Evidence
Prof. Jane Aiken
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I. Introductory Materials
A. Goal: To understand relevance, hearsay, opinions, and impeachment and their interrelationship. Types of Questions to Ask:
   1. What is the applicable rule/principle of evidence at issue?
   2. Is the Advisory Committee’s Note relevant/significant?
   3. What is the best objection? Any alternative objections?
   4. What is the proper ruling on the objection/correct outcome?

B. Reasons for the Rules of Evidence:
   1. Mistrust of Juries
   2. Substantive policies related to the litigation
   3. Substantive policies unrelated to the litigation
   4. Ensure accurate fact-finding
   5. Control the scope and duration of the trial

C. “Evidence” refers to (1) the stuff that constitutes the trial (2) the rules that govern admissibility (3) those items that have been admitted into evidence.

   - **Direct Evidence**: Evidence which, if believed, automatically resolves the issue.
   - **Circumstantial Evidence**: Evidence which, even if believed, does not resolve the issue unless additional reasoning is used.

*Although the probative value of direct evidence is not necessarily higher, it is more readily admitted by judges.*

D. Objections
   1. The Role of Objections
      (a) Forestalling errors in the immediate trial
      (b) Preserving errors for review on appeal
      (c) To gain a strategic advantage
   2. The Effect of Objections
      (a) A failure to object constitutes a *waiver* to the error.
      (b) Usually one must state a ground for the objection unless the objection is apparent from its context.
   3. General Objections
      (a) An overruled general objection will only be sufficient on review if there is no ground upon which the evidence could have been admitted ➔ do not preserve claims unless obvious.
      (b) A sustained general objection has the opposite effect, it will be upheld if excluding the evidence is right for any reason at all.

E. Offers of Proof—Make an objection and it is overruled. Make an offer of proof—what you would have said/presented had you not been overruled.
   1. Characteristics:
      (a) Allows the trial judge to hear what would have been offered if the objection had been overruled.
(b) Preserves a full record for appeal
(c) Should indicate the nature or content of the evidence, describe its purpose and why it is relevant, show that it is sufficient to prove its point and that the evidence is competent.

2. Methods for Making an Offer of proof:
   (a) Testimony—Either by taking the witness’ testimony or by the attorney describing the likely content of the witness’ testimony
   (b) Objects—Mark as an exhibit and enter as evidence that was excluded
   (c) Made out of earshot of the jury

3. On appeal: **FRE 103**
   (a) Trial judge’s ruling is entitled to deference and is subject to abuse of discretion review. Even if an error is found, it is subject to the harmless error doctrine. Reversible error occurs if the information may have changed a reasonable juror’s mind. **Plain error** occurs if the mistake is so obvious that the Court of Appeals grants a new trial/remands even if attorneys did not preserve the objection.
   (b) *Ohler v. United States*: A party introducing evidence cannot argue on appeal that the evidence was erroneously admitted.

II. Relevance

*Remember: Relevant evidence ≠ admissible.*

- **Relevance** is the essential hurdle in Evidence → **Boiled down**: If it isn’t relevant, it is not coming in.
- Relevance is a minimal threshold

A. **Definition**— **FRE 401**: Evidence is **relevant** if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without that evidence.”

1. Relevance is about relationships—need only a single link to establish relevancy → single chain of inferences. It need not be dispositive, merely increase the possibility that a material fact is so. A minimal threshold—relevancy is not weight.
2. **401 Rolls together CL objections/considerations of:**
   (a) Relevance
   (b) Materiality (dependant upon the law of the case)
   (c) Probative value (minimal threshold)

3. **Remoteness** is tied to relevance. Evidence is remote when it is so removed in time or circumstance from the proposition to be proven that it is deemed unsuitable for the case.
4. **FRE 402**: Relevant evidence generally admissible; Irrelevant evidence inadmissible.
5. **401 Questions**
   i. What is the issue in this case?
   ii. To what fact is the potential evidence addressed?
   iii. Is that a fact of consequence to the issue(s) in this case?
   iv. Does the potential evidence make the fact more or less probative than without the evidence?
B. Exclusion—**FRE 403**: Even relevant evidence may be excluded if its *probative value* is *substantially outweighed* by the danger of:
   1) Unfair prejudice
   2) Confusion of the issues
   3) Misleading the jury
   4) Considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

C. **FRE 104**: Preliminary Questions
   (a) Questions of admissibility generally.—Preliminary questions concerning the qualifications of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provision of subdivision (b).
      **Adv Committee Notes: Judge can hear any and all info regardless of admissibility. The only restriction is established privilege.**
   (b) **Relevancy conditioned on fact.**—When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.
      *Conditional relevance can be viewed as a foundational issue, one that must be shown as a prerequisite to admissibility. When the evidence is conditionally admitted, this means that the counsel promises to supply the missing fact or facts at a later time in the party’s case-in-chief. If the missing link is not provided, the evidence will be subject to exclusion by the judge. Gives attorneys flexibility in presenting their case.*
   (c) **Hearing of jury.**—Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted *when the interests of justice require*, or when an accused is a witness and so requests.
   (d) & (e)

D. Materiality—Evidence is immaterial if:
   *Not linked to the facts of consequence to the litigation.
   *Is evidence that helps prove a proposition but not one at issue in this case.
   *Is of so little help in proving a proposition at issue as to be worthless.

E. 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 other evidence in the case i.e. credibility, demeanor, background…

*Relevance opens the door to nearly everything—it is up to other rules to provide exclusions if the evidence is not going to be admissible in court.*
III. FRE 403

“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence.”

*As relevant, there is the presumption of admissibility→ must prove that the prejudice substantially outweighs the probative value.

**Must overcome general deference to allowing attorneys to put on their cases as they see fit.

***Backstop objection

A. Six specific concerns:

1) **Danger of unfair prejudice**
   (a) Adv Com Notes—Evidence creates unfair prejudice when it has “an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.”
   (b) *Old Chief v. United States:* When a court needs to decide under FRE 403 whether the prejudicial effect of the item of evidence substantially outweighs the item’s probative value, probative value should be determined by comparing the evidentiary alternatives to the item. (ie stipulation of prior conviction meets the felony req). The term “any actually available substitutes” theoretically allowed for creativity on the part of defense attorneys.
   BUT since 1997, Courts have applied the holding on its facts—applying the restriction only to felony possession of a gun.
   (c) Remember: Any adverse evidence prejudices the jury, the concern here is 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

B. Classic 403 problems:

1) Probability evidence—Although statistical evidence is routinely admitted at trial to assist the trier of fact, probability evidence is considered particularly misleading and is thus often excluded. Probability evidence is specifically offered to show the unlikelihood that another person with the same characteristics as the defendant committed the crime charged. Juries tend to interpret probability evidence as likelihood of guilt→ problematic. BUT A prime example of probability evidence is DNA which is frequently admitted.

2) Graphic Descriptions—Photos, film, anything that would make the jurors physically ill→ has to be pretty bad to overcome the probative value but may win 403 objection if there is a suitable alternative.

3) Reenactments—Evidence based on *scientific experiments* that seek to replicate or simulate the events on which a lawsuit is based has the potential to be both highly
credible and highly misleading. The reenactment must be “substantially similar to” what it intends to recreate to avoid the pitfalls of unfair prejudice.

C. Means of “Curing” Prejudice
   1) Limiting instructions for the jury
   2) Admitting liability and reducing or eliminating the relevance/probative value
   3) Stipulation (both parties must agree to it)* See Old Chief

IV. Similar Happenings
*The FRE do not specifically treat the admissibility of similar happenings evidence. However, the FRE 402 requirement that evidence be relevant means that federal court can and should exclude prior episodes that are not sufficiently similar to the present episode.

A. In general, similar happenings evidence is not flatly excluded, but the proponents must demonstrate that there is a substantial similarity between the collateral event offered as evidence and the event at issue in the case. Dissimilarities in the circumstances between the other events and the event in question diminish the worth of the evidence. In addition, no matter how similar, the prior events are nonetheless collateral to the specific facts to be decided.

B. Common uses of Similar Happenings evidence:
   1) Accidents or defective products (products liability)
   2) Sales of property or services—to show value
   3) Prior course of dealing between the parties
   4) Prior custom or usage in the industry

*The absence of similar happenings is sometimes used to show a lack of culpability or fault. But, often the probative value of absence evidence is overinflated.

C. Evaluating the relevant of similar happenings:
   1) Determine relevance under Rule 401
   2) Evaluate under Rule 403

*Both evaluations required a substantial similarity of operative circumstances—ie a party is particularly litigious/same kind of claim; a party has been involved in many such instances (arson); sales of similar property/UCC...same parties? same product? same pattern or practice?

V. Character Evidence (FRE 404-406)
“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.”

A. General Rule: Evidence of a person’s character is, in general, not admissible to prove that he “acted in conformity therewith on a particular occasion.” FRE 404(a)
NO character evidence is allowed in a civil suit unless it goes to the truthfulness of a witness. Watch out for cases that look criminal but are really civil i.e. RICO, fraud, etc. where courts mistakenly allow in character evidence.

To unravel the mystery of character evidence ASK:

1) Is the evidence being offered to show character? (Or is it offered for non-character purposes?)
2) If offered to show character, for what specific purpose is it being offered? (i.e. is it being offered to show a person’s propensity, to show a relevant person’s character directly, or to attack a witness’s credibility for truthfulness or veracity?)
3) Is the form of the character evidence proper? (reputation, opinion, specific acts)

Reputation and opinion evidence are the preferred forms of character evidence under the FRE. i.e Judge returns wallet and $ to owner is not admissible as it is a specific act BUT testimony from attorney general as to his honesty is admissible.

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

(a) Character evidence generally—Evidence of a person’s character or a trait of character is not admissible for the purpose of proving an action in conformity therewith on a particular occasion, except:

1) Character of the accused—Evidence of a pertinent trait of character offered by the accused, or by the prosecution to rebut the same.
2) Character of the victim—Evidence of a pertinent trait of character of the victim of a 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 the prosecution in a homicide case to rebut evidence that the victim was the first aggressor.
3) Character of witness—Evidence of the character of the witness, as provided in rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal class shall provide reasonable notice on good cause shown, of the general nature of such evidence it intends to introduce at trial.

*Remember: No evidence of D’s character comes in until he opens the door either by introducing character evidence on his own behalf or attacking the victim’s character.

B. Character evidence is offered for three primary purposes:

1) To indirectly show that because a person has a propensity to act in a particular manner, that person more likely acted in conformity with the propensity on a particular occasion.
   a) ***The Propensity Bar with the exceptions contained in 404(a) 1-3.
(b) Two categories of admissible propensity evidence are: (1) Criminal defendants may choose to use propensity evidence regarding themselves/their victim (2) Use of character evidence to impeach the credibility of a witness.

2) To directly prove a person’s character trait when it is an **element** of the cause of action, claim or defense
   (a) **Character “In Issue”**—A person’s character, or his particular character trait, is admissible if it is an **essential element** of the case:
      1) Defamation
      2) Entrapment
      3) Negligent entrustment
      4) Negligent hiring
      5) Seduction

(b) Proof can be made by reputation, opinion, or specific acts evidence.

3) For purposes **other than to show a person’s character trait**, such as to prove motive, intent, plan, common scheme, absence of mistake, or identity.

**Character versus Credibility Evidence**→ Credibility evidence is a special type of character evidence. It is offered to show a witness’ character for truthfulness or veracity to accredit or discredit the witness’ testimony. Governed by a separate set of rules: **FRE 607-609**. Specific acts evidence can be offered in respect to credibility but not for propensity.

**Aiken: What violates the propensity bar?** 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, he’ll do it again?”
   (2) If yes, then look for **exceptions** that would allow the evidence in. If no explicit exceptions exist, then it is barred.

C. Methods of Proving Character (FRE 405)

**Rule 405.**
(a) **Reputation or opinion**—In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to the reputation or by testimony in the form of opinion. On **cross-examination**, inquiry is allowable into relevant **specific instances of conduct**.
(b) **Specific instance of conduct**—In all cases in which character or trait of character of a person is an **essential element** of a charge, claim, or defense, proof may also be made of specific instances of that person’s conduct.

1. Rumors—Rumors are relevant to reputation BUT presents the ethical issue of a good faith basis for the questions.
2. Credibility is always relevant to any witness who takes the stand therefore specific acts evidence often gets in through impeachment.

**D. Rule 404(b)—Other Acts Evidence**

- Acts (no requirement of conviction)* that occur prior or subsequent to the incident or event in question are sometimes admissible at trial for a limited purpose—one other than to show propensity.
- Requires notice
  *
  
  **Supreme Court on “Acts”:**
  
  * **Dowling**—Even if D was acquitted of the prior bad act, it can be introduced.
  
  * **Huddleston**—To introduce other acts, the prosecution only needs to set forth enough evidence sufficient to support a finding that D did it. (Not even a preponderance “a quarter tank”)

1) Critical questions when assessing the 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/that D is of a criminal character?

2) The non-character “other” purposes include **but are not limited to:**

   1. **Intent**—show that the act was not done innocently. Ex: D claims he poisoned a person by mistake. P may offer evidence that this is D’s third accidental poisoning.
      
      **Doctrine of objective chances**—The repeated occurrence of certain unusual events is so unlikely as to render improbable the claim that any one of those events happened mistakenly or accidentally.

   2. **Motive**—existence of another crime provides the motive for the crime charged. Motive is the reason why a specific offender acted with a mental state required by the definition of a charge, crime, claim or defense. Ex: Homicide victim is witness to D’s previous crime.

   3. **Knowledge**—“knowingly…” requirement of some crimes. Ex: In a prosecution for knowingly passing a counterfeit bill, evidence of prior counterfeiting convictions may be admissible to show knowledge.

   4. **Common scheme or plan**—where one crime is predicated on another (ie bomb a police station to distract from a bank robbery OR Modus Operandi (serial rape/murder) where two or more crimes have been plotted by the same individual because they exhibit a similar or unusual pattern—signature trait.

      **Test** for a “common scheme or plan”: To prove the existence of a larger plan, scheme or conspiracy, of which the crime on trial is a part, each crime should be an integral part of an overarching plan explicitly conceived and executed by the defendant or his confederates. This will be relevant as showing motive, and hence the doing of the criminal act, the identity of the actor, or his intention.
5. **Opportunity**—Using uncharged misconduct to show that D had the opportunity to commit the crime. Ex: Evidence that D had previously stolen a key to the premises that were later burglarized is admissible in D’s trial for burglary.

   Meaning of “opportunity” for 404(b) purposes: Access to or presence at the scene of the crime or in the same sense possessing distinctive skills or abilities employed in the commission of the crime charged.

6. **Preparation**—often used to show identity or intent. Ex: To show identity—P may show D stole a vehicle to use as a getaway car for the charged crime. To show intent—D broke into a gun store and stole ammunition for a crime she claims had no premeditation.

7. **Absence of mistake**

8. **Identity**

9. **Res gestae**—Use of other crimes that occurred simultaneously to give the jury a full picture. Difficult to win→must be necessary to complete the story. Ex: Murder committed during the course of a robbery.

10. **Entrapment**—Put on character evidence to show D was not otherwise inclined to commit the act.

3) **Note on Acts versus Mental Propensity and 404**→The literal language of Rule 404 bars evidence of character or a trait of a character to prove “action” in conformity therewith on a particular occasion. Action implies “acts” and NOT mental states. Even though there is debate, most courts and commentators believe that Rule 404 does not prevent evidence offered to prove that a party experienced a mental state in conformity therewith on a particular occasion.

**Continuum of Character Evidence:**

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<tr>
<th>General Character</th>
<th>Non-character specific acts under 404(b)</th>
<th>Habit under 406</th>
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<tbody>
<tr>
<td>Character Traits</td>
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**VI. Sexual Character Evidence (FRE 413-414-415)**

**Aiken:** Rule 404
Rule 412
Rule 413-415

A. Rules 413, 414, and 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.

*Only argument against admission is a 403 objection.
*No time limit as to occurrences.
FRE 413: Sexual Assault  
FRE 414: Child Molestation  
FRE 415: Civil Cases Involving Sexual Assault or Child Molestation  
*Although not required by the plain language, Court have read in a “unless barred by other rules” requirement into 415. (Parallelism with 412 Civil)  

B. FRE 412, infra Relevance of alleged victim’s past sexual behavior/disposition  

C. “Sexual assault or child molestation” is broadly defined (much broader than Congress likely intended) as it includes touching a thigh through clothing.  

**413,414, and 415 are still subject to a 403 objection.  

VII. Syndrome Evidence  
*Form of character evidence as the “trait” is used to explain behavior.  
**Courts have generally not allowed syndrome testimony when offered to vouch for the credibility of the complainant or as evidence of the defendant’s substantive guilt.  

A. Battered Woman’s Syndrome—Expert opinion offered to explain the behaviors of a victim of domestic violence primarily regarding helplessness, perceptions of imminent violence, etc.  

B. Child Abuse Accommodation Syndrome—Expert opinion offered to explain (1) Lack of witnesses to support the child’s story (2) Delayed report of the incident (3) Recantation. The five characteristics are secrecy, helplessness, entrapment and accommodation, delayed conflicted and unconvincing disclosure, and retraction.  

VII. Habit Evidence—FRE 406  
“Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or the organization on a particular occasion was in conformity with the habit or routine practice.”  

A. Three elements of “habit”: 1) Specific behavior  
   2) Regularity/Frequency  
   3) Automatic  

B. Advisory Committee Notes:  
Although character and habit are closely akin, habit is more specific than character evidence. 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. Habit describes response to a repeated specific situation—involves probability theory, psychological theory (Pavlov, etc.). The doing of habitual acts may be semi-automatic.  
Agreement is general that habit evidence is highly persuasive as proof of conduct on a particular occasion. In fact, much evidence is excluded simply because its failure to achieve the status of habit.
VIII. Aiken Summaries

Character Evidence:
• Propensity evidence is evidence of other instances of the same behavior offered to show that the party has a propensity to behave in that fashion.
• Credibility evidence is a special type of character evidence dealing with the propensity of a witness to be truthful.

Other Acts:
• Propensity evidence is evidence of other instances of the same behavior offered to show that the party has a propensity to behave in that fashion.
• Evidence of other acts may be offered for purposes other than propensity, e.g. to show the behavior was not an innocent mistake, to show a motive for the charged offense, etc. Often, there is a jury instruction on the evidence’s limited admissibility.

Character In Issue:
Character is in issue when it is an element of the claim, cause of action, or defense. This only occurs in limited situations, e.g. seduction actions, subjective entrapment issues, negligent hiring or entrustment cases, or defamation actions.

Analyzing Character Evidence Problems—A Few Approaches:

1) Is the testimony being offered “character” evidence?  
   If yes, what is the purpose for which evidence of the person’s character being offered?  
   Is the person’s character itself a material fact?

2) Is the person’s character offered to prove “action in conformity therewith”?  
   Is the person’s character offered to prove the person’s mental state? (“mental propensity”)

3) Is the person’s character offered to prove or disprove the person’s credibility as a witness?  
   Do any of the exceptions to the general bar on act propensity apply?  
   Is this a homicide or sexual assault case, to which special character evidence rules apply?

4) What type of evidence of the person’s character is being offered?  
   The person’s reputation?  
   The opinion of a witness who knows the person?  
   Specific acts in which the person previously engaged?

5) Is this evidence that looks like character evidence but is not – such as some uses of prior bad acts – being offered and if so, for what purposes?  
   Are those purposes covered by Rule 404(b)?
OTHER EXCLUSIONS OF RELEVANT EVIDENCE

*Admissibility of relevant evidence turns on the purpose for which the evidence is offered. Due to public policy considerations and a fear of juror misuse, you must establish a proper foundation to get it in as the rules of evidence sometimes serve purposes other than the pursuit of truth.

When making 407, 408, and 409 arguments, the core should be the **purpose** behind the rule/spirit of the provision when deciding admissibility.

I. Subsequent Remedial Measures—FRE 407

“When, *after* an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent remedial measure is **not admissible to prove**: (1) negligence (2) culpable conduct (3) a defect in the product (4) a defect in the product’s design, or (5) a need for a warning or instruction.

This rule does not require the exclusion of evidence of subsequent remedial measures **when offered for another purpose** such as proving ownership, control, or feasibility of precautionary measures if controverted, or impeachment.”

• Adv Committee Notes on precluding the admission of D’s subsequent remedial measures: (1) The conduct is not in fact an admission/indication of culpability or negligence (2) Social policy of encouraging people to take, or at least not discourage them from taking, steps in furtherance of added safety.

Remember: Subsequent remedial measures may be used for purposes other than to show negligence or culpability. For instance, such measure may be used to rebut the defendant’s claim that there was *no safer way* to handle the situation. Or, if the defendant claims that he *did not own or control the property* involved in the accident (ownership), the fact that he subsequently repairs the property may be shown to rebut this assertion. FRE 407 is also not a bar to impeachment, feasibility of precautionary measures, etc.

II. Offers to Compromise and Plea Negotiations—FRE 408 and 410

“The cone of silence” for Settlements and Plea Bargains

A. Settlements—The fact that a party has offered to settle a claim may **not** be admitted on the issue of the claim’s validity.

1. Collateral Admissions of Fact: Admissions of fact made during the course of settlement negotiations are not admissible under **FRE 408**.

2. Other purposes: Settlement offers may be admissible to prove issues other than liability. (ie bias)

B. Guilty Pleas
1. **D’s offer to plead:** The fact that D has offered to plead guilty (and the offer has been rejected by the prosecutor) may not be shown to prove that D is guilty or conscious of his guilt. **FRE 410(4)** excludes not only the offer to plead guilty but any other statement made in the course of plea discussions with the prosecutor, from being used against the defendant.

2. **Withdrawn plea:** Similarly, the fact that D made a guilty plea and then later withdrew it may not be admitted against D.

3. **Later civil case:** The plea offer or withdrawn plea, and accompanying factual admissions are also not admissible in any later civil case—FRE 410(4).

FRE 410 covers: withdrawn guilty pleas, plea of *nolo contendere*, statements made during plea negotiations with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a withdrawn plea.

**Two exceptions:**
- If D uses the statements made in plea negotiations and fairness demands that the prosecutor be allowed to complete the story, then they are not barred.
- Statement made under oath in the course of plea negotiations.

In analyzing the admissibility of pleas, plea discussions, and related statements, ask:
- Was the statement made during the course of plea discussions?
- Was a prosecuting attorney present?
- Is the statement offered against the defendant who participated in plea discussions?

**III. Payment of Medical and Similar Expenses—FRE 409**

“Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible **to prove liability** for the injury.”

*Medical expenses/insurance claims can be introduced for purposes other than proving fault, i.e. ownership, relationship, etc.

***FRE 408, 409, 410—“The evidence is irrelevant, since the offer may be motivated by a desire for peace rather than from any concession of weakness of position.”

**IV. Liability Insurance—FRE 411**

“Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully.

This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership or control, or bias or prejudice of a witness.”

**V. Sex Offense Cases—FRE 412 Victim’s Past Sexual Behavior/Predisposition**
FRE 412(a)—Creates a presumption of inadmissibility in both criminal and civil proceedings involving alleged sexual misconduct:

1. Evidence offered to prove that any alleged victim engaged in other sexual behavior
2. Evidence offered to prove any alleged victim’s sexual predisposition

FRE 412(b)—Lists exceptions to the general rule for:

1. In a criminal case—
   (A) Evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence.
   (B) Evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of sexual misconduct offered by the accused to prove consent or by the prosecution.
   (C) Evidence the exclusion of which would violate the constitutional rights of the defendant.

2. In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is (1) otherwise admissible under these rules and (2) its probative value substantially outweighs the danger of harm to the victim and of unfair prejudice to any party. → Highly prejudicial therefore must be of great probative value to overcome.

→ Party who wants to get his evidence in must give notice via a written motion at least 14 days before the trial describing the evidence and purpose for admission. An in camera hearing must be conducted before the introduction of this type of evidence.

A. The 412 Criminal Rule
   • Specific instances of sexual acts to prove the source of semen
   • Specific instances of other sexual acts with the defendant offered to show consent or by the prosecution
   • Constitutionally required evidence

*Reputation/Opinion evidence excluded; Must be in the form of specific acts to even have a chance of being admitted/used for impeachment.

B. The 412 Civil Rule

Evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if:

- It is otherwise admissible AND
- Its probative value substantially outweighs the danger of harm to any alleged victim and of unfair prejudice to any party
- Reputation only if the victim opens the door (i.e. “virgin” “lesbian”)

*Proponent must prove and the admission is highly discretionary.
C. “Sexual Predisposition” includes pregnancy, abortion, fantasies, birth control, and prior sexual victimization. Evidence of sexualized dress, speech, or lifestyle also falls within 412.

D. 412 is a trial rule BUT the Advisory Committee Notes state that trial courts should liberally use protection orders (for extratrial such as discovery) to enforce the spirit of 412. Policy justifications underlying 412:
   - Get victims to come forward without fear of re-victimization by the process
   - Sex crimes have a high probability of recidivism

E. Note: The Supreme Court has held that one’s dress is pertinent to welcomeness. This is contrary to the federal rules. Again, ALWAYS weigh the probative value of the evidence against the likely prejudice

### Admissibility Break Down

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<tr>
<th>Type of Evidence</th>
<th>Crime</th>
<th>Civil</th>
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<tbody>
<tr>
<td>Marital Status → 412</td>
<td>No</td>
<td>Yes, P/P</td>
</tr>
<tr>
<td>Child out of wedlock → 412</td>
<td>No</td>
<td>Yes, P/P</td>
</tr>
<tr>
<td>Reputation Evidence of lack of chastity: 404 if pertinent, may be allowed; 412 as bar to 404</td>
<td>No</td>
<td>Yes, if placed in controversy by the V</td>
</tr>
<tr>
<td>Prior false rape accusation by V against another → Arg under 412</td>
<td>No**</td>
<td>Yes, if P/P</td>
</tr>
</tbody>
</table>

*P/P= If probative value outweighs the prejudice under 412(b)

**If the case involved repeated false rape accusations, you could get it in as a 404(b) signature act then argue that 412 exclusion does not apply as it is constitutionally required evidence.
THE EXAMINATION OF WITNESSES—FRE 607-615

I. The Basics of Witness Examination
A. First direct examination, then cross, then the option of redirect and re-cross examination.
B. FRE 611 governs the mode and order of interrogation and presentation.

FRE 611(b) provides that cross examination “should be limited to the subject matter of direct examination and matters affecting the credibility of a witness” → funnel metaphor. ***Object if the question is “Beyond the Scope of Direct” and does not involve credibility of the witness.

C. Common objections during examination:
   a. Leading questions—questions that suggest an answer. Questions that call for a “yes” or “no” response are often leading, e.g. questions that begin with “Was,” “Were,” “Did,” “Does,” “Have,” or “Had.”
   b. Asked and answered questions—questions that have already been asked of the witness and answered.
   c. Compound questions—questions that actually incorporate two or more questions in a single sentence → making any answer given by the witness inherently unclear.
   d. Questions assuming facts not in evidence—questions that assume the existence of facts not yet testified to by a witness or otherwise introduced into evidence. Can be objected to as “misleading” just like a question that assumes true a fact in dispute.
   e. Argumentative questions—questions that are phrased in such a way that they merely engage the witness in improper argument. One which tries to get the witness to agree with counsel’s interpretation of the evidence.
   f. Questions calling for speculation—questions asking for information beyond the witness’ personal knowledge, or for an inadmissible opinion. (FRE 701 and 702)
   g. Non-responsive answers—answers by witnesses that do not respond to the examiner’s question.
   h. Narrative answers—answers by the witness that exceed the scope of the questions put to them. A party may object to a question that would result in an objectionable answer; in that case, the objection would be phrased as “Calls for a Narrative Answer.”

D. FRE 611(c): Leading questions should not be used on direct examination of a witness except as necessary to develop the witness’ testimony, e.g., a witness who is hostile, unwilling or biased, a child/adult witness with communication problems, witness whose memory is exhausted, and in undisputed preliminary matters (Adv Committee Notes). The use of leading questions on cross examination is not only permitted, it is “a matter of right.” (ACN).

E. Three Components of Direct Examination:
   1) Background
2) Setting the scene
3) Action

F. Witness Rules Background:
FRE 601: Presumption of witness competency (precludes wacky rules at CL)
   *Rarely is disputed, except in cases of young children—must lay the foundation
   that they know the difference between the truth and a lie.
FRE 602: Requirement of personal knowledge (only exceptions are experts, hearsay
   exceptions)
FRE 603: Oath or affirmation required
FRE 604: Interpreters
FRE 605/606: Presiding judge/juror may not testify as a witness
FRE 610: Religious beliefs/opinions may not be used to show W’s credibility is impaired
   or enhanced.
FRE 611: (a) Control by the court
   (b) Scope of cross
   (c) Leading questions.
FRE 612: Writing Used to Refresh Memory

II. Impeachment of Witnesses—FRE 607, 608, and 610

A. There are five main ways of impeaching a witness:
   1) Untruthful character
   2) Prior inconsistent statements
   3) Bias
   4) Defects in capacity
   5) Contradiction

B. FRE 607—The credibility of a witness may be attacked by any party, including the
   party calling the witness. This is contrary to the common law rule that a party may not
   impeach his own witness.

C. Intrinsic Impeachment
   *Dependant upon the answers given by the witness being impeached. The
   impeachment arises from the witness’ mouth.
   1. Often elicited through leading questions
   2. Methods of impeachment:
      a) Contradiction—When the examining attorney disputes the witness’ testimony
         about a fact. The fact disputed need not be dispositive or important to the outcome to be
         used to impeach W got the fact wrong.
      b) Bias—Witness is shown to be influenced, corrupted, prejudiced, or
         predisposed towards or against a party.
      c) Prior Criminal Conviction—Under 609(a), one may use a prior criminal
         conviction to impeach a witness if:
            i. Crimen falsi—if the crime involved dishonesty or false statements, it may
               always be used to impeach W regardless of whether it was a misdemeanor or a felony and
regardless of the degree of prejudice to W. Examples: perjury, false statements, criminal fraud, embezzlement, counterfeiting, forgery, filing a false tax return—any crime where W actually behaved in a deceitful way. Not subject to a 403 objection.

ii. Felony—Crimes punishable by more than one year in prison are allowed to be introduced for the purpose of impeachment under FRE 609(a) BUT:

   Used to impeach a witness: Subject to 403
   Used to impeach the accused: May only be used if the court “the probative value of admitting this evidence outweighs the prejudicial effect to the accused.”
   a) Assessing Prejudice:
      - If the crime is probative of truthfulness or honesty.
      - Nearness or remoteness in time to the former felony conviction
      - Whether the crime is the same or similar to the present charge
      - The effect of the prior conviction on D’s willingness to testify

   iii. Conviction must not be stale: If more than 10 years have elapsed from the date of conviction or of the release of W from confinement, the conviction may not be used for impeachment unless the court determines that there are “specific facts and circumstances” that make the probative value of the conviction substantially outweigh its prejudicial effect. FRE 609(b)

d) Prior Bad Acts—FRE 608(b): Limited to specific prior acts of the witness that are probative of truthfulness—acts involving fraud or deception. As it is “acts,” no prior conviction is required for impeachment purposes.
   i. If W denies the act, the inquiry ends as prior acts may not be proven by extrinsic evidence.
   ii. Before the atty may ask a witness about a prior specific bad act, she must have a good faith basis for believing the witness really committed the act.
   iii. May inquire about the bad act, but not its consequences (ie arrest, conviction) as it is only used to indicate the witness’ truthfulness.

   *No staleness provision for prior bad acts BUT the probative value decreases with the passage of time so make a 403 objection frivolous inquiry.

e) Testimonial Capacity—Refers to the aspects of a witness’ testimony that are important for accuracy: (1) Perception (2) Memory (3) Narration (4) Sincerity.
   i. Attack a witness’ capacity by revealing defects in any of the above—be it through common deficiencies or physiological defects. Examples: Bad eyesight, amnesia, hearing loss, schizophrenia, etc. anything that interferes with W’s ability to be accurate or truthful.
   ii. Alcohol and drugs—W may be impeached by showing that he was drunk or high during the events he claims to have witnessed. However, courts are split on whether W may be impeached with the fact he is a habitual user or addict. To get it in, show a connection between the addiction and credibility/ability.

   *Capacity used for credibility—tie the inquiry into the events in order to present extrinsic evidence.
f) **Prior Inconsistent Statement**—FRE 613—Impeachment by self-contradiction. Requires two statements—one during the trial and one before the trial that appear to be mutually inconsistent.
* “I don’t remember” does not qualify as a statement unless the witness is acting in bad faith.
* The proponent must give the witness the opportunity to deny or explain the prior inconsistent statement, but the opportunity does not have to be given to him until after the statement has been proven by extrinsic evidence.

g) **Opinion and Reputation Regarding Character**—FRE 608(a) (Extrinsic Impeachment)
* Once W/D takes the stand, he opens himself up to this type of attack even if he does not affirmatively state he is a truthful person. W1’s credibility may be impeached by testimony from W2 that W1 has a bad reputation for truthfulness or that in W2’s opinion, W1 is a liar.
  • No specific instances of untruthfulness are allowed unless on cross-examination. Think Rule 404’s requirement that character be in the form of opinion or reputation.
  • One can only put on evidence of W’s **truthfulness** if W’s credibility has been attacked—No bolstering.

D. **Extrinsic Impeachment and The “Collateral Issue Rule”—FRE 608, 609, and 613**
1) Used to identify the collateral matter or collateral issue
2) Permits impeachment through extrinsic evidence for only non-collateral (important) matters
3) Non-collateral matters properly subject to extrinsic impeachment are
   a) **Bias,**
   b) **Fact at issue,**
   c) **Testimonial capacities,**
   d) **Convictions of crime; and**
   e) **Reputation or opinion evidence about the truthfulness or veracity of another witness.**
4) **608(b)** Evidence of the conduct of a witness:
   Specific instance of the conduct of a witness, for the purposes of attacking or supporting the witness’ credibility, other than a conviction of a crime as provided by FRE 609, may not be proven by extrinsic evidence.

5) What is extrinsic?
   a) In the impeachment context, any evidence offered to impeach that is not from the mouth of the witness.
   b) The need for extrinsic evidence generally arises when the impeached person denies the impeaching question and the impleacher seeks the opportunity to prove the matter used to impeach.
   c) Aiken’s List of things that are NEVER collateral:
      1. BIAS
      2. Memory
3. Perception
4. Sincerity
5. Fact at issue in the case

6) **The Collateral Issue Rule**: As W1 may be impeached by presenting W2, the situations in which a second witness may be used are limited by the collateral issue rule. By this rule, certain types of testimony by W2 are deemed to be of such collateral interest to the case that they will not be allowed if their sole purpose is to contradict W1.

Although the FRE does not contain an explicit collateral issue rule, the trial judge can apply the policies behind the rule by using **FRE 403’s balancing test** (evidence excludable where its probative value is substantially outweighed by confusion, prejudice, or waste of time).

E. **608 versus 609 Impeachment**
   If a conviction is inadmissible under 609, you cannot get it in under 608→ no end run around the rule. But, on cross, one can introduce specific acts to test credibility/basis of opinion of a witness.

F. **Preserving the Objection of Improper Impeachment—Luce v. US (1984)**
   “Requiring that a defendant testify in order to preserve Fed. R. Evid. 609(a) claims will enable the reviewing court to determine the impact any erroneous impeachment may have in light of the record as a whole. It will also tend to discourage making such motions solely to "plant" reversible error in the event of conviction.”

G. **Rehabilitating an Impeached Witness**
   1) The proponent of a witness may 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 veracity.

   2) “**Meet the attack**”—The rehabilitating evidence must support W’s credibility in the same respect the credibility has been attacked by the other side.

   3) **Prior Consistent Statement**—The fact that W made a prior consistent statement may only be used to rebut an express or implied charge of **recent fabrication** or **improper influence/motive**. (FRE 801(d)(1)B).

   **Temporal Req**: The proponent who wants to use a prior consistent statement must show that the prior statement was made **before** the alleged motive to fabricate or improper influence arose.

H. **Aiken’s Impeachment Review**:
   • A specialized form of character evidence

   • Prior inconsistent statements are a form of self-contradiction

   • **Extrinsic Impeachment**→ “Is it collateral?” asked to avoid the time consumption that litigating the issue will cause.
• Bias is any form of corruption, influence, prejudice, etc. that causes a witness to favor or disfavor a party—Rule 403 only limitation on evidence of bias.

• Rule 609 permits the introduction of two types of crimes for impeachment purposes: (1) Crimen falsi—dishonesty or false statements (2) Felonies—punishable by 1 year or more BUT subject to the balancing test

• Rule 608 prior bad act evidence only covers those specific instances of conduct that bear on the truthfulness of the witness (*Generally, impeachment by prior bad acts is collateral to the litigation)

• Impeachment by omission (ie domestic violence)

III. Refreshing Recollection—FRE 612
*Refreshing a witness’ memory most often occurs on direct examination. However, it can be done on cross-examination to attack a witness’ purported loss of memory → impeachment.

A. General Rule: If the witness’ memory on a subject is hazy, any item (picture, document, weapon, etc regardless of authenticity or admissibility) may be shown to the witness to refresh his recollection. The technique is called “present recollection refreshed.”

1) The item shown is not evidence, merely a stimulus to produce evidence in the form of testimony.
2) If the item shown is a document and the judge determines W merely read from it, the testimony may be stricken.

B. Cross-examination: The cross-examiner may examine the document or other item shown to the witness, and use any part of the document during cross examination. Further, the cross-examiner may introduce into evidence any parts of the document that relate to the witness’ testimony.

OPINIONS, EXPERTS, AND SCIENTIFIC EVIDENCE

I. Lay Opinion—FRE 701
A. As opinion evidence short-circuits the jury’s ability to draw conclusions for itself from the facts, lay opinions are limited to opinions and inferences that are:
(1) “rationally based on the perception of the witness” AND
(2) “helpful to a clear understanding of his testimony or the determination of a fact in issue” AND
(3) “not based on scientific, technical, or other specialized knowledge within the scope of 702 [dealing with expert testimony].”
B. “Rationally based on the perception of the witness”  
Two elements to determine:  
1) The opinion echoes the personal knowledge requirement of Rule 602 AND  
2) The opinion must be one that reasonable person could draw from the underlying facts (eliminates opinions based on hearsay, speculation and irrational reasoning).

C. Among the factors that affect whether a lay witness’s opinion meets the rationality test are:  
1) The extent to which the testimony goes to the heart of the case;  
2) The amount of factual matter subsumed in the opinion;  
3) The ability or inability of the witness to convey the information in the form of specific facts;  
4) The extent to which the jury is equally well-positioned to draw the inferences from the underlying data;  
5) The need for testimony.

D. The rule distinguishes between lay and expert testimony (not witnesses).

E. An objection to lay testimony will often prove more effective if it is supported with an explanation as to why the opinion is not rational or not helpful (calls for expertise not possessed by witness, requires mixed questions of law and fact, requires conclusion that amounts to little more than choosing sides).

F. FRE 704(a) allows lay opinions on the ultimate issues except where the mental state of a criminal defendant is concerned. BUT lay opinion may not be introduced on a question of law (unless foreign).

II. Expert Testimony—FRE 702 – 706

A. Overview  
1. Experts can offer opinions without personal knowledge of the facts of the case. Lay witnesses must generally testify only to facts rationally based on their own perceptions.  
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 “fit” the facts of the case.  
4. As long as the testimony will assist the jury in deciding the facts, an expert can testify about ultimate fact questions.  
5. Under FRE 703, the expert’s opinion can be based on that which is “reasonably relied on by experts in the particular field…” including inadmissible hearsay.  
6. Pursuant to FRE 705, experts must disclose the basis for their opinions id the court requires or questions are posed about the basis on cross examination.  
7. When can an expert be used?
Advisory Committee Notes: “There is no certain test for determining when experts may be used except for the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute.”

B. FRE 702: If scientific, technical, or otherwise specialized knowledge will assist the trier of fact to understand the evidence or 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 opinion or otherwise,* if

Rule 702 Amendment
(1) The testimony is based on sufficient facts or data
(2) The testimony is the product of reliable principles and methods
(3) The witness has applied the principles and methods reliably to the facts of the case.

*Bold=4 prongs for admissibility of expert testimony.

C. Qualities of “Qualified” Experts
1) Experience
2) Publications
3) Acceptance record
4) Education
5) Honors

D. Daubert and Kumho Tire
1) The common law Frye Test required that novel scientific evidence be “generally accepted” in the particular scientific field in order to be admissible. Daubert held that Frye was superseded by the FRE’s Requirements in 702.

Daubert Reliability Factors (3rd prongÆ not precluded just because technique is new as would have been under Frye):
   i. Is the theory or technique testable? Has it been tested? (reliably tested)
   ii. Has it been subject to peer review and publication?
   iii. What is the known or potential error rate? (low error rate)
   iv. Do standards exist that can serve as controls on a technique’s operation and were they used in this case? (professional standards)
   v. Is the theory generally accepted in the scientific community?
2) The Daubert Reliability Factors only come into play if the introduction of expert testimony is questioned. Often arises in complex civil litigation (toxic torts) when the opposing party requests a “Daubert Hearing.”

3) Kumho Tire expanded the use of Daubert Reliability Factors to nearly all expert testimonyÆ “technical and other specialized knowledge.”

4) JoinerÆ abuse of discretion review on admissibility of expert testimony.
E. **FRE 703**—Basis of Opinion Testimony by Experts

*An expert can testify based on three sources of knowledge: personal observations, observations in the courtroom, and facts made known to the expert at or before the time of trial.

*If “of a type reasonably relied upon by experts in the particular field,” the facts or data relied upon by the expert to form her opinions may be themselves inadmissible evidence. → BUT cannot be disclosed to the jury unless court determines that probative value outweighs prejudicial effect. This is a departure from common law and it makes it more difficult to impeach experts. Experts may even rely upon hearsay (other experts’ statements) in forming their opinions.

F. Even if 702 and 703 are met, there is always the backstop **FRE 403** objection. Expert testimony is likely to be: overweighed, cumulative, prejudicial.

G. **FRE 704**—Opinion on Ultimate Issue

*(a) Can offer expert testimony in the form of opinion or inference regarding the ultimate issue to be decided by the trier of fact *(b) except: 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.

H. **FRE 705**—Disclosure of Facts or Data Underlying Expert Opinion

*The expert may testify in terms of opinion or inference and give reasons therefore without first having to testify 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.

I. **FRE 706**—Court Appointed Experts

*If the case turns into a competing battle of the experts, the judge can hire an independent expert/evaluator.

***Boiled Down Analysis:
(1) Qualified Daubert: (2) Reliability (3) Relevance **FRE 403** (4) Prejudice

**HEARSAY—FRE 801-806**

I. **FRE 802**—The Hearsay Rule: “Hearsay is not admissible except as provided by these rules or by others rules prescribed by the Supreme Court pursuant to statutory authority or Act of Congress.”

A. Under **FRE 801(c)**, hearsay is: “an out of court statement made by a declarant offered for the truth of the matter asserted.”

   (1) **An out of court**

   Made outside this current official judicial proceeding. i.e. Pre-trial hearings and depositions are out-of-court statements.
(2) Statement
An oral or written assertion or nonverbal conduct intended by the declarant to be a communication to others (i.e. assertive). They are intentional and purposeful. Nonverbal conduct will constitute a statement only if the primary motive of the actor is to communicate to others. Silence is treated as a statement only if it is intended to be an assertion by the declarant.

(3) Made by a declarant
The source of the out of court statement must be a human being (i.e. dogs and radar guns do not qualify). It could be the prior out of court statements of the testifying witness himself or of another party.

(4) Offered for the truth of the matter asserted.
A statement is offered for the truth of the matter asserted if it is offered to show that its factual content is true. Statements not offered for the truth of the matter asserted are relevant simply because they have been said, without regard to whether they are true. These include:

a) State of mind—Statements offered to prove either the listener’s or the declarant’s state of mind (“I am the walrus” to show insanity). Statements offered to show the effect on the listener (warnings, notice).

b) Impeachment—Prior inconsistent statements. Truth is irrelevant as they are intended to show contradiction.

c) Res gestae—Not offered for the truth, but simply as background evidence to “complete the story” of an incident or event. (rarely used exceptionÆpotential to swallow up hearsay exclusion)

d) Legally operative facts—Statements that create legal obligations or duties. Offered simply to show that the statement was made. (i.e. defamation, offer/acceptance, solicitation)

e) Verbal acts—A category of statements related to operative facts. Verbal acts are the words accompanying an act which help to explain the legal significance of that act. (i.e. statement accompanying a donative transfer of property clarifying whether it was a gift or a loan.)

B. Hearsay LogicÆStatements introduced solely on the theory that when a person asserts that a fact is true, that fact is more likely to be true.
Declarant did X
Therefore declarant believed Y
Y is a fact of consequence to the litigation.

**A: If we do not need to believe the declarant (rely on their perception, sincerity, etc.), then it is not hearsay (as not offered for the truth of the matter asserted).

C. Four dangers of hearsay evidence: (1) ambiguity (2) insincerity (3) incorrect memory (4) inaccurate perception.

1. As the declarant cannot be tested or impeached, hearsay poses these dangers if allowed into the proceedingÆuse if arguing against admission.
2. The value of having a witness present:
   a) The Oath—Religious belief, potential for perjury prosecution, etc.
   b) Demeanor—Fact-finder can assess sincerity, perception, narrative, etc.
   c) Cross-examination—impeach, clarify, probe, etc.

3. If there is a hearsay exception, one of the above dangers is mitigated.

4. The hearsay rule is rigid due to: the need for consistency and predictability, a
distrust of judge’s discretion/jury’s limiting instructions, a desire for control on the part
of the trial bar.

II. Statutory Non-hearsay—FRE 801(d)
* Declares that certain out-of-court statements are not hearsay even though they meet all
the elements of hearsay.

A. **Prior Statements of Witnesses**—FRE 801(d)(1)
   Permits the prior statements of a testifying witness to be admitted for the truth of
the matter asserted in three situations, provided that the witness is subject to cross
examination at the trial about the prior statements:

1) **Sworn prior inconsistent statements of the witness:** Admissible for the truth of
the matter asserted if the statements were made under oath and subject to the penalty of
perjury at a prior trial, hearing, deposition, or other qualifying proceeding (i.e. grand
jury).

2) **Prior consistent statement of the witness:** Admissible for the truth of the matter
asserted if the statement is offered to rebut a charge of recent contrivance or fabrication.
Need not be made under oath but there is a temporal consideration that must be met before the motive/incentive to fabricate or change the story arose.

3) **Prior identifications by the witness:** The fact that a witness has made an
identification of another person prior to trial may be admitted at trial for the truth of the
matter asserted. Often arises in criminal cases w/ line-up, photo array, etc. The prior
identification is close in time to the event and consequently may even be preferable to a
subsequent in-court identification.

B. **Admission by a Party Opponent**—FRE 801(d)(2)
   To constitute an admission by a party opponent, an out-of-court statement must
fulfill two requirements. The statement (1) must have been made by or on behalf of a
party opponent, and (2) must be offered against that party.

*** “You made the statement, now explain it.”
***Most powerful way to get around hearsay.

**Five different types of party admissions are nonhearsay:**
1) It is the party’s own statement. 801(d)(2)(A)
2) The party adopts or acquiesces in the statement of another person. 801(d)(2)(B)
3) The party authorizes another person to make statements about a subject.
   801(d)(2)(C) (i.e. judicial admissions)
4) The party’s agent or servant makes the statement concerning a matter within
the scope of the agency or employment, during the existence of the relationship.
   801(d)(2)(D) (i.e. ER/EE)
5) A co-conspirator of the party makes the statement *during and in furtherance of* the conspiracy.
   a) Conspiracy:
      i. Existence decided by the judge
      ii. Preponderance of the evidence standard of proof
      iii. Can rely on disputed evidence to prove its existence
      iv. Can’t rely *entirely* on inadmissible evidence to prove

III. Hearsay Exceptions—FRE 803 and 804

A. **Declarant Availability Immaterial**—FRE 803 (Reliability)
   (1) **Present sense impression**
      *Observations/words occurring simultaneously
      **Requirements:**
      i. Describing or explaining an event (NO opinions)
      ii. Made while the declarant was perceiving the event or immediately thereafter
   (2) **Excited utterance**
      *Requirements:
      i. Statement relating to a startling event or condition
      ii. Made while the declarant was under the stress of the excitement caused by the event or condition
      *Temporal consideration—no definitive law on amount of time that can pass, but D must still be under the stress of the event
   (3) **The State of Mind Exception**—statement of the declarant’s *then existing mental, emotional, or physical condition*
      *Cannot be backward looking/past tense to fall under the exception
      *Under the *Hillmon Rule*, 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 or her state of mind (intent). Proof of a subsequent event (Angelo hypo).
      *FRE finds more reliable the predictions of the future than the descriptions of the past.
   (4) **Statements for the purposes of medical diagnosis or treatment**
      *Requirements:
      i. The statement was made for the purpose of medical diagnosis or treatment
      ii. Statement describes medical history, past or present systems, pain or sensations, or the inception or general character of the cause or external source.
      iii. Statement is pertinent to diagnosis or treatment.
      *Cannot admit parts of the statement/facts extraneous to info required for treatment or diagnosis. (Must tie the hearsay to diagnosis/treatment).
      *To whom the statement can be made: ACN—Doctors, nurses, EMTs, anyone you would ask for medical diagnosis or treatment. Parents/family members may also be included as children look to them for medical
help statements between parents about child’s reported symptoms falls under exclusion.

*Under FRE, extends to both treating doc and testifying doc.

(5) Recorded recollection—when no amount of “refreshing” will allow the witness to testify from present recollection.

*Requirements (Preliminary fact questions—all must be met or inadmissible hearsay):
  i. Memo or record
  ii. Regarding a matter about which the witness once had knowledge but now has insufficient present memory [to testify fully and accurately]
  iii. Made by the witness or adopted by the witness
  iv. When the witness’ memory was fresh
  v. To reflect the knowledge correctly

*Witness must testify/authenticate it. If uncooperative, only option is perjury it is not getting in.

*The writing cannot be presented to the jury: this is testimony AND risk of overhearing.

(6) Records of regularly conducted activity—Business Records
  i. Memo, report, etc.
  ii. Made at or near the time of occurrence
  iii. By a person with knowledge or transmitted by a person with knowledge
  iv. Kept in the regular practice of that business activity to make the memorandum
  v. Shown by custodian or other qualified witness
  vi. Unless untrustworthy (burden on objecting party)
    a. Palmer v. Hoffman—“Regular course of business”

*Business Records that contain statements:
  -Reports says X says
  -Report itself admissible as a business record
  -Statements within the report must be examined to determine if the makers of those statements had a BUSINESS DUTY to make such statements
  -Otherwise it is hearsay and you must look for another exception.

(8) Public records and reports
  *Public Records Setting Forth:
    (8)(A): The activities of an office or agency (lien, tax recs, deeds)
    (8)(B): Matters observed pursuant to a duty imposed by law (rainfall recs, ct reprt transcripts, police reports)
      i. Duty to report
      ii. Except in criminal matters observed by police (not usable in prosecution, unless D introduces)
    (8)(C): Factual findings resulting from an investigation (OSHA, FAA investigations, etc.)
i. Made pursuant to authority granted by law
ii. Only in civil cases or against the government in criminal cases→ Confrontation Clause issue

***Watch out for public records evidence trying to get in under 803(6) business records in criminal cases.

B. Other Miscellaneous Exceptions under FRE 803:
*VERY specific—a necessity as no other source so FRE creates an exception:

803(9) Records of vital statistics
803(10) Absence of a public record or entry
803(11) Records of religious organizations
803(12) Marriage, baptismal, and similar certificates.
803(13) Family records. (Bible hypo, all we have is hearsay of who are parents are)
803(14) Records of documents affecting an interest in property.
803(15) Statements in documents affecting an interest in property.
803(16) Statements in ancient documents (Tombstone hypo)
803(17) Market reports, commercial publications
803(18) Learned treatises exception—Must show established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. (Must have an expert on the stand to introduce/impeach)

If admitted, the statements may be read into evidence but not received as evidence. → Under 104, judge can consider otherwise inadmissible evidence for preliminary fact determinations.

803(19) Reputation concerning personal or family history
803(20) Reputation concerning boundaries or general history
803(21) Reputation as to character—Is it hearsay? Yes as it is based on conversations occurring outside the proceeding offered for the truth of the matter asserted. So, we need (21) to get reputation evidence for character in. NO preliminary fact questions—see character rules.

803(22) Judgment of previous conviction. Convictions=Twelve people saying you are guilty→ hearsay therefore you need an exception.
803(23) Judgment as to personal, family, or general history or boundaries.

803(24) Transferred to Rule 807.

C. Declarant Unavailability Required—FRE 804 (Necessity)
*Certain types of hearsay are admissible only if the declarant is unavailable to testify. These hearsay statements include former testimony, dying declarations (statements made under the belief of impending death), statements against the declarant’s interest, and statements of personal or family history.

This type of hearsay possesses indicia of reliability, but is not as reliable as the exceptions in FRE 803.

***FRE 804(a) Definition of unavailability:
1) Privilege
2) Refusal to testify despite court order
3) Lack of memory
4) Unable to testify due to death or infirmity
5) Cannot be procured for the hearing despite proponent’s efforts

*Refers not so much to the unavailability of the declarant but the unavailability of the declarant’s testimony.
*Not unavailable if due to the procurement or wrongdoing of the proponent of the statement

FRE 804(b) Hearsay exceptions:
(1) Former testimony
   i. Must have been given in a proceeding
   ii. The same party against whom the former testimony is now offered (or, in a civil case, the same party or predecessor in interest) must have had the opportunity to cross-examine the declarant in the prior proceeding.
   iii. The party against whom the testimony is now offered must have a similar motive to develop the testimony in both the earlier and current proceedings.

*Grand jury—an indicting procedure where a prosecutor presents evidence to a jury and it decides whether or not to indict based on sufficiency of evidence. Defense attorneys are not allowed in nor can they see grand jury testimony unless it is exculpatory. → No opportunity to cross examine.

*Not hearsay if offered to impeach.

“Opportunity to develop”→
If in grand jury, prosecution has opportunity to develop SO:
   - Might be usable if offered against the govt as it did have the opportunity to cross
   - Examine/develop it in the grand jury.
   - Not a literal interpretation of “cross examination”
   - Exculpatory evidence—therefore constitutional considerations.
“Similar Motive” → Where a lot of these cases turn:
• What was at stake at the previous proceeding
• Under what conditions was the previous testimony developed
• Generally, of the previous proceeding was criminal and the following was civil that will suffice—But not always: ie DUI vs. Wrongful Death → stakes in civil case higher than in criminal case. Most felonies → civil suffices.

(2) Dying Declarations → Statement under the belief of impending death
i. Declarant must believe at the time of the statement that death is imminent
ii. Statements must concern the cause or circumstances of the supposed impending death.
iii. Only admissible in homicide or civil cases (linked to the impending death).
iv. Death need not actually result.

*If you need to prove that D believed death was imminent—provide some evidence in the form of doc comments, egregious circumstances, etc.

*Personal knowledge still plays a role—could disqualify statement under 602 → speculation.

(3) Statement against interest — FRE 804(b)(3)
  i. Statement was against the declarant’s interest at the time it was said.
  ii. The statement is so far against declarant’s interests that declarant wouldn’t have said it if her or she did not believe it.
  ii. Interests considered: pecuniary, proprietary, civil liability, and criminal liability. Types of Interests:
     Pecuniary → Money. “I owe you $10k.”
     Proprietary → Property. “I no longer own Blackacre.”
     Penal → Criminal “I killed x.”
     Civil → “I am responsible for the accident.”

“Against interest”:
  -Must be adverse to the declarant
  -The declarant must be aware of that adversity at the time of making the statement.

Exculpatory statements → When a declaration against interest is offered to exculpate an accused, we need additional corroborating circumstances that clearly indicate its trustworthiness.
  -What constitutes corroboration?
    -Other evidence that suggests D is not guilty
    -Circumstances surrounding the declaration—large # of people heard, said to a priest/religious person indicating honesty, etc.

How much of the declaration can be included?
Collateral statement—the part that is not against the declarant’s interest. This comes up a lot in the situation of exculpatory statement.

SC in Williamson: We need to decide if the relevant collateral portion is “integral to the whole.” The Adv Com Notes use the terms “related” to deal with collateral statements.

*Different that a party admission in three respects:
  i. Statements against interest require the declarant to be unavailable to testify.
  ii. Statements against interest do not have to be made by parties or their agents
  iii. Statements against interest must have been against a defendant’s pecuniary, proprietary, civil or penal interest at the time of the utterance.

(4) **Statement of personal or family history**
* A special hearsay exception exists for statements concerning important personal or family milestones such as birth, adoption, marriage, divorce, ancestry, and the like.

  Aiken: You only know who your parents are because of hearsay.

(5) Rule 807→ **Residual exception** (Cross referenced in 803(24))

**FRE 807: The Residual Exception**
Designed to capture things that the FRE forgot or circumstances in which all the reasons to have a hearsay exception are present.

Questions:
- Are there equivalent guarantees of trustworthiness? (to other hearsay exceptions)
- Is the statement offered as evidence of a material fact? (necessity issue)
- Is the evidence more probative on the point for which it is offered than any other evidence the proponent can procure through reasonable efforts?
- Are the general purposes of the rules and interests of justice served by admitting this evidence? (equity)
- Has notice to the adverse party been given?
  → When you are stuck with hearsay, this provision is a catch-all.

(6) **Forfeiture by wrongdoing**—A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to and did procure the unavailability of the declarant as a witness.

C. **FRE 805—Hearsay within Hearsay**
   If there is double/multiple hearsay, as long as both pieces fit an exception, it comes in. *i.e. witness statements in police reports:* Report—witness statement—about another’s statement. If you don’t have an exception, the report (public record) can come in, but the portion that is hearsay must be redacted.

FRE 805:
- Identify all pieces of hearsay
- Identify exceptions, or theories of nonhearsay, that will allow each piece to be admissible.
D. FRE 806—Attacking and Supporting the Credibility of the Declarant
   i. A hearsay declarant is impeachable as would be any other testifying witness, except
   ii. A hearsay declarant need not have an opportunity to explain or deny a prior inconsistent statement
   i. A declarant can be called and cross examined about the statement by the party calling that witness (if 803 exception—obviously not 804).

*For the whole test:
• Remember—The more it looks like pure propensity evidence, the greater the prejudice to D.
• If you have a rule that excludes something, that rule controls.
Exam:
21 page fact pattern
Evaluate evidence in light of what arguments will be made for or against admission and how will likely come out
Short questions like the ones in the book→ specific “call” to make and why w/ lines underneath for length of response. May use abbreviations/be succinct but mention the nuance and how it would be resolved
41 questions total—4.5 minutes per question. Some with be 30 seconds and others longer. Some are obvious others are spin offs.
Sketch out answers to questions you anticipate
Bring all that you create into the exam—most times you will not have time to look at it.
No time to flip through. Have familiarity of rules. List for quick reference.
Most important thing is to finish the exam—pace yourself, like a trial.
Aiken grades—NOT the conclusion, pick out the problem and decide what the issues are—look for the argument. The more it looks like what a lawyer does, the greater the chance you are doing it right.
Instruction sheet in power points slide section.
No common law…

Evidence Review

Putting it all together
The overriding question is "Is this evidence admissible?"
Our first threshold is, is it relevant?(FRE 401)
Next we ask, if relevant is its probative value substantially outweighed by it prejudicial effect? (FRE 403)
Then let's ask, does this evidence relate to character, other crimes or wrongs, acts or habits?

Putting it all together
Is character at issue in this case?
Is it a habit of a person or a routine practice? (FRE 406)
Is there another permissible use of character evidence?(FRE 404)
Character of the accused
Character of the victim? (but FRE 412)
Character of the witness
Other crimes, wrongs or acts?
Putting it all together
Is this a subsequent remedial measure? (FRE 407)
Is it offered for another purpose besides culpable conduct?
Is this evidence of prior bad acts or convictions? (FRE 608, 609)
Is the probative value of these prior bad acts substantially outweighed by the risk of prejudice? (FRE 403)
Is this evidence garnered during negotiations to settle a dispute, or a criminal case?
Putting it all together
Is this opinion testimony? (FRE 701-704)
Is it rationally based on the perception of the witness and would be helpful to the jury?
Is the witness qualified to testify as an expert and is the expert opinion reliable and does it fit?
Is it based on data reasonably relied upon by experts in the field?
Is this an opinion about the ultimate issue?
Putting it all together
Is this evidence hearsay?
Does this person have personal knowledge? (FRE 602)
Is there a non-hearsay purpose for this evidence?
Does a hearsay exclusion apply?
Prior statement by witness or admission?
Does a hearsay exception apply?
Must the declarant be unavailable?
Putting it all together
Is this a prior inconsistent statement by the witness? (FRE 613, 801(d)(1))
Is it offered for impeachment or for substantive purposes or both?
Is this a prior consistent statement? (FRE 801(d)(1)(B)
Is it a party statement offered against a party? (FRE 801(d)(2))
Putting it all together
Is the statement offered to refresh the witness? (FRE 612)
Is the statement offered as substantive evidence due to failed memory? (FRE 803(5))