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I. INTRODUCTION AND OVERVIEW

A. Why Evidence Law

1) Mistrust of Juries
2) Substantive Policies Relating to Matter Litigated
3) Serve Extrinsic Substantive Policies (privilege law, etc.)
4) Ensure Accurate Fact Finding
5) Control the Scope and Duration of Trials

B. Getting Evidence In: Foundation and Offer

1. Basic Questions about Evidence to Consider

1) Is it relevant?
2) Does it satisfy the authentication requirements?
3) Is it reliable evidence?
4) Are there policy reasons for excluding the evidence?

2. Witnesses

a. Direct Examination

1) Background Information
2) Lay the foundation for the testimony
3) Substantive Questions
4) Generally Must Be Nonleading Questions

b. Cross-Examination

1) Uses leading questions
2) Questioning is limited to the scope of the direct examination in most jurisdictions
3) Judge may permit broader cross in some cases

3. Real Evidence

Requires "authentication"
Chain of custody not required for authentication when you have first hand testimony

4. Demonstrative Evidence

5. Writings
- Best Evidence Doctrine
- Authenticate
- Show it Falls in a Hearsay Exception

C. Keeping Evidence Out

1. Objections make trials more efficient!

a. Substantive Objections

b. Formal Objections

Asked and answered; Assumes facts not in evidence; Argumentative; Compound; Leading the Witness; Misleading; Speculative or conjecture; Ambiguous, Uncertain, and Unintelligible; Nonresponsive to the Question; Incompetent, Irrelevant, and Immaterial

2. Offer of Proof

FRE 103(a)(2)

3. Motions in Limine ("at the threshold")

4. Judicial Mini-Hearings

5. Interlocutory Appeals

Generally only allowed for privilege rulings and the evidence suppressions in civil cases.

D. Consequences of Evidential Error

` Principles:

Award relief only when errors seem to have made a real difference in the result

FRE 103: Error must have affected a "substantial right" ("probably affected" the result)

Some evidence rules are vague standards and deference to trial judge is always in order. The adversary system holds parties to the choices they make and the errors they cause or would be expected to prevent. (Failing to object or offer proof (with precision), "inviting" error, opening the door).

1. Kinds of Errors

a. Harmless Error

Errors shown to be harmless through

i. "Cumulative Evidence" Doctrine
Existence of so much evidence on the same point (more than just "sufficient" evidence.

ii. "Curative Instruction" Doctrine

iii. "Overwhelming Evidence" Doctrine

b. Reversible Error

Evidential error "probably affected" the outcome. Preserved at trial by making proper objection or formal offer of proof.

c. Plain Error

Warrants relief even though appellant failed at trial to take steps to preserve its rights (generally means error was "obvious" and judge should have known better and it more certainly affected the result).

d. Constitutional Error
Criminal case. Usually means prosecution evidence was admitted that should have been constitutionally excluded. No reversal if prosecution shows error was harmless beyond a reasonable doubt (*Chapman v. California*, 387 U.S. 18 (1967))

II. RELEVANCE AND PREJUDICE

A. Relevance

1. FRE 401: Relevance Defined

Evidence having "any tendency" to make "any fact" of consequence more or less probable than it would be otherwise.

The dangers of inductive reasoning

2. Basic Principles of Relevance

i. It is always a relational concept (to both the substantive law and the facts of the case)
ii. Be wary of any statement attempting to codify the concept of relevance
iii. Check whether the evidence you are evaluating is direct or circumstantial.
iv. Any question of relevance is based on reason and logic.

3. Evidence Can Be Relevant Even if those Facts are Not in Dispute

Each party has an interest in letting evidence tell its story, build its case and satisfy expectations of jurors (*Old Chief*, finding the name of defendant's prior felony conviction is relevant despite stipulation, but see below)

a. But See Cal. Evid. Code:
Relevant evidence must go to prove or disprove any "disputed" fact.

4. Evidential Hypothesis

Proponent should be prepared to explain why the offered proof is relevant (by deductive or inductive reasoning)

5. "Tendency"

Makes the Point to Be Proved More Probable than it was without the Evidence

6. Evidence of Efforts to Avoid Capture are Generally Admissible in Criminal Trials[1]

(*Allen v. United States* (U.S. 1896)), but it does not create a presumption of guilt (*Hickory v. United States* (U.S. 1896)) and it cannot be taken as proof of

[1] Also: Use of false ids, destroyed or concealed evidence; fabricated evidence or perjury, threatening or impeding witnesses, attempted suicide, attempts to bribe officials.

some specific elements of the crime. But what is perceived as flight could actually be showing many other things. The relevance sometimes depends on the reasonableness of the assumption the defendant knew he was under investigation. Prosecution will want instruction to jury to consider flight as evidence of possible guilt but defense is entitled to instructions that flight could have been for other reasons (fear, etc.).

B. Prejudice

We do not want to "inflame the passions of the jury" and lead to decisions being made on an emotional rather than a rational/legal basis.

1. FRE 403

Otherwise relevant evidence can be excluded if its probative value is outweighed by
Dangers of *unfair prejudice*, *confusion* of the issues, or *misleading* the jury or;
Considerations of undue *delay*, waste of *time*, or *needless* presentation of *cumulative* evidence

2. Proper Analysis

1) Is the evidence relevant?
    a. Does it go to a contested question at trial?
2) Is it unfairly prejudicial

State v. Chapple (Ariz. 1983) (where the sole disputed issue at trial was whether the defendant was the identified shooter, gruesome photos of the body had little probative value and did a lot to inflame the jury, the facts illustrated were not in dispute so admission of photographs was reversible error)

3. Is there less risky alternative proof?

May be weighed in assessing the "probative value" of a particular piece of evidence in light of FRE 403. *Old Chief* (excluding name of prior felony conviction as unfairly prejudicial when probative value was minimal in light of defense stipulation. And narrative richness has less of a justification when the sole question is one of legal status).

4. Other notes on prejudice

- The fact that a photograph is gruesome does not mean it will be excluded
- Defense will often try to stipulate about cause of death and appearance of crime scene but prosecution will usually find some relevant ground to get evidence admitted anyway
- The judge will usually look at the piece of evidence in the context of the whole case

5. Limiting Instructions (FRE 105)

Evidence often tends to prove too much (relevant and probative to a particular point but unfairly prejudicial or incompetent on another point) so it will be admitted with a limiting instruction to the jury.

6. Completeness (FRE 106)

Evidence may be competent on a point but it would be a distortion not to present it in context. Adverse party may require the introduction of the rest of a writing or statement that should be in fairness considered at the same time (this can sometimes trump hearsay and other objections when necessary)

C. Simple and Conditional Relevancy

Often difficult to distinguish between 104(a) and 104(b) situations.

1. Simple Relevancy

Questions of simple relevancy are for the judge to decide (FRE 104(a) and it is up to the jury to weigh the evidence.

2. Conditional Relevancy for Jury

When relevance turns on the fulfillment of a particular fact, the jury decides whether the condition is satisfied when reasonable minds could differ (FRE 104(b)). e.g. questions of authenticity, personal knowledge of a witness,

3. Conditional Relevancy for Judge

When there is no evidence on which a jury could base a finding of the necessary condition under FRE 104(b), the judge could find the proof inadmissible under FRE 104(a). (examples on p.88-89)

D. Character Evidence

1. Character Evidence to Prove Conduct on Particular Occasion FRE 404

Not admissible to prove conduct unless:

a. Character of Accused to Prove Conduct (FRE 404(a)(1))

1. A pertinent trait is offered by the accused or by prosecution to rebut the same

2. Accused offers evidence of a pertinent character trait of the alleged victim and prosecution offers evidence to show accused has same character trait.

b. Character of Alleged Victim (FRE 404(a)(2))

Admissible to prove conduct when:

1. A pertinent trait of the alleged victim is offered by the accused or by the prosecution to rebut the same
2. A character trait of peacefulness is offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor.

c. Character Evidence is Admissible to Prove Things Other Than Conduct on a Particular Occasion

i. Prior offense evidence can be offered by government to prove sanity.

d. Must be a Pertinent Trait of the Accused
Depends on the nature of the charges (e.g trait of nonviolence would be pertinent to charge of battery, honesty to larceny, but not truthfulness to drug dealing, etc.)

e. Proof of Good Character Can Create Reasonable Doubt
A jury could be instructed that proof of good character in the context of all the evidence can create reasonable doubt.

2. Evidence of Other Crimes, Wrongs, or Acts (FRE 404(b)) (Can Be Introduced By Prosecution)

Evidence of other crimes, wrongs, or acts (FRE 404(b)) is not admissible to prove character in order to show conduct but could be admissible for other purposes (proof of motive, preparation, knowledge, plan, design, etc.) provided that the prosecution provides notice to the accused upon request about the general nature of that evidence.

a. Prior drug deals offered to show intent to deal drugs on a particular instance.

b. Entrapment defense
Always raises question of intent so will always open the door for other crimes, wrongs, or acts.

c. Prior Crimes Offered under FRE 404(b) not Limited by *Old Chief*
Prior drunk driving convictions admissible to show defendant knew it was dangerous to drink and drive.[2]

d. To Show Modus Operandi, Identity
Prior act must bear a singular strong resemblance to charged offense and similarities must be sufficiently idiosyncratic (enough to show a "signature") to permit the inference of a pattern.

e. For Defense to Prove Crimes were Committed by a Third Person
Generally admissible if all signature elements are distinctly present.

f. When Other Crimes are Blended with Charged Offense

g. Prior Crimes and Acts Can be Admitted to Show Skill or Capacity to Commit Charged Offense
e.g. showing defendant had the ability to smuggle a person through customs.

[2] Tenth Circuit Case.

h. *Huddleston* Test to Weigh Probative Worth of Prior Crime vs. Unfair Prejudice
Threshold Test for Judge:
1) Was the evidence offered for a proper purpose?
2) Is it relevant for that purpose?
3) Is its' probative worth outweighed by the risk of unfair prejudice?
4) Give a limiting instruction upon request
Then conditionally admissible for jury if they find a preponderance of the evidence supports admission.

i. Proving Prior Acts
Proof of a prior act is relevant if *jury* can conclude by a *preponderance of the evidence* that the defendant performed the act. *Huddleston*. Thus evidence of a crime for which defendant was acquitted can still be considered.

3. Civil Cases

a. Character Evidence Not Admissible to Prove Behavior in a Particular Instance
But may be an exception where the underlying charge is criminal in nature.

b. Character Evidence Admissible Where it Goes to an Ultimate Issue
Examples: Defamation (to prove truth of reports); negligent entrustment (to show careless disposition); child custody (to show parental fitness); wrongful death (to show worth of decedent to plaintiff)

4. Forms of Evidence to Prove Character

a. Specific Instances of Conduct (FRE 405(a))
Admissible where character is an essential element of a charge (almost never in criminal cases), claim, or defense.

i. Cross-examination
Can bring in specific instances of conduct of the accused to impeach testimony of a character witness (even when the accused cannot prove otherwise).

b. Opinion and Reputation Evidence (FRE 405(b))
May be offered in all cases where character evidence is admissible and on cross-examination inquiry can be made into specific instances of conduct (can bring big trouble for the accused).

i. Reputation after the Crime

Prosecutor cannot ask character witness about the reputation of the defendant after the crime was committed.[3]

5. Character in Sex Offense Cases

a. Evidence of Alleged Victim's Past Sexual Behavior (FRE 412)

A) *Not admissible in a criminal case:*

1) To prove alleged victim engaged in *other sexual behavior*

2) To prove alleged victim's *sexual predisposition*

B) *Exceptions*

1) To prove a person other than the accused was the source of semen, injury, or other physical evidence

2) Instances of sexual behavior with the accused offered by the accused to prove consent or the prosecution

3) Evidence which excluding would violate defendant's constitutional rights

C) *Civil Cases*

1) Admissible if otherwise admissible under the rules and probative value *substantially outweighs* danger of harm to victim and prejudice to parties

2) Evidence of reputation admissible where alleged victim has placed it in controversy.

i. *Constitutional Right to Cross Examine Victim About Past Sexual Relationships on Grounds of Bias*

b. Prior Offenses by Defendants in Sex Crimes Trials (FRE 413-415)

Prosecutors are allowed to prove charges of sexual assault (FRE 413) or child molestation (FRE 414) by means of evidence that defendant assaulted or molested others and such evidence is similarly admissible in civil cases (FRE 415) regarding sexual assault or child molestation.

i. "Offense" does not require a conviction

ii. The so-called "Lustful Disposition" Doctrine

E. Habit and Routine Practice[4]

Under FRE 406 evidence of habit of a person or routine practice of an organization is generally relevant and admissible to prove conduct whether corroborated or not and regardless of presence of eyewitnesses.

1. Habit or Routine Practice

One's regular practice of responding to a particular, repeated situation with a specific type of conduct, *not just a tendency* to act a certain way.

[3] Third Circuit Case, 1981.

[4] Does judge or jury decide this???

a. "Reflex-behavior" which is "semi-automatic" or "mechanistic"

Examples
1) Evidence of a person's habitual disregard to wear a seatbelt would be admitted, but occasional disregard of warnings not to drink and drive would not.
2) Evidence that victim's mother abused child could qualify as habit to show that mother's boyfriend did not (but may be unfairly prejudicial)

2. Rebuttable

Admissible evidence that the party followed a particular practice in issuing warnings or following certain procedures can of course be rebutted with evidence that they did not follow that procedure on that particular occasion.

F. Subsequent Remedial Measures (FRE 407)

Evidence of subsequent remedial measures that would have made the harm less likely is not admissible to show negligence, culpable conduct, defective product, etc.

1. Rationale

Rule exists for concerns of policy, relevance, and confusion of issues.

2. Should not Be Admissible to Show Applicable Standard of Care or Deviation from that Care

Tuer v. McDonald

3. Evidence May Be Admitted to Prove Ownership, Control, or Feasibility of Precautionary Measures if Disputed

a. Feasibility Differs from Something Being Considered a Judgment Call, or Simply not Considered Advisable or the Optimal Choice
Tuer v. McDonald (the exclusionary rule is designed to allow people to reassess certain risks)

b. To say that something is "not-safe" may be like saying "not feasible"

4. Claims Extends to Strict Liability/Product Liability

But many states do not apply it in the product liability setting.

G. Settlement Negotiations(FRE 408)

Proof of settlements, offers to settle, and conduct or statements made during such negotiations are not admissible to show liability.

1. Rests on Concerns of Relevancy and Public Policy

2. There Must Be a Real Dispute at Issue Before a Statement Becomes an Offer to Settle

The statement should go to validity, amount of the dispute for it to be excluded.

3. Settlement Negotiations Can Be Used to Show Witness Bias or Prejudice, to Negate a Contention of Due Delay or to Prove an Effort to Obstruct a Criminal Investigation or Prosecution

H. Plea Bargaining in Criminal Cases (FRE 410)

Similarly inadmissible.

1. Statement Must be Made in the Course of Plea Discussions with an Attorney for the Prosecuting Authority

May apply when agents purport to have the authority to bargain.

a. Two-Part Test

i) Did the defendant exhibit an actual subjective expectation to negotiate a plea?

ii) Was that expectation reasonable given the totality of the objective circumstances?

2. Statements Also Not Admissible to Impeach Unless Defendant Waives that Right in Plea

United States v. Mezzanatto (SCOTUS 1995)

3. Statements May be Admitted for Completeness if Other Statements from Negotiation Come In

4. May be Used in Prosecutions for Perjury or False Statements if Statements Made Under Oath, on Record and With Counsel

5. Defendant also Cannot Use Such Statements against the Government

Relying on FRE 408.

I. Proof of Payment of Medical Expenses (FRE 409)

Also not admissible to prove liability. The system wants to encourage responsible behavior after the fact and such behavior does not necessarily prove fault anyway.

J. Proof of Insurance Coverage (FRE 411)

Irrelevant *to show liability*!

1. But Pretrial Statements Gathered By Insurance Investigators May Be Admissible for Impeachment Purposes

III. WITNESSES

A. Competency

1. Who is Competent?

FRE 601 states all people are competent to be witnesses unless otherwise provided. Civil cases using state law may have different standards.

a. Minors
Generally kids below 6/7 are presumed incompetent and above 12 are presumed competent and in between the judge will examine the witness to determine the in between cases. If the case involves a child victim, that witness is presumed competent unless shown otherwise.

b. Witnesses Must Testify from Personal Knowledge of the Matter

2. Who Determines It?
Judge decides it as a threshold under 104(a), and it is up to the jury to decide what weight and sufficiency to attribute to the witness.

3. Previously Hypnotized Witnesses

a. A Per Se Rule Barring Hypnotically Refreshed Testimony Violates a Defendants Right to Testify on Their Own Behalf
Rock v. Arkansas (SCOTUS 1987)

b. Different Approaches By States on Hypnotically Refreshed Testimony
1) A per se bar of hypnotically refreshed testimony (not including criminal defendants), some based on failure to meet *Frye* standard for admissibility of scientific evidence.
2) A per se rule of admissibility – hypnosis only affects credibility
3) Balancing probativity versus prejudice on a case-by-case basis
4) Admissible if *procedural safeguards* are followed (p. 463)

c. Hypnosis Has Danger of Confabulation

B. Direct Examination

Generally cannot lead the witness, but there are certain exceptions left to the judges discretion under FRE 611(c).

1. Exceptions to No Leading Questions

a. To Develop the Testimony of Witness Who is
1) *very young*, hence apprehensive, uncomprehending, or confused.
2) timid, reticent, reluctant, or frightened
3) ignorant, uncomprehending, or unresponsive
4) infirm

b. When the Witness is Uncooperative
Such as a hostile witness, an adverse party, or a witness identified with an adverse party.

c. When the Rule is More Trouble than Its Worth
Such as for preliminary matters, uncontested issues, or for leading expert witnesses (who courts see as not being prone to being led)

d. When Memory Seems Exhausted
The lawyer can refresh his recollection, such as with Present Recollection Revived!

2. Present Recollection Revived (or Refreshed)! (FRE 612)

a. Different From Past Recollection Recorded
Does not have the same standards because the paper itself is not speaking to the jury (which would be read into evidence), it is being used to stimulate the memory of the witness.

b. The Stimulus Itself is Never Evidence

c. The Witness Can Never Be Allowed to Read the Evidence in the Guise of Refreshment to Admit an Inadmissible Document

d. Anything that Triggers the Memory Can Serve as a Stimulus

e. Adverse Party Can Inspect it and Introduce It into Evidence (FRE 612(2))

f. Think About
How such a statement could also be used as past recollection recorded, as a prior inconsistent statement (to impeach or as substantive evidence).

C. Cross-Examination

1. All About Leading Questions
Only disallowed when witness is her own client (or aligned with her client).

2. Cross-Examining on Witness Preparation Material
Using documents protected by the work-product privilege waives that privilege and they must be produced under FRE 612.

a. Work-Product versus Attorney-Client Waivers
Harder to waive w-p privilege because it is designed to protect information from opposing parties. Sometimes

3. Cross Examination is an Absolute Entitlement
In civil or criminal cases, if for some reason cross-examination cannot occur the direct testimony must be stricken and sometimes even a mistrial is called.

4. Scope of Cross Rule

D. Impeachment of Witnesses

1. Limits

Federal rules do not cover all of the shit on impeaching and rehabilitating witnesses. But such issues are subject to judge's limits under 611 to

a. Credibility May Be Impeached By Either Party (FRE 607)
Even if they called the witness

2. Bias or Corruption

a. Extent of Questions Allowed is Broad, Left to Discretion of Trial Court
Proof of bias is almost always relevant.

b. Questions about Plea Bargains and Fees Always Allowed

i. Prosecutor must disclose information about deals and promises of leniency affecting government witnesses

ii. High informant fees are suspicious, but testimony not excluded unless fees contingent upon conviction

c. Denying Defense Cross-Examination on Bias Can Violate Confrontation and Due Process Rights
Trial judge must permit defendant to uncover basic identifying facts (name, address, employment, etc.) about government witnesses.

d. Group Membership is Relevant to Show Bias and the Source and Strength of that Bias
United States v. Abel (SCOTUS 1984) (allowing testimony that witness was member of secret prison sect sworn to perjury and self-protection… the name (Aryan Brotherhood) was properly withheld as unfairly prejudicial).

e. Extrinsic Evidence Can Be Used (Introduced during Case-in-Chief)

f. "Framing" suggestions is a form of improper bias/influence

3. Defect in Sensory or Mental Capacity(Perception or Memory)

a. May Show Witness Was Under Influence of Drugs, Alcohol

b. Evidence or Cross on Mental Afflictions, Illness, or Lack of Capacity is Proper
But the impairment must be temporally related (to the event) and go to the witness' qualification to testify and ability to recall

c. Courts can Sometimes Order Production of Medical Records to Assist in Cross

d. Psychiatric Testimony Sometimes Admitted when Bears on Capacity to Observe, Report

e. Expert Testimony on Reliability of Eyewitness Identity
Often inadmissible, but sometimes left to discretion of trial court.

f. Extrinsic Evidence Okay

4. Untruthful Disposition: Character for Truth and Veracity (FRE 608-9)

a. Testimony of Untruthfulness by a Character Witness (FRE 608(a))
Can be by opinion or reputation evidence. Expert testimony on witness truthfulness is generally excluded.

i. If Witness is Party to Case, Would Lose Some Protection of FRE 404
Such party-witnesses can then be impeached for bad character pursuant to FRE 608 and 609, using character evidence to show the particular conduct of lying in court.

b. Cross-examining About Nonconviction Misconduct Casting Doubt on His Honesty (FRE 608(b))

i. Lawyers cannot ask such questions without an adequate factual basis[5]

ii. Behavior should directly involve lies and deception
Generally accepted *Middle View* considers behavior seeking personal advantage by taking from others in violation of their rights to reflect on veracity.[6]

iii. Theft Cases More Likely Accepted When it Involves Actual Deception

iv. Adultery/marital infidelities do not directly reflect on truthfulness

v. Threatening witnesses reflects on veracity

c. Evidence of Convictions for Certain Criminal Acts (FRE 609)

i. Conviction must be felony or crime involving dishonesty

[5] Left to the discretion of the trial court, so judge may screen such questions. Some judges require prior warning from counsel.
[6] *Manske* (7th Cir. 1999)

If witness is the accused only crimes involving dishonesty can be admitted. For felony to be admitted probative value must outweigh prejudicial effect (reverse 403 standard).

ii. Convictions older than ten years or ending in pardons and annulments are presumed excluded. Convictions pending appeal are not.

iii. Juvenile adjudications generally inadmissible except in criminal cases for witnesses other than the Accused.

iv. If Prior Crime Was Similar to Current Crime, Unfair Prejudice is More Likely

v. Calling Party Can Generally Disarm an Expected Attack by Bringing Out Prior Convictions During Direct

vi. Cross Can Only Bring Out Limited Information about the Prior Conviction

vii. Most courts look at the facts underlying a theft offense in deciding whether to allow it

5. Prior Inconsistent Statement (FRE 613)

a. FRE 613(a)
Statement need not be shown nor contents disclosed to witness at the time, but should be shown to counsel on request.

b. FRE 613(b): Extrinsic Evidence
Not admissible unless witness is afforded an opportunity to explain or deny the same and opposite party can interrogate, or the 'interests of justice' require otherwise.

c. Government Can Get in Otherwise Inadmissible Evidence as a PIS when Offered in Good Faith and not a Mere Subterfuge
United States v. Webster (7th Cir. 1984) (Government's witness went south on them).

d. You Are Not Acting in Bad Faith if You Call a Witness Up Knowing You Will Have to Impeach Certain Aspects of Testimony
United States v. Delillo (2d. Cir. 1980)

e. Otherwise Excluded Post Arrest, Pre-Miranda Statements Can Be Used as PIS to Impeach Testifying Defendant
Harris v. New York (SCOTUS 1971)

a) But suppressed statements cannot be used to impeach other witnesses

James v. Illinois (1990) (perjury should be enough deterrence for an ordinary witness)

f. Pre-Arrest Silence Can Be Used to Impeach a Defendant's Credibility
Jenkins v. Anderson (SCOTUS 1980) (follows Δ's own decision to cast aside silence and advance truth-finding function of court).

i. Post-Arrest Post-Miranda Silence Not Admissible to Impeach
Doyle v. Ohio

g. Post Arrest Pre-Warning Silence May Also be Allowed to Impeach
Weir (6th Cir. Case)

6. Contradicting the Witness

a. Three Kinds of Contradicting Proof
1) Contradicts and also proves a substantive point
2) Contradicts and also shows another impeaching point
3) Simple Contradiction (on a Collateral Issue)

b. Contradiction on a Collateral Issue is Usually Excluded
Issues generally don't become collateral till cross-examination.

7. Attacking on the Basis of Religious Beliefs/Opinions is Forbidden (FRE 610)

E. Repairing/Rehabilitating Credibility of Witnesses

1. The repair should be made at the point of the attack

2. Generally Cannot Repair Until the Attack Has Come

a. But Party Can Bring Out Expected Points of Impeachment on Direct
Such as expert fees, convictions, plea bargains, and obvious grounds for bias.

3. Evidence of Good Character

a. Evidence of Truthful Character Only Admissible Once it Has Been Put in Question at Impeachment (FRE 608(a)
Judge has discretion to admit evidence when impeaching attack can be characterized as being about truthfulness even if it was ostensibly about bias, etc. *Medical Therapy Sciences* (2nd Cir. 1978)

b. Expert Testimony About Truthfulness Inadmissible

c. But Expert Syndrome Testimony Can Be Used to Suggest Truthfulness

If not explicit (and invading function of jury)

4. Prior Consistent Statements

a. Will generally violate hearsay unless it is consistent with 801(d)(1)(B)

b. Rebutting Unspecific Uses of PISs
If a PIS comes up on cross without any specific attack on motive, failed memory, etc, it will be hard to demonstrate to the judge what grounds you want it in on, but many courts will let it in simply to rebut.

c. May also argue for their use in case of an attack suggesting witness testimony is wrong because she does not remember the event
????????

IV. HEARSAY

A. What is Hearsay?

An out-of-court statement offered to prove the truth of the matter asserted.

1. Rationales

Protects against risks of
1. Misperception
2. Faulty Memory
3. Risk of misstatement/ambiguity
4. Risk of distortion/insincerity/deception

Ensures safeguards of trial process met:
5. cross-examination
6. demeanor evidence
7. oath/affirmation)

2. What is a Statement?

An oral or written assertion or conduct, if it is intended (by the person) to be an assertion.

a. Assertive Conduct
Nodding, shrugging in answer to a question, pointing to identify or select, etc.

b. Nonassertive Conduct with Intent
Implied assertions[7] are not hearsay, unless there is evidence the person intended such an assertion.[8] This includes visible psychological, physical and emotional reactions of a person.

[7] From a two-step inference to prove the actor believed in a fact, hence the fact itself (e.g. truck moving at the light implies the light was green)

i. Nonassertive Verbal Conduct is Not Hearsay
"Ouch!!" Words/behavior that are more reflexive than reflective are not hearsay.

ii. Silence and statements offered to show notice or the absence of such statements are not hearsay[9]

c. Indirect Hearsay
United States v. Check (testifying to what you told another person in a conversation in order to indirectly get in their statements is still hearsay)

Commonwealth v. Farris (error to let detective testify that when he arrived at the crime scene he interrogated a person who "made a statement" that resulted in the detective arresting Farris)

d. Making an Ass of U and Me
A statement is hearsay when offered to prove something that the speaker was assuming. *Krulewitch v. United States* (SCOTUS 1949).

e. Machines and Animals
Proof of machine and animal behavior is generally not hearsay (although human induced machine/animal behavior may be).

Is there any human input of data or is it solely from mechanical processes?

3. Lies are not hearsay

B. Statements with Nonhearsay Uses
Statements can be used when they are not offered to prove truth of matter asserted. Generally it will fall into one of these categories:

1. Impeachment

2. Verbal Acts (Or Parts of Acts)
Does the performative aspects of the act outweigh its assertive aspects? If so, it is probably not hearsay. Classic case is the performative aspect of a contract.

United States v. Singer (the performative aspect of the landlord mailing the lease termination to the addressee was more significant than the assertive aspect that the addressee lived at that location).

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[8] Goes against broad Common Law Rule from Judge Parke that if a statement supports a relevant inference it is hearsay. (*Wright v. Doe d. Tatham)*
[9] *Cain v. George* (5th Cir. 1969)

3. Effect on Listener or Reader
Does the statement depend on the truth of the assertion or its effect on the listener?

4. Verbal Objects
Is it more significant as an object or a statement? Identifiers, even with words, are more like verbal objects.

5. Circumstantial Evidence of State of Mind

6. Circumstantial Evidence of Memory or Belief

C. When Statements are "Nonhearsay" because of FRE Statutory Magic

The judge will generally decide, under FRE 104(a), whether the statutory magic applies to the specific statement.

1. Prior Inconsistent Statements by Witnesses
Under FRE 801(d)(1) a witnesses prior inconsistent statements are admissible as substantive evidence when:

1. The witness is now *cross-examinable* "concerning the statement,"
2. The statement is *inconsistent* with his present testimony,
3. It was made under oath and in a *prior proceeding or deposition.*

a. "Prior Proceeding"
Generally consider the purpose for which the proceeding was made? Was it a proceeding to find probable cause? A sworn stationhouse affidavit will generally not be admitted for this purpose.[10]

b. Loss of Memory and "Inconsistence"
A loss of memory (whether feigned or otherwise), evasiveness, or silence all could constitute that inconsistent statement we are looking for. And he will still be seen as subject to cross examination (even if the loss of memory would make him "unavailable" for FRE 804 purposes[11]), though a total memory lapse regarding the statement and the events may be enough to make cross-examination effectively meaningless.

2. Prior Consistent Statements by Witnesses
Under FRE 801(d)(1) a witnesses prior consistent statements are admissible as substantive evidence when:

1. The witness is *cross-examinable* at trial "concerning the statement,"
2. The statement is *consistent* with his present testimony,

[10] At the federal level, but see *State v. Smith* (Wash. 1982).
[11] *United States v. Owens* (SCOTUS 1988). This apparently survives *Crawford.*

3. It is offered to *rebut* a charge of "recent fabrication or improper influence or motive"

a. May Be Used to Rebut an *Implied* Charge of Improper Motive, etc.

b. Used for Rebuttal not Bolstering
The statement must have been made *before* the supposed influence or motive arose and the statement cannot simply be used to bolster the veracity of the in-court statement or rehabilitate some other impeaching charge. *Tome v. United States* (SCOTUS 1995).

i. Other Rehabilitating Uses of Prior Consistent Statements
Prior consistent statements can still be used to rehabilitate other impeaching attacks (other than improper motive, etc.), they just cannot be admitted as substantive evidence under 801(d)(1)(B).

3. Statements of Identification[12]

Under FRE 801(d)(1) a witnesses prior statements of indentification are admissible as substantive evidence when:

1. The witness is *cross-examinable* at trial "concerning the statement,"
2. The statement is one of *identification of a person*,
3. *After perceiving the person*.

a. Criminal Cases
Pretrial identifications obtained by police must follow proper procedures or they will be subject to exclusion. *Wade-Gilbert* Doctrine.

b. New York
Prior statements of identification are usually barred.

c. Police Sketches
Most courts find police sketches to be hearsay. Yet under the FRE, composite sketches are admissible statements under this exception. Other jurisdictions admit them as nonhearsay because they are not statements and others will admit them under other common law hearsay exceptions.

4. Admissions by Party Opponents

Under FRE 801(d)(2) an admission by a party opponent can be admitted as "not hearsay" substantive evidence. This statement is not binding on the party.

a. The Statement Must Be:

[12] These can be more reliable and less suggestive than courtroom identifications anyways.

1. The party's own (in an individual or representative capacity), *or*
2. *Adopted* or believed by the party (and the party so manifests), *or*
3. Made by another person *authorized* by the party to make a statement on the subject,[13] *or*
4. Made by the party's *agent* or servant within the scope of that relationship and during the existence of that relationship, *or*
5. Made by a *coconspirator* of a party during the course and in furtherance of the conspiracy.

b. Proving Agency, Authority, Conspiracy, etc.
The contents of the statement can be considered to establish the declarant's relationship but are not sufficient to establish it. *The judge will consider whether there is sufficient evidence of the proper relationship to admit the statement.*

c. Does not Have to be "Against Party's Interest"
It only has to be offered by the party opponent against the party.

d. Drunks, Minors, Sleeptalkers, etc.
Will probably be decided on degree of capacity and awareness.

e. Admissions Cannot Be Used Against Codefendants
Criminal Trials: An admission by one party that implicates another party (spillover confessions) is too prejudicial and dangerous to the Confrontation Clause to be admitted (without redaction that cure the spillover, limiting instructions are *not* enough). *Bruton v. United States*.[14]

Civil Trials: Spillover is probably okay.

f. Adopted Admissions[15]
The total circumstances of the case should be considered in finding whether the party adopted the statement.[16]

Tacit Admissions Doctrine:
At a minimum it should be shown:
1. The party heard the statement?
2. The matter asserted was within his knowledge and
3. The nature of the situation was such that he would likely have spoken if he did not mean to accept what was said.

And the statement should be excluded if:
1. The party did not understand the statement or its significance
2. Some physical or psychological factors explain the lack of reply

[13] How is this different than representative?
[14] If the confession only implicates the defendant with evidence that is linked later, it will probably be admitted with a limiting instruction. *Richardson v. Marsh.*
[15] Examples include: a forwarded email,
[16] *United States v. Hoosier* (6th Cir. 1976) (Δ's girlfriend made admission to other friend in front of Δ, clearly implicating him in a crime, that given the circumstances Δ should have denied).

3. The speaker was someone who the party would likely ignore
4. The silence came in response to questioning/comments by a law enforcement officer during post-Miranda custodial interrogation.

g. Post-Arrest Silence Cannot Be Used Against a Defendant
Because of *Miranda*, every post-arrest silence is too insolubly ambiguous to be used against the person (as an admission under 801(d)(2) or for impeachment purposes). *Doyle* (SCOTUS 1976)

h. Pre-arrest Silence Can Be Used Against a Defendant
Jenkins v. Anderson (SCOTUS 1980)

i. Admissions Obtained by Deception Admissible
Illinois v. Perkins (Jail cell questioning by an undercover agent)

j. Admissions By Speaking Agents
Look to agency law. Statements by agents are usually not hearsay anyway when offered to commit the principle.

k. Prior Pleadings
Pleadings from prior lawsuits or even those superseded by amendment in the current suit are generally admissible against the filing party.

l. Employees as Agents
An employed driver in an accident is generally treated as an agent for these purposes. Further, if there is true agency there is no personal knowledge requirement (and even hearsay within hearsay will generally be admitted). Statements by public employees are generally not admissible against the government.

5. Coconspirator Statements (FRE 801(d)(2)(E))
Admissible if 1) declarant and defendant conspired (*coventurer requirement*) and the statement was made 2) during the course of the venture (*pendency requirement*) and 3) in furtherance thereof (*furtherance requirement*).

a. Judge Decides Whether the Exception Applies
Using 104(a) which allows the judge to use any evidence, including the *statements* themselves to find a preponderance of the evidence standard is met. *Bourjaily*.[17]

b. Statements in a Conspiracy Can Also be Considered Verbal Acts
Assuming they are furthering the conspiracy…

c. Once Conspirators Arrested, Exception Generally Inapplicable

[17] Old circuit approaches used to have admissibility either be an issue of conditional relevancy for the jury or something to be decided in a separate hearing. *Bourjaily* overrules these.

Because conspiracy is generally over…

d. Coconspirator Statements Can Still Be Admitted when Defendant is Acquitted of Conspiracy
Because of different burdens…

D. Unrestricted Exceptions to Hearsay Exclusion (FRE 803)

Certain types of statements are not excluded by the hearsay rule regardless of whether or not the declarant is available to testify. The judge will generally decide, under FRE 104(a), whether these exceptions apply.

1. Present Sense Impressions and Excited Utterances

Statements admissible under FRE 803(1) and (2) can come in for the truth of the matter asserted.

a. Common Law: *Res Gestae* (Things that Happened)
Both exceptions came from common law *res gestae*, expressing the notion that the statement and the event were so closely related that the event impelled the statement from the declarant with no time to reflect, lie or forget. The event is speaking through the witness.

b. FRE 803(1) Present Sense Impression
Immediacy is the key. A statement about the event or condition while the declarant was perceiving it or immediately thereafter

c. FRE 803(2) Excited Utterance
Excitement is the key. Related to a startling event or condition made while under the stress of excitement caused by it. Statement should appear spontaneous, excited, and impulsive rather than as a product of reflection and deliberation. *Iron Shell*

i. Factors to Consider
Lapse of time between the event and the statement are not dispositive. Also consider things such as the age of the declarant, the nature of the event, the subject matter of the statement, things occurring between the event and the statement, rekindling, etc.[18]

ii. Proving Excitement and Bootstrapping
Under the FRE, independent evidence that an exciting event had occurred besides the statement itself is not necessarily required but most courts would want corroborating evidence/circumstances. Again, it is a judge decision under FRE 104(a).

d. Corroboration

[18] *Iron Shell* (8th Cir. 1980)

Some states (including New York) require that the testifying witness corroborate that the declarant spoke from *firsthand knowledge*. The Federal Rules do not.

2. State of Mind: Mental, Emotional, or Physical Condition (FRE 803(3))
A statement of declarant's state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health) **not including** a statement of memory or belief to prove the fact remembered or believed unless it relates to the declarant's will.

a. Used to prove
1) Declarant's then-existing physical condition
2) Declarant's then-existing mental or emotional condition
3) Declarant's subsequent conduct
4) Facts about his will

b. Then-Existing Physical Condition
Words describe how declarant feels as he talks (does not necessarily have to be close to the time of injury)

c. Then-Existing Mental or Emotional Condition
Only statements regarding present mental or emotional state. Sometimes can be assumed that such a state persists over time, but often courts refuse to draw these inferences, particularly into the past.

i. Fact-laden statements of mental condition
Often statements about such a condition will be filled with facts and tend to prove the facts themselves. Courts should weigh whether probative worth is "substantially outweighed" by risk of "unfair prejudice."

d. Subsequent Conduct
***Hillmon* Doctrine**: when the performance of a particular act by an individual is an issue in a case, his intention (state of mind) to perform that act may be shown (from which the fact-finder may infer that he did that act but not to prove the conduct of another person[19]).

i. Subsequent Meetings with Another
A few circuits follow *Phaester* in allowing declarant's statement on intent to meet with someone be allowed to prove that he actually did meet with that person – if there is additional evidence of such a meeting.

e. Facts about Declarant's Will

[19] As clarified in House notes to FRE.

Statements of memory or belief in a declarant's will *can be* used to prove the fact remembered or believed *if* it relates to the will.

f. State of Mind Must Be Relevant to the Case
E.g. fear would be relevant in an extortion case but probably unfairly prejudicial in a murder case (though arguably relevant).

3. Statements for Medical Diagnosis or Treatment (FRE 803(4))
The theory is that you would not lie to the doctor you are trying to get to treat you.

a. Includes Descriptions of Both Past and Present Symptoms as Long as they are Pertinent to the Diagnosis or Treatment

b. Declarant's Motive for Statement Must be Consistent with Purpose of Seeking Treatment

c. Generally These Statements Can Include Description of the Cause but Not the Cause Actor
But abuse cases (and particularly child abuse cases) may come out differently.[20] The majority view is that such statements must be limited to *medical* treatment and not psychological, emotional, etc. purposes.

i. And Don't Forget About Crawford!

d. Statement Need Not Be to a Doctor so Long as it is Reasonably Made for Purpose of Medical Treatment or Diagnosis
Think of kids to their parents, etc.

4. Past Recollection Recorded (FRE 803(5))
Where the witness' present recollection of an event is still absent or incomplete but he is able to testify to the effect that his recollection was complete at the time the statement was made and it was accurately recorded.

a. Proponent of Past Recollection Recorded Must Demonstrate
1. The witness lacks present recollection of the matter
2. The statement accurately reflects the knowledge he once had
3. He "made" or "adopted" the statement
4. He did so while the matter was "fresh" in his mind

b. The Recorded Recollection is Only Read into Evidence and Will Not Be Received as an Exhibit Unless Offered By the Adverse Party

5. Records of Regularly Conducted Activity (Business Records) (803(6))

[20] See for example *Blake v. State* (Wyo. 1997)

a. Must be Regularly Generated Records of a Regular Business
This can include *nonprofit* business, *illegal businesses*, and *single person businesses* as long as each person involved in preparing the record was acting in the regular course of the 'business activities.'

i. Internal Reports & Records Prepared Anticipating Litigation
Palmer v. Hoffman, SCOTUS 1943 (Railroad accident report not admissible because not part of the railroad's systematic conduct of their business as a railroad).

Lewis v. Baker (2d. Cir. 1975) (Railroad accident report admitted. Report need not be excluded just because it might ultimately be of some value in a later suit or because it favors an employees version of events)

Statutes and public policy concerns sometimes bar admissibility of accident reports, particularly related to government agencies, because they do not want to discourage cooperation or the substance of information.

ii. Alternative Theories: Hearsay within Hearsay *Norcon v. Kotowski* (Alaska 1999)
Report on sexual harassment based on information from informants not giving information as part of their regular course of business but admissible as 801(d)(2) admissions of party opponents within a 803(6) business record.???

b. The Source of the Information Must Have Personal Knowledge
This does not mean the person making the record has to have personal knowledge, just the source of the information for the record.

i. *Petrocelli v. Gallison* (1st Cir. 1982)
Patient relaying previous doctor's diagnosis to new doctor did not satisfy business records exception for admitting new doctor's patient history form because he did not have personal knowledge and was not giving it as part of a regular participant in a business routine. Though it may have satisfied a combined exception or hearsay within hearsay exception.

c. Contemporaneous
The Information Must Be Recorded or Gathered Close to the Time of the Event

d. Foundation Testimony by the Custodian of the Record or Other Person with Knowledge of the Recordkeeping System

Such knowledge should be sufficient to satisfy the other three requirements (contemporaneously recorded in regular course of regular business with personal knowledge).

e. The Source of Information or Circumstances of Preparation Should not Indicate a Lack of Trustworthiness

f. Absence of Entry in a Regularly Kept Business Record (FRE 803(7))
Evidence that a matter was not included in a report kept in accordance with 803(6) is admissible to prove the nonoccurrence or existence of that matter.

6. Public Records and Reports (FRE 803(8))

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 (except matters observed by law enforcement in criminal cases), or
C) *Factual findings* from an investigation offered in civil cases or against the government in criminal cases[21], or

Unless the sources of information or circumstances indicate a lack of trustworthiness.

a. Factors to Consider for Lack of Trustworthiness (From ACN)
Burden is on the opponent of the evidence to show the lack of trustworthiness.
1. The timeliness of the investigation
2. The special skills or experience of the official
3. Whether a hearing was held and the level on which it was conducted
4. Possible motivational problems

b. Other Public Record Provisions
1. FRE 803(10) Absence of a Public Entry
2. FRE 803(9) Records of Vital Statistics
3. FRE 803(14) Documents Affecting an Interest in Property
4. FRE 803(22) Felony Judgments When Offered For Facts Necessary to Sustain that Judgment[22]
5. FRE 803(23) Judgments on Matters of Personal, Family or General History or Boundaries

7. Learned Treatises (FRE 803(18))

Can be read into evidence when relied on by expert witnesses.

[21] Factual findings can include factually based conclusions or opinions
[22] But in criminal cases, not for being offered against persons other than the accused.

E. Exceptions to Hearsay Exclusion When the Declarant is Unavailable

1. "Unavailability as a Witness" (or Testimony Unobtainable)

a. Judge Determines Unavailability Under FRE 104(a)

b. Court Exempts Them From Testifying Because of *Privilege*

c. Declarant *Refuses* to Testify or Cooperate
Contemplates a level approaching contempt.

d. Declarant Testifies He *Does Not Remember* the Subject Matter of His Prior Statement
Apparently a person with lack of memory can be simultaneously "subject to cross examination" for purposes of 801(d)(1)(a) and "unavailable" for purposes of 804.

e. Death or Existing Mental Illness or Infirmity
Generally there should be no foreseeable prospect for recovery, otherwise adjournment would be preferred.

f. Proponent of Statement is Unable to Procure Declarant's Attendance
Means the declarant's presence could not be obtained by subpoena or "other reasonable means." The possibility of a refusal or anticipation of difficulty is not enough.[23]

g. The Declarant's Absence Cannot be From the Procurement or Wrongdoing of the Statement's Proponent

2. Former Testimony (FRE 804(b)(1))

A witness' former testimony may be offered if the *party* against whom it is offered (or predecessor in interest in civil cases) had an *opportunity and similar motive* to develop that former testimony by direct, *cross*, or redirect *examination*.

a. Includes Depositions and Testimony Given in Preliminary Hearings

3. Dying Declarations (FRE 804(b)(2))

a) statement made under belief of impending death,[24]
b) concerning the cause or circumstances of that impending death,
c) in a civil action or homicide prosecution

4. Declarations Against Interest (FRE 804(b)(3))

So far against pecuniary, proprietary interests or so exposing to civil or criminal liability that a reasonable person would not make it unless it was true.

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[23] *Barber v. Page* (SCOTUS 1968)
[24] Judge decides under 104(a) whether declarant believed death was imminent.

a. General Considerations
   1) Always look at the context of the statement
   2) In the case of conflicting interests, look at which interest predominates
   3) The declarant must have understood his interests and how the statement would affect them
   4) The statement is not against interest if it only becomes so because of later events
   5) Statements against penal interest are included, statements against social interest are not.

b. Collateral and Neutral Statements in Criminal Cases
   Collateral and neutral statements to statements against interest are not admissible under this exception. *Williamson v. United States* (SCOTUS 1994).

   i. May just Be Attempts to Shift-Blame and Curry Favor

   ii. Context May Make a Facially Neutral Statement Not So

   iii. The Statements Should be Genuinely Self-Inculpatory

c. Dual Inculpatory Statements May Fit the Exception[25]

d. Statements against Penal Interest Exonerating the Accused Require Corroborating Circumstances to Indicate Its' Trustworthiness
   Statements implicating the accused probably do not require corroboration.

5. Statements Admissible Because of Forfeiture by Wrongdoing (FRE 804(b)(6))

A statement offered against a party that engaged or acquiesced in misconduct that successfully made the declarant unavailable as a witness.

a. Will Also amount to Waiver of Confrontation Rights Claim
   Must show wrongdoing by a preponderance of the evidence. *Crawford, Roberts*

b. Wrongdoing in Furtherance of a Conspiracy would Satisfy this Exception and in Waiving Confrontation Clause Rights for all Coconspirators
   United States v. Cherry (10th Cir. 2000)

c. A Mini-hearing May be Held to Find if there Was Wrongdoing
   Preponderance Standard

[25] *Schiappa* (Conn. 1999)

F. The Catch-All Exception (FRE 807)

Other hearsay statements not fitting any other exception but with *equivalent circumstantial guarantees of trustworthiness* can be admitted if:

1) Offered as evidence on a *material* fact
2) The statement is *more probative* on the point offered than any other evidence the proponent could procure with reasonable *diligence*
3) General purpose of rules and *interests of justice* served by admission
4) Proponent gives the adverse party *sufficient notice*

1. Some Courts Say the Catchall Cannot Apply to Statements Covered by "Near Misses" for other Exceptions

But most courts reject this theory.

2. In Criminal Cases Statements Must Meet Constitutional Standard of Trustworthiness

3. "Particular Guarantees of Trustworthiness"

Means circumstances surrounding the making of the statement and making the declarant particular worthy of belief, not corroborating evidence supporting the truth of the matter asserted. *Idaho v. Wright* (SCOTUS 1990)

G. Hearsay and the Constitution: The Confrontation Clause

1. Sixth Amendment

Gives the accused in criminal prosecution the right 1) to be confronted with the witnesses against him, 2) to have compulsory process for obtaining witnesses in his favor, and 3) to have the assistance of counsel for his defense

a. Absolutely no Cross-Examination is a Presumptive Violation of the Confrontation Clause

b. Confrontation Clause Guarantees Defendant a Face to Face Meeting

A one-way screen between the witness and the victim was held to violate the Conf. Cl.[26] but closed circuit TV was held to be okay in another case.[27] The state does have a legitimate interest in the physical and psychological well being of victims that can outweigh defendant's face to face rights on a case by case basis.

i. And the defendant can waive this right by acting up (forfeiture by wrongdoing). Shown by a preponderance of the evidence.

2. Testimonial Theory

[26] Coy v. Iowa (SCOTUS 1988)
[27] Maryland v. Craig (SCOTUS 1990)

Confrontation clause is specifically meant to apply to testimonial statements – those made under circumstances which would lead an objective witness to reasonably believe that the statement would be available for use at a later trial.

a. Testimonial Statements not Admissible Unless Witness is Unavailable and Defendant Had Prior Opportunity for Cross-Examination

b. Testimonial Statements can Still Be Used for Proving things Other than the Matter Asserted without Implicating the Confrontation Clause

c. Coconspirator Statements are Nontestimonial

d. Subsequent Cross-Examination is Good Enough
But declarant must be cross-examinable *about that statement*. *California v. Green* (SCOTUS 1970).

e. Prior Opportunity to Cross-Examine Might Not Be Good Enough

3. How to Determine if a Statement is Testimonial

a. What is the primary purpose of the statement?

i. A 911 Call would Not be Testimonial
Statements necessary to resolve emergencies rather than investigate events. They were describing things as they happened rather than past events, even though they identified her assailant (boyfriend). *Davis v. Washington* (SCOTUS 2006)

ii. A Statement to an Officer Responding to a Crime Scene When Danger Has Passed Would be Testimonial
Hammon v. Indiana (SCOTUS 2006)

b. Focus on Statements of Declarant not Questions of the Interrogator

4. Reliability Theory for Nontestimonial Statements (if Confrontation Clause is applicable at all)

a. Hearsay offered against the accused must meet Constitutional standard of reliability
(so reliable it was as if a Confrontation had occurred). Reliability is unimportant if the accused can cross-examine declarant. *Ohio v. Roberts* (SCOTUS 1980)

b. Reliability can Be Inferred where Evidence Fits Within a Firmly Rooted Hearsay Exception or has "Particularized Guarantees of Trustworthiness"

Ohio v. Roberts (SCOTUS 1980)
Includes coconspirator statements, excited utterances, statements for medical diagnosis/treatment, business records, dying declarations, agent's admissions, and public records

5. Admitting a Confession by One Defendant Incriminating Another by Name Violates the Confrontation Clause (Even with Limiting Instructions)

V. PRIVILEGE

A. General

1. Privilege and Confidentiality
Evidentiary privileges and ethical obligations of confidentiality are not the same thing. A practitioner seeking to preserve a higher standard of confidentiality than the law of evidence allows does so at the risk contempt

2. Not Codified
The law of privileges is not codified in the FRE because it touches on areas of state substantive law.

3. Not in Furtherance of Truth and Justice at Trial
Privileges are justified in obstructing the truth seeking function of the trial process for the sake of serving larger societal goals.[28]

B. Attorney-Client Privilege

It is the client that holds the privilege and the attorney cannot claim it if the client wants disclosure. But attorney is presumptively authorized (and ethically required) to assert it on behalf of the client.

1. Questions resolved under 104(a).[29]

2. Applies Only to Communications for Professional Legal Services
The privilege applies only to confidential communications made for the purpose of rendering professional legal services to the client.

a. Subject Matter of the Conversation Must Go to the Legal Problem

b. Things Not Included as Professional Legal Services
- giving notice about trial date (see subject matter rule)
- accounting, acting as a shipping agent, investigator, business agent, negotiator, business partner, attesting witness

[28] A defendant in a civil case still may not invoke the attorney-client privilege with respect to questions about the underlying facts.
[29] And often immediate review of the order is possible. Especially for the state in criminal prosecutions because of double jeopardy.

3. Applies to Communications not Observations

a. Should Apply to Actions with a Mostly Communicative Aspect

b. Was the Thing Observed Observable by Anyone?

c. Was their Evidence the Client Intended Confidentiality?
Physical appearance and lifestyle observations would not be privileged if they would be observable by anyone and their was not evidence the client intended confidentiality.

d. Protects Observations Made as a Consequence of Protected Communications
People v. Meredith (Cal. 1981)

i. If the defense discovers evidence as a result of such communications he should be able to turn it over without allowing the prosecution to disclose its source.

ii. If the attorney removes or alters evidence, the privilege does not bar revealing the original location or condition of the evidence.

iii. Destroying or concealing evidence is never good.

e. Testimony on Mental Capacity May Be Okay but Not if It Opens the Door to Revealing Privileged Information

f. Communications from the Lawyer to the Client
Generally covered by the privilege. The purpose of the privilege is to encourage full and frank, two way communication between attorney and client.

For broader communications, may be a question of whether revealing such statements would reveal confidential information provided by the client or the advice or opinion of the attorney.

g. Documents
Documents do not become protected by the A-C privilege just because they are passed to the attorney. But if they already have a separate privilege, they retain that privilege.

4. Communications to Necessary Third Parties Are Protected by the Privilege
As long as it is still in confidence for the purpose of obtaining legal advice from the lawyer (as opposed to accounting services, drycleaning, etc.).

5. Joint Clients and Pooled Defenses Maintain Privilege

Communications made between joint clients and the attorney are privileged with respect to outsiders and attorneys of clients with a common interest but separate attorneys can pool information and collaborate without destroying confidentiality.

6. Waiving the Privilege

a. Waived w/r/t Communications in Presence of Known Outsiders

b. Waived Where Client Communicates Information and Knows or Intends it Will Be Revealed to Others

c. Waived when Parents are in the Room with a Juvenile
But with spouses, a separate privilege protects that communication.

d. Not Waived with Respect to Eavesdroppers but Client Still Should Take all Possible Precautions to Preserve Confidentiality
Suburban Sew n. Sweep v. Swiss-Bernia (Inadvertent disclosures constitute a waiver because people should take more care. Minority rule)

e. Intentional-but-unauthorized Disclosure by an Attorney Does not Waive the Privilege, but Negligent Disclosure Might

7. Corporate Clients

Privilege can cover beyond the "control group" to middle and lower-level employees where the communications concerned matters within the scope of their corporate duties and the employees were sufficiently aware that they were being questioned so the corporation could obtain legal advice. Take a case-by case approach. Live for the moment. *Upjohn Co. v. United States* (SCOTUS 1981)

8. Exceptions to Coverage

- Suits between client and lawyer
- Suits by the lawyer for his fee
- Probate proceedings
- Fee arrangement (including source of fees paid)
- Address and Whereabouts of Client

a. Identity of the client
Client-communications exception: so much of the actual communication has been disclosed that the identification of the client amounts to disclosure of confidential information.
Legal-advice exception: where disclosure of the information would implicate the client in the very matter for which legal advice was originally sought.
Last-link exception: Probably not justifiable anymore because it is not grounded in the protection of *confidential communications*.

b. Communications in Furtherance of Crime or Fraud
Privilege protects communications about *prior wrongdoing*, obviously, but it is not meant to protect discussion of future crimes or frauds designed to conceal past wrongdoing.

Zolin rule: in camera discretionary examination to determine whether exception applies, but only if there is a factual basis to support a good faith belief by a reasonable person that the examination may reveal such evidence.

C. Psychotherapist-Patient Privilege

Jaffee v. Redmond (U.S. 1996)

Found that protecting confidential communications between a psychotherapist (or licensed social worker acting as one) and a patient promoted sufficiently important interests to outweigh the need for probative evidence (was already statutorily recognized in all 50 states).

1. Third Parties also Covered when they are Reasonably Necessary for the Communication

2. Some Jurisdictions Recognize a Dangerous Patient Exception

D. Spousal Privileges

1. Testimonial Privilege

Blocks all testimony by one spouse against another including accounts of premarital acts but lasts only as long as the marriage.

a. Jurisdictions Disagree Whether Witness-Spouse or Defendant-Spouse Holds the Privilege

b. The Witness-Spouse Alone Has a Privilege to Refuse to Testify Adversely
Trammel v. United States (SCOTUS)

2. Spousal Confidences Privilege

Blocks only testimony concerning private communications between spouses (and perhaps other private behavior) while the spouses are married, but protects the interval of the marriage forever.

a. Generally Held by Both Spouses

b. Confidential Communications Concerning Ongoing Criminal Activity are Not Protected by the Privilege
But probably does protect communications of past activity including recently committed crimes.

c. Extends only to acts (as opposed to all confidential communications) that were intended to convey a confidential message
Estes

d. Privilege Does Not Apply to Statements Relating to Crimes where a Spouse or Spouse's Children are the Victims
White.

VI. AUTHENTICATION

A. FRE 901

Is the evidence sufficient to support a finding that the matter in question is what the proponent claims.

1. Threshold Screening By Judge
Looks for prima facie case and relevance.

2. Jury Decides the Weight
Based on preponderance of the evidence (in civil) or beyond a reasonable doubt (if the piece of evidence is part of the element of the offense in a criminal case)

3. FRE 901(b): Illustrative List of Ten Methods of Authentication

4. Traditional Steps to Authenticate on Page 850

5. Authentication Can Be Accomplished by Stipulation or through Discovery in Civil Trials

B. Must Demonstrate Objects Uniqueness and Chain Of Custody

Chain of custody becomes more important with less unique objects.

1. Distinctive Characteristics Doctrine

a. Reply Doctrine – Variation For Letters

2. A Missing Link in the Chain is Okay
So long as proof supports that evidence is what it purports to be and has not been materially altered.

3. Can Be Based Entirely on Circumstantial Evidence

4. Evidence where there Are Questions Regarding Process of Production
Use *McKeever-McMillan Factors* (Such as for audio or video tapes) (p. 860)

5. Telephone Conversations
Self identification and the nickname of a caller would not be enough, need a voice identification.

C. Should Demonstrate no Substantial Change in Condition

D. Self Authenticating Documents (FRE 902)

1. Self-Authentication Does not Bar Counterproof from the Opponent

VII. BEST EVIDENCE DOCTRINE

A. Rules 1001-1008: Best Evidence Doctrine in the FRE

When a litigant seeks to prove the contents of a writing, recording, or photograph, the original itself should be produced or its absence satisfactorily explained.

B. Question for the Judge Whether Best Evidence is Satisfied

VIII. LAY AND EXPERT OPINION EVIDENCE

A. Opinion Testimony by Lay Witnesses: FRE 701

If not testifying as an expert, testimony based on opinion or inferences is limited to those: 1) Rationally based on the witness perception, *and*
2) Helpful to a clear understanding of the witness' testimony or a determination of a fact in issue, *and*
3) Not based on knowledge within the scope of FRE 702

1. Collective Facts Doctrine

Certain ideas can best be expressed reliably by use of a word or phrase.

2. Examples of Lay Opinion Testimony

Mental or physical condition of a person, character or reputation, emotions manifest by acts, speed of a moving object, sizes, heights, odors, flavors, color, heat. Questions of identity, handwriting, quantity, value, weight, measure, time, distance, age, strength, disposition, temper, intoxication.

a. Lay Opinion on Sanity

Usually okay, but you probably need a *substantial* basis to be credible.

3. Evaluative Question

Is it more convenient to insist witness disentangle his own mind or leave it to cross-examination to uncover the foundations of the opinion?

B. Testimony by Experts (FRE 702)

1. Scientific, Technical, or Other Specialized Knowledge

Includes people with practical experience but no formal training.

2. That Will Help the Trier of Fact Understand Evidence or Determine a Fact in Issue

Experts can even testify on matters familiar to juries if it helps with their understanding of the case.

3. If Testimony is
1) Based on sufficient facts or data, 2) the product of reliable principles and methods, and 3) the witness has applied the principles and methods reliably to the facts in the case

C. Bases of Expert Opinion Testimony (FRE 703)

1. Firsthand Knowledge
From personally observing, examining or testing the matter described in his testimony.

2. Facts Learned at Trial
Can include testimony heard by the expert or hypotheticals posed to the expert.

3. Outside Data
Information gathered before trial by consulting with other sources.

4. Otherwise Inadmissible Evidence
Expert can rely on otherwise inadmissible evidence for their opinion, but these bases should not be disclosed to the jury unless their probative value in helping the jury weigh the expert's opinion outweighs the prejudicial effect.

D. Disclosing Facts or Data Underlying Expert Opinion (FRE 705)

Expert need not disclose facts underlying opinion on direct, unless the court requires it, but he may be asked to do so on cross examination.

1. Cross-Examination is Key to Testing the Facts and Assumptions Underlying an Opinion

2. May Not Always Be Used to Get in Data
Such as for the defendant to get around testifying directly.

3. And Cannot be Used to Introduce Excluded Evidence
Such as an improperly obtained Blood-Alcohol Test.

4. May Not Be Able to Use an Opinion Based Solely on Data From Biased Witnesses[30]

5. Confrontation Clause Issues
An expert's testimony may be based entirely on hearsay reports, but a criminal defendant must have access to hearsay information relied upon by the expert to allow for effective cross of the expert.

[30] *Stegall* (6th Cir.)

E. Opinions on Ultimate Issue (FRE 704)

1. Expert Testimony Can Embrace Ultimate Issues for the Trier of Fact

b. But in Criminal Trials
Cannot testify whether defendant did or did not have the mental state or condition constituting an element of the crime charged or defense.

2. Experts Also Cannot Testify On

- Proper application of legal standards (e.g. whether decedent had capacity to make a will)
- Testimony about legal (as opposed to factual) cause of an accident

F. Foundations for Expert Testimony

Normally calling party brings out the persons educational background, experience, and familiarity with the subject at issue.

Adverse party may stipulate to these qualifications or call for a voir dire under 104(a).

G. Reliability for Scientific Evidence

1. Frye Test

Based on general acceptance in the relevant community.

2. Daubert Test

General acceptance is just one of many conditions to consider. The key is whether there is a *reliable foundation* for the testimony and whether the testimony is *relevant*. Factors.[31]

3. G.E. v. Joiner

Standard of review for excluding scientific evidence is "abuse of discretion."

4. Kumho Tire

Daubert applies to all technical expert testimony. Trial judge must determine whether the testimony has a reliable basis in the knowledge and experience of the relevant discipline.

H. Social Context Evidence

1. Battered Child Syndrome or Child Sex Abuse Accommodation Syndrome

To describe delays in reporting, partial reporting, behavioral problems at school, sexualized play, disclosure to a friend, withdrawal, daydreaming, etc.

[31] Testability, peer review/publication, rate of error, standards controlling techniques operation.

a. Experts Usually Should Not Say Either that Child Was Abused in a Particular Case or that the Child's Account was Correct/Truthful

2. Rape Trauma Syndrome

To help assess the conduct by the victim after the fact and evaluate defense claims of consent. Generally cannot be allowed to prove that an attack (or criminal penetration occurred).

3. Battered Woman Syndrome

Can be admitted to shed light on the behavior of the woman.

4. Profile Evidence of Typical Child Abuser

Defendant may offer expert testimony to show he does not fit profile of typical abuser, but prosecutor can rebut by compelling examination by its own expert (and that self-incrimination claim is waived).

IX. BURDENS AND PRESUMPTIONS EXIST