

- 1) **Relevance** – Relevant Evidence: is evidence that makes a fact more or less likely to be true than it would be without the evidence (looking for probative value). (FRE 401) Relevant evidence may be excluded for unfair prejudice, confusion, or waste of time. (FRE403) Relevant evidence is generally admissible and irrelevant evidence is never admissible. (FRE 402) Two leading principles on relevance: 1) that nothing is to be received which is not logically probative of some matter requiring to be proved; and 2) that everything which is thus probative should come in, unless a clear ground of policy or law excludes it. Relevancy exists as a relation between an item of evidence and a proposition sought to be proved.

A) Two General Types of Evidence

- i) Direct – evidence relating directly to the question of fact.
- ii) Circumstantial – evidence which may indirectly shed light on a question of fact.
- iii) Note: one must produce evidence to support each element of the matter tried.

B) Relevance & Inference

- i) Evidence is offered not in total, but piece by piece. Each new item of evidence cannot be expected to furnish conclusive proof of the ultimate fact to be inferred. **A brick is not a wall.**
- ii) Knapp v. State – appeal on conviction of murder. This case looks at the state's right, in trial to counter a claim made by D. P wanted to introduce evidence that countered D's claim that he killed in self-defense.
 - (1) Rule of Law – the determination of the relevancy of a particular item of evidence rests on whether proof of that evidence would reasonably tend to help resolve the primary issue at trial.
- iii) Collateral Fact – a fact that does not pertain to the issue at bar and therefore cannot be admitted as evidence.

C) Probative Value v. Prejudicial Effect (FRE 403)

- i) Courts must weigh the probative value of the evidence against the harm likely to result from its admission. Rule 403 is a loose liberal standard, but not an open door.
- ii) Relevant evidence may be excluded if it's value is substantially outweighed by either:
 - (1) The danger of:
 - (a) Unfair prejudice
 - (b) Confusion of the issues
 - (c) Misleading the jury

- (2) Considerations of:
 - (a) Undue delay
 - (b) Waste of time
 - (c) Needless presentation of cumulative evidence.
 - iii) Old Chief v. United States – case concerning stipulation on prior arrest. P refused to stipulate concerning prior arrest. D objected because he thought it would unfairly prejudice the jury.
 - (1) Rule of Law – relevant evidence may be excluded when its risk of unfair prejudice substantially outweighs its probative value, in view of the availability of alternative evidence on the same point.
 - iv) Ballou v. Henri Studios, Inc. – D wanted to show driver killed in accident was intoxicated at the time thereby showing contributory negligence in his death. Blood test would prove contributory negligence. Evidence should be let in to prove one element of the defense.
 - (1) Rule of Law – under the FRE 403, when a court endeavors to balance the probative value of evidence against its prejudicial effect it must give the evidence that amount of probative value it would have if the evidence is believed, not the extent to which the court finds it believable.
 - v) Stipulation – an agreement that X is true.
 - vi) FRE 403 – provides that a court may dismiss otherwise relevant evidence where its prejudicial effect on the proceeding outweighs any probative value it has.
 - vii) Logical Relevance – the relationship between offered evidence and a fact in issue that suggests such evidence makes the issue more or less public.
 - viii) Legal Relevance – the quality of offered evidence whose probative value outweighs its prejudicial effect.
 - ix) Probative – tending to establish proof.
- 2) The Decisional Framework
- A) Burden of Proof & Presumptions
 - i) Civil Cases (FRE 301) – presumptions in general in civil actions and proceedings. Presumptions governed by Rule 301 place the burden of establishing the nonexistence of a presumed fact on the opposing party only once the party invoking the presumption established the basic facts giving rise to it.
 - (1) Opposing Party’s Burden:
 - (a) The opposing party has the burden of going forward (burden of production, in that if you don’t produce evidence you’ll get a directed verdict) with evidence that either:

- (i) Rebutts the presumption directed to it; or
- (ii) Meets the presumption directed to it.
- (b) The opposing party does not have the Burden of Persuasion (which remains on the party that had the initial burden.
- (2) Presumption – a legal device where you can instruct the jury that if X and Z happened you can presume Y occurred. A true presumption is a rule of law that provides that when a particular group of facts has been established, another fact is also deemed established. In other words, the establishment of facts sufficient to create a presumption shifts the burden of producing evidence to the opposing party.
 - (a) Distinguished from Inference – In many instances, a jury rationally may infer one fact from the existence of another. Sometimes a party's burden of producing evidence may be satisfied by the use of an inference. However, unless the burden of producing evidence has actually been shifted, there is no presumption operating.
 - (b) Two types:
 - (i) Rebuttable – if A & B happened you **may** presume C.
 - (ii) Non-rebuttable – if A & B happened you **must** presume C.
 - (c) Conflicting Presumptions – where two presumptions conflict there is a bursting bubble and both go away. Under Federal Rule 301 and the law of most jurisdictions, a presumption operates only to shift the burden of producing evidence. Once evidence is introduced sufficient to support a finding with regard to the nonexistence of the presumed fact, the presumption disappears entirely or “bursts.”
- ii) Smith v. Rapid Transit – although unable to determine which bus company owned the vehicle which forced her off the road, P sued Rapid Transit (D) on the theory that the bus was most probably owned by them.
 - (1) Rule of Law – a proposition is proved by the preponderance of the evidence if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there. Mathematical evidence may not be introduced without some supporting direct evidence.
- iii) Dyer v. MacDougall – D moved for summary judgement when, through depositions, he learned that none of P's witnesses would testify that he heard any slander.
 - (1) Rule of Law – where a plaintiff will be unable to present any witnesses at trial who will testify to his allegations, summary judgement must be directed against him.
- iv) Legille v. Dann – case where the patent office (D) claimed the stamping of patent applications as received rebutted the presumption that P's patent

application, once mailed, was delivered in due course and without delay, and not on the late date stamped on it by the patent office.

(1) Rule of Law – a case involving contrary presumptions should not be summarily disposed of by assessing their relative strength and deciding which one should prevail.

v) Summary Judgement – judgement rendered by a court in response to a motion by one of the parties, claiming that the lack of a question of material fact in respect to an issue warrants disposition of the issue without consideration by the jury.

vi) Issue of Material Fact – a fact that is disputed between two or more parties to litigation that is essential to proving an element of the cause of action or a defense asserted or would otherwise affect the outcome of the proceeding.

vii) Directed Verdict – a verdict ordered by the court in a jury trial.

B) Criminal:

i) Effect in criminal cases: The constitutionality of a presumption in a *criminal case* depends on precisely the effect given to the presumption:

(1) Permissive presumptions: A so-called "*permissive*" presumption (one in which the judge merely instructs the jury that it "may" infer the presumed fact if it finds the basic fact) will almost always be constitutional, so long as the fact finder could "rationally" have inferred the presumed fact from the basic fact, the presumption will be upheld. (*Example*: The jury is told that where a weapon is found in a car, the jury may infer that each person in the car possessed that weapon. Since the presumption was rational on these circumstances, it was constitutional even though it relieved the prosecution from showing that each D actually knew of or possessed a gun.)

(2) Mandatory: But a "*mandatory*" presumption is subjected to much more stringent constitutional scrutiny:

(a) Shift of persuasion burden: If the presumption *shifts the burden of persuasion* to D, and the presumed fact is an *element of the crime*, the presumption will normally be *unconstitutional*. Such a presumption runs afoul of the rule that the prosecution must prove each element of the crime beyond a reasonable doubt. (*Example*: D, a dealer in second-hand goods, is charged with knowingly receiving stolen goods. The judge tells the jury that a dealer who buys goods that are in fact stolen, and who does not make reasonable inquiries about the seller's title to the goods, shall be presumed to have known they were stolen unless he shows that he didn't know this. Since this presumption has the effect of shifting to D the burden of showing that he did not know the goods were stolen – an element of the crime – it is unconstitutional.)

(b) Possibly constitutional: But even a presumption that shifts the burden of persuasion on an element of the crime will be constitutional if the

presumed fact flows from the basic fact beyond a reasonable doubt, and the basic fact is shown beyond a reasonable doubt. However, few if any presumptions can satisfy this stringent pair of requirements.

- ii) People v. Roder – Roder contended that the trial court committed a Constitutional error in instructing the jury to the effect that the burden of proof shifted to him to disprove an element of the crime of which he was charged.
 - (1) Rule of Law – a statute creating a mandatory presumption that works to shift to the defendant the burden of disproving an element of the crime is unconstitutional.
- 3) The Hearsay Rule
- A) Rationale & Meaning (Definitions)
 - i) Hearsay – 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. Rule 802 – Hearsay Rule: Hearsay is inadmissible except where provided for by the FRE or other rules prescribed by the US Supreme Court pursuant to statutory authority. A statement is used for a non-hearsay purpose when it is used only to show that it was made and not to prove that the matters asserted in the statement are true because the out-of-court declarant said that they were true. Possible non-hearsay uses include the following: proving verbal acts or verbal parts of acts, proving notice or knowledge, and impeaching the witness. A statement may be hearsay if offered for one purpose and not hearsay if offered for another purpose.
 - (1) Statement includes:
 - (a) An oral or written assertion; or
 - (b) Conduct (non-verbal) of a person, if that person intended it to be an assertion.
 - (2) Declarant – a person who make a statement. The declarant while not testifying makes these statements.
 - ii) Multiple Hearsay – If a piece of evidence contains multiple levels of hearsay, the evidence is not admissible unless some exception to the rule against hearsay can be applied to each level. However, the most distant level of hearsay sometimes may be admissible for a non-hearsay use if hearsay exceptions can be found for all intervening levels.
 - B) Statements which are Not Hearsay
 - i) Prior Statement by Witness is not Hearsay if:
 - (1) The declarant testifies and is subject to cross examination on the statement; and
 - (2) The statement is either:
 - (a) Inconsistent with the testimony and was given under oath; or

- (b) Consistent with the testimony and is brought to dispute a charge that the declarant:
 - (i) Lied; or
 - (ii) Was subject to improper influence; or
 - (iii) Had an improper motive. Or
- (c) A statement that identifies a person who was seen or heard.

<i>Prior Statements by Witnesses</i>		
Type of Statement	Required to Have Been Made Under Oath?	When Admissible?
Consistent	No	Only to rebut claimed improper influence or recent fabrication.
Inconsistent	Yes	Always

ii) Admission by Party Opponent – An admission of a party-opponent is any statement or act by a party to an action that tends to support the case against him. It is admissible to prove the truth of whatever it admits.

(1) A statement that is offered against a party is not hearsay if:

- (a) The statement is the party's own statement; or
- (b) The party seems to have adopted or believed the statement to be true; or
- (c) The party making the statement was authorized by the party to speak; or
- (d) The statement was:
 - (i) Made by an agent or servant;
 - (ii) Made during the existence of the relationship; and
 - (iii) Conceding an issue within the scope of the relationship. Or
- (e) A co-conspirator **during** and **in** the advancement of the conspiracy made the statement.

Cook said, if the admission is by the defendant, it will always get in.

(2) The contents of the statement shall be considered, but that is not enough in itself to establish any of the following:

- (a) The declarant's authority under (1) (c).
- (b) The agency or employment relationship (and their scope) under (1) (d).
- (c) The existence of a conspiracy and the declarant's participation with the party against whom the statement is being offered under (e).

(3) Admissions by Silence – a party's failure to deny a statement which he would be expected to deny if it were untrue is admissible against him as an

admission of the truth of the statement. However, a person in custody has a Miranda privilege to remain silent, and his silence cannot be used against him.

- (4) Admissions by Conduct – Evidence of conduct by a party that reasonably supports an inference inconsistent with his position is admissible as an admission by conduct.
- (5) Adoptive Admissions – A statement that a party indicates that he adopts or believes to be true may be admitted against him as an admission.

<i>Admissions and Statements Against Interest Compared</i>		
Points of Comparison	Admission	Statement Against Interest
Declarant	Party in current case	Anyone
Declarant's availability	Available or unavailable	Must be unavailable
Subject of statement	Anything adverse to the party's interest at trial	Creates financial or criminal risk to the declarant when declarant makes statement
Admissible against	Declarant, coconspirator, declarant's employer	Any party

C) Exceptions & Exemptions

- i) Dying Declarations (FRE 804(b)(2)) – there is a hearsay exception for statements made by a person who believes that his or her death is imminent. The rationale for this exception is that the dying person has no motive for making false statements and has nothing to gain from them. Exception applies in all civil cases and in homicide prosecutions. **Declarant must be unavailable (read dead).**
 - (1) Rule: Statement under the 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.
- ii) Spontaneous & Contemporaneous Exclamations – There are a few different exceptions noted under rule 803.
 - (1) Present Sense Impressions (FRE 803(1)) – people often describe things as they are seeing them or immediately afterwards. These statements are called present sense impressions and are admissible to prove the substance of what they observe. The rationale for this exception is that problems of memory are extremely slight in these circumstances since the rule requires that the statement is made during or immediately after the event or condition it describes.
 - (a) Rule: Present Sense Impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

Exam tip: often times an excited utterance question will begin with “Oh, no.” or “Oh my God.” And end with an exclamation point.

(2) Excited Utterances (FRE 803(2)) – Sometimes people speak out of excitement, or shock, or in reaction to having been startled. The rationale of this exception is that any motive the declarant might have to lie will be overcome by the shock of the startling event, and that memory’s not a problem because the statement must be made close in time to the event.

(a) Rule: Excited Utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Statement(s) of Current Mental, Emotional, or Physical Condition (FRE 803(3)) – When people say what they think about something or say how they feel physically or emotionally, there are no perception or memory problems likely to diminish the accuracy of what they say. This exception covers statements about what a person is feeling at the time he or she speaks, including both physical and emotional feelings.

(a) Rule: 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 the declarant’s will.

(b) Under the Federal Rules and in many states, a statement of past physical or mental condition is admissible as a hearsay exception if it was made either for the purpose of obtaining medical diagnosis or for the purpose of obtaining medical treatment. Under the Federal Rules, statements of external causation which are reasonably pertinent to the diagnosis or treatment are admissible.

iii) Admissions (FRE 801(d)(2)) – An admission is anything a party has ever communicated (in speech, writing, or in any other way) sought to be introduced against that party at trial. Under the Federal Rules of Evidences these statements are specifically exempted from the definition of hearsay and thus are not barred by the prohibition of introducing hearsay evidence. The statement, at the time the party made, could have been favorable to some interest of the party, unfavorable, or neutral. This is the largest loophole in the hearsay doctrine.

Exception.

(1) There are two primary rationales for permitting statements defined as admissions to be used in evidence despite the concerns that underlie the hearsay doctrine. They are:

(a) First, it seems fair that people ought to be forced to live up to their own claims, promises, and statements.

(b) Second, because admissions by definition are statements are always statements by a party (or someone closely affiliated with a party), many hearsay dangers are obviated.

- (2) There are five (5) types of statements defined as admissions under FRE 801(d)(2). They are:
 - (a) The party's own past words, relevant at the time of trial to an issue in the trial.
 - (b) An adoptive admission is a party's reaction to a statement or action by another person when it is reasonable to treat the party's reaction as an admission of something stated or implied by the other person.
 - (c) The statements of a person authorized to speak on behalf of someone who becomes a party to a lawsuit are admissible as admissions when offered against the party.
 - (d) A statement is an admission, usable against a party, if it is made by the party's agent or employee concerning something within the scope of agency or employment during the time of the agency or employment.
 - (e) One's conspirator's statements are considered admissions when offered against another conspirator so long as the statements were made during and in furtherance of the conspiracy.
- iv) Former Testimony (FRE 804(b)(1)) – 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. **Declarant must be unavailable.**
 - (1) In civil and criminal cases, testimony or deposition statements are admissible to prove the truth of what the statements assert if at the time they were made the party against whom the testimony is offered had an opportunity to cross-examine the declarant. Its also admissible if that party's motive to cross at the earlier proceeding was similar to the motive the party would have if the witness testified at the current case.
 - (a) For civil cases there is an additional liberalization: the requirement of opportunity and motive to cross examine can be satisfied by he presence in the earlier proceeding of a predecessor in interest to the party against whom the testimony is offered in the current trial.
- v) Declarations Against Interest (FRE 804(b)(3)).
 - (1) Types of Statements this Refers to:
 - (a) A statement so far against the declarant's interest; or
 - (b) A statement tending to subject the declarant to civil or criminal liability; or
 - (c) A statement tending to show that the declarant's claim against another is invalid; or

- (d) A statement offered to exonerate the accused by exposing the declarant to criminal liability, only if supporting circumstances show that the statement is trustworthy.
- (2) Required Standard – a reasonable person in the same position would not have made the statement unless he believed it was true.
- vi) State of Mind (FRE 803(3)) – 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).
 - (1) This does not include statements of memory (to prove the fact remembered) or belief (to prove the fact believed) unless the statement is about the declarant’s will.
- vii) Medical Diagnosis or Treatment (FRE 803(4)) – the theory here is that people have a compelling self interest in speaking truthfully to those who provide medical services. The rule makes admissible statements of past medical history as well as current symptoms if they are made for the purpose of medical diagnosis or treatment.
 - (1) Made for the purposes of medical diagnosis; and
 - (2) Describing any of the following:
 - (a) Medical history; or
 - (b) Past or present symptoms, pain or sensations; or
 - (c) The general character or cause of them.
- viii) Prior Identification (801(d)(1)(C)) – prior statement of a witness – one of identification of a person made after perceiving the person (the statement that identifies a person who was seen or heard). These are certain statements made outside of court by a person who testifies at the trial. Declarant must be at the trial and available for cross-examination.
 - (1) The rationale of the rule is that the identifications of people made prior to trials are likely to be more accurate than identifications made during testimony, and for that reason should not be excluded from substantive use.
- ix) Past Recollections Recorded (FRE 803(5)) – sometimes a witness at trial may have no recollection about a relevant fact but may have made written notes about it at an earlier time. Those notes are admissible under the recorded recollection exception provided certain conditions are met.
 - (1) This is a memorandum or record where:
 - (a) It concerns an issue that the witness had knowledge on; and
 - (b) The witness can no longer remember enough to testify fully and accurately; and

This is an exemption and therefore not considered hearsay

- (c) It is made or recorded when the issue was fresh in the mind of the witness; and
 - (d) It correctly represents the witness' knowledge.
- (2) If admitted, the memorandum or record may be read into evidence but may not be submitted as an exhibit unless offered by an adverse party.
- x) Business & Public Records (FRE 803(6)) – provides that a record kept in the course of a regularly conducted business activity is admissible as an exception to the rule against hearsay. The policy justification for treating these records as exceptions to the hearsay exclusion is that they are likely to be accurate since they are made for the purpose of running an enterprise rather than for some purpose in litigation.
- (1) Requirements:
- (a) The proponent must show that it was made as a part of the usual activities of the organization;
 - (b) That a person with knowledge of what the record says made the record or reported the information to the person who made the record; and
 - (c) The record was made near the time of the occurrence that it describes.
 - (d) A witness must testify about how the record meets these exceptions.
- (2) Public Records (FRE 803(8)) – there are basically three types of records you can get in under the public records exception. They are:
- (a) Records of office or agency activities;
 - (b) Records of matters observed and reported pursuant to duty (but records of matters observed by police officers are not admissible in criminal cases); and
 - (c) Factual findings of investigations (but in criminal cases only against the government).
 - (d) **Note:** no need to have records custodian, they just need to be certified.

<u>Admissibility of Public Records</u>				
Type of Report	<u>Can it be Introduced by:</u>			
	Civil Plaintiff	Civil Defendant	Criminal Prosecutor	Criminal Defendant
Activities of public office.	Yes	Yes	Yes	Yes
Matters observed and reported pursuant to legal duty by public employees except law enforcement personnel.	Yes	Yes	Yes	Yes
Findings from official investigations.	Yes	Yes	No	Yes

Evidence Outline

Prof. Cook

Matters observed and reported pursuant to legal duty by law enforcement personnel.	Yes	Yes	No	No ¹
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- xi) Miscellaneous Exceptions – a number of exceptions cover records that are usually highly reliable. They include:
- (1) Records of religious organizations (FRE 803(11)) (for issues of personal family history contained in a regularly kept record of a religious organization);
 - (2) Marriage and baptismal certificates (FRE 803(12)) -- Vital statistics, marriage certificates: Statements of fact contained in public records have an exception. (*Examples:* A report that X died on a certain day, offered to prove that fact. A statement in a marriage certificate that X married Y on a certain day offered to prove that fact.);
 - (3) Family records such as tombstones or engravings on urns (FRE 803(13)) – theory behind this exception is that statements about family history are likely to be either accurate or corrected when they are made in places that are subject to inspection and are regarded as important;
 - (4) Market quotations and other information from generally published materials (FRE 803(17)) – information like published weather reports, stock prices, commodity prices, or telephone directories are covered by this exemption. They are compiled by people with no motive to lie, and because they are used by the public, errors are likely to be discouraged;
 - (5) Judgement of prior convictions (used to prove something substantive) (FRE 803(22)) – conviction of a serious crime may be used in other proceedings as proof of any fact that was essential support for the judgement. Note that in criminal cases, this exception may not be used against a person different from the person who was found guilty; or
 - (6) Learned treatises (FRE 803(18)) – usually comes up in cross-examination scenarios. If a judge under FRE 104(a) concludes that published material is considered reliable by professionals in the field, statements in such materials are admissible for their truth, if they are used in direct or cross-examination of an expert witness. To avoid the risk that the jury will rely too heavily on these items, the rule prohibits their use as exhibits.
- 4) Return to Relevance
- A) Character, Habit, & Custom
- i) Character (FRE 404(a)) – character evidence is evidence of a persons character or character trait (not admissible to prove conduct; exceptions or other crimes).

¹ This is the Rule's provision, but some decisions allow such evidence, influenced by the criminal defendant's constitutional right to introduce relevant evidence, reinforced by an analogy to the Rules' treatment of admissions.

- (1) Admissibility – character evidence is **not admissible** to prove that the person acted in keeping with character.
 - (a) Exceptions:
 - (i) Character of the Accused, if:
 1. The evidence is offered by the accused; or
 2. The evidence is offered by the prosecution to rebut character evidence offered by the accused.
 - (ii) Character of the Victim, if:
 1. The evidence is offered by the accused; or
 2. The evidence is offered by the prosecution to rebut character evidence offered by the accused.
 3. Homicide Cases: if the evidence is:
 - a. Offered by the by the prosecution; and
 - b. Of the peacefulness of the victim of a homicide; and
 - c. Used to rebut evidence that the victim was the aggressor
 - ii) Methods of Proving Character (FRE 405) (in a case where character is at issue – all three types are admissible):
 - (1) Reputation or Opinion (FRE 405(a)) – in cases where character evidence is admissible, proof may be made by:
 - (a) Opinion testimony; or
 - (b) Gossip (i.e., reputation).
 - (c) Specific instances of conduct (may be explored as proof on cross-examination).
 - (2) Specific Instances of Conduct (FRE 405(b)) – may also be used as proof where a person’s character/character trait is an essential element of a charge, claim, or defense.
 - iii) Habit: Routine Practice (FRE 406) – evidence regarding a person’s habit or an organization’s routine practice is admissible to prove conduct on a particular occasion. Business practices are usually enough to prove that an organization acted in accordance with those practices on a particular occasion.
 - (1) Evidence Admissible: evidence of
 - (a) A person’s habit; or
 - (b) The routine practice or an organization..
 - (2) Relevance: the evidence is relevant to prove that a certain conduct was in keeping with that habit or routine.
 - (3) The evidence is admissible regardless of:

- (a) Whether the evidence has been corroborated; or
 - (b) The presence of an eyewitness.
- B) Similar Happenings:
- i) General Rule: Evidence that similar happenings have occurred in the past (offered to prove that the event in question really happened) is generally **allowed**. However, the proponent must show that there is **substantial similarity** between the past similar happening and the event under litigation.
 - ii) Accidents and Injuries: Thus evidence of past similar injuries or accidents will often be admitted to show that the same kind of mishap occurred in the present case, or to show that the defendant was negligent in not fixing the problem after the prior mishaps. But the plaintiff will have to show that the conditions were the same in the prior and present situations.
 - iii) Past Safety: Conversely, the defendant will usually be allowed to show due care or the absence of a defect, by showing that there have **not** been similar accidents in the past. However, D must show that: (1) **conditions were the same** in the past as when the accident occurred; and (2) had there been any injuries in the past, they would have been **reported** to D.
- C) Subsequent Happenings (FRE 407) – despite its possible relevance, this type of evidence is excluded due to two specific policy considerations. They are:
- i) The conduct is not a good indicator of fault since it may be in response to a mere accident or contributory negligence.
 - ii) There is the social policy of encouraging people from taking steps in furtherance of added safety.
 - iii) Definition:
 - (1) A measure taken after injury or harm caused by an event; and
 - (2) That measure would have made the injury or harm less likely to occur if it were taken earlier.
 - iv) Evidence Inadmissible to Prove:
 - (1) Negligence; or
 - (2) Culpable conduct; or
 - (3) A defect in a product; or
 - (4) A defect in a product's design; or
 - (5) A need for a warning or instruction.
 - v) Admissible to Prove:
 - (1) Ownership; or
 - (2) Control; or
 - (3) Feasibility of Precautionary Measures (only on cross); or

- (4) Impeachment.
 - vi) Examples of subsequent conduct are:
 - (1) Repairs;
 - (2) Installation of safety devices;
 - (3) Changes in company rules; or
 - (4) Discharge of employees.
- D) Offers in Compromise (FRE 408) – statements made in negotiating settlements, and the fact of an accomplished settlement itself, are kept from the knowledge of the of the trier of fact even though many settlement offers are probably a good indication that the party that offered the settlement believed that the opponents claims were valid.
 - i) Rule applies to evidence of:
 - (1) Giving or receiving (or offering or promising to give or receive) valuable consideration in a compromise/attempt to compromise when a claim is disputed (as to validity or amount of claim); or
 - (2) Conduct at compromise negotiations; or
 - (3) A statement made in compromise negotiations.
 - ii) Admissibility of Evidence Regarding a Compromise:
 - (1) **Inadmissible to Prove:**
 - (a) Liability for a claim or its amount; or
 - (b) Invalidity of a claim or its amount.
 - (2) **Admissible to Prove:**
 - (a) Proving bias or prejudice of a witness;
 - (b) Negating a contention of undue delay;
 - (c) Proving an effort to obstruct a criminal investigation or prosecution
 - (3) Any evidence that is otherwise discoverable and presented in the course of compromise negotiations is also admissible.
- 5) Impeachment & Cross Examination
 - A) **Five Types of Impeachment:** There are five main ways of *impeaching* a witness, i.e., of destroying the witness' credibility:
 - i) By attacking W's general character (e.g., by showing past crimes, past bad acts, or bad reputation);
 - ii) By showing a prior inconsistent statement by W;
 - iii) By showing that W is biased;
 - iv) By showing that W has a sensory or mental defect; and

- v) By other evidence (e.g., a second witness' testimony) that contradicts W's testimony.
- B) The Rule Against Impeaching One's Own Witness & Other Forensic Problems
- i) Modern and Federal Rule: Many states, and the Federal Rules, have now completely **abandoned** the common law rule prohibiting impeachment of one's own witness. See, e.g., [FRE 607](#) ("The credibility of a witness may be attacked by any party, including the party calling the witness.") Also, a criminal defendant may have the right under the [Sixth Amendment's Confrontation Clause](#) to impeach a witness he has called.
 - ii) Rule: The credibility of a witness may be attacked by any party, including the party calling the witness.
- C) Methods of Impeachment -- Under the Federal Rules, the credibility of a witness may be attacked by any party, including the party calling him. Most states have retained the rule that a witness' credibility may not be attacked by the party calling him, at least in the absence of a showing (1) of surprise and (2) that the witness' testimony was positively harmful to the party's case.
- i) Impeachment by Contradiction -- Evidence which contradicts a witness but which is collateral to the lawsuit and introduced solely for the purpose of attacking the witness' credibility may be brought out on cross-examination of the witness subject to the discretion of the trial judge. However, other evidence such as the testimony of other witnesses with regard to collateral matters (generally referred to as "extrinsic evidence") may not be introduced.
 - ii) Character of the Witness (FRE 404(b)) – although proof of someone's character is kept out if offered to show action in conformity with that character on a specific occasion (except in sexual offense and child molestation cases), it can be admitted if introduced for other purposes.
 - (1) Admissibility of Prior Bad Acts (FRE 404(b)) – evidence of a person's — other crimes, wrongs or acts is not admissible to prove that the person acted in keeping with that character.
 - (a) Exceptions:
 - (i) Such evidence may be admitted for other purposes, such as proof of:
 1. Motive
 2. Opportunity
 3. Intent
 4. Preparation
 5. Plan
 6. Knowledge
 7. Identity

Must weigh 403
probative v.
prejudicial..

8. Absence of mistake or accident.

(ii) Requirement (in criminal case): upon the request of the accused, the prosecution must provide reasonable notice of the general nature of the evidence, either:

1. Before trial; or
2. During trial, if the court excuses pretrial notice on good cause shown.

(2) Prior Convictions – is evidence of a witness’ past conviction admissible?

<i>Balance Between Probative Value and Risk of Prejudice</i>				
Type of Conviction/Type of Witness	Substantially more Probative than Prejudicial	More Probative than Prejudicial	More Prejudicial than Probative	Substantially more Prejudicial than Probative
Crime Involved truth-telling (deceit crime)/any witness	Yes	Yes	Yes	Yes
Crime did not involve deceit/ any witness except a criminal defendant	Yes	Yes	Yes	No
Crime did not involve deceit/criminal defendant witness	Yes	Yes	No	No
Any crime more than 10 years old/any witness	Yes	No	No	No

(3) Bad Reputation for Truth & Veracity (FRE 608(a)) – after a witness testifies, evidence may be introduced about that witness’ character traits related to truth telling. A party seeking to impeach the credibility of a witness may introduce evidence showing that the witness is the type of person that would likely lie.

(a) Rule: opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations:

- (i) The evidence may refer only to character for truthfulness or untruthfulness, and
- (ii) Evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Evidence attacking a witness’ character for truth telling is introduced by the testimony of other witnesses

iii) Prior Statements to Impeach or Rehabilitate (FRE 613) – when a witness has said something in testimony but has also written or said something earlier that conflicts with that testimony, what the witness said or wrote at the earlier time is called a prior inconsistent statement. On the theory that a person who says one thing one time and another thing another time has probably lied or suffered from memory deficiencies on one of the two occasions, proof of prior inconsistent statements may be used to impeach a witness.

iv) Bias – if a witness is biased either against or in favor of a party at a trial, proof of that bias is permitted on the theory that the witness may have shaded his or her testimony in line with their bias. A cross-examiner is allowed to ask questions that will show possible sources of bias.

(1) Common Sources of Bias:

- (a) Family ties
- (b) Financial ties
- (c) Membership in organizations

<i>Permitted Occasions for Proof Related To Credibility</i>			
			<i>Occasions for Use of Proof</i>
Type of Proof	Initial Information About Credibility	During Direct	During Cross
Convictions showing untruthfulness.	Yes	Yes	Yes
Opinion or reputation showing untruthfulness	Yes	Yes	Yes
Past acts showing untruthfulness	Yes	No	Yes
Opinion or reputation showing truthfulness	No	Yes	Yes
Past acts showing truthfulness	No	No	Yes

6) Confidentiality & Confidential Communication (FRE 501) -- Privileges for Confidential Communication to Attorneys, Doctors, Clergymen, and Between Husband and Wife

A) Attorney Client Privilege

- i) General Rule: A client has a privilege not to disclose, and to keep his attorney from disclosing, confidential communications between them if the communications were made as part of an attorney-client relationship in order to facilitate legal services by the attorney for the client.
- ii) Confidentiality: The communications must have been intended to be confidential. The presence of disinterested third parties destroys confidentiality.
- iii) Exceptions: The privilege does not apply in the following situations: a) disputes between joint clients, b) disputes between the attorney and the client,

c) disputes over a client's will after his death, and d) communications made in furtherance of a future crime or fraud.

- iv) Waiver: The client is the holder of the privilege and may waive it by testifying to the communications or causing his attorney to so testify.
- v) Work Product of Attorneys: Materials prepared by an attorney which do not incorporate privileged communications are nevertheless protected to a large extent since a party must show “good cause” to compel their production.
- vi) Application when Client is a Corporation: As a general rule, a corporation can claim the attorney-client privilege with respect to confidential communications made to its attorneys by its employees as part of an attorney-client relationship. There are differing views among the jurisdictions as to how a distinction should be drawn between such protected statements and all other statements to such attorneys by employees of the client corporation.

B) Physician – Patient & Psychotherapist – Patient Privileges

- i) Physician Patient Privilege -- Defined: privilege against the disclosure of confidential information acquired by the doc in a professional relationship entered into for the purpose of obtaining treatment. Has to be in furtherance of obtaining treatment.
 - (1) Court ordered examinations: don't count because not for the purposes of treatment.
 - (2) Elements to assert this privilege:
 - (a) Must be arguably necessary to facilitate medical treatment
 - (b) What a lay person would notice doesn't count
 - (c) Tax statements etc. don't count – has to be regarding the treatment
 - (d) Has to be made with the intention that it be confidential. If you made it in Camden Yards then not confidential, hospital protected.
 - (3) When doesn't this apply:
 - (a) For court appointed treatment.
 - (b) Doesn't apply in personal injury.
 - (4) When does this apply:
 - (a) Hospital records,
 - (b) Things the doctor says,
 - (c) Communications to the nurse, receptionist.
 - (5) Not accepted everywhere: Only about half the states have it.
 - (6) Waiver: It is frequently waived because of the patient litigant exception.
 - (a) Waived where holder of the privilege has put his or her own physical condition into dispute in litigation.

- (b) Statements by a litigant patient to a doctor are not protected from being revealed.
- (c) In most states the privilege does not apply in criminal cases.
- ii) Patient & Psychotherapist – this privilege has broader application than the physician-patient privilege because it covers statements made to therapists who are not physicians as well as to physician-therapists.
 - (1) Rationale – the privilege has been adopted by judicial decision and by legislation because of beliefs that psychotherapy is valuable to individuals and society, and that it cannot be preformed effectively unless a patient is assured that statements to the therapist will be confidential.

7) Writings

A) The Best Evidence Rule (FRE 1001-1004):

- i) What Does This Apply To:
 - (1) Writings
 - (2) Includes x-rays, recordings, writings, recordings
 - (3) Movies
 - (4) More then just actual writings
- ii) Rule: *When trying to prove the contents of a writing and when the writing is a key issue in the case - you have to produce the original writing.* All it does is express preference for the original. The name is a misnomer it does not mean that you have to have the most probative evidence. Asks that a party seeking to prove the content of a writing must either produce the original document or account satisfactorily for its absence.
- iii) What does proving the contents mean?
 - (1) Sometimes there are things that you know first hand that are ultimately put down in writing
 - (2) If at trial you are asked to testify as to what you did after your last day of evidence. You say you went to Chicken-Out say how much you pay. Object as to the fact that this is the content of a writing doesn't matter because you knew to begin with that this was 5.50 and then it was put down on a receipt. If they ask what Bill bought, you don't have firsthand knowledge so you would have to prove this.
 - (3) **If you have firsthand knowledge that is later documented you do not need to use best evidence:** *Herzig v. Swift & Co.*
 - (a) **Facts:** had to testify to the partners share of the earnings. Objection that you can't testify because this stuff is all written down.
 - (b) **Holding:** Objection overruled because he knew this independent of the writing. Had he not known this then you would have had to prove the

contents of the writing. You have to lay a foundation that you do have first hand knowledge.

(4) *Meyers v. US*

- (a) **Facts:** perjury case. The Meyers testified before a senate committee hearing. The allegation is that the testimony given is false. Lamar is asked to testify about what was said before the senate hearing. Objection was that the hearing transcript is the most accurate writing.
- (b) **Holding:** NO – he heard it himself, this is first hand information so you are not trying to prove up the contents of the writing.
- (c) Not introducing it for the truth.

(5) Secondary Evidence:

- (a) If the excuse for not having it is reasonable
- (b) Then a foundation has been laid for secondary evidence and a
- (c) Copy or oral testimony may be admitted to prove the content of the writing.

(6) When does it apply?

- (a) A writing is the legally operative document – a writing which itself creates or destroys a legal relationship that is at issue in the case. Like a deed, divorce decree.
- (b) Where witnesses sole knowledge comes from the writing. They don't have personal knowledge. Ex. Proving motive through letter. The officer has to produce the letter or give a good reason why he doesn't have it.

(7) When doesn't it apply?

- (a) When it is coincidentally described in a writing, but the fact exists somewhere else like through firsthand knowledge (examples: birth, death, payment – seeking you pay someone is as good as receipt, but if no one saw it and someone found it in receipt then it either has to be produced or its absence has to be explained.)
- (b) Does not apply to writings in minor controversy to the litigation. This is so as to not encumber litigation.
- (c) This is how many judges follow this – they consider this collateral evidence

(8) Modifications to the rule:

- (a) Public records – don't have to produce original – because you probably can't give out them. The best you can get is a certified copy. This is sufficient.

(b) Voluminous Document Modification – when they can't conveniently be examined in court then the proponent may prove the content by means of a summary or a chart or a calculation. By having a chart you are kind of proving the content of the materials w/o bringing the originals but they are too voluminous and even though you are offering it for truth they would qualify as business records or admissions.

(9) What is an original? Are duplicates?

(a) Duplicates are defined as counter parts produced by any technique, which would avoid casual errors. A copy of the lease, the videotape, unless opponent can show that it is not trustworthy. Don't have to get the original film.

(b) Don't have to get original marriage certificate, etc. – can get public record.

(c) Copies are generally duplicates except for hand written copies (secondary evidence).

(d) A duplicate is admissible just like the original unless a genuine question is raised about the authenticity of the original or unless it would be unfair to admit duplicate in place of the original.

(e) Are there preferred degrees of secondary evidence: NO, once you lay the foundation any form of secondary evidence would be sufficient.

(10) When is the rule waived:

(a) If the original is lost through no fault of the proponent then it is waived.

(b) If the original is not obtainable (i.e. in other country)

(c) If other side is on notice that this is needed for trial and doesn't produce it then you are waived.

(11) *Cotto*

(a) **Facts:** doctor called to testify as to what the doctor said. Looks at the photograph, sent the x-rays to another physician. Testifying as to what the pics said.

(b) **Does the best evidence rule apply:** yes

B) Authentication

i) **Common items:** When you introduce physical evidence you have to document it. Like a paper clip.

ii) **Unique item:** like Duke ring.

iii) **Photograph:** the way you admit this is that you show it to your witness and say, "do you recognize this picture?" They say it looks like Caesar's

palace parking lot. Does it accurately reflect the parking lot the way it looked on the day of the robbery?

- iv) **Document like a letter:** want to get it into evidence that there is a letter confession. You have to prove that the defendant actually signed it. If the defendant says he wrote it that is enough. If he recognizes it as his own then that is enough too.
- v) **Authenticating a writing:** gets someone who is familiar with that persons writing. You could get a handwriting expert too.
 - (1) *US v. Dockins*
 - (a) **Facts:** charged with felony possession of a firearm. Have to prove the person who had the gun is a felon. Use of aliases. One crime in DC one in Denver. One officer claimed to have obtained a finger print card that said "Denver police." The problem is that this document just said fingerprint card, but you have to authenticate that card. You have to show that it is in fact the official card from the Denver police station.
 - (b) **Issue:** how do you prove that someone is someone they say they are when the other side won't stipulate to it.
 - (c) **Holding:** have to authenticate the official Denver police record. Gov't did not prove that card was from that agency.
- vi) **Voice authentication:** get a bunch of tapes and the first thing you here is agent about to call a dooper. Informant can say that he talks to him every other day and can authenticate this voice. Another way to do it is to dial the # the phone company has assigned to the individual and then the person on the other end identifies himself.
 - (1) *First Bank of Denton v. Maryland Casualty Co.*
 - (a) **Facts:** claim there was an accidental burning. The first resident he was in burned down to the ground. This is a claim to recover the insurance money. Insurance company as part of their proof wants to introduce evidence that Mills was not at his second residence but was out setting his place ablaze at the time. Want evidence of police dispatcher calling him to tell him his old home is on fire. Answered that this was the Mills' residence. The call is authenticated because it was the number assigned to him and they answered accordingly. This means you authenticated the call, but not that this gets admitted into evidence. The insurance company is admitting this for the truth. They want to argue that he was not at home but was out burning down the other house. This is hearsay, yet the court admits this in evidence. The theory here is that this is because present sense impression. The court reasoned that you are observing something so in that instance it falls in and they allow in out of court statement. The problem here is that you don't have a foundation of reliability.

- (b) Rule of Law: under FRE 901(b)(6), when a person places a telephone call to a listed number and the answering party identifies himself as the expected party, the call is properly authenticated.