**Introduction**

1. FRE 103: Rulings on Evidence
   1. If objecting to evidence, must state a reason for doing so
      1. If a party fails to object at the lower level, cannot raise the issue on appeal
   2. In the case where a judge agrees w/ an objection to exclude the evidence, the other party must have made an offer of proof in order to raise the issue on appeal
2. Harmless Error Analysis
   1. Even if evidence was incorrectly admitted (or not), the initial determination of the lower court will not be reversed unless substantial harm was done to the party
      1. Must object at the lower court level w/ the correct reasoning
      2. Even if the judge dismisses the objection, must offer the proper reasoning for the evidence dismissal to be reversed at the appellate level
   2. Fundamental error differs from plain error
      1. Where plain error must be raised at the lower level to be asserted on appeal, fundamental error does not
      2. Fundamental errors are so serious that, it is irrelevant if they were raised at the lower court level before appeal

**I. Relevance**

*Logical Relevance*

1. Threshold Requirement
   1. Most fundamental requirement of admissibility is that evidence be relevant
   2. Irrelevant evidence is inadmissible
   3. Assessing relevancy should be the starting point of any evidence analysis
2. **FRE 401:** Definition of Relevant Evidence
   1. Definition:Evidence is relevant if it has 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
      1. Evidence with only slight probative values qualifies
      2. Does not have to establish that a fact is more probable than not nor provide sufficient basis for sending the issue to the jury
   2. Relational Concept: Relevancy of an item of proof is not judged in isolation
      1. Relevance can only be judged in the context of the specific issues raised by the parties, other evidence in the case, and applicable substantive law
   3. Materiality: Evidence is material if it has legal significance in the case
      1. If evidence has no legal significance, it is immaterial
         1. Analysis – Is it related to a substantial issue in the case?
      2. Relevance and materiality are treated separately at CL, but merged under FRE 401
      3. Materiality is part of the definition of relevance bc of the requirement that the fact to be proved must be “of consequence to the determination of the action”
   4. Only logical relevance required: Though low threshold, evidence having only marginal probative force is more likely to be excluded under FRE 403
3. **FRE 402:** Relevant Evidence Admissible Unless otherwise Proved
   1. All relevant evidence is admissible except as otherwise provided by…
      1. The Constitution
      2. Federal Statutes
      3. The Federal Rules of Evidence
         1. 403-405, 407-412, 501, 602, 605, 606, 610, 701, 702, 802, 901, 1002
      4. Other rules prescribed by SCOTUS

*Pragmatic Relevance*

1. **FRE 104(a):** Role of the Judge and Jury
   1. Usually, it is the judge who decides the relevancy of evidence at the time it is offered
   2. Only if the judge determines that it is relevant does the jury get to hear it
   3. During deliberations, the jury decides what weight, if any, to give it
2. **FRE 104(b):** Preliminary Question of Fact; Conditional Relevancy
   1. Role of Judge: The judge does not resolve the preliminary question
      1. Only decides whether there is *sufficient evidence* to support a jury finding of genuineness
      2. If there is, judge submits the document to the jury to make the ultimate decision whether it is genuine
   2. Role of Jury: If the jury finds the document was forged, disregard as irrelevant
      1. If the jury finds the document genuine (relevant), the jury can give it whatever weight it deems appropriate
   3. Connecting up: Under FRE 104(b), the judge has discretion to submit the document to the jury before the proponent makes a prelim showing of genuineness, as long as the proponent agrees to “connect up” evidence later by putting on evidence of genuineness
      1. Judge can admit evidence subject to later proof (authenticating evidence)
      2. Failure to connect up evidence by producing the promised evidence of genuineness, opposition can move to strike evidence from jury record
3. **FRE 403: Exclusion of Relevant Evidence** on Grounds of Prejudice, Confusion, Waste of Time
   1. Judges are allowed to exclude evidence of unquestioned relevance when
      1. Probative value is substantially outweighed by dangers of unfair prejudice
         1. Excessive emotionalism, used to unfairly enflame emotions of the jury
         2. Jury unable to limit use of the instruction
         3. Ex. Court rejected use of statement “Dr. B poisoned me” for the limited purpose of showing her will to live and unlikelihood of suicide, even though it was not for the purpose of proving that Dr. B had poisoned her
      2. Confusion of the issues
         1. Distracting jury with collateral matters
         2. Ex. Evidence that other persons allegedly involved in conspiracy were not prosecuted was excluded
      3. Misleading the jury
         1. Ex. Simulation of dummies flailing around in a jeep losing their body parts was excluded from a personal injury trial bc the dummies could not even hold on to anything
      4. Undue delay, waste of time
         1. Ex. Refusing to admit a tape of psychiatric interview lasting 2 hours bc the information on tape was already sufficiently established by other evidence
      5. Needless presentation of cumulative evidence
         1. Limit the number of witnesses called, prevent unnecessary repetition
   2. Balance in Favor of Admissibility: Authorizes exclusion only when probative value is *substantially outweighed* by competing considerations
      1. Rule is slanted in favor or admissibility (if value is equal to prejudice – admit)
      2. Offsets the broad relevancy of FRE 401, as relevant evidence can still be excluded
   3. Surprise: Does not recognize surprise as an independent ground for exclusion
      1. A-C Notes state a continuance is more appropriate for surprise than exclusion
      2. Surprise may sometimes be a factor in finding that evidence will result in unfair prejudice, confusion of the issues, and undue delay
   4. Credibility Determinations: Evidence may not be excluded under FRE 403 merely bc the trial judge does not find the evidence to be credible
      1. Court may consider probative value of the evidence in undertaking the required balancing, but nothing in the rule alter the principle that questions of credibility are for the jury
   5. Appellate courts give substantial deference to ruling of trial judges and only reverse for clear abuse of discretion
      1. Knowledge after the fact has no place in the post hoc analysis of reasonableness of an actor’s judgment
4. FRE 403 Relation to Other Rules
   1. Prior Crime Impeachment
      1. Impeachment by evidence of prior convictions under 609(a)(1), expressly incorporates FRE 403 as a limit for impeaching witnesses other than the accused
      2. FRE 403 cannot be used to prevent impeachment by convictions involving dishonesty or false statement under FRE 609(a)(2)
   2. Prior Acts FRE
      1. Used to limit proof of bad acts under 404(b) and inquiry into the acts bearing on truthfulness of a witness under 608(b)
   3. Cross-examination of Character Witnesses
      1. Used as a restraint on the scope of cross-examination of character witnesses about specific instances of conduct under FRE 405(a)

**II. Character Evidence**

*General Rule*

1. Definition of Character Evidence
   1. For purposes of evidence, character means a person’s tendency (disposition or propensity) to engage or not to engage in certain types of behavior, or traits
   2. Ex. People can have character for untruthfulness, being peaceable or prone to violence, or qualities of recklessness, drunkenness, or lawfulness/unlawfulness
2. Three Uses of Character Evidence
   1. Conduct on Specific Occasion:
      1. Most common use of character evidence is to prove a person’s conduct on a specific occasion
         1. Tendency to act in a certain way, and probably did it again here
         2. Know as *circumstantial* or *substantive* use of character evidence
      2. Such use is generally prohibited, subject to important exception
         1. *See* 404(a) for these exception
   2. Element of Charge, Claim or Defense
      1. In rare circumstances, a person’s character is an element of a criminal charge, a civil claim, or a defense
      2. In such cases, sometimes said that a defendant’s character is at issue, and character evidence is generally admissible
   3. To Prove Motive, Intent, or Similar Specific Points
      1. Behavior on specific occasions often reflects traits of character, particularly if the behavior is repeated
         1. Ex. A is caught entering someone else’s apt and claims he entered by mistake, but three prior burglaries might be proved to show this occasion he intended to commit burglary again, rebutting idea of mistake
      2. Evidence of prior bad acts to prove intent and similar narrow points is admissible under FRE 404(b), subject to possible exclusion of FRE 403
   4. Overview – Propensity Evidence is generally out, except for…
      1. Character of the accused (if first raised by accused – criminal cases only)
      2. Character of the victim (criminal only)
      3. Character of the witnesses that goes to (un)truthfulness (civil or criminal)
3. **FRE 404(a): When Character Evidence Offered to Prove Propensity Admissible** (Exceptions)
   1. Generally, evidence of a person’s character **cannot be used** to prove conduct in accordance with their propensity, their behavior on previous occasions
      1. Not admissible to prove that on an occasion, a person acted with the propensity of that character trait
      2. Ex. Prior acts of driving faster than the speed limit are not admissible to prove that defendant was speeding at the time of an accident
   2. FRE 404(a)(1): Exception for Criminal Defendants (The Accused)
      1. Allows the accused to offer evidence of a pertinent trait of character to help prove that he did not commit the charged crime
         1. If defendant does introduce character evidence, prosecutor may offer character evidence in rebuttal – opens the door to the prosecution
      2. Pertinent Trait: Character evidence here must relate to the type of crime charged
         1. Ex. Assault trial, proof of defendant’s honesty is not pertinent, but proof of a peaceable disposition would be pertinent and allowed
      3. Form of Proof: Character witness, whether called by the defendant or the prosecution, can testify on direct only as to reputation or opinion, and **not to specific instances**
         1. On cross-examination, character witness can be asked about specific instances of conduct by the person whose character is being proved
      4. Accused Attacking Victim’s Character: Prosecutor may also offer proof going to the character of the accused if he proves the character of the “alleged victim”
         1. In this situation, the prosecutor may prove the same trait of character in the accused
         2. Ex. In a battery trial, if the D proves that the alleged victim was an aggressive person (evidence to starting the fight), the prosecutor may prove the *defendant* is an aggressive person (to refute defense argument and establish the D started the fight instead)
   3. FRE 404(a)(2): Exceptions for Crime Victims
      1. In a criminal trial, evidence of a **pertinent character trait of an alleged crime victim is admissible** in three situations…
         1. When offered by the accused to prove his innocence
         2. When offered by the prosecutor to rebut character evidence offered by the accused
         3. In a homicide case when the prosecutor offers character evidence pertaining to the peacefulness of the alleged victim to rebut D evidence that the alleged victim was the 1st aggressor
      2. Character witness, whether called by the defendant or the prosecutor, can testify on direct only about reputation or opinion, not specific instances of conduct
         1. Character witness may, however, be asked about specific instance on cross
   4. FRE 404(a)(3): Exception to Character of Witnesses
      1. Evidence of the character of a witness is admissible, as provided in FRE 607-609
      2. *See* section III
4. **When 404(a) does *not* apply: Character as Element of Charge, Claim, or Defense** 
   1. When character is an element of a charge, claim, or defense, character evidence is admissible without limitation
      1. FRE 404(a) does not apply bc character is being proved for its own sake, not for the “substantive” purpose of supporting an inference of behavior on a certain occasion
   2. In cases where character is an essential element, character may be proved not only by reputation and opinion evidence, but also by specific instances of that persons conduct
      1. Wrongful death – character of decedent is an element of damages
      2. Defamation – where D raises truth as its defense, P’s own character is defense
5. **FRE 405: Methods of Proving Character** 
   1. **FRE 405(a): Reputation Testimony**
      1. Accounts offered by a character witness who is familiar with the person’s reputation in the community
         1. Relevant community is geographical and extends to colleagues or associates in the workplace, or other community settings
      2. Technically, reputation testimony is hearsay
         1. Distillation of out-of-court statements of community members or associates
         2. Exception FRE 803(21) allows reputation testimony to be used
      3. Reputation refers to the community’s ideas or view of the person
         1. Character describes tae actual nature or disposition of the person
   2. Opinion Evidence
      1. Rule allows opinion evidence, provide that the proponent shows that the character witness has an adequate basis in experience to support an opinion
   3. **FRE 405(b): Specific Instances of Conduct** 
      1. Generally, specific instances of conduct are not allowed as proof of character
         1. Otherwise would consume too much time and diver trial to side issues
         2. *See* FRE 412-415 for sexual assault where the prosecutor can offer proof of specific instances of the accused (or defendant)
      2. FRE 405(a): Even though a character witness generally cannot be asked about specific instances of conduct on direct, the cross-examiner can raise such points
         1. Acts in question should be relevant to the trait of character in question
         2. Ex. character witness who testifies that A has a reputation as peaceful can be asked whether the principal started a fight on a particular person (peace), but not whether they stole money from an ER (honesty, not peace)
      3. FRE 405(b) Exception
         1. In cases where character is an element to an indictment, claim, or defense, may raise specific instances of that person’s conduct
      4. No extrinsic proof is allowed
         1. Questioner is not allowed to prove specific instances of conduct by asking a character witness what she does not know (an attempt to circumvent)
         2. Before asking about a specific instance of conduct, cross examiner must demonstrate good-faith basis for believing conduct actually happened
      5. Link to FRE 403: Trial court retains discretion to prohibit cross about specific instances of conduct that are insignificant, remote, conjectural, or otherwise unfair
6. Review: Propensity evidence (you tend to drive drunk) is inadmissible, except for…
   1. FRE 404(a)(1): Character of the accused (criminal cases only)
   2. FRE 404(a)(2): Character of the victim (criminal cases only)
   3. No FRE: Character of the witness that goes to (un)truthfulness (civil and criminal cases)

*Prior Bad Acts for Non-Propensity Purposes*

1. **FRE 404(b): Other Crimes, Wrongs, or Acts** (Admissible for Non-Character Purpose)
   1. Restates the principal of FRE 404(a)
      1. Evidence of other crimes, wrongs, or acts are **not admissible** to prove the character of a person in order to show conforming action in the current situation
   2. However, such evidence is admissible for narrower set of purposes
      1. The rule lists permissible uses of specific instances of conduct, but the list is exemplary and not exhaustive
      2. Party offering evidence of prior crimes, wrongs, or acts under 404(b) must specify the particular purpose for which it is offered, not just the uses listed in the rule
   3. Prior crimes, wrongs, or acts are potentially admissible, subject to FRE 403
      1. Must be offered for any relevant purpose that does not require an inference from character to conduct; non-propensity purpose
2. Listed Purposes under 404(b)
   1. Motive: Prior crimes, wrongs, or acts may be used to prove motive
      1. When prior crimes are offered to prove motive, they do not need to be similar in nature to the charged offense
      2. Ex. Evidence that D has an expensive drug habit to prove motive for a financial crime, such as bank robbery
   2. Opportunity: Prior acts may show that D was in the vicinity of the crime when it was committed, or had access to some crucial instrumentality, or had necessary knowledge, familiarity, or experience to commit the crime
      1. Ex. Fact that D had escaped from prison was admitted to establish D’s presence in the vicinity of a car theft
   3. Intent: Prior crimes are sometimes highly probative on the issue of intent
      1. Generally, there must be a close resemblance between the prior crime and the charged crime, or at the very least they must involve the same mental state
      2. Allow use of prior crimes to prove intent only if intent is a genuine issue (where D denies intent and vigorously argues that requisite intent was not there)
   4. Preparation: Evidence of a prior crime can show preparation for the charged crime
      1. Ex. IN a trial for attempted bank robbery, proof that on a prior day D stole a car to use as a getaway would be admissible as evidence of prep
   5. Plan: Prior crimes often relevant in proving plan
      1. Ex. When D is charged w/ conspiracy to import illegal drugs, evidence he attempted to bribe customs would be admissible
   6. Knowledge: Prior crime evidence is often used to prove knowledge
      1. Ex. If D is charged with passing counterfeit currency, and he denies knowing it was counterfeit, the fact he was previously convicted of selling counterfeit currency could be admitted to prove knowledge
   7. Motus Operendi: Using prior crimes to prove identity overlaps with many categories
      1. This category describes cases in which the charged crime was committed by means of a M.O. that is **distinctive and unusual** that also bears a **very close resemblance** to some crime the D committed on a prior occasion
         1. “Signature” crimes probably committed by the same person
      2. Showing that the D committed such a crime before is powerful evidence that he probably committed the charged crime, admitted as proof of identity
   8. Absence of Mistake/Accident: Proving prior crimes or acts can sometimes rebut a claim that the charged crime was an accident or mistake
      1. Ex. D charged with child porn claims he acquired by mistake, not realizing he was purchasing porn of under age kids. To rebut, gov proves the D possessed other forms of child porn.
3. Degree of Similarity Required
   1. FRE 404(b) does not necessarily require that he prior act be similar to the charged crime
      1. For some uses of prior act evidence, such as motive, similarity not required
      2. For others, such as knowledge, similarity may be necessary for the evidence to have probative value
   2. When offered to prove M.O., the prior act must have a high degree of distinctive similarity in order to show the 2 crime bear the “signature” of the accused”
      1. Participation in the 1st would be persuasive as to his probable participation in the 2nd
4. Certainty that Prior Act was Committed
   1. Proponent of prior act evidence bears the burden of proving the prior conduct occurred
      1. Most certain and persuasive is by evidence of a criminal conviction, based on verdict or a guilty plea
      2. Conviction is not required, and prior act can be proved by other forms of evidence
   2. *Huddleston* Standard
      1. Prior act can be admitted under FRE 404(b) on the basis of proof that is sufficient to support a finding that the D committed the prior act
         1. Must only satisfy preponderance standard of evidence
      2. The question whether D committed the prior act is for the jury to decide under 104(b) as a matter of conditional relevancy, not for a judge to decide under 104(a) as a matter of admissibility
   3. Prior Acquittals
      1. Prior crime may be proved under 404(b) even if defendant has been charged and acquitted of that crime
         1. Link to *Huddleston* standard, and jury decision under 104(b) preponderance
      2. Acquittal establishes only presence of reasonable doubt and is not a specific determination that the D was not involved in the earlier crime
5. FRE 404(b) exclusion under FRE 403
   1. Evidence that fits FRE 404(b) is subject to exclusion under FRE 403
      1. A-C Notes to 404(b) states that a determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence” under 403
   2. Factors to consider:
      1. Prior crime evidence offered to prove an **undisputed issue** is less likely to admit
      2. More **uncertain** the proof that the **prior act occurred**, less likely to admit
      3. If prior act has only **marginal probative force**, more likely to be excluded
      4. Prior act evidence of an **inflammatory** nature more likely to be excluded
      5. If proponent can **establish the point by other evidence**, less likely to admit
      6. Increasing likelihood of **jury confusion** between permissible and impermissible uses of prior act evidence, more likely to exclude
6. Notice Required
   1. In a criminal case, prosecution must, on request by the defense, provide advance notice of the general nature of evidence it intends to offer under FRE 404(b)
   2. Such notice may be given during trial if the court excuses pretrial notice for good cause

*Habit and Custom*

1. **FRE 406: Evidence of Habit or Routine Practice (Admissible)**
   1. Evidence of the habit of a person or the routine practice of an organization is admissible “to prove that the conduct of the person or organization on a particular occasion was in conformity w/ the habit or routine practice”
2. Distinction between Character and Habit Evidence
   1. Under FRE 404, character evidence is generally inadmissible to prove conduct
   2. Under FRE 406, evidence of habit is generally admissible to prove conduct
      1. Habit describes particular behavior in a specific setting and is by nature at least regular, if not invariable
      2. Greater probative value in proving conduct on a particular occasion, and less likely to carry any moral overtones or lead to prejudice
3. Definition of Habit
   1. Habit is defined by the A-C Notes as a person’s “regular practice of meeting a particular kind of situation with a specific type of conduct”
      1. Habit is more specific than character
         1. Habit is always signaling right, where driving carefully is a characteristic
      2. Habit involves behavior that is more regular than character
         1. Always paying with CC is habit, being willing to use CC is character
      3. Habit is more automatic or unreflective than character
         1. More generally behavioral patterns are usually considered to reflect traits of character, habit looks to a specific act always done (keys in right pocket)
4. Methods of Proving Habit
   1. Usually proved by witnesses describing prior specific instances of conduct
      1. Witness must describe a period of observation sufficient to convince the court that the proof shows a habit
   2. Sufficient Instances
      1. Must be a large enough sample to establish a pattern of behavior and a sufficient uniformity of response
      2. Court decides under 104(a) whether the witness can describe enough instances to show habit, if not, testimony may be excluded
   3. Most courts allow habit to be proved by opinion testimony
      1. Witness must have an adequate basis of personal knowledge
5. Limitations on Habit Evidence
   1. No requirement that the habit evidence be corroborated by other witnesses
   2. Habit does not have to be proved by eyewitnesses
   3. Does not raise issues of unfair prejudice

**III. Impeachment of Witnesses**

1. Introduction
   1. All witnesses who testify are subject to impeachment
      1. Asking questions or introducing extrinsic evidence that attacks the credibility of a witness – Some methods of impeachment (bias) are not covered by the FRE
      2. Cannot impeach someone unless that person is sitting in the witness stand
   2. Five most common methods of impeachment
      1. *Bias*: No FRE for bias, but it is acceptable and commonly used
      2. *Impairment*: No FRE, but acceptable
      3. *Bad Character/Convictions*: FRE 608(a), (b), FRE 609
      4. *Contradiction*: No FRE, but acceptable
2. **FRE 607: Who May Impeach**
   1. Generally a witness is impeached by the adverse party, but a party may impeach its own witness as well (modern trend)
      1. Witness can be impeached on direct as well as on cross, and a party is not bound by testimony or other evidence she introduces or sponsors
      2. Free to contradict or explain such evidence if it damages her case

*Impeachment by Bias*

1. CL Impeachment for Bias
   1. Witness may be impeached by showing bias for or against a party through…
      1. (1) Animus; (2) Sympathy; (3) Motive to falsify; (4) Corruption; (5) Bribery
   2. Under FRE 401, bias is always relevant
      1. Bias may be explored on cross of the witness *and* may be proved via extrinsic evd
      2. Where bias is explored on cross, it is exempt from the rule that cross must stay within the scope direct, and of course, other forms of impeachment are also exempt
         1. *See* FRE 611(b) – limiting cross to subject matter of direct, and to matters affecting the credibility of the witness
2. Proving Bias
   1. By examination of witness, including questions on direct
      1. Bias is usually brought out on cross, but the calling party may also develop points showing bias on direct
         1. Otherwise jury might think the calling party was hiding something
      2. If the witness is impeached by prior statements indicating bias, witness usually has to be asked about it first on cross before using extrinsic evidence
   2. By Extrinsic Evidence (*Abel*)
      1. Extrinsic evidence of prior instances of conduct is excluded **only** when it is offered to prove untruthful disposition (propensity or character) – *See* 608(b)
      2. Extrinsic evidence of prior instances of conduct is **not excluded** when it is offered to impeach in other ways, as by showing bias or lack of capacity, or contradiction
      3. Bias is never collateral, and it can be proved by extrinsic evidence
3. Restricting Proof of Bias
   1. Parties are entitled to reasonable latitude in showing the bias of a witness
      1. Latitude extends to bias impeachment via cross or extrinsic evidence
      2. Undue restriction on proving bias may constitute error
   2. In criminal cases, the accused is entitled to impeach prosecution witnesses for bias
      1. Accused can develop the relevant points sufficient to let the fact finder make an informed evaluation on witness credibility
   3. Judges have discretion to limit attempts to establish bias in order to prevent
      1. Harassment; confusion of issues; waste of time; unfair prejudice

*Impeachment by Impairment (Mental or Sensory Defect)*

1. Introduction
   1. Involves showing a defect in sensory or mental capacity if it…
      1. Affected ability of the witness to observe and understand at the time of events; or
      2. Affects her memory and ability to recount the events
   2. Examples include bad eyesight, poor hearing, faulty memory, etc…
      1. Impaired capacity usually does not make a person incompetent as a witness, but impairments are relevant in assessing the credibility of the witness and testimony
   3. CL addresses this method of impeachment, but it is still commonly used/accepted
      1. *US v. Abel*: Approved impeachment by bias in federal courts even though it is not mentioned in the FRE; bias is relevant, and FRE do not end w/ CL tradition
      2. Under reasoning in *Abel*, any challenge to impeachment via impairment would be rejected as well
2. Forms of Proof
   1. Attacking party can inquire on cross about sensory or mental defects that affect a witness and bear on his testimony
      1. Attacking party may also call other witnesses to testify to such points (rare)
   2. The calling party may also bring out sensory or mental impairments on direct
      1. Try to show that despite these problems, witness should still be believed
3. Alcohol or Drug Use
   1. Attacking party may go into the matter of intoxication or drug influence at the time of the events about which the witness testifies
      1. If the witness is under the influence of drugs or alcohol at time of trial, this matter can be explored as well
   2. Generally, evidence of drug addiction or alcoholism is excluded unless it bears on the ability of the witness to perceive or recall the events at issue
4. Mental Illness or Disability
   1. Impeaching a Witness: Attacking party may show by cross or extrinsic evidence that the witness suffers (or once did) from a mental illness that could affect her ability to perceive or recall events at issue
      1. Evidence of an unrelated mental illness and medical records indicating treatment for relevant impairment are excluded for privacy reasons
      2. When the adverse party attacks a witness by questions or extrinsic evidence suggesting mental impairment, other party may offer counterproof in form of expert testimony that the witness is not impaired
   2. Court-ordered Exams: Used to assess mental condition and capacity to distinguish reality
      1. Courts can effectively force parties to undergo exams by refusing to allow them to testify unless examined, or by limiting claims/defenses until preformed
      2. Courts cannot compel nonparty witness to submit to such exams, and can only exclude their testimony if they refuse

*Bad Character: Prior Bad Acts*

1. **FRE 608(a): Reputation or Opinion Evidence of Witnesses** 
   1. Involves the use of one witness (character witness) to show that another (target or principal witness) is untruthful
      1. Character witness can give either opinion or reputation testimony on the truthfulness of the target witness
      2. Not proving the witness is lying specifically in this case, only that the witness tends to have trouble saying the truth
   2. Circumstantial Evidence: This form of impeachment involves circumstantial rather than direct evidence that the principal witness may be lying
      1. What is being proved is the *character* of the principal witness
      2. Use of character evidence requires an exception to the general bar against character to prove conduct; *See* 404(a)(3) – allowing proof of character of witness in all trials
   3. Opinion and Reputation Evidence Allowed: FRE 608(a) authorizes character witnesses to give either opinion or reputation testimony
      1. Ex. “I know [target], and she is not a truthful person, lying when needed”
      2. Ex. “I know the reputation of [target] for truth and veracity, and it is bad”
   4. Foundation for Character Testimony: Character witnesses must have an adequate foundation to testify on points of opinion and reputation of the target
      1. Reputation – Must be acquainted w/ the community where the principal spends most of his time, does not need to actually live or work there, as long as familiar
      2. Opinion – Witness must know the principal for some period of time in some setting, personal, business, or professional
2. FRE 608(a): Requirements of Character Witness Testimony
   1. *Specific Conduct Bearing on Truthfulness*
      1. Character witness who gives reputation or opinion testimony about the untruthful character of the target witness may be cross-examined about specific instances of conduct by the target witness bearing on the target’s (un)truthfulness
   2. *Goes Only to Credibility of Character Witness* 
      1. Attempt by party supporting the target witness to negatively undercut the character witness is not the proper method of showing the target witness is truthful
      2. Only legitimate purpose of cross is to test the character witness Truthfulness and untruthfulness may not be shown by extrinsic evidence of conduct
         1. Try to ask questions that would amount to extrinsic evidence
3. **FRE 608(b): Specific Instances of Conduct** 
   1. Involves cross examination about specific instances of conduct that suggest untruthfulness of the witness (impeachment by showing bad acts)
      1. Can only be used during cross examination
      2. Impeachment through character evidence – exception to the propensity rule
   2. Scope: Rule limits the inquiry to acts that bear on the truthfulness of the witness, meaning acts that involve falsehood or deception
      1. Ex. Proper matters to raise on cross of the target witness include false ID, false statement on government forms, false claims on employment apps, etc…
         1. Violent behavior, drug use, debt, sexual misconduct is not proper here
      2. Generally improper to ask about being arrested, charged or indicted
         1. Rather than asking if they had been arrested for embezzlement, ask if they had embezzled funds from their ER
   3. Discretion to Exclude: Judges can bar question when probative value is overbalanced by the need to protect parties from undue prejudice, witness harassment, jury confusion, or trial being unnecessarily prolonged (608(b); 611; 403)
      1. Questions about misconduct involving lies or deception may be barred even though the misconduct tends to indicate untruthfulness
      2. Remoteness in time erodes probative value, but no set time
   4. No Extrinsic Evidence: Even when a witness denies committing a prior untruthful act, EE of that act is not admissible under 608
      1. Cross-examiner must accept the answer of the witness when it comes to non-conviction misconduct
         1. Extrinsic evidence of prior misconduct is inadmissible (collateral evidence)
      2. Does not mean the cross-examiner has to accept the first answer
         1. Cross-examination allows testing and proving, and has the chance ot overcome an initial denial
      3. Bar against EE of specific instances of conduct applies only when offered to show untruthful disposition/character
         1. The bar does not apply to EE offered in support of other forms of impeachment, such as bias or impairment or prior inconsistent statements

*Impeachment by Prior Convictions*

1. FRE 609(a)(1): Impeachment by Evidence of Prior Felony Conviction
   1. FRE allow the use of *any* prior felony convictions (punishable by penalty exceeding one year) to impeach, subject to a balancing test and time limitations
      1. Standard focuses on the *nature and extent of possible punishment*, not than punishment actually imposed
   2. Balancing for Impeaching Witnesses other than Accused
      1. For witnesses other than the accused, prior felony convictions are admissible to impeach subject to FRE 403
      2. Lenient standard in favor of *admitting* convictions, since 403 only excludes if probative value is substantially outweighed by danger of prejudice
   3. Balancing for Impeaching Accused (Who Takes the Stand as a Witness)
      1. If the accused is the witness, prior felony convictions are admissible to impeach if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused
      2. Stricter standard in favor of *excluding* convictions, where convictions only come in if the probative worth outweighs prejudice
   4. Factors to Consider in Balancing
      1. Nature of the prior crime – more the prior crime reflects adversely on honesty or integrity, the greater its probative wroth
         1. Crimes of “dishonesty or false statement” are automatically admissible under FRE 609(a)(2)
         2. Crimes requiring planning or prep bear more strongly on veracity
         3. Crimes against public morality (drugs, prostitution) are low on veracity
      2. Recency or Remoteness
         1. FRE 609(b) creates a presumption that a conviction more than 10 years old should be excluded
         2. More recent convictions suggest that a D has not changed, and strengthen inference that witness is willing to violate the law (strongly prejudicial)
      3. Similarity to Charged Crime
         1. Closer the resemblance between charged crime and the crime of prior conviction, greater the potential prejudice to the D
         2. Such resemblance weights heavily for exclusion due to unfair prejudice
      4. Extent and Nature of Record
         1. Isolated conviction carries less probative worth on veracity than a conviction that fits a pattern of behavior
         2. Pattern of behavior may be excluded for unfair prejudice
2. FRE 609(a)(2): Impeachment by Convictions of Crimes Involving Dishonesty or False Statement
   1. FRE allows impeachment for any conviction for any crime of dishonesty or false statement
      1. Reaches for both felonies and misdemeanors
      2. No distinction among witnesses, unlike (a)(1)
      3. Convictions w/in this category are automatically admissible, not judge discretion to exclude them
      4. These convictions may still be excluded if they do not satisfy FRE 609(b)-(d)
   2. If a conviction qualifies under both 609(a)(1) and (2), such as perjury – which is both a felony and a crime of dishonesty/false statement, the fact it fits (a)(2) makes it automatically admissible
      1. Only a small subset of crimes fit FRE 609(a)(2), thus becoming auto admissible…
         1. Ex. Perjury, false statement, criminal fraud, embezzlement, false pretense
      2. Legislative history focused on crimes involving false statement of some sort
         1. Assault, rape, sexual acts, battery, moral offenses, burglary, robbery, larceny, and other forms of theft generally do not fit
   3. Meaning of “Conviction”
      1. Under FRE 609, a conviction does not require a contested trial
      2. Conviction following a plea of guilty, nolo contendere, or an *Alford* plea is still a conviction, does not matter if it led to a suspended sentence either
3. FRE 609(b): Ten-Year Limit on Prior Convictions
   1. Presumption that convictions more than 10-years old are not admissible to impeach
      1. Beginning point of the ten-year period is the date of the conviction or the release of the witness from confinement for that conviction, whichever is later
   2. Exception: Court may admit convictions more than ten years old if it determines, on “specific facts and circumstances” that probative value outweighs prejudicial effect
      1. Party wishing to use a conviction more than ten years old must give advance written notice sufficient to enable the other side to use such a conviction
4. Extrinsic Evidence
   1. Prior convictions are usually proved by asking the witness about them on direct or cross (ex. certified copy of conviction), but EE is also admissible
5. Details About Conviction
   1. Generally, the impeaching party may bring out only the date, place, and nature of the conviction, and the punishment imposed
      1. Questioning beyond these basic points is usually not allowed
      2. If the witness offers an explanation in an effort to exonerate himself, other side may pursue the matter further to refute/challenge (once door is opened, gopher it)
   2. Evidence of juvenile adjudication is generally not admissible to impeach under 609
   3. Conviction on appeal may still be introduced under FRE 609

*Contradiction*

1. CL basis for Contradiction Impeachment
   1. Contradicting a witness is till a recognized method of impeachment
      1. Like impeachment by bias or by showing mental impairment
   2. Showing that something the witness said is not so
      1. By offering counterproof, impeaching party may raise doubts in the jury about specific point contradicted, and general witness credibility
      2. Often accomplished by means of extrinsic evidence – testimony of other witnesses or in the form of physical/documentary evidence
2. Dual Relevancy Requirement
   1. Evidence to contradict a witness is not admissible if its only relevance is to prove the witness wrong on some specific point of testimony
   2. Must have dual relevancy, must also be relevant for some additional reason, such as proving a point that goes to the merits, or has some other impeaching significance
   3. Exception: If counterproof tends to refute a point that the witness could not be mistaken about if he is truthful, revealing a telltale lie that broadly undercuts what they said
3. Collateral Matter Limitation
   1. Exclude counterproof that contradicts only on collateral points
      1. Counterproof is collateral if it is relevant in only one way – in tending to contradict the witness, but has no other importance in the case
      2. Ex. Witness testifies he was wearing a jacket on the day he saw the accident, but can be shown he wore a sweater – counterproof is excluded
         1. Counterproof contradicts witness but does not count in any other way
   2. Bar against impeaching on collateral matters prevents a party from contradiction in points that are not independently important in the case – on merits or credibility

**IV. Other Relevance Rules**

*Settlement and Other Negotiations*

1. **FRE 408: Compromise and Offers to Compromise** 
   1. Settlement agreement and statements made by the parties or their lawyers in the course of trying to reach a settlement are inadmissible to…
      1. Prove liability;
      2. Prove invalidity of the claim or its amount; or
      3. Impeach testimony of a party at trial
   2. Exceptions commonly allow other uses of such proof
      1. Ex. Witnesses who have settled their claims with parties can be impeached by questions inquiring such matter bc they bear on possible bias
2. Settlement Agreements
   1. If suit is brought on the underlying claim, and if the settlement agreement can no longer be enforced bc the obligor breached duty to pay the agreed sum, the exclusionary principle normally applies and the agreement itself is excludable
      1. If a settlement agreement is not performed, and the party entitled to payment sues on the agreement itself, exclusionary principles do not apply
3. Statements during Negotiation
   1. When settlement talks fail to result in agreement, exclusionary principle applies only to statements made during negotiations, even those that eventually fail
      1. Exclusionary principle extends to statements by parties and their own representation, the exclusionary principle of 408 supersedes any authorized admission under FRE 801(d)(2)(C)
   2. Even unqualified admissions (“my client was speeding”) are excludable, so long as the purpose of the parties was to try to settle the case
4. Disputed Claim
   1. When a settlement claim exists, exclusionary principle comes into play only that dispute goes either to validity or the amount
      1. Exclusionary principle does not apply to every statement that follows the events that produce a claim   
         Ex. If a party concedes liability and promises to pay, and also accepts the sum demanded by the other side as correct, neither the validity nor the amount is disputed and exclusionary principle does not apply
   2. Even if a dispute exists, not every statement made by a part is an attempt to settle
      1. Ex. At the crash site, party saying “didn’t you hear me honk” could be admitted against him as an admission if the accident eventually went to court
5. Pre-Existing Materials
   1. Exclusionary principle does not apply to documents or statements made prior to settlement negotiations
   2. If lawyers mention or exchange such pre-negotiation materials during settlement talks, that does not bring them under the exclusionary principle
6. Applying FRE 408 to Criminal Cases
   1. Provision that clearly does apply in criminal cases (FRE 410) does not cover statements by prosecutors (only defendants)
   2. FRE 408 extends to criminal cases in order to exclude statement made by prosecutors during negotiation
7. Exceptions to the Exclusionary Principle of FRE 408
   1. Proving Bias: If a party has settled with a nonparty who testifies as a witness, the point may be explored on cross if it bears on bias
      1. Ex. D in an accident case paid money in settlement of a claim by a passenger who rode in P’s car, this payment might incline the passenger to shade testimony in favor of the D, and P may bring it out on cross-examination
   2. Refuting Claim of Undue Delay: Sometimes failing to negotiate a claim becomes an element in a future claim
      1. Here, proof of attempts by the carrier to settle is admissible by way of defense
      2. Ex. Insurance carrier adds to the liability of its insured by failing to properly investigate a claim, or delays increase its own liability to a claimant
   3. Impeachment: The newly amended rule does block the use of civil settlement statements to impeach a party by “contradiction” or by arguments that the prior statements are “inconsistent” with his testimony
8. **FRE 409: Payment of Medical and Similar Expenses** 
   1. Proof that a party paid the medical expenses of another is inadmissible when offered to show that the party is liable for the injury
      1. This also applies to payment of similar expenses, which should cover payment of other expenses related to treatment
      2. Encourages constructive and responsible behavior
   2. Principle does not apply to *statements* made by the party who pays such expenses

*Subsequent Remedial Measures*

1. F**RE 407: Subsequent Remedial Measures** (Proactive Measures)
   1. Evidence of post-accident measures, taken to prevent future accidents of the same nature, are *excludable* when offered to prove…
      1. Negligence or culpable conduct; or
      2. Defect in a product, product design, or need for a warning or instruction
   2. Exclusionary principle is broad, covering…
      1. Physical changes in the premises or machine involved in an accident
      2. Changes in design
      3. Safety modifications (like adding guard rails)
      4. Labeling changes
      5. New warnings
      6. Modifications in instructions
      7. Changes in personnel or procedures
2. FRE 407 and Products Liability Suits
   1. Amended rule makes clear that FRE 407 *does* apply in the product liability setting in federal courts, however, states continue to go their own way
      1. In its original form, 407 required negligence or culpable conduct, where strict liability turns on fitness of the product for intended use, not the D’s conduct
      2. Amended version clearly applies to using subsequent measures to prove a defect in product, design, or a need for warning or instruction – federal courts compatible
   2. *Flaminio v. Honda* – Held that FRE 407, even prior to the 1997 amendment, did apply in product liability cases and that the matter is procedural for *Erie* purposes
      1. Most federal cases conclude that FRE 407 is procedural for *Erie* purposes, but a few thought the matter was substantive prior to 1997
3. FRE 407: Exceptions
   1. In cases alleging either negligence or strict liability, the **exclusionary principle does not apply** to the use of subsequent measures to prove other points
      1. Ex. Ownership or control of the premises
   2. Impeachment: Where the defending party offers testimony that the machine or premises in question had a particular safety feature, or that certain procedures are always followed
      1. Proof of any post-accident modification (machine, premises, or procedure) is admissible if it tends to refute such testimony, thus impeaching the witness
   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
      1. Proof of subsequent measures is admissible if it tends to refute that testimony
   4. Fairness Issues: The rule contains a proviso to the effect that post-accident changes are admissible to prove feasibility only “if controverted” (if disputed)
      1. Otherwise, claimants might effectively evade the exclusionary principle by (1) trick cross that forces disclosure of post-accident changes, or (2) offering post-accident changes routinely as proof of feasibility

**V. Special Cases of Sexual Crimes**

*Rape Shield Statutes – Restricting Use of Character Evidence Against Victims*

1. **FRE 412: Sex Offenses; Relevance of Victim’s Past Sexual Behavior/Alleged Disposition**
   1. “Rape Shield” provisions are an exception to the general rule that a defendant may prove a pertinent trait of a victim’s character
      1. Restricts evidence of a sex crime victim’s character that might be otherwise admissible under FRE 404(a)(2) – FRE 412 supersedes here
      2. Applies in both the federal system and all state courts
   2. **FRE 412(a)**: In both civil and criminal proceedings involving alleged sexual misconduct, rape shield statutes generally…
      1. Bar evidence that the alleged victim engaged in some sexual behavior; **or**
      2. Bar any proof that the alleged victim has some particular sexual disposition
2. Four Exceptions to FRE 412 General Rule of Exclusion
   1. Proving alternative source of semen or injury
      1. D is allowed to prove sexual behavior by the alleged victim in order to show that some 3rd person was the source of the semen, in jury or other physical consequence of the alleged sexual contact
   2. Prior Sexual Behavior w/ the Accused
      1. Allows evidence of prior instances of sexual behavior by the alleged victim with the accused when offered on the issue of consent
      2. In cases of date or marital rape, where consent is the only contested issue, the past sexual relationship btwn the parties may be sufficiently probative to override general rule of exclusion
   3. Constitutionally Required to be Admitted:
      1. Allows evidence of prior sexual history or predisposition of the alleged victim when excluding it would violate the constitutional rights of the D
      2. Under the 6th amendment guarantee of confrontation and compulsory process, D’s sometimes have a right to introduce exculpatory evidence even when inadmissible as a matter of evidence law
   4. Exception only for Civil Cases
      1. Specifically prohibits evidence of the alleged victim’s reputation unless it has been placed in controversy by her
      2. When proof of the alleged victim’s sexual behavior or predisposition substantially outweighs the danger of harm or prejudice, and the evidence is otherwise admissible (if not for rape shield statutes)

*Special Rules for Various Sexual Crimes*

1. **FRE 413: Sexual Assault Prosecutions** 
   1. **FRE 413(a)** states that in any criminal cases in which the D is accused of sexual assault, evidence that D has committed other sexual assaults is *allowed* 
      1. Such evidence may be considered for its bearing on any relevant matter
   2. Contrary to FRE 404(a), in other words, FRE 413 allows the evidence – of prior offenses showing propensity to commit sexual assaults – to prove that defendant committed the assault for which he is prosecuted
      1. No Conviction Required: FRE 413 does not require that the prior offense result in a conviction or even that it was previously reported or prosecuted
      2. Notice Required: Under **FRE 413(b)**, if the gov intends to offer this evidence, the prosecutor is required to disclose the evidence to the D at least 15 days before trial
         1. Includes witness statements and summaries of anticipated testimony
      3. Application of FRE 403: Under **FRE 413(c)**, this rule shall not be construed to limit the admission or consideration of evidence under any other rule
         1. The rule does *not* say that evidence can be excluded under any other rule
         2. Legislative history indicates that FRE 413 is still subject to FRE 403
      4. Definition of Sexual Offenses: FRE **413(d)** includes a variety of sexual offenses
2. **FRE 414: Child Molestation Prosecutions** 
   1. Virtually identical to FRE 413, except that it applies to prosecutions for child molestation
      1. Except, allows evidence that the D committed previous molestation offenses
      2. As opposed to sexual assault, although molestation is often if not always sexual too

**VI. Introduction to Hearsay**

*Introduction*

1. **FRE 801(a) & (c): Defining Hearsay** 
   1. Hearsay is an out of court statement (or assertion), which can be verbal, written, or non-verbal, used to prove the truth of the matter asserted
      1. If a witness did not perceive an event and only heard it from other, and testifies to statements made by others, appropriate objection is hearsay
   2. Ex. Generally thought of as an out-of-court statement made by a 3rd person (the declarant) that is described in court by a different person, the witness
      1. If the witness and the declarant are the same person, *see* FRE 801(d)(1)
2. Verbal Expressions as Hearsay
   1. Verbal expressions are hearsay if it contains an assertion and offered to prove the truth of that assertion
      1. Not limited to declarative statements, includes requests, questions, and commands as long as they include an assertion
   2. Whether something is an assertion depends on the intent of the maker
      1. Verbal assertion is any intentional expression or communication of ideas or information using words
3. Conduct as Hearsay
   1. Assertive Conduct: Out-of-court conduct **that is intended to be assertive** is hearsay if offered for its truth (ex. pointing or nodding to signal agreement)
      1. Any simple act is hearsay if offered to prove the act, event, or condition that the actor was trying to express or communicate
   2. Nonassertive Conduct: Conduct that was not intended by the actor to make an assertion
      1. *Wright v. Doe d. Tatham* – Under CL, nonassertive conduct is hearsay when offered to support inference from act to belief, and from belief to the fact believed
      2. FRE takes the opposite view – Nonassertive conduct is not hearsay bc there is less danger of inaccuracy if the actor did not intend to make an assertion
4. Offered to Prove the Truth of the Matter Asserted
   1. An out-of-court statement is hearsay only if used to prove truth of the matter asserted
      1. Party is offering a statement to prove the truth of the matter asserted if the party is trying to prove that the assertion made by the declarant is true
         1. Using the declarant’s out-of-court statement for its truth as evidence to support the proponent’s primary, relevant claim
      2. For example, prior to trial Bob says, "Jane went to the store." If the party offering this statement as evidence at trial is trying to prove that Jane actually went to the store, the statement is being offered to prove the truth of the matter asserted.
   2. When a statement is offered for non-hearsay purpose (uses other than proving their truth), the rule excluding hearsay does not apply (*See* below)
      1. If the proponent specifies a narrow, permissible, non-hearsay purpose for introducing a statement, a limiting instruction may be requested that directs the jury to limit its consideration of the statement to the proper purpose – *See* FRE 105

*Non-Hearsay Purposes for Statements*

1. Impeachment
   1. Statement is non-hearsay if it is used only to impeach trial testimony by the declarant (person who originally made the out of court statement) who is now a witness on the stand
      1. The fact that the witness testified to one version of the facts at trial, but gave a different version in his earlier statement, may undermine credibility to the jury
   2. Jury does not need to decide whether the out-of-court statement was true, it has impeaching value solely bc of vacillation
      1. The witness telling the story in different (and apparently conflicting) ways at different times makes his trial testimony less believable
2. Effect on the Listener (or Reader)
   1. When a statement is offered only to prove that they had (or should have had or might have had) a particular effect on the person hearing or reading them, they are non-hearsay
      1. Out-of-court statements *may* operate to notify, warn, or even threaten the recipient
      2. Statement is not hearsay if it is offered only to prove the effect of the statement on a listener or reader
   2. Ex. A slips on icy steps in back of her apt and suffers injury, files suit against B
      1. B alleges A was contributory negligent bc she knew they were covered w/ ice
      2. B calls C (maintenance man) to testify he told A before the fall “Don’t use till I clear them off, steps are very icy”
   3. Analysis of Example
      1. C’s out-of-court statement is admissible as non-hearsay bc it is used to prove that A was on notice of the icy condition
      2. C’s statement not offered to prove its truth – fact that steps were icy on that day
3. Circumstantial State of Mind of the Speaker
   1. Out-of-court statements are sometimes admitted as non-hearsay on the theory they constitute **indirect** or circumstantial evidence of the declarant’s state of mind
      1. Ex. Evidence of angry comments directed towards a particular person might be admitted to show hostility on the speaker’s part toward the person
      2. Ex. Stating “I’m Nancy Reagan” when you clearly are not, is used to prove the declarant is crazy, not to prove she is actually Nancy Reagan
   2. **Direct** assertions by the declarant about his state of mind are hearsay, but are admissible under the state of mind exception (*See* 803(3))
      1. Statements that expressly describe the declarant’s state of mind cannot be described as circumstantial
      2. Ex. “I love her more than anyone I have ever met”
4. Verbal Acts
   1. Statement is non-hearsay if it is a verbal act or part of an act
      1. Verbal acts are words that have independent legal significance regardless of truth
         1. Assuming the words are being offered for a purpose other than to prove their truth, the words are not hearsay
      2. The mere fact that these words were said brings legal consequences, and the proponent is not using words as assertions to prove a truth that depends on the perception, memory, candor, or verbal accuracy of the speaker
         1. K negotiations
         2. Fraud, forgery, perjury, intimidation, extortion, and solicitation
         3. Libel, slander, misrepresentation, harassment
   2. Words as part of an act
      1. Generally, words accompany and become part of an act
         1. Words are being offered for their operative effect and not as assertions
         2. Words have effect not bc the speaker simply asserts something, but bc the speaker does something w/ words
      2. Ex. Rapist who attacks a woman and threatens harm if she does not cooperate
         1. Using words and physical actions in committing a crime
      3. Ex. One who lends his car to another, perhaps by turning over his keys while asking the other “to return it by Monday and not drive in the mountains”
         1. Accomplished a conditional transfer in which possession of car changes hands, but only for a time, and with restrictions on use of the vehicle
   3. Verbal acts also include words that have logical bearing outside their actual meaning
      1. Ex. Asked, “are you alive?” and answering “No, I’m dead”
      2. The fact of actually talking is an act w/ logical bearing outside the actual meaning

**VII. Hearsay Exemptions**

1. **FRE 801(d)(1): Prior Statements of Testifying Witnesses that are NOT Hearsay**
   1. As a qualification to the definition of hearsay in 801(c), FRE 801(d)(1) provides that a statement is **not hearsay** if…
      1. The declarant testifies at the trial or hearing;
      2. The declarant is subject to cross-examination concerning the statement; and
      3. The statement is either
         1. Prior inconsistent statement
         2. Prior consistent statement
         3. Statement by a party-opponent
   2. Subject to Cross-X: No prior statement in any of these categories is admissible unless the declarant testifies at trial and is subject to cross-x
      1. Not remembering the event described does not matter as long as witness is subject to cross-x concerning statement
      2. Ex. Prior statements are not admissible if the declarant dies prior to trial or if he testifies but refuses to answer questions about what he said before
2. **FRE 801(d)(1)(A): Prior Inconsistent Statements** 
   1. Prior inconsistent statements by a testifying witness is generally admissible to impeach her trial testimony
      1. When such a statement is admitted for impeachment, it is not to be used as substantive evidence – not to be used as proof of what it asserts
      2. Important in allowing the attacking party to use the prior statement not only to impeach, but also to indirectly (dis)prove what the statement asserts
   2. Limitations: Only covers prior inconsistent statements by testifying witnesses that…
      1. Given under oath subject to penalty of perjury; and
      2. Given at a trial, hearing, or other proceeding, or in a deposition
         1. Under the majority, “other proceeding” does not extend to situations which a witness gives police an affidavit at a stationhouse
         2. *State v. Smith* however found that an affidavit given by a crime victim at police was admissible under this exemption
   3. Prior Cross-X Not Required: Though 801(d)(1)(A) covers testimony given in a prior proceeding, there is no requirement that the declarant was *then* cross-xaminable
      1. Rule does not require that there be a prior cross-x occurred
      2. Grand jury testimony is covered by 801(d)(1)(A), even though defense had no opportunity in a that proceeding to cross-examine
   4. Degree of Inconsistency: Prior statement does not have to be completely inconsistent with trial testimony, but there must be enough so that the earlier statement could reasonably raise doubt of the credibility of current trial testimony
      1. Under majority view, a prior positive statement that describes an act, event, or condition is inconsistent enough w/ trial testimony that claims a lack of memory about the same event – prior statement is admissible
3. **FRE 801(d)(1)(B): Prior Consistent Statements** 
   1. Under CL and the FRE, prior consistent statements are admissible to rehabilitate a witness, or to repair the witnesses’ credibility and qualify as “not hearsay”
      1. This rule goes beyond the CL by allowing the use of certain prior consistent statement for rehabilitation **and** to prove what they assert
         1. No limiting instruction is required in this situation
         2. CL only allowed prior consistent statements to rehabilitate, not as proof of what they assert (hearsay use)
      2. Unlike prior *inconsistent* statements, prior *consistent* statements do not need to be made under oath or in a proceeding
   2. Not all prior consistent statements qualify as “not hearsay” under 801(d)(1)(b)
      1. Qualify only when offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive
      2. Sometimes prior consistent statements are used to rehabilitate a witness who has been impeached in other ways, but 801(d)(1)(B) would not apply in those settings
   3. *Tome* *v. US*: Earlier Statement Must Precede Motive to Fabricate
      1. Requires that prior consistent statements offered as substantive evidence must have been made before the motive to fabricate arose
         1. Statement made after the motive to fabricate came into being does not fit
      2. Rationale is that a post-motive statement that is consistent w/ trial testimony simply does not refute the claim that the witness is being untruthful
         1. The motive affects what he said after the motive came into being just as much as it affects what he says still later in his trial testimony
      3. Ex. An offer to give a share of any recovery made 60 days before trial, leading to corroborating statement 30 days later is not admissible – even though it is prior to the trial testimony, it was not prior to the event giving rise to fabrication
4. **FRE 801(d)(1)(C): Prior Statements of Identification** 
   1. An out-of-court statement identifying a person is admissible if the declarant testifies and is subject to cross-x about the statement
      1. Unlike prior inconsistent statements under 801(d)(1)(A), there is no requirement that earlier statements of identification be made under oath or in a proceeding
   2. Can Supplement Trial ID: Although the primary purpose is to admit earlier identifications when the witness cannot repeat the ID at trial, the rule covers statements of ID even if the witness does repeat the ID at trial
      1. The earlier statement may still be more convincing since circumstances of a trial are highly suggestive – when asked about the defendant, he is usually sitting there
      2. Thus, previous identification is still admissible even if they are able to do so at trial
   3. Example of FRE 801(d)(1)(C)
      1. A picks B out of a police lineup as the person who robbed the bank
      2. At the trial of B, A cannot say whether the defendant is the one who did the deed
      3. Police officer who was present at the lineup may testify that A picked out B
5. **FRE 801(d)(2): Admissions by Party-Opponent**
   1. Hearsay doctrine does not block one party from using statements against that their opponent has already made
      1. Technically an out-of-court statement used for its truth, making it hearsay
      2. However, admissions by a party-opponent are exempted, say it and stuck w/ it
   2. Admissions doctrine is very broad, applies to both civil and criminal context
      1. Personal knowledge is not required
         1. ER apologizing for accident, but he didn’t know what actually happened
         2. These instances can be explained away on direct
      2. Statements made to 3rd parties, and not the opponent are admissible
      3. Lack of sincerity (facetious statements) is irrelevant
   3. No limitations other than identity – must be, or be affiliated with the adverse party to invoke this rule
      1. Admissions do not have to be against interest to be admitted at trial
      2. Opposition can use anything, even if it’s completely self serving
   4. Admissions (other than co-conspirators) statements generally come in regardless of whether the speaker had personal knowledge
      1. Differs from other exceptions that require or assure such knowledge
   5. Admissions usually come in even if they are conclusory (just conceding fault or liability)
      1. Differs from other exceptions that only reach statements w/ high factual content
6. **FRE 801(d)(2)(A): Individual Admissions** 
   1. In suits by or against an individual, whatever he says that’s relevant is generally admissible
      1. Statement is admissible whether in an individual or representative capacity
      2. Admissions can also be excluded under FRE 403 if unduly confusing/prejudicial
7. **FRE 801(d)(2)(B): Adoptive Admissions** 
   1. Where A signs a written statement prepared by B or expressly (orally or in writing) with an oral statement by B – A has adopted what B has written or said
      1. A has in effect made the statement his own and that is admissible (*see* 801(d)(2))
         1. What A has adopted form B becomes A’s own admission
         2. Remaining quiet *may* be included as manifesting belief of truth
   2. Ex. Sending in a letter written by someone else speaking on your behalf is a form of adopting a statement as your own
8. **FRE 801(d)(2)(C): Authorized Admissions**
   1. Where A authorizes another person, B, to speak, statements by the B that were within the scope of the B’s speaking authority are admissible against A
      1. Classic principal-agent relationship – Whatever relevant things that the agent says in dealing w/ claims against their principle, it is often binding
         1. Does not require personal knowledge on the part of the speaker
   2. Authority: If the relationship between the Principal and Agent requires the Agent to speak in order to be effective, authority to speak is implied, and it does not matter that there is no additional indication that the agent is authorized to speak (ex. brokers and lawyers)
      1. Other situations do not necessarily bring speaking authority through the relationship – spousal relation does not imply authority by one to speak for other
   3. Internal Statements: Authorized admissions include *internal statements*, or conversations between the party and their agent
      1. In suits involving the Principal, what agent says to principal on subjects within his authority are authorized admissions by the principal
      2. Of course, look to existing privileges that would supersede this rule
         1. Attorney-Client Privilege
         2. Spousal Privilege
         3. Right against self-incrimination
   4. Independent Evidence: *Bourjaily v. United States* 
      1. SCOTUS said that a coconspirator statement could itself be used to prove the conspiracy that needs to be established to make the statement admissible
         1. In order to invoke this, independent evidence is required
      2. Now applied to authorized admissions, and statements by servants/agents of a party
         1. Courts allowed to consider the contents of the statement being offered to establish authority, or agency, though contents are not alone sufficient
         2. Some additional or independent evidence is required
9. **FRE 801(d)(2)(D): Admissions by Agents and Employees** 
   1. As long as an employee (agent) speak on a matter that is within the scope of his duties, what the agent or employee said is admissible against the employer (principal)
      1. Ex. Truck driver employed by B, comments to a bystander after a crash, “I ran a red light,” is speaking w/in scope of duties, and is admissible against employer B
         1. Truck driver’s statement is admissible against him personally under admission by party-opponent as well (if injured brings suit against driver)
   2. In suits against ER’s this principle is broad and reaches
      1. Statements that an alleged tortfeasor makes about their own conduct
      2. Statements by a supervisor describing things done by people under supervision
      3. Descriptions of a place/equipment for which the speaker is responsible
      4. Accounts of company practice/policy in areas of speaker’s responsibility
   3. Independent Evidence: As in authorized admissions, courts traditionally require independent evidence to avoid bootstrapping
      1. Under *Bourjaily*, contents of the statement are now considered, but the proponent is required to offer other proof to establish the employment and duties of the speaker
10. **FRE 801(d)(2)(E): Co-conspirator Statements** 
    1. If prosecutor is able to show 3 things against a criminal defendant, any of the coconspirator declarant’s statements are admissible as the defendant’s own
       1. Declarant and defendant conspired
          1. Exception usually invoked in cases w/ charges of conspiracy
          2. Exception can still be invoked if no conspiracy charges, if such charges are brought and dismissed, and even if such charges lead to acquittal
       2. Statement was made during the pendency of the venture; and
          1. Statements made before or after a conspiracy do not fit the exception
          2. Statements made by conspirators before the defendant are usually admissible against the D – theory that D adopted what was said before
          3. Statements made by a conspirator after arrest usually does not fin the exception when offerd against other conspirators
          4. Statements by conspirators still at large are usually admitted against an already-arrested member of the venture
       3. Statement furthered a conspiracy
          1. Further a conspiracy if they seek to drum up business, encourage continued adherence to the venture, or keep conspirators abreast of developments
             1. Statements made to undercover agents can satisfy the requirements
          2. Purpose of the speaker may be to further the venture even if they do not achieve that purpose – purpose alone is not enough
             1. Statements knowingly made to police do not fit the exception
    2. Procedural Issues: *Bourjaily* 
       1. Under this case, judges determine the predicate facts of the exception despite the fact that one of the predicate facts (defendant and declarant conspired) coincides with a question for the jury to decide
       2. Preponderance standard applies, despite the fact that usually coconspirator statements are offered by prosecutors against criminal defendants
       3. In deciding the admissibility question the judge my consider the statement itself, although the statement itself are not alone sufficient to establish the points

**VIII. Hearsay Exceptions – Unrestricted Exceptions**

1. **FRE 803: Hearsay Exceptions – Availability of Declarant Immaterial**
   1. These exceptions may be invoked regardless of whether the declarant testifies or is available as a witness
2. FRE 803(1): Present Sense Impression
   1. Three requirements for a present sense impression to be admissible hearsay
      1. Immediacy: Statement must describe an act, event, or condition that happens or exists at the moment of speaking
         1. Statement may fit if it follows an event by a few seconds, but not minutes
      2. Perceiving: The speaker must perceive what she describes
         1. Perceive usually refers to what he is “seeing,” but many cases admit statements describing what the speaker has heard (e.g. phone call)
      3. Descriptive: Statement must describe an act, event, or condition
         1. Ex. Comment to a passenger that the passing car must be drunk, and they would find them somewhere on the road wrecked if they keep that speed up
         2. Statement admitted to prove the manner of driving
   2. To be admissible, must make a fact or consequence more likely
      1. To admit evidence, must prove by a preponderance of the evidence
3. FRE 803(2): Excited Utterance
   1. Like PSI, based on spontaneity and is crucial in allowing statement by accident and crime victims to describe what happened to them
      1. Applies to statements by victims of violence to identify or describe their perpetrator
      2. Reaches statements by eyewitnesses (bystanders) who see such events and describe; do not have to be a participant in the startling event
   2. Three requirements for a excited utterance to be admissible hearsay
      1. External Stimulus: Must have a startling or exciting event
         1. Such an event that rivets the attention of the speaker
      2. Excitement: Speaker must be excited as he speaks
         1. Subjective – Court must decide whether a person like the declarant, in their position at the time, would be excited under circumstances
            1. Examine demeanor, content of statement, and nature of the event
         2. Unlike PSI, excited utterance can reach statements that are made some minutes or even hours after the events described, provided the speaker is excited as he speaks
            1. Focus on stress of the event, and if witness is still excited it is admitted as an exception to hearsay; no-planning allowed
      3. Related to an Event: Utterance must *relate* to an exciting act, event, or condition
         1. Connection is looser than what is required for PSI – must *describe*
4. FRE 803(3): State of Mind; Emotional or Physical Condition
   1. If not using the words for truth, but to circumstantially prove then existing state of mind, the statement is admissible
      1. Deals w/ direct evidence of state of mind, and circumstantially infer that the declarant actually did that claim
      2. Ex. If declarant says, “I intend to go to Chicago,” that is admissible and can circumstantially infer declarant went to Chicago
   2. This exception is also based on spontaneity, admissible statements include…
      1. Existing physical condition
         1. Statements describing ailments, pains, and injuries fit the exception
      2. Existing mental state as an end in itself
         1. Statements describing a mental state are admissible
         2. Ex: Intent of a criminal D, mental state of customers who are discouraged, or fear in an extortion victim, etc…
      3. EMS as basis for drawing inference about later conduct by the speaker
         1. Statement proving a person did something he intended to do is admissible
         2. Ex. If the question is whether A went to Chicago on Monday, proof that on Monday, A said “I’m going to Chicago today” is admissible to prove it
      4. Facts about the speaker’s will
         1. Statements by the decedent can explain reference in a will, and allows use of the decedent’s words to prove *previous* state of mind, later conduct, previous conduct, and conduct by others
   3. Requirement: Statements must show *existing* mental or physical states, not past states
      1. I intend to go to Chicago – admissible
      2. Last week I hope to get to Chicago – inadmissible
   4. Mental States – Facts Remembered: *Sheppard v. US* 
      1. Exception does not reach statements used to prove a fact remembered or believed
         1. Statement by victim saying her husband “had poisoned me” should not have been admitted to prove her will to live
         2. Jury could not confine its consideration to this issue, and using statement to prove the *cause* of her mental state (will to live at the time, not kill herself) would have made every hearsay fact admissible under the exception
         3. Any statement based on belief, “I believe A poisoned me” is inadmissible
5. FRE 803(4): Statements Made for Medical Diagnoses
   1. Statements made for both treatment and diagnosis are admissible
      1. Allowing statements of diagnosis allows for statements from doctors who gave no treatment, but can be called to testify
   2. Statement made for treatment or diagnosis must meet 4 requirements
      1. Condition or Symptoms: Medical statements must describe…
         1. Present condition or symptoms, or
         2. The history and cause of present condition or symptoms, or
         3. Past symptoms relating to the present symptoms or condition
      2. Medical Purpose: Statement must be made for the purpose of diagnosis or obtaining treatment
      3. Pertinent: Statement must be pertinent to treatment or diagnosis sought
         1. Excludes statements ascribing fault or blaming others
      4. By, to Whom: Originally envisioned patient-doctor convo, but is broader
         1. Doctors, Patients, Anyone to get you medical care
         2. Can reach statements by parents describing history and symptoms of a child, by good Samaritans who bring an injured person to a hospital, statements to admitting clerks and emergency room personnel, and statements by one doctor to another
6. FRE 803(5): Recorded Recollection
   1. 4 requirements to admit a memorandum or a record written down by the witness…
      1. Insufficient Memory: Exception only applies when the witness cannot remember
         1. Examining lawyer can resort to the exception only if he first tries but fails to refresh the recollection of the witness
         2. Not necessary to show total loss of memory, forgetting a single point should be enough – incomplete memory enough to use the exception
      2. Correctly Reflects Memory: The witnesses’ statement must correctly reflect the memory that the witness once had
         1. Courts usually accept testimony such as, “I remember making sure that the statement was accurate”
      3. Made or Adopted: Witness must have made the statement herself, or adopted a statement prepared by another
         1. No signature requirement, and a writing made by the witness can fit the exception even if it is unsigned
         2. When a writing is prepared by someone other than the witness, and indication of adoption is necessary
         3. Exception also extends to recorded statements
      4. Made While Memory Fresh: Statement must have been made while the matter was fresh in the mind of the witness, but no hard-and-fast time limit
         1. Not necessary that the statement be made contemporaneously with events or within moments of their occurrence
         2. Factors that count are the relative importance of the event in the life of the witness and indications of care in preparing or crafting a statement
   2. Recorded Recollections Not Taken to the Jury Room
      1. Acts as a substitute for live testimony, and the probative force is directly connected to witness’ credibility
      2. Writing may be read to the jury, but it cannot be taken back to deliberation with the jury unless offered by an adverse party
   3. Recorded Recollection v. Refreshing Memory
      1. Recorded recollection refers to prior statements by a testifying witness to be admitted as proof of what they assert
      2. Refreshing memory only allows use of prior statements (by witness or others) jog the witness’s memory in order to *now* to describe what she had forgotten
         1. Not asking the trier of fact to believe that what is on that paper is true, the paper is only used to job the witness’s memory
         2. If witness requires the use of paperwork under FRE 612, adverse party must be able to see those documents as well
7. FRE 803(6): Business Records
   1. Requirements for a hearsay business record to be admissible to prove TMA…
      1. Regular business; Regularly Kept Record – Exception applies only to business records that are regularly kept, not to personal records (checkbook, logs, etc…)
         1. Must be part of an *ongoing enterprise* that follows a *routine*
         2. Records must be made on a repetitive basis
            1. Either daily or weekly or every time an event occurs
         3. Records must be made by people acting in regular course of their work
      2. Source w/ Knowledge: Person who makes the record must have personal knowledge and must be acting in the course of employment
         1. Embraces layered hearsay – information passed along a chain of people and is ultimately recorded in the document offered
         2. Source must be a person who saw or observed what has been recorded
      3. Contemporaneous: When a record reflects an event, the record must be made close to the time of that event
         1. Reports made long afterwards that summarize transactions do not fit
         2. Requirement does not block use of a computer output generated long after data has been originally entered into memory
      4. Foundation Testimony or Certificate: Use of this exception require testimony at trial by someone who knows how the record was prepared, or a certificate (affidavit) by such a person
         1. Witness is ok if it has circumstantial knowledge and can describe the routines and steps involved in preparing similar records
         2. Even if he knows nothing about the record being offered and even if he was not employed when the record was made
   2. Records that satisfy the objective requirements may still be excluded if untrustworthy
      1. Seek to authenticate these records; FRE 901, 902
8. FRE 803(8): Public Records
   1. Admissibility of public records as evidence against D’s in *criminal* cases is restricted only to the following…
      1. Activities of Office or Agency: Public records may be used to prove almost anything public agencies do
         1. *See* FRE 803(8)(A) – includes serving papers, issuing tickets, disbursing checks, erecting signs, hiring and firing, buying and selling, etc…
      2. Matters Observed: Public records may be used to prove things observed by the office or agency that they were required to report on
         1. *See* FRE 803(8)(B) – requires the source of information to be someone within the public office or agency, information supplied by lay citizens are not admissible here
         2. *Use Restriction* – Public records cannot be used in criminal cases to prove matters observed by police officers and other law enforcement personnel
            1. Blocks the government from offering such records against accused
      3. Investigative Findings: Public records may be used to prove the factual findings resulting from an investigation authorized by the law
         1. *See* 803(8)(C) – “factual findings” does not include evaluations or conclusory statements
         2. Investigative findings can rely on information gleaned from sources outside government
            1. Only official findings are admitted, not simply findings or conclusions of outsiders who testify or give info to the gov
         3. *Use Restriction* – Cannot use public reports containing investigative findings against the D in a criminal trial (unless used against the gov)
   2. The *use restrictions* (above) apply only to criminal cases, not civil
      1. In a civil case, public records can prove the full range of points described above

**IX. Hearsay Exceptions: When Declarant is Unavailable**

1. **FRE 804(a): When a witness is considered “unavailable”** 
   1. Focuses on the unavailability of *testimony* for trial by the original declarant on the “subject matter” of their prior statement
      1. Even if they bring the declarant to court and he testifies on other points, if the declarant’s testimony cannot address his original statement, technically unavailable
   2. Being unavailable does not by itself make the declarant’s prior hearsay statement admissible as proof of what it asserts
      1. If the declarant fits one of the definitions of “unavailable,” and original statement meets an exception under section (b), the statement is admissible
      2. Must also show that a deposition could not be taken – except for former testimony
   3. FRE 804(a)(1): Unavailable by Privilege
      1. If declarant takes the stand and successfully claims a privilege blocking questions on the subject matter of his prior statement, witness is unavailable
         1. Attorney-Client Relationship
         2. Right against self-incrimination
         3. Spousal Privilege
      2. Declarant must be actually called to the stand, with hearing and ruling on privilege
      3. Advice from counsel that the witness would claim a privilege is insufficient
   4. FRE 804(a)(2): Unavailable by Refusal to Testify
      1. Simple refusal to testify makes a declarant unavailable
      2. Proponent is usually expected to go through the motions – declarant called, testimony sought, witness refuses
   5. FRE 804(a)(3): Unavailable by Lack of Memory
      1. When a declarant testifies that he lacks memory on the subject matter of a prior statement, witness is unavailable with respect to the subject matter
      2. If the witness only remember making a statement, still unavailable as to the subject
         1. Witness is unavailable if he does not remember the facts
   6. FRE 804(a)(4): Unavailable by Death or Physical/Mental Illness
      1. Death obviously makes a witness available
      2. Physical/mental illness makes a declarant unavailable if established by the side attempting to use the original statement
   7. FRE 804(a)(5): Unavailable by Unavoidable Absence
      1. If the proponent tries unsuccessfully to find and serve the declarant, or if the declarant is beyond reach of a subpoena, considered unavailable
   8. FRE 804: Unavailable by Procurement or Wrongdoing – link w/ the Rub Out Rule
      1. When a declarant is unavailable bc of misconduct by one of the parties, remedial measures taken so that party cannot take advantage; *See* 804(b)(6)
      2. If the proponent kills a declarant, or threatens or bribes such a person and persuades him to refuses to testify, proponent cannot invoke the rub out rule exception
2. **FRE 804(b): Hearsay Exceptions** 
   1. We covered four situations where the an unavailable declarant’s original statement is admissible hearsay as proof of the matter it asserts
      1. Former Testimony; Dying Declarations; Declaration Against Interest; Rub Out
3. FRE 804(b)(1): Former Testimony
   1. Former testimony given in a trial, hearing, or deposition, in which the declarant was sworn and examined, is admissible if it meets the requirements…
      1. Unavailable: Exception applies only if the declarant is unavailable at trial
         1. Do not need to show the declarant’s deposition could not be taken
      2. Hearing or Proceeding: Prior trials of the same or another case satisfy the “hearing or proceeding” requirement
         1. Preliminary hearings, grand jury proceedings, and almost any trial or pre-trial hearing in which live testimony is taken meets *this* requirement
      3. Opportunity and Motive for Prior Cross: Party *against whom* the former testimony is offered had the opportunity and similar motive in the prior proceeding to cross-examine the declarant
         1. Similar motive means the motive to cross-examine the declarant now is similar to the motive to cross examine in the prior proceeding
            1. Exception to this is found under the rub out rule
            2. Grand jury does not fit exception bc no opportunity for cross-x
4. FRE 804(b)(2): Dying Declarations
   1. Statements by a person who knows he is dying and describes the cause or circumstances of his death are admissible
      1. At CL, exception was designed to only admit the last words of a victim in the homicide trial of his alleged killer
   2. Under 804(b)(2) the exception applies in both, homicide prosecutions and civil cases
      1. Technically, the declarant does not have to be dead, since other forms of unavailability suffice
      2. It is theoretically possible for one to believe he is dying and to make a statement describing the situation – their dying declaration, yet recover and be unavailable at trial for some entirely other reason
   3. Dying declarations are only admissible if these requirements are met…
      1. Unavailability: Declarant is unavailable for trial
         1. *See* FRE 804(a) for when a witness is unavailable
      2. Settled Expectation: Speaker must believe death is imminent and unavoidable
         1. Not enough that the declarant knows he has a terminal illness, nor is it enough that he knows he is seriously at risk
         2. It suffices if the speaker thinks death is moments away (crime victim) or thinks death is certain to come in a few hours or days (terminally ill)
         3. Proof of settled expectation my be made by using statements
            1. Made to the dying person – you’re gonna die, tell us now
            2. Descriptions of his condition – bleeding, labored breath
            3. Statements by the declarant himself – I’m dying, take care of wife
      3. Concerning Cause or Circumstances: Suffices that the statement “concern” the cause or circumstances – “Bob snuck up on me, and we were fighting”
         1. Need not describe physical cause of death or injury
         2. These statements usually identify the assailant in some way
5. FRE 804(b)(3): Declaration Against Interest
   1. This rule makes statements against penal interest admissible, under the rationale that one does not usually concede a point that causes harm or loss unless it is true
      1. This rule is distinguished from the admissions of a party opponent
      2. Usually against-interest exception is used for statements by nonparties, but the admissions doctrine only reaches statements by parties (or their agents)
   2. Unavailable: Declarant must be unavailable for trial
      1. *See* FRE 804(a) – usually satisfied when the declarant claims privilege against self-incrimination, or is dead and/or cannot be brought to court
   3. Statement Against Interest: Must be against declarant’s criminal or financial interest, and the declarant must *understand* that it is **against interest** **when it was originally said**
      1. “Against interest” depends on context, statement may be against interest even though facially neutral, or context may show that what seems on its face to be against interest really is not (subjective standard)
         1. Ex. I was in N.O. for all of last week – on the face it is neutral, but against interest if trial is for a murder that took place in N.O. last week
            1. If you didn’t know about the murder, then the statement was not made against interest at the time – Inadmissible
         2. Ex. I robbed a bank in Detroit last week – on the face it is against interest, but it exonerates him for the murder trial and is not admissible
      2. Specifics integral to the substance of the statements against interest are the only things that are admissible
         1. Ex. I killed Joe on Monday and my mom visited after
         2. Mom visited after is not integral and not admissible
      3. So far contrary to declarant’s financial or criminal interests that it must be true
   4. *Special case of Criminal Defendants*: For statements against penal interests said by defendants in criminal cases, there must be corroborating circumstances
6. **FRE 804(b)(6): Rub Out Rule – Forfeiture Exception** 
   1. Admits statements by a person who has become unavailable to testify because of…
      1. Wrongdoing committed by the party against whom the statement is offered; **and**
         1. Done by the party itself, or by order of the party
      2. Wrongdoing was intended to, and did make, the speaker unavailable
         1. Activity ranging from frightening to murder fits “wrongdoing”
   2. Procedure: Typical conduct that triggers the exception is itself a crime, and normally the exception is invoked against the D in a criminal case
      1. The question whether the defendant committed an act that made the declarant unavailable, and that now justifies admitting the declarant’s statement is decided by the judge under FRE 104(a), not the jury – preponderance standard
   3. Reach of the Exception – Statements: Allows for statements of the most ordinary sort, and is not limited to statements given in testimony before a grand jury or a preliminary hearing
      1. Also applies to statements given directly to police during a criminal investigation, and statements made to friends or to co-offenders in a criminal venture
   4. Reach of the Exception – Intent: The exception applies only if D “intended” to make the declarant unavailable
      1. Decided by judicial discretion under 104(a)
   5. Reach of the Exception – Conduct: Admits statements where the party against whom they are offered did *far less* than kill the declarant or order his death
      1. Merely frightening the declarant into refusing to testify can be enough
   6. Ex. Rub Out Rule permits the prosecutor to introduce against a criminal defendant grand jury or preliminary hearing testimony by way a prosecution witness who has been murdered by, or by order of the defendant, where it is clear the D was trying to prevent the speaker from testifying in similar way at trial
7. **FRE 807: Residual Hearsay – The Catchall Exception**
   1. Allows courts to admit trustworthy hearsay that does not fit any of the categorical exceptions discussed above
      1. Hallmarks of the catchall are trustworthiness and a showing that the hearsay being offered is better than other available proof – for exceptional cases
   2. Must meet five requirements to invoke the catchall exception…
      1. Trustworthiness: Requires circumstantial guarantees of trustworthiness that are equivalent to those of the categorical exceptions
         1. Look to factors like spontaneity, careful routine, reliance, and against-interest elements – also appraise the hearsay risks in the setting that the statement was being offered
         2. *ID. v. Wright*: SCOTUS disapproves on the corroboration factor in the seeing of hearsay offered against the accused – corroborative evidence does not count in satisfying the confrontation clause
      2. More Probative: Hearsay offered under the catchall must be more probative than anything else available
         1. May force the proponent to call the declarant if she is available (in preference to offering her statement) and sometimes simply to resort to other kinds of evidence
      3. Material Fact: To fit the catchall, hearsay must bear on a material fact
         1. Means only that the hearsay must be relevant under FRE 401-402
      4. Interests of Justice: Hearsay may be admitted only if it serves interests of justice
         1. Echoes content of FRE 102 – Interests of justice are served when hearsay seems reliable, and those interest are not served when the hearsay does not seem reliable
      5. Notice: In advance of the trial or hearing, the proponent must make known to adverse parties the particulars of a statement offered under the catchall
         1. Name, address, etc…
   3. Most common use of the catchall – child victim statements
      1. Most common use of the catchall is child victim hearsay
         1. Burden is on the proponent to show trustworthiness
         2. Often these statements are admitted
      2. Favorable factors for trustworthiness include
         1. Spontaneity, age-appropriate language, intelligence, repetition, no motive to lie, and the training/experience of the interviewer (social worker)
      3. Presence of motivational factors sometimes indicate exclusion of child victim statements, as well as coaching and use of terms not expected in a child

**X. Confrontation**

1. **Sixth Amendment: Confrontation Clause (Criminal Trials Only)**
   1. Guarantees a *criminal* defendant the right to be confronted with the witnesses against him
      1. Right to cross-examine prosecution witnesses
         1. Right presupposes the presence of the defendant at his own trial, and the presence of the prosecution witness
         2. “Witness against” interpreted to include hearsay declarants
      2. If a declarant’s hearsay statement is testimonial, and the declarant is unavailable at trial for cross-examination, even if the hearsay exception is met, the statement is inadmissible under the CC
2. Right to Exclude Testimonial Hearsay Under the CC
   1. Testimonial Hearsay: CC entitles defendants to exclude *testimonial* hearsay
      1. Under the CC, criminal defendants entitled to exclude, *at least*, statements given by eyewitnesses to police investigating crimes or ex parte testimony at a pre-hearing
         1. Essentially, if the declarant should have reasonably realized, at the time they made their statement, that it could be used at trial, then it is a testimonial statement
         2. *Crawford v. Washington* established the modern standards of the CC and overruled past standards set in *Ohio v. Roberts*
            1. *Roberts* stated that if a witness was unavailable, but any hearsay exception was satisfied, no confrontation problem
   2. *Crawford* Doctrine on Confrontation
      1. If the declarant testifies at trial and can be cross examined on what he told police, CC no longer blocks the statement
      2. If the declarant has testified in a previous proceeding or trial, and was then actually cross examined by the D, CC no longer blocks
      3. Some other statements may be admissible in face of the CC if they fit exceptions to hearsay law (esp. witness unavailability exceptions)
         1. Business records, casual statements to a friend, statements with a co-conspirator are non-testimonial (No CC problem)
         2. Grand jury, former testimony are testimonial
   3. Non-testimonial Hearsay: CC does not apply to non-testimonial hearsay
      1. CC entitles the accused to confront anyone who is a witness against him, and that expression only covers those who make testimonial statements
      2. Non-testimonial hearsay cannot be excluded under the CC, but it remains excluded unless it fits a hearsay exception
         1. Will still be excluded if it meets a hearsay exception is the declarant is not available for cross-x at trial
   4. On-Going Emergency: *See Davis v. Washington*
      1. Statements made for purposes of dealing with an ongoing emergency are not testimonial - reduced the reach of *Crawford* doctrine
3. Example of Testimonial v. Non-Testimonial
   1. Ex. Victim’s 911 call during an attack is during an on-going emergency and is non-testimonial, and not blocked by the CC
      1. Would probably be viewed as an excited utterance exception if it reported an on-going startling, or stressful event
      2. Thus, neither the CC, nor the hearsay doctrine would block this statement against the criminal defendant
   2. Ex. The victim’s statements to the police after they respond to the 911 call and settle down the situation is testimonial, as there is no longer an ongoing emergency
      1. When sole purpose of the conversation, and subsequent statements is to investigate a possible crime, statements are testimonial
         1. *Hammon* – recounting events to police is testimonial
      2. Unless the victim is subject to cross-x on these testimonial statements, the statement is inadmissible
      3. Even if the statement meets another hearsay exception, like excited utterance, bc it is testimonial, and no cross, it is still inadmissible bc doing otherwise would violate defendant’s rights under the CC
4. Limitations on the CC
   1. If the defendant is show to have caused the unavailability of the declarant in order to silence the witness, the D forfeits his right to exclude his prior statements on grounds of either hearsay or confrontation
      1. *See* 804(b)(6) – same principle carries over from the rule
   2. *Crawford* indicates approval of co-conspirator statements and business records as non-testimonial hearsay exceptions to be admitted against the accused
      1. Dying declarations might be admissible as well as non-testimonial
      2. *Roberts* indicates that exceptions for present sense impressions, excited utterances, state-of-mind statements, and medical statements are admissible
         1. Unless they are said to a police officer, then the CC applies, and the statements are inadmissible if declarant does not testify
   3. Non-hearsay uses of out-of-court statements do not violate the CC, as *Crawford* suggests

**XI. Competence**

1. **FRE 601: Competency of a Witness** 
   1. Under the rule, everyone is competent to testify, except persons specifically made incompetent by the rules
      1. Judges and Jurors
         1. Judges cannot testify in cases in which they reside
         2. FRE 606(a) – Juror may not testify in the trials in which they sit
      2. Mentally disabled; Witness suffering from serious mental incapacity may still testify under FRE 601, provided that they have relevant evidence to offer
         1. Courts can authorize a voir dire exam if serious questions of capacity arise, and have authority to refuse testimony from a witness who has very serious mental problems or refuses to be examined
      3. Drug/Alcohol use: Even if a witness was under the influence at the time of the event (or is an addict), it still does not render him incompetent
         1. To the extent the substance use affected perception or memory at the time of the event may be raised by way of impeachment
         2. If under the influence at time of testimony, delay until recovery
      4. Children: No special restrictions or qualifications on child witnesses
         1. Many courts continue tradition of voir dire exams on children to test their understanding of duty to tell truth, or ability to deal with questioning
      5. Lawyers: Ethics codes bars lawyers from testifying in cases that they are trying
         1. Technically not bared by FRE though
2. **FRE 606(b): Jurors – Impeaching Verdicts** 
   1. In addition from being barred from testifying in cases where they sit, jurors are not allowed, after rebutting a verdict, to give evidence impeaching that verdict
      1. Testimony or affidavits by jurors describing any matter or statement during jury deliberation are generally excluded
      2. This exclusionary principle covers basically everything that a juror might say after a verdict that’d be relevant in showing that it is somehow improper
         1. Effect of anything on the mind of any juror
         2. Mental processes of any juror
   2. Three exceptions to Exclusionary principle that result in admitting proof in some cases…
      1. Extraneous Information: Use of juror testimony or affidavits is allowed to prove that the jury was provided extraneous prejudicial information
         1. Often in the form of media reports about the trial
         2. Acts by jurors going on their own to conduct outside investigation, visiting the scene of the crime, or experimenting w/ evidence in the jury room also qualifies as extraneous prejudicial info that can be proved by affidavit
      2. External Influence: Use of juror testimony or affidavits are allowed to prove any outside influence of the jurors
         1. Includes bribes or threats to jurors themselves, or their families
         2. Giving yourself a drink during trial is not an external influence, being drugged by someone else during trial is an external influence
      3. Error on Verdict Form: Use of juror testimony or affidavits is allowed to prove that a mistake was made in entering the verdict onto the verdict form
         1. Ex. Omitting a zero, if the form said $10,000 and the intent was to say $100,000 – juror testimony or affidavits would be admissible to prove this
   3. Limits to the Exceptions
      1. These exceptions cover only time *during the course of deliberations*, so pre-deliberate or post-deliberative conduct is not covered
         1. Jurors may testify to points raised during deliberation that indicate one or another juror lied or provided misinformation during voir dire
         2. Jurors may testify that an error was made in transmitting or communicating the intended verdict to the court
         3. Does not block jurors from communicating with judges during deliberations, and judges may address problems then
   4. *Tanner v. United States* and FRE 606(b)
      1. This decision held that FRE 606(b) blocks testimony by jurors describing the use of drugs and alcohol during trial
         1. Not an external influence if the jurors decided to drink themselves, exception is not met
         2. With no exception, court declines an evidentiary hearing into juror misconduct when those issues are raised after trial, and verdict issued
      2. Conversely, *see Powell*
         1. Anti-group animus so strong that it engages in blatant discrimination
         2. Open biases during deliberation invalidate the jury verdict

**XII. Privilege**

1. **FRE 501: Privilege is entirely CL doctrine** 
   1. Congress gave judges unfettered control to determine privilege through common law
   2. State privileges are all codified in statutes
2. Attorney Client Privilege
   1. Privilege extends only to legal advice
      1. Privilege exists only when your attorney is consulting you as an attorney
         1. If your BFF is your attorney, conversations when he is acting as your friend are not covered by privilege
      2. Scope is focused on necessary disclosures needed for informed legal advice
   2. Attorneys must maintain all confidences, even for former clients
      1. If a third party hears it, no longer confidential
      2. Subject to the crime-fraud exception – if telling your attorney your plans to commit a crime/fraud that is not subject to protection under privilege
3. Spousal Testimony Privilege
   1. Federal courts recognize a privilege covering testimony by the spouse of the defendant, when offered against him in a *criminal* case
      1. Requires witness and the defendant be legally married when testimony is sought
   2. **Witness-spouse holds the privilege**, the defendant-spouse does not hold this right
      1. Witness-spouse can refuse to testify, or decide to waive the privilege and testify against the defendant-spouse; *See Trammel v. US*
      2. Prosecutors who have evidence against both spouses involved in a crime may threaten charges against one to leverage them to testify against the other spouse
      3. Bc the defendant-spouse does not hold the privilege, defendant-spouse cannot prevent the witness-spouse from testifying
   3. When privilege is invoked, this spousal privilege covers all testimony by the spouse
      1. Includes testimony relating observations and matters occurring before the marriage
      2. Covers statements only, not facts – cannot just testify generally about other spouse
   4. Privilege does not apply where one spouse is charged with a crime or tort against the person or property of the other spouse, or a minor child of either spouse
4. Martial Confidential Information Privilege
   1. Federal courts recognize a privilege for marital confidence that covers private communications between spouses during marriage, applies to *criminal* and *civil* cases
      1. This privilege applies only to partners in a legal marriage
   2. Both spouses hold the privilege
      1. Each spouse can disclose and can block the other spouse from disclosing any confidential communication that occurred between them
   3. Privilege covers communications, not observed conduct (except conduct intended to be communicative)
      1. Only covers communications that are confidential and made *during* marriage, not before or after
      2. For confidential communications made during the marriage, privilege continues for all time, even if the marriage ends in divorce or death
   4. Privilege does not apply where one spouse is charged with a crime or tort against the person or property of the other spouse, or a minor child of either spouse

**XIII: Lay Opinion Testimony**

1. **FRE 701: Opinion Testimony by Lay Witnesses** 
   1. Permits lay opinion testimony if based on personal perception & helpful to the trier of fact
      1. Lay witnesses may give opinions on a wide range of standard points, even though such opinions sometimes involve characterizing, estimating, or making judgments
         1. Ex. Speed, distances, size, physical descriptions, emotional states, etc…
      2. Should avoid conclusions to the extent possible, lay witness should provide facts that lead to conclusions, not a conclusion itself
         1. Ex. He was “staggering, slurring speech, and said he had been drinking,” **not** that “He was drunk”
   2. Lay opinion testimony cannot be based on scientific, technical or specialized knowledge that falls specifically for experts under FRE 702
      1. Cannot use hearsay either, only expert witnesses can
2. FRE 701(a): Personal Perception – Requirement 1/2
   1. Requires that opinion by lay witnesses be rationally based on the perception of the witness
      1. Lay opinions that are mere speculation or conjecture are excluded
   2. 100% certainty is not required, and a witness may qualify his testimony
      1. Lay witness can preface their opinions by saying he thinks or believes a fact to be true – provided the opinion is based on 1st hand knowledge
   3. Jury makes the ultimate decision whether the witness actually perceived the acts, events, or conditions to which his opinion relates
      1. Judge has a screening role, excluding opinion testimony where the facts indicate a reasonable jury could not find that the witness had requisite first hand knowledge
      2. The question of personal knowledge is classified as a matter of “conditional relevancy” under 104(b), not a matter of admissibility under 104(a)
3. FRE 701(b): Helpfulness – Requirement 2/2
   1. Lay witness may give opinion testimony only if it helps clarify the understanding of his testimony or help determine the facts at issue
      1. Usually must give at least a minimal explanation for his view, rather than merely stating who is right (or wrong) and what was (un)justified
      2. If the witness had related the necessary particulars, usually be allowed to add a conclusion, overall impression
   2. Opinion testimony is excludable if it merely tells jurors what they already know or how they should decide the case

**XIV: Expert Testimony**

1. **FRE 702: Testimony by Experts** 
   1. Unlike lay witnesses, expert witnesses may give opinions about matters they did not personally perceive
      1. Their knowledge, skill, and experience can qualify them to express an opinion despite lack of 1st hand knowledge about the matter or event
      2. Expert opinions (like lay opinions) must *assist* the trier of fact or are inadmissible
   2. No uniform or rigid credentials required to qualify an expert as a witness
      1. Expert witness may rest on knowledge, skill, experience, training, or education
         1. Expert w/o expertise fails for 401 relevance
         2. Can be a non-academic; police officers, weed experts, etc…
      2. Before a witness is allowed to testify as an expert, the calling party must lay a foundation showing such qualifications
      3. Deciding whether the witness qualifies as an expert is up to the judge under FRE 104(a), but what weight to give the testimony is up to the jury
   3. Use of expert testimony requires giving other side notice
2. **FRE 703: Three Permissible Bases for Adequate Expert Opinion Testimony** 
   1. Facts perceived by expert: Expert opinion testimony may rest on personal perception
      1. If the expert has examined the relevant facts or data firsthand, the expert may rely on what she learns in this way
      2. Expert testimony does not have to rest on 1st hand knowledge (unlike lay opinion)
   2. Facts made known to expert at trial: Expert opinion may rest on facts or data made known to the witness at the trial or hearing, accomplished by…
      1. Having the expert listening to testimony by other witnesses; or
      2. Asking the expert hypothetical questions to recite the necessary facts that must be supported by already admitted evidence for the opinion being sought
   3. Facts reasonably relied on: Expert opinion may rest on outside information obtained by a variety of sources (experts *can* use hearsay)
      1. This information must be of a type reasonably relied on by experts in the field, in forming the kinds of opinions the expert is to testify on
         1. Treatises, 3rd party reports, test, bystanders, investigation, etc…
      2. Not necessary that such information already be provided in the case by evidence
         1. Such info is usually hearsay and might not be admissible
      3. When the expert does rely on inadmissible hearsay as the basis for an opinion, this rule bars the proponent from disclosing such hearsay to the jury unless…
         1. The probative value in helping the jury evaluate the expert’s opinion *substantially outweighs* their prejudicial effect
         2. Under FRE 705, the adversary may question the expert about this admitted hearsay on cross-examination
3. **FRE 704: Expert Opinion on the Ultimate Issue at Trial** 
   1. FRE 704(a): Allows expert testimony on the ultimate issue
      1. Opinion must still meet helpfulness (assist) requirement of FRE 702
      2. Opinions telling the jury expressly what result to reach remain excludable
         1. Ex. Opinion that “the accident was the D’s fault” offers little or no assistance to jury, bc it does not provide insight to help them reach a conclusion – excludable expert testimony
      3. Testimony expressing a conclusion on an ultimate issue is excludable if based on inadequately explored legal criteria
         1. Ex. Witness cannot testify that the decedent “had the capacity to make a will” – unclear whether witness applying proper standard – excludable
         2. Ex. Testifying that testator knew “the nature and extent of his property and natural object of his bounty” – more specific – admissible
   2. FRE 704(b): Prohibits experts from testifying about mental state
      1. Expert witnesses cannot testify as to whether a criminal defendant had the requisite mental state constituting an element of the crime charged, or a defense thereto
4. **FRE 705: Disclosure of Facts or Data Underlying Expert Opinion** 
   1. Allows an expert to express an opinion and give the underlying reasons without first testifying to the supporting facts or data
      1. Expert can rely on hearsay for conclusions, but cannot repeat the hearsay
         1. Ex. “I think he is dangerous” is allowed
      2. Test under 403 – if probative values substantially outweighs unfair prejudice, the hearsay based conclusion can come in
         1. Expert may be required to disclose underlying facts on cross-x
   2. Reduces use of hypothetical questions which could be confusing to the trier of fact

**XV: Real Evidence – Authentication**

1. **FRE 901: Required to Authenticate or Identify** 
   1. Before an exhibit of any sort (document, photo, gun, etc…) is introduced, the proponent must meet the **authentication requirement** and “lay the foundation” by…
      1. Offering enough evidence to support a jury finding that the physical evidence is what the proponent claims it is
      2. Usually involves offering testimony of someone w/ knowledge or other evidence
   2. Authentication requirement applies to basically all forms of non-testimonial evidence
      1. Judge decides whether enough evidence has been offered to support a finding that the exhibit is what its proponent claims
         1. If the sufficient standard is met, the exhibit is admitted and goes to the jury, who has the final say on its authenticity
      2. This is a matter of conditional relevancy under FRE 104(b)
         1. If the jury finds it authentic, the jury decides what weight to give it
         2. If the jury finds it not authentic, jury gives it no weight at all
   3. Look to Best Evidence Rule 1002 if authenticating a writing, recording, or photo
      1. Any other evidence that is authenticated does not have to meet BER
2. **FRE 901(b): Common Methods of Authenticating Real Evidence** (non-testimonial)
   1. Testimony of person with knowledge – FRE 901(b)(1)
      1. Most common; witness w/ knowledge of the exhibit identifies it as what the proponent claims it to be
         1. In certain cases may be required to explain how the witness is able to identify it (think ID’ing a murder weapon – gun, knife)
      2. Photographs – Authenticated by a person familiar with the scene depicting that it is a fair and accurate representation; witness need not have taken the photo itself
   2. Lay Opinion on Handwriting – FRE 901(b)(2)
      1. Signature or document written by human hand can be authenticated by the testimony of someone familiar with the handwriting of the person in question
      2. Witness need not have observed the signing or preparation of the document
   3. Comparison by trier or expert witness – FRE 901(b)(3)
      1. Handwriting and other documents can be authenticated by introducing specimens from the same source that have been authenticated, or by expert testimony that the exemplars match the document being offered
      2. Alternatively, the trier or fact may make such comparisons and conclusions on its own if there is enough similarity to support that a finding
   4. Distinctive Characteristics – FRE 901(b)(4)
      1. Evidence may be authenticated by its distinctive characteristics – appearance, contents, internal patterns – in conjunction w/ other circumstances
         1. Ex. If a location had a nickname, unusual spelling, etc…
      2. Ex. Signature is not enough to authenticate the document as having been written by that person, unless shown that the sig is that of the person in question
   5. Recordings – FRE 901(b)(5)
      1. Recording of a conversation may be authenticated by showing how it was made and identifying the participants
         1. Involves (1) showing what process was followed, and why it is reliable; and (2) showing who participated in the conversation
      2. Witness can identify a voice heard on a tape recording as being that of a certain person on the basis of familiarity w/ that person’s voice
   6. Telephone Conversations – FRE 901(b)(6)
      1. Party to a phone convo can identify the person on the other end of the call
         1. On the basis of the person in question’s voice; or
         2. If the identifier is the person who place the call, by testifying to the number he dialed and showing it is the numbers assigned to the person in question
      2. In the case of business calls, the convo can be authenticated by showing
         1. The number dialed was the one assigned to the business; and
         2. The call related to business reasonably transacted over the telephone
   7. Public Records or Reports – FRE 901(b)(7)
      1. Several ways to authenticate public records, including
         1. Identification by a person with knowledge
         2. Handwriting testimony
         3. Use of certified copies
      2. Public record may also be authenticated by showing it’s a certified copy
         1. It was authorized by law to be recorded and filed;
         2. It was recorded or filed in a public office; and
         3. It is kept in the office where such records are normally kept
   8. Ancient Documents – FRE 901(b)(8)
      1. Are in such condition as to create no suspicion on their authenticity
      2. In place where they would be expected to be if authentic; and
      3. Been in existence 20 years or more – written date is not enough to establish age
   9. Computer Process or System – FRE 901(b)(9)
      1. Authentication of computer output requires description of the process and a showing that it produces an accurate result
      2. If computer output embody out-of-court statements of person, hearsay doctrine must be satisfied – look for business record or public record exceptions

**XVI: Best Evidence Rule**

1. **FRE 1001: Common Definitions for the BER**
   1. FRE 1001(1): Defining “Writings and Recordings”
      1. Doctrine applies to all types of writings
         1. Letters, memos, notes, books, computer output, etc…
      2. Doctrine reaches letters, words, numbers, or the equivalent captured by magnetic impulse, or mechanical/electronic recording
   2. FRE 1001(2): Defining “Photograph”
      1. Include still photographs, medical imaging of (x-rays), videotapes, movies
   3. FRE 1001(3): Defining “Original”
      1. Original refers to the writing recording, or photo at issue in the case
         1. What constitutes an original depends on the nature of the claim or defense, surrounding circumstances, party intention, etc…
      2. There can be multiple originals, bc the definition includes any counterpart intended to have the same effect (Ex. Multiple executed copies of a contract)
   4. FRE 1001(4): Defining “Duplicate”
      1. Duplicate is a photocopy or other machine-made copy
      2. Includes virtually anything made by a modern office copier or generated commercially by similar machines operated at copy centers
2. **FRE 1002: Requirement of the Original** – General Rule for Best Evidence
   1. Party seeking to prove the content of a *writing*, *recording*, or *photograph* must offer the *original* unless it is unavailable or an exception applies
      1. Key concept is *proving content*
         1. When substantive law requires proof of content (libel case); or
         2. When parties are not forced to, but still choose to prove content (use of medical records to prove costs/diagnosis)
      2. BER does not apply when trying to prove the *absence* of content
         1. Ex. When a party shows that a particular transaction did not occur by testifying that the records that would likely reflect the act do not exist
      3. BER seeks to exclude secondary evidence in preference for writings themselves
   2. Matters incidentally recorded do not invoke the BER
      1. The fact that a party tries to prove a fact that is also reflected, described, or depicted in a writing, recording, or photo does not bring in the BER automatically
         1. Parties can choose to prove the facts without using the writing, recording, or photo, that is all right
         2. Does not matter if the physical evidence is “better” in the sense that it covers more detail compared to witness memory/testimony
      2. Ex. Participant in a conversation may testify to the content of the convo, even if it was recorded as well
         1. As long as the witness does not mention the existence of the physical evidence, then BER is not invoked, and the original w/r/p is not required
            1. “She signed an IOU” – requires you provide the original, however, if never mentions the IOU, it does not have to be produced
         2. If the witness *does* mention the w/r/p during their testimony, proponent forced to offer the original, or else testimony is excluded
      3. Ex. Testimony is “Aviva owes me $400, but this receipt indicates I only received $200” – if the other $200 receipt is not mentioned, no BER
         1. If witness mentions there is another $200 receipt, then BER triggered
3. **FRE 1003: Admissibility of Duplicates**
   1. Duplicates are admissible to the same extent as originals, unless the other party
      1. Questions authenticity or existence of the original; or
      2. It is unfair to admit the duplicate instead of the original
   2. Genuine question is raised as to the authenticity or existence of the original
      1. If a writing is offered as a duplicate and the other side offers evidence that the source of the copy is not the original – genuine question of authenticity
         1. If two differing documents are available and both are offered, one as the original, and the other as a duplicate, both should be admitted on suitable foundation – no violation if both forms of proof are offered
      2. If a writing ifs offered as a duplicate and the opponent offers evidence there never was an original – genuine question of authenticity
         1. Production of the original may be required, but if it is unavailable through no fault of the party offering the duplicate, it may be admitted as other evidence of content under FRE 1004
   3. Circumstances make it unfair to admit the duplicate instead of the original
      1. Exclusion is required if only part of the original is reproduced in the duplicate, and the remainder is needed for cross-x
      2. Duplicate may also be excluded if it has gaps or omissions, or if the party offering the duplicate has lost or destroyed the original in bad faith, or actually has and can offer the original
   4. Note that the party who offers the w/r/p must *authenticate* what is offered, and this must be done whether the party is offering the original or a duplicate
      1. The offering party must show that what he is placing in evidence is really what he claims that it is, whether original or duplicate; *See* FRE 901
4. **FRE 1004: Production of Original Evidence Excused** 
   1. When the original w/r/p is unavailable, party is excused from providing the original
      1. Secondary evidence is then admissible to prove content of the original w/r/p
   2. Reasons why the original w/r/p cannot be produced…
      1. FRE 1004(1): Lost or destroyed (unless done in bad faith);
      2. FRE 1004(2): Not obtainable
      3. FRE 1004(3): In possession of the opponent; or
      4. FRE 1004(4): Collateral (not closely related to critical issues in the case)
   3. If production is excused bc the original is validly unavailable, *any* form of secondary evidence is admissible to prove content
      1. Not required to bring in duplicates however, can just talk about the document
5. **FRE 1007: Testimony or Written Admission of Party** 
   1. The content of writings, recordings, or photographs may be established by the adverse party’s written or testimonial admission
   2. The adverse party’s admission would then relieve the proponent of the duty to offer originals or prove that the originals were unavailable