**Trial Mechanics**

1. General evidence rules
   1. Deference to trial judge’s choice on admissibility of evidence (*US v. Walton*)
   2. **Rule 103****:** 
      1. **(a) Effect of Erroneous Ruling.**--Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
         1. **(1) Objection.**--In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or
         2. **(2) Offer of Proof.**--In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.
            1. Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.
      2. **(b) Record of Offer and Ruling.**--The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.
      3. **(c) Hearing of Jury.**--In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.
      4. **(d) Plain Error.**--Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.
         1. **Standard?** Something so bad happened that we are going to review it even though we wouldn't normally, i.e., miscarriage of justice, egregious error
   3. If want to exclude testimony that has generally been ruled admissible in limine, need grounds for each objection as you make it (*Bandera v. City of Quincy*)
2. Why do we need rules of evidence?
   1. **Common principles**: efficiency and accuracy (twin principles)
      1. Reference to the jury
   2. Equity--everyone playing by the same rules
   3. No bias (appealing to emotions)--facts
   4. Accuracy
   5. Limit experts involved
   6. Keep trial manageable
   7. Moves at reasonable pace
   8. Conspiracy between judge and lawyers (self-serving)
      1. Lawyers have to help people navigate the system
   9. Consistency
   10. Clarity
   11. Fear of inflexibility and rigidity
3. Characteristics of US evidence law
   1. Statutory
      1. Exception: Privilege is usually a local standard
      2. Some things constitutionalized
         1. **Example:** confrontation clause
   2. Why not everyone following fed rules?
      1. States as laboratories--try out different rules
      2. Let common law evolve over time--benefit of the common law
      3. Unfair--in one district versus another, the proof varies
      4. But, conception of what is fair varies by jurisdiction
   3. Benefit of statute is text!
      1. Purpose and construction clause
      2. Fairness, efficiency, and development of evidence law
   4. Applied by judges, not juries
      1. **Rule 104(a)**: Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.
         1. When a judge is deciding what is admissible, the rules of evidence don't apply to what he can see to help decide its admissibility
         2. Court can hear all the information without applying the rules of evidence
      2. Before jury hears it, court decides if it is admissible
      3. **(b) Relevance That Depends on a Fact.** When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.
   5. Heavily discretionary (Rule 103)
      1. For lawyers and judges
      2. Lawyers can always waive objections (103(a))
         1. Objections-need to state the grounds if not apparent
         2. Proof--shorthand of what you would have said
      3. If you do object, two characteristics of review that make relief difficult
         1. **Test:** Would it have an impact on the outcome upon appeal?
         2. **Test:** Was there an abuse of discretion?
         3. Not just a harmless error and reviewed for abuse of discretion, not de novo
4. Order of proof
   1. **CL**: Scope of cross-examination must be limited to matters raised on direct
      1. Since then: however many iterations necessary to present full testimony to the jury
   2. Judge discretion
      1. **Rule 611(a)**: The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.
         1. Mandate to judge to keep courtroom under control (efficiency, truth-seeking, witness protection)
         2. Examples of judge doing this:
            1. *Stone v. Peacock*: you have to testify first
            2. *Elgabri v. Lekas*: You can't call the defendants and make your case through their testimony
            3. *US v. Wilford*: Judge reserves the right to not allow surrebuttal
      2. **Rule 611(b)**: Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.
         1. *US v. Carter*: Trial court has discretion over permission to inquire into additional matters in cross examination not raised on direct
         2. The court may, in exercise of discretion, permit inquiry into additional matters as on direct
         3. Accuracy/efficiency
      3. Only subject to reversal if clear abuse of discretion
   3. **Rule 106**: Rule of completeness: When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.
      1. Limited to writings and recorded statements; avoid taking matters out of context
      2. Permits disruption of testimony of important to the narrative being established
5. Mode and order of interrogation
   1. Prohibition on leading questions
      1. **Rule 611(c)**: Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.
         1. Leading questions not to be used on direct except as to develop testimony, should be permitted on cross.
      2. Rationale: witness more likely to tell truth if doesn’t know answer questioner wants to hear
      3. Allowed for hostile witness, adverse party
   2. Leading questions can be proper for children, especially in certain cases
      1. Example: reluctance to say bad word in a formal place (*US v. Nabors*)
   3. Even though after the fact, the witnesses called on direct could be classified as adverse, not enough to overturn judgment (Harm caused by this speculative) (*Ellis v. City of Chicago*)
      1. Example of deference to choices of trial court judge
6. Sequestering witnesses
   1. **Rule 615**: Exclusion of Witnesses: At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause, or (4) a person authorized by statute to be present.
   2. Discouraging and exposing fabrication, inaccuracy, and collusion
7. Questioning by judge
   1. **Rule 614**: Calling and Interrogation of Witnesses by Court
      1. (a) Calling by court. The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.
      2. (b) Interrogation by court. The court may interrogate witnesses, whether called by itself or by a party.
         1. If judge, cannot reveal judge's opinion of evidence to jury
      3. (c) Objections. Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.
   2. *US v. Tilghman*: judge can question witness up to a limit--cannot ask questions that show their belief/disbelief in witness's credibility
      1. Err on the side of abstention from intervention
8. Questioning by jurors
   1. *US v. Hernandez*: questioning by jurors must be very limited, in extreme circumstances with precautions
   2. *State v. Fisher*: discouraged, but at discretion of court, lists restrictions that should be put on juror questioning

**Competence of Witnesses**

1. Who can be a witness?
   1. General idea: everyone is considered competent as a witness, and the jury can decide for themselves
      1. *US v. Lightly:* Every witness presumed competent to testify unless it can be shown the witness does not have personal knowledge, capability to recall, or understand the duty to testify truthfully
         1. If witness can understand the proceedings and aid in the trial, should be allowed to testify
         2. Again, let the jury decide the strength of his testimony—jury as authoritative resolver
   2. Constraints
      1. Lack Personal Knowledge
      2. Refuse to tell truth
      3. Incapable of telling truth
      4. Witnesses who are by state competency rules incompetent (see Dead Man Statutes)
      5. Judges, Lawyers and Jurors in certain situations
   3. States have the right to impose additional competency requirements for civil cases
   4. **FRE**: General competency rules
      1. State law controls for substantive issues in connection with state law
      2. **Rule 601**: Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.
      3. **Rule 605**: Presiding judge may not testify in trial as witness
         1. Can be enforced even if not objected to during proceeding
      4. **Rule 606**: Juror can testify, but not at the trial in front of the rest of the jury, or if after, cannot testify about jury deliberations, but can about extraneous prejudicial information brought before the jury, outside influences upon jurors, mistake in entering verdict on verdict form
      5. **Rule 603**: Before testifying, witnesses must take an oath or affirmation
   5. **CL**: limits on competence, excluded:
      1. Parties to a dispute
      2. People convicted of crimes
      3. Young children
2. How to examine witness
   1. Direct examination: requirements
      1. Relevance
      2. Probative value
      3. Prejudice
   2. Cross examination: scope (**Rule 611(b)**)
      1. Topics involved in direct
      2. Topics concerning witness reliability
      3. FRE rejects allowing a cross-examiner to ask anything relevant to an issue at trial
      4. Scope-of the-direct rule: can only ask questions related to the scope of the direct examination
      5. Flexible; discretion to trial judge
3. Personal knowledge
   1. Witness must have personal knowledge of the subject of his or her testimony (exception for expert)
   2. **Rule 602**: witness may not testify unless evidence introduced sufficient to support a finding that witness has personal knowledge. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.
      1. May, not need not, consist of witness’s own testimony
      2. Examples: witness saw or experienced setting; not that someone TOLD them about that
   3. *US v. Hickey*: Testimony of cocaine addict allowed
4. Oath or Affirmation
   1. **Rule 603**: Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.
   2. Inconsistencies in story/problems in testimony raise problems in credibility, not competence, so up to jury to decide them
   3. Understand that they will be punished if they lie
5. Children
   1. Generally allowed
   2. Can exclude under 403 if probative value seems low because of child’s inability to tell truth from falsehood
6. Spousal privilege
   1. Spouse has privilege to refuse to testify at spouse’s trial
   2. CL: either spouse could invoke
   3. Current law: only prospective witness can invoke
7. Dead Man’s statutes
   1. Prevents witnesses from testifying about transactions with a person involved in the litigated claim if that person died prior to the trial
   2. EXCEPTION: accidents involving cars, planes, or vessels, as long as limited to the facts of an accident, not conversations with the deceased
   3. Rationale: if they are dead, not there to contest
8. Other
   1. Hypnotically refreshed testimony: can’t have a per se rule forbidding for a criminal defendant who wishes to testify on his own behalf (*Rock*)
      1. Constitutional violation (rare to allow things on against the rules of evidence because of a constitutional violation)
9. Due Process Safeguards
   1. Opportunity for oath
   2. Observation of demeanor
   3. Fifth Amendment
   4. Sixth Amendment
   5. Fourteenth Amendment: applies these amendments to the states
   6. Examples
      1. *Chambers v. Mississippi*
         1. Right to call witnesses on one’s behalf
         2. Right to cross-examine witnesses
         3. Exception for what would normally be hearsay under circumstances that assure reliability
            1. Principle: a person is unlikely to fabricate a statement made against his own interests at the time it is made
      2. *Fortini v. Murphy*
         1. States can create their own exclusion laws unless they infringe upon a weighty interest of the accused

**Relevance and Irrelevance**

1. Goal of evidence law to exclude irrelevant and include relevant
2. **FRE 401**: "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
   1. Relevance AND materiality (does not need to be disputed)
3. **FRE 402**: All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress [statute], by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.
   1. No exceptions to the irrelevance rule
4. Relevance exists only as a relation between an item of evidence and a matter properly provable in the case
   1. *US v. Dominguez*: Fact that he might have had a good reason for owning a gun doesn't make the evidence irrelevant, just less probative. The replacement effort makes guilt MORE PROBABLE than if there had been no replacement effort; therefore, evidence is relevant
      1. Even if chain of evidence is weak, still permissive
   2. *US v. Bandera*
      1. Admissible: her own experience, as it creates a chain of inference (something happened to me, so it makes it more likely that the person who did this to me would do it again later and a pattern of knowing toleration)
      2. Inadmissible: her opinions about Bandera’s experience, as she had no firsthand knowledge nor was she an expert
   3. *Knapp v. State*: Testimony that renders a claim more or less probable is relevant evidence
      1. Doesn't matter if true, what matters if is he thinks it was true (self-defense law)
   4. *State v. Larson*: Admittance of blood alcohol content as evidence relevant as it allowed the jury to use the blood alcohol levels recommended for drivers as a comparison point for him as riding a high-strung horse
5. How to determine?
   1. Depends on context of the case
   2. Not an inherent characteristic, but relation between item of evidence and a matter properly provable in a case

**Prejudice and Probative value**

1. Most important exception to relevance
2. **FRE 105**: When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.
3. **FRE 403**: Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.
   1. First half of rule: accuracy, fairness, and clarity
   2. Second half: efficiency
   3. Rule favors admission and if prejudice, must be unfair
4. *US v. Noriega*:
   1. Actual services as evidence had some probative value--otherwise not believable that he had received the sums of money he claimed; probative value relatively marginal, however
   2. Efficiency outweighs relevance
   3. Remember—test is abuse of discretion! Cannot conclude district court abused its discretion in making the above determination
5. *US v. Flitcraft*:
   1. FRE 403, evidence can be excluded, and ruling only overturned if appellate court finds abuse of discretion
   2. Introduction of documents would have had little probative value and danger of confusing the jury
6. *Abernathy v. Superior Hardwoods, Inc.*: District judge not required to allow evidence of a slight probative value merely because effective cross-examination might expose its weaknesses
   1. Efficiency and accuracy issues
7. *US v. McRae*: Only UNFAIR evidence SUBSTANTIALLY outweighing probative value should be excluded
   1. Another example of appellate court refusing to interfere with trial court's exercise of discretion
8. *Old Chief v. US*
   1. 403 problem: Impermissible inference: Old Chief had a gun and used it to assault the victim in this case because he it did before
   2. Wanted to only include evidence that he had committed a crime punishable by at least a year, but not any evidence about the nature of the crime; over objections at trial, government introduced this evidence
   3. Relevant in making Old Chief's status more probable than it would have been without the evidence
   4. Unfair prejudice: luring the factfinder to find proof of guilt on some other basis than proof specific to the offense charged
   5. District court abused its discretion in admitting defendant's record of conviction because its discounted probative value was substantially outweighed by the risk of unfair prejudice.
9. Relevance versus probative value
   1. Relevance: anything that is more or less likely to make a fact true
   2. Probative value: any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable

**Conditional relevance**

1. *State v. McNeely*
   1. Some man in jail confessed to committing the murder
   2. But couldn't identify McNeely as the person who confessed
   3. FRE 104(b)
   4. Was it sufficient for any reasonable juror to find the fact exists?
   5. **Holding:** court can admit on condition proof will be introduced later (sufficient for any reasonable juror to find that the fact on which the relevance is conditioned exists
   6. **Here**: It is relevant if some guy in jail at the same time as the accused said someone in jail confessed
2. Think of it as a sub-category of conditional other things
3. Lots of instances where judge plays gatekeeper role

**Hearsay**

1. Introduction
   1. **Rule 801**: The following definitions apply under this article:
      1. (a) **Statement**. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.
      2. (b) **Declarant**. A "declarant" is a person who makes a statement.
      3. (c) **Hearsay**. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.
   2. Advisory notes
      1. Nothing is an assertion unless intended to be one
   3. **Rule 802**: Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.
   4. *Raleigh*: Historical example of not bringing the accuser to the trial to confront the accused face to face
      1. Uncertain, vague, out of court testimony no way to assess the credibility of or to assess the other motivations of the witness
   5. *Leake*: admitted testimony that light had been out on the tractor, unavailable to testify
      1. Same concern: don’t know about other motivations
      2. Harmless error here because other people testified to the same fact
      3. Cannot test completeness if witness not there
   6. **Remember**: issue with hearsay is not if the witness is telling the truth, but if the declarant is telling the truth
   7. Hearsay usually includes two people
      1. Declarant: person who spoke the statement
      2. Witness: person under oath at the courthouse telling about the statement
   8. Impermissible inference (triangle)
      1. Link between what the declarant says and believes is erroneous
         1. **Ambiguity/Narration** (i.e. the son said taillight and he meant headlight)
         2. **Insincerity of declarant** (son lied)
      2. Link between belief and fact is erroneous
         1. **Erroneous memory** (i.e. that was the other tractor, I forgot he got a new one)
         2. **Faulty perception**
      3. Impermissible inference: said it🡪believe it🡪 is true
   9. Five pitfalls
      1. Out of court: not enough that it occurred in another courtroom
      2. The matter asserted (content of declarant’s statement)
      3. Introduced to prove: if just one piece of an inferential train is hearsay, the whole thing is hearsay
      4. Don’t confuse witness and declarant
      5. Manner of proof doesn’t matter in terms of verifying the unreliable trip through the declarant’s mind
   10. Why not have judge make decisions on ad hoc basis?
       1. How to advise a client, advise settlement
       2. Wouldn't be any standards
       3. Too much discretion to judge is letting judge assess the weight of evidence instead of jury
       4. With rules, jury knows what gets to them is reliable
       5. But maybe if no rigid rules, juries would have more faith
2. Nonhearsay
   1. Two categories
      1. Prior witness statements
      2. Party admissions
   2. Admitted for two reasons:
      1. Effect on listener – introduced to show effect on the listener – i.e. notice (*Jefferson, Southerland*)
         1. Easiest to show when statement demonstrably false; harder if true (looks like trying to prove truth of the matter asserted)
      2. State of Mind of Declarant – whether the statement is true or not true
   3. *Lyons Partnership v. Morris*: Entered into evidence to show that the children and reporters expressed their belief that those persons were Barney--direct evidence of their reactions, not hearsay
      1. Ultimate inference: That people are confused between Duffy and Barney
      2. Not that Duffy is Barney, but that people are confusing the two
      3. Impermissible Inferential Chain: Children and Reporters Say “Its barney” 🡪 Children and reporters thought it was Barney 🡪It is Barney
      4. Permissible Inferential Chain: Children and Reporters said it was Barney 🡪 Children and reporters thought it was Barney 🡪 The costume was confusing
   4. *US v. Parry*: Using an out of court statement as circumstantial evidence of the defendant's knowledge of a fact, rather than evidence of the truth of the matter asserted, does not offend the hearsay rule
      1. Permissible: Parry’s statement “the man is an agent” admitted not for the truth the man was an agent, but for that Parry believed that he was an agent
   5. *Subramaniam v. Public Prosecutor*: Evidence not hearsay when it is proposed not to prove the truth of the statement, but the fact that it was made
      1. Relevant in considering the mental state and conduct thereafter of the witnesses: they said it, and HE believed it (not that they believed it)
   6. *Southerland v. Sycamore Community School District*: rumor testimony not hearsay if introduced to show that officials had *knowledge* of the problem, not if the problem existed
      1. Permissible: there were rumors they were involved🡪they knew they might be involved; not they WERE involved
   7. *US v. Johnson*: for state of mind, hearsay admissible to show defendant had knowledge that he knew he was doing something wrong (writing bad Rxs)
      1. *Have to warn the jury what inferences are permissible*
   8. *US v. Jefferson*: hearsay letters admissible as evidence to show he had been sent notice, not that hearing actually took place at that time
   9. Performative utterances
      1. *US v. Montana*: performative utterances not within scope of hearsay rule, because they do not make any truth claims
         1. Performative utterance was setting the price as part of an oral contract
         2. Words not as truth, but as making the thing happen (think, “I now pronounce you husband and wife”)
      2. Admission of the advice of counsel: reliance on the statement, not that the statement is true
      3. “I agree”: shows the contract is made
      4. Try throwing in “Hereby” to test if it is a good verbal act
      5. Why permissible? Not making impermissible trip through declarant’s mind
3. Implied Assertions: “Statements” include nonverbal conduct only when it is intended as a form of communication
   1. *Wright v. Tallum*
      1. Letters written by various businesses and social groups to the testator to show that testator was competent inadmissible
         1. Court treats them as express assertions, give analogy to a sea voyage; almost as if offering proof of seaworthiness of a vessel
         2. Verbal example: Letter writers told Marsden about conditions, so thought Marsden was sound of mind, so he was of sound mind
      2. FRE: involves what we recognize to be impermissible inference
         1. Other explanations for why what happened happened
   2. Captain bringing family on ship that later sinks example: problems
      1. Perception problem: maybe captain didn't perceive something was wrong with the ship
      2. Memory: boarded the wrong ship
      3. Not sincere: not TRYING to say that the ship is safe
      4. Narrative: could be other motivation, trying to make ship look good to cameras, or wants family to die
   3. *US v. Zenni*: If in doing what he does a man has no intention of asserting the existence or non-existence of a fact, it would appear that the trustworthiness of evidence of this conduct is the same whether he is an egregious liar or a paragon of veracity
      1. Called, police answered, tried to place a bet with them—the act of trying to place a bet an implied assertion (verbal, non assertive)
      2. Not trying to prove the truth of the matter asserted (but once you put “I want to place a bet” in front of that, already starts to look like that)
   4. Nonverbal can be a statement: example, he pointed to indicate that was the culprit is hearsay; he pointed so he didn’t have a broken arm is not

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|  | **Verbal (oral or written)** | **Nonverbal** |
| **Assertive** | Hearsay if to prove truth of matter asserted    Nonhearsay: if for inferring something other than truth   * 1. State of mind   2. Effect on listener   Hard cases: Assertive or nonassertive? Drawing the line between these two | Hearsay if to prove truth of matter asserted  Nonhearsay if for inferring something other than truth |
| **Nonassertive** | Nonhearsay because not a statement   * 1. Verbal acts      + Operative Conduct      + Performative utterances | Nonhearsay because not a statement |

1. Hearsay: Confrontation
   1. Sixth Amendment: right to be confronted with the witness against you
   2. Limitations
      1. Criminal Prosecutions
      2. Right only for the accused
      3. Right satisfied if accused confronts accuser in court
   3. Primary purpose inquiry: was the out of court statement testimonial?
      1. Circumstances and party’s perception of ongoing emergency
      2. Statement and actions test
         1. Statements and actions of declarant and interrogator
   4. *Crawford v. Washington*
      1. Facts: wife claimed marital exception and would not testify, Crawford claimed could not be confronted with her recorded testimony because of the 6th
      2. Interrogations by LE officials exactly the type of hearsay the 6th trying to protect against; reliability must be examined during cross
   5. *Davis v. Washington*
      1. Admitted 911 call: non-testimonial when made to meet ongoing emergency
      2. Once primary purpose switches to giving an account of what transpired to police, testimonial
   6. *Michigan v. Bryant*
      1. Excited utterances made by injured (dying) victim
      2. The medical condition of the victim is important to the primary purpose inquiry to the extent that it sheds light on the ability of the victim to have any purpose at all in responding to police questions and on the likelihood that any purpose formed would necessarily be a testimonial one. The victim's medical state also provides important context for first responders to judge the existence and magnitude of a continuing threat to the victim, themselves, and the public.
      3. Because his statements objectively indicate that the “primary purpose of the interrogation” was “to enable police assistance to meet an ongoing emergency,” Davis, Covington's identification and description of the shooter and the location of the shooting were not testimonial hearsay. The Confrontation Clause did not bar their admission at Bryant's trial.
   7. Spectrum of formality
      1. 911 call
      2. Oral statements made face to face with LE
      3. Written, signed, sworn affidavit
   8. Limit: if defendant did something to make sure the witness could not show up at trial, confrontation clause doesn’t limit their testimony
2. Hearsay Exceptions: things introduced for the truth of the matter asserted, but okay because of exceptions (can use the Confrontation clause to cancel out the exception)
   1. Not hearsay: **FRE 801(d)**
   2. **Prior Statements:** witness is the declarant (confrontation clause satisfied!)
      1. **FRE 801(d)(1):** **Prior statement by witness.** A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is
         1. (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or
         2. (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or
         3. (C) one of identification of a person made after perceiving the person
      2. *Albert v. McKay & Co.*
         1. Workplace accident; witness said one thing at trial (machine has already been running), but defendant sought to impeach him because another witness said the first witness said after the incident that the machinery had not been running (clearly hearsay)
         2. Prior inconsistent statement: Impeached by proof of prior inconsistent statements to discredit him, but former statements incompetent for any other purpose
            1. Not introduced to prove the truth of the matter asserted, but to discredit the testimony (so not coming in under (d)(1): would have to have been under oath)
      3. Prior consistent: repetition ≠ veracity; under the rule, limited to rebut
      4. Identification: IDing someone right after it occurred, more reliable than weeks or years later
      5. *US v. Owens*
         1. Counselor couldn't remember anyone visiting him at hospital besides FBI agent, and on stand said he couldn't remember attack or attacker though in interview with FBI agent he identified Owens in a picture
         2. Not hearsay for bringing in earlier identification of a person if testifies at trial and is subject to cross examination (d)(1)(B)
         3. No confrontation problem: witness there and testifying
   3. **Admissions/opposing party statements**
      1. Theory: not reliability: adversarial fairness, you know who you are talking to, and not going to say something you wouldn't normally
      2. Direct Admissions/Opposing party statement
         1. **FRE 801(d)(2)(A)**: A statement is not hearsay if the statement is offered against a party and is the party's own statement in either an individual or a representative capacity.
         2. Based on adversary theory of litigation: Must be offered against an opposing party, but need NOT be a statement against opposing party's interest (don’t ask if it is inculpatory!)
         3. *Salvitti v. Throppe*:
            1. Evidence: Other party visited plaintiff after car crash and admitted fault, though no personal knowledge
            2. Admissible as a declaration against interest, even though he said he had no personal knowledge when he said it, still admissible and up to jury to determine what basis it was made on
         4. *US v. McGee*
            1. Evidence: LE officer testified that McGee gave three different stories about how he got to bank re: bank robbery
            2. Offered by the prosecution, as evidence of what the defendant said against the defendant
            3. Statement does not need to be inculpatory to be admitted—need only be made by the party against whom it is offered
            4. Crawford analysis

Can't be formal interrogation, has to be testimonial statement

Criminal

Has to hurt defendant

Needs to confront witness/declarant--that is him!

I have a right not to testify, you by introducing this evidence are forcing me to relinquish that right, and you can't force me to do that

Could say that I want to take the stand just for this, unless I bring it up, can't talk about anything else

* + - 1. *US v. Phelps*: party can't offer statement supporting itself against a co-defendant
    1. Admissions and multiple hearsay
       1. **FRE 805**: Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.
       2. *Reed v. McCord*
          1. Evidence:Coroner testified for plaintiff as to statement defendant made, a statement that he had no personal knowledge of
          2. Stenographer testifying about what boss told him about what somebody else told the boss!
          3. First level: Stenographer’s account offered to prove effect on the listener
          4. Second level: opposing party statement (employee was negligent)
          5. Third level: present sense impression
          6. Qualifies under the above nonhearsay rule, so competent evidence against him
       3. *Foster v. Commissioner of IRS*
          1. A said that x is a fact admissible not as that x is a fact, but as an admission
    2. Admissions and completeness
       1. **FRE 106**: When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.
       2. *Beech Aircraft Corp. v. Rainey*
          1. Evidence: letter written by widower concluding not pilot error, but a couple of sentences taken out of context could point to their fault

Defense examination asked Rainey about certain contents of letter that pointed to opposite conclusion (okay because opposing party statement), on cross they wanted to go more in depth, defense objected, sustained

* + - * 1. Erred by doing this: abuse of discretion
    1. Adoptive admissions
       1. **FRE 801(d)(2)(B)**: Nonhearsay if…the statement is offered against a party and is a statement of which the party has manifested an adoption or belief in its truth
          1. If you can make a logical claim where someone wouldn't speak up, it should not be admissible as an adoptive admission (I don’t want to say I don’t like his cooking because I don’t want to hurt his feelings)
       2. *US v. Fortes*: allows admissions by silence or acquiescence
          1. Evidence: silence to show he didn’t disagree
          2. Statement and failure to deny statement both admissible as evidence of acquiescence in the truth—this was a situation you would expect someone to speak out if they disagreed
       3. *Southern Stone v. Singer*
          1. Evidence: One side wants failure to reply to the letter as acceptance of the truth of the letter
          2. So, letter becomes hearsay

First level: SS's counsel said

Second level: that Moore said

Couldn't interview the counsel because he was also trial counsel!

* + - * 1. Reason for not responding reasonable: Moore had moved on and had no interest in responding, no longer with company
    1. Authorized admissions
       1. **FRE 802(d)(2)(C)**: Nonhearsay if…the statement is offered against a party and is a statement by a person authorized by the party to make a statement concerning the subject.
       2. *Hanson v. Waller*
          1. Evidence: made in the course of managing case by attorney (authorized)
          2. FRE applies to statements made by an attorney in a representative capacity
    2. Agent and employee admissions
       1. **FRE 802(d)(2)(D)**: Nonhearsay if: The statement is offered against a party and is a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship
       2. *Mahlandt v. Wild Canid Survival & Research Center, Inc*.
          1. Evidence: Note said wolf bit child, in casual conversation mentioned wolf bit child, board meeting minutes describing
          2. Note not hearsay, is admissible: his own statement, in which he had belief in its truth, even if no personal knowledge; matter in the scope of his employment
          3. In house admission exception doesn't apply to (D), only (C), so not excepted here; same for notes from meeting of Board, but no exception allows that evidence AGAINST Poos (Poos not their agent, nor are they his)
       3. *Sea-land Service v. Lozen*
          1. Evidence: Email from one employee, forwarded by another
          2. Even if we didn't have any idea who sent it, it wouldn't be a problem because of the adoption; when Martinez forwarded she incorporated an adopted statement as true then sent it on, proving she was employee and within her employment
    3. Co-conspirator admissions
       1. **FRE 801(d)(2)(E)**: Not hearsay if the statement is offered against the party and is a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.
       2. *Bourjaily v. US*
          1. Evidence: out-of-court statements by a co-defendant, also a member of the conspiracy, to an informant

Yes: in course of conspiracy

Yes: in furtherance of the conspiracy

* + - * 1. Holding: admissible to the judge to be examined under Rule 104—certain things will come in for the preliminary determination that will not be able to come in as regular evidence
        2. Standard: preponderance of the evidence
      1. *Bruton v. US*
         1. Evidence: prior statement by a co-defendant after in jail (not during the course of the conspiracy)
         2. Holding: admission of co-defendant’s confession violated Bruton's right of cross-examination by the Confrontation Clause; even with a limiting instruction, not enough
      2. *Gray v. Maryland*
         1. Evidence: co-defendant’s confession, with Gray’s name removed
         2. Holding: this still falls under Bruton’s protective rule and is a confrontation clause problem: obvious to the jury that this would not be read unless it implicated this defendant

Direct inferential chain from confession to who “deleted” is

* 1. **Spontaneous & contemporaneous utterances**
     1. **FRE 803**: The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
        1. (1) 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.
           1. Must be descriptive
        2. (2) 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
           1. Related to excitement causing the event, but doesn’t have to describe the event
     2. Availability immaterial
        1. Have to do confrontation test still!
     3. Why do we allow this?
        1. Time is a factor in both
           1. 1: time more circumscribed; has to be proximate enough to be present-ish (5-15 minutes, has to be pretty proximate)
           2. 2: has to be while still under the influence of the startling event; has to last longer
        2. Standard for excitement: objective, but has some subjective features
           1. But, if have strong evidence of non-excitement, could defeat an excited utterance claim
           2. If a reasonable person might have calmed down, might not come in
        3. Both about an inability to fabricate, reason different
           1. 1: don't have time
           2. 2: too freaked out
     4. *United States v. Obayagbona*
        1. Undercover cop identifies woman who gave him drugs
        2. Witness too excited to be fabricating evidence
        3. Just because he was LE doesn't preclude using his testimony as evidence
        4. Look at the impression, reaction, and time since event
        5. This is on the outer limits, tipped to let in because no prior opportunity
        6. Confrontation question:
           1. Testimonial: establishment of past facts for prosecution purposes
           2. Not testimonial: stopping drug deals in the future
     5. *Bemis v. Edwards*
        1. Evidence: statements from 911 call in which witness described him being beaten
           1. But other evidence showed that he had no firsthand knowledge and was relating descriptions from other people
           2. Personal knowledge requirement: Need evidence to support a finding the declarant perceived it firsthand (can use contents of the statement itself)
        2. Double hearsay: Perceiving the event of his wife perceiving things in an excited state
           1. But both fall under hearsay exception (805 lets in double hearsay if both under exception)
        3. Because affirmative evidence of lack of firsthand knowledge, did not abuse discretion in refusing to admit
        4. Confrontation: civil case, so not an issue
     6. *US v. Elem*
        1. Nothing in record to support that he was excited so should be admitted under that rule ("res gestae")
           1. Verbal act if statement part of event that happens, not hearsay, not in for truth of the matter, but to show thing occurred
           2. Excited utterances, which can be under 803
  2. **State of Mind**
     1. **FRE 803(3)**: The following are not excluded by the hearsay rule, even though the declarant is available as a witness: 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.
     2. Why? Not offered to prove the truth of what it asserts.
     3. Advisory note
        1. Have to be careful of state of mind provable by hearsay statement to serve as the basis for an inference of the happening of the event that produced the state of mind
        2. House judiciary: want statements of intent admissible only to prove his future conduct, not the future conduct of another person
     4. *US v. Harris*
        1. Evidence: defendant said he knew he was being set up to his parole officer
           1. Excluded in trial court
           2. Ruled as error: Statements that the government WAS trying to set him up: admissible as circumstantial evidence of his state of mind (lending proof, not direct proof)
        2. Depending on their testimony phraseology could have been:
           1. Nonhearsay: Could be introduced not to show the truth of the matter asserted (that he was or was not a cop)
           2. Hearsay exception: Existing state of mind
        3. Statements that he BELIEVED agent brought to him would be hearsay
           1. Evidence depended on truth of the matter asserted--his belief
           2. Direct proof, barred by hearsay rule
        4. Like present sense impression: declaration about THEN existing state of mind
     5. *Mutual Life Ins. Co. v. Hillmon*
        1. Evidence: letters expressing an intention at a time to accompany others
           1. Direct evidence of the fact as his own testimony that he then had that intention would be
           2. Not competent as narratives of the facts they said, but as evidence that at the time he intended to go with Hillmon, making it more probable that he went than if there had been no proof
           3. Can bolster other evidence that he did go
        2. Extended state of mind exceptions to statements of intent offered to prove that the declarants actually did what they said they would
     6. *Shepard v. United States*
        1. Evidence: Wife said before she died that her husband had poisoned her
           1. Introduced not as evidence that he did, but state of mind that she was not suicidal
        2. Impermissible: backward-facing, not an intention like in Hillmon
        3. But the gov't instead tried to use as evidence that she was dying of poison from her husband
        4. When the risk of confusion is so great to upset the balance of advantage, the evidence goes out
        5. Difference between declarations of intention and of memory
        6. This testimony faced backward, to past act by someone not the speaker
        7. Reversed
     7. *US v. Houlihan*
        1. Evidence: statement to sister that he was going to meet Herd as proof that it was Herd who killed him later
           1. Admitted under 803(3)
           2. Impermissible to show conduct of the third party: who he was planning to meet; only to show his future conduct
        2. 803(3) codifies Hillmon as written, not the House Judiciary interpretation
        3. Note: some jx’s allow, only if corroborating evidence the third party did what the declarant said
  3. **Statements for medical diagnosis or treatment** (hearsay exception)
     1. **FRE 803(4)**: The following are not excluded by the hearsay rule, even though the declarant is available as a witness: Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.
     2. Applicable to statements to medical experts hired for purposes of litigation
     3. Usually related to cause, not fault (though sometimes fault pertinent, like domestic violence situations)
     4. *Rock v. Huffco*
        1. Evidence: things decedent told doctor about his at-issue accidents relating to the cause of injury
        2. Holding: because the things he told the doctor were not necessary for the medical diagnosis, they are inadmissible under this exception
     5. *State v. Moses*
        1. Evidence: statements made to doctor about fault in a domestic violence situation
        2. Holding: statements made both to doctor and police while at hospital for injuries admissible because they affect treatment (spouse’s access to records, etc.)
        3. Admissible until told CPS contacted—then could believe testimonial, and inadmissible
           1. Not testimonial: no role in investigation of assault and not working for or on behalf of gov't, and victim had no reason to believe statements would be used later at a trial
        4. Ruled as harmless error to let in
     6. Under the exception the statement need not have been made to a physician. Statements to hospital attendants, ambulance drivers, or even members of the family might be included.
  4. **Recorded Recollection**
     1. Past recollection recorded: witness theoretically has no present recollection of the matter; substitute for memory and admitted for the truth of its contents
        1. Itself a form of substantive evidence
        2. Cannot be shown to the jury
     2. Present recollection revived: given to jog memory; testimony subject to being prodded
        1. Not evidence on its own
        2. Not given to jury
        3. Not substantive itself
     3. Exception to jury viewing: when the other side wants to give it to the jury
     4. **FRE 612: Writing Used to Refresh Memory**. Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh memory for the purpose of testifying, either--(1) while testifying, or (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.
     5. **FRE 803(5)**: The following are not excluded by the hearsay rule, even though the declarant is available as a witness: Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.
     6. *Fisher v. Swartz*
        1. Evidence: business record to aid plaintiff’s recollection
        2. Holding: can use on the stand to aid witness, but not as independent evidence; however, harmless error to use as independent evidence
     7. *US v. Riccardi*
        1. Evidence: Witnesses describing chattels stolen by D used longhand notes from the owner, later typed up, some of which were lost, used to refresh recollection while testifying
        2. Holding: using their present recollection, judge prodded them; so many items no one would normally know them all—no error
  5. **Business Records**
     1. **FRE 803(6)**. The following are not excluded by the hearsay rule, even though the declarant is available as a witness: Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.
     2. (7) Absence of entry in records kept in accordance with the provisions of paragraph (6). Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.
     3. *State v. Acquisto*
        1. Evidence: payroll vouchers of two people who claimed to not be at work and supported D’s alibi
        2. Holding: admissible
     4. *Keogh v. IR Commissioner*
        1. Evidence: blackjack dealer’s diary of tip pooling; informal but regular record
        2. Holding: admissible under 803(6); personal but in course of personal business activity; no reason to lie to himself
     5. *US v. Gibson*
        1. Evidence: record of drug transactions
        2. Holding: little reason to falsify and regularly relied upon, so admissible
     6. *Palmer v. Hoffman*
        1. Evidence: Statements made just for the court and litigation don't qualify under this exception—not in the “ordinary course of business”
        2. Holding: inadmissible—purpose is litigation not business
     7. *Lewis v. Baker*
        1. Evidence: accident reports made by people not involved in the accident
        2. Holding: Utility to employer in making sure equipment not defective and to prevent future accidents, so likely trustworthy
     8. *Wilson v. Zapata*
        1. Evidence: Record made by hospital employee (H1) from information supplied by witness’s sister (H2) that witness is a habitual liar
        2. Holding:
           1. H1: sister's statements DO NOT fall under 803(4): statements excepted for purposes of medical diagnosis
           2. H2: unnecessary (but looks like fits under business records exception)
     9. *US v. Gentry*
        1. Evidence: business records to show a pin had never been found in candy;
        2. Holding: absence in record admissible to show nonoccurrence
  6. **Public Records**
     1. **FRE 803**: The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
        1. **(8) Public records and reports**. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.
        2. **(9) Records of vital statistics**. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.
        3. **(10)** Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.
     2. Overview
        1. More narrow exception than for business records
        2. (A): narrow set of materials
        3. (B): things they have a statutory duty to report/observe
        4. (C): factual findings required by law
        5. Further clarifications
           1. Courts have interpreted B limitation of introducing police report in criminal case as long as introduced by the DEFENSE
           2. Trustworthiness clause in rule 8 applies to a and b as an all-purpose clause, catch-all
     3. *Beech Aircraft v. Rainey*
        1. Evidence: reports containing factual findings, including conclusions and opinions
        2. Holding: Factually based conclusions or opinions not excluded under 803(C), as long as based on factual investigation and trustworthy
     4. *US v. Oates*
        1. Evidence: chemist testified in another’s place and with his handwritten analysis
        2. Holding: evidence does not satisfy 803(8)(C): inadmissible
           1. (B): not satisfied; law enforcement personnel for the purposes of this report
           2. Right of criminal defendant to confront the witness against him--would be deprived
           3. Also: cannot bring in something under business records if excluded under public records: if looks like they could have been a public record but get kicked out under the language of (8), EXCLUDED (different from other rules)
     5. *US v. Orozco*
        1. Evidence: routine, nonadversarial record falls under public records exception
        2. Holding: admissible under 803(8): police record being used against a D in a criminal case, but mechanical observations so no motive to lie or fabricate on part of LE
     6. *Hinojos-Mendoza v. People*
        1. Evidence: Lab report of cocaine analysis admitted without testimony
        2. Holding: Lab reports testimonial subject to Crawford*--*sole purpose of report to analyze substance for criminal prosecution, testimonial in nature
     7. Good test to use:is it routine and non-adversarial? Safeguard: trustworthiness.
  7. **Former Testimony**
     1. **FRE 804(a) Definition of unavailability.** “Unavailability as a witness” includes situations in which the declarant--
        1. **(1)** is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
        2. **(2)** persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
        3. **(3)** testifies to a lack of memory of the subject matter of the declarant's statement; or
        4. **(4)** is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
        5. **(5)** is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.
        6. A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying. **(Forfeiture by wrongdoing)**
     2. **(b) Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
        1. **(1) Former testimony.** Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.
     3. *US v. Bollin*
        1. Evidence: Trying to invoke 5th amendment privilege against self-incrimination under FRE 804 (making himself unavailable to testify)
        2. Holding: Criminal D who invokes 5th does not make himself unavailable under 804
     4. *Kirk v. Raymark*
        1. Evidence: former testimony in a different asbestos case to rebut evidence by defendant that his asbestos could not have caused this disease
        2. Holding: witness has to be shown to be unavailable; no evidence here of “reasonable means”
     5. *Clay v. Johns-Manville*
        1. Evidence: plaintiff wants to put forward deposition (under oath and subject to cross) of doctor who worked for defendant for many years, and is now dead
           1. Test: was predecessor in interest (to the party against whom the evidence is being introduced) sufficiently similar to allow testimony in?
        2. Holding: Unfair to impose to the current party responsibility for the way a witness was handled by a previous party
        3. Exception: when predecessor in interest (had opportunity and similar motive to examine witness)
     6. *US v. Salerno*
        1. Evidence: Two guys testified for grand jury for immunity, then refused to do so at trial under 5th amendment; P tried to get grand jury testimony admitted
        2. Holding: Wouldn't allow-said motive at grand jury proceedings and at present different, didn't qualify as unavailable
        3. SCOTUS: Even though similar motive element should evaporate when gov't obtains immunized testimony in a grand jury proceeding, Congress decided this in the statute
        4. Willing to say bad stuff, then get immunized, but don't want to go in later and get a perjury charge
     7. Background
        1. Prior proceeding: must have been
           1. Under oath AND
           2. Subject to cross AND
           3. If criminal: SAME party at past proceeding had to have similar motive to develop examination as the present proceeding
           4. If civil: either party themselves or predecessor in interest must have had opportunity for cross
        2. Present proceeding
  8. **Dying Declarations**
     1. **FRE 804(b)(2):** 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.
        1. Personal knowledge of cause and circumstances of death
        2. Hopeless expectation of imminent death
     2. *Shepard v. US*
        1. Evidence: declaration that her husband poisoned her
        2. Holding: admissibility depends on if person is certain that they are dying/be resigned/settled hopeless expectation
     3. US v. Sacasas
        1. Evidence: on deathbed, declarant says tell them the Greek had nothing to do with it
        2. Holding*:* Not following a homicidal attack, so outside the scope of the rule
           1. Limitation 3: has to be a prosecution for homicide or a civil case
           2. Limitation 4: has to be about the cause or circumstances of the impending death
     4. State v. Lewis
     5. Crawford problem: seems to survive it!
  9. **Declarations against interest**
     1. **FRE 804(b)(3):** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: **Statement against interest.**--A statement that:
        1. **(A)** a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; AND
        2. **(B)** is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability. CHECK SLIDES FOR LANGUAGE
     2. **Test**: would a reasonable person have made the statement if it weren’t true?
        1. Example: exposes them to criminal liability
        2. Against interest at the time made, not at the trial
     3. *US v. Duran Samaniego*
        1. Evidence: apology by alleged criminal’s family for stealing goods
        2. Holding:
           1. State of mind exception: admissible to show remorse, but not to show why he was remorseful
           2. Opposing party admission: not an opposing party, but his brother, so not admissible under this exception
           3. Declaration against interest exception: unavailable under (5) because he was in another country and could not be summoned; corroboration not required because not a criminal case, so properly admitted as statement against interest
     4. *US v. Jackson*
        1. Evidence: plea bargain of a different person who chose not to testify because he invoked his 5th amendment right against self-incrimination
        2. Holding: inadmissible under:
           1. (b)(1): former testimony? No—not same opportunity for cross at a plea bargain as adversary proceeding.
           2. (b)(3): statement against interest? No—each statement must be self-inculpatory on its own; cannot pick and choose non-inculpatory statements
     5. Crawford
        1. If statement made to police: testimonial, and locked by Crawford
        2. If not testimonial, no Crawford problem
     6. Opposing party statements v. Declarations against interest

|  |  |
| --- | --- |
| **Opposing party statement** | **Declarations against interest** |
| availability immaterial | Must be unavailable |
| Must be opposing party | Can be anyone |
| No content limitation | Has to be against interest |
| No corroboration | Criminal: corroboration requirement |
| Unlikely confrontation problem--they are right there | Possible confrontation issues |

* 1. **Forfeiture by wrongdoing**
     1. **FRE 804(b)(6): Forfeiture by wrongdoing.** A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.
     2. Testimonial versus nontestimonial under the FRE
        1. Testimonial: narrow (Giles) version because of Crawford
        2. Nontestimonial: narrow version (not because of Crawford, but because of the rule)
     3. *Giles v. California*
        1. Evidence: statements made by dead ex-girlfriend three weeks before accused allegedly shot her to police (sounds testimonial)
        2. Holding:
           1. Dying declaration? No, weeks before shooting
           2. Forfeiture by wrongdoing? Was the purpose of shooting her to keep her from testifying? No
           3. Confrontation clause does not allow a broad view of this—has to be with INTENT to keep them from testifying
     4. Forfeiture by wrongdoing and confrontation clause
        1. Exception to confrontation clause if defendant reason witness unavailable
        2. If statements non-testimonial, at its broadest: if find by preponderance victim killed by defendant, let evidence in
     5. Standard of proof
        1. Giles: preponderance of the evidence
        2. FRE: clear and convincing
  2. **Residual Exceptions**
     1. **FRE 807:** A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that
        1. (A) the statement is offered as evidence of a material fact; AND
        2. (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; AND
        3. (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.
        4. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.
     2. *US v. Laster*
        1. Evidence: business records introduced by different agent who had no personal knowledge of them because owner died
        2. Holding: not admissible under 803(6) because lack of personal knowledge, but admissible under the residual exception because there was no evidence that they were not reliable.
     3. Requires circumstantial guarantees of trustworthiness, be really important, more probative than any other evidence they could introduce, and in the interest of justice
     4. Two theories of interpretation
        1. Near miss theory: if evidence almost fell under an exception, or if would have fallen under but had a piece missing, should be rendered inadmissible under this exception (otherwise would render the other rules superfluous!)
           1. This rule should just be for letting in things if no clear rule that deals with that kind of evidence
        2. Close-enough theory: if evidence was almost in an exception but for some reason failed to meet, can admit it if meets 807 requirements.

1. Hearsay plan of attack:
   1. Was it admitted for the truth of the matter asserted?
      1. Yes: continue
      2. No: 401, 402, 403 tests
   2. Is there a constitutional problem?
      1. Is it a criminal case?
         1. Yes: continue
         2. No: no confrontation problem
      2. Was it introduced against the defendant?
         1. Yes: continue
         2. No: no confrontation problem
      3. Is the declarant not present?
         1. Yes: continue
         2. No: no confrontation problem
      4. Is it testimonial?
         1. Yes: continue
         2. No: no confrontation problem
      5. Is there any other way it might nonetheless be admissible?
         1. Forfeiture by wrongdoing?
            1. Did D intentionally do something for the purposes of making the declarant unavailable to testify?

If yes, no confrontation problem

If no, continue

* + - 1. Did D have a prior opportunity to confront the declarant?
         1. If yes, no confrontation problem
         2. If prior testimony, probably no confrontation problem
         3. If no, continue
      2. Is it a dying declaration?
         1. If yes, probably no confrontation problem--no definitive ruling
         2. If no—INADMISSIBLE
  1. Is it admissible under a hearsay exception?
     1. Rules-based nonhearsay if:
        1. Admission by party opponent (801d1)
        2. Prior statement (801d2)
     2. Is it an exception to the hearsay rule, regardless of if declarant is available?
        1. Excited utterance
        2. Present-sense impression
        3. Recorded recollection
        4. Business records
        5. Public records
        6. Medical records
     3. Are there any exceptions available if you can show declarant unavailable (provable)?
        1. Former testimony
        2. Dying declaration
        3. Declarations against interest
        4. Forfeiture by wrongdoing
     4. Does it qualify as a residual exception?
     5. Does it qualify under an independent statute outside of the rules?

**Character Evidence**

1. **FRE 404(a): Character evidence generally.** Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
   1. (1) Character of accused - In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if  evidence of  a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404 (a)(2),  evidence of the same  trait of character of the accused offered  by the prosecution;
   2. (2) Character of alleged victim - In a criminal case, and subject to the limitations imposed by Rule 412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;
   3. (3) Character of witness - Evidence of the character of a witness, as provided in rules 607, 608, and 609.
2. Basic Rule
   1. How it works
      1. Defendant triggers; nothing ever comes in unless the D opened the door by offering evidence in it
         1. Of their own character OR
         2. Character of the victim
      2. Good character: If D introduces evidence of good character; gov't can rebut with evidence of bad character
      3. Victim: if D opens door by attacking victim's character; prosecution can than attack **defendant's** character
      4. Homicide: can introduce to rebut claims of first aggression
   2. *People v. Zachowitz*
      1. Evidence: pistols and tear gas gun; admitted to show defendant had vicious and dangerous propensities
      2. Holding: no permissible inferences allowed from weapons you own but leave at home—not connected to the case at hand
         1. Cannot connect ownership of guns (constitutional right) with propensity to murder (impermissible inference)
   3. *Cleghorn v. NY Central and Hudson RR Co.*
      1. Evidence: previous habits of intemperance, introduced to show negligence AT THE TIME (action in conformity therewith)
      2. Holding: impermissible; only admissible to show gross negligence by employer (had notice in employing someone who has habits of intemperance)
   4. *Berryhill v. Berryhill*
      1. Evidence: of character in a child custody proceeding; asked if D had ever killed someone.
      2. Holding: admissible: in a custody setting, this type of evidence is very important in judging fitness of guarding a child—character of the parties is at issue
   5. *Larson v. Klapprodt*
      1. Evidence: in a claim for libel, sought to introduce evidence the bad reputation of the other party (of the character the opposing party is claiming is not true)
      2. Holding: because damage to reputation is part of the claim, evidence to support or refute the reputation is admissible
         1. Character is at issue
         2. Not circumstantial: not introduced to prove conformity with character
   6. Circumstantial use of character to show how would have acted in instance under dispute usually not admissible. Exceptions:
      1. D may introduce evidence of good character; P can rebut with evidence of bad character
      2. D may introduce for victim, such as in self defense for homicide or consent in rape
3. Methods of proving character
   1. **FRE 405**
      1. **(a) Reputation or opinion.** In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.
      2. **(b) Specific instances of conduct.** In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.
   2. Specific Conduct
      1. Usually inadmissible
      2. **FRE 803(21) Reputation Concerning Character.** The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness: A reputation among a person's associates or in the community concerning the person's character.
      3. *Michelson*
         1. Evidence: Defendant called five witnesses to prove that he enjoyed a good reputation. Prosecution asked each if they knew he had an earlier conviction.
         2. Objection:right of prosecution to cross character witnesses about conviction.
         3. Holding:Under general rule, prosecution may not resort in its case in chief to any kind of evidence of defendant's evil character to establish probability of his guilt.
      4. *VI v. Roldan*
         1. Issue: gov’t asked witness if she knew that defendant had previously been convicted of murder on re-direct after D’s counsel had asked on cross about if he had ever bothered anyone
         2. Holding: permissible—defense introduced, doesn’t matter with whose witness
         3. Variation: What if witness, not counsel, brings up credibility first?
            1. Impermissible: Defense needs to open the door
      5. *Krapp*
         1. Evidence: witness asked if she knew that her husband had omitted tax income
         2. Holding: Question about her husband and her lying on tax returns prejudiced jury enough mistrial should have been declared
      6. *US v. Setien*
         1. Holding: Evidence of good conduct not admissible to negate criminal intent; need reputation evidence
   3. Specific conduct and other crimes
      1. **FRE 404(b):** **Other Crimes, Wrongs, or Acts.**--Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.
         1. To show MIMICK:
         2. Motive/opportunity
         3. Intent
         4. Lack of Mistake
         5. Identity/Modus operandi
         6. Common scheme or plan
         7. Knowledge
      2. Admissible for defendant or victim
      3. *US v. Beechum*
         1. Evidence: credit cards found in D’s wallet introduced in trial for theft of silver dollar
         2. Holding: Two step test for prejudice v. probative in character evidence:
            1. Relevant to issue other than character

Here: both intent and absence of mistake

Once targeting a specific issue, probativeness outweighs prejudice

* + - * 1. Evidence must possess probative value not substantially outweighed by its undue prejudice and must meet other requirements of 403
    1. *US v. Boyd*
       1. Evidence: that D was a drug user (in trial for drug trafficking)
       2. Holding: admitted for proof of motive (passes 403 test)
    2. *US v. DeJohn*
       1. Evidence: that he was caught where stolen checks were stored and that he was caught with stolen checks on him
       2. Holding: admitted as evidence that he had access to the checks, not that he misbehaved
    3. *Lewis v. US*
       1. Evidence: earlier burglary during which tools were stolen that were used in the burglary at issue
       2. Holding: admissible: establishing plan and intent (equipment needed for second burglary)
    4. *US v. Crocker*
       1. Evidence: that D had been arrested with the same person before
       2. Holding: probative that D didn’t have a lack of knowledge
    5. *US v. Dossey*
       1. Evidence: later robbery
       2. Holding: admissible to prove earlier robbery—similar modus operani/disguise
    6. *US v. Wright*
       1. Evidence: conversation recorded over a wiretap (not to prove intent but to identify)
       2. Holding: Has nothing to do with sale six months earlier for which he was being tried, but a different sale—different issue at this case and impermissible
    7. *Huddleston v. US*
       1. Evidence: Evidence that D had sold stolen goods before (D pleading he didn’t know they were stolen)
       2. Holding: is there enough on the FACE of the earlier evidence for reasonable jury to find that the goods were stolen?
          1. Preponderance of the evidence
          2. Example: sold at a price too low to be legitimate, how they were delivered, etc.
    8. Four safeguards to preponderance showing:
       1. Be offered for proper purpose (104b)
       2. Relevancy requirement (402)
       3. Assessment of trial court )that under 403 more probative than prejudicial)
       4. Limiting instructions (105)
  1. Habit evidence
     1. **FRE 406: Habit and Routine Practice**. Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.
     2. “How he greets situations with a specific kind of conduct”; may be semi-automatic
     3. Two theories
        1. Psychological: on autopilot, so automatic, no conscious decision-making
        2. Probability: this is how you would likely react to a specific stimulus
     4. *Loughan v. Firestone Tire & Rubber*
        1. Evidence: Drinking as evidence of habit
        2. Holding: admissible because a uniform pattern, not just a few instances; probative to show he acted in conformity if he did it every day
     5. *Burchett v. Commonwealth*
        1. Evidence: Fact that he smoked marijuana daily
        2. Holding: inadmissible: because he smokes daily doesn't mean he had smoked before or during accident
           1. Calling something a habit can give it excess significance to jurors
           2. Just because he regularly does something, doesn't mean he did it that day, and evidence of habit can lead jurors to confuse the two

1. Sex Assault & molestation
   1. **FRE 412 (federal rape shield statute)**
      1. **(a) Evidence generally inadmissible.**--The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):
         1. **(1)** Evidence offered to prove that any alleged victim engaged in other sexual behavior.
         2. **(2)** Evidence offered to prove any alleged victim's sexual predisposition.
         3. **(b) Exceptions.--**
            1. **(1)** In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:

**(A)** evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence;

**(B)** evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

**(C)** evidence the exclusion of which would violate the constitutional rights of the defendant.

* + - * 1. **(2)** In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.
        2. **Civil:** if probativeness = prejudicialness; exclude—only if it outweighs.
  1. *Graham v. State*
     1. Evidence: victim was unchaste
     2. Holding: admissible to show victim was the first aggressor--would be more likely to make advances, if spurned, more likely to react violently
  2. *US v. Saunders*
     1. Evidence: D’s friend’s corroborating testimony that this woman exchanged sex for drugs (friend did it and she had a reputation for it) for state of mind during alleged rape
     2. Holding: this is not one of the carve-outs in 412(b); unreasonable for D to base consent on her past sexual experiences (for prior instances with the same accused or that the other guy committed this rape)
  3. *Olden v. Kentucky*
     1. Evidence: Conflicting accounts of what happened between Matthews, white woman, and a series of black men, when she may have been intoxicated, two presented by petitioner and her now-husband; wanted to present evidence that she now lived with this man to impeach her (she was just telling the story to protect her relationship with him so he wouldn’t think she was sleeping with other men)
     2. Holding: violation of constitutional right to confront his accuser; probative value outweighed prejudice. Such evidence was relevant to defendant's claim that he and complainant engaged in consensual sexual acts and that complainant, out of fear of jeopardizing her relationship with boyfriend, lied when she told boyfriend she had been raped, and evidence could not be excluded on basis of mere speculation as to effect of jurors' racial biases.
  4. Defendant's character
     1. **FRE 413**: Evidence of similar crimes in sexual assault case
        1. **(a)** In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.
        2. **(b)** In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.
        3. **(c)** This rule shall not be construed to limit the admission or consideration of evidence under any other rule.
        4. **(d)** For purposes of this rule and Rule 415, “offense of sexual assault” means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved--
           1. **(1)** any conduct proscribed by chapter 109A of title 18, United States Code;
           2. **(2)** contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person;
           3. **(3)** contact, without consent, between the genitals or anus of the defendant and any part of another person's body;
           4. **(4)** deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or
           5. **(5)** an attempt or conspiracy to engage in conduct described in paragraphs (1)-(4).
     2. **FRE 414: Child Molestation.**
        1. **(a)** In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.
        2. **(b)** In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.
        3. **(c)** This rule shall not be construed to limit the admission or consideration of evidence under any other rule.
        4. **(d)** For purposes of this rule and Rule 415, “child” means a person below the age of fourteen, and “offense of child molestation” means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved--
           1. **(1)** any conduct proscribed by chapter 109A of title 18, United States Code, that was committed in relation to a child;
           2. **(2)** any conduct proscribed by chapter 110 of title 18, United States Code;
           3. **(3)** contact between any part of the defendant's body or an object and the genitals or anus of a child;
           4. **(4)** contact between the genitals or anus of the defendant and any part of the body of a child;
           5. **(5)** deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or
           6. **(6)** an attempt or conspiracy to engage in conduct described in paragraphs (1)-(5).
     3. **FRE 415: Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation**
        1. **(a)** In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these rules.
        2. **(b)** A party who intends to offer evidence under this Rule shall disclose the evidence to the party against whom it will be offered, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.
        3. **(c)** This rule shall not be construed to limit the admission or consideration of evidence under any other rule.
     4. *US v. LeCompte*
        1. Evidence: that D molested another niece previously (uncharged), in trial for current child molestation
        2. District Court: Under 403, found probative value limited--different people present, separated by 8 years, had not played games before first niece, while risk of prejudice high. Tried to get under 404(b) for motive (predisposition as motive)
        3. Holding: Rule 403 must be allowed to let rule 414 have its intended effect; 404(b) cannot be used as a workaround—would then let in everything. Admissible under 414 if notice is given per the rule.
     5. *US v. Cunningham*
        1. These rules not necessary, 404b (to establish motive) is enough
     6. Under and over inclusive
        1. Under: might lead to tendency to expect someone to have committed previous assault before can be convicted again
        2. Over: make it easier to convict people of sexual assault
           1. Higher likelihood that someone innocent will be swept in

**Impeachment**

1. Generally
   1. **FRE 607**.  Who May Impeach. The credibility of a witness may be attacked by any party, including the party calling the witness.
   2. **FRE 806**: Attacking and Supporting Credibility of Declarant. When a hearsay statement, or a statement defined in Rule 801(d)(2)(C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.
   3. Five main modes of attack on credibility
      1. Self-contradiction
      2. Bias
      3. Attack on character (not lack of religious belief)
      4. Defect of witness capacity to observe or remember
      5. Specific contradiction
   4. Hearsay declarants can also be impeached
      1. Okay to attack or impeach a non-present declarant if their testimony was admitted under hearsay
   5. If solely introduced to show contradiction, not for the truth of the matter asserted, then not hearsay
2. Reputation for untruthfulness “aren’t you a known liar?”
   1. **FRE 608: Evidence of Character and Conduct of Witness**
      1. (a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations:
         1. (1) the evidence may refer only to character for truthfulness or untruthfulness, and
         2. (2) 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.
      2. (b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness
         1. (1) concerning the witness' character for truthfulness or untruthfulness, or
         2. (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.
      3. The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness.
   2. **FRE 610: Religious Beliefs or Opinions**. Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.
   3. Inferences
      1. Permissive inference: not credible because of XYZ
      2. Impermissible: that he has committed a crime because this person who know him says you can't trust him (propensity)
   4. *US v. Lollar*
      1. Evidence: Gov’t wanted to present a witness, D’s employer, who said he would not believe the appellant under oath
      2. Holding: Once D testifies, places credibility in question; okay to testify as to reputation for veracity
   5. *US v. Rosa*
      1. Evidence: gov't wants to cross their own witness on an alleged (not convicted) act of bribery to impeach his credibility
      2. Holding: Can inquire on cross exam as to specific instances of conduct probative of truthfulness if used for the purpose of showing truthfulness; court did not allow testimony of him bribing: that act does not show truthfulness or untruthfulness
   6. *US v. Ling*
      1. Evidence: extrinsic evidence of an act that D denied committing when asked during cross-examination
      2. Holding: When D agrees to testify, then crossed for purposes of impeaching his credibility by proof of specific acts of past misconduct not the subject of a conviction, cannot call other witnesses to prove the misconduct after denial--bound by that answer
   7. *US v. White*
      1. Evidence: trying to impeach the gov’t witness by bringing in extrinsic evidence (his prior attorney) that he had offered to fabricate testimony in a previous case
      2. Holding: Can elicit only through cross of him himself, not a third source—no extrinsic evidence
3. Prior convictions
   1. **FRE 609: Impeachment by Evidence of Conviction of Crime**
      1. (a) General rule.--For the purpose of attacking the character for truthfulness of a witness,
         1. (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and
         2. (2) evidence that any witness has been convicted of a crime shall be admitted regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness. (NO WEIGHING REQUIRED!)
      2. (b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.
      3. (c) Effect of pardon, annulment, or certificate of rehabilitation.--Evidence of a conviction is not admissible under this rule if
         1. (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime that was punishable by death or imprisonment in excess of one year, or
         2. (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.
      4. (d) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.
      5. (e) Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.
   2. Test stingier for accused than witness
   3. *US v. Wong*
      1. Evidence: that a witness has previously been involved in a crime involving dishonesty
      2. Holding: No discretion to weigh probative v. prejudicial 609(a)(2): no weighing necessary like under (a)(1); shall be admitted
         1. No judge discretion, no balancing under 403
   4. *US v. Ameachi*
      1. Evidence: conviction for shoplifting to impeach prosecution's witness against him
      2. Holding: imprisonment could not have exceeded one year--not admissible under (a)(2); not a crime of dishonesty or false statement unless committed in fraudulent manner--to do so would swallow the rule
   5. *US v. Sanders*
      1. Evidence: Prior conviction possession of contraband
      2. Holding: Under a modified 403 test, similar offense does a lot of prejudice but little probative value for impeachment-should be admitted sparingly if at all
         1. The only thing this evidence could show is propensity to commit assaults, which is impermissible to show conformity therewith
         2. Error in admitting evidence of prior convictions was harmless as to conviction for possession of contraband, in light of defendant's admission to possession of shank used to stab victim
   6. *US v. Hernandez*
      1. Evidence: Similarity between crimes (drug possession, then kidnapping for ransom money for drugs)
      2. Holding: Since credibility important in this case, properly admitted
   7. *Luce v. US*
      1. Evidence: that an adverse ruling (that they would try to impeach him with evidence of earlier crimes if he testified) made him decide not to testify
      2. Holding: To raise and preserve for review a claim of improper impeachment with a prior conviction, a defendant must testify
   8. *Ohler v. US*
      1. Evidence: A party that introduced evidence generally cannot claim on appeal that evidence was erroneously admitted
      2. Holding: Must choose to introduce on direct to remove the sting or wait and take chance If prosecution elicits it on cross
4. Prior inconsistent statements “didn’t you tell someone else something different about this?”
   1. **FRE 613: Prior Statements of Witnesses**
      1. (a) Examining witness concerning prior statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.
      2. (b) Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).
   2. **FRE 801(d)(1): Statements which are not hearsay.** A statement is not hearsay if--
      1. **(1) Prior statement by witness.** The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is
         1. (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or
         2. (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or
         3. (C) one of identification of a person made after perceiving the person.
   3. *US v. Lebel*
      1. Evidence: Witness failed to ID D the first time, wanted to bring in evidence this happened before bringing him to the stand
      2. Holding: Can bring in impeacher, then call and confront—order of proof is okay
   4. *US v. Dennis*
      1. Evidence: Miller, witness, changed testimony at trial from grand jury, prosecutor said because he was scared
      2. Holding: Can impeach your own witness. Grand jury testimony not hearsay, ok for leading questions, ok to use to impeach with silence, evasiveness, etc.
   5. *US v. Ince*
      1. Evidence: statement Newman made to police about firing gun (introduced by gov't only to impeach its own witness to circumvent hearsay rule and expose jury to otherwise inadmissible evidence of alleged confession)
      2. Holding: Admission of impeachment evidence was reversible error where government's only apparent purpose for impeaching one of its own witnesses was to circumvent hearsay rule and to expose jury to otherwise inadmissible evidence of defendant's alleged confession.
   6. *US v. Morlang*
      1. Cannot admit evidence as to a prior statement of prosecution witness, which implicated defendant, in order to impeach such witness (circumvent hearsay rules by bringing in statement to impeach and hoping jury gets confused)
   7. *US v. Webster*
      1. Evidence: Gov't called witness who gave testimony that would exculpate D; then brought other testimony to impeach him in hope jury would miss subtle distinction between impeachment evidence and substantive evidence
      2. Holding: Affirmed--she brought him to stand without jury to see what he would say and didn't intend to have to impeach him
   8. *People v. Freeman*
      1. Evidence: Hi Norman not hearsay: to identify, not for truth of matter asserted
      2. Holding: Can’t bring her to stand to ask about statements, have her deny them, have interviewer/investigator come to stand to impeach her (but really to just have his version of events that is really hearsay let in—forbidden by Morlang)
      3. But here, conditions satisfied, correctly allowed the man to testify to impeach her—statements otherwise admissible as substantive
5. Bias “aren’t you angry at the person you are testifying against?”
   1. Extrinsic proof allowed to show bias: Because of the nature of bias, less likely to cop to it
   2. *US v. Abel*
      1. Evidence: membership in gang to show that members would do anything, include lie under oath and murder, for each other
         1. D wanted to get friend to testify that a third cohort cohort has admitted need to implicate D falsely to get favorable treatment from gov't; cohort wanted to testify both members of gang willing to lie for each other
      2. Holding: admissible to show bias, though not under 608(b) for character
   3. *US v. Sasso*
      1. Evidence: that witness took Prozac sometimes for depression following a catastrophic accident
      2. Holding: Inadmissible; No evidence that accident or drugs would give her delusions, etc.
   4. *Henderson v. Detella*
      1. Evidence:; defense wanted to introduce testimony of witness for evidence that victim and witness to murder/attempted murder used drugs sometimes
      2. Holding: Testimony barred--would not have shown under influence at that time or that she couldn't recall events she was testify towards; would only have impeached character, impermissible
6. Specific contradiction/incapacity “aren't you legally blind?”
   1. Collateral evidence rule/specific contradiction rule: no extrinsic impeachment by contradiction on a collateral matter
      1. Demonstrating that some part of what a witness said was false and suggesting this gives jury reason to disregard all testimony
      2. Is it collateral? Could the fact in question be proven for any purpose other than contradicting the witness? If fails, collateral.
   2. *Simmons v. Pinkertons*
      1. Evidence: that D lied to P about taking a polygraph
      2. Holding: Inadmissible; collateral evidence (fear of mini-trial)
   3. *US v. Copelin*
      1. Evidence: that D had tested positive for cocaine three times to show he knew what cocaine looked like
      2. Holding: Use of extrinsic evidence doesn't matter when cross examining
   4. Lincoln example
      1. Farmer's almanac: collateral evidence problem
      2. Extrinsic, not material to the issue, not admissible, but turns out material: proves he was the killer (went to capacity: ability to see)
      3. If it had nothing to do with ability to see--event happened indoors--would have felt collateral and would have not been able to bring in (you misremembered the moon, so misremembered the whole murder)

**Rehabilitation after impeachment**

1. Generally
   1. Five modes, mirroring impeachment
      1. Honesty
      2. Consistency
      3. Disinterest
      4. Capacity
      5. Specific corroboration
   2. Can’t bolster before impeachment
   3. *US v. Lindemann*
      1. Evidence: Testimony from helper about who and how many people he had killed horses for; limited to understanding scope of his cooperation with the gov't
      2. Objection: D argues this is bolstering (enhancing his testimony before impeachment)
      3. Holding: only limitation is 402 relevance, there is no bias here, so admissible; not collateral, so can admit extrinsic evidence
         1. 608: prohibits bolstering for truthfulness
         2. 801: consistency
         3. 402: here is relevant because attack on bias
2. Reputation for truthfulness
   1. **FRE 608: Character for truthfulness**.
      1. **(a) Opinion and reputation evidence of character.** The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations:
         1. (1) the evidence may refer only to character for truthfulness or untruthfulness, AND
         2. (2) 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.
      2. **(b) Specific instances of conduct**. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness
         1. (1) concerning the witness' character for truthfulness or untruthfulness, or
         2. (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.
      3. The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness.
   2. *Beard v. Mitchell*
      1. Evidence: prior inconsistent statements of police informant
      2. Holding: falls under “other” and admissible
   3. *US v. Danehy*
      1. Evidence: of his own reputation to prove truthfulness
      2. Holding: Just because cross-examined and testimony contradicted by other evidence in the case doesn't constitute attack on reputation for truth--introduction of evidence would be pure bolstering
   4. *US v. Drury*
      1. Evidence: of truthful character
      2. Holding: Attack that consists only of gov't testimony pointing out inconsistencies in testimony and that it isn't credible does not constitute an attack on truthfulness within 608—can’t rehabilitate
   5. *US v. Murray*
      1. Evidence: officer testifying about informant’s reliability during an extended cross that included many sordid activities, but not any specific reputation or opinion evidence
      2. Holding: Fell into the "otherwise" attacked area that permits introducing evidence to support his credibility, but not allowed to present extrinsic evidence of specific instances to support credibility
         1. If have relevant, extrinsic, bias evidence, can use that
         2. Extrinsic evidence that specifically address bias (we love informant he gives to charity)--fine rehab for bias
3. Prior consistent statements
   1. **FRE801(d)(1): Statements which are not hearsay.** A statement is not hearsay if--
      1. **Prior statement by witness.** The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is
         1. (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or
         2. (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or
         3. (C) one of identification of a person made after perceiving the person.
   2. Most courts: if prior inconsistent statement attack goes to a motive to lie or recent fabrication, even if in form of prior inconsistent statement, can qualify under 801d1B
   3. *Tome v. US*
      1. Evidence: adults testifying about what child had previously told them re: her father abusing her
      2. Holding: under 801d1bB, Balance strength of motive to lie, circumstances in which statement is made, and declarant's demonstrated propensity to lie
         1. On these facts: Did AT's alleged statements rebut the alleged link between her desire to be with her mother and her testimony?
         2. Court says no, did not meet those requirements
         3. Specific reason to admit prior consistent statements: to show prior, no underlying motive to lie; once you say a lie, of course stuff after that will be lies to support it
         4. The Court reversed and remanded the appellate court order because it found that Fed. R. Evid. 801(d)(1)(B) only permitted the introduction of consistent, out-of-court statements to rebut a recent fabrication, improper influence, or motive charge, when those statements were made prior to the time the charges of recent fabrication, improper influence, or motive arose.
   4. *US v. Simonelli*
      1. Evidence: government to cross-examine tax fraud defendant about his other bad acts, in allegedly altering company time cards, inflating bills to company clients, and stealing company records
         1. Gov’t wanted to attack witness with a prior inconsistent statement from grand jury
         2. D wants to rehabilitate him with a prior consistent statement from the grand jury
         3. district court should not have permitted government, in guise of rehabilitating government witness, to examine witness as extensively as it did about his prior consistent statements;
      2. Holding: Tome allows for consistency rehabilitation ONLY (not substantive evidence) post-motive

**Other forbidden inferences**

1. Subsequent remedial measures (inadmissible to prove fault)
   1. **FRE 407:** When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.
   2. *Clausen v. Storage Tank*
      1. Evidence: that a few years after accident the occupier asked the owner to replace the ramp that plaintiff slipped on
      2. Holding: admissible, because introduced to prove control (the person who replaced the ramp had control over operating it), not that there was a problem with the ramp; with limiting instructions this was fine
   3. *In Re Asbestos Litigation*
      1. Evidence: that company placed warning labels about exposure after death introduced to show feasibility of putting labels on product
      2. Holding: Inadmissible: this was not a contested issue (a remedial measure only available for a permissible purpose)
2. Settlement efforts (inadmissible to prove right to recovery/guilt)
   1. **FRE 408: Compromise and Offers to Compromise**
      1. **(a) Prohibited uses.**--Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:
         1. **(1)** furnishing or offering or promising to furnish--or accepting or offering or promising to accept--a valuable consideration in compromising or attempting to compromise the claim; and
         2. **(2)** conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.
      2. **(b) Permitted uses.**--This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.
   2. Civil Cases
      1. *Ramada v. Rauch*
         1. Evidence: Document confirming defect alleged by Rach that made him not want to pay the contract; want to show notice, not admission of fault
         2. Holding: Falls under 408, not admissible to show notice because it is overshadowed by the fact it shows defect
      2. *Carney v. American University*
         1. Evidence: changed settlement package when she informed them intended to sue
         2. Holding: admissible to show retaliation, but not liability
   3. Criminal Cases
      1. **FRE 410: Inadmissibility of Pleas, Plea Discussions, and Related Statements.** Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:
         1. **(1)** a plea of guilty which was later withdrawn;
         2. **(2)** a plea of nolo contendere;
         3. **(3)** any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or
         4. **(4)** any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.
         5. However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.
      2. *US v. Mezzanatto*
         1. Evidence: while meeting with prosecutor, prosecutor warned him that anything he said during negotiations could be used at trial to impeach him; started to confess then lied
         2. Holding: possible to waive right to use statements during plea discussions against him during cross (though might be different if case in chief).
3. Medical payments/insurance (inadmissible to prove fault)
   1. **FRE 409: Payment of Medical and Similar Expenses.** Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.
   2. **FRE 411: Liability Insurance.** Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.
   3. *Charter v. Chleborad*
      1. Evidence: Attorney employed by defendant's insurer testified plaintiff's doctor had bad reputation
      2. Holding: Okay to show his employment to show bias, not that D had liability policy
   4. *Higgins v. Hicks*
      1. Evidence: in suit against city, wanted to admit evidence of insurance so jury wouldn't think taxpayers (themselves) would be paying judgment
      2. Holding: Excluded-not allowed under the rule
   5. McDonald’s examples
      1. Oh you poor man I will give you free coffee for life--admissible because not about medical payments

**Opinion Evidence and Expert testimony**

1. Lay opinions
   1. Generally: Opinions must be helpful to the jury and must be based on the witness's own firsthand observations
   2. **FRE 701: Opinion Testimony by Lay Witnesses**
      1. If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are
         1. (a) rationally based on the perception of the witness,
         2. (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and
         3. (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.
   3. **FRE 704: Opinion on Ultimate Issue**
      1. (a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.
      2. (b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.
   4. *US v. Meling*
      1. Evidence at issue: 911 operator and paramedic who said he was feigning his grief
      2. Holding: The people in these positions were in places that they could form these impressions--in better place than jury to decide if feigning because of their role in the situation
   5. *Virgin Islands v. Knight*
      1. Evidence: exclusion of eyewitness and investigating officer's testimony that firing of gun while beating a person with it was an accident
      2. Holding: Investigator didn't see, so no firsthand knowledge; eyewitness did so should be allowed under FRE 701--would have allowed his interpretation of facts that then jury could weigh credibility
   6. *Robinson v. Bump*
      1. Evidence: eyewitness to accident said driver was in total control of truck before hit by another car, causing it to hit a third car
      2. Holding: Admissible under 701 and 704 as opinions of lay witness--observed truck movement/control of driver and helpful in assessing negligence
   7. *US v. Peoples*
      1. Evidence: gov't informant was killed, agent who had been investigating his murder gave her opinion as to phrases used in recorded conversations between suspects
      2. Holding: Her testimony should only be admitted if:
         1. She was a participant in the conversation
         2. Has personal knowledge of the facts being related
         3. Observed the conversations as they occurred
      3. None of these conditions satisfied, so inadmissible
   8. *US v. Ayala-Pizarro*
      1. Evidence: officer testified as to drug distribution points and how they operate and how heroin is packaged for distribution at those points
      2. Holding: close call, but personal knowledge-don't need special expertise to make the conclusions he does
2. Expert reports
   1. **FRE 702: Testimony by Experts**. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if
      1. (1) the testimony is based upon sufficient facts or data,
      2. (2) the testimony is the product of reliable principles and methods, and
      3. (3) the witness has applied the principles and methods reliably to the facts of the case.
   2. *Hatch v. State Farm*
      1. Evidence: deposition testimony of expert who died before trial
      2. Holding: not specialized knowledge, just his opinion regarding a non legal standard—not “beyond the ken” of the average juror
   3. **FRE 703: Rule 703. Bases of Opinion Testimony by Experts**. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.
   4. *State v. Lewis*
      1. Evidence: scientist talked about analysis on hairs on hat found at scene concluded that could have come from D, her sons, or anyone maternally related to her; all hair consumed by process and she didn't perform firsthand, but analyzed work performed by colleague
      2. Holding: under FRE 703, allowed: no Crawford problem as long as crossing some expert: his opinion in evidence, not the underlying facts
   5. **FRE 705: Disclosure of Facts or Data Underlying Expert Opinion.** The expert may testify in terms of opinion or inference and give reasons therefore without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.
3. Reliability of experts
   1. **FRE 706: Court Appointed Experts**
      1. (a) Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.
      2. (b) Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.
      3. (c) Disclosure of appointment. In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.
      4. (d) Parties' experts of own selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection
   2. *LeBlanc v. PNS Stores*
      1. Evidence: court appointed expert physician
      2. Holding: Should be reserved for situations where ordinary adversary process does not suffice
   3. *Frye*
      1. **General acceptance**: The thing from which the expert deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs
   4. *Daubert v. Merrell Dow*
      1. Evidence: D submitted affidavit of renowned physician citing studies that said their drug could not have done this
      2. Holding: Under FRE 702: an expert may testify to scientific, etc., knowledge if it will assist the trier of fact
         1. Requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility
      3. New test: judge as gatekeeper, under 702: is the expert testifying to:
         1. scientific knowledge
            1. Can it be tested/has it (falsifiability/testability)?
            2. Has it been subjected to peer review?
            3. Rate of error/standard operating procedures?
            4. General acceptance (but not dispositive)?
         2. that will assist the trier of fact to understand or determine a fact in issue? If yes, admissible
   5. *General Electric v. Joiner*
      1. Evidence: Plaintiff’s experts linking PCB fluids to his disease
      2. Holding: Studies so dissimilar from facts in litigation that it was not an abuse of discretion to reject experts' reliance on them; appeals courts need to defer to trial courts (not overly stringent)
         1. Read Daubert to favor admissibility
         2. Look for analytical gap between conclusion and method used
   6. *Kumho Tire v. Carmichael*
      1. Evidence: testimony of tire failure analyst using his own method for determining tire failure
      2. Holding: Daubert applies to all expert testimony, not just scientific, and since no one else uses the tests this expert uses, trial court did not abuse its discretion in excluding it
   7. Sometimes things like contamination are lumped under weight, not admissibility--for jury to decide if accept or reject--threshold so unreliable it shouldn't be admitted for a 702 admissibility question
   8. *Marsh v. Valyou*
      1. Evidence: P wanted to introduce expert testimony trauma could cause fibromyalgia, D moved that this was not generally acceptable under Frye, held Frye hearing, agreed, summary judgment
      2. Holding: Frye only applies to new or novel scientific technique; a disagreement among experts doesn't move an opinion on medical causation to a new principle subject to Frye
         1. In a Frye state, don’t look for causation, but just to see if disease is generally accepted
   9. *Melendez-Diaz v. Mass*
      1. Evidence: affidavits reporting the results of forensic analysis which showed that material seized by the police and connected to the defendant was cocaine. The question presented is whether those affidavits are “testimonial,” rendering the affiants “witnesses” subject to the defendant's right of confrontation under the Sixth Amendment.
      2. Holding: Not only were the affidavits “ ‘made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,’ ”Crawford, but under Massachusetts law the sole purpose of the affidavits was to provide “prima facie evidence of the composition, quality, and the net weight” of the analyzed substance. We can safely assume that the analysts were aware of the affidavits' evidentiary purpose, since that purpose – as stated in the relevant state-law provision – was reprinted on the affidavits themselves.
         1. Absent a showing that the analysts were unavailable to testify at trial and that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to “‘be confronted with’” the analysts at trial.
         2. Forensic reports not necessarily neutral--interpretation required, subjective judgments might need to be exercised, there might be other ways of testing evidence
   10. *Michigan v. Bryant*
       1. Evidence: statements made to police while dying-was the questioning by the police to meet the emergency or interrogation?
       2. Holding: in order to determine if an emergency is ongoing, Context-dependent inquiry:
          1. Medical condition of victim
          2. Ongoing emergency
          3. Informality of situation
          4. Statements and actions of declarant and interrogators
   11. *Bullcoming*
       1. Evidence: forensic lab report of D’s BAC containing a testimonial certification; brought in through the in-court testimony of a scientist who did not sign the certification or perform or observe the test
       2. Holding: No, accused has the right to be confronted, unless analyst unavailable and accused had pre-trial opportunity to cross-examine that particular scientist
       3. Limitations: doesn’t rule on:
          1. Testing for a different reason other than use at trial
          2. Testifying witness was a supervisor, reviewer, with a personal, albeit limited connection to the test
          3. Not a case where a witness offering an opinion on underlying testimonial materials
          4. Not a case where there is a machine printout jurors can read and interpret on their own
4. Scientific Controversies
   1. Lie Detection
      1. **Polygraph**: three types of questions
         1. **Neutral**: name, address, no response
         2. **Relevant**: questions about crime at issue
         3. **Control**: similar but not directly related to this crime; designed to provoke a response (can't say no easily)--deliberately vague and provocative (Anyone innocent or guilty would probably have a positive response to these)
      2. *Porter*
         1. Evidence: results of D’s polygraph test admitted during his trial for arson.
         2. Holding: satisfies Daubert, but fails 403 balancing test and inadmissible
      3. *US v. Scheffer*
         1. Evidence: Polygraph by US airman after he failed a drug test.
         2. Holding: exclusion of evidence unconstitutionally arbitrary or disproportionate only where it has infringed upon a weighty interest of the accused; the rule that makes polygraphs inadmissible in court-martial proceedings is neither arbitrary or disproportionate.
   2. Social Science
      1. *US v. Smithers*
         1. Evidence: expert to speak generally about problems with eyewitness identifications at trial for D who was IDed by three eyewitnesses
         2. Holding: problems with eyewitness IDs include:
            1. Detail salience (focus on unusual characteristics)
            2. Relationship between time passed and accuracy of recollection
            3. Effect of post-identification events on memory
            4. Preparation and administration of photo spread by same person increases likelihood of misidentification
            5. Conformity effect
            6. Relationship between confidence and accuracy
      2. *State v. Coley*
         1. Evidence: expert to speak generally about problems with eyewitness identifications at trial for D who was IDed by eyewitnesses
         2. Holding: Simply offers generalities and not specific to witness whose testimony is in question; prejudice or issue confusion outweighs the probative value (tension between role of the jury and use of expert testimony)
   3. Traditional forensic science
      1. *Henderson*
         1. Evidence: potentially suggestive eyewitness identification procedures
         2. Holding: memory is malleable, and that an array of variables can affect and dilute memory and lead to misidentifications. Those factors include system variables like lineup procedures, which are within the control of the criminal justice system, and estimator variables like lighting conditions or the presence of a weapon, over which the legal system has no control.
         3. Result: new recommendations for eyewitness identifications
      2. *Fuji*
         1. Evidence: testimony of gov’t handwriting expert
         2. Holding: Daubert analysis
            1. Never been tested to see if it actually does what it purports to do
            2. No peer review by a financially disinterested community
            3. Error rates: unknown
            4. General acceptance: a long time
      3. *Llera Plaza*
         1. Evidence: expert fingerprint analysis
         2. Holding: admissible: this expert in this situation passes Daubert
      4. Arson
         1. Study: longer after flashover, only 25% of investigators can even tell what quadrant the fire started in (same results as expect by chance)
         2. Some of the folk wisdom is actually the opposite of what is correct
   4. Probabilistics & DNA evidence
      1. DNA match does not 100% mean suspect is the source; just that they cannot be excluded as the source
      2. Three types of probability
         1. Random match probability: probability that a person selected at random from the population would match the trace and suspect samples
         2. Source probability: probability the suspect is the source of the recovered evidence
         3. Guilt probability: probability suspect guilty of the crime in question--strength of both genetic and non-genetic evidence
      3. *People v. Collins*
         1. Evidence: witness from state college who testified that probability of blond woman and negro man committing crime, using product rule: probability of the joint occurrence of a number of mutually independent events is equal to the product of the individual probabilities that each of the events will occur (polled clerical staff in D office to get base numbers)
         2. Holding: two fundamental prejudicial errors:
            1. Lack of foundation in evidence and statistical theory
            2. Testimony and the manner in which prosecution used it distracted jury from its function of weighing evidence on the issue of guilt, encouraged jurors to rely on logically irrelevant but expert testimony, foreclosed the possibility of effective defense by unfamiliar with math defense attorneys, and placed jurors and D at disadvantage to distinguish facts from theory
      4. *State v. Spann*
         1. Evidence: Blood and tissue tests (HLA antigen tests)--to prove D WAS the father
         2. Holding: probability of paternity opinion admissible only if the expert notes that the calculations leading to the opinion use as one of the critical factors a prior probability of paternity of .5 (this value is something the jury should be deciding)
      5. *US v. Veysey*
         1. Evidence: testimony by actuary that probability of four residential fires occurring by chance in 9 years was only 1/almost 2 trillion
         2. Holding: actuary usurped jury's function by making a case for beyond a reasonable doubt equivalent to 1 in 2 trillion
      6. *US v. Shea*
         1. Evidence: FBI scientist’s testimony about blood evidence from bank robbery where suspect was masked; he said that DNA evidence that probability of finding a similar profile would be 1 in 200,000
         2. Holding: must satisfy 602's reliability requirement; look at:
            1. Error rate, handling deficiencies, methodological problems, and interpretation issues
            2. Product rule cannot be used because databases too small
            3. Gov't should not be allowed to tell jury probability of random match because it will mislead the jury
            4. Need to do 403 balancing here
            5. Possibility of error higher than possibility of coincidental match
            6. Human error more common than technical errors
         3. Even if 100% error, still admissible: goes to WEIGHT not admissibility
      7. Odds
         1. **Prior odds**: 50-50 odds that he on the stand is just as likely to be the father as any other man (if really the D versus the world, would be very very small)
         2. **Posterior odds**: odds that D is the match (multiply prior odds by DNA odds)
         3. Game changers
            1. Clean samples (known father) versus sample from ground mixed with other stuff
            2. Kinship radically changes these probabilities

**Physical Evidence**

1. Generally
   1. Must satisfy two rules:
      1. Authenticated: sufficient evidence to show the factfinder it is genuine
         1. Like conditional relevance
      2. Best evidence rule: a party seeking to prove the content of a document introduce the original
   2. FRE 901: **Authenticating or Identifying Evidence**
      1. **(a) In General.** To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.
2. Best Evidence rule
   1. *US v. Long*
      1. Evidence: employment contract defendant's witness testified as to being he was participating in legitimate business venture
      2. Holding: Matter for jury to determine if reliable and accurate; D just had to show if same doc witness says that she saw
         1. Test for authentication: rational basis for the claim if the doc is what it says it is supposed to be
   2. *Bruther v. GE*
      1. Evidence: bulb that electrocuted plaintiff
      2. Holding: admissible; using this evidence, a jury could reasonably conclude that the bulb in question was the same one that injured the P
         1. Gaps in custody go to weight, not admissibility
         2. Could a reasonable jury find that this was the same bulb?
   3. *US v. Casto*
      1. Evidence: Because one of three people who handled evidence of meth did not testify, D wants to say chain of custody violation
      2. Holding: custody goes to weight, not admissibility
   4. *US v. Grant*
      1. Evidence: drugs with a 2-week gap in their chain of custody
      2. Holding: Not an issue: gov't didn't offer drugs themselves into evidence, but testimony of chemist--no need to authenticate testimony of a live witness
3. Demonstrative evidence
   1. Demonstrative evidence (charts, etc): not constrained by either rule
   2. Just has to be sufficiently explanatory or illustrative to be of potential help to trier of fact: discretion of trial court if it will mislead
   3. *US v. Weeks* 
      1. Evidence: firearm displayed to jury, even though not connected with D
      2. Holding: Although not exact one used, IDed by a victim as similar to the one used to kidnap; qualified as demonstrative only
   4. *US v. Humphrey*
      1. Evidence: Used bags filled with Styrofoam instead of coins as an example; objected because they were bigger
      2. Holding: Should have weighed probative versus prejudicial under 403
   5. *Bannister v. Town of Noble*
      1. Evidence: three videotapes
      2. Holding:
         1. Impact of injury on P's life--prejudicial?
            1. No abuse of discretion in admitting
         2. Car like one in accident demonstrating a similar accident
            1. Demonstration of certain principles: okay
            2. With limiting instruction, no abuse of discretion
         3. Concluding video with clips from others: already admitted as wholes, and reviewed by court: not abuse of discretion