EVIDENCE OUTLINE

I. Intro/Relevance
   A. Chapter 1 - Introduction
      Rule 101 (Scope), Rule 102 (Purpose and Construction), Rule 106 (Writings - completeness)
      - 3 types of rules:
         1. Traffic – concerning smooth operation of the trial
         2. Accuracy – promoting truthful verdicts
         3. Policy – advancing external policies larger than the individual lawsuit
      - Circumstantial evidence – requires an inference to be drawn for it to be relevant
      - Direct evidence – does not require an inference; proves a fact without requiring any deductions

   B. Chapter 2 – Roles of Judge, Jury, & Attorney
      Rule 103 (Rulings on Evidence – objection; proffer), Rule 104 (Preliminary Questions)
      - An overruled general objection will only be sufficient on review if there is no ground upon which the evidence could have been admitted
      - Sustained general objection—has the opposite effect; will be upheld if excluding the evidence is right for any reason
      - Proffer
         - need it, or point is foreclosed on appeal (except for plain error)
         - if lose an objection, have the right to make a proffer
         - lawyer puts on evidence that is part of the record (but not heard by the jury)
         - lets trial judge hear what would have been said if objection had been overruled
         - preserves full record for appeal
         - has to include nature and content of evidence
      - Rule 104(a) - Judge can consider evidence that is not necessarily admissible evidence—ex:
         out-of-court letter by someone not in court; can use anything except privilege
      - Judges have to make determinations, so get to hear more than juries do (juries only hear admissible evidence)

   C. Chapter 3 - Relevance
      Rule 401 (Definition of Relevant Evidence)
      - Relevance: “any tendency to make the existence of any fact”
      - Materiality: “fact that is of consequence to the determination of the action”
      3 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 (credibility, demeanor, impeachment, background information, etc.)
      - Probative value: “more probable or less probable than it would be without the evidence”
         - Minimal threshold – Does this potential evidence make the fact more or less probative than without the evidence?
Questions inspired by Rule 401:
1. What is the issue in this case?
2. To what fact is this potential evidence addressed?
3. Is that a fact of consequence to the issue(s) in this case? (Does this help us? Materiality question)
4. Does this potential evidence make the fact more or less probative than without the evidence? (Probative question)

Hypo: Y killed X; Evidence—love letter from Y to X’s wife

- Inferences: Y loves X’s wife, would want to be with X’s wife exclusively, with X out of the picture (which gives Y motive to get rid of X), so Y probably killed X since X is now dead

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

- “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 unusable for the case
  - Conditional relevance (Rule 104(b))
    - Sometimes the relevance of an item depends on the existence of some other fact or condition, in the absence of which the evidence would be irrelevant
    - There must be “evidence sufficient to support . . . the fulfillment of the condition” for the court to admit the evidence
    - The “sufficiency” test provides a low standard

D. Chapter 4 – Relevant but Inadmissible
- Limiting instruction – directive by the judge to the jury to use the evidence only for a legitimate purpose
  Rule 402 (Relevant Evidence is Generally Admissible)
  Rule 403—Confusion & Prejudice
    - Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issue, or misleading the jury, or by consideration of under delay, waste of time, or needless presentation of cumulative evidence
    - Has to be unfair, not enough that it hurts one party’s case
    - Burden—danger must substantially outweigh the probative value
      - Person opposing the evidence must show that it substantially outweighs

Probative value is substantially outweighed by:
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
Classic 403 Problems:
- Probability evidence – only for criminal (*People v. Collins*)
- Graphic depictions – too violent to “lose lunch”
- Reenactments
- Scientific Evidence
- Similar happenings, events, or occurrences
- Prior dealings

Curing Prejudice
- Exclude the evidence
- Limiting instructions—limit ways can and cannot use the evidence
- Could stipulate to the facts—agree between the parties, so that you don’t have to prove them
- Admitting Liability and Reducing or Eliminating Relevance—get rid of probative value of piece of information

*People v. Collins*
- Product rule cannot be used
- Two fundamental errors in case:
  1. Testimony lacked adequate foundation in evidence and statistical theory
  2. Encouraged jurors to rely on logically irrelevant expert testimony and placed the jurors and defense counsel at a disadvantage
- Figures imply a likelihood of over 40% that at least one other couple might have equally committed the robbery. Implies a very substantial likelihood that the area contained more than one such couple and that a couple other than the Ds was at the scene of the robbery.

*Old Chief*
- If an alternative is found to have substantially the same or greater probative value and a lower danger of prejudice, sound judicial discretion would discount the value of the item first offered and exclude it if its discounted probative value were substantially outweighed by unfairly prejudicial risk.
- Has been limited to its particular holding—limited only to 18 USC 922(g)(1)
- Prior felony was assault—Defendant said all the detail would be prejudiced against him and wanted to stipulate, but the prosecution wouldn’t
- Supreme Court said you can force stipulation, as prosecution doesn’t have complete control
- The only reasonable conclusion was that the risk of unfair prejudice did substantially outweigh the discounted probative value of the record of conviction, and it was an abuse of discretion to admit it.

E. Chapter 19 – Authentication, ID, and Best Evidence Rule

Rule 901 (Authentication or Identification); Rule 902 (Self-Authentication – certain documents don’t need to be authenticated)
- Authentication
  - A showing that a thing is what it purports to be
  - The party offering the exhibit need only offer evidence that is sufficient to justify a finding that the thing is what it purports to be
  - It is enough that someone says it is (very low threshold), which can be cross-examined by the other party
  - The judge only determines whether a reasonable jury could find the thing to be authentic

- Writings, Recordings, & Photographs
Rule 1001 (Definitions), Rule 1002 (Requirement of Original), Rule 1003 (Admissibility of Duplicates), Rule 1004 (when original is not needed); Rule 1005 (public records can be proved by a copy); Rule 1006 (can use summaries, charts); Rule 1007 (testimony or written admission of party); Rule 1008 (Functions of Court & Jury)

Photographs
- Foundation: Competent witness says that this is a fair and accurate representation of the thing portrayed
- No need for the photographer
- Can be admitted for a limited purpose if different
- May be disallowed if distortions in the photograph make it misleading

Best Evidence Rule (better called “The Original Document Rule”)
- Goals of the Best Evidence Rule:
  1. Prevention of fraud
  2. Avoid unintentional mistakes in copying
  3. Avoid good faith errors in testimony
- If one can get from testimony to conclusion sought without the writing, then the Best Evidence Rule does not apply
- If the writing is central to the litigation, or there is importance in bringing the precise words of the writing before the trier of fact to avoid the danger of mistransmission, then the writing is required

Working the Rules
- FRE 1002 requires the original
- FRE 1003 says a duplicate can be used unless there is a genuine question as to authenticity or it would be unfair to allow the duplicate
- FRE 1001 gives all the definitions
- FRE 1004 tells when the original document rule will be waived

II. The Examination and Impeachment of Witnesses
Rule 601 - Competency is assumed – have to understand what it means to be truthful; competency is not the same thing as credibility
Dead Man’s Statute—rule of competency, which disqualifies party in affect with opposing party who is now dead
- based on the idea that if the lips of one party have been sealed by death, then the lips of the other party should be sealed by law
- jury can’t assess credibility, if no one to rebut it
- deal with oral transactions, not written

Types of limits on how may testify
1. Competency restrictions – help maintain fundamental fairness of trial process
2. Substantive limits – deter suspect evidence, such as hearsay, propensity character evidence, and settlement offers
3. Form limitations – intended to foster fairness and efficiency
Rule 602 – Lack of Personal Knowledge – otherwise would probably be hearsay or speculation

Rule 605 – Judges – total bar against testifying in that trial as a witness; don’t even have to object

Rule 606 – Jurors – can’t testify at trial (606(a)); they can talk about extraneous prejudicial information, but not the effect (606(b))

Rule 611 – Mode and Order – cross-examination should be limited to subject matter of direct examination (611(b)); ordinarily leading questions should be permitted on cross, but not direct (611(c))

-gives judge authority – can allow leading Q’s on direct, can restrict time & scope of cross

-Direct Examination—non-leading open questions used; very difficult to phrase

-Rule 611(c)—Leading Questions should not be used on direct except as may be necessary to develop the witness’ testimony

-Direct questions should not be compound or call for a narrative

-compound—don’t know which question is being answered, so difficult for appeal

-narrative—opponent can’t object during narrative

-If a question has been asked and answered, it should not be asked again on direct

-Common objections

-Leading; Asked and answered; Compound questions; Assuming facts not in evidence; Argumentative; Calling for speculation—asks them for an opinion that is not for them to make; Non-responsive; Narrative (or Calls for a Narrative)

-Cross-Examination

-Leading questions are encouraged

-What is leading?

-Does it call for a “yes” or “no” answer?

-Does it begin with “Did” or “Does”?

-Does it assume facts not in evidence?

-Restricted in scope of Cross (611(b))

-“Funnel Questioning”—scope of cross is generally tied to the scope of direct examination. All inferences and components of subject matter covered on direct examination, plus the credibility of the witness are fair game on cross.

-Wholly new substantive matters are not the proper subject of inquiry

-Impeachment (Rules 607, 608, and 610)

-intrinsic—depends on answer witness has given you → occurs during examination

-extrinsic—depends on something other than witness’ answer

The Common Law Voucher Rule

-If you call the witness, you vouch for that witness and cannot impeach the witness unless:

-The witness is adverse [positively harmful] and

-The litigant is surprised

Rule 607—the credibility of a witness may be attacked by any party, including the party calling the witness
-Types of Impeachment:
  1. Contradiction - shows that the witness is not a good truth-teller; occurs when attorney disputes the witness’ testimony about a fact
     -Impeachment by contradiction is classic impeachment showing that the witness testifies to something today that is inaccurate. Therefore she is not a good truth-teller generally and should not be believed.

  2. Bias - showing that the witness is disposed against or for the party for whom they are testifying; shown to be influenced, prejudiced, or predisposed toward or against a party
     -Rule 610 – can’t use religion to impeach for inferences of credibility (positive or negative)

  3. Criminal Convictions - Rule 609 – prior conviction
     -felonies of imprisonment of more than 1 year or crimes of dishonesty or false statement
       -includes: perjury, false statement, criminal fraud, embezzlement, false pretenses
     -witness, not accused – it is subject to 403, so burden is on the opponent
     -accused – need a mini-trial (so harder to get in) and burden is on person offering it
       -609(a)(2) (dishonesty crimes) – automatically in – no balancing between prejudice and probative value
     -Rule 609 does not permit:
       -Crimes over 10 years old from date of conviction or release
       -Crimes subject to annulment, pardon, etc.
       -Juvenile crimes
     -Can impeach a denial of prior conviction with extrinsic evidence (i.e. the record of the charge)

     Assessing Prejudice
     -Determine the following:
       -If the crime is probative of truthfulness or honesty
       -Nearness or remoteness in time to the former felony conviction
       -Whether the crime is same or substantially similar to the present charge
       -The effect on the defendant’s willingness to testify

  4. Rule 608(b) – Prior bad acts
     -only acts that involve truthfulness, not acts of violence, speeding, bankruptcy, etc.
     -can’t be asked about arrest, conviction – just about the underlying act
     -Does not permit:
       -Acts proven by extrinsic reputation or opinion testimony not relevant to truthfulness
       -Character evidence as being a truthful person before credibility has been attacked
         -can’t bolster your witness with character evidence until it becomes an issue
       -Arrest, charge, indictment, expulsion, suspension
         -those are acts of other people in response to this person’s bad act
       -Specific evidence when only probative of truthfulness (*-the hard one)

     Rule 608 permits (with some limitations):
     -Reputation or opinion evidence about character for truthfulness
     -Specific acts that are probative of truthfulness when inquired about on cross examination
5. Testimonial Capacities – can be intrinsic or extrinsic
   -Ability to be accurate
   -Incentive to lie in this case
   -Memory
   -Knowledge
   -Perception
   -Sincerity

6. Prior inconsistent statements (Rule 613) – just to show they aren’t a truth-teller, not to show that one statement is correct and one is wrong
   -608(a) – poor reputation or opinion – extrinsic evidence
   -Rule 613(a)—don’t need to show actual prior inconsistent statement to the witness, unless requested by opposing counsel→much different from the common law
   -Rule 613(b)—deals with extrinsic evidence→evidence other than out of the mouth of the witness
   -extrinsic evidence not admissible unless witness allowed to explain or deny the same and opposite party is allowed to interrogate the witness, or interests of justice otherwise require
   -Can be admitted for truth of the matter asserted if it meets qualifying features (under oath, prior proceeding, etc.)

Rule 612 – refreshing recollection – can do anything, but opposing party can see it
   -Can use **anything** to refresh a witness’ recollection either while testifying or before their testimony
   -If necessary, an adverse party is entitled to have the writing produced at the hearing, to inspect, to cross-examine the witness thereon, and to introduce into evidence those portions which relate to the testimony of the witness
   -so, if you refresh, it might put you at a disadvantage, although probably better to get the evidence in then to let it go

Review of Intrinsic Impeachment
   -Impeachment by contradiction
   -Prior bad acts
   -Felony conviction or conviction of a crime of dishonesty
   -Bias
   -Prior Inconsistent Statement

Extrinsic
   -In the impeachment context, any evidence offered to impeach other than from the mouth of the impeached person
   -The need for extrinsic evidence generally arises when the impeached person denies the impeaching question and the impeacher would like to prove the impeachment
The Collateral Matters Rule
- Extrinsic evidence either has to go to opinion or reputation or has to go to some issue in the case, can’t go just to the truthfulness of the witness
- Not collateral
  - Bias is never collateral
  - Testimonial capacities—ability to be accurate; memory; knowledge; perception; sincerity
- A Fact in Issue in the Case
- Proof of Conviction
- You can use extrinsic evidence for:
  - Bias
  - Fact at issue
  - Testimonial capacities
  - Convictions of a crime
  - Reputation or opinion evidence about truthfulness of another witness

Character for Truthfulness
- Rule 404(a)(3) allows character evidence
- Rule 608(a) permits the credibility of a witness to be attacked or supported by evidence in the form of opinion or reputation but limited to:
  - Reference to character for truthfulness or untruthfulness
  - Truthful character only admissible after credibility has been attacked

Rehabilitation of Witnesses
- Rule 608(a): Evidence or truthful character is only admissible after the character of the witness for truthfulness has been attacked

Review: Impeachment
- Impeachment is a specialized form of character evidence that attacks the truthfulness or veracity of the witness
- Prior inconsistent statements are a form of self-contradiction
- Extrinsic impeachment is limited to avoid the time consumption that litigating collateral issues will cause.
- Bias is any form of corruption, influence, prejudice, interest, etc. that can cause a witness to favor or disfavor a party or its position.
- Two types of crimes are permitted: felonies and crimes of dishonesty or false statement.
- Crimes falling outside of these categories are considered less probative of truthfulness
- The required balancing for the accused is considered a special dispensation because he or she has so much more to lose. This gives force to the presumption of innocence.
- Prior bad act evidence should only cover those specific instances of conduct that bear on the truthfulness of the witness.
- Impeachment by omission requires two statements: one preceding trial and one during it. The trial witness’ prior statement omits one or more facts testified to at trial. The inference drawn from this embellishment is that the factual additions at trial suggest dishonesty.
III. Quasi-Privilege – Other Exclusions of Relevant Evidence

-Exclusionary evidence rules are most often justified in one of two ways:
  1. The evidence, if admitted, will mislead the jury or otherwise impede an accurate and efficient search for truth
  2. Exclusion of the evidence will promote some public policy that has little to do with the “truth” in a specific case

-Best example—Settlement—want to allow people to be truthful in settlement discussions, as judicial system relies on settlement

Three Core Concepts
  1. Admissibility turns on the purpose for which evidence is offered
     - Why are you offering it? What is it being offered to prove?
  2. Admissibility turns on establishing a proper foundation
  3. Evidence rules sometimes serve purposes other than the pursuit of truth

-Rule 407 – subsequent remedial measures
  -can include repairs, installation of safety devices, firing, etc.
  -Subsequent remedial measures cannot be offered to prove:
    -Negligence
    -Culpable conduct
    -Defect in a product
    -Design defect
    -Need for warning or instruction
      -allowed for purposes not stated though (“inclusionary rule”)
  -Rule 407: Subsequent Remedial measures can be used to prove another purpose such as:
    -Ownership; Control; Feasibility of precautionary measures, if controverted; Impeachment

-Rule 408 – Offers to Compromise (want to encourage compromise)
  -2 parts:
    -Furnishing, offering or accepting or promising to accept valuable consideration
    -To settle a claim which was disputed as to validity or amount (“inclusionary”, as can use if for purpose other than validity or liability)
    -Is NOT admissible
      -This includes statements or conduct made in compromise negotiations
    -Practical reasons for the rule—sometimes people will be willing to pay a small amount of money to get rid of a nuisance, even if they don’t believe they are at fault
  -Admissible Compromise Evidence
    -Evidence otherwise discoverable
    -Evidence offered for another purpose such as:
      -Proving bias or prejudice of a witness
      -Negating a contention of undue delay
      -Proving an effort to obstruct a criminal investigation or prosecution

General Rules, re: Compromise
  -Use against a compromising party, not admissible
  -Use by a compromising party, then admissible
  -Use against a non-party to impeach, admissible subject to Rule 403
- Rule 410 – plea bargains – guilty plea can be used unless withdrawn
  - Covers: Withdrawn guilty pleas; Plea of *nolo contendere*; Statements made during plea negotiations with an attorney for the prosecution which did not result in a guilty plea or plea was withdrawn
  - Prosecuting authority must be present

- Rule 409 – Payment of Medical or Similar Expenses
  - Can be offered for anything else
  - Can be made to anyone who can accept payment, not just the injured party
  - No dispute necessary for the rule to apply
  - 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

- Rule 411 – Liability insurance
  - Evidence that person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully
  - Possible inference: Person buys insurance which gives you permission to act negligently, as someone else will pay for it; also, jury might be more likely to find against person with insurance, as they know the person won’t really have to pay for it

- When Evidence of Insurance Is Admissible
  - When offered for another purpose such as proof of:
    - Agency
    - Ownership
    - Control
    - Bias or prejudice of a witness

IV. CHARACTER
- Optimistic view of people—not going to say that because you did it before, you’re going to do it again
- Rule 404(a)—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

- 5 rules for understanding character evidence (p. 149) GOOD SUMMARY
  1. If evidence concerns “character” and offered to prove act propensity, inadmissible (Rule 404(a))
  2. Can be rendered admissible if fits within 404(a)(1), (2), or (3) exception or 413-415
  3. Not character or offered for other than act propensity, then admissible as long as not barred by other rules
  4. If character evidence admissible, then can be proven by reputation or opinion; can be proved by prior acts if evidence offered for non-act propensity purpose or not character at all
  5. Rape shield laws = whole special set of rules
What is propensity?
- Previous conduct → to prove character for that kind of conduct → to prove conduct on this occasion
  - this logical inference is what is barred by Rule 404

Exceptions to the Propensity Bar
- The Character Evidence Offered by a Criminal Defendant (called the mercy rule)
  - allowed to be rebutted by the evidence
- Character of the Victim in cases other than homicide or sexual misconduct
- Character trait of peacefulness of victim in homicide case
- Character of Accused, where there first has been attack on victim’s character
- Character of defendant in criminal or civil case involving sexual assault
- Character impeachment of a witness

- When assessing whether Rule 404 will operate as a bar, ask yourself?
  - Is the sole evidence of this evidence based on the idea that “he did it before, therefore he was more likely to have done it again?”
  - If so, then look for exceptions that would allow the evidence. If no exceptions, then it is barred.

Act v. Mental Propensity
- Rule only precludes character evidence offered to prove that the person acted consistently with the character trait on this particular occasion
- If offered to show an internal state, then it does not offend the rule

Method of Proving Character
- 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
- Rule 405(b)
  - When character is an essential element of the charge, claim or defense, can use specific instances of conduct
    - when it is an issue in the case, you can use either

Character in Issue
- 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
- Because propensity is a legitimate part of the case it is not barred by Rule 404
- Proof can be made by reputation, opinion, or specific acts evidence
  - Examples of Character “In Issue”
    - Defamation, Entrapment, Negligent entrustment, Negligent hiring, Seduction
Rape Shield Laws
Rule 412: Presumptively Inadmissible Evidence
-Rule 412(a) creates a general rule against admission of evidence offered to prove:
   -The alleged victim engaged in other sexual behavior
   -The alleged victim’s sexual predisposition
-primary idea was that prior willingness to consent would not mean she would consent every time
-reinstates the propensity bar for victims of alleged sexual misconduct
-exceptions
-criminal
   1. To prove that a person other than accused was source of semen, injury, or other physical evidence
   2. To prove consent
   3. Evidence that exclusion would violate Constitutional rights of defendant
-civil – balancing test (look at the Rule) – probative value must substantially outweigh danger of harm
-Different in 3 ways from general Rule 403:
   1. Shifting burden to proponent to demonstrate admissibility
   2. More stringent; must substantially outweigh
   3. Puts “harm to victim” on scale in addition to prejudice to parties

Rule 413-415: A New Approach
-180 degree turn on propensity evidence
   -allows act propensity evidence of any sexual assault by defendant—doesn’t have to be charged or prosecuted
-can’t just use it to make the defendant a bad person
-413 is the definition of sexual assault, 415 allows it in civil cases
-still subject to Rule 403

IMPEACHMENT
Impeachment by Prior Convictions (Rule 609)
-Rule 609 permits:
   -Prior felonies to be used to impeach witnesses subject to 403
   -Prior felonies to be used to impeach the accused if probative value outweighs prejudice
   -Crimes involving dishonesty or false statement can be used to impeach anyone, regardless of punishment

-Admissibility is favored when the impeached person is the witness, not the defendant
-Exclusion is favored when the witness is the defendant

Factors for gauging degree of prejudice to criminal accused:
   1. Degree to which crime reflects on credibility
   2. Nearness/remoteness of prior conviction
   3. Similarity of prior offense to offense charges
   4. Extent to which defendant’s testimony is needed for fair adjudication
   5. Whether defendant’s credibility is central to the case
The many forms of character
-Specific acts to show untruthfulness on cross-examination
-Opinion/Reputation testimony regarding untruthfulness or truthfulness or a pertinent trait offered by the accused re: self or victim and rebuttal by prosecution
-Specific acts and/or opinion/reputation when an element of the offense or defense

Act vs. Mental Propensity
-The literal language of Rule 404 bars evidence of character or a trait of character to prove “action” in conformity therewith on a particular occasion. Actions implies “acts”, not mental states
-Even though there is debate, most courts and commentator 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
-General Character: likely behavior across many different sorts of situations (truthfulness)
-Character traits: behavior in a narrow set of circumstances (wife-beater)
-“Non-character” specific acts under Rule 404(b): behavior in even more narrow circumstances (kills women and puts them in bathtubs)
-Habit: covered by Rule 406

RULE 404(b) – Other Crimes, Wrongs or Acts Evidence (Non-Propensity Uses)
-Allows crimes or acts evidence if the purpose for such evidence is to show something other than propensity such as motive, opportunity, intent, plan, knowledge, identity, or absence of mistake or accident
-There must be notice of intent to offer such evidence
-Can be used in civil cases like fraud, tort, etc. (we have already seen it in similar happenings)

Proof under 404(b)
-The list is illustrative, so if there is a non-character purpose for the evidence even if not listed, it may qualify as 404(b) evidence
-Can be prior or after occurring events
-Proof must be by evidence sufficient for a reasonable jury to conclude that it occurred by a preponderance of the evidence

What is admitted under 404(b)?
-When offered as mental propensity evidence
-Act propensity evidence: this is using prior specific acts to prove action on this occasion will be admissible under 404(b) when such acts are situationally specific: they have more predictive value than general character evidence
- like signature crimes
Other Purposes: Motive
- The existence of other crime provides a motive for the crime charged.
- Example: Homicide victim is a witness to the defendant's former crimes.
- Showing attacks on other victims to prove hate or drug addiction to prove need for money resulting in theft.
- Useful Definition of Motive
  - Motive is the reason why a specific offender acted with a mental state required by the definition of a charge, crime, claim, or defense.
  - If the reason why a suspect acted is offered to prove that the action was done with a particular mental state, not to prove that the suspect committed the criminal act in the first place, the evidence addresses mental propensity and can be offered.

Other Purpose: Opportunity
- Using uncharged misconduct to show that the defendant had an opportunity to commit the crime.
- Example: Evidence that the defendant had previously stolen a key to the premises that were later burglarized admissible in trial for the 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.

Other Purpose: Identity: Modus Operandi
- Means: the criminal’s method of operating
- Look for a signature trait: that is that the pattern and characteristics of the crimes are so unusual and distinctive as to be like a signature

Other Purposes: Intent
- To show that an act was not done innocently
  - Example: person claims he poisoned a person by mistake. Prosecution may offer evidence that this is the third poisoning “by mistake”
  - Intent must be proven in criminal case
  - Intent is where you will see most of appeals
  - Evidence of other similar acts may help to establish that a D did not act mistakenly or accidentally but rather with the intent or knowledge required by the elements of the applicable tort or crime

“Objective chances”
- The repeated occurrence of certain unusual events is so unlikely as to render impossible the claim that anyone of these events happened mistakenly or accidentally
  - Usually it takes quite a few events to be dealing with objective chances
  - If your gut is telling you that something is wrong, you are likely dealing with objective chances, and that’s about all there is to it
  - Could be character propensity in disguise
Other Purpose: Res gestae
-The use of other crimes that occurred simultaneously to give the jury a full picture
-Example: Murder committed during the course of a robbery

Other Purposes: Common Scheme or Plan
-Where one crime is predicated on another. Example: bombing of a police station to distract police while bank is being robbed
-Two or more crimes have been plotted by same individual because they exhibit similar or unusual pattern (Modus operandi)

Test for 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

Other Purpose: Preparation
- Often used to show identity or intent
- Example: To prove identity: The prosecution may show that the defendant stole a car to use as a getaway car for the charged crime
  -To prove intent: The D broke into a gun store and stole guns prior to the killing for which she claims no premeditation

Critical Questions when assessing Admissibility of Other Crimes or Acts Evidence
-Is the issue for which the evidence is offered in dispute?
  -If not, then can’t use the evidence
-Does the chain of reasoning focus the trier of fact on some purpose other then the D’s general criminal propensities?
  -If yes to both these, then evidence is likely to be admissible under Rule 404(b)

Habit
- Rule 406: 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
- 2 theories on habit:
  1. Probability—this is the kind of act that a person does every time (or almost every time)
  2. Psychological Theory—some say must be almost automatic response

Distinguishing Habit from Character Evidence
- Does the evidence indicate that the behavior occurs with frequency and regularity?
  AND
- Does the evidence offer specificity about the behavior occurrence?
Summary of Character Evidence
- Propensity evidence is the circumstantial use of character evidence to prove conduct on a particular occasion.
- Credibility evidence is a special type of character evidence dealing with the propensity of a witness to be truthful.

Summary of Other Acts Evidence
- 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.
- 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
- Character is in issue when it is an element of a 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.

V. HEARSAY
Chapter 10
-Rule 801(c): Definition of Hearsay
   -“Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted
-Refined Definition of Hearsay
   -HEARSAY is an out of court statement offered in evidence to prove the truth of the matter asserted by that statement . . . solely on the theory that when a person asserts that a fact is true, that fact is more likely to be true. (In other words, if there is another theory of logical relevance, then it is probably not hearsay)
   -If a distinction between hearsay and non-hearsay makes any sense, then an opportunity for meaningful cross-examination should be available when a party offers an out-of-court statement for a non-hearsay purpose
-Hearsay Dangers
   -Sincerity; Perception; Memory; Ambiguity
     -Cross Examination allows us to check all of these (and mode of expression)
-Values of Having a Witness Present:
   -Oath: religious belief; possibility of a perjury prosecution; solemnity of the occasion
   -Demeanor: jurors/fact-finder can assess sincerity, narrative, ability to perceive, memory
   -Cross-examination: clarify ambiguities; reveal mistakes in narrative; weakness in perception; raise reasons to question sincerity
-Is it hearsay? (To determine if it hearsay, need to do the following)
   -First question: Is it a statement?
   -Next: Was it made out of court?
     -can be hearsay even if same person is witness and declarant, if they are referring to a statement they made themselves out of court
     -What is asserted by that statement?
-What is it offered to prove?
- The Hearsay rule must be rigid because:
  - Consistency—we don’t want to worry about case-by-case basis
  - Predictability
  - We don’t trust judge’s discretion (or juries with limiting instructions)
  - Trial bar likes it because it ensure their control
    - must hire a lawyer because no one can understand the hearsay rule

-Declarants are persons (Who is declarant?)
  - Not animals
  - Not mechanical devices
  - Declarant can be same person as witness
- Was statement made out-of-court?
  - Three ideals of testimony are present: under oath, subject to cross examination, jury can observe demeanor
    - Has to be from same trial to not be out-of-court

-What is a statement?
  - Verbal vs. Nonverbal assertions
    - written or oral statements intended to assert something are subject to the hearsay rule if offered out-of-court and asserted for the truth
      - have to have an intent to assert (Rule 801)

-Zenni: The Federal Rules Approach
  - Go to assert Defendant for betting/bookkeeping and while there answer phone calls
    - Under common law, this would be hearsay to show that it is a betting establishment
      - Using people’s statements that they believe it is a betting establishment to show that it is
        - They were only calling to make a bet, not to assert that this was a betting establishment
          - Non-assertive words here

-Non Assertive Conduct and Implied Assertions
  - Declarant did X …therefore the declarant believed Y and Y is a fact of consequence to this litigation
    - in common law, we are not allowed to offer this evidence

-Truth of matter asserted
  - has to be accurate to be relevant
    - depends on relationship to stuff important to trial

-Common Hearsay Misconceptions
  1. It’s not hearsay if you paraphrase
  2. It’s not hearsay if the witness is also the declarant
  3. The statement isn’t hearsay if it’s circumstantial evidence
  4. It’s not hearsay if the statement was made in a police officer’s presence
  - If you infer something from the conduct that was not intended to be inserted by the conduct, then it is not hearsay
Chapter 11 (Offering Statements for Non-Hearsay Purposes)

-When offering an out-of-court statement as non-hearsay, need to show how the statement is relevant without regard to its accuracy

-Virtually any statement can give rise to a myriad of non-hearsay uses – however, need to establish a connection between statement and a material fact or credibility of a witness

-Routine non-hearsay purposes:
  1. Evidence of speaker’s state of mind
     -Important if declarant’s belief is a material fact or belief is circumstantial evidence of the declarant’s behavior
  2. Listener’s state of mind (usual for self-defense claim)
  3. Notice
  4. Legally operative fact
  5. Assertion offered to contradict/impeach testimony (prior inconsistent statement)
     -not being offered for truth, just to show that they are a liar

-Rule 613(b) – Prior Statements of Witnesses

-Witnesses may be allowed to explain or deny it and opposite party is afforded an opportunity to interrogate the witness if extrinsic evidence used

-2 statements about a topic – 1 during testimony, 1 prior

-must be inconsistent

-sometimes inconsistency is a matter of degree and depends on perception, perspective, and personal experience

-6. Assertion offered to provide context and meaning

-Often they are out of court statements where the witness and the declarant are the same person

-If offered to show context or relationship, ask if there is any significant fact that is gleaned from these statements that is usable for substantive proof. If so, then it probably has gone beyond context.

A. Non-assertive conduct

-No hearsay, because person who observed the conduct is on the stand – merely describing the conduct gives us the inference we need

B. Words not offered for the truth, but as circumstantial evidence of a fact

-Federal Rules – verbal conduct, trying to prove something other than being asserted, will get you around the hearsay rule

-Determining declarant’s mental or emotional condition would not be hearsay

C. Notice – not offered to prove truth, but to show that someone was aware of a fact (i.e. spill)

-When an out-of-court statement is being offered to show the declarant’s then existing awareness or knowledge of a fact, then it is not hearsay

D. Legally operative words – these words become an “event” when they happen (offer, donative intent)

-not hearsay – can test witness’ memory, perception, sincerity, etc.
E. Relevance
- The critical determination that makes what looks like hearsay non-hearsay is identifying the fact of consequence for which it is offered. In other words, what does this statement help you prove? If the answer is the truth of the statement then it is hearsay. If offered for another purpose as outlined above, then an argument can be made that it is not hearsay.
- If non-hearsay use is not relevant, then cannot offer it for that purpose
- You can create relevance
  - Example – shotty police work – brings in all statements that police heard – attorney has made this evidence relevant

Overview of Non-Hearsay
- Statement not dependent on its truth
- Statement offered to show the effect on the hearer
- Verbal act or legally operative statement
- Non-assertive conduct offered to prove a fact of consequence or an internal state
- Implied assertions not intended to communicate the fact of consequence
- Silence under conditions in which one would not be silent

VI. Chapter 12 – Exceptions
- Rule 801(d)(1) – Not hearsay if:
  A. Inconsistent with declarant’s testimony
  B. Consistent with declarant’s testimony and offered to rebut an express or implied charge against the declarant
  C. One of identification of a person made after perceiving the person

- Exemptions vs. Exceptions
  - With Exemptions, trustworthiness is not as great an issue because:
    - The declarant is also testifying at trial and is subject to cross examination, or
    - The declarant is a party
  - With Exceptions, there is something about the circumstances giving rise to the hearsay that makes it trustworthy.
- Foundations
  - In order to admit what looks like hearsay under exemption or exception, one has to prove the necessary conditions are present
    - Rule 104(a) – judge decides whether foundational requirements have been met, as we don’t want the jury to hear something they might not be allowed to hear
    - Preponderance of the evidence (even from criminal, although jury has different burden)

- 801(d)(1)(A) – Prior Inconsistent Statements
  - Is the declarant present and subject to cross examination concerning the statement?
  - Was it a prior INCONSISTENT statement?
  - Was it made under OATH?
  - Was it subject to the penalty of perjury at another proceeding or deposition?
- Used to cast doubt on credibility
-Setting up an inconsistency?
  -If witness called merely to offer prior inconsistent statements for impeachment and doesn’t
    meet Rule 801, must meet:
      1. Essential witness test
      2. Primary purpose test – if witness offers other facts and primary purpose is not to sneak
         in these facts, then allowed
  -If meet 801 requirements, you can bring them just for prior inconsistent statements

-801(d)(1)(B) – Prior Consistent Statements
  -really dealing with bolstering their truthfulness and what they said (I’ve said it so many
    times, so it has to be true)
  -timing is everything – prior statements only admissible if made before a motive was
    established
  -It is offered to rebut a charge of recent fabrication or improper motive or influence

-801(d)(1)(C) - Identifications
  -Witness can be person who made ID or witnessed the person making the ID, as long as
    original witness is subject to cross-examination
    -Is the statement one of prior identification made after perceiving him or her?
    -Is the person who made the identification testifying at trial and subject to cross-
      examination?

Chapter 13 – Party Admissions
-801(d)(2): Not hearsay if
  A. Party’s own statement (straight admission)
  B. Statement which party has adopted (adoptive admission)
  C. Statement by person authorized by party to make statement (authorize admission)
  D. Statement by party’s agent or servant within scope of agency or employment (employee
    admission)
  E. Statement by conconspirator in furtherance or in course of conspiracy (co-conspirator
    admission)

-Basics principles of party admissions:
  1. Must be offered by the adversary
  2. Any statement can qualify – doesn’t have to confess wrongdoing or be against party’s
     interests
  3. Out-of-court statement can be offered regardless of when it was made
     -doesn’t have to have personal knowledge
     -doesn’t matter if it is an opinion

-Elements of Admission
  -Statement by a party
  -Identify party
  -What is statement being offered for (who it is being offered against)
  -We are very liberal in what we allow in
Judicial Admissions
Once a party opponent makes a statement in pleadings, pre-trial admissions, interrogatories and the like, it cannot be disputed at trial
-What one says in testimony though can be disputed (although it would probably sound dumb)
-Such statements are characterized as binding judicial admissions

Questions to ask:
-Who made the out of court statement?
-Is that declarant a party?
-Who is offering the out of court statement?
-Is it offered against the declarant/party?
-Is the party against whom the statement is offered the state?

801(d)(2)(B) – Adoptive Admissions
-if party doesn’t deny something that most people would deny, then it is as though they “adopted” it
-Foundation:
-Party heard and understood the statement
-Subject matter was within the party’s personal knowledge
-Under the circumstances a reasonable person would have disputed/denied the statement had it not been true

801(d)(2)(C) – Authorized Admissions
-Is it a statement by a person authorized by the party?
-Is it offered against that party?
-Was the person authorized to speak on behalf of the party regarding this statement?
-If, so, then the person’s statement is attributable to the party
-Judge decides, as he decides foundational requirements
-Must offer independent evidence of authorization other than statement (for D & E too)

801(d)(2)(D) – Statement by Party’s Agent or Employee
-Is this a statement by a party’s agent or employee?
-Is the statement concerning a matter within the scope of the declarant’s employment or agency?
-Was the statement made during the existence of that relationship?
-Independent contractors are not usually employees

801(d)(2)(E) – Co-Conspirator’s Statements
-Was there a conspiracy? (Don’t have to charge them with conspiracy)
-Was the statement made by a co-conspirator?
-Was the statement made during the course of the conspiracy?
-Was the statement made in furtherance of the conspiracy?
-Preponderance of the evidence is proof needed for evidence, but beyond a reasonable doubt is needed for criminal case
-Thus, you can prove it for evidence, but not have enough for the criminal case
Bruton Rule – statement made by co-conspirators; statement is admissible against one party and inadmissible as hearsay against another party, then 2 cannot be tried together

-Proving the Foundational Requirement of Conspiracy
  -What is the evidence of conspiracy?
  -Is the evidence proving the conspiracy independently admissible?
  -How strong is the admissible evidence?

Chapter 14 – Hearsay Exceptions – Availability of Declarant Immaterial
-Rule 803 – allows for hearsay whether or not declarant is available in court
  -these exceptions are considered the most reliable exceptions
-Rule 803 exceptions trustworthiness ties together all Rule 803 exceptions
-partial knowledge is an implicit requirement to all these exceptions

-Rule 803(2): Excited Utterances
  -Is it a statement that relates to a startling event or condition?
    -subjective and objective startling
  -Was the statement made while the declarant was under the stress of excitement caused by the event or condition?
    -under the assumption that people won’t lie when a startling event happens, as no time to lie
    -less concern about memory because it happens immediately
    -however, may be perception and ambiguity problems
  -Timeframe depends upon how startling

-Rule 803(1): Present Sense Impression – fairly new
  -Is this a statement describing or explaining an event?
  -Is it made while the declarant was perceiving this event or immediately thereafter?
  -believed to be more reliable because simultaneous to the event
    -memory and sincerity issues aren’t a problem
  -statement usually made to someone else who witnessed the event, so they would be able to recognize any problems with the statement
  -many present sense impressions happen over the phone – can report what you hear other people saying over the phone
  -less time allowed then under startled event
  -Observations:
    -Personal knowledge – content of statement generally suffices to prove personal knowledge, but look for other evidence to corroborate
    -Content is preferred to be a description – need to watch for impermissible opinions
  -Common-law did not allow this, so it won’t be allowed in common-law jurisdictions
-Rule 803(3) - The State of Mind Exception
   -Statement of the declarant’s then existing state of mind, emotion, sensation, or physical condition . . .
   -But not including a statement offered to prove the fact remembered or believed
   -Usually has to be an internal state
   -Hillmon
   -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).
   -an assertion of declarant’s intention to perform a future act is admissible to prove that the declarant followed through and did it
   -only captures intent, but many courts apply it liberally
   -803(3) under Federal Rules only captures declarant’s intent, but many courts make it more like these 2 cases (Hillmon and Pfeaster) and allow more in

-Rule 803(4) – Medical Exception
   -Reliable because you are not going to tell a doctor that it hurts somewhere because you are going to get treatment
   -At common-law, only a treating physician would be allowed
   -Federal Rules don’t make a distinction between treating and testifying physicians – allows a larger group of statements in; doesn’t have to be a doctor either (nurse, etc.)
   -Questions to Ask:
     -Is the statement made for medical diagnosis or treatment?
     -Does it describe medical history, past or present symptoms, pain or sensations, or the inception or general character of the cause or external source?
     -Is such a statement pertinent to diagnosis or treatment?

Rule 612: Refreshing Recollection
-Can use anything to refresh a witness’ recollection either while testifying or before their testimony
   -Idea is that they are now giving present testimony from their own memory
-If necessary, an adverse party is entitled to have the writing produced at the hearing, to inspect, to cross-examine the witness thereon, and to introduce into evidence those portions which relate to the testimony of the witness

-Rule 803(5) – Recorded Recollection
   -Requirements:
     -Memo or record
     -Regarding a matter about which the witness once had knowledge but now has insufficient present memory [to testify fully and accurately]
     -Made by the witness or adopted by the witness
     -When the witness’ memory was fresh
     -To reflect knowledge correctly
-3 ways to get witness’ testimony into evidence
  1. Testimony from present recollection
  2. Testimony from past recollection refreshed
  3. Testimony from past recollection recorded
-Rule 803(6) – Business Records (and 803(7) – absence of records)
  -Memo, report, record, etc.
  -Made at or near the time
  -By a person with knowledge or transmitted by a person with knowledge
  -Kept in the regular practice of that business activity to make the memo
  -Shown by custodian or other qualified witness
  -Unless untrustworthy – onus is on party seeking to exclude the record to convince the judge that the record is untrustworthy
  -Palmer v. Hoffman, p. 613
  -Evidence at issue – accident report 2 days after the accident; not admissible because it is not in the regular course of business
  -Statements lose their trustworthiness when used solely for litigation purposes

-Rule 803(8) – Public Records
-Public Records Setting Forth:
  -803(8)(A): the activities of an office or agency
    -Example – filed a lien
  -803(8)(B): matters observed pursuant to a duty imposed by law
    -duty to report
    -except in criminal matters observed by police
    -Example – rainfall records; court reporters information
  -803(8)(C): factual findings resulting from an investigation
    -made pursuant to authority granted by law
    -only in civil cases or against the government in criminal cases
    -Example – EEOC investigation after allegation of discrimination
-All 3 subparts apply to Records of public officers or agencies
-All have the trustworthiness element like business records (803(6))
-Beech case
-Court said that as long as conclusion was based on factual investigation, then it is allowed (very broad reading of the Rule)

Rule 803(9) – (23)
-Vital Statistics – birth certificate
-Family Records
-Dispositive Documents
-Ancient Documents – some debate at what is an ancient document
-Market Reports
-2 not mentioned in the book:
  -803(21) – Reputation as to character
  -803(18) – Learned treatises – incredibly useful impeachment devices to impeach an expert
VIII. Chapter 15 – Declarant Unavailable

Rule 804 – declarant has to not be available to testify

-doesn’t mean that declarant is not in the courtroom (could be 5th Amendment privilege)

-Rule 804(a): Definition of Unavailability

-Privilege – 5th Amendment
-Refuses to testify despite order
-Lack of Memory
-Unable due to death or infirmity
-Despite efforts, cannot be procured for the hearing

-Unless unavailability procured by the proponent of the statement

-Rule 804(b)(1): Former Testimony

-Remember that the declarant is unavailable
-There was an opportunity for cross examination at the first proceeding
  -Don’t have to exercise the opportunity
-There was a similar motive to cross-examine in both proceedings
  -If civil case follows criminal case, then can usually find a pretty good motive to stay out of jail, unless it is a speeding ticket vs. damages for wrongful death

-How do you determine if it is a similar motive?
  -What is at stake at the previous proceeding?
  -Under what conditions was the previous testimony developed?

-Rule 804(b)(2): Dying Declarations

1. Declarant unavailable per 804(a)
2. Believes that death is imminent (need not be dead)
3. The statement concerns the cause or circumstances of the impending death
4. Homicide prosecution or civil case

Common Law for Dying Declarations

-Declarant must be dead; Believed death was imminent; Statement regarding cause and circumstances of that death; Statement can only be used in a homicide prosecution, i.e. the victim must be the declarant

-Idea is that you don’t want to say an untruth right before you die

-Rule 804(b)(3): Statements Against Interest

-Declarant unavailable per 804(a)

-The statement is so far against declarant’s interests that declarant wouldn’t have said it if he or she didn’t believe it

-The interests considered are:

- Pecuniary interests – interest in money
- Proprietary interests – interest in property
- Civil Liability – “I was at fault in this accident”; “I agreed to deliver coal”
- Criminal Liability (wasn’t included in common law rules) – “I just sold 2 pounds of coke”
Don’t trust them that much to include them under 803, but do trust them enough to use them when the declarant is unavailable – likely to be true because they disadvantage the person making the statement.

1. What is against Interest?
   - Must be adverse to the declarant (subjectively adverse)
   - The declarant must be aware of that adversity at the time of making the statement

2. Declarations against Interest Offered for Exculpatory Purposes
   - When a declaration against interest is offered to exculpate an accused, then in order for it to be admissible, we need additional corroborating circumstances that clearly indicate its trustworthiness
     - Notion that there is honor among thieves – will lie to get other people off
     - Prosecutor however doesn’t have to put on corroborating evidence when bringing it in
       - So, same statement can be used by prosecution, but not by defense

3. Corroboration Requirement
   - Why do we require corroboration when a declaration against interest is offered to exculpate?
   - The most typical corroboration is other evidence in the case that makes the defendant appear innocent
     - However, circumstances surrounding the declaration against interest can be corroborating in some instances

4. How Much of the Declaration Should be Included?
   - Collateral Statements (Williamson case)
     - This comes up a lot in exculpatory statements because the exculpating part is generally not the part that is against interest – want to be able to capture the collateral statements to make sure that you get everything you need
       - Is the relevant portion “integral to the whole?”
       - The Advisory Committee Note uses the term “related” to deal with collateral statements
         - opens the door to even more statements surrounding a statement against interest

Rule 804(b)(4): Statement of Personal or Family History
- How do you know where you were born and who your parents or grandparents are?

Rule 805: Hearsay Within Hearsay
**Quite useful for exam purposes
- Identify all of the pieces of hearsay, and
- Identify exceptions, or theories of non-hearsay, that will allow each piece to be admissible
- Look for hearsay; if there is a record, look for hearsay within the record (which still might get in under business/medical record)

Rule 806: Impeaching the Hearsay Declarant
- Treat them just like any other witness (personal knowledge, speculating, bias, impeachment, etc.)
- A hearsay declarant is impeachable as would be any other testifying witness, except
  - A hearsay declarant need not have an opportunity to explain or deny a prior inconsistent statement
  - A declarant can be called and cross-examined about the statement by the party calling that witness

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IX. Chapter 16 – Residual Hearsay and Confrontation Clause

- Rule 807 (Residual Exception)
  1. Equivalent circumstantial guarantees of trustworthiness
     - Look at circumstances surrounding the statement, not other evidence
     - Leading questions, time between event & questions, indicators of sincerity, lack of ambiguity, good memory, ability to perceive
     - To admit under 807, need to tell the judge that these dangers aren’t a problem
     - “Near miss” – almost have a hearsay exception, but something is missing
       - Some courts say allow it in under 807 (if you meet other requirements)
       - Other courts say you must meet the elements
     - Grand jury testimony – may no longer be available after Crawford – no prior testimony exception, but used to come in under 807
       - Crawford says that testimonial hearsay is not admissible against a criminal defendant because it violates the Confrontation Clause (bright-line rule)
  2. Statement offered to prove a material fact (slightly more than relevant)
     - Have to be reasonable efforts to get other evidence in
     - 807 doesn’t require unavailability
  3. More probative than other available evidence
  4. General purposes of these rules and interests of justice will be best served by admission of the statement (doesn’t add much from Rule 102)
  5. Notice – has to be reasonable notice
     - Courts have relieved party of notice if it happens on the eve of the trial, if there is no prejudice to the opponent (might have to give them a continuance)

Confrontation Clause

- 6th Amendment – “accused shall enjoy the right to confront witnesses against him”
- Has resulted in 3 kinds of rights:
  1. Right to be present at trial
  2. Right to face accuser
  3. Right to cross-examine
     - If come in under hearsay rule, then have deprived defendant of ability to cross-examine
- Past – if hearsay is firmly rooted in the laws of Evidence, then will accept it as not a problem to Confrontation Clause
- Now – we have a new Rule (from Crawford v. Washington)
  - Instead of looking for firmly rooted exceptions to the hearsay rule, we have a bright line test
    - If hearsay is testimonial hearsay, then it cannot be used in a criminal case
  - Supreme Court suggests that private conversations that become admissible hearsay are still allowed – 6th Amendment only meant to capture government officials
  - “Testimonial” – statements that were made under the circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial
     - Includes affidavits, statements given to police officers, courtroom testimony, and depositions
     - Doesn’t encompass any statement to a government employee (too broad)
X. Chapter 8 – Lay Opinion

-Rule 701

-Lay opinion is limited to opinions or inferences that are:
  -Rationally based on the perception of the witness (knowledge; applies a logic) AND
  -Helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue
  -just has to be helpful, not necessary

-Lay opinion is easier to get in than expert opinion (expert opinion has more hoops to jump through)
-Statement requires person to make inferences in making the statement or statement is a conclusion
-As a practical matter, sometimes you don’t want lay opinion, but sometimes you have to have it
-Want to be able to cross-examine, as we don’t want to deal just with conclusions
-Concerned that the trier of fact makes the conclusions – if they can do it without a witness telling them the conclusion, then we would rather do that

Background

-Common law: Non-expert witnesses could only testify to matters within their personal knowledge; i.e. the witness obtained the knowledge through his or her senses (Rule 602)
-Inferences, conclusions and opinions are not merely the product of observation but of the human power of reason rather than by observation
-Drawing conclusions from the facts presented is usually the job of the jury
  -Lay opinion as to sanity is questionable, because they can report what they saw and leave it to the jury to decide

Rationally Based on the Witness’ Perception

-This requirement reflects a preference for a more specific over more general description
-Great deal of judicial discretion in determining whether the opinion is “rational” given the witness’ observation and even if rational, helpful to the jury

Helpful to the Jury – Rule 701(b)

-Helpfulness includes:
  -“You had to be there” circumstances: the witness’ recounting of the facts does not capture the reality of what happened
  -“Collective facts”: a shorthand rendition of what the witness perceived. Example: a smile. Inferences a lay person commonly and reasonably draws.

-Collective Facts
-Skilled Lay Opinions
  -The admissibility of a skilled lay observer’s testimony turns not on whether most layperson’s commonly could reasonably draw the inference but whether this lay person has prior experience that enables lay persons with such experience to reasonably draw the proffered conclusion
Invading the Province of the Jury
- How is the testimony relevant to the issue?
- If the opinion goes to the ultimate issue, then look to see if it invades the province of the jury
- What do you do to avoid this?

Caveats on Lay Opinion
- Common law – “necessary”; FRE loosened to when “helpful”
- Fact and opinion are not always divisible: sometimes the distinction is a matter of degree
- Common law flatly prohibited opinions on ultimate issues. FRE generally permits such opinions by experts and lay people.
- It is about the testimony, not the person.