I. INTRODUCTION

- Rule 103  -  Rule 605
- Rule 104  -  Rule 606
- Rule 401  -  Rule 611
- Rule 402  -  Rule 614
- Rule 403  -  Old Chief v. United States

A. Kinds of evidence: direct evidence v. circumstantial evidence

1. Direct evidence is evidence which, if believed, automatically resolves the issue
   a) ex. W says, “I saw D strangle V.”
   b) not always better b/c of witness credibility problems

2. Circumstantial evidence is evidence which, even if believed, does not resolve the issue unless additional reasoning is used; must draw an inference/chain of reasoning
   a) ex. W says, “I saw D running from the place where V’s body was found and I found a stocking in D’s pocket.”
   b) ex. fingerprints

3. Probative value: the probative value of direct evidence is not necessarily higher than the circumstantial evidence, but it will sometimes be more readily admitted by the judge.

B. Conditions for admitting evidence

1. Relevant: Only relevant evidence may be admitted [FRE 402] – threshold issue for all evidence (relevant evidence admissible unless otherwise provided; all irrelevant evidence is inadmissible)
   a) def: evidence is relevant if it has “any tendency to make the existence of [a material] fact. . . more probable or less probable than it would be without the evidence” [FRE 401]
   b) to be admissible, evidence must be both probative and material
      i) material = consequential facts:
         - the elements of the crime charged
         - the elements of a cause of action
         - the elements of an affirmative defense
         - damages in civil cases
         - evidence that bears circumstantially upon the evaluation of the probative value given to the other evidence in the case (ex. credibility, demeanor, impeachment, background info)
      ii) immaterial
         - evidence which helps prove a proposition, but not one at issue in the case (Advisory Committee Notes)
         - evidence which is of so little help in proving a proposition at issue as to be not worth hearing (suffers in value)
      iii) however, background evidence is still admissible
      iv) probative = increases the likelihood, even if by only a small amount
   c) remoteness is tied to relevancy – evidence is remote when it is so removed in time or circumstances that it is deemed unusable for the case
   d) judge determines relevancy based on experience or science, applied logically to the situation at hand
   e) relevancy is a very low standard
2. Conditional Relevancy
   a) governed by FRE 104(b)
   b) when the relevancy and admissibility of evidence relies upon the existence of a particular preliminary fact
   c) admitted by the judge if a reasonable jury could find by a preponderance of the evidence that the fact exists
   d) sometimes the foundation for the admissibility of an item of evidence cannot be laid through the testimony of one witness. In such cases, the trial court will often permit the jury to hear the evidence on the condition that the foundation will be laid through later witnesses

3. RULE 403 BALANCING: evidence may be excluded if its **probative value is substantially outweighed by** the danger of:
   a) unfair prejudice
      i) jury cannot rationally evaluate the evidence
      ii) causes jury to disregard the issues
      iii) jury would use it for improper purposes
      iv) ex. evidence of excessive violence or gruesome photos
      v) Advisory Committee Notes: Evidence has a high danger of unfair prejudice when it has an undue tendency to suggest a decision on an improper basis, commonly an emotional one.
   b) confusion of the issues
   c) misleading the jury
      i) mathematical probability and some scientific evidence (except DNA probability, which is usually admitted)
      ii) probability as evidence of guilt in a criminal case (People v. Collins)
      iii) scientific experiments that seek to replicate or simulate events on which a lawsuit are based are subject to Daubert tests (for expert witnesses)
      iv) must be sufficiently similar to the events that occurred
   d) considerations of undue delay, waste of time, or needless presentation of cumulative evidence
   e) **most important evidence rule – always comes up!**
   f) STEPS
      i) judge determines probative value of evidence
      ii) the court identifies the presence of any of the dangers
      iii) judge engages in 403 balancing – if the dangers **substantially outweigh** the probative value, exclusion is **discretionary**
         - **favors admissibility**
         - in judge’s discretion – very rarely overturned on appeal
g) exclusion of evidence b/c of prejudice should only be done as a last resort after the judge determines that a limiting instruction to the jury would be insufficient to offset any prejudice

h) Old Chief v. United States: Balancing Test: If evidence is highly prejudicial, the judge evaluates the degrees of probative value and unfair prejudice for that item and for any actually available substitutes; if an alternative is found to have substantially the same or greater probative value and a lower danger of prejudice, sound judicial discretion exclude the first item if its discounted probative value were substantially outweighed by unfairly prejudicial risk.

   i) def. charged w/ possession of a firearm by someone who has committed a prior felony
   ii) def. stipulated that he had been convicted of a felony, but to keep the nature of the felony (assault causing serious harm) out
   iii) Court said that it was an abuse of discretion to admit evidence of the nature of the prior felony when a party admission of felony conviction was available
   iv) Holding has been limited to only cases arising under 18 U.S.C. §922

4. Similar Happenings
   a) FRE don’t explicitly address, however FRE 402 requires that evidence be relevant means that the court should exclude prior episodes not substantially similar to the present situation
      i) collateral to specific facts
      ii) jurors might be misled
      iii) differences in the situations diminish the worth of the evidence
   b) Common uses
      i) to show dangerous condition, accidents, or defective property (products liability)
      ii) sale of property or services (for value)
      iii) prior course of dealings b/w parties
      iv) prior custom or usage in industry
      v) repeat litigation by same party (ex. people that sue often and for same kind of suit, like whiplash)
      vi) to show causation
      vii) to show mental state of party when at issue
      viii) rebut claim of impossibility
      ix) lack of similar circumstances to show absence of culpability or fault but only if substantially similar and evidence that would have received info of problem
   c) must be substantially similar
   d) ways to cure prejudice
      i) stipulations
      ii) limiting instructions
      iii) admitting liability

C. Making and responding to objections
   1. making objections
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a) not automatic – evidence will not be excluded unless the opponent makes an objection [FRE 103(a)(1)]
b) timely – the objection must be timely (usually b/f the witness can answer the question) [FRE 103(a)(1)]
c) specific – the objection must be specific enough to explain to the trial judge and the appeals court the basis for it [FRE 103(a)(1)]
d) an objection must be made to preserve a challenge to admissibility on appeal [FRE 103(a)(1)]
e) when able to, should be away from jury so jury doesn’t hear inadmissible evidence

2. responding to the objection
   a) if the judge sustains the objection, the proponent must usually make an offer of proof in order to preserve his right to argue on appeal that the evidence should have been admitted; must make it clear what the evidence would be through: [FRE 103(a)(2)]
      i) testimony (witness states or attorney describes)
      ii) objects (mark and enter as excluded)
      iii) should be away from jury

D. Themes in the FRE
   1. admissibility is favored
   2. Trial judge discretion
   3. Distinctions b/w civil and criminal cases

E. Roles of the Judge and Jury
   1. Role of the Judge
      a) controls the conduct of trial [FRE 611]
      b) admissibility of evidence, qualifications of witnesses
         i) when determining admissibility, the trial court is not bound by the rules of evidence except those with respect to privileges
      c) Under rule 614(a), the trial court can call witnesses on its own motion
         i) rarely exercised
         ii) all parties are entitled to cross-examine a court-called witness
      d) under Rule 614(b), the trial court can question witnesses
         i) to clear up doubts from testimony
         ii) should generally stick to matters raised by the parties
      e) Under Rule 614(c), objections to the questioning of witnesses by the court may be made at the time the witness is questioned or at the next available opportunity that the jury is absent
      f) must be impartial
         i) Rule 605 – judges cannot testify as witnesses in that trial
      g) decides preliminary questions regarding the qualifications of persons to be witnesses, the existence of privilege, or the admissibility of evidence [Rule 104]
      h) decides if facts exists are sufficient for conditional relevancy
      j) can look at material that is inadmissible when making many determinations
   2. Role of Jury
      a) weight of evidence
      b) jury nullification
c) fact determination
   i) judicial notice: judicial declaration of fact when facts are beyond dispute, where the court instructs juries to accept certain facts as true

d) Under Rule 606(a) a member of the jury may not testify as a witness b/f that jury in the trial of the case in which the juror is sitting

e) upon inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of jury deliberations or to the effect of anything upon that or any other juror’s mind or emotions in making his decision [Rule 606(b)]
   i) a juror may testify on the question whether extraneous prejudicial info was improperly brought to the jury’s attn or whether any outside influence was improperly drawn to bear upon any juror
   ii) common experienced is allowed for discussion in jury deliberations; no specialized information is allowed, however

F. Appeals and Error

1. Under Rule 103, error may not be predicated upon a ruling which admits or excludes evidence unless (1) a substantial right of the party is affect and
   a) if the ruling is for the admission of evidence, a timely objection or motion to strike stating the specific reason for the objection or
   b) if the ruling is for the exclusion of evidence, the objection was made to the court,
   c) Once the court makes a definitive ruling on the record, admitting or excluding evidence, either at or b/f trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal

II. AUTHENTICATION

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Seiler v. Lucasfilm, Ltd.

A. Generally

1. FRE 901(a): the proponent of all evidence must come up with evidence sufficient to support a finding that the matter in question is what the proponent claims
   a) jury decides whether the proffered item is what the proponent claims it to be
   b) judge determines whether there is some evidence from which a jury could reasonably find that the item is what it is claimed to be

2. Real evidence: if the object is real evidence (a tangible object that played some actual role in the matter that gave rise to the litigation), authentication means showing the object is the object that was involved in the underlying event

3. Demonstrative: if the evidence is demonstrative (tangible evidence that illustrates a matter of importance in the litigation, such as a model or diagram), authentication usually
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means showing that the object fairly represents or illustrates what it is claimed to represent or illustrate

B. Methods of authentication

1. Real Evidence
   a) readily or uniquely identifiable items – can be authenticated by showing that it is readily and uniquely identifiable and the object is therefore the one that played the actual role
   b) chain of custody: the item’s chain of custody must be demonstrated; every person who handled or possessed the object since it was first recognized as being relevant must explain what he did with it

2. Demonstrative Evidence – authenticated by showing that the object fairly represents some aspect of the case

3. Sponsoring Witness: all items that are not self-authenticating need a sponsoring witness who testifies that the item is what the proponent claims it to be. Testimony must fall into one of two categories:
   a) the sponsoring witness has personal knowledge that the item is what the witness claims it is
   b) chain of custody

4. Writings and Recordings
   a) authorship: usually, authentication of a writing consists of showing who its author is
   b) a writing or other communication carries no presumption of authenticity
      i) the proponent bears the burden of making an affirmative showing that the writing or communication is what it appears to be and what the proponent claims it to be
      ii) a writing’s signature is not sufficient proof; the proponent must make some independent showing that the signature was made by the person who the proponent claims made it
   c) can authenticate a writing or communication by direct testimony that the document is what the proponent claims
   d) a writing’s distinctive characteristics or the circumstances surrounding it may suffice for authentication [FRE 901(b)(4)]
   e) if a document is signed, even if no witness is available who saw the person do the signing or writing, the document may be authenticated by a witness who can identify the signature or handwriting as belonging to a particular person
      i) hand-writing expert
      ii) If a non-expert witness, must testify that he saw X’s handwriting b/f the litigation and recognizes the signature of the handwriting to be that of X.
      iii) exemplars can be shown to the jury to makes its own conclusion
   f) phone conversations – must establish the parties to the conversations
      i) outgoing calls, proponent can authenticate the call by showing that (1) W made a call to the no. assigned my the phone company to a particular person and (2) the circumstances show that the person who talked on the other end was in fact the person the caller was trying to reach [FRE 901(b)(6)]
To prove who was on the other end, (1) self identification by the callee; or (2) caller’s identification of the callee’s voice through prior familiarity.

- If calling a business, authentication can be made by showing that the call was made to the listed number for the business and that the conversation related to the business of a sort that would be reasonably transacted over the telephone.

  ii) incoming calls: self identification is not enough; there must be add’l evidence that the caller is who he said he was (ex. voice recognition)

  g) wills: under FRE 903, no attesting witness needs to testify, unless state law so requires

5. Self-Authenticated Documents [Rule 902] – documents that are so likely to be what is purported that no testimony or other evidence is required

a) deeds and other notarized instruments
b) certified copies of public records
c) official publications, including statutes
d) newspapers or periodicals
e) labels, signs, trade inscriptions or other inscriptions indicated ownership, control, or origin

6. Pictorial evidence authenticated by:

a) must establish that the photograph is an accurate and faithful representation of the scene or object depicted
b) authenticated witness adopts the photograph as her own testimony
c) can also elicit testimony about the reliability of the process by which the photo was produced
d) videotapes may also be used in the same way photographs are used – must have showing that they accurately depict the scene which they purport to portray

  i) day in the life video – may be barred under 403, but usually admissible

7. Computer print-outs

a) authentication done by a witness who testifies that the methods used to put data into the computer, to program it, and to produce a print-out of the data were reliable
b) includes computer created business records, FAX, email

8. Maps, models, diagrams, are incorporated into the witness’ testimony so they become evidence for purposes of trial and appeal (witness testifies that it is what it purports to be)

9. Experiments conducted by a party are sometimes admitted

a) if conducted out of court, admissibility depends mostly on whether the conditions are sufficiently similar b/w the experiment and the event it is attempting to explain

10. Authentication is unnecessary if

a) Admission: the proponent served his opponent a written request for admission and the opponent has granted it
b) the parties have jointly stipulated to the genuineness of a particular document or object

C. Best Evidence Rule
1. FRE 1002: To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required
   a) FRE allows a duplicate in lieu of the original unless the opponent raises a question about authenticity or it would be unfair in the circumstances to allow the duplicate
   b) “writing” = writings, artwork, engineering drawings, architectural designs, tombstones, etc. [Rule 1001(1)] (Seiler v. Lucasfilm; drawings are writing under terms of BER; if trying to prove copyright infringement on drawings, original is necessary b/c danger of fraud is high)

2. Only applies where what is sought to be proved are the terms or contents of the writing
   a) if trying to prove that the writing existed, BRE does not apply
   b) if a photograph, usually admissible as “pictorial testimony” – testimony that the photo is an accurate and faithful representation of the scene or object depicted.
      i) there are some instances where photos are introduced to prove the contents of the photo (ex. copyright, defamation, invasion of privacy, obscene photo) or if the photo has an independent value (photo of bank robber by surveillance camera, X-ray). In these instances, the rule applies
   c) where a party against whom the writing is offered admits the contents, the original need not be produced [Rule 1007]
   d) If one can the from testimony to the conclusion sought w/o the writing, the BER does not apply
   e) look for situations in which the witness’ testimony relies almost entirely on what a document says

3. Collateral Matters: Documents which only have a tangential connection to the litigation need not be produced [FRE 1004(4)]

4. “Originals” defined
   a) Rule 1001(3) defines an original as the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it.
   b) there may be more than one original (ex. carbon copy)
   c) computer generated writings: any printout or other output readable by sight, shown to reflect the data accurately, is an original
   d) photographs: originals include the negative or any print therefrom
   e) duplicates are generally admissible [FRE 1003] -- copies produced by any reliable modern method are duplicates that are presumably admissible unless
      i) a genuine question of the authenticity of the original is raised
      ii) fairness requires production of the original

5. Rule 1002 does not apply when the even sought to be proved existed independently of a writing, even if that event has been recorded.
   a) ex. If the accused makes an oral confession which is recorded or subsequently written down, the rule does not apply

6. Excuses for non-production
   a) loss or destruction [Rule 1004(1)]: if the proponent can show that the original has been destroyed or lost, he may use a copy (unless the loss or destruction is due to the proponent’s bad faith)
      i) trial court determines if proponent has established loss or destruction and the absence of bad faith
ii) subjective test – negligence is not bad faith
b) inconvenience: extreme inconvenience, in some courts, will suffice to allow use of derivate evidence (ex. a manual copy or oral testimony)
c) if the original is in the possession of a third person and cannot be obtained by judicial efforts, non-production is excused
d) if the original is in the hands of the opponent or under the opponent’s control and the proponent has notified him to produce it at trial but the adversary has failed to do so, most courts permit a copy to be introduced instead [FRE 1004(3)]

7. Summaries
a) if the original writings are so voluminous that they cannot conveniently be introduced into evidence and examined in court, most courts permit a summery to be introduced instead [FRE 1006]
   i) must be voluminous
   ii) the underlying materials must be made available for inspection and copying by the other parties
b) the summary must be sponsored by a witness who testifies that the has reviewed the underlying writings and the summery and the summary accurately reflects the underlying documents

8. The judge, not the jury, decides most questions relating to the application of the BER [FRE 1008]. The judge decides
a) whether a particular item of evidence is an original
b) whether the original has been lost or destroyed
c) whether the evidence relates to a collateral matter

9. Goals of the Best Evidence Rule
a) prevention of fraud
b) avoiding unintentional mistakes in copying
c) avoiding good faith errors in testimony

III. EXAMINATION AND IMPEACHMENT OF WITNESSES

A. Flow of examination
1. Direct examination [FRE 611(c)]
a) first, the party who called the witness examines
b) witness takes an oath [FRE 603]
c) may not ask leading questions, unless:
   i) it is necessary to develop a witness’ testimony (ex. child, adult w/ communication problems, etc.)
   ii) the witness is hostile
iii) the witness is an adverse party
iv) or the witness is identified with an adverse party
v) leading questions are generally permitted on preliminary matters

2. Cross examination [FRE 611(b)]
   a) the opposing side may cross examine after direct examination
   b) generally, leading questions are permitted
   c) scope of the questions is limited to the matters testified to on direct examination
       [FRE 611(b)]
   d) the witness’ credibility can be attacked on cross-examination

3. Re-direct examination
   a) limited to those aspects of the witness’ testimony that were first brought out during cross examination

4. Re-cross examination
   a) limited to matters newly brought up on re-direct

5. Witnesses must be competent – must understand what means to be truthful
   a) child witnesses: does this person have an appreciation of the difference b/w telling the truth and lying
   b) adults presumed to be competent [FRE 601]
   c) witnesses must also have personal knowledge [FRE 602]

B. Refreshing recollection [FRE 612]
   1. if the witness’ memory on a subject is hazy, any item (picture, document, weapon, etc.) may be shown to the witness to refresh his recollection
      a) the document need not have been prepared by the witness
      b) document need not be prepared contemporaneously with the event
      c) document doesn’t even have to be accurate.
   2. witness then testifies to present recollection refreshed
   3. the item shown to the witness is not evidence at all
   4. Safeguards
      a) the witness’ memory must be exhausted to nearly exhausted b/f a writing may be used to refresh recollection.
      b) Memory must then refreshed: if the item shown to the witness is a document and the trial judge concludes that the witness is really reading the document on the stand rather than testifying from his now-refreshed recollection, he may order the testimony stricken
      c) opposing party can inspect the writing and cross examine the witness, admitting into evidence the parts of the writing used
   5. Cross examination
      a) the cross-examiner may examine the document or item shown to the witness and use any part of the document or other item during cross examination.
      b) the cross-examiner may introduce into evidence any parts of the document that relate to the witness’ testimony
   6. if the document has been consulted by the witness b/c he took the stand, FRE give the trial court discretion to order that they documents be shown to the other side in the interests of justice

C. Common Objections to Witness Testimony
   1. Leading Question
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a) a question that suggests to the witness the answer desired by the questioner
b) only objectionable on direct examination
c) exceptions
   i) hostile witness
   ii) aged
   iii) infirmed
   iv) child

2. Asked and Answered
3. Compound Question
4. Question assuming facts not in evidence
   a) misleading
   b) assumes a fact not in evidence or in dispute
   c) ex. “When did you stop beating your wife?”
   d) sometimes on cross-examination, since on cross, cannot bring up new substantive issues
5. Argumentative Question
   a) a question that tries to get the witness to agree with counsel’s interpretation of the evidence; “badgering the witness”
   b) more common on cross
6. Question calls for speculation
7. Non-responsive Answer
8. Narrative Answer

D. Common Types of Impeachment
1. Impeachment Generally
   a) Under FRE 607, the credibility of a witness may be attacked by any party, including the party calling the witness.
   b) to impeach is to attack credibility by showing that testimony is untrue or inaccurate; not simply about lies and deceit, but also perception, memory, etc.
2. Contradiction
   a) W1 may be impeached by presenting W2, who contradicts W1 on some point
   b) witness can be impeached by contradiction even if the facts at issue are not dispositive or even important in the case, but 403 balancing can keep collateral issues out
   c) if the witness denies the asserted contradicting facts, however, the cross examiner may not be allowed to prove them by extrinsic evidence
3. Bias
   a) all courts allow proof that the witness is bias either in favor or against the party, or the witness has an interest in the outcome
   b) bias may be shown by intrinsic or extrinsic evidence, but courts require a foundation b/c extrinsic evidence may be used to impeach for bias
   c) no federal rule on bias but a number of rules mention bias
   d) examples
      i) relationship b/w witness and one of the parties (either favorable or hostile)
      ii) fear
iii) relationship b/w the witness and the litigation (financial interest, related case, etc)

4. Prior Criminal Convictions [FRE 609]
   a) *crimen falsi*
      i) if the crime involved dishonesty or false statement, it may always be used to impeach the witness, regardless of whether it was a misdemeanor or felony, and regardless of the degree of prejudice to the witness
      ii) examples: perjury, false statement, criminal fraud, embezzlement, taking of property by false pretenses, counterfeiting, forgery, filing false tax returns
      iii) shoplifting and robbery are not *crimen falsi*
      iv) NO 403 balancing occurs
   
   b) Felonies
      i) if the crime was a felony not involving dishonesty or false statement, and is being used against a criminal defendant, the crime may be used only if the court determines that the probative value outweighs its prejudicial effect to the accused
      ii) if the witness is not a criminal defendant, the witness gets no special protection against impeachment. A prior conviction is only to be excluded if the person opposing its introduction shows that the conviction’s probative value is substantially outweighed by the danger of unfair prejudice
      iii) matter of judicial discretion
      iv) 1990 Amendment: felony convictions must first satisfy the unfair prejudice test of 403 for all witnesses, w/ exception of testifying criminal defendant, who receives more protection
   
   c) 10 YEAR RULE: if more than 10 years have passed from the conviction and prison term for that conviction, the conviction may not be used for impeachment unless
      i) the court determines there are specific facts and circumstances that make the probative value of the conviction substantially outweigh is prejudicial effect and
      ii) The party gives notice of intent to use such evidence [FRE 609(b)]
   
   d) motion *in limine*: def may, b/f taking the stand, ask the trial court to rule *in limine* whether a particular conviction will be allowed to impeach him. If the rule goes against D, he can elect not to take the stand
      i) *Luce v. United States*: SC held that if a def. loses a motion in limine to exclude a prior conviction and then does not testify, the def. cannot complain on appeal. It would be impossible to determine the amnt of prejudice.
   
   e) ineligible convictions:
      i) If witness was pardoned, based on a finding of innocence, the conviction can never be used [FRE 609(c)]
      ii) if the witness was pardoned b/c of rehabilitation, it may only be used for impeachment if W has been convicted of a subsequent felony
      iii) a juvenile adjudication may not be used to impeach a D. [609(d)]
f) both crimen falsi and felonies can be proven by extrinsic or intrinsic evidence
g) in 403 balancing, court looks to several factors to assess level of prejudice to the criminal accused
   i) degree to which crime reflects credibility
   ii) nearness or remoteness
   iii) similarity
   iv) extent to which def. testimony is necessary for fair adjudication of the trial
   v) whether def. credibility is central to the case
   vi) whether the witness’ credibility can be explored adequately w/o evidence of prior conviction

5. Prior bad (untruthful) acts [FRE 608(b)]
a) Generally allowed, even if the act has not led to a criminal conviction. But:
   i) the prior bad act must be probative of truthfulness (ex. bribery)
   ii) cannot be proved by extrinsic evidence (must be introduced on cross-examination). If the witness denies the act, the questioner must take the witness’ answer w/o further follow-up so as to not confuse or mislead the jury
   iii) all questions about prior bad acts are in the discretion of the court, including whether the questioner has a good faith basis for believing the witness committed the act (probative value outweighs danger of unfair prejudice)
   iv) good faith basis for the inquiry must exist
   v) most courts say the witness can’t be asked about arrests; must have committed the act
   vi) does not bar admissibility if the proffered evidence is relevant for some other purpose

6. Testimonial capacities
   a) witness may be impeached by showing that his capacity has been impaired, including:
      i) memory
      ii) perception
      iii) narration
      iv) sincerity
   b) can be done by intrinsic evidence or extrinsic if not a normal defect
   c) can be done by physical disabilities
   d) alcohol and drugs
      i) if witness was drunk or high on drugs at the time he claims to have witnessed, can be impeached
      ii) Under 601, evidence of a drug addiction cannot be taken into consideration
   e) no federal rule on this type of impeachment

7. Prior inconsistent Statement [FRE 613]
a) witness’s credibility may be impeached by showing he has made a prior statement inconsistent with the witness’ trial testimony
   i) FRE are lax – a direct contradiction is not required
ii) if a witness’ present testimony includes material facts that were omitted in the prior statement, the statement is inconsistent
iii) statements can be oral, written, or assertive conduct
iv) “I don’t know” on the stand is not grounds for impeachment

b) foundation: W must be given a chance to explain or deny the inconsistent statement, but this opportunity does not have to be given to him until have the statement has been proved
c) extrinsic evidence to prove prior inconsistent statement may only be made when
i) the witness is afforded an opportunity to deny the statement and
ii) the opposite party is afforded an opportunity to interrogate the witness thereon, or
iii) the interests of justice otherwise require [Under 613(b), the court can dispense w/ the explain/deny requirement in interests of justice]
d) both statements must have been made by the witness
e) setting up an inconsistency
i) if meet the criteria of 801(d)(1)(A), statement comes in for its truth
ii) if not, and using statement to impeach:
   • Essential witness test
     o If an essential witness, the heart of the case, must be able to determine if witness tells the truth
     o Then, can just call to impeach
     o But if essential witness, probably not only one calling it
   • Primary purpose test
     o If the primary purpose to call witness is to impeach them to get evidence out there, not allowed
     o But if the primary purpose is not to just get info in there to use it inappropriately, but going to offer other statements too, probably admitted

If call own witness just to offer prior inconsistent statement so that the statement gets in so jury can improperly use it, cannot be admitted

8. Impeachment by Omission
9. CANNOT impeach by asking people about their beliefs or opinions on matters of religion for the purpose of showing that by reason of their beliefs, the witness’ credibility is impaired or enhanced
10. Extrinsic v. Intrinsic Impeachment
    a) intrinsic impeachment depends on answers given by the witness being impeached
    b) extrinsic depends on a witness other than the one to be impeached
       i) subject to greater restrictions
    c) Matters subject to extrinsic evidence impeachment:
       i) bias
       ii) impeachment relating to a fact at issue
       iii) witness’ testimonial capacities
       iv) convictions of a crime
v) reputation or opinion evidence about the truthfulness or veracity of another witness

D. Rehabilitating Witnesses
1. No bolstering – cannot offer evidence supporting a witness’ credibility until it has been attacked by the other side.
2. The rehabilitating evidence must meet the attack – it must support the witness’ credibility in the same respect as that in which the credibility has been attacked by the other side.
3. If the witness’ credibility for truthfulness is attacked by reputation, opinion, prior bad act or conviction, can rebut with good character for truthfulness.
   a) but if the attack is only to show that present testimony is inaccurate (bias, erroneous testimony), good character evidence will not be allowed to rebut
4. Prior consistent statement
   a) the fact that the witness has made a prior consistent statement may be used ONLY to rebut an express or implied charge that the witness’ testimony is a recent fabrication or the product of improper influence or motive. [FRE 801(d)(1)(B)]
      i) cannot be used to rebut prior criminal convictions, prior bad acts, or bad reputation for truthfulness
   c) the opponent’s showing that the witness has made a prior inconsistent statement will not, by itself, entitle the proponent to show that the witness has also made a prior consistent statement. Proponent must show that prior inconsistent statement use amounts to an express or implied claim that the witness made up his trial testimony, or is lying b/c of improper influence or ulterior motives.
   d) statement must have been made before the alleged motive to fabricate arose (Tome v. United States)

IV. QUASI PRIVILEGES

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A. Subsequent remedial measures [FRE 407]
1. Generally
   a) FRE do not allow evidence that a party has taken a subsequent remedial measure, when offered to prove that the party was at fault. Cannot be offered to prove:
      i) negligence
      ii) culpable conduct
      iii) defect in product
      iv) defect in design
      v) need for warning or instruction
   b) includes the installation of safety devices, changes in company rules, discharge of employees, disciplinary action against the employee who caused the injury, changes in drug warnings, modifications in product designs, as well as repairs
Evidence Outline
Aiken, Fall 2004

i) post-accident reviews or studies generally not considered subsequent remedial measures

c) The remedial measure must take effect after the accident or incident being litigated
d) does not apply if remedial measure done by third party

2. Other purposes

a) subsequent remedial measures may be shown to prove elements other than culpability or negligence
   i) ownership, control, feasibility of precautionary measures, impeachment
b) ex. such measures could be used to rebut D’s claim that there was no safer way to handle the situation
c) ex. can be used to rebut D’s claim he did not own or control the property involved in an accident

3. Rationale

a) social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety
b) irrelevant

B. Civil offers to compromise [FRE 408]

1. Evidence of a compromise or offer to compromise are inadmissible when offered to prove liability for the proof of the validity of a claim or its amount.
   a) Admissions of fact made during the course of settlement negotiations are not admissible under FRE 408
   b) statements must be made in the course of the compromise negotiations
   c) usually protects third-party statements that deal with the same claim

2. Admissible Compromise Evidence

a) evidence otherwise discoverable
b) evidence offered for another purpose
   i) proving bias or prejudice of a witness
   ii) negating a contention of undue delay
   iii) proving an effort to obstruct a criminal investigation or prosecution

3. General Rules

a) used against a compromising party, not admissible
b) used by a compromising party, admissible
   c) used against a non-party to impeach, admissible subject to 403

4. Rationale

a) want to preserve the use of settlements of lawsuits
b) relevance – motivated by desire for peace rather than weakness of position

C. Criminal case offers to compromise [FRE 410]

1. Evidence of (1) withdrawn please of guilty, (2) nolo contendere pleas, and (3) statements made during plea discussions with the prosecutor are inadmissible in both civil AND criminal cases if offered against the defendant who made the offer, plea or statement.
   a) does not protect discussions b/w defendant and the police – only the prosecutor
   b) must be in the form of a plea negotiation

2. the plea offer or withdrawn plea and the accompanying factual admissions are also not admissible in any later civil case [FRE 410(4)]
3. Exceptions
   a) in any proceeding wherein another statement made in the course of the same plea or plea discussion has been introduced and the statement ought, in fairness, be considered contemporaneously with it
   b) in criminal proceedings for perjury or false statement, if the statement was made by the defendant, while under oath, and in the presence of counsel
   c) *United States v. Mezzanatto*: a defendant may waive the right to the rule’s protection if the prosecutor insists on such a waiver as a precondition to the negotiations

D. Payment of medical expenses [FRE 409]
   1. the fact that a party has paid the medical expenses of an injured person is not admissible to show the party’s liability for the accident
   2. only the fact of payment, not related admissions of fact, are excluded
   3. Rationale
      a) offers usually made from a humane impulse, not from an admission liability
      b) do not want to discourage helping injured persons

E. Liability insurance [FRE 411]
   1. evidence that a person carried or did not carry liability insurance is never admissible on the issue of whether he acted negligently
      a) includes contributory negligence or other fault of the plaintiff too
   2. Such evidence is admissible for other purposes, ex. to show bias, or to show agency, ownership or control.

V. CHARACTER EVIDENCE

| - Rule 404 | - Rule 413 |
| - Rule 405 | - Rule 414 |
| - Rule 406 | - Rule 415 |
| - Rule 412 | - Rule 608 |
| - Rule 609 | *Huddleston v. US*

*Michelson v. United States*

A. Generally
   1. General Rule: evidence of a person’s character is, in general, not admissible to prove that he acted in conformity therewith on a particular occasion. [FRE 404(a)]
      a) FRE 404(a): 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
      b) ask yourself, “is the sole reason this evidence is being offered to prove that b/c he did it before, he was more likely to have done it again?
   2. Forms of Character Evidence
      a) FRE 405(a): whenever proof of a character trait is allowed, FRE let the proof be by either reputation or opinion testimony
         i) must establish foundation for reputation evidence including where the witness lives, works, goes to school, etc. to show ability to testify to reputation in the community at the time of the alleged events
         ii) for opinion evidence, witness must be sufficiently acquainted with the accused or victim to give a personal opinion
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b) specific act testimony usually not allowed

c) specific act testimony is allowed only in limited situations including:
   i) witness giving reputation or opinion testimony may be impeached on
      cross by questions about specific acts (ex. Did you know Harry did X?)
   ii) essential element of the claim or defense

3. Act versus mental propensity evidence
   a) mental propensity (mental state) is probably not barred by Rule 404 (shows an
      internal state)
   b) act propensity, on the other hand, is – precludes evidence that the person acted
      consistently w/ the character trait on this particular occasion

B. Exceptions to the Propensity Ban

1. Character in issue
   a) Essential Element: a person’s general character or particular character trait is
      admissible if it is an essential element of the charge or defense.
      i) Libel
      ii) negligent entrustment
      iii) defamation
      iv) entrapment
      v) negligent hiring
      vi) seduction
   b) When character is directly at issue, all three types of character evidence
      (specific acts, opinion, reputation) are admissible [Rule 405(b)]

2. Character Evidence offered by the accused (Mercy Rule) [FRE 404(a)(1)]
   a) Usually admissible to prove he has a good general character
   b) evidence that he possesses a narrow favorable trait is allowed only if relevant
      or pertinent to the crime charged
   c) method of proof through reputation or opinion
   d) rebuttal by prosecution – if the D puts on proof of good character, opens the
      door for rebuttal by prosecution
      i) by prosecution’s own witness (only be reputation or opinion)
      ii) by cross examination
         - By opinion, reputation
         - By specific acts if the prosecutor has (1) a good faith basis
            for believing D really committed the specific bad act and
            (2) the specific bad act is relevant to the specific character
            trait of the witness
      *** iii) prosecutor’s ability to show specific bad acts is limited to cross
            examination; he may not put on extrinsic evidence to prove that the acts
            took place, even if the character witness denies they did. Conversely, the
            def. may not put on other witnesses to show the specific act referred to by
            the prosecutor never took place
      iv) again, must be pertinent trait
   e) Michelson v. United States
      i) def. charged w/ bribery of IRS agent. Def. called witness to testify for
         good character for truth and honesty
ii) on cross-exam, witnesses asked whether they knew about def. 20 y.o. conviction for trademark violation and 27 y.o. arrest for receiving stolen property
 iii) Def. convicted and appealed.
 iv) HELD: Prosecution has the right to test a character witness’ basis for their testimony including questions about prior specific acts.

3. Character of the victim [Rule 404(a)(2)]
   a) Victim’s violent character
      i) Def. in a homicide or assault case who claims the victim was the first aggressor may introduce evidence that the victim had a violent character
      ii) must be in the form of reputation or opinion
      iii) most states and FRE bar the use of specific acts
      iv) limited to criminal cases
      v) prosecution prohibited from introducing evidence of the victim’s character until the defense opens the door.
      vi) The def. can put on evidence of the victim’s violent character to show its effect on the accused’s state of mind (self-defense). Depends on whether the accused knew of the victim’s character. (non-propensity use)
   b) Rebuttal by Prosecution
      i) Once evidence of the victim’s (of homicide or assault) violent character is introduced by the accused, the prosecution may introduce rebuttal evidence of the victim’s character for peacefulness
      ii) can also put on evidence of the accused’s violent character
         - most commonly used in cases where D is charged with crime of violence against V and uses FRE 404(a)(2) to show V has a violent character. Prosecution can then show D also had a violent disposition
      iii) In homicide cases only, any evidence that the victim was the first aggressor in a homicide case triggers the prosecution’s right to introduce rebuttal evidence of the victim’s peaceful character
   c) Rape Shield (criminal cases) [FRE 412]
      i) FRE 412 disallows reputation or opinion evidence concerning the victim’s past sexual behavior
      ii) also prohibits evidence of specific acts concerning the victim’s past sexual behavior in most situations
      iii) does not bar evidence that the victim made numerous allegedly false prior claims of others’ sexual misconduct
      iv) Exceptions in a criminal case
         - 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 [412(b)(1)(A)]
         - Evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of sexual misconduct offered by the accused to prove consent or by the prosecution [412(b)(1)(B)]
exception extends beyond prior instances of sexual activities between the alleged victim and the accused to include statements in which the alleged victim expressed an intent to engage in sexual intercourse with the accused or voiced sexual fantasies involving the specific accused
- Evidence the exclusion of which would violate the constitutional rights of the defendant

v) Rule 412 protects any alleged victim
vi) Rule 403 may still be relied upon as a ground for excluding evidence that would otherwise be admissible [412(b)(1)(C)]

d) Exceptions in civil cases
i) balancing test: the probative value must substantially outweigh the danger of harm to the victim and unfair prejudice to a party
ii) shifts burden onto the proponent to show admissibility
iii) evidence of an alleged victim’s reputation is only admissible if it has been placed into controversy by the alleged victim
   ex. if P sues for sexual harassment, D can’t show that P was known to be promiscuous with others or dressed seductively

e) Procedure: b/f admitting evidence under this rule, the court must conduct a hearing in camera and afford the victims and parties a right to attend and be heard. The motion, related papers, and record must be sealed and remain sealed unless the court orders otherwise.

4. Character of the Defendant in Criminal Cases of Sexual Assault or Child Molestation
a) Under FRE 413, if D is accused of sexual assault, evidence that D has committed a sexual assault in the past is admissible
b) Under FRE 414, proof that D previously molested a child (under 14 years of age) is admissible in a current molestation trial
c) Rule 415 admits proof of D’s prior sexual assaults or child molestation to be introduced in civil proceedings where P claims D sexually assaulted or molested P.
d) must be similar or 403 objection
e) no conviction requirement
f) no time frame limitations
g) very broad definition of sexual assault
h) the proponent of the evidence must offer enough evidence so that a reasonable juror could find that the def. committed the offenses

5. Character Impeachment of a Witness [Rule 608]
a) Circumstantial evidence in civil cases is usually inadmissible
b) credibility attack must involve evidence that refers only to character for truthfulness or untruthfulness
c) Other crimes and bad acts evidence in criminal cases
   i) General rule: The prosecutor may not introduce evidence of other crimes committed by D for the purpose of proving that b/c D is a person of criminal character, he probably committed the crime with which he is charged. [FRE 404(a)]
ii) evidence of other crimes can be used for some other purpose (non-propensity use)

iii) need not have led to a conviction (Huddleston – HELD: in order to admit evidence of similar acts, the Court must inquire whether a reasonable jury could find the preliminary foundation – that the similar acts occurred and the def. was involved in the act, -- by a preponderance of the evidence by looking at the sum of the evidence, not just individual parts)

iv) the fact that the def. was acquitted of the other crime does not mean that the evidence will automatically be excluded

v) balancing: even where the other crimes by D circumstantially establish an element of the present charge, the judge must still balance the probative value against the prejudice

vi) Use by D: def may show someone’s prior past crimes or bad acts to show that its that other person, not D, who did the present crime

d) evidence of the witness’ character for truthfulness may not be admitted unless that trait has first been attacked by reputation, opinion, prior convictions, showing of corruption, inconsistent statement raising inference of untruthful nature

i) DOES NOT INCLUDE: impeachment by prior inconsistent statement b/ of flawed memory or mistake, contradicting evidence offered by opponent, or showing of bias, interest, or coercion.

e) Specific Acts of the conduct of the witness to attack character for truthfulness, other than conviction of crime under 609, may not be proved by extrinsic evidence

i) in court’s discretion, may be inquired into on cross concerning character for truthfulness of witness or another witness

6. Non-propensity uses: other crimes or bad acts by D may be admitted if not to show D’s general criminal disposition, but to establish circumstantially some element of the crime charged [FRE 404(b)].

a) not limited to crimes; it embraces wrongs and other acts
b) the other act need not be similar to the charged offense
c) need to have occurred prior to the charged offense
d) application requires 3 steps:

i) identify a material issue (other than character) for which the evidence is being offered to prove

ii) balance the probative value against the risk that the jury will ignore the limiting instruction and make the prohibited character inference

iii) determine whether there is prima facie evidence of the accused’s involvement in the other act (preponderance of the evidence)

e) non-propensity uses

i) motive – reason why a specific offender acted with a mental state required by the definition of a charge, crime, claim or defense

ii) opportunity – access to or presence at the scene of the crime or in the same sense possessing distinctive skills or abilities employed in the commission of the crime charged (can be uncharged misconduct)
iii) intent/knowledge: other crimes may be used that D had the particular intent or knowledge required for the crime charged. Generally done to rebut D’s contention that he did the act charged innocently or unknowingly. (ex. accidentally poisoned girlfriends 3x)
  - Doctrine of Objective Chances: the repeated occurrence of certain unusual events is so unlikely as to render improbable the claim that any one of those events happened mistakenly or accidentally
iv) preparation: to prove identity (ex. def. stole a car to use as a getaway car in a robbery now charged) or intent (def. broke into a gun store and stole guns prior to the killing for which he claims no premeditation)
v) common scheme or plan: where one crime is predicated on another (ex. fire to distract police so can commit robbery)
  - must be by a preponderance of the evidence
  - common scheme does not have to be identical
  - exhibit similar or unusual patterns
  - to prove the existence of a larger plane, scheme, or conspiracy, of which the crime on trial is part, each crime should be an integral part of an overarching plan explicitly conceived and executed by the defendant or his confederates. This will be relevant as showing motive, and hence, the doing of the criminal act, the identity of the actor, or his intention
vi) identity/signature: if the perpetrator’s identity is in doubt, proof that D has committed prior crimes that are so similar in method that they constitute his “signature” and thus identify him as the perpetrator of the crime charged may be proved. (modus operandi)
vii) absence of mistake or accident – relate to mens rea; can put on evidence to show that def. claim of accident or mistake is a lie
viii) Res gestae: the use of other crimes that occurred simultaneously to give the jury a full picture is permitted but only if necessary
f) proof by reputation, opinion, or specific acts
g) There must be notice of intent to offer such evidence

7. Under Rule 405(a), when character is admissible, can be shown by reputation or opinion testimony on direct. On cross, can inquire into specific instances of conduct

C. Habit and Custom
1. Generally:
   a) definition
      i) specificity: the more specific, the more likely to be deemed a habit
      ii) regularity: ratio of reaction to situations (ex. 95% of the time); the more regular the behavior, the more likely to be a habit
      iii) unreflective/semi-automatic: the more unreflective, the more likely to be a habit (ex. using left hand turn signal)
      iv) duration – longer practice has been in existence, more likely to be deemed a habit
b) evidence of a person’s habit is admissible to show that he followed his habit on a particular occasion

2. FRE 406 provides that “evidence of the habit of a person or of the routine practice of an organization, regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

3. 406 also allows evidence of the routine practices of an organization or business to show that the practice was followed on a particular occasion.

D. Similar Happenings

1. General Rule
   a) evidence that similar happenings occurred in the past (offered to prove that the event in question really happened) is generally allowed
   b) proponent must show substantial similarity b/w the past similar happening and the event under litigation

2. Examples
   a) accidents and injuries
      i) evidence of past similar injuries or accidents will often be admitted to show that the same kind of mishap happened in the present case or to show that the def. was negligent in not fixing the problem after the prior mishaps
      ii) still, P must show that the conditions were the same in the prior and present situations
   b) past safety
      i) D is usually allowed to show due care or the absence of defect by showing that there have not been similar accidents in the past
      ii) To do so, D must show that (1) the conditions were the same in the past as when the accident occurred; and (2) had there been any injuries in the past, they would have been reported to D.

VI. HEARSAY

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A. Introduction

1. definition: hearsay is a statement or assertive conduct which was made or occurred out of court and is offered in court to prove the truth of the matter asserted
   a) can be written or oral
2. Use of hearsay presents four main dangers (b/c declarant not available for cross-exam)
   a) ambiguity
   b) insincerity
   c) incorrect memory
   d) inaccurate perception
3. Testimonial Triangle
a) statement is hearsay if the trier of fact as asked to determine that the declarant truly held the belief and that the belief accurately reflects reality

4. Is it hearsay?
   a) is it a statement (verbal or non-verbal)?
   b) was it made out of court?
   c) what is being asserted by the statement?
   d) what is the statement being offered to prove?
      i) if a non-hearsay purpose, is that purpose relevant? Does its probative value substantially outweigh the risk of unfair prejudice?
      ii) if the statement is offered for its truth, is it admissible under one of exceptions or exemptions of 801, 803, 804, or 807?

B. Special Issues
1. Who is the declarant?
   a) declarants are persons
      i) not animals
      ii) not mechanical devices
   b) ask, “how do we know what we know? Where is the information coming from?”

2. Out of court statement: an out of court statement is any statement except one made by the witness during the trial while testifying before the trier of fact, including
   a) any oral or written statement by someone other than the at-trial witness
   b) a prior statement by the at-trial witness, where the prior statement was not made in the present trial b/f the trier of fact

3. Truth of the matter asserted: there are some uses to which a statement may be put that do not constitute offering the statement for the truth of the matter asserted and thus are not hearsay:
   a) verbal acts – an operative fact that gives rise to legal consequences (offered to show the words were said, not that they were true)
      i) I offer you….
      ii) solicitation for purpose of prostitution
      iii) slander
   b) verbal part of the act – words that accompany an ambiguous physical act, making it an operative fact giving rise to legal consequences, and is not offered for the truth of its contents.
      i) ex. words of donative intent along with the transfer of diamonds
      ii) ex. statements made in connection w/ handing a bag of $ as a bribe
   c) Effect on hearer/reader: a statement offered to show its effect on the listener or reader or the listener’s state of mind will generally not be hearsay. Includes:
      i) statements to put the listener or reader on notice
      ii) to show knowledge
      iii) to show emotion
      iv) to show that the listener or reader behaved reasonably or unreasonably
      v) to show belief
      vi) to show good faith
      vii) to explain behavior
d) Statement not dependent on its truth and circumstantial evidence of guilt (ex. giving wrong name to police)

e) Declarant’s state of mind: statements introduced to show the state of mind of the declarant are not offered for the truth of the matter asserted and are thus not hearsay
   i) knowledge of declarant
   ii) other mental state: sanity or another emotion, such as fear
   iii) relevant when the declarant’s belief is itself a material fact or is circumstantial evidence of the declarant’s behavior
   iv) ex. “I am the walrus” to show sanity or insanity
   v) United States v. Zenni: phone calls to the def. house to place bets was not hearsay b/c it was not intended to state that the def. was a bookmaker.

f) implied assertions not intended to communicate the fact consequence

g) non-assertive conduct is not hearsay (ex. writhing in pain; W says A put up an umbrella)

h) statements to provide context and meaning
   i) often, out-of-court statements where the witness and the declarant are the same person
   ii) if offered to show context or relationship, ask if there is any significant fact that is gleaned from these statements that is usable for substantive proof. If so, it has gone beyond context and is hearsay

j) all still must be relevant
   i) sometimes lawyers will inadvertently inject an issue that opens of the use of what would otherwise be hearsay
   ii) ex. in many of the criminal cases in which otherwise hearsay evidence has been allowed, the defense attorney has raised questions about why the police conducted the investigation in the manner in which they did. Once this becomes an issue, all statements that the police heard become relevant

4. Other types of hearsay

a) assertive conduct – treated as if it were a statement (ex. nod of head, pointing are hearsay)

b) silence – silence is treated as a statement if under such circumstances, a reasonable person would not remain silent

c) implied assertion: hearsay statement on ground that declarant’s statement demonstrates an implicit intent to assert the fact the statement is offered to prove

d) invisible assertion: an implied assertion, even though neither the question nor the answer refers to it explicitly, commonly occurring when the information is presented as based on a witness’ own perception, when in reality the witness is simply a conduit for info supplied by an invisible declarant.
   i) United States v. Brown: tax-preparer was charged w/ tax fraud for overstating deductions on nearly all tax returns he prepared; gov’t agent testified that he examined the returns and the deductions were all overstated. Court held that since the agent could only know that the deductions were overstated if he talked to the taxpayers, the testimony was hearsay
e) attributed assertions: consists of a statement made by one declarant that is treated as thought it had been made by a different declarant against whom the assertion is offered (Rule 801(d) lists bases upon which Court can attribute a statement made by one declarant to another declarant)

5. Hearsay within Hearsay [FRE 805]
   a) if one out-of-court declarant quotes or paraphrases another out-of-court declarant, there is a problem of multiple hearsay
   b) to admit both statements, must find exception for both statements
   c) identify all the pieces of hearsay and all the exceptions, or theories of non-hearsay that will allow each piece to be admissible

6. Impeaching the Hearsay Declarant [FRE 806]
   a) a hearsay declarant is impeachable as would any other testifying witness, except
      i) a hearsay declarant need not have an opportunity to explain or deny a prior inconsistent statement
      ii) a declarant can be called and cross-examined about the statement by the party calling that witness

VII. HEARSAY EXEMPTIONS

| Rule 801 |
| Tome v. United States |
| United States v. Owens |
| Bourjaily v. United States |

A. Admissions [FRE 801(d)(2)] (Hearsay exemption so not hearsay)
1. A party’s words or acts may be offered as evidence against him, even if theses would be inadmissible hearsay if said or done by someone other than a party [FRE 801(d)(2)(A)]
   a) an admission is admissible even if it contains an opinion or conclusion at law
   b) no personal knowledge requirement
   c) statement admitted for the truth of its contents
   d) does not have to be inculpatory
2. Rule identifies 5 forms of party admissions
   a) A party’s own statement offered against him are admissible if relevant
      i) statements made in pleadings are admissions
      ii) conduct can also be an admission if it is intended as an assertion
   b) Adoptive admission [FRE 801(d)(2)(B)]: a party may be deemed to have adopted another person’s statement, in which case the statement will be admissible as a statement of the former party. Foundational requirements:
      i) circumstances show that the party heard the statement
      ii) the party understood the statement
      iii) the subject matter of the statement was w/in the party’s personal knowledge
      iv) under the circumstances, a reasonable person would have denied the statement had it not been true.
v) in criminal cases, D’s failure to respond to accusations made by the police while D is in custody will not be admissible against him as an adoptive admission

c) authorized admission [FRE 801(d)(2)(C)]: even if a party did not make another person’s admission, that admission may be admissible against the party if he authorized it in some way

d) Agent Admission [FRE 801(d)(2)(D)]:
   i) Statements by agents or servants
   ii) concerning a matter w/in the scope of their agency or employment and
   iii) made during the existence of the agency or employment relations are admissible as substantive evidence if offered against the party
   iv) normally, independent contractors are not employees and cannot use their statements against the principle

e) Co-conspirator admissions [FRE 801(d)(2)(E)]: a statement by one coconspirator is admissible against other members of the same conspiracy so long as the statement is made:
   i) during the course of the conspiracy; and
   ii) in furtherance of the conspiracy (weakly applied)
   iii) No need to charge conspiracy
   iv) procedure – the judge decides whether the conspiracy has been shown by preponderance of the evidence. In determining, he may consider the alleged statement itself, but the contents of the statement may not be the sole proof that the conspiracy existed; must have some independent evidence that the conspiracy existed
   v) Bourjaily v. United States: when deciding whether the foundational requirement of a conspiracy exists, the trial judge can consider the hearsay statements themselves

B. Prior Statements of an Available Witness [Hearsay Exemptions – FRE 801(d)(1)]

1. Prior inconsistent statements
   a) Under FRE 801(d)(1)(A), certain prior inconsistent statements of the trial witness are admissible if the declarant testifies at trial and is subject to cross-examination concerning his prior statement, that statement is admissible if
      i) it is inconsistent with the declarant’s trial testimony and
      ii) was given under oath subject to the penalty of perjury
      iii) at a trial, hearing, or other proceeding, or in a deposition
   b) admitted for truth of the matter asserted
   c) prior inconsistent statements of a party, introduced by another party, are also admissible for the truth of the matter asserted as a party admission

2. Prior consistent statements [FRE 801(d)(1)(B)]
   a) if a prior statement is consistent with the witness’ trial testimony, it is substantively admissible but only if it is offered to rebut an express or implied charge against the witness of recent fabrication or improper influence or motive
   b) Tome v. United States, SC held that Rule 801(d)(1)(B) only applies when the statements were made b/f the charged recent fabrication or improper influence or motive existed.

3. Prior Identifications [FRE 801(d)(1)(C)]
a) a statement of identification of a person made after perceiving him is substancively admissible if the declarant testifies at the trial and is available for cross-examination
   i) does not need to have been made under oath or at a formal proceeding – can be to anyone!
   ii) includes descriptions to police, mug shot identifications, lineups, etc.

b) United States v. Owens – victim of attack identified def. as attacker and picked his picture out of array of photos while in hospital; at trial, witness testified about attack, but admitted he could not remember seeing his assailant. The SC held that the requirements of 801(d)(1)(C) had been met b/c the victim was subject to cross-examination. The witness’ impaired memory did not mean that cross-examination was lacking

VIII. HEARSAY EXCEPTIONS

| Rule 803 | Mutual Life Ins. Co. v. Hillmon |
| Rule 804 | Palmer v. Hoffman |
| Rule 807 | Beech Aircraft v. Rainey |
| U.S. v. Pheaster | Williamson v. U.S. |

A. Availability of Declarant immaterial

1. Excited Utterances [FRE 803(2)]
   a) statements made under the influence of a startling event that relates to that event and made while the declarant was still under the stress or excitement caused by the event
      i) must have first hand knowledge
   b) the amount of time that has passed b/w startling event and the statement is of paramount importance; usually must be w/in a half-hour
   c) rationale: declarant has no time to reflect, so likely to be reliable

2. Present Sense Impressions [FRE 803(1)]
   a) exception for statements describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter
      i) immediacy requirement (stricter than excited utterance)
      ii) must describe or explain the event perceived
   b) rationale: originally thought that person to whom the statement was made would be able to verify; however, phone calls still allowed

3. Statement of presently existing mental, physical, sensation, or emotional condition [FRE 803(3)]
   a) condition must be directly in issue
   b) statement of a present mental state (ex. intent) can be offered to prove that the declarant subsequently acted in accordance with that state of mind, not because the mental state itself is in issue, but because it is circumstantial evidence that a subsequent event took place
i) *Mutual Life Ins. Co. v. Hillmon* – insurance co argued that body found way that of Walters, not the insured, Hillmon. Letters in which Walters stated that he intended to travel from Wichita to Crooked Creek (where body found) w/ Hillmon were admissible to show that Walters in fact did so.

ii) if the statement of present intent concerns an act which requires the cooperation of a third person, most courts will allow the statement to be used as circumstantial evidence that the declarant did the contemplated act with the third person’s cooperation. However, in this situation, courts usually require that there be independent evidence either that the declarant really did the intended act, or that the third person actually participated.

iii) HELD: statements of an out of court declarant’s intent can be admitted to show state of mind and that the declarant acted in accordance w/ his or her state of mind.

c) exception does not apply to statements of memory or belief about past actions or events, when offered to prove that past action or event took place.

d) *United States v. Pheaster*

i) def. and others were charged with kidnapping Larry Adell. Prosecution offered evidence that b/f he disappeared, Larry told his friend that he was going to meet the def. to pick up a lb. of marijuana.

ii) Court upheld the admission of the statement as proof that def. had met with Larry.

iii) When evidence concerns the declarant’s of his intention to do something w/ another, *Hillmon* requires that the trier of fact infer from the state of mind of the declarant the probability of a particular act by the declarant AND another person.

iv) statements by a declarant of intent that included intent and future acts of another are admissible to prove what both actors did.

4. Statements for medical diagnosis or treatment [FRE 803(4)]

a) includes medical history, past symptoms, present symptoms, pain or sensations, or the inception or general character of the cause or external source

b) statement made by a friend or relative, if made to help the patient get treatment

c) includes statements made to a nurse, ambulance driver, hospital admitting clerk, or other third person involved in the health care process are covered by the exception.

5. Past recollection recorded [FRE 803(5)]

a) a written record of an event made shortly after the event has occurred will be admissible under the hearsay exception to refresh a witness’ recollection either while testifying or before their testimony.

b) the memorandum must relate to matters of which the sponsoring witness once had first-hand knowledge.

b) it must have been made while fresh in the witness’ memory (w/in several days under FRE)

d) the witness’ memory of the events recorded must now be impaired.

e) the witness must testify that the record was accurate when it was made.

f) entered as evidence but cannot be taken into the jury room as an exhibit.
g) if necessary, an adverse party is entitled to have the writing produced at the hearing, to inspect, to cross-examine the witness thereon, and to introduce into evidence those portions that relate to the witness’ testimony

6. Business records – Under FRE 803(6), business records are admissible if:
   a) Requirements
      i) a memo, report, or record of an act, event, or condition
      ii) made at or near the time
      iii) by or from information transmitted by a person with knowledge
      iv) which was kept in the regular practice of that business activity to make the memorandum
      v) as shown by the testimony of the custodian or other qualified witness (who lays the foundation)
      vi) unless the source of information or the method or circumstances of preparation indicate a lack of trustworthiness
   b) If statements of a witness are in the report, the witness must have been under a duty to transmit the information or must look for another exception
   c) business is broadly defined; applies to schools, churches, hospitals, etc.
   d) opinions can be admitted
   e) if the record contains hearsay (b/c someone outside the business made a statement contained in report), must find another hearsay exception to get that statement in
   f) proving the record: not self-admitting
      i) must have sponsoring witness who can testify that the requirements of the business-records statute were satisfied
      ii) under FRE 803(6), a business record can be admitted through written certification rather than a live sponsoring witness
   g) the document itself (containing the hearsay) must be offered into evidence
   h) If the computer printout is involved, special requirements exist for the testimony, which must include a description of:
      i) the equipment
      ii) how the computer was programmed and how errors in programming are detected and corrected
      iii) how data is entered
      iv) how errors in data are caught and corrected
      v) how unauthorized access to program or data files is prevented
   j) Under 803(7), the absence of such records is admissible – “Failure of a record to mention a matter which would ordinarily be mentioned is satisfactory evidence of its nonexistence”
   k) Palmer v. Hoffman:
      i) wrongful death of wife, sued RR Co. Engineer w/ written statement through accident investigation
      ii) Held: statement was not in the regular course of business; they are in the business of railroading, not litigating
      iii) Rationale: statements lose trustworthiness when made in defense of litigation
iv) note – often internal accident reports are admissible; but if they are solely created for or in anticipation of litigation, inadmissible

7. public records
   a) FRE 803(8) admits federal public record:
      i) the activities of an office or agency [803(8)(A)]
      ii) [803(8)(B)] matters observed pursuant to a duty imposed by law, if:
         - There was a duty to report
         - does not apply in criminal cases to matters observed by police officers and other law enforcement personnel
   iii) [FRE 803(8)(C)] factual findings resulting from investigations, when:
      - made pursuant to authority granted by law
      - only in civil cases or against the government in criminal cases
      - may not be used against private criminal defendant
      - Beech Aircraft Corp. v. Rainey – An investigative report containing opinions, evaluations, and conclusions along with factual findings can be admitted as a public record in its entirety as long as it is based on a factual investigation
      - Facts: gov’t investigation of crash of Navy plane produced a report containing numerous factual findings. It also stated that the most probable cause of the accident was pilot error. The statement was admitted even though it was an opinion/conclusion
   b) multiple hearsay
      i) if the statement is from one gov’t agent to another and the first agent had a duty to tell the other agent, the entire statement is admissible
      ii) if the statement is by someone w/o a duty to talk, the quoted statement can only be admitted if it falls under another hearsay exception
   c) if sources of information or other circumstances indicate a lack of trustworthiness, the judge can keep the report out of evidence
   d) FRE 803(10) – the absence of a public record is admissible to prove nonexistence as long as a diligent search failed to disclose the record

8. Family records
   a) [Rule 803(13)]: admits statements of fact concerning personal or family history written in family bibles, inscribed on rings, engraved on urns, crypts, or tombstones, or found in other similar locations

9. Statements in dispositive documents
   a) [Rule 803(15)]: admits statements in property-affecting documents such as deeds, mortgages, wills, security agreements, etc.

10. Statements in ancient documents [FRE 803(16)]
    a) FRE admits documents that have been in existence for 20 years
    b) proponent must prove the document is authentic and meets the no suspicion and likely place of custody requirements

11. Market reports and commercial publications
    a) admissible for truth under FRE 803(17)
b) admits statements in commercially-prepared publications in general use by the public and people in various occupations.
c) includes market quotations, tabulations, lists, directories, and other published compilations

12. Learned Treaties [FRE 803(18)]
a) admissible as substantive evidence  
b) can only be used when expert is on the stand  
c) can be read to the jury but not received as an exhibit

B. Declarant Unavailable [FRE 804]
1. Under the FRE, there are 5 hearsay exceptions that require the declarant be unavailable to testify at trial:
   a) testimony given in a prior proceeding [804(b)(1)]  
   b) dying declarations [FRE 804(b)(2)]  
   c) statements against the declarant’s interest when made [FRE 804(b)(3)]  
   d) Statements of family or personal history; statements concerning important personal or family milestones [FRE 804(b)(4)]  
   e) forfeiture by wrongdoing [FRE 804(b)(6)]
2. A declarant is deemed unavailable if he [FRE 804(a)(1)-(5)]:
   a) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter or the declarant’s statement; or  
   b) persists in refusing to testify concerning the subject matter of the declarant’s statement despite an order of the court to do so; or  
   c) testifies to a lack of memory of the subject matter of the declarant’s statement; or  
   d) is unable to be present or to testify due to death or then existing physical or mental illness or infirmity; or  
   e) is absent from the hearing and the proponent of a statement has been unable to procure the declarant’s attendance by process or other reasonable means
3. A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying
4. Former Testimony
   a) there is a hearsay exception for former testimony – testimony given in an earlier proceeding – if the witness is unavailable for trial  
   b) Testimony must have been given either at a hearing in the same or earlier action or in a deposition in the same or different proceeding, AND  
      i) any sworn testimony in an official inquiry suffices – prior trial, preliminary hearing, grand jury hearing, deposition  
      ii) not covered: affidavits, statements made to law enforcement officials during interrogations  
   c) the party against whom the testimony is now offered must have been present at the earlier testimony; AND  
      i) the proponent of the former testimony need not have been a party to the taking of the former testimony.  
      ii) The opponent, however, must have been present (or his predecessor in interest)
d) the party against whom the testimony is offered must have had the **opportunity** and **similar motive** to develop the testimony and cross-examine  
   i) there must be overlap b/w the issues at the prior hearing and present trial  
   ii) doesn’t matter if didn’t take advantage of the prior opportunity to cross-examine as long as it existed

5. Dying Declarations  
   a) hearsay exception for statements made by a declarant who believes his death is **imminent**, relating to the **causes and circumstances of his killing** for use in **criminal homicide cases** and civil litigation and is now unavailable to testify  
   b) actual death not necessary  
   c) statement may be admitted on behalf of or against the accused

6. Declarations Against Interest  
   a) the declaration must have been against the declarant’s pecuniary, proprietary, or civil or criminal liability when made  
      i) declarant must know that statement is against his interest  
      ii) must be against his interest at the time it was made  
      iii) a statement against penal interest that is offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement  
         - usually other evidence in the case that makes the def. appear innocent  
         - however, circumstances surrounding the declaration against interest can be corroborating in some instances  
   b) the declarant must now be unavailable  
   c) the declarant must have first hand knowledge of the facts asserted in the declaration.  
   d) collateral statements that are self-serving will usually be excised unless they relate to the whole (integral to the whole)  
   e) when used against a criminal defendant, the Confrontation Clause may keep the statement out  
   f) a declaration whose assertion is offered as a declaration against interest will almost never be a party to the action in which the assertion is offered (otherwise it would be admissible as a party admission)  
   g) *Williamson v. United States*  
      i) a deputy sheriff pulled over a car and found that it contained 2 suitcases filled with cocaine. Driver said he was transporting cocaine for car’s owner, the def. The police found other evidence linking def. to the suitcases. Def. was arrested.  
      ii) Driver unavailable to testify at trial. Pros. argued that the statement as a while was against the driver’s interest. Def. argued that each part of the statement should be looked at differently and only those that were self-inculpatory of the driver should be admitted. Court agreed w/ the def. position.  
      iii) HELD: Rule 804(b)(3) makes admissible only those declarations or remarks w/in the confession that are self-inculpatory. It does not allow
admission of non-self-inculpatory statements, even if they are made w/in a broader narrative that is generally self-inculpatory

7. Statements of Personal or family history
   a) birth, marriage, death, etc.
   b) declarant must be unable to testify
c) FRE 804(b)(4) declarant must be intimately associated with the family of the person the statement concerns that it is likely the declarant would have accurate information concerning the matter declared
d) the declarant must have no motive to falsify

8. Forfeiture by wrongdoing
   a) a criminal defendant will often have an incentive to attempt to keep a witness from testifying against him at trial. A declarant might do this by intimidating the witness, bribing him, or even murdering him. However, in many instances the witness will have made a previous out-of-court declaration
   b) Under FRE 804(b)(6), there is a hearsay exception for a statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to and did procure the unavailability of the declarant as a witness.
c) no reliability requirement

C. Residual Hearsay Exception [FRE 807]
   1. the statement must have circumstantial guarantees of trustworthiness that are equivalent to those inherent in the other, more specific, federal hearsay exceptions
      a) in determining trustworthiness, court considers the following factors among others:
         i) whether the declaration was under oath
         ii) how much time elapsed b/w the event and the statement
         iii) the declarant’s motive for telling the truth
         iv) first hand knowledge
         v) written v. oral (written presumed to be more reliable)
         vi) whether the declarant has subsequently recanted his statement
   b) near-miss: when facts come close to hearsay exception, some courts allow it under 807 while some courts refuse to apply the residual hearsay exception

2. the statement must be offered as evidence of a material fact
3. The statement must be more probative on the point for which it is offered than any other evidence which is available through reasonable efforts
4. Use of the evidence must be consistent with the general purposes of the Federal Rules and the interests of justice
5. The proponent of the evidence must give notice of his intention to offer the statement sufficiently in advance of the trial or hearing to provide a fair opportunity to prepare to meet it. Must include:
   a) the particulars of the statement
   b) declarant’s name and address
6. Examples
   a) most frequent example is grand jury testimony, although Confrontation Clause problem under Crawford v. Washington’s interpretation of Confrontation Clause.
IX. CONFRONTATION CLAUSE

A. The Confrontation Clause of the Sixth Amendment guarantees a criminal defendant the right to be confronted with the witnesses against him. Includes:

1. The right of the accused to be present at trial
2. Guarantees the accused the right to face adverse witnesses
3. Def. has the right to cross examine these witnesses
4. Hearsay rule often permits admission of evidence w/o the opportunity to cross-examine the declarant, raising hearsay problems

B. In order to be admissible, the statement must be non-testimonial

1. *Crawford v. Washington* – If a statement is testimonial, it may not be admitted against the accused unless the declarant is made available for cross-examination by the accused, either at the time of the statement or at the time of the accused’s trial.
2. The rough meaning of testimonial is bearing testimony – the declarant has some idea that the statement will be or may be used in a serious legal proceeding such as a criminal investigation.
3. Under *Crawford*, the following types of statements are considered testimonial (and thus inadmissible)
   a) prior testimony at preliminary hearings
   b) prior testimony before a grand jury
   c) testimony at a former trial
   d) statements made during the course of a police investigation
4. The following are probably not testimonial
   a) statements by a co-conspirator during the course of and in furtherance of the conspiracy
   b) excited utterances (to a private person)
   c) present sense impressions (to a private person)
   d) state of mind statements to a friend or relative
   e) dying declarations to a relative
5. Common scenarios
   a) police interrogation: where a witness is interrogated by the police, perhaps under suspicion of some criminality, and implicates the defendant during the interrogation. If the witness does not testify at the defendant’s trial, the witness’ statement to the police cannot be used against the defendant
   b) grand jury testimony: witness testifies in front of grand jury but then refuses to testify at the defendant’s later trial – any statement said in front of the grand jury is inadmissible
6. Confession implicating someone else, used during joint trial
   a) *Bruton v. United States*
      i) special problems arise when A and B are tried together and A’s confession implicating himself and B is sought to be used by the prosecution.
      ii) If the same jury hears A’s confession implicating B and A does not take the stand, then B’s Confrontation Clause rights are violated even if the prosecution only purports to be offering the confession against A.
iii) This holds true even if the judge warns the jury not to consider A’s confession against B.

b) two jury technique: one way around this problem is to use two juries when coconspirators are tried – a separate jury for each defendant.

C. If the declarant is available for cross-examination at trial, the demands of the Confrontation Clause are usually met

1. Mere unused opportunity to cross examine does not keep a statement out
   a) when the accused has an opportunity to conduct cross examination of the declarant at the time of the declaration and does not take advantage of the opportunity, the statement is not barred by the Confrontation Clause

2. “Availability” for cross examination:
   a) if the witness is not found (can’t be located) for a subpoena or receives the subpoena but does not come to court, witness is “unavailable” and his prior statement cannot be used against a criminal defendant
   b) if the witness takes the stand and pleads privilege, the witness is unavailable and the prior statement cannot be used
   c) if the witness takes the stand at trial and purports to answer, the fact that the witness is evasive or says he can’t remember probably does not prevent the witness from being considered “available” for cross examination

X. LAY OPINIONS

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A. First Hand Knowledge Required [FRE 602]

1. a lay witness must limit his testimony to facts of which he has first hand knowledge
2. Extents to all senses (saw, heard, smelled)
3. Knowledge at the time of trial is what is determinative – a witness could have gained new personal knowledge after an accident or crime

B. Opinions [FRE 701]

1. FRE 701 allows non-experts opinions or inferences that are
   a) rationally based on the perception of the witness, and
   b) helpful to a clear understanding of the testimony or determination of a fact in issue, and
   c) not based on scientific, technical, or specialized knowledge

2. When Laypersons can offer opinions
   a) “rationally based perceptions of witness”
      i) preference for more specific over more general
      ii) vests substantial discretion in trial judges in determining whether opinion is rational and even helpful
      iii) still must be useful to jury
   b) collective facts
i) collective fact is a shorthand rendition of what the witness perceived (ex. def. smiled as opposed to his lip curved up 1/8 inch on both sides; def. was drunk)
ii) inferences a lay person commonly and reasonably draws

c) Helpful to the jury
i) includes situations in which “you had to be there” – where recounting the details alone would not fully capture the reality
d) skilled lay observers
i) admissibility turns on whether this layperson has prior experience that enables laypersons w/ such experience to reasonably draw the proffered conclusion
ii) ex. handwriting: have there been sufficient observations of the handwriting so to reliably determine if the handwriting is known to the witness?
   - like personal knowledge requirement

3. Ultimate Issues
   a) FRE 704(a) allow opinions on ultimate issues except where the mental state of a criminal defendant is concerned

4. Offering testimonial evidence by a lay witness
   a) W must take an oath [FRE 603]
   b) W must have personal knowledge FRE 602]
   c) W must preferably state facts rather than opinion. Under FRE 701, W may give an opinion if:
      i) it is rationally based on his own perceptions
      ii) it is helpful to the fact finder
      iii) not based on scientific, technical, or other specialized knowledge
d) Competency: at common law, W must be competent (those not include felons, interested parties, etc). Under the FRE, nearly everyone with first-hand knowledge is competent (under FRE 601, ex, everyone is competent except judges and jurors, made incompetent by rules 605 and 606)