# Evidence

## Overview

### Common Evidence-Related Terminology

* **Admissibility** - whether evidence is permitted to be presented before a trier of fact for them to consider while deciding the case
  + Rules of evidence determine what types of evidence is admissible, and the judge applies these rules to the case
  + Might be limited; admissible for one purpose and not another; in such cases, court typically issues "limiting instructions" to jury
* **Circumstantial** - Type of evidence that tends to indirectly prove a factual proposition through inference from collateral facts; can be contrasted with direct evidence (e.g., surveillance camera footage of the crime)
* **Competency** - applies to witness testimony; refers to one's ability/qualification to testify as a witness. Note: this competency is not the same as credibility; the former, decided by judge (rather than fact finder), determines whether individual is allowed to testify in the first place, whereas credibility is ultimately a matter decided by jury
  + Can also be used in a broader sense to refer to the appropriateness of evidence, including its relevance and whether privilege or some other basis for exclusion applies
* **Completeness** - rule of completeness allows party to request that, if one piece of evidence is admitted and introduced, any other part/piece of evidence be introduced at the same time if needed to be fairly considered
* **Materiality** - offered for the purpose of directly proving a specific fact/matter at issue (e.g., a fact proving/disproving a necessary element of the claim/offense)
  + Conversely, evidence offered for any other purpose (evidence which does not stand to have a probative effect on the facts at issue) is said to be immaterial
  + The term is less common in modern law of evidence, but still utilized in some jurisdictions
* **Preliminary Questions** - those related to the competence of evidence, including the admissibility of evidence, witness qualifications, whether privilege exists or hearsay exception applies
  + In ruling on preliminary questions of fact, court is not bound by FRE except when related to privileges; can consider things that would otherwise be inadmissible, hearsay, etc.
  + Hearings may be required to take place outside presence of jury if preliminary question involves admissibility of confessions, defendant in criminal case requests it, and "justice so requires" (gives judge discretion)
* **Probativeness or Probative Value** - the extent to which a piece of evidence makes the disputed fact more or less probable or true
* **Relevance** - having any tendency to make the facts at issue more or less probably than if this evidence were excluded entirely (i.e., having probative effect)
  + Relevance is a necessary condition for evidence to be admissible; must meet minimum threshold of relevance to be admissible
  + This threshold is not strict: the extent to which evidence tends to affect probabilities does not need to be significant, it just needs to affect it all
* **Sufficiency** - has to deal with meeting burden of production and establishing prima facie case; evidence is "sufficient" when there is enough of it has been produced to move forward to be considered by fact-finder.
  + Difference between this and relevance is that the former is minimum threshold for a piece of evidence to be admissible; for a piece of evidence to be relevant, it does not need prove an element of the claim/offense by itself;
    - Relevance is more of an attribute of individual pieces of evidence, where as sufficiency is an attribute of the entire body of evidence
* **Weight** - The degree to which evidence convinces a fact-finder, based on its credibility/believability, to either accept or reject a factual assertion
  + Weight can be used to describe the strength/credibility of the whole body of evidence in favor of one side of the question of fact
  + Can also describe the strength/credibility of an individual piece of evidence and its contribution to persuading the jury in a certain direction (i.e., how much it moves the needle)
  + Whereas admissibility determined by a judge, weight is ultimately determined by fact-finder (e.g., jury) in credible they find a piece/body of evidence and thus how much reliance to place on it when deciding a question of fact

### Federal Rules of Evidence and Their Applicability ???

* The Federal Rules of Evidence (FRE) are applicable to all civil and criminal trial proceedings before U.S. Federal courts (regardless if bench trial or jury trial)
* The FRE **do not apply to**:
  + Trials in state courts
    - Note: The FRE also functions as a de facto set of model rules that have been adopted in a majority of states, thus most states trials are governed by evidence rules very similar to the FRE
  + Non-trial criminal proceedings (e.g., grand jury, discovery, sentencing or probation hearings, issuance of warrants)
    - Exception: the rules in the FRE relating to Privilege apply here as well
  + Court’s deciding on a preliminary question of fact (e.g., admissability/competency of evidence and witnesses)
    - Exception: the rules in the FRE relating to Privilege also continue to apply here
* In federal diversity cases, Fed courts generally apply the FRE in deciding/resolving evidentiary issues that arise during trial
* Ruling on evidence under FRE (103)
  + Court required to prevent inadmissible evidence from reaching jury to the extent practical
  + Party **can only claim error** (i.e., appeal) in court's ruling to admit/exclude evidence **if it affects substantial right** of party **AND**:
    - If ruling was to admit, party must have made **a timely objection/motion to strike and stated specific grounds** for doing so
    - If ruling was on exclusion, **offer of proof** (explanation why evidence is relevant, admissible) must have been made
      * Once court rules definitively, don't need to renew objection/offer of proof in order to preserve appeal
      * Exception: error affecting substantial right is plain obvious, can appeal even if no objection at the time

## Burdens of Proof and Presumptions

* The burden of proof consists of two separate burdens: the burden of producing the evidence and the burden of persuasion
  + In a trial, one party is initially presumed to be correct, while the other side bears the burden of producing evidence persuasive enough to establish the truth of facts needed to satisfy all the required legal elements of the dispute

### Burden of Producing the Evidence

* First, there is the **burden of production**, also known as the "**burden of going forward**", which is the obligation to produce enough evidence to establish a prima facie case.
  + To meet this burden, one **must produce enough evidence as to each element of a claim or defense, such that a reasonable fact finder *could* infer**, on its face (i.e., without opportunity for rebuttal) that **what is alleged has been proven**
    - This is a question of law, not fact
* In other words, satisfying this burden means a party has produced to evidence on an issue to have it decided by a fact-finder ("going forward") who it must then persuade, to the extent required by the standard of proof, that issue is true
  + Failure to meet this burden likely results in summary judgement or directed verdict/JMOL

### Burden of Persuasion

* **Burden of persuasion**, also commonly referred to as the **standard of proof**, is a certain **required degree/level of proof with which one must establish a particular issue**
  + Determination of whether burden has been met is the responsibility of the trier of fact
* The standard of proof is different between civil and criminal matters
  + **Civil case = preponderance of the evidence**
    - Simply put, this standard requires showing the fact is "more probable than not"
    - Exception: there are certain matters (mostly equity suits e.g., custody, wills, fraud) that use a heightened "clear and convincing evidence" standard, which is somewhere between "preponderance of the evidence," and "beyond reasonable doubt" (must be highly probable/reasonably certain)
  + **Criminal case = beyond a reasonable doubt** (w/r/t/ each element)
    - Note: for D raising affirmative defenses, must only meet preponderance of the evidence
* **This burden does not shift during a trial**; it stays with the party to whom the law allocates it by default
  + Example: the prosecution establishing a fact that tends to prove an element of a crime does not shift the burden to the defendant to disprove it beyond a reasonable doubt; instead, the burden stays with the prosecution and the defendant must merely raise enough doubt so as to prevent that burden from being met
  + The burden of producing evidence, however, may shift throughout the trial
    - For example, if one party makes a prima facie case, opposing party then faces burden of producing counter-evidence
  + Multiple burdens of persuasion may exist in one case (e.g., one for establishing elements of the claim/offense, one for asserting an affirmative defense)

### Presumptions

* **Presumption** - A an **inference that must be made, as a matter of law, in light of certain ("basic") facts**
  + These basic facts, once established by force of evidence, are what necessitate the legal presumptions
* Most presumptions are **rebuttable presumptions**, meaning **evidence can be introduced to defeat them** (aka "bursting the bubble")
  + Can do so **by challenging the existence of either the "basic facts**" (those giving rise to the presumption) **or the presumption itself**
  + A rebuttable presumption shifts the burden of production, but not the burden of persuasion, to the opposing party
    - The FRE and a majority of states treat **rebuttable presumptions as having a procedural effect, meaning the presumption merely shifts the burden of production** to the opposing party and "vanishes" entirely if that party produces sufficient evidence supporting facts contrary to the presumption (hence the phrase "bursting the bubble")
* There are also **conclusive presumptions**, also referred to as irrebuttable presumptions, which are those that **cannot be directly overcome by introducing counter-evidence against the presumption**; once a "basic fact" is established, presumption is conclusive
  + Unlike rebuttable presumptions, which are treated as procedural devices, conclusive presumptions are treated as rules of substantive law (stating that legally X = Y, therefore if X then Y);
  + However, **can still offer counter-evidence challenging the "basic fact"**
* Although, as noted in the first section, FRE usually governs evidentiary issues in Federal diversity cases, Rule 302 of the FRE also states that "state law governs the effect of a presumption regarding a claim or defense for which state law supplies the rule of decision"
  + Thus, when there are questions about presumptions/burdens of proof w/r/t a element needed to establish a state law claim/defense, state law, rather than the FRE, controls the effect of said presumption
  + This upholds the *Erie doctrine*, which states that there is no general federal common law, thus Federal courts must apply state substantive law in suits between citizens of different states

### Judicial Notice

* Judicial Notice is when court determines that that something will be accepted as truth, relieving party of need for more proof
  + Like stipulations, but decided by court rather than agreement between parties
* Two main types of judicial notice, though FRE only applies to one
  + **Legislative facts** - those which have relevance to legal reasoning and the lawmaking process, whether in court's formulating legal principles/ruling or legislature's enactment of a law
    - Political, social, economic, or scientific assumptions that guide judiciary's consideration of public policy concerns, for example, when faced with questions of first impression, extending or restricting existing legal rules, or constitutional/statutory interpretation (e.g., the idea underlying Hand formula in Carroll Towing)
    - The **FRE do not govern legislative facts**, but generally speaking, these are **not indisputable** (nor are they required to be), as courts are afforded much more latitude w/r/t them
  + **Adjudicative Facts** - are simply the facts of the particular case, the type that go to the jury to deliberate on
    - Under FRE 201, **judicial notice for adjudicative fact only if it is not subject to reasonable dispute because:**
      * It is **generally known within the jurisdiction** of the trial court (not Judge's personal knowledge, but also need not be universal)
      * OR it **can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned**
    - Procedure
      * Court can take notice on its own or or party requests it and supplies necessary information
        + Judge doesn’t need to refer to outside material to take judicial notice of a fact
        + The court may take judicial notice at any stage of the proceeding
      * Party, upon request, is entitled to be heard on the propriety judicial notice and the nature of the fact to be noticed, even if court has already taken notice
      * In **criminal cases, notice of adjudicative facts is not conclusive** and final; court must instruct jury they may chose not to accept them
        + In **civil cases, they are conclusive**, jury must accept them

## Relevance

* **Relevance** of evidence is a **necessary condition for admissibility and can be defined as having tendency of to make the facts at issue more or less probable** (i.e., having probative effect)
  + The minimum threshold of relevance that must be met for evidence to be admissible is not that strict hover; simply **needs to have some probative value**
  + The facts which it makes more or less probable must also be ones that **affect the issues on trial**
  + Trial judge is responsible for applying this relevance analysis by reviewing piece of evidence and determining its probative value (if any);
  + FRE states that relevant evidence is considered admissible unless some other rule of the FRE or statute maintains otherwise
    - However, as shown in following sections, FRE contains several other provisions that could result in relevant evidence being deemed inadmissible
* Even if a piece of evidence meets this relevance threshold, it may be inadmissible on one of the other grounds for exclusion
  + FRE 403 provides that even relevant evidence may be excluded if its **probative value is substantially outweighed by the danger of:**
    - **Unfair prejudice**
      * Might unnecessarily cause the jury to become improperly sympathetic towards or biased against a party
    - **Confusion of issues**
    - **Misleading the jury**
    - **Undue delay**
    - **Waste of time**
    - **Needlessly presenting cumulative evidence**
  + The term "substantially" in FRE 403 is important; even where the aforementioned risks outweigh the probative value of evidence, it may still be admissible if the extent to which it is outweighed is less than substantial
* **Conditional relevance** - There may be circumstances where the question of **relevance hinges on the existence of some other fact, which must first be proven** before relevance can be determined (FRE 104(b))
  + In these cases, court may admit the evidence so long as conditional fact can be proven later on when it considers the sufficiency of the whole body of evidence
  + At this stage, court makes preliminary decision **whether jury could reasonably find (pretty low hurdle) the condition to be satisfied**, it is admitted; jury then considers weight/credibility
  + Example: Letter purportedly from X has no probative value unless can be established that X actually sent or authorized it; if judge decides that jury could reasonably find that X indeed sent the letter, it will be admitted
* Finally, if a party believes a pieces of admitted evidence is improper, it may, subject to the court's discretion, admit otherwise inadmissible evidence in order to show this (remember, Court not bound by FRE in considering preliminary questions)

### Character Evidence

* **Character evidence**, which is **generalized information about a person’s personality, traits, ethics, temperament, etc**. It can be contrasted with similar, albeit different
  + This is different than habit evidence, which is intended to show that a person repeatedly acts a certain way under specific circumstances or in response to specific stimuli
  + Also distinct from evidence of business routine or industry custom/practice, which intend to show something very similar to habit evidence but w/r/t businesses/organizations
* **General Rule**: **character evidence NOT admissible to prove one's alleged conduct at a particular time/place was consistent with their character (i.e., D is predisposed to or has propensity for this type of conduct)**
  + This invites inference that since alleged conduct is consistent w/ D's character, it makes it more likely that he engaged in it
  + FRE 404(a)(1) - "Evidence of a person’s character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait."
  + Applies both to criminal and civil cases, although tends to arise more in criminal
    - Example: Prosecution not able to admit evidence attempting to show some aspect of D's character, such as misogynistic attitudes/views expressed in the past, to prove D is highly predisposed to domestic violence and is therefore likely to have committed the crime on trial.
  + Reasoning: risks creating unfair prejudice/bias and impair a jury's ability to consider the fact at issue objectively; this is the case even though this character evidence may have some probative value
* **Exceptions to rule** - character evidence not always excluded, either because it is deemed to fall outside the general rule or falls within one of a few explicit exceptions to the rule
  + Character evidence is **admissible when character itself is an essential element** of a claim/defense, rather than as a way to prove one's conduct
    - In these cases, such evidence is not subject to the general prohibition at all
    - One place where this can apply is defamation cases; can also be applicable in child-custody matters
  + **Evidence of D's good character** may be admissible to show that the thing he is accused of is **inconsistent with his character**, but only if this evidence **pertinent to the crime**
    - However, this then **opens the door for P to rebut it by introducing evidence of D's bad character** (which would otherwise be inadmissible)
  + **Evidence of victim's character** introduced by D may be admissible to show their innocence
    - However, under FRE 402(a)(2)(B) doing this both:
      * **Allows P to counter with rebuttal evidence showing V's good character**; and
      * **Opens the door for P** to introduce evidence showing that the **"bad character" D attacks V on is actually true of D himself**
    - FRE 402(a)(2)(C) allows P to introduce evidence of V's peaceful/non-violent character in homicide cases where D claims self-defense and that V was instigator/initial aggression, even if V's character not directly attacked
    - Example: D in assault may be admit evidence of V's violent/aggressive character to show he was attacked first and only acted in self defense; however P may then respond by introducing evidence of V's non-violent character and/or evidence of D's own violent/aggressive character
  + **Evidence of witnesses' character**, specifically as it relates to their truthfulness, may be admissible for the purpose of impeaching a witness.
    - However, this also applies when D will testify in trial and is thus the witness
* **Types of character evidence** - In the exceptions mentioned above in which character evidence may be permissible, this proof of character generally must take the following forms:
  + **Reputation testimony** - a defendant’s reputation is not the opinion of specific person but of a specific "community", which includes people with whom the defendant engages on a regular basis (not necessarily limited to residential community)
  + **Opinion testimony** - character witnesses personal opinion of some aspect of subject's character
    - Traditionally, character witnesses were limited exclusively to offering reputation (as opposed to witnesses' individual opinion). However, has become more permissive towards opinion testimony
  + **Specific Acts** - see following section for more, but general rule is:
    - Inquiry into specific instances of past conduct usually only allowed on cross-examination of witnesses (usually in attempt to discredit their knowledge)
    - However, when person's character is at issue (essential element of a charge/claim), relevant specific instances of the person’s conduct are admissible and thus inquired into on direct examination of character witness

### Evidence of Specific Acts

* In addition to general character evidence (i.e., those based on perceptions of others like opinion or reputation), FRE 404(b)(1) states that **evidence of a specific act is not admissible to prove a person’s character in order to show that the person acted in accordance with that character on a particular occasion**
  + Same justification as prohibition of character evidence in general: it can lead to unfair prejudice and distract/impair jury. Rather than weigh evidence objectively, jury might rely on inferences drawn about persons character or propensity to act a certain way.
* **Exceptions** - like with evidence of character in general, some instances where evidence of specific past acts may be admissible
  + May be **admissible to show something other than propensity to act a certain way**. The purposes for which specific act evidence may be admitted are captured (albeit non-exhaustively) by the acronym "**MIMIC**" (FRE 404(b)(2))
    - M - **Motive**: past bad act establishes motive for the one on trial
    - I - **Intent**: where knowledge/intent is required element and past bad act helps establish it; this is also relevant in civil cases where knowledge of a defect or condition is a required element of the claim
    - M - **Mistake**: where past bad act dispels D's claim that his act was accidental or a mistake
    - I - **Identity**: where identity of the perpetrator is disputed, evidence of past crimes connecting defendant to current one (e.g., the wet bandits from Home Alone)
    - C - **Common plan** - Common scheme or plan between two or more crimes where proof of one tends to establish the other
  + Note: this evidence still subject to other relevance limitations; may still be excluded if risk of prejudice outweighs probative value
  + Criminal D may request that P provide advance notice of intent to use past crimes or bad acts as evidence before trial; if notice is requested and P fails, evidence may be inadmissible (unless excused by court for good cause)
* Distinguishable from habit evidence and business custom/routine
  + Unlike specific prior acts, habit evidence attempts to show that conduct occurs with such regularity under certain circumstances that they are effectively automatic or reflexive;
    - **Habit/business routine evidence can be admissible** - Must show evidence that this **habit both exists** with a certain level of **inflexibility/invariability** (i.e., always instead of often) **and** that the **circumstances triggering the habit were present**
      * "Habit" must be specific behavior that is consistently/repetitively demonstrated, occurs subconsciously/automatically

### Special Exceptions in Sexual Assault and Molestation Cases

* Sexual assault and molestation cases are tricky and involve a number of special exception to the rules governing admissibility of character evidence and specific acts
* Exception to the rule allowing character evidence intended to attack V's character
  + Evidence offered by D intended to prove **V's promiscuity/predisposition towards consensual sex or that V engaged in other sexual behavior is generally inadmissible** under FRE 412.
    - Why? Possibility of V's sexual past being revealed in trial may deter V from reporting sexual assault
  + Exception to the exception (FRE 412(b)(1)) - In **criminal case, specific instances of V's past sexual behavior may still be admissible if**:
    - Offered for the purpose of **proving someone other than D was responsible** (reputation and opinion still excluded)
    - Offered for the purpose **proving consent** (where specific instances of V's past sexual behavior is with D)
    - Excluding evidence would otherwise violate D's constitutional rights
  + In **civil cases**, court my allow evidence about sexual predisposition if **probative value substantially outweighs risk of unfair prejudice** (FRE 412(b)(2))
  + Special process determining admissibility of this type of evidence
    - Requires separate motion (and accompanying notice) be made in advance by offering party
    - Court reviews evidence in camera; gives V opportunity to be heard in hearing, the record of which is sealed unless court directs otherwise
* **Evidence of D's past similar crimes in sexual assault or child molestation cases**
  + Under FRE 413 and 414, evidence of D committing sexual assault or child molestation (respectively) in the past is **admissible, even if offered by P to prove that D acted in conformance with propensity** (i.e., not just for proving one of MIMIC)
    - Does not require D to have been charged and convicted for these past specific acts; evidence may be in the form of someone coming forward for the first time
  + However, if P intends to offer this type of evidence, must disclose witness statements and expected testimony to D in advance (typically at least 15 days before trial unless court allows otherwise for good cause).
  + FRE 415 extends this to civil cases involving claims related to the alleged sexual assault of molestation as well; subject to same advance disclosure requirement

### Other Evidence with Special Relevance/Admissibility Considerations

* **Evidence of liability insurance** (e.g., malpractice insurance) is **not admissible to prove whether the person acted negligently or otherwise wrongfully**. (FRE 411)
  + However, court **may admit it for another purpose**, such as **proving a witness’s bias or prejudice** or proving agency, ownership, or control.
  + Note: this is different than the Collateral Source Rule from tort law, which may also involve the admissibility of evidence of insurance
    - The CSR is a common law doctrine stating the award for an injury should not be reduced by compensation P already received from another party. Since this renders evidence of such compensation irrelevant to the issues on trial, it becomes inadmissible.
    - CSR would exclude evidence of insurance payouts received by the victims rather than evidence of an insurance policy held by the tortfeasor (which is what FRE 411 does).
* **Evidence of subsequent remedial measures** (i.e., measures taken after the injury that make future one less likely to occur) are **not admissible to prove negligence, products liability, culpability**(FRE 407)
  + However, **may be allowed for purposes like proving the feasibility of precautionary measures**, as well as impeaching witnesses or demonstrating ownership/authority/control
* **Evidence of compromise offers/acceptances and negotiations is not admissible by either party to prove the validity or amount of a claim or to impeach for prior inconsistent statement**
  + Includes any conduct or statements made during compromise negotiations
  + Exceptions: may be **admissible for purpose of proving witness bias, refuting claim of undue delay**, or proving effort to obstruct criminal prosecution (e.g., trying to bribe the DA)
* **Evidence of pleas or statements in plea bargaining** - if someone withdraws from guilty/no-contest plea and decides to go to trial, or makes a statement in plea discussions involving prosecuting attorney, evidence of original plea or statement **not admissible to prove guilt** (FRE 410)
* **Evidence of the alleged wrongdoer's offers to pay expenses** (e.g., medical expenses) is **not admissible** (FRE 409)
  + Consistent with exclusions above for evidence of subsequent remedial measures or offers to compromise; these alone are not and admission of liability, but may in fact be legitimate, reasonable, prudent, and/or humane responses to injury that would be deterred if this evidence were admissible
  + However, unlike compromise negotiations, **any statements made in the process of offering to pay expenses are not excluded** under the rule; only evidence of the existence of such offers is inadmissible

## Tangible Evidence

### Identification/Authentication

* Identification and authentication used interchangeably, though authentication used more frequently in the context of writings/documents, whereas more identification tends to be used more in context of other physical objects
* Authentication requirement - **tangible evidence cannot be admitted until it’s been authenticated/identified**; this is part of laying foundation for non-testimonial evidence
  + FRE 901: "To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must **produce evidence sufficient to support a finding that the item is what the proponent claims it is.**"
    - "Sufficient to support a finding" standard here is lower preponderance of the evidence (i.e., **enough evidence that jury could find it genuine**)
  + Authentication is preliminary question of "conditional relevancy" (FRE 104(b)), which proponent can establish by showing connection between the item offered and the facts of the case
    - Even if judge determines threshold has been met and item can be admitted, whether or not it is accepted by jury as authentic/genuine is still entirely up to them
    - Similarly, admission of item doesn't mean opponent cannot present counter-evidence attacking its authenticity
* Methods for authenticating evidence (non-exhaustive)
  + **Testimony by someone w/ personal knowledge of the object** - admission that it belongs to them or they directly saw signature be made
    - In the case of photos, W can testify picture a fair/accurate representation
  + Evidence about origin and the **unbroken chain-of-custody up until trial**; this is important for physical objects
  + **Non-expert Testimony on handwriting**- A non-expert’s opinion that handwriting is genuine based on past familiarity with it
  + **Comparison** - A comparison by an expert witness or the trier of fact of the item in question with a genuine version of it (e.g., handwriting samples)
  + **Distinctive characteristics** - appearance, contents, substance, internal patterns, etc. taken together with all the circumstances
  + Others include **voice recognition** (w/ additional corroborating evidence), solicited replies, so-called ancient documents obtained from ordinary place of custody
* There is also such thing as **self-authenticating** evidence for which proponent is not required to meet threshold
  + These are things whose authenticity is self-evident, requiring no additional extrinsic evidence to lay foundation and be admitted
  + This includes:
    - Public documents bearing a governmental seal and a signature of authorized official
    - Certified copies of public records
    - Official government publications
    - Notarized documents and other acknowledged docs (e.g., those with attached certificate attesting to authenticity)
    - Articles from newspapers and periodicals

### Best Evidence Rule

* Rule maintaining that **when party attempts to prove the substance/contents of a "writing" (including photographs, videos, audio recordings, and the like), the original version needs to be offered**, subject to some exceptions
  + Note that "**duplicates**", defined as **counterpart produced by some process/technique to reproduce original and insure its accuracy/genuineness**, are generally **treated the same as the original** and are admissible unless it is determined that doing so would be unfair or there are questions about whether original is even authentic (FRE 1003)
    - Example of a duplicate is something like a carbon copy
* **Exceptions to Best Evidence Rule** - Secondary evidence (i.e., anything less than original or duplicate, such as testimony about the original) may be admissible if:
  + All **originals have been destroyed/lost** and not by some bad faith act of proponent
  + Original **cannot be obtained by any available judicial process** or if opposing party fails to produce it
  + OR the writing is **not closely related to a controlling issue**
* Other special cases
  + Certified copies of official public records are generally acceptable
  + Summaries of "voluminous documents" (those that cannot be conveniently examined in court) are allowed, so long as proponent makes original available by other parties at reasonable time/place

## Witnesses

### Competency

* As a general rule, **every person is, by default, presumed to be competent to be a witness unless the FRE provides otherwise** (FRE 601)
  + However, FRE provides that state law governs the witness’s competency regarding a claim or defense for which state law supplies the rule of decision
  + When state law does not govern (i.e., federal non-diversity case), FRE leaves question to judge, who applies same "probative value > risk of prejudice" analysis as with relevance
  + FRE still sets out basic minimum rules for that are effectively competence ones since they affect whether or not witness is able to testify
    - **Personal knowledge** - witness may only testify in matter if evidence is introduced sufficient to support a finding that they have personal knowledge of the matter (FRE 602)
      * Threshold here is typically set at **firsthand knowledge** of the thing being testified: something capable of being perceived by ones senses and that the witness did in fact perceive (although this part can be supported by witnesses own testimony)
      * N/A to expert testimony
    - A witness must give an **oath or affirmation to testify truthfully**. The oath or affirmation must be in a "form designed to impress that duty on the witness’s conscience"
    - Jurors are incompetent to testify not only in the trial they are sitting on a (obviously), but also may not testify w/r/t deliberation process in future proceedings challenging the original verdict
      * The only exceptions is testifying about the existence extraneous prejudicial information the jury was exposed to, external influence against juror, or mistake made on verdict form
* Under common law, used to be multiple grounds for finding witnesses incompetent and thereby disqualifying them.
  + Examples: under old common law approach to competence, you could be disqualified if you:
    - did not believe in God
    - had prior convictions (not all offenses triggered this though)
    - had beneficial interest in the case
    - were too young, retarded, or crazy to give truthful testimony under oath (this is now typically determined on individualized basis via preliminary examination of truth-telling ability; if you satisfy it, you can testify)
  + However, these are inapplicable in proceedings where the FRE governs. Further, even where state law governs (including federal diversity cases), common law has greatly evolved and, in most states, rendered these disqualifications obsolete.
    - That said, many states still have statutes known as "**Dead Man's Acts**" which prevent personal with financial interest from testifying against decedent w/r/t their communications or transactions in civil cases to which decedent's estate is party
      * However, to apply, must be a civil case, prospective witness needs to have direct interest at stake, his testimony needs to be adverse to the decedent and in favor of his interest. These can also be waived.
    - Most of these grounds for disqualification now instead factor into the question of witness credibility and may be raised for purposes of impeachment
      * Exception here is religious belief, evidence of which cannot be introduced to discredit witness

### Interrogation/Examination of Witnesses

* FRE 611 states that **court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to make those procedures effective for determining the truth, avoid wasting time, and to protect witness from harassment/embarrassment**
  + A court can also call a witness on its own (or on party's behalf) as well as examine a witness (regardless of who called them) (FRE 614)
    - However, party may object to court calling or examining a witness
    - Advisory Comm. notes warn that authority of judge to examine witness is "abused when the judge abandons his proper role and assumes that of advocate"; needs to be in furtherance of his objective of making the process "effective for determining the truth"
  + Large amount of discretion here technically allows court to permit jurors asking questions to the witness
* Presentation of evidence in the form of (oral) witness testimony occurs through how examination and begins when party calls witness the stand
  + **Direct examination** is the questioning of the witness by the party who called them
  + The opposing party then has opportunity to examine the witness through a **cross-examination**
    - **Scope** of this cross-examination is **typically limited to subject matter in the direct examination as well as that related the credibility** of the witness (however court may allow more at its discretion) (FRE 611(b))
* Certain types of improper questions in direct and/or cross-examination that may be disallowed by the court, either on its on volition or by granting objection made be a party allowable
  + Question may disallowed by court pursuant to specific rule (e.g., FRE 611(c)) or as part of its more general responsibilities under FRE 611(a) (e.g., prevent confusing witness)
    - Objections can be raised by party to prevent the witness from answering (since usually raised before witness response), or if a question becomes inappropriate only in light of the answer it elicits (or doesn't), an objection after the fact then operates to make the answer inadmissible (i.e., motion to strike)
      * Can raise an objection generally or for a specific reason; however, only the former type of objection generally retains right to appeal (objection must be timely and specific to appeal)
      * Recognized grounds for objection/striking during examination/cross-examination include:
        + Leading questions, though not always (see more below)
        + Compound question (aka double-barreled question) - a question that require witness to provide responses to what are really two different questions

"How frequently do go on bike rides and for how long?"

* + - * + Questions assuming facts have not been established (aka Extrapolation)

"What time did you leave your house that night?" when not clear that W left home at all

* + - * + Argumentative question ("badgering the witness" when especially rude or provoking) - Question that intended to make an argument/challenge witness instead of establish a fact

"How do you expect the jury to believe . . ."

* + - * + Questions prompting an opinion/speculation - call for witness to give their opinion on something or draw a conclusion they are not qualified to make

"What do you think was going through his mind?"

"Would you say he was driving negligently?" to a layperson

* + - * + Asked and answered questions (repetitive) - asking same question over and over again in slightly different ways, perhaps in attempt to trip-up witness
        + Non-response answers - answers that do not respond to the question, meaning a substantive response that has no connection/relevance to what was asked (as opposed pure silence)

In such cases, the examining party (but typically not opposing one) can make motion to strike the non-responsive answer

* FRE 611(c) explicitly identifies **leading questions**, which are those **designed to elicit a type of response that is favorable to the party** questioning the witness, as ones courts should disallow in direct examinations (with a few exceptions)
  + Although **generally not allowed in direct examinations**, ordinarily **allowed during cross-examination**
  + **Exceptions**: leading questions are usually allowed in direct examination as necessary to develop witnesses testimony, if a hostile witness or adverse party is called; also may be allowed if witness is a child, experiencing memory loss, hard of hearing, or limited in english
  + **Examples**:
    - "Is it true that X was speeding when he lost control of his vehicle and hit the victim?"
    - "You were in the area at the time of the crime, were you not?"
    - "You left the party at 11 PM, correct?"
* Excluding witnesses from the courtroom - Witness be excluded from courtroom during proceedings (save for their testimony) to insulate them from the testimony of other witnesses upon request of a party or at the courts own election (FRE 615)
  + Exceptions:
    - person is party to the proceedings
    - an official representative of a non-natural person party to the proceedings
    - someone who is entitled to be present in the courtroom by law (e.g., statutes permitting victims to be present)
    - any other person whose presence is deemed essential to a party's ability to make their case

### Use of Tangible Evidence to Aid Witness Recollection

* Two situations where this is applicable/permissible, although only one actually involves refreshing witness memory
  + **Refreshing recollection** - used to **aid witness with personal knowledge who is struggling with recall**, item (usually written documents, but not limited to them) by sparking their memory
    - The **item/writing itself is not evidence; does not need to be authenticated** or comply with any other rules of evidence
      * W's personal knowledge, not the contents of the writing, is the actual evidence here; writing **must only serve to refresh W's recollection, not act as a substitute for it**
      * However, **opposing party can still see it, cross-examine about it, and potentially admit parts of it as evidence (usually only for impeachment purposes)**
      * Item required to be produced upon opposing party request; failure to do so can result in the related testimony being deemed inadmissible or, worse case scenario, a mistrial
      * If cross-examining party does try to admit it as evidence for impeachment purposes, must be relevant to witness credibility
        + May also be admissible by either party as substantive evidence on other grounds, but needs to satisfy other evidentiary requirements including hearsay exception
  + **Recorded Recollection** - this is really just an exception to the hearsay prohibition; it is a writing that captures the recollection of a witness with personal knowledge at a point in time when memory was clear, but can no longer recall well enough to testify fully and accurately (FRE 803(5))
    - Unlike documents for refreshing recollection, recorded recollections are the evidence themselves and must satisfy other admissibility rules in addition to hearsay exception
    - Document admitted under this exception may be read into evidence, but not introduced as an exhibit (i.e., document circulated to jury)

### Opinion Testimony

* Opinion testimony from **lay witnesses** - FRE 701 provides that **non-expert opinions, such as inferences drawn from their factual observations, may be admissible in circumstances**
* FRE 701 identifies 3 necessary criteria:
  + (1) Must be **rationally based on the witness’s perception**
  + (2) Must be **helpful to understanding** testimony clearly or determining fact at issue AND
  + (3) Must be one **not based on specialized knowledge (e.g., technical or scientific)**
    - Specialized in this context means it requires certain education/training/experience to acquire, not merely that general public tends to lack it despite being very accessible
  + **Cannot draw legal conclusions** (e.g., D was negligent)
  + Examples of types of inferences lay W can draw: someone's physical or emotional state, estimated measurements, etc.
* Traditional rule (aka “shorthand rendition" or "collective facts") was that opinion from non-expert was admissible if court, using its own discretion, determines that thing being described consists of so many underlying factual details that an inference drawn from them is the only practical/realistic way to express it and inference/opinion involved does not exceed what lay persons can be reasonably expected to draw
  + However, even under traditional rule, opinion testimony on dispositive issues (e.g., whether D did it) was never admissible; not the case with FRE 701

### Expert Testimony

* Testimony by **expert witnesses** - FRE 702-706 govern use of expert witnesses and admissibility of their testimony
* Difference between expert and lay witnesses: the former may be able to give opinion on dispositive issues, can testify on something that requires technical, scientific, or other specialized knowledge, and do not need personal knowledge of the matter
* FRE 702 requirements for testifying expert witnesses
  + **(1) Appropriateness (Reliable + Relevant)** - requires that **expert's scientific, technical, or other specialized knowledge will help the trier of fact** to understand the evidence or to determine a fact in issue; according to *Daubert* court, this **has two components** that court, acting as gatekeeper, is tasked with enforcing when determining the admissibility of expert testimony
    - **(1) Relevance** - whether the subject matter of the expert's testimony is **relevant to the fact-finders inquiry**; comes from the "whenever scientific, technical, or other specialized knowledge will help the jury" part of FRE 702; **must “fit” the facts of the case**
    - **(2)Reliability** - court must focus on the reliability of the testimony , which is implied by the "scientific knowledge" part of original FRE 702 (i.e, something is scientific knowledge if the product of sound scientific methodology)
      * *Daubert* court identifies a number of **factors to consider when inquiring into reliability**, though no single one is dispositive:
        + has it been tested
        + has it been subjected to peer review
        + is it generally accepted/used by relevant scientific community
        + is it known to have high rate of error/variance in application
        + Are there standards/controls and were they in place?
      * 702 revised post-*Daubert* to basically affirm its understanding. In addition to helpfulness criterion, added that criteria for (b) testimony to be **based off sufficient facts and data**, (c) testimony to be the **product of reliable principles and methods**; and (d) expert to **reliably apply principles and methods to facts of case**
  + **(2) Qualification** - Requirement coming from the beginning of FRE 702 - "A witness who is qualified as an expert **by knowledge, skill, experience, training, or educations**"
    - Special education and training is not necessarily required; experience alone can be sufficient
      * However, if the witness is relying solely/primarily on experience, then must explain why it is a sufficient basis for the opinion, how it leads to the conclusion reached, and how that it is reliably applied to the facts
* As noted above, **opinion of expert witness may be admissible even if it embraces the "ultimate issue"**, unlike lay witnesses where it is automatically inadmissible (FRE 704)
  + However, 704 makes explicit exception: **expert opinion on whether D possessed a particular required mental state is never admissible**
* Bases for opinions - There are 3:
  + (1) Expert **may base an opinion on facts or data in the case they personally observed**. (FRE 704)
    - Example of "personally observed" would be medical expert who provided examination giving opinion based on findings
  + (2) May base expert opinion on **facts/data they were made aware of prior to court**
    - **If experts in the particular field would reasonably rely on certain kinds of facts or data to form an opinion, they need not be admissible for the opinion to be admitted**. (FRE 704)
    - However, if facts or data would otherwise be inadmissible, may disclose them to the jury only if their probative value in helping the jury substantially outweighs their prejudicial effect (FRE 704)
  + (3) Hypothetical questions, in which expert witness is presented with a **hypothetical scenario with premises relevant to actual facts**, may also be basis for opinion
    - At one point in time, many jurisdictions required this; this is no longer true, including in federal courts
  + In addition to not requiring hypotheticals, not ordinarily required (unless court orders otherwise) to first testify to the underlying facts or data in the examination, thereby disclosing them to the jury; however, may be required to disclose those them on cross-examination (FRE 705)

### Impeachment

* To impeach a witness simply means to attack or cast doubt on the credibility/believability of their testimony;
  + Almost always by the cross-examining party during or after the cross-examination, as it rarely makes sense for examining-party to impeach their own witness (although technically you are permitted to under FRE 607)
  + Impeachment can occur by targeting a number of different aspects of a witnesses and their testimony. The main vulnerabilities are:
    - Truthfulness/sincerity of W - W is dishonest person and is intentionally lying, or has personal bias causing them to embellish their testimony
    - Ability of W to accurately recall what they are testifying about - W could have poor memory, get things confused
    - Ability of W to communicate - ambiguity and inconsistencies in W's testimony
    - Ability of W to have accurately perceived subject of testimony - W could be hard of hearing, have poor eyesight or obstructed view
  + The inverse of impeachment, in which party seeks to build the credibility of a witness, sometimes called **bolstering, is generally not allowed unless it is in response to W's truthfulness being attacked by opposing party**
    - Known as **rehabilitation**, can defend W's credibility using **character evidence, but only after truthfulness of character is first attacked**
    - That the attack be directed at truthfulness is important; **no rehabilitation if W attacked for bias, mental/sensory defect**
    - Can take the form of allowing giving W chance to explain on redirect examination as well as character witness testifying in support of W's truthfulness
* Two types of evidence for impeaching witness
  + **(1) Testimony in cross-examination**
  + **(2) Extrinsic evidence** - basically refers to everything else (i.e., all impeachment evidence that is not cross-examination testimony)
    - Depending on method of impeachment, it is **usually required to first attempt impeachment through cross-examination--called foundation requirement--before extrinsic evidence is allowed, allowing W to first have opportunity to deny/explain** (i.e., if W denies during cross-exam, then can resort to extrinsic evidence)
    - However, there are also methods of impeachment for which extrinsic evidence is not admissible, specifically past bad acts intended to call into question the truthfulness of their character and collateral matters (see below)
      * **Collateral matters doctrine** - attempting impeachment based on collateral matters is not prohibited, but **use of extrinsic evidence not allowed to contradict witness on these these matters** (i.e., can bring it up in cross-exam, but must accept W’s testimony)
      * **Collateral matters** - those not relevant to any material issue on trial nor any other method of impeachment, but only relevant insofar as it affects W's credibility
      * Example: Witness to bank robbery states it was raining when he entered the building, a trivial detail with no bearing on the issues, yet someone else who was there says it was sunny or W previously suggested the weather was perfect
        + Neither the testimony of the contradicting W nor a record of the prior statement would be admissible, as they are extrinsic evidence; however, **can still question W on it in cross-examination** ("Is it true that you previously suggested the weather was perfect")
* Methods of impeachment
  + **Prior Inconsistent Statements and Contradictory Evidence** - evidence that conflicts with parts of W's testimony; can be self-contradictory (i.e., past recorded statements by W that contradicts testimony at trial) or just contradictory (i.e., extrinsic evidence showing that something is different than was described in W's testimony)
    - Both PIS and contradiction are **subject to the collateral matters doctrine**
    - In the case of prior inconsistent statements:
      * Must first give W opportunity to explain/deny (informing them of time/person/place) before introducing extrinsic evidence (FRE 613)
      * When examining W about prior statement, **not necessary to show/disclose its contents**, though disclose to an adverse party upon request. (FRE 613)
      * **Statement made by party opponent** (under oath by party, such as during past deposition, hearing, grand jury, etc.) may also be admitted as substantive evidence (i.e., not just for showing contradiction) and **not subject to foundation requirement**
  + **(2) Bias/Interest** - Attempting to show that W has interest in outcome, personal relationship with or animus against D, or some other group/ideological affiliation causing them to be impartial and thus motivating them to fabricate or exaggerate testimony
    - **Extrinsic evidence is admissible**, but requires foundation; **only allowed after W has chance to explain** in cross-exam
    - However, evidence of W's religious beliefs is not admissible to attack or support a witness’s credibility;
  + **(3) Past Specific Conduct** - attempting to call truthfulness into question by pointing to past instances of dishonest conduct (not necessarily convicted crimes); **must be probative of truthfulness** (i.e., makes it more or less likely that W is telling truth)
    - As with all evidence, judge may still exclude under FRE 403 or 611 if decided that risk of prejudice > probative value or would cause undue embarrassment to witness
    - Probative value on truthfulness may be greatly increased if W "opens the door" on matter by some response in testimony
    - As noted above, **no extrinsic evidence allowed to bolster/attack truthfulness through past specific acts**; must accept W's response in cross-exam
  + **(4) Past Criminal Conduct** - attempting to call truthfulness into question by pointing to past conviction of a **crime involving dishonesty/deceitc(e.g., perjury, fraud) always permitted**
    - Court also has discretion over admissibility of **other felony convictions** that do not implicate truthfulness:
      * Those of **non-D W w/in the last 10 years**, but subject to FRE 403 (**probative value NOT substantially < risk of prejudice**)
      * Those of **D**, only if **probative value > risk of prejudice**
      * Those where conviction/release **> 10 years ago**, then only if **probative value SUBSTANTIALLY > risk of prejudice** plus written notice by party who intends to use it
    - **Extrinsic evidence** in form of conviction record is **admissible without first giving W chance to explain**
  + **(5) Reputation/Opinion** - **Reputation/opinion testimony from character witness as to the truthfulness of W's character (always extrinsic)**
    - As noted in section on character evidence, admissible if attacking W's character for purposes of impeachment
    - However, character witness **cannot make reference to past specific conduct** in their reputation/opinion testimony, as this is extrinsic evidence which is not allowed for specific instances of conduct
  + **(6) Sensory/Mental Defects** - attacks W's ability to perceive and recall the things they are testifying about;
    - Example: that W has poor eyesight; was too far away to have seen anything
    - Extrinsic evidence allowed, but subject to foundation requirement

## Hearsay

* Defined as **an out-of-court statement offered as evidence to prove the truth of the matter asserted**; it is generally inadmissible with some exceptions (hearsay rules)
  + Definition has two parts: (1) needs to be out-of-court statement and (2) needs to be offered for the purpose of proving the truth of whatever the statement was about
    - These statements need to be **made by a human declarant and intended to assert something**
* FRE 802 states that "hearsay is not admissible unless any of the following provides otherwise: a federal statute; these rules; or other rules prescribed by the Supreme Court"
  + Policy justification for excluding hearsay: as second-hand information, it is unreliable; not made under oath, no opportunity to cross-exam declarant
    - 6th Amendment - "the accused shall enjoy the right ... to be confronted with the witnesses against him"
* Also such thing as **multiple hearsay**, which is a out-of-court statement nested in another out-of-court statement
  + These may nonetheless be **admissible if both levels of hearsay fall under one of the recognized exceptions** (FRE 805)
* Impeachment of hearsay declarant - even where hearsay is determined admissible under one of the exceptions, opposing party still **permitted to attack (or support) credibility of the declarant, regardless of their availability, just as if they had been W testifying at the trial** (FRE 806)

### Types of Evidence That are Not Hearsay

* Statements not made by a human declarant (e.g., computer generated, such as a timestamped log entry)
* **Conduct that is not intended to be assertive** - although non-verbal cues like head nods can still be hearsay since it is intended to assert "yes", but non-assertive conduct from which a fact may be implied falls outside the definition of hearsay
  + If the act of D touching a hot stove is offered as evidence that the stove wasn't hot, it is not hearsay. However, A testifying that B told him the stove was hot, or that B nodded in response to his question about the stove being hot, is hearsay if offered for the purpose of proving the stove was hot
    - Why? Actions are louder than words. Conduct that strongly suggests one's belief that something is true = more reliable than mere assertions that they are
* Statements offered for purposes other than proving the truth of the thing asserted
  + **Legally operative facts** - where the **act of making the statement is of legal significance** (e.g., slander, bribery); **not hearsay if offered as evidence that statement was made** rather than to prove that the statement is true
  + Offered to show **effect on listener** - not hearsay if offered to **explain listeners response/conduct or to show notice/warning was given**
    - Examples: testifying that D told P to be careful of the wet floor, or testifying that D told P he was going to kill him to explain why P took measures of self-defense
  + Offered to as **circumstantial evidence of mental state** - cannot be direct ("I am intentionally going to harm P"), since that would be offered to prove the truth of the thing asserted
* **Exclusion: Impeachment of declarant W based on prior inconsistent statement** (see previous section) - need to be offered for **purpose of attacking credibility**, not as proof that the prior inconsistent statement is true
  + Never hearsay if prior statement was given under oath, at hearing/deposition (remember "out-of-court" component of definition); may also be substantive evidence
  + Can also be offered to rehabilitate witness, refute claims of bias/motive by showing testimony is consistent with past statements (regardless if made under oath or not)
  + **Prior out-of-court identification by Declarant W** (e.g., picking out of a lineup) also not hearsay, so long as W (as original declarant) is subject to cross-exam
* **Exclusion: Party-opponent admissions** - **prior out-of-court statement** by a party in the proceedings may be admissible when **offered against that party**
  + Why? Because they are subject to oath, cross-examination, and other procedural safeguards intended to preserve the truth
  + Under FRE 801, this is only if one of the following is true:
    - Statement was **made by the party in an individual or representative capacity**, by a **person authorized to make such statements on behalf** of the party, or by an agent/employee acting within the scope of the agency/employment relationship
    - Statement of another person was one the **party manifested they believed or accepted to be true**
    - Statement was made by the party’s **co-conspirator during and in furtherance of the conspiracy**
  + Doesn't need to be adverse to party at time it was made, just needs to be inconsistent with present position at trial
  + Also can be a legal conclusion instead of an observable fact (e.g., "it was intentional")

### Overview Exceptions to the Rule Against Hearsay

* FRE 801 says things that fall under the definition of hearsay are not admissible unless the FRE (or other statute) says otherwise; FRE 803 and 804 explicitly provide a number of exceptions, where as 807 contains a catch-all
  + Difference b/w 803 v. 804 is that former only apply when D is not available to testify
  + Per 804, **W is "unavailable" to give testimony if**:
    - exempt from testifying b/c privilege
    - refuses to testify in defiance of court order or b/c "can't remember"
    - not present due to death, physical/mental illness
    - absent from hearing/proceeding after efforts of proponent to get them to attend/testify by process and other reasonable means were unsuccessful

### 804 Exceptions - Only Where Declarant Unavailable

* **Former testimony** - two components, both need to satisfied to apply:
  + Testimony was given by unavailable W **under oath at previous trial/hearing/deposition**, whether part of current proceeding or a different yet related one
    - Grand juries do not count since no chance to cross-examine
  + Is now is now **offered against same party who had meaningful opportunity and similar motive** to cross-examine W previously
    - Issue/charges/claims need to be fairly similar else it gives rise to a new set of reasons/motives in examining W
    - Identity of party must be same, unless civil cases involving someone with vertical privity to the party before (e.g., successors in interest)
* **Dying declaration** - statement made by declarant, **under the belief of imminent death, about its cause or circumstance**
  + Applies in homicide cases and civil cases only
  + Needs to be genuine belief of certain imminent death (mental state)
  + Needs to convey actual knowledge about cause/circumstances, not just suspicions
* **Statement against interest** - statement that would have only been made if reasonable person in D's position believed it to be true since it is so averse to his interests
  + Must have been against interests at time it was made; based on firsthand knowledge
  + Examples: statement would be **severely damaging to finances or reputation, expose him to civil/criminal liability, invalidate claim** he has against someone else
  + If offered in criminal case where it tends to expose D to criminal liability, must also be supported by corroborating circumstances that clearly indicate its trustworthiness
* Others
  + Statement of Personal or Family History - D's statement about own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, etc. is not hearsay
  + Statement Offered Against a Party That Wrongfully Caused the Declarant’s Unavailability (e.g., opposing party lies about date to D so he misses his scheduled testimony)

### 803 Exceptions - Applicable Regardless of Declarant's Availability

* **Present Sense Impression** - A statement describing or explaining an event or condition, **made while or immediately after the declarant perceived it**
  + Statement describing what D is directly perceiving; can be plain, dispassionate report of what one is looking at (i.e., doesn't need to be out of shock, excitement, etc.)
  + However, making of the statement needs to more or less be contemporaneous w/ the perceiving
* **Excited Utterance** - A statement relating to a startling event or condition, made while the declarant was **under the stress of excitement** that caused it
  + Doesn't have to be contemporaneous with event that caused it, but event needs to be sufficiently shocking/startling/exciting--so much so that someone experiencing it would be unable to craft a calculated lie--and statement needs to be made while still under its effect
* **Then-Existing Mental, Emotional, or Physical Condition** - Statement **about D's present** (i.e., at the time the statement was made):
  + **State of mind** (e.g., motive, intent, or plan) - different from circumstantial evidence of mental state that fall outside definition of hearsay (since not asserted to prove truth of the matter stated); this exception applies only when statement offered to prove that person did the thing they planned/intended
  + **Emotional state** (e.g., fear, anger)
  + **Physical condition** (e.g., pain, illness, fatigue) - can be used to prove the existence of the condition, but not what caused it; can't be past condition (but see, medical diagnosis exception)
  + But not statements of memory or belief to prove the fact remembered/believed unless it relates to the validity or terms of the declarant’s will
* **Statement Made for Medical Diagnosis or Treatment** - Statement that:
  + (1) is **made for — and reasonably pertinent to — medical diagnosis/treatment**
  + AND (2) describes **medical history, past/present symptoms or sensations, their inception, or their general cause/character**
  + Application of this exception
    - Doesn't matter if the diagnosis is only sought for purpose of giving testimony
    - Statement must be made with the expectation of treatment/diagnosis, but not necessarily to a physician; may also be a statement relayed by some other person to the physician (e.g., family member)
* **Business records** - A record of an act, event, condition, opinion not hearsay if certain conditions satisfied.
  + Not hearsay if:
    - (1) record was **made at or near the time** by (or from information given by) **someone with knowledge** of act/event/condition/opinion
    - (2) record was made/kept **in ordinary course of business** in which **record-keeping is a regular practice** of (i.e., not done simply in anticipation of lawsuit) **AND**
    - (3) record **can be authenticated** (either by testimony from custodian, expert, or other form of certification under FRE 902) and there is **nothing untrustworthy** that is identified by the opposing party
  + Also not hearsay where record of a ordinary business activity (for which records a regularly kept) does not describe act/event/condition alleged to have occurred; can be admitted as evidence that thing did not occur (though opposing party can still point out untrustworthiness)
  + Records can include medical records, but only insofar as they relate to treatment/diagnosis (e.g., not statements about fault or cause)
* **Public Records** - exception applicable to certain **records and/or statements of a public office**
  + Not hearsay if:
    - The records/statements set out either:
      * The **office's activities**
      * An **observation of person under legal duty to report**, **EXCEPT** if by law-enforcement and case is criminal)
      * Factual findings from a legally authorized investigation, but **ONLY IF** civil case or against government in criminal case
    - AND opponent does not show anything to indicate lack of trustworthiness
  + Exception extends to certain public records of vital statistics, such as records of a birth, death, or marriage, if reported to a public office in accordance with a legal duty
    - Similar exception for records/certificates of marriages, baptisms, and other religious ceremonies where made by person authorized (e.g., priest) within reasonable time after occurrence
  + Similar to w/ business records, exception can extend to **absence of public record/statement**; if diligent search fails to yield such a record/statement, **may be admissible to prove that**:
    - such a **record/statement does not exist**
    - OR, taking inference a step further, **subject of record/statement does not exist or never happened** (though this inference can only be made if the subject is something regularly recorded by office)
      * Subject to written notice requirement of at least 14 days before trial if prosecution intends to use this against D
* **Statements in Learned Treatises** - exception for statements in treatises, periodicals, or pamphlets if:
  + Expert relied on the statement during direct examination or called to their attention in cross-exam
  + Source of statement established as **reliable authority according to expert's testimony** (i.e., is "learned")
    - Still can only be read into evidence, not received as exhibit
    - There is similar exception for market reports, indexes, quotations, compilations, or other similar commercial publications that are generally relied on by the public or by persons in particular occupations
* **Judgment of a Previous Conviction** - may be excepted from hearsay rule if:
  + Judgment was **entered after a trial or guilty plea**, but not no contest plea
  + Was for sufficiently serious crime (punishable by death or > 1 year imprisonment)
  + Admitted to **prove some fact essential to the judgment**
  + AND judgement was against defendant (this is only necessary if statement offered by prosecution for reason other than impeachment)
* Other exceptions explained in more detail elsewhere in this outline:
  + Recorded Recollections - see earlier Witness Examination section
  + Reputation Concerning Character - see earlier Character Evidence section
    - There are also exceptions for reputation in community about personal/family history, about land boundaries/customs affecting land, and about general historical events important to that community

### 807 - Residual Exception

* Statements that don't fall under specific exception listed above may nonetheless by admissible under 807, which functions as a catch-all rule
  + Statement needs to be:
    - (1) **sufficient guarantees of trustworthiness after considering the totality of circumstances** it was made and any corroborating evidence; AND
    - (2) **more probative** on the point for which it is offered **than any other evidence that the proponent can obtain** through reasonable efforts
  + When considering the totality of circumstances:
    - usually need to consider the extent to which they mitigate the risks of untruthfulness/unreliability
      * This is common denominator among recognized exceptions in 803/804 (e.g., someone unlikely to lie in dying last words or to doctor when trying to get treated/diagnosed; records are more reliable where they regularly generated as part of standard procedures)

### Constitutional Limitations on Hearsay Exceptions

* Even if out-of-court statement falls in one of the exceptions listed above, it may nonetheless be excluded on grounds that permitting it to be used against defendant in criminal case would violate 6th amendment rights
  + Where out-of-court statement is offered against defendant in **criminal trial** to prove truth of the matter asserted, any recognized exception to the hearsay rule applies only if:
    - Declarant is unavailable at trial (even for 803 exceptions)
    - The defendant must have had a prior opportunity to cross-examine the declarant
    - out-of-court statement is **testimonial**
      * Testimonial statement = statement that declarant could anticipate being offered at trial in aid of prosecution (i.e., resembling the type of statement that would be offered as testimony at trial)
        + This is one that tends to identify the wrongdoer, the commission of the act, and other surrounding circumstances that is made following the crime (e.g., statement made to police by onlooker, but NOT usually 911 calls)

## Privilege

* Privilege provides a basis for a party's refusal to disclose certain confidential information during proceedings, as well as for prohibiting another party's disclosure of that information, even if it would otherwise be admissible
  + Why? Policy justification is that it facilitates full, truthful disclosure within special confidential relationships since these relationships require transparency to function effectively. Fear of information eventually being used against them would lead people to be restrained, less forthcoming in their communications with lawyers, doctors, etc.
* Instead of the FRE, it is common law (i.e., federally developed common law based on modern reason and experience) that governs claims of privilege unless federal statute/Constitution provides otherwise (FRE 501)
  + However, in diversity case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision (as is the case with many other areas of the FRE)

### General Requirements for Privilege to Apply

* Communications **must made within one of the special types of relationships** that the law recognizes as privileged
* Communication **needs to be confidential**, or in other words, it was intended to be communicated only to the person w/ whom there is a privileged relationship
  + If communications are made in the presence of a third party, privilege may not apply
    - However, not the case if communication parties are unaware of the third party's presence (e.g., eavesdropping) or if their presence is necessary/essential for the making of the communication (e.g., a secretary sending fax, translator, or expert)
* Privilege must be **asserted by the person to whom it applies**
  + Can't assert privilege over confidential communications between third parties
  + In attorney-client, privilege is for the client to waive and attorney can only do so if authorized by client; this is also the case in doctor-patient relationships
* Privilege has **not been waived**
  + Can be waived if person voluntarily agrees to waive it
  + Can also be waived if person intentionally and voluntarily discloses substantial part of communications to another party to whom privilege does not apply (or knowingly permits this to happen)
    - If disclosure is unauthorized and/or accidental, typically not waived but could still be
  + Can be considered waived if one fails to assert in a timely manner when the opportunity to do so arises
* One of the exceptions to privilege does not apply
  + Tend to be specific to the type of privilege (see below)

### Attorney-Client Privilege

* Apply to communications:
  + **intended to be confidential between client and attorney**
    - presence of essential third parties does not destroy
    - FRE 502 provides protection against inadvertent disclosures
      * Not a waiver if reasonable steps were taken to prevent it and promptly rectify error
      * Also not waiver in current proceeding if previously waived through disclosure to federal office/agency or in other federal proceeding (potentially state ones too if there are no conflicts b/w state and federal waiver rules)
  + **AND made for the purpose of seeking, obtaining, or offering legal advice/assistance**
    - Does not necessarily require attorney to agree to represent; statements made in initial consultation may still be privileged
    - Nor does it matter whether legal assistance relates to present case
* Things that are NOT privileged, either by definition (first two) or exception (other four)
  + (1) Statements to attorney not made for the purpose of seeking/obtaining legal advice/services
  + (2) Since privilege applies only to communications, it does not extend to actions, physical evidence, or pre-existing documents (e.g., can't attach a bunch of old records to email to lawyer in order to exclude them from discovery)
  + (3) If legal services were sought in furtherance of the commission of a crime/fraud
  + (4) Where legal dispute is between attorney and former client and communications are relevant to issues (e.g., legal malpractice actions)
  + (5) Where two parties now adverse to each other were formerly joint clients, either party can bring in past joint-communications w/ attorney related to previous they had in common
  + (6) Where client is now deceased and communications are relevant to dispute between parties who all claim under the deceased client

### Doctor-Patient Privilege

* Protects confidential information communicated to physician or psychiatrist for purpose of, and thus relevant to, obtaining treatment
  + Needs to happen within the boundaries of the professional relationship; complaining about your back to your neighbor, who happens to be a doctor, is not privileged
* Physician-patient **privilege has not been firmly established in federal common law** (only psychiatrist-patient), though most states have statutes to this effect
  + In federal question (arising under) cases, likely does not apply
* Exceptions: similar to attorney-client, there is exception where in furtherance of a crime as well as in legal disputes between doctor and patient

### Privileges Between Spouses

* Spousal Immunity - person **cannot be forced to testify against their spouse in a criminal** (but not civil) case
  + Applies to any type of testimony, although spouse can voluntarily elect to testify
  + To apply, marriage must be valid at time of trial
* Confidential Marital Communications - prevents spouse from **being required to disclose confidential communications** w/ spouse in their marriage, while also prohibiting one spouse from **doing so voluntarily without the consent of the other**
  + Unlike spousal immunity, the marriage only needs to be valid when the communication is made (not at the time of the trial)
  + Does not apply when spouses suing each other (e.g., divorce) or if spouse is being charged for crime committed against spouse or their children
  + Like other privileged relationships, can be waived if made in presence of third parties and is inapplicable to protect against communications made in furtherance of crime/fraud

### 5th Amendment

* Not really a form of evidentiary privilege in the same way those above are, but protects defendant at any proceeding from being compelled to give testimony that tends to incriminate themselves
  + This only applies to testimony that has yet to be given, not to past statements, writings, etc.
  + Applicable in all types of proceeding (not just criminal)
  + No additional hearing needed to determine appropriateness of invoking 5A or to evaluate risk of self-incrimination; upheld if court believes there is reasonable possibility that W will incriminate self