Evidence Outline
Miller Moreau
Campbell Law School
Professor Tilly
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I. Preserving Error, Elements of Proof & Witnesses

FRE 103 : Rulings on Evidence

(a) **Preserving a Claim of Error**. A party may claim error in a ruling to admit or exclude
evidence only if the error affects a substantial right of the party and:

1. If the ruling admits evidence, a party, on the record:
    a. Timely objects OR moves to strike; and
    b. States the specific ground, unless it was apparent from the context
2. If the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context

- Must be a ruling
- Objection must **specifically state grounds**, those grounds are ONLY part preserved for appeal
    - "Apparent from the context" is hard to get on appeal, usually is presented when continuous line of objections on same line
- Substantial right being affected?
    - No bright-line test, relying on probabilities- harmless error or not
        - Generally, violation only affects substantial right when there is a reasonable probability that absent the error, the outcome of the trial would have been different
        - I.E. – Whether erroneous evidence was primary evidence relied upon
- Many types of offers of proof
    - I.E. – Witness Q&A is preferred
- "Timeliness" = when grounds first become apparent
    - Typically, before question is answered

(b) **Not Needing to Renew an Objection or Offer of Proof**. Once the court rules definitively on the record, either before or at trial , a party need not renew an objectionor offer of proof to preserve a claim of error for appeal

- NC is different *State v. Ogelsby*, pre-trial objection w/ ruling **must be re stated** in trial to be preserved for appeal (court still heard for fairness reasons)

- NC evidence said error was preserved, but Rules of Appellate Procedure said it must be restated → Appellate Procedure dominates b/c NC constitution grants Supreme Court authority to make its rules

(e) **Taking Notice of Plain Error**. A court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved.

- Don't rely on this, must be "serious, egregious, manifest, highly prejudicial" "not correcting would result in manifest of injustice"

Standards of Review

- Generally, abuse of discretion standard
  - Unless constitutional violation → then it's de novo

FRE 601. Competency to Testify in General: *Every person is competent* to be a witness unless these rules provide otherwise. But in a civil case, state law governs the witness's competency regarding a claim or defense for which state law supplies the rule of decision.

- Only two witness requirements: (1) personal knowledge; and (2) promise to testify truthfully
  - Competence is presumed
  - Competency is determined when the witness testifies, not when the event occurred
- When to apply state law of evidence for competency:
  - Civil action or proceeding;
  - Concerns an element of a claim or defense; and
  - The claim or defense is one as to which state law supplies the applicable substantive rule (diversity jurisdiction)
- *Rock v. Arkansas*, court excluded hypnotic memory of criminal defendant, per se rule violates 6th amendment right to defend self and right to call witnesses in your defense
  - States may have laws excluding hypnotic memory for civil cases, if defendant is not a witness in criminal case, or if rule is non-arbitrary like this one (was per se rule)
  - States may still limit admission of hypnotic therapy if the witness is not the defendant, or other non-arbitrary measures
    - Jury's duty to determine credibility , this removed that ability from them
- *Ohio v. Clark* (mainly about confrontation clause- come back and add later)

NC 601(b): A person is disqualified to testify as a witness when the court determines
that he is

1. incapable of expressing himself concerning the matter as to be understood, either directly or through interpretation by one who can understand him, or

2. incapable of understanding the duty of a witness to tell the truth

- Basically, same standard as federal rule, just stated differently
- NO MINIMUM AGE IN NC
    - Thus, would be an error if a court excluded a witness solely because of their age

NC 601(c): Dead Man's Statute: Upon the trial of an action...1) a party or a person interested in the event ... shall not be examined as a witness 2) in his own behalf or interest ...3) against the executor , administrator or survivor of a deceased person, or the guardian of an incompetent person...4) concerning any oral communication between the witness and the deceased person.

This rule does not apply when:

1. The executor, administrator, guardian is examined in his own behalf regarding the subject matter of the communication;
2. The testimony of the deceased or incompetent person is given in evidence concerning the same transaction or communication;
    a. (I.E. – nurse (neutral party) overhears decedent and presents testimony)
3. Evidence of the subject matter of the oral communication is offered by the executor, administrator, survivor, guardian or person so deriving title or interest

- Specific to NC!!! Federal rules do not recognize this rule
- ONLY prohibits oral communications
- ONLY applies to interested parties
    - But – remember that propounder may be the interested party
    - Propounder doesn't necessarily mean the Estate
- *Estate of Redden*: Wife suing Estate, wife offers dead husbands oral communications in deposition (not requested by Estate, she's trying to say the Estate waived) and estate objects → testimony is incompetent under Dead Man's Statute
    - If nurse had overheard the oral communications? → could testify because not interested party (aside from hearsay concerns)
- *In re Will of Baitschora*: trial court should not have excluded Propounder's testimony of oral communications w/ decedent after Caveator discussed subject matter of oral communications (opened door)
    - Discussing subject matter does not have to involve oral communications to open door

FRE 602. Need for Personal Knowledge: Witness may testify to a matter ***only if*** evidence is introduced ***sufficient to support a finding (104(b)*** that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony.

- PORN:

    - Perception
    - Comprehension
    - Recollection
    - Narration
- Standard- "if rational juror could find the witness had personal knowledge"
    - Low standard, speculation is proper objection when not met
- Witness doesn't have to be absolutely certain about the accuracy of her observations
    - "I think..." does not necessarily violate this rule
- But- limited to first-hand knowledge based on perception
    - Ie- if bystander just hears the car crash happen/someone yells "that car just ran the red light!" the bystander can't just straight up say "that car ran the red light and caused the crash"
    - "Why did Billy take a swing at Bobby?"
        - "Well it seemed like Billy just got flat mad that Bobby had beaten him" → speculative, can't testify to mindset of other person
        - But- "Bobby had just beaten Billy. Billy looked mean and angry; real made like" → rationally based on perception, fine
            - Would probs have to be
            - Expert testimony doesn't need personal knowledge (different rule)

FRE 603. Oath or Affirmation to Testify Truthfully: Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience.

- Oath is deity related, affirmation is not- doesn't matter which form it comes in
    - Ie- atheist can say "I do not believe that god will punish me if I lie today" and that may be fine.

Comments:

- If witness objects on religious grounds to taking either oath or affirmation, court can come up w/ alternative form of "serious public commitment to answer truthfully that does not transgress the prospect's sincerely held beliefs
    - Acceptable alternative: "Do you affirm to speak with fully integrated honesty, only with fully integrated honesty and nothing but fully integrated honesty?"
    - Unacceptable: "I am a truthful man" and "I would not tell a lie to stay out of jail" testimony was properly excluded after witness refused to affirm: "I state that I will tell the truth in my testimony"

Other Miscellaneous Federal Rules for Competency

- **604**: Interpreter must be qualified and must give an oath or affirmation to make a true translation

● **605**: Presiding judge may not testify as a witness at trial. Party need not object to preserve the issue.
● **606**: Juror may not testify as a witness before the other jurors at the trial.
    ○ During inquiry of validity of verdict or indictment- can't testify about anything that happened in deliberation, mental processes etc. Exceptions:
        ■ Extraneous prejudicial information was improperly brought to the jury's attention
        ■ An outside influence was improperly brought to bear on any juror; or
        ■ A mistake was made in entering the verdict on the verdict form
    ○ (prejudicial/outside influence) blurred line, examples are consulting books/newspapers, information on Internet superseded indictment, conducted experiment or investigation, jurors discussed prior conviction of defendant that had not been admitted into evidence
        ■ 6A trumps this rule when a juror seeks to testify about overt racial bias in the deliberation of a criminal case

II. Best Evidence of Writings, Recordings & Photographs

FRE 1001. Definitions
A. "Writing": letters, words, numbers, or equivalent set down in any form
B. "Recording": ^ same but recorded in any manner
C. "Photograph": photographic image or its equivalent stored in any form
D. "Original" of a writing or recording means the writing or recording itself or any counterpart ***intended to have the same effect by the person who executed or issued it***.
    a. For electronically stored information, "original" means any printout- or other output readable by sight, if it accurately reflects the information.
    b. "Original" photograph includes the negative or a print from it"
E. "Duplicate" means a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original
    ● I.E. – of counterpart- 5 parties all have their own copies of lease agreements

FRE 1002. Best Evidence Rule: An original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise
ONLY APPLIES in two situations:
    ● 1) a writing is itself the thing to be proved; or
        ○ I.E. – contract dispute
            ■ But- "did you sign a will?" would be fine b/c not about content, just existence
            ■ Courts typically find "date" of writing is fine without the best

evidence as well

- 2) a party seeks to prove a matter by using a writing as evidence of it
    - I.E. – witness's description of GPS monitoring display showing location and movements of a boat b/c the display was a "writing" and the testimony was offered to prove the contents (location and movement of the boat)
- Party still able to prove non-writing event although writing exists that happens to record the event
    - I.E. – person can testify to hearing oral communication even though recorded tape of conversation exists
        - But if witness's knowledge is derived from such records → his testimony in lieu of the records violates the rule
            - I.E. – if cashier is robbed and it was also captured on camera → cashier can testify about the robbery without the film being an issue
                - But - if the manager is testifying and didn't see the actual robbery (watched it on film) → need that film
    - Rule does not apply to testimony that written records have been examined and found not to contain a certain matter (absence of biz rec/public rec after diligent inspection)
- *US v. Smith*, ATF agent testifying for gov. Trying to establish interstate commerce element, testifies to the fact that guns were produced at certain place using certain logs as his reference guide
    - BER rule not violated b/c only referenced the fact itself- not the content of the logs
    - Defense should have objected to lack of personal knowledge instead (agent was not an expert witness)

"Original" Exceptions to Best Evidence Rule

***Exceptions to the Best Evidence Doctrine**:

FRE 1003. Admissibility of Duplicates. A duplicate is admissible to the ***same extent as the original*** unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate

- Original's authenticity: I.E. – if case presents jury Q about whether original document is forged, proponent should not use a duplicate if he is in a position to produce the original
- Re-writing is NOT a duplicate
    - But- screenshotting is
        - Remember- "mechanical, photographic, chemical, electronic, or

other equivalent process or technique that accurately reproduces the original"

FRE 1004. Admissibility of Other Evidence of Content: An original is not required
and other evidence of the content of a writing, recording, or photograph is admissible if:

A. All the originals are lost and destroyed, and not by the proponent acting in bad faith;
    a. Intentional destruction doesn't necessarily it was in bad faith.
        i. I.E. – negligent, regular course of business destruction is fine.
B. An original cannot be obtained by any available judicial process;
C. The party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or
    a. I.E. – prosecution for robbery put defendants on notice that serial numbers of stolen "bait bills" would be subject of proof at trial
D. The writing, recording, or photograph is not closely related to a controlling issue
    a. I.E. – Plaintiffs could establish their standing as aggrieved owners in a zoning case by their testimony, without producing title instruments
        i. Party could examine own witness about contents of a flyer about the case, without producing the flyer, to show how witness learned of the case and came to testify

- If any are met → proponent can prove contents by any means of secondary evidence he chooses

FRE 1005. Copies of Public Records to Prove Content: The proponent may use a copy to prove the content of an official record - or of a document that was lawfully recorded or filed in a public office - if these conditions are met: the record or document is otherwise admissible; and the copy is certified as correct in accordance with rule 902(4) or is testified to be correct by a witness who has compared it with the original . If no such copy can be obtained by reasonable diligence, then the proponent may use other evidence to prove the content.

- I I.E. – Warranty deeds
- 902(4): "certified as correct by the custodian or other person authorized to make the certification"
    - Affidavit that file is official will suffice
- Admissible whether a duplicate by definition or not

FRE 1006. Summaries to Prove Content: The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time or place. And the court may order the proponent to produce them in court.

- Ie- summary of total hospital costs for 30 day stay
- Still need to have the information the summary is based on ready, the court can order them to be produced

FRE 1007. Testimony or Statement of a Party to Prove Content: The proponent may prove the content of a writing, recording, or photograph by the testimony, deposition, or written statement of the party against whom the evidence is offered. The proponent need not account for the original.

- Not for any oral out-of-court admission, limited to these 3
    - I.E. – representing P and deposing D about contract
- "Written statement" doesn't have to be affidavit
    - Can even just be an email or something
    - Use siri to send text message? → text is written message
        - But- screenshot of voicemail transcription? → third party writing, not getting in

FRE 1008: Functions of Court and Jury: Court determines preliminary facts (104(a)),
but jury determines (104(b)) whether:

A. Asserted writing, recording, or photograph ever existed;
B. Another one produced at the trial or hearing is the original; or
    a. Ie- two documents are produced, each party claims a different one is the original
C. Other evidence of content accurately reflects the content

III. Judicial Notice, Relevance, & its Limits

FRE 201. Judicial Notice of Adjudicative Facts

A. Governs only adjudicative fact, not a legislative fact
    a. Adjudicative fact does not involve questions of law
        i. Ie- weed is schedule IV drug
B. Court may judicially notice a fact that is not subject to reasonable dispute (indisputable) because it:
    a. Is generally known within the trial court's territorial jurisdiction; or
        i. I.E. – "tumbleweeds are a road hazard" in Lubbock TX (wouldn't be the case in NC)

1. But not that a pothole is on a certain road--even if the judge knows about it

b. Can accurately and readily determined from sources whose accuracy cannot reasonably be questioned

i. I.E. – Dow Jones stock price data

C. Court can take notice sua sponte OR if party requests and the court is supplied with necessary information

D. Timing- court can take judicial notice at any stage of the proceeding

a. even on appeal! Ie- party who has failed to prove essential fact at trial can establish it on appeal

E. Party opposing notice is entitled to be heard upon timely request

a. Even after ruling has been made

F. Instructing jury- for civil cases, court instructs the jury the fact is conclusive

a. Criminal case - court instructs the jury that it may or may not accept the noticed fact as conclusive

i. *Rae v. State*, court gave conclusive notice that D's license had been suspended → reversible error

1. Notice itself is fine- just can't give conclusive instructions

- Two step Test:
  - 1) Indisputable
  - 2) Generally known or verifiable
- Examples of Judicial Notice-
  - When Thanksgiving was when witness only remembers event took place "two days after thanksgiving"; life tables to determine average life expectancy; that breathalyzers that are properly calibrated accurately measure BAC (note – this doesn't extend to taking notice of the outcome of the breathalyzer)
  - But – can't take judicial notice of findings of fact from another case
    - Can still take notice of decisions of other courts, just not factual findings or truth of statements quoted in the record

Relevance & its Limits

FRE 401. Test for Relevant Evidence: Evidence is relevant if:

A. It has ANY tendency to make a fact more or less probable than it would be without the evidence; and

B. The fact is of consequence in determining the action

- Incredibly low threshold, any increase/decrease in probability makes it relevant
  - Even if just based on inferences
- Doesn't have to go towards/against elements themselves, but also applies to if facts are more or less probable

    - I.E. – credibility, bias of where evidence comes from
        - Ex.- witness's record of perjury
- *State v. Jaeger*, D claims V committed suicide in murder trial, there were records she had attempted suicide in the past → relevant, even if speculative
    - But harmless b/c plenty of other evidence- this dumbass man had gunshot residue on his hands

FRE 402. General Admissibility of Relevant Evidence: Relevant Evidence is admissible unless any of the following provide otherwise

A. The Constitution
B. Federal Statute
C. These rules
    a. I.E. – hearsay
D. Other rules prescribed by SCOTUS

- Irrelevant evidence is not admissible
    - Being relevant doesn't actually mean shit, just the first bar to get through
- Conditional Relevance: May not seem relevant at first, but is relevant as it links up to evidence presented later
    - "Your honor, this evidence is relevant because…"
    - I.E. – "Grits" scene from My Cousin Vinny

FRE 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons: The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

- BIIIIG rule, know by #
- Must be outweighed by a significant amount, high threshold and is only used sparingly
    - All evidence is prejudicial; this is weighed considering degree of probative value.
    - Rule is aimed to prevent evidence brought for its prejudicial effect
        - Doesn't require party to "sanitize its case"
- Probative value: degree to which an item of evidence affects the likelihood that a fact of consequence in the case is or is not true
    - 1) logical force of the evidence; and
        - Strength and number of inferences that connect the evidence to the fact to be proven
    - 2) context in which it was offered
        - I.E. – one witness who saw incident is significantly greater context than if ten witnesses saw it
    - Probative value may be calculated by comparing evidentiary alternatives (see *Old Chief*)
        - More essential the evidence → the greater its probative value

- Unfair prejudice: "undue tendency to suggest decision on an improper basis, though not necessarily an emotional one"
    - Two main types:
        - Inferential error: situation where jury misconceives the logical import of the evidence
            - I.E. – pictures of injury look worse than they really are
        - Nullification: evidence invites jury to lawlessness, makes them want to punish or reward a party regardless of guilt or liability
            - I.E. – gov stating D is heroin addict while on trial for bank robbery
    - I.E. – D on trial for importing controlled substances- inadmissible testimony about potential side effects and birth defects resulting from D's drug business
- Cumulative: Merely repeats other evidence that adequately establishes a fact
- *US v. McCrae*, D claims to have accidentally shot his wife, wanted to exclude photos of gunshot to the jury
    - Highly prejudicial but probative of nature of the killing (shot her point-blank w/ hollow point) → affirmed allowance of evidence
        - But- trial court had excluded non-probative pictures such as children's bloody handprints on the walls
- *Old Chief v. US*, prior record used to prove to jury D was convicted felon, D wanted redacted record that didn't show what criminal record was for
    - Each record was equally probative for case → SC rules the alternative record should have been provided instead because the same probative value yet less unfair prejudice

IV. Preliminary Questions

FRE 104. Preliminary Questions of Fact:

A. **In General**. The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible . In so deciding the court is not bound by evidence rules , except those on privilege.

B. **(b) Relevance That Depends on a Fact**. When the relevance of evidence depends on fulfilling a factual condition, the court may admit it on, or subject to, the introduction of evidence sufficient to support a finding that the condition is fulfilled.

C. **(c) Matters that the Jury May Not Hear**. A hearing on a preliminary question must be conducted outside the jury's hearing if:

a. 1. The hearing involves the admissibility of a confession .

b. 2. A defendant in a criminal case is a witness and requests that the jury not be present; or

c. 3. Justice so requires.

- A) In General
    - Standard is preponderance of the evidence, judge is not bound by evidence rules
    - Applies to foundational issues other than relevance
        - I.E. – whether statement was dying declaration; expert qualifications; whether a witness is actually unavailable
    - When judge is making this decision- not bound by any other evidence rules except for those on privilege
        - But- privilege does not prevent judge from determining if privilege exists in the first place

- B) Conditional Relevance
    - Can be introduced on the condition that the proof is introduced later
    - If doesn't become relevant → can renew objection, then strike the conditionally admitted evidence and give curative instructions
        - "Sufficient to support" is very low standard
    - Effectively gives jury the issues that go only to relevance
        - But- somehow this same standard is used for 404(b) (crimes wrongs, other acts) → some dumbass prosecutor won big and now we're stuck with this ass backwards logic but the law is the law
            - (*Huddleston*) fact that previous crime happened in the first place, not preponderance of the evidence but rational juror basis
    - I.E. – district court determined it was not convinced voice on the telephone was somebody's & excluded it as irrelevant → erred without making a finding that no rational juror could have concluded that D made the statement at issue

- *Feaster v. US*, Trial court skipped question of witness's availability and went straight to assess his credibility when excluding his testimony → reversible error
    - 104(a) does not permit a trial judge to usurp the jury's function and exclude the evidence based on the judge's determination that it lacks persuasive force

V. Hearsay

FRE 801. Hearsay is a prior statement the declarant made not while testifying at the current trial or hearing that a party offers in evidence to prove the truth of the matter asserted

Analysis
1. Is there a statement?
2. Who was the declarant?
3. Was it made "not while testifying at this trial or hearing"
4. Is it offered to prove the truth of the matter asserted?

1) Statement
- Action of declaring or positively stating
    - Oral or written assertion; or
    - Nonverbal conduct if the person intended it as an assertion
        - I.E. – pointing "he went that way"
        - I.E. – shaking umbrella at porch during rain doesn't assert that it's raining, but if asked first then shake umbrella back at the person → it's conduct asserting the fact that it's raining
- Questions are generally not an assertion unless they set forth some factual matter
    - I.E. – "why is he wearing a yellow jacket" → hearsay
- Command is generally not an assertion even if you can imply a fact exists from it
    - *United States v. Zenn*i, "can I place a bet on _____" implies that this person thinks they're talking to a bookie → doesn't assert a statement
        - Person must intend to assert the fact itself
        - I.E. – "this is a place of gambling" would be assertion
        - Rationale: sincerity is not involved, rarely in our own actions do we deceive ourselves
- CONDUCT NOT INTENDED AS AN ASSERTION IS NOT HEARSAY
    - Can use extrinsic evidence to figure out intention of declarant

2) Declarant
- Person who made the statement
    - Not animal or machine
        - But- would be hearsay if person interpreting machine "ie- it's 2 o'clock"
    - Often the same as the witness, but not necessarily

3) Not testifying at this trial or hearing
- Must be under oath at THIS trial or hearing
    - If prior case? → hearsay, even if it was under oath

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- Must be under oath at THIS trial or hearing
    - If prior case? → hearsay, even if it was under oath

5. **Notice to the listener**
    a. I.E. – Mechanic tells person "you need new brakes" may be offered not about whether the defect existed but if the person acted as a reasonable person
6. **Knowledge of the speaker**
    a. Regardless of truth- his knowledge whether it is correct or not
    b. I.E. – patient saying "I'm worried about this surgery, the risk is pretty high"
        i. If offered to prove high risk → hearsay
        ii. If offered to prove informed consent → not hearsay
7. **Circumstantial evidence of the declarant's state of mind**
    a. "Cyclists are morons", "I'm Elvis" → doesn't matter if true or not, not hearsay
        i. But "I hate cyclists", "I believe I'm Elvis" → hearsay b/c direct evidence

Hearsay "Exemptions"

FRE 801(d) "Statements that are Not Hearsay"
By definition not hearsay
- Different than "exceptions" which are hearsay but still admitted

d(1) Declarant Witness' Statements
- Inconsistent (A)
- Consistent (B)
- Identification (C)

d(2) Opposing Party's Statement
- Party Admission (A)
- Adoptive Admission (B)
- Vicarious Party Admission (C & D)
- Co-Conspirator (E)

** remember: the statement itself doesn't establish the requisite relationship necessary for (C)(D) or (E)
Analysis:
A. Identify declarant
B. Is declarant a party?
C. Offered by opposing party against who made the statement?

801(d)1 : Prior Statement of Testifying Witness. Not hearsay if the declarant is a witness and testifies and is subject to cross examination about a prior statement , and the statement:

A. Is inconsistent with the declarant's testimony now and the prior statement was given under the penalty of perjury at a trial, hearing, or other proceeding or in a deposition; or
B. Is consistent with the declarant's testimony and is offered:
    a. To rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in testifying; or
    b. To rehabilitate the declarant's credibility as a witness when attacked on another ground; or
C. Identifies a person as someone the declarant perceived earlier

- a) **Inconsistent** "Other proceeding" means more than just "under the penalty of perjury"
    - I.E. – extends to grand jury but not "station house interrogation" or affidavit
        - I.E. – grand jury testimony: "oh yeah i saw him shoot that man" but in trial: "nah he dint do nuffin" → can use the grand jury testimony
            - But couldn't do this with station house interrogation affidavit
    - Can be used to prove facts, but must be under oath in proceeding!!!!
        - Otherwise, can just use to impeach (later)
    - "Inconsistency" may be found in evasive answers, inability to recall, or change of position

- b) **Consistent**
    - Can't be used to bolster, must be offered after your witness is attacked by opposing counsel
    - (a) If other party implied motive to fabricate- statement you're rebutting with must have been made before motive to fabricate arose
    - (b) Rehabilitate credibility when attacked on another ground
        - I.E. – dumbass prosecutor says to your aged witness "wow your memory must get better with age huh?" → you get to bring in that written statement your witness wrote that's consistent boiiiiii
    - No oath requirement for previous testimony

- c) **Identification**
    - Mere descriptions are not exempt, must make actual identification
        - I.E. – ID'ing at a lineup is exempt
            - But- telling cop what dude looked like after is not
    - Rule not limited to testimony by identifying witness, other witness who was present can attest to that person's identification why though? Look into
        - I.E. – cop who was there when photo ID occurred, if witness testifies (thus, subject to CX) to facts of what happened, but not the ID, and then the cop testifies to the ID → admissible, other party still had opportunity to CX (think this only applies in civil case though?)

- No oath requirement (for original statement)!!!
- No consistency requirement!
  - Doesn't even have to remember the statement!!!
    - *US v. Owens*, man got the shit beat out of him, ID'd D right after but got memory loss after having his ass whooped so bad. Way later he's brought to trial and doesn't remember ID'ing the dude but someone else who was there produces it → admissible
      - He's still subject to cross examination even though he doesn't remember
      - Also, no confrontation clause concern!!!
- Requirement of cross examination is satisfied if witness is available to be recalled for re-cross examination
  - Just has to be subject to cross examination at some point!!! (I.E. – in deposition)

801(d)(2). Statement of Party Opponent. The statement is offered against an opposing party and:

A. Was made by the party in an individual or representative capacity;
B. Is one the party manifested that it adopted or believed to be true;
C. Was made by a person whom the party authorized to make a statement on the subject;
D. Was made by the party's agent or employee on a matter within the scope of the relationship while it existed ; or
E. Was made by the party's co-conspirator during and in furtherance of the conspiracy
*remember- whether statement was adopted, sufficient relationship, etc. are all 104(a) issues (preponderance of the evidence standard)
Also: no first-hand knowledge requirement for any of these

A. **Made by the party in an individual or representative capacity**

a. In criminal trial, prosecution represents the State, not the victim. Thus, out of court statements made by a victim do not come in under this Rule (exam trick)
b. Doesn't actually have to be admission/confession
c. Declarant must be the opposing party
d. No personal (first-hand) knowledge requirement for declarant
   i. I.E. – Bieber wasn't with cab driver but tweets "my cab driver ran over someone lol" → he can't object on lack of P.K. when it is used against him

B. **"Is one the party manifested that it adopted or believed to be true"**

a. Opposing party MUST:
   i. hear/see statement (context matters); and

ii. do something to signal adoption or belief
1. I.E. – nod head
2. What about facebook likes, etc? Depends on context
a. I.E. – liking a picture of Anne Frank on general public post vs. liking a picture in a private skinheads group

b. Original "statement" doesn't even have to actually assert anything, just may be answered in the affirmative
i. I.E. – "is Mike a baby back bitch" doesn't assert anything, but when I nod back, I am asserting that Mike is a baby back bitch

c. Adoption by silence?
i. Must hear AND understand statement
ii. "whether the circumstances as a whole show that the lack of a denial is so unnatural as to support an inference that the undenied statement is true"
1. Context is huge
2. I.E. – cop- "this is your cocaine" declarant: "....." → declarant said this is cocaine
3. I.E. – someone says, "everyone here hates Trump" and you love the fact that our economy is on top of the world and we finally have a president with cajones but you don't speak up to avoid conflict → not an adoption b/c not unnatural to speak up

d. Imputed statement to the party, words or conduct can apply
i. Even if question that doesn't assert anything but is answered in the affirmative → still an adoption
ii. Ex in Comments: Reprinting newspapers and distributing to person with whom defendants were doing business → defendants manifested their adoption of statements made in newspapers

C. "**Was made by a person whom the party authorized to make a statement on the subject"**
a. Specific authorization for person to speak on a particular subject matter on your behalf
i. Ex- spokesperson, attorney, PR firm, letter of recommendation

b. Statement itself does not establish the declarant's authority to speak on the subject!!!
i. I.E. – Mike: "Miller told me to confess on his behalf" → NOT getting in without more evidence (104(a))

c. Depends on nature of authorization
i. I.E. – focus on "xyz" → person isn't authorized to talk about abc

d. Statement must be on subject matter authorized, narrower than "relating to" (I.E. – agent/employee admissions)

D. **"Was made by the party's agent or employee on a matter within the scope of that relationship and while it existed"**

a. Requirements:
    i. Speaker is agent or employee of the party
    ii. Statement relates to matter within the scope of the speaker's agency or employment
        1. I.E. – after wreck, truck driver says "I didn't see the light turn green. My company will pay the damages" first sentence is admissible, second sentence is not b/c he isn't risk management position.
    iii. Statement must have been made during the speaker's relationship with the party
        1. I.E. – statement made in resignation letter is not admissible
        2. Note- this is different than co-conspirator statements!!!!
b. Statement itself does not establish the existence or scope of the relationship (104(a) issue)
c. In criminal cases- typically does not apply to statements of government agents
    i. I.E. – something dumbass cop says claiming another person committed the crime

E. **"Was made by the party's co-conspirator during and in furtherance of the conspiracy"**
a. Requirements:
    i. Conspiracy existed
        1. Not formal elements of conspiracy, just need a common venture
            a. Doesn't even have to be charged
    ii. Declarant was a member of the conspiracy
        1. Witness testifying doesn't have to have been though
        2. But- party doesn't have to be a member of the conspiracy at the time of the statement for it to be admissible against him
    iii. Statement made while the conspiracy existed
        1. I.E. – if arrested → conspiracy is over (confession wouldn't be in furtherance anyways)
    iv. Statement made in furtherance of the conspiracy
        1. achieving common goal I.E. – recruiting
            a. But doesn't extend to bragging about the conspiracy
                i. I.E. – telling your wife "honey, you'll never believe who I killed today!" wouldn't work
                    1. But- "honey, I just killed one of the crips for the boys. Help me hide the body" →would work
b. Statement itself does not establish existence or participation in conspiracy!!!
c. Cooperating witness talking to cops is not in furtherance of the conspiracy

● But- Bruton v. United States, (joint trial) A statement that explicitly names a co-defendant and implicates that codefendant on its face violates 6A right to confrontation. The statement cannot be admitted in this form

d. Prosecutor can redact the statement and make it fine

i. Can also "wait and see" if Defendant testifies then introduce the full form

e. But- This doesn't apply to co-conspirator statements!!!!!! Co-conspirator statements made during and in furtherance of the conspiracy are not considered testimonial so their use does not implicate the confrontation clause

● Remember this Rule is only about statements AGAINST the opposing party, you can't use them on your party's behalf

○ BUT FRE 106: Remainder of or Related Writings or Recorded Statements: If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part--or any other writing or recorded statement--that in fairness ought to be considered at that time

■ ONLY applies to writings or recorded statements

● MUST object at time other party is offering it

■ "Rule of completeness" writing/recording offered must be to 1) explain admitted portion; 2) place the admitted portion in context; 3) avoid misleading the trier of fact; or 4) insure a fair and impartial understanding

● I.E. – prosecutor offers video of Mike Pence saying "i hate gay people" but the full video actually says "i can't believe this prosecutor thinks i hate gay people- I love equality!" → Mike can bring that in

Hearsay Exceptions: 803 Regardless of Availability

FRE 803(1) Present Sense Impressions: Statement describing or explaining an event or condition, made while or immediately after the declarant perceived it

● Requirements:

a. Event or condition occurred;

■ No requirement of emotions affected,

b. Statement describes or explains that event or condition; and

■ More narrow than excited utterance

● I.E. – child tracks in mud "my mom is going to have a cow!" is EU but not PSI

○ If he says "looks like i tracked mud in, who cares" →PSI but not EU

c. Declarant must have made the statement "while or immediately after

he perceived it"
- ■ Can't be time for reflection, this has nothing to do with how witness was impacted by the event or condition
  - ● More time restrictive than excited utterance!!
    - ■ "Perceived it" → first-hand knowledge requirement for declarant regarding the event or condition

● When someone is answering questions → unlikely it's getting in under this rule
a. I.E. – expert reads report of tire marks for cop to see if they match and quickly says "yep these match" → there has been time for reflection, even if it was quick b/c of expert's expertise

FRE 803(2) Excited Utterance: A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused
- ● Requirements:
  - ○ Startling Event or condition
  - ○ Statement relates to the event
    - ■ Broader than PSI
  - ○ Statement was made while under the stress of excitement that it caused
    - ■ Looking for something subjectively impacting the declarant, varies based on context such as the magnitude of the event that occurred and the type/age of declarant (still use objective signs)
      - ● I.E. – paramedic is not as phased by seeing trauma as someone else would be
        - ○ Young child will be upset for awhile
      - ● I.E. – you're appalled way longer after seeing someone getting shot as opposed to seeing a minor fight

● General Rule → if sufficient time has passed to give declarant time to reflect on the event, not getting in
- ○ More lenient than PSI though, examples in rules:
- ○ Rape victim still upset hour after incident talking to cop in response to his questioning

● Slip and fall, bystander says: "I told them to clean it up about two hours ago--an hour and a half ago" → still relates to the event enough for EU
- ○ But- this would not be describing the event itself for PSI (might be reflective thought issue too)

● *U.S. v. Boyce*, girlfriend getting beat by husband runs to neighbors to call 911, is freaking out on the phone → probably too long after to be present sense but excited utterance made 911 call admissible

FRE 803(3) Then Existing Mental, Emotional, or Physical Condition: A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or

bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity of the declarant's will.

- Requirements:
    - Condition must exist at the time actual statement is made
        - I.E. – "main i was so stressed last week" is reflective
    - Must be the declarant's condition
        - Motive, intent, plan; or emotional, sensory, physical condition, etc.
    - Internal conditions/feelings/intent outwardly expressed
    - Does not extend to "backward looking" statements
        - Unless a will! Compare Hillmon and Shephard
- This is DIRECT evidence of state of mind
    - Otherwise would be not hearsay in first place if circumstantial (b/c not for truth purpose)
        - "You can go to hell, I'm going to Texas"
            - Admissible- first clause is circumstantial evidence, second is direct evidence of his plan
        - "I believe I am Elvis"
            - Can be used to prove the declarant is delusional
        - "I am afraid of Bob" → is fine
            - But- "I'm afraid of Bob because he threatened me" → the explanation (memory part) does not get admitted under this rule
                - Can say how you feel, just not why ("nobody gives a crap how you feel" - Kent)
    - Once this state of mind is proven → jury can infer conduct of the declarant

- *Hillmon* declarant had expressed his plan to go somewhere → that's fine
    - Hillmon doctrine allows you to prove intent and conduct through a statement of intent
    - When then-existing state of mind plan implicates someone else? Circuit split, I think? But Tilly doesn't seem to like it.
        - Prosecution for murder of victim. To prove Defendant committed the crime, the prosecution offers evidence that earlier in the day she was killed, Victim told a friend, "Defendant is planning to come over for dinner tonight." not admissible , this is evidence of victim's plan, not defendant's
        - Prosecution case against D is circumstantial – no eyewitness can place D in the company of Victim on the day the murder occurred. P offers the testimony of Willa, a friend of the Victim, that on the day she last saw Victim she said, "I am going to meet D at the diner for lunch today (the last day the Victim was seen alive).
            - Different than Hillmon b/c that case didn't require knowing where Hillmon actually was, just that another person was there (body identification purposes) here, we need evidence of D being at the diner

- *Shepard*, In murder trial for Shepard, prosecution offered statement from dying woman "Dr. Shephard poisoned me" to prove she was not suicidal → Court calls out this was offered for its truth
    - 803(3) exception? → no, her statement is only based on belief in memory (backwards looking)
- Will exception: when declarant's statement "relates to the execution, revocation, identification, or terms" of HIS OR HER will
    - NOT ie- statement concerning the conduct of others influencing the terms of the will

FRE 803(4) Statement Made for Medical Treatment or Diagnosis: A statement that is:

1. Made for purposes of and pertinent to medical diagnosis or treatment
2. Describing medical history, past or present symptoms, pain, sensation, causes, or source

- Doesn't have to be made to actual medical provider
    - I.E. – child telling mom he feels sick
- Unlike then-existing condition, this exception extends to past symptoms etc.
    - Also extends to statements made to get help for other people
- Statement purpose must be to OBTAIN medical diagnosis or treatment
    - I.E. – doesn't extend to dr. giving the actual diagnosis
    - Post accident bystander asks if you're hurt? → typically the answer is not for the purpose of obtaining treatment but just to answer the question
        - (but could get in under then-existing physical condition)
- Only part of statement that is relevant to the medical help is admitted
    - Must be "reasonably pertinent to treatment"
        - Thus, "i got hit by a car" would be fine
    - I.E. – if statement mentions the person that caused the injury → that part of the statement usually doesn't come in
        - Unless that Identity is pertinent to treatment or diagnosis →
    - *U.S. v. Joe*, victim told dr. about rape and threats from her ex husband
        - Rape statement found admissible b/c ID was pertinent to treatment, Dr. would give different treatment plan based on who the assailant was (this is rare circumstance)
            - But- if it was "I was raped by a 200 pound man with brown hair" → that's not pertinent to treatment
        - Threat was not admissible
- Declarant does not have to be the one getting the treatment!
    - I.E. – pass out on floor and someone says "someone call 911 Ben got too drunk"
    - I.E. – Paramedic to Dr.: "patient says his hip hurts" → admissible hearsay w/in hearsay
        - Patient to Paramedic: 803(3) & (4)

- Paramedic to Dr.: (803(4)

FRE 803(5) Recorded Recollection: A record that:

A. is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately ;

B. was made or adopted by the witness when the matter was fresh in the witness's memory; and

C. accurately reflects the witness's knowledge.

a. If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party (rare)

i. Think- getting read into evidence just makes it on par with regular witness testimony

- Foundational Elements:
  - Witness had knowledge in the past about a matter.
  - Present knowledge is insufficient to permit the witness to testify fully and accurately about the matter.
  - Memo or record made or adopted by the witness while matter was fresh in witness' memory.
  - Memo or record accurately reflects witness's prior knowledge.
- "Made or adopted" must manifest acceptance of truth and accuracy
  - I.E. – signing notepad of police officer's after cop writes down your statement
- At first just try to refresh the witness's memory through the document, if that doesn't work → gets to be read into evidence
  - Rule 612 covers refreshing ability (doesn't even need to be witness' actual statement to just do that), 803(5) is last resort
  - RULE DOESN'T HAVE TO APPLY TO JUST REFRESH WITNESS'S MEMORY, THAT'S NOT HEARSAY → ONLY HEARSAY WHEN ACTUALLY, READ INTO EVIDENCE
    - 612 allows other party to cross exam and inspect the recording
- Exam trick: look out for if witness is also a defendant

FRE 803(6) Records of Regularly Conducted Business Activity: A record of an act, event, condition, opinion, or diagnosis if:

A. Was exhibit __ made by, or from information transmitted by, a person with knowledge of the events or conditions recorded;

B. Was exhibit ___ made at or near the time of the events or conditions recorded;

C. Was it in the regular course of your business to make these types of records;

D. Was it in the regular course of your business to keep these records.

- "Record" includes memos, receipts, spreadsheets, letters, reports, statements, medical charts, invoices, computer printouts, etc.

A. Was exhibit __ made by, or from information transmitted by, a person with knowledge of the events or conditions recorded;

a. Timing is "reasonable" standard, fluctuates based on circumstances
b. Personal knowledge - Maker of record has personal knowledge of the event OR maker received information from somebody who had personal knowledge
i. Each person in chain must have a DUTY to collect/report the information
1. **Source must have personal knowledge**
ii. I.E. – VP of Sales creates a spreadsheet showing all of the sales figures for 1,000 salespeople throughout the country
1. VP created it based on information passed to him from regional VPs who obtained information from the actual salespeople who made the sales

B. the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
a. Type of record that is usually kept
i. Something businesses usually rely on
b. Organization can extent to illegal organizations
i. I.E. – bookies
ii. But not personal matters- ie checkbook balancing sheet
1. Quasi personal? Ie- farm where farmer logs miles for truck used personally and for work on farm → can fall under this rule

C. making the record was a regular practice of that activity;
a. Made business must commonly make this type of record
i. Showing it was made for business purpose and not litigation purpose
1. But if business routinely generates incident reports? → probs getting in (like work product)

D. all of these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statue permitting certification; and
a. Need sponsoring witness to lay foundation but DOESN'T HAVE TO BE SOMEONE WHO MADE THE STATEMENT OR KNOW WHO DID
i. Just need someone to testify to the process in which the records are developed
ii. I.E. – can be an undercover agent in a gang, or a receptionist who wasn't even working there at the time
b. 902 affidavit exception

E. neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

- Hearsay within hearsay often applies here → look to each level of communication and apply the rule
  - This rule only applies to business insiders (think- people with the duty to pass along information)
  - I.E. – Patient tells Dr. symptoms (statement for medical diagnosis) → Dr.

puts diagnosis in records (regularly conducted business activity)

FRE 803(7) Absence of a Record of a Regularly Conducted Activity:
Evidence that a matter is not included in a record for (business record exception) is exception to hearsay if:

a) The evidence is admitted to prove that the matter did not occur or exist;
b) A record was regularly kept for a matter of that kind; and
c) The opponent does not show that the possible source of the information or other circumstances indicate a lack of trustworthiness

We never covered this but on syllabus

- Permits proof of the nonoccurrence or nonexistence of a matter by showing that no record of it is found in regularly kept records that would be expected to have recorded it if it did occur or exist
  - Requirements:
    - 1) foundation sufficient to qualify the record under 806(6) (four predicates;
    - 2) either the record must be introduced, or the custodian/other qualified witness must testify that a diligent search failed to disclose the matter

- **FRE 803(10)** is the same rule for public records exception
  - FOR EITHER OF THESE!! Best evidence rule not violated by testimony that a writing does not contain any reference to the matter (or that it doesn't exist in the first place)

FRE 803(8) Public Records: A record or statement of a public office

A. if it sets out:
   a. the office's activities ;
   b. a matter observed while under a legal duty to report , (But if Pros. offering in criminal case : does not include a matter observed by law-enforcement personnel); OR
   c. in a civil case or against the government in a criminal case , factual findings from a legally authorized investigation; and

B. (B) neither the source of information nor other circumstances indicate a lack of trustworthiness.

A. Records that set out office's activities
   a. Broad, ministerial activities
      i. I.E. – Payroll records, personnel hiring, meetings held, office hours, committee assignments, agendas, employee handbook, etc.

B. a matter observed while under a legal duty to report ,

a. Must be within scope of the agency's duties
    i. Ex: TSA report on contraband items recovered;
    ii. National Weather Service report on hurricane activity
b. Records containing observations of law enforcement cannot be used by the prosecution in criminal cases
    i. But i can use them to show the government is lying trying to bring me down

C. in a civil case or against the government in a criminal case , factual findings from a legally authorized investigation
a. Crim defense can still use against the government, just not vice versa
    i. Think- not gonna let these fuckers have their cake & eat it too
b. Fair game in civil court
    i. I.E. – coroner report; social worker report
c. "Factual findings" is very broad
    i. FAA investigations re: plane crashes, FDA investigations re: drug safety; CDC investigation re: disease outbreaks
    ii. Opinions and conclusions often come in under this

- Differences from business record exception?
    - No regularity or timing requirement for this rule
    - No need to call witness for authenticating foundation
        - Self authenticating
    - Must be public agency/office!
    - BUT- still have same possible hearsay w/in hearsay dilemma
        - I.E. – statements of bystanders at the scene

FRE 804: Hearsay Exceptions: When Declarant is Unavailable as a Witness

1. Former testimony.
2. Statement made under belief of imminent death.
3. Statement against interest.
4. Statement of personal or family history.
5. Statement offered against a party that wrongfully caused the declarant's unavailability.

Defining Unavailability

- First step to be proven, necessary predicate for ANY of these exceptions
    - 1) who is witness; 2) why can't they testify
    - Witness may even be in the courtroom, yet unavailable for another reason
        - I.E. – privilege
    - If available? → none of these exceptions can apply

Categories of Unavailability (I went to pick him up during PM RDU but he wasn't there)

1. Privilege (spousal, 5th Amendment)
2. Lack of subject matter Memory
3. Refusal (after ordered by judge)
4. Dead or very sick
5. Unable to locate/serve

Remember- unavailability is a preliminary question to applicability of hearsay exceptions → judge not bound by rules of evidence when finding witness is unavailable

1. Privilege

a. Witness (except criminal D) needs to invoke privilege in front of the judge.
b. Threat to invoke privilege is not enough; call witness to the stand and have him/her invoke.
c. Common privileges: Spousal, 5th Amendment
    i. Must be ACTUAL marriage for spousal to apply
        1. No longer valid once divorced
d. Can be waived
    i. I.E. – if claiming medical damages → dr. testifies to past conditions, etc.

2. Refusal to Testify

a. Must call the witness and have him/her refuse in court. Judge will then order witness to testify or face contempt.
b. If witness still will not testify after contempt, then he/she is unavailable
c. Threatening to refuse is not enough.

3. Lack of Memory

a. Must be total lack of memory as to the event in question.
    i. Not about full or substantially accurate memory → must not be able to remember subject matter at all
        1. Even if he doesn't remember the statement at issue → still may be available if he remembers the subject matter
b. Must call the witness at trial;
    i. pre-trial statement of lack of memory is not sufficient.

4. Death, Infirmity, Physical/Mental Illness

a. Then existing infirmity/illness (physical or mental) must be so severe that witness can't appear to testify and little likelihood of recovery in near future
    i. Must be at the time of the trial!!
b. No reasonable likelihood they'll get better soon
    i. If major witness → can continue case for awhile

5. Absent Witness

a. Unknown Whereabouts: Must make reasonable efforts to locate

1. Subpoena; search efforts; calling family, etc.
2. Should offer to pay for travel

b. Known but unable to compel attendance

1. I.E. – witness is outside of jurisdiction and is refusing to attend

a. Must still show efforts!

b. No need to subpoena if out of range

i. If in range? → hard to show reasonable efforts without subpoena

c. * typically higher burden for prosecutors to prove this than others

d. "Is absent from the trial or hearing and the statement's proponent has not been able to procure attendance or testimony, by process or other reasonable means"

i. (5)(A) Former Testimony Exception → procuring attendance is only requirement to try and make

ii. 5(B) All other exceptions → must try to procure attendance and testimony before claiming one of those exceptions

1. I.E. – If someone can't attend → you still have to try and conduct a deposition (get testimony)

a. Can even require lawyer to be the one to travel to try and get the testimony

2. Applies to dying declarations; statements against interest; and statements of family/personal history.

**** can't establish unavailability if proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or
testifying

FRE 804(b)(6) Statement Offered Against a Party that Wrongfully Caused the Declarant's Unavailability: Not hearsay: A statement offered against a party that wrongfully caused--or acquiesced in wrongfully causing--the declarant's unavailability as a witness, and did so intending that result.

a. Actions must be intentional and wrongful with the intent to prevent the witness from testifying

i. Doesn't necessarily have to be bad- (Luke Combs "deep sea fishin out in Panama")

1. Judge Forever Dever: "you can attract bees with honey or vinegar"

ii. Mere negligence to keep witness in custody is not enough

b. *Giles v. CA*, D prosecuted for killing wife, prosecutor tries to get in statement made to her from weeks prior under this rule (don't think other hearsay exception applied) to prove intent → Court: No, wrongdoing must be designed to prevent testimony- need intent

c. Waives confrontation clause protection as well.

d. "Acquiesced" I.E. – *US v. Cherry* protections waived if preponderance of evidence shows:

i. the defendant participated directly in planning or procuring the declarant's unavailability through wrongdoing, or

ii. that the wrongful procurement was in furtherance, within the scope, and reasonably foreseeable as a necessary or natural consequence of an ongoing conspiracy. (*note- this is the same standard for waiving confrontation clause protection)

● *Feaster*: Court failed to properly establish unavailability. Judge should have made a 104(a) ruling as to Oscar Mitchell's availability. If defense used private investigator—would likely need to bring that PI before the judge to explain the efforts that had been made to try to locate Oscar

- ○ But- calling prosecutor for help is NOT a necessary step

FRE 804(b)(1): Former Testimony: Testimony that: (A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and (B) is now offered against a party who had – or, in a civil case, whose predecessor in interest had – an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

Requirements:

- ● Unavailable
- ● Testimony
  - ○ Prior proceeding
  - ○ Under oath
  - ○ On the record
- ● Offered against party who had:
  - ○ Opportunity to develop through CX, direct, or redirect
  - ○ Similar motive to develop
  - ○ By the party against whom it is offered
    - ■ Don't worry about "predecessor in interest" for civil case

● "Opportunity to develop" doesn't mean it was taken, just had the opportunity

- ○ I.E. – lawyer doesn't cross exam → still had opportunity
- ○ But- D often has no opportunity to cross exam grand jury testimony
  - ■ But D can use that testimony against pros. b/c dumbass prosecutor

developed it through direct

- Note- keep in mind this exception is based on opportunity to develop in ***any way***. Not limited to cross exam like others

- "Similar motive to develop" is broad
  - General rule: when the issue to which the testimony related at the former hearing is substantially identical to the issue in the present proceeding
  - Differences as to lawyering tactics do not change this
    - I.E. – limiting cross examination in discovery proceeding based on strategy of doing it later → still had similar motive

- Trayvon Martin's family sues George Zimmerman for the wrongful death of their son. During the course of the trial, they attempt to locate Jane Surdyka to testify on behalf of the plaintiff. Ms. Surdyka previously testified under oath at the Zimmerman murder trial that she observed an altercation wherein an older "man" used angry, aggressive words and the voice of a "boy" could be heard saying, "help, help, help." Plaintiff 's counsel has tried to locate Ms. Surdyka but after the murder trial she sold her condo and has not been seen since testifying. Google searches, private investigations and calls to friends and relatives have been fruitless. During the current wrongful death trial, plaintiff 's counsel offers Ms. Surdyka's prior testimony from the prior state murder trial. Defense counsel objects, "hearsay!"
  - During criminal case, Zimmerman had similar motive & opportunity to develop through cross → admitted
- Trayvon Martin's family sues George Zimmerman for the wrongful death of their son. During the course of the trial, Zimmerman's defense counsel attempts to locate John Goode to testify on behalf of the defendant. Mr. Goode previously testified under oath for the defense at the Zimmerman state criminal trial. On direct examination he had said that he observed an altercation wherein it appeared that a person in a grey, hooded shirt was on top of and physically striking a person in a red jacket. Defense counsel has tried to locate Mr. Goode to testify again but he sold his condo and has not been seen since testifying in the murder trial. Google searches, private investigators and calls to relatives have been fruitless. During the wrongful death trial, defense counsel offers Mr. Goode's testimony from the prior state murder trial. Plaintiff 's counsel objects, "hearsay!"
  - Admissible- Prosecutor was predecessor in interest and had opportunity to cross

FRE 804(b)(2) Dying Declaration

Requirements

1. Unavailability
2. Case must be civil action or homicide prosecution
3. Declarant subjectively believed his death was imminent; and
4. The statement concerns the cause or circumstances of death

- "Subjectively believed his death was imminent"
    - Doesn't have to actually die, just belief the death was imminent
        - (can be available for other reasons)
- "Cause and circumstances"
    - Declarant must have P.K.
        - I.E. – "I've been poisoned!"
    - Can even be based on questions ie- repeatedly saying "am i going to make it? Am i? Oh my god Ben shot me. He was fucking around with the gun and he shot me. Help me Oprah Winfrey. Help me Jewish god. Help me allah"

FRE 804(b)(3) Statements Against Interest: A statement that:
(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
(
B) *If offered in a criminal case, must be* 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.

Requirements

1. Unavailability
2. Statement against interest at the time it was made:
3. Against interest because:
    a. Contrary to declarant's pecuniary interests
    b. Contrary to declarant's proprietary interests
    c. Rendered a claim declarant had against another invalid
    d. Subjected declarant to criminal or civil liability
4. Objective standard: Under circumstances would a reasonable person not have made the statement unless believing it to be true.
5. If offered in criminal case: Must have corroborating circumstances

- "When made" I.E. – if seems fine at the time then become incriminating later → this rule doesn't get it in
- Standard is really "a reasonable person wouldn't have made the statement unless it were true"
    - Can extend to a statement made to a friend, cellmate, former wife or family member
- "Against interest" does not extend to social interests
    - I.E. – Cam Newton's dumbass statement is really only about social harm
    - Has to be pretty severe when rendering a claim invalid

        - I.E. – undermines entire claim

- *Williams v. United States*, W gives confession to drug dealing scheme which implicated D to conspiracy but later W becomes unavailable.
    - Pushing blame on someone else is not "self-inculpatory" is neutral at best→ doesn't get in under this rule
        - (this statement wouldn't have gotten in under Crawford anyways)
    - But- you can still implicate someone else and it qualifies as a statement against interest, just not if you're only being a snitch like this dude
        - I.E. – telling the boys you and your roommate just killed a man is way different than telling the cops someone was in on it with you

- Sara and her twin brother Ben both worked for the family business. Millions of dollars disappeared from the business, and the twins' father concluded that Ben had taken the money. Ben was fired, and the government prosecuted him for embezzlement. Shortly before Ben's trial, police found Sara's dead body in a park. A suicide note in Sara's pocket read, "I can no longer live with what I have done. I have stolen millions from the family business, and my brother has been falsely accused. Now the entire family faces financial ruin because of me. The only way out is to take my life. I'm sorry. Sara"
    - Q: Can Ben introduce Sara's note at his embezzlement trial?
    - No, criminal case → need corroborating circumstances
        - (wouldn't be dying declaration b/c not homicide prosecution)

FRE 807. The Residual Exception (availability doesn't matter)

(a) **In General**. Under the following circumstances, a hearsay statement is not exclude by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:

1. the statement has equivalent circumstantial guarantees of trustworthiness;
2. it is offered as evidence of a material fact;
3. it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and
4. admitting it will best serve the purposes of these rules and the interests of justice.

(b) **Notice**. The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarants' name and address, so that the party has a fair opportunity to meet it.

Summary of Requirements:

1. Equivalent circumstantial guarantees of trustworthiness as the 803 and 804(b) exceptions.
2. More probative than other evidence reasonably available.
3. Notice given to adverse party.
    a. Statement is evidence of a material fact.

b. General purpose of rules and interests of justice will be served by admitting the statement

- Sparingly used--going straight here is just poor lawyering
    - Prosecutors are far more successful with this exception (because they are shitty lawyers)
        - But- remember constitutional rights implicated (I.E. – *Chambers v. MS*)
- Factors of trustworthiness
    - Oath
    - Relationship
    - Recantation
    - Corroboration
    - Bias/motive
    - Inconsistency

Miscellaneous Hearsay Exceptions

803(18) Statements in Learned Treatises, Periodicals, or Pamphlets. A statement contained in a treatise, periodical, or pamphlet if:

A. The statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and
B. the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit.

- Used to bring in other information with an expert witness

803(21) **Reputation Concerning Character**: A reputation among a person's associates OR in the community concerning the person's character (see rule 405(a), 608(a))

803(22) **Judgment of a Previous Conviction**: Evidence of a final judgment of conviction if: (see Rule 609)

A. the judgment was entered after at trial or guilty plea, but not a nolo contendere plea;
B. the judgment was for a crime punishable by death or imprisonment for more than a year (felony);
C. the evidence is admitted to prove any fact essential to the judgment; and
D. If offered by the prosecutor in a criminal case for a purpose other than impeachment (I.E. – not Rule 609), the judgment was against the defendant .

The pendency of an appeal may be shown but does not affect admissibility.

Hearsay and the Constitution

- "Where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanically to defeat the ends of justice."
    - *Chambers v. Mississippi*
- Federal prosecutors charge George Zimmerman with federal hate crimes in connection with the death of Trayvon Martin. During the trial, defense counsel attempts to locate John Goode to testify on behalf of Defendant. Mr. Goode previously testified under oath at the Zimmerman murder trial that he observed an altercation wherein it appeared that a person in a grey, hooded shirt was on top of and physically striking another person in a red jacket. Defense counsel has tried to locate Mr. Goode but he sold his condo and has not been seen since testifying. Google searches, private investigators and calls to friends and relatives have been fruitless. During the current federal hate crimes trial, defense counsel offers Mr. Goode's prior testimony from the state murder trial. The AUSA objects, "hearsay!" → not former testimony exception b/c different party than last time (criminal case, so can't try predecessor in interest). Would probably be type of situation where defendant can bring in statement

Confrontation Clause

- Only applies to defending the accused in a criminal prosecution
    - I.E. – prosecution doesn't have the right to cross examine a dead witness
- Last line of analysis
    - If civil case → hearsay is all you need
    - For criminal prosecution → must pass this after
        - But- not if D wrongfully procures witness's unavailability (then anything gets in)
- Clause is triggered when out of court statement is "testimonial"
    - "Witnesses" = declarants of "testimonial" statements
    - If testimonial, statement is only admissible if:
        - 1) declarant testifies at trial and is subject to cross examination; or
        - 2) declarant is unavailable and was previously subject to cross examination
    - Testimonial exceptions not barred by the Confrontation Clause
        - Statement of party opponent
            - Can't be prevented from confronting yourself → statement coming in whether you take the stand or not
        - if non-hearsay purpose → cc doesn't exclude it
            - I.E. – not offered for truth
        - Dying declarations are also probably not barred by cc (dicta)
        - If D wrongfully procures witness's unavailability → statement is coming in

- (preponderance of the evidence standard, see above *U.S. v. Cherry* rule)

- *Crawford v. United States*, overruled *Ohio v. Roberts* (standard was either firmly rooted hearsay exception or particular guarantees of trustworthiness), test goes from "substantive" (reliability) approach to procedural.
  - Prosecutor was bringing in wife's statement from police station after D killed a guy
    - She claimed marital privilege → still considered unavailable
  - **Testimonial statements** are "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use in a later trial."
    - At a minimum: 1) prior testimony at preliminary hearing; 2) grand jury testimony; 3) answers to police interrogations
- *Davis*, "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency."
  - Thus, 911 call of wife in the process of being attacked was not testimonial
  - But- Hammon: affidavit signed once cops responded to domestic violence situation that had calmed down? → that's testimonial
- *Ohio v. Clark*, young child's statement to teachers about dad abusing him, teachers were asking and under mandatory duty to report → not testimonial
- *Bryant*, man bleeding out in parking lot asked abunch of questions by 5 cops before he dies → non-testimonial on-going emergency
  - Probs bullshit, shows how Crawford is getting widdled away
  - Develops factor test (below), pretty much goes back to reliability
  - Holding: Objective standard for the "primary purpose of the interrogation" based on the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and circumstances in which the encounter occurred. Because the circumstances of the encounter as well as statements and actions of Covington and the police objectively indicate that the "primary purpose of the interrogation" was to "enable police assistance to meet an ongoing emergency," Covington's ID and description of the shooter were not testimonial hearsay barred by the Confrontation Clause.

- *Bryant* Factors important to determine if primary purpose is testimonial or other (I.E. – ongoing emergency)
  - Medical Condition of Declarant.
  - Nature of Emergency.
    - ongoing?
  - Formal v. Informal Interrogation.
  - Statements & Actions of Interrogators and Declarant
    - Asking what happened to learn? (testimonial) or to respond to emergency (non-testimonial)

- Exigent circumstances:
  - Whereabouts of perpetrator known?
  - Gun involved?
  - Purely private dispute?
  - Threat over?

● Statements can start off as non-testimonial and turn testimonial!!!!!!!!
- Honestly, these factors are dumb. Just use common sense with all of this shit and you'll probs be aight

<u>Non-Interrogation Testimonial Statements</u>

● Reports/certificates that are …functionally identical to live, in-court testimony, doing precisely what a witness does on direct examination
- The absence of interrogation is irrelevant.
- A witness who volunteers his testimony still a witness.
- There is no support for the proposition that witnesses who testify regarding facts other than those observed at a crime scene are exempt from confrontation.

● ***Melendez-Diaz*** —Analyst report certifying test at state lab deemed substance to be cocaine = testimonial, analyst must testify at trial
- Lab test literally said at the top that purpose of the test was for evidence at trial

● ***Bullcoming*** — Analyst, other than the one who ran the test, testifying to state lab test determining blood alcohol level = Testimonial , analyst who did the actual test must testify, this analyst just knew how the test was done (not the declarant)

<u>Nontestimonial Statements</u> (typically)

1. Coconspirator statements 801(d)(2)(E)
   a. Think- purpose of these statements is to further the conspiracy, not for future use at trial
      i. If you're snitching on the boys in the conspiracy? → it isn't a conspiracy statement in the first place
2. Medical diagnosis/treatment 803(4)
   a. Primary purpose typically just for medical treatment
3. Business records 803(6)*
   a. * Unless "the regular business activity is the production of evidence for use at trial" – *Melendez-Diaz*
   b. (or the document is prepared in anticipation of litigation)
4. Statements against interest 804(3)
   a. Made for purpose of incrimination, not future use
      i. Especially when talking to people other than cops
5. Statements of party opponent 801(d)(2)(A)
   a. You can always confront yourself → can't keep out your own statement

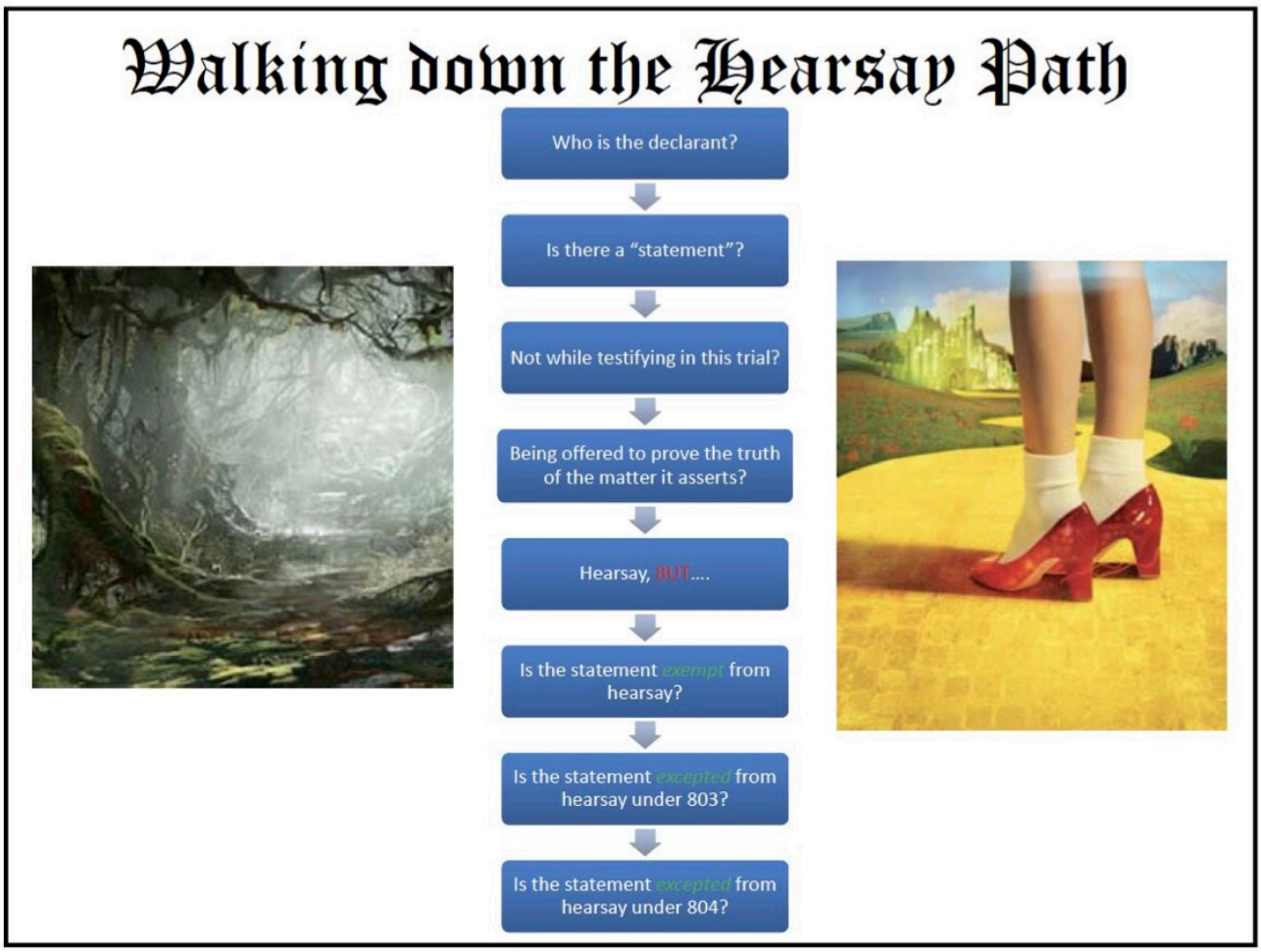
-**THE PATH**:

1. Who is the Declarant?
    a. There can be multiple declarants
    b. Declarant could be a person who merely flashed their headlights
    c. The more declarants there are, the less reliable the information will be
2. Was there a Statement?
    a. Conduct + Intent (oral, conduct, or writing) (ex. a will)
    b. Assertion
    c. By our conduct, we convey facts
        i. Ex. Flashing headlights to assert the fact that a police officer is ahead
    d. Conduct intended to assert a fact
        i. Ex. Shaking our wet umbrella off after being asked "is it raining outside" would essentially be like answering "yes" to the question asked
    e. There can also be conduct made, but not intended to assert a fact
        i. Ex. Dora placing wet umbrella down, but witness is the one observing. Dora did not intend to assert a fact by merely placing her dripping umbrella down
3. Offered to Prove the Truth of the Matter Asserted
    a. If offered to show its effect on the listener, would be admissible
    b. Ex. Blue Bell Ice Cream Hypo
        i. Assertion: Ice cream is safe to eat
        ii. Offered to Prove: That it was said by the president
        iii. So, yes it is hearsay to introduce evidence that the president of Blue Bell was on a tv commercial, and through his conduct was asserting that Blue Bell ice cream was safe to eat, BUT that evidence not offered to prove the matter asserted, so not excluded by the rule against hearsay (might have best evidence issues though
4. Not Made While Testifying at the Current Trial?
    a. Was statement made while not testifying under oath?
        i. If yes, subject to the rule excluding hearsay
    b. OJ Simpson Example
        i. OJ trying on the glove in front of jury WAS him testifying
        ii. The conduct of trying on gloves is asserting the fact that gloves did not fit him
        iii. He tried on the gloves while NOT under oath or subject to cross-examination; so, his assertion of a fact through his conduct should have been objected to

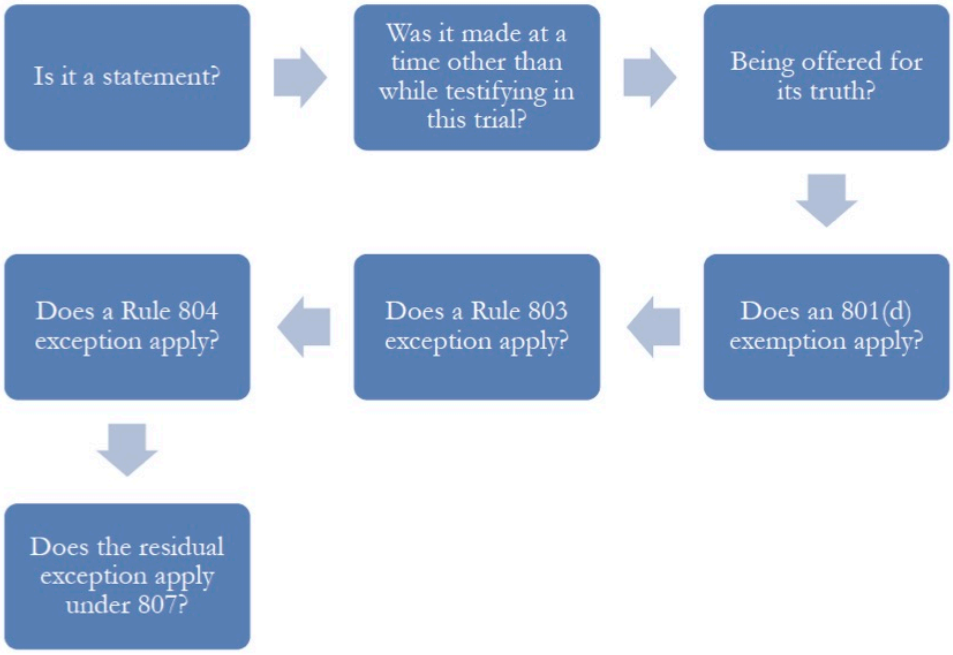
FULL HEARSAY ANALYSIS

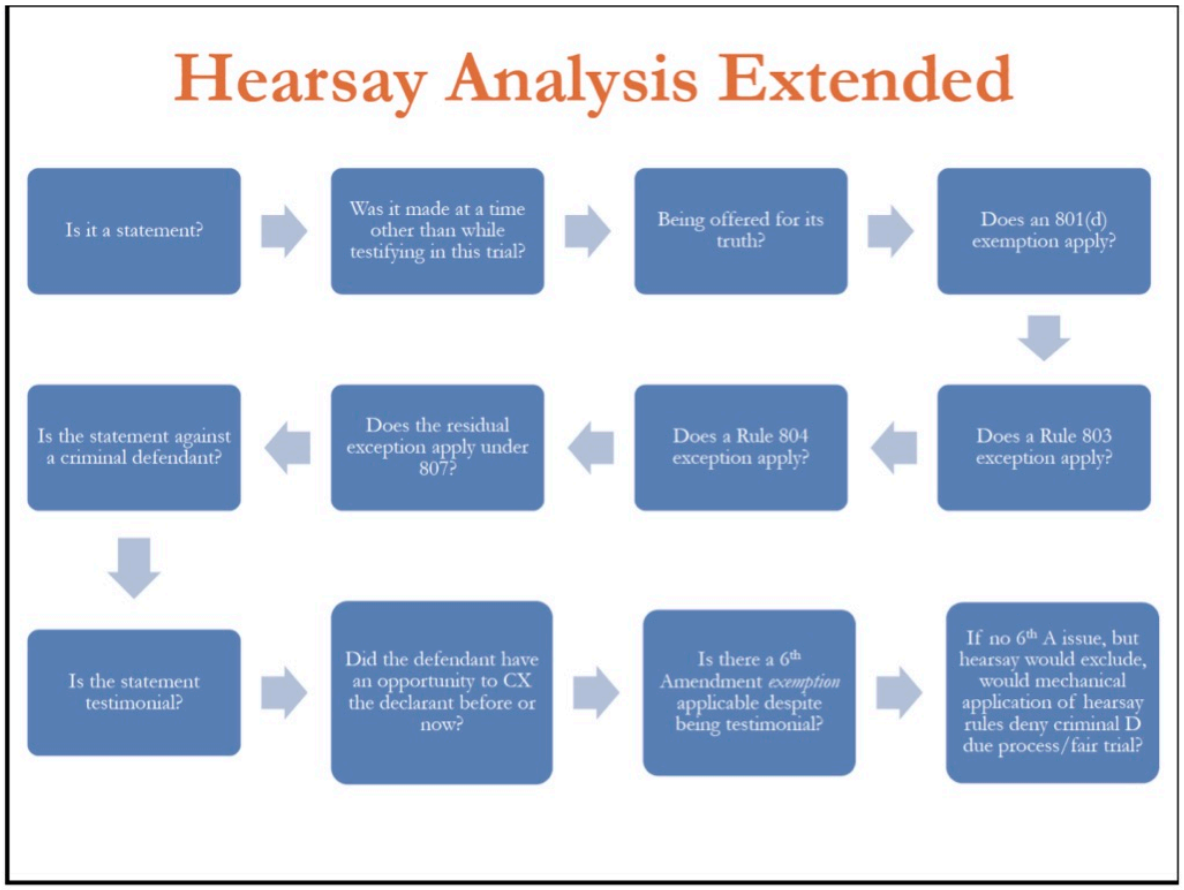
1. Who is the declarant

2. Is it a statement?
3. Was it made at a time other than while testifying in this trial?
4. Being offered for its truth?
5. Does an 801(d) exemption apply?
6. Does a Rule 803 exception apply?
7. Does a Rule 804 exception apply?
    a. Remember unavailability!!!!!
8. Does the residual exception apply under 807?
9. Is the statement against a criminal defendant?
10. Is the statement testimonial?
11. Did the defendant have an opportunity to CX the declarant before or now?
12. Is there an exemption applicable despite being testimonial?
13. Would mechanical application of hearsay deny criminal defendant due process?



Hearsay Analysis Extended





Character Evidence

FRE 404 Character Evidence

(a) Character Evidence.

(i) Prohibited Uses. Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

(ii) In Criminal Case, Exceptions for a Defendant or Victim:

(iii) a defendant may offer evidence of the defendant's pertinent trait and if the evidence is admitted, the prosecutor may offer evidence to rebut it;

(iv) subject to the limitations in 412 (rape shield), a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted the prosecutor may:

(1) offer evidence to rebut it; and

(2) offer evidence of the defendant's same trait; (this is typically rebuttal to D's case in chief) and

(v) in a homicide case, the prosecutor may offer evidence of the alleged

victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

- "Pertinent trait" is one related to the charge: A trait that acting in accordance with would be towards the crime charged
    - I.E. – D charged w/ possession of cocaine → can't bring in testimony that he's a "good family man", that's not pertinent
    - If D offers pertinent trait of V → prosecutor can rebut it as applied to V, offer evidence of D but ONLY that same pertinent trait
        - Remember D is limited by 412
- All of these are still limited to proving by opinion and reputation evidence (discussed more in Rule 405)
- Homicide prosecution example is ONLY when responding to D saying V was first aggressor
    - ONLY allows prosecutor to offer evidence of VICTIM's trait
        - This exception is different than other parts because defendant doesn't have to "open door" by other character evidence necessarily, can just be asserting self-defense claim wholly irrespective of any character evidence
- This rule doesn't apply when the character is "in issue", aka when character is an element type cases (where 405(b) comes into play)

A bar fight breaks out at Scruffy Murphy's during karaoke night at the bar. The victim is severely injured by a beer bottle to the face allegedly thrown by D. At trial, D offers two witnesses:

1. Dan, who will testify that he has been out to bars with victim on many occasions and knows him to be someone who, in his opinion, becomes aggressive after drinking.
    a. Admissible: offered by the defendant about the victim and aggressiveness is a pertinent trait for a bar fight prosecution
2. Paul, who will testify that he has lived in town for many years, and is familiar with what people say about victim, and that the victim is known for reckless and drunk driving.
    a. Not admissible - reckless/drunk driving is not a pertinent trait towards THIS charge

Once character evidence is admissible →

FRE 405 Methods of Proving Character Evidence

A. By Reputation or Opinion: When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct.

B. By specific Instances of Conduct. When a person's character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct.

A. Once character evidence is admissible under 405(a)
- a. For opinion evidence: must have personal knowledge
  - i. For reputation- witness doesn't even have to actually know the person
- b. But- can only inquire into specific instances if on cross exam (impeachment), not direct
  - i. Specific incidents inquired about must be relevant to the character traits involved at trial
    - 1. Also Need good faith belief that event actually happened!! Not just that people had heard about a rumor
      - a. If witness says he doesn't know about specific instance of conduct → can't prove it by extrinsic evidence
      - b. Classic prosecutor bs "oh Ben's a nice gentle guy huh? did you know he was convicted of punching a cop in the face one time?" type of thing
        - i. Cross examination here is really supposed to be more geared towards credibility of witness's testimony. Cross examining inconsistencies with reputation/opinion of pertinent trait that the witness offered
- c. Criminal D must open door → then prosecutor can rebut, but also just with reputation or opinion (can't do specific instances on direct)
  - i. Remember- for cross exam into specific instances, this is "court May allow" standard, doesn't have to

B. Extends to civil cases, direct exam can prove by relevant specific instances of conduct in certain instances!!!!!
- a. ONLY when the character trait is an essential element of a charge, claim, or defense, main instances:
  - i. Defamation/Embezzlement
    - 1. Typically when defendant raises defense of truth
  - ii. D claims entrapment
    - 1. (prosecutor showing pre-disposition to commit crimes, often even involves bringing in criminal record)
  - iii. Best interest
    - 1. (I.E. – domestic issues)
  - iv. Negligent entrustment/hiring/retention
    - 1. I.E. – reasonably prudent employer would have taken bad driver off road; bartender owner hires bouncer w/ violent criminal background → becomes direct liability

a. When P claims D was grossly negligent in hiring the person that caused the injury
b. Notes seem to indicate that this extends to the trait of "incompetence" of the employee himself

b. Not restricted by 404 b/c not really about "conformity"
i. Is being offered as a material fact that the substantive law determines rights and liabilities
1. Comes up way more in civil cases, but can be applicable in some criminal

c. When in issue → can prove by specific instances, reputation, AND opinion

Two Doors Analogy

- At the start of the trial there are two doors at the front of the courtroom. One is the door through which evidence of defendant's character may pass.
- The other is for evidence of the victim's characters. When the prosecution begins its case, both doors are locked. Only the defendant has the keys to these doors.
- The defendant opens his door by offering evidence of his own character. Now that this first door is open, the prosecution may rebut with its own evidence of defendant's character.
- The defendant unlocks the second door by offering evidence of the victim's character. Now the prosecution can walk through that door and present rebuttal evidence about the victim's character. These doors normally open separately, but:
- **There are two exceptions**:
  - When defendant opens the victim's door, he also cracks his door open such that the prosecution may respond by presenting evidence that defendant has the same character trait.
  - In a homicide case , the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor
    - Other actual exceptions are the sexual assault/child molestation statutes

FRE 412. Sex-Offense Cases: The Victim (Rape Shield Law)

(a) Prohibited Uses. The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct:

(1) evidence offered to prove that a victim engaged in other sexual behavior; or

(2) evidence offered to prove a victim's sexual predisposition.

(b) Exceptions.

(1) Criminal Cases. The court may admit the following evidence in a criminal case:

(A) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;
(B) evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and
(C) evidence whose exclusion would violate the defendant's constitutional rights.

(2) Civil Cases . In a civil case , the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy .

Recall: 404(a)(2)(B) is subject to Rule 412, D can offer "pertinent trait" of V's character

(a) Prohibited Uses

- I.E. – if rape case and D tries to bring in evidence that V got around the town to show she probably consented → not getting in
- "Behavior" is evidence that implies sexual conduct
  - I.E. – birth control, pregnancy, statements of fantasies, etc.
  - Disposition extends to dress, lifestyle, etc.

(b) Exceptions (to the exception)

(i) Criminal Cases

(1) Specific instances of V's sexual behavior to prove person other than D was the source of semen, injury, or other physical evidence

(2) Specific instances of V's sexual history with D if offered by D to prove consent, OR if offered by prosecutor

a) (I.E. – pros. Can offer to prove this was continuous assault)

(3) Evidence whose exclusion would violate D's constitutional rights

a) *Olden v. Kentucky*, witness bias based on who she was sleeping with

(ii) Civil Cases

(1) Evidence may be admitted if probative value substantially outweighs unfair prejudice (reverse 403)

(2) Evidence of victim's reputation only can be admitted if victim places it in controversy

Rule 413. Similar Crimes in Sexual-Assault Cases

(a) Permitted Uses. In a criminal case in which a defendant is accused of a sexual assault , the court may admit evidence that the defendant committed any other sexual assault . The evidence may be considered on any matter to which it is relevant.

(b) Disclosure to the Defendant. If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses' statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.

Rule 414. Similar Crimes in Child Molestation Cases

(a) Permitted Uses. In a criminal case in which a defendant is accused of child molestation , the court may admit evidence that the defendant committed any other child molestation . The evidence may be considered on any matter to which it is relevant.

(b) Disclosure to the Defendant. If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses' statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.

- Sexual assault" is the broad category
  - I.E. – if on trial for sexual assault, prosecutor can bring in past child molestation crime
    - But- if on trial for child molestation → prosecutor can't bring in past general sexual assault claims
- For this rule and 414, Rule 403 rarely excludes evidence
  - Congress wants sick fucks off the street → evidence is coming in
    - I.E. – even if charges were dismissed for DNA evidence of another person → good chance it's getting in
      - Probative? Lmaoooooooooooooo
      - Not explicit but FRE book says 104(b) rational juror standard is probably applicable for 413 and 414
- These rules are about specific acts
  - Thus, can't bring in with reputation/opinion (unless D opens door)

Rule 415. Similar Acts in Civil Cases Involving Sexual Assault or Child Molestation

(a) Permitted Uses. In a civil case involving a claim for relief based on a party's alleged sexual assault or child molestation, the court may admit evidence that the party committed any other sexual assault or child molestation. The evidence may be considered as provided in Rules 413 and 414.
(b) Disclosure to the Opponent. If a party intends to offer this evidence, the party must disclose it to the party against whom it will be offered, including witnesses' statements or a summary of the expected testimony. The party must do so at least 15 days before trial or at a later time that the court allows for good cause.

- Applies criminal exceptions interchangeably
  - I.E. – accused of child molestation in civil case → can bring in general sexual assault history

Remember: 404(a) only barred that evidence for establishing propensity → "other purposes" may make that type of evidence admissible

FRE 404(b). Crimes, Wrongs, Other Acts

1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
2) Permitted Uses; Notice in a Criminal Case. This evidence may be admissible for another purpose , such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case , the prosecutor must:
a) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and
b) do so before trial--or during trial if the court, for good cause, excuses lack of pretrial notice.

- General rule is to exclude evidence of crime, wrong, or other act for proving character
  - But- if offered for different purpose → may be ok
    - Depends on how probative it is towards other purpose & how prejudicial that is
- Applies towards ALL acts, good and bad
  - D can use it as well
- Non-exhaustive list but pretty much what is used
- Doesn't necessarily have to be one of the party's actions to come in here
  - I.E. – A slept with B back in the day. B later marries C, and C kills A. In C's murder trial, prosecutor can introduce evidence of B and A sleeping together
- NOT necessarily dealing with arrests/convictions, this covers other crimes/wrongs/acts that are not part of the case at hand

- BUT- act can even be one that took place after the event being tried
- Wrongful act doesn't even have to have been charged
    - Disposition of previous act really just goes towards probative value
    - Previous act can still be conviction, just offering for different reason than impeachment (609)

- "Status" can constitute an act
    - I.E. – drug addiction, gang membership
- If Criminal case → prosecutor must give notice
- M.O. is "signature" going towards identity
    - Requires a showing that the crime or its perpetrator and the other crime share distinctive characteristics that evinces a signature quality
        - Still only applies when identity is in issue
- Intent is often a big one that gets these cases in
    - Often overlaps with knowledge or lack of mistake
        - I.E. – "oh i didn't mean to push my wife down the staircase", but your previous wife also died from getting pushed down the staircase → it's coming in
- Motive is big too → often probative of accused's guilt, obviously doesn't have to be an element
    - I.E. – *U.S. v. Moon*: D charged with firearm possession Court admitted evidence of his previous drug dealing to prove his motive to possess the gun found in his room
- *LaCompte* Rd. 1 , D on trial for molestation, pros. failed to get evidence under 414 so tries under this rule (notice req. Is just "reasonable time" for this rule, 414 is 15 days). Previous victim testified that D molested her and had played "hide and seek" to do it, P offers as "common plan"
    - Court: no, evidence only goes towards deviant sexual behavior, not relevant towards plan/purpose/M.O
        - Not plan b/c was way beforehand and not relevant towards this case
    - Identity was not at issue, undisputed that D was only adult present at the time
- *LaCompte* Rd. 2 , prosecutor gives notice in better time frame to get in through 414 → appellate court reverses 403 exclusion
    - Shows courts should rarely exclude such evidence based on congress' intent to lock these fuckers up
- *Huddleston v. US*, standard of whether acts actually happened: judge only has to find that the jury could reasonably conclude by a preponderance of the evidence that the defendant committed or is responsible for the other crime, wrong, or act
    - I.E. – if D was convicted of previous crime → pretty conclusive
    - But even if acquitted → does not bar its admission
        - Innocent until proven guilty?

- *US v. Mound*, the statute is constitutional
    - For probative value: look to how specific the acts are, similarities, timing, reliability, etc.

Analytical Framework

1. Is the evidence offered for a proper non-character purpose?
2. Is the evidence relevant when offered for that purpose?
3. Has the proponent offered evidence sufficient to support a finding by a rational juror that defendant committed the 404(b) act?
4. Does the danger of unfair prejudice substantially outweigh the probative value of the evidence when offered for that purpose?
5. Can the jury understand and apply an instruction to limit their use of the evidence to that purpose?

FRE 406. Habit; Routine Practices. Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.

- "Habit" definition: "specific, repeated responses to a particular situation or stimulus."
    - Much more specific than character evidence
    - Standard is "always" or "almost always",
    - Situation/stimulus must be SPECIFIC
        - I.E. – i eat during evenings → not specific
            - I have Taco Tuesday at 7 every week → habit
- Allowed regardless of corroboration
    - Able to prove in any way - specific instances, reputation, or opinion
- Typically, morally neutral → lesser chance it's unfairly prejudicial as compared to propensity evidence
    - Higher probative value typically admitted.
    - Admissible to prove conforming conduct
- Unique admissibility reasons
- Habit examples
    - Driver's habit of wearing a seat belt
    - Mechanic's habit of drinking on the job
    - Dude's habit of invariably acting with extreme violence to an contact with police officers
- Routine practice examples
    - Insurance company's agents routinely waived written policy conditions
    - Military base's practice of using base facilities to make authorized retirement gifts
    - BUT NOT - general business customs or industry standards

A few weeks after undergoing dental surgery, Katie Meyer learned she had suffered nerve damage in her tongue and gums. She sued the dental clinic, claiming the dentist who performed the surgery failed to warn her that the procedure could result in nerve damage. The dental surgeon, Kent Askins, could not remember the exact conversation he had with Meyer, but he testified that his standard procedure with any patient undergoing surgery was to advise the patient of all risks associated with the surgery entailed.

- This is fine- can even introduce evidence of one's own habit without corroboration
    - Credibility is for jury to decide

Examining Witnesses: Attacking & Supporting Credibility

Witness Specific Rules

FRE 615 – Separation of Witnesses
FRE 611 – Mode & Order of Examining Witnesses
FRE 607 – Who May Impeach a Witness
FRE 608 – Impeaching a Witness's Character for Truthfulness
FRE 609 – Impeachment by Prior Conviction
FRE 801(d)(1) – Prior Consistent & Inconsistent Statements
FRE 613 – Witness's Prior Statement

Three ways to impeach witness character for truthfulness

1. 608(a) Reputation & Opinion
2. 608(b) Specific Instances of Conduct
3. 609 Criminal Convictions

Recap: 404(a)(3) Character Evidence: Exceptions for a Witness. Evidence of a witness's character may be admitted under Rules 607, 608, and 609

FRE 608(a) Reputation & Opinion as to Character for Truthfulness/Untruthfulness of Witness: (a) Reputation or Opinion Evidence. A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

- After character for truthfulness has been attacked, can support witness truthfulness through propensity evidence through opinion or reputation evidence
    - Can only support witness truthfulness when that trait has been attacked (must be specific attack on truthfulness)

        - I.E. – if witness's perception was attacked → not rebutting w/ evidence of truthfulness, that is different than character for truthfulness
- Identical to 404
    - (can only use opinion/reputation for this pertinent trait) but has to be attacked before supporting!
        - Can only do specific instance on cross (next section)
- Supporting witness' truthful character? = only if that truthful character has been attacked
    - Vigorous cross is insufficient
    - Narrow interpretation.
    - Bias does not implicate – Perception does not implicate – Prejudice does not implicate
- If criminal D is a witness? Rule still applies same as any other W.
    - Limiting instruction under FRE 105
- Can call one witness ("character witness") to impeach character of a prior witness ("fact witness")
    - Ex: John ("fact witness") is the first witness to testify for the prosecution in an assault trial. John claims to have witnessed the assault. After the prosecution rests its case, Defendant calls Tom ("character witness") who used to be John's best friend. Tom testifies that John is known in the community as a liar.
- "Opinion" standard is personal knowledge
    - Can be just from a few circumstances where you've dealt with the person (but remember those specific instances aren't what come to evidence under this part of rule -- just the opinion itself) State v. Hernandez
        - Specific instances in which that opinion is based on may be inquired into on cross examination under 608(b) →

FRE 608(b) Specific Instances of Conduct. Except for a criminal conviction under Rule 609 , extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination , allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:

1. the witness; or
2. another witness whose character the witness being cross-examined has testified about.

"By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness." (I.E. – can still say "i plead da fif")

- Any witness may be cross-examined about specific instances that are probative of truthfulness or untruthfulness

- (b)(2) Character witness may be cross-examined with specific instances committed by the fact witness.
    - Testing the basis of character witness's testimony
        - How well does character witness know the fact witness?
        - How credible is the opinion/reputation?
            - Can't use specific instances to support a witness's opinion/claimed rep. but can use them to deconstruct it

- Extrinsic evidence = Evidence other than testimony of the witness being crossed
    - You can ask the questions on cross, but you can't bring in other witnesses or documents on that issue
        - I.E. – If you say to the witness on CX "is it true that you were arrested for fraud 5 years ago, and the witness denies it, even if you have the criminal records on-hand that show witness is lying you can't admit them. Aka, you can't "prove up the impeachment" (subject to Rule 609)
- Specific Instances of Untruthfulness
    - No specific instances on direct to support opinion/reputation.
    - Specific instances of untruthfulness allowed on cross examination of any witness – fact or character (even if it is the defendant who took the stand like a dumbass) –to discredit .
        - Limited scope; acts that involve trait of dishonesty.
        - Fraud, forgery, false statements, perjury, theft by deception, material omissions from official documents.
- But not- shoplifting, speeding, etc.
    - Subject to FRE 403, court "may" allow
    - Good faith requirement that specific act actually happened
    - Criminal convictions → go to Rule 609
    - No "extrinsic" evidence of specific instances of dishonest acts may actually be admitted, but may be inquired into.
- (possible exam trick) if evidence going towards element of claim for a party who was also a witness → this rule isn't necessary to get it in because it is part of the substantive law (405(b))

(Recap) 608 starts w/ "except for criminal conviction under 609" →
See chart for how to go about this rule

FRE 609. Impeachment by Evidence of a Criminal Conviction

A. In General. The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

a. For a felony, the evidence:

i. must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant ; and
ii. must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and

b. For any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving – or the witness admitting – a dishonest act or false statement.

i. (crimen falsi crimes: counterfeiting, fraud, perjury, etc.)
1. But not shoplifting, simple theft, robbery, etc.
a. Looking for DECEPTION in elements

ii. Even if the crime committed involved dishonest acts → this part of the rule doesn't apply unless the actual ELEMENTS involved proving dishonesty

iii. Punishment doesn't matter here!!!!
1. 403 doesn't apply here either

- Applies to ALL witnesses who testify.
  - But still only applies when conviction is offered to prove character for truthfulness
  - No restriction to method of proof
- Applies to criminal & civil cases.
- Punishment that actually gets imposed doesn't matter
- For past felony (that isn't crimen falsi): probative v. prejudicial value analysis varies based on whether witness is criminal defendant or not.
  - If criminal defendant → must be more probative than prejudicial
    - (not quite flip of 403, no "substantial" requirement)
  - If civil case or not criminal defendant → subject to regular 403
- Probative value is based on how it sheds light on credibility, for bringing in conviction of criminal D witness? Look to:
  - Impeachment value of the prior crime.
    - I.E. – more the previous crime is related to veracity → more probative
  - Timing of the prior conviction and subsequent criminality.
    - Closer together → more probative of untruthfulness
  - Similarity between the prior crime and the charged one. (similarity goes towards prejudicial effect badly)
  - Importance of the defendant's testimony.
  - Centrality of credibility
    - I.E. – need for full exploration of credibility is greatest when the case boils down to a he said she said contest
- Keep in mind how this rule may not be necessarily be implicated when introducing prior conviction

○ I.E. – rebutting factual assertion made by witness who said "I've never dealt drugs" → statement can be impeached through prior conviction and this rule isn't even considered (go to 803(22))

(B) Limit on Using Evidence After 10 Years. If more than 10 years have passed since the witness's conviction OR release from confinement for it, whichever is later. Evidence of the conviction is admissible only if:

1. its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and
2. the proponent gives an adversary party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

- Rarely gets in, flip of 403
  - **Remember written notice requirement**!!!!!!
- Timeline is based on whichever one is closer
  - I.E. – convicted 30 years ago but let out of jail 9 years ago? → this rule doesn't even restrict it
  - Based on actual time served, not potential

(C) Effect of a Pardon, Annulment, or Certificate of Rehabilitation. Evidence of a conviction is not admissible if:

1. the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding that the person has been rehabilitated, and the person has not been convicted of a later crime punishable by death or by imprisonment for more than one year (felony); or
2. The conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

- If person was pardoned based on finding of rehabilitation → they lose this protection if they get convicted of another felony afterwards
  - But if they were pardoned based on innocence → it's not getting in
    - I.E. – Barack Obama pardons a terrorist because he thinks he's a changed man, terrorist goes and blows up the world trade center → previous terrorist act can come in
    - But- Trump pardons Mike because he knows he was innocent. Mike gets wrongfully arrested again → Mike's previous crime isn't coming in

(D) Juvenile Adjudications. Evidence of a juvenile adjudication is admissible under this rule only if;

1. it is offered in a criminal case;
2. the adjudication was of a witness other than the defendant;

3. an adult's conviction for that offense would be admissible to attack the adult's credibility (crimen falsi); and
4. admitting the evidence is necessary to fairly determine guilt or innocence.
● Not limited to showing witness's character for truthfulness → I.E. – can be used to show bias

Preserving right to appeal under Rule 609, In order to raise and preserve for review the claim of improper impeachment with prior conviction, a defendant must testify
● *In limine* ruling where D tried to excuse the admission was not enough, too speculative

NC Rule 609
● (a) For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a felony, or of a Class A1, Class 1, or Class 2 (more than 30 days) misdemeanor, shall be admitted if elicited from the witness or established by public record during cross-examination or thereafter.
○ (not limited to felonies), majority of crimes are admissible
■ Even just disorderly conduct
● stale (10 y/o) convictions must pass reverse 403 balancing test & prior written notice of intent to use

Other Witness Specific Rules

FRE 615. Excluding Witnesses *"Invoking THE RULE"* At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:
A. a party who is a natural person;
B. an officer or employee of a party that is not a natural person , after being designated as the party's representative by its attorney;
C. a person whose presence a party shows to be essential to presenting the party's claim or defense; or
D. a person authorized by statute to be present.
a. I.E. – may be a statutory right for criminal victim

● Lawyer's choice whether or not to invoke (court has no discretion, but can also do it *sua sponte*)
○ Designed to make sure witnesses don't collaborate
● Applies to trial, depositions, hearings, etc.
● Exceptions to sequestration:
○ Natural person parties.
○ Designated officer/employee of a non-natural person party.

- "person whose presence is essential to presenting claim/defense"
  - I.E. – experts
- Statutory authorized persons.

FRE 611. Mode and Order of Examining Witnesses and Presenting Evidence

(a) Control by the Court; Purposes. The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:

1. make those procedures effective for determining the truth;
2. avoid wasting time; and
3. protect witnesses from harassment or undue embarrassment.

(b) Scope of Cross-Examination. Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility.

The court may allow inquiry into additional matters as if on direct examination.

(c) Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. Ordinarily, the court should allow leading questions:

1. on cross-examination; and
2. when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party

A. Order of witnesses is really just tradition, not mandated
   a. Court can change order if good reason but usually requires a compelling reason

B. Scope of cross-exam is limited to what was brought out during direct exam
   a. BUT scope ALWAYS allows cross examiner to inquire into issues of credibility too
   b. Court may allow inquiry into additional matters as if on direct examination
      i. I.E. – if opposing counsel objects to "outside the scope" you can be like "judge, my guy, if you don't let me go on with this I'm just going to call this man back to the stand next week. It would save time if we went forward with this" → good shot he'll let ya go ahead (basis of NC practice)
   c. NC: no scope limitation, just must be relevant

C. Leading questions are questions that suggest an answer
   a. "Yes or no" type questions is often a bad sign
   b. Fine on cross and with hostile/adverse witness

FRE 610. Religious Beliefs or Opinions. Evidence of a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility.

- Limited to evidence regarding credibility, does not exclude all evidence of religious belief offered for impeachment

○ Inadmissible only when offered to show that a witness's character for truthfulness or untruthfulness is influenced by the nature of that belief

■ Admissible for other purpose, even when it affects credibility in some way

● I.E. – religious belief offered to show the bias of a witness, MO, basis for a claim or defense

- Extends to unconventional beliefs
  - ○ Difficult when having to distinguish b/t religious beliefs and political/philosophical beliefs

FRE 607. Who Can Impeach a Witness. Any party, including the party that called the witness, may attack the witness's credibility

- Can call witness with the sole purpose of impeaching them
  - ○ BUT, *United States v. Hogan*, prosecution may not call a witness it knows to be hostile for the primary purpose of eliciting otherwise inadmissible impeachment testimony, for such a scheme serves as a subterfuge to avoid the hearsay rule

Methods of Impeachment listed in FRE 607

1. Untruthful character
   a. (Rules 608 and 609 previously stated)
2. Prior Inconsistent statements
   a. (Rule 613)
3. Defects of Capacity
   a. Witness's capacity to perceive, recall, or relate may be shown to be impaired
      i. I.E. – mental illness that evinces an "impairment" of ability to comprehend, know, and correctly tell the truth; alcohol or drug use; bad eyesight, memory, hearing
   b. Extrinsic evidence generally allowed
4. Contradiction
   a. Substance of witness's testimony may be contradicted
5. Bias
   a. Witness may be shown to be biased or interested
      i. I.E. – have some reason to slant or fabricate his testimony
   b. Extrinsic evidence is typically admissible to prove bias

- No federal rule
- Bias: State of mind that may cause a witness to favor or disfavor a party
  - ■ I.E. – friends/family, financial relationship, employment, shared beliefs or background, payment of money
  - ○ Accused may have constitutional right to attack a Witness for bias (confrontation clause)
  - ○ Since no federal rule → standards of 403 and 611 typically apply

- *U.S. v. Abel*

Impeachment by Contradiction

- No federal rule
- Statement Inconsistency can have impeachment value OR truth value
  - If offering for truth → must meet 801(d)1(A) (declarant witness inconsistent)
    - Can bring in to rebut or rehabilitate
  - If just offering for impeachment value → no oath requirement
    - Can even be hearsay statement (b/c not offering for truth)
- Extrinsic evidence that contradicts is admissible if goes towards credibility more than just for the sake of contradicting
  - But for collateral matters (just contradicting to contradict) → can't bring in
    - If it contradicts & relevant to the merits: Admissible
    - If it contradicts & relevant to another form of impeachment (bias, perception, etc.): Admissible
    - Merely contradicts: Inadmissible
- Analysis for prior inconsistent statements
  - 1) Witness must testify to a fact (or omit a fact) under oath.
  - 2) The witness has made an inconsistent statement prior to trial testimony.
  - 3) The inconsistency is not merely collateral if proven by extrinsic evidence.
  - 4) THEN Admissible for impeachment value AND truth?
    - I think- this is when you need 613 & 801
  - OR Admissible for impeachment value only?
    - I think- this is when you only need 613 (unless SOPO)

FRE 613. Witness's Prior Statement

A. **Showing or Disclosing the Statement During Examination**. When examining a witness about the witness's prior statement, a party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party's attorney.

B. **Extrinsic Evidence of Prior Inconsistent Statement**. Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires.

a. This subdivision does not apply to an opposing party's statement under Rule 801(d)(2) (Admission of party opponent) (IN SUM- PARTY OPPONENTS DON'T NEED OPP TO EXPLAIN)

- (a)- no notice requirement

- But- other party may request it once you bring it up
- (b) Prior inconsistent statement by extrinsic evidence not admissible unless 1) witness has opportunity to explain or deny (available for recall); and 2) cannot be on a collateral matter (but- does not apply to statement of party opponent)
  - Evidence is non-collateral as long as it says something about the witness's credibility other than contradicting him
    - I.E. – Evidence Witness was drinking a diet coke, not dr. pepper → inadmissible (can still point out, just not bring in the extrinsic evidence)
      - But- Evidence Witness was drinking her 5th gin and tonic, not dr. pepper? → admissible
  - NC DOESN'T HAVE THIS SUBDIVISION, Extrinsic evidence of the prior statement can be admitted even though the witness was never confronted with the prior statement or provided an opportunity to explain

FRE 806. Attacking and Supporting the Declarant When a hearsay statement — or a statement described in Rule 801(d)(2)(C), (D), or (E) — has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, *regardless of when it occurred or whether the declarant had an opportunity to explain or deny it*. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

- We didn't go over this in class but it is on the syllabus
- Declarant of admissible hearsay statement is subject to same manner of impeachment as if the declarant was witness testifying at trial

BUT REMEMBER- 801(d)(1)(B) Prior Consistent Statements not hearsay if the declarant testifies and is subject to cross examination about the prior statement, and the statement…

- is consistent with the declarant's testimony and is offered:
  - (i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or
    - Can be implied, but the statement must have been from before that motive arose
      - If made after? → inapplicable
  - (ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground.
    - Timing not an issue here

        - Limited in use (I.E. – inconsistent/faulty memory)
- Thus, here it can be offered for truth
- Different standard than "character for truthfulness" being attacked which enables witness bolstering to take place after
    - This Rule is more broad

Public Policy Exclusions of Evidence

407: Subsequent Remedial Measures
408: Settlement Offers
409: Medical Expense Offers
410: Plea Negotiations
411: Liability Insurance

FRE 407: Subsequent Remedial Measures. When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measure is not admissible to prove:

- Negligence;
- Culpable conduct;
- A defect in a product or its design; or
- A need for a warning or instruction.

But the court may admit this evidence for another purpose , such as impeachment or—if disputed – proving ownership, control, or feasibility of precautionary measures.

Key Points

1. Requires a "measure"
    a. Expanding definition, key question is: had the party taken that measure before the accident at issue, the accident would have been less likely to occur
        i. I.E. – Revising harassment policy (maybe)
2. Must be "subsequent."
    a. ***Injury*** is timing here
        i. If change is made after sale but before injury → rule not implicated (it's admissible)
3. Applies equally to negligence & strict liability
4. Third party remedial measures n/a.
    a. Only protects what THIS party did
        i. Can be waived
5. Admissibility is purpose dependent:
    a. I.E. – Impeachment is fine
    b. If disputed: ownership, control, or feasibility.
        i. Feasibility- (economic, physical restraints, etc.)

Mary Ann has a rare genetic disorder that affects her daily life. Being born with too few chromosomes, Mary Ann has adjusted her living arrangements so that she can live close to her workplace. In May, Mary Ann rented an apartment two blocks from her work. She walked back and forth to her hourly job for six months with out incident. Mary Ann was walking to her apartment in the dark after her late shift. While walking up the apartment's sidewalk, she suddenly tripped over something that was not visible. Due to her condition, Mary Ann fell awkwardly. When she looked down, her heel was pointing up and her toe pointing down. She suffered a severe femur fracture. Mary Ann claims the apartment was negligent as a landowner by not providing adequate lighting and by the maintenance crew leaving a hose strung across the sidewalk. • At trial, Mary Ann seeks to offer evidence that (i) the Apartment's maintenance policy indicates that to personnel that, "All sidewalks must be kept free and clear;" and (ii) after her injury, the maintenance man at the apartment began installing much brighter light bulbs along the walkways.

Defense counsel objects to both as hearsay and subsequent remedial measures.

1) (i) the Apartment's maintenance policy indicates that to personnel that, "All sidewalks must be kept free and clear;" and
    a) Admissible → this policy existed before the injury
2) (ii) after her injury, the maintenance man at the apartment began installing much brighter light bulbs along the walkways.
    a) Inadmissible → based on these facts, rule is implicated i) But- can still inquire into how lighting was bad, just can't ask "what do you do now?"

● *Tuer v. McDonald*, Dr. said "we believed it was unsafe at the time" for practice that is in place now → that didn't put feasibility in dispute
    ○ If Dr. said "it's unsafe af" → would be in dispute, but this was true judgment call
    ○ Plus, P had tried to elicit reason to impeach (courts frown upon that)

FRE 408: Compromise Offers & Negotiations

A. Prohibited Uses. Evidence of the following is not admissible – on behalf of any party – either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:
    a. Furnishing, promising, or offering – or accepting, promising to accept, or offering to accept – a valuable consideration in compromising or attempting to compromise the claim; and
    b. Conduct or a statement made during compromise negotiations about the claim
        i. Criminal Case Exception: when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.

B. Exceptions The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or

proving an effort to obstruct a criminal investigation or prosecution.

Key Points

1. Applies to all parties, neither can even get in their own statement
2. No impeachment exception
3. Offers & acceptance broadly defined.
4. Includes both conduct and statements.
5. Applies to criminal & civil cases.
6. Must involve a "claim" that is "in dispute"
    a. "Dispute"- need a party to be denying liability or rule doesn't protect
    b. If ANY dispute → court will probably apply rule
        i. Doesn't have to be an actual mediation, just some dispute and an effort to resolve it
            1. (disputed claim BEFORE offer is made)
7. Statements/conduct must occur during "compromise negotiations"
    a. Extends to general statements made during these negotiations that aren't related to the negotiation itself
8. Applies to settlements with 3rd parties.
9. Exception I.E. –
    a. Sending letter to IRS "here's 10K, I'll get the rest in the next few months if you don't prosecute me plz" then you are later prosecuted for tax evasion → that letter is coming in you dumbass

Richard drove his pickup through a red light while texting on his phone. He struck Dan who was cycling on a brand-new Specialized Roubaix carbon frame bike. • Dan filed a lawsuit for personal and property damage. The parties held a mediation where in Richard said, "I'll give you $5,000.00 to settle the claim." • Later, during the mediation, Richard says, "Okay, the reason I hit you was because I was texting with my girlfriend. It was completely inappropriate. If I pay you $10,000.00 can we walk away?" • After settlement talks break down, the parties clear their things and head for the door. Richard says, "I'm really sorry. I should never have been texting while driving." • At trial, Dan offers all of the above. Admissible?

- Neither statement getting in probably
    - Room for argument for when they're leaving the office

Ronnie is a veterinarian who worked for the Apex Vet Clinic. When hired, he signed a contract with a no-compete clause barring him from opening a competing business w/in 30 miles of the Apex clinic. After 2 years, Ronnie left and set up an online company that allows clients to purchase pet medication over the internet. He advertises the site in the local Apex newspaper. AVC's attorney sends a cease and desist letter demanding he stop selling to local customers. Ronnie believes the business does not compete but to avoid trouble sends a letter back saying he would be willing to pay AVC $1K per year to sell to local customers. AVC responds by

suing Ronnie. At trial, AVC attempts to offer Ronnie's letter into evidence. Ronnie claims it is barred by Hearsay and rule 408. Admissible?

- Probably getting in
    - Big room for argument as to whether claim was disputed at the time
        - Good lawyer would include in offer: "we didn't do shit but will offer 1k for you to leave me alone"

FRE 409. Offer to Pay Medical and Similar Expenses. Evidence of furnishing, promising to pay, or offering to pay medical, hospital, or similar expenses resulting from an injury is not admissible to prove liability for the injury.

- Limited to if offering to prove liability
    - Thus, admissible if offering for impeachment, ownership/control, etc.
- No disputed claim requirement!
- Other statements/conduct around the offer still admissible
- No time duration → can happen wayyy after and rule still protects
- Rule applies regardless of if person making the offer is a party or was involved in the injury
- Scope limited to these types of expenses
    - I.E. – paying tow charges would not be excluded

Casey Cooper slipped and fell while walking into the restroom at Chuy's Tex-Mex restaurant. As a result of the fall, she herniated a disc in her back between the L4/L5 vertebra. She filed a lawsuit against Chuy's for negligence claiming pain, suffering, and medical expenses. At trial, she attempted to introduce two statements made by Angela Taplin, the restaurant's manager. Shortly after the fall, Taplin said: "I've told our staff not to mop the floor like this when people are in the restaurant! This is the sixth time this month that someone's been hurt." • Later, after seeing Cooper placed in an ambulance, she said "Please take care of yourself; make sure you request a private room and get the best medical care. Our company will take care of it." Defense counsel objects to both statements as inadmissible hearsay and prohibited by rules 408 and 409.

- "I've told our staff not to mop the floor like this when people are in the restaurant! This is the sixth time this month that someone's been hurt."
    - Hearsay? No, statement of party opponent
    - 408? No, not offer after disputed claim
    - 409? N/A here
- "Please take care of yourself; make sure you request a private room and get the best medical care. Our company will take care of it."
    - Hearsay? No, statement of party opponent (unless outside of scope)
    - 408? No, not offer after disputed claim
    - 409? → yes, this statement is excluded

NC 413 Medical Actions; Statements to Ameliorate or Mitigate Adverse Outcome Statements by a health care provider apologizing for an adverse outcome in medical treatment, offers to undertake corrective or remedial treatment or

actions, and gratuitous acts to assist affected persons shall not be admissible to prove negligence or culpable conduct by the health care provider in an action brought under Art. 1B of Ch. 90 of the General Statutes.

- "Gratuitous acts" is broadly defined
    - "Affected person" doesn't have to be the actual patient

Bryce Allen, a surgeon who works for Rex Hospital was driving home from the hospital. As he was driving, he was dictating patient files and failed to notice the light had changed to red. He drove through the intersection, colliding with Kim Dixon in her Cadillac Escalade. Dr. Allen jumped out of the car and said, "Oh no. I'm so sorry! I completely missed that light; I was dictating while driving. I'm so sorry." •

- Not dealing with medical treatment → admissible

Bryce Allen, a surgeon who works for Rex Hospital in Raleigh, N.C., operated on Kim Dixon's knee. Before closing the incision, Dr. Allen failed to remove two sponges from the patient. After she returned three months later with excruciating pain, Dr. Allen said, "Oh no. I'm so sorry! I completely missed removing the sponges from your knee! I'm so sorry."

- Apologizing for adverse outcome in medical treatment → inadmissible

Bryce Allen, a surgeon who works for the federal V.A. hospital, operated on Kim Dixon's knee. Before closing the incision, Dr. Allen failed to remove two sponges from her knee. After she returned three months later with excruciating pain, Dr. Allen said, "Oh no. I'm so sorry! I completely missed removing the sponges from your knee! I'm so sorry."

- (federal hospital) → admissible

FRE 410. Pleas, Plea Discussions, and Related Statements.

A. **Prohibited Uses**. In a civil or criminal case, evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions: (note- only applies if against the defendant!!!)

a. a guilty plea that was later withdrawn;

b. a nolo contendere plea;

c. a statement made during a proceeding on either of those pleas under FRCP 11 (plea hearing) or a comparable state procedure; or

d. a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later withdrawn guilty plea.

i. (need an actual prosecutor in there for this to apply!!)

B. **Exceptions**. (If subject to exception) can be admitted:

a. In any proceeding in which another statement made during the same plea or plea discussion has been introduced, if in fairness the statements ought to be considered together (comparable to Rule of Completeness); or

b. In a criminal proceeding for perjury or false statement, if the defendant made the statement under oath, on the record, and with counsel present.

- NO IMPEACHMENT EXCEPTION
- Rule does not apply to statements made during guilty/nolo plea discussions that are not withdrawn
- Rule does not apply to statements offered against a DIFFERENT defendant

Robert Kraft is accused of conspiracy to engage in human trafficking, a federal offense. The AUSA meets with Kraft and his lawyers before trial. In the discussions, Kraft acknowledges that he paid for sex acts on at least three different occasions at the Orchids of Asia Day Spa. Prosecutors offer Kraft a plea deal whereby he would admit to a lesser charge of engaging in trafficking activities but nothing less. Kraft rejects the deal. A jury later convicts Kraft on all charges. At the sentencing hearing, the AUSA seeks to offer Kraft's statement made during plea discussions about the number of acts he engaged in. Kraft's lawyers object to hearsay and inadmissible statements made during a plea negotiation.

- Sentencing hearing → rules of evidence don't apply

Jack Skaggs is a lawyer in Austin. After ten years he had still not made partner. Disgruntled, Skaggs begins turning in expense reports based on "client dinners and development" which, in fact, never occurred. Skaggs received reimbursements in the U.S. mail of over $15,000. • The firm's CPA begins scrutinizing all expense reports and suspects Skaggs of embezzlement. He contacts the FBI which confirms. • Skaggs and his lawyer meet with federal prosecutors. In the meeting they discuss an agreement whereby Skaggs will plead guilty to one but not three counts of federal mail fraud. During the meeting, Skaggs says, "Look, I filed four false reports each year; but the firm undercut my salary and didn't promote me. It's not like I didn't have a reason."

- At the Rule 11 plea hearing, prosecutors offer Skaggs' statement. Defense counsel objects as inadmissible hearsay and FRE 410. Admissible?
  - Rule 11 plea hearing → not subject to rules of evidence
- After the plea is rejected by the judge, prosecutors offer the statement at trial. Defense counsel objects as inadmissible hearsay and FRE 410.
  - Rule applies → inadmissible

FRE 411. Liability Insurance. Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, such as proving a witness's bias or prejudice or proving agency, ownership, or control.

Negligence action by plaintiff against the owner of a grocery store. P claims injuries from falling on the slippery floor of the store's produce department. To prove D

negligently permitted the store to become slippery, P wishes to offer evidence that the D was covered by a slip & fall policy of insurance. Defendant objects. How should the court rule?

- Not BER b/c not contents & not a controlling issue → Inadmissible under FRE 411?
    a. Yes

Same case. D claims the produce section is stocked and maintained by a separate company hired as an independent contractor. P offers evidence on cross examination of the store manager that D maintains a liability policy covering accidents in the produce section, including slippery floors. D objects.

- Ownership/control in dispute → admissible b/c other purpose