I. Basic Concepts
   A. Overview of the Federal Rules of Evidence

1. **Purposes of FRE**- the federal rules of evidence are effective for any federal court in the US, rules were adopted to establish *uniformity and consistency* in the courts as well as the following concerns:
   
   a) *Suspicion of Juries*- in order to control the human inference that juries present in the courtroom.
   
   b) *Serve Substantive Policies*- such as allocations of burden of proof
   
   c) *Serve Policies Outside the Courtroom*- such as the protection of privileged communications, settlement negotiations etc.
   
   d) *Control the scope and duration of trials*
   
   e) *Ensure Accurate Fact-finding*

2. **Determining Admissibility**- FRE 104
   
   a) *Judge v. Jury* – who decides generally- Judges will determine whether evidence is admissible; juries will be allowed to determine if evidence is credible. This is typical with the usual allocation of law decisions to the judge and fact decisions to the jury. These determinations should be made outside the presence of the jury.
   
   b) *FRE 104(a)*- provides that “preliminary questions concerning the qualifications of…admissibility of evidence should be determined by the court, subject to (b) [conditional relevance]…."
   
   c) *Not Limit to Admissible Evidence in Determination*- with exception of privilege concerns, a court is *not* bound by the FRE in its determination of admissibility. i.e. the court may use a statement that is clearly hearsay in determining the admissibility of another statement.
   
   d) *Preponderance of Evidence Standard*- the court uses a preponderance of the evidence standard (51%) in determining the admissibility of evidence.

3. **Reversible Error** - FRE 103– trial judges will be given wide discretion in their determinations with respect to the admissibility of evidence. Where the judge has made a mistake to evidence, that mistake will not be remedied with reversal unless it clearly affected the outcome of the case.
   
   a) *Harmless Error* (FRE 103(a))- if the ruling did not effect a “substantial right of the party” – it will be considered harmless, and an appellate court should not reverse the decision.
   
   b) *Plain Error* (FRE 103(d))- normally a party will be required to have made an objection in order to challenge the ruling of the trial judge. However, if the error committed was “plain” it may be reversed even though no objection was made.

B. **Relevance** – FRE 401- a primary goal of the rules of evidence was to limit the scope of trials with hope of making the process more efficient. To this end, the FRE limit the introduction of evidence relevant to the issue at trial. Evidence that serves a *probative value* will be considered relevant. *Irrelevant evidence is inadmissible* (FRE 402).

1. **FRE Rule 401 Text**- the rule defines relevant evidence as “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 that it would be without the evidence.”

2. **Minimum Threshold**- relevance is a minimal threshold, and much relevant evidence may be excluded by other rules, but in order to be admissible evidence must meet the this test.
3. “Facts of Consequence” – may be proven in three ways.

   a) Direct Evidence- this is evidence which, if believed, resolves a matter at issue.

   b) Circumstantial Evidence- this is evidence which additional reasoning is used to reach the proposition to which it is offered.

   c) Measurement of Probative Valuation (Credibility)

4. Two Tests of Relevance- when determining relevance, the court essentially weighs the following:

   a) Material Link- in order to be material, the evidence must tend to establish a link between the factual proposition and the substantive law at issue. e.g. the evidence must prove something of consequence to the case.

   b) Probative Value- evidence is probative where it makes the fact attempting to be proved more or less likely to be true.

   1) Remoteness- evidence may be considered to be irrelevant where it so far removed from the events at issue its probative value may be eliminated.

   2) Need not be dispositive- evidence need not completely resolve an issue; i.e. “a brick is not a wall” – all the evidence must do is made the fact more or less likely of being true than without the evidence.
5. **Questions in Determining Relevance** - the following should be considered when determining relevance:

   a) *What is the issue of adjudication?*

   b) *To what fact is the potential evidence addressed?*

   c) *Is that fact of consequence to the issue in the case?*

   d) *Does the potential evidence make the fact more or less probable than without the evidence?*

6. **Conditional Relevance** - this is evidence whose relevance is dependant on the proving of another point. So long as the evidence provides a necessary link in a chain of inference, it is relevant. The court will be allowed to determined if the necessary conditional facts have been proved under FRE 104(b).

7. **Not a measure of Credibility** - a judge is not determine the weight or credibility of the evidence, but only it’s creation of a permissive inference. Issues of credibility should be left to the jury. (Ballou v. Henri Studios)

C. **Probative v. Prejudicial Value – FRE 403** – evidence that is relevant to proving a matter may be excluded on the basis of several countervailing circumstances. Essentially these exceptions revolve around the fact the admitting the evidence will do more harm than good to the trial process. *This is a common last-stand objection when all else fails.*

   1. **FRE 403** - if it probative value is *substantially outweighed* by one of the following dangers, relevant evidence may excluded by the court.

      a) *Unfair Prejudice* - this is more than prejudicial (all relevant evidence is prejudicial), the evidence must have an “an undue tendency to suggest decision on an improper basis, commonly, though not necessarily and emotional one.” It does not cover unfair surprise. (Committee notes)

      b) *Confusion of the issues*

      c) *Misleading the Jury*

      d) *Undue Delay*

      e) *Waster of Time*

      f) *Needless presentation of cumulative evidence*

2. **Wide Discretion** - trial courts are given wide discretion in making 403 determinations. Rulings will only be overturned on appellate review where there is a clear abuse of discretion.

3. **Use Least Prejudicial Evidence** - where there are several ways of proving the same fact. The party should be required by the judge to use the method that would cause the least amount of unfair prejudice. (Old Chief-willing to stipulate to conviction)

4. **Limited Admissibility** - where evidence has the potential to cause unfair prejudice (i.e. evidence supports a permissible and impermissible purpose), the evidence may still be admitted under 403 with a *limiting instruction* at the discretion of the trial judge.

II. **Hearsay** - the hearsay rule prevents the admission as evidence in a trial of statements of a party that are considered to be less reliable than if they had been made by the witness in the courtroom while under oath where the declarant’s demeanor can be evaluated by the jury for truthfulness and be cross examined. Hearsay is not admissible, other than by exception per FRE 802. This may cause the exclusion of what would otherwise be highly probative evidence. (State v. English)
A. **Overview - What is hearsay?**

1. **The Hearsay Defined** - FRE 801 - *is a statement by a declarant, made out of court, offered to prove the truth of the matter asserted.* Based on the following definitions:
   
   a) *Statement* - is an oral or written assertion or non-verbal conduct *intended* as an assertion.
   
   b) *Declarant* - is a person who makes a statement.

2. **Reasons for Prohibition** - hearsay is prohibited because of the four dangers of inaccurate perception - stemming from the declarant and the witness. These dangers are minimized by direct testimony.
   
   a) *Ambiguity* - did the declarant mean to say what was said
   
   b) *Insincerity* - did the declarant actually believe what was said
   
   c) *Incorrect Memory* - did the witness/declarant remember correctly
   
   d) *Inaccurate perception* - did the witness/declarant actually see/hear what they though they did.

3. **Multiple Hearsay Problems** - FRE 805 - hearsay can be within itself - “he said that she said that he said” – an exception will have to apply to each “level” of hearsay in order for it to be admissible.

4. **Statements Based Entirely on Hearsay = Hearsay** - where a person’s testimony is based entirely off of hearsay, but is not hearsay itself, it still may be excluded as hearsay. (US v. Brown)

5. **Test For Hearsay** – when attempting to determine if something is hearsay, the following questions should be asked:
   
   a) *It is a statement?*
   
   b) *By a declarant?*
   
   c) *Outside of court?*
   
   d) *Is it offered to prove the truth of the matter asserted?*

6. **General List of Things that are not Hearsay**
   
   a) *Belief of declarant = irrelevant*
   
   b) *Legally Operative words*
   
   c) *Effect of Hearer*
   
   d) *Non-Assertive Conduct (except Common Law)*
   
   e) *Mere Utterance*
   
   f) *Internal State of Declarant trying to be proved*
   
   g) *Silence (except common law)*
h) Veracity of inference from statement is independently verifiable (the Bobby Avilla Problem)

B. **What it’s Not Hearsay** - in order for a statement to be considered hearsay it must fall entirely under 801’s prohibition. There are several types of statement which may on the surface appear to be hearsay but don’t violate the rule:

1. **“true of the matter asserted”** - in order to be considered hearsay the words must be offered to prove the truth of the matter asserted…therefore if the evidence would be relevant **even if they are not true** but merely for the **fact they were spoken**, however a **limiting instruction will be given** where the statement can be used for non-hearsay such as for the following purposes:

   a) **Mere Utterance** - the words may be offered merely to prove what that were spoken by the party if that serves a relevance purpose. (person says “I can speak” - offered to prove he can speak = not hearsay, truth of words irrelevant) (In re Murdock)

   b) **Effect on the Hearer or Reader** - where a statement is offered to show the effect it had on the hearer (i.e. the witness). Whether the declarant believed what he said is irrelevant to it’s purpose. (Subramaniam v. Public Prosecutor).

   c) **Independent Legal Significance** - the fact that the words spoken has independent legal significant – whether the declarant actually meant/believed the words and their effect are to be determined by the jury.

      1) **Contract/Gift** - word that could be considered to form a contract or a illustrate that something was a gift by a person will not be considered hearsay. (i.e. “I will sell you my pants.”)

      \[⇒\] Past Tense Distinction- only the actual statements that would be considered not hearsay. Later statement recounting the offer (such as “I offered you my pants”) would be hearsay- and not admissible w/o exception.

      2) **Defamation** - in defamation suits, words meaning will be applied by the jury- they are admissible as non-hearsay utterances. (whether the declarant believed the statement is irrelevant).

   d) **State of Mind –Knowledge ,belief or intent** - statements (written or oral) that illustrate the declarant had certain knowledge will be admitted because there truth is irrelevant. (in neg. case – A said to B “the step is slippery” may be offered to prove that B was aware of complaints **but not** to prove the step was slippery. Same for a statement by B- “I think the step is slippery” – not hearsay to prove B was aware.

2. **“statements”** - where the inference to be drawn from the evidence is not based on a cognitive statement (oral or written), specifically that declarant never meant to assert the inference in

   a) **Silence** - is admissible and is not hearsay because the declarant never asserted anything and so that statement clearly is not offered to prove the “truth” of an unstated matter. (The common law may consider such statements hearsay as non assertive conduct.) Specifically this may be allowed where the defendant want to show **failure to complain**, the allow the inference, all of the following must be shown:

      1) **Access to a decision maker** - must have had someone to complain to.

      2) **Thought the complaint would be received** - must have a reasonable belief that complaint would have been acted on if it was made.

      3) **“Average” person in the situation would have complained**
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b) Non-Assertive Conduct - conduct offered to prove something that was not intended to be asserted as true by the declarant will also not be considered to be hearsay. The idea behind the exception is that since the assertion was not intended by the declarant, the worries about untruthfulness don’t apply (no sincerity or ambiguity problem). The logic goes like this *Declarant did x, therefore declarant believed Y, and Y is a fact of consequence.*

1) Common Law/FRE Distinction - while non-assertive conduct is generally admissible under FRE, the common law held that this evidence is hearsay and inadmissible.

2) Test for Assertive Conduct - whether conduct was assertive should be tested by the following questions:

⇒ Is the declarant using non-verbal conduct as a substitute for words?

⇒ Did the declarant intend to communicate a fact that is of consequence to the litigation?

3) Type of Conduct - essentially this kind of non-assertive statement can be broken into three categories:

⇒ Acts only – Sea Captain Hypo - using the fact a captain got on the ship with his family as evidence of the ship’s seaworthiness.

⇒ Words Only - Using evidence of a phone call “put 20 on Paul Revere” to prove that residence was being used as gambling racket. (US v. Zenni)

⇒ Documents - that are being used for another purpose than the truth of the matter asserted can be used as non-assertive conduct. (sheet of paper with cocaine prices, don’t care if that was really price [truth of matter] used to infer D is a coke dealer). (US v. Jaramillo-Suarez).

3. “by a declarant” - by the federal rules, a declarant must be a person, where the thing making the statement is not, it is not hearsay. This is based on the problems of associated with hearsay are not present (II.A.2)

a) Machine Readings - a reading by a machine (radar gun) will not be hearsay if reported by a witness. However, testimony must be offered to accuracy of the machine. (Webster Groves v. quick)

b) Animals - evidence of animal behavior (bloodhounds) will not be considered hearsay. (Buck v. State)

C. Common Law Hearsay Rule - as per usual, there are a number of differences between the common law definition of hearsay and the FRE. As per usual, it should be noted that FRE is generally more lenient in determinations of admissibility.

1. Non-Assertive Conduct/Silence - common law considers silence and other non-assertive conduct as hearsay, unlike the FRE.

2. Prior In/consistent Statements - unlike common law, a prior inconsistent made under oath is not hearsay under the FRE. A prior consistent statement may be offered to rebut challenge of consistency (regardless of if it was made under oath) and is not hearsay under the FRE.

3. Identifications - prior eyewitness identification is made non-hearsay by the FRE, though such an identification was hearsay at common law.

4. Admissions - at common law, admissions are an exception to the hearsay rule, under the FRE, they are not hearsay—this distinction is largely irrelevant.

III. Exceptions to the Hearsay Rule - These exceptions can be generalized as being allowed where the risks of hearsay (ambiguity et. al.) are minimal and where it is not particularly unfair to a party to allow the evidence. The exceptions may be limited by the 6th amendments confrontation clause (requiring c/x). Evidence that may be admitted on an exception should be considered outside the presence of the jury. These exceptions are grouped below
into ones involving parties and witnesses (that are not hearsay under FRE 801) and ones where the declarant availability is or is not relevant.

A. Parties & Witnesses- FRE 801- while these look like exceptions, within the definition of the FRE, the exceptions listed below are actually defined as non-hearsay, although this distinction has no notable effect of claims made pursuant to the rule. This exceptions are allowed based on the fact that hearsay

1. Prior Statement by a Witness- (802d(1))- evidence of prior statements by a witness are admissible and not considered hearsay on the basis that the dangers associated with hearsay are minimal since the witness is present and must be able to be cross-examined regarding the prior statement. This expands the common law rule that would only allow such evidence for impeachment purposes only.

   a) Inconsistent Statement- a prior inconsistent statement of a witness is admissible at anytime so long as it was made under oath subject to penalty of perjury.

   b) Consistent Statement- a prior consistent statement is admissible only in response to claims of fabrication or improper influence, regardless of if it was given under oath.

   c) Identification- evidence of a prior identification by the witness is also allowed, regardless if it was made under oath or not.

      1) Others may testify as well- police officer, etc. may also testify to the prior identification so long as the declarant does testify.

      2) Limited to Persons- the exception is limited to prior identifications of persons, not objects etc.

      3) Loss of Memory Doesn’t Invalidate - even if the declarant cannot remember the circumstances surrounding or making the indication. As long as he appears to respond to c/x, evidence of the identification will be admissible. (US v. Owens)

2. Admissions by a Party/Opponent- (801d(2))- this “exception” is based on the fact it doesn’t seem particularly unfair or untrustworthy to use a parties words against him.

   a) Own Statement- any statement made by a party may be used against him. Including the following:

      1) Pleadings - this includes statements in pleadings (unless later amended or pleading in the alternative). Note that withdrawn guilty pleas are not admissible per 410( see IV:kkkk)

      2) Acts of Culpability- in criminal cases this may include flight from prosecution, obstruction of justice. This does not include failure to testify or produce a witness.

   b) Adoptive Admissions- a statement of which he has manifested his adoption or belief in its truth. Such as “Did you hit my car?” and D says “yes”- is an admission by D to the effect of “I hit the car”

      1) Real and Knowing Agreement- the parties adoption must be a real and knowing agreement to the adopted statement.

      2) Silence as adoption- silence generally will not be considered adoption of a statement. In criminal cases, silence in the face of police questioning will never be allowed as an adoptive admission. Some courts may allow silence as an adoptive admission based on the presence of the following factors:

         ⇒ The statement was heard by the party

         ⇒ The statement was understood by the party
⇒ The party must have knowledge of subject matter
⇒ The statement itself must be such as would, if untrue, call for a denial under the circumstances.

3) **Decision on Adoption – Judge or Jury?** Generally the issue of whether a statement was adopted by a party is determined by the judge as a preliminary question of fact under FRE 104(a).

c) **Statements by Authorized Agent** - this non-hearsay exception allows a statement to be considered an admission by a party where it is made by an agent is expressly authorized to speak on the matter for the party. The most common occurrence is a corporate spokesperson, etc.

1) **Must be on Authorized Matter** - a corporation that authorizes B to speak on subject X will not be bound by statements given by B on Y.

2) **Statements to Principal Admissible** - statements (records, memos) made by an agent to his principal are admissible against the principal, despite the common law protection of such communications.

d) **Statements by Agent within Scope of Employment** - unlike the common law, under the FRE where an agent is authorized to perform a task/transaction statement. This is an expansion of the evidence allowed under c. The following elements are required:

1) **Must Be With Scope of Agency** - the statement must be made within/regarding the matters that the agent is charged with performing by the principal. (Prof. Aiken cannot bind Wash U with comment on tuition, but could on evidence curriculum)

2) **Must Be While an Agent** - the statement must be made while the agent is an agent of the principal. Statements by an ex-employee (made after his discharge) would be inadmissible.

e) **Co-Conspirator Statements** - this is based off of agency liability in partnership law, since either partner may bind the joint enterprise, the same is assumed for conspiracies with “partners in crime”.

1) **Required Elements** - the following elements are required to allow a statement to be admitted under the coconspirator exception.

⇒ Must be a member of the same conspiracy
⇒ During the Course of the Conspiracy
⇒ In furtherance of the Conspiracy

2) **No Need to Charge Conspiracy** - the rule may be used in cases where the actual conspiracy is not listed as charge or where a coconspirator has been acquitted of conspiracy.

3) **Preponderance of Evidence Must Show Conspiracy** - subject to 104(a), a judge must determine by the preponderance of the evidence that a conspiracy exists before statements can be offered under the exception.

4) **Independent Proof of Conspiracy Required** - following the decision of the court in *Bourjaily v. US*, the rules were amended to require that hearsay evidence alone would be insufficient for determining that a conspiracy exists, although it may be used as evidence towards that conclusion. So other admissible evidence must demonstrate that a conspiracy existed between the declarant and the party.
B. **Declarant Availability Immaterial- FRE 803** - the following exceptions to the hearsay rule will be allowed irrespective of the availability of the declarant to testify. This stems from the belief that they are likely to be accurate by their nature, avoiding the problems normally associated with hearsay.

1. **Present Sense Impression- (803(1))**- this exception is a modern one based of the fact that someone who just witnessed an event may be in a better position to relate the occurrence when he/she was not excited by it. Like excited utterances, the key is that the declarant spoke without reflection. Required elements:

   a) *Statement limited to description or explanation of event* - the statement may be one of opinion but must be limited to the events actually observed by the declarant that describe or explain the event.

   b) *Must be made while perceiving or immediately after* - temporal limits in present sense impression are stricter than excited utterances- the statement must be made contemporaneous with the observation or immediately after.

2. **Excited Utterances- (803(2))**- traditionally and the in FRE a hearsay exception has been allowed for statements (res gestae) that are made in response to sufficient stimuli on the basis that the person probably spoke before they thought. Required Elements:

   a) *Sufficiently Startling* - the event causing the utterance must have been sufficiently startling as to make a reasonable person speak without thinking- it is determined by a reasonable person standard by the judge.

   b) *Relating to a Startling Event/Occurrence* - the FRE require that the utterance must explain or relate to the startling event.

   c) *Still Under Influence of Event* - the person must still be influenced by the event. This is generally not an issue where the statement is made contemporaneously with the event.

   1) *Time Passage* - as time passes the court will be less likely to view the declarant as still under the influence of the event, as a rule, typically statements made within a half-hour will be considered within the exception.

   2) *Reflection Evident* - even where the little time between the event and the statement- if it is evident that the statement is made after the declarant had a chance to reflect (think before speaking) the statement will **not** be allowed under the exception.

3. **State of Mind - (803(3))** – this exception allows statement by a declarant pertaining to a then existing state of mind to be admitted so long as they do not include statements of memory or belief to prove a fact remembered or believed. These are allowed since there is no problem in memory or perception since it is self reported. Essentially, this mental state exception will be used in the following two instances:

   a) *Mental State at Issue* - where the declarant’s mental state is at issue in the trial. Particularly statements demonstrating the declarant’s intentions or feeling towards another or the facts that a declarant believed to be true. “I think Law school sucks” – admissible to prove belief of dec. but not the prove that law school in fact sucks. “I think Tom is a cheat” – admissible to prove dec. thought Tom was a cheat, but not to prove Tom was in fact a cheat.

   1) **Must be present sense** – the statement “I felt ill yesterday” would not be admissible.
b) Proof of subsequent acts- a persons statement of intent that they are going to do something may be used as circumstantial evidence to prove that they later did what the said. (Hillmon case). This is only allowed for future acts and not past recollections of acts already performed.

c) Survey Evidence- survey evidence is considered to be admissible (multiple level hearsay problem) as a recording of the state of mind of the participants. (Zippo v. Rogers Import)

4. Statement for Purposes of Medical Treatment- (803(4))- an exception is provided to the hearsay rule for statements made purposes of medical treatment or diagnosis. This includes medical history, symptoms, pain and as far as reasonably pertinent to treatment/diagnosis – causation. This is based on the belief that a patient has every incentive to be truthful and forthright in order to assure proper medical treatment.

a) Need not be made to Doctor- the rule does not require that the statement be made to a doctor, but only that it be made in the attempt to seek treatment. This could include any number of non-doctors (paramedics, receptionists, etc.) A common place for this is children reporting symptoms to parents.

b) Testifying v. Treating Physician- the FRE makes no distinction between treating and testifying physicians. They are allowed full use of the exception, the common law is distrustful of the incentive of the patient to tell the truth to testifying doctors and does not extend the exception to them. (even if it would qualify under state of mind)

c) Present Sense Pain- statements about present sense pain are within the exception whether they are made to a lay person, treating or testifying doctor under the FRE.

d) Past Sense Pain- statements regarding past sensed pain will only be admissible where made to a treating or testifying physician. At common law, all statements regarding past pain would be inadmissible hearsay.

e) Statements of Causation or Circumstance- statements regarding the causation of the injury or the circumstances under which it was incurred (i.e. “The car hit me and broke my leg”) are only admissible where they are reasonably pertinent to treatment or diagnosis. Specifically this would exclude statements of fault or identity. (“The D’s car hit me and broke my leg”)  

f) 3rd Party Statement- the federal rule doesn’t require that the patient be the one to make statements, therefore, a statement by a friend or relative for the purposes of seeking treatment for the victim would be admissible. (i.e. “he was hit by a car”) This is particularly likely where the victim is unconscious.

g) Reported by 3rd Party- the rule would also seem to allow a third party (i.e. someone else in the waiting room) to testify to statements made to a doctor etc. seeking medical attention.

5. Past Recollection Recorded – (803(5)) – this exception is allowed based on the belief that as an event is distanced in the mind accuracy of them memory may decrease (or be lost entirely). As a result, where the witness has made or adopted a record of the event near and regarding its occurrence, it will be admitted for factual purposes in order to increase reliability of the testimony. It is closely related to the Business Record exception.

a) Required Elements- in order to be admitted, a past recollection must meet the following criteria:

1) Memo or Record- essentially the recollection has to be written in some form. This may include tape recordings.

2) About a matter which the witness had knowledge- the witness must have first hand knowledge of the event that is recorded.

3) Witness’ memory is now insufficient- in order to be admissible, the witness’ recollection must be somewhat impaired under the FRE, so the without it, he would be unable to testify “fully and accurately.” If the witness has a perfectly clear memory, the recollection may not be admitted. Under common law, the witness must have no present memory of the event.
4) **Made or Adopted by the Witness**—the witness must have either made the recording himself, or adopted it at the time of recording. Specifically, a witness cannot adopt another’s recording at trial.

5) **While the memory was fresh**—at common law this requirement was stricter requiring the recording to be done during at or near the time, FRE only require it be made while ‘fresh’; interpreted as within several days.

6) **Reflects knowledge correctly**—At trial, the witness must endorse the record as being an accurate recording of his knowledge.

   b) **May Only be Read into Record**—a past recollection recorded may only be read into the record by a witness. The actual recording may not be entered into evidence as an exhibit under the FRE.

   c) **Distinguish from Present Recollection Refreshed**—a present recollection refreshed occurs when a witness is given a picture/memo/etc. to refresh his memory. The memory aid is not hearsay and is not evidence—the witness is only making direct testimony. Since the aid is not evidence, the rules regulating what may be used [(Baker v. State)](https://www.example.com) However, the witness must state the aid did refresh his memory. The document used to refresh is subject to the restrictions established in FRE 612.

6. **Business Records**—(803(6))—this exception is derived from the old “shop book” rule that would allow the use of a ledger in debt collection suits. The modern rule is not limited to businesses but applies to most organizations. It allows any record kept in the normal course of business on the basis that they will be accurate because a business has no incentive to lie to itself. The common law requirement that the recorder be unavailable has been dropped from the rule.

   a) **Required Elements**—in order to be admitted under this exception

      1) **Business Memo or Record**—some sort of recording

      2) **Made at or near the time of the event**

      3) **By a person w/knowledge**—the person making the recording must have first hand knowledge or making it from first hand knowledge of the event. This allows for memos made by a clerk/secretary.

      4) **Kept in the regular course of business**—the entries must be made in the routine and regular practice of the business.

      5) **Shown by a custodian of records**—a custodian of records or other qualified witness must testify as foundation for the record. The witness must testify as to the personal knowledge of the recorder and that the record was made in the ordinary course of business.

      6) **Unless untrustworthy**—the source of the information and the manner it was recorded in must be found to be trustworthy by the court in order for the record to be admitted.

   b) **Must have duty to Report Information**—the person making the record must have been doing so as part of his job (i.e. he had a duty to make the record). Any statements offered in addition to what would be required by employment. This exclusion is based on the fact someone who doesn’t have a duty to report something doesn’t have the same incentive to be truthful [(Johnson v. Lutz)](https://www.example.com)

      1) **Police Records**—police records are addressed separately under public records (see III.B.8) and therefore generally inadmissible under the business records exception.

      2) **Hospital Records**—statements in hospital records regarding matters other than diagnosis and treatment (records of patient statements) will not be allowed where they solely relate to fault or identity as they will be considered not to
be within the hospital’s normal course of business or duty to record. Record cannot be admitted for expert opinion. These statements may be admitted for the limited purpose of proving they were made. (Williams v. Alexander)

c)  *Infrequency Not Dispositive on Exclusion* - questions arise where reports are made in response to accidents—since such reports are not made regularly (every week etc.) but where they are made whenever an accident occurs. (regular procedure)

1)  **Excluded where made for self-serving purposes** - the supreme court held such records would be excluded where the report was made *in contemplation of litigation* that would likely emerge from the accident on the basis that there was incentive for the report to be biased in terms of its determining liability—they are excluded on the grounds they are untrustworthy. This holding has been narrowly construed. (Palmer v. Hoffman)

2)  **Generally Admissible** – recent case have admitted these infrequently made reports that are made after specific events as ordinary course of business records, so long as they are not shown to be untrustworthy. (Lewis v. Baker)

d)  *Opinion in Report* - the fact that a record may contain opinion of the writer will not make it inadmissible per se. FRE provided specifically that opinion in records is admissible, however, if it cannot be justified it may be excluded on the basis that the record is “untrustworthy”.

e)  *Frequent Multiple Hearsay Situation* - often the report itself will contain hearsay, reporting the statements of other, each of those statement require there own exception so that the report may admitted (Reports says Jimmy said…) (US v. Duncan)

f)  *Admitting Full Record where Excerpt Offered* - if a party admits part of a record, the opposing party may admit the full record under FRE 106. However, this rule will not be a blanket exception for allowing hearsay contained within the record.

7.  **Absence of Business Records** – (803(7)) – the FRE also recognize that “silence” in records may be admitted as evidence. This exception allows for the admittance of the fact that no business record was made in reference to an event where a party can demonstrate that—in the normal course of business had the event occurred it would have been recorded as evidence that event did not occur. (eg. A claims paid B, B seeks to introduce a ledger that should have a record of such a transaction, but does not.) This is also subject to the trustworthiness standard (i.e. court must believe event would have been recorded)

8.  **Public Records** – (803(8)) – the exception for public records like the one for business records is based on the assumption that where a person has first hand knowledge of the facts and a duty to report it, the like result will be a reliable record. Note that while this exception is titled public records, there is no need for the records to be publicly available to be considered under the exception. Unlike business records no foundation witness is required for records under the public record exception. Again, these records are subject to a determination of trustworthiness. The federal rules provides an exception to the hearsay rule in 3 areas:

a)  *Activities of an Office or Agency* - this included an agencies records of its own activities. The are not subject to any restrictions on use and may be used a proof of the matter asserted. Eg. Records of an FAA inspection of a plane crash can be admitted to show an investigation took place (findings of report admissibility is discussed under c).

b)  *Matters Observed Pursuant to a Legal Duty* - events witnessed by a government agent and recorded may be included in the public record exception, where they meet the following requirements:

1)  **Required Elements** - the following are necessary for reports of observations to be admitted:

⇒ Must be made “in the line of duty”
⇒ Must have a duty to report observations
⇒ Legally required to prepare and maintain record

2) **Police Reports Excluded In Criminal Prosecution** - the rule specifically provides that police reports will not be admissible under the exception in criminal cases by the prosecution. The defendant may introduce police reports, is generally held despite the fact it is technically not allowed by the rule.

⇒ Use of Other Exceptions - Courts split - the attempts to use other hearsay exceptions, notably the business records exception to admit police lab reports is prohibited by the intent of congress to exclude such evidence. Would allow as business record where recorder available (US v. Oates).

⇒ ‘Routine’ Observations are not Prohibited - where police observations are routine (i.e. don’t imply any criminal activity) they will be allowed under the exception. (recording of serial numbers, US v. Grady)

c) **Factual Findings pursuant to an investigation** - of an agency/law enforcement officers are provided admissibility where an investigation was made pursuant legal authority. So long as they are being used in a civil action or against the government in a criminal action.

1) **Findings Prohibited in Criminal Prosecution** - like (b), the finding of law enforcement investigations are prohibited for admission by prosecutors, however, the defendant may introduce evidence of factual finding from such investigations.

2) **Opinion Conclusions Admissible** - the rule creates no distinction between factual findings and opinion. *Conclusions of a report will be admissible so long as they do not state a legal conclusion.* Eg. The statement in a report “we believe A’s car hit B” would be admissible, but “we believe A negligently hit B” would not be. (Beech Aircraft Corp. v. Rainey)
9. **Records of Vital Statistics – (803(9))** – public records with regard to births, deaths, marriages, etc. will be admissible. This type of records is admissible from a number of sources under parallel exceptions for religious organizations (803(11-12)) and even family records (803(13)).

10. **Absence of Public Records – (803(10))** – this parallels the omissions exception of 803(7) for business records. A party may introduce the lack or record to prove an event did not occur where such an event would normally have been recorded.

11. **Ancient Documents - (803(16))** – documents that are more than 20 years old may be admitted on this exception where there authenticity and trustworthiness can be established. This based on belief that the document is so far removed from the dispute its is likely to be truthful. This is often used to admit old newspaper articles.

12. **Market Reports, Commercial Publications – (803(17))** – this rule authorizes the use of market quotes and alike where there are used and relied on by the general public. This often includes weather almanacs, car value bluebooks, telephone directories for addresses, etc.

13. **Learned Treatises – (803(18))** – this exception is often employed to avoid the costs of expert witnesses or counter the testimony of an expert witness. These are allowed on the basis that they are free from the normal hearsay dangers of bias and are likely to be impartial. In order to be used under the Federal Rules- the following elements are necessary:
   
   a) *Witness must be confronted with treatise-* either by having his attention called to it on cross-examination or by relying on it during direct examination.
   
   b) *Authority Must be Established-* the authority of the treatise must be established by an admission by the witness, other expert testimony, or judicial notice.
   
   c) *Absent Expert Testimony- Cannot be Admitted-* unless an expert testifies on the subject, treatises may only be read for the record and cannot be admitted as substantive evidence.
   
   d) *Common Law = Narrower Exception-* at common law the exception was much narrower. Treatises could not be admitted as substantive evidence and could only be used to impeach expert testimony where the expert recognizes the authority of the treatise.

14. **Judgement of Previous Conviction – (803(22))** – the federal rules provide an exception for prior felony convictions. The exception is based on that the conviction represents truth that the party was culpable.
   
   a) *Must be after trial or Guilty Plea-* pleas of nolo contendere (where allowed) will not be admissible under the exception.
   
   b) *Criminal Prosecution –may only use for impeachment-* in a criminal prosecution, convictions of the accused or anyone else may only be used for impeachment purposes.
   
   c) *Proof of Fact Essential to Judgment-* the exception allow the admittance of the conviction as proof of any fact that was essential to the judgment in a criminal/civil case.
   
   d) *Pending Appeal Irrelevant-* the fact the conviction may be under appeal is irrelevant to its admissibility.

C. **Declarant Unavailable- FRE 804**- these exceptions apply only where the declarant is unavailable.

Unavailable (defined in 804(a)) means the declarant is dead, unable or unwilling to testify (immunity, 5th amend., or just plain doesn’t remember), or cannot be reasonable summoned (cannot be found).

1. **Former Testimony (804(b)1)**- there has been a long standing exception for the acceptance of former testimony from another trial, etc. where the witness is now unavailable to testify on the basis that it is highly credible since it was under oath and recorded. In order to meet the exception, the offering party must show the following:
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1. Offered against a party in prior action in current action - (or predecessor in interest in a civil case) the testimony must have been offered against the party at a prior proceeding.

2. Ability to examine at first proceeding (usually c/x) - at the proceeding the party must have had the opportunity to question the witness. It is not required that they actually did question the witness, only that they had an opportunity to. (For this reason affidavits and police statements are not covered)

3. Similar motivation to cross-examine in prior proceeding - the issues and the stakes at the prior proceeding must have been similar that relevant questions would have been likely asked by council. This is strictly enforced (US v. Salerno).

2. Dying Declarations (804(b)2)- a traditional exception has been in the instance where a declarant was dying his word were accepted because of the belief that one wouldn't lie on his death bed. This exception has been keep into the modern FRE. Required elements:

   a) Homicide or Civil Action - the exception only applies in homicide cases (may be other than declarant’s in FRE) or civil cases relating to the death.

   b) Declarant Must Believe Death is Imminent - the declarant must have subjectively believed his death was imminent, not only that it was likely (‘must have lost all hope of recovery’), at the time of making he statement. This should be determined by a judge outside the presence of the jury.

   c) Must be Related to Cause/Circumstance of Death - the exception only extents to statements regarding the circumstances or causes of the declarant’s death, it does not give credence to everything he may say.

   d) Common Law More Restrictive - at common law, this exception was only available in the homicide trial of the declarant where the declarant actually died.

3. Statements Against Interest (804(b)3)- this is an exception for statements that are assumed to be true since they are so against the declarant’s interest that is unlikely they would have been made if they were not true.

   a) Different from admissions - These are not titled “admissions” because the witness is not a party, must not be available, and first hand knowledge is required.

   b) Interests Statement may be ‘against’ - the party must know at the time of the statement that it is against one of the following interests of his-

      1) Pecuniary (money)

      2) Proprietary

      3) Civil Liability

      4) Criminal Liability – (not an interest at common law)

   c) Exculpatory Statement Require Cooperation - if a statement of declarant is offered to exculpate the accused (“me and Lucky did it”), it must be cooperated in some way, statements offered to inculpate the accused don’t require cooperation unless it is a criminal case (“me and defendant did it”). Courts consider the following factors:

      1) Motive to lie/Character of Declarant - the declarant’s character and reasons for making the statement will be examined. Particularly in the use of inculpatory statements to curry favor with authorities that are self-serving and shift blame will be looked upon with disfavor.

      2) Who statement was made to - if the declarant had a particular reason to be truthful (priest) the court will look favorably on the statement
3) **Other Evidence**- there may be other physical evidence etc. that demonstrates that the declarant’s statement is likely to be true will increase the likelihood of its acceptance.
d) **Collateral Statements**- an interesting (for lawyers anyway) problem arises where a statement against interest is made by the declarant, but the statement of consequence is in a neutral or self-serving part of the narrative. This statements are not admitted. (US v. Williamson) The statement wishing to be used must be *integral to the whole* in order to be admissible as a statement against interest.

4. **Statement of Personal/Family History (804(b)4)**- statements concerning the declarant's own birth adoption, marriage, divorce, legitimacy, are admissible.

D. **Residual Exception- FRE 807**- the new rule combines the former catch all exceptions under 803 and 804. Essentially, it provides for admittance of hearsay evidence that is in the “spirit” of the other hearsay exceptions. In order to meet with the exception, the evidence must meet the following five criteria:

1. **Circumstantial Guarantee of Trustworthiness**- evidence to be offered must have the same approximate level of trustworthiness of the other exceptions under 803 and 804.

2. **Offered as evidence of a material fact**- the evidence must go to some necessary fact in the case (well, Duh!)

3. **More probative on the point that other evidence**- the evidence must serve a potentially greater probative value towards a point in the case than evidence that could be offered under the other rules of evidence.

4. **Interests of Justice**- the evidence should be considered to be admitted where its admittance is within the general purpose of these rules and the interests of justice.

5. **Notice Requirement**- the party intending to invoke the exception must give notice that evidence will be offered under 807 sufficiently in advance of trial to allow the opposition to prepare.

E. **Attacking Credibility of Hearsay- FRE 806**- if hearsay is admitted the credibility of the declarant may be attacked and if attacked, may be defended by the offering party. Declarant may be called and treated as a hostile witness by the party the statement is offered against.

IV. **Character Evidence**- It a type of evidence that may seem particularly relevant. However, character evidence is generally prohibited by the federal rules of evidence to the extent that one is not allowed to use the fact that one has a bad character or had done prior bad act to prove that the committed the act they are currently accused of. This stems from a worry that bad character evidence will highly prejudice a jury who may wish to punish a person for being a bad guy, rather than because they committed the act they are accused of.

A. **General Prohibition – FRE 404**- provides the general rules for the admission of character evidence. Specifically, evidence of reputation and prior acts will not be admissible to prove a propensity to committed the act the accused is currently charged with. This exclusion is based on this evidence being highly prejudicial.

1. **Character Evidence for Propensity Purpose Prohibited**-(sub A) provides that evidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion except in the following circumstances:

   a) **Character of the Accused**- the accused may offer pertinent (beneficial) character evidence on his own behalf. If offered (‘the door is opened’), the defense may rebut with character witness.

   b) **Character of the Victim**- evidence of pertinent character traits of the victim may be introduced by the accused. If introduced, the prosecution may rebut. If a defendant claims victim was first aggressor in a homicide trial– prosecutor may offer evidence of victim’s peacefulness.

   c) **Character of the Witness**- different rules apply for the character of witnesses, evidence showing a propensity to lie or to tell the truth may be considered- see 607, 608, 609 (VI.?????)

2. **Prior Bad Act Inadmissible for Propensity**-(sub B) evidence of prior crimes, wrongs or specific conduct is not admissible to prove the character of a person in order to show action in conformity therewith.
a) *Other uses acceptable*- They may be used to demonstrate motive, opportunity, intent preparation, plan, knowledge, identity, or absence of mistake or accident. This list is not exhaustive – essentially character evidence is likely to be admissible where it is being used for other than propensity purposes.

b) *Must provide notice in criminal cases if requested*- if the accused requests, the prosecutor must provide reasonable notice of the nature of any evidence she will produce to prove items in (a).

c) *Where Admitted = limiting instruction*- when a judge allows character evidence to be admitted for other than propensity purposes, pursuant the FRE 105, a limiting instruction should be provided to insure it isn’t used for propensity purposes.

B. **Methods of Proving Character - FRE 405**- where character evidence is admissible it may be proved in one of two ways (subject to restriction) under the FRE.

1. **Reputation or Opinion (sub a)**- proof of character or a trait where admissible may be proved through testimony of reputation or opinion.

2. **Specific Acts (sub b)**- specific acts may be used to prove character or trait in the following instances only:

   a) *Where Character is at issue in the trial*- (see IV.C) specific instances may be offered where character is a substantive issue in the trial.

   b) *Cross Examination of Reputation or Opinion (sub a)**- specific instances of conduct may be used to test the formation of the opinion by a witness. Eg. “did you known he once sold poison milk to school children?”

C. **Character At Issue**- character evidence will always be allowed in cases where the character of a person is the very issue of the case. Here character is not being used for a prohibited purpose, such propensity, but is key to resolution of the case. The following are example of cases where character is at issue:

1. **Defamation/Liable**- where a person sues for defamation/liable, his character is directly at issue in the case. If he claims D said “P is a jerk who has sex with goats”, D will be allowed to parade all the character evidence of P’s “jerkness” and goat fetish that he wants.

2. **Poor Employment Decision**- character of an employee may be at issue where the employer is accused of being negligent in hiring/maintaining the employee. The old drunken signal man hypo- character evidence that the signal man is a drunk cannot be used in a negligence suit for the accident (propensity to be drunk when accident occurred prohibited). However would be admissible in suit against RR for hiring/keeping an employee they knew was a drunk.

D. **Habit - FRE 406**- this rule allows an exception to the prohibition against propensity evidence to allow evidence of habit or routine practice (a character trait) to demonstrate propensity for the person to have performed the habit or routine in a specific instance without the presence of an eyewitnesses.

1. **Factors in Determining Habit**- in order to be considered a “habit” within the meaning of the rule rather than a mere character trait the behavior must exhibit the following:

   a) *Specificity*- the more specific the behavior, the more likely it would be considered a habit.

   b) *Regularity*- the more regular the behavior is performed, the more likely is it would be considered to be a habit. This is the largest factor.

   c) *Unreflected Behavior*- the more “automatic” the behavior, i.e. it is done without thinking, the more likely it is to be considered a habit.

2. **Proving a Habit**- the rule doesn’t provide specifics for proving the existence of habit. Most jurisdictions will accept the testimony of witness who is familiar with the person and who has observed the habit under separate instances, which when taken together demonstrate regularity.
3. **Similar Happenings** – As a form of propensity evidence, parties may use prior instances of accidents (e.g., people tripping in the same spot) to prove knowledge or defect. Courts are generally reluctant to let in evidence of similar happenings or occurrences in terms of accidents. However, evidence may be admitted if the proponent can demonstrate a *substantial similarity* between the events. There is no specific rule governing similar happenings it is dependant on passing 401 and 403 tests.

**E. Prior Sexual Conduct of Accused** - A *exception to the general prohibition* against the use of character evidence of specific acts for propensity purposes is the rules allowing the use of evidence of the prior sexual conduct of the accused. These rules were drafted by congress rather than the advising committee and as a result are poorly drafted.

1. **Past Sexual Assaults - Criminal - FRE 413** - in criminal cases, evidence of past sexual assaults is admissible in matters where the defendant is accused of a criminal assault.

2. **Past Child Molestation - FRE 414** - in criminal cases, evidence of past child molestation is admissible in matters where the defendant is accused of child molestation.

3. **Past Sexual Conduct – Civil Suits - FRE 415** - evidence of prior child molestation or sexual assault is admissible against a party in a civil case where conduct alleged includes child molestation or sexual assault.

4. **Notice Requirements** - in all three rules, the opposing party must notify the other what evidence it will offer under the rule 15 days before trial.

5. **“Shall Be Admissible?”** – the poor drafting of the rules seems to exclude evidence offered under the rule from being subject to the hearsay rule or rule 403. *Court have interpreted that such evidence is still subject to 403 and the hearsay rule.* Other problems with rules include:

   a) **No Temporal Exclusion** - the rule does not provide that evidence may be excluded on a temporal basis, however this may be subject to 403 if applied.

   b) **No Conviction Required** - the rules do not require that the accused have ever been convicted of the offense for the evidence to be admissible.

   c) **Similar Circumstances Implied** - most court read into the rules that evidence of such activity must include similar circumstances and may excluded on a 403 basis, however, no such limitation is actually in the rule.

V. **Policy Exclusions of Relevant Evidence** - these rules pertain to the exclusion of evidence that would often be very relevant to the determination of issues at trial. However for policy reasons, often to encourage or discourage actions by parties, the evidence will be excluded from consideration at trial.

**A. Subsequent Remedial Measures - FRE 407** - after an accident, if a defendant in suit took measures to insure that the same sort of accident doesn’t occur in the future. Evidence of these measures will not be admissible for purposes of determining liability. This is based on the fact that if a defendant’s actions to make something safer could be used against him to prove liability for a past injury, he would probably not remedy the problem.

1. **Measures Included** - most often these measures included the following so long as they were taken after the accident occurred:

   a) **Installing a Safety Device**

   b) **Establishing a New Safety Rule**

   c) **Firing a culpable employee**

2. **Product Liability** - rule 407 was recently modified to include subsequent changes in the designs in a product. Specifically, to “defect in a product, a defect in a product’s design, or need for a warning instruction.”
Post-Manufacture/Pre-Accident Remedial Measures- despite the fact that by its language 407 would seem not to apply to actions taken before the accident, but post manufacture. The court has extended the protection of the rule to include such cases. This is based that such protection is “in the spirit” of the rule. (Kelly v. Crown Products)

3. 3rd Party Actions Not Barred- rule 407 only extends to defendant actions for liability. If a manufacturer of a product, not the defendant, takes a remedial action, it is not barred from admittance by 407. Eg. P is working for X using a machine made by D, after the accident, X puts a new guard on the machine, that fact would be admissible against D.

4. Permissible Uses- evidence of remedial measures may be used for other purposes illustrated below when they are disputed. When admitted the judge would give a limiting instruction in an attempt to restrict any impermissible inferences of liability (yeah, right). Defendant may claim a 403 objection, on the basis the evidence may be obtained in a less prejudicial manner (through stipulation, etc.)

   a) Refute Claim of Infeasibility- evidence of the subsequent measure may be introduced where defendant claims that such a measure would be impossible to take. (Anderson v. Molloy)

   b) Show Ownership/Control- if the defendant claims he doesn’t own or control the equipment/etc. evidence that he performed a remedial measure may be used to prove ownership or control.

   c) Impeachment- evidence of remedial measures may be admitted where defense witnesses claim “there was no hazard” or that “nothing more could be done”. This exception can be exploited by a crafty questioner to almost make 407 irrelevant.

B. Settlement/Compromise Negotiations- FRE 408- this policy exception prohibits any offers to compromise or settle a dispute to be offered against a party of the compromise/settlement negotiations for showing the validity or amount of a claim. The logic is that failure to protect such negotiations would prevent any form of pretrial settlements where a party believes an attempt to negotiate would weaken its case. The rule applies in civil settings only.

1. Must Have Dispute- in order for protections to apply there must be a recognized dispute between the parties.

2. Threat to Sue not protected- a threat to take action against a party will not be protected – a mere statement of the party’s position will not be protected. Must make some movement towards an agreement.

3. 3rd Party Settlements Inadmissible - evidence of a settlement with a third party will not be admissible against a party to show liability (maybe for bias). E.g. where there is a three car accident with A, B, and C. A cannot offer evidence that B settled with C to show B’s liability. However, if B wanted to introduce evidence of the settlement it would be admissible.

4. Collateral Statements Protected- any statements (admissions, etc.) made in connection with a offer to settle or compromise will be protected. Such as “I know my dog ripped your face off, can we settle this for 20k?”

5. Cannot Immunize Discoverable Material- a party cannot by reveling witnesses or documents during a settlement negotiation make them protected at trial where they would have been discovered anyway

6. Broadly Applied Protection- the protections of the rule are strongly held by the court and broadly interpreted. Courts may extend protection of the rule to include situations that are in the “spirit” of the prohibition.

7. May be used for purposes- evidence of a settlement may be used for purposes other than attempting to impute liability including refuting a contention of undue delay, bias or prejudice.

8. Not Excluded from Subsequent Criminal Proceedings- note that the protection of rule for 408 don’t apply to use of admissions for subsequent use in a criminal proceeding.
9. **Common Law Protection Much Narrower** - at common law, collateral statements and admissions related to offers to settle were not protected by the rule. Although, hypothetical admissions under the common law rule are protected.

C. **Offer to Pay Medical Expenses - FRE 409** - evidence that a party offered to pay/paid the medical and related expenses of the plaintiff will not be admissible to show liability of the defendant. This is provided in order not to discourage a party from paying the medical expenses of the other on the basis it may be subjected to later liability.

1. **May be used for other purposes** - the evidence of payment may be used for purposes other than liability for the injury.

2. **No Protection for Collateral Statements** - the protection of 409 applied only to the actual offer or payment of medical expenses. It doesn’t apply to admissions made by a party in the course of the offer. Eg. In the statement “I’m sorry my big dog ripped your face off, please allow me to pay for your reconstructive surgery.” Only to offer to foot the surgery bill is protected.

D. **Withdrawn Pleas of Guilty - FRE 410** - this is the criminal equivalent of 408. **Offer/Negotiations Protected** - the rule protects any statement made in connection with plea negotiations or in relation to a guilty plea that was later withdrawn. Essentially the motivations for the rule are the same- that failure to protect such offers and compromises would prevent such negotiations from taking place.

1. **Collateral Statements Protected** - included in the protection associated statements including *factual admissions*. (i.e. defendant may state during negotiations he was at scene; he can still maintain he was not at trial).

2. **Must Be With Prosecutor** - in a prior version of the rule these ‘negotiations’ could be used towards statements for leniency made to any law enforcement officer. However, such protections are now only granted with offers made to an attorney for the prosecuting authority.

3. **Where Apparent Authority May Have Protection** - where defendant was under the good faith illusion that the party he was negotiating had the authority to negotiate his statements may be protected.

4. **Nolo contendere Pleas Excluded** - as there very purpose, evidence of past pleas of nolo contendere are excluded by the rule.

5. **Excluded from Subsequent Civil Proceedings** - 404(4) make the plea offer or withdrawn plea of guilty equally inadmissible in any subsequent civil proceedings.

6. **May be used for other purposes** - where a defendant offers a statement from a plea negotiation as exculpatory, the prosecution may use other statements to *impeach* the testimony. (410(i))

E. **Evidence of Insurance - FRE 411** - the fact that the defendant carries liability insurance that would cover the event at trial will not be admitted. This is on the basis that the jury would be more willing to find against the defendant if they new that an insurance company rather that himself personally would be responsible to pay the judgement. The evidence may be admissible where the following are disputed:

1. **Evidence of Ownership or Control** - if a party disputes his ownership or control of an item/place – evidence of that he has an insurance policy covering it will be allowed. – Note: this is subject to a limiting instruction under 105 to prevent impermissible inferences.

2. **Bias of Witness** - if a party calls a witness who is affiliated with an insurance company- the fact that his property/action is covered by the insurance company may be admissible as evidence of possible bias.

F. **Prior Sexual Conduct (Rape Shield Laws) - FRE 412** - evidence of the prior sexual history of victim is excluded from any civil or criminal proceeding involving alleged sexual misconduct. Specifically, this general provision excludes evidence of *other sexual behavior or sexual predisposition* of the victim. This evidence is excluded on the basis that admission *reputation* would be presumptively more prejudicial than probative and would *discourage victims* to make claims.
1. **Exceptions (b)- Criminal Cases (1)-** this part of the rule provided that evidence of prior sexual conduct by the victim will be admissible in the following 3 circumstances:

   a) **Show Alternate Source of Semen/Injury-** defendant may offer evidence of sexual conduct where it is offered to prove someone other than the accused is responsible for the assault.

   b) **Sexual Behavior with Accused-** the prosecution may offer other instances of sexual conduct with the defendant, the defendant may offer such evidence *where a claim of consent is asserted*.

   1) **Temporal Limitation-** Where in the distant past – may be precluded as temporally irrelevant. (i.e. Ken banged Barbi 3 months before the assault, etc.)

   c) **Exclusion of Evidence Would Violate Constitutional Rights-** the broadest of the exceptions- it is the catch-all for defendant claims. Some things that have been admitted under the exception include:

   1) **Prior False Allegations-** evidence of prior allegations of rape, etc. that were latter proved false may be admitted.

   2) **Rebut Claim of Virginity/Lesbian-** where the victim claims to be a virgin or from the isle of Lesbos (if you know what I mean) evidence of prior sexual conduct may be admitted.

   3) **Evidence of State of Mind –Mistaken Consent-** evidence that the perpetrator was mistaken as to consent may also be admitted. (Case where guy tells friends wife likes it rough…)
2. **Exceptions (b)- Civil Cases (2)**- the rule makes admission of prior conduct by the victim easier in civil matters. Evidence is allowed in the following circumstances:

   a) *Probative Substantially Outweighs Prejudice*- where the party can show the probative value substantially outweighs the prejudicial effect (this is essentially a reverse 403 burden).

   b) *Character Placed in Controversy By Victim*- if the victim offers evidence that she is pure as the driven snow, the defendant can walk out every sailor from the pier to tell about her birthmarks...

3. **Notice Requirement (c)**- in order to offer evidence under an exception, the party must notify the other side at least 14 days before trial- stating the specific evidence and its purpose.

4. **Potential Conflicts**- some conflict may occur with the adopted rule. For example, in *Meritor* the Supreme Court held that style of dress may be relevant, but such evidence is clearly barred by the rule; however the rules enabling act (REA) under which the FRE are established prohibits rules that change case law- this conflict is not resolved.

VI. **Impeachment of Witnesses**- the goal of any cross examination is show flaws and doubts about the credibility of the testimony offered by the witness. This includes evidence that the witness changed her story, perceived the events poorly, or just doesn’t tell the truth. This section deal with what evidence is admissible for the purposes of destroying a witnesses credibility.

   A. **Overview of Impeachment**- FRE rules on impeachment are encompassed in Article VI.

   1. **Common Law Voucher Rule**- a common law a person who called a witness was said to vouch for his/her credibility, as a result, a party could not impeach its own witness unless the following conditions were satisfied:

      a) *Must Be Adverse* – and– testimony by the party must be adverse to the interests of the party, this is more than just not what the party hoped for – it has to hurt the party’s interests. (i.e. W was expected to state he was with D, but says he did see D do anything (not adverse), but if he said ‘I saw D kill V’ that would be adverse.

      b) *Litigant Must Be Surprised by Testimony*- the testimony must be a surprise to the calling party on the stand. i.e. if the party is informed by the witness before the trial of a change in testimony, the party cannot call the witness and claim surprise.

   2. **Federal Voucher Rule**- FRE 607- “the credibility of a witness may be attacked by any party, including the one calling the witness” The federal voucher rule does not put any limitations on impeachment.

      a) *Potential for Abuse*– since hearsay is admissible for impeachment (not trying to prove truth of the matter asserted) – so calling to impeach may be used to introduce otherwise inadmissible hearsay—a limiting instruction should be given anytime hearsay is admitted for impeachment value.

   3. **Scope of Cross-Examination**- FRE 611(2)- the subject matter for questions on cross-examination must be limited to what was asked on direct examination.

      a) *Ask for latitude*– May ask for latitude from judge for related matters- if not allowed must call witness for direct as part of own case.

      b) *Leading Questions*– a witness may be asked leading questions on cross examination or on direct where the witness is hostile.

   4. **Methods of Impeachment**- there are essentially five ways to impeach a witness:

      a) *Character for truth-telling*– the normal prohibition against character evidence is waived by FRE 608 that establishes certain types of character evidence will be allowed. This is based on the assumption that any witness on the stand puts his character for truthfulness at issue.
1) **Reputation** - evidence of a the witness’s reputation for truth-telling.

2) **Bad Acts** - specific prior acts of conduct that demonstrate a propensity not to tell the truth.

3) **Convictions** - evidence of prior criminal convictions may be allowed on the basis that criminals lie.
   
   b) **Prior Inconsistent Statements** - a witness’s credibility may be attacked by demonstrating that he has made a statement that is inconsistent with his present testimony.

   c) **Bias** - a witness’s credibility may be attacked by showing that he is biased in favor of or against one side based on ulterior motive, relationship, or financial interest.

   d) **Defective Perception** - credibility may be attacked by showing that witness suffers from a sensory or mental defect.

   e) **Contradiction** - witness may be impeached by other testimony (another witness) or evidence.

**B. Character Evidence - Witnesses - FRE 608** - this rule provides for the impeachment of a witness based on the witnesses character for truthfulness. This represents an exception to the normal prohibition against propensity character evidence (here impeachment is based on ‘once a liar always a liar’ theory). This is based on the assumption that a witness’s character for truthfulness is always at issue. As in other matter of proving character, evidence is allowed in the basis of opinion and in limited circumstances by specific acts.

1. **Opinion/Reputation for Truth-telling - FRE 608(a)** - a witness’s credibility may be attacked by a witness offering character evidence in the form of personal opinion or reputation that he/she is poor at truth-telling, character evidence of other traits is not admissible.

   a) **Evidence of Truthfulness allowed on rebuttal** - where a party introduces opinion/reputation evidence that a witness is a poor truth teller, the other party is entitled to rebut that presumption with evidence of “good truth tellin’”.

2. **Prior Bad Acts - FRE 608(b)** - the rule, like 404, also provides a limited instance where instances specific conduct (other than criminal convictions – provided for in 609) may be used to prove a bad character for truthfulness.

   a) **Must be on Cross** - note that as in 404, inquiries in to specific actions may only be asked on cross examination.

   b) **Must be Probative of Quality of Truthfulness** - the bad act must relate to the witness’s character for truthfulness, not that he is generally an asshole.

   c) **Must Have Good Faith Basis** - before accusing a witness of a prior bad act, the party must have a good faith basis that such an act was committed.

   d) **Admitted at court’s digression** - note that any prior bad act to be admitted under 608(b) is subject to exclusion at the court’s discretion, this may specifically be considered in the light of a 403 objection.

   e) **Limiting Instruction** - a limiting instruction may be given that the prior bad act be used only for determination of truth and not for any other impermissible purpose.

   f) **Cannot Use Extrinsic Evidence to Prove Collateral Matter** - where the witness denies a matter not directly relevant to the case it is considered to be collateral and evidence other than the witnesses own testimony will not be admissible. This is based on that allowing such evidence may create a “trial within a trial.”

   1) **Defining Collateral** - an act will be considered to be collateral where it is not directly relevant to the matters at trial
2) **Must “take witness’s answer”-** if the witness is questioned and denies that bad act, the party is stuck with his answer.

3) **Evidence of Perception Not Collateral-** evidence of a witness poor ability to perceive events (eyesight, intoxication, knowledge, sincerity)- will not be considered to be a collateral matter.

4) **Evidence of Bias Never Collateral-** evidence of a witnesses bias towards a party is also never considered to be collateral to the determination of credibility.

5) **A way around 608(b)-** a party may attempt to circumvent 608(b) by calling a person with first hand knowledge of the collateral bad act to testify as to their opinion of truth-telling of the witness under 608(a) and then hope the other side inquires into the basis of the opinion on cross examination.

C. **Prior Convictions- FRE 609-** perhaps the most controversial of all forms of impeachment. The question of the use of this form is particularly at issue where it is the testimony of the accused that is sought to be impeached on the sole basis that a conviction is representative of general character to tell the truth. The federal rules represent a middle ground from the common law allowing this evidence in some instances.

1. **609(a)(1)- Admissible-** evidence that a witness has been convicted of a **felony** is admissible subject to 403.

   a) **Where Accused is Witness- Subject to Reverse 403-** where the witness the conviction is sought to be introduced against is the accused the court will weigh the probative value (towards bearing on truthfulness) with the prejudicial effect. **Must be more probative than prejudicial.** Factors in determining include:

   1) **Probative of Truthfulness-** if the crime is not necessarily very probative of truthfulness, like manslaughter, it is likely to be excluded based on prejudicial value. (convict for being a bad guy)

   2) **Similar Crimes-** risk of impermissible use (for propensity) may be a concern where the prior crime is similar to the current charge.

   3) **Will the it keep the accused from testifying?-** the prejudice will be considered greater where the conviction is sufficient to prevent the accused from testifying.

   4) **Temporal Concerns-** where the accused is concerned, the court is less likely to let in convictions from many years ago.
b) **Must Testify to Preserve Error**—if the court determines that a conviction (of the accused especially) is admissible, in order to claim error on appeal the accused must testify in the trial. (Luce v. US)

2. **609(a)(2)-Crimes of Dishonesty Always Admissible**—evidence of crimes of dishonesty, *crimen falsi*, (perjury, fraud, etc.) is always admissible.
   a) **Can Be Misdemeanor**—even if the conviction was for misdemeanor fraud it would still be admissible.
   b) **No 403 Balancing**—even if the conviction is offered against the accused there is no balancing as to prejudice under 403, the conviction is admissible.

3. **Time Limit (b)**—in order to be admissible the conviction must have been *released from custody* for the offense *less than 10 years prior*. This time limit may be waived by the court where admission of the conviction probative value of the conviction substantially outweighs its prejudicial effect.

4. **Pardon = Inadmissible (c)**—if a person has been pardoned based on innocence, the conviction is never admissible. If the person has been pardoned based on rehabilitation, the conviction is inadmissible so long she has not be convicted of a subsequent felony.

5. **Juvenile Record (d)**—evidence of a juvenile conviction is not admissible. However, evidence of a juvenile conviction of a witness other than the accused may be allowed where it is necessary for fairness. (against a prosecution witness)

6. **Effect of Appeal (e)**—the conviction will be admissible regardless of the pending appeal—although evidence that an appeal is pending is admissible.

7. **Common Law Treatment**—at common law evidence of any prior felony convictions and any misdemeanor involving fraud or dishonesty is admissible against a witness. Felonies were admitted regardless of their proving of veracity.

**D. Prior Inconsistent Statements- FRE 613**—the most common form of civil impeachment is the use of prior inconsistent statements. The theory behind this is that people who say one thing now and another thing before are dirty nasty liars.

1. **No Confrontation Requirement - 613(a)**—unlike the common law, the party who wishes to use a prior inconsistent statement does not need to confront the witness with the statement while he/she is on the stand. However, it must be disclosed to the other side upon request.

2. **Where Prove by Extrinsic Evidence-Must be Given Opportunity to Explain/Deny - 613(b)**—where a party proves a prior inconsistent statement through extrinsic evidence (i.e. another witness, writing, video, interpretive dance). The declarant of the statement must be afforded an opportunity to deny/explain statement by the other party.
   a) **Doesn’t Apply Where Statement is Party Admission**—where the statement is made by a party and is therefore termed an admission, the party need not be afforded a specific opportunity on the basis they have the entire trial if they want to.
   b) **Only Issue = Where Witness Becomes Unavailable**—the only real concern of 613(b) comes where a witness testifies, the other party offers extrinsic prove of inconsistency, and the witness becomes unavailable (before or after extrinsic offered). In such circumstances the extrinsic evidence cannot be offered/must be stricken.
   c) **Trial Judge may suspend requirement**—a judge may allow the testimony even without the opportunity to explain/deny the statement where the “interests of justice otherwise require.”

3. **Collateral Matter**—evidence that the witness has lied on another occasion may also be used to impeach. This is considered a collateral matter and different rules apply, similar to 608(b).
a) *Can Question About While on Stand*- a witness may be questioned regarding collateral matters on the stand.

b) *Cannot be Used for Extrinsic Evidence to Prove*- where the prior inconsistent statement is in regards to a collateral matter, no extrinsic evidence (other witnesses, etc.) can be used to prove the inconsistency.

4. **Hearsay Concerns** - hey a prior inconsistent statement sound like it was probably out of court and smells of hearsay....

   a) *Where Under Oath = Not Hearsay*- where a prior statement is offered as inconsistent and was under oath under penalty of perjury, it is exempted from the hearsay rule and may be offered for the truth of the matter asserted under 801(d)(1)a.

   b) *Where Hearsay - May Be Offered for Impeachment Purpose Only*- where a statement does not meet any hearsay exemption (i.e. wasn’t made by a party, etc) it may still be offered for impeachment on the basis it is *not hearsay since it is offered for credibility rather than truth*. As a result, the statement will be subject to a limiting instruction by the judge limiting it to its permitted purpose. (yeah, that works)

5. **Common Law Treatment = Stricter** - at common law in order to produce a prior inconsistent statement the witness must have a foundation laid (asked about place, person to whom and date it was made) and have an opportunity to deny/explain the prior inconsistency in his testimony.

6. **Prior Consistent Statements** - where a witness’s credibility has be attacked specifically claims of recent fabrication or improper influence, (changed story for deal from DA, etc.) the party may be allowed to introduce prior consistent statements in order to show credibility. This parallels the common law rule.

   a) *Must Be Prior to Alleged ‘Improper Influence’*- in order to be admissible to refute claims of improper influence, the statement must be made before the alleged improper influence.

   b) *May Be Only Implied Attack of Credibility*- even if the charge of impropriety is only implied by the other party, the statement may be offered in rebuttal.

   c) *No Oath Requirement*- unlike prior inconsistent statements, there is no requirement that the prior consistent statement be made under oath.

   d) *No Hearsay Problem*- prior consistent statements are exempted from the hearsay rule, and are therefore not hearsay under the FRE (801(d)(1)b) and *may be offered for the truth of the matter they assert*.

E. **Bias** - testimony may also be discredited by showing that the source of the testimony is in some way biased towards a party in the case.

1. **Types of Bias** - bias may be illustrated on a number of a ways including-

   a) Family/Relationship

   b) Hostility towards a party

   c) Interest in outcome (paid witness-expert testimony).

   d) Membership in a group (US v. Abel)

2. **May Use Extrinsic Evidence to prove** - outside evidence of bias may be admitted and is *not barred by 608(b)* and *no foundation is required* this is based on the assumption that *Bias is Never a ‘Collateral Matter’*- and not actually written in the rule.
VII. Opinion Testimony - to some extent all testimony is an opinion rather than a true fact. However the law differs opinion from fact based on the *inferences made by the witness*, such as “he was jumping up and down screaming” (fact) versus “he was mad” (opinion). The law will allow witness to testify as in the form of opinion only in some instances.

A.  **Layman Opinion- FRE 701-** where a witness is not an expert, she will only be allowed to testify to opinion in limited circumstances. At common law, lay witnesses were limited to only testifying to facts. The federal rules are more liberal. Laymen may testify opinions that normal people may form (speed of cars, intoxication, etc.) specifically the opinion should be drawn from the witnesses' *life experiences*.

   1.  **Two Part Test:** Rule 701 requires that the opinion met the following two criteria in order to be admissible:

   a)  *Rationally Based on Perception* – essentially this codifies the requirement of first hand knowledge- a notable difference from expert opinion is that a lay witness must have personal knowledge of the events that the opinion is in regards to.

   b)  *Provide Clear Understanding of Testimony* - the opinion of the witness must be helpful to the trier of fact to the determination of the value of the witnesses testimony.

   2.  **Short Handed Descriptors** - one of the most common uses of allowable lay witness testimony are short descriptors like “he looked nervous” where the opinion likely represents many little observations (twitching, shaking, etc.) that are easier to report in the form of opinion.

   3.  **May Challenge Foundation** - a foundation for lay opinion is not required, but the opposing party may challenge the foundation on which the lay witnesses opinion is based on (as in expert testimony).

   4.  **Subject to 403** - lay opinion is always subject to 403 allowing the exclusion of any opinion that is particularly prejudicial. Like “I think he was drunk, like always.”

   5.  **Exclusion Rarely = Plain Error** - where a trial judge precludes a lay witness from offering opinion evidence, it is extremely unlikely that any such exclusion would be considered plain error by any appellate review.

   6.  **“Lay Experts”** - a party may call a party who could potentially be qualified as an expert witness but is not by the party. The party may then have the witness testify as to conclusion drawn from his “specialized knowledge”. This may be done in order to avoid the *Daubert* test being applied. An amendment is pending that would constrain testimony under 701 to “common knowledge” and eliminate this loophole.

B.  **Expert Opinion- FRE 702** - both the federal rules and the common law exempted persons qualified as experts from the preclusion of testimony in the form of opinions. This is based that the expert's opinion can serve to aid the trier of fact in making determinations. As opposed to lay witnesses, expert witnesses are *expected to draw inferences* from the facts. In order to be allowed the testimony must be *qualified* and *suitable*.

   1.  **Must Be Qualified** - a foundation must be laid by the party offering that the expert has special knowledge, skill, or experience in the matter being testified to. This is done by asking a series of questions regarding training, experience, etc.

      a)  *May Stipulate Qualifications* - the other party may stipulate that a witness is an expert in a particular field without laying a foundation.

      b)  *May Want to Refuse Stipulation* - where a party has a particularly qualified expert, they may want to refuse the stipulation in favor of introducing such awing evidence as to make the jury believe the witness is a God.

   2.  **Must Be Helpful to Determination of Fact** - in order to be helpful, the testimony must be considered to be reliable by the court See *Daubert Test Infra*.

C.  **Expert Basis of Opinion- FRE 703** - this rule limits what a expert may base his/her testimony on. It is much broader that the common law rule, and allows the expert to base opinion on “facts or data …received by or made
known to the expert at or before the hearing." So long as the facts or are data is of a type reasonably relied upon by experts in the particular field.

1. **No Requirement of first hand knowledge**- unlike lay opinion testimony an expert is not specifically not required ("or made known to") to have any first hand knowledge regarding the issues he is testifying to.

2. **May be based on Inadmissible Facts**- the federal rule specifically provides that an experts may base their testimony on evidence not admissible under the federal rules (i.e. hearsay, see 'backdooring' below).
   
   a) **Some States Limit to “Admissible” Evidence**- some state evidence codes limit experts to basing their testimony on evidence that could be admitted into evidence, but does not require that is actually be admitted.

   b) **Common Law- Limited to Facts in Evidence**- at common law, expert were limited basing their opinion solely on facts that were admitted at trial.

3. **Cannot Evaluate Credibility of other Witnesses**- specifically she also cannot evaluate the credibility of other witnesses and use that valuation in determining and opinion. Credibility is an issue that must be left to the jury. (US v. Scop).

4. **Disclosing Basis for Expert Opinion- FRE 705**- this rule provides an expert does not have to offer the basis at the time of stating his opinion, unless required by the court, an expert witness is required to disclose the basis for his opinion if questioned on cross examination.
   
   a) **Changes Common Law Disclosure Requirement**- at common law, an expert was required while giving his opinion to disclose the basis for its formation.

   b) ‘Cleansing’ Hearsay- because an expert may base her testimony on hearsay, a popular mode of getting such evidence in where it was otherwise inadmissible was having her ‘rely’ on it – and then disclose it when being questioned on the foundation of the opinion.

   c) **Limits on the Use of Hearsay**- because of this, courts have limited the ability of persons to abuse this method of getting stuff admitted.

   1) **Can Rely on but Can’t Repeat**- some state court have specifically prohibited the stating of hearsay evidence as being relied on in a proceeding even though an experts opinion was based on it. Unless asked on C/X.

   2) **Can Rely on and Repeat with Limiting Instruction**- some courts allows the hearsay to be used in supporting a basis of opinion issues (yeah, right!) Federal Rule

   3) **Can Rely on and Repeat for truth**- so jurisdictions will allow an expert to rely on the hearsay and once introduced as a basis the information may even be used from the truth of the matter asserted.
d) **Amendment Proposed**- an amendment to 703 has been proposed that would limit the ability of the rule to be abused for the purposes of getting otherwise inadmissible evidence in by an experts reliance on it.

D. **Opinion on Ultimate Issue- FRE 704**- the Federal rule provides than an expert or lay witness may testify as to an opinion on an ‘ultimate issue.’ The expert/lay testify conclusive on an issue.

1. **Hinckley Exception- 704(b)**- the rule was modified after the shooting of Ronnie to exclude testimony on the ultimate issue of mental state required for an offence. An expert may testify may testify that a defendant suffers from disease but **cannot** state that he is legally insane.

2. **Hypo Question Requirement Eliminated**- at common law, an expert was not allowed to give opinion on the ultimate issue of a case, as a result his opinion on the ultimate issue was solicited through the use of a hypothetical question. (suppose that someone walked into an Arby’s naked and with a knife and….)

a) **May be Used where Expert Unfamiliar with Facts**- where the expert testifying in the trail is unfamiliar with the precise facts of the case, the offering party may phrase question in hypothetical form to aid in drawing the sought conclusions.

b) **May Object to Hypo on 403**- where a hypo is overly confusing or assumes facts that are contrary to those admitted into evidence, it may be objected on 403 grounds (confusion of issues, waste of time).

3. **Cannot Testify to Legal Conclusion**- a witness may testify conclusively on the subject of fact, the witness may not testify conclusively on a legal state or element, i.e. “defendant acted recklessly” would be inadmissible. Unless the testimony was offered by a lawyer (etc.). (US v. Scop)

E. **Court Appointed Experts- FRE 706**- in order to avoid a ‘battle of the experts’- the court may seek to have a court expert appointed (or a the request of a party). The court may also sua sponte appoint a expert to testify in a trial.

F. **Determining Reliability- Daubert**- issues may arise where there are different scientific theories or ways of interpreting evidence regarding a matter. As a result the court has adopted the Daubert test for determining the admissibility of scientific evidence.

1. **Daubert Hearing for Determination**- under the standard adopted in Daubert v. Merrell Dow Pharm. scientific evidence is admissibility is determined (where contested) at a hearing outside the presence of the jury, this may be through affidavit or full blown hearing (depends on circuit) and must meet with two factors:

a) **Reliability**- the evidence must be shown to be scientifically valid.

b) **Fit**- the evidence must be sufficiently tied to the case, ie relevant to at least one issue in the case.

2. **Factors in determining**- the court stressed the knowledge be **scientifically valid**. The court in Daubert makes a list of factors that it cites as important in determining reliability, the list by the courts own statement is not exhaustive of available factors.

a) **Tested**- the research has been subject to testing, specifically can it be verified through testing. (under scientific method?).

b) **Peer Review/Publication**- if the knowledge/theory has been published/reviewed by peers in the field.

c) **Rate of Error**- not only if the knowledge has low error, but that the percentage of error is determinable.

d) **General Acceptance**- if the evidence is generally accepted by others in the field, this is essentially the old Fry test, discussed infra.

3. **Abuse of Discretion is Review Standard**- the standard of review for a judge’s decision to admit/deny evidence subject to the Daubert test is reversible only where an abuse of discretion is shown, i.e. it is not very likely.
4. Replaced Fry Test—before Daubert, scientific evidence was judged by the Fry Test which would allow evidence only where the evidence was generally accepted. Daubert specifically rejects Fry.

5. Questions Unresolved—Daubert left two specific and related questions governing the application of the test, the answers vary by circuit:

   a) Does Daubert apply to all expert testimony or only scientific?—some circuits apply Daubert to all experts, a supreme court case is pending that is expected to resolve this issue.

   b) What is the scope of ‘scientific’ testimony?

6. Polygraph Tests—these exams have always been suspect based on the possibility of false results, the 2nd circuit ruled, however, that such tests may be admitted at the discretion of the judge in limited circumstances. (US v. Piccinonna).

   a) Stipulated by Parties—where parties stipulate the reliability of the exam.

   b) For Impeachment—it may be offered in limited circumstances for impeachment purposes.

VIII. Requirements for Admissibility— in addition to all this crap, evidence has to meet some other administrative hurdles to be admitted in certain circumstances:

   A. Authentication— is the requirement that a witness identifies that a piece of evidence is what it purports to be. The only requirement is that evidence is produced so that a permissible inference is created as to the evidence’s authenticity. Whether a piece of evidence is in fact authentic is a decision of fact to be made by the jury.

   1. Requirement of Authentication – FRE 901— the requirement of authentication is met where evidence sufficient to support a finding that the matter in question is what it purports to be is established. This can be done in any number of ways, part b lists some ways, but not all ways...

   2. Self-Authentication – FRE 902— extrinsic evidence of authenticity is excused in some situations, where the material itself is considered to ‘self-authenticate’

      a) Public Documents— are self authenticating where:

         1) Under Seal

         2) Not Under Seal— if accompanied by a sealed statement of authenticity.

         3) Foreign— ???
b) Public Records- where accompanied with a certification valid under ‘public documents’

c) Official Publications- publications of a public authority.

d) Newspapers and Periodicals- materials purporting to be printed newspapers or periodicals.

e) Trade Inscriptions (Labels)- inscription, signs or tags or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

f) Acknowledged Documents- accompanied by a notarized certificate of acknowledgement.

g) Commercial Paper

h) Congressionally Created Presumptions

B. Best Evidence Rule- the best evidence rule is better referred to as the original document rule. Essentially the rule requires that were ever possible when a person offers a writing, recording or photograph for its contents the original should be produced.

1. Definitions - FRE 1001- for purposes of the best evidence rule the following definitions are utilized by the court.

   a) Writing or Recordings- any compellation of data, consisting of letters, words, numbers or their equivalents.

   b) Photographs- includes motion pictures, still photographs, X-rays, video tapes.

   c) Originals- the writing or recording itself, for photos- any print from the negative, for electronic data- any original hardcopy print-out.

   d) Duplicate- any accurate reproduction with the same impression as the original – enlargements of photos are considered duplicates.

2. Requirement of Original for Contents - FRE 1002- except as otherwise provided, where the contents of a writing, recording, photograph are sought to be proved the original should be produced.

3. Duplicates Admissible- FRE 1003- duplicates are fully admissible as the original unless:

   a) Question of Authenticity- if there is a general is of authenticity.

   b) Unfair to Admit Duplicate- as determined by the court.

4. Extrinsic Proof of Contents – FRE 1004- the requirement of the production of the original is excused and extrinsic evidence may be used to prove the contents of the original.

   a) Original Lost/Destroyed- unless the it was lost or destroyed in bad faith by the proponent.

   b) Not Obtainable- document is beyond the suponea power of the court.

   c) Original in Possession of Opponent- where the opposing party was in possession of the original and put on notice that the contents would be t a subject of an issue of fact.

   d) Relates to Collateral Matter- where the contents of the writing etc. is not closely related to a controlling issue of the trial.
e) No Degrees of Secondary Evidence- the rule does not create a hierarchy of what order evidence should be admitted where the original is not available. (i.e. no rule provides a hand written copy supercedes oral testimony, etc.

5. Public Records Exception- FRE 1005- this rule preempts 1003 general allowance for duplicates to be equal the original. Copies of public records are only admissible as an ‘original’ where they are certified in accordance with the authentication rules for public records supra. This includes publicly filed private documents (mortgages, deeds, leases.) Unless they are unavailable after ‘reasonable diligence’ then see 1004.

6. Admission of Parties Exception- FRE 1007- where opponent has admitted the existence of the recording, etc. the production of the original will be excused. The admission fulfills the best evidence rule.

7. Judge/Jury Division- FRE 1008- compliance with the rule may be made by the court (authenticity of copy), however decisions as to the existence, is the document is the original, correctly reflects the contents are left to the finder of fact (usually a jury.)