

EVIDENCE OUTLINE

Article I: General Provisions

103. Rulings on Evidence

- Once a definitive ruling by the court, renewal of the objection/offer not needed
- With **objection**, rule emphasizes TIMELINESS which means right after the question is asked, right after the answer, or before the witness leaves the stand with a specific GROUND for the objection (the objection is only preserved on the specific ground)
- Motion to Strike: Where 1) a witness blurts out an answer deliberately to prejudice a party or 2) when an innocuous Q is asked that wouldn't key off the attorney to the answer but it's prejudicial
 - 1) Move to strike
 - 2) Move for a mistrial
 - 3) Offer of proof:
 - a) Make an offer when you are trying to persuade the jury to find in your favor and you want to protect the record
 - b) With **offer**, need to make an offer of proof (don't rely on the context to explain it) 3 ways to make an offer of proof
 - c) An attorney offer of proof (say why its admissible, seek a ruling)
 - d) Question and answer with witness (excuse the jury and have the witness answer the Q to tell the judge why the evidence is admissible so that it gets on record)
 - e) Get it marked for identification on appeal
 - (b) allows the judge to make his/her record
 - To win on appeal over *plain error*, need to prove 1) error, 2) plain, on the face, 3) affects substantial rights of a party, not harmless, 4) fairness and integrity of public proceedings such as trial, else you can win on direct appeal with an *intervening law* (and you didn't object b/c you know it was useless)

What five possible objections can you make when evidence is being offered against you to a document coming into evidence?

Lack of authentication, relevancy, relevant but unduly prejudicial, Best Evidence Rule, hearsay, privilege

104. Preliminary Questions

- Court will decide preliminary questions and can do outside hearing of jury if need be
- D testifying at preliminary hearing does not become subject to cross on other issues
- You **OBJECT** when:
 - 1) You have issue with the question the opposing counsel asks (in form or substance)
- You make a **MOTION TO STRIKE** when:
 - 1) The question may have been ok, but the answer that comes out is prejudicial/hearsay/problematic
 - 2) When the opposing counsel's admitted evidence doesn't "connect-up"

- When a problematic question is asked and answered before you can object, you must make an objection AND a motion to strike
- A general objection (meaning one that does not specifically state the grounds on which it is based so that the court may intelligently rule on it) is generally insufficient

105. Limited Admissibility

- If evidence comes in that is detrimental only to one party and not another (this is with multiple P's or multiple D's), upon request, the court will give a limiting instruction on how much weight to give the evidence
- You want limiting instructions to confuse the jury and sometimes, you might be playing for a hung jury

106. Remainder of Related Writings/Recorded Statements

If a writing/recorded statement is introduced by a party, the opposing party can require introduction *at that same time* of any other part of/any other writing that ought to be considered with the first portion *in fairness*

Article IV: Relevancy and Its Limits

401. Definition of "Relevant Evidence"

Evidence that make any fact of consequence more probable or less probable it would be without the evidence.

- If there is an objection on relevance grounds, just state FRE 401
- If you are objecting on the basis that the prejudice outweighs the probative value, you are arguing a mix of FRE 401 and 403
- **"Conditional relevancy"**: probative value of evidence depends not only on satisfying the basic requirement of relevancy in Rule 401 but also upon the existence of some matter of fact
- Relevance is not inherent characteristic of any piece of evidence but only based on relation b/w that item and matter properly provable in the case
- **Evidence must have:**
 - 1) **Materiality**; goes to or helps to establish:
 - a) **claim**- civil case: must be related to one of the elements of the offense
 - b) **charge**- criminal case: must go to an element of the offense charged
 - c) **defense**- criminal or civil case
 - d) **credibility**: can go to witness's credibility
 - e) **background evidence**: is a subspecies of credibility, but puts witnesses in their place
 - 2) **Probability**; (+ or - value), making it more likely or less likely
- Materiality + Probability Value = Relevancy
- **Stipulation**: Stipulation of fact relieves a party of burden of proving the fact (and is not required); however, if stipulation evidence is unduly prejudicial, court can require a stipulation and not allow the party to present its evidence
- **"Circumstantial" evidence** means that from the evidence, the fact must be inferred
- **Circumstantial evidence showing consciousness of guilt:**
- Flight (can be guilt or innocence)

- Escape (shows guilt b/c an innocent would not flee)
- Other admission by conduct
 - 1) Threat to a witness (evidence of guilt)
 - 2) Attempt to bribe a witness
 - 3) Refusal to provide handwriting exemplars
 - 4) Destruction of evidence

In civil cases:

- Occurrence of similar events under similar conditions (for P, can be used in breach of k)
- Lack of similar events under similar circumstances (admissible by D)
- Demonstrations of the event
- **"Demonstrative/illustrative" evidence** include all tangible items presented at trial that did not have a real connection to the events but that are employed to aid the trier to comprehend testimony or other evidence
- **Demonstrative evidence:**
 - 1) Charts
 - 2) Videotapes
 - 3) Eyewitness testimony
 - 4) Exhibiting a personal injury
- **"Real/direct" evidence** is physical evidence having or alleged to have an actual connection with events that are the subject of the trial; must build foundation of:
 - 1) relevancy
 - 2) identity
 - 3) condition has not materially changed
- Judge decides what evidence is relevant
- ALL evidence is subject to FRE 401, 402, 403; real evidence is subject to identification or authentication
- Trier must establish the evidence items depict relevant info and that it is accurate
- View of property or a scene is under the trial court's discretion and they usually negate such evidence over concern for jury disruption/confusion

402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, *except* US Constitution or FRE

- Some evidence may be relevant but not be admissible, for ex., privileges recognized, expert testimony, some hearsay, contents of writings/recordings

403. Exclusion of Relevant Evidence on Ground of Prejudice, Confusion or Waste of Time

Relevant evidence *may be excluded* if its probative value *substantially* outweighed by the *danger of unfair prejudice*, confusion or misleading the jury, or by considerations of undue delay, waste of time or cumulative evidence

- Even if relevant, some evidence can be excluded if:
 - 1) its probative value is substantially outweighed by a danger of unfair prejudice (e.g., gruesome photos)
 - 2) confusion of the issues
 - 3) misleading the jury

- 4) (by considering undue delay) a waste of time or *needless* presentation of cumulative evidence (e.g., calling 18 character witnesses all that just say the D is a good, honest person)

Relevance	Prejudice	Result
Low	Low	Admit
Medium	Medium	Admit
High	High	Generally, admit
Low	High	Exclude

- With objections that are NOT based on materiality, are one of two kinds:
 - 1) Remoteness: Where circumstantial evidence is so far removed from the present situation that the probative value is negligent
 - 2) FRE 403
- In a negligence action, evidence of other *similar* accidents or occurrences may be relevant circumstantially to show a defective or dangerous condition, notice thereof or causation to the present occasion. The absence of other accidents or occurrences may also be probative
- Three theories for introducing such kinds of "similarity" evidence:
 - 1) Notice
 - 2) Negligence
 - 3) Causation

404. Character Evidence Not Admissible to Prove Conduct; Exception; Other Crimes

(a) Generally; of the accused; of the alleged victim

- **D can introduce 4 pertinent character traits on himself:**
 - 1) **Peace & good order**- used for crimes of violence (e.g., not bad check writing)
 - 2) **Honesty**- used in theft, embezzlement, drug distribution, forgery, obstruction of justice
 - 3) **Truth & veracity**- used for perjury, false statement, false report
 - 4) Law abidingness- is not really used
- *When can D put on a character witness for truth & veracity?* Only if the following occurs: 1) D is charged with a non-T&V crime and the D is roughed up on cross-examination, then the D can call a witness to offer his T&V, and 2) D is charged with a T&V crime
- When cross-examining the D, prosecution impeach him by a 1) prior conviction, 2) prior inconsistent statement, or 3) prior bad act; then after this the D can call a character witness for T&V
- D does not have to take the stand in order to get character evidence in and even if the D does take the stand, can get a positive instruction to the jury
- D can hardly EVER call a character witness under 404 in a civil trial b/c of the wording of the rule referring to the "accused" and the "prosecution" indicates a criminal trial
- Sexual battery, assault and battery, and civil fraud that could also be indicted as a crime may allow character witnesses
- **Prosecution MUST rebut a character witness with the same pertinent character trait** (cannot offer rebuttal on honesty when

the D's character witness discussed peace & good order); P is limited to reputation and opinion form and may not include proof of particular instances of conduct such as prior convictions

- Convictions, accusations made in good faith, and indictments are fair game for prosecution rebuttal on a character witness (must be information out in the community)
- Prosecution can impeach the character witness D puts on with cross-examination or by putting another witness on the stand to rebut the D's character witness
- **Prosecution can rebut with:**
 - 1) Attacking base of witness's knowledge
 - In any case, rebuttal must be rooted in a good faith basis of witness's knowledge (D can object if P brings out stuff witness couldn't have known)
 - 2) Attacking the witness him/herself - 600's rules
- **3 ways to bring out D's prior convictions:**
 - 1) Cross examining D's character witness
 - 2) FRE 404(b) evidence in P's case in chief
 - 3) FRE 609 - impeaching D if he takes the stand

(b) Other Crimes, Wrongs, Acts

Not admissible to prove the character of a person in order to show action in conformity therewith. Evidence of other crimes/wrongs/acts can be used however, for other purposes

- **The acts must be similar in nature to the crime for which the D is charged, and the act must be relatively recent in time to be admissible**
- Generally, this kind of evidence is done reasonably before the crime at issue (not the day before sampling cocaine before purchasing- that tends to be part of the same act, underlying it)
- Here with this rule, the Govt. should give pre-trial notice of what will be offered; the D counsel would then file a motion *in limine* to seek an advance evidentiary ruling to see if this evidence is admissible and the judge will issue a ruling
- If P offers such evidence, D needs to show that 1) it is being offered for propensity of D to commit the crime, 2) materiality/relevance the P is seeking to offer it on is not really an issue, and 3) that the prejudice outweighs the probative value in order to prevail on an objection (MNPP)
- This rule can be used by both P and D

405. Methods of Proving Character

(This Rule assumes FRE 404 is already being used)

(a) Reputation or Opinion

- Cannot ask such witnesses about specific instances of conduct on direct; on cross-examination, however, can ask them about specific relevant conducts

(b) Specific Instances of Conduct

- **5 torts/crimes that qualify for specific relevant instances of conduct:**
 - 1) Custody suit/fitness of parent
 - 2) Entrapment defense (lack of predisposition is an element of the crime)
 - 3) Libel and slander defense (truth is a defense to libel and slander)

- 4) Extortionate credit (have to show fear of the victim as an element of the crime)
 - 5) Negligent entrustment of an automobile (lawsuit occurs b/c a person loans his/her car to a known reckless driver)
- P can put on relevant specific instances of conduct under this rule, but a D never can (D can only put on general character evidence)
 - P can use specific character evidence when cross-examining a character witness, re-directing a good character witness, or either side (P or D) can bring it up when it is part of a charge/claim/defense

406. Habit; Routine Practice

IS relevant to prove *that the conduct of the person or the organization on a particular occasion was in conformity with the habit or routine practice.*

- 4) Habit is one's regular response to a repeated specific situation
- 5) Habit incidents cannot be too remote from each other in time (e.g., 4 years for 4 incidents is not regular enough)
- 6) In terms of admissibility, is the habit that of a person or organization? This is always going to be circumstantial evidence b/c you want the fact-finder to infer a fact from that habit
- 7) Much authority has supported corroboration as a condition precedent to the evidence being admitted but this rule specifically rejects this b/c it related to the merit/sufficiency of the evidence rather than admissibility
- 8) Habit evidence is more specific than character evidence which is general and party offering has a heavy burden of proof here

407. Subsequent Remedial Measures

Evidence of the subsequent measures is *not* admissible to prove:

- 1) Negligence
 - 2) Culpable conduct
 - 3) Defect in a product
 - 4) Defect in a product's design
 - 5) Need for a warning or instruction
- If evidence is offered for another purpose (e.g., proving or controverting ownership, control, or controverting feasibility of measures) it is ok
 - Measure has to be taken *after* the alleged injury/occurrence in order to be subsequent measure timing-wise
 - Examples of 5 most common subsequent remedial measures:
 - a. Repair/upgrade
 - b. Design change
 - c. Change in rule/policy
 - d. Firing an employee
 - e. New or modified warning/instruction
 - Depending on evidence offered by D, judge may make one of the 5 examples admissible in cross-examination or rebuttal
 - If evidence comes in, can ask for a limiting instruction
 - With feasibility of precautionary measures, most often will come up where opposing party testifies about non-feasibility and then does subsequent measures contradicting that
 - Point of this rule is to ensure lying parties can be impeached (must be a sweeping claim made by the D); is triggered by facts

asserted by the party or assertions by the party that conditions are "the best" or "the safest" they could be

408. Compromise and Offers to Compromise

Evidence of offering (or promising to offer) or accepting (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 amount*. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. If evidence offered for another purpose (e.g., proving bias/prejudice of a witness, negating a contention of undue delay, proving an effort for obstruction of a criminal investigation or prosecution) is ok

- This rule comes up to bar evidence when it is to be used in relation to the validity of the claim (ex. was D negligent in torts) or amount (ex. how much compensation or damages are at issue in the claim)
- *There needs to be a settlement conference or negotiation*; if only the P wanted to settle but there was no meeting of the minds, the evidence is NOT kept out at trial
- Applies in civil and criminal cases
- Compromise/offers can be used to show bias or on credibility
- Admissions made under this rule during negotiations are NOT admissible

409. Payment of Medical and Similar Expenses

Does not prove *liability for the injury*

- This rule (unlike FRE 408) does not extend to conduct or statements that are not a PART of the act of giving or offering to pay b/c the statements would be incidental to the actual giving
- This reason for this rule is that payment or offer is usually made from humane impulses and not from an admission of liability; to hold otherwise would discourage assistance to the injured person
- This rule is a narrower species of FRE 408
- Admissions made during the offer to pay ARE admissible at trial

410. Inadmissibility of Pleas, Plea Discussions, and Related Statements

- This evidence, if admitted, would contradict D's decision to have a trial
- Limited use of the exclusion is ok b/c use for or against other people will not impair effectiveness of allowing freedom to withdraw a plea
- Possible loophole in rule is where D makes a (otherwise voluntary) statement to law enforcement and later states he made it in hope of obtaining leniency by a plea
- This rule covers D's incriminating admissions made to D's counsel who made statements about them
- Statements made oral, written, or grand jury CAN be used to impeach; post-agreement grand jury testimony is not excluded from admittance
- If prosecutor specifically states in plea agreement that D agrees to waive FRE 410 and D signs it and gives some debriefing

statements, and if D withdraws plea later, P CAN bring in the evidence b/c D can waive his FRE 410 evidentiary right

- FRE 410 limits its application to statements made to an attorney for the government, but has been extended to law enforcement agents who have the express authority to act for the prosecuting govt attorney and thus negotiate plea bargains that are excludable

411. Liability Insurance

Evidence of whether person was or was not insured against liability is NOT admissible to prove *whether the person acted negligently or otherwise wrongfully*. If evidence offered for another purpose (e.g., proof of agency, ownership, control, trade custom, bias of witness) it is ok

- Courts have supported that liability insurance does not prove fault (and lack of insurance as proof of innocence)
- Purpose of this rule to keep juries from deciding case on whether one can pay if liable
- Can bring in insurance evidence for ownership, control, of feasibility of precautionary measures (if challenged), or witness bias/prejudice

412. Sex Offense Cases; Relevance of Victim's Past Behavior

(a) Inadmissible in criminal or civil cases except as provided in (b) and (c):

- 1) Evidence offered to prove that any victim engaged in other sexual behavior
- 2) Evidence offered to prove any victim's sexual predisposition

(b)(1) In a criminal case, can admit:

- a) Evidence of specific instances of sexual behavior by victim offered to prove that another person other than the accused was the source of semen, injury, or other physical evidence

Ex. If V alleges D gave her the cut on her forehead when he raped her, D can introduce evidence that V's boyfriend gave her the cut a week earlier when he hit her

- b) Evidence of specific instances of sexual behavior by the victim with the accused person of the sexual misconduct offered by the accused to prove consent or by the prosecution

- c) Evidence that, if excluded, would violate the D's constitutional right

Ex. Under *Chambers v. Mississippi*, evidence of child's other sexual conduct to show familiarity with sexual words/terms otherwise jury will think it comes from D and is unconstitutional inference

(b)(2) In a civil case, can admit:

If it is otherwise admissible under the Rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Reputation evidence only admissible if placed in controversy by the victim first.

(c) Procedure to determine admissibility

413. Evidence of Similar Crimes in Sexual Assault Cases

(a) In criminal case where D is accused of sexual assault, evidence of D's commission of another offense or offenses of sexual assault is admissible

(c) This rule does not limit admission/consideration of evidence under any other rule

414. Evidence of Similar Crimes in Child Molestation

Admissible for any purpose (like FRE 413)

415. Evidence of Similar Acts in Civil Cases for Sexual Assault/Child Molestation

Is admissible for any purpose.

Article V: Privileges

501. General Rule on Privileges

In criminal cases, principles of common law govern. In civil cases, State law regarding privileges governs (whether in state or federal court).

- Under Federal Rules, do have caselaw in other areas and the privileges are:
 - 1) **Attorney-client**
 - 2) **Husband-wife**
 - 3) **Psychotherapist-patient**
 - 4) **Priest-penitent**
- Privilege has been rejected with parent-child, accountant-client

Attorney-client: Need both persons and a convo concerning the case; the client has a privilege to refuse to disclose AND prevent anyone else from disclosing:

- 1) His communication with the attorney or representative of the attorney regarding the attorney's professional *legal* services
 - 2) Communications b/w lawyer and lawyer's representative
 - 3) B/w a lawyer and another lawyer involved in the same case
 - 4) B/w reps of the clients themselves
 - 5) B/w client and rep. of another client
 - 6) B/w lawyers when more than one lawyer representing a client
- The privilege is of the *client* or a person who is an attorney at the time of the communication may also invoke the privilege (but not if he later sues)
 - **Exceptions:** Lawyers hired not for a legal matters but for business matters (e.g., stock tips); or where services of lawyer were sought or obtained for a person to commit or plan to commit with the lawyer knowing or should have reasonably known was a crime; or where there is a claim of a breach of duty by the lawyer/ineffective assistance of counsel; or where clients have a falling out themselves and sue
 - 'Client' covers artificial entities (e.g., corporation, government, municipality); does not cover where attorney acts as a friend or in any other capacity as a lawyer (burden is on party seeking privilege to show there was an attorney-client relationship)
 - 'Lawyer' means you have passed the relevant bar and have received a law degree from an accredited school (is an objectively reasonable test)

- 'Representatives of lawyer' covers secretaries, associates, law clerks, other partners or anyone else working on that particular case
- Confidentiality requirement means you have to have made those statements to a lawyer in confidence (without presence of someone who does not count in privileges like a friend or significant other)
- Privilege extends to either written or oral statement; does not affect one's knowledge about something
- Documents not covered: Prior documents given to lawyer for safekeeping (e.g., cannot give something that could be subpoenaed to the lawyer so it falls under the privilege)

Husband-Wife Privilege

- Two types of privilege here:
 - 1) Adverse spousal testimony privilege (*Trammel* privilege): In a criminal case, only the spouse/witness called to the witness stand may invoke the privilege
 - 2) Confidential marital communications privilege: Broader than #1;
- Applies to all adverse statements by the spouse but in CRIMINAL case only!
- Trammel privilege may NOT be invoked after marriage
- Can only be recognized by testifying spouse only
- Even with this privilege, if the husband or wife wants to invoke it and the witness-spouse refuses to testify, there are exceptions:
 - In domestic abuse complaint
 - If it concerns person property
 - If it concerns the child of the other
 - Acts prior to the marriage
- Can be used by either spouse in a criminal or civil case
- Applies only to communications made in confidence made at time of marriage
- This privilege applies even after marriage by either spouse
- Requires that the marriage have been recognized at the time of the communication
- A mere act is not covered by this privilege, has to be an oral communication
- If statement made to third party, privilege does not apply; also, eavesdroppers do NOT waive the privilege (since spouses did not know someone was listening)
- Basic principle on this privilege: No one should be allowed to drop a dime on statements I made in confidence with my spouse when times were good

Article VI: Witnesses

601. General Rule of Competency

- *When does court have discretion NOT to let a witness testify?*
Where a witness cannot give coherent testimony due to mental competency, intoxication, drug use

602. Lack of Personal Knowledge

- Need to introduce some evidence to support a "sufficient finding" that the witness has personal knowledge (can consist of the witness's own testimony)
- The witness needs to be in a position to see, hear, feel, smell, or touch, else there can be an objection

603. Oath or Affirmation

605. Competency of Judge as Witness

- Judge cannot testify in his own trial where he's presiding
- No objection has to be made here- is an automatic objection rule

606. Competency of Juror as Witness

(a) At the trial

- Juror cannot testify in a case where she is sitting
- If a juror is called to testify, the opposing party may object OUTSIDE THE PRESENCE OF THE JURY (to avoid prejudice)
- If there is a hung jury or a new trial, then the juror might be allowed to testify (as long as they are not sitting in on the trial)

(b) Inquiry into Verdict/Indictment

- Jury cannot testify to any feature of jury's deliberations concerning any juror's mental processes or connection
- A juror may testify to whether any extraneous prejudicial information improperly brought to the jury or whether any outside influence was improperly brought to bear on any juror
- Party who is hurt by the extrinsic evidence may inquire; the burden is on the party who was helped by the evidence to show it was not improper
- Evidence that is not presented at trial but that reaches the jury and is extrinsic to the case may be testified to

607. Who May Impeach

608. Evidence of Character and Conduct of Witness

(a) Opinion and Reputation Evidence of Character

- Can only occur where the D opens the door or where the D is on the stand and calls a character witness for truthfulness as his second witness

(b) Specific Instances of Conduct

- Kinds of conduct admissible under FRE 608(b) are perjury, false report, false pretenses, fraud
- With impeachment purpose here, with a prior bad act, form of the question must have an ACTION verb showing the D's actions/conduct

609. Impeachment by Evidence of Conviction of Crime

(a) General Rule

- **5 factors of FRE 609(a) balancing test for probative value of prior conviction outweighing prejudicial effect:**
 1. Impeachment value of the prior crime

2. Point in time of the conviction and the witness's subsequent history
3. Similarity b/w the past crime and the charged crime
4. Importance of the D's testimony
5. The centrality of the credibility issue
 - Most relevant crimes under (a)(1) would be a property crime, then drug offense crime, then next ground would be a violent crime of murder/kidnapping/arson, at lowest end (most prejudicial) would be possession of a gun and sodomy

(b) Time Limit (remoteness)

610. Religious Beliefs or Opinions

- CAN use such evidence for bias/prejudice (e.g., member of KKK or white supremacist organization) for a specific instance in the specific case

611. Mode and Order of Interrogation and Presentation

(b) Scope of Cross-Examination

- Limited to subject matter of the direct examination AND matters affecting credibility of the witness
- 611(b) is cited when one is crossing for the purpose of bringing out a bias or prejudice of the W
- Court can permit inquiry into additional matters (with their discretion) and counsel must proceed AS IF on direct examination

(c) Leading Questions

- When a party calls a hostile witness/adverse party/witness identified as an adverse party, counsel can use leading Qs
- **All cross-examining questions will fall into one of 9 different categories relating to witness:**
 - 1) Competency- 611(b)
 - 2) Narration- can impeach- 611(b)
 - 3) Form of communication- 611(b)
 - 4) Memory
 - 5) Lack of personal knowledge
 - 6) Bias/interest/prejudice- 611(b)
 - 7) Prior inconsistent statement (613(b) or 801(d)(1)(A))
 - 8) Prior conviction
 - 9) Prior bad act relevant to truthfulness* (cannot use extrinsic evidence)
 - 10) Specific contradiction of a material fact
 - 11) Negative character witness for truthfulness
- Only one rule can bar impeachment: FRE 403
- May be allowed to lead a child witness or a witness who exhausts memory
- Form objections include asked and answered, lack of foundation, calls for narrative, non-responsive, etc.; else is hearsay

612. Writing Used to Refresh Memory

- At trial, can show the witness his testimony and then ask him again about it (have to show it to the opposing counsel also); if he still cannot recall it, the attorney can read it into testimony

613. Prior Statements of Witnesses

(a) Examining Witness Concerning Prior Statement

(b) Extrinsic Evidence of Prior Inconsistent Statement of Witness

- Extrinsic evidence of a prior inconsistent statement isn't admissible unless the W has a chance to explain or deny it and the opposing party has a chance to interrogate the witness about it. It doesn't apply to an admission of a party-opponent.
- FRE 801(d) (1) (A) is different from this rule b/c its narrower and subject to penalties of perjury- only GJ, deposition, prior testimony allowed with it
- Also 801(d) (1) (A) is substantive evidence
- FRE 613 deals with statements that are not under oath (unwritten statement)

614. Calling and Interrogation of Witnesses by the Court

- Court can call witnesses and all parties can cross-examine him/her
- Court can interrogate a witness called by the court or a party
- Objections on court's calling/interrogation can be made at the time or the next available chance when the jury is not present
- Usually only applies if a party wants the witness to appear impartial or where the party calling the witness does not want to vouch for the witness

615. Exclusion of Witnesses

Article VII: Opinions and Expert Testimony

**Identify whether it is lay or expert witness, and then if lay witness, check FRE 702 requirements and if expert, check FRE 702, 703, 704 requirements

701. Opinion Testimony by Lay Witnesses

- A lay witness cannot give an expert opinion in the guise of lay testimony
- Lay witnesses usually have to give only FACTS
- Most testimony will not be knocked out if it relates to the lay person's testimony in helping the jury understand it
- Cannot ask a question related to a legal conclusion to a lay witness

702. Testimony by Experts

- An expert need not have personal knowledge can testify in form of opinion if it is
 - (1) based upon sufficient facts or data
- This is a gate-keeping function determined by the judge
- The underlying basis should be brought out for good lawyering
 - (2) product of reliable principles and methods
- Subject to peer review, testing, known rate of error
 - (3) the witness has applied the principles and methods reliably to the facts of the case
- This expert's testimony must be relevant with (3)
- Also cannot ask a question related to a legal conclusion to an expert witness
- Inquiries on whether expert testimony allowed must include:

- Does there exist a specialized body of knowledge on the subject?
- Does the proffered witness personally sufficiently possess the knowledge?

Daubert v. Merrell Dow Pharmaceuticals, Inc: Court looked to FRE 702 and removed the "general acceptance" test that prevailed in courts prior. Replaced it with new standards:

- 1) Is this a scientific knowledge case?
- 2) Is the expert testifying to a scientific issue?
- 3) Will the testimony help the trier of fact to understand the evidence or determine a fact in issue

Reliability Prong- Used to determine whether testimony will assist trier of fact:

- 1) Does the testimony constitute scientific information that is testable
 - 2) Has it been subjected to peer review and publication
 - 3) Known or potential rate of error
 - 4) Existence and maintenance of standards controlling techniques and methods of operation
- Expert witness cannot testify to a legal conclusion!

703. Bases of Expert Opinion Testimony

- Three forms of expert witnesses:
 - 1) Treating physician
 - 2) Hypothetical question
 - 3) Hired gun
- FRE 403 is built in this rule for the 'hired gun' witness
- Would probably be unduly prejudicial if it affected a D's constitutional right in a criminal case to confrontation or is statutorily inadmissible
- Scope of FRE 703 (assumes she is qualified and testimony passes *Daubert*)
 - 1) Personal knowledge of expert
 - 2) Evidence presented at trial through other witnesses and exhibits made known to the expert (e.g. by hypo)
 - 3) Facts made known to the expert before the hearing of which he has no personal knowledge of before hearing it at the trial
- Whether to give opinion first or facts first is a choice of lawyering; usually, give opinion and then the basis for the opinion
- Can always cross-examine a witness on the basis for his opinion even if it was not covered specifically on direct examination

704. Opinion on Ultimate Issue

- This rule applies to what forms of questions can be asked
- The witness can give an opinion but cannot tell the jury what legal conclusion they must reach
- If the opinion tracks the language in the statute, that is BAD (US v. Scott, 846 F.2d 135)
- The expert also cannot tell the jury they are basing their opinion on the testimony of some witness that they believe (violated 608(a)(1))

- Under FRE 704, cannot give an opinion with either insanity or a mens rea defense, cannot put on an expert to say he "lacked intent" b/c that is a legal conclusion
- Must be a FACTUAL opinion, as opposed to a legal conclusion

705. Disclosure of Facts or Data Underlying Expert Opinion

- Court may require the underlying information if its in an area that is questionable

Article VIII: Hearsay

801. Definitions

(d)(1): Not hearsay where declarant (d) testifies at trial/hearing and is subject to cross-ex about a prior statement and the prior statement is:

(A) Inconsistent with the d's testimony and prior statement was given under oath subject to penalty of perjury at trial, hearing, or other proceeding, or in a deposition

- "Inconsistent" is where something is diametrically opposed or where the W is unsure about what was said or doesn't remember or denies saying it
- Prior statement has to be made under oath @ proceeding (e.g., prior trial, prior hearing, grand jury, immigration investigation proceeding)
- Purpose of introducing this inconsistency can be for impeachment AND for substantive evidence under FRE
- Does not apply to silence or changes of position

(B) Consistent with d's testimony and is offered to rebut an express or implied charge against the d of recent fabrication or improper influence or motive

- Must be offered to rebut a charge or its not admissible; this will *never* come out in direct examination of a witness
- Reason for this rule was to ensure the statements were made BEFORE there was a motive to fabricate or improper influence/motive
- In civil case, need to look at the time of the prior statement was made to see if there is any motive
- In criminal case, needs to be a contemporaneous statement made to someone other than a law enforcement officer made shortly after the crime (b/c likelihood of improper motive is present with law enforcement with hopes for a plea deal)
- **US v. Tome:** D molests his young child and child makes statement to 6 witnesses about the abuse; statements here were made *after* there was a motive to fabricate and thus they cannot be used to rebut the charge of recent fabrication; Court adopts the common law ruling allowing only statements prior to the improper motive/influence/fabrication; relevance of OOC statements does not determine admissibility, it must be relevant in order to be admitted but must also be properly authenticated/not hearsay/undue prejudice/qualify as a prior inconsistent statement

(C) One of identification of a person after perceiving the person

- Act of pointing out someone in courtroom is necessary to get in identification in record b/c any earlier ID by a witness would be hearsay at trial
- An in-court ID would not raise hearsay problems, but if the in-court ID is wrong, P can wait till D raises the issue on cross (or is ok as long as witness is subject to cross) and then bring in the prior statement as rebuttal
- Applicable to photo IDs, sketches, fresh on-the-scene ID, line-ups; not applicable to out-of-court ID of objects

Hearsay and Constitutional Right of Confrontation:

- Distinguish among four diff types of objectionable hearsay:
 - 1) prior statements by witnesses who testify in the present proceeding under oath and are subject to cross-ex concerning prior statement
 - 2) Declarant is on the stand and subject to cross in any case!
 - 3) Former testimony of presently unavailable witnesses
 - 4) Prosecution must show witness is unavailable despite good faith efforts to produce the witness at trial
- Ex. Prosecution issuing a writ and another jurisdiction does not honor it
- Ex. Grand jury testimony not admissible b/c no right of cross for witness at grand jury
- 3) Other hearsay falling with "firmly rooted" exception
 - Availability of witness is irrelevant for a hearsay analysis
 - Where proffered hearsay has sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule, the Confrontation Clause is satisfied and there is no objection
 - Hearsay not falling into "firmly rooted" exception

These consist of:

 - FRE 803(3) Statement that looks backwards
 - FRE 804(b) (3) Declaration against penal interests
 - FRE 807 Residual hearsay rule
 - It CAN come in if there are shown particularized guarantees of trustworthiness shown by the totality of the circumstances only surrounding the making of the statement

(d)(2): Admission by Party Opponent

Statement is offered against the opposing party and is:

- Do not want P-P or D-D offerings; needs to be against one's interest
- Does not matter who the witness is, it matters who made the statement

(A) Party's own statement (individual/representative capacity)

- Trustworthiness does not matter under this rule

(B) Statement of which a party has manifested an adoption or belief in its truth

- CANNOT adopt something unless someone else says something- adoptive admissions are always contextual hearsay
- This is usually conduct, if it's a statement can use (A)
- Problems in this area with civil/criminal areas with SILENCE;

**Silence in the face of an accusation is NOT admissible b/c of 5th Amdt

- In a tort, silence can be admissible if :
 - 1) There is an accusation of civil liability
 - 2) It was heard by the party against whom its being offered
 - 3) The party against whom it is being offered, if it were not true, that a reasonable person would have responded to it
- Doesn't matter, if D comes into a civil case and makes a statement that hurts him, it does not matter and is a statement made by a party-opponent

(C) Statement made by a person authorized by the party to make a statement concerning the subject

- Need to show authorization or agency and authorization for the person to speak about the particular subject matter

(D) Statement by party's agent or servant (employee) concerning matter within the scope of agency/employment, made during existence of relationship

- Is narrower than (C); P only has to prove that the matter stated by the employee concerned matter within the scope of agency/employment and the statement was made during the existence of the relationship
- Statements by different prior experts in prior litigation are NOT agent/servant admissions b/c they are independent and impartial in their testimony in each case and not authorized to speak on behalf of the party

(E) Statement by co-conspirator of a party during the course and in furtherance of the conspiracy

- 5 foundational requirements that must be proved:
 - 1) A conspiracy was in existence- No need for writing; is proved by circumstantial evidence
 - 2) The declarant was a member of the conspiracy- Agency theory
 - 3) The D was a member of the conspiracy
 - 4) The statement was made in furtherance of the conspiracy
 - 5) Statement was made during the course of the conspiracy
- Different ways the court can deal with this rule in criminal and civil cases; the rule can apply to both
- Is one of the few rules where in the criminal area, it is a one-way street- it is always the prosecutor who introduces evidence under it
- A good attorney would file for this under an *in limine* hearing b/c he wants a hearing before trial b/c co-conspirator evidence is so prejudicial that it should be looked into before trial
 - a. Lazy judge would let it in under conditional relevance
 - b. Judge may also require a proffer as to what coconspirator's evidence is and the foundational facts surrounding it
 - c. Court says prosecutor must bring on the witnesses and show the evidence for the 5 foundational requirements

802. Hearsay Rule

803. Hearsay Exceptions; Availability of Declarant Immaterial

(1) Present Sense Impression

(2) Excited Utterance

- Need to show stress/excitement and that being the base for the utterance

(3) Then Existing Mental, Emotional, or Physical Condition

- Must be "then existing"; Must be statement of declarant's, not another's state of mind
- Does not include statement of memory or belief
- Hillmon doctrine states when the performance of a particular act by an individual is an issue in a case, his intentions (state of mind) to perform that act may be shown
- Statement of memory or belief is okay for d's will if its:
 - f. Execution- I signed the will
 - g. Revocation- I tore up the will
 - h. ID- That's my will
 - i. Terms of d's will- keeping money in trust for 5 years

(5) Past Recorded Recollection

- **"Double stone" rule:** Are talking about past recorded recollection, usable even when the declarant is available and when he has been shown document and still does not remember the event, then it can be read by the attorney and admitted
- **Elements:**
 - 1) **Witness had first hand knowledge**
 - 2) **Statement must be made or adopted by declarant (SIGNED statement)**
 - 3) **Must be made when the matter was fresh in witness's mind**
(could not be months later)
 - 4) **Reflects the knowledge of the witness correctly**
- Can be used for good memory on direct; can be used to refresh recollection ("**single stone" rule**) of witness saying they don't remember

(6) Business Records of Regularly Conducted Activity

- **Foundational requirements:**
 - 1) **Records must be made and kept in course of regularly conducted business activity (can include an illegal venture)**
 - 2) **Was a regular/routine practice of the business activity to make the record**
 - 3) **Record was made at or near time of event recorded (tighter than 803(5))**
 - 4) **Record was made by or from information transmitted by a person with knowledge within the organization**
- Next, must be shown by a qualified witness or custodian to authenticate or must be self-authenticating
- Cannot get in a statement made to a business by an outsider
- Kick out clause in this rule: Unless the source of info or method/circumstances of preparation indicate untrustworthiness (e.g., if the document is prepared in anticipation or for litigation)
- Witness brought in does not have to have personal knowledge, only the person who reported or compiled data must have it

(7) Absence of Entry of Records Kept under (6)

(8) Public Records and Reports

- Police officer, detectives, public officials all go into this activity
- Setting forth:
 - 1) Activities of office/agency
 - 2) Matters observed during duty which there was a duty to report (excluding criminal case matters)

- 3) In civil actions/proceedings and introduced against Govt., factual findings (can include opinions/conclusions from an evaluative report) resulting from investigation made pursuant to authority granted by law

(10) Absence of Public Record or Entry

- Same as (7) but applicable to public records
- Used regularly in income tax prosecutions (absence of tax return)

(16) Statements in ancient documents

- Authenticity must be established (e.g., an article by the Post that is 20 years old and has not been corrected has a presumption of truth)

(17) Market reports, commercial publications

- Reliance by public or persons in field establish trust

(18) Learned Treatises

- Treatise on history, medicine, science, art may be admissible IF established as a reliable authority by the testimony/admission of witness or expert or judicial notice
- Can be brought in under direct (relied upon) or cross (called to the attention of) examination of an expert witness

(21) Reputation as to Character

- An opinion on honesty, peace and good order, law abiding

(22) Judgment of previous conviction (final judgment)

- If previous conviction was punishable over a year, can be brought in to prove *any fact essential to sustain judgment*
- Is not ok if offered by govt. for ANY other purpose except impeachment or for judgment against anyone other than the accused (appeal may be shown but doesn't affect admissibility)
- Does not apply to plea of *nolo contendere*

804. Hearsay Exceptions: Declarant Unavailable

- With this rule, the witness MUST be unavailable in order for these exceptions to kick in (and unavailability must be addressed as a basis for the exceptions)

(a) Definition of unavailability includes where the declarant:

- Invokes privilege concerning the subject matter of d's statement (attorney-client, husband-wife)
- Persists in refusing to testify about the subject matter of the d's statement
- Lack of memory on subject matter (this can be partial)
- Is absent from hearing and proponent hasn't been able to secure d's attendance by process or other reasonable means

(b)(1): Former Testimony

- Witness testimony from another hearing of the same or different proceeding or in a deposition for the same or different 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 that testimony by direct/cross/redirect examination
- Can be offered by the P or D so long as the opposing side had a chance to develop d's testimony

(b)(2): Dying Declaration

- In prosecution for homicide or in a civil action/proceeding, a statement made by the d *while believing DEATH is imminent* concerning the cause or circumstances of what d believed to be impending death

(b)(3): Statement against interest

- So far contrary to d's financial or appropriate interest, or tending to subject the d to a civil/criminal liability, or to render invalid a claim by the d against another
- Evidence exculpating the accused must have corroborating circumstances that clearly indicate trustworthiness to be admissible
- **Williamson v. US:** Scope of hearsay exception of 803(b)(3) include statements against interest only (and other neutral collateral statements), but cannot include other statements that may include blaming someone else for something (whether it happens to be a party to any case or not) b/c that part may not be as reliable/trustworthy
- In order to be a statement against interest, it need not be an outright confession but that it tend to subject the d to criminal liability to such an extent that they wouldn't have said it if it wasn't true
- A statement against interest offered by the prosecution to inculcate another is not a firmly rooted exception to the Confrontation Clause
- Statement may be given to a family member, friend, confederate, cellmate

(b)(4): Statement of personal or family history

(A) Matter of d's birth, adoption, marriage, divorce, legitimacy, ancestry, or similar fact of personal/family history even if witness had no personal knowledge of the matter stated

(B) Earlier matters AND death if the d was related to the person or so intimately associated with the d's family

805. Hearsay within Hearsay

- With a statement with a statement, need to show a separate exception for each level of hearsay

806. Attacking and Supporting Credibility of Declarant

- Any evidence admitted under FRE 801(d)(2)(C-E), the credibility of the d can be attacked, and if attacked, can be supported by any evidence which would be admissible if d was attending/testified
- Statements that are inconsistent with the hearsay statements admitted are admissible and not subject to any requirement that d needs to have an opportunity to explain or deny the statement

807. Residual Exception

- Need to show:
 - 1) Statement offered is material fact
 - 2) Statement is more probative on point for which it is offered than any other evidence available through reasonable efforts
 - 3) General purposes of justice and rules will be best served by admission
- The proffering party must give the opposing party notice of the proffer for them to have a fair opportunity to prepare to meet the proffer, including the particulars of the statement, including the name and address of the d

- This kind of evidence needs to be specially reliable; is often GJ

Article IX: Authentication and Identification

901. Requirement of Authentication or Identification

- Standard here is nominal ("sufficient to support a finding")
- Authentication and identification are imp. part of relevancy conditioned on fact and are governed by FRE 104(b)
- (b) gives examples (not exhaustive) of how evidence can be authenticated/identified:
 - a. Testimony that a matter is what it is claimed to be
 - b. Lay opinion on handwriting as to genuineness based upon familiarity *not acquired for purposes of litigation*
 - c. Comparison by trier of fact (judge or jury) or expert witness with handwriting specimens of evidence and handwriting sample of D
 - d. Distinctive characteristics and the like (ex. appearance, contents, substance, internal patterns) taken into consideration w/circumstances- applies to writing, voice ID
 - e. Voice ID- deals with call made BY someone at any time
 - f. Telephone conversations- deals with a call made TO a) person, circumstances incl. self-ID show its that person, or b) business, convo related to rsbl. business transactions over phone
 - g. Public records/reports from a public office
 - h. Ancient documents/data compilation- a) good condition regarding authenticity, b) where it would be if authentic, c) has been in existence for 20+ years when offered
 - i. Process or system used to produce an accurate results
 - j. Method provided by statute or rule
- Uninterrupted chain of custody not a prerequisite for admissibility; that issue goes toward credibility of the evidence
- **Mechanics for Introducing Evidence:**
 - i. have it marked by clerk for ID
 - ii. permit opposing counsel to examine document
 - iii. authenticate document by testimony of witness (unless self-authenticating)
 - iv. offering document into evidence
 - v. opposing counsel objecting, if he chooses
 - vi. submitting document to court for examination if court desires
 - vii. court's ruling on admission
 - viii. if admitted, presenting it to the jury by reading/passing it among them

902. Self-Authentication

Outside evidence of authenticity not needed (b/c of policy or that practical considerations reduce possibility of unauthenticity to small dimension) with:

- 1) Domestic public documents under seal and signature
- 2) Domestic public documents that are signed without a seal if a related employee verifies that the signature under seal has official capacity and is genuine
- 3) Foreign public documents authorized by one with official capacity and accompanied by a final certification verified by the executor/attesting person or any foreign official related to the signature perhaps by chain of command (though final authorization may be exempted if good cause shown)

- 4) Certified copies of official records, official publications (ex. IRS form), periodicals, trade inscriptions (ex. labels on goods), acknowledged documents (ex. notarized document), commercial paper/related documents, presumptions under Acts of Congress
- 5) Certified domestic records of regularly conducted activities, certified foreign records of regularly conducted activities

● **Pictorial testimony theory:** Photographic evidence is merely illustrative of a witness's testimony and only becomes admissible when a sponsoring witness can testify that it is a fair and accurate representation of the subject matter

● **Silent witness theory:** Photographic evidence is a "silent witness" which speaks for itself and is substantive evidence of what it portrays independent of a sponsoring witness

Article X: Contents of Writings, Recordings and Photographs/Best Evidence Rules (only triggered by WRITINGS)

**** First need to see if Best Evidence Rule applies (1002)? If not, then how do you get around it- 1003 or 1004?**

1001. Definitions

- Definitions of writings/recordings, photographs, "original", and "duplicate"
- Original is the writing/recording itself or any counterpart intended to have same effect by person issuing it (ex. photo negative)
- Duplicate is counterpart produced by impression of original or mechanical/electronic/chemical reproduction

1002. Requirement of Original/BER Rule

- Need an original writing, recording, or photograph in order for evidence to be provable (except as provided in FRE or Congressional Act)
- Key to this rule is "to prove the content"; rule only requires production of the original when the party seeks to prove its contents (determined by substantive law) or if party chooses to prove the matter using a writing as evidence (is a choice of lawyering)
- BER only applies when a party seeks to prove the content of the original, not anytime something of the type is offered into evidence
- BER also applies where a party chooses to use writing as evidence of matter that isn't written (but not if writing exists that recorded the event)

1003. Admissibility of Duplicates

- Duplicate is admissible like an original unless:
 1. There is a genuine Q about authenticity of the original (ex. D claims forgery of signature on original)
 2. It would be unfair to admit the duplicate in lieu of the original

1004. Admissibility of Other Evidence of Contents

- Original is not required and other evidence of the contents of a recording, writing, or photo is admissible IF:
 - Originals are lost or destroyed (in good faith)
 - Original is not obtainable
 - Original is in possession of the opponent
 - Original is only related to collateral matters

- This rule is a way around the Best Evidence Rule (if you're attempting to prove the contents or trying to get in the contents) and allows the introduction of a duplicate
- FRE recognizes no degrees of secondary evidence to prove the contents of a writing that has been lost or destroyed

1005. Public Records

- Official record(s) may be proved by copy if they're certified under FRE 902 or testified to be correct by a witness who has compared the copy to the original
- If a copy that complies with this can't be obtained with reasonable diligence, other evidence can be used
- If you can get the evidence in under self-authentication, FRE 1005 cannot help

1006. Summaries

- Contents of voluminous writings/recordings/photos that cannot conveniently be examined in court can be presented by a chart, summary, or calculation
- The originals/duplicates need to be made available for examination or copying @ a rsbl time or place
- The court can order that they be produced in court
- Questions here are 1) have you given notice to adverse party, and 2) is underlying evidence admissible?
- Summary of witnesses is NOT allowed, and need to ensure every underlying piece of evidence that is summarized is admissible
- FRE 1006 does not embrace a summary prepared by the lawyers trying the case, of the other evidence and exhibits- is only for voluminous material

Rule 1007. Testimony of Written Admission of a Party

- Contents of writings/recordings/photos can be proved by the testimony/deposition/written admission of the opposing party without accounting for the lack of the original

Rule 1008. Function of Court and Jury

- If the writing/recording/photos' admissibility depends on the fulfillment of a fact, the conditional fulfillment is determined by the court (under FRE 104)

Ex. Court would determine a condition that could be that the originals really have been lost or destroyed

- The jury determines the issue when the issue is:
 - whether the asserted writing ever existed
 - whether another writing/recording/photo produced at the trial is the original
 - whether other evidence of contents accurately reflects the contents
- Jury determines all questions on the MERITS of the case (ex. differing versions of content of lost originals)
- If trying to decide if Rules 1001-1004 apply, those are preliminary decisions for the court; once you determine that rule applies, question about this duplicate or that duplicate versions go to the jury