Evidence Outline — Goldwasser

RELEVANCY & PROBATIVE VALUE

FRE 401
Relevant evidence is any evidence having 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 the evidence.

Relevancy is the sum of two different concepts:

Materiality
1. Relates to whether the evidence is offered upon a matter properly in issue
2. Some issues are always material → credibility of witnesses
3. Relationship between the point being offered and the element necessary. “…of consequence to the determination of the action…”

Probativeness
1. Evidence must logically tend to prove the proposition for which it is offered
2. Probativeness is a matter of sense, logic, and experience

The evidence must not make the proposition substantially more likely than not but only somewhat more likely than not.

FRE 402
1. Only relevant evidence is admissible
2. The evidence must bear a sufficient relationship to the maters in dispute
3. The evidence must tend to prove or to disprove any proposition
4. Circumstantial v. Direct Evidence
   a. Direct → is believed, establishes an essential element of the case
   b. Circumstantial → an essential element not so immediate and may require intervening inferences

FRE 105
Where evidence is admissible for one purpose (or as to one party), it is not rendered inadmissible solely because it is improper or irrelevant for some other purpose.

FRE 403
Evidence may be excluded if its probative value is substantially outweighed by the danger of:
* Unfair prejudice → refers to the danger that evidence might suggest an improper basis upon which the jury could decide the case.
  o The test is not whether the evidence is detrimental, but whether it is so unfairly prejudiced as to substantially outweigh its probative value.
  o Evidence can trigger a response that has nothing to do with its logical connection to a fact of consequence.
  o A single item of evidence can generate several different inferences and be used by the jury in more than one way.
This rule prohibits the use of prior specific acts to prove action in conformity with the character.

Confusion of the issue—evidence confuses the issues when it focuses the jury’s attention too closely on a factual issue that is not central to the outcome of the case. Such issues are called collateral.

Misleading the Jury
  - A risk that a jury may give a piece of evidence more weight than it deserves

Undue delay
Waste of time
Needless presentation of cumulative evidence

With 403 you must assess the probative value by examining:
  1. Strength of the underlying inferences
  2. Certainty of the starting point
     a. Judges may not consider the credibility of witnesses, it is the jury’s job to determine the weight; the judge only determines the relevancy
  3. Need

When an item of evidence has a proper relevant use to prove a fact of consequence but also creates the risk of an improper use, the judge may give a limiting instruction that directs the jury to consider the evidence only for its proper use.

FRE 104
The offeror of the evidence has the burden of proof.

104(a)—Where the preliminary fact relates to the legal admissibility of the offered evidence (e.g., the qualifications of an expert), the issue is determined by the judge. The proponent of the evidence must establish a preliminary fact by a preponderance of the evidence.
  - Examples
    - With experts, the proponent must persuade the judge the expert possesses expert qualifications
    - With hearsay, the proponent must persuade the judge of the existence of any facts essential to bring the evidence within some hearsay exception
    - With duplicates, the proponent must show by a preponderance of the evidence the original was lost

104(b)—Where the preliminary fact goes to relevancy, credibility, or weight of the evidence, the trial judge initially determines only whether there has been a minimal showing of the preliminary fact. The ultimate determination of the preliminary fact is for the jury.
  - Only admissible evidence may be reviewed

104(c)—Hearings

How do you decide between 104(a) & 104(b)?
  - If the evidence is absolutely irrelevant without the preliminary fact, then 104(a) or 401 applies
  - If the evidence is relevant without the preliminary fact, then 104(a) applies
LAYING THE FOUNDATION FOR PROOF

**FRE 601**

- Witness competence → 104(a)
- Every person is competent to be a witness except where state law supplies the rule of decision.
  - Example, in a diversity case where state law supplies the rule, a child witness to be competent would have to meet the 3 required elements under common law.
- Test for competency is the minimum competency test
  - Requires personal knowledge (**FRE 602**)
  - Requires declaration to testify truthfully (**FRE 603**)
    - Dispense with strict competency requirements and let the jury weigh the evidence. (104(b))
- **FRE 604**: Interpreters may be used

**FRE 901: Authentication of Exhibits**

- All exhibits must be shown to be what they are claimed to be before they can be admitted into evidence.
  - Real evidence → documents, writings, voice samples, physical evidence
  - Demonstrative evidence → explanation evidence (visual aids, charts, maps, etc.)
- **FRE 901(a)** establishes the evidentiary standard that the proponent of an exhibit must satisfy for the judge to admit the exhibit.
  - There is a relevancy theory requirement—there must be a connection between the item and the parties or events in the case.
  - There must be evidence sufficient to support a finding.
    - Evidence upon which the judge thinks a jury could reasonably find a fact to be more likely true than not.
- **FRE 901(b)** sets forth illustrations of the kinds of foundation facts that the drafters of FRE believe should satisfy that standard.
  - There must be some authenticity and identification
  - Real evidence—tangible items
  - Two principle methods of identification:
    - Witness may recognize item
    - Chain of custody → to ensure no one has tampered with the evidence.

**BEST EVIDENCE RULE**

**FRE 1002**

- To prove the contents of a writing, the original must be produced, unless it is shown to be unavailable.
  - Situations where best evidence rule does not apply:
    - Merely to prove that a writing existed
    - Merely to prove that a statement was made
Where the contents of the writing are collateral to the issues being litigated→FRE 1004

Situations where the best evidence rule does apply:

- Where the writing itself has independent legal significance
  - Words of a contract, deed, etc.
- Where the writing is offered into evidence to prove an event
- Where the testimony is reliant on the writing, not reliant on personal knowledge

2 layers of best evidence rule

- Best evidence
- Hearsay

Example: Witness is listening to police scanner and hears that red and (speeding) blue car got into an accident at the corner of Maple and Cedar. Witness lives at this intersection and goes to her window and sees the cars in the intersection. At trial, witness is produced by the Π and asked to testify as to what she heard on the police scanner. This would be inadmissible as hearsay. Her testimony as to what she heard was an out-of-court statement offered to prove its truth. She is testifying as to the speeding blue car, but she didn’t see the blue car speed, she only saw them after they crashed at the intersection. How about the best evidence rule? It doesn’t apply because there was no writing, recording, or photograph.

FRE 1003

Duplicates and photocopies are admissible and treated as originals unless there is a dispute as to the authenticity of the original or it would be unfair to admit the duplicate

CHARACTER EVIDENCE (RELEVANCY)

FRE 404(a)

Character evidence is evidence of how a person generally behaves, or behaved on some other occasion.

Character evidence (evidence of a person’s character or trait or a pattern of bad conduct) is not admissible for the purposes of proving action in conformity therewith on a particular occasion.

- Policy
  - People don’t always act within their character
  - Juries might be unduly swayed

- Exceptions:
  - Where character is an essential element of a claim, defense, or cause of action, character evidence is admissible
    - Defamation cases
    - Child custody cases
  - Where knowledge of the character of another is at issue, character evidence is admissible
    - Self-defense
Negligent entrustment
- Where the accused opens the door under FRE 404(a)(1)
  - Δ may offer evidence of good character by reputation or opinion evidence, not specific acts, to prove his innocence and the prosecution may rebut with negative traits
- Bad character of the victim
  - To show the victim acted in conformity with character, then conduct would tend to prove Δ’s innocence
  - Reputation and character evidence

In civil actions, 404(1) prohibits the use of character evidence to show conformity, but it may be used in a civil case if the civil action is based on culpable conduct proscribed by criminal law.

**FRE 404(b)**
- Evidence of other crimes and acts is admissible when it is offered to show something other than character.
  - KIPPOMIA
    - Knowledge
    - Intent
    - Plan
    - Preparation
    - Opportunity
    - Motive
    - Identity
    - Absence of mistake or accident
- There must be notice of using these other crimes and acts
- Specific trait to be proved must be in issue
- Where evidence of other crimes are admissible to show KIPPOMIA, it need not be shown that anyone was actually convicted, just that the other acts occurred.

Character evidence has low probative value, is highly prejudicial.

**FRE 405**
- Where character evidence is admissible, all 3 forms of character evidence may be used as proof of character.
- Specific acts can only be admitted by:
  - By inquiry during cross-examination of a witness giving reputation or opinion evidence (405(a)), or
  - In cases where character or character trait is an essential element of a charge

**FRE 413-415**
Sex crimes→these rules override 404(b) and allow specific acts of sexual assault to prove a person’s character or propensity for engaging in such misconduct to show action on a particular occasion.
413: When a criminal defendant is accused of sexual assault, the prosecution may introduce evidence that the defendant committed other such crimes to show his propensity to commit sexual assault.

414: Same as 413 but for when a criminal defendant is charged with child molestation.

415: Same as 413 but for civil cases involving sexual assault or child molestation.

This evidence is still subject to 403 balancing.

**THE OTHER RELEVANCY RULES**

**FRE 406**

Evidence of a person’s habit or the routine practice of an organization 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.

**FRE 407**

Evidence of subsequent remedial measures is inadmissible to prove negligence or culpable conduct in connection with the event:

- Exceptions:
  - To prove ownership or control
  - To show an attempt to conceal or destroy evidence
  - For impeachment of testimony as to the safety of the condition
  - To show precautionary measures were feasible

- Rationale:
  - Subsequent repairs do not logically establish prior lack of care
  - Admitting such evidence would tend to discourage beneficial changes from being made after an accident.

**FRE 408**

Evidence that a Δ has paid or offered to pay money in a settlement of a disputed claim against her is not admissible to fix liability as between the parties.

- Public policy → to encourage out of court negotiations.
- Exceptions:
  - To prove bias or prejudice of a witness
  - To controvert a contention of undue delay by one of the parties
  - To prove that a party attempted to obstruct a criminal investigation.

**FRE 409**

Evidence that a Δ paid or offered to pay medical, hospital bills is not relevant to prove the Δ's liability for injuries.

- But admissions of fact accompanying offers to pay medical expenses are admissible. The admission of fact is admissible but the statement regarding offer to pay medical bills is not.

**FRE 411**

Evidence that a person was insured is not admissible to the issue of whether a person acted negligently or wrongful. It is admissible for other purposes than to prove the Δ liable.
HEARSAY

Hearsay is an assertion made or done by someone other than a testifying witness on the stand that is offered into evidence to prove the truth of the matter asserted.

Approach to hearsay:
1. Is the statement offered to prove the truth of the matter asserted?
   a. Is the statement relevant for any purpose other than does not require accepting the truth of the matter asserted?
2. Is the statement is hearsay, is it nonetheless admissible under an exception or exemption to the hearsay rule?

Exemptions→statements offered for their truth but still not considered hearsay
Exceptions→statements acknowledged to be hearsay but still admissible

Pay close attention to the facts for suggestions of exceptions
Be sure that all the technical requirements of an exception are met before deciding that the exception does in fact apply

Concerns: reliability, sincerity, perception and memory problems

The hearsay rule is not applicable where evidence of the out-of-court words or actions is offered only to show that the statement was made or that it had a certain effect on a listener or observer, rather than to prove the truth of the matter asserted.

FRE 801

Statement
   o Includes assertive conduct→actions that are the equivalent of words are treated as hearsay if the words would be hearsay
   o Nonassertive conduct is not treated as hearsay and is admissible not only to show the declarant’s state of mind but also to prove the truth of the matter asserted (there are no issues of trustworthiness)

Declarant
Hearsay

FRE 801(d): Hearsay Exemptions

1. Prior inconsistent statements by witness→801(d)(1)(a)
   a. Statement inconsistent with testimony given at trial
   b. Made under oath and in a proceeding
   c. Prior inconsistent statements not sworn are only admissible to impeach
2. Prior consistent statements by witness→801(d)(1)(b)
   a. Contents of statements are consistent with what was given at trial
b. Used to rebut an express or implied charge of recent fabrication or improper influence or motive on the part of the witness

3. Witness’s prior statement identifying a person→801(d)(1)(c)
   a. Statement identifies a person
   b. Statement may be either consistent or inconsistent with trial testimony
   c. Statement must have been made after declarant perceived that person.

4. Admission by party-opponent→801(d)(2)
   a. Direct admission→(a)
      i. Statement is made by a party and that statement is against the interest of the party, although it didn’t have to be against the interest when it was made
         1. Δ comes up to Π after car accident and says, “It was my fault.”
   b. Admission by conduct or silence (Adopted Admission)→(b)
      i. Judge decides under 104(a) whether the party’s conduct does manifest the belief.
      ii. Π suing former employer after longterm exposure to a chemical causing leukemia. Δ denies chemical was unsafe and they knew there was any special danger caused by exposure. Π offers a report complied by Δ to a federal agency detailing the harmful effects of the chemical. Upon objection, it will be admissible.
         1. At trial, they deny danger. But report they conducted says it is. This is the inconsistency.
   c. Authorized admission→(c)
      i. A statement of any person specifically authorized by a party to speak
   d. Vicarious admission→(d)
      i. Statement of an agent or employee made during the existence of the relationship and concerning a matter within the scope of employment
   e. Co-conspirator’s admission→(e)

**FRE 803: Hearsay Exceptions – Availability of Declarant Immaterial**

- Can be invoked whether the declarant is available or not
- Always a requirement of 1st hand knowledge
- Credibility may be attacked as if the declarant was available
- Judges have no discretion as to admit or not admit this evidence

1. Present sense→803(1)
   a. Governed by 104(a)
      i. Can use the statement to determine preliminary facts
   b. Event or condition
   c. Describe/explain
   d. While perceiving/immediately thereafter
      i. Time frame element→while perceiving or immediately thereafter (10 minutes is too long). Strict requirement.
   e. Personal knowledge required

2. Excited utterance→803(2)
   a. Governed by 104(a)
b. Startling event
c. Statement relates to starting event
d. Statement made while under stress of excitement caused by startling event

3. Then existing mental, emotional, or physical condition → 803(3)
   a. Statement contents → existing state of mind, etc. at the time of the statement
   b. Statements of intent, pain, bodily health
   c. Hillman case
   d. Look for the present tense verbs
   e. May be made to any person, not necessarily to a physician
   f. Past mental state regarding a declarant’s will is permitted.
      i. “I revoked my will last week”

4. Statements for purposes of medical diagnosis or treatment → 803(4)
   a. Statements made for the purposes of medical diagnoses/treatment
   b. Describes medical history, past/present symptoms
   c. Reasonable pertinence
   d. May be made to any person
   e. Declarant need not be the person seeking treatment herself → parent can make statement about a child
   f. Severance
      i. Declarant says, “That speeding car hit me and broke my leg.” Can you sever the speeding aspect from the physical condition? Yes. The statement that the car hit declarant and broke her leg is admissible but the fact the car was speeding would not be.

5. Past Recollection Recorded → 803(5)
   a. Where a witness’ memory has failed to been refreshed, the witness may read into evidence statements from a writing provided:
      i. The witness once had personal knowledge about the matter; And
      ii. The memo or writing itself must have been made by the witness or adopted by her at a time when it was fresh in her memory
   b. As a prerequisite, refreshing (handing a writing to a witness and taking it back, then witness testifies from own memory) must have been attempted and failed.

6. Records of regularly conducted activity → 803(6)
   a. Two main issues:
      i. Spotting and contending with multiple hearsay issues → often with business records.
      ii. Dealing with trustworthiness concerns → seems to meet the requirements but we are fighting, because someone was thinking about litigation when making the records.

7. Public Records and Reports → 803(8)
   a. Basic Requirements:
      i. Statement is in the form of a record or report from a public office or agency
      ii. The contents of the record include:
         1. Activities of the office/agency
         2. Matters observed & reported pursuant to duties imposed by law but not in criminal cases, or
3. Factual findings resulting from an investigation authorized by law, but not against the defendant in a criminal case.

8. Absence of Public Record or Entry→803(10)
9. Final judgment→803(22)
   a. Evidence of a final judgment entered after a trial or a guilty plea to a felony are admissible as a hearsay exception

AND OTHER EXCEPTIONS

FRE 804: Hearsay Exemptions—Declarant Must Be Unavailable
**Remember definition of unavailable

* May arise in the following forms:
  o Assertion of a privilege
  o Refusal to testify
  o Lack of memory
  o Absence due to death, illness, or injury
  o Absence from the court’s jurisdiction

* 104(a) decision
  1. Former testimony→804(b)(1)
     a. Statement must be in a form of testimony given at a hearing or deposition.
     b. Criminal trial, the party against whom the statement is being offered must have had an opportunity and similar motive to develop testimony
        i. Opportunity
           1. If party was present but had no meaningful opportunity to develop testimony→prior testimony may be inadmissible.
           2. Opportunity includes direct, cross, or redirect examination.
              There is really nothing to complain about unless the judge unduly restricted direct/cross/redirect examination.
        ii. Motive
           1. Similar motive does not mean identical motive.
           2. Questioner must be on the same side of the issue of both proceedings and a substantial interest in prevailing on the issue.
     c. Civil trial→party against or predecessor
  2. Dying Declaration→804(b)(2)
     a. Statement concerns the cause of circumstances of what the declarant believes is impending death.
        i. Includes identifications of perpetrator and descriptions of accidents of past events that led up to the mortal injury or disease.
     b. Statement is made while the declarant believes death to be imminent
        i. There is a lack of hope for recovery
        ii. Likelihood of sincerity
        iii. 104(a) concern
     c. Statement is offered in a homicide prosecution or a civil case.
  3. Declarations Against Interest→804(b)(3)
     a. Content of statement was made
        i. Against pecuniary or proprietary interest of declarant
        ii. Could subject declarant to civil or criminal liability
iii. Could render invalid a claim held by declarant
   b. A reasonable person wouldn’t have made such statement unless it was true
   c. There must be corroborating evidence that indicate trustworthiness of the offered statement
   d. Declarant must have had 1st hand knowledge

(This is different from 803(b)(3) Party Admissions. Party admissions have many more foundational requirements and it applies to statements made by anyone, not just a party, and is typically not offered against the person who made the statement (and who is unavailable) against someone else.)

4. Statements about Personal or Family History→804(b)(4)
   a. Content must concern declarant’s own personal or family history; or
   b. Statement concerns the personal or family history of one whom the declarant is related or was intimately associated

5. Forfeiture by Wrongdoing→804(b)(6)
   a. Statement must be made by declarant who was a witness or potential witness
   b. Statement must be offered against a party
   c. Party must have engaged in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness or potential witness

6. Residual Exception→FRE 807
   a. Statement must have circumstantial guarantees of trustworthiness
   b. Guarantees should be equivalent to the exceptions in Rules 803 and 804
   c. Statement is offered for material fact
   d. Statement is more probative on the point for which it is offered than any other evidence that can be secured through reasonable efforts
   e. Admission will serve the general purposes of the rules and the interests of justice
   f. Notice is given to the opponent.

MULTIPLE HEARSAY FRE 805

Example: Π is in hospital, Π’s mother testifies as to a nurse’s statement of what the doctor told her about the Π’s condition.

* For multiple hearsay to be admissible, each layer must be separately admissible, either under an exception or a form of non-hearsay.
  o Doctor’s statement could be a business record
  o Nurse’s statement might be hearsay but possibly the statement is made to the nurse to show state of mind, knowledge, notice.

IMPEACMENT AND REHABILITATION OF WITNESSES
FRE 608

1. 608(a)→Opinion and Reputation Evidence
   a. (a)(1) limits evidence to prove “character for truthfulness or untruthfulness”
   b. (a)(2)→reputation or opinion testimony regarding a witness’s good character for truthfulness is not admissible until the witness’s character has been attacked. Bringing forth prior convictions, bad acts.

2. 608(b)→Specific Instances of Conduct
   a. If they lie, you have to accept the answer.
b. Prohibits the use of extrinsic evidence of a witness’s specific acts to prove character for truthfulness to show dishonesty or honesty on the witness stand. It does permit inquiry into a witness’s own acts during the examination of that witness. The examiner is bound by the answer of the witness.
c. Specific acts must relate to character for truthfulness.

FRE 609
1. 609(a) General Rule
   a. Permits impeachment for convictions of serious crimes and for crimes of dishonesty and false statements.
   b. There is no prohibition against the use of extrinsic evidence.
   c. Balancing test for civil defendants → FRE 403 (prejudice must substantially outweigh probative value)
   d. Balancing test for criminal defendants → Reverse 403 (probative value must substantially outweigh prejudice)
      i. Conduct reflecting on truthfulness during the time during release from imprisonment and giving testimony should be an important part of the probative value determination.
      ii. Murder convictions are more likely admissible for witnesses who are not criminal defendants.
      iii. Dishonesty and false statement convictions are automatically admissible without regard to balancing and without regard to the seriousness of the crime.
   e. The rule is justified by the belief that prior convictions, even if they are based on activity that does not relate very directly to truthfulness, may be especially relevant to the question of the witness’s general credibility.
      i. A person of generally bad moral character is more likely to lie than a person of generally good moral character.
      ii. Most prior convictions under (a) are likely to be more prejudicial than non conviction bad acts admissible under (b).
2. 609(b) Time Limit
   a. All prior convictions falling within the scope of 609(a) are subject to the reverse FRE 403 balancing test if FRE 609(b) if they fall outside the 10-year time period specified in that subsection → typically not permissible
   b. There must be sufficient notice that prior convictions will be used

FRE 611
1. Cross examination is limited to matters on direct examination and matters affecting the credibility of the witness → 611(b)
2. (a)(2) Reputation or opinion testimony regarding a witness’s good character for truthfulness is not admissible until the witness’s character has been attacked.
   Bringing forth prior convictions, bad acts.
   a. Questions addressing issues of scope of direct examination
      i. Example: Π testifies he was bitten without provocation by a brown German Sheppard with a white paw. Π calls Δ as an adverse witness and only asks 1 question: Do you own a brown German Sheppard with
a white paw. Δ answers yes. Δ attorney asks Δ that dog is gentle and never bites without provocation. Π objects. It should be inadmissible subject to court’s discretion b/c Δ’s answer goes beyond direct examination.

1. When one party asks the other party as an adverse witness and asks only one question, the party is limiting the scope of the testimony to that one question. The only issue brought up was ownership.

b. Leading questions
i. Generally not allowed on direct examination except when:
   1. Preliminary background information
   2. Examination of expert witnesses
   3. Child witnesses
   4. Hostile or adverse witnesses
   5. To refresh recollection (FRE 612)
      a. Memory may be refreshed by leading questions or writings either while testifying or before testifying.
      b. Limitations
         i. Witness must testify without looking at the writing (can have a moment to refresh but attorney must take the writing back).
         ii. Opposing counsel has an absolute right to inspect the document, to cross examine using the document, and introduce relevant portions of the writing.
         iii. Witness need not have made writing herself.
         iv. Writing need not be admissible in evidence.

FRE 613
1. Prior inconsistent statements (FRE 613)
   a. Most common form
   b. Foundation requirements
      i. Witness must be afforded an opportunity to explain or deny the statement (for extrinsic evidence, not necessary for intrinsic)
         1. May be afforded after cross-examination, not necessarily on cross examination.
         2. Common law → extrinsic evidence of a prior inconsistent statement was inadmissible unless the witness was asked on cross-examination whether she made the statement.
      ii. Opposing party must be given change to interrogate witness about extrinsic evidence
      c. Any inquiry in permitted regardless of its relevancy, but the witness’ response is limited by the collateral matter rule.
         i. Witness testifies Δ’s sweater was green. On cross, witness is asked if she told X the Δ’s sweater was blue and she says no, then X cannot be called to refute witness’ answer.
      d. Even the credibility of a hearsay declarant can be impeached.
Intrinsic impeachment → evidence brought out from the mouth of the witness herself
Extrinsic impeachment → all other evidence not from the mouth of the witness (contradictory evidence from other witnesses discrediting the testifying witness)

**Collateral Matter rule** → an issue not material to the issue being litigated
- Collateral evidence used to discredit a witness may be inquired into on cross examination intrinsically → prior inconsistent statement
- Extrinsic evidence on the same question with regard to collateral matters may not be introduced.
  - Witness testifies Α is a honest man. On cross, witness may be asked if he know Α committed 3 burlgaries. This in intrinsically.
  - Π’s witness testifies that Α drove through the intersection and was wearing a green shirt. Α cannot then bring forth a witness to testify that Α was wearing a blue shirt. This is extrinsic evidence and not admissible.

4 methods of impeachment
1. Sensory defects
   a. Go to the credibility of a witness
   b. Manner of impeachment may be intrinsic questioning or extrinsic evidence regarding the inability of the witness to see or remember
   c. Foundation requirement → prior questioning as to the sensory deficiency (do you normally wear glasses?) before introducing extrinsic evidence
      i. A persons religious beliefs are inadmissible to impeach credibility

2. Bias
   a. 4 ways to show bias
      i. Interest in the outcome
      ii. Economic or marital relationship
      iii. Hostility or favoritism
      iv. The fee paid to an expert witness
   b. Manner may be intrinsic questioning or extrinsic testimony
   c. Foundation requirements → court is very lenient, ask the witness about the facts that form the basis for the bias
   d. Bias is always material and never collateral

3. Character
   a. 4 ways to impeach using character evidence
      i. Reputation and opinion evidence (FRE 608(a))
         1. At common law, only reputation was allowed
         2. Proof is limited to the character trait of untruthfulness
      ii. Bad act impeachment (FRE 608(b))
         1. Questions on cross examinations may inquire into prior unconvicted acts relating to truthfulness.
            a. On cross, witness is asked if he embezzled money from his employer. It relates to truthfulness. This is proper.
            b. Witness is asked if embezzled and witness says no. No other witnesses may be called to contradict this answer
because such evidence would be extrinsic evidence on a collateral matter and would be excluded under the collateral matter rule.

2. Limited to good faith questioning.

iii. Felony convictions (FRE 609(a))
   1. Crimes punishable by death or imprisonment > 1 year.
   2. May be admissible to impeach provided the court determines the probative value outweighs the prejudicial effect. This is a balancing test→FRE 403.
   3. Should bear on truthfulness.

iv. Crimes bearing on untruthfulness (FRE 609(a))
   1. Conviction of crimes involving false statements or dishonesty.
   2. Either a felony or misdemeanor
   3. Judge has no discretion to exclude such proof.

v. Ten year rule (FRE 609(b))
   1. Conviction of a crime under FRE 609 (a) is inadmissible to impeach if more than 10 years has elapsed after the conviction unless the court determines that the probative value outweighs the prejudicial effect. It probably won't come in but it might.
   2. Impeachment using a conviction more than 10 years old requires advance written notice to the opposing party.

b. How to impeach with a conviction
   i. Asking the witness (intrinsically)
   ii. Offering a certified copy of the conviction (extrinsically)

3. Prior inconsistent statements (FRE 613)
   a. Most common form
   b. Foundation requirements
      i. Witness must be afforded an opportunity to explain or deny the statement.
         1. May be afforded after cross-examination, not necessarily on cross examination.
         2. Common law→extrinsic evidence of a prior inconsistent statement was inadmissible unless the witness was asked on cross-examination whether she made the statement.
   c. Any inquiry in permitted regardless of its relevancy, but the witness’ response is limited by the collateral matter rule.
      i. Witness testifies Δ’s sweater was green. On cross, witness is asked if she told X the Δ’s sweater was blue and she says no, then X cannot be called to refute witness’ answer.
   d. Even the credibility of a hearsay declarant can be impeached.

LAY AND EXPERT TESTIMONY
FRE 701→Lay opinion
1. Generally, lay witnesses cannot offer testimony opinion
2. Non-expert witness may testify in the form of opinion or inferences if they are
   a. Rationally based on the perception of the witness AND
b. They are helpful to a clear understanding of the testimony (leads to relevancy)
c. Must have personal knowledge
d. Scope: permissible to talk about:
   i. Speed and other physical measurements (height, weight, color)
      1. Not to say car was driving recklessly, bridge was properly constructed → improper forms of lay opinions. Legal conclusions must be avoided.
   ii. Identity of a person
   iii. Sensory descriptions (sound, smell, taste)
   iv. Value of property
   v. Familiarity with one’s handwriting
   vi. Sanity, Emotional State (happy, sad), Irrational Behavior
      1. But not mental incompetence
   vii. Physical condition (appeared drunk, was intoxicated, but not alcoholic or schizophrenic → require expert opinions)

**FRE 702: Qualifications of Expert Witness**
1. Must have special knowledge, skill, training, education, or experience
2. Opinion must be helpful or assist the fact-finder
3. Must be within the expert’s field of expertise
   a. Expert truck mechanic may not give an opinion as to the speed of two vehicles at the point of impact. You would need an expert on accident reconstruction.

**Daubert:**
1. Evidence must be scientifically valid
2. Reasoning/Methodology behind evidence can properly be applied to facts in case

**Facts courts consider:**
1. Is the theory/technique tested/testable?
2. Has it been subjected to peer received?
3. Potential Error rate?
4. Generally accepted?
5. Technique developed independent of litigation?

**FRE 703: Bases of Expert Opinion**
1. May base opinion on:
   a. Facts perceived by her or made known to her at or before the trial
      i. Testimony by a coroner as to the findings of an autopsy
      ii. Facts about a fatal accident made known to the expert at trial despite her lack of personal knowledge
      iii. Lay vs. opinion: expert need not have personal knowledge, but a lay witness must have personal knowledge
   b. Facts reasonably relied upon by experts in the particular field
      i. An expert opinion may be based on facts not in evidence or on inadmissible hearsay

**FRE 704**
1. 704(a):
   a. An expert witness may testify as to an ultimate issue
i. Contrary to common law rule

2. 704(b):
   a. Limited to criminal cases
   b. An expert may not give an opinion as to whether a criminal defendant did or did not have a particular mental state constituting an element of the crime charged or a defense thereto.

FRE 705: Cross Examination of Experts

1. An expert need not give the reasons for her opinion on direct examination.
   a. She may be required to disclose such facts on cross-examination.