I) Relevancy, Probative Value, and The Rule 403 Dangers
   a) Relevancy – Basic Concept
      i) Only relevant evidence helps the jury reach rational outcomes
      ii) Rule 401 (Two Issues the judge must consider)
         1. Is the item offered to prove a fact that is “of consequence” to the case?
            a) A fact is “of consequence” in a legal dispute if it can be connected through inferential reasoning to one of the essential legal elements of the substantive law that governs the case
               i) Evidentiary Fact is offered into evidence
               ii) Fact of Consequence is an inference that the jury can make after accounting for the Evidentiary Fact presented
                  1. The Fact of Consequence is not presented but the jury can decide to believe, that the fact of consequence connects to the Essential Element
                     a. The substantive law determines the essential element in every case.
                        i. Elements that must be proved in order to establish a legal cause of action.
         2. Does the evidence actually tend to prove (or disprove) that fact by making it more (or less) probable?
            a) Probability is Determined from Knowledge and Experience
               i) Jury uses its generalized knowledge and experience as well as various other intellectual tools to draw inferences based on the evidentiary fact.
            b) Relevancy Requires Reasonable Generalizations
               i) Judge must determine whether a reasonable person might believe the probability of the truth of the consequential fact to be different if that person knew of the proffered evidence.
                  1. Judge estimates the probabilities of such generalizations in a subjective way, from the perspective of the reasonable juror.
                  2. A proponent will have to present proof of an underlying generalization if the judge requires it, or may do so simply to persuade the jury that the generalization has particularly strong force.
                  3. Two Limits to Reasonable Juror test:
                     a. Necessary generalizations cannot be known to the judge to be false
                     b. Necessary generalizations cannot be speculation
                        i. Relevancy based on stereotypes speculation should be rejected
            c) FRE 401’s Minimal Standard of “Any Tendency”
               i) The judge compares how probable the FOC is with and without the offered EF and will find it relevant if it makes a OFC somewhat more or less likely than it would be were the evidence known.
                  1. Size of the change is of no importance in determining relevancy
(ii) Promotes rational decision making by promoting the jury’s access to relevant evidence.

(3) Direct Versus Circumstantial Evidence
(a) Direct Evidence
(i) Evidence that, if believed, establishes an essential element
(ii) Requires inferential reasoning that an eyewitness’s ability to observe an event, remember it, and describe it accurately.

(b) Circumstantial Evidence
(i) Most evidence, the testimony does not establish the essential element, and additional inferences are necessary to explain something
(ii) Can often be more reliable than direct evidence (blood spot, fingerprint)

(4) Background Information
(a) Background information about the witness who is testifying is always admissible
(i) Allows the jury to make better informed judgments about the credibility of a witness and the reliability of that witness’ observation

(5) Relevancy is not Sufficiency
(a) The question of admissibility under 401 is separate from the question of whether an item of evidence is sufficient proof to justify sending a case to the jury

b) Probative Value and the Rule 403 Danger
i) FRE 403 – Although relevant, evidence may be excluded if its probative value is substantially outweighed by other dangers

(1) Probative Value
(a) To decide the merits of a 403 objection, the judge must first analyze the persuasive effect that the item of evidence will be likely to have on the jury’s thinking about the fact of consequence it is offered to prove

(b) Probative value measures the strength of the effect on the probabilities. This is so, even if measured only in general terms like “highly,” “somewhat,” or “minimally” probative.

(i) Strength of the Underlying Inferences
1. Strength depends on the rough probabilities of the generalizations underlying those inferences

(ii) Certainty of Starting Point
1. Certainty of the starting point of the inferential chain can affect probative value

(iii) Need
1. Judges should balance the probative value of and need for the evidence against the harm likely to result from its admission
2. Availability of other means of proof
3. The centrality of the point to be proved and the degree to which it is disputed by the opponent, can increase a party’s need for evidence and would increase its probative value
4. If there is already substantial evidence on the same point, there is less need for an additional item and its probative value is lower

(2) Rule 403 Dangers
(a) Unfair Prejudice
   (i) Danger that evidence might suggest an improper basis upon which the jury could decide the case
      1. Not unfairly prejudicial simply because it is detrimental to a party’s case
   (ii) Two Principal Risks of Unfair Prejudice
      1. Evidence about a party can trigger a response that has nothing to do with its logical connection to a fact of consequence
         a. Improper reaction is commonly, although not necessarily an emotional one
      2. Could be used by the Jury in a manner that violates an evidence rule

(b) Confusion of the Issues
   (i) Focuses the jury’s attention too closely on a factual issue that is not central to the outcome of the case
   (ii) Issues are termed collateral, which usually means that their connection to the essential elements is trivial and may be based on complicated or attenuated theories of relevance
   (iii) If a jury gets involved and interested in determining a collateral issue, it will spend less of its attention on the important questions.
   (iv) Issues are not irrelevant, they are just too confusing.

(c) Misleading the Jury
   (i) Involves a risk that an item of evidence will cause the jury to draw a mistaken inference
      1. Facts taken out of context or presented in a falsely suggestive manner
         a. Scientific evidence and expert testimony may appear overpersuasive
   (ii) Despite the risks, the need for scientific evidence is very high

(d) Undue Delay, Waste of Time, and Needless Cumulative Evidence
   (i) As a general rule, evidence may not be excluded solely to avoid delay
   (ii) Still, evidence may waste the jury’s time if offered to prove stipulated, collateral, or background facts
   (iii) Judge must assess:
      1. The degree to which the testimony actually is repetitive,
      2. Any reasons why repetition may be needed
      3. Centrality of the FOC being proved
      4. The degree to which the facts is in dispute,
      5. The probative value of the corroboration itself
(3) Probative Value Substantially Outweighed by One of the FRE 403 Dangers

(a) The Meaning of Substantially Outweigh
   (i) The rule’s requirement that probative value be outweighed “substantially” appears to require that some risks of negative impact be tolerated
   (ii) Evidence should be excluded only when the judge is quite confident that the prejudicial aspects of the evidence outweigh its probative value
   (iii) If probative value is mid to high, it will probably be admitted.

(b) The Effect of Limiting Instructions on the Balancing Process
   (i) FRE 105 – When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly
      1. Judge may give a limiting instruction that directs the jury to consider the evidence only for its proper use
   (ii) May serve to emphasize the inadmissible evidence, which may be more damaging than simply letting the matter go unnoticed
   (iii) Courts assume that these instructions are effective

(c) Old Chief v. United States
   (i) Two basic possibilities for the analytical method to be used in 403 balancing:
      1. An item of evidence might be viewed as an island
         a. Estimates of its own probative value and unfairly prejudicial risk the sole reference points in deciding whether the evidence ought to be excluded
      2. Question of admissibility might be seen as inviting further comparisons to take account of the full evidentiary context of the case as the court understands it when the ruling must be made

II) Laying the Foundation for Proof
   a) Laying the Foundation For Witnesses
      i) FRE 601
         (1) General Rule of Competency
            (a) Every person is competent to testify as a witness
               (i) Varies greatly from the common law
         (2) Challenging a Witness’s Mental Competency
            (a) No mental or moral qualifications for testifying as a witness are specified
            (b) Procedure for challenging the competence of a witness (2 approaches):
               (i) The inability of a witness to take or comprehend an oath or affirmation will allow judge to exclude testimony
               (ii) Trial court retains the complete discretion to decide whether an individual witness is competent to testify
(c) Trial court may need to hold a hearing on the competency issue at which the witness is placed under oath and evaluated without the jury
   (i) Appellate courts seldom overturn the trial court’s complete discretion on the issue of witness competency
   (ii) Most disabling factors should be treated as matters affecting credibility for the jury to resolve, not as matters of competence
(d) Child Witnesses
   (i) Competency examination only if compelling reasons exist
   (ii) Only on motion by the opposing party and an offer of proof of incompetence

ii) FRE 602
   (a) Lack of Personal Knowledge – Witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter
   (i) The Requirement of Personal Knowledge
      1. Visual Perception
         a. Makes the witness an eyewitness (perceptual witness) who was present at an event or occurrence
      2. Knowledge Based on Senses
      3. If testimony is not based on personal knowledge, then it is probably based either on speculation or on hearsay
   (ii) The Requirement of Evidence Sufficient to Support a Finding
      1. A reasonable jury could find that it is more probable than not that the witness has personal knowledge
      2. Proponent usually need only ask the witness whether the witness saw or heard the matters that are about to be described to the jury
         a. Witness’s own testimony will usually suffice
         b. Additional testimony concerning the extent of the witness’s perception may be relevant
      3. Sufficiency is not primarily concerned with credibility
         a. The proponent is entitled to the most favorable of competing rational inferences

b) The Authentication and Identification of Exhibits
   i) FRE 901 – Requirements of Authentication or Identification
      (1) What the Exhibit is Claimed to Be
         (a) Theory of relevance requires the proponent to articulate a connection between the item and the parties or the litigated events in the case
         (i) Identification – Who authored a writing, whose voice was heard speaking
         (ii) Authentication – Refers to the genuineness of the connection between what the exhibit is and the specific facts of the case
      (2) The Requirement of Evidence Sufficient to Support a Finding
         (a) Proponent must produce evidence sufficient to support a finding to show that the evidence is what it is claimed to be
         (i) Evidence that the “evidence” is relevant and connected
(3) 901(b) Illustrates How to Produce Evidence Sufficient to Support a Finding
   (a) Examples
      (i) Person with personal knowledge
      (ii) Circumstantial Evidence
      (iii) Comparison
   (b) The proponent has the added burden of locating the proper witness and of presenting that witness at trial

(4) Judicial Determination of Sufficiency Under FRE 901(a)
   (a) The judge’s determination of “sufficiency” will depend primarily on the judge’s assessment of the strength of the generalizations underlying the inference presented by the evidence
      (i) Judge will exclude from evidence only if, on hearing the evidence from both parties, the judge concludes that no jury could reasonably find it to be relevant
   (b) It is the jury who will ultimately determine the authenticity of the evidence, not the court

(5) The Process of Laying the Foundation
   (a) An exhibit is typically received into evidence after being given a number or letter designation
   (b) After the foundation is laid, the proponent asks the judge to admit the exhibit “into evidence”
      (i) The opponent may object, either because the foundation is not adequate under 901(a) or on grounds of some other exclusionary rule
   (c) Exhibits remain in the custody of the clerk during trial
      (i) They are taken into the jury room during deliberations; and they are part of the record on appeal

ii) Real and Demonstrative Evidence, Written Documents, Recordings
 (1) Real Evidence
     (a) Tangible items that played some role in the litigated event and from which the jury may draw inferences
     (b) Foundation for real evidence typically consists of a witness who can identify the item’s physical involvement in the case
        (i) Identification Through a Readily Identifiable Characteristic or Through Chain of Custody
           1. Readily Identifiable Characteristic
              a. Unique design, initials, label, number, tax, fingerprint
           2. Chain of Custody
              a. Typically used when an exhibit is generic and has no identifiable characteristic
              b. Links the people who handled the exhibit between the time of its discovery at the crime scene and its appearance in the courtroom
c. Complete chain of custody requires the testimony of all people plus testimony to show that the exhibit was stored in a secure place when it was not being handled

(ii) Unchanged Condition Established Through Chain of Custody
1. Chain establishes that the item has not been tampered with and that it is in the same condition as it was when it was discovered
2. Shows that the same conditions existed when items were found, tested, presented in court

(iii) Under FRE 901(a), the Complete Chain of Custody is not Always Required
1. Where gaps exist in substances that require testing, courts have held that a jury could reasonably find that the exhibit in question was what it was claimed to be

(2) Demonstrative Evidence
(a) Definition
(i) Refers to the exhibits that reproduce or depict persons, objects or scenes that are connected to the litigated events in the case
   1. Models, diagrams, drawings, photographs
   2. Relevant because its content is connected to the case
      a. Typically identified by testimony from a person with knowledge about the nature of its content, and by the connection of that content to the case

(b) Demonstrative Evidence Must Assist the Trier of Fact
   (i) The advocate must be prepared to show that the exhibits a “fair,” “accurate,” or “true” depiction of what it is claimed to portray
      1. Witness must be able to recognize and identify the object depicted and testify that the evidence fairly and correctly represents it
      2. Claims that demonstrative evidence is misleading would be decided under 403

(c) Application of 403 to Real and Demonstrative Evidence
   (i) Some types are generally admitted as a matter of course:
      1. Murder weapons, seized substances, photographs
   (ii) Sometimes the admission of real and demonstrative evidence raises 403 dangers such as unfair prejudice and risk of misleading the jury
      1. Gruesome photos may generate unfair prejudice
      2. Complex charts and graphs may mislead the jury
      3. Photos may be misleading if they portray a scene in a different condition than when the relevant incident occurred

(3) Demonstration and Experiments in Court
(a) The proponent of the demonstration must lay a proper foundation establishing the similarity of circumstances and conditions between the out of court event and the in court presentation
(b) Must be sufficiently similar to provide a fair comparison
(c) 403 applied due to potential to confuse the jury

(4) Recorded Simulations and reconstruction of Events
   (a) Filmed or computer generated animations
      (i) Consist of a set of drawings that depict objects in motion
      (ii) Subject to the same foundation of fairness and accuracy as a single drawing
   (b) Computer Generate Simulation
      (i) More complex, in that they involve reconstruction of events based on mathematical models
      (ii) Claimed to produce results very similar to the physical facts being modeled
      (iii) Most complete will involve the underlying scientific principles that govern the accident; a foundation for the mathematical model that re-creates the physical events; and a detailed foundation for the functioning of the computer system that generates the animation
      (iv) 403 Dangers that the model simplifies the real world events; and that much data pertinent to accident reconstruction may be unknown, concern that jurors will be misled or overly influenced by such animated exhibits despite cautionary instruction

(5) Written Documents
   (a) Usually relevant because they are connected to the litigated events of a case by the identity of their author or by knowledge of where they came from
      (i) Signature
         1. Observation of the creation or execution
         2. Identification based on familiarity with handwriting
      (ii) Contents and Other Circumstances
         1. A document may be identified by its contents alone
         2. A document may be identified by the circumstances in which it was found
         3. Records of a business or other institution can be authenticated through testimony of a custodian about how the business’s filing or data retrieval system operates and that the document was retrieved from a certain file or in a certain way
   (iii) Ancient Document Admissible if:
         1. Writing of more than 20 years old
         2. In a place where it would likely be if it were authentic
         3. Document must be in such condition as to create no suspicion concerning its authenticity
         4. Document must be the type that its proponent claims it to be
   (iv) Electronic Documents
         1. Courts have noted that 901 provides flexibility in applying its standards of sufficiency, and have developed analogies to traditional writings in admitting e-mails, Web postings, chat group discussions, and logs.

(6) Recordings
(a) Cross between real evidence and eyewitness testimony
   (i) Record of real events imprinted on tape or film or some other medium by mechanical, electronic, or other processes
   (ii) Reveals what the equipment “saw” or “heard”
(b) Satisfying the 901 Foundation with a Percipient Witness
   (i) When a percipient witness exists who has perceived events outside the courtroom, the witness can then lay the foundation for the admission of a recording of those same events
      1. Testimony that identifies the events recorded, that states the basis for the witness’s ability to identify the events, and that affirms that the recording is a fair, accurate, or true record of the events perceived
   (ii) Courts now permit a simplified foundation
      1. There are electronic techniques for determining whether a tape has been altered
      2. Courts simply ask if there is evidence to support a finding of fact that the recording is fair
(c) Satisfying the 901 Foundation Without a Percipient Witness
   (i) When a recording functions as a silent witness, a percipient witness does not exist and cannot testify to the simplified foundation
   (ii) Authenticity relies upon evidence that the process or system produced an accurate result:
      1. Reliance of the scientific theory of the operation of the recording device
      2. Qualifications of the operator
      3. Conditions of the equipment
      4. Unchanged condition of the recording
      5. Chain of custody from the recording device to the courtroom
   (iii) Courts differ in the degree to which they require the complete traditional foundation of the common law, even when the recording device is functioning as a silent witness
   (iv) Recordings can be authenticated by their content alone
      1. Internal labels, manner of their production, and the information they contained
(7) FRE 901 Provides Flexibility in Application
   (a) Courts apply the standard of 901(a) flexibly and do not always require that a particular subsection of 901(b) be satisfied
   (b) Over time, courts do tend to distill the elements of an adequate foundation into criteria that they apply routinely
(iii) FRE 902: Written Documents That are Self-Authenticating
   (1) Interpretation
   (a) Documents that, on the basis of their appearance or self-evident content alone, are so likely to be authentic that the proponent need produce no evidence to prove it.
(b) Formalities such as a seal or a statement of certification, indicate that someone has paid attention to genuineness
   (i) A foreign passport must be accompanied by official certifications to be self-authenticating under 902(3)
(c) Other kinds of writings trigger a generalization that they are very difficult to forge
   (i) Because the risk of forgery is low, they are from the source they appear to be from

c) Judicial Determination of Preliminary Questions Under FRE 104
   i) Interpretation of 104
      (1) Three types of questions to be decided by judges in applying evidence rules:
          (a) Questions of Law
          (b) Questions of Fact
          (c) Questions that required the exercise of discretion
      (2) FRE 104(a) Questions of Admissibility Generally
          (a) In general, all preliminary questions are to be decided by the court
             (i) Trial judge applies the rules of evidence in order to determine whether items of evidence offered by the parties should be admitted or excluded
             (ii) The power of the court is subject to 104(b)
              1. Under (b) the judge must still determine whether evidence sufficient to support a finding of fact has been introduced
      (3) FRE 104 Establishes Two Standards for Deciding Preliminary Questions of Fact
          (a) 104(a) - The Court Decides the Preliminary Question Itself, Under a Preponderance of the Evidence Standard
             (i) Preliminary questions of fact concerning the admissibility of evidence shall be determined by the court
                1. Judges are to decide these on a “preponderance of the evidence” standard
                   a. The preponderance standard ensures that before admitting evidence, the court will have found it more likely than not that the technical issues and policy concerns addressed by the FRE have been afforded the consideration
                2. The judge must be persuaded that it is more likely than not that the preliminary fact is true
          (b) 104(b) - The Court Screens the Preliminary Question, Under a Sufficiency of the Evidence Standard, But Gives the Question to the Jury
             (i) Relevance of an offered item depends on a “condition of fact”
                1. Judge determines only whether the proponent has introduced “evidence sufficient to support a finding of the fulfillment of the condition.”
a. If there is sufficient evidence of this preliminary “condition of fact,” the judge will admit the offered item and leave it to the jury to decide the preliminary question.

(c) The Difference Between FRE 104(a) and 104(b)

(i) Under the lower standard of proof of 104(b), the evidentiary burden on the proponent is lighter, and the more likely it is that the judge may find that the evidence is “sufficient to support a finding” of the preliminary fact.

(ii) Under the higher standard of proof of the 104(a), the evidentiary burden on the government is heavier, and the more likely it is that the judge may not be persuaded by a preponderance of the evidence.

III) The Best Evidence Rule

a) FRE 1001 – FRE 1007

i) FRE 102 – Basic Principles of the Best Evidence Rule

(1) An original is required when a proponent seeks to prove the content of a writing, recording, or photograph

(a) Applies broadly, insofar as writings and recordings are defined very broadly to include any form of data compilation

(2) Key issue is deciding when “content” is being proved

ii) FRE 1003 – Duplicates may be furnished instead of an original in most circumstances

(1) Once a duplicate satisfies the 901 authentication foundation and the best evidence requirements of a duplicate, any additional concerns are determine under 403

(2) Situations where duplicate may not be used:

(a) If the opponent presents evidence that disputes the authenticity of the original

(b) If other aspects of the original or duplicate make it unfair for the proponent to use (incompleteness, erasures, defects)

iii) FRE 1004 – Common Law Exceptions that justify or explain why a proponent should not be required to produce an original or duplicate

(1) Loss or destruction – Proved through evidence of a diligent but unsuccessful search

(2) Documents in the Possession of Others – Show that the originals cannot be obtained through judicial process or procedure

(3) Original in possession of Opponent

iv) FRE 1006 – Summary, Chart, or Calculation

(1) Proponent of voluminous writings, recordings, and photographs may present the contents in a summary, chart, or calculation

(a) Proponent is obligated to permit the opponent to examine, copy, check for errors and inconsistencies and check for purposes of cross-examination

(2) Originals themselves must have been admissible into evidence in order to lay a proper foundation of the summary

b) Scope of The Best Evidence Rule
i) Elaboration of 1002 and 1006

(1) When is a Writing Offered to Prove Its Own Content Under 1002
   (a) The Content of the Writing, Recording, or Photograph Is the Event
      (i) When the terms of the writing are at issue, accuracy is important and the original would be required
         1. Libel, Obscenity film
         2. Disputes over terms of written agreements and written rules may require proof of the contents of the writing
      (ii) Non-hearsay statements relevant for their effect on the listener or relevant as legally operative facts
   (b) The Writing, Recording, or Photograph Is the Record of an Event
      (i) A writing, recording, or photograph may be relevant because it records an out-of-court event, and it is the happening of this past event that the proponent is trying to prove
      (ii) If a writing or a recording is offered to prove what happened, the proponent would be offering it to prove its contents and the original would be required
      (iii) When there are several ways to prove a past event (tape recording, transcript, eyewitness testimony), any version is acceptable because proving what happened is not proving a writing.
   (c) Facts About the Writing Are Not Its “Contents”
      (i) The rule prevents the introduction of evidence designed to prove the terms of the document, where often small changes in words may be of significance
         1. The Rule does not, however, prevent the introduction in evidence of facts about the document, or facts that exist independently of the document that are not given legal consequence by the terms of the document

(2) Types of Summaries and Rule 1006
   (a) Summaries of Voluminous Documents Not Admitted at Trial
      (i) If a summary or chart is offered as an exhibit in the place of voluminous documents, the proponent must establish that the documents underlying it are admissible in evidence
         1. It is not required that the underlying materials are actually admitted at trial because the rule provides that the summary may substitute for those materials
   (b) Illustrative Evidence
      (i) Summaries and charts that are to be used as illustrative aids are to be distinguished from 1006 summaries and charts
         1. Such devices are not within the terms of 1006 and are not admitted into evidence
         2. Use of illustrative aids at trial is regulated by 403 and 611
   (c) Analytic Summaries
      (i) Summaries are not merely illustrative because they do contain some analysis of the raw data, but the raw data has already been admitted through testimony and original records
1. Admitted, not as a summary of the data, but in addition to the data
2. Summaries must accurately portray the evidence already admitted since they will be in the jury room during deliberations
c) FRE 1008
   i) Preliminary questions of fact necessary to apply FRE 1001-1007 are typically to be decided by the judge under 104(a) prior to admitting evidence of the contents of a writing
      (1) The trial court is to determine:
      (a) Whether the item is original
      (b) Whether an item qualifies as a duplicate
      (c) Whether there is a genuine question raised as to the authenticity or the original
      (d) Whether it would be unfair to admit a duplicate
      (e) Whether an original was lost or destroyed and whether there was a diligent search
      (f) Whether the proponent lost or destroyed the original in bad faith
      (g) Whether an original can be obtained using the judicial process
      (h) Whether an adverse party has possession or control over the original, and whether proper notice was given to that party
      (i) Whether evidence goes to a collateral matter or to a controlling issue
      (2) The specific factual issues are for the trier of fact to determine
      (a) Whether the asserted writing ever existed
      (b) Whether another writing, recording, or photograph produced at the trial is the original
      (c) Whether other evidence of contents correctly reflects the contents
IV) The Character and Propensity Rules
   a) Evidence of a Person’s Character Offered To Show Action in Conformity With That Character
      i) FRE 404(a)(1) and (2): A Criminal Defendant’s Right to Open the Door
         (1) A criminal defendant is free to open the door to the character evidence issue by introducing evidence of the D’s own character - 404(a)(1)
         (2) A criminal defendant is free to open the door to the character evidence issue by introducing evidence of the victim’s character – 404(a)(2)
      ii) FRE 404(a)(1) and (2): The Prosecution’s Right to Respond to a Defendant’s Character Evidence
         (1) When a D elects to open the character evidence door, the P is in its rebuttal case may introduce character evidence to rebut the D’s evidence – 404(a)(1)
            (a) Whenever the P is rebutting the D’s character evidence, the P’s evidence must be about the same character trait addressed by the D’s evidence
            (i) i.e. Can’t rebut testimony that D is peaceful with testimony that D is dishonest
(2) If an assault D introduces evidence of the victim’s character for violence in order to suggest that the victim was the aggressor, the P may respond for the victim’s character for peacefulness – 404(a)(2)

(3) When Ds open the door to a victim’s bad character, they also open the door to their own bad character

iii) FRE 404(a)(2): The Prosecutor’s Limited Right to Open the Door

   (1) The prosecution may introduce evidence of a homicide victim’s character for peacefulness, if the D has suggested that the victim was the first aggressor

iv) The FRE 404(a) Requirement of Pertinence

   (1) The D’s and the P’s character evidence must tend to establish a “pertinent” character trait
       (a) i.e. Can’t rebut character of dishonesty with evidence of character of truthfulness

v) FRE 404(a)(3): The Character of Witnesses

   (1) Parties are permitted to introduce evidence that undermines or supports a witness’s truthfulness

b) Elaboration of the FRE 404(a) Restrictions

i) The Rationale for Restricting Evidence of a Person’s Character

   (1) The probative value of character evidence to show action in conformity with character will seldom, if ever, be very great
       (a) People never act in complete conformity with their character traits
           (i) Character evidence tells the fact finder very little about the likelihood that the D behaved in accordance with that character on that one particular occasion

(2) Low Probative Value of the Evidence to Prove Character; Diversion from Main Issues

   (a) The inference from the evidence offered to what a person’s character actually is may be weak
   (b) Where there is conflicting character evidence, there is the risk that the main focus of the trial will become diverted to “minitrials” on the question of character

(3) Bad Person Prejudice

   (a) Evidence that a party possesses a certain trait may arouse an emotional response and dispose the jury to decide in favor of that person if it is a positive character trait or against the person it is a negative one
   (b) Jury may be willing to ignore a reasonable doubt and convict a person who may not have been sufficiently punished in the past and who may commit crimes in the future.

(4) The Moral Issue

   (a) It is simply wrong to base a conviction on the character of a person as opposed to what the person has done

ii) The Rationale for the FRE 404(a)(1) and (2) Exceptions

   (1) The problem of unfair prejudice is likely to be greatest with respect to evidence of a criminal D’s bad character
Therefore, this will not be admissible unless the D chooses to open the door to the character evidence inquiry.

Despite the low probative value of character evidence to show action on a particular occasion and despite the risk of unfair prejudice to the P, a criminal D should not have to face the consequences of conviction without have had every opportunity to establish a reasonable doubt. Proof of good character may establish such doubt.

Any risk of unfair prejudice to the D from evidence of a victim’s good character seems relatively remote.

The evidence of the victim’s violence in a self-defense suit is relatively relevant to the D’s.

(a) Saying that the victim is violent is inevitably to say that the D, in comparison to the victim, is peaceful.

iii) Evidence of Character in Civil Actions

(1) 404(a) – Expressly prohibits the use of character evidence to show action in conformity with a person’s character in civil actions

(a) Minority Rule – Permits D in civil actions to open the door to character evidence if the civil action is based on culpable conduct proscribed by the criminal law.

c) FRE 404(b) and 405(a)

i) Types of character evidence that may be used, when admissible

(1) Specific instances of conduct of the person whose character is in question

(a) Prohibited by 404(b)

(2) A witness’s testimony that in the witness’s opinion the person in question has the particular character trait

(a) Permitted by 405(a) – character witness

(3) A witness could offer to testify that the person has a reputation in the community for having the kind of character trait that is relevant to the litigation

(a) Permitted by 405(a) – character witness

d) Elaboration of the Permissible Methods of Proving a Person’s Character to Show Action in Conformity with Character

i) The Prohibition Against the Use of Specific Acts

(1) There are substantial 403 type countervailing concerns that justify excluding specific acts to prove character to show action in conformity with character

(a) Bad Person Prejudice

(i) Likely to be unfairly prejudicial in that the jury may have a tendency to decide for or against an individual because they believe that the individual really is a generally good or bad (and possibly dangerous) person

(b) Confusion and Efficiency Concerns

(i) Likely to be more time consuming and confusing to the jury than the use of reputation or opinion evidence

1. Litigant presumably would want to rely on more than one act
2. There would probably be disputes about the precise manner suggested by the proponent of the evidence.

3. Each party may also want to call additional witnesses to impeach the credibility of the primary witness.

(c) Low Probative Value

(i) The inference from character to action on a particular occasion is likely to be weak.

1. Not worth the time, possible prejudice, and confusion of the issues to try to prove or disprove various specific facts that are themselves collateral to the issues at hand.

(2) The Probative Value of Opinion and Reputation Evidence to Prove Character

(a) Value will depend in part on how long, how well, and in what contexts the witness has known or has known about the person whose character the evidence is offered to prove.

(b) Common law required that a reputation witness testify to the person’s reputation in the community.

(i) As a practical matter today there will not be many instances in which an individual has a reputation throughout the entire community in which the person lives.

1. Courts recognize this fact and permit reputation testimony to be based on what a witness has heard in some relevant community.

(c) Question of whether the witness knows about the individual well enough to testify in the form of opinion or reputation.

(i) 403 gives judges the latitude to exclude testimony that is marginally probative because the witness does not have much of a basis for knowing or knowing about the person in question.

(3) Reputation Evidence Versus Opinion Evidence

(a) When a witness testifies in the form of opinion, it is permissible to inquire into the underlying basis for the opinion on both direct and cross-examination.

(4) The Cross-examination of Character Witnesses

(a) 405(a) says you may cross-examine the character witness about whether relevant specific acts were committed by the person whose character is the subject of the testimony.

(i) The Relevance of the Specific Acts Inquiries

1. Relevant purpose of persecutor’s use of specific acts is to test the credibility of the witness.

   a. If the witness denies that acts referred to occurred, one can infer that the witness does not have a very good sense of the D’s reputation.

   b. If the witness had heard of the acts, one might doubt the truth of the witness’s testimony.
2. Because the specific act questions are admissible only to impeach the character witness and not to prove the character of the D, the D is entitled to a limiting instruction pursuant to a. FRE 105

(ii) The Prejudicial Impact of Specific Acts Questions
1. Two-Fold Risk of Prejudice
   a. The jurors may infer from the questions about the specific acts that the person who committed the acts that person always acts as he did on the particular instance
      i. 403 - Jurors may infer from the questions to Mary about John’s violent acts that John is a violent person and may have acted in conformity with that violence character trait by murdering the victim of the charged crime, as the prosecution has alleged
   b. Jurors may be willing to ignore a reasonable doubt if they regard John as a bad, dangerous person
      i. 403 – Jurors may base their decision on an emotional and legally improper ground
2. Courts regularly permit
   a. High probative value because it is specifically authorized by FRE
      i. Still, very prejudicial although it often gets admitted

(iii) The Relationships Between the Character Trait and the Specific Acts Inquiries
1. Specific act inquiries made pursuant to 405(a) must be relevant to the character trait about which the character witness testified
   a. Specific Act inquiries must relate to the character trait in question

(iv) The Character Witness’s Likely Knowledge of the Specific Act
1. The questions should be limited to acts about which the witness is likely to have known about or have heard
2. Factors used in assessing whether a witness is likely to have heard of particular acts:
   a. How well witness knows D
   b. How long witness has known D
   c. Is the act likely to have been the subject of discussion
   d. Is the D the kind of person whose activities are likely to be known to people situated similarly to witness

(v) The Cross-examiner’s Reasonable Belief that the Act Occurred
1. The cross-examiner must have a reasonable belief for believing that the act occurred
   a. No general, open questions trying to get any information you can out of the witness
2. Some courts have the P bring the factual basis to the judge outside of the presence of the jury
3. Reasonable basis
a. The requirement of a reasonable basis limits legally relevant inquiries to those based on legally irrelevant facts in order that the legally irrelevant conclusion which the jury probably will draw from the relevant questions will not be based on unsupported or untrue innuendo

(vi) Acts, Arrests, and Convictions

1. Arrests
   a. FRE permits P’s to ask defense character witnesses not only about D’s prior acts, but also about their prior arrests
      i. An arrest is conduct by the police, not the D
      ii. Out of court statement by authorities that the D engaged in illegal conduct
   b. The purpose of the question is to test what the character witness knows or has heard about the D
   c. Still a risk that the jury will regard the arrest as evidence that the D actually engaged in illegal activity

2. Convictions
   a. Sometimes specific act questions to a D’s character witness refer to a D’s prior convictions
      i. May be even more prejudicial that permitting questions about arrests
      ii. Especially difficult for the jury to disregard the improper inference that the D is a bad person

(vii) The Form of the Questions on Cross-examination

1. At Common Law, the Courts were very exacting on insisting that the question to the “Have you heard?” form.
   a. Reasons for insisting on this language has been eroded by the allowance of opinion and reputation testimony on direct examination

(viii) The Potential Unfairness of 405

1. Gives a significant unfair advantage to the cross-examiner
   a. 403 is not often applied to exclude 405 specific acts

e) Evidence of a Person’s Character When Character is an Essential Element of a Claim or a Defense

i) 405(b)
   (1) In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense proof may also be made of specific instances of that person’s conduct
      a. Substantive law makes a person’s character an essential element of a claim or a defense
   (2) When the substantive law makes the character of a person an essential element of a claim or a defense, the party with the initial burden of producing evidence will have to introduce character evidence in order to avoid a directed verdict
(a) In contrast, specific acts to show action in conformity with character is merely circumstantial evidence of a person’s conduct, and is never essential

(3) When character evidence is allowed to prove a claim, any of the three types of evidence are permissible
(a) Reputation, opinion, specific acts

f) Evidence of Specific (Bad) Acts Not Offered to Prove a Person’s Character
i) Second Sentence of 404(b) –
(1) The Permissible Uses for Specific Acts Evidence
(a) Traditional purposes for which the common law permitted the use of specific acts
(i) The proponent of specific acts evidence must convince the court that the evidence is offered for some purpose other than proving a person’s character

(b) McCormick on Evidence list of permissible purposes
(i) Complete the story of the crime on trial by placing it in the context of nearby and nearly contemporaneous happenings
(ii) To prove the existence of a larger plan, scheme or conspiracy of which the crime in trial is a part
   1. Each crime should be an integral part of the over-arching plan explicitly conceived and executed by the defendant or his confederates
(iii) To prove other crimes by the accused so nearly identical in method as to earmark them as the handiwork of the accused
   1. So unusual and distinctive as to be like a signature
(iv) To show, by similar acts or incidents, that the act in question was not performed inadvertently, accidentally, involuntarily, or without guilty knowledge
(v) To establish motive
   1. May be probative of the identity of the criminal or of malice or specific intent
(vi) To establish opportunity
   1. In the sense of possessing distinctive or unusual skills or abilities employed in the commission of the crime charged
(vii) To show, without considering motive, that defendant acted with malice, deliberation, or the requisite specific intent
(viii) To prove identity
   1. One of the ultimate purposes for which evidence of other criminal conduct will be received
      a. Rarely used on its own
         i. Almost always flows from one or more of the other theories
(ix) To show a passion or propensity for unusual and abnormal sexual relations

(2) Preliminary Fact-finding with Respect to Whether the Person in Question Committed the Act
(a) The probative value of specific acts to prove noncharacter purpose depends on the strength of the proof that the person committed the act

(i) If culpability is important to the relevance of the evidence, requires proof that the person did so culpably

1. Supreme Court has held that question of person’s culpable conduct was one of conditional relevance governed by 104(b)
   a. Proponent must show evidence sufficient to support a finding by a preponderance of the evidence that the person was culpably involved in the act

2. Some state courts continue to apply 104(a)
   a. Must persuade the judge
      i. That the person allegedly responsible for the act in fact committed the act AND
      ii. That the person did so culpably

(3) Probative Value and Prejudice Generally

(a) The term “may” in 404(b) makes it clear that admissibility is subject to compliance with the other rules of evidence, most notably 403

(i) 403 Factors for courts to consider

1. How probative the noncharacter purpose is of some contested issue in the case
2. How probative the specific act is to prove the noncharacter purpose
   a. Whether there is a sufficiently close temporal proximity between the specific act and the crime charged
3. How probative the evidence is to establish that the act occurred
   a. Whether there is a dispute about the nature of the act or the defendant’s involvement in the act
4. How much of a risk of unfair prejudice would result from introduction of the evidence
   a. How heinous the specific act
5. How effective a limiting instruction is likely to be in reducing the risk of unfair prejudice

(ii) Jurors may be willing to ignore a reasonable doubt because they regard the D as a bad person who perhaps has not been sufficiently punished for prior misdeeds and who may commit similar bad acts in the future

(4) FRE 403 and the Question Whether the Specific Act Evidence Is Offered to Prove a Contested Issue

(a) The noncontested issue scenario

(i) D may object to inclusion if D offers:
   1. To stipulate that whoever committed the crime did so with the requisite knowledge
   2. To accept a jury instruction explaining the stipulation to the jury

(b) The Argument for Exclusion
If there is a stipulation, there is no longer much need for the evidence of the prior act.

Unfair prejudice

1. Jury might infer that because the D committed the crime once before, the D is the kind of person who has a propensity to commit the crime.
2. The jurors may be willing to forego a reasonable doubt in order to convict.

(c) The Impact of Old Chief in Theory

1. 403 Balancing Test must include an assessment of evidentiary alternatives.
2. At the same time the probative value of evidence includes its descriptive richness and its ability to convince a jury what is morally reasonable.

(d) The Impact of Old Chief in Fact

1. Most courts have concluded that Old Chief supports admissibility.

(5) Multiple Specific Acts and the Anticoincidence Theory of Relevance

(a) There will be cases involving multiple similar specific acts in which the proponent will not be able to satisfy the 104(b) test with respect to whether a particular person was culpably involved in the commission of any one of the specific acts.

(b) Anticoincidence Theory of Relevance

1. Based on the generalization that if the specific acts are sufficiently numerous and similar to the crime charged, coincidence or randomness is unlikely to explain their occurrence.
   1. Doctrine of Chances - It is more likely that there is some alternative, rational explanation.
2. If the prior incidents were not sufficiently similar to the crime charged, opponent might argue that the evidence is being used to prove character.
3. Evidence should not be excluded merely because there is not evidence sufficient to support a finding of the D’s culpable involvement in any particular incident.
   1. Appropriate focus of attention for preliminary fact-finding should be the acts in the aggregate rather than the individual acts.
4. Where prior acts of apparent coincidence are similar, the repeated reoccurrence of such an act takes on increasing relevance to support the proposition that there is an absence of accident.

(g) Evidence of Similar Crimes in Sexual Assault Cases

1. The Relationship between FRE 413-415 and Other Rules of Evidence
   (a) FRE 413-415 and 404(b)
      1. Liberalization of the pre-existing rules.
      2. Sexual assault evidence “is admissible” and may be considered for its bearing on any matter to which it is relevant.
(iii) The one clear impact of 413-415 is that they override 404(b) and allow specific acts of sexual assault to prove a person’s character or propensity for engaging in such conduct to show action on a particular occasion.

(b) FRE 413-415 and FRE 403
   (i) Sexual misconduct is subject to FRE 403 balancing
      1. Some cases have suggested that if FRE 403 were not available to exclude prejudicial evidence of sexual misconduct, admitting such evidence would violate a defendant’s due process right to a fair trial.
   (c) FRE 413-415 and Other Rules of Evidence
      (i) It is likely that courts will conclude that other established rules (hearsay) were also applicable evidence offered pursuant to 413-415.

(2) FRE 413 and Preliminary Fact-finding
   (a) There is no requirement that the sexual assault resulted in a conviction or even a criminal charge.
      (i) If there is a question about the nature of the defendant’s involvement in an alleged sexual assault, a court should resolve this issue in the same manner that it resolves the issue when there is a question about a defendant’s culpable involvement in other types of specific acts.
      (ii) There must be evidence sufficient to support a finding that the defendant was culpably involved in the act.

(3) The Broad Definition of “Offense of Sexual Assault”
   (a) Any acts having these characteristics are included as so long as some state has enacted a criminal statute that embraces the conduct:
      (i) Contact, without consent, between any part of the defendant’s body or an object and the genitals or anus of another person.
      (ii) Contact, without consent, between the genitals or anus of the defendant and any part of another person’s body.
   (b) Deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person.
   (c) An attempt or conspiracy to engage in any of these acts.

(4) The Meaning of “Without Consent” in 413(d)(2) and (d)(3)
   (a) Legal consent
      (i) Sexual contact with a minor that was with the minor’s actual consent, but not legal consent because of the minor’s age.
   (b) Actual Consent
      (i) Prior sexual contact with other adults against their will.

(5) The Extent to Which 413-415 Change the Law of Evidence

(6) Limiting Instructions and Closing Arguments
   All admissible sexual misconduct evidence may be considered for its bearing on any matter to which it is relevant.
   (i) No right to a limiting instruction and no restriction on the prosecutor’s making a character/propensity argument to the jury.
(7) Previously Inadmissible Character Evidence
   (a) Many courts have been quite liberal in admitting specific acts evidence in sexual misconduct cases
   (b) Often admit the kind of propensity evidence that they would probably exclude if the case were not a sexual misconduct prosecution
   (c) Some courts limit evidence to sexual misconduct with the same victim
      (i) The trend is not uniformly in favor of broader admissibility for prior sexual assault evidence
(8) The Application of 403 to Previously Inadmissible Character Evidence
   (a) Courts take a variety of approaches to this issue
      (i) Some hold that highly prejudicial evidence should carry a very high degree of probative value if it is to be admitted
      (ii) Some courts have been willing to admit evidence of very old, seemingly isolated, and sometime dissimilar instance of sexual misconduct.
      (iii) Best bet is probably to go for a happy medium
(9) The Results of 403 Balancing: Acquaintance Rape, Stranger Rape, Child Molestation, and Sexual Harassment
   (a) Results in particular cases may sometime have more to do with the nature of the case than with what the court articulates about the relationship between 403 and 413-415
(10) The Underlying Rationale for the New Rules
    (a) Unfair Prejudice
       (i) The prejudicial impact of any specific acts evidence is a function of how bad or dangerous the specific acts are in the minds of the fact finder
    (b) Probative Value and Recidivism
       (i) Evidence of repeated sexual violence against the same person is likely to be considered noncharacter evidence and potentially admissible in any event pursuant to the second sentence of 404(b)
       (ii) Studies indicate that the recidivism rate for sexual offenders is not consistently higher than for other serious crime offenders
(11) The Significance of 413-415 to Federal Litigation
    (a) Sexual crimes are predominantly state crimes
       (i) Relatively few opportunities for Federal Courts to apply 413-414 ii) Evidence of an Alleged Victim’s Past Sexual Behavior or Disposed in Sex Offense Cases
    (1) FRE 412 – Relevance of Alleged Victim’s Past Sexual Behavior or Alleged Sexual Disposition
       (a) Evidence that is offered to prove that any alleged victim engaged in other sexual behavior or evidence offered to prove any alleged victim’s sexual predisposition is generally inadmissible
       (b) Relevance to prove conduct
       (c) 412(b)(1)(B) – Explicitly permits proof of sexual behavior between the D and the alleged victim to prove the victim’s consent
(i) There is no explicit limitation on the use of prior sexual conduct to prove consent in civil cases.

(2) The Underlying Propensity Theory
   (a) Individuals have propensities to behave in characteristic ways and if we know something about the individual’s conduct on some occasions, we can make reasonable inferences about their conduct on other occasions.

iii) The Scope of FRE 412
   (1) The Meaning of “Other Sexual Behavior” and “Sexual Predisposition”
      (a) Sexual behavior connotes all activities that involve actual physical conduct or that imply sexual intercourse or conduct
         (i) Use of contraceptives, birth of an illegitimate child, or venereal disease
         (ii) Activities of the mind – Fantasies or dreams
      (b) Evidence that does not directly refer to sexual activities or thought but that the proponent believes may have a sexual connotation of the fact finder

(2) The Applicability of 412 When the Issue Is the Victim’s Behavior on a Particular Occasion
   (a) The theory of relevance will be that the evidence shows something about the sexual predisposition of the individual and that from this predisposition one can infer how the victim behaved on a particular occasion.

(3) The Applicability of 412 in Other Contexts
   (a) Sexual behavior includes activities of the mind, such as fantasies or dreams

(4) Hostile Work Environment Claims
   (a) Defendants frequently claim that the plaintiffs welcomed or created the environment that they claim is discriminatory
      (i) Courts have held that 412 applies to this evidence

(5) The Admissibility of Other Sexual Behavior and Sexual Predisposition Evidence in Civil Cases
   (a) 412(b)(2) governs admissibility of evidence of an alleged victim’s sexual behavior and predisposition
      (i) Reverse 403 Test:
         1. Requires that the probative value must substantially outweigh countervailing factors
            a. Favors exclusion
      (ii) Specifically refers to prejudice against a party and harm to the alleged victim
         1. The court must weigh the probative value of this evidence against both the risk that the evidence may make the jury unfavorably disposed toward the plaintiff and the harm to the victim from the presentation of evidence about the victim’s prior sexual activity
The Admissibility of Other Sexual Behavior and Sexual Predisposition Evidence in Criminal Cases

(a) Three Exceptions to the General Rules of Exclusion:
   (i) The victim’s behavior with third persons to suggest that they may be the source of semen or injury
   (ii) The victim’s sexual behavior with the defendant to suggest consent
   (iii) Cases in which exclusion would violate the constitutional rights of the defendant
      1. Due process doctrine that a criminal defendant has the constitutional right to a defense
      2. The Sixth Amendment confrontation clause right to confront and cross-examine witnesses

(b) The first two exceptions are not automatically admissible
   (i) The evidence must be otherwise admissible under the rules
      1. Court retains the discretion to exclude the evidence on 403 grounds

(7) The Notice Requirement
   (a) Notice and hearing requirement is more demanding than any other notice requirement in the Federal Rules

iv) The Rationale for a Rule Excluding Evidence of Prior Sexual Behavior and Sexual Predisposition
   (1) Alternative would give the defendant the opportunity to try to make the victim and the victim’s character the focal point of the litigation
      (a) May discourage many victims from cooperating with the prosecutors, or even reporting sexual assaults in the first place
   (2) Jury may overestimate the probative value of the prior sexual history evidence on the question of consent or be prejudiced against the victim because of the sexual conduct
      (a) May readily dismiss a defendant believing the victim got what they deserved
   (3) Prior sexual history will frequently be of no more than marginal relevance the question whether the victim consented on the occasion in question

v) FRE 412 and the Constitutional Rights to Present Evidence and to Confront and Cross Examine Witnesses
   (1) The right to present a reasonable defense take precedence over the state’s policy
   (2) The importance of the evidence is what triggers the constitutional right
   (3) Two Generalizations
      (a) The vast majority of constitutional challenges are unsuccessful
      (b) The most common type of successful constitutional challenge occurs in cases in which the defendant seeks to introduce the evidence to impeach the alleged victim by showing bias

h) Habit and Routine Practice
   i) FRE 406
      (1) Evidence of the habit of a person or of the routine practice of an organization is relevant to prove that the conduct of the person or
organization on a particular occasion was in conformity with the habit or routine practice

ii) Interpretation of 406
(1) Merely announces that the evidence is relevant, rather than whether it is admissible for
(2) The Importance of Habit and Routine Practice Evidence
(a) Can be very powerful proof of action on a particular occasion
(b) Sometimes it may be the only way to prove action on a particular occasion
(c) May be admissible to establish an organization’s liability
(3) Methods of Proving Habit and Routine Practice
(a) The habit witness is likely either to mention:
   (i) A number of specific acts OR
   (ii) To offer a summary or opinion based on a large number of observations that are not individually described
(b) A routine practice witness may describe specific instances or describe generally what the practice is
(c) A proponent should not be able to use reputation evidence to prove habit or routine practice
   (i) There is no hearsay exception for reputation evidence offered to prove habit or routine practice
(4) The Distinction Between Habit and Character
(a) Habit refers to a propensity that is much more specific and routine than a character trait
   (i) Generalizations about a person’s practices are usually considered character
(b) Habit trends tend to be morally neutral
   (i) Character traits have a moral connotation: being violent is bad; being careful is good
(5) Judicial Fact-finding on the Question of Habit
(a) Activity must be sufficiently regularized to constitute habit

iii) Elaboration of 406
(1) Rationale for Permitting Habit and Routine Practice Evidence
(a) Because of the regularized, specific nature of habit and routine practice evidence, it is likely to be much more probative of action on a particular occasion than is character evidence
(b) To the extent that habit or routine practice is morally neutral, it does not have the potential for prejudice that inheres in character evidence
(c) May be the only evidence available for an organization to prove how it behaved on a particular occasion
(2) The Degree of Regularity and Specificity Required for Habit Evidence
(a) A person’s regular practice of meeting a particular kind of situation with a specific type of conduct
(3) The Strategy for Distinguishing Between Habit and Character
(a) Twofold
(i) Look at the existing case law and draw analogies to and distinctions from situations in which courts have designated evidence as habit or character
(ii) One should try to relate the desired classification to the evidentiary justifications for having different rules for habit evidence and character evidence in the first place

V) The Other Relevance Rules
a) Inadmissible to Prove “Negligence,” “Culpable Conduct,” or “Liability”
   i) 407 – Subsequent Remedial Measures
      (1) When, after an injury measures are taken that, if taken previously would have made the injury less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, defect, or a need for warning or instructions
   ii) Interpretation
      (1) The Exclusionary Mandate
         (a) The Inference of Negligence or Culpable Conduct
            (i) When such measures are taken, one possible inference to draw from the remedial action is that the person who made the alteration believed that the object or condition before the alteration posed an unreasonable risk of injury
               1. According to this theory, when such actions are taken, it is the equivalent of an admission of negligence or culpable conduct
         (b) Products Liability Actions
            (i) Extends to subsequent remedial measure evidence offered to prove product defects
         (c) Low Probative Value for Prohibited Purpose; Countervailing Concerns
            (i) There will usually be several possible explanations for a remedial measure
               (ii) Exclusion of measures rests on the social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety
         (d) Activities That May Be Subsequent Remedial Measures
            (i) Any action that a person takes after an event to reduce the likelihood of an event’s reoccurrence
               1. Sending of a memo to employees
               2. Repairing or altering the condition of property
               3. Disciplining or firing an individual whose alleged negligence was responsible for an accident
               4. Sending a recall notice
               5. Changing rules or regulations
               6. Posting warning signs
         (e) The Effectiveness of the Remedial Action
            (i) Courts rarely focus on the question whether a remedial measure would have made the injury or harm less likely to occur
               1. There is precedent for the proposition that 407 does not apply to investigations because they are not remedial measures, but
only initial steps toward ascertaining whether any remedial measures are called for

(f) The Timing of Remedial Action
   (i) For evidence of a remedial measure to be inadmissible, it must occur after an injury or harm caused by an event
   (ii) If the D took remedial action subsequent to the injuries of several other people but prior to the plaintiff’s injury, 407 would not preclude admissibility of the design change

(2) Permissible Use of Subsequent Remedial Measure Evidence
   (a) Subsequent remedial measure evidence may be admissible for any purpose other than to show negligence or culpable conduct, if controverted
      (i) Purposes listed in 407 are the most likely ways measures will be relevant
         1. Prove ownership
         2. Show that D, rather than someone else had control over something
         3. Rebuts a claim that it was not feasible to maintain something in a safer manner
         4. Impeach the credibility of the D

(3) The “If Controverted” Requirement
   (a) If controverted requirement applies to all of the permissible uses of subsequent remedial measure evidence

(4) The Relationship Between 407 and 403
   (a) Is the probative value of the evidence for the legitimate purpose substantially outweighed by the possibility that the jurors may use the evidence for the impermissible purpose if inferring negligence or other culpable conduct

iii) 408 – Compromise and Offers of Compromise
   (1) Evidence of:
      (a) Furnishing or offering of promising to furnish OR
      (b) Accepting or offering or promising to accept, a valuable consideration in compromising a claim is not admissible

iv) Interpretation
   (1) The Exclusionary Mandate; Permissible Uses; FRE 403
      (a) One inference to draw from offers of compromise is that the offerors believe they were at fault in the incident giving rise to a claim against them
         (i) Tacit admission of fault or liability
      (b) To encourage settlements, the first sentence excludes evidence of compromises and of offers to compromise on the question of liability for or the amount of claims
      (c) The last sentence makes it clear that such evidence may be admissible for other purposes
         (i) To show bias of a witness
         (ii) To show knowledge
(iii) To rebut a charge of undue delay
(iv) To prove an effort to obstruct a criminal investigation or prosecution

(2) Conduct or Statements Made During Negotiations
   (a) The second sentence excludes conduct or statements made during compromise negotiations
      (i) Significant departure from the common law

(3) Compromise Negotiations and Discovery
   (a) The third sentence makes it clear that a party cannot insulate from discovery documents and information that would otherwise be discoverable merely by making reference to or relying on such evidence in the compromise negotiations

(4) The Attempt to Resolve a Disputed Claim Requirement
   (a) Offers of compromise and statements of fault are inadmissible pursuant to 408 only if made during compromise negotiations over a disputed claim
      (i) If there is no disputed claim or if the statement of fault occurs outside the context of compromise negotiations, the statement of fault will be admissible
   (b) Depends on the courts interpretations of compromising a claim which was disputed

(5) Elaboration
   (a) The primary motives for compromising a claim will frequently be a desire to avoid the costs of litigation or the risk of losing a good deal more than the person loses in compromising the claim
   (b) The probative value of an offer to compromise as an admission of fault or liability will often be quite low

(6) 409 – Payment of Medical and Similar Expenses
   (a) Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury

(7) Interpretation
   (a) The Exclusionary Mandate
      (i) Paying or offering to pay another person’s medical expenses may be an implied admission of fault
   (b) The Admissibility of Statements Made in Conjunction with Medical and Similar Payments
      (i) Statements made in conjunction with payments – including statements of fault – are not excluded
      (ii) The difference in treatment arises from fundamental differences in nature
   (c) The Question Whether 409 permits Evidence of Payment for Purposes Other than to Show Liability
      (i) There is no indication in the legislative history that the drafters of 409 intended to depart from the common law which permitted the evidence for other purposes
(ii) There is precedent under the Federal Rules for admitting payments
to prove something other than liability
(d) The Question What Constitutes a “Similar Expense”
   (i) 409 is rarely invoked, but if it was invoked, this would certainly be
        an issue
(8) 411 – Liability Insurance
   (a) Evidence that a person was or was not insured against liability is not
       admissible upon the issue whether the person acted negligently or
       otherwise wrongfully
(9) Interpretation
   (a) The Exclusionary Mandate
       (i) Underlying premise is that people with liability insurance are
           likely to be less careful than people without insurance, who will be
           individually responsible for the injuries they cause
       (ii) Jurors might be inclined to impose damages because of insurance
           or to forego or minimize damages out of sympathy for the
           uninsured
           1. If an uninsured party is not able to present evidence of absence
              of insurance, there is risk that the jury may assume the party is
              insured and impose damages on the basis of this incorrect
              assumption
   (b) The Permissible Uses of Evidence of Liability Insurance
       (i) 411 excludes evidence of liability insurance only to prove
           negligence or wrongful conduct
       (ii) When there is a permissible purpose the admissibility of the
           evidence should depend on 403
           1. 403 should require at a minimum that the issue for which the
              evidence is offered is a contested issue in the case
   b) Withdrawn Guilty Pleas, Pleas of No Contest, and Offers to Plead Guilty
      i) 410 – Evidence not admissible against D who made the plea:
         (1) A plea of guilty which was later withdrawn
         (2) A plea of nolo contendere
         (3) Any statement made in the course of any proceeding regarding Rule 11 or
             similar state law regarding either of the foregoing pleas
         (4) Any statement made in the course of plea discussions with an attorney for
             the prosecuting authority which do not result in a plea of guilty or which
             result in a plea of guilty later withdrawn
      ii) Interpretation
         (1) Withdrawn Guilty Pleas
            (a) A D may withdraw a guilty plea only with permission of the court
            (i) Must be cause
            1. A court is likely to permit withdrawal of a plea if there is
               reason to believe that the plea is inaccurate because the D is
               innocent or if it appears that the D’s rights were violated in the
               process of procuring the plea
(b) If the prosecutor could respond to a withdrawn plea by using that plea against the D in a subsequent proceeding, the value of the withdrawal as a remedy would often be substantially undermined.

(2) Pleas of No Contest

(a) Pleas of no contest are by their nature compromises

(i) Constitute an acquiescence to a criminal conviction without an admission of guilt or a determination of guilt after an adjudicatory trial

(ii) Compromise nature makes uncertain their probative value to prove that the person committed the acts charged

(3) Statement Made in Conjunction with the Process of Making and Negotiating Pleas

(a) An offer to plead guilty, at least if the plea is to a relatively serious charge, may have more probative value than the offer to settle a civil claim

(i) Settling Criminal Charges May be Undesirable

(ii) Plea bargaining is an acceptable method for disposing of criminal cases

(b) It may be at least as important to encourage guilty pleas as it is to encourage settlements of civil cases

(i) Just as excluding statements made in conjunction with offers to settle civil suits may facilitate the negotiating process, excluding statements made during plea negotiations may facilitate obtaining guilty pleas

(4) The Scope of 410(4)

(a) Two Limitations

(i) The statements must be made in the course of plea discussions

(ii) The statement must be made to an attorney for the prosecuting authority

1. Statements to police officers don’t fall within the rule

2. Statements made to police officers as part of the plea negotiation may be covered by the rule if the police are acting as agents of the prosecutor

(5) The Exceptions to 401(3) and (4)

(a) Rule of Completeness

(i) If a D introduces part of a statement made in conjunction with plea negotiations, the prosecution can introduce other statements that provide a context or explanation for the statement introduced by the D

(b) Prosecutor may bring perjury charges against a D who lies under oath during plea negotiations

(i) Seldom available

(6) Waiver of 410’s Exclusionary Mandate

(a) Supreme Court held that a D may waive the 410(4) exclusionary mandate, at least with regard to the impeachment use of statements made in the process of plea negotiations
c) Similar Happenings
   i) Arise most often in these situations:
      (1) Offers to prove that a tort D has committed similar torts in the past
      (2) Offers in a tort case to prove that an instrumentality has caused other
           similar injuries
      (3) Offers to prove that a party has filed similar claims in the past
      (4) Offers in a breach of contract case to prove that a party has entered into
           similar contracts
      (5) Offers of other property transactions to prove the value of property
   ii) No Specific Federal Rule for Similar Happenings
   iii) The Approach to the Admissibility of Similar Happenings
        (1) Must ask the same kinds of questions that one must ask with respect to
            other evidence
            (a) Why is the evidence arguably relevant
            (b) If the evidence is relevant does some specific exclusionary rule make
                the evidence inadmissible
            (c) If the evidence is relevant and not inadmissible pursuant to some
                specific exclusionary rule, is the evidence inadmissible because its
                probative value is substantially outweighed by 403 factors
   iv) Human Versus Nonhuman Evidence
        (1) If the proponent of this type of similar happenings evidence offers
            witnesses with firsthand knowledge of these events, the only rules that a
            judge will probably have to consider are 401-403
        (2) Since no rule makes similarity a special condition of admissibility, it is not
            a 104 preliminary fact for the judge to consider
               (a) The judge’s task is to determine only whether the evidence is relevant
                   and if so whether the probative value is substantially outweighed by
                   the countervailing 403 factors
   v) Similar Happenings Offered to Show an Institutional Policy
      (1) Challenge certain practices at an institution
   vi) Application of 403 to Similar Happenings
      (1) The case law favors admissibility when similar happenings evidence is
          offered to show notice of a possible defect
         (a) Probative value depends on whether the D was or should have been
             aware of the other incidents and not on how similar they are to the
             incident that gave rise to the litigation
      (2) When the probative value of the evidence depends on the degree of
          similarity among the happenings, courts are likely to require a high degree
          of similarity as a condition of admissibility
         (a) Most courts require “substantial similarity”
            (i) Probative value of similar incidents standing alone is sufficiently
                low that it is substantially outweighed by the 403 efficiency and
                confusion factors
            (ii) Undue Delay - One should look not merely at the time that it will
                 take initially to introduce the evidence but rather at the total time
                 that it will take to deal with the evidence
1. Once the proponent introduces evidence, the other party is likely to feel compelled to respond with evidence suggesting that the events did not occur at all or that there are not relevant similarities among the events. 

   (b) Unless the proponent is prepared to demonstrate at the outset that the evidence has more than minimal probative value, a 403 decision to exclude similar happenings evidence may often be warranted.

vii) Evidence of Similar Nonhappenings

   (1) Court is likely to require evidence that the conditions were similar during the time of the nonhappening.

   (2) Courts is likely to require a significant number of Nonhappenings.

   d) “Fighting Fire With Fire” – The Doctrine of Curative Admissibility

   i) Permits a party to introduce normally inadmissible evidence in response to the opposing party’s introduction of or attempt to introduce inadmissible evidence.

   ii) Most jurisdictions recognize some version of the curative admissibility doctrine, and although there is no Federal Rule of Evidence dealing with the subject, federal courts have invoked the doctrine.

VI) The Hearsay Rule

a) The General Rule of Exclusion and Definition of Hearsay

   i) FRE 801 AND 802

      (1) Hearsay Statement

         (a) A statement
          (i) Oral or written assertion OR
                (ii) Nonverbal conduct of a person, if it is intended by the person as an assertion

         (b) Declarant

            (i) Person who makes a statement

         (c) Hearsay

            (i) A statement, other than one made by the declarant while testifying at trial

            (ii) Offered in evidence to prove the matter of asserted

      (2) Hearsay Rule

          (a) Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

   ii) Interpretation and Illustration of 801 and 802

      (1) Relevancy of Declarant Statement

          (a) Relevant to prove the fact of consequence of

      (2) Hearsay Testimony Describes:

          (a) A statement

          (b) Made by a declarant

          (c) Made by a declarant while at trial

          (d) Offered to prove the truth of the matter asserted

   (3) Hearsay Dangers

          (a) Narration Dangers
(i) Likely to exist if speakers use language with which they are somewhat unfamiliar, or if they speak carelessly or inadvertently omit a critical word

(b) Ambiguity Dangers
(i) Unclear from the context what the speaker is intending to assert

(c) Sincerity Danger
(i) Declarant’s words willfully misrepresent what the declarant really believes

(d) Perception Danger
(i) Declarant does not observe the incident accurately

(e) Memory Danger
(i) If at the time the declarant makes the statement the declarant has forgotten detail about the event she perceived

(4) The Relevancy of Hearsay

(a) Testimonial Triangle
(i) Step 1 – Declarant’s Words (spoken or written) outside of court which are usually presented to the jury through testimony or an exhibit
1. Left Leg – Inference from the declarant’s words to the declarant’s state of mind of “belief”
   a. Depends on declarant’s sincerity and narrative ability
2. Right Leg – Represents the inference from the declarant’s state of mind of belief to the existence of an event that caused that belief
   a. Depends on declarant’s perception and memory

(ii) Relevance of declarant’s statements requires a complete trip around the testimonial triangle

(5) Hearsay Policy Differentiates between Witnesses and Hearsay Declarants

(a) Three Factors that Differentiate Witnesses
(i) The witness in the courtroom is always under oath, thereby theoretically minimizing the likelihood of insincerity
1. A declarant’s out-of-court statement may or may not be made under oath
2. Solemnity and formality of the court proceedings may cause the witness to be particularly careful about properly narrating the event

(ii) Jury is able to observe the demeanor of the in-court witness
1. Observing how the witness responds and reacts to questions, particularly on cross-examination, may give the jurors a somewhat better sense of the witness’s sincerity, narrative ability, perception, and memory than they would get from having the content of the statement related to them by some third person

(iii) Cross-examination
1. Beyond any doubt the greatest legal engine ever invented for the discovery of the truth
(b) Hearsay in a Nutshell
   (i) A witness’s oath demeanor and cross-examination are thought to reduce testimonial dangers and to make in-court testimony more reliable.
   (ii) Cross-examination also increases the likelihood that testimonial dangers will be exposed and evaluated by the jury
      1. Generates information that helps the jury decide whether to rely on a witness’s statement

iii) Elaboration of 801 and 802
   (1) Identifying What a Hearsay Statement Is Offered to Prove
      (a) The truth of the matter asserted test of 801(c) requires the identification of the “matter” that an out-of-court statement is offered to prove
      (i) Any further inferences that may be necessary to reach the essential element in the case
   (2) Testimony by Witnesses About Their Own Out-of-Court Statements May Still Be Hearsay
      (a) When witnesses testify in court about statement that they themselves made outside of court, those out-of-court statements may still be defined as hearsay by 801(c)
      (i) Statements “other than one made by the declarant while testifying at the trial or hearing.”
   (3) Hearsay, Lay Opinions, and the Firsthand Knowledge Rule
   (4) Multiple Hearsay
      (a) Evidence will be inadmissible unless there is hearsay exception or exemption for each layer of hearsay

iv) 801(c): Nonhearsay Statements with No Hearsay Dangers
   (1) Nonhearsay Uses
      (a) Effect on the Listener
         (i) Notice
            1. Tends to prove that someone had knowledge, which may be a fact of consequence in the case
            2. Not being offered to prove anything about the declarant’s belief
         (ii) Relevance depends on listener’s apparent sincerity, not on listener’s actual sincerity
         (iii) May create state of mind that may be an essential element of a case such as:
            1. Knowledge
            2. Duress
            3. Good faith
            4. Provocation
            5. Motive
      (b) Legally Operative Facts
         (i) Words themselves are the event to be proved
            1. Utterances too which the law attaches duties and liabilities
a. Contracts, slander, offers to sell drugs, statements forming a conspiracy

(c) Identifying Nonhearsay Use
   (i) Statements relevant for their effect on the listener
   (ii) Legally operative facts
   (iii) Prior inconsistent statements offered to impeach witnesses
   (iv) Identifying characteristics of an object
   (v) Words that have a performative aspect that dominates the assertive aspect
      1. Focus is on the inferences necessary to the relevance of the out-of-court statement

(2) Statements Relevant for Both Nonhearsay and Hearsay Uses
   (a) Question of admissibility is one of discretionary balancing for the trial judge under 403

(3) Key Point
   (a) When an out-of-court statement is offered to prove its effect on the listener, or some legally operative fact, or some other matter where relevance does not depend on inferences about the accuracy of declarant’s belief about an event, the statement is not hearsay.
      (i) It is not offered to prove the matter it asserts

v) 801(a)(2): Nonverbal Conduct
   (1) Assertive Nonverbal Conduct
      (a) In some instances, hearsay is completely nonverbal
         (i) All hearsay dangers are present
         (ii) No pertinent difference between the intentional nonverbal assertion and a verbal response that says the same thing
      (b) Application of 802(a)(2)
         (i) 801(a) definition of statement:
            1. Oral or written assertion OR
            2. Nonverbal conduct of a person, if it is intended by the person as an assertion
         (ii) Test:
            1. Did the person intend the nonverbal conduct to be an assertion?
   (c) Nonassertive Conduct
      (i) Nonverbal conduct is a statement only if the conduct is intended as an assertion
         1. Hearsay dangers are still possible, but less likely given the context
      (ii) Likely that the conduct was not intending to assert or communicate anything to anyone
   (d) 801(a)(2)’s Intent Test
      (i) Was the actor’s nonverbal conduct intended as an assertion?
         1. This preliminary question will be decided on the basis of the nature of the conduct and the circumstances surrounding it as presented by both parties
         2. 104(a) Question
a. Burden on the party that claims the intention exists  
b. Ambiguous and doubtful cases will be resolved in favor of admissibility

vi) Justification for the Distinction Between Assertive and Nonassertive Conduct
(1) Absence of Hearsay Danger  
   (a) No sincerity danger  
      (i) A person can tell a lie only if the person is intending to communicate a particular fact that would be the subject of the lie  
      (ii) Testimonial qualities other than sincerity do present a high risk of danger  
      1. Dangers are minimal in the absence of an intent to assert  

(2) Necessity  
   (a) Excluding relevant evidence because of some hearsay dangers may be too great a price to pay when it is very burdensome or perhaps even impossible to obtain other “better” evidence on the same point  
   (b) Nonassertive conduct is so pervasive and so often relied on as a matter of course in our everyday lives that we would be giving up too much relevant evidence by classifying such conduct as hearsay

vii) Utterances Relevant for the Truth of the Declarant’s Unstated Beliefs
(1) Utterances Relevant for Unstated Beliefs to Prove Events  
   (a) “That driver must be drunk” to prove “That driver was negligent”  
      (i) Wide range of opinion as to whether or not they should be defined as hearsay  
      (ii) Relevant to prove the truth of a declarant’s belief about an event, occurrence, or condition external to the declarant  
      1. Belief is unstated, even though the declarant may actually be thinking about it when making the utterance  
      2. Even though the unstated belief may be different from the statement that the declarant’s words literally articulate, the relevance of these utterances depends on making an inference that the is unstated belief is true because it is based on accurate perception and memory  

   (b) Hearsay Dangers Exist for Utterances Relevant for Unstated Beliefs to Prove Events  

   (c) The Declarant-oriented Definition of Hearsay  
      (i) Focuses on whether the use of the utterance will require reliance on the credibility of the out-of-court declarant  
      1. Statements of a third person on the matter in issue is inadmissible in all cases where such a statement or opinion not on oath would be of itself inadmissible  

   (d) FRE 801 Rejects the Declarant-oriented Definition of Hearsay  
      (i) Advisory Committee:  
      1. Situations giving rise to nonassertive nonverbal conduct are such as virtually to eliminate questions of sincerity
What are “Nonassertive Verbal Conduct” and “Assertive Verbal Conduct Offered as a Basis for Inferring Something Other Than the Matter Asserted”

1. Nonassertive Verbal Conduct
   a. Hortatory comments, instructions, and commands or questions which are not declarative sentences
      i. Watch your step
      ii. Accept only cash
      iii. Come on through
   b. Verbal Conduct Offered as a Basis for Inferring Something Other Than the Matter Asserted
      i. Declarative sentences offered to prove the event that is the subject of the declarant’s unstated belief

(iii) What is the Justification for Excluding These Two Types of Utterances from the Definition of Hearsay?

1. Reduced sincerity dangers

viii) Should There Be an Intent Test?
   (1) If a court finds that a declarant specifically intends to communicate an unstated belief, it will usually exclude the utterance as hearsay
   (2) Intent to communicate may be difficult to prove either because of factual uncertainty or because of ambiguity in the meaning of intent

b) General Approach to the Admission of Hearsay Under the Exemptions and Exceptions
   i) Process of Admission
      (1) Proponent offers to prove a declarant’s out-of-court statement
      (2) Opponent objects on grounds of hearsay
      (3) Judge must decide whether the statement is hearsay under 801(a)-(c)
         (a) If yes, the judge decides whether it fits within the categorical terms of a specific exception or exemption
         (i) Burden is on proponent of the statement to produce foundational evidence that satisfies the categorical terms of the specific exemption
             1. Foundation Facts - typically evidence of who the declarant is, what the content of the statement is, or the out-of-court circumstances in which the hearsay statement was made
                a. Foundation Witness - proponent will produce a witness who can testify about these foundation facts
         (b) 104(a) applies unless the facts are foundational requirements necessary to the out of court statement’s relevancy
   c) Hearsay Exemptions
      i) 801(d)(1): Cross-examination of the Testifying Witness Concerning the Statement
         (1) Two Requirements:
            (a) The declarant is Testifying at Trial
               (i) The person testifying must be identified as the same person who made the statement
(ii) This can be acknowledged by declarant’s own acknowledgement that he made the statement, or through the testimony of another witness who can say that the witness was the out of court speaker.

(b) The declarant is subject to cross-examination concerning the statement
   
   (i) This is the principal justification for allowing the statement
   
   (ii) Has been construed to mean redirect examination as well
   
   1. Either party may introduce a prior statement of a witness
      
      a. If the proponent presents the witness’s prior statement during direct, the witness must be subject to cross-examination about it by the opponent
      
      b. If the witness is presented with the prior statement for the first time by the cross-examiner, the it is the direct-examiner who must have the opportunity to re-examine the witness on rebuttal
      
      c. Prior statements can be admitted after the witness has testified, through the testimony of a third person
         
         i. Declarant-witness must still be available in court or subject to recall by the opposing party
   
   (c) Elaboration
      
      (i) The opponent of the statement will want to cross-examine the declarant witness concerning the statement in order to expose reasons why it should not be relied on by the jury
      
      1. The cross-examiner can elicit information about all of the circumstances that are pertinent to evaluating the declarant-witness’s testimonial qualities at the time the statement was made
   
   (d) Denial of, or Inability to Remember, the Prior Statement
      
      (i) If the declarant does not remember, or denies making, the statement, then it is likely to be nothing more than a swearing contest between two witnesses about whether the statement was made
   
   (e) Inability to Remember the Underlying Event
      
      (i) No need for the declarant to remember the underlying event
      
      1. the cross-examination need only concern the statement, it does not on its face require more
      
      (ii) Minimal requirement of what it means to cross-examine a witness concerning a prior statement
      
      1. It does not matter that the witness denies making, or cannot remember, either the underlying event or the prior statement, or either
   
   (f) Personal Knowledge Is Required
      
      (i) Must be evidence sufficient to support a finding of fact that the declarant had personal knowledge of the underlying event
   
   ii) 801(d)(1)(A): Prior Inconsistent Statements
      
      (1) Three Requirements
(a) The contents of the statement are inconsistent with testimony given at trial
   (i) Generally, inconsistency is shown by comparing the two statements and will appear from the contents alone
      1. Also has been held that inconsistency is shown when a witness testifies that his own prior out-of-court statement was false
   (ii) May be doubt about inconsistency
      1. Allegedly inconsistent statement might be ambiguous or explainable
      2. Judge should make a 104(a) determination of inconsistency
   (iii) Inconsistency Due to Evasion
      1. Statements are not confined to those diametrically opposed to each other
         a. May be found in loss of memory, evasive answers, silence, a change of position, or a manifest reluctance to testify at trial

(b) The statement was made under oath subject to the penalty of perjury AND
   (i) Person who administered the oath must have had legal authority to do so

(c) The statement was made at trial, hearing, other proceeding, or in a deposition
   (i) The formality of trials, hearings, and depositions is thought to be conducive to reliability and truthfulness
   (ii) Other Proceeding
      1. Typically, statements made in lineups are held not to be within the meaning of other proceedings
      2. Grand Jury testimony is usually allowed

(2) Justification for the 901(d)(1)(A) Limitations
   (a) Because the statements are closer in time to the events they relate to, and the declarant witness is testifying before the jury, hearsay dangers are diminished
   (b) Compromise
      (i) Statement may be used for its truth only if made at a trial, hearing, deposition, or other proceeding, or in a deposition, but without the requirement of cross-examination

(3) Prior Inconsistent Statements Not Within 901(d)(1)(A)
   (a) If the statement does not fit within this rule, it still may fit into an exception for impeachment purposes

iii) 901(d)(1)(B): Prior Consistent Statements
   (1) Two Requirements
      (a) The contents of the statement are consistent with testimony given at trial AND
      (b) The statement is offered to rebut a charge of recent fabrication or improper influence or motive
(i) Applies only if the credibility of the testifying witness has been attacked in the particular way spelled out in the rule
1. Proof of the apparent attack will be apparent to the judge from the opponent’s cross-examination of the witness or from the admission of other impeaching evidence
2. Prior consistent statements should not be admitted for their truth until such an attack has actually occurred

(ii) To “Rebut” the Charge
1. Question of fact to be resolved by the trial court based precisely on the particular circumstances of an individual case

(2) Justification
(a) Broader admissibility would create a risk of admitting manufactured consistent statements and could unfairly surprise the opponent

(3) Prior Consistent Statements Not Within FRE 801(d)(1)(B)
(a) May still be relevant on other grounds, although not admissible for their truth

iv) 801(d)(1)(C): Prior Statements of Identification
(1) Two Requirements
(a) The statement is one if identification of a person AND
   (i) Limited to statements about the physical characteristics of persons
       1. One may be able to use this rule to argue by analogy for the physical description of something else (automobile, e.g.)
   (b) The statement was made after the declarant perceived that person
       (i) Intended to include statements of identification made at traditional lineups and show ups
       (ii) Not limited to line ups
           1. Includes statements that identify a person seen after the disputed event in a chance encounter
           2. Includes statements that identify a person seen after the disputed event in a chance encounter
           3. Includes statements that identify a police artist sketch of the person
           4. Has been held to permit the admission of hearsay statements that identify people who are known to the declarant but when the declarant did not perceive the underlying disputed event
           5. Has been held to include the physical description of a person given by the declarant to the police without any reperception of the person at all
    (iii) Frequently also admitted under spontaneous and excited statements of 803(1) and (2)
(2) Adds to (A) and (B)
   (a) A prior identification that is consistent with in-court testimony can be admitted without proof of an express or implied charge of recent fabrication or improper influence or motive
(b) A prior identification that is inconsistent with in-court testimony can be admitted even if not admissible under 801(d)(1)(A) because not made under oath or at a hearing

(3) Justification for Admissibility

(a) Need
   (i) May be essential to avoid a directed verdict of acquittal
   (ii) Some witnesses may have lost the ability to make an in-court identification

(b) Reliable
   (i) Made closer in time to the event in which the person identified participated

v) 801(d)(2): Party Admissions

(1) 801(d)(2)(A): A Party’s Own Statements

(a) Two Requirements:
   (i) The statement is made by a party AND
   (ii) The statement is offered against the party

(b) Elaboration
   (i) Any out of court statement made in any context by any party to any action may be admissible, unless otherwise objectionable, if offered against the party
      1. Must be relevant and not subject to any other exception
   (ii) Individual and representative Capacity
      1. The rule provides for the admission of statements against the individual person even of those statements were made when the individual was speaking as a representative outside of court
      2. Statements made outside of court by a person, whether as an individual or as a representative, will be admissible against the person if he appears as a party solely in a representative capacity

(iii) Admissions, Personal Knowledge, and Lay Opinions

1. There is no requirement that a party admission be based on firsthand knowledge
   a. When people speak against their own interest, it is generally to be supposed that they have made an adequate investigation
   b. The vast majority of admissions that become relevant in litigation concern some matter of substantial importance to declarants upon which they would likely have informed themselves, and as a result such admissions possess greater reliability than the general run of hearsay even when not based on firsthand observation

2. Courts have tended to be liberal in admitting conclusory statements of opinion, if the evidence is an admission

(c) Justification

   (i) The Opportunity to Explain
1. The party can take the stand and have a full opportunity to explain any difficulties with the party’s own sincerity, narration, perception, or memory when the statement was made.

(ii) Fifth Amendment Concerns
1. Criminal D has the right to refuse to testify
   a. A D may feel pressure to testify simply because of the nature or strength of the P’s case, and this type of pressure does not raise constitutional problems.

(iii) Responsibility for One’s Own Statements and Fairness
1. People are expected to tell the truth as a matter of course, not because the law required veracity in everyday speech, but because accepted notions of morality require it.
2. People who choose to speak usually do so in their own self-interest
   a. The party’s own out-of-court statement presumably served that party’s interest when it was made.

(d) Further Elaboration
(i) Preliminary Fact-finding on the Identity of the Declarant
1. 104(a)

(ii) Admissibility of Party Admissions in Multiparty Cases
1. One party’s party admission is not admissible against anyone other than the party who made the statement
   a. Limiting instruction could be used to instruct the jury to use the statement only in deciding the issues that pertain to the party declarant
      i. Confrontation clause may prohibit even this limited use if the statement of a declarant defendant tends also to incriminate a codefendant
      ii. Supreme Court has held that whenever one declarant-defendant’s statement implicates another codefendant, admission may be precluded
   b. May sever the trials of the codefendants
      i. Expensive remedy
   c. May redact all specific reference to the codefendant from the declarant-defendant’s statement.

(2) 801(d)(2)(B): Adoptive Admissions
(a) Three Requirements
   (i) A statement has been made
   (ii) The party has done something to manifest adoption of it or to show belief in its truth AND
      1. There is no limitation on the type of language or conduct that might be regarded as an adoption
         a. Whatever ambiguity surrounds the meaning of a party’s behavior is ultimately for the jury to assess
      2. Adoption by Silence
a. Theory is that the person would deny the statement if it is not true and thus silence indicates veracity
   i. Ambiguities are resolved by preliminary fact-finding on the question whether the party’s conduct manifests adoption or belief
(iii) The statement is offered against the party
(b) Justification
   i. An inference can be drawn that the party knows that the contents of the statements are accurate, or thinks that the person speaking is reliable and knowledgeable.
      1. The party can still dispute these inferences and the statement’s accuracy at trial
(3) 801(d)(2)(C) and (D): Admissions by Agents, Servants, and Employees
   (a) Requirements
      i. Three Requirements for (C)
         1. The statement concerns a subject
      (ii) The statement was made by someone whom a party authorized to make a statement concerning that subject AND
         a. Must have evidence showing that declarant had the authority to make the statement
            i. Contents of the statement itself may be used to prove the issue of authority
      2. The statement is offered against that party
   (iii) Four Requirements for (D)
      1. The declarant is an agent or servant
         a. The contents of the statement itself may be used to prove the fact of agency and the scope thereof, but the statement alone is not sufficient
            b. Partnerships as agents depends on the nature of the partnership
      2. The statement was made during this relationship
      3. The statement concerns a matter within the scope of the agency or employment AND
      4. The statement is offered against the party
(b) Elaboration
   (i) Statements by Attorneys
      1. Statements of facts made in litigation documents and in opening and closing statements at trial may all be found to be within the scope of the attorney’s authority even though there is no specific grant of authority to make the statement
   (ii) Other Specifically Authorized Statements
      1. If the declarant is an agent, his statement falls into category (D) and we need not determine whether or not he was authorized to speak
2. If he was not an agent, his statement may fall into category (C) and we must determine whether his statement was authorized within the meaning of the subject
   a. An agent may make vicarious admissions whether or not he is specifically authorized to speak on that subject

(iii) Statements made During the Relationship That Concern a Matter Within the Scope of the Employment
1. Typical cases involve agents speaking about their own job performance or about events that happened on the job that would be of legitimate concern to the speaker
2. The proponent of a statement under (D) must provide evidence that the statement was made during the existence of the principal-agent relationship
   a. Does not mean that the statement must be made on the job or during the performance of job duties
      i. The exemption includes statement made away from the workplace to third parties uninvolved in the speaker’s work

(c) Justification
(i) Necessity
   1. Individuals, corporations, and other institutional entities conduct their affairs through authorized representatives, agents and employees
      a. Constitutes a primary source of information about corporate activities
2. Fairness
   a. If proponents cannot use hearsay, they would either have to call the declarants as hostile witnesses or forego the information altogether if the declarant has disappeared
3. Reliability
   a. If a statement is authorized under (C), it is reasonable to infer that the principal has exercised some discretion in selecting a trustworthy and reliable spokesperson
   b. If a statement is authorized or is about a matter central to the declarant’s activities, one can infer that the statement is likely to be made carefully and accurately
   c. If the declarant is an agent at the time of the statement, it is reasonable to infer that the declarant is loyal to the interests of the principal and, therefore, the declarant would not lie to injure the principal

(d) Personal Knowledge
   (i) Many courts dispense with the personal knowledge requirement
      1. It is thus possible to admit a representative’s or agent’s statement that is based only on rumor

(e) Admissions by Government Employees
   (i) Criminal Cases
1. Courts faced with this issue have refused to apply this provision to government employees testifying in criminal trials based on the rationale that no individual can bind the sovereign
2. Some courts have admitted statements of P’s as statements of the party-opponent

(ii) Civil Cases
1. Government manuals and sworn affidavits submitted to a judge have been admitted under (D)

(4) 801(d)(2)(E): Co-conspirators’ Admissions
(a) Three Requirements:
   (i) The declarant and the party against whom the statement is offered were both members of the same conspiracy
      1. Proof of Co-Membership
         a. Membership in a conspiracy requires a meeting of the minds to accomplish a specific illegal purpose
            i. Specific intent to further a common unlawful objective, and knowing and voluntary participation
            ii. Conspirators do not have to have contact with, or even know, all of the other conspirators, they are linked by acts in furtherance of a common goal
            iii. There does not have to be a formal charge of conspiracy for the exemption to apply
      (ii) The statement was made during the course of the conspiracy
         1. Conspiracy must have been ongoing while the statement was made
            a. Statements made prior to a D’s joining the conspiracy may not be used to prove the D’s participation, but may be admissible to show the nature of the illegal enterprise and its preparations
      2. Concealment Phase
         a. Issue with respect to whether this extends to statement made after the objectives of the conspiracy have been met or thwarted, usually by discovery or arrest
            i. Danger that the declarant is lying in order to shift the blame away from himself or herself
            ii. Greater likelihood that each co-conspirator will be primarily concerned with self-protection
         b. Majority says statements made within the concealment phase are not part of the conspiracy
         c. May be dispute as to when the concealment phase begins
   (iii) The statement was made in furtherance of the conspiracy
      1. Statements that further the common objectives, or set in motion transactions that are part of it, will satisfy the “in furtherance” requirement
2. Idle chatter and statements among conspirators that merely narrate past events have been held not to satisfy the requirement.
3. Statements that keep co-conspirators informed of significant acts and events have been held to be in furtherance of the conspiracy.

(b) Elaboration
   (i) Preliminary Facts
      1. 104(a) question for the judge alone to decide by a preponderance of the evidence
   (ii) Bootstrapping
      1. Judges may consider the content of the hearsay statement itself in deciding whether the foundational requirements have been satisfied
         a. Because there are reasons to distrust the reliability of statements, it may be that it would be unwise to rely on nothing but the statement at issue to establish the foundational requirement of the party’s membership in the conspiracy

(c) Justification
   (i) Agency
      1. Each co-conspirator authorizes the statements of other co-conspirators
   (ii) Necessity
      1. Conspiracies tend to be secret enterprises, and the criminal activities tend to be very difficult to prove
      2. It is arguably appropriate to burden a person who chooses to engage in a conspiracy with the risk that false or inaccurate co-conspirator’s statements will be used against that person
   (iii) Reliability
      1. To the extent that during and in furtherance of the conspiracy requirements are taken seriously, co-conspirators’ declarations may tend to be trustworthy because they advance the interest of the speaker in the success of the criminal enterprise

(d) Amendment: Requirement of Additional Evidence
   (i) There must be some additional evidence for a source independent of the co-conspirator’s hearsay statement to corroborate the defendant’s membership in the conspiracy
      1. Evidence of the identity of the speaker and the circumstances in which statement was made might suffice as additional evidence
      2. Also sufficient:
         a. D’s own statements
         b. Statements adopted by D
         c. Phone contact
3. Mere association held to be insufficient evidence of membership

(e) Process for Admission of Co-Conspirator’s Statement
   (i) 
P frequently offers co-conspirators’ admissions before presenting the evidence to establish that all the conditions of the exception have been satisfied

1. Conditional Admissibility
   a. A court may conditionally admit a challenged statement subject to later proof to satisfy the co-conspirator rule and defer a final ruling on admissibility until after hearing the relevant evidence

d) Hearsay Exceptions Not Requiring the Unavailability of the Declarant
   i) 803(1): Present Sense Impressions
      (1) Three Requirements
         (a) The occurrence of an event or condition
         (b) The contents of the statement describe or explain the event or condition
            (i) Limited to the description or explanation of the event or condition
         (c) The declarant made the statement while perceiving the event of condition, or immediately thereafter
            (i) Many courts have interpreted this to mean within a matter of seconds
               1. Some courts have stretched to mean several minutes
               2. Time lapse of an hour held not sufficiently contemporaneous
      (2) Justification
         (a) Reliable
            (i) Generalization that contemporaneity between the statement and the event is an indication that the statement is spontaneous rather than premeditated
               1. If the statement is spontaneous, there is no time to develop the intent to fabricate
            (ii) Virtually any memory problem is eliminated
      (3) Elaboration
         (a) 104(a) Preliminary question for the judge to determine
            (i) The court should be convinced by a preponderance of the evidence that there was an event occurring just before the declarant’s statement was made and that the declarant’s statement describes it
            (ii) The judge can determine whether the statement describes or explains the event or condition from the contents of the statement itself
         (b) Proponent of the evidence must show that the declarant had personal knowledge of the event or condition about which the statement was made

   ii) 803(2): Excited Utterances
      (1) Four Requirements:
         (a) The occurrence of a startling event or condition
(b) The contents of the statement related to a startling event or condition
   (i) The statement need only relate to the startling event or condition
       1. Affords a broader scope of subject matter than present sense
          impressions
(c) The statement was made by the declarant while under stress of
    excitement AND
   (i) Factors:
       1. Age of the declarant
       2. Nature of the event
          a. In cases where the event was less startling, courts tend to
             require a shorter time lapse between event and statement
       3. Whether the statement was made in response to questions
       4. Declarant’s physical and mental condition
       5. The stress of excitement was caused by the startling event or
          condition
   (ii) The declarant must be sufficiently startled to render inoperative the
        normal reflective thought process
   (iii) The longer the time lapse between event and statement, and the
        more intervening events that might suggest facts to the declarant or
        calm the declarant and allow reelection, the more reason there is to
        doubt whether the statement was made while the declarant was
        under the stress of excitement
(2) Justification
   (a) Reliable
       (i) Spontaneity makes it unlikely that a person will develop the intent
           to fabricate
           1. No foundational requirement of contemporaneity between the
              event and the statement
              a. Stress of excitement is substitute
              b. Longer time lag will not defeat the exception if the
                 declarant is still under stress
           2. However, the stress may increase perception, memory, and
              narration dangers
   (3) Elaboration
       (a) Proponent of the evidence must show that the declarant had personal
           knowledge of the event or condition about which the statement was
           made
   iii) 803(3): State-of-Mind Declarations
       (1) Three Requirements
           (a) The contents of the statement must express the declarant’s currently
               existing state of mind at the time of the statement
               (i) Judge can determine content from proof of the statement itself
                   1. Applies to all exceptions that depend on content as a
                      categorical requirement
               (ii) Frequently, inferences both forward and backward in time are
                    made from statements of currently existing mental states
1. Generalization that strong feelings about something are not likely to change in a short period of time, nor were they likely to have changed in a short period of time
2. Statements made months after the time at which the declarant’s state of mind was relevant have been held too remote to be probative

(b) State of mind may include emotion, sensation physical condition, intent, plan, motive, design, mental feeling, pain, and bodily language

AND

(i) Defined broadly to include any sensation present in the mind of declarant, including emotion, intent, memory, knowledge or belief

(c) A state of mind of memory or belief may not be used to prove the fact remembered or believed unless it relates to the declarant’s will

(i) i.e. “I think my brakes are bad”

1. May be used to show notice of bad brakes, may not be used to show that brakes were bad

(ii) The past fact is an event outside of the declarant’s mind

(iii) It is possible that if the past fact is not relevant to the litigation, then the declarant’s entire statement might be admissible simply to prove the relevant fact

1. However, 403 may prevent admission because of bad person prejudice

(2) Justification

(a) Reliable

(i) The fact of consequence is what is going on inside the mind of the declarant, and the declarant’s statement must sincerely and accurately express what that is

(ii) No memory problem because it is the declarant’s then-existing state of mind

(iii) Substantial risk of sincerity danger

(b) Necessity

(i) Mental states are such a pervasive part of our substantive law that it would be unwise to bar from admissibility one of the primary sources for evidence about mental states

(3) Elaboration

(a) State of Mind Utterances Are Classified as Either Direct or Circumstantial

(i) Direct

1. Direct statements of the witness’s feelings and state of mind

(ii) Circumstantial

1. Not a direct assertion of a mental state, but it probably reflects a state of mind

2. Not offered for the truth of the literal matters they assert

   a. Some courts have taken the position that these are not hearsay at all

(b) Future Conduct of the Declarant
(i) For a statement suggesting future conduct to be relevant, must infer the truth of the matter that is asserted
1. Must infer that people with intentions or plans are not going to change these plans, and that people generally do the things that they intend or plan to do
2. The probability of each inference from intent to future conduct will vary depending on the nature of the intended activity and the time lag involved
   a. Intent may be stated so far in advance, or may be so contingent, that there is no probative force to the generalization that people act in conformity with intent
iv) 803(4): Statements for Medical Diagnosis or Treatment
   (1) Three Requirements
   (a) The statement must describe medical history, past or present symptoms, pain, sensations, or the inception or the general cause or external sources of symptoms
      (i) Declarant need not be the patient, relating the declarant’s own medical history and symptoms
         1. Family, friends, nurses and other medical personnel may convey information
            a. Statements made by doctors to patients are not covered by the rule
   (b) A statement about the cause or source must be reasonably pertinent to diagnosis or treatment AND
      (i) In general, pertinence is determined from testimony of the medical professional as to what a reasonable practitioner would ask about, or want or want to know, concerning the source or cause of the declarant’s condition
         1. If the declarant’s statements are not medically pertinent, there is some reason to suspect the declarant’s motivation in speaking and thus to suspect lack of sincerity
   (ii) Child Abuse
         1. The physician generally must know who the abuser was in order to render proper treatment because the physician’s treatment will necessarily differ when the abuser is a member of the victim’s family or household
   (c) The statement must be made for the purpose of medical diagnosis or treatment
   (i)
   (ii) Evaluations for Liquidation
         1. Most courts have held that admission of statements made to physicians only for the purpose of providing expert testimony is now permitted by the rule
            a. Sincerity rational may not apply when a statement of physical condition is made for the purpose of diagnosis in preparation for litigation
(2) Justification
(a) The assumption is that a person seeking medical diagnosis and treatment is highly motivated to speak carefully and honestly about symptoms and conditions
(b) When a person’s physical condition is at issue, there frequently will be an expert witness to testify about the nature of the condition, and the expert is likely to have reached conclusion about the person’s physical condition at least in part on the basis of what the person said outside of court about present and past symptoms

v) 803(5): Past Recollection Recorded

(1) Six Requirements:
(a) The declarant is testifying as a witness
(b) The statement is in the form of a memorandum or record
   (i) Statement must be in written or recorded form
(c) The statement concerns a matter about which the witness cannot remember sufficiently to testify fully and accurately
(d) The witness once had personal knowledge of the matter
(e) The statement was made or adopted when the matter was fresh in the witness’s memory
   (i) If the witness did not actually write or record the statement, but read over and adopted the written statement made by another, the requirement can be satisfied
      1. Still would have to show that the contents of the record reflected what the witness knew from firsthand knowledge
(f) The statement correctly reflects the witness’s knowledge
   (i) Some evidence that the statement is both sincerely and accurately recorded is required
   (ii) May be impossible for the witness to testify that the record is a correct reflection of what the witness knew when the record was made
   (iii) Several Ways to Lay Foundation
      1. Record itself may contain information relevant to its accuracy
         a. Erasures and corrections may indicate accuracy
      2. Written statement could reicte that the statement is accurate
(iv) 104(a) question

(2) Justification
(a) Need
   (i) Created by the absence of adequate memory
(b) Reliable
   (i) The foundational requirements indicate trustworthiness
   (ii) Made while the matter was fresh minimizes memory problems
   (iii) Requirement to show that it is a correct reflection of the witness’s knowledge affirms the truthfulness of the witness in making the statement and the accuracy and care in recording it
(iv) Witness’s current availability for general cross-examination may furnish information pertinent to perception ability and opportunity

(3) Elaboration

(a) The Contents of the statement

(1) There is no limit on the subject matter or contents of a statement admitted as a past recollection recorded

(1) Any record of any event that later becomes relevant in litigation is admissible

(b) Laying the Foundation

(i) If the witness remembers making the written recollection, the witness will be able to testify about the circumstances in which it was created

(ii) If the witness cannot remember making the written record, then the record’s own contents, or the testimony of someone who saw the record being made, or other circumstantial evidence, would be used to satisfy the requirement of personal knowledge and fresh memory

(c) The Record May Only Be Read to the Jury

(i) The past recollection recorded may not be received as an exhibit

(1) May not be handed around to the jury or taken into the jury room

(d) Past Recollections Recorded Can Be Created By Multiple Declarants

(i) May take more than one person to make a record of events occurring outside the court

(1) Multiple levels of hearsay contained in one document

(ii) Multiple Person involvement in the process of observing and recording is entirely consistent with the exception

(1) One person orally reports facts to another person, and the other person writes them down

(iii) Both declarants must testify about the observing and recording process

(1) Gives the opponent the opportunity to cross-examine both the observer and the recording party about their part in the creation of the record.

(e) Multiple Hearsay Requires a Hearsay Exception or Exemption for Each Level

(i) Any combinations of exception, exemption, and nonhearsay statements is permitted

(f) Present Recollection Recorded

(i) Refreshing Memory

(1) When a witness initially cannot recall something, it may be possible to refresh the witness’s memory by presenting that witness with a document or something else that the examiner thinks, or that the witness suggests, may jog the witness’s memory
2. There are no substantive limits on the type of item that may be used to refresh recollection

3. **Rule 612 - If the witness uses the writing for the purpose of testimony, the adverse party is entitled to have the writing produced at the party**
   a. More important than any of the other rules of evidence is that a lot of people are likely to be involved in depositions – if you are preparing a client for a deposition, and you want to make sure the client is prepared, and show them records that may be protected by some sort or privilege.
   b. If the witness looks at these in refreshing their memory, you are risking giving up the otherwise privileged information to the other party
   c. Not being used as evidence

vi) 803(6): Business Records
   (1) Six Requirements
      (a) The statement is in written or recorded form
         (i) Broad range of documents
            1. Distinguishing Feature:
               a. Information has been stored somewhere outside of the human mind and can be recalled in some form other than oral testimony
                  i. Memoranda, reports, records, or data compilations
      (b) The record concerns acts, events, conditions, opinions, or diagnoses
         (i) Broad Range of Permissible Contents
            1. Anything that is regularly recorded as part of the regular business activity
      (c) The record was made at or near the time of the matter recorded
      (d) The source of the information had personal knowledge of the matter
         (i) Source may make the record alone, or may transmit information to a series of other people who record the information in various formats
      (e) The record was kept in the course of regular business activity AND
         (i) Declarant had a duty to keep the record
            1. Regularity implies trustworthiness, testimony as to the accuracy of the contents not required
      (f) It was the regular practice of the business activity to make the record
         (i) Such a record, or records like the record, happen systematically
            1. Regularity implies trustworthiness, testimony as to the accuracy of the contents not required

(2) Justification
   (a) Necessity
      (i) There is frequently multiple person involvement in the production of a business record
         1. Too time-consuming and inconvenient to call every person that had an involvement to the stand
2. Many involved in making the record may be unidentifiable or no longer associated with the business
   (ii) Even if the people who were responsible for making the record were on the witness stand, they might not have any present memory of matters contained in the record
(b) Reliable
   (i) Contemporaneity requirement minimized memory problems
   (ii) Business requirement minimizes sincerity and accuracy problems
(3) Elaboration
   (a) 104(a) – Judge must be persuaded by a preponderance of the evidence that all of the elements are met
   (b) The Broad Scope of What Constitutes a Business Record
      (i) Exception was designed to liberalize the common law restrictions on the use of such records to prove the truth of the matters they assert
      (ii) When record-keeping activity assumes a public role or provides a function within a formally organized institution, their terms of the exception probably apply
      (iii) There are cases in which a person’s own records of expenses, or income, kept for business reasons can qualify
         1. Must be systematically checked and regularly and continually maintained
            a. Balancing bank accounts, maintaining a budget, or preparing tax returns may qualify
         2. Courts do not treat people as being in the business of being a consumer
            a. Receipts and bills are your own personal records
   (c) Custodian or Other Qualified Witness
      (i) Personal knowledge not required
      (ii) Courts have interpreted the exception to mean that the witness must be able to explain the record-keeping procedures of the business organization
      (iii) The foundation witness need not be an employee of the business, so long as there is a showing of familiarity with the record-keeping system
      (iv) Foundation May Be Provided By Written Declaration
         1. Live testimony not necessary pursuant to 902(11) and (12)
            a. Notice required (Check rule)
   (d) Exclusion for Untrustworthiness
      (i) Judge may exclude a business record if “the source of the information or the method or circumstances of preparation indicate lack of trustworthiness.”
         1. Judge may eliminate documents prepared with a specific, self-interested motivation
            a. Judge deals with the issue of untrustworthiness on a case-by-case basis
(ii) Burden of Persuasion
1. Opponents to the business record must persuade the judge that it lacks trustworthiness
2. Proponent must be prepared to respond to the opponent’s attack with facts that show trustworthiness

(iii) Circumstances Indicating Lack of Trustworthiness
1. Motivation of the Preparer
   a. Records specifically prepared for litigation are viewed as infused with a motive to distort the truth
      i. Where accident reports are prepared pursuant to a statutory duty, or a regular business routine, they may be found not oriented toward litigation
      ii. Where the original source of the information or the method of preparation of the record is unclear or unknown, or when a record on its face is irregular or contains serious mistakes or inconsistencies, courts may find untrustworthiness

(e) Opinions and Diagnoses
(i) Opinions and diagnoses contained within business records are admissible
1. Some states do not extend the exception so far

(ii) Problem
1. Not necessarily able to cross-examine the person that made the statements

(iii) Argument for Exclusion Regarding Experts
1. Source has not been qualified as an expert
2. Bases for the expert opinion cannot be disclosed
3. Probative value of the evidence is substantially outweighed by the time that it will take to present the evidence and the risk that, in the absence of critical evaluation, the jury will be misled and will give undue weight to the opinion

(f) Records Containing Multiple Levels of Hearsay
(i) If several people contribute to the creation of a business record, then there are multiple levels of hearsay in the document
1. Each level must fit with a hearsay exception

(ii) Sources of Information with No Business Duty
1. Intent of the rule is to exclude statements from persons with no business duty to transmit the information to the record keeper
   a. If the supplier of the information does not act in the regular course, an essential link is broken – the assurance of accuracy does not extend to the information itself, and the fact that it may be recorded with scrupulous accuracy is of no avail
   b. The rule has been interpreted consistently with the Advisory Committee’s comments
2. If the information is provided by outside persons within a
business duty, the exception may still apply if it is the business’s standard practice to verify or otherwise assure the accuracy of the information transmitted.

(iii) Use of Multiple Exceptions and Exemptions
1. If the bystander’s statement fits within another exception, combining that exception for the other hearsay steps would make the entire record admissible.

(g) Computer Documents and Electronic Data as Business Records
(i) The underlying data must be generated in a manner that satisfies 803(6), and the input, storage and retrieval systems must satisfy the rule as well.

vii) 803(8): Public Records and Reports
(1) 2 Requirements
(a) The statement is in the form of a record or report from a public officer or agency AND
(b) The contents of the record involve (3 possibilities)
   (i) The activities of that officer or agency
      1. Interpreted to admit records pertaining to a public agency’s own “housekeeping” functions
         a. Personnel records and budgetary information are typical examples
      2. Records of official activities of the agency that are necessary to the performance of its public duties independent of any specific investigation or litigation
         a. County’s registry of information for a firefighter position or the record of an auto’s title history
   (ii) Matters observed and reported pursuant to a duty imposed by law but NOT matters observed by police or law enforcement in criminal cases OR
      1. Rarely requires proof of the pertinent law
         a. Duty is presumed from the legal purpose of the public agency itself and the scope of employment of the public employee
            i. Weather reports, records of border crossings, accident scene measurements, damage reports
      2. Often the Result of Multiple Hearsay
         a. As long as each link in the chain is acting pursuant to public duty, the requirements are met
      3. Criminal Reports
         a. Generally held that criminal defendants may offer records against the government
      4. Law Enforcement Defined Narrowly
         a. Prosecutorial Function
            i. Some courts have found it reasonable to interpret to include only individuals whose functions are similar to police officers
b. Routine and Regular Activities
   i. Routine, bureaucratic and nonadversarial reports made by
      law enforcement personnel, and even by police officers,
      need not be excluded in criminal cases

(iii) Factual findings resulting from an investigation authorized by law
But NOT against the defendant in a criminal case
1. Wide range of factual findings have been admitted
   a. Accident reports, safety and diagnostic studies, reports and
      studies on housing and employment discrimination
2. Very persuasive in their findings and conclusions
3. Evaluative Opinions and Conclusions
   a. As long as the conclusion is based on a factual
      investigation and satisfies the Rule’s trustworthiness
      requirement, it should be admissible along with other
      portions of reports
   i. Broad admissibility consistent with the FRE general
      approach of relaxing the traditional barriers to opinion
      testimony

(2) Justification
   (a) Necessity
      (i) The inconvenience of calling public officials to testify and the
      likelihood that public officials may not recall the information in the
      records create the need for the exception

   (b) Reliable
      (i) The public official’s duty and the likelihood that public access to
      the records will reveal inaccuracies tend to ensure the records’
      reliability

(3) Elaboration
   (a) No person with knowledge of the contents of the proffered public
      record is necessary to lay the foundation
      (i) Some records, if identified and authenticated, can satisfy the
      foundational requirements with their contents alone

   (b) Exclusion for Lack of Trustworthiness
      (i) Exclusion can apply to all three subsections
      (ii) Burden is on the opponent to persuade the judge as to the record’s
      lack of trustworthiness

   (c) The Problem of Multiple Hearsay Sources Within Investigative
      Reports
      (i) Factual findings might be based on interveiws of witness
          conducted by the investigrator or on research evaluating both
          public and private records
          1. Section (c) contemplates that the investigator may use those
             sources, evaluate them, and then reject them or rely on them in
             making factual findings
          2. Sources relied on under 803(8)(c) need not be operating under
             any sort of public duty in relaying information to the
investigator

(ii) Twofold safeguard to reliability:

1. Public agency’s ability to evaluate such sources before it decides to rely on them
   a. If the original source has personal knowledge and no reason to misrepresent the information to the public official, under the circumstances, then the public report may be admitted

2. Court’s ability to exclude on the lack of trustworthiness clause
   a. Courts have used to exclude records of findings that are based on hearsay sources that are unidentified or that the court finds to be unreliable

(iii) FRE 703 – Findings and conclusions are admissible not for their truth, but for in order for the jury to evaluate the basis for the investigation’s findings

(iv) Administrative Findings

1. Findings and conclusions that result from judicial proceedings do not fall within 803(8)(c)

2. Agency hearings within the executive branch, even those presided over by Administrative Law Judges, do qualify as investigations
   a. Still subject to 403 for admission

(v) Factors indicating lack of trustworthiness

1. The timeliness of the investigation

2. The special skill or experience of the official

3. Whether a hearing was held and the level at which conducted

4. Possible motivation problems

5. Scope and methods of an investigation

6. Skill of the investigator

7. The qualified nature of the findings

8. The lack of unbiased motivation of the author AND

9. The failure to interview key sources of information

(viii) 803(22): Judgment of Previous Conviction

(1) Four Requirements

   a. The judgment must follow a criminal trial or guilty plea

   b. The judgment must be for a crime punishable by death or more than one year’s imprisonment

   c. The judgment must be offered to prove the truth of a fact essential to the judgment AND

   d. A judgment offered against a criminal defendant must be a judgment entered against that defendant, unless it is offered only for impeachment

(2) Justification

   a. Reliable

      i. The high standard of proof – Beyond a reasonable doubt

      ii. Pleas of nolo contendere are left out
(iii) Judgments entered against person's other than the D are excluded from criminal trials, unless used for impeachment because of constitutional concerns.

e) Hearsay Exceptions Requiring the Unavailability of the Declarant

i) 804(a): Grounds for a Finding of Unavailability

(1) Preliminary Fact Finding

(a) 104(a) Question – Includes situations in which the declarant:

(i) Is exempted by ruling of the court on the ground of privilege from testifying concerning subject matter of the declarant's statement

1. Some courts hold that statements from counsel are insufficient to show that the declarant will not testify
   a. Witness must claim the privilege in court

(ii) Persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so

(iii) Testifies to a lack of memory of the subject matter of the declarant’s statement

(iv) Is unable to be present or testify at the hearing because of death or then existing physical or mental illness or infirmity

1. Must show that the illness will continue for a considerable length of time
   a. Otherwise, the court may seek a continuance

(v) Is absent from the hearing and the proponent of a statement has been unable to procure the declarant’s attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant’s attendance or testimony) by process or other reasonable means

1. Preference for former testimony that applies when the declarant is absent (not deceased)
   a. Makes clear that the proponent of an absent declarant’s dying declaration, declaration against interest, or declaration of pedigree must first use the declarant’s former testimony or deposition
      i. If none exists, the proponent must make reasonable efforts to obtain the declarant’s deposition testimony as a precondition to the declarant being held to be unavailable

2. Reasonable Means to Procure Attendance
   a. Good faith effort on the part of the proponent for hearsay, but not the doing of a futile act
      i. Effort to contact witness in witness’s foreign country
      ii. Offers to pay airfare

3. Unavailability Caused by the Opponent
   a. 804(a) directs that the witness not be found to be unavailable

ii) 804(b)(1): Former Testimony

(1) Three Requirements
(a) The statement must be in the form of testimony given at a hearing or in a deposition

(b) In a criminal case, the party against whom the statement is being offered must have had an opportunity and similar motive to develop the testimony at the prior hearing or deposition by direct, cross, or redirect examination

(c) In a civil case, either the party against whom the statement is being offered, or a predecessor in interest to that party, must have had an opportunity and similar motive to develop the testimony at the prior hearing or deposition by bidirect, cross or redirect examination

(2) Elaboration

(a) Opportunity to Develop by Same Party or a Predecessor in Interest

(i) In a current criminal action, only the party against whom the former testimony is currently being offered, and not some third person, must be the one who had the earlier opportunity to develop that former testimony

1. Concern with opportunity to confront and cross-examine witnesses underlies the distinction

(ii) In a current civil action, either the party against whom the testimony is being offered or a predecessor in interest to that party must be the one who had the earlier opportunity and motive to develop the former testimony

(b) Opportunity and Similar Motive

(i) Opportunity to develop testimony is enough, even if the opponent to the evidence does not take advantage of the opportunity

1. Opportunity is found if the questioner is on the same side of the same issue at both proceedings, and must have a substantially similar interest in asserting and prevailing on the issue

a. Factors

i. The type of proceeding in which the testimony was given

ii. Trial strategy

iii. Potential penalties or financial stakes AND

iv. The number of issues and parties

v. Similarity between the factual issues in dispute in the first and second proceedings

(c) No Opportunity

(i) If the former testimony is taken at a proceeding where, due to its nature or due to the conduct of the judge, a party was present but had no meaningful opportunity to develop testimony, courts have held that prior testimony is inadmissible

(d) No Requirement of Offered on the Same Issue

(i) There is no reason to insist that the legal issue be precisely the same

(ii) The testimony is still relevant, and it is difficult to believe that the
motive of the parties to develop the testimony is any different because of the different legal standard against which the D’s culpability will be measured

(e) Identity of the Parties
   (i) No requirement that the party offering the former testimony must have been a party to the original proceeding in which the testimony was given
      1. It is sufficient if the party against whom the evidence is offered had an opportunity to develop the testimony

(f) Predecessor in Interest
   (i) Former testimony cannot be offered against a D who was not a party to the first proceeding
   (ii) In a Civil Case, the party in the former proceeding may also be a predecessor in interest
      1. Predecessor in interest must have had an opportunity and similar motive to cross-examine the witness
         a. Any party to an earlier proceeding who had a similar motive to develop the testimony fully is a predecessor in interest

(g) Lack of Similar Motive Due to Difference in Procedural Context
   (i) In some procedural contexts, parties do not have the same motive to develop a witness’s testimony that they will have later at a full trial on the merits
      1. The proper approach to similarity of motive must consider whether the party resisting the offered testimony at a pending proceeding has at a prior proceeding an interest of substantially similar intensity to prove the same side of a substantially similar issue
      2. The nature of the two proceedings – both what is at stake and the applicable burden of proof, and to a lesser extent, the cross-examination at the prior proceeding - both what was undertaken and what was foregone - will be relevant though not conclusive on the ultimate issue of similar motive

(h) Method of Introducing Former Testimony
   (i)

(3) Justification
   (a) Necessity
      (i) Since the witness is unavailable, the choice is between hearsay or nothing
   (b) Reliable
      (i) The prior opportunity and motive to develop testimony are important justifications for the lack of present cross-examination

iii) 804(b)(2): Dying Declarations
   (1) Three Requirements
      (a) The statement concerns the cause or circumstance of what the declarant believes is impending death
(i) Identifications of the perpetrator
(ii) Descriptions of accidents
(iii) Past events that led up to the mortal injury or disease

(b) The statement is made while the declarant believes the death to be imminent
   (i) Lack of hope of recovery
      1. Settled hopeless expectation that death is near at hand and what is said must have been spoken in the hush of its impending presence
   (ii) State of mind can be shown by:
      1. The declarant’s own statement
      2. Circumstances such as the nature of the declarant’s wound
      3. Evidence that the declarant was told that death was imminent
      4. Opinion of a physician

(c) The statement is offered in a homicide prosecution or a civil case

(2) Justification
   (a) Necessity
      (i) May not be anotehr means of obtaining the same or similar evidence because the witness is dead
   (b) Reliability
      (i) People who realized that death is imminent will be especially likely to be sincere, since their condition obviates any motive to misstate the truth
      1. Not clear that the need for a dying declarant’s statement about the cause or circumstances of death is any greater than the need for the statement of any unavailable witness
      (ii) Declarants may believe it is in their interest to meet their maker with clean hands
      1. No requiremnt that dying declarants be shown to be religious

iv) 804(b)(3): Declarations Against Interest
   (1) Three Requirements
      (a) The content fo the statement, at the time the statement was made, was
         (i) Against the pecuniary or prorietary interest of the declarant
         (ii) Could subject the declarant to civil or criminal liability
         (iii)Could render invalid a claim held by the declarant
      (b) The statement was against any of the aboves interests of the declarant to ane xtent great enough such that a reasonable person, in declarant’s position, would not have made such a statement unless it was true
         AND
      (i) Objective reasonable person standards in light of the circumstances and facts know to the particular individual whose conduct or statement is at issue
      (c) If the statement exposes the declarant to criminal liability and is offered to exculpate the accused, evidence of corroborating circumstances that clearly indicate the trutworthiness of the statement must be offered
(2) Justification
   (a) Reliable
      (i) Principle of experience that a statement asserting a fact distinctly
          against one’s interest is unlikely to be deliberately false or
          heedlessly incorrect

(3) Elaboration
   (a) Content Against Interest
      (i) Must be contrary to one of the specific interests of the declarant
          identified in the rule when the statement is made
      (ii) Requires that the declarant had personal knowledge of the against
            interest fact when the statement was made
      (iii) If the facts in the statement can no longer cause trouble for the
            declarant then the against interest element may not be satisfied
      (iv) If the context within which the statement is made gives the
            declarant a strong self-serving motive, then the exception may not
            apply
   (b) Ascertaining the Declarant’s Knowledge
      (i) We assume that people in general have an interest in maintaining
          ownership of their money and their possessions
      (ii) If particular facts affect the declarant’s assessment of what is
           against interest, then these facts will be taken into account
   (c) Two Categories of Declarations of Interest
      (i) Mixed Motive Statements
         1. Insincere statement made for some ulterior motive
            a. Appears to be against interest but have a high risk of being
               unreliable if there was an ulterior motive for making the
               statement
            b. Sometimes there may not be much available information
               bearing on the real motivation of the declarant and the court
               may fail to see that the declarant also had a self-serving
               reason to make the statement
               i. If courts do not discern such mixed motives,
                  untrustworth statements may be admitted
      (ii) Statements Made With No Motive to Lie
         1. Statements that appear sincere because the declarant lacks any
            obvious motive to lie, but that the declarant also would not
            think of as “against interest”
   (d) Requirement of Corroborating for Statements Against Penal Interest
      Offered to Exculpate the Accused
      (i) Special requirements on declarations against penal interest that are
          offered by defendants in criminal cases to exculpate themselves
         1. Out of court declarant has made a statement assuming criminal
            responsibility for the crime with which the defendant is
            charged
            a. Fear that people may be willing to confess falsely to curry
               favor with the police or to help a friend who has not yet
been convicted
(ii) Courts look to circumstances that corroborate either the content of
the statement or the trustworthiness of the declarant
1. Recantation of exculpatory statements, and assertions of the
5th Amendment privilege, have been held to weigh against
the trustworthiness
(iii) Concern that witnesses may fabricate their testimony about
declarations against interest
1. Courts have held that doubts about the credibility of the testifying witness should not be a factor in assessing the
trustworthiness of the declarant’s statement.

(e) Statements that Inculpate Accomplices
(i) When a person who is suspected of a crime or wrongdoing
confesses or acknowledges some degree of fault, that statement is
usually held to be against penal or civil interest and therefore
admissible under 801(d)(2)(A) and not really needed under
804(b)(3)
1. To use these acknowledgements against accomplices, must
analyse each statement allegedly against the declarant’s
interest, but offered to implicate another person, on an
individual basis to see if it is content, standing alone, was self-
inculpatory

(f) Should the Corroboration Requirement Apply to Inculpatory
Statements Too?
(i) Critics of the corroboration requirement have argued that if penal
interests are less reliable and require corroboration, there is no
reason to limit the requirement solely to exculpatory statements

v) 804(b)(4): Statements of Personal or Family History
(1) Two Requirements
(a) The content must concern the declarant’s own personal or family
history
(b) The statement concerns the personal or family history of one to whom
the declarant is related or was intimately associated
(2) Justification
(a) Reliable
(3) Elaboration
(a) Does not require that the declarant have personal knowledge
   (i) There is no personal recollection of birth or place of birth
   (ii) Any declarant meeting the requirements of (A) is going to have
        knowledge of circumstantial evidence of personal and family
        relationships
(b) Statements of Relations and Intimate Associates
   (i) Family members and intimate associates so long as the relationship
        is such that the declarant would have accurate information about
        the family history
(c) Concerning Personal History
(i) The exception is limited to past facts and events of an objective, rather than subjective, nature.

vi) 804(b)(6): Forfeiture by Wrongdoing

(1) Three Requirements

(a) The statement must be made by a declarant who was a witness or a potential witness against a party.
   (i) Secure the admission at trial of hearsay statements made by unavailable declarants who were actually serving as witnesses against a party.
   (ii) If there is no grand jury yet, and no scheduled trial, but instead only an ongoing criminal investigation, declarants are potential witnesses if they are assisting in this investigation.

(b) The statement must be offered against the party.

(c) That party must have engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness or potential witness.

(2) Elaboration

(i) The party against whom the declarant’s statements are offered must be shown to have procured the unavailability of the declarant by engaging in or acquiescing in wrongdoing.
   1. 104(a) – Proponent must persuade the judge by a preponderance of the evidence that the party did so act.

(ii) Wrongdoing is broadly defined.
   1. Threats, intimidation, kidnapping, hideings, acts of violence, and murder to secure the silence of the then-unavailable declarant.
   2. Engaging in wrongdoing means the person participated directly in planning or procuring the declarant’s unavailability.

(iii) Proof of the party’s engagement in wrongdoing may include the declarant’s hearsay statements.
   1. 104(a) permits the court to bootstrap a finding of a foundational fact by relying on the contested hearsay statement itself.

(iv) Intent to Procure the Declarant’s Unavailability.
   1. All courts agree that a specific finding must be made by the trial court that the party acted with the intention of making the declarant unavailable as a witness.
   2. The government has the burden of proving by a preponderance of the evidence that the party against whom the out-of-court statement is offered acted with the intent of procuring the declarant’s unavailability as an actual or potential witness.
      a. The government need not show that the declarant’s sole motivation was to procure the declarant’s absence.
      b. It need only show that the defendant was motivated in part by a desire to silence the witness.

(3) Justification
(a) The law will not allow a person to take advantage of his own wrong
(b) Reliability is not taken into account
   (i) Once the D has waived rights by doing wrong, the court is not
       required to assess independently the reliability of those statements
(4) Application of 403
   (a) Admission of the unavailable declarant’s testimony is not automatic,
       as the court still must perform the 403 balancing test
   (i) Because the rule itself takes no account of reliability, 403 may be a
       weigh of reliability against countervailing facotrs
(5) Content of Declarant’s Statement
   (a) Classic statements pertain to past events or future wrongdoing that the
       declarant could have testified about at the time of the wrongdoing
   (b) Increasingly, the government is prosecuting the defendant for the very
       act of wrongdoing that has made the declarant unavailable
   (i) The content of some of the hearsay statements offered under the
       rule concern the murder, not the defendant’s past offenses as to
       which the declarant would have been a witness
(6) Some courts require a 104(c) hearing
vii) The Residual Exception
   (1) Requirements
       (a) The statement must have circumstantial guarantees of trustworthiness
       (b) These guarantees should be equivalent to the exceptions in 803 and 804
       (c) The statement is offered to prove a material fact
       (d) The statement is more probative on the point for which it is offered
           than any other evidence that can be secured through reasonable efforts
       (e) Admission will serve the general purposes of the rules and the interest
           of justice AND
       (f) Notice is given to the opponent
VII) The Impeachment And Rehabilitation of Witnesses
   a) Some Basic Concepts
      i) Impeachment: The Inferential Process
         (1) The Testimonial Inferences
             (a) A witness must be able to observe events, to remember them, and to
                 relate them honestly and accurately
             (b) The jury must make inference about these abilities
               (i) The ability to be honest
               (ii) The ability to narrate accurately
               (iii) The ability to perceive
               (iv) The ability to remember
         (2) Types of Impeachment Evidence
             (a) Impeachment is the process of trying to raise doubts about the
                 inferences presented by the witness
         (3) Impeachment Evidence Versus Substantive Evidence
             (a) Evidence offered to impeach the credibility of a witness must be
                 relevant to prove or disprove some fact that is of consequence to the
                 litigation
(b) When evidence is admissible only to impeach the credibility of a witness, the limited admissibility has three significant consequences:

(i) The proponent of the impeachment evidence in resisting a directed verdict or summary judgment motion cannot rely on that evidence to satisfy a burden or production

(ii) The proponent in closing argument cannot rely on the impeachment evidence as substantive proof of disputed facts

(iii) Whenever the evidence is relevant but inadmissible for some nonimpeachment purpose, the party against whom the evidence is offered can make a 403 objection and is entitled to a limiting instruction

ii) Extrinsic Evidence and Impeachment

(1) Any evidence other than that developed through direct or cross-examination of the witness

   (a) Record of a prior conviction

   (b) Testimony of another witness that impeaches the first witness

(2) If the cross-examiner were not allowed to use extrinsic evidence to impeach a witness, the witness could deny the facts relevant to the impeachment, and the impeaching party would be at a loss to correct the witness’s misstatement

iii) Bolstering Credibility

(1) 608(a) prohibits introducing reputation or opinion evidence of a witness’s good character for truthfulness unless the witness’s character for truthfulness has been attacked

(2) Jurors will often assume that the witness is likely to be truthful

   (a) Bolstering evidence is likely to have little probative value and is likely to be kept out on 403 grounds

b) Impeachment and Rehabilitation With Character Evidence

i) 608(a)

(1) Reputation and Opinion Evidence to Prove Character for Truthfulness

   (a) The usual method of impeaching or rehabilitating witnesses pursuant to 608(a) is with extrinsic evidence

      (i) Opinion or reputation testimony offered by one witness about another witness’s character for truthfulness

   (b) 608(a) permits both reputation and opinion evidence of character for truthfulness, just as when character evidence is offered for substantive purposes

   (c) Limited to character for truthfulness or untruthfulness

      (i) Limitation repudiates the position of a few jurisdictions, which have permitted parties to impeach witnesses with evidence of general bad character or bad moral character

      (ii) Result is to sharpen relevancy, to reduce surprise, waste of time and confusion, and to make the olot of the witness somewhat less unattractive

ii) 608(a)(2) Limitation on Evidence of Truthful Character

(1) Reputation or opinion testimony regarding a witness’s good character for
truthfulness is not admissible until the witness’s character has been attacked.

(a) Courts traditionally regard impeachment by showing prior convictions or bad acts that did not result in convictions as an attack on a witness’s character.

(b) Courts have regarded proof of a witness’s biases as not being an attack on the witness’s character.

(i) However, courts agree that evidence of corrupt conduct on the part of a witness should be regarded as an attack on his truthfulness warranting supportive evidence.

iii) 608(b)(1)

(1) Specific Instances of Conduct

(a) The Prohibition Against the Use of Extrinsic Evidence

(i) FRE prohibits the use of extrinsic evidence of a witness’s specific acts to prove character for truthfulness to show dishonesty or honesty on the witness stand.

(ii) Prohibition means that the examiner is bound by the answer of the witness.

(b) The Proposed Clarifying Amendment

(i) Most courts have interpreted as banning extrinsic evidence of specific acts only when specific acts are offered to prove character for truthfulness.

1. These courts permit parties to introduce extrinsic evidence of specific acts for other impeachment purposes.

(c) The Limited Scope of Permissible Inquiry

(i) Specific acts must relate to character for truthfulness.

1. Effective cross-examination demands that some allowance be made for going into matters of this kind, but the possibilities of abuse are substantial. Consequently, safeguards are erected in the form of specific requirements that the instances inquired into be probative of truthfulness or its opposite.

(ii) The time factor is relevant in assessing probative value, and the concern with remoteness should be remoteness from the time of trial.

(d) The Rationale for the Extrinsic Evidence Ban

(i) If the impeaching party is allowed to introduce the extrinsic evidence, the party whose witness was impeached should have an opportunity to counter that evidence.

1. A substantial amount of time and energy could be devoted to litigating the truth or falsity of facts whose only value is to impeach the credibility of the witness.

2. There would be the potential for a minitrial with every witness.

(e) The Scope of Permissible Questions: The Meaning of Untruthfulness

(i) There is not uniform agreement about the scope of the limitations.

1. Most courts allow evidence of perjury or other instances of making false statements and that acts of violence do not
suggest untruthfulness

2. There is a gray area upon which courts cannot agree

(f) Questions About Specific Acts and 403

(i) 403 concerns may militate against even asking a witness about specific acts of untruthfulness

1. In some instances the witness’s conduct, even if relevant to show untruthfulness, may have low probative value

2. In some instances, if the witness acknowledge an act of untruthfulness, there is a risk of unfair prejudice because the jury may be willing to decide against the party because the jury regards the witness as a bad person

3. There are numerous inquiries about the specific acts of truthfulness that are likely to be concerns with time-consumption and confusion issues

4. Even if the witness honestly denies having committed a dishonest act, there is a risk that the jury may be more swayed by the suggestiveness of the question than by the answer

5. If the witness is a party and if the question relates to conduct similar to the conduct that is the subject of the litigation, there is a risk that the jury will consider the evidence as evidence that the defendant engaged in the conduct that is the subject of the litigation

(ii) Still, court use the same liberal techniques that favor admissibility on 403 grounds

(g) The Discretion of the Court to Exclude Questions About Specific Acts

(i) Nothing more than a reminder to the court and litigants that 403 may be a basis for exclusion

(ii) If the clause means anything, it means that the trial judge has more discretionary power to exclude specific acts questions than to exclude other evidence pursuant to 403

(h) Good Faith Requirement

(i) The examiner must have a good faith basis for believing that the act occurred

1. Probably satisfied if the witness had been arrested for the activity

2. Probably satisfied by hearsay information obtained during the investigation of the case

(ii) A litigant who suspects that the opponent may ask a question without a factual basis for the inquiry should request a hearing on that issue outside the presence of the jury

(i) Specific Acts Showing Good Character for Truthfulness

(i) 608(b) specifically permits questions that are probative of truthfulness, and there is precedent for permitting litigants to question witnesses about good acts that tend to show the witness’s truthful character

(ii) Not good evidence:
1. So obviously self-servicing that it is seldom worth objecting to or even attempting to introduce.

2. If the lawyer feels it necessary to rely on such evidence to convince the fact finder of the witness’s truthfulness, perhaps there is reason to doubt the witness’s truthfulness.

(iii) 608(b)(2)

1. Party may use character evidence to test the witness’s knowledge of the reputation or the basis for the opinion about which they testify.
   a. Once a character witness has given reputation or opinion testimony pursuant to 608(a), the opposing party may impeach the character witness in the same manner in which a party may impeach a character witness who gives reputation or opinion testimony pursuant to 401.

2. The impeaching party may ask the character witness if the character witness is aware of relevant acts committed by the person whose character was the subject of the witness’s testimony.
   a. Specific acts must relate to the character trait being challenged, which in 608 is always going to be truthfulness.

iv) 609

(1) Impeachment By Evidence of Conviction of a Crime
   (a) Two Types of Convictions
      (i) Serious crimes
         1. Those punishable by imprisonment for more than one year
            a. Federal definition of a felony
      (ii) Crimes of dishonesty
         1. Regardless of sentence
   (b) The Two 609(a)(1) Balancing Tests
      (i) Witnesses that are Not Criminal Defendants
         1. Balancing test for all witnesses except criminal defendants is 403
      (ii) Witnesses that are Criminal Defendants
         1. Reverse 403 Test
            a. The probative value must outweigh the prejudice to the defendant
               i. Favors exclusion and in effect puts the burden on the prosecution to justify admissibility
         2. Probative Value
            a. Assessment should include consideration of:
               i. The age of the conviction
               ii. How probative the conviction is to show bad moral character or general disposition for law-breaking, which in turn shows a disposition for untruthfulness (may be inferred that the person has such little regard for the law that they would be willing to lie in court)
iii. The witness’s intervening behavior

3. Unfair Prejudice
   a. Two Primary Concerns:
      i. To what extent the jury will consider the witness to be a bad person, and therefore be disposed against the witness
      ii. To what extent there is a risk the jury may use the conviction not only in its proper propensity sense to prove that the witness may be untruthful on the witness stand but also in an improper propensity sense

4. The Reverse 403 Balancing Test For Criminal Defendants
   a. The prejudice is likely to be greatest when the witness is a criminal defendant
   b. The risk that a jury may utilize a prior conviction in an improper sense exists only if some conduct of the witness is the subject of the current litigation

5. The 403 Balancing Test For Other Witnesses
   a. Civil parties do not get the benefit of the reverse 403 balancing test
   b. Risk of prejudice from using prior convictions for impermissible propensity purposes may be less in civil cases generally than in criminal prosecutions

(c) The Automatic Admissibility of 609(a)(2) Dishonesty and False Statement Convictions
   (i) The Rule
      1. Dishonesty and false statement convictions are automatically admissible without regard to balancing and without regard to the seriousness of the crime
         a. Court has no discretion to exclude the evidence
   (ii) The Meaning of Dishonesty or False Statement
      1. Narrow Interpretation
         a. It means crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement or false pretenses, or any other offense, in the nature of crimen falsi the commission of which involves some element of untruthfulness, deceit or falsification bearing on the accused’s propensity to testify truthfully
   (iii) The Significance of the Underlying Details of the Crime
      1. Some courts look to the underlying criminal act
      2. Some courts focus exclusively on the statutorily defined elements of the crime

(d) The FRE 609(b) Reverse Balancing Test
   (i) 10 Year Time Period
      1. All prior convictions falling within the scope of 609(a) are subject to the reverse 403 balancing test if they fall outside the 10 year time period
2. Period runs from the date of conviction or release from imprisonment, whichever is later

(2) The Rationale For Permitting Impeachment with Convictions
   (a) Common Law Origin
      (i) Common Law restricted the use of the witnesses altogether
   (b) A person of generally bad character is more likely to lie than a person of generally good moral character
      (i) Compelling proof of bad moral character may be particularly probative of untruthfulness

(3) Prior Convictions and Prejudice
   (a) Similarity Between Prior Conviction and Current Criminal Charge
      (i) When the witness is a criminal defendant, similarity between the current criminal allegations and the facts underlying the impeachment evidence enhances the prejudice, not the probative value of the prior conviction
      (ii) The only permissible inference to draw from the conviction is that the witness is an untruthful person and therefore may be lying on the witness stand
   1. Possibility of the jury using the evidence for impermissible reasons is greatest when the prior behavior represented by the conviction is similar to the alleged activity that gave rise to the litigation

(4) Extrinsic Evidence
   (a) Extrinsic evidence is permissible to show a 609 conviction
      (i) Seldom any need
         1. Because a party can so easily establish a conviction, it is unlikely that a witness will deny the conviction in the first place

(5) The Factual Details of Conviction
   (a) Courts have an interest in not spending a great deal of time exploring the facts underlying a witness’s conviction
   (b) Eliciting the factual details underlying a conviction is likely to increase its prejudicial impact
      (i) Courts typically will permit the impeaching party to mention the name of the crime, when and where it occurred, what sentence was imposed, and nothing more
   (c) Some courts go further than others in allowing details
      (i) While proof of the details may make the impeachment evidence more prejudicial, proof of the details creates some prejudice without giving the jury the benefit of the facts what warrant admissibility in the first place

(6) Hearsay
   (a) Regardless of whether the prior conviction is elicited from the witness or proved extrinsically with the record of conviction, the evidence is hearsay
      (i) The conviction is a manifestation of the jury’s or the judge’s
assertion is an earlier proceeding that the witness committed the acts essential for the conviction, and it is the truth of this assertion that is critical to the relevance of the evidence.

(b) Judgments Exception – 803(22)
(i) Narrower than the rule authorizing impeachment with prior convictions
1. Extended only to convictions punishable by imprisonment for more than one year
   a. Does not exclude convictions regarding truthfulness

(7) Motions in Limine
(a) Parties frequently file motions in limine seeking an advance ruling on whether prior convictions will be admissible against them
(i) 2 Reasons for Importance
1. There is substantial empirical evidence suggesting that the admission of a criminal defendant’s prior convictions contributes to the likelihood of a guilty verdict
2. For Defendant witnesses, it is likely to be tactically important for the witness to mention admissible prior convictions on direct examination

(c) Impeachment And Rehabilitation With a Witness’s Prior Statements
i) 613: Prior Statements of a Witness
(1) 613(a) – Prior Inconsistent Statement
   (a) Examiner need not disclose the prior inconsistent statement to the witness before asking whether the witness made the statement
      (i) Showing the statement to the witness before questioning gives the dishonest witness the opportunity to concoct a false story that minimizes the impact of the inconsistency
   (b) Opposing counsel has the right, upon request, to learn of the statement
      (i) Provision is designed to protect against unwarranted insinuations that a statement has been made when the fact is to the contrary

(2) 613(b) – Extrinsic Evidence
   (a) Twofold condition for admissibility of extrinsic evidence:
      (i) The witness must have the opportunity to explain the statement AND
         1. Gives the fact finder a reasonable basis for evaluating the alleged inconsistency
         2. The requirements are inapplicable to statements by a party falling within 801(d)(2)
      (ii) The opposing party must have the opportunity to explore the inconsistency with the witness
         1. To fulfill the requirements, party offering the statement must do so when the witness is still testifying or must make sure that the witness is available for recall

(b) Interests of Justice Exception
   (i) May be situations in which it is not possible to give the witness an opportunity to explain the apparent inconsistency
1. Still may further the search for truth to permit extrinsic evidence of the inconsistent statement without any opportunity for the witness’s explanation rather than to exclude the impeaching evidence altogether.

(c) Departure From the Common Law
   (i) More flexible than the Common Law
   1. Flexibility is in favor of providing the witness an opportunity to explain and the opposite party an opportunity to examine on the statement, with no specification of any particular time or sequence.
   2. As long as the witness has not been dismissed and is subject to recall, extrinsic evidence is admissible.

(3) Extrinsic Evidence in Practice: Practical Considerations
   (a) Because of the common law, some courts have been unwilling to give 613(b) an expansive reading
   (i) Some trial judges have prohibited litigants from introducing extrinsic evidence of prior inconsistent statement that they made no effort to explore with the witness on cross-examination
      1. Unless counsel feels that there is a compelling tactical reason not to do so, the safe course of action is to lay the traditional common law foundation and to confront the witness with the inconsistent statement on cross-examination.

(4) Probative Value and 403 Concerns
   (a) The Risk of Improper Substantive Use
      (i) Possibility that the jury will consider the statement not merely for its impeachment purpose
   (b) Loss of Memory and Inconsistency
      (i) If a witness who testifies to a lack of memory about an event has made a prior statement about the event, some courts view the claimed current loss of memory and the prior statement as inconsistent with each other
         1. When it is reasonable to regard the loss of memory as feigned and therefore, tantamount to a denial of the earlier statement, the characterization of the statements as inconsistent is reasonable
         2. To the extent that the claimed loss of current memory seems plausible, there is no inconsistency between the witness’s testimony and the prior statement.
      (ii) Inconsistencies Statements About Collateral Matters
         1. Probative value may be so low that 403 efficiency concerns arise
            a. Very low probative value may not warrant the consumption of time required to call an additional witness to offer extrinsic evidence of the inconsistency
            b. 403 question

ii) Prior Consistent Statements
(1) Admissibility for Truth Pursuant to 801(d)(1)(B)
   (a) Exempted from the definition of hearsay a witness’s statement that is consistent with the declarant’s testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication
      (i) Only prior consistent statements made prior to the time that a motive to fabricate or an improper influence arose fall within the scope of the rule
   (b) Admissibility to Rehabilitate Pursuant to 401-401
      (i) Putting Inconsistent Statements in Context Following Impeachment with Prior Inconsistent Statements
         1. When a witness has been impeached with prior inconsistent statements, the uniform view is that contemporaneous prior consistent statements not satisfying the criteria of 801(d)(1)(B) may be admissible to clarify or explain the alleged inconsistency
            a. Consistent with both the principle of completeness in 106 and the 613(b) requirement that a witness have an opportunity to explain or deny an inconsistent statement
      (ii) Rehabilitation with Consistent Statements in Other Contexts
         1. Split Courts
            a. 801(d)(1)(B) governs the use of prior consistent statements for both hearsay and rehabilitation purposes
               i. If the statement is not admissible for its truth, it is not admissible to rehabilitate
               ii. Primary objective of 801(d)(1)(B) is to eliminate the need for a limiting instruction when prior consistent statements are admissible
               iii. The objective is to make all consistent statements admissible for their truth, and the tacit premise is the common law limitations on the use of prior consistent statements
            b. Nothing More than a hearsay exemption
               i. Since there is no rule restricting the use of prior consistent statements for nonhearsay purposes, the admissibility of prior consistent statements is governed by 801(d)(1)(B)
   d) Other Impeachment Techniques
      i) Bias
         (1) Relevance
            (a) Three methods of showing a witness’s emotional incapacity
               (i) Bias Generally
                  1. All varieties of hostility or prejudice against the opponent personally or of favor to the proponent personally
                     a. Intimate family relationship with one of the parties
               (ii) Interest
                  1. Specific inclination which is apt to be produced by the relation
between the witness and the cause at issue in the litigation
a. The expectation of favorable treatment from the prosecutor
or sentencing judge in return for the testimony

2. Corruption
a. Conscious false intent which is inferable from giving or
taking a bribe or from expressions of a general
unscrupulousness for the case at hand
i. Attempt to bribe another witness or the receipt of money
for testimony

(b) Two kinds of available evidence:
   (i) The circumstances of the witness’s situation making it a priori
   probable that he has some partiality of emotion for one party’s
   cause
   (ii) The conduct of the witness himself, indicating the presence of such
   partiality, the inference here being from the expression of the
   feeling to the feeling itself

(2) Extrinsic Evidence
   (a) Bias is allowed to be proven with extrinsic evidence

(3) Possible Limitations on Extrinsic Evidence
   (a) Two Limits
      (i) Some federal courts hold that when the evidence of bias is a
      witness’s prior statement, extrinsic evidence of the statement is not
      admissible unless the witness first has had an opportunity to
      explain or deny the statement
      (ii) There is always the possibility of a successful 403 objection

1. Typically evidence of bias is highly probative
   a. If the witness fully admits the bias or if the evidence in
      fact suggests little about the witness’s possible bias, a court
      should probably sustain the 403 objection

(4) Bias Versus Character
   (a) It is not clear to what extent one should regard the concepts of
   character and bias as mutually exclusive or as potentially overlapping
   (b) 608(b) prohibition against extrinsic evidence to prove character should
   not apply when the evidence is relevant and otherwise admissible to
   show bias
      (i) To the extent that it is reasonable to infer from a corrupt act that a
      witness has some particular concern about or interest in the
      outcome of the litigation, the evidence has relatively high
      probative value on the question whether the witness’s testimony is
      tainted because of this interest
      1. It seems appropriate to attach the bias label to this type of
         evidence in order to permit exploration of the matter with
         extrinsic evidence
      (ii) If the only reasonable inference to draw from a corrupt act is that
         the individual has a general lack of integrity or disregard for the
         truth, the probative value of the evidence to suggest untruthfulness
on one specific occasion on the witness stand is relatively low
1. The evidence should receive the character label in order to prevent the possibility of tomie consuming and distracting exploration of the matter with extrinsic evidence

ii) Mental or Sensory Incapacity
   (1) Relevance
   (a) Any sensory or mental deficiency that inhibits a witness’s ability to perceive events accurately what happened at the time of trial is relevant to cast doubt on the witness’s credibility
   (b) Any fact relating to the witness’s general testimonial capacities for narration, perception, and memory or about the exercise of these capacities in the occasion in question is relevant to impeach the witness
   (c) It is permissible to inquire about these matters during the examination of the witness whose sensory or mental condition is at issue

(2) Extrinsic Evidence
   (a) Parties may introduce extrinsic evidence of a witness’s mental or sensory incapacity
      (i) Regarded as showing something different from a moral incapacity or character trait
         1. Courts have permitted evidence of such matters as strange, seemingly irrational acts of a witness
         2. Expert testimony from a psychiatrist about a witness’s mental capacity
         3. Courtroom experiments to demonstrate a witness’s poor memory or eyesight
      (b) It is appropriate to decide on a case by case basis how extensive a cross-examination to permit and how much, if any, extrinsic evidence to introduce about a witness’s sensory or mental incapacity

(3) Mental Incapacity as a Bar to Testimony
   (a) 601 presumes that every person is competent to be a witness, including a person with a mental illness

iii) Contradiction
   (1) Relevance
   (a) Evidence that contradicts something the witness has said
      (i) If one can establish that a witness is incorrect about one thing, it is arguably appropriate to infer that the witness may be wrong about other things
         1. Deficient with respect to definiteness
         2. Wide range with respect to possible significance
      (ii) Evidence of contradiction is not offered as definitely showing any specific defect of any kind, and yet it may justify an inference of the existence of any one or more defect
         1. All we know is that the witness is capable of making an erroneous statement
            a. Possible sources of defect
i. Mental defect as to powers of observation or recollection
ii. Lack of veracity character
iii. Bias
iv. Corruption

2. Some unspecified defect which became a source of error, the same defect may equally exist as the source of some other error, otherwise not apparent

(2) Extrinsic Evidence
(a) Courts applying 403 may permit cross-examination but exclude extrinsic evidence to prove the contradiction if the contradiction appears to have little probative value to impeach the witness
(i) Typically not very probative of how reliable the witness’s testimony is on relevant, disputed facts

(3) The “No Extrinsic Evidence to Impeach on a Collateral Matter” Doctrine
(a) What is Not Collateral Generally
   (i) Facts Not Within the Term
      1. Facts relevant to the substantive issues in the case
         a. Evidence that is directly relevant to substantive issues can be introduced for its substantive value apart from any impeachment value that it may have
            i. In effect, the impeachment value of the evidence is secondary
            ii. If evidence is independently admissible, there is no need to consider whether it is also admissible for impeachment purposes
      2. Facts relevant, apart from the contradiction, to impeach the credibility of a witness, if extrinsic evidence is generally admissible for the noncontradiction impeachment purpose AND
         a. Collateralness doctrine should not prohibit the use of extrinsic evidence that both contradicts the witness and also impeaches credibility in some other way, as long as it is clear that extrinsic evidence would be admissible for that independent impeachment purpose
      3. Facts recited by the witness that, if untrue, logically undermine the witness’s story

   (b) A Test For Collateralness
      (i) Could the fact have been proven with extrinsic evidence for any purpose except to show a mere contradiction
         1. If yes, there is some relevant, permissible use for extrinsic evidence above and beyond its value as showing a mere contradiction, it is not collateral

VIII) Lay Opinions and Expert Witnesses
   a) Lay Opinions
      i) Rule 701
(1) Definition
(a) Non-expert testimony is limited to the opinions or inferences which are:

(i) Rationally based on the perception of the witness AND
   1. Rulings are extremely case-specific
      a. Conclusion of a trial judge to permit opinion testimony is conditioned by all the events at trial, including behavioral cues from the witnesses that are not reflected in the record
         i. Consequently, the decisions are largely unreviewable
   2. When the witness observes first hand the altercation in question, opinions on the feelings of the parties are based on personal knowledge and rational perceptions are are helpful to the jury

(ii) Helpful to a clear understanding of the witness’ testimony or the determination of the fact in issue AND
   1. The opinion must be a fact observed
      a. The witness must speak of facts within his knowledge, he cannot under the pretext of an opinion, give his decudtive conclusion from what he saw and knew
   2. Must allow the witness to describe in the aggregate rather than break it down into component parts
      a. Three advantages
         i. Since the witness probably has not consciously perecieved or thought about the discrete attributes of the phenomenon, requiring the witness, after the fact, to break down the phenomenon into its component parts would make the testimony appear artificial
         ii. Regardless of the witenss’s actual thought process at the time of perceiving the phenomenon, it may be difficult for ht eiwitness at the time of the trial to reconstruct and articulare the underlying details
         iii. To the extent that the jurors tend to percieve a phenomenon in the aggregate rather than in its component parts, the jurors may be doenecerted and confused about testimony that describes the component parts of the phenomenon
   3. Trial judges are invested with substantial discretion
      a. Limiting witness can become problematic, and when insisting on testimony about facts rather that opinion proves difficult, if not impossible, and impedes rather than facilitates inquiry at trial, lay opinions should be allowed
      b. Judges must be watchful and prevent witnesses from, either purposely or carelessly, drawing conclusions that they are no more qualified than the jury to reach
   4. The more opinions are allowed, the more the witness usurps the role of the fact finder
5. Forbidding lay opinions may at times interfere with the normal manner in which a person relates what has been observed
   a. Detailed descriptions should not be required in some instances because of the way that people perceive certain phenomena
   (iii) Not based on scientific, technical or other specialized knowledge

(2) Elaboration
   (a) Fact versus Opinion
      (i) Line between fact and opinion is unclear
         1. Question of Degree
      (ii) All testimony involves opinions
         1. Witnesses offer opinions of what the witness thinks was observed
            a. Witness’s perspective may have been bad, whether known to the witness or not, and memory may have decayed
      (iii) Distinguishing between fact and opinion pushes witness toward relating sensory impression that are less rather than more thickly varnished
         1. The more testimony concentrates on relating sensory impressions, the easier it is for the fact finder to mediate among conflicting versions from the various witnesses, and thus to decide what actually happened almost as though the juror had access to the inner workings of the witnesses’ minds
      (iv) No plausible alternative to relying on common sense to distinguish between opinion and fact

b) Expert Witnesses
   i) 702
      (1) Elements
         (a) If scientific, technical, or other specialized knowledge
            (i) Broadly interpreted to include a vast array of expert testimony
         (b) Will assist the trier of fact to understand the evidence or to determine a fact in issue
            (i) Any knowledge that is not likely to be possessed by the fact finder qualifies for admission under this rule, no matter how the knowledge is obtained
               1. Person may testify to a skill even if the skill was gained through experiences rather than traditional study
            (ii) If a potential witness possesses knowledge that the fact finder is not likely to possess, even though some other fact finder somewhere else might, the testimony is admissible
               1. Grits – My Cousin Vinny
            (iii) To be confident that such testimony is helpful, one must know the reliability of the information presented and how it is likely to affect the fact finder
         (c) A witness qualified as an expert by knowledge, skill, experience, training, or education
(i) If there is no reasonable doubt about the expertise, the opposing party may try to stipulate to it
1. Counsel often reject the stipulation because they want the fact finder to hear the credentials of the witness

(d) May testify thereto in the form of an opinion or otherwise, IF:
(i) The testimony is based upon sufficient facts
(ii) The testimony is the product of reliable principles and methods
   AND
(iii) The witness has applied the principles and methods reliably to the facts of the case

(2) Elaboration
(a) Evidence with slight probative value might be excluded
(i) May be misleading if scientific jargon gives the evidence an aura of legitimacy that it does not deserve
   1. The complexity of the evidence may tend to confuse rather than help jurors
   2. The speculative nature or low probative value of some specialized evidence may not warrant spending the time to demonstrate the possible relevance of the evidence and to explore all the weaknesses in the evidence
(ii) Three factors that may inhibit parties from procuring unreliable specialized evidence
   1. The attorney will need to develop some familiarity with any specialization about which the attorney desires to interrogate a witness, and the specialist is likely to demand a fee for preparing for the litigation and testifying
   2. The seemingly bizarre nature of some specialized evidence may lead jurors to reject it out of hand
   3. The nature of scientific evidence increases the possibility that unreliable evidence will be exposed on cross-examination

(b) Three Important Cases – Background of Subsections
(i) Frye
   1. Scientific evidence is admissible only when the scientific principle or technique has received general acceptance by a consensus of the relevant scientific community
(ii) Daubert Two Prong Test
   1. The evidence must present valid science meaning it must be what the court considers reliable
      a. Falsifiability
         i. Must assess whether the theory or techniques can be tested
      b. Peer Review
         i. Whether the theory or technique has been subjected to peer review and publication
         ii. Publication does not necessarily correlate with reliability
c. Error Rate  
   i. In the case of a particular scientific techniques, the court ordinarily should consider the known or potential rate of error

d. Operational Standards  
   i. Presence or absence of standards, whether set by government agencies or private associations, governing the practices or techniques employed to produce evidence being offered

e. General Acceptance  
   i. No longer the sine qua non for admissibility, but it still can have an important bearing  
   ii. A scientific technique may be viewed with skepticism if it has been able to attract only minimal support within the community  

(iii) Kuhmot Tire Company  
   1. Daubert does not only apply to scientific evidence  
      a. All expert testimony must have a reliable basis, including testimony by experts based on their experience  
         i. Daubert criteria may be helpful in evaluating other types of expert testimony for reliability, but they are not exclusive  
         ii. Some of the criteria are less likely to apply to nonscientific forms of expert testimony  
   2. The science must be pertinent, meaning it must “fit” in the sense of relating directly to the issues of facts so that it can be truly helpful to the trier of fact

(c) Three Conditions to Admitting Polygraph  
   (i) Notice of intent to use the evidence must be given to the opposition  
   (ii) The opposing side must be given an opportunity to administer its own test AND  
   (iii) Admissibility of the evidence is to be governed by the normal rules for admissibility of corroboration and impeachment evidence  
   1. Corroborating evidence would not be admissible until a witness’s character for truthfulness had been attacked under 608

ii) 705
   (1) Elements  
      a. The expert may testify in terms of opinion or inference  
      b. And give reasons therefor without first testifying to the underlying facts or data UNLESS  
         i. Direct examiner given the flexibility to elicit the opinion or conclusion before developing all the details that support it  
         ii. Permits the opinion without requiring the proponent ever to produce the underlying basis  
   (c) The court requires otherwise
If there is reason to suspect that the information on which the experts bases the opinion is so unreliable that it may be appropriate to exclude the opinion altogether, the opponent will want to test the basis for an opinion before, rather than after the jury hears the opinion.

The expert may in any event be required to disclose the underlying facts or data on cross-examination.

In some cases, the information revealed upon cross-examination can be quite damagin to the party that proffered the evidence, either because it weakens the expert’s credibility or because it muddles the story the jury hears.

Cross-examiner is under no obligation to bring out any facts or data other than those unfavorable to the opinion.

1. Assumed that the cross-examiner has the advance knowledge of the opinion from the discovery process.

(2) Elaboration
(a) Eliminates the requirement of experts testifyin in the form of a response to a hypothetical
(b) Allows Direct Examiner Flexibility
   (i) If the proponent is concerned that the jury will not pay careful attention without having the expert opinion already before them, the proponent may introduce the evidence early
   (ii) If the proponent believes that laying the foundation first and then bringing out the opinion is optimal, that approach is permissible
(c) As a matter of strategy, the direct examiner is likely to explore the bases for an expert’s opinion sometime during the direct examination.

(1) Elements
(a) The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing.
(b) If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject,
   (i) Reasonably relied upon requirement is taken seriously, and judges are not required to bend over backwards to accommodate other disciplines
   (ii) Judge must have a reason to believe that others in the field would rely on similar data
(c) The facts or data need not be admissible in evidence in order for the opinion or inference to be admitted
   (i) Many and most facts relied upon by experts are hearsay that would not be allowed without this element
   (ii) The law bends to accommodate the practices of other professions
(d) Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference UNLESS
   (i)
(e) The court determines that the probative value in assisting the jury to evaluate the expert’s opinion substantially outweighs their prejudicial effect
   (i) Reverse 403 test plus must assist the jury
(2) Elaboration
   (a) The knowledge of other disciplines is not usually organized into legal requirements
c) Opinions on an Ultimate Issue
   i) 704
      (1) 704(a) – Except as privded in subsection (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact
      (2) 704(b) – No expert witness testifying with respect to the mental state or condition of a D in I a criminal case may state an opinion or inference as to whether the D did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto
      (a) Such ultimate issues are matters for the trier of fact alone