I. BEGINNING STUFF
   a. Purposes of evidence
   b. Purposes of rules
      i. Mistrust of juries
      ii. Substantive policies related to litigation
      iii. Substantive policies unrelated to litigation
         1. we have spousal privilege because we don’t want to pitt husband against wife
      iv. Ensure accurate fact finding
      v. Control scope and duration of trial
   c. Different meanings of “evidence”
   d. Different types of evidence
      i. Real – gun
         1. only real evidence goes to the jury room
      ii. Representative – drawing of gun
         1. demonstrative evidence doesn’t go to the jury, but they can ask for it and get
            it if the judge agrees
      iii. Testimonial – comes from witnesses
   e. Direct v. circumstantial
      i. Direct – proves a fact without requiring an inference
      ii. Circumstantial – used indirectly; requires an inference.

II. FUNCTION OF JUDGE, JURY AND ATTORNEY
   a. Judge rules on admissibility of evidence
      i. Preliminary fact questions are governed by rules 104(a) and (b)
      ii. Dying declaration: threshold questions – judge has to determine whether the
          statement meets the requirements necessary to be a dying declarations. Did she
          believe her death was imminent or not? This is a question for the judge
      iii. Judge cannot offer strategy suggestions
   b. Standard of review on appeal
   c. Jury’s role
   d. Attorney’s role
      i. Zealous representation
      ii. Disclose adverse authority
      iii. Don’t engage in conduct prejudicial to the administration of justice
   e. Offer of proof
      i. Make an objection and its overruled. Make an offer of proof – offer what you would
         have gotten out of it if not overruled. This preserves it for appeal
   f. Ohler v. United States
i. A party introducing evidence cannot complain on appeal that the evidence was erroneously admitted

g. Rule 103
   i. This rule governs how objections will be viewed on appeal

III. RELEVANCE
   a. Remember: relevant does not mean admissible
   b. Relevance is the only essential rule – if it isn’t relevant, you are screwed.
   c. Defining relevance
      i. Evidence is Relevant if it is
         1. probative of
         2. a fact of consequence to the determination of the action (401)
      ii. Three kinds of facts of consequence
         1. Direct evidence of claims and defenses
         2. Circumstantial evidence of claims and defenses
         3. evidence that bears circumstantially upon the evaluation of the probative value given to the other evidence in the case, ie credibility, demeanor, impeachment, background information
   d. Rules 401 and 402
      i. 401: relevant evidence means having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence
      ii. 401 incorporates
         1. relevance
         2. materiality
         3. probative value
   e. 401 Questions
      i. what is the issue in this case?
      ii. to what fact is this potential evidence addressed?
      iii. Is that a fact of consequence to the issue in this case?
      iv. Does this potential evidence make the fact more or less probative than without the evidence?

Chain of inferences

f. There is no such thing as inherent relevance – ITS ALL ABOUT RELATIONS – HOW ONE THING RELATES TO ANOTHER THING. If a person is holding a pen in her right hand, it may be inferred that she writes with her right hand, writes with a pen, knows how to write, or has written something.

g. Remoteness is tied to relevance

h. Evidence is immaterial if:
   i. It is evidence which helps prove a proposition buy not one at issue in the case
ii. It is evidence which is of so little help in proving a proposition at issue as to not be worth hearing. Evidence may be seemingly relevant but suffer in value so to be excludable

i. Reasonable belief – Goetz case. Based on the circumstances facing the defendant or his situation in terms encompassing more than the physical movements of the potential assailant or assailants.

j. Conditional Relevance (104(b))
   i. Delayed introduction of a fact
   ii. If subsequent evidence is not admitted, then the previous evidence will not be admitted either
   iii. When the relevance of evidence depends on the existence of a separate fact

k. Knapp v. State
   i. Δ testified in his own defense, claiming that he had reason to fear the deceased because he had clubbed a man to death
   ii. Over Δ’s objection, prosecution introduced evidence to show the deceased had actually died of old age.
   iii. Why is it relevant?
      1. goes to state of mind
      2. instills a fear in the guy

l. Rule 403 – confusion and prejudice
   i. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence
   ii. (catch all)
   iii. 6 specific instances:
      1. danger of unfair prejudice
      2. danger of confusion of the issues
      3. danger of misleading the jury
      4. considerations of undue delay
      5. waste of time
      6. needless presentation of cumulative evidence
   iv. classic 403 problems:
      1. probability evidence
         a. offered to show the unlikelihood that another person with the same characteristics as Δ committed the crime charged
      2. graphic depictions
         a. evidence that would make the jury lose its lunch
      3. reenactments
a. Rule 403 – scientific evidence – may be excluded as unfairly prejudicial if it is not “substantially similar” to what it intends to recreate.
   1. is the scientific experimental evidence sufficiently similar to the event in question so to avoid misleading the jury?
   2. can the jury judge the significance of the differences?
   3. can the difference be cured by a clear jury instruction?

vi. Curing prejudice:
   1. limiting instructions
   2. stipulation
   3. admitting liability and reducing or eliminating relevance

vii.

m. Similar Happenings (this could be used with the exam fact pattern) when will similar happenings be allowed?
   i. Aiken says you see this where one party is particularly litigious:
      1. this is a person who sues all the time. Particularly good if it’s the same type of suit – ie whiplash.
   ii. Commonly offered concerning the following:
      1. accidents, to show causation**
      2. sales of prop or services, to show value
      3. prior course of dealing
      4. prior custom or usage
   iii. Evaluating relevance of similar happenings
      1. determine relevance under rule 401
      2. evaluate under rule 403
         a. (both evaluations require a substantial similarity of operative circumstances)
   iv. Prior dealings
      1. Problem 4-10: seafood chowder
      2. Look for similar operative circumstances
         a. Same parties
         b. Same product
         c. Same pattern or practice
         d. – its likely that the seafood chowder would have had to have been shipped the same way as shrimp. Parties would have contracted for the same treatment.
   v. Lack of similar occurrences
      1. problem 4-11
      2. look to see if there have been no other accidents or just no other complaints
3. look to see if probative value is inflated: lack of prior accidents does not resolve the issue of whether the ride was safe.

n. People v. Collins
   i. Probability evidence not allowed in robbery prosecution to say that the black guy did it.

o. Old Chief
   i. Rule: a court abuses its discretion if it spurns a defense offer to concede fact (but not details) of prior judgment, and admits the full record of the prior judgment, when the name or nature of the prior offense raises the risk of a verdict tainted by improper considerations, and when the purpose of the evidence is solely to prove the element of prior conviction.
   ii. Why? Unfair prejudice, assface.

IV. CHARACTER EVIDENCE (FRED 404-406)
   a. this is a public policy bar – prior records already disadvantage people
      i. this is already a feature of the criminal justice system
   b. Three forms of character evidence:
      i. Reputation – most probative, but also greatest influence on jury, therefore disfavored
      ii. Opinion
      iii. Specific acts
   iv. (Reputation and opinion evidence are the preferred forms)
   v. if it is permitted, only evidence in the form of reputation or opinion is allowed; specific acts are not allowed because of their potential for unfair prejudice
   vi. Great illustration of this on pg 68 – judge returning wallet and $ to owner is not admissible, but testimony from attorney general as to his honesty is admissible
   vii. (at common law, could only testify to reputation)
   c. Mystery of character evidence depends on three things:
      i. Is evidence being offered to show character or for non-character purposes?
      ii. If it is offered to show character, then for what specific purpose? Ie, propensity?, credibility for truthfulness?
      iii. Is the form of the character evidence proper? (reputation, opinion or specific acts?)
   d. Character vs. credibility evidence:
      i. Credibility evidence is a special kind of character evidence. Goes to show witness’s character for truthfulness.
      ii. Governed by a different set of rules → FRED 607-609
   e. The propensity bar:
      i. Why exclude propensity evidence?
         1. not always an accurate representation
         2. people and their characters can change over time
3. Character evidence requires looking backward or forward from the event in question and likely distracts the trier of fact from the event at issue. Such distractions are misleading and a waste of time.

f. Character evidence: any evidence having a tendency to show a person’s trait or disposition. Includes truthfulness, carefulness and peacefulness and many other general personality descriptions. “character is a generalized description of one’s disposition or of one’s disposition in respect to a general trait, such as honesty, temperance, or peacefulness.” McCormick, Evidence

g. Rule 404(a)
   i. Evidence of a person’s character or trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion (propensity)

h. 404(a)(2)
   i. character of the victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by prosecution in a homicide case to rebut evidence that the victim was the first aggressor.

i. What is propensity?
   i. Previous conduct,
   ii. To prove character for that kind of conduct
   iii. To prove conduct on this occasion.

j. Exceptions to the propensity bar:
   i. (to benefit criminal defendant) The character evidence offered by a criminal defendant (and then rebutted by the prosecution). It is allowed in criminal cases because the stakes are so high. Crim defendant can show evidence of his character, but only for reputation and opinion evidence.
      1. once the door is opened by the defendant, the door is opened and the prosecution can get its own witnesses to testify.
   ii. (to impeach) The character for truthfulness of a witness. Use of character evidence to impeach the credibility of a witness. Can be used in a civil or criminal case

k. What violates the propensity rule?
   i. When assessing whether Rule 404 will operate as a bar, ask yourself:
      1. is the sole relevance of this evidence based on the idea that “he did it before, therefore he was more likely to have done it again?”
      2. if so, then look for exceptions that would allow the evidence. If no exceptions, it is barred.

l. Methods of Proving character: (FRED 405)
   i. Cross examination of character witnesses:
      1. rule 405 allows inquiry into relevant specific acts of conduct on cross-examination
2. the purpose of such inquiry is to test the basis for the opinion or reputation testimony.

   ii. Rule 405(a) – when character is admissible, can be shown by reputation or opinion testimony on direct. On cross, inquiry into specific instances of conduct is allowed.

   iii. Rule 405(b) – when character is an essential element of the charge, claim or defense, can use specific instances of conduct

   iv. Cross

m. Character in issue (FRED 405 (b))

   i. Character “in issue” occurs when an element of a claim, cause of action or defense calls for proof of a person’s character trait or disposition

   ii. Because propensity is a legitimate part of the case, it is not barred by Rule 404

   iii. Proof can be made by reputation, opinion or specific acts evidence

   iv. Examples of character in issue:

     1. defamation
     2. entrapment
     3. negligent entrustment
     4. negligent hiring****
     5. seduction

   v. good example of character in issue pg 72

n. Other Acts Evidence (FRED 404(b)) ** this is good stuff

   i. Use requires notice

   ii. Sometimes other acts are admissible for a limited purpose, other than to show propensity. (Aiken says this is a big deal)

     1. Critical questions when assessing admissibility of other crimes or acts evidence

        a. is the issue for which the evidence is offered in dispute?
        b. does the chain of reasoning focus the trier of fact on some purpose other than the defendant’s general criminal propensities?

     2. motive

        a. existence of another crime provides a motive for the crime charged. Ex: homicide victim is a witness to the Δ’s former crimes

     3. intent

        a. to show that an act was not done innocently
        b. ex: person claims he poisoned a person by mistake. Prosecution may offer evidence that this it the third “accidental” poisoning

     4. identity

     5. absence of mistake

     6. knowledge

        a. some crimes require the prosecution prove knowledge
        b. ex: in a prosecution for passing a counterfeit bill, evidence of prior counterfeiting convictions may be admissible to show knowledge.
7. opportunity
   a. using uncharged misconduct to show that the defendant had an opportunity to commit the crime
   b. ex: evidence that the defendant had previously stolen a key to the premises that were later burglarized admissible in trial for the burglary
8. preparation
   a. often used to show identity or intent
   b. ex: to show identity: the prosecution may show that the defendant stole a car to use as a getaway car for the charged crime
   c. ex: to prove intent: the defendant broke into a gun store and stole guns prior to the killing for which she claims no premeditation
9. common scheme or plan
10. entrapment:
   a. put on character evid to show the person was not otherwise inclined to commit an act

iii. Problem 5-22 Psychobubbles:
   1. two of the guys’s previous wives have died in the Jacuzzi
   2. this is the doctrine of chances: what are the odds that his first two wives died accidently and that this one did too? ASK ABOUT THIS – sounds like statistics.

iv. Other purposes: Res gestae
   1. the use of other crimes that occurred simultaneously to give the jury a full picture
   2. Example: murder committed during the course of a robbery

o. Sexual character evidence: 413-414-415
   i. Rules 413, 414, 415 allow evidence of similar crimes of sexual assault or child molestation to be used for any purpose in civil and criminal cases involving sexual assault or child molestation.
   ii. Rules:
       1. 404
       2. 412
       3. 413 – 415
   iii. Smith v. Owen industrial
       1. Smith worked for restaurant owned by Owen Ind. Harris was her manager.
       2. Smith says Harris assaulted her at work. Harris says it was a relationship gone bad. He alleges all approaches have been welcome.
   iv. Rule 412: presumptively inadmissible evidence
       1. 412(a) creates a general rule against admission of evidence offered to prove
          a. the alleged victim engaged in other sexual behavior
          b. the alleged victim’s sexual predisposition
2. rule 412 applies in any civil or criminal proceeding involving alleged sexual misconduct
3. it protects *any* alleged victim

### Habit

i. Rule 406

ii. Evidence of a habit of a person or the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice

iii. **Distinguishing habit from character evidence**

1. does the evidence indicate that the behavior occurs with frequency and regularity?

   a. **and**

2. does the evidence offer specificity about the behavior occurrence?

### Summary of Character evidence:

i. Propensity evidence is the circumstantial use of character evidence to prove conduct on a particular occasion

ii. Credibility evidence is a special type of character evidence dealing with the propensity of a witness to be truthful.

### Summary of other acts evidence

i. Propensity evidence is evidence of other instances of the same behavior offered to show that the party has the propensity to behave in that fashion

ii. Evidence of other acts may be offered for other purposes than propensity, e.g. to show that the behavior was not an innocent mistake, or that the person would have a motive to commit the charged offense.

### Summary: Character in issue

i. Character is in issue when it is an element of a claim, cause of action or defense. This is only in limited situation, e.g. seduction actions, subjective entrapment issues, negligent hiring or entrustment cases, or defamation actions

### People v. Zackowitz

### Michelson v. US

### Rex v. Smith

### Dowling v. US

### Huddleston v. US

i. Must put on evidence sufficient to support a finding

### US v. Beechum

i. Mail carrier had stolen a silver $ in the mail. Judge allowed prosecution to introduce evidence that the carrier had stolen credit cards in the mail, to rebut the carrier’s claim that he was going to return them. Appellate court said that the similarity between the object offense (theft of silver $) and the other acts (theft of cred cards) was sufficient to overcome an objection claiming unfair prejudice under 403.
z. Jones v. Southern Pacific RR
   i.

aa. People v. Chambers

V. OTHER EXCLUSIONS OF RELEVANT EVIDENCE
a. FRED 407 – 415
b. There are other reasons to exclude relevant evidence
   i. Likely to mislead the jury if offered to show culpability or guilt
   ii. Its exclusion promotes various public policies

c. Subsequent Remedial Measures – FRED 407
   i. Cannot be offered to prove
      1. negligence
      2. culpable conduct
      3. defect in a product
      4. design defect
      5. need for warning or instruction
   ii. **Problem 6.1 – the firing of a responsible EE won’t be admissible – its remedial**
   iii. Post accident study is generally not considered to be a subsequent remedial measure
      1. Why? Post-accident study is more about finding out what happened than fixing the problem.
      2. if it is closely connected with remedial measures then it probably won’t be allowed.
      3. if the business does it anyway, as part of their business policy, then they aren’t likely to stop investigating anyway, so the study would probably be admitted.

d. Liability insurance – FRED 411
   i. FRED excludes any mention of the existence of liability insurance, or the lack thereof, to show culpability or wrongful behavior.
   ii. Like other relevant but inadmissible evidence, however, the existence of liability insurance may be offered for other purposes, such as showing bias

e. Offers to compromise or pay medical expenses, and pleas of guilty or nolo contendere – FRED 408 – 410
   i. From the advisory opinion: “the evidence is irrelevant, since the offer may be motivated by a desire for peach rather than from any concession of weakness of position”
   ii. Covers furnishing, offering, or accepting or promising to accept valuable consideration
   iii. To settle a claim which was disputed as to validity or amount
   iv. Is not admissible
v. This includes statements made in settlement negotiations

vi. Problem 6-7 ($350 + Harry Connick ticket to settle a $500 debt). No! has to be a dispute, either as to validity or amount, for the rule to apply. This doesn’t apply to rule 409—there doesn’t have to be a dispute to make inadmissible offers to pay medical expenses.

vii. Some compromise evidence is admissible

1. evidence otherwise discoverable
2. evidence offered for another purpose:
   a. proving bias or prejudice of a witness
   b. negating a contention of undue delay
   c. proving an effort to obstruct a criminal investigation or prosecution

viii. What if the party gets on the stand and says something inconsistent with what he said during settlement negotiations?

1. use as prior inconsistent statement to impeach
2. (most courts don’t allow compromise evidence to be used to impeach)

ix. Rule on plea bargaining:

1. a lot like compromise
2. if a plea bargain falls through, it won’t be admissible

f. Rape Cases – FRED 412

i. 1978 – meant for criminal cases
   1. rape shield
   2. identity and consent

ii. changed in 1995
   1. no prior sexual acts or predisposition

iii. offerer has burden of proof –
   1. the rule is meant to get rid of bias

iv. Party who wants this evidence in has to make a motion ahead of time and there has to be notice and there has to be an in-camera hearing.

v. There are exceptions under 412(b)(2)
   1. prior sexual history is allowed if its used to show that someone else was the source of seamen, injury or other physical evidence
   2. evidence with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution
   3. evidence the exclusion of which would violate the constitutional rights of the defendant.

vi. Rule 415

1. does it allow plaintiff to bring in a witness to testify as to other sexual assaults.
   a. Yes – see rule 415
2. Objections to this?
   a. Rule 403 – prejudice, confusion, etc.
vii. Hurtleston – evidence sufficient to support a finding.
g. **Prior acts by sexual battery defendants** – FRED 413 – 415

VI. **THE EXAMINATION AND IMPEACHMENT OF WITNESSES**
a. FRED 607 – 615
b. Basic stuff about examining witnesses
   i. First direct, then cross – the obvious stuff
   ii. Can’t do these:
       1. ask leading questions,
       2. assume facts not in evidence,
       3. asked and answered questions,
       4. ask compound questions
       5. ask argumentative questions
       6. ask questions calling for speculation
       7. non-responsive answers
       8. ask a question calling for a narrative answer
   iii. cross examination
       1. can ask leading question
c. **Impeachment of witnesses** (attack the credibility of a witness)
   i. Fred 607 – who may impeach
       1. Any party may attack the credibility of a witness, including the party calling
          the witness
       2. Five methods of impeachment are mentioned in the author’s comments
          a. untruthful character
          b. bias
          c. prior inconsistent statements
          d. defects of capacity
          e. contradiction
   ii. *Intrinsic* impeachment – from the witness’ own mouth
       1. depends on answers given by the witness being impeached. It is
          impeachment from “the witness’ own mouth”
       2. often elicited through leading questions
       3. methods of impeachment
          a. **contradiction**
             i. when the examining attorney disputes the witness’ testimony
                about a fact.
             ii. The fact disputed need not be dispositive or even important to
                 the outcome
          b. bias
i. witness is shown to be influenced, corrupted, prejudiced, or predisposed towards or against a party

c. criminal convictions

i. overview: 609 permits

1. prior felonies to be used to impeach witnesses, subject to 403
2. prior felonies to be used to impeach the accused if probative value outweighs the prejudice
3. crimes involving dishonesty or false statements can be used to impeach anyone, regardless of punishment

ii. The theory here is that a witness who has been convicted of certain types of crime is less believable.

iii. Under 609, two types of crime bear on a witness’ credibility and can be used to impeach:

1. Crimen falsi: crimes of dishonesty or false statements (deception, fraud – 9th Circuit has held a narrow definition). Senate judiciary report: “crimes such as perjury, …false statement, criminal fraud, embezzlement…”
2. felonies, those crimes punishable by more than one year in prison – **these are not automatically allowed** can raise a 403 objection– have to apply the unfair prejudice test of Rule 403 – (one factor is the similarity between the impeachment felony and the crime charged – the greater the similarity, the greater the likelyhook that the impeaching conviction will be misused by jurors as propensity evidence)
3. other crimes, like misdemeanors, are not allowed to be used to impeach.
4. also excluded are juvenile adjudications and “stale” convictions – can’t use an 11 year old felony conviction
5. basically: if convicted of a felony, can impeach. If it’s the accused, you NEED TO apply the balancing test
6. Rule 403 doesn’t apply to crimen falsi crimes. Can’t use 403 to object to crimen falsi
7. Problem 7-11 – Medical mal
   a. Have to use 609(a)(2) because this was a misdemeanor conviction

iv. Assessing prejudice:

1. if the crime is probative of truthfulness or honesty
2. nearness or remoteness in times to former conviction
3. whether the crime is the same or substantially similar to present charge
4. the effect on the defendant’s willingness to testify
d. **Prior bad acts** – FRED 608(b)
   i. Permits (with some limitations)
      1. reputation or opinion evidence about character for truthfulness
      2. specific acts that are probative of truthfulness when inquired about on cross exam
   ii. The rule generally bars evidence of specific instances of conduct of a witness for the purpose of attacking or supporting his credibility.
   iii. But two exceptions
      1. specific instances are provable when they have been the subject of criminal conviction
      2. specific instances may be inquired into on cross-examination of the principal witnesses or of a witness giving an opinion of his character for truthfulness.
   iv. Impeachment by prior acts under FRED 608(b) is limited to specific prior acts of the witness that reflect on the witness' capacity for truthfulness or veracity. Limited to acts that involve fraud or deception.
   v. **608 is for credibility.** Under 608, The witness may only be asked about the underlying bad act by itself, and not about an arrest, charge, indictment, suspension, or expulsion relating to the bad act.
      1. **This is okay:** “you defrauded the company, didn’t you”
      2. **This is not:** “you were arrested for defrauding the company, weren’t you”
   vi. Here is the kicker: permissible prior act impeachment may not be proven by extrinsic evidence under FRED. If the witness denies the act, the questioner must take the witness’ answer without any further follow-up FRED 608(b). Otherwise, a mini-trial would occur and it would distract and mislead the jury. (May be allowed under state evidence rules)
e. **Testimonial capacities**
   i. Ability to be accurate
   ii. Incentive to lie in this case
   iii. Memory – what the witness recalls from a prior happening
   iv. Knowledge
v. Perception – what the witness heard, saw, etc.
vi. Sincerity – distinct from accuracy
vii. Attack a witness’ testimonial capacity by revealing defects in memory, perception, or narration, from common deficiencies to psychological defects. “I forgot” is minor. Amnesia or schizophrenia is major.
viii. Psychotic chips problem 7-14

f. Prior inconsistent statements – *FRED 613(a)* Aikes says this is the most important tool in civil litigation. The reason for depositions.
i. Impeachment by self contradiction
ii. Requires two statements – one during the trial, another before the trial
   1. “I forget” doesn’t count
iii. Ask myself, “how am I using the prior inconsistent statement”
iv. 613(b) – what happens if the witness says no –
v. 613(b) – witness has to have opportunity to deny or explain
vi. common law, before asking about a prior inconsistent statement, have to go through a whole process to ID the statement.

5. Refreshing the witness’ memory – FRED 612
a. Rules are pretty loose for this.

iii. Extrinsic Impeachment (not from mouth of the witness) – FRED 608, 609, 613
1. called the collateral matter or collateral issue rule
   a. If extrinsic impeachment evidence is offered, it must be either in the form of reputation or opinion or go to some additional issue beyond the witness’ general propensity for truthfulness, such as bias, fact in issue, testimonial capacities, or conviction of a crime. If not, it is inadmissible as a collateral matter.
2. permits impeachment through extrinsic evidence for only non-collateral (important) matters. If collateral issues were allowed, it would confuse the jury.
3. 608(b) Evidence of conduct of the witness
   a. specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’ credibility, other than a conviction of a crime as provided by rule 609, may not be proven by extrinsic evidence
4. What is extrinsic?
a. In the impeachment context, any evidence offered to impeach other than from the mouth of the impeached person
b. The need for extrinsic evidence generally arises when the impeached person denies the impeaching question and the impeacher would like to prove the impeachment

5. The non-collateral matters that are properly the subject of extrinsic impeachment are:
   a. Bias
   b. A fact at issue
   c. Testamonal capacities
   d. Convictions of a crime
   e. Reputation or opinion evidence about the truthfulness or varacity of another witness

6. Aikes says theses are never collateral
   a. Bias
   b. Memory
   c. Perception
   d. Sincerity
   e. Fact at issue

7. most often used after an attempt to impeach a witness intrinsically has failed. The witness has been asked a question intending to impeach, but denies the impeaching question. Counsel must either “take the answer” or proceed with extrinsic impeachment.

d. **Rehabilitating the Impeached witness**
   i. The proponent of a witness may be able to rehabilitate a witness whose credibility has been attacked. Rehab can occur either through questioning on redirect or through a separate reputation or opinion witness testifying about the discredited witness’ good character for truthfulness or varacity.

e. **Review of Impeachment:**
   i. Attack witness
   ii. Prior inconsistent statements are a form of self-contradiction
   iii. Extrinsic impeachment is limited to avoid the time consumption that litigating the issue will cause
   iv. Bias is any form of corruption, influence, prejudice, etc. that causes a witness to favor or disfavor a party
   v. Two types of crimes permitted:
      1. felonies
      2. crimes of dishonesty or false statements
   vi. balancing test for the accused – gives force to the presumption of innocence.
   vii. Prior bad acts evidence
VII. **OPINION EVIDENCE**

a. **Lay opinion** – FRED 701
   
i. Lay opinions are limited to opinions or inferences that are
   1. Rationally based on the perception of the witness
      a. and
   2. helpful to a clear understanding of the witness’ testimony or the determination of the fact at issue

ii. Problem 9-1 Slippery tiles
   1. is this opinion testimony? Yes
   2. is there a way to express th underlying facts that lead him to this conclusion without using his lay opinion?
   3. is slipperiness something that is part of a common experience?  
      a. Yes!
      b. → usually admissible
   4. same analysis

b. **Expert Testimony** – FRED 702-706
   
i. Overview:
   1. experts can offer their opinions without personal knowledge of the facts of the case. Lay witnesses must generally testify only to facts rationally based on their own perception
   2. “helpfulness” goes beyond relevance, requiring that the testimony assist the jury in resolving a fact in issue.
   3. All expert opinion must be based on reliable and valid methods and also “fit,” that is, be helpful to determining an issue in the case.
   4. as long as the testimony will assist the jury in deciding the facts, an expert can testify about ultimate fact questions. The jury cannot, however, abdicate its responsibility and allow the expert’s judgment to substitute for its own.
   5. under rule 703, the experts opinion can be based on that which is “reasonably relied on by experts in the particular field…” including inadmissible hearsay.
   6. Persuant to rule 705, experts must disclose the basis for their opinions if the court requires or questions are posed about the basis on cross examination.

ii. Rule 702 –
   1. “if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise.”

iii. Daubert and Kumho Tire
   1. is the expert proposing to testify to specialized knowledge?
   2. will the testimony assist the trier of fact to determine or understand a fact in issue?
   3. is the evidence relevant?
4. is it reliable?

iv. Daubert reliability factors:
1. is the theory or technique testable? Has it been tested?
2. Has it been subjected to peer review and publication?
3. what is the known or potential error rate?
4. do standards exist that can serve as controls on a technique’s operation and were they used in this case?
5. is the theory generally accepted in the scientific community?

v. Rule 703 –
1. the facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of the type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

vi. Rule 704 –
1. can offer expert testimony regarding the ultimate issue except:
   a. expert opinion as to whether the defendant in a criminal case did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto
   b. Aiken – Ultimate issue: is this testimony necessary for the jury or judge?
      i. If yes then does it go to the ultimate issue. Then to 704.

vii. Rule 705 –
1. The expert may testify in terms of opinion or inference and give reasons therefore without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination

viii. Problem 9-26: the law of the dominica
1. expert testimony on foreign law will likely be allowed.

ix. Problem 9-27:
1. can an expert witness testify on something which he based his opinion on something that is inadmissible hearsay?
   a. Yes then to 703 (but see note 8) an expert as hearsay conduit is not allowed!!!

x. Qualifying the expert:
1. Relevant qualities:
   a. Experience
   b. Publications
   c. Acceptance record
   d. Education
   e. Honors
VIII. **HEARSAY** – FRED 801-80...

a. what is hearsay?
   i. 801 hearsay is (1) an out of court (2) statement (3) made by a declarant and (4) offered for the truth of the matter asserted.
   ii. Out of court
       1. Out of this proceeding
   iii. Statement
       1. *oral or written assertion or non-verbal conduct intended by the declarant to be a communication to others*
   iv. by a declarant
       1. the source of out-of-court statement. Must be a human being.
   v. Offered for the truth of the matter asserted.
       1. offered to show that its factual content is true. Eg., The statement that “the sky is blue” is asserting that the sky is blue.
          a. State of mind: ex: girl acts strangely. Says she is the queen of england – “I am the queen of England” – and starts punching people. At the subsequent battery trial she claims insanity and wants her statement in as evidence. Is it inadmissible hearsay? No. The statements are not offered to show she is the queen of England, only that she was suffering from psycosis. Offered to show state of mind, not for their truth. Not hearsay.
          b. Impeachment: show what someone said before to attack their credibility.
          c. Res gestae
          d. Operative facts – legal significance
          e. Verbal acts.
   vi. Why do we care about hearsay?
       1. we want to be able to cross examine. We cant do that with hearsay.
       2. hearsay dangers
          a. perception
          b. memory
          c. sincerity
          d. ambiguity
       3. there is value to having the witness present
b. Overview of Non-hearsay:
   i. Statement not dependant on its truth – I can speak
   ii. Statement offered to show the effect on the hearer
   iii. Verbal act or legally operative statement
iv. Non-assertive conduct offered to prove a fact of consequence or an internal state – writhing in pain
v. Implied assertions non intended to communicate the fact of consequence
vi. Silence under conditions in which one would not be silent
vii.
c. In class problem: I can speak
d. **Problem 10-4: admitted**
   i. Psych Dr. admitted Jack to state psych hospital for observ.
      1. issue in case is whether jack has psych illness
      2. is it hearsay?
      3. \( \rightarrow \) statement?
         a. Was Dr. intending to tell people that Jack is crazy by admitting him to hospital? NO! \( \rightarrow \) no hearsay
   4. But – some courts say that you have to communicate that Dr. thinks he is crazy to get him into the hospital. Aikes thinks this is a stretch.
e. **Problem 10-5: by the pale moonlight**
   i. Is the wife’s testimony hearsay?
      1. No – husband’s barking at the mood and sleeping in doghouse is not meant to show that he is crazy… huh?
f. **Problem 10-7: contract clause issue**:
   i. One party dies. Other party dies. Other wants to testify. Hearsay?
      1. Are these contract words offered to prove they truth of what they assert?
      2. are they legally operative? That is, do they create legal rights and duties simply because they were said?
      3. legally operative assertions – the words become an event. The event occurs in from of a witness who is in court reporting the “event.” We can test memory, perception, sincerity, etc.
g. **Wright v. Doe Tetham**
   i. The letters did not flatly state that marsden was competent
   ii. The letters did tend to show that the writers sincerely believed that marsden was competent
   iii. The theory of relevance under which the letters were offered was since the letters treated Marsden as competent, he was more likely to be competent than without the letters
h. Non assertive conduct and implied assertions
   i. Declarant did x, therefore the decarant believed Y and Y is a fact of consequence to this litigation
   ii. **Umbrella**:
      1. issue in case is whether it was raining. Testimony offered that A put up his umbrella. Based on above, under common law rule, the evidence that A put up his umbrella wouldn’t be allowed.
2. BUT, under FRED it would be allowed because A isn’t trying to tell the world that it is raining when he puts his umbrella up – he is just trying to stay dry.

i. Problem 10-8: the scarlet letter
   i. Do the letters intend to assert that the testator is competent? No!
   ii. No problem under FRED, but will be a problem under common law.

j. Problem 10-11: cry cry cry
   i. Is the statement offered for its truty?
   ii. Would the statement be relevant even if were not true?

k. In class problem: patty hearst:
   i. She asserted duress
   ii. She said that but for the SLA’s threats she wouldn’t have robbed the bank
   iii. Is it hearsay? Looks like it
   iv. But – this depends on duress. If it didn’t matter as far ad the effect on the hearer is concerned.

v.

l. Statutory non hearsay
   i. Prior statements of witnesses – FRED 801(d)(1)
      1. prior statement by witnesses
         a. ****these are not hearsay
            i. was it a prior inconsistent statement?
            ii. Was it made under oath?
            iii. Was it subject to penalty of perjury at another proceeding or depo?
      2. Allowed provided that the witness is subject to cross at trial about the prior statements
         a. sworn prior inconsistnat statements of witnesses
         b. prior consistant statements of witnesses – prior consistent statement is hearsay unless offered under 801(d)(2)(b)
         c. prior ID by witnesses
      3. Is the statement one of prior identification made after perceiving him or her? What?
      4. Problem 10-68
         a. Karen’s testimony will not be allowed – there was no opportunity to cross examine her at the grand jury
      5. How do you determine if it’s a similar motive
         a. What is at stake in the previous proceeding?
         b. Under what condition was the previous testimony developed.
         c. Generally: if the previous proceeding was criminal and the following civil, that will suffice

ii. FRED 801(d)(1)(a):
1. was it a prior INCONSISTANT statement?
2. was it made under oath?
3. was it subject to the penalty of perjury at another proceeding or deposition?

iii. FRE 801(d)(1)(b): Improper motive
  1. is this a prior consistent statement?
  2. is it offered to rebut a charge of recent fabrication or improper motive or influence?
  3. what is the motive?
  4. when did the motive arise?
  5. does this offered statement pre-date the motive?
  6. Tome v. US
     a.

iv. admissions by a Party Opponent – FRE 801(d)(2)
  1. to constitute an admission by a party opponent, out of court statement must fulfill two requirements – the statement
     a. must have been made by or on behalf of a party opponent
     b. must be offered against that party
  2. (theory of “admissions” is that “you made the statement, now you explain it”
  3. there are five kinds of party admissions recognized by the FRE: a statement is considered a party admission in each of the following:
     a. party’s own statement 801(d)(2)(a)
     b. party authorizes another person to make statements about a subject 801(d)(2)(c)
     c. employee admissions
     d. co-conspirator admissions
  4. Statement of a party offered against that party is an admission
v. FRE 801(d)(2)(c)
  1. admissions by authorized person
  2. statement of a party or a party’s representative offered against a party
     a. is it a statement by a person authorized by the party
     b. is it offered against the party?
     c. Was the person authorized to speak on behalf of the party regarding this matter?
     d. If so, the person’s statement is attributable to the party
vi. Aikes says that admissions are one of the most powerful ways around hearsay – shweet.

vii. Judicial admissions
  1. once a party opponent makes a statement in pleading, pre-trial admissions, I-rogs and the like, it cannot be disputed at trial.
  2. such statements are characterized as binding judicial admissions
3. Lawyer represents client and is his agent/authorized to speak for him. What
the lawyer says affects client. Be careful – Aikes says this is fear of g-d stuff.
Your statement becomes a party admission

viii. Problem 10-30
1. is the statement by a party agent or EE? YES
2. Is the statement concerning a matter within the scope of the declarent’s
employment or agency? YES
3. Was the statement made during the existence of that relationship? YES
4. Can you use the fact that the driver was later fired? NO!! 407 subsequent
remedial measure

ix. Mahlandt v. WildCanid Survival and Research Ctr.
1. a

x. Co- conspirator’s statements – FRED 801(d)(2)(e)
1. what there a conspiracy? YES
2. was the statement made in furtherance? YES
3. was the statement made by a co-conspirator? YES
4. was the statement made during the course of the conspiracy? YES
5.

m. Exceptions to the hearsay rule – FRED 803(1) – (3)
i. Present sense impression – FRED 803(1)
1. is this statement describing or explaining an event?
2. is it made while the declarant was perceiving the event or immediately
thereafter?

ii. Excited utterances – FRED 803(2)
1. is it a statement that relates to a startling event or condition?
2. was the statement made while the declarant was under the stress of
excitement caused by the event or condition?

iii. By the way – under rule 104, you can use inadmissible evidence to get hearsay
evidence in under the exceptions

iv. State of mind exception – FRED 803(3)
1. statement of the declarant’s then existing state of mind, emotion, sensation,
or physical condition
2. but not including a statement offered to prove the fact remembered or
believed.
3. The Hillmon Rule – common law version of 803(3)
a. Statements of an out of court declarant’s intent can be admitted to
show state of mind and that the declarant acted in accordance with his
state of mind.
i. “I’m going to the parking lot at McDonald’s” OKAY
ii. “Angelo is going to the parking lot at McDonalds” NO
4. Aikes says that p 239 comment 8 is iffy

v. Statement for the purposes of Medical Diagnosis or Treatment – FRED 803(4)
   1. no common law 803(4) exception
   2. is the statement made for medical diagnosis or treatment?
   3. does it describe medical history, past or present symptoms, pain or sensations, or the inception or general character of the cause or external source?
   4. is such a statement pertinent to diagnosis or treatment?

vi. Recorded recollection – FRED 803(5)
   1. memo or record
   2. regarding a matter about which the witness once had knowledge but now has insufficient present memory (to testify fully and accurately)
   3. made by the witness or adopted by the witness
   4. when the witness’ memory was fresh
   5. to reflect knowledge correctly

   1. memo, report, etc.
   2. made at or near the time
   3. by a person with knowledge or transmitted by a person with knowledge
   4. kept in the regular practice of that business activity to make the memorandum
   5. shown by custodian or other qualified witness
   6. unless untrustworthy.
      a. Palmer v. Hoffman

viii. Business records that contain statements
   1. report says x-rays
   2. report itself admissible as a business record
   3. statements within the report must be examined to determine if the makers of those statements had a business duty to make such statements
   4. otherwise it is hearsay

ix. Public Records – FRED 803(8)
   1. public records setting forth
      a. (8)(a): the activities of an office or agency
      b. (8)(b): matters observed pursuant to a duty imposed by law
         i. duty to report
         ii. except in criminal matters observed by police
      c. (8)(c): factual findings resulting from an investigation
         i. made pursuant to authority granted by law
         ii. only in civil cases or against the government in criminal cases

x. State v. Daneeka
   1. speeding prosecution
   2. police report offered
3. peckem v. Daneeka
   a. civil action for damages caused by the speeding
   b. police report offered

xii. The Residual exception – FRED 807
   1. are there equivalent guarantees of trustworthyness?
   2. is the statement offered as evidence of a material fact?
   3. is the evidence more probative on the point for which it is offered than any other evidence the proponent can procure through reasonable efforts?
   4. are the general purposes of the rules and interests of justice served by admitting this evidence?
   5. had notice to the adverse party been given?

n. More hearsay exceptions – declarant unavailable – FRED 804
   i. Definition of unavailable
      1. privilege
      2. refuses to testify despite order
      3. lack of memory
      4. unable due to death or infirmity
      5. despite efforts cannot be procured for the hearing
      6. unless unavailability procured by the proponent of the statement
      7. 
   
   ii. Dying Declaration – FRED 804(b)(2)
      1. requires that
         a. declarant unavailable per 804(a)
         b. believes that death is imminent
         c. the statement concerns the cause or circumstances of impending death
         d. homicide prosecution or civil case
      2. Problem 10-72
         a. Have to show that the declarant thought death was imminent

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