1) Incorporation
   a) Privilege: if the case is based on state law, state rules apply
2) Pleadings -- generally not evidence, except if there are admissions
   a) Opening statements not evidence
3) Burdens of proof
   a) If the party with the burden does nothing, it loses – even if the other side does nothing
      i) Have to show all evidence
   b) Civil cases the defendant might have a burden on proof on some defenses
   c) Criminal cases
      i) Lesser criminal – some points may need to be shown by clear and convincing
4) In considering the admissibility: evidence to jury box
   a) Evidence
      i) Proponent is defined as Offeror of evidence
         (1) One of the evidence has placed it there
      ii) Fact-finder
      iii) Judge (passive) – usually like an umpire
   b) Objections: Hear Pa(pp) Brown
      i) **Hear**say: really only arises when the probative value of the declarant depends on their credibility
         (1) Rule: hearsay inadmissible rule 802[1] 801c[2] Hearsay is defined as statement other than one made by the declarant while testifying at the trial or hearing offered in evidence for the truth of the matter asserted
            (a) Policy: quoted witness not subject to cross examination (weight and meaning might be altered by cross-examination)
               (i) Perception
               (ii) Sincerity

[1] Rule 802. Hearsay Rule: Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

[2] FRE 801: **Definitions**

Word	*Definition of hearsay*
Hearsay	"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.
Statement	A "statement" is • an oral or written assertion or • Nonverbal conduct of person, if it is intended by the person as an assertion.
Declarant	A "declarant" is a person who makes a statement.

Word	*Negative Definition of hearsay*
Prior statement by witness	The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, (B) or in a deposition, consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person
Admission by party-opponent	The statement is offered against a party and is -- note that the contents of the statement are not dispositive of the relationship (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. Note on use of content to establish relationsho: The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision ©the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

(iii) Credibility: Jury can't judge demeanor. Difficult areas are where there are implication problems Types of out of court statements or conduct that depend on credibility (five categories)

1. explicit verbal assertion that asserts exactly what it is being offered to prove: hearsay under (Common law and FRE)
2. non-verbal conduct intended as an assertion
   a. when a person chooses to assert something to communicate by a sign or a gesture it is hearsay under FRE and COMMON LAW
   b. for example
      i. raising hand to show incomprehension
      ii. sign language to show assertion
3. Non-verbal conduct (not intended as assertion) to show external fact, but not to communicate (no direct statements, but they are based on that they wouldn't make statement if the matter asserted wasn't true). Sea Captain Hypo: Evidence that a sea captain inspected a boat and than took his family sailing, would have to make statement that *would depend on credibility*
   a. common law; yes (Wright v. Tatem)
   b. FRE: **non-verbal conduct not intended as an assertion is not hearsay**, because if the sea captain inspects a boat and goes sailing he really believes that it is accurate, and the danger that he will be acting as if he is sailing, the **actions speak louder than words**
4. Non-assertive verbal conduct are: because words are written or spoken, but the declarant doesn't want to intend to do something (ie asking for an umbrella) inference is based on a case by case basis the value of the inference flows from the belief that it is reading and the accuracy of the belief
   a. Common law: hearsay
   b. FRE: not hearsay, b/c there is nothing asserted
5. Verbal assertions used inferentially: statement is offered to prove something implicit rather than the truth of the statement itself
   a. Common law: hearsay
   b. FRE: not hearsay: Verbal assertions used inferentially, it is not being offered for the truth of what is asserted (assert is defined as explicitly)

(iv) Memory

(v) Oath of declarant

(vi) Cross examination could clarify ambiguity: cf Some scholars think that if the declarant is on the stand, he should be allowed to be cross-examined

(b) Requirements

(i) Statement

1. 801a: verbal assertion
2. 801a2: Conduct as a statement is a statement if they intend to make an assertion
   a. Nodding head: not intending to make an assertion
   b. Running from police: not intending to make an assertion: Relevant because it suggests that someone did something that is illegal
   c. Common law (not FR) : hearsay includes conduct even when the person engaging in the conduct is not intending to make any assertion
      i. Wright v. Tatem: Competence proven by manor in which the people write letters. (Though letters are not conduct, they are writing).
      ii. Common law: Ship captain taking his family on a ship is hearsay if offered to show ship is hearsay under federal rules (no hearsay). Under FR, there is no intent to assert the safety of the vessel
3. Things that are indirect (for example conveying other idea, or desire) so that if the person was not consciously trying to make a point then it is not hearsay. 801a2

a. The more indirect way of saying things, the more likely it is that it will be considered to be hearsay

4. Machines: requirement of intelligent conscious
   a. statements by machines which are assertions other than that of the original design are not hearsay
   b. requires intelligent consciousness at some point in the reading to be statement (otherwise not hearsay)
   c. if there is someone putting the data in, or it is the result of intelligent consciousness it is hearsay
5. animals
   a. dogs can't be said to make a statement in barking
   b. difficult to cross examine

(ii) Out of court is defined as (for these purposes) out of this trial
1. Statement is not being made on the witness stand
   a. Oral
   b. Written
   c. Conduct as an assertion
2. Made before trial
3. If the witness and the declarant are the same person, rule still applies. When the witness's own out of court statements are offered for the truth of the matter asserted, they are treated the same, subject to exceptions.

(iii) 801c: Truth of the matter asserted in the statement (matter asserted in the statement)
1. definition of matter asserted (to prove the truth of the point that the speaker was trying to make) -- exceptions
   a. prior inconsistent statements offered only for purposes of impeachment (if only point of the proponent is to show a reason why she shouldn't be trusted) -- will be given with limiting instruction
      i. difference between substantive admission and credibility admission – substantive evidence required for bringing something to jury
      ii. witness said something different at another time
   b. only certain prior inconsistent statements are non-hearsay
      i. old rule: prior inconsistent statements of a witness who testified at trial, and who could be cross-examined was considered non-hearsay
      ii. witness must be available
      iii. must be made under oath
      iv. subject to penalty or perjury
      v. must be made in trial, hearing or deposition.
   c. verbal acts (look to substantive law to see if they have legal substantive effect)
      i. independent legal significance (for example contract, gift)
      ii. verbal acts, only for impact of the witness (indirect implications)
      iii. reception of warning
      iv. a verbal act to see whether a party was aware of a given fact
      v. circumstantial evidence of the declarant's state of mind
   d. statements offered to show the effect on the listener
   e. verbal objections is defined as statements or collections of words when words are like symbols that are not meant to include an idea (like a machine
      i. for example napkin with symbol
      ii. words don't matter
   f. state of mind: statement admissible to tell declarant's state of mind, but there is an exception for state of mind (for example to discern something was true). Could tell us about their state of mine.

i. Exception for statements about one's own mental state

2. A party that offers evidence is trying to make some point, which makes it relevant
3. A test of speaking ability is not hearsay
   a. Admissions come in for other reasons
4. Lying:
   a. Lies
      i. If only offered for motive to lie, than not hearsay
   b. Crazy statements
      i. Probably admissible because not offered for truth
      ii. Alternative argument: this is what the Declarant believes (but there is an exception for mental states

(iv) Methodology: Steps -- **note: a witness and a hearsay declarant may be the same statement**

1. Is there an out of court statement? (Out of court is defined as out of the current court room (for example extrajudicial)
   a. Oral
   b. Written
   c. Conduct intended as a substitute for words (for example pointing at a picture)
2. What is the evidence being offered to prove? – for one purpose for hearsay, and for other reasons might be hearsay
   a. For example that someone said something isn't hearsay to prove that they were capable of saying things
   b. But, **Legally operative fact**s: where the substantive law imbues the words, with legal import, where the fact that the declarant uttered the words give it legal significance, and it means that they are not really statements, but acts
   c. If the out of court statement derives its probative value from the fact that the statement was made
   d. Circumstantial evidence of state of mind
   e. Effect on listener
   f. Could be offered to impeach witnesses
3. Does the probative value of the statement depend on the credibility of the declarant.
   a. Policy – probative value depends on being able to judge the characteristics of the declarent to the jury
      i. If all we care about is whether the statements was made or not made by the declarant it is not hearsay (substantive law makes the statement an act, not a statement)
      ii. On the other hand, if we do care about the declarant's credibility it is hearsay
      iii. Legally operative facts are not hearsay, because all that matters is whether they were actually made
   b. Sincerity
   c. lying
   d. Communicative ability (does he mean to communicate that idea)
   e. mistaken
   f. Perception
   g. Memory
   h. Things that don't relate to credibility take it out of hearsay
4. Multiple Hearsay
   a. Determine whether each of the levels is hearsay
5. If statements are allowed as hearsay for one purpose and not hearsay for another purpose, the judge may allow it (limiting instruction) it for one purpose and not for another

(c) Exceptions (non-hearsay)**: policy 801d** -- witness must be subject to cross examined**: Bad Splits Pepe -- Burden of Proof is Preponderance standard**

(i) **B**usiness Records: 803.6[3]: business record exception (also for other regularly created records,)

1. Requirements: **K**EEP, **R**EGULAR, **A**T (or near the time), **P**ersonal knoweldge -- only presumptively reliable, only reliable if the source or the method indicate a lack of trustworthiness
   a. by business or other organization (not family)
   b. regularly kept – not in anticipation of litigation
   c. made by person with knowledge or upon information provided by someone with a business duty to report the information
   d. if it is a recording of 'testimony' (for example complaints can't come in)
   e. multiple hearsay – chain of restatement
      i. 805[4]: hearsay within hearsay is admissible if each of the statements comes within an exception, for example they are records of regularly conducted activity, such as recording excited utterances.
   f. can come in, if passed up chain of command regularly
   g. general trustworthy requirements – judge can keep out if it seems suspect
      i. courts are suspicious of records made with an eye toward litigation
      ii. Plaintiff can get in, because they are all statements along the line, because they are admissions
   h. If someone has personal knowledge of something it will come within
   i. If someone keeps a record of someone else's statement, it is admissible if it is in the normal course of business.
      i. If the source of the information is not under a business duty to report, there is no reason to believe it is accurate (but ultimate hearsay may come in under hearsay exception)
      ii. (for example nonhearsay, or excited utterance)
2. policy
   a. forms are more reliable
   b. there is reliability, and at the time
   c. there is no motive to distort, accuracy is no problem
   d. note: person making records might be expert

(ii) **A**dmission by party opponent: really an exclusion

1. Plaintiff can offer any statement made by defendant, if it is an admission
2. Requirements
   a. Common Law: they were exceptions

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[3] 803.6: Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

[4] FRE 805: Copr. © West Group 2000. No claim to orig. U.S. Govt. Works
Amendments received to 10-2-2000

Rule 805. Hearsay Within Hearsay: Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

b. Policy: Not based on the ground that the statements are reliable, but are based on estoppel theory
c. Limited admissibility: only against the party who made the statement
    i. Can't admit one's own statement
d. They don't need to be admissions, any statement is admissible.
    i. The statement can be self-serving (for example alibi used for other purposes can be used against someone)
e. There is no such thing as an "admission against interest"
f. Theses statements are admissible, even if there is no evidence of the transaction at issue (statement of defendant mechanic admissible about auto accident he didn't see)

3. Types of statements admissible
    a. Party's own statements: Anything said can be offered over objection (opinion, eyewitness)
    b. Adoptive admission: party can adopt a statement made by another as their own
        i. **Adopt explicitly**: if a party says or indicates they agree, they adopt as their own
        ii. **Adopt by implication** (implied admission or admission by silence): party can tacitly adopt; when a statement is made in a party's presence, and contains a statement that a party would use, it is not true, it is a manifestation of a belief in the statement. Will be found only when it is reasonable to view the silence as constituting an adoption. People under arrest can't make adoptive admission.
        iii. **Vicarious admissions**: A party is responsible for statements that someone else makes, even if the party does nothing. Agent (common law: only if authorized to speak on behalf of the party, so rare, but FRE liberalizes so that it counts if it concerns a matter within the scope of agency of employment, or it was made while the speaker was still an agent or an employee), employee or a coconspirator (must be conspiracy, must be made during the conspiracy, must be made in furtherance of the conspiracy), which are attributed to the party.
4. Judge decides whether the requirements have been met. Standard of proof: Some:
    a. SC: **Preponderance**, Clear and Convincing. In making the statement the court cannot consider the statements themselves to see if there was a conspiracy.
        i. FRE: such hearsay statements may be considered by the court in deciding whether the proponents itself.
        ii. Common law: could not

(iii) **D**ying Declaration: declarant must be unavailable
1. Common law: only when the defendant was being tried for killing the declarant
    a. Admissible
2. FRE:
    a. Declarant needs to be unavailable, but not necessary dead
    b. Admissible in civil cases and criminal homicide
    c. in criminal cases, it only applies in homicide cases
    d. Must believe that death is imminent
    e. Doesn't need to die
    f. Must contain the causes or circumstances of what they believe to be the circumstances of his impending death
        i. things could come in under excited utterances

(iv) **S**pontaneous statements: doesn't matter if declarant is there
1. Excited utterance:

a. stress under which the statement is made precludes fabrication
b. must be made before the declarant had time to reflect, but no time requirement (for example unconsciousness)

2. Present sense impression:
   a. Danger of memory loss negligible
   b. Has to be made while it is being perceived -- tighter than utterance

(v) **P**ublic Records 803.8[5]: public record exception
1. Agency's own activities
2. Matters that the agency is required by law to observe and report -- doesn't apply in criminal cases, as to matters observed by police officers and other law enforcement personnel
3. Conclusions as to fault (factual findings that result from investigation)
   a. Report by agency investigating plane crash
   b. no requirement that the proponent show that they are prepared in the course of regular activity
   c. presumption of reliability and unbiased
   d. three categories of admissibility
      i. admissible to show what agency is doing (for example conducted inspection)
4. 803.8b[6]: if it is their duty to inspect and to make records it comes in
5. police records not admissible (detective has to testify)
6. category C in rule 803.8[7]: factual findings admissible
   a. broad interpretation: conclusions okay (including causation)
7. narrow interpretation: statements to fact, and to whether or not something comply with law criminal and civil operate about the same way

(vi) **L**earned Treatise -- statements admitted under this exception can only be read into evidence
1. 803.18[8]: party can use a statement in a treatise, if an expert relies on it
   a. can only be read into evidence, and not admitted as evidence
2. Only let in conjunction with the expert
3. Has to be established as reliable by either witness, another exert, or by judicial notice

(vii) **I**nterests, Declaration against: declarant must be unavailable 804.b.3[9]

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[5] FRE 803.8: Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

[6] 803.8b: matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel,

[7] 803.8c: in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

[8] FRE 803.18: cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. **If admitted, the statements may be read into evidence but may not be received as exhibits.**

[9] Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending

1. declarant must be unavailable
    a. different from admissions, because admissions are admissible if the declarant is available
    b. declarant would always be available because he is a party
    c. only applies if the defendant can't test
2. definition of interest
    a. common law: pecuniary, finance or proprietary, civil liability
    b. FRE: Penal (criminal) included pecuniary, finance or proprietary, civil liability
        i. Defense: Declarations against penal interest can only be offered to exculpate, only when corroborating interests indicate the substance and truthfulness
3. can be used by a party in a civil suit if the statement is helpful to the party, and the party is no longer around out of court declarant must not be able to be found
    a. this come up only if the out of court declarant cannot be found.
4. Can be used in a criminal case to show that someone is responsible – out of court declarant must not be able to be found
5. Prosecution:
    a. Can't come in under the *admission by party opponent*
    b. can't come in nor can it come in as admission by co-conspirator, this statement wasn't made in furtherance of the conspiracy
    c. Williamson: have to look at individual remarks. Entire confession can't be viewed as one big statement, and non-self-inculpatory party (for example part that implicate someone else). Only statements that are truly self-inculpatory can be used. But if the government can show that there was a conspiracy, more can be used.

(viii) Former **T**estimony

1. tests
    a. Declarant must now be unavailable to testify at the current trial
    PRIMA -- common law is different[10]
        i. **P**rivilege
        ii. **R**efusal (common law may differ)
        iii. **I**ll, Infirmed, or dead
        iv. **L**ack of Memory (common law may differ)
        v. **A**bsent (proponent can't procure)
    b. Party against whom the testimony is now being offered must have had the opportunity to develop the testimony in the hearing
    c. Was there a similar motive to develop the similar motive

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to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

[10] **Definition of unavailability**. "Unavailability as a witness" includes situations in which the declarant--
(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
(3) testifies to a lack of memory of the subject matter of the declarant's statement; or
(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.
A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

i. could they ask questions of the witness at the previous hearing
ii. was there the incentive

2. in civil cases only, even if the party didn't have the opportunity, the former testimony is admissible if a predecessor in interest had the opportunity and motive to do so
   a. definitions vary
      i. must be privity
      ii. someone who had a similar interest in developing the testimony
3. former testimony (803d1a is different about former statements under oath)
   a. deals with depositions, and now someone is unavailable, if the party to whom it is being offered if the party or predecessor in interest had opportunity to develop it
      i. there was opportunity to develop the statement
      ii. since there was the opportunity to cross-examine, even if they were careless in the deposition
   b. civil cases include predecessor in interest
   c. can also come up from prior hearings
   d. or different case

(ix) **S**tate of mind or condition

1. Policy:
   a. No problem of memory of perception
   b. People's state of mind is often difficult to prove
2. includes
   a. Has to be present state of mind, where present state of mind is a current issue
   b. Where the belief about something is an issue
   c. Attitude about someone
   d. Statements of mental feeling
   e. Current physical condition
   f. Presently existing intent to do something in the future if offered to show that he actually do it
      i. Hillman: last letters of someone admissible to show that he intended to go somewhere with someone, letters admissible for intention, and that someone else later acted as was predicted, no requirement that it be made to any person
   g. FRE; Statements about the past to a physician for the purpose of treatment, to treating and non-treatment of physicians (reliability ensured)
      i. Different under common law
   h. Statements as to the cause of pain, if they are pertinent of the treatment are admissible (aren't admissible to prove things that are immaterial to the communication)
3. Excludes: state of mind about something that happened in the past
   a. Shepard: doesn't reach backward looking statements, because every out of court statement about what happened in the past could be characterized as a statement of memory or belief
      i. Exception: testator's statements can be admissible to execution or identification of a declarant's will because we need the evidence
   b. state of mind
      i. circumstantial evidence isn't hearsay
      ii. window of state of mind is indirect
      iii. "I have worked at one boring job after another' is that X is dissatisfied

iv. direct statement of mental conditions (so dissatisfied with career), is admissible of 803.3[11]
v. doesn't cover past conditions

c. statements of physical or mental conditions
i. my back hurts v. my back hurt yesterday (doesn't count)
ii. I intend to go to school tomorrow is ok
iii. I remember that X doesn't count for these purposes, because it would nullify hearsay rule
iv. Statements about things remember not included

4. Backward looking statements are not admissible, but forward looking ones are
a. Can increase probability of things happening, even though they don't actually do it
5. Admissions might be these things as well – but this comes in to show that someone else had the state of mind

(x) **P**ast Recollection record
1. four requirements
a. eyewitness must testify that she one had personal knowledge about what happened
b. eyewitness must testify to insufficient recollection about the events
c. must testify that she made a statement about the event when it was in her mind
2. must testify that the matieral accurately reflected the knowledge at the time

(xi) **E**quivalent (residual or catchall): equivalent circumstantial guarantees of trustworthiness
1. Must be more probative than another evidence than the probative can come up with
2. Must give notice to opposing party under this exception: 803.24[12]: if none of the exceptions in 803 apply, there is interest of justice waiver
a. circumstances must say that it is trustworthy
b. evidence of a material fact
c. must be more probative than other evidence could offer
d. interest of justice must be served

(xii) **P**rior inconsistent statements
1. only certain prior inconsistent statements are non-hearsay
a. old rule: prior inconsistent statements of a witness who testified at trial, and who could be cross-examined was considered non-hearsay
b. requirements
i. witness must be available
ii. must be made under oath
iii. subject to penalty or perjury
iv. must be made in trial, hearing or deposition.**P**rior consistent statements
2. Exclusion, but it is defined as an exception

(xiii) **I**dentification: declared to be non-hearsay
1. Exclusion, but it is defined as an exception
2. Statements of prior identification made after perceiving the person are one category

(xiv) prior statement by witnesses 801d1: declarant must be unavailable

[11] FRE 803.3 Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

[12] FRE 803.24: see 807

1. prior inconsistent under oath at prior oath preceding 801d1a
    a. definition of prior proceeding
        i. preliminary proceeding
        ii. grand jury
        iii. most courts say that statement to police not preceding
    b. definition of cross-examination for 801d
        i. SC says that if they can't remember the facts, as long as they can remember making the statement, they are subject to cross examination regarding the statement
        ii. No answer if they can't remember making the statement
    c. rationales
        i. witness can be cross-examined
2. prior consistent statement 801d1b if the witness's credibility is attack
    a. can be admitted substantively (usually to strengthen credibility of witness)
        i. does not apply unless there has been some kind of attack on witness's credibility
        ii. Tome v. US: requires that the prior consistent statement doesn't come in unless it was made be the motive to lie 801d1b doesn't apply if the statement come up during an investigation
    b. for example witness told people earlier
3. statements of ID after perceiving a person: requirement that the witness be subject to cross exam applies 801c
    a. immediate identifications are deemed to be reliable

(xv) Admissions 801d2 (5 situations). Statements by a party that can be used against it by the other side (admissions by party opponent). Party's statements that would be used as hearsay can still be used, because a party can't avoid effects of own statement, subject to cross exam by own counsel. Admissions don't have to admit anything, they only have to be statements

1. by party himself – 801d2a – only if offered by opposing party
    a. all statements by a defendant in a criminal case would qualify as admission if offered by government
    b. courts usually let in, even if there is no personal knowledge of the matter
        i. for example dog owner who admits that a dog bit someone, but didn't see it
    c. confessions
        i. require Miranda, but because of Miranda
        ii. Doyle: post Miranda silence can't be used to impeach. Can't impeach by silence in front of police
        iii. Jenkins: Silent prior to arrest can be used to impeach
        iv. "I want to speak to someone because I killed Marry" – not hearsay
2. adoptive admissions -- by part that someone has adopted – 801d2
    a. definition: person A says something, and person B does something to show agreement
        i. could be silence when someone says something horrific
    b. if there is an adoption statement can be used as if they said it themselves
    c. affidavit by informant is held to be adopted by government
    d. 801d2 is speaking agents: legal significance just because they are spoken by authorized agents
    e. 801d2d: if it concerns the statements of employees or agents whose job it was to make statements (within scope of the employment or agency)
        i. must be currently in the employ
        ii. common law – old law, only employees authorized to make specific statement

f. 801d2e: co-conspirator
    i. statement must be made in the course of an in furtherance of the conspiracy
    ii. during the pendancy of the conspiracy and in furtherance of it – so after confrontation doesn't count
    iii. can be used if one conspirator is never prosecuted
    iv. Ruton – statements made after arrest don't count, in the case of a statement that is inadmissible against one defendant can't be used at all
    v. Boujoulis: judge must decide that the government has met the burden of establishing that the requirements are met by a preponderance. --- People call this bootstrapping

(d) exceptions (non-hearsay) – 803 and 804: some classes of statements have inherent guarantees of reliability
  (i) 803: availability of declarant immaterial (doesn't matter if the declarant can be called)
    1. not calculated/stream of consciousness exceptions
    2. present sense impressions: must describe an event or condition while the event is happening or immediately thereafter
      a. sincerity, because people don't have to think about it
      b. while something is happening
      c. or something where someone is just happening to them
    3. excited utterance
      a. speaker is emotionally worked up when they say something
      b. (oh god) (or X just killed Y)
      c. immediacy requirement
    4. state of existing physical conditions xx
    5. 803.4[13]: statements in aid of diagnosis and covers past conditions
      a. policy: policy reason that they are ruthful
      b. this is different than 803.3 – which is statements to anyone
      c. most courts say that intermediary to doctor counts as well
        i. there are questions about matters than go beyond diagnosis
        ii. won't allow reference to an assailant's name under this exception
    6. 612[14]: **present recollection refreshed**. Sort of a line-up at trial.
      a. Line-up, etc. are not evidence
      b. Must be turned over to other side, who can introduce them
      c. Can give something to witness to look over – can show anyone's account of the accident – can show anything or do anything.

[13] 803.4 Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

[14] Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh memory for the purpose of testifying, either--

- while testifying, or
- before testifying, if the court in its discretion determines it is necessary in the interests of justice,

an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

7. exceptions
    a. 803.7[15]: absence of an entry can be admitted to show that the event didn't happen
    b. 803.10[16]: absence of an entry can be admitted to show that the event didn't happen
    c. 803.19[17]: testimony about someone's reputation comes in for the truth of the out of court statements
    d. 803.22[18]: record of a previous condition to come in as exception

ii) 804[19]: if the declarant unavailable

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[15] FRE: 803.7: Absence of entry in records kept in accordance with the provisions of paragraph (6). Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

[16] FRE 803.10: Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

[17] 803.19: Reputation concerning personal or family history. Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.

[18] FRE 803.22: Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

[19] Rule 804. Hearsay Exceptions; Declarant Unavailable

Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant--

1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
3) testifies to a lack of memory of the subject matter of the declarant's statement; or
4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

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

Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(1) definition: unavailability defined is defined as can't take the stand
  (a) dead or ill
  (b) can't be located or out of the reach of subpoena
  (c) privilege
  (d) can't remember subject matter of statement
    (i) 804.2.3.5: most don't apply if they don't try to get the deposition
  (e) 803a: a person is not considered unavailable, if they are shipped away by proponent
(2) exceptions
  (a) 804.b.4: statements about personal or family history
  (b) interest of justice
    (i) trustworthy
    (ii) material fact
    (iii) more probative
    (iv) interest of justice will be served

iii) **P**rivileges: relevant evidence being kept out: 501 In federal court, if it is based on federal law, it is up to the courts. Will be governed by common law, and in diversity cases the federal courts must apply state privilege law as well
(1) Policy: social benefits from privileges outweigh the value
  (a) Courts often say that they are to be construed narrowly
(2) Structure and rationale
  (a) Guaranteeing confidentiality is necessary to ensure a smooth relationship]
  (b) Confidential communication privilege gives to the holder the power to refuse to discuss protected communications
    (i) It is crucial to understand that communication privileges protect communication privileges and not other things
    (ii) what the person knew independent of the lawyer is not protected
    (iii) the communication privileges protect the communication, not the information
  (c) 6 problem areas:
    (i) is there a privileged relationship?: Must be an actual relationship
      1. society deems certain relationships to be beneficial and worth promoting
    (ii) was there a germane communication: if there was a communication did it relate to the privileged relationship
    (iii) confidential: only guarantee confidentiality to confidential communications

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(2) Statement under belief of impending death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statement of personal or family history. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(6) Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

(iv) holder of the privilege is asserting the privilege
(v) holder has waived the privilege
(vi) exceptions

(3) Confidential communications privileges
  (a) spouse: reasons relate to few communication (as opposed to the testimonial privilege). Communications before marriage, or after divorce, it will remain privilege if after divorce.
    (i) Marital communicatin
      1. Communications is defined as two views
        a. One view: Only communications
        b. Other view: includes observations if one spouse allowed the other to make that observation
      2. bars all testimony – not just testimony about communication
        a. not usually acts in the presence of other spouse
        b. witness spouse is the one who can invoke
        c. Trammel exception for disputes between the spouses
      3. imitations
        a. most courts say it is only statements, not observation
      4. have to be confidential statements
        a. in third person doesn't count
      5. no privilege for common enterprise
      6. old: treated as competence
        a. encourage spouses to communicate with each other
        b. forcing one spouse to testify against another would disrupt
      7. survives marriage
    (ii) marital testimony: held by accused
      1. one spouse can prevent the other from testifying
      2. modern trend is to give the wife the right to refuse to testify
      3. if the wife is willing to testify, she can be allowed to do so
      4. wife can't be forced to testify against husband
      5. law has no qualms with compelling an ex-wife to testify against an ex-husband
      6. non confidential communications are not held (for example if the wife spotted the husband doing somethoing)
  (b) Attorney: if atty. can be subpoenaed than people will be intimated. privilege allows a client to refuse to disclose and to prevent other's from disclosing confidential communications made between the atty. and client or representatives for the purpose of facilitating the rendition of legal service
    (i) Subject view as to who is an atty.
      1. common law: objective definition of lawyer
      2. majority: if he reasonably thought the person was a lawyer, it will apply
    (ii) there has to be a client
      1. relationship even if there is not a client
      2. if the lawyer isn't paid, there is still an attorney client relationship
      3. entity as client: when a client is a corporation, the questions is who speaks for the corporation -- two standards
        a. Control group test (rejected): only members of the group that control the corporation (only people who could authorization action based on their advice). SC said it wasn't setting forth a broad set of rules to govern future cases.
        b. FRE (maybe): protection of communication of an employee who is outside the control group if he made the communication at the behest of his superior, so what he could secure legal advice
    (iii) Germanity of communication
      1. Communication is defined as verbal conduct, oral or written
        a. Non-verbal conduct intended to communicate

b. Observations made by the lawyer during the relationship are not communications (for example someone bleeding or screaming inappropriately)
c. Just turning it over to the lawyer doesn't make it privileged
i. Pre-existing business files are inappropriate
d. Writing down the history of a dispute, the history must still app.
i. A communication is privileged only if it is made for the facilitation of legal services (joint business enterprises don't count)

2. Communications must also be confidential
a. So long as it is confined to lawyer and representatives
b. Presence of unnecessary people will destroy confidentiality
c. Eavesdroppers:
i. Common law: destroys confidentiality
ii. Modern view: intent of the client that a communication be confidential that governs

(iv) Is the holder of the privilege asserting?: client is the holder
1. Lawyer may assert on the client's behalf, and usually his responsibility to do so
2. Privilege survives death, and it can be asserted by representatives

(v) Did the holder waive:
1. Not self-executing
2. Must be asserted in a timely fashion
3. Voluntarily revealing the communication
a. Exception: if a client discloses a privileged communication to someone else with whom he has a privileged relationship no waiver occurs

(vi) Is there an exception
1. Crime/fraud exception: privilege doesn't attach to something to someone who is seeking the lawyer's advice to commit a crime or a fraud
2. Breach of duty by lawyer or client is exception
3. Joint clients – not privileged if there is a falling out
4. Communications relevant to a dispute over a deceased client (for example if the lawyer knows)

(vii) not applicable even if lawyer drops
1. Not to items in possession of atty.
2. Not to actions in front of atty.
3. Unprivileged documents not drafted by atty.
4. Attorneys have to testify as to condition (for example dunk)
5. Other crimes
6. malpractice

(viii) Only to communications intended to be confidential
1. Communications to investigators or accountants who work with atty

(ix) Corporate
1. Senior officers: confidential
2. Junior:
a. New: Upjohn subject matter
b. Old: control group and subject matter

(x) Survives end of relationship

(c) Clergy
(i) In some places both the clergy and the parishioner are the same
1. There are no generally accepted exceptions
(ii) Could be greater than just a confession
(iii) Marriage counseling is often under hear

(d) Physician (not universal) -- Psychotherapist (not universal)
(i) Need relationship
1. Dispute over what constitutes a physician

(ii) Protects not only communication made to the doctor, but also to the medical and hospital records
1. Results of blood alcohol tests performed
2. Issues of confidentiality are the holder
3. The doctor or the psychotherapist may assert the privilege
(iii) Exceptions – inter alia
1. Criminal proceedings – some say it isn't applicable in criminal cases
2. Patient litigant – if the patient puts her physical or mental conditions into issue.
(iv) What is reasonable related
(v) No future crimes provisions
(vi) Associated professionals covered
(e) Some states recognize drug counsels, accountants

(4) Confidential/constitutional
(a) Spousal testimonial privilege
(b) self-incrimination
(i) applies to testimony in any proceeding
(ii) doesn't apply if there is no chance of prosecution
(iii) doesn't apply to corporation
(iv) doesn't apply to documentation
1. voluntarily prepared documents are not privilege
2. testimonial production and act of production are privileged
(v) can't comment on a failure to testify
(c) journalists (rejected by SC)
(d) law thinks it is important to protect certain information
(i) state secrets
(ii) informer's id privilege
(e) trade secrets

iv) **A**uthentication 901-2: authentication: process of showing that an item of evidence is what the proponents say it is (for both illustrative or demonstrative purposes)
(1) Standard is the low one associated with conditional relevance: proponent must only introduce enough evidence for a reasonable juror to find what it is – as long as Plaintiff introduces sufficient evidence to find that it is a letter written by defendant, Plaintiff has authenticated it
(2) Authentication of things used for illustrative purposes
(a) Witness can say that it is a fair, or accurate representation
(b) Person who took the photo need not testify
(3) Real evidence
(a) Can call someone who has personal knowledge as to the real evidence's use
(b) Some items can be easily tampered with or confused – prosecution will have to show the chain of custody
(i) Substantial compliance ok: Failure to prove even link is usually not fatal
(4) for example letter or documents
(a) can be authenticated by someone who has personal knowledge
(b) can be authenticated also by circumstantial evidence
(i) identifying handwriting of the author
1. by having the jury compare the disputed document with an exemplar of the author's handwriting
2. could have experts compare with another piece of handwriting
(ii) as long as there is sufficient evidence, it will get to the jury
1. jury will get actual handwriting samples
(c) preliminaries
(i) must be relevant
(ii) must pass hearsay problems
(iii) can't violate character rules
(d) guidelines (901b says it is illustrative)

(i) general standard (901a) requirement of authentication is met if the proponent offers evidence that the proponent offers evidence sufficient to support a showing that the items is what it is claimed
    1. jury decides whether it is
(ii) 901b1:
    1. authentication though testimony of witness with knowledge
    2. can call as a witness the person who prepared the document
(iii) 901b2: someone (non-expert) can identify handwriting
(iv) 901b-4: authentication based on appearance, distinction appearance, etc.
    1. standard does not require that it be beyond a reasonable doubt
    2. has to be something that it is something that it is what the proponents claim that it can be
(v) 901b5: familiarity with voice
    1. has to be more than just testimony that someone claimed to be someone on the phone
    2. can authenticate by subsequent knowledge of the voice
        a. hearing someone's voice at deposition is enough
    3. circumstntial evidence:
(vi) 901b6: can authenticate based on corporate (or personal) phone greeting
    1. have to show that you properly dialed
(vii) a person who heard a conversation while it is being taped, that is enough authentication
(viii) If a person isn't listening to a tape, than it is may need to show that the equipment is working, etc.
(ix) real evidence is defined as item involved in the event
    1. detective proves it was found, and other witness shows that it belonged to someone
(x) demonstrative is defined as some item not involved
    1. all that it has to be show is that it is what someone claims it is
    2. all someone needs to do is to claim that it is an accurate representation of the spot

(5) ancient documents: unlikely that someone forged something awhile ago
    (a) common law: 30, FRE: 20 years
    (b) must be in a conditions as to be free from suspicion as to its authenticity
    (c) document must be found where it is likely to have been kept
(6) reply letter doctrine
    (a) in trying to show that a letter was written by another person, and can't be written in an other way – if it is in response to a previous communication, it is unlikely that they wrote that response
        (i) if there is a "in reference to your fax" – this is enough to establish
        (ii) if a communication contains information used only by the author, it is unlikely that anyone else would have written that
(7) 902: self-authentication -- all counsel has to do is explain what that the requirements have been met **Contac**
    (a) **C**ommercial Paper
        (i) Signatures on commercial paper and related document are self-authenticated
        (ii) UCC has some things such as bank records showing dishonor are self-authenticating
    (b) **O**fficial public documents
        (i) Statutes
        (ii) Court reports
        (iii) Rules
        (iv) regulations
    (c) **N**ewspapers and periodicals
    (d) **T**rade inscriptions: Brand-names

(e) **A**cknowledged :A document that has been acknowledged by a notary, or someone who his authorized to accept a document under oath
(f) **C**ertain public records
(i) domestic documents under seal
1. public documents
2. Birth certificate, etc.
(ii) not under seal, if a public official later certifies under seal

v) **B**est evidence rule (contents of writings, recordings, and photographs) best evidence rule 1002 – despite its name, it doesn't require a party to offer the best evidence available (not explicitly)
(1) When party seeks to prove the contents, of a writing, recording, or photo, the party must use the original of that writing, recording or photo
(a) History: scribes
(b) Now: efficiency goes about eliminating disputes
(2) Definitions
(a) Proving the contents
(i) Whether the offered evidence is being used to prove the contents of a writing, recording or photograph
1. Where the legal rights, obligations, or consequences arise directly form the recording or photograph
a. Where the fundamental legal obligations arise, the precise words possession independent legal significance
b. because of the fraud or mistake, it provides independent writing or photographs
i. where the writings is only evidence of a fact (receipts, evidence
c. the substantive law means that this paper is worth something
2. receipts or other evidence are not accorded independent legal significance
(ii) Where a party is relying on the evidence as evidence to prove something, if a party physically offers writing as evidence, they are offering the trier of fact the evidence to rely on the writing, **she must offer the original, unless one of the exceptions to the best evidence rule applies**
1. Might be hearsay
(b) Testifying to contents of writing
(i) If the writing is the basis of the information, and the witness must produce the original, unless an exception applies
(ii) This is different from someone testifying that they "remember" something happening
(c) Definition of writing, recording or photo
(i) Every tangible process of recording
(ii) Photos include movies, videos, and x-rays
1. Photos are usually used for illustrative purposes, not to prove their contents
2. Of course, someone contesting obscene photos, must produce new photos
(d) Definition of original
(i) Itself
(ii) If the person executing or intending a counterpart to have the same effect, the counterpart is the original (duplicate original)
(iii) Original of photo for best evidence rule is defined as negative or any print made from
(iv) Data printouts – anything that represents its correctly
(e) only needs to be brought in when the documents is being used as EVIDENCE
(i) for example doesn't apply to reports of experts not used
(ii) if someone testifies to the contents of a report, it does violate – which also creates a hearsay problem, which makes the report inadmissible
(iii) if a witness took photos should give photos
(3) exceptions

(a) for duplicates: unless a genuine question is raised about the authenticity of the original, a duplicate is acceptable
(i) so long as it is accurate
(b) public records
(i) certified copy of public record may be used in place of the original
(ii) something that is compared by official is valid
(c) summaries: 1006: summaries permitted – easier for the jury to assess damages if these things are
(i) this is an exception, as long as the other side has the opportunity to look at source material
(ii) other side can make rebuttal summary

(4) documents are so specific and so definitive that the documents should be used to prove its contents, if at all possible
(a) 1001.1-2: also to computer files, video, etc.

(5) limitations
(a) 1003: duplicates are normally treated as originals
(i) photocopies ok
(b) 1004: original documents don't have to offered if can't be found, or the point is minor

(6) **if the original is unavailable through no fault of the opponent, it can be brought in**
(a) lost or destroyed, the best evidence rule is applicable, unless the proponent destroyed it in bad faith
(i) business can routinely destroy if no litigation
(b) if the original can't be contained by original process or procedure
(c) if the opponent has control of the original, than the best evidence rule doesn't apply

(7) **if the contents of the writing, don't relate to a key matter – best evidence rule doesn't apply**

(8) something that is impracticable to produce in court, the court will find that the object is a chattel and not a writing and therefore the objection won't apply

vi) **R**elevance is defined as it makes an element of the case more or less likely

(1) Terms (not used too much anymore)
(a) Logical relevance: evidence that tends to prove or disprove a fact that is of consequence to the outcome
(b) Legal relevance: not only relevant, but is not rendered inadmissible due to other factors

(2) 402[20]: all relevant evidence is admissible (other limits)
(a) Evidence has something to do with point to be proven – makes an element of a case more likely than without the evidence
(i) Arguments about evidence usually begin with arguments about evidence
(b) Must be related to an element of a case
(i) The fact that a fact make a fact more likely doesn't meant it is relevant, unless it relates to a an element in a case
(c) An idea of evidence that bears on credibility is admissible

(3) 401: evidence is relevant if it make a fact or issue more or less likely than if it wasn't introduced -- *ad hoc*basis[21]
(a) direct v. circumstantial evidence (no distinction in FRE): but they are really matters of degree of to which they may change the probability
(i) direct is defined as direct observation evidence

[20] Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible. All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

[21] Definition of "Relevant Evidence" "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

1. doesn't need to be too credible
(ii) circumstantial is defined as evidence that is suggested but doesn't constitutional direct observation
1. requirements of inferences to be drawn

(b) past events: usually not admissible, but sometimes it is probative enough -- need substantial similarity
(i) whether the past event, or the other event, occurred under circumstances substantially similar to the event in question
1. have to look to what the event tells us about the Pl's firing
2. substantial similarity gains probative value
3. will have to look at the dangers of brings things in
a. economy of trial
b. misleading
(ii) introduction of evidence that there were no similar happenings
1. proponent will have to say that if the other event would have occurred, it would have been reported
(iii) selling price of other pieces of property
(iv) evidence of chronic litigation for different claims is not admissible
1. but evidence of similar claims against similar Plaintiffs are probative, there needs to be circumstances that are substantially similar

(c) probability: people v. Collins: where the is a valid basis, they will be admissible
(i) could be confusing
(ii) have to show the factors by which the probabilities are based on
(iii) have to show that the factors are really independent

(d) gruesome items:
(i) usually overruled, as they are really necessary

(e) reenactments
(i) was the reenactment under circumstances that were substantially similar

(f) standard of care in the industry as to what a defendant's standard of care would be
(i) it is probative, but not conclusive -- everyone in the industry may be negligent

(4) 407: remedial measures and insurance -- policy consideration inadmissible
(a) remedial measures after an event are not admissible to show negligence
(b) evidence of repairs can be brought in for other reasons (with limiting instruction)
(i) show ownership at the time of the accident
(ii) if Plaintiff claims that a safer design was **feasible**
(iii) if the defendant claims that no safer design was feasible, the modification was admissible

(c) have to look at what the evidence is being offered to prove
(i) absent a limiting instruction, the evidence can be brought in for anything

(d) 411: fact that a person is covered by insurance is not admissible to show negligence
(i) can be used to show responsibility and ownership

(e) strict liability: (evidence isn't being offered to prove negligence or culpable conduct)
(i) Federal Courts: don't allow
(ii) States do allow

(f) Liability insurance is not admissible to show whether a person acted negligently or wrongly
(i) Theoretically, this could be offered either way
(ii) Can be used for **c**ontrol, **a**gency, **b**ias, **o**wnership

(5) 408[22]: makes a settlement offer, inadmissible

[22] Rule 408. Compromise and Offers to Compromise: Evidence of (1**) furnishing or offering or promising to furnish**, or (2) **accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount**. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of

(a) defendant's statement can't be used
(b) also applies when non-parties try to use statements within settlement negotiations
(c) note: **litigation blackmail is admissible, if the validity of the claim and the amount of the damages involved are not admissible they are admissible**
(d) evidence is admissible for non-value instances
    (i) bias of the witnesses
    (ii) undue delay
    (iii) evidence of the agreement is admissible in enforcement actions
(e) payment by defendant of medical expenses are inadmissible
    (i) if there was no quid pro quo it is inadmissible, but it has to be a unilateral
    (ii) doesn't protect statements of liability made in connection with payment of liability
(f) 410: use of statements made during plea-bargaining inadmissible
    (i) (check rule 410 waiver)
    (ii) inadmissible for
        1. statements during plea proceedings
        2. plea bargain reached
        3. no lo contentre
        4. withdrawn: plea falls though
            a. withdrawn pleas can be used in later litigation
    (iii) Mezzanato: accused can waive this rule, so that the prosecution can impeach the def
(g) problem is often when people are talking to the police or to the DA
    (i) talking to the police is not a discussion
    (ii) but it is the defendant's view of whether there are plea discussions
(h) if other discussions in plea discussion are admitted, plea discussions can be
    (i) if there are statements made under oath with counsel, can be prosecution for perjury

(6) materiality (part of the relevance idea) is defined as **when it makes an element of the case more or less likely – important** to think that the std of relevance is more demanding than it really is
(a) counsel must show what the link is – an evidential hypothesis
    (i) (for example someone in debt is more likely to want money, and more likely to want to rob a bank)
    (ii) can be a building block – one points to another fact, which eventually points to the defense
        1. for example: bet heavily-> lost often-> in debt-> desperate --> robbed bank
(b) Doesn't have to be that great jump.. it doesn't have to make the entire point
(c) question is whether it makes the given offense
(d) old common law: relevance as distinguished from materiality in the common law
    (i) relevance is defined as whether evidence of fact A made fact B more likely
    (ii) materiality is whether fact A is an issue in the case
(e) incompetence (common law) can't give any kind of testimony no matter how relevant

(7) 104b[23]: admission on conditional relevance (based on reasonable juror could find)
(a) judge may admit on the evidence on the condition that later evidence be admitted
(b) jury decides if the conditions is made later
    (i) if they don't believe, they are supposed to disregard

vii) **O**pinion testimony

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compromise negotiations. **This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness**, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

[23] FRE 104b: Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(1) Expert opinion – 702[24] – allowed when it will assist the trier of fact in understanding (doesn't have to be based on any perception of the witness). Called because they possession some scientific or otherwise special notice
  (a) Problems
    (i) Subject matter:
      1. FRE: Scientific, technical or other specialized knowledge, if it will assist the fact finder
      2. COMMON LAW: only admissible if it is beyond the common knowledge of the average juror
    (ii) Qualification
    (iii) basis
  (b) 703[25]: Experts can go beyond what they have observed: even if they have never seen the Plaintiff
    (i) common law: had to be based only on what the expert knew themselves
      1. there was a bunch of hypos made,
        a. limitation was that all of the hypos had to be proven somewhere in the case
        b. on cross, different hypos could be put foward
      2. technique can still be used
      3. Plaintiff's lawyer can assume the truth of the testimony, and render an opinion
    (ii) FRE 703: testimony based on facts perceived by, or made known to the expert allowed, at or before the hearing (outsider of personal knowledge and record)
      1. can be based on facts know from own experience
      2. can be from inadmissible evidence
        a. if reasonably relied upon by expert (experts in the field rely on it)
        b. 803.18[26] – learned treatises
      3. can be based on otherwise inadmissible hearsay
      4. and from other
      5. statements and info before and after trial
      6. 705: can just ask opinion on direct -- 705: all of the assumptions are not required to be brought out on direct
        a. opposing counsel can get the bass on direct
    (iii) 702: still has to be helpful and not conclusory (to underlying facts)
      1. common law: answers to ultimate issues
        a. can object that the answer would not be helpful to the finder of fact
        b. Hinkley rule: experts may not give their opinion as to whether a criminal defendant did or did not have the mental state or condition constituting an element of the crime charged or a defense thereto
      2. FRE: must still be helpful
      3. Courts till exclude questions of mixed law and fact
    (iv) 704a: expert can testify as to conclusion

[24] Rule 702. Testimony by Experts: If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

[25] Rule 703. Bases of Opinion Testimony by Experts: The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

[26] FRE 803.18: Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(v) 704b: expert can't testify as to the mental state of the defendant if that is an ultimate issue in the case
1. no; "he is insane"
2. no "he didn't intend to kill"
3. yes: "criminal defendant suffers from disease and thinks aliens are in brain"

(c) Can base their conclusion on a wide variety of information
(d) Qualification: Preliminary questioning by the proponent, certified by the judge -- **on a specific subject**
(i) 702 – qualification based on education, qualification, skill, or experience
(ii) can come in for possession, or self-study (for example there was a case where a five-timer bugler was brought in)
(iii) opposing party can be voir dired: whether the witness displays sufficient expertise is for the court to decide
(e) expert opinion admissible if it will assist the jury, so no "I have heard the evidence and IMHO, someone is guilty or not"
(f) 706[27]: judges can call experts themselves
(g) Daubert: evidence doesn't need to satisfy accepted scientific standards
(i) Factors: must be relevant to the issue (for example must be related to the inquiry)
1. Has technique or theory been or can be tested
a. falsification
2. Peer review and publication
3. Known or potential Rate of error of particular theory of technique and whether means exist for controlling its operation
4. Is it generally accepted (old Fry test)

(ii) Old rule, Fry, expert opinion based on technique only if accepted in scientific community. Excluded cutting edge techniques. Relied on judges to determined what is valid or not. Test, theory, or principle has gained general acceptance

(2) Lay opinion
(a) Common law: lay people could not give opinions because they had no special expertise
(i) As a practical matter, it is impossible to tell opinion from fact
(ii) Could testify to "short hand renditions of fact"
1. Handwriting
2. speed

(b) FRE 701: pragmatic, flexible – two requirements (there is no longer any distinction between fact and opinion). Brother in law test: whether this is your kind of opinion that your brother-in-law would be qualified to give (non-expert).
(i) Statement is rationally based on perception of the witness

[27] Rule 706. Court Appointed Experts
(a) Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.
…
(c) Disclosure of appointment. In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.
(d) Parties' experts of own selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection.

1. 602: personal knowledge
2. observation
3. everything must be determined by the view
4. no speculation

(ii) **Helpful to a clear understanding of the facts:** helpful to jury
1. 704a: testimony not inadmissible solely because it embraces an ultimate issue
   a. if objection, can ask to be more specific
2. common law: no opinions about ultimate issue

viii) Witnesses
(1) Competency
(a) Common law: felons, atheists, children, and insane
(i) Common law: if lacks sufficient mental capacity
(b) Attributes: no personal attributes render someone ineligible
(i) Can still be impeached
(c) Status
(i) Obviously judge (usually plain error)
(ii) juror can't testify (reversible error)
(2) Must be under oath
(3) Must have personal knowledge of matter
(a) Personal knowledge waived for experts

ix) **N**otice: 201: Judicial notice
(1) Legal facts: judges can do research as to law
(a) Exceptions (must be proven)
(i) Foreign law
(ii) Municipal ordinances
(2) some things are so obvious that they shouldn't have to be proven by evidence
(a) 201 consists of adjudicative facts: relate to events in the case
(i) judge can't take judicial notice because he was personally in knowledge of the facts
(ii) not facts about laws of nature: procedure for taking judicial notice is simple – either on its own motion, or upon request by a party
1. once the court takes judicial notice in a civil case, the fact is established
   a. can introduce other evidence
   b. jury instructed to accept it as true
2. criminal juries are instructed that they may accept that fact as true

(iii) adjudicative facts is defined as not subject to reasonable dispute
1. adjudicative facts are indisputable facts, which well informed people in the community would know
2. capable of accurate and ready determination by disputing to undisputed things
   a. geography
   b. construction
   c. dates
3. allows courts to accept certain things as true without requiring that they be proved

(iv) it is that these fact can be established without going through the formality of traditional proof
1. for example offering an almanac

(v) 201c says that the court can take judicial notice of a fact, even if it isn't requested
(vi) 201d forces the court can take judicial notice if a party supplies appropriate reference material
(vii) 201f says it can be taken at any time, even if trial isn't' concluded
(viii) 201g: it might not be constitutional required
1. civil: jury can be instructed to take as conclusive

2. criminal: jury must be instructed that they can reject a fact even if it is judicially noticed
    a. some courts have called these things legislative facts
(b) 201 doesn't deal with
    (i) Judicial notice of evaluative facts (no rule) for example
        1. showing of darkness is something that the defense should have proven
        2. jury can use general knowledge of nature
(c) Judicial notice of legislative facts -- no rules
    (i) Courts can consider how the world works
    (ii) Decide whether one fact should apply to another thing (for example privilege to apply to juvenile)
    (iii) For example
        1. People more if paid less
        2. Hard to raise children if no daycare

x) – **P**resumptions (if the jury is persuaded of fact A, than they must conclude that fact B exists)
(1) burdens
    (a) burden of persuasion (risk of non-persuasion)
        (i) persuading the fact finding of some requisite level of certainty of some element of his claim
        (ii) if the fact finding thinks that it is more likely than not that those facts don't exist, than the Plaintiff is going to lose. If it is 50/50, the Plaintiff has failed to meet its burden of persuasion
        (iii) in criminal case, it is the same, but to a higher level (each element of the carge)
        (iv) in criminal and civil cases, the defendant may have the bop as to elements of some sane issues
    (b) burden of production
        (i) burden of going forward with the evidence
        (ii) who loses without going to the jury
        (iii) a party that fails to meet its burden of production will lose without going to the jury – may shift from one party to the other
        (iv) if the Plaintiff meets his burden, absent some evidence from the Defendant, the burden of production shifts – and they don't get to the jury
            1. the burden of persuasion has shifted
            2. in this way they have to introduce enough evidence to find that they were not negligent
(2) definitions
    (a) basic fact (triggering)
        (i) if there is no dispute, the presumption is triggered
        (ii) opponent of the presumption may always try to show that the basic facts exist
    (b) presumed fact
    (c) presumption implications if basic fact is presumed
    (d) presumption is what can be presumed if basic fact is establish, the presumed fact is deemed to be established regardless of other evidence
        (i) conclusive presumption for example statute that says once basic fact of marriage is established, no matter what the evidence is, the jury is instructed to find that the husband is the father
        (ii) irrebuttable presumption (uncommon)
            1. if the basic facts are show, resulting fact can't be disputed
            2. if the basic facts required to trigger these presumptions are established, the presumed fact is conclusively, irrebuttable established
        (iii) rebuttable presumption: if there is no counterproof of basic fact, presumed fact is established
            1. if the basis fact is established, than the jury must find that the husband
            2. two ways
                a. Morgan-McCormack approach: shift the burden of persuasion, unless the opponent persuades it that the presumed fact doesn't exist

i. This promotes a public policy goal that juries will reach certain outcomes

b. rule 301: bursting bubble (Thayre-Wigmore) approach
   i. has a practical effect only if the opponent fails to produce some evidence
   ii. burden of production only shifted as to the opponent
   iii. presumption (rebuttable) imposes on the party against who the presumption that the evidence is directed the party whom the party is directed
   iv. if the party against who the presumption is directed comes up with some evidence than the burden doesn't shift –
   v. there are some courts which have not taken on the burden shifting
   vi. if there is some counterproof on the presumed fact, under the language of 301, if there is some evidence that the presumed fact is not established, than the presumption bubble has burst

c. permissive presumption (really an inference)
   i. there is enough evidence that a juror could conclude that a certain fact has been established
   ii. therefore, the burden shifts to the other party, and the target has to present other evidence – but it doesn't shift the burden of persuasion

(e) if a claim or a defense is based on state law, and if the presumption involves an element of the claim or defense which is established by state law, the court has to look to the rule on presumption
   (i) tactical presumptions (for example letter mailed) federal law
   (ii) RIL: state law

(3) burdens
   (a) rule 301 presumptions in civil cases
      (i) Plaintiff have the burden of showing causation
      (ii) Defendant have the burden of showing defenses
      (iii) If there is no proof offered of a claim, the judge won't give an instruction
   (b) Criminal cases
      (i) Will always go to jury
      (ii) Constitutional requires that all elements of a defense be proved beyond a reasonable doubt
      (iii) Can shift burdened
         1. Self defense
         2. Insanity
      (iv) Question of when the state can shift the elements to the defendant is unclear
         1. Some of the courts statements say that if an element of the crime such as "intent to kill" has been an element it can't shift lack of intent to the defendant
      (v) State can't impose a conclusive or irrebuttable presumption
      (vi) State can't impose a irrebuttable presumption on a necessary element
      (vii) Can be a permissive inference based on a certain fact, but have to make it clear that it isn't a permissive presumption
      (viii) Jurors must be instructed that all elements must be proved beyond a reasonable doubt

xi) – **p**rocedural matters
   (1) timing
   (2) limiting instructions
   (3) preservation for appeal
      (a) needs to be made at first opportunity
      (b) needs to be grounds stated clearly with specificity
      (c) excluded evidence, must ensure that the appellate court would gave some way of knowing what was admissible done by offer of proof

(4) motions in limine
(a) asks the court in advance as to how the notices will arise

c) Finder of fact

5) Admissibility
   a) Preliminary questions of admissibility: 104a
      i) Judge decides relevance
      ii) Jury has to decide weight
   b) Appellate review
      i) On appeal, many of the arguments deal with the substantive law
      ii) Arguments can also deal with procedural issues such as evidentiary rulings – unless evidence offered
      iii) Should object after the question but before the answer
         (1) If too late, could be waived
         (2) 105: limiting instruction (evidence admissible for one purpose but not for another)
      iv) record on appeal
         (1) offer of proof is defined as statement about what the evidence they will present will show
            (a) whether to allow someone to testify – to make a determination of what is admissible – if I allow you to present this evidence, what it will show
         (2) appellate court will say that even though a ruling might be wrong,. The appellate court says that it is harmless error
         (3) 103: for reversal, there must be a substantial right infringed
            (a) reversible error is defined as objecting to the error and probably effected the outcome
            (b) harmless is defined as objected to but didn't effect the outcome
            (c) plain error is defined as no objection, but would probably have been a disparage of justice
            (d) constitutional error is defined as error violated constitutional (usually evidence for the government but should be kept out) -- *does not lead to automatic reversal anymore)
               (i) courts says that if the government can say beyond a reasonable doubt that it won't effect the outcome
               (ii) appeallate court may say that there is already evidence on that point (cumulative)
               (iii) can usually argue grounds that you intended to object to
               (iv) if there was any basis to make the same ruling – even if different from what the judge made, the appellate court will uphold the ruling

6) Types of evidence
   a) Testimony: statements at trial
   b) Documents: contract, letter, etc.
   c) Real: for example involved in case
   d) Demonstrative: photo, chart, etc.

7) 403: judge's discretion
   a) a judge can decide that evidence is inadmissible even if it is relevant, if the probative values of the evidence, the actual usefulness of the evidence substantially in proving an issue in the case is **substantially** outweighed by the – most relevance in.
      i) danger of unfair prejudice
         (1) can't be kept out because it is prejudicial, damage to the other side must be unfair
            (a) often come up in character evidence, prior character such as past drug use – and therefore he could not have confused the two
               (i) if the evidence is inadmissible to show that the defendant is a drug addict, and the jury might make an improper inference from the evidence
         (2) something being too graphic, and something that might tend to inflame the jury
      ii) confusion of the issues
      iii) misleading the jury
      iv) undue delay
      v) waste of time
      vi) needless presentation of cumulative evidence

(1) even if the testimony is relevant, it would waste time
(2) if it would repeat

8) character evidence – really special rules about relevance
   a) civil cases: in civil actions, some cases hold that if the behavior is like criminal conduct than the exceptions are applicable
   b) what, may, how approach
      i) what is the evidence being offered to prove
         (1) Reasons to introduce
            (a) Character might be an element
               (i) Negligent entrustment or hiring
               (ii) Truth as a defense to defamation case, where truth is raised as a defense
               (iii) Mental state
                  1. Insanity
                  2. incompetence
               (iv) Entrapment as a defense to a criminal charge
                  1. (rare)
            (b) Person's character might itself be an issue
            (c) To prove how someone acted on a particular occasion (this is not an element of the Pl's claim) -- this is **circumstantial evidence**
               (i) To create inferences of violent type of personality
               (ii) To show that they acted similarly in the past
      ii) may evidence be used to proved?
         (1) Admissible if it is an element of a claim or defense
         (2) Not as element of crime (in conformity) -- in admissible due to balancing test that it is not as probative as it could be
            (a) When character evidence is based on a sence of balance between the probative value and the prejudicial effect of such evidence, at least insofar as it reflects on the crime
         (3) 404a: evidence of a person's character is not admissible to show that he acted in conformity therewith in a particular occasion
            (a) a party cannot attempt to prove that someone engage in a certain conduct, by showing that they had a personality or character that made them engage in that conduct
            (b) Forbidden character propensity inference: might be hard for the jury not to give too much weight to the evidence
               (i) jury might think that someone is such a rotten person even if he didn't commit the crime he is charged with
      iii) How may the evidence be used? -- can be used if character is an element of the substantive crime
         (1) character as element As element of crime -- admissible
            (a) Reputation evidence -- was only element at cl
               (i) Demonstrate that the witness has knowledge of the reputation
                  1. Length of time of knowledge
                  2. Prosecution can cross examine as to specific acts of conduct
                     a. (have you heard?)
               (ii) Must know what the community is
                  1. New: broad, where lived
                  2. Old: where working, etc.
               (iii) Can only report in conclusory fashion (good, excellent, outstanding)
                  1. Can't give reasons for why this exists
            (b) Opinion
               (i) About the same as reputation -- no details, or explanations
               (ii) Prosecution can cross examine as to specific acts of conduct (have you heard?)
            (c) Specific instances of conduct -- must relate to the particular character trait to cross a defense opinion character trait (did you know that the defendant had mugged someone in the past)
               (i) Ie proof of lying on many occasions

(ii) Form of question:
1. FRE: "did you know questions" to opinion witnesses only safer
2. Common law (better practice) "Have you heard"
   a. "did you know, was improper"

(iii) 608b: **cannot call extrinsic witnesses to prove that the specific acts occurred** -- can get a limiting instruction, to say that this is only to test familiarity with reputation.
1. on cross, unlike on direct, counsel can ask about specific conduct in order to impeach the character of the witness for truthfulness
   a. Michaelson v. US: prosecution must only ask the reputation witness a question which is something that the prosecution believes (in good faith) actually has happened
2. instead of calling a witness to testify, during cross of witness, a question about a prior act of the witness is allowed
   a. if she witness admits, the point is made: to keep things from getting out of end, the defense cannot go into specific instances of credibility, can't be proved by extrinsic evidence
   b. rule bars extrinsic evidence only if it is for truthfulness or untruthfulness of witness: no physical characteristics
3. rule does not bar prior criminal convictions of witness, can prove by witness or court records

(2) If the door is opened, prosecution and rebutt
(a) Prosecutions own reputation and opinion witnesses
(b) But only conclusory evidence can be offered

(3) Can't offer evidence of specific acts
(a) Cl: only reputation

(4) Evidence of victim's character -- three veins
(a) First agressor
(i) If the victim was the first aggressor, Def can offer evidence of the victim's character as evidence the def acted in conformity with that
1. FRE: only reputation and opinion evidence can be used
2. Minority: specific acts admissible as well

(ii) Prosecution can cross with "have you heard" and "did you know"

(b) **Alternative:** Pre-emptive strike theory of self-defense (what did the defendant reasonably believe about the victim)
(i) What was the defendant aware of the victim at the time, and it made him think that he should strike first

(c) Rape shield: rape shield/child molestation -- begin with presumption that character evidence is inadmissible
(i) 412: past sexual activities admissible only when in accorance of rules (rape shield in federal civil, not in all state law(sexual battery, sexual harassment))
1. defense can offer evidence to show that there was consent if that was the basis of the prosecution
2. can offer evidence to show that physical evidence is the result of another encounter
3. admissible when exclusion would legislate the right constitutional requirement of due process or confrontation, which only applies to criminal cases
   a. if the declarant testifies at all, the confrontation clause is not offended
   b. Olden: confrontation to introduce evidence of the complainant's relationship with another man in order to falsely accuses the defendant of rape?
   c. Exception: if the declarant is unavailable and reliable, than it doesn't violate confrontation
      i. Older things are more reliable
      ii. If there are particularized guarantees of reliability

d. If the declarant is available, and is not called by the prosecution,
i. Grey area
4. There can be discretionary admission if the probative value is greater
(ii) character propensity inference
1. 413: (criminal) prior conduct of defendant admissible --- if there is a propensity to engage in this kind of activity
2. 414: (child molestation)
3. 415: (civil criminal and child)

iv) In a homicide case, if the defendant offers any evidence that the diseased was the first aggressor, all character can be brought in.

c) exceptions: different for impeachment
i) 404a1: evidence about the character of an accused in a criminal case (defendant can show good evidence, but prosecution can rebut)
(1) ie good character and peaceableness -- puts his character in issue
(a) this opens the door -- this is different when character is an element of the claim or defense
(b) note: can only offer evidence of relative character traits (ie honesty not as element of defense to murder, and peacefulness as defense to forgery)
(2) codification of old practice of allowing accused to call character witness
(3) once the defense has called a good character witness, the door is open to the prosecution calling a bad character witness
(4) prosecution can cross-examine good character witnesses
ii) 404a2: evidence about the character of a victim in some circumstances (defense can show bad character of victim in self-defense claims)
(1) generally the character of the victim is irrelevant
(2) to show reasonable behavior (for example self defense in homicide case) in order to support a claim of reasonable behavior, if someone has a bad tempter and a tendency to be violent, makes the behavior admissible
(a) this is door-opening, and the prosecutor can rebut
(b) if the defense makes an argument that there was reasonable behavior, even though there is no evidence, the door is opened for the government (at least vis-avis- the victim)
iii) 404a3: character of a witness for truthfulness or untruthfulness is admissible – this is an exception to the forbidden character propensity inferences
(1) can undermine the credibility of a witness by trying to show that the witness is a liar
(a) can rebut the credibility determinations
(2) references to
(a) 607:
(b) 608:
(c) 609:
(3) 609: impeachment of criminal witnesses – differs by crimes, and includes misdemeanors
(a) definitions
(i) unfair prejudice
(ii) in case of non-accused witness (for example friend of defendant): if the jury hears about a characteristic
(iii) if the witness is the defendant himself there is a high likelihood of forbidden character propensity inference (prior assault conviction, might conclude that there is a personality)
(iv) probative: might show that there is something that there is something untrue, generally
(v) balancing: for example credibility not show by showing molestation for fraud (might enrage jury)
(vi) SC hasn't said what is a crime of dishonesty
(vii) Forgery, etc. is a crime of dishonesty
(viii) Sexual assault ins't a crime of dishonest
(ix) Some say to look the facts of the crimes

(b) 609a: crimes involving dishonesty
(i) witness is the accused: prior conviction can be used to impeach, only if the probative value outweighs the prejudicial effect (demanding standard)
(ii) witness is not the accused: and the felony is not one involving dishonesty, it is under 403 -- unfair prejudiced **substantially outweighs** the probative value (lenient)
(c) 609a2: dishonesty or false statements: shall be admitted -- just must admit
(i) witness can have it admitted
(ii) defendant can have it admitted
(d) 609a1: felonies that aren't crimes of dishonesty
(e) old convictions
(i) 10 years have passed since conviction or release – unfair prejudice that substantially outweights

d) 404b: evidence which seems close to character evidence is admissible to show something besides character – suggestions of patterns (for example people becoming insanely jealous when Linda talks to Ralph)
i) can get limiting instruction to show that A had a certain feeling, and not that they are a certain trait (for example violent) by nature
(1)
ii) patterns
(1) similar technique in prior cases
(2) motive
(a) for example one gets jealous when he sees his wife talking
(3) opportunity
(4) intent
(5) absence of mistake
(a) for example offer of proof that someone knows that heroine is

e) 405a, proof of character: in all cases can be proved, reputation and opinion are admissible to prove it
i) 405a: character can't be proved by saying "give us examples of something that the defendant has done over the years"
(1) specific acts on direct enough
(2) specific instances of conduct on cross are allowed
(a) for example if the opinion is based on full info
(b) if there is full information, to see what the conception of character based on the knowledge is (for example I knew he stole, but it he still an honest person)
(c) there is often a question of the # of inferences, as well, as the strength of the inferences
ii) 405b: use of specific conduct to prove character is allowed if character is an essential element of a claim or dense
(1) this rarely comes up
(a) intent is not character – it is the mental state at the time of the action
(2) might come up in defamation
(a) if someone can show in defense to defamation that someone is a liar specific examples

9) 406: where prior conduct shows a **habit** or routine practice of person or organization. This stuff is usually probative
a) habit is defined as a regular response to a *specific* situation
i) *cf* character is a generalized description of a trait
(1) needs to be done w/ a specific frequency
(a) invariably
(b) without fail
(c) always
ii) *ie* difference between locking one door and being safety conscious

b) (for example jogging at a time is character evidence) or evidence of someone always having the same food[28]
c) business organizations have habit evidence as well

10) other crimes as evidence for *things other than character* (probative v. prejudicial balance does not tilt toward exclusion) acronym (Miami Cop) -- there is a danger of unfair prejudice. There is still discretionary exclusion. Prosecution must give defense notice. Huddleston: This is a conditional relevancy problem, and that the prosecution is required to admit only enough evidence that a jury could find enough evidence. Dowling: If someone was acquitted, it can still be admitted and it isn't offensive.
    a) **M**otive: Can be admissible to show that if someone was a witness, or similar
    b) **I**dentity
        i) Similar crimes with the same modus opporundi
        ii) Signature or calling card
            (1) signature crimes
                (a) the more specific and unusual, the more likely that it is
            (2) not, the government needs to give notice to the defendant – and present a serious risk that the jury will still consider it to show bad character
                (a) the defense better think twice before defendant tells crazy ignorance story
        iii) Evidence of prior bad act admissible
            (1) Wording of threats -- if someone else has seen something else
    c) **A**bsence of **M**istake or accident: Someone who has been previously convicted of something that likely not to confuse a substance
    d) **I**ntent:
        i) prior acts will enhance knowledge of substances (ie realization that a substance that was previously used has an effect)
        ii) Becham: prior bad acts (not convicted) admissible to show that there is intent: (ie possession of other stolen goods admissible to show that someone would have stolen something), but in these cases mistaken identity defense would not bring evidence in
    e) **C**ommon plan or scheme: Pattern of behavior to show that a crime was a part of a larger scheme
    f) **O**pportunity: admissible evidence it that which someone had knowledge, capacity, or something that someone had access to things.
        i) Prior burglary with sophisticated equipment admissible to show someone had the ability
    g) **P**reparation: stealing the tools for the preparation of the charged crime admissible
    h) There are some courts which will allow previous sexual offenses upon children to prove that the defendant committed the offense.

11) competency:
    a) choice of law
        i) if the case is FQJ than it is federal law
        ii) if on diversity jurisdiction, it is based on state law
    b) 601[29]: no automatic disqualification
        i) up to court
        ii) problems with minors and dead-man's statutes
    c) 602[30]: people can't testify about something that isn't within their personal knowledge

[28] FRE 406: Rule 406. Habit; Routine Practice: Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

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

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

i) counsel usually raises the issue of whether he knows about it first
ii) note: there is still a hearsay issue (for example someone in debt because the defendant said so)
(1) but there can be exceptions if there are admissions of personal knowledge
(2) note: records of regularly conducted activity are under 806
iii) note: experts can often give under 703 opinions beyond stuff that is not within their personal knowledge

d) 603: oath requirement
i) no specific wording

e) 604: interpreter has to be qualified as an expert

f) 605: judges can't testify in a trial as a witness – must recuse

g) 606a: jurors can't testify
i) 606b: jury deliberations – can't be called later to testify as to how they reached their verdict
(1) disparage: can testify about external corrupting influence

12) 611a: judges have discretion in controlling how testimony proceeds

a) 611b,c: cross and direct
i) direct usually by not leading
(1) 611c: when the witness is likely to be uncooperative, the Plaintiff can ask leading questions
(a) hostile
(b) identified as connected with other party
(c) calling the other party

ii) leading questions can be used
(1) preliminary matters
(2) where necessary
(a) difficulty testifying
(b) language
(c) child
(d) week-minded witness
(e) infirm witness
(f) jog memory
(i) should only ask what is necessary to jog memory
(ii) Present recollection refreshed: Can give something (writing) to witness to look over – can show anyone's account of the accident – can show anything or do anything.
1. Danger: witness hasn't had their memory jogged, but they are "remembering" what they just read
2. Proponent can't introduce jogging material into evidence, but opponent can (isn't evidence, but is merely a prod)
a. People saying things similar to what they say ver batem, seems to be something similar to their letter
3. Refreshing something the day before
a. Common law: opposing counsel doesn't get it
b. FRE: Court has discretion (in the best interests of counsel to give opposing counsel the best interests)

(iii) **past recollection recorded**: eyewitness witness can't remember, and after being show something they can't remember something, despite the best attempts to refresh memory. 803.5[31] writing that qualifies as pas recollection recorded **cannot be introduced as an exhibit, it can only be read to the jury**

[31] 803.5: Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

1. getting the jogging material (normally hearsay) into evidence, that you want to offer into evidence
2. if someone makes a record when their memory is fresh, but she can't remember, the record comes in
3. doesn't apply if witness CAN remember (notes are inadmissible)
4. note can't be used as exhibit
5. rule applies only if Betty can't remember if she is on the stand
6. four requirements
    a. eyewitness must testify that she one had personal knowledge about what happened
    b. eyewitness must testify to insufficient recollection about the events
    c. must testify that she made a statement about the event when it was in her mind
    d. must testify that the material accurately reflected the knowledge at the time

(3) someone unlikely to follow lead
    (a) adverse party
    (b) party identified with adverse party
(4) party certified as hostile witness

iii) direct testimony will be stricken if there is no opportunity for corss

b) cross: opposing party than asks what questions it wants, which in turn is limited to matters on the previous exam
    i) Majority and FRE: new subject areas can't be brought up
        (1) FRE will all discretion ask the witness about the severity of injury afterwards
        (2) Minority: wide-open cross
    ii) usually limited to scope on direct
        (1) judge can have discretion to do it now
    iii) if the defense wants to call the person as an expert, they can do so themselves
    iv) can ask about all matters relating to credibility
        (1) including convictions for fraud
        (2) have to have a good faith basis for these basics
    v) usually leading questions are allowed on cross
c) objections on form
    i) argumentative
    ii) speculation
    iii) compound
    iv) repetitive
    v) assumes facts not in evidence
    vi) leading: leading is defined as clearly suggests the answer
        (1) usually "isn't it true"
        (2) tone of voice, as well

13) past recollection
    a) 612 is procedural which talks about how to deal with documents
14) 614: court to call and question witnesses
    a) judges usually don't call
    b) judges can question
15) 615: court can exclude people from testimony
    a) party can't exclude the other party
        i) corporations can have at least one rep in courtroom
    b) expert witnesses and parties who need to be in the courtroom, because they need to hear all of the testimony cannot be excluded
16) impeachment of witnesses
    a) before and after impeachment are bolstering and rehabilitation
        i) bolster – presumption of credibility until attacked
            (1) inadmissible: offering evidence that someone is known as having a reputation for truthful

(2) inadmissible: prior consistent statements

ii) rehabilitation
  (1) could show that someone's attitudes have changed
  (2) can rehabilitate capacity
  (3) truthfulness
    (a) can offer evidence of the witness's truthful character
    (b) could have the witness explain away the inconsistency
      (i) general rule is that once someone has been shown to be inconsistent statement doesn't really rehabilitate (a consistent statement doesn't rehabilitate)
      (ii) if the thrust of the impeachment is to show that it changes her story, a prior use may be used to rehabilitate that charge
    (c) Tome: prior consistent statement can, however, be used to rebut a charge that the witness has changed his story because of some improper motive
    (d) Federal rules provide that if a prior consistent is offered to rebut such a charge, we are going to consider such a statement to be non-hearsay
    (e) Prior consistent statement admissible to rebut a charge of fabrication are deemed to be nonheresay
      (i) Pepe
        1. Prior constant
        2. Id
        3. Prior inconsistent

b) which witness
  i) common law : under voucher rule couldn't impeach one's own witness
    (1) exception: surprise and injury could allow for impeachment
  ii) FRE: party can impeach its own witness
c) weight given to testimony turns on the credibility of the witnesses
  i) pointing out an inconsistency undermines a statement at trial
d) usually by calling another witness who will say something or other
e) BICCC
  i) **B**ias: can bring in extrinsic evidence
    (1) Some reason, independent of the merits to give negative
      (a) lover
      (b) intimidation
      (c) payment
      (d) creditor
      (e) with a plea agreement
      (f) hatred
        (i) threats – extrinsic evidence can be offered
    (2) not dispositive
    (3) some jurisdictions say that if the witness admits the bias on the stand, it obviates things
      (a) FRE: no requirement to lay the foundation for bias
  ii) **I**nconsistent statements: (goes to hearsay)
    (1) Very often these things can be hearsay – but these things are not being offered for the truth of the matter asserted, as this detracts from his credibility, as in theory the prosecutor is not asking the jury to believe that this story is true
    (2) 613: prior statements by witness
      (a) can question about a statement without showing it to them
      (b) can wait until witness leaves the state
        (i) witness must have opportunity to retake the statement
    (3) will be given a limiting statement, that it can be considered only for impeachment purposes xx
    (4) only certain prior inconsistent statements are non-hearsay
      (a) old rule: prior inconsistent statements of a witness who testified at trial, and who could be cross-examined was considered non-hearsay
      (b) requirements
        (i) witness must be available

(ii) must be made under oath
(iii) subject to penalty or perjury
(iv) must be made in trial, hearing or deposition.

(5) Foundation requirement
(a) Common law: foundation be laid in order to impeach with a prior inconsistent statement
(i) Must include the identity, time and place, and substance of where the statement was made -- context
1. Identity of the recipient of the testimony
2. Were it was
3. When it was
(ii) If the prior statement can be pinpointed in time by the witness
1. Can be seen as a time-saving device as well
(iii) Old rule: Queen's Case: before a witness could be asked, they had to be shown the writing
(b) FRE: Witness can be asked to a prior inconsistent without any foundation

(6) Extrinsic evidence
(a) Common law; extrinsic evidence allowed only if the witness is asked and refuses to admit about the statement
(b) FRE:
(i) Impeaching counsel may decline to question, but ask another one – as long as witness one is still available to testify, it is proper
1. This can be waived in the interest of justice
(ii) witness is given an opportunity to explain or deny the statement
(iii) opposing counsel is given to question the witness

iii) **C**apacity
(1) Simple and most obvious means of impeaching a witness
(2) Can us extrinsic evidence – not just asking evidence about incapacity

iv) **C**haracter:
(1) evidence is offered to show that the Plaintiff is testifying untruthfully
(2) exceptions to the general rule to show conduct or conformity
(a) opinion or reputation testimony
(i) can only state the opinion or relate the reputation
(ii) can't state specific instances to relate their reputation
(iii) witnesses to good character or truthfulness
1. they may themselves cross examined
a. reputation: can be asked "have you heard" questions in an effort to determine just how knowledgeable they actually are
b. opinion: did you know
2. even if the witness answers in the negative, than if they didn't know what they falsely stated their income, than extrinsic evidence can't be introduced
(b) evidence of specific acts of the witness that didn't result in a conviction
(i) in the discretion of the court, a witness can be asked about things that bear on their specific reputation – most be probative of untruthful character
1. untruth yes, violence, no
(ii) extrinsic evidence can't be introduced
(c) convictions of certain crimes
(i) can bring in certain other crimes (conviction)
(ii) states differ as to the type of crimes that are used
1. sometimes it is only crimes of dishonesty to be used
2. some states say that the trial judge has to always balance
(iii) FRE: two factors about whether a witness can be impeached
1. Nature of the crime
a. Crimes involving dishonesty or false statement can be used to impeach
i. Perjury

ii. False statement
iii. Criminal fraud
iv. Embezzlement
v. False pretenses
vi. Elements of deceit, untruthfulness, or falsity

b. Doesn't matter whether the witness is the criminal defendant or not -- **judge has no discretion**

2. Whether or not the witness is the criminal defendant or not
   a. If it **didn't involve** dishonesty or false statement, if the crime is punishable by over a one year, the court must **balance** the probative value against the prejudice
      i. Accused witness: only if the probative value outweighs the prejudicial effect
   b. Non-accused witness: can exclude if the probative value **substantially outweighs** the dangers of unfair prejudice
3. Time limits
   a. FRE: remote conviction – if a conviction is old, it can be used to convict, if the court finds that its probative value substantially outweighs its prejudicial effect
   b. Definitions
      i. Remote is defined as 10 years since release of conviction
      ii. 10 years from conviction if no time served
4. proof
   a. asking and admission
   b. public record: basic facts, but no not aggravating factor

v) **C**ontradiction:
   (1) Collateral is defined as only if it relates to a tangential issue and is inadmissable (where were you on another day than what matters)
      (a) Extrinsic evidence usable to impeach, so long as that aspect of the witness's testimony is no collateral to the case
      (b) Extrinsic evidence no admissible, if the contradiction goes to a collateral matter
   (2) If it is a substantive fact in dispute, than it won't be collateral

f) General impeachment (to distrust everything that the witness says) – Rule 607: party can impeach any witness (different from common law).
   i) perception
      (1) for example
         (a) eyewitness can't see well
         (b) witness has poor memory for details
         (c) they are by nature untruthful
            (i) objection:
               1. although character propensities are generally objectionable, there may be an exception
   ii) memory

g) can impeach parts of the testimony that is untrue

h) governmetn can call a person, knowing that they will lie, just to get the stuff before a jury
   i) some caselaw says it is improper

i) impeaching someone's testiomy for truthfulness
   i) rules 608a, credibility of a witness can be attacked through character evidence
      (1) cannot show truthfulness, until there is a character witness to show untruthfulness
         (a) policy reason of shortening trials
      (2) must be in the form of a reputation or impeachment testimony
      (3) once the character is attacked, they can then come up with character to support the
      (4) specific instances of defendant's conduct can be raised (for example did you know that the defendant had been convicted of fraud)
      (5) privilege and cross examination of a character witness:

(a) just because someone takes the stand and testifies he hasn't waived his privilege against self-incrimination
(i) if someone (defendant or witness) says that they are of good character, they can assert privileges

j) collateral evidence rule (keeping out marginally related issues)
i) common law: prohibits use of extrinsic evidence to prove a point that is only collateral
(1) 611 cross can cover any subject raised on direct
(2) can call additional witnesses to contradict on some points
(a) if relevant in his won right – could be offered if witness never testify
(b) courts don't bar evidence of bias based on collateral evidence rule
(c) defense could not call the witness because the evidence is truly collateral
(d) if it is highly probative as to his credibility it will probabily still be allowed
ii) often applied via 403
iii) 608b collateral source rule: extrinsic evidence can't be used to show witnesses trustfulness or untruthfulness

k) constitutional issues
i) Doyle: post-Miranda silence can't be used
(1) Pre-arrest can be used
(2) Constitutional to impeach someone for pre-Miranda silence
ii) Jenkins: delay in turning in, is admissible
(1) Silent occurred prior to arrest
iii) Defendant opened door to subject that would be inadmissable
(1) Harris: statements made in violation of Miranda can be used to impeach, if the defendant doesn't take the stand (these are admissions for hearsay for Miranda)
(a) Miranda: Only for custodial interrogation (not free to walk out of the room)
(b) Failure to give a warning – inconsistant anti-Miranda statements can be used for impeachment if the defendant does something that he doesn't need to do
(2) Havens: evidence seized in violation of the 4th amendment can be used to impeach (if it is inconsistent with the physical evidence)
(a) Defendant doesn't have to take stand
(b) Defendant doesn't have to lie
(3) See also 609a1: Prior convictions can come in (opens door to other areas)