* 1. Relevance
     1. Evidence has to make fact more/less probable, and be material to crime/action
        1. Probative to fact, material to action
     2. Relevant 
        fact 
        action 
        "probabitive" 
        of in See-mining 
        "material" 

* 1. 401 - Test for Relevant Evidence
     1. 401a - has tendency to make a fact more or less probable (PROBATIVE) and
     2. 401b - The fact is of consequence (MATERIAL)
     3. Very liberal, a brick is not a wall, each piece doesn't have to prove the whole thing
  2. 402 - General Admissibility of Evidence - Relevant Ev. Admissible Unless
     1. US Const, Fed. Stat., FRE, other SCOTUS rules, say otherwise
  3. 403 - exclude relevant evidence if probative value substantially outweighed by:
     1. **Unfair prejudice**, confusing the issues, misleading the jury, undue delay, wasting time, needlessly present presenting cumulative evidence
     2. Skewed toward admission
     3. Is the prejudice relevant, threats to the victim probably relevant, but mentioning D. was in a cult is unfair prejudice.
        1. Undue probative weight - for example if something has happened more than once, jury more likely to hold it happened this time
        2. Gruesome photos prejudicial, no new additional evidence
        3. Only some of the photos from crazy party entered
  4. 104b - Conditional Relevance
     1. When relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist
        1. The court may admit the proposed evidence on condition that the proof be introduced later
  5. Probabilistic Evidence
     1. This kind of evidence allowed, but math can blind jurors to other evidence that may be more probative.
     2. Courts rarely find Statistical evidence alone to be dispositive.
        1. Courts often admit as long as probative and not overly prejudicial

* 1. Categorical Exclusion Rules
     1. Elements of Each Rule
        1. Types of Evidence Covered
        2. Forbidden Purposes
        3. Sometimes Allowable Alternative Purposes
     2. 407 - Subsequent Remedial Measures
        1. Forbidden to prove: negligence; culpable conduct; a defect in a product or design; a need for a warning or instruction
        2. Allowable for: impeachment, and if disputed: proving ownership, control, or feasibility of precautionary measures
     3. 408 - Compromise Offers and Negotiations
        1. Type of evidence: evidence of conduct or statements made during negotiation,
           1. Must be in dispute to be protected. "not admitting guilt we offer…"

I know I made a mistake, damage is 500, but I can only give you 200. This is an admission, only the "200" is protected

* + - * 1. Must be in actual compromise negotiations (not regular business)
        2. Can be brought in if obtainable in other places. (prevents parties from trying to keep info out of court)
      1. Forbidden: to Prove liability for or invalidity of claim or amount
      2. Allowable for: prove bias/prejudice of witness, negating claim of undue delay, showing obstruction of justice
    1. 409 - Offers to Pay Medical and Similar Expenses
       1. Evidence of furnishing, promising to pay, or offering to pay medical bills is not admissible to prove liability for injury
       2. Allowable for: bias and other reasons
          1. Statements admitting fault are admissible, statements can be parsed phrase by phrase
          2. 409 narrower than 408: only applies to statements or payments
          3. 409 borader than 408: can be anytime, anyplace
    2. 410 - Pleas, Plea Discussions, and Related Statements
       1. Applies in ALL cases: civil and criminal
       2. Only covers plea bargaining w/ prosecutor - most confessions are outside of scope of rule
       3. Not admissible:
          1. A guilty plea later withdrawn
          2. A nolo contendere plea;
          3. A statement under FRCP 11
          4. Discussion w/ pros. If did not result in guilty plea or later resulted in withdrawn guilty plea
       4. Allowable:
          1. Court may admit 3 or 4 above if either of the following reasons:

If another statement was introduced and they two should be considered together

In criminal only for purjury, if the D made statement under oath, on record, or with counsel present.

* + - 1. Waivable
         1. Can be waived during plea bargaining, so naturally part of most plea bargains.
    1. 411 - Liability Insurance
       1. Forbidden: to prove negligence or wrongfulness
       2. Allowable for: proving witness bias, prejudice, or proving agency, ownership, or control
  1. Character Evidence
     1. 404
        1. **404a: Character Evidence**
           1. 404a1:

Not admissible to prove that person acted in according with the character/trait on a specific occasion

"they're the type of person who would do that" - propensity

* + - * 1. 404a2: Exceptions for Defendant or Victim in **criminal case only**

404a2A: (in criminal case) defendant may offer evidence of defendant's trait, and if admitted prosecution may rebut

404a2B: limited by 412: (in criminal case) defendant may offer evidence of alleged victim's pertinent trait, and if admitted

Prosecution may rebut and offer evidence of defendant's same trait

Defendant must open door about victim's trait, but the victim may then attack defendant for this same trait, as well as rebut the Defendant and bring their own witnesses about that victim's particular trait.

404a2C: in **homicide case,** prosecution may offer evidence of alleged victim's evidence of peacefulness to rebut evidence victim was first aggressor. (said evidence that victim was first aggressor need not be character evidence)

* + - * 1. 404a3:

Evidence of witness's character can be brought in under 607, 608, and 609

i.e. character evidence may be brought for impeachment.

Has the witness been truthful?

* + - 1. **404b: Crimes, Wrongs, Other Acts**
         1. Forbidden Use: evidence of crime, wrong or other act not admissible to prove person's character and that person acted in accordance with that character
         2. Permitted Use: (non-exclusive list) motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, lack of accident.

On request by Defendant in criminal case prosecution must:

Provide notice of any such evidence prosecutor plans to offer at trial; and

Do so before trial; or during trial if court excuses lack of notice

* + - * 1. Other Exceptions

Huddleston Standard (Evidence of Prior similar acts w/o conviction) - Alleged Crimes, Even acquitted crimes.

Court need only determine it meets the 104b standard - preponderance of the evidence rather than clear and convincing.

Used to show identity, lack of mistake, etc.

Common Plan - to prove existence of larger plan, scheme or conspiracy, of which the crime on trial is apart

MO; Earmarks - requires pattern (modus operandi and characteristics of the crimes must be so unusual/distinctive as to be like a signature

High degree of uniqueness combined with similarity.

Sometimes to improve narrative integrity (res jestines)

* 1. Character evidence to prove character allowed when it is an element of the claim. For example in a defamation case.
  2. Character Evidence Regarding Sexual Assault
     1. 412 - Rape Shield: Victim's sexual behavior or predisposition
        1. 412a: following evidence is forbidden in civil or criminal cases involving sexual misconduct
           1. 412a1: evidence victim engaged in other sexual behavior
           2. 412a2: evidence to prove victim's sexual predisposition
        2. 412b: Exceptions
           1. 412b1: Criminal cases

412b1A: specific instances of victim's behavior to prove defendant is not the source of semen, injury, or other physical evidence.

412b1B: specific instances of victim's behavior with respect to person accused of sexual misconduct, if offered by D to prove consent, or if offered by prosecutor.

Prosecution can admit to support claim defendant engaged in a pattern of misconduct w/ alleged victim.

412b1C: Evidence whose exclusion would violate Defendant's constitutional rights.

If an excluded piece of evidence would change jury's mind, maybe that's unconstitutional (D knows of V's character to consent)

* + - * 1. 412b2: Civil Cases - court may admit evidence to prove victim's sexual behavior or disposition if its probative value outweights danger of harm to victim or unfair prejudice to any party. Court may admit evidence of victim's reputation only if victim placed in controversy.

This balance is different (from 403) b/c it mentions harm to victim, and probative value "substantially" outweighs danger. 403 evidence is admissible unless dangers substantially outweigh probative value.

* + - * 1. 412c - Procedure to determine admissibility (procedures to preserve privacy)

Motion

Hearing

* + - 1. Victim includes alleged victim
    1. 413a - in criminal case, if D is accused of sexual assault, evidence of other assaults committed by D is admissible. Specific instances, not reputation or opinion
    2. 414a - in criminal case, if D accused of child molestation, allowed to admit evidence that D committed other child molestation. Specific instances, not reputation or opinion
    3. 415a - in civil case court where relief based on sexual assault or child molestation, court may admit evidence party committed any other sexual assault or child molestation, considered under 413 and 414 respectively. Specific instances, not reputation or opinion.
  1. 405 - Methods of Proving Character: how to prove what is permissible in 404
     1. 405a: by reputation or opinion
        1. When evidence admissible, on direct, may be proven by testimony regarding reputation, or by opinion
        2. On cross examination - court may allow inquiry in specific instances.
     2. 405b: by specific instances of conduct - when
        1. For "character at issue" cases (where character is essential element of a charge, claim or defense, like defamation). Specific instances allowed on direct.
     3. 405a Applies to and 404a2 exception; 405b only to character at issue cases.
        1. Does NOT control for 404b2, 413, 414, or 415.
     4. Once Defendant opens the Door, prosecution may cross the Defendants witness, and bring its own witnesses, the direct for prosecutions witness may still only be by opinion/reputation.

* 1. 406 - Habit; Routine Practice
     1. Evidence of habit may be submitted to prove on a particular occasion the person acted in accordance with the habit. No need for corroborated or eyewitness.
     2. Habit; allowable: I brush my teeth every morning, therefore the inference that they brushed on Tuesday is allowable
     3. Character; forbidden: I'm clean and the type of person who would brush, therefore the inference I brushed my teeth Tuesday is forbidden.
  2. Machine generated alternative text:
     406: 
     Disposition to 
     commit act 
     Pattern of action 
     Regularity of action 
     Voluntariness 
     Heuristics 
     Habit 
     specific 
     homogeneous 
     invariable 
     reflexive 
     Cha racter 
     general 
     heterogeneous 
     episodic 
     conscious 

* 1. Witness Impeachment and Rehabilitation
     1. 606 - Jurors Competency as a Witness
        1. 606a - Juror's may not testify before Jurors
        2. 606b - During Inquiry into Validity of a Verdict or indictment
           1. Courts reluctant to reverse jury verdicts, even more reluctant to inquire about deliberations, and using jury testimony about those deliberations to overturn
           2. Internal influences (insanity, congnitive defects) - not open to inspection after trial, only during (don't want second guessing after the fact)
           3. External Influences - can be sources of testimony and grounds for reversal (bribes, threats, improper contact w/ interested party, bias indicating faulty voire dire (prelim. Exam of witness/judge/jury)).
     2. 607
     3. 608
     4. 609
     5. 613
     6. Methods of Impeachment
     7. Witness Rehabilitation
     8. Extrinsic Evidence & Collateral Matters
        1. Like in 405a, when on cross asking about specific instances, must accept answer witness gives. (did you know your friend embezzled? "No") and can't give evidence about the specific instances.
  2. Hearsay
     1. 801
        1. 801a-c: definitions of statement, declarant, hearsay
           1. Truth of Matter Asserted

Words offered to prove their effect on the listener

Legally operative words (verbal acts)

Inconsistent statements offered to impeach

State of mind, independent legal significant, inconsistent statement to impeach. Anything NON-TMA is not hearsay

* + - * 1. Analysis:

Was it a statement?

Was it testimony at the current trial

Is it being introduced for the truth of the matter asserted?

If answered yes, no, yes (its hearsay, although that doesn't mean its inadmissible)

* + - 1. 801d - Statements that are **NOT** hearsay
         1. 801d1 - Declarant-Witness's Prior Statement (statements made outside of court by a person who then testifies at trial). Declarant must NOW be available for cross.

801d1A - prior inconsistent statement

Prior statement **must** have been made **under oath**.

Made by witness, out of court that conflicts with something witness has said in testimony in current trial.

Being used to show the contrast in statements, may not be introduced to show prior statement is true.

801d1B - prior consistent statement

Statement made by witness out of court *before* the witnesses testified that reinforces/supports the testimony

Prior consistent statement does not need to be made under oath.

Used to show current testimony is NOT fabricated

(statement must be made before time of alleged fabrication, or before time witness had motive to lie)

to rehabilitate witness credibility when attacked on another ground.

No timing requirement for prior statement.

This would be used to show that the witness doesn't have a poor memory, and they're not inconsistent (you can say, "see, look, they said the same thing back then")

801d1C - identifying statements

The identifications made earlier will be more accurate than the ones made during testimony.

* + - * 1. 801d2 - Opposing Party's Statements (Admissions) - a statement offered against an opposing party (party A said it, party B is telling court A said it)

Made by party

Party manifested adoption of statement or believed it to be true (adoptive assertions)

"You didn't stop at the light", "I'm sorry I didn't". The I'm sorry I didn't response is adoptive

Statements need not be verbal

Double Indemnity: Silence is an assertion -

Silence adopting a statement that amounts to an admission by a party opponent.

Courts generally look for 4 conditions to be met:

1. D heard and understood;
2. D was at liberty to respond;
3. circumstances naturally called for a response from D; and
4. D failed to respond appropriately.

Statement made by someone authorized to make statement on the subject (does not by itself establish declarant's authority)

Statement made by agent or employee on a matter w/in scope of that relationship (while it existed) (does not by itself establish existence or scope of relationship)

Was made by party's co-conspirator during and in further of the conspiracy. (does not by itself establish existence of conspiracy or participation in it)

Between co-conspiartors, statements made to recruit, statements meant to conceal criminal objectives of conspiracy

* 1. 802 - hearsay not admissible unless fed. Statute, FRE, or other SCOTUS rules.
  2. 803
     1. Present Sense Impression - statement explaining an event while being perceived or immediately thereafter
        1. Must describe or explain something
     2. Excited Utterance - statement related to startling event made while declarant under stress of excitement it caused
        1. Must only relate that the event was startling.
        2. Look for exclamation points and shouting.
     3. Then Existing Mental, Emotional Physical condition
        1. Forward looking allowed as evidence of declarant’s future conduct. (he planned to go camping) - motive, intent, plan, feeling, pain, health
        2. Backward looking not allowed (while recovering, claimer husband had poisoned her)
        3. Out of court statements:
           1. I planned to go to the movies yesterday ok. I went to the movies yesterday is inadmissible.
     4. Statement made for medical diagnosis or treatment
        1. Test:
           1. (A) is made for — and is reasonably pertinent to — medical diagnosis or treatment; and
           2. (B) describes medical history; past or present symptoms or sensations; their inception; or their general cause.
        2. People usually truthful in order to get best medical treatment
           1. Even if no treatment is expected (i.e. told to doctor for trial), expert's evaluation is diagnosis and admissible.
        3. Doesn't have to be made by or to doctors, identity/fault usually excluded. Do not need to be made by the person getting treated (he hit his head on the table, to the receptionist, is ok) but "there was no warning slide by the slippery pool" would probably be excluded
     5. 803(5) - recorded recollection
        1. 805(5)
           1. Is on a matter witness once knew but now cannot recall enough to testify
           2. Was made or adopted by witness when still fresh in mind
           3. Accurately reflects witnesses knowledge
        2. Refreshing Memory
           1. 803(5) Recorded Recollection & 612 Together
           2. When a witness can't remember something, the attorney does the following:
           3. Under 612, they can be shown a document that will "refresh" their recollection. They look at the document and, if they then recall the details (as is often the case), recount what happened.
           4. If the W still can't recall all the details (it might be a lengthy document), then the attorney can read the document aloud under 803(5)
           5. The document itself is not entered into evidence, but the part that is read aloud is entered into the record.
           6. Quite often the opposing party will allow in the document in after some prompting by a judge.
     6. Records of regularly conducted activity (Business Records)
        1. Made at or near time of the event
        2. From info transmitted by employee w/ knowledge
        3. Kept in a regular practice of the business (of note: what does this business do?)
        4. Testified to by the custodian or other qualified witness and
        5. Seems fairly trustworthy
           1. Records important outside of litigation
           2. Records made prior to dispute
     7. Absence of record of Regularly conducted activity
     8. Public records & reports
        1. Often admissible except when made in anticipation of legal action
           1. Excludes police reports (why police have to testify)
           2. Oates. Lab reports not admissible as business records; part of adversarial process.

Lab technicians and specialists testify

* + - * 1. Hayes. A report by tax examiner that a citizen failed to file a return, is less adversarial and thus admissible
        2. Weiland. Admission of photos and records for a prison intake are non-adversarial
  1. 805 - hearsay within hearsay ok, as long as each level is admissible
  2. 804 - Exceptions to Hearsay: Declarant is Unavailable as a Witness
     1. 804a: Criteria for Being Unavailable
        1. Privilege
        2. Refuses to testify (despite court order to do so)
        3. Testifies does not remember
        4. Cannot be present because of death or infirmity (physical, or mental illness); or
        5. Good faith failure to procure declarant attendance or testimony
           1. See 804b1 or 6; 804b2,3,4
     2. 804b: Hearsay Exceptions - the following is not excluded if declarant is unavailable
        1. Former Testimony
           1. Given at current proceeding or an earlier one; and
           2. Is now offered against a party (or in civil - interest) had opportunity and similar motive to develop it by direct, cross, or redirect examination

Parties must have been subject to examination by the party against whom the statement is offered either now or previously. (Grand jury testimony not covered.)

Look for similar opportunity and motivation to cross examine the witness.

Criminal -> Civil, typically okay.

Civil -> Criminal, typically not okay.

* + - 1. Dying Declaration
         1. Person must be anticipating Imminent Death (no need for actual death),
         2. Statement must relate to circumstances of impending death

Suspicions not grounded in some knowledge of facts are not admissible

Statement can be proof of knowledge of those facts

* + - 1. Statement Against Interest (unlike opposing party interest, the declarant need not be a party, just must be unavailable)
         1. Reasonable person would have made it only if they believed it tru eb/c it was so contrary to their interest

If a reasonable person would think it was against declarant’s interest:

declarant's pecuniary, social, or if reliable, criminal or civil interest

doesn’t have to actually be against declarant's interest

declarant doesn't have to believe it was against her interest

* + - * 1. Proffering party bears the burden of showing that corroborating circumstances “clearly indicate [the] trustworthiness” of the statement.

What the court looks for

* 1. the timing and circumstances under which the statement was made;
  2. the declarant’s motive in making the statement and whether there was a reason for the declarant to lie;
  3. whether the declarant repeated the statement and did so consistently, even under different circumstances;
  4. the party or parties to whom the statement was made;
  5. the relationship between the declarant and the opponent of the evidence; and
  6. the nature and strength of independent evidence relevant to the conduct in question.
  7. Statement of Personal or Family History
  8. [transferred to rule 807]
  9. Statement offered against a party that wrongfully caused the declarant's unavailability
     1. Allows statements in against witnesses who were bribed, murdered, etc. by the other party. Because not based on likelihood the statement is reliable, can only be introduced against party responsible for absence of witness.
  10. 807 - Residual Exception. Catch-all
      1. If not specifically covered by exceptions in 803 or 804 and:
         1. Statement is trustworthy
         2. Offered as evidence of material fact
         3. Is more probative on than any other evidence
         4. Admission will best serve purpose of rules and justice
      2. Must give notice of this evidence
  11. Confrontation Clause
      1. Testimonial evidence triggers the CC.
         1. Affidavits, custodial examinations, prior testimony w/o cross, pre-trail statements that declarants would reasonably expect to be used prosecutorial, confessions, ex parte testimony, statements taken by police officers (police reports), test results
      2. Test:
         1. Was the inquiry into an ongoing threat or possible threat or had the threat passed?
            1. Statements are nontestimonial when made in course of police interrogation under circumstances in response to emergency
         2. Were questions directed towards prosecution rather than threat ascertainment or reduction?
         3. Did defendant secure the witness's unavailability for the purpose of preventing the witness to testify?
         4. Prosecution must show this by preponderance of the evidence.
      3. **If there was opportunity to cross declarant under oath at the time the statement was made \*or\* they are now available, then the CC is satisfied. (Mattox & Green)**
      4. **If not, then the statement is only admissible if it is \*not\* testimonial. (Crawford)**
      5. **Of course, what is and what isn't testimonial will be hard to determine in some cases. The Court will make it up as they go along. May look a lot like hearsay doctrine (Hammon & Davis). Or it may not make much sense at all (Williams).**
      6. **The “primary purpose” of producing evidentiary statements is emerging as the key element of “testimonial hearsay” triggering the CC.**

* 1. Lay and Expert Opinion
     1. 701 - Lay Opinion
     2. 702 - Expert Opinion
        1. Daubert
     3. 703 -
     4. 705
     5. 104a -
     6. Matter of Common Knowledge
     7. Eyewitnesses
  2. Privileges
     1. When does marriage priv. apply?
  3. Authentication