwriting
            - 2) Someone familiar with the handwriting can identify it
            - 3) Expert can compare a known sample with an exhibit and give opinion
            - 4) Jurors can compare a known sample with an exhibit and decide for themselves.
- Signature

- Proof of the genuineness of a signature is sufficient to identify the author of a writing.
- Observation of the act of signing a document, as exemplified by the testimony of the landlord's nephew in our hypothetical case between the landlord and tenant.
- Identification of a signature based on familiarity with handwriting will satisfy FRE 901(b)(2), and under FRE 901(b)(3) either the jury or an expert may compare the signature on the exhibit itself with a specimen that has been authenticate pursuant to FRE 901.

- Contents and other Circumstances
  - FRE 901(b)(4) is an extremely broad and flexible standard that permits proof of authorship or source through many types of evidence.
    - I.e. the author may be identified by the document's contents.
  - Business records:
    - Can be authenticated as to source under FRE 901(b)(4) through proof of matching letterhead, comparison with matching forms, testimony about routine practices of the institution in generating such records, and through testimony of a custodian about how the business filing or data retrieval system operates and that document was retrieved from a certain file or in a certain way.
    - If a computerized data retrieval process or system is used, further testimony may be required to satisfy the requirement of FRE 901(b)(9) that further testimony may be required to satisfy the requirement of FRE 901(b)(9) that the computerized process must produce an accurate result.
  - Public Records:
    - FRE 901(b)(7) provides for the authentication of certain types of public records or reports.
    - Proof that they "are from the public office where items of this nature are kept" can be provided by testimony from the custodian or by a certificate of authenticity from the public office
    - Or a witness may simply testify that the record is from the appropriate office.
- Ancient Documents
  - If a writing is more than 20 years old and is in a place where it would likely be if it were authentic, the document will be admitted as "genuine" pursuant to FRE 901(b)(8) as an ancient document.
  - The document must be in such condition as to create no suspicion concerning its authenticity.
- Electronic Writings
  - Electronic writings are increasingly used in both civil and criminal litigation.
  - Most common are computer-generated data files, e-mails, and Internet postings.
  - The authentication of such electronic writings can be hotly contested when authorship is in dispute.
  - There are no subsections of FRE 901(b) that address these new electronic technologies, but FRE 901 provides flexibility in applying its standard of sufficiency.
  - E-mails can be authenticated by their authorship.

- Courts are skeptical about attributing documents obtained from a website to the organization or individual who maintains the site.
- Key points:
  - (1) Written documents are usually identified pursuant to FRE 901 by testimony that identifies the author or the source of the document, typically using the signature, the contents, the locations of the document, or other circumstances.
  - (2) Writings created by new electronic technologies are identified and authenticated by analogies to Rule 901(b) illustrations.

**5. Written Documents that are Self Authenticating**

FRE 902: Written documents that are self-authenticating.
Extrinsic evidence of the authenticity as a condition precedent to admissibility is not required with respect to the following:

- (1) Domestic public documents under seal
- (2) Domestic public documents not under seal
- (3) Foreign public documents
- (4) Certified copies of public records
- (5) Official publications. Books, pamphlets or other publications purporting to be issued by public authority.
- (6) Newspapers and periodicals.
- (7) Trade inscriptions and the like.
- (8) Acknowledged documents (i.e. notary public)
- (9) Commercial paper and related documents
- (10) Presumptions under Acts of Congress
- (11) Certified domestic records of regularly conducted activity
- (12) Certified foreign records of regularly conducted activity.

- Interpretation of FRE 902
  - FRE 902 defines those documents that, on the basis of their appearance or self-evidence content alone, are so likely to be authentic that the proponent need not produce extrinsic evidence to prove it.
- Key point
  - FRE 902 provides that some written documents can be authenticated by their appearance alone, without the testimony of a foundation witness. The opponent may still dispute the authenticity of these "self-authenticating documents"

- C. Best Evidence Rule
  - Generally
    - Theory of the best evidence rule: when a writing, recording or photograph is offered to prove its content, the chances are good that the original will be more trustworthy than a copy
    - Therefore, the best evidence rule creates a requirement for the production of originations.
    - The best evidence rule requires an original only when the proponent is offering a writing, recording, or photograph as relevant to *prove its own content*.
    - The writings and recordings here are "non-hearsay" statements.

- When the proponent is trying to prove the event using a percipient witness, there is no requirement that a documentary record of the event be produced instead because oral testimony is being used to prove the *event* not the *content of the writing*.

Best evidence chart

1. Is the evidence relevant
2. Is the evidence offered to prove contents of a writing? (1002)

**FRE 1002**

FRE 1002: Requirement of an original

- To prove the content of a writing, recording, or photograph, the

original writing, recording, or photograph is required, except as otherwise provided in the rules or by an Act of Congress

- An original is required when a proponent seeks to prove the content of a writing recording or photograph
- FRE 1002 applies broadly, insofar as *writings* and *recordings* are defined broadly under FRE 1001, but doesn't go beyond writings, recordings, and photos.
- In some cases, a writing may be referred to but it is a fact about the writing, not the precise terms of its contents, that the proponent is trying to prove and in these cases FRE 1002 does not apply.

**FRE 1003**

FRE 1003: Admissibility of Duplicates

- A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

- FRE 1003 provides that duplicates may be furnished instead of an original in most circumstances.
- FRE 1003 provides that duplicates may not be used if the opponent presents evidence that disputes the authenticity of the original, or if other aspects of the original or duplicate—incompleteness, erasures, defects—make it unfair for the proponent to use the duplicate.

**FRE 1004**

FRE 1004: Admissibility of other evidence of contents

The original is not required and other evidence of the contents of a writing, recording or photograph is admissible if:

- (1) Originals lost or destroyed. All originals are lot or have been destroyed, unless the proponent lost or destroyed them in bad faith.
- (2) Original not obtainable. No original can be obtained by any available judicial process or procedure or
- (3) Original in possession of opponent. At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise that the contents would be a subject of proof at the hearing, and that party doesn't produce the original at the hearing or
- (4) Collateral matters. The writing, recording, or photograph is not closely related to a controlling issue.

- Loss or destruction of the original may be proved by testimony from a person with knowledge, or by circumstantial evidence that the proponent has made a reasonable, diligent, and unsuccessful search for the original.
- The party need not explain with absolute certainty what happened to the original but has the burden to prove that its loss was not in bad faith.
- No preference is given to any particular type of secondary evidence once the original is not available.

**FRE 1006**

FRE 1006: Summaries

- The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place.

  - FRE 1006 permits the proponent of voluminous writings, recordings, and photos to present the contents of these items in the form of a summary, chart or calculation.
  - These voluminous materials must themselves be shown to be admissible.
  - The proponent is obligated to produce the originals in time to permit the opponent to examine and copy them, obviously to check the summary for any errors or inconsistencies, and for purposes of cross-examinations.
  - If the originals are no longer available, then FRE 1006 would not apply.
  - Distinguishable from 1006 summaries are summaries and charts that are used simply as "illustrative" aids to summarize and display the testimony of the witness and its not within the scope of FRE 1006.

**FRE 1008**

FRE 1008: Functions of Court and Jury

- When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends on the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of rule 104. However, when an issue is raise (a) whether the asserted writing ever existed or (b) whether another writing, recording, or photograph produced at trial is the original or (c)whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

  - FRE 1008 provides that most preliminary questions of fact under the best evidence rules are for the judge pursuant to 104(a), and the judge will admit or exclude the offered evidence accordingly
  - But if the opponent raises an issue as to the existence of or the true content of the original then the judge must admit the evidence so the jury can decide (104(b)).
    - When the trier of fact determines—jury—the judge shouldn't decide the question by a preponderance of the evidence but only whether there is sufficient evidence to support a jury finding on the matter.

- Key points
  - (1) FRE 1002 requires the proponent of a writing, recording or photograph, to produce the original item when the proponent is trying to prove the content of the item. This requirement applies when the content of the item has independent legal significance or when the item is the record of an event and the proponent has chosen it as the means of proving the event.
  - (2) FRE 1003 permits the proponent to produce a duplicate instead of the original in most circumstances.

- (3) FRE 1004 permits the proponent to produce secondary evidence of the original if the absence of the original can be explained or justified. No particular type of secondary evidence is preferred. Only FRE 1005 states a preference for certified or compared copies of public records
- (4) FRE 1006 permits the use of summaries of voluminous writings, recordings, and photos without the admission of the originals into evidence. The originals or duplicates must, however, be available to the opponent. A summary admitted under Rule 1006 is itself substantive evidence.
- (5) FRE 1008 provides that most preliminary questions of fact under the best evidence rule are for the judge pursuant to FRE 104(a) and the judge will admit or exclude the offered evidence accordingly.
- (6) If the opponent raises an issue as to the existence of or the true content of the original, then that issue must go to the jury under FRE 104(b), and the judge must admit the evidence to permit the jury to decide the issue.

# IX. CHARACTER

FRE 404: Character evidence not admissible to prove conduct, exceptions, other crimes

(a) **Character Evidence Generally**. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

- (1) Character of the accused. In a criminal case, evidence of a pertinent trait of character offered by an accused or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the **same** trait of character of the accused offered by the prosecution;
- (2) Character of alleged victim. In a criminal case, and subject to the limitations imposed by Rule 412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of **peacefulness** of the alleged victim **offered by** the **prosecution** in a homicide case to rebut evidence that the alleged victim was the first aggressor.
- (3) Character of witness. Evidence of the character of a witness as provided in rules 607 (who may impeach), 608 (evidence of character and conduct of witness), and 609 (impeachment by evidence of conviction of crime).

(b) **Other crimes, wrongs, or acts**.

- Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown of the general nature of an evidence it intends to introduce at trial.

- A. Character Generally:
    - General Rule:
        - Evidence of a person's character is, in general, *not admissible to prove that he "acted in conformity therewith on a particular occasion*." (FRE 404(a))
    - Definition
        - "Character traits" are qualities or aspects of a person that tend to be reflect in occasion, rather than routine, conduct and tend to have moral overtones (i.e. honesty or dishonesty) and therefore, inherent prejudice.
    - Exceptions to 404 (a)
        - **404(a)(1)**

- Character of accused—
    - Criminal case
        - Accused offers evidence of a pertinent trait of character of accused, Prosecution may rebut that same pertinent trait
    - OR
        - If Accused offers evidence of a pertinent trait of character of victim, Prosecution may rebut that same pertinent trait

- **404(a)(2)**
    - Character of alleged victim—
        - Criminal case (subject to limitations of 412—sex offense statute)
            - Accused offers evidence of pertinent character trait of victim, Prosecution can offer evidence pr pertinent character of victim to rebut accused's assertions on that same trait.
        - OR
            - If accused offers evidence that the alleged victim was the first aggressor, Prosecution can offer evidence of victim's peacefulness to rebut this claim.
- **404(a)(3)**
    - Evidence of a person's character for proving action in conformity therewith is admissible under:
    - **FRE 607: Who May Impeach**
        - The credibility of a witness may be attacked by any party including the party calling the witness.
    - **FRE 608: Evidence of Character and Conduct of Witness**
        - (a) Opinion and Reputation Evidence of Character
            - The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations:
            - (1) The evidence may only refer to character for truthfulness or untruthfulness and
            - (2) Evidence of truthful character is admissible only after the character of the witness or for truthfulness has been attacked by opinion or reputation evidence or otherwise.
        - (b) Specific Instances of Conduct
            - Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, may not be proved by extrinsic evidence (THINK 403). They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness:
            - (1) Concerning the witness's character for truthfulness or untruthfulness or
            - (2) Concerning the character for truthfulness or untruthfulness of another witness as to which character the witness cross-examined has testified.
            - The giving of testimony, whether by an accused or by any other witness, doesn't operate as a waiver of the

accused's or the witness' privilege against self-incrimination.

- **FRE 609: Impeachment by Evidence of Conviction of Crime**.
  - (a) General Rule:
    - For the purposes of attaching the character for truthfulness of a witness
    - (1) Evidence that a witness other than an accused has been convicted of a crime shall be admissible subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law if the court determines that probative value outweighs its prejudicial effect to the accused.
    - (2) Evidence that any witness has been convicted of a crime shall be admitted if it is determined that the crime required proof or admission of an act of dishonesty or false statement by the witness.
  - (b) Time Limit:
    - Evidence of a conviction is not admissible if a period of more than ten years has elapsed since the date of the conviction.

- **Methods of Proving Character:**
  - FRE 405 (a) permits the proponent to offer both reputation and opinion testimony in the limited situations in which FRE 404 (a0 allows the use of character evidence to show a person's action in conformity with character.
    - The probative value of such evidence will depend on how long, how well, and in what contexts the witness has known (opinion) or has known about (reputation) the person whose character the evidence is offered to prove.
    - If a character witness offers opinion testimony, it is not permissible to explore on direct examination the specific acts that may be the basis for the witness's opinion
    - On cross-examination, opposing party may ask the witness about specific acts, committed by the person who is the subject of the character testimony.
      - Courts also permit questions about the person's arrests or convictions
      - The specific acts (or arrests or convictions) must relate to the character trait about which the witness has testified.
      - Purpose is to impeach the testimony of the character witness, not to show the character of the person about whom the witness has testified.
    - When the use of character evidence is permissible, the character evidence must relate to a pertinent character trait
  - FRE 404 (a) prohibits the use of character evidence to show action in conformity with character on a particular occasion except:
    - In a criminal case:
      - If D opens the door to the victim's character, P can offer evidence of a victim's character or D's character (on the same trait)
      - IF D opens the door on his own character, P can offer evidence of D's character (on the same trait)

        - In a homicide case, P may open the door to victim's character for peacefulness in order to rebut a claim that the victim was the 1st aggressor.
    - If character is an essential element of a claim or defense (i.e. libel) can prove character with opinion or reputation evidence, or specific acts. (405(b)).
  - Any party may introduce character evidence for impeachment and rehabilitation purposes allowed by FRE 607-609
  - In civil cases, FRE 404 prohibits the use of character to show action in conformity with character except in the context of impeaching/rehabilitating witnesses, or if character is essential element of the claim or defense.
- **Character Evidence Continued**:
  - Character in issue:
    - **Essential Element**: A person's general character, or his particular character trait, is admissible if it is an essential element of the case.
  - Circumstantial evidence in civil cases
    - In civil cases, circumstantial evidence of character is generally inadmissible.
  - Other crimes (and "Bad acts") evidence in criminal cases:
    - **General rule**: The prosecution may not introduce evidence of other crimes committed by D for the purpose of proving that because D is a person of criminal character, he probable committed the crime with which he is charged. Nor may the prosecutor show D's prior "bad acts that didn't lead to convictions for this purpose
    - **HOWEVER**: Under FRE 404 (b), evidence of other crimes may be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."
  - Evidence of a criminal Δ's good character:
    - **Allowed**: Evidence by a criminal Δ that he has a good general character is allowed by all courts.
      - MUST still show relevance.
    - **Method of Proof**: FRE 405(a) says that it can be shown either through witness's own opinion and reputation evidence.
    - **Rebuttal by Prosecution**: If D puts on proof of his good character, the prosecution my rebut this evidence.
      - By cross-examination: can ask about specific instances.
        - The prosecutor must have a good faith basis for believing that D really committed the specific bad act
        - The specific bad act must be relevant to the specific character trait testified to by the witness.
        - (Even an arrest that did not lead to conviction MAY be brought up if relevant to the character trait in question)
      - MAY NOT put on extrinsic witnesses (i.e. other witnesses) to prove the specific acts took place.
        - Conversely, the Δ may not put on other witnesses to show that the specific act referred to by the prosecutor on cross-examination never took place.

- B. Specific Acts Evidence

- Generally
  - **FRE 404 (b)** prohibits the use of past specific acts only to prove character in order to show conduct in conformity on a specific occasion (except in limited situations governed by FRE 413-415, 608(b) and 609)
    - BUT specific acts may be admissible for any non-character purpose, including, but not limited to:
      - **Motive**
      - **Opportunity**
      - **Intent**
      - **Preparation**
      - **Plan**
      - **Knowledge**
      - **Identity/modus operandi** (high degree of distinctiveness and similarity required)
      - **Absence of mistake or accident** ("Doctrine of chances" allows admission of prior incidents as to which D denies culpable involvement in order to rebut a defense of mistake or accident under the "anti-coincidence" theory), and
      - **Sex offense cases**

  - Proponent must:
    - 1) Convince the judge that there is a legitimate non-character purpose
    - 2) Satisfy the preliminary fact standard with respect to the culpable involvement of the person who allegedly committed the act (104(b))
    - 3) Respond to a FRE 403 objection.

- FRE 405 (a)
  - Whenever proof of a character trait is allowed, the FRE let that proof be by either reputation or opinion.
    - A) *D's good character evidence*
      - So D in a criminal case can show his own good character by W's testimony that D has a good reputation for, say honesty or non-violence, or by testimony that in W's opinion, D possesses these favorable character traits (But D cannot show specific instances of his own good character)
        - Rebuttal by Prosecution:
          - If D makes this showing ("opening the door") the prosecution may rebut by reputation or opinion evidence of D's poor character. Also, the prosecution may use specific acts evidence during its cross-examination
          - Requirements:
            - 1. Good Faith basis for specific Act Question: Before the cross-examiner asks about a specific act during cross she must have a good faith basis for believing that the act actually occurred.
            - 2. No extrinsic Acts: Also the prosecution cant use extrinsic evidence of the specific

acts, merely ask the defense's witness about them.

- B) *Character of Victim*
  - Similarly D can show the character of the victim by use of reputation or opinion evidence
    - Rebuttal by Prosecution:
      - Again, the prosecution in rebuttal can not only use reputation or opinion, but can also refer to specific acts on cross.
  - Review Session Notes: **Criminal Case**.
    - Δ says:
      - (1) Victim was the first aggressor
        - Factual statement not a character statement
        - Under 404, the only exception is a homicide case where the Δ says the victim was the first aggressor
          - SO prosecution can open character door on peacefulness of the victim in a homicide case (not Δ) FIRST through reputation OR opinion evidence.
          - If Δ comes back and says no victim was **not** peaceful, NOW the prosecution can come back and talk about Δ's violent character.
      - (2) I was afraid of the victim
        - The basis of your fear is the victim's character and the basis of this fear is now an essential element of your defense and now we need to know why you were afraid of him.
          - So now under 405, you can bring in specific acts (and reputation and opinion) evidence to prove the basis of this fear (Δ is opening the door to the victim's peacefulness and his own violence).
          - Prosecution can respond on victim's character on peacefulness through reputation and opinion evidence
          - OR/AND
          - Prosecution can respond on Δ's violent character by reputation and opinion
          - Cannot bring in **specific acts**.
      - (3) Hybrid
        - Victim is the first aggressor AND I was afraid of him.

- Prosecution can respond with the victim's peaceful character and Δ's violent character by reputation or opinion
  - DEFENSE: they can bring in reputation and opinion AND specific acts.
- Review Session Notes: **Civil Cases**.
  - Character must be an essential element or defense, otherwise it is banned—i.e. defamation case.
    - In a harassment case, the Δ allegedly retaliated someone who harassed a woman until she left the firm—its ok to include law firm and the woman
    - If you're name a corporate Δ, did they have notice? To establish that firm was on notice of this behavior

- C) *Proof of "other purposes"*
  - Where a party (usually the prosecution) us using D's prior crimes or bad acts for some "other purpose" (i.e. identity, knowledge), this proof can be by specific acts.

- C. Habit and Routine Practice

**FRE 406: Habit, Routine Practice**

- Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

  - Generally
    - FRE 406 places no specific limitations on the use of habit evidence to show action in conformity on a particular occasion.
    - But proponent shouldn't be able to use reputation evidence to prove habit or routine practice because then its hearsay.
    - *If someone comes in and says something contrary to your testimony and says you didn't behave in that fashion on a particular day – it does not undermine your assumption that it's a habit – this is an* ***impeachment***.
    - Generally allowable:
      - Evidence of a person's habit is admissible to show that he *followed this habit on a particular occasion*. "
      - There are three main factors courts look to in deciding whether something is a habit: Regularity, specificity, and moral neutrality.

  - Admissibility Analysis
    - 1) Is the activity a habit/routine practice, or is it a character trait?
      - The factors that tend to distinguish habit from character:
        - Regularity
          - The more regular the behavior, the more likely it is to be a habit. "Regularity" means "ratio of reaction to situations." (So something that X does 95% of the time

she's in a particular situation is more likely to be a habit than something X does 55% of the time in that situation)
- Specificity
  - The more specific the behavior, the more likely it is to be deemed a habit.
- Moral neutrality
  - "Unreflective behavior": The more "unreflective" or "semi-automatic" the behavior, the more likely it is to be a habit.

- Habit is more about regularity of response instead of frequency.

- 2) Is the evidence sufficient to establish the existence of the habit or routine practice?
  - 104 (a), can testify about own habit, or someone else who knows you

- Objection:
  - FRE 403 exclusion

- Business practices:
  - All courts allow evidence of the routine practice of an organization, to show that that practice was followed on a particular occasion.

- D. Similar Happenings or Non-Happenings
  - Generally
    - General Rule
      - Evidence that similar happenings have occurred in the past (offered to prove that the event in question really happened) is generally allowed. However, the proponent must show that there is substantial similarity between the past similar happening and the event under litigation.
      - There is no specific Federal Rule governing the use of similar happenings, but as a practical matter the controlling rules are likely to be FRE 401-403
        - Such evidence is not "character" or "habit" and involves either no propensity inference, or a propensity inference about organizations/things v. persons.
    - Evidence of similar happenings or non-happening is offered to show things like
      - 1) The behavioral propensity of an organization or an object to show the behavior of the organization (or its agents/employees) on a specific occasion.
      - 2) The institutional policy of an organization where that is a fact of consequence or essential element.
      - 3) The behavior or characteristics of an inanimate object
    - Except when similar happenings evidence is offered to show **notice**, courts tend to require a showing of similarity as a condition of admissibility.
      - Similar happenings will require fewer instances than habit to be admissible (sufficient similarity is the focus rather than frequency)
      - But courts usually require a high number of non-happenings to be admissible
  - Accidents and Injuries
    - Evidence of past similar injuries or accidents will often be admitted to show that the same kind of mishap occurred in the present case, or to show that the Δ

was negligent in not fixing the problem after the prior mishaps. But the π will have to show that the conditions were the same the prior and present situations.

- Past safety:
  - Conversely, the Δ will usually be allowed to show due care or the absence of a defect, by showing that there have not been similar accidents in the past. However, D must show that
    - (1) Conditions were the same in the past as when the accident occurred, and
  - (2) Had there been any injuries in the past, they would have been reported to D.

- E. Sex Offense Cases

**FRE 413**

- In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the Δ's commission of another offense of sexual assault is admissible.
- Prosecution needs to give defendant 15 days heads up. (Notice)
- IF it's a crime in another state and not in this jx, you can still bring in evidence of that behavior that would be considered a crime in a different state.

**FRE 414**

- In a criminal case in which the Δ is accused of an offense of child molestation, evidence of the Δ's commission of another offense of child molestation is admissible

**FRE 415**

- Same as 413 and 414 except civil court.
- In a civil case in which a claim for damages is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party's commission of another offense of sexual assault or child molestation is admissible

- Evidence of Sexual Assault and Child Molestation:
  - FRE 413-415 permit the use of specific acts to prove a person's character or propensity for engaging in sexual assault/child molestation to prove action on a particular occasion.
    - These rules apply in both criminal and civil suits.
    - "Offense of sexual assault" is broadly defined- crime in ANY jurisdiction
    - Prosecution must give **notice** to the criminal
    - 104(b) governs question of whether Defendant committed the past specific acts i.e. if the past specific act was without consent—under 403, might be an undue waste of courts time.
    - No right to a limiting instruction
    - Evidence potentially admissible under these rules may be excluded pursuant to FRE 403 (And hearsay rules still apply).

- Evidence of an Alleged Victim's Past Sexual Behavior or Disposition
  - **FRE 412** severely limits the extent to which a party can introduce evidence of an alleged victim's sexual predisposition or sexual behavior in both criminal and civil cases
    - "Sexual behavior: connotes activities that involve actually physical conduct or that imply sexual intercourse or conduct, or activities of the mind
    - "Sexual predisposition"= evidence that doesn't directly refer to sexual activities thoughts but may have a sexual connotation (i.e. dress, speech)

  - **FRE 412(b)(1**) allows a criminal Δ to introduce such evidence only if it is:
    - (A) Specific instances of sexual behavior with a third person offered to show the source of semen, injury, or other physical evidence,
    - (B) Specific instances of sexual behavior with Δ offered to show consent,
    - (C) Constitutionally required evidence (Refers to DP and confrontation clause rights)

  - **FRE 412(b)(2)** provides that evidence of an alleged victim's sexual predisposition or behavior is admissible in civil cases only if
    - Probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party (this is **reverse 403** balancing test), favoring exclusion over admissibility
    - Evidence of an alleged victim's reputation is admissible in a civil case only if it has been placed in controversy by the alleged victim.

## X. IMPEACHMENT

- **Impeachment—Generally**
  - How to Impeach a Witness
    - (1) By examination (usually cross) of the witness
    - (2) By introduction of extrinsic evidence
  - Generally
    - Anytime a witness takes the stand, their character for truthfulness is on the table, but truthfulness of a witness is a collateral issue, and cannot use extrinsic evidence to impeach on a collateral matter.
    - When evidence is admissible only to impeach credibility, proponent cannot rely on impeachment evidence as substantive proof of disputed facts, and opponent can make a 403 objection and is entitled to a limiting instructions.

- **A. Impeachment by Prior Criminal Conviction**
  - A) FRE 609(a)(2)
    - Provides that dishonesty and false statement convictions falling within the 10 year time limit described in 609(b) are automatically admissible to impeach all witnesses (including criminal Ds) without regard to penalty or balancing
      - The 10 year time limitations run from the date of conviction or the date of release from imprisonment, whenever's more recent
      - Courts interpret "dishonesty and false statement" relatively narrowly
        - Look to the statutorily defined elements of the crime (i.e. perjury, false statement, criminal fraud, embezzlement, false pretenses)
  - B) FRE 609(a)(1)
    - Provides that other convictions falling within the 10-year time limit are admissible only if they are punishable by more than a year's imprisonment and if they satisfy the appropriate balancing test.
      - Balancing test for all witnesses except criminal Δs is FRE 403
      - Balancing test for criminal Δs who are witnesses is a reverse 403
        - Note that similarity between current criminal allegations and the facts underlying the impeachment evidence enhances the prejudice, not the probative value of the prior conviction.
  - C) Convictions outside the 10 year time limit
    - Convictions that fall outside the 10 year time limit are potentially admissible but are subject to reverse FRE 403 balancing test
  - D) When conviction is admissible
    - Where a conviction is admissible, can generally only bring in the fact of conviction, when and where it happened, and what sentence was imposed but not the underlying facts.

- **B. Impeachment by Prior Bad Acts**
  - Generally Allowed:
    - The federal rules basically follow the common-law approach to prior bad act impeachment (FRE 608(b))
    - Most common law courts allow the cross-examiner to bring out the fact that the witness has committed prior bad acts, even though these have not led to a criminal conviction
      - Probative of Truthfulness:

        - However, only prior bad acts that are probative of truthfulness may be asked about
            - EX. A prior act of lying on a job application or embezzling from a employer could be asked about, but the fact that W killed his wife and was never tried could not be, because this act doesn't make it more likely than it would otherwise be that W is not lying.
    - No extrinsic evidence:
        - The prior bad acts must be introduced solely through the cross-examination, not through extrinsic evidence (i.e. if W denies having lied on a job application, the cross-examiner cannot call a different witness to prove that the lie occurred).
    - Discretion of court:
        - All questions about prior bad acts are in the discretion of the court. The extent to which the questioner has a good faith basis for believing W really committed the act will, of course, be one factor the court normally considers.
    - Good-faith basis (ASK ABOUT THIS—IS THIS COMMON LAW OR FRE?)
        - Before the prosecutor may ask a witness about a prior specific bad act, he must have good faith basis for believing that the witness really committed the act.

- **C. Impeachment by Opinion and Reputation Regarding Character/Rehabilitation with Character Evidence**
    - 1) **Impeachment by Opinion/Reputation Testimony**
        - FRE 608(a): Permits a party to impeach the credibility of a witness by offering extrinsic evidence in the form of opinion or reputation testimony about the witness's character for truthfulness (not general moral character)
            - Reputation or opinion evidence may only be offered to prove a witness's good character for truthfulness after the opposing party has attacked the witness's character for truthfulness.

    - 2) **Impeachment by Specific Acts**
        - FRE 608(b)(1): Permits the impeachment and rehabilitation of witnesses with question about the witnesses' own specific acts that show character for truthfulness.
            - Examiner must have a good-faith basis for asking the question
            - Examiner is bound by witness's answer to such questions and may not introduce extrinsic evidence to challenge the answer
            - Specific acts questions must relate to character for truthfulness
            - Subject to exclusion on FRE 403 grounds
        - When an FRE 608(a) character witness offers opinion or reputation testimony about another witness's character fort truthfulness, opposing party can ask the character witness about specific acts probative of truthfulness that the other witness may have committed (to test basis for the testimony).

- **D. Impeachment by a Witness's Prior Inconsistent Statement**
    - Generally
        - Prior inconsistent statement may be admissible for the non-hearsay purpose of impeaching the credibility of a witness.
    - FRE 613(a):

        - Provides that the examiner need not disclose the contents of a prior inconsistent statement to the witness before asking whether the witness made the statement but must disclose to opposing counsel if asked
    - FRE 613(b):
        - Provides that normally a party may not introduce extrinsic evidence of a prior inconsistent statement unless:
            - The witness has an opportunity to explain or deny the statement, AND
            - Opposing counsel has an opportunity to question the witness about the statement.
        - "Interests of justice" exception exists for situation in which it is not possible to give the witness an opportunity to explain the apparent inconsistency.
            - Also this provision doesn't apply to party admissions (see FRE 801d2)
            - Some federal courts prohibit extrinsic evidence if the impeaching party does not call the statement to the witness's attention
        - Subject to exclusion on FRE 403 grounds (i.e. inconsistent statements about collateral matters, or loss of memory)
    - General Rule:
        - W's credibility may generally be impeached by showing that he has made a prior inconsistent statement.
    - Foundation:
        - But before W's prior inconsistent statement may be admitted to impeach him, a foundation must be laid
        - Federal Rule:
            - The federal rules liberalize the foundation requirement: W must still be given a chance to explain or deny the prior inconsistent statement, but the opportunity doesn't have to be given to him until after the statement has been proved (i.e. by testimony from W2 that W1 made the prior inconsistent statement).
        - Writing
            - If the prior inconsistent statement is written, the common law rule is that the writing must be shown to the witness before it is admitted. But FRE 613(a) relaxes this requirement, too: the examiner may first get W to deny having made the prior statement, and then admit it into evidence.
    - Extrinsic Evidence
        - Special rules limit the questioner's ability t prove that W made a prior inconsistent statement by "extrinsic" evidence

- **E. Impeachment for Bias**
    - Generally
        - Showing a witness's bias is relevant to impeach the witness's credibility because it suggests a particular reason or motive for the witness to lie
        - FRE 401-403 govern admissibility of evidence of bias
        - Extrinsic evidence of bias is admissible (though some courts impose foundation requirement similar to that for prior inconsistent statement)
    - Generally Allowed
        - All courts allow proof that the witness is biased. W may be shown to be biased in favor of a party (i.e. W and P are friends) or biased against a party (I,e, W and D were once involved in litigation). W's interest in the outcome may also be shown as a form of bias (i.e. if W is an expert, the fact that he is being paid a

fee for his testimony is generally allowed as showing that he has an interest in having the case decided in favor of the party retaining him.

- Extrinsic Evidence
  - Bias may be shown by use of extrinsic evidence. However most courts require a foundation before extrinsic evidence may be used for this purpose: The examiner must ask W about the alleged bias, and only if W denies it may the extrinsic evidence (i.e. testimony by another person that W is biased) be presented.

- **F. Impeachment by Sensory or Mental Defect**
  - Generally
    - Showing a sensory or mental incapacity that inhibits a witness's ability to perceive events accurately at the time they occur, or to remember and to narrate accurately what happened at the time of trial is relevant to cast doubt on the witness's credibility
    - FRE 401-403 govern proof of a witness's sensory or mental incapacity (and, if expert testimony is involved)
  - Generally allowed:
    - W may be impeached by showing that his capacity to observe, remember or narrate, events correctly has been impaired
  - Alcohol and drugs:
    - Use during event:
      - W may be impeached by showing that he was drunk or high on drugs at the time of the events he claims to have witnessed
    - Addiction:
      - Courts are split on whether W may be shown to be a habitual or addicted user of alcohol and drugs—many courts will not allow this if there is no showing that W was drunk or high at the time of the events in questions.

- **G. Impeachment by Contradiction: The "Collateral" Rule**
  - Generally
    - Introducing evidence that contradicts something the witness has said is relevant to cast doubt on the witness's credibility
    - FRE 401 and FRE 403 should govern the admissibility of evidence for this purpose
      - Some federal courts rely on the common law prohibition against the use of extrinsic evidence to impeach on a collateral matter to exclude extrinsic evidence that a contradicts a witness on a collateral matter
        - Extrinsic evidence is "collateral" if the fact that the evidence establishes cannot be proven with extrinsic evidence for any purpose other than to show the contradiction.
      - In most cases proper application of FRE 403 would lead to same result.
  - Collateral issue rule:
    - However the right to put on a second witness to impeach the first by contradicting him, is limited by the "collateral issue" rule, at least at common law.
  - The federal rule

- The federal rules do not contain any explicit "collateral issue" rule. However the trial judge can apply the policies behind the rule by using FRE 403's balancing test.

## XI. HEARSAY

FRE 801 (c): Hearsay
- "Hearsay" is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

- A. Generally
  - Hearsay Testimonial Dangers:
    - (1) Memory Danger
    - (2) Ambiguity Danger
    - (3) Perception Danger
    - (4) Sincerity Danger
  - Hearsay Objections
    - Lack of firsthand knowledge
    - Hearsay
  - Oral and Written
    - Hearsay may be written as well as oral
  - **All hearsay issues are FRE 104(a) questions for the judge**
  - Unstated Beliefs
    - Relevancy of unstated beliefs—there are some examples of utterances that can be relevant only if they are offered to prove beliefs that the declarant holds but doesn't state explicitly.

- B. Hearsay Broken down:

  - **1. "Statement"**

FRE 801 (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.

    - a) Oral v. written
      - A statement may be oral or written.
    - b) Need not be testimonial
      - Even things that don't sound at all "testimonial" may be statements and thus hearsay
        - I.e. P tells the court that a bottle's liable bore the words, "Contains sodium chloride." The label has since been destroyed. The label's contents are probably a "statement," so if P is offering those words in order to prove that that's what the bottle contained, this is probably hearsay
    - c) Non-verbal Conduct
      - **Generally**:
        - Where what happened out-of-court is non-verbal conduct, consider whether the person who did it intended it as an

assertion, if it was, it can be hearsay, if it wasn't, it cant be hearsay.
        - I.e. D is on trial for burglarizing W and W's wife Helen. W testifies that a week after the crime, W and Helen were in a park, when Helen saw D and shouted, "You're the one who burglarized my house!" W further testifies that D immediately ran away. If D's flight is found to be the equivalent of saying "I did it and don't want to be caught," W's statement about the flight would be hearsay. Probably, however, the court will find that D's flight was not intended by D as an assertion of any factual matter; in that case, W's testimony about the flight would not be hearsay.
    - *Animals and machines:*
        - Animals and machines don't make statements
            - I.e. W, a DEA agent, testifies for the prosecution that a dog sniffed D's luggage and then started baring—the barking isn't a statement and therefore cant be hearsay
    - *Question of "intent" is a FRE 104(a) question for the judge*
        - Intent test: Was the nonverbal conduct intended as an assertion?
            - Based on *nature of the conduct* and *circumstances surrounding it* as presented by both parties.
        - If the actor is not intending to communicate belief, then the evidence is defined as not hearsay and is admitted to prove the truth of that belief.
- **Assertive Conduct**
    - Generally:
        - Assertive conduct is treated as if it were a "statement" so that it can be hearsay
        - I.e. O pulls D's mug shot out of a collection of photos, since by this act O intends to assert, "That's the perpetrator," this act will be hearsay if offered on the issue of whether D was the perpetrator
- **Non-Assertive Conduct**
    - Generally:
        - Conduct that is not intended as an assertion will never be hearsay.
    - Non-Assertive Verbal conduct:
        - Even a verbal statement will not be hearsay if it is not intended as an assertion
    - Non-verbal conduct
        - Non-verbal conduct that is not intended as an assertion will not give rise to hearsay.
        - I.e. O, while walking down the street, suddenly puts up his umbrella. If this act is introduced to show that it was raining—it will not be hearsay—O was not intending to assert to anyone.
- **Silence**

- A person's silence will be treated as a "statement" and thus possibly hearsay, only if it is intended by the person as an assertion.

- **2. "Declarant"**

**FRE 801(b): Declarant**
- A "declarant" is a person who makes a statement

  - a) Hearsay In-Court Declarants
    - Are always under oath
    - Jury can observe their demeanor
    - They are subject to cross-examination.

  - b) Hearsay Out-of-Court Declarants
    - When witnesses testify in court about statements that they themselves made *outside of court*, those out-of-court statements may still be defined as hearsay because they are "other than one made by the declarant while testifying at the trial or hearing."
  - c) The term "declarants" generally refers to people who make statements out of court since people who make statements in court under oath and subject to cross are witnesses.

- **3. "Offered in Evidence to Prove the Truth of the Matter Asserted"**
  - A statement may sometimes be put into uses that do not constitute offering the statement for the "truth of the matter asserted."

- **4. The statement isn't hearsay when it doesn't go to the truth of the matter asserted**
  - (a) Effect on listener
    - Objection: "this is not offered for its truth, your honor"
    - The proponent needs to articulate the non-hearsay theory of relevance i.e. that the statement is offered to prove an effect on the listener (regardless of its truth) and that this effect on the listener is a fact of consequence in the case.
  - (b) Impeachment
    - If W makes a statement at trial, use of a prior inconsistent statement made out of court by W will not be hearsay when used to impeach W's present testimony—what is being shown is not that the prior out of court statement was truthful, but that the conflict between the two statements raises questions about W's credibility.
  - (c) Notice
    - If a statement is offered to show that the listener or reader was put on notice, had certain knowledge, had a certain emotion, or behaved reasonably or unreasonably, this will not be hearsay.
  - (d) Reputation
    - Generally
      - Statements about a person's reputation may not be hearsay
      - I.e. Libel action, W testifies at trial, "O told me that P has a reputation for thievery." IF offered to show that O's statement caused this false reputation of P—this will not be hearsay00 it is

only to prove that P has been given a false reputation for thievery.

- (e) Legally operative fact/Verbal Act
  - Definition:
    - Legally operative fact: an operative fact that gives rise to legal consequences.
    - I.e. O says to W (A vice officer), if you pay me $25 I will have sex with you." If O is prosecuted for solicitation, her statement will not be hearsay because it is not offered to show its truth (that O would really have had sex with W had he paid her $25); rather, the crime of solicitation is defined so as to make an offer to have sex for money an act with legal consequences.
    - I.e. to prove offer of horse sale, verbal out of court offer comes in
  - **Verbal parts of the act:**
    - Similarly, a "verbal part of the act," i.e. words that accompany an ambiguous physical act, is not offered for truth and thus is not hearsay.
    - I.e. O gives X money, saying, "This will repay you for the money you lent me last year." If offered by X in defense of a bribery charge, this will be non-hearsay because the words that accompanied the payment give the payment its particular legal effect—loan payment
  - **Immediate Legal significance**
    - Statements are legally operative facts because principles of substantive law give them *immediate legal significance*.

- C. Analysis
  - 1. Is it hearsay?
    - (a) Is it a statement?
      - If yes, move on to next question
      - If no, continue.
        - Assertive conduct?
        - Non-assertive conduct?
        - If yes→ move on to next question
    - (b) Was it made out of court?
      - If yes, move on to next question
      - If no:
        - Is Declarant testifying to the truth in court?
          - If yes, not hearsay.
    - (c) Does the statement go to the truth of the matter asserted?
      - If yes, then move on to the next question. This is hearsay.
      - If no,
        - Could it be made for non-hearsay reasons?
          - (1) Effect on listener
          - (2) Impeachment
          - (3) Notice
          - (4) Reputation
          - (5) Verbal part of act
          - (6) Legally operative fact
          - If yes, then not hearsay.

- (2) Is there an exemption to this hearsay?"
  - If yes, then move on to question (4)
    - Prior statement by witness:
      - Prior inconsistent statement
      - Prior consistent statement
    - Admission by party opponent:
      - Party Admission
      - Adoptive Admission
      - Authorized Admission
      - Statements by Agent or Employee of the Party
      - Co-conspirator, statements
  - If no, the move on the next question.
- (3) Is there an exception to this hearsay?
  - If yes, then move on to question (4)
    - Present Sense Impression
    - Excited Utterance
    - State of Mind
    - Statements for Purposes of Medical Diagnosis or Treatment
    - Past Recollection Recorded
    - Business Records
    - Public Records of Reports
    - Judgment of previous conviction
  - If no, then this is hearsay and it should not be allowed in for the truth of the matter asserted.
- (4) Is it relevant?
  - If yes, then move on to the next question
  - If no, then it cannot be admitted in court
- (5) Does the unfair prejudice substantially outweigh the probativeness of the statement under FRE 403?
  - If yes, then it cannot be admitted in court
  - If no, then it can be admitted.

## XII. EXCEPTIONS TO HEARSAY

- **A. Hearsay Exemptions** (Statements which are not Hearsay)
  - Generally:
    - Prior statements may be more reliable than in-court testimony.
    - The witness's testimony, for example, will have been fresher when making the prior statement.

  - 1. Prior Statement By Witness [FRE 801(d)(1)]
    - Generally
      - With prior statements by witnesses:
        - The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement must be:
    - Key points
      - (1) The prior out-of-court statement of a testifying witness may be admitted for the truth of the matter it asserts if it is (A) inconsistent with the witness's testimony, (B) consistent with the witness's testimony and rebuts a charge of recent fabrication or improper influence or motive or (C) a statement of identification of a person, made after perceiving that person.
      - (2) The judge must be persuaded, pursuant to FRE 104(a) that the foundational requirements are satisfied prior to admitting the statements
      - (3) The witness must be subject to cross-examination concerning the statement by answering questions willingly, the witness need not necessarily remember the underlying event or making the prior statement.

    - **a) Prior Inconsistent Statement [FRE 801(d)(1)(A)]**

      FRE 801(d)(1)(A): Prior Inconsistent Statements: Preliminary Factfinding
      - (1) The contents of the statement are inconsistent with testimony given at trial.
      - (2) The statement was made under oath subject to the penalty of perjury, +
      - (3) The statement was made at a trial, hearing, other proceeding, or in a deposition.

      - i. Generally
        - If inconsistent statement is ambiguous—higher threshold/standard of 104(a) by the judge of preponderance of the evidence
        - The relevancy of the prior statement is to prove the truth of its own content—relevancy is not dependent on whether the statement is actually inconsistent wit the witness's trial testimony.

      - ii. Under Oath at a trial, hearing, or other proceeding

- The proponent must show that the statement was made under oath, that the person administering the oath had legal authority to do so, and that the penalty of perjury attached.

- iii. Must be subject to cross at the time prior inconsistent statement was made
  - Admissibility should be limited to statements made under oath and subject to cross-examination at the time they were made.
  - This is to increase the trustworthiness of the statement and to reduce sincerity dangers.

- **b) Prior Consistent Statement [FRE 801(d)(1)(B)]**

| FRE 801(d)(1)(b): Prior Consistent Statement: Preliminary Factfinding<br>• (1) The contents of the statement are consistent with testimony given at trial<br>• (2) The statement is offered to rebut a charge of recent fabrication or improper influence or motive. |
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- i. Charge of fabrication:
  - The defense will seek to impeach such witnesses with the suggestion that they have received favorable treatment from the government in exchange for testimony inculpating the defendant.
- ii. To Rebut the Charge
  - Prior accusations do not fall within the meaning of rebut.

- **c) Prior Statement of identification by witness {FRE 801(d)(1)(C)]**

| FRE 801(d)(1)(C): Prior Statement of Identification by Witness:<br>• A statement is not hearsay if the declarant makes a statement (at the trial or hearing, and is subject to cross re: the statement); that is one of identification of a person made after perceiving the person. |
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- 2. Admission by Party Opponent [FRE 801(d)(2)]
  - Generally
    - General Requirements: All foundation requirements are 104(a) questions for the judge:
      - (1) Proponent must offer the declarant's statement against the opposing party
        - Doesn't mean statement must have been "against interest" when made
      - (2) Need not be based on firsthand knowledge; liberal in admitting opinions
      - (3) May be assertive non-verbal conduct
      - (4) In multi-party cases, one party's party admission is not admissible against anyone other than the party who made the statement
      - (5) Contents of statement alone are not sufficient to find relevance for C, D, or E.

- Key Points
  - (1) Under FRE 801(d)(2)(A), any statement made out of court by a party may be used against that party to prove the truth of the matter it asserts, so long as it is relevant and not otherwise objectionable.
  - (2) FRE 801(d)(2) also provides a hearsay exemption for: (B) Statements adopted by a party, or statements in which a party manifests belief, (C) statements authorized by the party, (D) certain statements made by an agent or employee of the party during the relationship and concerning matters within the scope of the agent's employment and (E) certain statements made by a co-conspirator of the party during the conspiracy and in furtherance of it
  - (3) The judge must be persuaded, pursuant to FRE 104(a), that the foundational requirements for each of these exemptions is satisfied. The judge may use the statement itself in deciding the preliminary questions, but other evidence is necessary to find authority, agency, and a co-conspirator relationship.
  - (4) The primary justification for the FRE 801(d)(2) exemptions is that the party cannot fairly complain about the loss of cross-examination of the declarant because the party can explain the unreliability in the statement, or because it is necessary and fair to impose on the party the risk and burden of not being able to do so.

- **(a) Party Admission [FRE 801(d)(2)(A)]**

| FRE 801(d)(2)(A): Party Admission: Preliminary Factfinding<br>• (1) The statement is made by a party and<br>• (2) The statement is offered against that party |
|---|

  - i. Generally
    - EXAM: If Party Admission applies, NEVER go into other hearsay exceptions.
    - Different from <u>offers of compromise</u>
    - Under Party Admission—everything you say—as long as its relevant—it comes in.

  - ii. First hand knowledge
    - There is <u>no</u> requirement that a party admission be based on firsthand knowledge
    - Courts are liberal in admitted statements of opinion if the evidence is an admission.

  - iii. Against Interest?
    - The statement need not have been made "against interest" when made.

  - iv. Fifth amendment concerns
    - In criminal cases, while it is true that the criminal defendant has the same right as any other litigant to testify, it is also true that the criminal defendant has the 5th amendment right to refuse to

testify. Admitting a criminal defendant's statements under FRE 801(d)(2)(A) may put some pressure on the defendant to abandon that right..

- But it is well settled that the FRE 801(d)(2)(A) exemption applies criminal defendants as well as to all other parties to the actions.

- v. Multiple party cases—Bruton Problem
  - in some cases, there are multiple plaintiffs or defendants. One party's party admission is not admissible against anyone other than the party who made the statement.
  - Whenever one declarant-Δ's confession implicates another co-defendant, Bruton may preclude admission unless the declarant-defendant can be cross examined.

- **(b) Adoptive Admission [FRE 801(d)(2)(B)]**

FRE 801(d)(2)(B) Adoptive Admissions: Preliminary Factfinding
- (1) A statement has been made
- (2) The party has done something to manifest adoption of it or to show belief in its truth and
- (3) The statement is offered against the party.

- i. Generally
  - Under FRE 801(d)(2)(B), there is no limitation on who may make the statement that is subsequently offered against the party.
  - A party may manifest adoption of a statement in any number of ways, including through:
    - 1) Words
    - 2) Conduct
    - 3) Silence
  - If ambiguous, the meaning of a party's behavior is ultimately for the jury to assess, but it has been held that the proponent must present evidence that the party heard, understood, and acquiesced in the statement.

- ii. Adoption by silence
  - A common type of adoptive admission is the admission by silence.
    - I.e. ask: is this the type of statement that a party normally would respond to if innocent?

- **(c) Authorized Admission [FRE 801(d)(2)(C)]**

FRE 801(d)(2)(C): Authorized admissions: Foundational Requirements
- (1) The statement concerns a subject
- (2) The statement was made by someone whom a party authorized to make a statement concerning that subject and
- (3) The statement is offered against the party

- i. Generally
  - When one person authorizes another person to speak, statements by that person are within the scope of his speaking authority and are admissible against that first person.

- ii. Authority
  - If the relationship between X and Y requires X to speak in order to be effective, authority to speak is implied, and doesn't matter that there is no additional indication that Y is authorized to speak.

- iii. Statements by attorneys
  - Many of the cases involving authorized admissions that are offered under (c) concern statements made by attorneys on behalf of their clients
    - Statements of facts made in litigation documents—pleadings, interrogatories, briefs—may all be found within the scope of the attorney's authority even though there is no specific grant of authority.

- iv. Other specifically authorized statements
  - Some agents would ordinarily be viewed as having authority from a party to make statements that are necessary to the performance of their duties: i.e. minutes taken by the secretary at a school board would be admissible as authorized statements if offered against the board.

- v. Personal knowledge
  - As is true generally of admissions, authorized admissions do not require personal knowledge on the part of the speaker.

- **(d) Statements by an Agent or Employee of the Party [FRE 801(d)(2)(D)]**

| FRE 801(d)(2)(D): Statements by Agent or Employee: Preliminary Factfinding |
|---|
| • (1) The declarant is an agent or servant (employee) of the party<br>• (2) The statement was made during this relationship<br>• (3) The statement concerns a matter within the scope of the agency or employment<br>• (4) The statement is offered against the part. |

- i. Generally
  - This section does not require that the declarant have specific authority to speak
  - It does not require that the statement be made within the scope of the agent's duties.
  - Rather, the statement must concern a matter within the scope of employment—that it must match the subject matter of the employee's job description.
  - Statements are excluded as not concerning a matter within the scope of the agency when the declarant is like a bystander

eyewitness who describes an event perceived at work that has no relationship to the job or the concerns of the speaker
    - The proponent of a statement under (D) must also provide evidence that the statement was made during the existence of the principal-agent relationship

- ii. Personal knowledge
    - Not required for statements by an agent or employee of the party

- **(e) Co-Conspirator's Statements [FRE 801(d)(2)(E)]**

| FRE 801(d)(2)(E): Co-Conspirator Admissions—Preliminary Factfinding |
|---|
| • (1) The declarant and the party against whom the statement is offered were both members of the same conspiracy<br>• (2) The statement was made during the course of the conspiracy<br>• (3) The statement was made in furtherance of the conspiracy |

- i. Generally
    - The typical co-conspirator statement is offered by the government against a criminal defendant to prove that defendant's criminal conduct.
    - The SC in Bourjaily said that all preliminary facts necessary to admit hearsay under (E) are 104(a) questions for the judge to decide by the preponderance of the evidence and its ok for the judge to consider the content of the hearsay statement itself when deciding whether the foundational requirements have been met.

- ii. Proof of co-membership
    - The proponent of a co-conspirator's statement must prove that a conspiracy exists and that both the declarant and the boss are members of it.

- iii. During the course of the conspiracy
    - Statements made to the government informant in the drug ring will satisfy this requirement if the conspiracy was ongoing when the statement was made.

- iv. In furtherance of the conspiracy
    - Statements naming the drug ring boss in order to secure a sale—seem to further the goals of the illegal enterprise
    - "Idle Chatter" and statements among conspirators that merely narrate past events have been held not to satisfy the requirement
    - But statements that inform new conspirators, or keep co-conspirators informed, of significant events or problems have been held admissible

- **B. Hearsay Exceptions Not Requiring the Unavailability of the Declarant**
    - Generally

- FRE 803 excepts 23 different types of hearsay statements from the general rule of exclusion.
- There is no requirement that the declarant be unavailable to testify as a witness
- The fundamental requirement that witnesses **must** speak from personal knowledge applies under 803 and 804.

- **1. Present Sense Impression [FRE 803(1)]**

FRE 803(1): Present sense impression: Preliminary Factfinding
- (1) The occurrence of an event or condition
- (2) The contents of the statement describe or explain the event or condition and
- (3) The declarant made the statement while perceiving the event or condition, or immediately thereafter.

- i. Generally
  - These statements are considered reliable because the immediacy requirement reduces risks of memory loss and deception.

- ii. Immediacy
  - This requirement is strict: The statement must describe an act, event or condition that happens or exists **at the moment of speaking**.
  - A statement may fit the exception if it follows a fleeting even by a few seconds, but not minutes or hours

- iii. Perceiving
  - The speaker must **perceive** what she describes

- iv. Describing
  - The speaker must **describe** an act, event, or condition.

- v. Proof of personal knowledge
  - The proponent of a present sense impression must show that "the declarant had personally perceived the event or condition about which the statement is made."

- **2. Excited Utterance [FRE 803(2)]**

FRE 803(2): Excited Utterances—Preliminary Factfinding
- (1) The occurrence of a startling event or condition
- (2) Contents of the statement relate to a startling event or condition
- (3) The statement was made by the declarant while under the stress of excitement, +
- (4) The stress of excitement was caused by the startling event or condition

- i. Generally
  - There is no foundational requirement of "contemporaneity" between the event and the statement. Stress of excitement is the substitute for contemporaneity.

- ii. External Stimulus

- The first requirement is **startling or exciting event**—it should rivet the attention of the speaker

- iii. Excitement
  - The speaker **must be excited as he speaks**.

- iv. Time Restraint
  - FRE 803(2) places no specific time restraint on the scope of the exception. The temporal gap is therefore not dispositive, but is a relevant consideration in determining whether the statement is made while the declarant is still under stress.
  - Other relevant factors include "the characteristics of the event, the subject matter of the statement, whether the statement was made in response to an inquiry, and the declarant's age, motive to lie, and physical and mental condition.

- v. Statements by Children
  - Statements of young children about incidents of sexual abuse are frequently made hours or even days after the alleged incident occurred.
  - Some courts admit these statements under FRE 803(2) citing various justifications.
  - For a teenager, a time lapse of 3 hours has been held to be too long to reduce the risk of deliberate fabrication.

- vi. Personal knowledge
  - The proponent of an excited utterance must show that the "declarant had personally perceived the event or condition about which the statement is made."

- **3. State of Mind [FRE 803(3)]**

| FRE 803(3): State of Mind: Preliminary Factfinding |
|---|
| • (1) The contents of the statement express the declarant's state of mind that is currently existing at the time of the statement.<br>• (2) State of mind may include **emotion, sensation, physical condition, intent, plan, motive, design, mental feeling, pain, and bodily health**, and<br>• (3) A state of mind of memory or belief may not be used to prove the fact remembered or believed unless it relates to the declarant's will. |

- i. Generally
  - The scope of the FRE 803(3) exception is specifically limited.
    - Statements of memory or belief may be used to prove a declarant's then-existing relevant state of mind, but may not be admitted to prove the fact remembered or belief, unless that fact relates to the declarant's will.
      - Thus the statement of belief "I think my brakes are bad" or the statement of memory "My brakes squeaked yesterday" may be used to prove the declarant's current state of mind of knowledge (notice), but not the fact that the breaks are bad.

- A statement relevant to prove the declarant's current state of mind requires inferences about the defendant's sincerity and narration.

- ii. Present not Past
  - Apart from wills cases, there is an important limit: Statements must show **existing mental or physical states** not past states.
    - Thus "my head aches" is ok but "three days ago I had a head ache" is not ok.

- iii. Key points
  - Statements expressing a declarant's current state of mind, both directly and circumstantially are admissible under FRE 803(3) to prove that state of mind, if it is relevant to the case. Although sincerity and narration dangers are present, there are no perception or memory dangers
  - State of mind evidence may not be admitted under FRE 803(3) if its relevancy is to prove an historical event or condition, typically the fact that caused the state of mind.
    - If statements of state of mind were used to prove past facts, or to prove the conduct of third persons, perception and memory dangers would be involved.
  - Statements of past state of mind and past fact relating to the declarant's will may be admitted, however.

- **4. Statements for Purposes of Medical Diagnosis and Treatment [FRE 803(4)]**

| FRE 803(4): Statements for Medical Diagnosis—Preliminary Factfinding |
|---|
| • (1) The statement must describe medical history, past or present symptoms, pain, sensations, or the inception or the general cause or external sources of symptoms<br>• (2) A statement about the cause or source must be reasonably pertinent to diagnosis or treatment and<br>• (3) The statement must be made for the purpose of medical diagnosis or treatment. |

- i. Generally
  - FRE 803(4) doesn't specify that the declarant be the patient, relating the declarant's own medical history and symptoms. Family, friends, nurses, and other medical personnel may convey information for purposes of medical treatment that will be admitted under 803(4)
    - Even an unidentified declarant speaking to an ambulance crew may qualify under the exception if the court is persuaded that the declarant spoke for purposes of securing medical care for the patient.

- ii. Pertinence
  - Pertinence is determined from testimony of the medical professional as the type of information "reasonably relied on by a physician in treatment or diagnosis."

- iii. Key Points

- If the statement contains information about the cause or source of the medical condition, there must be evidence that such information is reasonably pertinent to treatment or diagnosis. Such evidence is typically supplied by the physician seeking the information
- Statements made for purposes of medical diagnosis only, including a diagnosis undertaken for preparation in litigation, are included within the 803(4) exception.

- **5. Past Recollection Recorded [FRE 803(5)]**

FRE 803(5): Past Recollection Recorded
- (1) The declarant is testifying as a witness
- (2) The statement is in the form of a memorandum or record
- (3) The statement concerns a matter about which the witness cannot remember sufficiently to testify fully and accurately
- (4) The witness once had personal knowledge of the matter
- (5) The statement was made or adopted when the matter was fresh in the witness's memory and
- (6) The statement correctly reflects the witness's knowledge

  - i. Generally
    - Written or recorded memoranda or notes about events are often a substitute for failed memory in our everyday lives.

  - ii. Contents of the Statement
    - FRE 803(5) places no limit on the subject matter or contents of a statement admitted as a past recollection recorded.
      - Any form of record of any sort of event that later becomes relevant in litigation can qualify

  - iii. Declarant must be a witness with Failed Memory
    - FRE 803(5) is unique because it requires the present of the declarant in court, as a witness. It is categorically requires that the witness <u>not</u> have sufficient memory of the underlying events that are the subject of the out of court statement, and that statement must be in written or recorded form.

  - iv. Made with Personal Knowledge and Fresh Memory
    - There is an explicit requirement of showing that the witness had personal knowledge of the matters when the memoranda or recording was made, and that it was made when that knowledge was "fresh" in the witness's memory.

  - v. Record may only be read to the jury
    - The use of a past recollection recorded statement—may only be read to the jury but may not be received as an exhibit

  - vi. Not to be confused with Present Recollection Refreshed
    - The past recollection recorded exception shouldn't be confused with the process of refreshing recollection.

- When a witness initially cannot recall something, it may be possible to refresh the witness's memory by presenting that witness with a document or something else that the examiner thinks, may job the witness's memory.
    - Under the FRE, there are no substantive limits on the type of evidence used to refresh the recollection.
- FRE 612
    - Any documents that a person looks at in preparing for a deposition may be discoverable by the opposing party.

- vii. Refreshing someone's Recollection: Notes from Class
    - If a witness doesn't recall something, we must first refresh their recollection.
    - They have to say "I don't recall."
        - We must say "Are you sure"
        - If they say "I'm sure that I don't recall" or not a 100%
    - You say "Would it be helpful to see exhibit ___ to refresh your recollection"
        - (They say yes)
    - Then you say: "I'm handing you Exhibit 5. Can you read paragraph 5? Ask when they're done and take it away.
    - Ask: "Has looking at the item helped your recollection?
        - (They say yes)
        - If they say it didn't help them, then move to past recollection recorded
    - Note: We can give the witness <u>anything</u> to refresh their recollection. (Because you're not entering anything into evidence).

- **6. Business Records [FRE 803(6)]**

| FRE 803(6) Business Records: Preliminary Factfinding |
|---|
| • (1) The statement is in written or recorded form<br>• (2) The statement concerns acts, events, conditions, or opinions, or diagnoses<br>• (3) The record was made at or near the time of the matter recorded<br>• (4) The source of the information (not the person testifying, the person who wrote it), had personal knowledge of the matter<br>• (5) The record was kept in the course of regular business activity, and<br>• (6) It was the regular practice of the business activity to make the record. |

- Generally
    - FRE 803(6) defines "business" very broadly.
    - Most jxs have 4 requirements:
        - <u>Regular business</u> (regularly kept record)
            - Applies only to business records that are regularly kept—not to personal records (i.e. checkbooks, mileage logs).
            - It needs to be an ongoing enterprise that follows a **routine**.
        - <u>Source with knowledge</u>

        - The source of what is recorded must have personal knowledge and must be acting in the course of employment
    - Contemporaneity
        - When a record reflects an event, the record must be made close to the time of that event
    - Foundation testimony or certificate
        - Invoking the exception requires testimony by someone who knows how the record was prepared, or a certificate (affidavit) by this person.

- **7. Public Records and Reports [FRE 803(8)(A-C)]**

FRE 803(8): Public Records and Reports: Preliminary Factfinding

The basic foundation requirements for public records under FRE 803(8) are:
- (1) The statement is in the form of a record or report from a public office or agency, and
- (2) The contents of the record involve
- (A) The activities of that office or agency
- (B) Matters observed and reported pursuant to a duty imposed by law, but not matters observed by police or law enforcement in criminal cases, or
- (C) Factual findings resulting from an investigation authorized by law, but not against the defendant in a criminal case.

- i. Generally
    - Public records are admissible to prove the activities of a public office or agency, matters observed and reported under official duty, and certain investigative findings.
    - Unlike the business records exception, which is bounded by specific criteria, the public records exception contains general descriptive phrases and "use restrictions" limiting the admissibility of public records against criminal defendants.

- ii. Activities of office or agency
    - Public records may be used to prove almost anything public agencies do—serving papers, issuing tickets, disbursing checks, erecting monuments, hiring and firing people, buying/selling equipment, etc.

- iii. Matters observed
    - Public records may be used to prove things like temperature and weather conditions, building code violations, geographical features, and prices of commodities studied or regulated by the government.
    - Inside Sources
        - Like the business records exception, this provision requires the source of information to be someone within the organization.
    - Use restriction
        - Clause B has a use restriction blocking use of public records in criminal cases to prove "matters observed by police."

- iv. Investigative Findings
    - Public agencies and hearing officers conduct studies over a wide range of subjects, and the exception may be used to prove the result of such studies. Included are reports on the nature, causes, and spread of diseases, product safety, discrimination in housing, educational attainments, etc.
    - Factual Findings
        - Excludes "evaluations" or "conclusions."
    - Outside Sources
        - Investigative finds can rest on information gleaned from sources outside the government. The point, however is to admit *official findings*, not simple the findings or conclusions of outsiders who testify or give info to the government.
- v. Civil cases
    - The use of restrictions does not apply in civil cases. Here public records can prove the full range of points described above.

- vi. Criminal Cases
    - In criminal cases, the prosecution may <u>not</u> use FRE 803(B) to admit reports of matters observed by police or law enforcement officials against criminal defendants. This limitation may not apply to records of public officers not engaged in the investigation or prosecution of individual criminal cases, or to routine and regular records kept by police.

- **8. Judgment of Previous Conviction [FRE 803(22)]**

| FRE 803(22): Judgment of Previous Conviction: Preliminary Factfinding |
|---|
| • (1) The judgment must follow a criminal trial or guilty plea<br>• (2) The judgment must be for a crime punishable by death or more than one year's imprisonment<br>• (3) The judgment must be offered to prove the truth of a fact <u>essential</u> to the judgment and<br>• (4) A judgment offered against a criminal defendant must be a judgment entered against that defendant, unless it is offered only for impeachment. |

- i. Generally
    - The high standard of proof—beyond a reasonable doubt—is probably the strongest argument in favor of reliability.

- **<u>C. Hearsay Exceptions Requiring the Unavailability of the Declarant</u>**

- Generally
    - FRE 804 provides 5 categorical hearsay exceptions that may be used only when the hearsay declarant is unavailable—former testimony, dying declarations, declarations against interest, statements of personal and family history, and statements offered against a party whose wrongdoing procured the unavailability of the declarant as a witness.

- 1. Definition of "Unavailability as a witness" [FRE 804(a)(1-5)]

FRE 804(a)(1-5): Unavailability as a witness
(a) "Unavailability as a witness" includes situations in which the declarant—
- (1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement or
- (2) Persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so, or
- (3) Testifies to a lack of memory of the subject matter of the declarant's statement or
- (4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity or
- (5) Is absent from the hearing and the proponent of the statement has been unable to procure the defendant's attendance by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the statement for the purpose of preventing the witness from attending or testifying.

  - i. Generally
    - Representations of counsel have been held sufficient to establish the absence or unavailability of a witness under FRE 804(a)(5) as long as good faith efforts have been made to secure the witness.

- 2. Hearsay Exceptions: [FRE 804(b)]

  - **a) Former Testimony [FRE 804(b)(1)]**

FRE 804(b)(1): Former Testimony: Preliminary Factfinding
- (1) The statement must be in the form of testimony given at a hearing or in a deposition
- (2) In a criminal case, the party against whom the statement is being offered must have had an opportunity and similar motive to develop the testimony at the prior hearing or deposition by direct, cross, or redirect examination, and
- (3) In a civil case, either the party against whom the statement is being offered, or a predecessor in interest to that party, must have had an opportunity and similar motive to develop the testimony at the prior hearing or deposition by direct, cross, or redirect examination.

    - i. Unavailability
      - Must show that both the declarant's trial testimony is unavailable and that his deposition

    - ii. Hearing or proceeding
      - Prior trials of the same or another case satisfy the "hearing or proceeding" requirement.

    - iii. Opportunity and motive for prior cross

- The Key requirement is that the party against whom former testimony is offered had "opportunity and similar motive" in the prior proceeding to cross-examine the declarant.
- Actual cross isn't required.

- iv. Key Points
  - The party may not have had the same motive at the prior hearing if different facts are at issue in the 2 proceedings, or if the procedural context in the prior hearing eliminated the party's incentive to fully examine the witness.

- **b) Statement made under belief of impending death [FRE 804(b)(2)]**

FRE 804(b)(2): Dying Declarations: Preliminary Factfinding
- (1) The statement concerns the cause or circumstances of what the declarant believes is impending death
- (2) The statement is made while the declarant believes death to be imminent and
- (3) The statement is offered in a homicide proscedution (Criminal context) or in a civil case.

- i. Generally
  - Statements about the cause/circumstances of the declarant's death include IDs of the perpetrator + descriptions of accidents + of past events that led up to the mortal injury or disease
  - Even though the belief in imminent death may generally enhance a declarant's sincerity, contents other than the cause or circumstances of death are not included within the exception.
  - A belief in imminent death means the lack of hope or recovery.

- **c) Statement against interest [FRE 804(b)(3)]**

FRE 804(b)(3): Statement against Interest: Preliminary Factfinding
- (1) The content of the statement, at the time the statement was made, was:
- (2) Against the pecuniary or proprietary interest of the declarant
- (3) Could subject the declarant to civil or criminal liability OR
- (4) Could render invalid a claim held by the declarant
- (4) The statement was against any of the interests of the declarant to an extent great enough such that a reasonable person, in declarant's position, would not have made such a statement unless it was true, and
- (5) If the statement exposes the declarant to criminal liability and is offered to exculpate the accused, evidence of corroborating circumstances that clearly indicate the trustworthiness of the statement **must** be offered.

- i. Generally
  - The focus of the "against-interest" requirement is usually on the content of the statement

        - The content must be contrary to one of the specific interests of the declarant identified in the rule when the statement is made.
        - A statement need not have been said in the face of immediate adverse consequences.

- ii. Key Points
    - In order to determine whether the statement is against interest, the court should examine the situation and motives of the declarant.
    - Statements of fact that inculpate others, made in the context of a self-inculpating statement, are admissible only if each specific statement is against the declarant's interests.
    - Statements against penal interest offered by a criminal defendant for exoneration must be corroborated as to contents, the trustworthiness of the declarant or both.

- **d) Statement of personal family or history [FRE 804(b)(4)]**

| FRE 804(b)(4): Statements of personal family or history: Preliminary Factfinding |
|---|
| • (1) The content must concern the declarant's own personal or family history OR<br>• (2) The statement concerns the personal or family history of one to whom the declarant is related or was intimately associated. |

- i. Personal knowledge of one's own personal and family history
    - FRE 804(b)(4) doesn't require that the declarant have personal knowledge.
    - Obviously a declarant doesn't have personal recollection of birth or place of birth.

- ii. Statements of relations and intimate associates
    - FRE 804(b)(4)(B) expands the common law pedigree exception to close family members and intimate associates so long as the relationship is such that the declarant would have accurate information about family history

- iii. Concerning personal history
    - The exception is limited to past facts and events of an objective, rather than subjective nature.
        - Statements as to motives or purpose for marriage are beyond the scope of the rule.

- vi. Key Points
    - Assuming unavailability, a statement asserting the declarant's own family history may be admitted without a showing of personal knowledge
    - A statement asserting the family history of another person may be admitted if the declarant had accurate knowledge as a result

of being related to or intimately associated with the other person's family.

- **e) Forfeiture by wrongdoing [FRE 804(b)(6)]**

| FRE 804(b)(6): Forfeiture by wrongdoing: Preliminary Factfinding |
|---|
| • (1) The party engaged or acquiesced in wrongdoing<br>• (2) The wrongdoing was intended to procure the unavailability of the declarant as a witness against the party<br>• (3) The wrongdoing did not render the declarant unavailable as a witness<br>• (4) The declarant's statement is offered against the party. |

  - Generally
    - The declarant was a witness or was a potential witness against a party
    - The party engaged in wrongdoing that procured the unavailability of the declarant
    - There must have been an intent to procure the declarant's unavailability as a witness.

- **E. More on hearsay: Cell Phone videotape and maps**
  - If you see a crime when walking down the street and take out your cell phone and record then it is an assert
    - Act of taking the video—becomes an assertion if you did it for a specific reason.
      - Your conduct of recording that event =assertion→ is hearsay
      - Hearsay= if you want to get it into evidence
    - But doesn't apply to "demonstrative aid"
      - Need to explain (1) Why its helpful to the jury and (2) if they really need to see it
  - Map= hearsay, demonstrative aid
    - If witness draws a map of intersection its not hearsay because its not an out of court statement- while drawing you move it into evidence
    - If attorney draws it—OBJECTION—as to if the attorney is drawing according to witness's testimony.
    - If map is dawn *outside* court—OBJECTION—that its hearsay bc it was drawn outside court
      - Retort—that its a demonstrative aid.
    - If underlying map =is a skeletal map of the city and the witness draws on it—then underlying map=business records, public records and drawing live= not hearsay
      - So this is ok

- **D. The Residual Exception**

| FRE 807: Residual Exception |
|---|
| • A statement not specifically covered by Rule 803 or 804 but having equivalent circumstance guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that |

- (A) The statement is offered as evidence of a material fact
- (B) The statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and
- (C) The general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.
- But a statement may not be admitted under this exception unless its proponent makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

- 1. Foundation Requirements for FRE 807
  - (1) **The statement must have circumstantial guarantees of trustworthiness**
    - (1) Reliability of Testimonial Qualities
      - Show that one or more of the testimonial qualities appears to be reliable because of circumstances within which it was made.
      - Facts relating to identity, knowledge, qualifications, and motivation of the declarant, the content of the statement, and the circumstances in which it was made, are all considered for their effect on testimonial qualities.
      - Motive and incentive to lie commonly figure in evaluations of trustworthiness.
    - (2) Independent Corroboration
      - The 2nd means of establishing trustworthiness is to show by way of independent corroborating evidence that the facts asserted in the particular hearsay statement are probably accurate.
  - (2) **Those guarantees should be "equivalent" to those in FRE 804 and 803**
    - Here, it is impossible to identify a single standard but a showing "rigorous" equivalency
      - IF you can prove the point through some other piece of evidence then you don't get FRE 807
    - But courts sometimes do analogize the hearsay sought to be admitted to the indicia of trustworthiness of some categorically admitted hearsay, such as spontaneity, against interest, or carefully routine.
    - "Near Miss"
      - Many courts of held that a near miss does not necessarily prevent admission under residual exception, and that closeness to an established exception may be viewed as enhancing trustworthiness.
      - The majority of Circuits now agree that the language of FRE 807 means that statements found to be inadmissible under the R. 803 and 804 categories may still be considered under Rule 807.
        - The fact that they are near misses doesn't mean that they are not allowed in under 807.
        - Minority jx: maintain that if its close to established exceptions, then it doesn't have trustworthiness
  - (3) **The statement is offered to prove a material fact**
    - The statement must be relevant

        - (4) **The statement is more probative on the point for which it is offered than <u>any other</u> evidence that can be secured through reasonable efforts**
            - If we can prove the point through some other piece of evidence, then you don't get FRE 807.
            - Proponent has been reasonably diligent in trying to secure evidence that would substitute for hearsay admitted under this exception
        - (5) **Admission will serve the general purposes of the rules + interests of justice**
        - (6) **Notice is given to the opponent**
    - <u>2. Preliminary Factfinding</u>
        - There is no categorical requirement that the declarant be unavailable
        - NOTICE MUST BE GIVEN
        - Reliability is at issue.
    - <u>3. Key Points</u>
        - (1) Under FRE 807, the judge has discretion to admit hearsay statements that appear to be reliable, that is that they have circumstantial guarantees of trustworthiness either because the circumstances indicate that the declarant has reliable testimonial qualities or because the contents of the statement are corroborated.
        - (2) The statement must also be more probative than other available evidence, typically because the hearsay declarant is unavailable.
        - (3) The proponent of the statement must also notify the opponent of the intent to invoke the residual exception preferably before trial but <u>not</u> in cases of <u>necessity</u>.

- **<u>E. Hearsay and the Confrontation Clause: Only at issue in CRIMINAL Case</u>**
    - Generally:
        - Confrontation Clause in the 6th Amendment: "In all criminal prosecutions, the accused shall enjoy the right to be confronted with the Witnesses against him."
        - Therefore, the admission of hearsay presents an immediate threat to the criminal Δ's confrontation right.
        - Crawford v. Washington: The Court held that the confrontation Clause bars the use of some, but not all, hearsay against criminal defendants and it provided a set of standards to test when the confrontation right is violated.
    - Ohio v. Roberts
        - Came before <u>Crawford</u> and established a two-pronged test: "unavailability and reliability—for satisfying the accused's confrontation right when hearsay is admitted but the declarant doesn't testify.
        - Under <u>Roberts</u>, the confrontation clause imposed only an inquiry whether the hearsay statement fits within a "firmly rooted" exception and, if it doesn't, whether there are <u>particularized guarantees</u> of the statement's trustworthiness
    - Right to confrontation
        - Two issues
            - (1) When you look me in the face you are less likely to lie (looking in my face will minimize the chances of you lying)
            - (2) I have a right to cross-examine you.
        - Even if courts and Congress deal with hearsay, if you're dealing with criminal defendant they get to cross-examine and those hearsay rules should jive with their right to Confrontation under Sixth amendment.

- Under the 6th amendment the Δ has a right to Confrontation. There has been a case that has come out since the textbook was written which we don't have:
  - If the evidence is testimonial—something that the declarant could reasonably believe can be used in a court, then under the sixth amendment, the testimonial statements would not be admissible under the 6th amendment, unless the Δ has the opportunity to cross-examine them in the courtroom.
  - What was unclear after Crawford—what would happen if the statement was non-testimonial? Belief was that Roberts would apply to non-testimonial statements
    - Yet it appears that Roberts has been overturned.
    - So that if its non- testimonial, it is now allowable under the regular hearsay analysis.
  - The only exception to testimonial and hearsay where declarant doesn't need to be here:
    - Dying-declaration—in a homicide case, that statement <u>can</u> come in.
    - Otherwise, <u>if its hearsay statement and its testimonial then it's a hearsay statement and the defendant must have the ability to cross-examine them at this trial</u>.
- Testimonial v. Non-testimonial
  - Testimonial:
    - (1) Confessions of an accomplice made to a police officer
      - However, If you call 911 and report a then ongoing crime, then we perceive those statements as non-testimonial—if facts appear to be that they are trying to get help—then non-testimonial.
        - **Tricky part**: when 911 officer starts to interrogate you.
          - It's a Fact-by-Fact analysis
          - "*Has a question gone beyond the point necessary to respond to the emergency*?"
            - Seeking information on assailant's physical description—then this is necessary—so its <u>non-testimonial</u>
            - BUT if the question is not really about the ongoing crime and the interrogation—once the emergency has ended—anything that goes beyond the initial questioning—is <u>testimonial</u>.

      - These are treated as regular excited utterance.

## XIV. LAY AND EXPERT OPINION

- **A. Lay Opinions**

> **FRE 701: Lay Opinions**
> If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inference is limited to those opinions or inferences which are
> - (a) Rationally based on the perception of the witness, and
> - (b) Helpful to a clear understanding of a the witness's testimony or the determination of a fact at issue, and
> - (c) Not based on scientific, technical, or other specialized knowledge within the scope of FRE 702

  - 1. First Hand knowledge:
    - **a) Generally**
      - An ordinary (non-expert) witness must limit his testimony to facts of which he has first hand knowledge.
      - Lay opinion does not excuse or substitute the requirement of firsthand knowledge.

    - **b) Distinguished from hearsay**
      - You must distinguish the "first-hand knowledge" requirement from the hearsay rule. If W's statement on its face makes it clear that W is merely repeating what someone else said, the objection is to hearsay, if W purports to be stating matters which he personally observed, but he is actually

    - **c) Experts:**
      - The rule for requiring first-hand knowledge doesn't apply to experts

  - 2. Lay Opinions:
    - **a) Traditional view:**
      - The Traditional view is that a non-expert witness must state only facts and not "opinions"

    - **b) Modern/Federal Approach:**
      - Lay opinions are **allowed** if they have **value** to the fact-finder.
        - See FRE 701, allowing non-expert opinions or inferences that are
          - (1) Rationally based on the perception of the witness and
          - (2) Helpful to a clear understanding of his testimony or the determination of a fact in issue and
          - (3) Not based on scientific, technically, or other specialized knowledge within the scope of FRE 702 (expert)

    - **c) Opinion on the "ultimate issue"**
      - Of the courts that allow lay opinions, a few bar opinions n "**ultimate** issues." But most today allow even opinions on ultimate issues.

- Thus FRE 704(a) allows opinions on ultimate issues except where the mental state of a criminal defendant is concerned
  - EXCEPTION:
    - But even the liberal federal approach excludes a few types of opinions on ultimate issues.
      - I.e. a witness will not be permitted to express his opinion on a question of law (except foreign law) or an opinion on how the case should be decided.

- 3. Key Points:
  - (1) The concern underlying the prohibition against lay opinions is that a witness's opinion (inferences, summaries, or conclusions) may sometimes deprive the jurors of important data they need to perform their fact-finding role.
  - (2) Whether a jury is deprived of important data does not depend on an *a priori* distinction between fact and opinion. It depends instead on an assessment of what information will be optimally helpful to jurors in their fact-finding role in the context of a particular case.
  - (3) If a summary or conclusion that foregoes underlying details will be adequate for the jury's purposes, the testimony in that form should be admissible. If, to the contrary, the jurors need underlying details and it is feasible to provide them, the witness should be required to provide those details rather than the witness's own summary or conclusion.

- **B. Expert Opinions**

**FRE 702: Testimony by Experts**

- If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise if:
- (1) The testimony is based upon sufficient facts or data
- (2) The testimony is the product of reliable principles and methods and
- (3) The witness has applied the principles and methods reliably to the facts of the case.

- 1. Generally
  - Whenever testimony is in form of opinion and opinion requires there to be specialized knowledge—it's a FRE 702 issue
    - 702 requires some sort of training.
  - If you offer an expert, other side can
    - 1) voir dire the witness
    - 2) Ask about her expertise.
  - Under 702, you still have to assist the trier of fact—so must make argument why we need this testimony
  - Analysis of admissibility of opinion is **not** 702
    - In CALIFORNIA→ FRYE , FRE→ DAUBERT
      - So its either Frye or Daubert

        - On the **EXAM**—MUST do both unless he specifies if we're in federal court or in California.
- 2. Requirements
    - **a) FRE 702 imposes five requirements for expert testimony to be admissible**.
        - (1) it must be the case that "scientific, technical, or other *specialized* knowledge" will assist the trier of fact to understand the evidence or to determine a fact in issue"
            - Ordinary evidence:
                - Expert testimony will most be appropriate whether it involves the interpretation of facts of a sort that lay persons are not usually called upon to evaluate.
        - (2) The witness must be "qualified" as an expert by "knowledge, skill, experience, training, or education,"
            - Source of expertise
                - This expertise may either come from education or experience
        - (3) The testimony must be based upon "sufficient facts or data"
            - Keeping out unreliable testimony
                - This third requirement is to keep out unreliable testimony known as "junk" science.
        - (4) The testimony must be the product of "reliable principles and methods" and
            - "good science"
                - I.e. testimony based on astrology would probably be rejected because the court wouldn't be satisfied that its based on "reliable principles and methods."
        - (5) The witness must have **applied** these principles and the methods reliably to the facts of the case.
            - The most reliable of principles and methods wont lead to useful testimony unless the witness shows that she is apply those principles and methods to the actual facts of the case.

- 3. Basis for Expert's opinion
    - **a) Generally:**
        - The expert's opinion may be based upon any of several sources of information, including
        - (1) the expert's first hand knowledge
        - (2) The expert's observation of prior witnesses and other evidence at the trial itself and
        - (3) A hypothetical question asked by counsel to the experts

    - **b) Inadmissible evidence**
        - Today, the expert's opinion may be based on evidence that would otherwise be **inadmissible**.
            - Under FRE 703, even inadmissible evidence may be the basis for the expert's opinion if that evidence is "of a type" reasonably relief upon by experts in a particular field in forming opinions or inferences upon the subject

- 4. Specialized Knowledge—Daubert v. Frye

- **a) Frye: California test**
  - i. Generally
    - We only get the opinions if we need them
    - If someone says they're an expert, jury will likely give them undue weight and may absolve themselves from responsibility of determining the facts
    - The thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs
    - Frye only applies if the thing is new—if its been around forever, then there 's no Frye challenge.
      - If technology we're talking about is not new, there's no Frye challenge for admissibility of the expert evidence
      - Frye only applies if its novel.

  - ii. Requirements of Frye
    - 1) Must be helpful to the jury
    - 2) Must be reliable

  - iii. General Acceptance
    - Need to define what the field is we're talking about
    - Determine who the general audience is

  - iv. Problems with Frye and General Acceptance
    - A rigorous application of the test prevents use of scientific evidence based on the emerging disciplines or cross-disciplinary studies.

  - v. Frye Analysis
    - 1) Is it new?
    - 2) If it is new, then, has it been generally accepted in the industry?

- **b) Daubert: Federal Rules Test**
  - i. Generally:
    - Does 702 change the Frye standard
    - Blackmun writes this opinion
    - Under Daubert and FRE 702, the federal court should normally consider the following factors, among others, in deciding whether the test or principle is "the product of reliable principles" and methods.
      - A "yes" answer makes the test/principle more likely to be scientifically valid.
    - Daubert—dealt with science—but what about a non-science standard?
      - 702 makes no distinction between science and others, so we cannot make the distinctions
      - The softer the science, the more lienient the standard of admissibility.

- ii. Balancing Test Requirements:
    - 4 factors:
        - 1) Testability—is this something that can be reliable subject to testing
        - 2) Error rate—is this something that has a reasonably low error rate?
        - 3) Existence and maintenance of standards and controls concerning its operations—is it subjected to professional standards controlling its operations
        - 4) General acceptance—is it generally accepted in the field? (this used to be an absolute requirement for science in the federal courts, but Daubert makes it merely one factor)

- c) Gatekeeping
    - In Federal court, 702 imposes upon the court a gate keeping function and they need to look at these recommendations but are not bound by tell—so court can also look to other factors

- d) Conclusion
    - Frye: tells industry to tell us and we respect your opinion
    - Daubert: is judge's role to figure out if its reliable
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## XV. PRIVILEGE

- **A. Privileges Generally**
  - 1. Generally:
    - Rules of evidentiary privilege exclude relevant evidence in order to promote extrinsic policies unrelated to accurate factfinding.

  - 2. Not constitutionally based
    - Most privileges are not constitutionally based. (The privilege against self-incrimination is the only exception.)
    - Therefore, each state is free to establish whatever privileges it wish es and to define the contours of those privileges as it wishes
    - Federal:
      - FRE 501 is the only FRE dealing with privileges.
        - It provides that privileges "shall be governed by the principles of the common law as they may be interpreted by the federal courts in the light of reason and experience." That is, normal federal judges will decide what privileges to recognize based on prior federal case law and the court's own judgment.
          - Diversity:
            - In Diversity cases—the existence and scope of a privilege will be decided by the law of the state whose substantive law is being followed.

  - 3. Proceedings where applicable
    - If a privilege not to disclose certain information exists, that privilege applies regardless of the proceeding.

  - 4. Who may assert
    - The privilege belongs to the person whose interest or relationship is intended to be fostered by that privilege.
      - Therefore, he is the only one who may assert it.

  - 5. Third person learns
    - Most privileges protect communications between 2 parties to a specified relationship. If a **third party** somehow learns of the conversation, the privilege may be found to have been **waived**.
    - Modern view:
      - The communication is protected even if intercepted, as long as the interception was not reasonably to be anticipated.

- **B) Attorney-Client Privilege**
  - 1. Generally
    - The privilege is basically that a client has a **right to not disclose** (and the right to prevent his lawyer from disclosing) **any confidential communication between them relating to the profession relationship**.
    - Protects communications, which men the attorney and client have to establish a relationship—for the purposes of communication—that is confidential advice
    - You can talk to other people and with those you have a privilege—therapist, spouse

        - But NOT mom, dad, boyfriend, or sibling
    - Privilege is held by the client and therefore they may waive the privilege

- 2. Crime Fraud Exception
    - The privilege doesn't apply where the confidence relates to the commission of a future crime or fraud.

- 3. Professional Relationship
    - The privilege applies only in the context of a professional lawyer-client relationship.

- 4. Waiving Privilege
    - I.e. if you placed trash in can or dumpster—a place that is publicly available—then you know somebody will pick it up—and the expectation of privacy in the trash is not that high—so its waived

- 5. Invoking privilege on behalf of someone
    - Anyone can invoke privilege on behalf of the absent party when they're not there.

- 6. Corporations—slightly different
    - When a corporation is being sued (we have to depose people)—can ask certain questions but we cannot ask others
    - If the attorney doesn't defend the other witness but is just representing the corporation
    - If the former employee—you prepare them and say I represent you for the purposes of the deposition so in that context the conversation is privileged.
    - If former employee says something that shows that their interests are different than the company, you can no longer represent them and whatever you talk about is not privileged
        - During a deposition, there is a civ pro rule that says that opposing counsel is entitled to know what was used to refresh the witness's recollection—that is discoverable—opposing counsel can ask for a list of documents
        - Must ask: "was there anything used to refresh your recollection" Because whatever is shown to them in preparation is discoverable
        - If you shown them attorney client documents in preparation—then you've waived the privilege if the witness said they were there to refresh the witness's recollection—and that is when the privilege is now waived.
    - If the attorney throws the document in the dumpster—it can also be a waiver—but it's a closer call—so if its in a client's dumpster—then its waived because there's no expectation of privacy—if the attorney is doing it—then it's a closer call

- 7. Corporations and Upjohn
    - Attorney-client privilege—
        - When the attorney talks to a member of the corporation—as long as the person was working in the normal scope of their employment, then its privileged.

- Control group test fails.

- 8. Work Product Doctrine
  - **a) Generally:**
    - It's a doctrine not a privilege.
    - Work product doctrine: close to absolute but not quite

  - **b) What is absolute:**
    - What is absolute: thoughts and impressions of the attorney
    - Tricky: factual information contained in your documents and your investigations
    - Once the party seeking the information makes a showing that they cannot obtain the information through **reasonable** efforts –then they are entitled to the factual investigations in an attorney's work product at that point

  - **c) Key trigger: Witness is DEAD**
    - Hearsay and Work Product—when someone is dead.
    - Whenever someone is outside the subpoena power of the court AND they refuse to speak to the other side
    - If the other side was aware of the witness and they waited for 2 years and didn't go interview them and then they died—the other side's delay was unreasonable and so they are not entitled

  - **d) Things to look for:**
    - 1) Could the other side have obtained the information through reasonable means?
    - 2) Was it available to the other side?
    - 3) Was the other side allowed to speak to them?

  - **e) Work Product and waiver.**
    - When the opposing side makes a discovery request, because work product stuff is in the files—then you are supposed to go through the files and so make sure there is a **privilege log**.
      - Who was the document sent to? Who was it CCed to? (if CCed to someone who wasn't supposed to see it—arguably a waiver), brief description of the document (is attorney working in dual role? Business and legal capacity—you only get privilege for stuff you do as an attorney)—does the memo say its business related? Date is important!
    - IF the attorney accidentally produces the document that is privileged to the other side and we don't make every attempt to get it back—then its waived.
    - What to look for:
      - Other entities who are doing work—are they doing it on behalf or contractual basis of the attorney? If so, then work product
      - You're the only one who can waive the claim to confidentiality of your own work product.