RELEVANCY

FRE 401 – Definition of Relevance
Relevant evidence is evidence that tends to make the existence of any fact that is of consequence to the determination of the action more or less probable

- Must be connection from Evidentiary Fact ➔ Fact of Consequence ➔ Essential Element
- Can also include Inferential Facts (e.g. EF ➔ IF ➔ .... ➔ IF ➔ FOC ➔ EE (direct and circumstantial ok – separated only by length of IF chain)

Any tendency to make fact more or less probable (could test not would test)

Reasonable generalizations ➔ reasonable person believes existence of FOC is affected by EF
EXCEPT nothing known to judge to be false AND no speculative generalizations

Allows background info about witness testifying and consequential evidence to explain situation better

FRE 402 – Irrelevant evidence is inadmissible
“All relevant evidence is admissible, except as otherwise provided... Evidence which is not relevant is not admissible.

If relevant ➔ Admissible UNLESS otherwise provided (Const, statute, other rules)
If not relevant ➔ not admissible

FRE 403 – Exceptions to admissibility of relevant evidence
“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation cumulative evidence.”

Balancing Test – Is probative value “sub outweighed by” danger?
“Bad aspect must dominate the mind of the jury, overwhelming the “good” aspect

Excluded only when judge is very confident that the prejudicial aspects outweigh probative value

Determined by:
- strength of underlying inferences,
- certainty of starting point (but judged cannot judge believability)
- need (can be relative – alternative forms of providing fact?)
Dangers
- Unfair Prejudice
  - evidence that might suggest an improper basis upon which the jury could decide the case
  - Two principles to judge this issue
    - Will it trigger a response independent of logical connection to fact at consequence (often emotional)?
    - Will this evidence be used in a way that violates an evidence rule (e.g. showing that past acts are in conformity with character)?

- Confusion of the Issues
  - Focuses attention of jury on collateral issues – trivial connection to the EE

- Misleading the Jury
  - Similar to misleading (often no distinction)
  - Usually refers that jury will draw a mistaken inference
  - Sometimes refers to difficulty of jurors to weigh persuasive force (e.g. expert testimony seems better than it really is)

- Undue Delay/Waste of Time/Needless Cumulative Evidence
  - Delay alone not enough to exclude. Judge must balance
  - Evidence may waste time if it is offered to prove stipulated, collateral, or background facts

FRE 105 – “When evidence 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”

Old Chief v. US
Old Chief charged with crime that added penalty if possession of a firearm accompanied the commission of a crime punishable by more than one year, stipulated to the commission of a crime but prosecution provided evidence which revealed crime was assault. A complained this was prejudicial and had no probative value since the EE (commission of a crime) was stipulated. HELD:
  1. 403 allows comparison of evidence to determine least prejudicial form
  2. Prejudicial evidence CAN be used solely to connect inferences
  3. Here nature of crime shown by stipulation, no need to use assault to satisfy statute or jury requirements
  4. Therefore, prejudice outweighed probative value
FOUNDATION FOR WITNESSES

FRE 601 – Competency
Every person is competent to be a witness EXCEPT as otherwise provided by these rules. (When the fed courts act as judges of state law, state rule on competency govern)

In most cases, allowed to use evidence against competency to question testimony’s validity, but not to bar testimony. Competency challenges can also work under FRE 602, 603, or 403

Children and Mentally ill are competent to testify, provided they meet other rules (e.g. 603 would bar those unable to understand the oath to tell the truth)

FRE 602 – Lack of Personal Knowledge
A witness may not testify to a matter unless evidence in introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness’ own testimony. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

Personal knowledge of subject being testified about is required – typically achieved by witness statement

Percipient witnesses (those who were there to see it go down) are most common, but can also have witnesses who only heard the action, etc.

FRE 603 – Oath or affirmation
Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness’ conscience and impress the witness; mind with the duty to do so.

FRE 601, 602, 603 taken together
Rules require:
- the witness has the capacity to accurately perceive record and recollect impressions of facts at the time of the event.
- the witness did in fact did perceive, record, and ca recollect impressions having the any tendency to establish a FOC
- the witness declares that he will tell the truth, understand the duty to tell the truth,, and understands the difference between a truth and a lie or fantasy
- the witness possess the capacity to comprehend questions an express himself understandably, where necessary with the aid of an interpreter

FRE 604 – Interpreters
Subject to rules relating to qualification as an expert
Subject to administration of an oath to make a true translation

FRE 605 & 606 – Prevent presiding judge or jury from testifying
FRE 901(a) – Authentication and identification of exhibits
The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims

Real Evidence
- tangible exhibit that played some role in the events that in dispute at trial
- typically identified pursuant to FRE 901 by testimony concerning:
  - a readily identifiable characteristic of the exhibit AND/OR
  - the chain of custody (may be necessary to establish unchanged condition)
- Pursuant to FRE 901(a), the judge must determine whether there is evidence sufficient to support a finding of the exhibit’s identity and unchanged condition

Proponent of evidence must establish 2 things:
- what the proponent claims the exhibit is – alleged connection between item and events at dispute
- testimony “sufficient to support the finding” that the evidence is what it is claimed to be – judge must determine that a jury could reasonably find the item more likely than not to be what it is claimed to be

Process of laying the foundation
- Item offered into evidence
- Hearing to prove it is what it is claimed to be
- Item become part of record

Examples of Real and Demonstrative evidence, written docs, and recordings
- Real Evidence
  - Tangible items that played some role in the litigated event and from which the jury can draw inferences
  - can be identified through readily identifiable characteristic or chain of custody
    - chain of custody not always required
- Demonstrative evidence
  - Generally
    - exhibits that reproduce or depict persons, objects or scenes connected to litigated events
    - Relevant b/c its content is connected to the case – must assist trier of fact
    - Demonstrative evidence needs:
      - testimony as to what its contents are claimed to be
      - evidence that the witness has a basis for being able to identify it
      - evidence that it is a “fair, accurate, and true” reproduction
    - may violate FRE 403 (e.g. gruesome photos or autopsy report)
- Demonstrative Evidence (con.)
  o Demonstrations and experiments in court
    ▪ Often vulnerable to FRE 403 for potential to confuse or mislead
    ▪ Lay foundation by showing similarity of demonstration to event
  o Recorded Simulations and Reconstruction of Events
    ▪ subject to same foundation of fairness and accuracy
    ▪ risks oversimplifying real world events
    ▪ might mislead jurors into overestimating the value
  o Written Documents
    ▪ can be identified as accurate by:
      • signature
      • contents alone – FRE 901(b)(1)
      • testimony of a custodian (business records) – FRE 901(b)(1)
      • public records or reports – FRE 901(b)(7)
  o Ancient Documents
    ▪ Over 20 years old
    ▪ Must be in a place logical for an authentic document
      • Pursuant to FRE 901(b)(8)
  o Electronic Documents
    ▪ Authenticity issues, but modern courts are fairly confident
    ▪ no specific mention in FRE 901(b)
  o Recordings
    ▪ courts easily accept, provided can be shown to be accurate and real
    ▪ percipient witness can lay foundation by corroborating events
    ▪ if no percipient witness to corroborate (“silent witness”) – authenticity
      depends on science of operating device, qualifications of operator,
      unchanged condition of recording, and chain of custody
    ▪ can be authenticated by contents alone

- FRE 901 is flexibly construed
  o FRE 901(b) is illustrative, not comprehensive

FRE 902 – Self-Authenticating Documents
List of types of written documents that are considered so secure that they need no authentication

Self-authentication does not resolve questions as to source or accuracy of information in the doc

Objections can still be made on grounds of inaccuracy or hearsay
PRELIMINARY QUESTIONS

FRE 104 – Judicial Determination of Preliminary Questions

Two methods:

FRE 104(a) – The Court Decides the Preliminary Question Itself, Under a Preponderance of the Evidence Standard

- Preliminary question of fact concerning the qualification of a person to be a witness, the existence of privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its decision it is not bound by the rules of evidence except those with respect to privileges.
  - Judge has full power to make decision as to admissibility and is permitted to hear all available evidence (regardless of legal relevancy, hearsay, etc)
  - E.g. Is the alleged expert a qualified physician? Is a witness whose former testimony is offered unavailable? Was a stranger present during a conversation between attorney and client? Does a hearsay statement offered as a declaration against interest possess the required against interest characteristics?

FRE 104(b) the court screens the preliminary question, under a sufficiency of the evidence standard, but gives the question to the jury.

- When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.
  - Judge makes preliminary decision on “sufficiency of evidence” to prove the fact its offered to prove. Low threshold. Could a reasonable jury conclude it proves the fact? If judge determines yes, goes to jury for final decision.
  - E.g. Did X receive the statement that Y relies on to prove that he gave notice to X? Is Z really the author of the letter W presents?
  - “Conditional relevancy” – relevancy is dependant on some decision of fact. If jury believes the contested facts about the evidence, it is relevant. IF jury does not believe contested fact, irrelevant. Jury is entitled to hear the evidence and judge the credibility of the witnesses. Judge is entitled to prevent presentation of this evidence ONLY if he concludes that no reasonable jury could reach that conclusion
BEST EVIDENCE RULE

Generally, it is assumed that an original is more probative than a copy – less chance of deceit, inaccuracy, or incomplete duplication
- preference given to originals
- may be waived. Duplicates can be used if the absence of the original is explained or justified

FRE 1001 – Definitions
- writings and recordings
- photographs
- original (includes photos printed from original negative, carbon copies of contracts, prints from a computer holding an original)
- Duplicate

FRE 1002 – Requirement of Original; Former Testimony; Depositions
To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided...”

Not required
- in relation to testimony that seeks to prove that there is no reference to a matter
- if a photograph or motion picture is introduced by a witness to illustrate testimony (e.g. “is this video consistent with what you observed?”)
- if all that is important is facts about a writing, not precise terms of the writing (e.g. “did you file a report?”)

Required
- if the content is the event (obscenity prosecution, libel suit, etc)
- if the content is the record of the event (automatic picture, transcript, officer’s report, etc)

FRE 1003 – Admissibility of Duplicates
A duplicate is admissible to the same extent as an original unless (1) a genuine question is released as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

FRE 1004 – Admissibility of Other Evidence of its Contents
The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if (1) originals lost or destroyed... (2) original not obtainable ... (3) original in possession of opponent ... (4) collateral matters

Rule of Best Evidence is essentially a rule of preference, given the numerous ways exceptions

There are no degrees of secondary sources. Advisory Committee notes that this is typically handled by a proponents desire to provide the most compelling evidence available.
Sub-provision notes
(1) Originals Lost or Destroyed
   o cannot be destroyed in bad faith by proponent of duplicate (or a person who act at
     the instigation of the proponent)
   o loss or destruction typically proved by evidence of a diligent but unsuccessful
     source
   o proof of loss or destruction pursuant to FRE 104(a) – judge decides based on
     preponderance of the evidence
(2) Original not obtainable
   o in possession of a third party
   o requires proponent to show that originals cannot be obtained by judicial process
     (subpoena)
(3) Original in possession of opponent
   o must give reasonable notice to the other party to produce
   o gives other party an opportunity to produce, does not compel them to do so
   o logic – if they have opportunity but don’t produce original, don’t need to protect
     them from the secondary source
(4) Collateral matters
   o not closely related to a controlling issue

FRE 1005 – Public Records
Generally, you don’t need the original of a public record if (1) the record has been certified as
correct under FRE 902 or (2) testimony by someone who compared the copy to the original has
shown it to be correct

FRE 1006 - Summaries
The contents of voluminous writings, recordings, or photographs which cannot conveniently be
examined in court may be presented in the form of a chart, summary, or calculation.

The originals, or duplicates, shall be made available for examination or copying, or both, by
other parties at reasonable time and place.

The court may order that they be produced in court.

Types of summaries permitted
   o voluminous documents not admitted in court
     ▪ original documents must be shown to be admissible, but don’t need to be
       actually admitted
     ▪ summary then becomes evidence itself
     ▪ as evidence, it is not subject to limiting instructions
Types of summaries permitted (con)

- Illustrative Evidence
  - Summarize and display evidence that has already been admitted
  - Not admitted as evidence, and are not subject to FRE 1006
  - Foundation must be laid, but this is done under FRE 403 and provisions for testimony found in FRE 611(a)

- Analytic Summaries
  - Combine FRE 1006 and FRE 611(a) – not merely illustrative because they have some analysis, but refer only to items already in evidence
  - Admitted as evidence
  - Only as credible as underlying evidence to which they refer

**FRE 1007 - Testimony or Written Admission of Party**

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party’s written admission, without accounting for the non-production of the original.

No requirement to account for lack of original

Only applies to written admissions or those in testimony

- Does not apply to oral statements
- Oral admissions may be used if missing original is addressed and oral admission is being used to allow duplicate pursuant to FRE 1004

**FRE 1008 – Functions for the Court and Jury**

When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of FRE 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another WRP produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

Examples of preliminary questions of fact regarding the best evidence rule that are decided by the judge:

- Whether a given piece of evidence is an original
- Whether a given item qualifies as a duplicate
- Whether a genuine question is raised as to the authenticity of the original
- Whether it would be unfair to admit a duplicate in lieu of the original
- Whether an original is lost or destroyed, and whether a diligent search has been conducted for the original
- Whether the proponent lost or destroyed evidence in bad faith
- Whether an original can be obtained by any available judicial process
Examples of preliminary questions of fact regarding the best evidence rule that are decided by the judge (con):
  o whether an adverse party has possession or control over the original, and if so, whether proper notice was given to that party
  o whether evidence goes to a collateral matter or to a controlling issue

Judge uses lower standard only if it is the specific factual issue for which the factfinder is trying to determine (e.g. was there a contract?)
CHARACTER AND PROPENSITY RULES

General notes:
Character is different than reputation

- Character is nature of a person – their disposition
- Reputation is the community estimate of a person’s character (may enter under FRE 405 or FRE 608)

Only directly pertinent character evidence is relevant (e.g. evidence of non-violence doesn’t help if the charge is fraud)

Character Evidence is available only in criminal cases (unless part of the charge, claim, or defense under FRE 405(b))

FRE 404(a) – Character evidence not admissible to prove conduct; exceptions
Evidence of a person’s character or a trait of character is no admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

1) Character of accused.
   - Can only be first raised by the defendant
     - Prosecution can offer evidence of bad character of Δ to rebut evidence of good character offered by Δ
       - Needs to rebut the same character trait as offered by the Δ’s testimony
     - If evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under FRE 404(a)(2), evidence of the same trait of character of the accused may be offered by the prosecution.
       - Designed to prevent Δ from attacking victim’s character while being protected from having his own character revealed.

   - Must be in the form of reputation or opinion testimony
     - Cannot use evidence of specific conduct per FRE 405(a)

   - Prosecution may introduce evidence regardless of whether Δ testifies, so long as evidence of his character is introduced

2) Character of alleged victim
   - The Δ may introduce evidence of the alleged victim’s bad character
     - Prosecution may not initiate character evidence relating to victim
     - If the Δ opens the door, the prosecution may offer evidence showing:
       - victim’s good character
       - that the Δ shares the same bad trait that s/he alleges in victim
     - in homicide cases, the prosecution may rebut evidence that the victim was the first aggressor by offering evidence that the victim had a peaceful character
Character of witnesses

- may be introduced to impeach testimony under FRE 607-609

FRE 404(b) – Other crimes, wrongs or acts

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may be admissible for other purposes ... [notice requirement]

Other purposes where other crimes might be relevant

- Listed in FRE 404(b)
  - proof of motive
  - opportunity – acts that prove presence, access, special skills, tools
  - intent
  - preparation
  - plan
  - knowledge
  - identity
  - absence of mistake or accident

- other purposes (list is illustrative, not exhaustive)
  - existence of a conspiracy
  - person’s participation in a conspiracy
  - consciousness of guilt
  - to corroborate crucial testimony
  - to rebut a defense of entrapment
  - to complete the story of the crime by placing it in context of nearby and contemporaneous crimes (e.g. evidence of killing spree)
  - to prove the existence of a larger plan, scheme or conspiracy, of which the crime on trial is a part
  - to prove other crimes by the accused so nearly identical as to show them as handiwork of the accused (calling card crimes)
  - propensity for abnormal sexual relations

Introduction of crimes for other purposes is subject to FRE 403; Limiting instruction under FRE105 should be addressed at jury to indicate that evidence should “not go to the character of the accused”

Three things are needed to introduce evidence of prior acts

- non-character purpose for the evidence
- evidence that the person who allegedly committed the act did indeed commit the act
- ability to respond to a FRE 403 objection for prejudice

No specific time limit on notice requirement
FRE 405(a) – Methods of Proving Character; Reputation or Opinion
In all cases in which evidence of character or trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross examination, inquiry is allowable into relevant specific instances of conduct.

Specific acts on cross (specific instances of relevant conduct and rumors and reports thereof may be brought out on cross; the reputation or opinion witness may be asked either “if he knows” or “has he heard” of such matters)
  o counsel must have a good faith basis for an inquiry; counsel may be required to disclose this to the court (away from jury)
  o extrinsic evidence not permitted – can only take witnesses answer
  o may deserve a FRE 105 limiting instruction

<table>
<thead>
<tr>
<th>Δ may:</th>
<th>If so, prosecution may</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduce evidence of his own good character using opinion or reputation evidence (but not specific act)</td>
<td>-Cross-examine character witnesses using evidence of reputation, opinion, and specific acts (but only in relation to the traits introduced by Δ)</td>
</tr>
<tr>
<td>(If the prosecution produces its own character witnesses, the Δ may ask about specific acts on cross)</td>
<td>-Produce their own character witnesses to rebut evidence of accused’s good character by means of reputation and opinion (BUT NOT specific acts)</td>
</tr>
<tr>
<td>Introduce evidence of the victim’s bad character by means of reputation or opinion evidence (BUT NOT specific acts)</td>
<td>-Cross-examine character witnesses using evidence of reputation, opinion, and specific acts (but only in relation to the traits introduced by Δ)</td>
</tr>
<tr>
<td>(If the prosecution produces its own character witnesses, the Δ may ask about specific acts on cross)</td>
<td>-Produce their own character witnesses to rebut evidence of victim’s bad character by means of reputation and opinion (BUT NOT specific acts)</td>
</tr>
<tr>
<td>-Produce their own character witnesses to provide evidence of that the accused has the same bad character trait using reputation and opinion evidence (BUT NOT specific acts)</td>
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</tr>
<tr>
<td>In homicide cases, produce evidence (by testimony or otherwise) indicating that the victim was the first aggressor</td>
<td>Introduce evidence of the victim’s peaceful nature (by testimony or otherwise)</td>
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FRE 405(b) – Character as an element; Specific instances of conduct
In cases where 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.

Examples:
  o chastity of a victim under a statute where that is an element of the crime
  o competency of a driver when charged with negligently entrusting a motor vehicle to an incompetent driver
Examples (con)
  - truthfulness in a perjury prosecution
  - truth is an essential element of a defamation defense
  - fitness or character in a custody determination
  - character for lack of care is an essential element in a negligence claim
  - when damages in a wrongful death claim depend on character

Other Issues
  - Is the evidence offered to address a contested issue?
    - If a $\Delta$ stipulates to knowledge, what use is past act evidence?
      - E.g. $\Delta$ is charged with possessing heroin. Pros. offers evidence that $\Delta$ sold heroin 2 years ago to show that $\Delta$ knows what heroin is. $\Delta$ asks for a statement that he knows what heroin is rather than the example.

      - Courts should weigh the probative value of evidence against the prejudicial tendencies under FRE 403
        - This seems like it would not support the heroin sale

      - In fact, courts are loath to throw out this type of evidence. They logic that the stipulation does not make the evidence irrelevant. Given a non-character purpose, they will accept that the admission of the evidence was proper (or at least not reversible error.
          - Under this view, the heroin evidence comes in.

  - Anticoincidence theory – If the specific acts are numerous enough and similar enough to the accused act, coincidence or randomness seems like a poor explanation. Admissibility is determined by asking:
    - Taking into account the anticoincidence theory, is there relevant evidence to support a finding that $\Delta$ was culpably involved in one or more of the prior incidents, even if we are not sure which one?

    - To the extent that there is sufficient evidence to support such a finding, is the evidence relevant to prove something other than $\Delta$’s character (absence of accident, etc)

    - Is the probative value substantially outweighed by a FRE 403 danger?
SEXUAL BEHAVIOR

FRE 412 – Sex Offense Cases; Relevance of alleged victim’s past sexual behavior or alleged sexual predisposition

(a) – Generally excluded
The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c)

1. Evidence offered to prove that any alleged victim engaged in other sexual behavior
   - “Accused” and “alleged” victim are not technical terms. There don’t need to be charges for FRE 412 to take effect
   - includes all activities that involve actual physical conduct or that imply sexual intercourse or conduct
     - use of contraceptives, birth of an illegitimate child, veneral disease
     - activities of the mind – fantasies or dreams

2. Evidence offered to prove any alleged victim’s sexual predisposition
   - evidence that does not directly refer to sexual activities or thought but that the proponent believes may have a sexual connotation for the fact finder

(b) – Exceptions
(1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules
   (A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence
      - evidence that a third party was responsible for semen, injury or other evidence
   (B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution
      - victim’s behavior with the accused can be used by \( \Delta \) to show consent
      - may also be used by the prosecution
   (C) evidence the exclusion of which would violate \( \Delta \)’s constitutional rights
      - due process doctrine that criminal \( \Delta \) has the right to a defense
        - right of \( \Delta \) to present reasonable defense trumps state policy
        - importance of the evidence triggers right
(C) evidence the exclusion of which would violate Δ’s constitutional rights (con)
  • Sixth Amendment confrontation clause right to confront and cross-examine witnesses
  • Constitutional challenges rarely successful
    o exception is when Δ seeks to introduce the evidence to impeach the alleged victim by showing bias

(2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim’s reputation is admissible only if it has been placed in controversy by the alleged victim.
  o Reverse 403 Test – favors exclusion
    ▪ probative value must substantially outweigh countervailing factors

(c) – Procedure to determine admissibility
Notice requirement more strict than any other notice requirement in FRE

FRE 413 – Evidence of Similar Crimes in Sexual Assault Cases

(a) In a criminal case in which the Δ is accused of an offense of sexual assault, evidence for the Δ’s commission of another offense or offenses of sexual assault is admissible and may be considered for its bearing on any matter to which it is relevant
  o admissible for any matter which is relevant
    ▪ propensity to commit similar offenses
    ▪ assessment of the probability or improbability that the Δ has been falsely accused
    ▪ no right to limiting instruction and prosecutor may make a propensity/character argument at closing
  o “is admissible” language makes it seem that other FRE rules are inapplicable
    ▪ this interpretation has been rejected

(b) [Notice requirement] – 15 days before trial or other later date the court allows for cause
(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule

(d) “Offenses of sexual assault” means any crime that involved
  o conduct proscribed by chapter 109A of Title 18
  o contact, w/o consent, between any part of the Δ’s body or an object and the genitals or anus of another person
    ▪ consent means
      • actual consent – against a person’s will
      • legal consent – person is unable to legally consent (age of minor)
(d) “Offenses of sexual assault” means any crime that involved (con)
  o contact, w/o consent, between the genitals or anus of the Δ and any part of another person’s body
  o deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain to another person
  o an attempt or conspiracy to engage in conduct described in paragraphs (1)-(4)

**FRE 414 – Evidence of Similar Crimes in Child Molestation Cases**
Identical to FRE 413, but substitute child molestation for sexual assault

Child is a person under the age of 14

**FRE 415 – Evidence of Similar Acts in Civil cases concerning Sexual assault or child molestation**

(a) In a civil cases in which a claim for damages or other relief is predicated on a party’s alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party’s commission of another offense or offenses of sexual assault or child molestation is admissible and may considered as provided in FRE 413 and 414

(b) [Must be disclosed to other party 15 days in advance unless ct. gives extension]
HABIT AND ROUTINE PRACTICE

FRE 406 – Habit; Routine Practice
Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitneses, 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.

Habit of an individual
- A regular response to a repeated specific situation – becomes semi-automatic
- Admitted only if a sufficient pattern exists established.
- Distinguished from character traits by regularity, specificity, and moral neutrality
  - Strategically, first look to existing case law, then:
    - If the act is consistent and regular, push for habit based on high probative value
    - If there is a risk of unfair prejudice, or generalizations, seek character
- Not:
  - “habit” of intemperance to show drunkenness
  - Evidence of other assaults to prove an assault
  - Evidence of a religious “habit” to show presence at a particular time

Routine of an organization
- Admitted only if a sufficient pattern of repeated responses is established to warrant a finding that the practice was routine

Methods of proving
- Introduction of testimony on a number of specific acts
- Summary or “opinion” based upon personal knowledge of a number of observations not described individually
  - FRE 602 and 701, in combination, provide that an opinion of a non-expert witness is admissible if based upon personal knowledge and helpful to the trier of fact in determining the FOC
- NOT allowed to use reputation evidence
- Proof is subject to FRE 403 against prejudicial evidence

Judicial fact-finding
- First, is the activity one that could be called habit?
- Second, does the witness’s testimony establish that the activity is sufficiently regularized to be her habit.
- In close cases on either question, judges lean towards non-admissibility
EVIDENCE INADMISSIBLE TO PROVE FAULT OR LIABILITY

FRE 407 – Subsequent Remedial Action
When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product’s design, or a need to offer a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted or impeachment.

Rational
- Steps taken afterward may be overly relied upon by the jury to indicate that the responsible party acted negligently
- Public policy not served if person is held liable for improvements, since public policy desires that corrective steps are taken

Activities that may be sub. remedial measures
- Sending a memo to employees urging them to follow safety regs.
- Repairing or altering the condition of property
- Disciplining or firing an individual whose alleged negligence was responsible for an accident
- Sending a recall notice
- Changing rules or regulations
- Posting warning signs

DOES NOT APPLY to investigations which are not remedial measures but only “steps toward ascertaining whether remedial measures are called for”

Must occur “after an injury or harm caused by an event”
- Rule applies to changes only after occurrence
- If Δ took the remedial action subsequent to the injuries of several other people, but prior to the π’s injury, FRE 407 does not preclude

“If controverted” language regarding other purposes for which the evidence may be admitted
- Applies to proving:
  - Ownership
  - Control
  - Feasibility
- Does not apply to impeachment
- If an issue is not controverted, FRE 403 may provide means to preclude the evidence
FRE 408 – Compromise and Offers of Compromise

- Evidence of the following is not admissible to prove liability for, amount of, or invalidity of a claim which was disputed as to either validity or amount
  o furnishing or promising to furnish a valuable concession in compromising or attempting to compromise the claim
  o accepting or offering or promising to accept a valuable concession in compromising or attempting to compromise the claim

- Evidence of conduct or statement made in compromise negotiations is likewise not admissible

- This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.

- This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution
HEARSAY

FRE 801 – Definitions

(a) Statement. A statement is
   (1) an oral or written assertion
   (2) non verbal conduct of a person, if it is intended by the person as an assertion

(b) Declarant. A declarant is a person who makes a statement

(c) Hearsay. Hearsay is a statement, other than one made by the declarant while testifying at
   the trial or hearing, offered to in evidence to prove the truth of the matter asserted

FRE 802 – Hearsay Rule
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.

Components:
   o statement
   o by declarant
   o outside of court
   o offered to prove the truth of the matter asserted

Reasoning
   o No oath
   o No ability of trier of fact to evaluate witness in person
   o No cross-examination

Includes
   o Testimony by witnesses about their own out of court statements
   o Testimony based entirely on hearsay (e.g. a witness testifying that something
     happened when the only reason she knows that is because someone told her)
   o Multiple hearsay (he said she said that he said...). Each element of hearsay would
     need an exception.
     - FRE 805 – Hearsay within hearsay. Hearsay included within hearsay is
       not excluded under the hearsay rule if each part of the combined
       statements conforms with an exception to the hearsay rule provided in
       these rules.

Does not include:
   o testimony not offered to prove the truth of what is asserted
     - Mere utterance – words offered merely to prove that words were spoken,
       truth of statement irrelevant
     - Effect on the hearer or reader – offered not to prove truth, but just that the
       statement was made and affected the hearer
- **Independent legal significance** – the fact that the words were spoken is important in and of itself, regardless of whether the declarant actually meant/believed the words
  - *Gifts/Contracts* – “Take this as a gift” is a legally functional phrase and is not hearsay
    - Past tense exception – “I gave that to you as a gift.” does not have the same legal status
  - *Defamation* – word’s meaning and impact determined by trier of fact.
- **State of mind** – Knowledge, belief or intent – statements that indicate that the declarant had certain knowledge will be admitted because the truth is irrelevant. (E.g. warnings)
  - testimony about speech that is not assertive
  - *Silence* – not assertive, therefore not a statement under FRE 801, so cannot be hearsay
    - *Nonassertive Conduct* – conduct offered to prove something that was not intended to be asserted by the declarant (e.g declarant did why, which indicates that declarant believed Y, and Y is a FOC).
  - testimony about a statement made by someone other than a declarant (a declarant must be human)
    - *Machine readings* – a machine reading is not hearsay (radar gun) even if reported by a witness. Testimony must be offered as to the machine’s accuracy
    - *Animals* – evidence of animal behavior (bloodhounds) is not hearsay

### HEARSAY EXCEPTIONS

**FRE 801(d)** – Statements which are not hearsay.

**1. Prior statement by witness.** The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is

a. inconsistent with the declarant’s testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other preceding, or in a deposition
  - inconsistent statement admissible at any time
  - must be made under oath, though
b. consistent with the declarant’s testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive
   ▪ admissible only in response to claims of fabrication
   ▪ does not need to be given under oath

c. one of identification of a person made after perceiving the person
   ▪ others (such as police officers present) may testify as to the prior identification, so long as the declarant also testifies
   ▪ limited to identification of persons, not objects
   ▪ loss of memory does not invalidate – even if the declarant does not remember making the identification, others can testify (so long as the declarant does testify as well)

(2) Admission by party-opponent. The statement is offered against a party and is
a. the party’s own statement, in either an individual or representative capacity
   ▪ any statement made by a party may be used against it
   ▪ includes pleadings (unless later amended or plead in the alternative)
     • not withdrawn guilty pleads per FRE 410
   ▪ acts of culpability (flight from prosecution or obstruction of justice)

b. a statement of which the party has manifested an adoption or belief in its truth
   ▪ real and knowing adoption
     • Typical example – Did you hit my car? Yes
     • Not necessary to know the contents (e.g. “X is a reliable person and knows what he’s talking about”)
   ▪ silence not typically allowed to prove adoption
     • explicitly prohibited in criminal cases
   ▪ decision on adoption
     • typically left to judge to determine whether the assertion was adopted under FRE 104(a)

c. a statement by a person authorized by the party to make a statement concerning the subject
   ▪ must be authorized to speak on issue (e.g. corporate spokesperson)
   ▪ conversations with principal admissible

d. a statement by the party’s agent or servant concerning a matter within the scope of the agency or employment made during the existence of the relationship
   ▪ within scope of agency (Kuhns cannot bind Wash U with a comment on tuition, but he could bind them with a statement on the evidence curriculum)
   ▪ must be while an agent (no good if ex-employee makes statement)

e. a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.
• Requirements
  • Member of same conspiracy
  • during course of conspiracy
  • in furtherance of the conspiracy

• no need to charge conspiracy
  • must be a conspiracy by preponderance of the evidence under FRE 104(a)
  • must be evidence apart from